ORIGINALISM AS THE ANTI-MISCONSTRUCTION OF TEXTUAL LEGITIMIZING RIGHTS

GREGORY VELLOZE[*]

ABSTRACT

Originalist theories often fail to: (i) connect their justifications for constitutional legitimacy to their historical methodologies and (ii) explain how originalism is descriptively 'our law' despite its purpose as prescriptive law reform. The following Article deals with these theoretical defects by weaving together constitutional legitimacy and historical evidence under the common thread of text. Originalism thus emerges as a theory of anti-misconstruction, where ahistorical constructions have eroded the determinacy and consistency of the text, endangering the textual rights that legitimize the Constitution. Such descriptive misconstruction necessitates the prescriptive historical context of originalism to keep Constitutional constructions within the determinate bounds of original textual principles, protecting those rights that legitimize the Constitution.

---

[*] J.D., University of Southern California Gould School of Law; special thanks to USC Professor Rebecca Brown.

TABLE OF CONTENTS

I. INTRODUCTION 247

II. WHY ORIGINALISM? 248

A. WHY CONSTITUTIONALISM? RIGHTS-BASED LEGITIMACY 249

1. SOCIAL CONSENT BASED ON RIGHTS 250

2. ADEQUATE ENUMERATION 253

B. WHY TEXTUALISM? 254

1. DETERMINATE RIGHTS 254

2. HOLISTIC CONSTITUTIONALISM 256

C. WHY HISTORY? CONTEXTUALIZING 261

1. DEVOLVING CONSTRUCTION ZONES 261

2. UNEXPECTED APPLICATIONS AND LIMITS 264

3. WHAT HISTORY? 267

D. ORIGINALISM AS ANTI-MISCONTRUCTION 269

III. MISCONSTRUCTION OF ORIGINAL TEXTUAL PRINCIPLES 273

A. COMMERCE CLAUSE VAGUENESS 273

1. POWER CONFUSION 275

2. FEDERALISM 276

3. ENUMERATED AND RETAINED RIGHTS 277

B. MISPLACED PRIVILEGES OR IMMUNITIES 279

1. INCORPORATION 281

2. UNENUMERATED RIGHTS AND EQUAL PROTECTION 283

3. ORIGINAL TEXTUAL PRINCIPLES 285

C. CIRCULAR FOURTH AMENDMENT REASONABLENESS........292

IV. CONCLUSION..295

I. INTRODUCTION

Originalism often suffers from several disconnects. First, originalists often disconnect what they are doing from why they are doing it, recounting history while forgetting to explain why it is relevant, important, or binding.[1] Second, originalism is simultaneously described as having always been "our law," even when standing in opposition to decades of precedent.[2] Third, originalism often fails to serve as both a prescriptive and descriptive constitutional theory.[3] Finally, historical expected applications can be defined at varying degrees of marginality, making it difficult to discern what history is actually relevant to our inquiries.[4]

In this Article, I attempt to create a coherent theory of originalist interpretation and construction by weaving these loose ends together under the common thread of the constitutional text. I argue that originalism is necessary for the sustainable interpretation and construction of the textual principles of the Constitution and that these textual principles then, in turn, protect the rights that legitimize the Constitution.

In Part II, I first explain why we ought to follow the Constitution, arguing that it protects the rights that legitimize government. I argue that constitutional legitimacy must rest on a theory of *natural rights supplemented consent*, where the nature of legitimizing textual rights best explains why a majoritarian constitutional legitimacy mandates a counter-majoritarian originalist method of interpretation.[5] Originalist textualism best protects these legitimizing rights by giving them determinacy and structure.[6] I then argue that history allows us to contextualize and tether these textual rights in a consistent and coherent framework, where atextual doctrine otherwise sways with political tides or denigrates into unprotective vagueness and where traditional or expected applications of originalism

1. Stephen E. Sachs, *Originalism as a Theory of Legal Change*, 38 HARV. J.L. & PUB. POL'Y 817, 823 (2015).

2. *Id.* at 828; William Baude & Stephen E. Sachs, *Grounding Originalism*, 113 NW. L. REV. 1455, 1457 (2019) ("Whatever a theory's conceptual elegance or normative attractions, it also matters whether that theory already reflects *our law* or is instead a call for *law reform*.").

3. JACAK M. BALKIN, LIVING ORIGINALISM 23 (2011); David A. Strauss, *What is Constitutional Theory*, 87 CAL. L. REV. 581, 586 (1999).

4. BALKIN, *supra* note 3, at 25; KEITH E. WHITTINGTON, CONSTITUTIONAL INTERPRETATION: TEXTUAL MEANING, ORIGINAL INTENT, AND JUDICIAL REVIEW 163 (1999); RANDY E. BARNETT & EVAN D. BERNICK, THE ORIGINAL MEANING OF THE FOURTEENTH AMENDMENT: ITS LETTER AD SPIRIT 45 (2021); JOHN MCGINNIS & MICHAEL B. RAPPAPORT, ORIGINALISM AND THE GOOD CONSTITUTION 121 (2013).

5. *Compare* RANDY E. BARNETT, RESTORING THE LOST CONSTITUTION 33 (2003) (describing the counter-majoritarianism of James Madison), *with* BALKIN, *supra* note 3, at 61 (describing majoritarian "sociological legitimacy,").

6. WHITTINGTON, *supra* note 4, at 109; BARNETT, *supra* note 5, at 107.

otherwise lose sight of textual determinacy.

Further, Part II connects what originalists do with why they do it: history serves as the context that provides determinacy for textual protections of rights that themselves legitimize the text in which they are enumerated. Construction originalists like Jack Balkin often make their mistakes here, seeing construction zones as static bounds of language rather than the continuous denigration of principles and ambiguities into vagueness.[7] Their distinction between construction and interpretation is misleading, as where textual determinacy is seen as a function over time, interpretation contrary to originalist construction generates unsustainable *mis*construction. But by viewing history as contextualizing text, we limit the marginalities of its applications to those provided by and consistent with the narrow bounds of the original text.

In Part III, I describe how exceeding the bounds of original textual principles creates *mis*construction with the historical language of the Constitution, which in turn generates conflicts throughout the larger constitutional framework, and how this larger disruption of the larger framework can negatively impact the textually protected rights that legitimize the Constitution. The purpose of this section is to demonstrate how originalism has always been the law even when contrary to decades of precedent, answering questions raised by Will Baude and Stephen Sachs—the doctrinal incoherence that results from the *mis*construction of non-originalism is itself the source of originalism and is itself what mandates a return to first principles. By relying on textual principles, the prescriptive aspect of originalism ties back to a descriptive theory of language denigration. This section applies the distinction between sustainable construction and *mis*construction to a host of modern doctrines to demonstrate how original textual principles provide for more sustainable protections of the rights that legitimize our constitution.

Overall, originalism is best understood as a theory of anti-misconstruction. It uses historical context to provide definite and consistent textual principles and prevents the construction of vagueness and indeterminacy regarding rights.

II. WHY ORIGINALISM?

To explain the justifications for an originalist method of interpretation, any theory must first answer some entry-level questions. First, one must

7. Lawrence B. Solum, *Originalism and Constitutional Construction*, 82 FORDHAM L. REV. 453, 458, 495–99 (2013); Ian C. Bartrum, *Wittgenstein's Poker: Contested Constitutionalism and the Limits of Public Meaning Originalism*, 10 WASH. U. JUR. REV. 29, 34, 42, 58 (2017).

explain why citizens, political actors, and judges ought to adhere to a constitution, where without that binding instrument, originalism would be nothing more than mere traditionalism. Second, one ought to explain why a close reading of that text is necessary, for if history serves to narrow the bounds of meaning, one should first explain why we need the bounds of plain language at all. Finally, after these analyses, we can then understand the role that history plays in narrowing this understanding of language, where history allows for more sustainable constructions of our constitutional framework.

A. Why Constitutionalism? Rights-Based Legitimacy

The Constitution binds political actors as a sort of dictionary of rights. I use this metaphor to offer up relatively colloquial reasoning before then discussing the textual, historical, and philosophical evidence of such a theory. As Professors John McGinnis and Michael Rappaport have written, a "thick theory, such as libertarianism or socialism, is not appropriate as the basis for a constitution in a pluralistic society in which the people hold differing views about the good (or justice)."[8] Similarly, as Professor John Hart Ely has written, it is improper to say, "[w]e like Rawls, you like Nozick. We win, 6-3. Statute invalidated."[9] Also, I use this metaphor to describe the reasons why a constitution should be *binding*, not the reasons it should be *fixed*.

So, returning to our more positivistic and practical framework, what makes a dictionary binding on a language? Much like the Constitution, the binding nature of a valid dictionary is presumptive—we often presume it is binding as a matter of its usage. But as described, we consent to dictionaries through a social process. Language could evolve on its own, independent of any set rules, but the communication of a language benefits from a shared understanding and a certain fixation of meaning (though certain structural arguments, discussed below, provide better reasons for fixed meaning).

At the same time, the validity of a dictionary depends on its accuracy and position within society. It is not enough for me to merely scribble a few lines on a piece of paper and call it a dictionary. First, dictionaries must accurately fix and provide determinacy for the language they define. No one would want to use an inaccurate dictionary or one that misses key definitions. And while no one would want to use an outdated dictionary, there are certain fixed elements of a language essential to communication

---

8. MCGINNIS & RAPPAPORT, *supra* note 4, at 8.
9. JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 58 (1980).

across generations. Even if not fixed over time, a dictionary should retain a fixed present meaning. Second, dictionaries maintain institutional authority that supplements their consent. They are not merely the works of amateurs, scribbling indecipherable lines, but reputable sources.

So, comparatively, what makes a constitution a binding dictionary of rights? Much like a dictionary, our social process and compact consents to this certain enumeration for its communicative content. Where our constitution describes rights that can be recognized by social institutions, its list of rights and powers provides a framework by which individuals communicate their rights.[10] Even if one dislikes the scope of an enumerated right, the Constitution still serves an institutional purpose as the framework by which this right is best communicated and litigated.

From a less practical and positivistic perspective, our constitution is binding based on social consent to legitimizing rights. This raises two questions: (1) what is the basis of this social consent, and (2) does the Constitution adequately enumerate its legitimizing rights?

1. Social Consent Based on Rights

Among constitutionalists, there are three general academic camps for constitutional legitimacy: (1) libertarians like Randy Barnett, who argue that the Constitution's procedural protection of rights takes the place of tacit consent;[11] (2) progressives like Jack Balkin, who see the Constitution as binding through majoritarianism;[12] and (3) those who rely on the Constitution's past popular sovereignty in arguing judicial restraint.[13]

Barnett argues against the popular sovereignty of binding consent by claiming that the Constitution binds government actors rather than individuals[14] and that "hypothetical consent" exists only in theory.[15] He further maintains that majoritarianism, on which popular sovereignty would rest, was contrary to Madison's views in Federalist No. 10.[16] Ultimately, he

---

10. BALKIN, *supra* note 3, at 4.

11. BARNETT, *supra* note 5, at 52. *Compare* RICHARD A. EPSTEIN, THE CLASSICAL LIBERAL CONSTITUTION 20 (2014) (describing a social process of consent) *with* RICHARD A. EPSTEIN, TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN 14–15 (1985) [hereinafter EPSTEIN, TAKINGS] (arguing against tacit consent).

12. *Compare* BALKIN, *supra* note 3, at 4 ("Keeping the plan going over time . . . requires faith in the constitutional project.") *with* MCGINNIS & RAPPAPORT, *supra* note 4, at 118 (arguing instead for a super-majoritarian process).

13. Ilan Wurman, *The Original Understanding of Constitutional Legitimacy*, 2014 BYU L. REV. 819, 821 (2015); WHITTINGTON, *supra* note 4, at 144.

14. BARNETT, *supra* note 5, at 12, 26–27.

15. *Id.* at 11, 29, 43–45.

16. *Id.* at 33 (citing THE FEDERALIST NO. 10 (James Madison)).

concludes that "when consent is lacking, a constitution is legitimate only when it provides sufficient procedures to assure that the laws enacted pursuant to its procedures are just."[17]

First, there are practical issues with Barnett's theory of legitimacy. A constitution cannot practically bind only government actors without also binding individuals because those same government actors still create laws, rules, and regulations that purport to bind the people. Limitations on powers may bind the government, but the government will still invoke that power on the people. The people still give up their sovereignty to the government to give the Constitution binding power, and the people cannot give up this power without some sort of consent.

Second, it is erroneous to describe the consent of the governed as hypothetical. Much like our consent to a dictionary as binding on a language, there are practical, social, and institutional layers to consent. We could create alternative procedures to protect rights, but those would mean nothing without consent. For example, the Constitution replaced the Articles of Confederation, which were essentially a competing procedural protection of rights.[18] We could only choose one set of procedures over another based on some form of consent and popular sovereignty. Absent consent, Barnett's argument makes less sense in 1788 than it does in 1791 (or 1868, for that matter). The Constitution was drafted without a Bill of Rights and was ultimately ratified and binding on the people with little more than a promise that the First Congress would enumerate rights.[19] Clearly, this requires consent and at least some degree of popular sovereignty.

However, majoritarian theories of popular sovereignty put the cart before the horse and ultimately misstate the relationship between democracy and constitutional legitimacy. Democracy does not legitimize the Constitution—the Constitution legitimizes democracy.[20] It legitimizes democracy not only by creating a framework for the communication of rights but also by providing a fixation for protections that cannot succumb to factions or political tides. McGinnis and Rappaport's super-majoritarian theory[21] tries to reconcile the majoritarianism of popular sovereignty with

---

17. *Id.* at 52.

18. PAULINE MAIER, RATIFICATION: THE PEOPLE DEBATE THE CONSTITUTION 1787-1788, at xvii (2010) at xvii ("As the instrument came from them, it was nothing more than the draught of a plan, nothing but a dead letter, until life and validity were breathed into it, by the voice of the people, speaking through the several state conventions."). *See also id.* at 53, 60, 269.

19. *Id.* at 78, 81, 87, 108, 187, 251, 266, 270, 284, 379, 391, 445, 448–51, 455; LEONARD W. LEVY, ORIGINS OF THE BILL OF RIGHTS 14, 16, 20, 26, 28, 30, 33, 35–36, 43 (1999).

20. *See* ELY, *supra* note 9, at 74 ("But a concern with process in a broader sense—with the process by which the laws that govern society are made."); RONALD DWORKIN, FREEDOM'S LAW: THE MORAL READING OF THE AMERICAN CONSTITUTION 20 (1996).

21. John O. McGinnis & Michael B. Rappaport, *Original Methods Originalism: A New Theory*

the counter-majoritarianism of constitutional limitations but has it backward. The supermajority does not legitimize rights. Instead, the consented framework of rights creates a super-majoritarian framework for its own protection.

It is also worth noting that constitutional legitimacy might have rested on a different basis prior to 1868. The Fourteenth Amendment fundamentally changed the relationship between the Constitution and its citizens. Professor Ilan Wurman describes how the founders often blended their understanding of libertarianism, majoritarianism, and popular sovereignty in the Declaration of Independence, Federalist No. 10, and in Madison's response to Jefferson's "dead hand of the past."[22] Wurman recounts Madison's response, that the "improvements made by the dead form a debt against the living," as mandating prudence in response to a framework that derives its power from consent, secures just ends of government, and creates a representative form of government.[23] Wurman concludes that:

> The important point is that popular sovereignty, as the Founding generation understood it, was not equivalent to direct rule by the people or even representative rule by the people. It was the people's very representatives who were violating the rights of the people. Thus, rule by the general will of the legislature was an inadequate expression of the true will of the whole people. Because the people could not rule themselves properly even through the most representative of governments, to be truly sovereign they had to delimit the power of the government in a contract. That was the only way to maintain their sovereignty.[24]

Nevertheless, a more libertarian, rights-based theory of sovereignty emerged with the Fourteenth Amendment. The "privileges or immunities of

of Interpretation and the Case Against Construction, 103 NW. L. REV. 751, 781 (2009) ("Under our theory, the Constitution is desirable because it was enacted mainly through a supermajoritarian process that produces beneficial constitutions. To ensure that the Constitution has this desirable quality, it is necessary to follow its original meaning, because it was that meaning that passed through the supermajoritarian process.").

22. Wurman, *supra* note 13, at 848–49, 855, 860–61.

23. *Id.* at 849, 861, 864.

24. *Id.* at 860. *See also* KURT T. LASH, THE LOST HISTORY OF THE NINTH AMENDMENT 27 (2009) (describing how the Ninth Amendment was originally routed in popular sovereignty in the collective rights of the people to engage in self-governance); AKHIL R. AMAR, THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION 21 (1998) (describing how the original Bill of Rights were more structural and federalist in nature until the Fourteenth Amendment incorporated them as individual rights).

citizens of the United States," as enumerated in the Fourteenth Amendment,[25] originated in the arguments of constitutional abolitionists, who argued that a citizen's duty of obedience towards a government required a reciprocal duty of protection and natural rights.[26] As such, the Fourteenth Amendment arguably itself added to the text a specific theory of constitutional legitimacy, where consent depended on rights.

As such, our consent to a framework of rights best explains why we ought to follow the Constitution—provided that it adequately defines our rights. Consistent with the libertarian model, the same rights the Constitution protects are the ones that give it binding authority.

2. Adequate Enumeration

Does the Constitution adequately define our rights? From a practical and somewhat positivistic standpoint, rights are social creatures. Much like dictionary definitions, certain rights have a basis in our social institutions, while others fall by the wayside. There are common non-words that exist in common usage outside of the dictionary, such as the word "irregardless." Our social structures avoid institutionalizing such non-words, and our dictionaries have procedures limiting such changes.[27]

The Constitution reflects our socially defined rights, though it takes a different approach than does the dictionary. A dictionary requires a more continuous amendment process per its separate structure. While a dictionary attempts to enumerate every word, the Constitution does not enumerate every right, even indirectly—instead, the Constitution enumerates limited powers to create residual plenary rights.

Before the Bill of Rights and the Fourteenth Amendment, the Constitution was originally one of broad rights and narrow powers, with rights otherwise narrowed at the state level. It was easier to provide a strict construction of enumerated powers because it was impossible to truly enumerate every legitimizing right—the Constitution generally takes the path of defining rights through limiting definitions of powers.[28]

The framer James Wilson described the construction of rights through original limited powers by noting that "everything which is not reserved is

25. U.S. CONST. amend. XIV.

26. BARNETT & BERNICK, *supra* note 4, at 64–68, 78, 93–101, 129, 138 (2021).

27. Poppy Noor, *Is 'irregardless' a real word? We asked our journalists as battle rages on*, THE GUARDIAN (July 6, 2020), https://www.theguardian.com/books/2020/jul/06/is-irregardless-a-real-word-dictionary.

28. BARNETT, *supra* note 5, at 56 ("Enumerate all the rights of men! I am sure, sir, that no gentleman in the late Convention would have attempted such a thing.").

given."[29] Wilson's strict construction of government powers was preserved in the Ninth Amendment, which favored structural rights over powers by maintaining that the "enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people."[30] In describing this original meaning, where the framers forged these clear distinctions between rights and powers, Randy Barnett describes the Constitution as creating "islands of government powers surrounded by a sea of individual rights," existing with a presumption of liberty.[31]

Furthermore, the Fourteenth Amendment essentially includes all legitimizing rights in the Constitution by mandating the protection of all "privileges or immunities of citizens of the United States."[32] Thus, the Constitution's dictionary of rights includes all the definitions necessary to make it a valid dictionary, even if it does not utilize the same methodology as a language dictionary. The Constitution has two ways, it both: (1) defines rights through limitations on powers or (2) confers plenary rights through plenary provisions that include all rights necessary to its legitimacy.

B. Why Textualism?

The justifications for a written constitution may themselves serve as justifications for textualism and close reliance on the text.[33] But, given that certain constitutional provisions are plenary and open-ended, we need to go the extra step and explain why such open-ended provisions still require textualism. It is one thing to say that a dictionary of rights is binding and another to say that we ought to read its definitions closely.

1. Determinate Rights

Relying on Keith Whittington's discussion of the written nature of the Constitution, Randy Barnett has maintained that "writtenness ceases to perform its function of constraining political actors if meaning can be

---

29. MAIER, *supra* note 18, at 78; LEVY, *supra* note 19, at 20.

30. U.S. CONST. amend. IX; BARNETT, *supra* note 5, at 240 ("Madison viewed the Ninth Amendment as providing authority for a rule against the loose construction of these powers—especially the Necessary and Proper Clause—when legislation affected the rights retained by the people.").

31. BARNETT, *supra* note 5, at 269.

32. U.S. CONST. amend. XIV. BARNETT, *supra* note 5, at 63–64; BARNETT & BERNICK, *supra* note 4, at 129–30 (describing Ohio Rep. John Bingham's theory, discarded in favor of the Fourteenth Amendment's enumeration, that Article IV, § 2 conferred the national rights on sojourning state citizens as *ipso facto* citizens of the United States).

33. WHITTINGTON, *supra* note 4, at 109 ("Although the writtenness of the Constitution authorizes the judiciary only to pursue an originalist interpretive method, there are additional implications of the written text that must be taken into account by a complete originalist theory.").

changed by these actors in the absence of an equally written modification or amendment."[34] Understandably, textualism maintains the writtenness of the Constitution by upholding textual restraints. As Justice Antonin Scalia wrote: "[w]ords do have a limited range of meaning, and no interpretation that goes beyond that range is permissible."[35]

Under a theory of *natural rights supplemented consent*, we consent to a framework of limited powers in textual provisions. By limiting those textual provisions, textualism limits those powers to protect legitimizing, retained rights. Narrow text allows for narrow powers that pose less of a risk to rights. But, to frame the more important question, why should we not exceed the bounds of text in protecting rights that a judge believes are necessary to the Constitution, rights, or good governance? Put plainly, textualism is good for powers, but is it bad for rights?

First, McGinnis and Rappaport provide a good reason against the judiciary exceeding the text based on judicial competency:

> To begin, the Supreme Court is less likely to generate norms that represent a national consensus than the constitutional amendment process is. Justices are few in number and thus are unlikely to have the knowledge that comes from a process that represents a wide variety of people. The Justices are also not very representative of the nation as a whole because they are chosen from a pool of elite, upper-middle-class lawyers. Finally, the Justices are relatively insulated from the ebb and flow of information in the continental republic because they live physically in Washington, D.C.—a unique city devoted to governance—and because they work mentally in a cocoon spun by the bench and the bar.[36]

Second, judicial constructions lack the stasis and determinacy for rights that are necessary for legitimate consent. As Justice Scalia has argued, "[i]f the law is to make any attempt at consistency and predictability, surely there must be general agreement not only that judges reject one exegetical approach (originalism), but that they adopt another. And it is hard to discern any emerging consensus among the non-originalists as to what this might be."[37] Though the justice spoke of originalism, his argument should apply to textualism more generally.

---

34. BARNETT, *supra* note 5, at 107.
35. ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 24 (1997).
36. McGinnis & Rappaport, *supra* note 21, at 782.
37. Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849, 855 (1989).

As I will later demonstrate, many of the judicial constructions designed to exceed the bounds of the text are subject to political tides and the inconsistent interpretations of varying judges on an ever-changing bench. As a result, less textual judicial constructions provide less stasis and determinacy. And without stasis and determinacy, the Constitution is unable to adequately protect legitimizing rights. Judicial doctrine that exceeds the bounds of text generally creates inconsistent and incoherent frameworks where, as Justice Jackson long ago noted, the "Court is forever adding new stories to the temples of constitutional law, and the temples have a way of collapsing when one story too many is added."[38] The inconsistencies of judicial constructions, in contrast to the common law, arguably occur more frequently in the politicized domain of the Constitution, where political actors have incentives to distort doctrine and meaning. Such judicial constructions can disrupt the larger framework of the text where clauses do not sit in perfect isolation.

2. *Holistic Constitutionalism*

As Professor Akhil Amar notes, "[t]extual argument as typically practiced today is blinkered ("clause-bound" in Ely's terminology), focusing intently on the words of a given constitutional provision in splendid isolation. By contrast, intratextualism always focuses on at least two clauses and highlights the link between them."[39] Amar advocates for intratextualism, a more holistic version of textualism, that "takes seriously the document as a whole rather than as a jumbled grab bag of assorted clauses. To modify [Justice] Marshall, it is a (single, coherent) Constitution we are expounding."[40] Similarly, Randy Barnett and Evan Bernick maintain that: "[t]he Constitution's provisions, like the Constitution as a whole, are calculated to perform particular functions, and they would be without value if they did not do so. Truly understanding and applying the text may *require* an understanding of those functions."[41]

Barnett and Bernick advocate for good-faith construction that looks to both the letter and spirit (i.e., original functions) of the Constitution, arguing that judges should: (1) make a good-faith effort to resolve cases on the original meaning of the letter of the text, and (2) if unable, identify the text's

---

38. Douglas v. Jeannette, 319 U.S. 157, 181 (1943) (Jackson, J., dissenting).

39. Akhil R. Amar, *Intratextualism*, 112 HARV. L. REV 747, 788 (1999).

40. *Id.* at 796. *See also* AKHIL REED AMAR, AMERICA'S UNWRITTEN CONSTITUTION: THE PRECEDENTS AND PRINCIPLES WE LIVE BY 47 (2012) (advocating for the "Constitution as a whole" over "clause-bound literalism").

41. Randy E. Barnett & Evan Bernick, *The Letter and the Spirit: A Unified Theory of Originalism*, 107 GEO. L.J. 1, 32 (2018).

original functions or spirit, to (3) then formulate rules consistent with the letter, original functions (or spirit) of the provision, its structure, and the Constitution as a whole.[42]

In arguing for holistic good faith construction, they further explain how:

> The Constitution can be thought of as describing a device or mechanism like a watch. Like a watch, the Constitution as a whole has functions (described in the Preamble). Like the flywheel, gears, and springs of a watch, each of its clauses was designed to work harmoniously with the others to fulfill those functions. Like a watch, each of its constituent parts have their own secondary functions as means to the more general ends.[43]

However, neither Amar, in advancing his holistic intratextualism, nor Barnett and Bernick, in advancing their theory of construction, focus on the inverse of their propositions. Where the clauses of the Constitution function together as part of a larger framework, does misconstruing individual clauses disrupt the larger framework? Yes. The larger framework of the Constitution benefits from originalism and textualism, where textual deviations can upset the balance of interrelated and interconnected provisions.

Frameworks of rules depend on consistency in interpretation. Take, for example, the board game Monopoly. In Monopoly, players with starting money advance around a square board by rolling a die (with extra turns on doubles), and after a set number of spaces, pass "Go" to collect additional money.[44] Along the way, they buy properties to charge other players rent, build houses and hotels to increase rent on monopolies of properties of the same color and win by pushing the other players into bankruptcy.[45]

Suppose we were to play Monopoly with four-sided dice rather than six-sided dice. How might this affect the rules?[46] In part, it would require more turns to circle the board to pass "Go," players would roll doubles with greater frequency, and the shorter movements of turns would make it more difficult for players to collect a diverse selection of properties. Because the rules are interconnected, and certain rules are based on the assumptions of other rules, disrupting one rule disrupts the larger framework. To try and fix

---

42. *Id.* at 35.
43. *Id.* at 48.
44. The Parker Brothers, *Monopoly*, HASBRO, https://www.hasbro.com/ common/instruct/ monins.pdf.
45. *Id.*
46. Having done this, I do not recommend it.

the rules after they have been disrupted requires a multi-faceted patchwork beyond the capability of the players. For the dice example in Monopoly, some possible rule changes may include no additional turns on doubles, increased starting money, starting with properties, etc.

Monopoly, however, is just a board game. What happens to a framework of rules like the Constitution, where the larger framework functions together to protect the rights of citizens that legitimize their governance? How might misconstruing one constitutional provision disrupt the larger framework? The nondelegation doctrine, which states that Congress should not delegate lawmaking authority to the executive branch, is a perfect example of how disrupting certain rules undermines the larger system and how multi-faceted patchwork is generally beyond the competency of judges.

In *Originalism: The Lesser Evil*, Justice Scalia disparaged the creation of "quasi-legislative" and "quasi-judicial"[47] agencies in *Humphrey's Executor v. United States*[48] as contrary to the unitary executive in *Myers v. United States*.[49] But the creation of "quasi-legislative" and "quasi-judicial" constructions did not realistically occur because of *Humphrey's Executor*, but because of *J. W. Hampton, Jr., & Co. v. United States*.[50] In *J. W. Hampton, Jr., & Co.*, taking place after *Myers* and before *Humphrey's Executor*, Chief Justice Taft removed constitutional limits on delegation, allowing for an expansion of the administrative state and executive branch.[51]

In *J. W. Hampton, Jr., & Co.*, the Court held that:

> It is a breach of the National fundamental law if Congress gives up its legislative power and transfers it to the President, or to the Judicial branch, or if by law it attempts to invest itself or its members with either executive power or judicial power. This is not to say that the three branches are not co-ordinate parts of one government and that each in the field of its duties may not invoke the action of the two other branches in so far as the action invoked shall not be an assumption of the constitutional field of action of another branch. In determining what it may do in seeking assistance from another branch, the extent and character of that assistance must be fixed according to common sense and the inherent necessities of the governmental co-ordination.[52]

47. Scalia, *supra* note 37, at 851–52.
48. Humphrey's Executor v. United States, 295 U.S. 602 (1935).
49. Myers v. United States, 272 U.S. 52 (1926).
50. J. W. Hampton, Jr., & Co. v. United States, 276 U.S. 394, 410 (1928).
51. *Id.*
52. *Id.* at 406.

A separate rule change in the Constitution would disrupt the larger framework. Article I vests Congress with "[a]ll legislative Powers."[53] And while *Myers* may have taken three years and seventy pages[54] to determine the original ambiguous meaning of Article II, § 1's "executive Power,"[55] *J. W. Hampton, Jr., & Co.* instead settled on the vague misconstruction that "[i]f Congress shall lay down[,] by legislative act[,] an intelligible principle to which the person or body authorized to fix such rates is directed to conform, such legislative action is not a forbidden delegation of legislative power."[56]

As Justice Gorsuch would later write in *Gundy v. United States*:

> If Congress could pass off its legislative power to the executive branch, the '[v]esting [c]lauses, and indeed the entire structure of the Constitution,' would 'make no sense.' Without the involvement of representatives from across the country or the demands of bicameralism and presentment, legislation would risk becoming nothing more than the will of the current President. And if laws could be simply declared by a single person, they would not be few in number, the product of widespread social consensus, likely to protect minority interests, or apt to provide stability and fair notice.[57]

As Justice Gorsuch notes, the vesting clauses offer different powers to the distinct and separate branches of the government. Misreading the vesting clauses creates a direct conflict with the larger structure of the Constitution.

In *Buckley v. Valeo*, this Vesting Clause misconstruction ran headfirst into the Appointments Clause, where the FEC's method for appointments violated requirements of Article II, § 2, clause 2 for appointing an "Officer of the United States."[58] Misreading the Vesting Clauses had created a quasi-legislative and quasi-judicial agency for which Congress wanted to take back its oversight. Similarly, in *INS v. Chadha*, this delegation misconstruction inverted the relationship of the President, Congress, and the Veto.[59] Adrift from the text, administrative law struggles to find

---

53. U.S. CONST. art. I, § 1.
54. Scalia, *supra* note 37, at 851.
55. U.S. CONST. art. II, § 1.
56. J. W. Hampton, Jr., & Co., 276 U.S. at 409.
57. Gundy v. United States, 139 S. Ct. 2116, 2134–35 (2019) (Gorsuch, J., dissenting).
58. 424 U.S. 1, 125, 137 (1976).
59. 462 U.S. 919, 947 (1983); PHILIP HAMBURGER, IS ADMINISTRATIVE LAW UNLAWFUL? 351 (2014) ("The result is a strange reversal of roles. Administrative lawmaking belongs to the branch of

consistency.

Many of the misread Vesting Clauses' most disruptive effects hide in the shadows. Philip Hamburger describes how, despite the origin of the constitutional system in opposition to the King's misuse of prerogative quasi-legislative and quasi-judicial power,[60] our courts now allow the administrative state to evade numerous constitutional protections.[61] By misreading the Vesting Clauses and allowing a return to the prerogative power of monarchs,[62] courts have disrupted the framework of protections afforded to citizens through impartial judges, jury rights, specified accusers, public trials, the right against self-incrimination, warrant requirements for searches and seizures, and due process of law.[63] Not only does this delegation misconstruction run headfirst into the rights that legitimize our Constitution, but it also requires a perpetual patchwork to fix the now-incoherent system. But these patchwork cases should not necessarily be disparaged for non-originalism or for construction. Far from creating misconstruction, a case like *Humphrey's Executor* merely noticed an already-occurring misconstruction and sought to respond to it elsewhere in the constitutional framework. But while imploring good-faith construction, the better solution would have been a return to the original principles of the text that remain true to a consistent and sustainable framework.

---

government that constitutionally enjoys only a veto. In contrast, the veto on such lawmaking now requires full, constitutionally authorized legislation adopted by both houses of Congress and the president.").

60. HAMBURGER, *supra* note 59, at 138–39 (describing how Parliament abolished the Star Chamber, citing to Magna Carta for the Constitutional principle that all adjudications should be in accordance with the law of the land).

61. *Id.* at 55–56 ("The primary issuer of regulations was the Court of Star Chamber. It took its name from a spacious room, decorated with gold stars on its ceiling, located in the Palace of Westminster. The king's council had long attempted to exercise extralegal judicial power, outside the regular courts, and its judicial meetings, in the Star Chamber, developed into a distinct court—not one of the courts of law, but the leading prerogative court, which implemented royal policy as well as law . . . . The Star Chamber's most notorious regulations created a system of licensing the press. By requiring printers to get permission before establishing presses and before publishing, the Star Chamber controlled the dissemination of printed materials, thus protecting the English government and church from criticism.").

62. *Id.* at 51, 287.

63. *Compare id.* at 234, 240–41, 248, 252, 254, 263, *with* LEONARD W. LEVY, ORIGINS OF THE FIFTH AMENDMENT: THE RIGHT AGAINST SELF-INCRIMINATION 53, 128–29, 133, 170, 194–97, 296, 301–02, 332, 336–37, 390–91, 422 (1968) (describing how the Star Chamber and High Commission's legacy contributed to developments in the First Amendment, Fourth Amendment, Fifth Amendment, and Sixth Amendment).

C. Why History? Contextualizing

Using historical meaning is intuitive. For example, a first-time reader of the Constitution often asks: what are letters of marque and reprisal?[64] A subsequent, intuitive Google search uncovers the meaning of the language:

> A letter of marque and reprisal ('M&R') is a government commission to a private vessel or 'privateer' to attack and seize property from enemy vessels. M&Rs are a tool of naval warfare.
>
> Privateers under an M&R function like a navy. During the Revolutionary War, we didn't really have a navy, so we used M&Rs to convert our merchant ships into the equivalent of a navy. These ships could then do whatever a navy could do, including engaging with and seizing British vessels.[65]

Thus, to understand the meaning of such constitutional language, we turn to historical context and narrow ambiguities to the point where the meaning is readily apparent. This, however, is an easy case. Before touching on harder cases, we should rely on something more concrete than intuition alone. Our intuition is justified by the devolving ambiguities of language when its context is forgotten, the new unforeseen applications of old text, and the contextual history that best refocuses on language.

1. Devolving Construction Zones

Professor Lawrence Solum, building on the work of Keith Whittington, describes a distinction between interpretation and construction. He writes that "courts and legal theorists mark a general distinction between 'interpretation' (discovering meaning) and 'construction' (determining legal effect)."[66] Solum argues that where the "text may be vague or irreducibly ambiguous," there exists a "domain of constitutional underdeterminacy" that he calls the "construction zone" and that the "construction zone is ineliminable: the actual text of the U.S. Constitution contains general, abstract, and vague provisions that require constitutional construction for their application to concrete constitutional cases."[67]

---

64. U.S. CONST. art. I, § 8, cl. 1.

65. David Lat, *What Is A 'Letter Of Marque And Reprisal'?*, ORIGINAL JURISDICTION (Mar. 2, 2022), https://davidlat.substack.com/p/what-is-a-letter-of-marque-and-reprisal.

66. Solum, *supra* note 7, at 453, 455–56, 467–68 (2013). *Compare* Solum, *supra* note 7, at 455-56, 467-68, *with* Randy E. Barnett, *Interpretation and Construction*, 34 HARV. J.L. & PUB. POL'Y 65, 70 (2011), *and* KEITH WHITTINGTON, CONSTITUTIONAL CONSTRUCTION 1 (1999).

67. Solum, *supra* note 7, at 458.

Therefore, he claims, "Originalists converge on what we can call the 'Constraint Principle': constitutional construction should be constrained by the original meaning of the constitutional text."[68] His overall theory, correctly seeing the value of a static written text, is grounded in the original language but limits originalism solely to interpretation:

The core of Originalism is a theory of constitutional interpretation: Originalists claim that the linguistic meaning of the constitution is fixed by linguistic facts at the time that each constitutional provision is framed and ratified. Most Originalists also affirm a partial theory of constitutional construction: they claim that the legal content of constitutional doctrine should be constrained by the linguistic content of the text.[69]

However, McGinnis and Rappaport argue against the distinction between interpretation and construction, seeing the constructionist view as identifying "certain situations—such as those involving ambiguity and vagueness—as ones where the original meaning runs out."[70] Disagreeing with the idea that original meaning could ever run out, they "disagree with this claim that originalism cannot address ambiguity and vagueness" and maintain "that the original interpretive rules under the Constitution provide an alternative method for resolving ambiguity and vagueness that does not rely on extraconstitutional norms."[71]

Different still, Randy Barnett and Evan Bernick maintain that "the postulate that constitutional construction is inherently nonoriginalist is mistaken and has led to unnecessary division among originalists," arguing "that construction not only can but *must* be originalist."[72] Based on this, they advocate a theory of good-faith constitutional construction. But their theory of originalist construction is grounded not in constitutional legitimacy but in a separate theory of judicial duty: The duty of good-faith performance is a 'gap-filling' doctrine that is calculated to preserve people's reasonable expectations in receiving the performance of the other party and the benefit of their bargains. The doctrine operates to thwart exercises of discretion that

68. *Id.* at 460.

69. Lawrence B. Solum, *The Interpretation-Construction Distinction*, 27 CONST. COMMENT. 95, 116 (2010).

70. McGinnis & Rappaport, *supra* note 21, at 773. *See also* ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 14 (2012) (questioning the interpretation-construction distinction and arguing that, where "[t]hus is born, out of false linguist association, a whole new field of legal inquiry.").

71. McGinnis & Rappaport, *supra* note 21, at 773. *See also* John O. McGinnis & Michael B. Rappaport, *The Power of Interpretation: Minimizing the Construction Zone*, 96 NOTRE DAME L. REV. 919, 940 (2021) ("We argue that ambiguity can always be resolved through interpretation. Even in close cases, the evidence will be stronger in favor of one of the possible meanings of an ambiguous provision, and that meaning should be followed according to the 51–49 rule.").

72. Barnett & Bernick, *supra* note 41, at 5.

violate those reasonable expectations, even if that behavior does not breach any express contractual terms.[73]

However, there are significant faults with this larger theory of construction. It attenuates *what* originalists do from *why* they do it, and it offers a prescriptive theory that is not descriptive enough to explain the relationship between a "lost" originalist constitution and the law as it is.[74] But there is only one reason for these errors, which is united under one common thread: the interpretation-construction distinction is misleading with regard to language over time. Devolving constructions are based on devolving interpretations, and the purpose of history is to improve constructions by limiting interpretations.

Interpretation and construction, based on ambiguities and vagueness, look in opposite directions over time. Construction zones, based on the indeterminacy between interpretation and construction, are not static bounds of language.

Looking to a theory of language, Ian Bartrum describes "two underappreciated sources of such indeterminacy: intentional contemporary ambiguity and incidental evolutionary vagueness."[75] He describes how language is like a game, where to "understand the meaning of the ten of Spades, it turns out, is simply to have the practical ability to play that card appropriately within a particular game at a particular time and place."[76] Terms like "Commerce" as rules of the game need to be understood in light of the games' rules.[77] But as he notes, we have a system of "contested constitutionalism" where "constitutional language game meanings arise out of a contest."[78] Importantly, Bartrum sees inevitable indeterminacies as "part of contested language games, which exploit linguistic uncertainty to further different communicative or political ends."[79]

As part of contested language games, construction zones widen over time. The interpretation-construction distinction often mistakenly ignores these dynamics. Interpretation looks backward, looking from a present-day construction zone back to a narrower historical construction zone. Construction looks forward, looking from a fixed construction zone—either historical or present-day—to the structures that can be built upon it.

---

73. *Id.* at 27.

74. William Baude, *Is Originalism Our Law?*, 115 COLUM. L. REV. 2349, 2364 (2015); Stephen E. Sachs, *The "Constitution in Exile" as a Problem for Legal Theory*, 89 NOTRE DAME L. REV. 2253, 2255, 2260, 2298 (2014).

75. Bartrum, *supra* note 7, at 29–30, 34.

76. *Id.* at 36.

77. *Id.* at 40.

78. *Id.* at 42.

79. *Id.* at 58.

The purpose of originalism and history then, is to maintain consistent and sustainable constructions, as built on the historical ambiguities in language, and to avoid building upon the constructed vagueness that widens construction zones as part of a contested language game. Simply put, historical context keeps the text from devolving into increasing uncertainty—eroding the determinacy of rights where the Constitution then would eventually prove too indeterminate to provide sufficient protections of legitimizing rights.

2. *Unexpected Applications and Limits*

Jack Balkin argues for a looser form of construction originalism, agreeing with public meaning and its underlying principles but disagreeing with the idea that "the concepts and principles underlying those words must be formulated and applied in the same way that they would have been formulated and applied when they were adopted."[80] He relies on a more expansive formulation of construction zones, arguing that:

> The text of our Constitution contains different kinds of language. It contains determinate rules (the president must be thirty-five, there are two houses of Congress). It contains standards (no 'unreasonable searches and seizures,' a right to a 'speedy' trial). And it contains principles (no prohibitions of the free exercise of religion, no abridgments of the freedom of speech, no denials of equal protection). *If the text states a determinate rule, we must apply the rule because that is what the text offers us. If it states a standard, we must apply the standard. And if it states a general principle, we must apply the principle.* Perhaps technically we should call this the method of 'text, rule, standard, and principle,' but 'text and principle' is a far simpler shorthand.[81]

Balkin concludes that fidelity to original meaning refers only to "the semantic content of the words in the clause," where "[a]lthough the original expected application is not binding, the constitutional text is."[82] Maintaining that living constitutionalism is consistent with originalism, Balkin argues

80. BALKIN, *supra* note 3, at 7.

81. *Id.* at 6 (emphasis added). *See also* SCALIA & GARNER, *supra* note 70, at 31–32 ("But there is a useful and real distinction between textual uncertainties that are the consequence of verbal ambiguity (conveying two very different senses . . . and those that are the consequence of verbal vagueness . . . . A word or phrase is ambiguous when the question is which of two or more meanings applies; it is vague when its unquestionable meaning has uncertain applications to various factual situations.").

82. BALKIN, *supra* note 3, at 13–14.

that "where the text offers an abstract standard or principle, we must try to determine what principles underlie the text in order to build constructions that are consistent with it," but that "[p]eople in each generation must figure out what the Constitution's promises mean for themselves."[83]

Balkin's living originalism, much like Ronald Dworkin's moral reading, would read constitutional principles with a wide degree of latitude.[84] Principles are allowed to exceed the text: "One might object: Can principles really exist apart from their expected applications? Not only is this possible, it is precisely what makes them *principles* rather than a rule, a historical test (apply the words as they would have been applied in 1791), or a laundry list of concrete expectations."[85]

Balkin distinguishes "Skyscraper Originalism" theories that view the document as complete, from "Framework Originalism" theories that see the Constitution as a document open to change and evolution.[86] Balkin sees "Framework Originalism" as lending itself towards his "text and principle" approach, which allows for prescription while semantically remaining true to original meaning, even if not to "expected applications."[87]

But a textual principles approach finds itself in the middle ground of this false dichotomy. Our constitutional frameworks are neither completely static nor entirely open to change. A principle restricted to a textual level of marginality better functions within the larger constitutional framework. A semi-complete framework can only support so much construction. When we take a holistic view of the text, we see a skyline of constitutional frameworks, defined by the text and their relationships by varying levels of completion—we do not build bridges on skyscrapers nor a top-heavy structure above a weak foundation.

The best discussion of this textualist distinction comes from *Underlying Principles*, in which Randy Barnett responds to Jack Balkin's living originalist defense of abortion.[88] Stressing the importance of textual reliability, Barnett argues:

> To remain faithful to the Constitution when referring to underlying principles, *we must never forget it is a text we are expounding.* And it is the text, properly interpreted and specified in light of its underlying principles, *not the underlying principles themselves*, that

83. *Id.* at 14, 17.
84. RONALD DWORKIN, FREEDOM'S LAW: THE MORAL READING OF THE AMERICAN CONSTITUTION, at 2, 6, 10 (1996).
85. BALKIN, *supra* note 3, at 44.
86. BALKIN, *supra* note 3, at 21.
87. *Id.* at 44, 125.
88. Randy E. Barnett, *Underlying Principles*, 24 CONST. COMMENT. 405–16 (2007).

> are to be applied to changing facts and circumstances by means of constitutional doctrines. When you need to penetrate beneath the surface of the text to the principles that lie underneath, you must reemerge through the text. In other words, it is not the underlying principles that are applied to present circumstances but the original meaning of the text interpreted in light of these principles.[89]

Balkin's living originalist defense of abortion relies on an unwritten principle of "equal citizenship" in the Fourteenth Amendment.[90] Barnett describes how Balkin's "text and principle" approach leads to utilizing the wrong clause, as an originalist would instead question whether privacy or reproductive rights were among the "Privileges or Immunities" in the Constitution's text.[91] By relying on the wrong clause, Balkin further devolves the Fourteenth Amendment, creating an entirely new construction zone amidst three otherwise existing constructions. An equal citizenship principle is entirely disconnected from the text, free-floating and untethered, rather than a more directed inquiry into the historical relationship of rights between state and citizen that make up the legitimizing privileges or immunities of national citizenship.[92]

Textual principles better balance the functionality, sustainability, and coherency of the constitutional framework. In doing so, they better protect the Constitution's legitimizing rights. Adhering to original textual principles ensures that interpretation and construction do not run in opposite directions. Instead, interpretation accurately narrows the construction zone to a foundation that the text supports and prevents constructions so narrow as to undermine the perennial nature of the Constitution's principles. Overall, textual principles offer perennial, unchanging, and undying standards that can be faithfully applied to new circumstances with their construction zones narrowed at the fixed bounds of contextualized language.

---

89. *Id.* at 413.

90. *Id.* at 415.

91. *Id.*

92. RANDY E. BARNETT & BERNICK, THE ORIGINAL MEANING OF THE FOURTEENTH AMENDMENT: ITS LETTER AND SPIRIT, 240–43 (2021) (using textual history to narrow the Construction Zone of the Privileges or Immunities Clause for a framework). While Barnett and Bernick's work here serves as a useful counter-example, it does not go far enough in narrowing the textual principles of the Fourteenth Amendment, ultimately adopting a too-open-ended refined *Glucksberg* test. *Id.* at 238–39. *Cf.* ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS, 18–19 (2012) (arguing that "[t]he most destructive (and most alluring) feature of purposivism is its manipulability. Any provision of law or of private ordering can be said to have a number of purposes, which can be placed on a ladder of abstraction," and also that "[t]he purposivist, who derives the meaning of text from purpose and not purpose from the meaning of text, is free to climb up this ladder of purposes and to 'fill in' or change the text according to the level of generality he has chosen.").

3. *What History?*

History is used to define the context of a textual principle. Similar to the rules governing evidence, there are no cut-and-dry rules for relevance or probative value. Intent, common understanding, and settled practice can all prove relevant and probative in varying situations. Nonetheless, when defining constitutional principles, often what the Framers *did not want* is more valuable than what they *did want*. Rather than channeling the Framers,[93] we are channeling the historically narrow principles of their text. As such, misconstructions are more easily identified through negative definitions.

For example, because the expected applications of the First Amendment evolved within their early changing context, such expected applications provide little guidance as to its interpretation.[94] The principle evolved in the colonies before the First Amendment and then was recontextualized in the new constitutional democracy. Discussing the *Zenger* trial, historian Leonard Levy describes how an expected application against requiring licenses or prior restraints on printing, immunizing libel liability before the fact,[95] transformed into the use of truth as a defense to libel prosecutions after the fact.[96] The First Amendment's expected applications then expanded to more broadly preventing seditious libel prosecutions, where the consequences of the Alien and Sedition Act of 1798 in a new constitutional democracy suggested that the "bold statement, not the narrow understanding, was written into the fundamental law."[97]

The textual principle, in its new context, was broader than a narrow focus on licenses and prior restraints on printing but extended further to limit the government's censorial power in the new context of a democracy. Thus, what the founding generation *did not want*—political limitations on the dissemination of truth—better encapsulates the textual principles. By applying original textual principles rather than expected applications, we give the Constitution its necessary perennialism, where finite principles can long outlive those who proposed them.

Furthermore, expected applications can themselves misinterpret founding-era attempts to engage in contested language games, constructing vagueness where there was none. When expected applications are applied

---

93. Barnett & Bernick, *supra* note 41, at 46 (discussing how asking "What would the Framers do?" is "channeling" the Framers, unlike identifying "empirical facts: the original functions of the Constitution's provisions and structural design elements.").

94. LEONARD W. LEVY, EMERGENCE OF A FREE PRESS 220 (1985).

95. *Id.* at 7, 66–67.

96. *Id.* at 37–44, 199–200.

97. *Id.* at 272, 348.

to methodological tools under McGinnis and Rappaport's framework,[98] their limiting rule may have the effect of compounding error. For example, McGinnis and Rappaport cite Alexander Hamilton's rejection of evidence from the Philadelphia Convention, but never mind that this might have been the work of a shrewd lawyer who distinguished unfavorable evidence.[99]

More broadly, expected applications can often misstate the circumstantial application of an unchanging textual principle. If 'cruel and usual' depends on contemporaneous circumstances,[100] then evidence of expected applications absent circumstantial context may distort the original meaning.[101] What was usual then may still be unusual now, even within the bounds of the larger framework.[102] Or, in another example, freedom of speech is not limited to the languages that the Framers understood. No one would argue that Esperanto should be exempt from the protection of the First Amendment.

As a hypothetical, let us imagine that Congress has the power to ensure an even dispersion of wolves and deer in forests. The textual principle would be for evenness—the historically justified principle of maintaining a balance in the ecosystem—even if there might be a historical practice of solely thinning deer herds. But if, eventually, changes to the ecosystem result in an inordinate number of wolves, would Congress be unjustified in using their hypothetical power to hunt wolves? Based on original textual principles, Congress would not be unjustified. But, if based on expected applications, the answer is less clear. This power might be limitedly construed as the power to thin out deer herds. Alternatively, the expected application could be reinterpreted at a higher level of marginality and abstraction—the power to thin non-exclusive-species herds. But this odd construction either arrives back at textual principles or otherwise devolves. Rounding out the hypothetical, under both theories, Congress would be unjustified in using the power to the benefit of sheep and shepherds in fields. Using the power to protect sheep and shepherds runs contrary to the bounds of the language's historical meaning, which relates solely to wolves and deer in forests.

98. McGinnis & Rappaport, *supra* note 21, at 773.

99. *Id.* at 791–92.

100. Anthony F. Granucci, *"Nor Cruel and Unusual Punishments Inflicted:" The Original Meaning*, 57 CAL. L. REV. 839, 846-47, 860 (1969).

101. *Id.* at 862–63 (describing how Blackstone's catalogued list may have contributed to misinterpretation); John F. Stinneford, *The Original Meaning of "Unusual": The Eight Amendment as a Bar to Cruel Innovation*, 102 NW. U.L. REV. 1739, 1757–63 (2008) (describing Justice Scalia as misreading historical meaning).

102. Scalia, *supra* note 37, at 863 (describing how capital punishment is still written in the Constitution).

Additionally, expected applications can undermine the holistic textualism of the constitutional framework that necessitates originalism. If amendments to the Constitution reconfigure a principle, then prior historical evidence may be erroneous when taken out of adapted context.[103] Thus, reliance on historical practice in the face of an authorized reconstruction defeats the purpose of originalism in having a coherent and consistent doctrine.

In another challenge to a focus solely on expected applications, Lawrence Solum and Randy Barnett have questioned the Supreme Court's recent use of extended historical practices, which may treat historical precedents as the law instead of the historical text itself, with Solum and Barnett describing recent 'history and tradition' tests as a form of conservative constitutional pluralism.[104] Such historical traditionalism, even where concurrent with originalist results, may further embroil constitutional misconstructions, creating unsustainable frameworks for future precedents. In the long term, originalist reasoning may prove more valuable than originalist results, where longstanding historical practice may misstate the principles of the text.

D. Originalism as Anti-Misconstruction

So far, I have used the word *misconstruction* a few times. I use this term to describe constructions that exceed the bounds of the text's historical meaning or principles, which then disrupt the larger framework of the Constitution and ultimately endanger the textual rights which legitimize the Constitution. Misconstructions commonly occur in constructed vagueness, in bad faith construction, or in blatant misinterpretation. Precedent is then created on judicially shaky ground, untethered from the text.

Although the titular term is a double negative, originalism is best understood as a theory of anti-misconstruction. Originalism was itself born out of an anti-misconstruction movement. First, time itself constructed vagueness, with courts playing a game of 'telephone' as the plain meaning of constitutional phrases changed over time. Then, amidst the New Deal, justices constructed vagueness, built bad faith constructions, and often blatantly misinterpreted the Constitution.[105] Originalism required this

103. AMAR, *supra* note 24, at 281 (describing refined incorporation of militia clause, which will be further discussed *infra*).

104. Randy E. Barnett & Lawrence B. Solum, *Originalism after Dobbs, Bruen, and Kennedy: The Role of History and Tradition*, 118 NW. U. L. REV. 433 (2023), https://ssrn.com/abstract=4338811.

105. Howard Gillman, *Political Development and the Origins of the Living Constitution*, 1 ADVANCE 17, 22 (2007).

eventual deviation from original meaning and the misconstructions it created for the doctrine and its justifications to take hold.

Following the excesses of the Warren Court, originalism resurfaced as a theory of anti-misconstruction in the works of Robert Bork and Raoul Berger.[106] But where these proto-originalist scholars failed to adequately ground their theories, Paul Brest coined the name 'originalism' in his critique, which led future Justice Scalia to ultimately ground the movement in what was actually being misconstrued—the original public meaning or the language and text of the Constitution.[107] Thereafter, originalism moved away from constraining judges and refocused on determining the original meaning of the constitutional language.[108]

By viewing originalism as a theory of anti-misconstruction, we can correct some of its theoretical deficiencies by weaving together the common thread of text. First, originalism is both prescriptive "law reform" and descriptive of "our law" in that the misconstructions of our law that it describes form the justifications for a return to original meaning.[109] These misconstructions are modern social facts of our law, where deviations from the framework disrupt the larger framework. Second, originalism connects what we want to do to why we want to do it. By reverting to originalist principles, we can avoid the misconstructions of text that harm the rights that legitimize the Constitution. Third, we can explain how we should use historical evidence in light of textual legitimizing rights to identify textual principles of linguistic meaning for sustainable constructions that cede no legal ground.

In explaining why originalism is both prescriptive law reform and descriptively our law, many theories have floundered on the concession of legal ground, either taking hard-line approaches that find ink blots on vague propositions[110] or watering down the directionality of anti-misconstruction. Discussing legal concession, Jack Balkin has argued:

> No doubt, once gay rights are fully assimilated into American culture, conservative originalists will add *Lawrence v. Texas* as another 'mistake' that we cannot take back. (Or perhaps someone will write a very clever article showing that the framers and ratifiers of the

---

106. *Id.* at 23.

107. Barnett & Bernick, *supra* note 41, at 8.

108. William Baude, *Originalism as a Constraint on Judges*, 84 U. CHI. L. REV. 2213, 2216–17 (2017).

109. Baude & Sachs, *supra* note 2, at 1457 ("Whatever a theory's conceptual elegance or normative attractions, it also matters whether that theory already reflects *our law* or is instead a call for *law reform*.").

110. BARNETT & BERNICK, *supra* note 4, at 256; BARNETT, *supra* note 5, at 79.

> Fourteenth Amendment really did mean to outlaw the criminalization of same-sex relationships.) But each time conservative originalists add a new 'mistake' to the list, each time they adjust themselves to the evolving constitutional regime, they confront a world in which more and more of the Constitution in-practice is in irremediable error and less and less can be made consistent with their theories of original meaning. This is a loser's game, a war of constitutional attrition in which originalists must continuously concede ground to the constitution-making power of the public that originalists fail to recognize as a source of democratic legitimacy. It generates a world in which 'originalism' and 'what the framers wanted' become little more than political gestures alternatively adopted and discarded as conditions demand.[111]

Similarly, Justice Scalia worried against "faint-hearted originalism" in that "[w]hen one goes down that road, there is really no difference between the faint-hearted originalist and the moderate nonoriginalist, except that the former finds it comforting to make up (out of whole cloth) an original evolutionary intent, and the latter thinks that superfluous."[112]

The difference, of course, is that constructing principles need to be grounded in text. Our linguistic understanding needs to be historically grounded, where construction cannot exceed those bounds nor disparage the rights that legitimize our governance. And where judicial opinions are otherwise *misconstruction*, originalism is better grounded in the need for anti-misconstruction than it is in reviving mere traces of the past[113] or in higher-level concepts of positive law that achieve a descriptive ability at the cost of originalism's prescription.[114]

In *Is Originalism our Law?*, William Baude notes the relation of higher-order originalist practices to the lower-order practices of law concerning Supreme Court practices,[115] but he does not specifically ground these practices in the determinacy of the textual rights that legitimize the Constitution. Yet, it is this attenuation between higher-order and lower-

111. BALKIN, *supra* note 3, at 44 ("One might object: Can principles really exist apart from their expected applications? Not only is this possible, it is precisely what makes them *principles* rather than a rule, a historical test (apply the words as they would have been applied in 1791), or a laundry list of concrete expectations."); *see also id.* at 118–19.

112. Scalia, *supra* note 37, at 862.

113. BALKIN, *supra* note 3, at 61 (viewing the higher law of our Constitution as part of *our* constitutional story and narrative of change, where "[w]e consent to something we have a choice in; but we can become attached to something that we live with or live in over time.").

114. Baude, *supra* note 74, at 2365–76.

115. *Id.*

order practices that creates misconstructions that necessitate originalism. Where our Constitution is neither lost nor in exile, the misconstruction of our Constitution exists as a modern social fact of our law,[116] one which both describes the devolution of construction zones and prescribes a return to original meaning.

Furthermore, by describing originalism as a process of anti-misconstruction, we can see how well-accepted constructions—that are consistent with the textual principles, framework, and legitimizing rights of the constitution—can find a place within originalism without watering down the impetus for law reform.[117] There are constitutional decisions that traditional originalism cannot explain, but which we can retain here based on their limited potential for misconstruction.

One such example is *Miranda v. Arizona*, in which the Supreme Court constructed a prophylactic, semi-constitutional rule to protect against self-incrimination in coercive police interrogations.[118] While the dissent notes that the rule is contrary to the history and tradition of the Fifth Amendment jurisprudence,[119] the majority's prescription offers little danger to the larger framework and legitimizing rights of the Constitution. Because *Miranda* is a decision that expands on textual presupposed natural rights, protecting the rights of the accused, it offers no danger to legitimacy beyond the self-governing federalist rights attenuated through a process of non-natural electoral rights. Additionally, *Miranda* offers little danger to the determinacy of the text, as it still relies on the Fifth Amendment's enumerated principle that no person "shall be compelled in any criminal case to be a witness against himself"[120] to provide a textual hook. And while it broadens the construction zone, there is neither vagueness nor contradiction in its construction. Furthermore, by reading *Miranda* as evincing a textual principle of non-compulsion,[121] courts have continued to uphold minimal historical tension in a reconstruction that does little to endanger our Constitution's determinacy and legitimacy.

Another commonly-accepted legal change is in *Gideon v. Wainwright*, in which the Supreme Court held that the textual right of the Sixth Amendment, that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense,"[122] required the

116. *Id.* at 2364; Baude & Sachs, *supra* note 2, at 1459.
117. Baude, *supra* note 74, at 2376–86.
118. Miranda v. Arizona, 384 U.S. 436, 461 (1966).
119. *Id.* at 501.
120. U.S. CONST. amend. V. *See also Miranda*, 384 U.S. 436, 461.
121. *See e.g.*, Berghuis v. Thompkins, 560 U.S. 370, 383–84 (2010).
122. U.S. CONST. amend. VI; *see also Miranda*, 384 U.S. at 461.

provision of counsel in both state and federal courts.[123] While the original meaning of the Sixth Amendment was the right to be able to employ counsel rather than a right to be provided with counsel,[124] this textual expansion creates little misconstruction—it does not move far from its textual hook,[125] it does not run afoul of the larger framework, and it expands on the rights that legitimize the Constitution.

Decisions like *Miranda* and *Gideon* do not need to be accepted as originalist. Instead, they are merely *not contrary* to originalism, where the need for anti-misconstruction finds minimal misconstruction. And where the purpose of originalism is to counter misconstruction, it stands to reason that countering constructions in *Miranda* and *Gideon* would merely be originalism for the sake of originalism, divorced from the purpose of originalism in correcting missteps that upset our framework and legitimizing rights, assuming such missteps have not occurred.

III. MISCONSTRUCTION OF ORIGINAL TEXTUAL PRINCIPLES

Where misconstruction is directly related to originalism's justifications—determinate text, a consistent framework, and legitimizing rights—it should be understood along those steps. A misconstruction of a constitutional text can be described as a tripartite process: (1) a clause is misconstrued as either vague or in contradiction with its original meaning, (2) the misconstruction of that one clause creates misconstructions with other clauses along the Constitution's larger framework, and (3) this misconstruction undermines the rights that legitimize the Constitution. In this section, I will describe this tripartite process through examples in our Constitution: Commerce Clause vagueness, misplaced Privileges or Immunities, and circular Fourth Amendment reasonableness. These descriptions of misconstruction exemplify the need for a return to more determinate original principles for sustainable constitutional construction.

A. Commerce Clause Vagueness

The text of the Commerce Clause gives Congress the power "to regulate commerce with foreign nations, and among the several states, and with the

123. Gideon v. Wainwright, 372 U.S. 335, 339–40 (1963).

124. Garza v. Idaho, 139 S. Ct. 738, 756–58 (2019) (Thomas, J., dissenting).

125. *Compare* AMAR, *supra* note 40, at 111 (describing a symmetry in requiring public defenders, where originally judges were expected to protect the rights of defendants, an expected application, but where later appointed counsel proved to be a better solution).

Indian tribes."[126] As such, originalists generally contend that the Commerce Clause was originally understood to make trade regular across state lines,[127] serving to preserve a zone of free trade across the United States.[128] We can best interpret the Commerce Clause by narrowing its constructions to the narrower textual principle of interstate commercial regularity.

Justice Bushrod Washington, riding circuit in *Corfield v. Coryell*, specifically described how Congress's power to regulate interstate commerce did not interfere with resultant state powers such as "inspection, quarantine, and health laws; *laws regulating the internal commerce of the state*; laws establishing and regulating turnpike roads, ferries, canals, and the like."[129] Justice Washington cited *Gibbons v. Ogden*[130] as implying a clear limit of the Commerce Clause, maintaining "that no direct power over these objects is granted to congress, and consequently they remain subject to state legislation. If the legislative power of the Union can reach them, it must be for national purposes; it must be when the power is *expressly given for a specified purpose*, or is *clearly incident to some power which is expressly given*."[131] But over the course of a century, the Supreme Court constructed vagueness out of the more determinate original meaning[132] to treat the Commerce Clause as a freestanding grant of power with few limits. This misconstruction undermined the determinacy and legitimacy of the Constitution.

We can find constructed vagueness in both the definition of "commerce," expanding it far beyond the scope of what is trade, and the definition of that which exists "among the several states," expanding the

126. U.S. CONST. art. I, § 8, cl. 3.

127. BARNETT, *supra* note 5, at 178–91, 297–312 (vagueness was constructed out of ambiguities in the original meanings of "commerce" as trade, "to regulate" as to make regular, and "among the several states" as between states).

128. EPSTEIN, *supra* note 11, at 166 ("The Constitution sought to make the United States into one national trade zone, not a no-trade zone . . . regulation, in the form of "making regular," gives Congress far more scope than prohibitions.").

129. 6 F. Cas. 546, 550 (C.C.E.D. Pa., 1823) (emphasis mine).

130. 22 U.S. 197, 215 (1824) (holding that Congress had the incidental power to regulate navigation under the Commerce Clause). Justice Marshall rested this interpretation on the legitimizing natural rights of the Constitution, noting that the right of intercourse between State and State . . . derives its source from those laws whose authority is acknowledge by civilized man throughout the world," and that "[t]he constitution found it an existing right, and gave the Congress the power to regulate it." *Id.* at 211.

131. Corfield, 6 F. Cas. 546, 550 (emphasis mine).

132. Randy E. Barnett, *Jack Balkin's Interaction Theory of "Commerce"*, 2012 U. ILL. L. REV. 623, 640–41 (2011) (describing how the original linguistic understanding of commerce was relatively unambiguous). On another note, while Madison did apparently refer to the Commerce Clause as "vague" this was specifically relative to its possible preclusive effect on states. BARNETT *supra* note 5, at 118. *Compare with* EPSTEIN, *supra* note 11, at 229, 243 (resolving the vagueness of this unexpected application in favor of less regulation).

language to include activities within a state. These language misconstructions have then created framework misconstructions through (1) expansive definitions of commerce have created overlap and *power confusion* with other enumerated powers of Congress to undermine textual reliability, (2) aggregating commerce to include activities within the state has broken down our system of *federalism*, and a misconstruction of legitimizing rights through (3) expansive definitions of federal power in contradiction of the rights *enumerated* elsewhere by the Constitution and *retained* by the people.

1. Power Confusion

First, the overbroad definitions of commerce have created power confusion from overlap with several separate enumerations of power, such as the Enforcement powers of the Fourteenth Amendment and the Taxing power of Article I. In *Gibbons v. Ogden*, Chief Justice Marshall had made sure to reaffirm the distinct lines between the Commerce Clause, Congress's taxing power, and the powers otherwise left to the states by the Tenth Amendment,[133] and he ultimately held that Congress had the power to regulate navigation under the Commerce Clause.[134] As a matter of textual determinacy, with the legitimacy of curtailed powers, it makes sense that Marshall would describe these powers as narrow and discrete. Overlap of these powers would result in the use of Congressional authority without finite corresponding textual limitations that serve the legitimizing function of protecting rights from powers.

Modern decisions of the Court differ starkly from Justice Marshall's beginnings. In *National Federation of Independent Businesses v. Sebelius*, the Court was forced to distinguish between Congress's power to tax and its power to regulate interstate commerce.[135] Moreover, in both *Katzenbach v. McClung* and *United States v. Morrison*, the Court described an overlap of Congress's misconstrued power to regulate activities that substantially affect commerce and Congress's enforcement power under the Fourteenth

---

133. *Gibbons*, 22 U.S. 197 at 197–202. "The grant of the power to lay and collect taxes is, like the power to regulate commerce, made in general terms, and has never been understood to interfere with the exercise of the same power by the States; and hence has been drawn an argument which has been applied to the question under consideration. But the two grants are not, it is conceived, similar in their terms or their nature." *Id.* at 198.

134. *Id.* at 211.

135. Nat'l Fed'n of Indep. Bus. v. Sebelius, 567 U.S. 519, 562 (2012); *see also* EPSTEIN, *supra* note 11, at 206 (criticizing Chief Justice Roberts for seeing this use of Congress's Taxing Power and Commerce Power as not functioning in congruence with one another).

Amendment.[136] Notably, while the ignored textual limitations of the Commerce Clause are its subject matter (commercial regularity) and jurisdiction (interstate), the textual limitation of the Enforcement power of the Fourteenth Amendment applies only to its appropriate subject matter (non-electoral civil rights).[137] And because the Constitution is legitimized by reliable textual limitations on power, it is understandable that such power confusion undermines both legitimacy and reliability. This ultimately creates incoherency within the constitutional framework and doctrine.

2. Federalism

Federalism protects the legitimizing rights of the Constitution by geographically dividing the use of power and by protecting the self-government of the people.[138] But in *Wickard v. Filburn*, the Supreme Court held that a farmer growing wheat on his own farm to feed his own livestock rather than to trade had an indirect effect on interstate Commerce to allow regulation.[139] This broadly constructed vagueness, contrary to original meaning, was affirmed in *Gonzales v. Raich*, which allowed intrastate regulation for the purposes of prohibiting the use of marijuana.[140]

Because federalism is baked into our Constitution, the effects of the constructed contradiction in *Gonzales* have become readily discernable, a direct result of the undermined legitimacy and reliability of the Constitution. In *Standing Akimbo, L.L.C. v. United States*, Justice Thomas concurred with a denial of certiorari but provided in length the extent to which the Court's overbroad reading of the Commerce Clause had resulted in an incoherent "half-in, half-out regime that simultaneously tolerates and forbids local use of marijuana."[141]

Justice Thomas described the "mixed signals" of state and federal government under the Controlled Substances Act, with Congress allowing the District of Columbia to decriminalize medical marijuana under local ordinance and prohibiting the Department of Justice from "spending funds to prevent states' implementation of their medical marijuana laws."[142]

He described how "the Government's willingness to often look the other way on marijuana is more episodic than coherent" and how many

136. Katzenbach v. McClung, 379 U.S. 294 (1964); United States v. Morrison, 529 U.S. 598 (2000).
137. U.S. CONST. amend. XIV § 5.
138. MAIER, *supra* note 18, at 463; LEVY, *supra* note 19, at 11–12; AMAR, *supra* note 24, at 159.
139. 317 U.S. 111, 118–19 (1942).
140. 545 U.S. 1 (2005).
141. 141 S. Ct. 2236, 2237 (2021) (Thomas, J., concurring with a denial of certiorari).
142. *Id.* (citing United States v. McIntosh, 833 F. 3d 1163, 1168, 1175–77 (9th Cir. 2016)).

"marijuana-related businesses operate entirely in cash because federal law prohibits certain financial institutions from knowingly accepting deposits from or providing other bank services to businesses that violate federal law."[143] Justice Thomas noted how these cash-based operations were vulnerable to crime, but that using armed guards for protections would "run afoul of a federal law that imposes harsh penalties for using a firearm in furtherance of a 'drug trafficking crime.'"[144]

This nonsensical situation, where the Constitution can no longer be relied on for the legitimizing rights of self-government, even where states no longer wish to continue prohibiting the use of marijuana, further demonstrates the dysfunctional nature of misconstruction. This framework misconstruction undermines the legitimacy of the Constitution in providing determinate limits on powers for the protection of enumerated and retained rights.

3. Enumerated and Retained Rights

Intrastate expansions of the Commerce Clause, based on constructed vagueness, create further misconstructions by allowing expansive federal power to encroach on the enumerated and retained rights of the people.[145] Here, the framework misconstruction extends into a misconstruction of legitimizing rights. The framers of the Constitution had once argued that the Bill of Rights was unnecessary:

> When the opponents of the Constitution objected to the absence of a bill of rights, the Federalists argued that this additional protection was unnecessary because the Congress was not given any power to violate the rights retained by the people. 'Why for instance,' asked Hamilton, 'should it be said that the liberty of the press shall not be restrained, when no power is given by which restrictions may be imposed?[146]

But with the modern expansions of the Commerce Clause, one could easily argue that the liberty of the press substantially affects interstate commerce when aggregated, that arms do as well, or even liquor. These

143. *Id.* at 2238.
144. *Id.*
145. LEVY, *supra* note 19, at 14 (describing how George Mason believed "the omission of a bill of rights became an Anti-Federalist mace with which to smash the Constitution," and believed that "the new government would diminish state powers and by the exercise of its commerce power could 'ruin' the southern states").
146. MAIER, *supra* note 18, at 236.

would all be modern examples of historical contradictions.[147]

Furthermore, the expansive role of the federal government, as allowed by the misconstrued Commerce Clause, has arguably resulted in restrictive effects on the rights otherwise preserved by the Fourth Amendment. In *Florida v. Riley*, the dissenting Justices found it "difficult to avoid the conclusion that the plurality has allowed its analysis of Riley's expectation of privacy to be colored by its distaste for the activity in which he was engaged."[148] In *Kentucky v. King*, Justice Ginsburg argued in dissent that the Court "arms the police with a way routinely to dishonor the Fourth Amendment's warrant requirement in drug cases."[149] While these are appealed state cases of debatable connection to the federal war on drugs, it is not difficult to infer the connection between our federal limitations on powers and our federal protections of rights. Our rights and powers are part of the same framework and are subject to the same framework tension.

In *United States v. Lopez*, Justice Rehnquist attempted to reconstruct an originalist rule, limiting the Commerce Clause to instrumentalities, channels, and substantially affecting activities of interstate commerce.[150] However, this reconstruction lacked complete determinacy of original meaning in narrowing the construction zone. In its creation, Richard Epstein points out how "Chief Justice Rehnquist uneasily embraced both James Madison and *Wickard* simultaneously in his highly influential account of the three strands of the commerce power."[151] Given this misconstruction of the constitutional framework and its legitimizing rights, judges who wish to restore constitutional order must go further than Justice Rehnquist and must restore original meaning to alleviate our Constitutional disorder.

147. U.S. CONST. amend. XVIII, XXI. Additionally, there is likely an underexplored relationship between the expansion of federal power and the increased need for reverse incorporation, by which equal protection atextually applies to the federal government. Adarand Constructors v. Pena, 515 U.S. 200, 215 (1995) (citing Bolling v. Sharpe, 347 U.S. 497, 499 (1954)). While the textual inapplicability of equal protection to the federal government now seems like an oversight, at the time of the Fourteenth Amendment, the federal government then lacked the broad powers that could allow it to discriminate in the same manner as a state. As such, reverse incorporation functions much like a presumptive feature of the text, comparable to how the Eleventh Amendment is interpretated, with regards to its text. *Cf.* William Baude & Stephen E. Sachs, *The Misunderstood Eleventh Amendment*, 169 U. PA. L. REV. 609, 611, 614 (2021).

148. 488 U.S. 445, 463 (1989).

149. 563 U.S. 452, 473 (2011) (Ginsburg, J. dissenting).

150. 514 U.S. 549, 558 (1995).

151. EPSTEIN, *supra* note 11, at 183.

B. *Misplaced Privileges or Immunities*

Section One of the Fourteenth Amendment provides that:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws. . . .[152]

If we were to give this clause its logical textual reading, apart from the Court's misconstructions, we would first see the Citizenship Clause as creating a two-level system of rights.[153] First, all citizens would be entitled to the privileges or immunities of citizenship.[154] Next, all persons would be entitled to due process of law and equal protection of the laws.[155] While one could argue that a two-tier enumeration contradicts a natural rights reading,[156] the Fourteenth Amendment could not disparage natural rights by merely extending federal protection to those that were deemed fundamental and leaving the protection of other natural rights to the states—that is a matter of remaining federalist procedure.

At the very least, there is a great deal of historical evidence that the Privileges or Immunities Clause was originally understood to incorporate the first eight amendments of what we now call the Bill of Rights.[157] More broadly, there is evidence that the Privileges or Immunities Clause was also understood to encompass aspects of Equal Protection and unenumerated rights.[158]

---

152. U.S. CONST. amend. XIV.

153. EPSTEIN, *supra* note 11, at 525.

154. *Id.*

155. *Id.* at 524 (noting that "[a]ny effort to understand the progression of the Fourteenth Amendment is fraught with difficulty"). *See also* AMAR, *supra* note 24, at 172. From a textual standpoint, it is interesting that the Equal Protection clause describes "laws" in the plural while the Due Process clause describes "law" in the singular. U.S. CONST. amend. XIV.

156. EPSTEIN, *supra* note 11, at 525. *Cf.* KURT T. LASH, THE FOURTEENTH AMENDMENT AND THE PRIVILEGES AND IMMUNITIES OF AMERICAN CITIZENSHIP 82 (2014).

157. EPSTEIN, *supra* note 11, at 526; *see also* BARNETT, *supra* note 1, at 191–96; LASH, *supra* note 156, at 84, 92.

158. *See, e.g.*, Randy E. Barnett & Evan D. Bernick, *The Privileges or Immunities Clause, Abridged: A Critique of Kurt Lash on the Fourteenth Amendment*, 95 NOTRE DAME L. REV. 499 (2019) (responding to Kurt Lash's theory that the Fourteenth Amendment incorporated enumerated rights only); *see also* Kevin Christopher Newsom, *Setting Incorporationism Straight: A Reinterpretation of the Slaughter-House Cases*, 109 YALE L. J. 643, 734 (2000) ("Precisely what my reinterpretation of

In order to counter Kurt Lash's theory that the Fourteenth Amendment incorporates only enumerated rights, Randy Barnett and Evan Bernick have relied heavily on the history of the Amendment's framing.[159] Barnett and Bernick note how Representative John Bingham and Senator Jacob Howard heavily referenced *Barron v. Baltimore*,[160] Blackstone's definition of privileges or immunities,[161] and Justice Washington's description of privileges and immunities in *Corfield v. Coryell*.[162] Barnett and Bernick also note the history of the Civil Rights Act of 1866,[163] much like how Michael McConnell references the Civil Rights Act of 1875 in his defense of an originalist defense of *Brown v. Board of Education*.[164] Thus, the Privileges or Immunities Clause of the Fourteenth Amendment should be understood to include unenumerated rights.

It is also important to contrast the different textual phrases used in the Fourteenth and Fifteenth Amendments. Aside from separating civil rights from electoral rights,[165] the Fourteenth Amendment refers to non-racial "citizens" and "any person," while the Fifteenth Amendment makes direct mention of "race, color, or previous condition of servitude."[166] Disagreements over the original understandings of the Fourteenth Amendment must adhere to this distinction, where unexpected applications may extend much further, even within the constraints of text.

However, the misconstruction of vagueness, to purposely redact the Privilege or Immunities Clause's broad enumerations of rights, has produced framework misconstruction in two ways: (1) incorporation has occurred through the wrong clause, removing acknowledgement of the transformative refining effect of the Privileges or Immunities Clause,[167] and (2) the doctrine of substantive due process has constructed vagueness where the Privileges or Immunities Clause otherwise offered only ambiguity.

Slaughter-House portends for the other, more controversial branch of substantive due process jurisprudence—the protection of unenumerated rights against state interference—is an issue for another day."); LASH, *supra* note 156, at 229.

159. Barnett & Bernick, *supra* note 158.

160. 32 U.S. 243 (1833) (holding that the Bill of Rights did not apply to the states).

161. Barnett & Bernick, *supra* note 158, at 509 (describing "Sir William Blackstone's conception of privileges and immunities as the positive law protections that civil society affords to the natural rights of its own citizens").

162. *Id.* at 526; Corfield v. Coryell, 6 Cas. 546 (C.C.E.D. Pa. 1823).

163. Barnett & Bernick, *supra* note 158, at 563.

164. Michael W. McConnell, *The Originalist Case for Brown v. Board of Education*, 19 HARV. J. L. & PUB. POL'Y 457, 459 (1995).

165. Barnett & Bernick, *supra* note 158, at 545; BARNETT & BERNICK, *supra* note 4, at 83.

166. U.S. CONST. amend XIV–XV. *See also* Bradwell v. Illinois, 83 U.S. 130 (1872) (an early challenge of sex discrimination under the Fourteenth Amendment); LASH, *supra* note 156, at 145, 147, 241.

167. AMAR, *supra* note 24, at 21, 174.

The patchwork of due process incorporation is a paradigmatic example of framework misconstruction, as this doctrine has created conflicts throughout the whole Constitution without textually limiting principles. Substantive due process is an enlightening example of legitimizing rights misconstruction, where the lack of guiding textual principles leads the rights that legitimize the Constitution to change and sway with political tides.

1. Incorporation

Following *The Slaughter-House Cases*,[168] the Supreme Court has wrongly relied on the Due Process Clause for the purpose of incorporation.[169] This misconstruction, a misguided attempt to reconstruct some definiteness, has instead resulted in numerous textual discrepancies.

First, a due process reading ignores the transformative effects of incorporation, where formerly structural rights in the first eight amendments textually became individual rights when incorporated as Privileges or Immunities of Citizenship—per Akhil Amar's theory of refined incorporation.[170] Second, a due process reading implies that one can be deprived of their rights so long as they are given due process.[171]

This tension came to a head in *District of Columbia v. Heller*, in which Justice Stevens wrongly claimed in his dissent that the right to bear arms only applies to "the right of the people of each of the several States to maintain a well-regulated militia."[172] However, this rests on a narrow, pre-incorporationist view of the Second Amendment, where the right to bear arms was since incorporated as an individual right among the Privileges or Immunities of Citizenship.[173]

Akhil Amar claims in his theory of refined incorporation: "[t]hus far, the refined incorporation model and Black's total incorporation approach appear to converge. But refined incorporation can help us to see what Black's approach obscured: how the very meaning of freedom of speech, press, petition, and assembly was subtly redefined in the process of being incorporated."[174] As Amar notes, even if the Privileges or Immunities

168. Slaughter-House Cases, 83 U.S. 36 (1872).

169. BARNETT, *supra* note 5, at 308 (noting how the role of Privileges or Immunities was later carried out by the Due Process Clause); *see also generally* Newsom, *supra* note 158.

170. AMAR, *supra* note 24, at 21, 174.

171. LASH, *supra* note 156, at ix ("This reading of the Due Process Clause is in serious tension with the text. Rather than guaranteeing certain substantive rights, the text suggests that life, liberty, and property *may* be deprived so long as a state provides 'due process.'").

172. 554 U.S. 570, 637 (2008) (Stevens, J., dissenting).

173. AMAR, *supra* note 24, at 21, 51, 54, 174, 210, 223, 259.

174. *Id.* at 236.

Clause has not been used for purposes of legitimacy and reliability, the Supreme Court has still reached the correct results, even if based on incorrect reasoning.

This textual discrepancy is central to the written rights that legitimize the Constitution. The text should be determinate in describing our current law and, therefore, be able to protect its legitimizing rights. Decisions should thus relate to the text with a matter of coherency. In *McDonald v. Chicago*,[175] which more directly dealt with the incorporation of the Second Amendment, Justice Scalia disparaged the correct originalist and textualist clause as "the darling of the professoriate."[176]

Separately, in *Timbs v. Indiana*, Justice Gorsuch noted the incoherency and illegitimacy that comes from incorporation under a theory of due process:

> The present case illustrates the incongruity of the Court's due process approach to incorporating fundamental rights against the States. Petitioner argues that the forfeiture of his vehicle is an excessive punishment. He does not argue that the Indiana courts failed to 'proceed according to the 'law of the land'—that is, according to written constitutional and statutory provisions,' or that the State failed to provide 'some baseline procedures.' His claim has nothing to do with any 'process' 'due' him. I therefore decline to apply the 'legal fiction' of substantive due process.[177]

Individual rights and due process provide no determinate or legitimate textual basis. In *McDonald v. Chicago*, Justice Thomas understood the importance of maintaining the integrity of the Constitution and wrote separately to rely on the correct clause of the Fourteenth Amendment, citing *Lochner*, *Roe*, and *Lawrence*[178] to say:

> All of this is a legal fiction. The notion that a constitutional provision that guarantees only 'process' before a person is deprived of life, liberty, or property could define the substance of those rights strains credulity for even the most casual user of words. Moreover, this fiction is a particularly dangerous one. The one theme that links the

---

175. 561 U.S. 742 (2010).

176. Transcript of Oral Argument at 7, McDonald v. City of Chicago, 561 U.S. 742 (2010) (No. 08-1521).

177. *Id.* at 692 (citations omitted).

178. Lochner v. New York, 198 U.S. 45 (1905); Roe v. Wade, 410 U.S. 113 (1973); Lawrence v. Texas, 539 U.S. 558 (2003).

> Court's substantive due process precedents together is their lack of a guiding principle to distinguish 'fundamental' rights that warrant protection from nonfundamental rights that do not.[179]

But by restoring the original meaning of the Constitution, the Supreme Court can thus reaffirm the legitimate rights of the Constitution according to determinate textual enumerations. Following *New York State Rifle & Pistol Association v. Bruen*, originalists have fought over the uses of founding-era and Civil War-era history in defining the enumerated right to keep and bear arms.[180] By defining the incorporated Bill of Rights as privileges or immunities, we can better clarify the textual basis for our uses of history in determining the logical ends of rights and powers.

2. Unenumerated Rights and Equal Protection

Using the original language of the Privileges or Immunities Clause, we can accept for our purposes here: (1) that "while the Privileges and Immunities Clause of Article IV barred discrimination against out-of-staters, the Privileges or Immunities Clause of the Fourteenth Amendment barred states both from discriminating among different citizens within a state and from abridging or impairing the rights of all citizens even if the restrictions apply equally to all,"[181] and (2) that the Privileges or Immunities clause encompasses the unenumerated "positive law protections that civil society affords to the natural rights of its own citizens."[182]

---

179. *McDonald*, 561 U.S. 742, 811–12 (Thomas, J., concurring).

180. 597 U.S. 1 (2022); Mark Smith, *Attention Originalists: The Second Amendment was adopted in 1791, not 1868*, HARV. J.L. & PUB. POL'Y PER CURIAM (DEC 7, 2022), https://www.harvard-jlpp.com/attention-originalists-the-second-amendment-was-adopted-in-1791-not-1868-mark-smith/.

181. BARNETT, *supra* note 5, at 196. *See also* LASH, *supra* note 156, at 156; BARNETT & BERNICK, *supra* note 41, at 43.

182. Barnett & Bernick, *supra* note 158, at 509; 1 WILLIAM BLACKSTONE, COMMENTARIES 125.

> Thus much for the declaration of our rights and liberties. The rights themselves thus defined by these several statutes, consist in a number of private immunities; which will appear, from what has been premised, to be indeed no other, than either that residuum of natural liberty, which is not required by the laws of society to be sacrificed to public convenience; or else those civil privileges, which society hath engaged to provide, in lieu of the natural liberties so given up by individuals. These therefore were formerly, either by inheritance or purchase, the rights of all mankind; but, in most other countries of the world being now more or less debased and destroyed, they at present may be said to remain, in a peculiar and emphatical manner, the rights of the people of England. And these may be reduced to three principal or primary articles; the right of personal security, the right of personal liberty; and the right of private property: because as there is no other known method of compulsion, or of abridging man's natural free will, but by an infringement or diminution of one or other of these important rights, the preservation of these, inviolate, may justly be said to include the preservation of our civil immunities in their largest and most extensive sense.

See also LASH, *supra* note 156, at 241; BARNETT & BERNICK, *supra* note 4, at 43.

Understandably, these somewhat ambiguous original meanings could offer greater definiteness than the extratextual doctrine of substantive due process, something John Hart Ely described as "a contradiction in terms—sort of like 'green pastel redness.'"[183] Substantive due process has largely expanded under a theory of our nation's evolving history and tradition of providing protection to rights.[184] However, this theory of history and tradition relies on an ill-defined version of what would otherwise find greater clarity under a definition of Privileges or Immunities, thus deprecating our ability to rely on this legitimizing protection of rights.

Griswold v. Connecticut exemplifies the nature of this framework and legitimizing rights misconstruction, primarily because Justice Douglas attempts to expand on the indefinability of substantive due process without relying on any clause, wholly divorcing meaning from the text.[185] Justice Douglas claims that unenumerated rights are created by "specific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance."[186] This extratextual construction does not lead to a clear standard, and comparatively, a decision relying on the Privileges or Immunities Clause would have provided a more reliable precedent for protecting the legitimizing rights of citizens. Justice Black's dissent claims there are no "constitutional provision or provisions forbidding any law ever to be passed which might abridge the 'privacy' of individuals,"[187] though his argument has less to do with the Privileges or Immunities Clause and more to do with Justice Douglas's vague, indeterminate, and illegitimate extratextual construction.

Thus, reliance on the Due Process Clause has created framework misconstructions through (1) overlapping aspects of equal protection that would otherwise have greater reliability and legitimacy under the correct clause and (2) contradictions removing the determinacy and legitimacy of unenumerated rights according to the original textual principles of the Fourteenth Amendment.

Brown v. Board of Education is often cited as a rebuke of originalism, even where originalists may defend the decision under the Civil Rights Act of 1875.[188] But where originalist defense arguments flounder under the logic of equal protection, they find greater refuge under the Privileges or Immunities Clause. The Clause bars intrastate discrimination in the same

---

183. ELY, *supra* note 9, at 18.
184. Daniel O. Conkle, *Three Theories of Substantive Due Process*, 85 N.C. L. REV. 63, 66–68 (2006).
185. 381 U.S. 479 (1965).
186. *Id.* at 484.
187. *Id.* at 508.
188. McConnell, *supra* note 164.

manner that the original Constitution barred interstate discrimination.[189] As such, the Privileges or Immunities Clause allows for greater legitimization of this commonly accepted legal change.

By contrast, in *Dobbs v. Jackson Women's Health Organization*, Justice Thomas engages in originalism for the sake of originalism, invoking the correct Privileges or Immunities Clause but still deferring to the same atextual history and tradition test that the majority uses.[190] However, unlike the textual principles of the Privileges or Immunities Clause, discussed in greater detail in a later section, the history or tradition test is circular, gives too much discretion to judges, and bends to political tides. Indeterminacy here harms the legitimacy of the Constitution, where the open-ended history and tradition test offers more questions than answers.

3. Original Textual Principles

Originalists generally look upon the unenumerated rights of the Privileges or Immunities Clause with caution and fear.[191] This fear is misguided. With a focus on anti-misconstructionism, we can use history to restore the original, long-since-devolved construction zone, defining unenumerated rights as those rights inherent to legitimate state and federal sovereignty. Instead of using a circular and dead-hand 'history and tradition' test, we can more accurately define unenumerated privileges or immunities by the legitimate ends of government as provided for by an *ejusdem generis* construction that considers the relationship of government and citizen in those rights already enumerated.

In this subsection, I will begin with a cursory reconstruction of the Privileges or Immunities Clause. While the point of this reconstruction is to explain how we can provide a determinate protection of legitimizing unenumerated rights, I do not wish to exceed the scope of this paper. However, the legitimate rights of the Privileges or Immunities Clause are so

---

189. BARNETT, *supra* note 5, at 534 (arguing that *Brown v. Board of Education* makes more sense under the original meaning of the Privileges or Immunities Clause than under the original meaning of the Equal Protection Clause).

190. Dobbs v. Jackson Women's Health Organization, 597 U.S. 215, 333 (2022) (Thomas, J., concurring) ("After overruling these demonstrably erroneous decisions, the question would remain whether other constitutional provisions guarantee the myriad rights that our substantive due process cases have generated. For example, we could consider whether any of the rights announced in this Court's substantive due process cases are 'privileges or immunities of citizens of the United States' protected by the Fourteenth Amendment. To answer that question, we would need to decide important antecedent questions, including whether the Privileges or Immunities Clause protects any rights that are not enumerated in the Constitution and, if so, how to identify those rights. That said, even if the Clause does protect unenumerated rights, the Court conclusively demonstrates that abortion is not one of them under any plausible interpretive approach.") (cleaned up and with emphasis added).

191. Scalia, *supra* note 37, at 862.

central to the legitimizing textual rights of our Constitution that such a discussion is unavoidable.

Off the bat, the Privileges or Immunities Clause means what it says. It protects the rights of national citizenship, including those of state citizenship, from abridgement by law. The text provides evidence that the Privileges or Immunities Clause includes both state and federal rights because of how the text creates a two-tiered level of protection. Both federal due process and state equal protection are included in the broader "any person" and are therefore implicitly included within the broad span of the Privileges or Immunities of "citizens."[192] Furthermore, the arguments of constitutional abolitionists under the Privileges and Immunities Clause of Article IV, § 2, which informed the Fourteenth Amendment, further emphasizes the inclusion of both federal and state rights of citizenship.[193] This should counsel against Kurt Lash's enumerated-rights only reading,[194] as well as purely nondiscriminatory readings.[195]

In a useful summary, Randy Barnett describes three keys to the original meaning of the Privileges or Immunities Clause in "[f]irst, Supreme Court Justice Washington's explanation of the meaning of 'privileges and immunities' in *Corfield v. Coryell*; second, the rights protected by the Civil Rights Act of 1866; and third, Michigan Senator Jacob Howard's speech" before the Senate.[196] However, Randy Barnett and Evan Bernick still go on to argue in favor of a too-open-ended refined *Glucksberg* test[197] that does not adequately ground its construction in the original *textual* principles of the Fourteenth Amendment and which instead jumbles Equal Protection and Incorporation as somewhat separate doctrines.[198]

Starting with *Corfield v. Coryell*, we should pay careful attention to how Justice Washington's reading informed textual principles:

> We feel no hesitation in confining these expressions to those privileges and immunities which are, in their nature, fundamental; which belong, of *right, to the citizens of all free governments;* and

---

192. U.S. CONST. amend. XIV.

193. Randy E. Barnett, *Whence Comes Section One? The Abolitionist Origins of the Fourteenth Amendment*, 2 J. LEGAL ANALYSIS 165, 173, 207, 225–26, 249 (2011); BARNETT & BERNICK, *supra* note 4, at 92–101.

194. LASH, *supra* note 156, at 7; Barnett & Bernick, *supra* note 158, at 532.

195. ILAN WURMAN, THE SECOND FOUNDING: AN INTRODUCTION TO THE FOURTEENTH AMENDMENT 63 (2020); RAOUL BERGER, GOVERNMENT BY JUDICIARY: THE TRANSFORMATION OF THE FOURTEENTH AMENDMENT 167 (2d ed., 1997).

196. Randy E. Barnett, *Three Keys to the Original Meaning of the Privileges or Immunities Clause*, 43 HARV. J.L. & PUB. POL'Y 1, 2, 4, 8 (2020).

197. BARNETT & BERNICK, *supra* note 4, at 238–39.

198. *Id.* at 376.

> which have, at all times, been enjoyed by the citizens of the several states which compose this Union, from the time of their becoming free, independent, and sovereign. What these fundamental principles are, it would perhaps be more tedious than difficult to enumerate. They may, however, be all comprehended under the following general heads: *Protection by the government*; the enjoyment of *life and liberty*, with the right to acquire and possess *property* of every kind, and to pursue and obtain happiness and safety; subject nevertheless to such *restraints as the government may justly prescribe* for the general good of the whole.[199]

Justice Washington's discussion of "general heads" specifically describes "Protection by the government," which relates to Equal Protection, and "life and liberty," which relates to Due Process.[200] The most important line may be the right "to pursue and obtain happiness and safety; subject nevertheless to such restraints as the government may *justly prescribe* for the general good of the whole."[201] Here, we can relate unenumerated Privileges or Immunities to those that are enumerated, just as violations of equal protection through discrimination or violations of enumerated rights of due process are illegitimate ends of government, unenumerated rights are best defined by similar illegitimate ends of government.

Next, the Civil Rights Act of 1866 protected the rights "to make and enforce contracts, to sue, be parties, and give evidence, to inherit, purchase, lease, sell, hold, and convey real and personal property, and to full and equal benefit of all laws and proceedings."[202] Again, enumerated and unenumerated rights are blended, but these are all rights central to the pursuit of happiness, subject only to just restraints by the government.

When Senator Jacob Howard read from *Corfield v. Coryell*, he continued this blending of enumerated and unenumerated rights:

> To these privileges and immunities, whatever they may be—for they are not and cannot be fully defined in their entire extent and precise nature—to these should be added the personal rights guarantied and secured by the first eight amendments of the Constitution: such as the freedom of speech and of the press; the right

199. Barnett, *supra* note 196, at 2–3 (citing Corfield v. Coryell, 6 F. Cas. 546, 551–52 (C.C.E.D. Pa. 1823) (No. 3,230)) (emphasis modified).

200. *Id.*

201. *Id.*

202. *Id.* at 4–5 (citing Civil Rights Act of 1866, ch. 31, § 1.).

> of the people peaceably to assemble and petition the Government for a redress of grievances, a right appertaining to each and all the people: the right to keep and to bear arms; the right to be exempted from the quartering of soldiers in a house without the consent of the owner; the right to be exempt from unreasonable searches and seizures, and from any search or seizure except by virtue of a warrant issued upon a formal oath or affidavit; the right of an accused person to be informed of the nature of the accusation against him, and his right to be tried by an impartial jury of the vicinage; and also the right to be secure against excessive bail and against cruel and unusual punishments.
>
> Now, sir, here is a mass of privileges, immunities, and rights, some of them secured by the second section of the fourth article of the Constitution; which I have recited, some by the first eight amendments of the Constitution.[203]

Perhaps much of the modern confusion comes from a post-incorporation understanding of the Bill of Rights, where originally, the rights that Senator Howard described were illegitimate ends of the federal government. These rights were restatements of areas over which the federal government already lacked power. Alexander Hamilton wondered, "[w]hy, for instance, should it be said that the liberty of the press shall not be restrained, when no power is given by which restrictions may be imposed?"[204]

Ohio Representative John Bingham, the principal drafter of the Fourteenth Amendment, seemed to carry Hamilton's understanding that these were restatements of illegitimate ends of government:

> The question is, simply, whether you will give by this amendment to the people of the United States the power, by legislative enactment, to punish officials of States for violation of the oaths enjoined upon them by their Constitution? That is the question, and the whole question. *The adoption of the proposed amendment will take from the States no rights that belong to the States.* They elect their Legislatures; they enact their laws for the punishment of crimes against life, liberty, or property; but in the event of the adoption of this amendment, if they conspire together to enact laws refusing equal protection to life, liberty, or property, the Congress is thereby vested with power to hold them to answer before the bar of the national

203. CONG. GLOBE, 39th Cong., 1st Sess. 2765 (1868).
204. THE FEDERALIST No. 84 (Alexander Hamilton).

courts. . . .[205]

Under Bingham's reading, the purpose of the Fourteenth Amendment was to provide enforcement for what were already illegitimate ends of government. In deciphering unenumerated illegitimate ends, we can use those rights enumerated in the Constitution as evidence of what would be an illegitimate practice. Barnett and Bernick have touched on using the traditional limits on state police powers under the Fourteenth Amendment, but an *ejusdem generis* construction would provide a much more determinate framework of textual rights.[206] Perhaps, instead of a refined *Glucksberg* test, we need a refined *Griswold* test.

When the Bill of Rights and other enumerated protections, including Equal Protection, are understood in their historical context, they share a common thread that identifies the illegitimate ends of government. This common thread is in laws that ask citizens to betray their conscience and autonomy with discriminatory ends but is historically narrower than Justice Douglas broadly describes:

> Various guarantees create zones of privacy. The right of association contained in the penumbra of the First Amendment is one, as we have seen. The Third Amendment, in its prohibition against the quartering of soldiers 'in any house' in time of peace without the consent of the owner, is another facet of that privacy. The Fourth Amendment explicitly affirms the 'right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures.' The Fifth Amendment, in its Self-Incrimination Clause, enables the citizen to create a zone of privacy which government may not force him to surrender to his detriment.[207]

History allows us to better refine this common thread. The founding-era concerns underlying the first eight amendments can be consolidated under a single case. A political dissident, someone like John Wilkes or John Lilburne,[208] is published as criticizing a religious establishment (i.e., the

205. *Cong. Globe*, 39th Cong., 1st Sess. App. 1090 (1868).

206. BARNETT & BERNICK, *supra* note 4, at 305–06.

207. Griswold v. Connecticut, 381 U.S. 479, 484 (1965). Justice Douglas also cites the Ninth Amendment in his discussion, but because history and structure counsel against incorporating the Ninth Amendment, it should be omitted from any *ejusdem generis* analysis. *See* LASH, *supra* note 24, at 231.

208. LEVY, *supra* note 63, at 271–72, 296, 301–02, 390–91 (1968). LEVY, *supra* note 94, at 79, 145. Michael Kent Curtis, *In Pursuit of Liberty: The Levellers and the American Bill of Rights*, 8 CONST. COMMENT. 359, 372–73 (1991). It is also interesting that the Levellers wanted equality of all persons before the law in their Bill of Rights, further suggesting Equal Protection is a Privilege or Immunity of Citizenship. *Id.* at 373.

First Amendment).[209] They are subject to a general warrant (i.e., the Fourth Amendment),[210] though absent a warrant, they could defend their private home by arms (i.e., Second and Third Amendments)[211] or by suit of trespass (i.e., Seventh Amendment).[212] If subject to prosecution for seditious libel, they are entitled to a fair trial within the due course of law with a right against self-incrimination (i.e., Fifth and Sixth Amendments). If convicted, they are entitled to a fair a sentence (i.e., Eighth Amendment).

Moreso than privacy, conscience is the common thread. The first eight amendments all historically originated in the rights of religious, moral, and political dissenters. The Founders were influenced by the disarming of Catholics during the Glorious Revolution,[213] by the use of general warrants to search the private homes of libelers and religious dissidents,[214] by the oath *ex officio* forcing men to betray their consciences in ecclesiastic prerogative courts,[215] and by the punishment of Titus Oates for perjury regarding a "Popish Plot."[216] The very purpose of a constitution was rooted in common law opposition to the prerogative power of monarchs who led the Church of England.[217]

As for the drafters of the Fourteenth Amendment, conscience was no less important. Abolitionism was rooted in evangelical movements from the Second Great Awakening.[218] Southern regulations prohibited the after-dark assemblies of African Americans to chill religious assemblies and prevented slaves from learning to read the Bible.[219] As Kurt Lash summarizes:

> Lyman Trumbull introduced the 1866 Civil Rights Act by pointing out that, under slavery, blacks were prohibited from 'exercising the functions of a minister of the Gospel,' and that the Black Codes continued to violate these 'privileges essential to freemen.'

---

209. LEONARD W. LEVY, THE ESTABLISHMENT CLAUSE 84, 87 (2d ed., 1994).

210. Thomas Y. Davies, *Recovering the Original Fourth Amendment*, 98 MICH. L. REV. 547, 693–94 (1999).

211. *Id.* at 625; Tom W. Bell, *The Third Amendment: Forgotten but Not Gone*, 2 WM. & MARY BILL RTS. J. 117, 120 (1993).

212. AMAR, *supra* note 24, at 75.

213. LEVY, *supra* note 19, at 137.

214. Laura K. Donohue, *The Original Fourth Amendment*, 83 U. CHI. L. REV. 1181, 1208–10 (2016).

215. LEVY, *supra* note 63, at 81, 140–41, 332.

216. Granucci, *supra* note 100, at 857–59; Stinneford, *supra* note 101, at 1760–61.

217. HAMBURGER, *supra* note 59, at 51–56.

218. Kurt T. Lash, *The Second Adoption of the Free Exercise Clause: Religious Exemptions Under the Fourteenth Amendment*, 88 NW. U.L. REV. 1106, 1131 (1994). Steven G. Calabresi & Abe Salander, *Religion and the Equal Protection Clause: Why the Constitution Requires School Vouchers*, 65 FLA. L. REV. 909, 984–85 (2013).

219. *Id.* at 1135.

> Congressman Cydnor B. Tompkins of Ohio noted that southern states would 'condemn as a felon the man who dares proclaim the precepts of our holy religion.' Representative James M. Ashley pointed out that '[u]nder the plea of Christianizing [blacks], [the South] has enslaved, beaten, maimed, and robbed millions of men for whose salvation the Man of sorrows died . . . . It has silenced every free pulpit within its control, and debauched thousands which ought to have been independent.'[220]

Of course, there is no directly enumerated right to teach reading and writing. But as the concerns of the Thirty-Ninth Congress demonstrate, such a right could fall within the unenumerated privileges or immunities of citizenship, assuming that exemptions are otherwise beyond the scope of the original meaning of Free Exercise.[221] There is, however, an unenumerated right of individual conscience, where discrimination serves as no legitimate state interest.

Based on this history, one could argue that the Privileges or Immunities Clause stands for the broader *ejusdem generis* textual principle that governments lack the power to interfere in matters purely of conscience. Rather than inferring rights through circular and open-ended privacy discussions, we could instead define unenumerated privileges or immunities by the laws that abridge them under purely moral justifications of conscience.

Moreover, we need not define conscience by religion. The secular political abuses of seditious libel prosecutions and general warrants emphasize that governments have no legitimate end in discriminating against the tides of political change. Substantive due process case law describes a plethora of matters purely of moral conscience: contraceptives, sexual orientation, and education.[222] Matters purely of moral conscience are those essential to a citizen's peaceful pursuit of happiness—these are privileges and immunities necessary to legitimate governance. Perhaps Jefferson was prophetic in saying that "[t]he legitimate powers of government extend to such acts only as are injurious to others. But it does me no injury for my neighbour to say there are twenty gods or no god. It neither picks my pocket nor breaks my leg."[223]

---

220. Kurt T. Lash, *The Second Adoption of the Establishment Clause: The Rise of the Nonestablishment Principle*, 27 ARIZ. ST. L.J. 1085, 1142 (1995).

221. Michael W. McConnell, *Free Exercise Revisionism and the Smith Decision*, 57 U. CHI. L. REV. 1109, 1118–19 (1990).

222. Griswold v. Connecticut, 381 U.S. 479 (1965); Lawrence v. Texas, 539 U.S. 558 (2003); Pierce v. Society of Sisters, 268 U.S. 510 (1925).

223. Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of*

C. Circular Fourth Amendment Reasonableness

Fourth Amendment caselaw is paradigmatic of misconstruction. Not only does it involve all three layers of misconstruction, but the case law also demonstrates the flaws of strict constructionist and traditionalist alternatives that flounder in the face of technological change, contravening first principles. The text of the Fourth Amendment reads as follows:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall be issued, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched and the persons or things to be seized.[224]

The text depends on the relationship of two operative clauses: (1) the Warrant Clause and (2) the Reasonableness Clause.[225] With little regard to the relationship between those two clauses, courts and scholars have developed competing interpretations of the Fourth Amendment as either a general reasonableness construction or a warrant-preference construction.[226] Either all searches need to be reasonable, or courts prefer a warrant subject to recognized exceptions.

Further compounding this inconsistency, courts apply language that differs greatly from the text of the Fourth Amendment. In *Katz v. United States*, Justice Harlan's concurrence laid forth the ahistorical test for unreasonable searches, finding "a twofold requirement, first that a person have exhibited an actual (subjective) expectation of privacy and, second, that the expectation be one that society is prepared to recognize as 'reasonable.'"[227] In dissent, Justice Black argued against the pending misconstruction with a twofold objection:

> (1) I do not believe that the words of the Amendment will bear the meaning given them by today's decision, and (2) I do not believe that it is the proper role of this Court to rewrite the Amendment in order 'to bring it into harmony with the times.'[228]

Religion, 103 HARV. L. REV. 1409, 1451 (1990) (citing THOMAS JEFFERSON, NOTES ON THE STATE OF VIRGINIA 159 (W. Peden ed. 1955) (1st ed. 1787)).

224. U.S. CONST. amend. IV.

225. Thomas Y. Davies, *Recovering the Original Fourth Amendment*, 98 MICH. L. REV. 547, 557–58 (1999).

226. *Id.* at 559.

227. Katz v. United States, 389 U.S. 347, 361 (1967) (Harlan, J., concurring).

228. *Id.* at 364 (Black, J., dissenting).

Further complicating the matter, in *United States v. Jones*, Justice Scalia would champion a traditionalist originalist view of the Fourth Amendment that would offer another atextual, albeit historical, description of unreasonable searches.[229] Relying on the common law history, Justice Scalia held that searches were unreasonable where there was a trespass because English Common law authorized trespass suits against officers physically intruding without warrants.[230]

The common law and Fourth Amendment history offer a different meaning when one looks to *principles* rather than *practice*. The Fourth Amendment was designed against a backdrop of general warrants and writs of assistance, like those in *Entick v. Carrington*, *Wilkes v. Woods,* and the *Writs of Assistance Case*.[231] Under general warrants, a house would be broken into, the persons inside seized, and papers and effects rifled through. The Fourth Amendment was therefore designed against promiscuous searches, those without any particularity, not solely against trespasses. The original textual principle of the Fourth Amendment is in inherent particularity, which can shift based on changes in information technology.[232]

By understanding reasonableness as an inherent particularity, we can counter a misconstruction of the Reasonableness and Warrant Clauses—both stand for the same principle. Moreover, this principle does not need to evolve to be applied to new circumstances but instead allows for a more consistent and faithful application. Two cases best exemplify the application of this static principle to new circumstances based on changes in technology.

In *Riley v. California*, the Supreme Court found it unreasonable to search cell phones incident to a lawful arrest.[233] While a search of address books, wallets, and purses is inherently particular, far from authorizing a promiscuous search of a person's papers and effects,[234] the search of a cell phone amounts to a quantitatively greater violation of information privacy.

Similarly, in *Kyllo v. United States*, the Court found unreasonable a search of a private home with a thermal-imaging device.[235] Writing for the

229. 565 U.S. 400, 410–11 (2012) (Scalia, J.).

230. *Id.* at 405.

231. Laura K. Donohue, *The Original Fourth Amendment*, 83 U. CHI. L. REV. 1181, 1208–14 (2016).

232. Gregory Velloze, *Fourth Amendment Reasonability as Technologically-Shifting Inherent Particularity*, SSRN (unpublished), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4332620.

233. 573 U.S. 373, 386 (2014).

234. *Id.* at 392–93.

235. 533 U.S. 27, 29 (2001).

majority, Justice Scalia relied on the inconsistent *Katz* test, even against his own trespass test, and his discussion of "intimate details" understood that the principles of the Fourth Amendment extended beyond solely physical intrusions.[236] But seventy-three years earlier, Justice Brandeis had prophesized the very situation that the Court would deal with in *Kyllo* and did so with an eye to the original principles of the Fourth Amendment:

> Ways may someday be developed by which the government, without removing papers from secret drawers, can reproduce them in court and by which it will be enabled to expose to a jury the most intimate occurrences of the home. Advances in the psychic and related sciences may bring means of exploring unexpressed beliefs, thoughts, and emotions. 'That places the liberty of every man in the hands of every petty officer' was said by James Otis of much lesser intrusions than these.[237]

However, Fourth Amendment case law is anything but originalist. Instead, it typifies the sort of misconstruction that comes from the politicized common law construction of an ever-changing bench. Far from faithfully applying perennial, textual principles, the Court plays a game of telephone with its own inconsistent rulings. The Court has misconstrued vagueness from the Reasonableness Clause, creating a framework misconstruction with the Warrant Clause that then misconstrues the rights that legitimize the Constitution.

Scholars have described Fourth Amendment case law as "a mess," "an embarrassment," or "a mass of contradictions."[238] Jeffrey Bellin describes a "Post-Katz Textual Drift," where the "*Katz* test is circular," and the "privacy we can reasonably expect depends on the privacy the Supreme Court tells us we have. As a result, the test is best understood as a formulaic incantation that precedes an answer, 'a mere ornament, not connected with the mechanism at all.'"[239] Tracey Maclin describes how the *Katz* misconstruction is essentially a "rational basis model" that "severely diminishes our rights."[240]

Fourth Amendment case law explains why originalism is necessary as the anti-misconstruction of textual legitimizing rights. By faithfully

236. *Id.* at 34, 37–38.
237. Olmstead v. United States, 277 U.S. 438, 474 (Brandeis, J., dissenting).
238. Orin S. Kerr, *An Equilibrium-Adjustment Theory of the Fourth Amendment*, 125 HARV. L. REV. 476, 479 (2011) (internal quotation marks omitted).
239. Jeffrey Bellin, *Fourth Amendment Textualism*, 118 MICH. L. REV. 233, 251 (2019).
240. Tracey Maclin, *The Central Meaning of the Fourth Amendment*, 35 WM. & MARY L. REV. 197, 247 (1993).

adhering to the original textual principles of the Fourth Amendment, we can create a consistent framework for our rights and ensure that they neither expire against technological changes nor spiral beyond our grasp.

IV. CONCLUSION

In summary, the purpose of originalism is the anti-misconstruction of the textual rights that legitimize the Constitution. Unauthorized changes in constitutional meaning have constructed vagueness and contradictions that undermine the larger textual framework and, in doing so, have constructed indeterminacy in the rights the Constitution protects. These are misconstructions with the framework, language, and rights of the Constitution.

The purpose of originalism is to protect the textual rights that the Constitution legitimizes. A proper understanding of this purpose will enable originalists to better understand their methodology. History serves as linguistic context, narrowing ambiguities rather than limiting the Constitution to expected applications that do little to protect legitimizing rights. By narrowing textual constructions to their original principles, originalists can restore a coherent, determinate, and consistent constitutional framework. Ultimately, originalists can restore the first principles of the text to create constructions within the bounds of text and history to perpetually vindicate the legitimizing rights of the Constitution.