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Originalism in Practice

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Originalism in Practice†

LAWRENCE ROSENTHAL*

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INTRODUCTION

Originalism is ascendant. Consider *District of Columbia v. Heller*,[1] in which the Supreme Court, confronting the Second Amendment "right of the people to keep and bear Arms,"[2] invalidated the District of Columbia's prohibition on the possession of handguns in light of "the original understanding of the Second Amendment."[3] The relevant "understanding," the Court added, was that of the framing-era public:

> "[T]he Constitution was written to be understood by the voters; its words and phrases were used in their normal and ordinary as distinguished from technical meaning." Normal meaning may of course include an idiomatic meaning, but it excludes secret or technical meanings that would not have been known to ordinary citizens in the founding generation.[4]

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* Professor of Law, Chapman University School of Law. Many thanks are owed to Isa Lang and the staff of Chapman University School of Law's Rinker Law Library for highly capable research assistance. I am deeply grateful to Jack Balkin, Saul Cornell, Richard Kay, Donald Kochan, Ron Rotunda, George Thomas, and Adam Winkler for their enormously helpful comments on prior drafts. They did their best to set me straight; any errors that remain are entirely my own.

1. 554 U.S. 570 (2008).
2. U.S. CONST. amend. II ("A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.").
3. *Heller*, 554 U.S. at 625.
4. *Id.* at 576–77 (quoting United States v. Sprague, 282 U.S. 716, 731 (1931)) (citation omitted).

This, of course, is originalism, which "regards the discoverable meaning of the Constitution at the time of its initial adoption as authoritative for purposes of constitutional interpretation in the present."[5] Notably, in *Heller*, the Court's originalism was not based on the intentions of the Constitution's framers—an approach that has been criticized as unacceptably indeterminate and inconsistent with the framing-era understandings about how legal texts should be interpreted[6]—but instead was based on the original meaning of constitutional text as understood by the framing-era public.[7] In this embrace of original meaning, *Heller* was no sport; in recent years, for example, the Court has used originalism to revolutionize

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5. Keith E. Whittington, *The New Originalism*, 2 GEO. J.L. & PUB. POL'Y 599, 599 (2004). Although this definition will suffice for present purposes, Lawrence Solum has provided a helpful elaboration:

> [M]ost or almost all originalists agree that original meaning was *fixed* or determined at the time each provision of the constitution was framed and ratified. We might call this idea *the fixation thesis*. It is no surprise that originalists agree on the fixation thesis. The term "originalism" was coined to describe a family of textualist and intentionalist approaches to constitutional interpretation and construction that were associated with phrases like "original intentions," "original meaning," and "original understanding." These phrases and the word "originalist" share the root word "origin." The idea that meaning is fixed at the time of origination for each constitutional provision serves as the common denominator for all of these expressions. Thus, *the fixation thesis* might be described as a core idea around which all or almost all originalist theories organize themselves.

Lawrence B. Solum, *What Is Originalism? The Evolution of Contemporary Originalist Theory*, *in* THE CHALLENGE OF ORIGINALISM: THEORIES OF CONSTITUTIONAL INTERPRETATION 12, 33 (Grant Huscroft & Bradley W. Miller eds., 2011) [hereafter THE CHALLENGE OF ORIGINALISM] (emphasis in original).

6. *See, e.g.*, LEONARD W. LEVY, ORIGINAL INTENT AND THE FRAMERS' CONSTITUTION 284–398 (1988); JACK N. RAKOVE, ORIGINAL MEANINGS: POLITICS AND IDEAS IN THE MAKING OF THE CONSTITUTION 340–65 (1996); Robert W. Bennett, *Objectivity in Constitutional Law*, 132 U. PA. L. REV. 445, 456–74 (1984); Paul Brest, *The Misconceived Quest for Original Understanding*, 60 B.U. L. REV. 204, 209–22 (1980); Paul Finkelman, *The Constitution and the Intentions of the Framers: The Limits of Historical Analysis*, 50 U. PITT. L. REV. 349, 351–58 (1989); H. Jefferson Powell, *The Original Understanding of Original Intent*, 98 HARV. L. REV. 885, 948 (1985). For responses to these criticisms from advocates of original-intention originalism, see, for example, Larry Alexander, *Simple-Minded Originalism*, *in* THE CHALLENGE OF ORIGINALISM, *supra* note 5, at 87, 89–94; Raoul Berger, *The Founders' Views—According to Jefferson Powell*, 67 TEX. L. REV. 1033, 1055–76 (1989); Richard S. Kay, *Adherence to the Original Intentions in Constitutional Adjudication: Three Objections and Responses*, 82 NW. U. L. REV. 226, 236–84 (1988); Charles A. Lofgren, *The Original Understanding of Original Intent?*, 5 CONST. COMMENT. 77 (1988); Earl M. Maltz, *The Failure of Attacks on Constitutional Originalism*, 4 CONST. COMMENT. 43 (1987).

7. For a useful typology of the various approaches to originalist constitutional interpretation, see Thomas B. Colby & Peter J. Smith, *Living Originalism*, 59 DUKE L.J. 239, 247–67 (2009).

its sentencing jurisprudence, as well as its approach to the Sixth Amendment's Confrontation Clause.[8]

Originalism stands in opposition to nonoriginalism, which does not regard original meaning as authoritative.[9] Perhaps nonoriginalism's classic exposition came from Justice Holmes:

> [W]hen we are dealing with words that also are a constituent act, like the Constitution of the United States, we must realize that they have called into life a being the development of which could not have been foreseen completely by the most gifted of its begetters. It was enough for them to realize or to hope that they had created an organism; it has taken a century and has cost their successors much sweat and blood to prove that they created a nation. The case before us must be considered in the light of our whole experience and not merely in that of what was said a hundred years ago.[10]

The emergence of originalism in the Supreme Court's jurisprudence parallels its emergence in the academy. In recent decades, originalism has been advocated by a growing and diverse group of scholars who, although often taking different positions on the particulars of originalist interpretation, agree that the Constitution's status as a written legal text means that constitutional interpretation should be governed by the meaning of text as it was understood in the framing era.[11] One leading scholar has claimed that among academics, originalism has

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8. For useful discussions of the manner in which originalism has revolutionized the Court's jurisprudence in these areas, see, for example, Rachel E. Barkow, *Originalists, Politics, and Criminal Law on the Rehnquist Court*, 74 GEO. WASH. L. REV. 1043, 1044–64, 1068–69 (2006); Stephanos Bibas, *Originalism and Formalism in Criminal Procedure: The Triumph of Justice Scalia, the Unlikely Friend of Criminal Defendants?*, 94 GEO. L.J. 183, 189–99 (2005); John C. Eastman, *Politics and the Court: Did the Supreme Court Really Move Left Because of Embarrassment over* Bush v. Gore*?*, 94 GEO. L.J. 1475, 1476–81 (2006); Douglas H. Ginsburg, *Originalism and Economic Analysis: Two Case Studies of Consistency and Coherence in Supreme Court Decision Making*, 33 HARV. J.L. & PUB. POL'Y 217, 231–32 (2010); and Antonin Scalia, *Foreword*, 31 HARV. J.L. & PUB. POL'Y 871, 871–72 (2008).

9. A typology of nonoriginalism can be derived from Philip Bobbitt's modalities of constitutional argument, which include historical, textual, prudential, ethical, structural, and doctrinal argument. *See* PHILIP BOBBITT, CONSTITUTIONAL FATE: THEORY OF THE CONSTITUTION 3–119 (1982). Of these modalities, only the first is originalist. Even historical argument, however, does not qualify as originalist under the definition offered above if it is based on understandings of constitutional text that emerged after the framing era, as is sometimes the case. *See, e.g.*, Bruce Ackerman, *The Living Constitution*, 120 HARV. L. REV. 1737, 1797–1812 (2007); Barry Friedman & Scott B. Smith, *The Sedimentary Constitution*, 147 U. PA. L. REV. 1, 33–76 (1998); Stephen M. Griffin, *Constitutional Theory Transformed*, 108 YALE L.J. 2115, 2138–41 (1999).

10. Missouri v. Holland, 252 U.S. 416, 433 (1920).

11. *See, e.g.*, JACK M. BALKIN, LIVING ORIGINALISM 35–37 (2011); RANDY E. BARNETT, RESTORING THE LOST CONSTITUTION: THE PRESUMPTION OF LIBERTY 92–117 (2004); GREGORY BASSHAM, ORIGINAL INTENT AND THE CONSTITUTION: A PHILOSOPHICAL STUDY 67–90 (1992); MICHAEL J. PERRY, THE CONSTITUTION IN THE COURTS: LAW OR POLITICS? 28–

become "the prevailing approach to constitutional interpretation."[12] As a normative matter, originalism is said to offer three primary virtues. First, it is said to appropriately constrain the judiciary by confining it to the interpretation of legal text.[13] Second, it is thought to reflect the proper role of the judiciary in a republican form of government by treating as binding the judgments made by the framers and ratifiers when adopting constitutional text.[14] Third, originalism is said to lead to

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53 (1994); KEITH E. WHITTINGTON, CONSTITUTIONAL INTERPRETATION: TEXTUAL MEANING, ORIGINAL INTENT, AND JUDICIAL REVIEW 160–212 (1999); Hans W. Baade, *"Original Intent" in Historical Perspective: Some Critical Glosses*, 69 TEX. L. REV. 1001, 1103–07 (1991); Steven G. Calabresi & Saikrishna B. Prakash, *The President's Power to Execute the Laws*, 104 YALE L.J. 541, 550–59 (1994); Robert N. Clinton, *Original Understanding, Legal Realism, and the Interpretation of "This Constitution,"* 72 IOWA L. REV. 1177, 1186–259 (1987); Charles Fried, *Sonnet LXV and the "Black Ink" of the Framers' Intention*, 100 HARV. L. REV. 751, 756–60 (1987); Christopher R. Green, *"This Constitution": Constitutional Indexicals as a Basis for Textual Semi-Originalism*, 84 NOTRE DAME L. REV. 1607, 1641–67 (2009); Kay, *supra* note 6, at 229–36; Vasan Kesavan & Michael Stokes Paulsen, *The Interpretive Force of the Constitution's Secret Drafting History*, 91 GEO. L.J. 1113, 1127–48 (2003); Gary Lawson, *On Reading Recipes . . . and Constitutions*, 85 GEO. L.J. 1823, 1833–36 (1997); Michael W. McConnell, *The Importance of Humility in Judicial Review: A Comment on Ronald Dworkin's "Moral Reading" of the Constitution*, 65 FORDHAM L. REV. 1269, 1278–87 (1997); Michael Stokes Paulsen, *How to Interpret the Constitution (and How Not to)*, 115 YALE L.J. 2037, 2056–62 (2006); Saikrishna B. Prakash, *Unoriginalism's Law Without Meaning*, 15 CONST. COMMENT. 529, 541–45 (1998) (reviewing RAKOVE, *supra* note 6); Ronald D. Rotunda, *Original Intent, the View of the Framers, and the Role of the Ratifiers*, 41 VAND. L. REV. 507, 512–14 (1988); Lawrence B. Solum, District of Columbia v. Heller *and Originalism*, 103 NW. U. L. REV. 923, 940–55 (2009).

12. Randy E. Barnett, *An Originalism for Nonoriginalists*, 45 LOY. L. REV. 611, 613 (1999). For accounts of the turn toward originalism among legal scholars see, for example, DENNIS J. GOLDFORD, THE AMERICAN CONSTITUTION AND THE DEBATE OVER ORIGINALISM 20–154 (2005); and JOHNATHAN O'NEILL, ORIGINALISM IN AMERICAN LAW AND POLITICS: A CONSTITUTIONAL HISTORY 101–216 (2005).

13. *See, e.g.*, BARNETT, *supra* note 11, at 100–09; PERRY, *supra* note 11, at 31–38; WHITTINGTON, *supra* note 11, at 50–61; Lillian R. BeVier, *The Integrity and Impersonality of Originalism*, 19 HARV. J.L. & PUB. POL'Y 283, 288–91 (1996); Lino A. Graglia, *"Interpreting" the Constitution: Posner on Bork*, 44 STAN. L. REV. 1019, 1020–29 (1992); Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849, 854 (1989); Steven D. Smith, *Law Without Mind*, 88 MICH. L. REV. 104, 105–06 (1989); Lawrence B. Solum, *We Are All Originalists Now*, *in* CONSTITUTIONAL ORIGINALISM: A DEBATE 1, 38–42 (Robert W. Bennett & Lawrence B. Solum eds., 2011) [hereinafter CONSTITUTIONAL ORIGINALISM].

14. *See, e.g.*, BALKIN, *supra* note 11, at 54-56; ROBERT H. BORK, THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW 143–60 (1990); WHITTINGTON, *supra* note 11, at 152–59; Frank H. Easterbrook, *Textualism and the Dead Hand*, 66 GEO. WASH. L. REV. 1119, 1121–26 (1998); Kurt T. Lash, *Originalism, Popular Sovereignty, and Reverse Stare Decisis*, 93 VA. L. REV. 1437, 1440, 1444–46 (2007); Jonathan R. Macey, *Originalism as an "Ism"*, 19 HARV. J.L. & PUB. POL'Y 301, 307–08 (1996); Michael W. McConnell, *Textualism and the Dead Hand of the Past*, 66 GEO. WASH. L. REV. 1127, 1132–37 (1998); Antonin Scalia, *Common-Law Courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws*, *in* A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 3, 40 (Amy Gutmann ed., 1997) [hereinafter A MATTER OF INTERPRETATION]; Solum, *supra* note 13, at 42–44.

desirable outcomes by protecting legal commitments that reflect fundamental values.[15]

To be sure, originalism has its critics, who deny that originalism follows from the character of the Constitution as a written text,[16] or vindicates popular sovereignty within republican government.[17] The critics also claim that originalism is not required or even able to impose adequate constraint on the judiciary given the indeterminacy of historical inquiry and the rigor of many nonoriginalist approaches.[18] The critics add that originalism enshrines framing-era understandings even when they come to be regarded as outmoded or unjust.[19]

The scholarly debate over originalism often seems abstract. Supporters and opponents debate the theoretical merits of originalism, but rarely test their views on the merits of originalism by reference to the realities of constitutional adjudication.

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15. *See, e.g.*, Jamal Greene, *On the Origins of Originalism*, 88 TEX. L. REV. 1, 82–88 (2009); John O. McGinnis & Michael B. Rappaport, *Originalism and the Good Constitution*, 98 GEO. L.J. 1693, 1698–733 (2010).

16. *See, e.g.*, STEPHEN BREYER, ACTIVE LIBERTY: INTERPRETING OUR DEMOCRATIC CONSTITUTION 115–18 (2005); CASS R. SUNSTEIN, A CONSTITUTION OF MANY MINDS: WHY THE FOUNDING DOCUMENT DOESN'T MEAN WHAT IT MEANT BEFORE 20–32 (2009); Mitchell N. Berman, *Originalism Is Bunk*, 84 N.Y.U. L. REV. 1, 38–68 (2009); Andrew B. Coan, *The Irrelevance of Writtenness in Constitutional Interpretation*, 158 U. PA. L. REV. 1025 (2010); Colby & Smith, *supra* note 7, at 282–87; Tara Smith, *Originalism's Misplaced Fidelity: "Original" Meaning Is Not Objective*, 26 CONST. COMMENT. 1, 25–53 (2009).

17. *See, e.g.*, CHRISTOPHER L. EISGRUBER, CONSTITUTIONAL SELF-GOVERNMENT 32–39 (2001); Berman, *supra* note 16, at 69–75; Brest, *supra* note 6, at 225–29; Coan, *supra* note 16, at 853–57; Michael J. Klarman, *Antifidelity*, 70 S. CAL. L. REV. 381, 388–91 (1997); Richard A. Primus, *When Should Original Meanings Matter?*, 107 MICH. L. REV. 165, 187–202 (2008); Larry G. Simon, *The Authority of the Framers of the Constitution: Can Originalist Interpretation Be Justified?*, 73 CALIF. L. REV. 1482, 1499–501 (1985); Smith, *supra* note 16, at 13–24; Mark S. Stein, *Originalism and Original Exclusions*, 98 KY. L.J. 397, 448–56 (2009–10); David A. Strauss, *Common Law Constitutional Interpretation*, 63 U. CHI. L. REV. 877, 928–34 (1996).

18. *See, e.g.*, STEPHEN BREYER, MAKING OUR DEMOCRACY WORK: A JUDGE'S VIEW 76–78 (2010); BREYER, *supra* note 16, at 118–27; DANIEL A. FARBER & SUZANNA SHERRY, DESPERATELY SEEKING CERTAINTY: THE MISGUIDED QUEST FOR CONSTITUTIONAL FOUNDATIONS 11–21 (2002); DAVID A. STRAUSS, THE LIVING CONSTITUTION 18–21 (2010); Robert W. Bennett, *Originalism and the Living American Constitution*, *in* CONSTITUTIONAL ORIGINALISM, *supra* note 13, at 78, 87–114; Berman, *supra* note 16, at 75–77, 88–93; Erwin Chemerinsky, *The Supreme Court, 1988 Term, Foreword: The Vanishing Constitution*, 103 HARV. L. REV. 43, 92–103 (1989); Coan, *supra* note 16, at 1047–70; Colby & Smith, *supra* note 7, at 288–305; Larry Kramer, *Two (More) Problems with Originalism*, 31 HARV. J.L. & PUB. POL'Y 907, 911–13 (2008); Thomas W. Merrill, *Originalism, Stare Decisis, and the Promotion of Judicial Restraint*, 22 CONST. COMMENT. 271, 277–82 (2005); Suzanna Sherry, *The Indeterminacy of Historical Evidence*, 19 HARV. J.L. & PUB. POL'Y 437, 440–41 (1996).

19. *See, e.g.*, BREYER, *supra* note 18, at 78–79; STRAUSS, *supra* note 18, at 12–18; SUNSTEIN, *supra* note 16, at 69–92; Scott W. Howe, *Slavery as Punishment: Original Public Meaning, Cruel and Unusual Punishment, and the Neglected Clause in the Thirteenth Amendment*, 51 ARIZ. L. REV. 983, 1019–32 (2009); Ethan J. Leib, *The Perpetual Anxiety of Living Constitutionalism*, 24 CONST. COMMENT. 353, 358–61 (2007); Adam M. Samaha, *Originalism's Expiration Date*, 30 CARDOZO L. REV. 1295, 1331–49 (2008).

In science, a theory gains acceptance if it makes testable predictions that are later borne out.[20] Perhaps we cannot expect the precision of science from legal theory, but surely we ought to expect something like it.[21] Whatever its theoretical merit, originalism deserves recognition as a genuinely distinctive and useful approach to constitutional adjudication only if, in practice, it provides a genuinely originalist vehicle for deciding real cases—that is, by reference to the meaning of constitutional text as historically fixed at the time of framing and ratification—when nonoriginalists would decide them otherwise. Yet the scholarly literature to date makes no effort to address that question. This Article aims to fill this gap by assessing how originalist interpretations of the Constitution fare in practice.[22]

To the extent that originalism demands that constitutional text be treated as binding, there is no real difference between originalism and nonoriginalism. Nonoriginalists rarely if ever contend the language of the Constitution can be ignored when it is inconsistent with contemporary sensibilities; to the contrary, they readily acknowledge that constitutional text is binding and that constitutional adjudication is properly concerned with interpreting rather than remaking the Constitution's text, even if text is afforded evolving content to maintain its relevance to contemporary circumstances.[23] Accordingly, nonoriginalist constitutional adjudication reflects the primacy of constitutional text. When embracing on nonoriginalist grounds the view that the Fourteenth Amendment's Equal Protection Clause forbids apportioning state legislative districts on any basis other than population, for example, the Supreme Court never suggested that the Constitution's allocation of two senators to each state can somehow be ignored as inconsistent with the current understanding of the constitutional mandate of equal

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20. *See, e.g.*, Daubert v. Merrell Dow Pharm., Inc., 509 U.S. 579, 593 (1993).

21. *Cf.* Lawrence M. Friedman, *Law Reviews and Legal Scholarship: Some Comments*, 75 DENV. U. L. REV. 661, 668 (1998) ("In most fields, a theory has to be testable; it is a hypothesis, a prediction, and therefore subject to proof. When legal scholars use the word 'theory,' they seem to mean (most of the time) something they consider deep, original, and completely untestable.").

22. About the only effort along these lines in the literature to date is a study of the Supreme Court's federalism decisions demonstrating that the use of originalism fails to eliminate ideological differences among Members of the Court. *See* Peter J. Smith, *Sources of Federalism: An Empirical Analysis of the Court's Quest for Original Meaning*, 52 UCLA L. REV. 217 (2004).

23. *See, e.g.*, BREYER, *supra* note 18, at 80–81; EISGRUBER, *supra* note 17, at 31–32; Bennett, *supra* note 18, at 139–40; Brest, *supra* note 6, at 228–29, 234–37; Coan, *supra* note 16, at 1047–66; Thomas B. Colby, *The Sacrifice of the New Originalism*, 99 GEO. L.J. 713, 749–55 (2011); Michael C. Dorf, *Integrating Normative and Descriptive Constitutional Theory: The Case of Original Meaning*, 85 GEO. L.J. 1765, 1796–99 (1997); Charles A. Reich, *Mr. Justice Black and the Living Constitution*, 76 HARV. L. REV. 673, 734–36 (1963); Peter J. Smith, *How Different Are Originalism and Non-Originalism?*, 62 HASTINGS L.J. 707, 722–24 (2011); Strauss, *supra* note 17, at 906–23; Laurence H. Tribe, *Comment*, *in* A MATTER OF INTERPRETATION, *supra* note 14, at 65, 71–73; *see also* STEVEN D. SMITH, LAW'S QUANDARY 131 (2004) ("[T]he form of judicial activism that appears to enjoy substantial support insists that judges interpret the law, not reauthor it; but they should interpret in a creative fashion and not be confined to ascertaining the supposed intentions of the enactors.").

protection, but instead noted that the Constitution's text offers no basis for state legislatures to be apportioned in the same manner as the United States Senate.[24] The advocates of a "living Constitution" instead make the more limited claim that contemporary understandings are of use in interpreting the broadest, most open-ended provisions in the Constitution.[25] For their part, even committed originalists acknowledge that the original meaning of constitutional text is sometimes vague or ambiguous,[26] requiring what they characterize as nonoriginalist construction rather than interpretation on the basis of original meaning.[27] Thus, whatever its theoretical merits, originalism offers a workable and distinctive approach to constitutional adjudication only if it provides a vehicle for utilizing the historically fixed meaning of constitutional text as a means of reducing the interpretive leeway claimed by nonoriginalists.

The discussion that follows examines whether, in practice, originalism offers a method for using the framing-era meaning of constitutional text to reduce the scope of textual vagueness and ambiguity that gives rise to nonoriginalist constitutional adjudication. Part I explores the efforts of originalists to reduce the scope of textual vagueness and ambiguity by relying on framing-era understandings and practices as a means of fleshing out the original meaning of constitutional text—what I will call "original-expected-applications" originalism. Part II explores "semantic originalism," in which what is regarded as interpretively binding is not the original meaning of constitutional text as reflected by its original expected applications, but instead the original semantic meaning of constitutional text stated at the level of generality found in the text.[28] Part III examines the leading ostensibly originalist

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24. *See* Reynolds v. Sims, 377 U.S. 533, 574–77 (1964).

25. *See, e.g.*, SOTIROS A. BARBER & JAMES E. FLEMING, CONSTITUTIONAL INTERPRETATION: THE BASIC QUESTIONS 155–70 (2007); RICHARD H. FALLON, JR., IMPLEMENTING THE CONSTITUTION 27–42, 111–18 (2001); GOODWIN LIU, PAMELA S. KARLAN & CHRISTOPHER H. SCHROEDER, KEEPING FAITH WITH THE CONSTITUTION 25–40 (2010); KERMIT ROOSEVELT III, THE MYTH OF JUDICIAL ACTIVISM: MAKING SENSE OF SUPREME COURT DECISIONS 50–58 (2006); STRAUSS, *supra* note 18, at 7–10, 102–14; LAURENCE H. TRIBE & MICHAEL C. DORF, ON READING THE CONSTITUTION 8–19 (1991); Bennett, *supra* note 18, at 124–25; William J. Brennan, Jr., *The Constitution of the United States: Contemporary Ratification*, *in* INTERPRETING THE CONSTITUTION: THE DEBATE OVER ORIGINAL INTENT 23, 25–32 (Jack N. Rakove ed., 1990); Thomas C. Grey, *Do We Have an Unwritten Constitution?*, 27 STAN. L. REV. 703, 709–10, 714–17 (1975).

26. For present purposes, Professor Solum's definition of vague or ambiguous text is helpful: "*Vagueness*: A term or phrase is vague if and only if it admits of borderline (or uncertain) cases"; and "*Ambiguity*: A term or phrase is ambiguous in the strict or philosophical sense when it has more than one sense or meaning." Lawrence B. Solum, *Incorporation and Originalist Theory*, 18 J. CONTEMP. LEGAL ISSUES 409, 415 (2009) (emphasis in original) (footnotes omitted).

27. *See, e.g.*, BALKIN, *supra* note 11, at 14, 31–32; BARNETT, *supra* note 11, at 118–30; WHITTINGTON, *supra* note 11, at 5–14; Solum, *supra* note 26, at 436–42; Grégoire C.N. Webber, *Originalism's Constitution*, *in* THE CHALLENGE OF ORIGINALISM, *supra* note 5, at 147, 173–76. For a more general discussion of the distinction between interpretation and construction, see Lawrence B. Solum, *The Interpretation-Construction Distinction*, 27 CONST. COMMENT. 95, 101–08 (2010).

28. For a helpful discussion of the distinction between an originalism based on original

decisions of recent years to determine whether originalism, in practice, has proven able to make constitutional adjudication turn on historical evidence of the original meaning of constitutional text.

I. ORIGINAL EXPECTED APPLICATIONS

Perhaps the leading originalist account that denies the possibility of ascribing evolving content to constitutional text is original-expected-applications originalism. This account does not claim that textual vagueness or ambiguity disappears merely by consulting the framing-era meaning of the words used in the Constitution's text, and with reason. Consider, for example, the Fourth Amendment's prohibition on "unreasonable searches and seizures."[29] Two schools of thought have emerged about the original meaning of the phrase. One relies on evidence that the term "unreasonable," at least in a legal context, was understood in the framing era as a "pejorative synonym for gross illegality or unconstitutionality,"[30] while the other contends that in the framing era the term meant pretty much what it means today—"contrary to sound judgment, inappropriate, or excessive."[31] For present purposes, it hardly matters which is correct; the original semantic meaning of the Fourth Amendment seems little more than a conclusion. Original meaning must be defined with greater specificity if it is to provide meaningful guidance to constitutional adjudication.[32] The kind of vague or ambiguous text that nonoriginalists claim as their domain, however, resists such specificity. Original-expected-applications

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expected applications and a semantic form of originalism, which the author labels "skyscraper originalism" and "framework originalism," respectively, see BALKIN, *supra* note 11, at 21–34.

29. U.S. CONST. amend. IV. Its drafting history sheds little light on the original meaning of this phrase. The Amendment began as a single clause forbidding unreasonable search and seizure "by warrants issued without probable cause, supported by oath or affirmation, or not particularly describing the places to be searched, or the persons or things to be seized." THE COMPLETE BILL OF RIGHTS: THE DRAFTS, DEBATES, SOURCES, AND ORIGINS 223 (Neil H. Cogan ed., 1997). The text was changed during debate in the House to create a freestanding clause prohibiting unreasonable search and seizure, and in the most complete analysis of the limited historical materials, Thomas Davies concluded that the alteration was intended to do no more than phrase the prohibition on general warrants in an imperative fashion because of the paucity of evidence that anyone intended to make a substantive change to the original proposal. *See* Thomas Y. Davies, *Recovering the Original Fourth Amendment*, 98 MICH. L. REV. 547, 716–24 (1999). That view may well be correct as a matter of congressional intent, but the inference that Professor Davies draws from the legislative history is of little significance in determining the original public meaning of the proposal—at least absent evidence that the public or at least the ratifiers were aware of a congressional intent to preserve the substance of the original proposal in a two-clause format. There is, however, virtually no surviving evidence that sheds any light on the understanding of the Fourth Amendment in the ratifying states. *See* WILLIAM J. CUDDIHY, THE FOURTH AMENDMENT: ORIGINS AND ORIGINAL MEANING 602–1791, at 712–23 (2009).

30. Davies, *supra* note 29, at 693.

31. David A. Sklansky, *The Fourth Amendment and Common Law*, 100 COLUM. L. REV. 1739, 1781 (2000).

32. For a helpful discussion of the challenges presented for originalism when constitutional text is defined at a high level of generality, see TRIBE & DORF, *supra* note 25, at 31–64.

originalism meets this challenge with the claim that textual vagueness and ambiguity can be addressed by using framing-era understandings and practices as a means of fleshing out the meaning of constitutional text.

Likely the most prominent contemporary originalist, Justice Scalia professes adherence to original-expected-applications originalism. Justice Scalia does not claim that the original semantic meaning of constitutional text alone does much to reduce the scope of textual vagueness or ambiguity; to the contrary, he acknowledges that the Constitution contains much that is "abstract and general rather than specific and concrete,"[33] but contends that "[t]he context suggests that the abstract and general terms, like the concrete and particular ones, are meant to nail down current rights, rather than aspire after future ones—that they are abstract and general references to *extant* rights and freedoms possessed under the then-current regime."[34] Thus, reference to the manner in which rights and freedoms were applied in the framing era, we are told, can resolve textual vagueness and ambiguity.

Taking a different route to original-expected-applications originalism, John McGinnis and Michael Rappaport have argued that a commitment to originalism entails the use of the interpretive devices that were in general acceptance in the framing era, including reliance on the generally accepted original understanding of a legal text and the drafters' intentions rather than permitting the kind of evolutionary approach favored by nonoriginalists.[35] Utilizing this original-methods originalism, they argue that the framing generation's expectations as to the manner in which constitutional text would be applied provide powerful evidence of original meaning.[36] As a means of addressing the difficulties of ascertaining a collective intent of the framers or ratifiers and applying it to concrete constitutional debates, those who advocate a purposivist brand of originalism, in which textual meaning is based on the original intentions underlying constitutional text, similarly find framing-era practices and understandings to be an essential means of identifying original intentions.[37] Despite the differences in these accounts, all utilize the framing-era understanding of the text to give content to the open-ended constitutional provisions that nonoriginalists claim as their own.

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33. Antonin Scalia, *Response*, *in* A MATTER OF INTERPRETATION, *supra* note 14, at 129, 135.

34. *Id.* (emphasis in original).

35. *See* John O. McGinnis & Michael B. Rappaport, *Original Methods Originalism: A New Theory of Interpretation and the Case Against Construction*, 103 NW. U. L. REV. 751, 758–72 (2009).

36. *See* John O. McGinnis & Michael Rappaport, *Original Interpretive Principles as the Core of Originalism*, 24 CONST. COMMENT. 371, 378–81 (2007). Others similarly contend that framing-era practices and understandings provide potent evidence of original meaning. *See, e.g.*, Larry Kramer, *Fidelity to History—and Through It*, 65 FORDHAM L. REV. 1627, 1654–55 (1997); Caleb Nelson, *Originalism and Interpretive Conventions*, 70 U. CHI. L. REV. 519, 525–38 (2003); John C. Yoo, *The Continuation of Politics by Other Means: The Original Understanding of War Powers*, 84 CALIF. L. REV. 167, 172–74 (1996).

37. *See, e.g.*, Kay, *supra* note 6, at 253; Steven D. Smith, *Reply to Koppelman: Originalism and the (Merely) Human Constitution*, 27 CONST. COMMENT. 189, 194–99 (2010).

A. Strong Original-Expected-Applications Originalism

Original-expected-applications originalism comes in strong and weak forms. Strong original-expected-applications originalism treats the framing-era's understanding of the manner in which constitutional text would be applied as controlling, while weaker versions permit departures from framing-era understandings upon what is regarded as an adequate justification.[38]

The classic argument against the strong form of original-expected-applications originalism points to *Brown v. Board of Education*,[39] noting that racially segregated schools remained common throughout the country even after the ratification of the Fourteenth Amendment, and therefore were likely consistent with the framing-era understanding of the Fourteenth Amendment.[40] The charge that strong original-expected-applications originalism cannot justify *Brown* seems a damning one; as Pamela Karlan has written, "because *Brown* has become the crown jewel of the *United States Reports*, every constitutional theory must claim *Brown* for itself."[41] Indeed, the response of most originalists to *Brown* is to condemn reliance on original expected applications and argue that racial segregation is inconsistent with the original meaning of the Fourteenth Amendment's textual commitment to equality, even if the framing generation did not yet understand the implications of the constitutional text it had ratified.[42]

Still, some endeavor to reconcile *Brown* with original-expected-applications originalism. Justice Scalia, for example, believes that the text of the Fourteenth Amendment condemns all racial discrimination,[43] and since, in his view, framing-era practices and understandings are relevant only to resolve ambiguities in constitutional text, they need not be consulted in this instance because the text of the Fourteenth Amendment's Equal Protection Clause is unambiguous when it comes to racial discrimination.[44] Yet the clarity of the constitutional command that

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38. I have borrowed from Mitchell Berman the concept of the "strength" of originalism. *See* Berman, *supra* note 16, at 10–11.

39. 347 U.S. 483 (1954).

40. *See* Michael J. Klarman, Brown*, Originalism, and Constitutional Theory: A Response to Professor McConnell*, 81 VA. L. REV. 1881, 1885–93 (1995).

41. Pamela S. Karlan, *What Can* Brown® *Do for You?: Neutral Principles and the Struggle over the Equal Protection Clause*, 58 DUKE L.J. 1049, 1060 (2009).

42. *See, e.g.*, BORK, *supra* note 14, at 81–83; PERRY, *supra* note 11, at 42–44; Lawrence Lessig, *Understanding Changed Readings: Fidelity and Theory*, 47 STAN. L. REV. 395, 423–26 (1995). *But see* Michael W. McConnell, *Originalism and the Desegregation Decisions*, 81 VA. L. REV. 947, 1092–105 (1995) (arguing that *Brown* can be reconciled with framing-era understandings by noting that majorities in Reconstruction-era Congresses expressed opposition to segregation during consideration of what became the Civil Rights Act of 1875, though admittedly not the requisite two-thirds majority to amend the Constitution).

43. *See, e.g.*, Grutter v. Bollinger, 539 U.S. 306, 346–49 (2003) (Scalia, J., concurring in part and dissenting in part); *id.* at 353–54 (Thomas, J., joined by Scalia, J., concurring in part and dissenting in part).

44. Rutan v. Republican Party of Ill., 497 U.S. 62, 95–96 n.1 (1990) (Scalia, J., dissenting). Justice Scalia added that support for segregation was not unbroken in the framing era since segregation was challenged in some quarters and denounced by Justice Harlan in his dissenting opinion in *Plessy*. *See id.* This may be so, but it is far from a

no "State . . . deny to any person within its jurisdiction the equal protection of the laws,"[45] when applied to the separate-but-equal segregation at issue in *Brown*, is surely open to doubt. As Herbert Wechsler famously wrote in defense of the Court's decision upholding separate-but-equal segregation in *Plessy v. Ferguson*[46]: "In the context of a charge that segregation *with equal facilities* is a denial of equality, is there not a point in *Plessy* in the statement that if 'enforced separation stamps the colored race with a badge of inferiority' it is solely because its members choose 'to put that construction upon it'?"[47] Unless Professor Wechsler is regarded as having lacked a basic understanding of the English language, something more than the unadorned text is required to support *Brown*.

But put *Brown* aside. Justice Scalia has acknowledged that "originalism is strong medicine," and admits, "in a crunch I may prove a faint-hearted originalist."[48] Perhaps the difficulty of hewing to original expected applications when it comes to racial segregation has caused Justice Scalia to flinch. The fact that extreme cases may produce a "faint-hearted" originalism, however, need not discredit the approach as a general matter. After all, in many other cases, Justice Scalia has faithfully relied on framing-era practices and understandings to flesh out the original meaning of otherwise vague or ambiguous constitutional text.[49] Surely the case against original-expected-applications originalism should not be based solely on the one example of *Brown*.

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demonstration that segregation was inconsistent with the Fourteenth Amendment's original public meaning as reflected in predominant framing-era practice and understandings.

45. U.S. CONST. amend. XIV, § 1.

46. 163 U.S. 537 (1896).

47. Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 33 (1959) (emphasis in original) (quoting *Plessy*, 163 U.S. at 551). Justice Scalia's position is even more puzzling because when it comes to segregation by sex, he thinks that framing-era practice is properly consulted. *See* United States v. Virginia, 518 U.S. 515, 568–70 (1996) (Scalia, J., dissenting). The Equal Protection Clause, however, offers its protections to every "person," without textual reference to either race or sex. It is therefore hard to understand how the text could be regarded as unambiguous as to race but ambiguous as to sex, requiring reference to framing-era practice for the latter but not the former.

48. Scalia, *supra* note 13, at 863–64.

49. *See, e.g.*, Doe v. Reed, 130 S. Ct. 2811, 2833–36 (2010) (Scalia, J., concurring in the judgment) (First Amendment Free Speech Clause); Boumediene v. Bush, 553 U.S. 723, 843–49 (2008) (Scalia, J., dissenting) (Suspension of Habeas Corpus Clause); Lawrence v. Texas, 539 U.S. 558, 595–98 (2003) (Scalia, J., dissenting) (Due Process Clause); Board of Cnty. Comm'rs v. Umbehr, 518 U.S. 668, 687–90 (1996) (Scalia, J., dissenting) (First Amendment Free Speech Clause); United States v. Virginia, 518 U.S. 515, 568–70 (1996) (Scalia, J., dissenting) (Equal Protection Clause); Harmelin v. Michigan, 501 U.S. 957, 980–85 (1991) (Scalia, J.) (Eighth Amendment prohibition on cruel and unusual punishment); Cnty. of Riverside v. McLaughlin, 500 U.S. 44, 60–66 (1991) (Scalia, J., dissenting) (Fourth Amendment prohibition on unreasonable search and seizure); Rutan v. Republican Party of Ill., 497 U.S. 62, 95–97 (1990) (Scalia, J., dissenting) (First Amendment Free Speech Clause).

1. The Incompleteness of Strong Original-Expected-Applications Originalism

At the outset, we can put aside the objection that evidence of framing-era practices and understandings may sometimes be confusing or in conflict. Although Justice Scalia himself has acknowledged that it will often be difficult to sort through framing-era evidence,[50] if an approach to constitutional interpretation is acceptable only if it produces no difficult cases, none could bear scrutiny.[51] Another threshold objection contends that framing-era practices and understandings are an unreliable indicator of constitutional provisions that are aspirational in nature.[52] Even for constitutional provisions with an aspirational character, however, practices and understandings that survived the wake of ratification could surely be thought consistent with original meaning.

A more serious problem is that original-expected-applications originalism will be of no help in addressing issues that did not arise in the framing era. Consider *Weems v. United States*.[53] At issue was whether the Eighth Amendment's prohibition on "cruel and unusual punishments"[54] barred the use of *cadena temporal*—a punishment originating in the Spanish Penal Code involving fifteen years at hard labor while painfully shackled, followed by permanent surveillance and disqualification from any position of public trust and the loss of parental and other civil rights—for falsifying entries involving relatively small sums in government ledgers.[55] The Court explained that the evidence from the framing era suggested that the Eighth Amendment was intended to prohibit the kinds of

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50. *See* Scalia, *supra* note 13, at 856–61.

51. To be sure, the difficulty of assessing historical evidence is sometimes great, and that may pose considerable problems for originalism. In *McDonald v. City of Chicago*, 130 S. Ct. 3020 (2010), for example, eight Justices rejected an argument that the original meaning of the Fourteenth Amendment's Privileges or Immunities Clause made the protections of the first eight amendments enforceable against the states, in significant part because of uncertainty about the Clause's original meaning. *See id.* at 3030 (plurality opinion); *id.* at 3089 (Stevens, J., dissenting); *id.* at 3132–33 (Breyer, J., dissenting). Four of the five Justices who supported incorporation of the Second Amendment within the Fourteenth relied on the Due Process Clause without any claim that incorporation was consistent with the original meaning of that clause. *See id.* at 3030–31, 3050 (plurality opinion); *see also id.* at 3062 (Thomas, J., concurring in part and concurring in the judgment) ("[N]either [the plurality nor the dissents] argues that the meaning they attribute to the Due Process Clause was consistent with public understanding at the time of its ratification."). Indeed, in terms of original public meaning, incorporation of the first eight amendments within the Fourteenth Amendment's Due Process Clause makes little sense because it renders the Fifth and Fourteenth Amendments' Due Process Clauses redundant. *See* Adamson v. California, 332 U.S. 46, 63–66 (1947) (Frankfurter, J., concurring). For an analysis of this issue by a leading originalist who concedes that nonoriginalist construction may be required to determine if the Fourteenth Amendment makes the first eight amendments applicable to the states, see Solum, *supra* note 26, at 419–45.

52. *See*, *e.g.*, Michael C. Dorf, *The Aspirational Constitution*, 77 GEO. WASH. L. REV. 1631, 1644–51 (2009); Tribe, *supra* note 23, at 87–91.

53. 217 U.S. 349 (1910).

54. U.S. CONST. amend. VIII.

55. *Weems*, 217 U.S. at 362–65.

punishment imposed under the Stuart kings of England that had come to be regarded as excessive.[56] Even though the *cadena temporal* did not resemble any of these punishments, the Court nevertheless concluded that it violated the Eighth Amendment in light of the imbalance between the severity of the punishment and the gravity of the offense.[57]

It is hard not to sympathize with *Weems*; if the Eighth Amendment prohibited only those punishments labeled as cruel and unusual in the framing era, the Constitution would offer no protection against the creation of new punishments that produce chilling pain and terror in novel ways. This seems an untenable approach to a textual prohibition framed at a level of considerable generality. Even Justice Scalia concedes that the Eighth Amendment states "an abstract principle," and for that reason applies "to all sorts of tortures quite unknown at the time the Eighth Amendment was adopted."[58] He also appears to accept the holding of *Weems*.[59]

A similar problem arose in *Clinton v. Jones*[60] when the Court considered whether the Constitution's delegation of executive power to the president meant that a sitting president could not be compelled to face trial in a civil action arising out of conduct occurring before he took office, because such a trial could impede the president in the discharge of his constitutional duties. The Court observed that no remotely comparable issue arose during the framing era; therefore, the Court concluded that historical inquiry shed no light on the issue.[61] And, in *Boumediene v. Bush*,[62] the Court declined to rely on framing-era practice to determine whether the constitutional right to challenge the legality of one's detention by writ of habeas corpus applied to prisoners at Guantanamo Bay, Cuba—where Cuba technically

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56. *Id.* at 371–72.

57. *Id.* at 377–82. The Court also advanced a classic argument against reliance on original expected applications:

> Legislation, both statutory and constitutional, is enacted, it is true, from an experience of evils, but its general language should not, therefore, be necessarily confined to the form that evil had theretofore taken. Time works changes, brings into existence new conditions and purposes. Therefore a principle to be vital must be capable of wider application than the mischief which gave it birth. This is peculiarly true of constitutions. They are not ephemeral enactments, designed to meet passing occasions. They are, to use the words of Chief Justice Marshall, "designed to approach immortality as nearly as human institutions can approach it." The future is their care and provision for events of good and bad tendencies of which no prophecy can be made. In the application of a constitution, therefore, our contemplation cannot be only of what has been but of what may be. Under any other rule a constitution would indeed be as easy of application as it would be deficient in efficacy and power. Its general principles would have little value and be converted by precedent into impotent and lifeless formulas. Rights declared in words might be lost in reality.

Id. at 373.

58. Scalia, *supra* note 14, at 145 (emphasis in original).

59. *See* Harmelin v. Michigan, 501 U.S. 957, 990–92 (1991) (plurality opinion).

60. 520 U.S. 681 (1997).

61. *Id.* at 695–97.

62. 553 U.S. 723 (2008).

retains sovereignty but the United States exercises complete control under a perpetual lease—since there was no analogous framing-era practice and the relevant historical record was incomplete.[63]

Thus, an approach to constitutional interpretation that depends on framing-era practices and understandings to flesh out the original meaning of the Constitution's vague or ambiguous provisions is of no aid when facing problems that did not arise in the framing era. But beyond this deficiency, there is the problem of changed circumstances.

2. Original-Expected-Applications Originalism and Changed Circumstances

An even more serious problem with a reliance on original expected applications to guide the interpretation of vague or ambiguous constitutional text is that framing-era understandings and practice may be irrelevant to contemporary circumstances. This point was central to *Brown*; in light of the changes in importance of public education since the framing of the Fourteenth Amendment, the Court concluded that in assessing the constitutionality of racial segregation under the Equal Protection clause: "We must consider public education in the light of its full development and its present place in American life throughout the Nation."[64] The problem, however, is not confined to matters of racial discrimination. Consider Justice White's Fourth Amendment originalism.

Justice White was no foe of using framing-era practices and understandings to illustrate the meaning of the Fourth Amendment's prohibition on unreasonable searches and seizures; for example, he authored the opinion of the Court in *United States v. Watson*,[65] in which the Court relied on the framing-era law of arrest as it held that the Fourth Amendment permits warrantless arrests on probable cause to believe that the arrestee had committed a felony.[66] Yet, in *Tennessee v. Garner*,[67] Justice White wrote the opinion of the Court invalidating a state statute codifying the framing-era rule that deadly force could be used to stop a fleeing felon, concluding: "Because of sweeping change in the legal and technological context, reliance on the common-law rule in this case would be a mistaken literalism that ignores the purposes of a historical inquiry."[68] The framing-era rule, Justice White reasoned, was a consequence of "the relative dangerousness of felons," as well as the fact that "virtually all felonies were punishable by death," but since then, most felonies had become noncapital offenses and many nondangerous offenses had

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63. *Id.* at 746–52.

64. Brown v. Bd. of Educ., 347 U.S. 483, 492–93 (1954).

65. 423 U.S. 411 (1976).

66. *Id.* at 418–23. Justice White's commitment to framing-era practice as illuminating the meaning of the Fourth Amendment was not ephemeral; he later dissented from the Court's holding that the Fourth Amendment requires a warrant to make a forcible entry into an arrestee's home for purpose of effecting an arrest, on the ground that this holding was unsupported by framing-era practice. *See* Payton v. New York, 445 U.S. 573, 604–14 (1980) (White, J., dissenting).

67. 471 U.S. 1 (1985).

68. *Id.* at 13.

become classified as felonies.[69] "These changes have undermined the concept . . . that use of deadly force against a fleeing felon is merely a speedier execution of someone who has already forfeited his life. They have also made the assumption that a 'felon' is more dangerous than a misdemeanant untenable."[70] Moreover, arrests were more dangerous affairs in the framing era, "when weapons were rudimentary."[71] Accordingly, "though the common-law pedigree of Tennessee's rule is pure on its face, changes in the legal and technological context mean the rule is distorted almost beyond recognition when literally applied."[72] Thus, Justice White believed that the framing-era judgment about the reasonableness of using deadly force against a fleeing felon was based on a framing-era context no longer relevant.[73]

One of the most potent charges against originalism is that it "depends on using history without historicism, the use of evidence from the past without paying attention to historical context."[74] As *Garner* illustrates, strong original-expected-applications originalism is particularly vulnerable to this charge: changed circumstances may undermine the relevance of framing-era understandings or practice to contemporary circumstances.[75] To be sure, some constitutional text seems to codify framing-era practice. The Seventh Amendment, for example, provides: "In Suits at common law . . . the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law."[76] This formulation

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69. *Id.* at 13–14 (footnote omitted).

70. *Id.* at 14.

71. *Id.*

72. *Id.* at 15.

73. Even the dissenters would not embrace framing-era practice without regard to changed circumstances, although they afforded it greater weight:

> Although the Court has recognized that the requirements of the Fourth Amendment must respond to the reality of social and technological change, fidelity to the notion of *constitutional*—as opposed to purely judicial—limits on governmental action requires us to impose a heavy burden on those who claim that practices accepted when the Fourth Amendment was adopted are now constitutionally impermissible.

Id. at 26 (O'Connor, J., dissenting) (emphasis in original).

74. Stephen M. Griffin, *Rebooting Originalism*, 2008 U. ILL. L. REV. 1185, 1188.

75. Indeed, Professor Davies has argued that the framers' focus on general warrants was itself a product of contemporary circumstances; in particular, the considerable evidence that the original understanding of the Fourth Amendment as limited to a prohibition on general warrants was a consequence of the fact that general warrants were understood as the only abuse of power likely to emerge from the federal government. *See* Davies, *supra* note 29, at 619–68. He concludes:

> Applying the original meaning of the language of the Fourth Amendment in a completely changed social and institutional context would subvert the *purpose* the Framers had in mind when they adopted the text. They focused on banning general warrants because they perceived the general warrant as the only means by which discretionary search authority might be conferred.

Id. at 740–41 (emphasis in original) (footnote omitted).

76. U.S. CONST. amend. VII.

seems to constitutionalize framing-era jury rights, and the Court has therefore turned to framing-era practice as the basis for interpreting this constitutional guarantee.[77] But, as we have seen, nonoriginalists claim the open-ended provisions of the Constitution as their own—those most readily characterized as vague or ambiguous—and it is far from clear that framing-era practice supplies a reliable guide to their original meaning in light of changed circumstances. Christopher Eisgruber has made the point this way:

> Suppose that Grandpa is on his deathbed, and he whispers to Sonny, "Just promise me this Sonny: eat only healthy food." Sonny, eager to grant this modest request, makes the promise. Grandpa dies, confidently believing (as Sonny well knows) that raw fish and red wine are bad for you and that whole milk is good for you. Now suppose Sonny becomes convinced, on the basis of subsequent scientific studies, that sushi and Chianti are part of a healthy diet but that whole milk is not. We can argue, I suppose, about whether Sonny, if he wishes to honor his promise, should eat or refuse sushi. But we should in any case be able to agree that the concept "healthy" does not become meaningless if divorced from Grandpa's outdated beliefs about what is healthy. If Sonny decides to eat sushi, he will still be acting on the basis of a promise to eat healthy food.[78]

Indeed, slavish adherence to framing-era practices and understandings without inquiry into changed circumstances puts one in mind of Holmes's famous axiom: "It is revolting to have no better reason for a rule of law than that so it was laid down in the time of Henry IV. It is still more revolting if the grounds upon which it was laid down have vanished long since, and the rule simply persists from blind imitation of the past."[79] There is surely a powerful argument that when the constitutional text does not expressly codify a framing-era rule, but rather states a more general standard, the standard should be applied in light of contemporary understandings rather than framing-era conceptions that may be outmoded or

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77. *See, e.g.*, City of Monterey v. Del Monte Dunes at Monterey, Ltd., 526 U.S. 687, 708 (1999); Feltner v. Columbia Pictures Television, Inc., 523 U.S. 340, 347–52 (1998); Markman v. Westview Instruments, Inc., 517 U.S. 370, 376 (1996); Ross v. Bernhard, 396 U.S. 531, 533–34 (1970). For contrasting views of the original meaning of the Seventh Amendment, see, for example, AKHIL REED AMAR, THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION 89–93 (1998) (Seventh Amendment guarantees a jury in federal court only when a jury is available in state court); Stanton D. Krauss, *The Original Understanding of the Seventh Amendment Right to Jury Trial*, 33 U. RICH. L. REV. 407, 479–83 (1999) (Seventh Amendment leaves federal jury rights to congressional discretion); and Rachael E. Schwartz, "*Everything Depends on How You Draw the Lines*": *An Alternative Interpretation of the Seventh Amendment*, 6 SETON HALL CONST. L.J. 599, 616–29 (1996) (same).

78. EISGRUBER, *supra* note 17, at 29. For similar discussions, see, for example, RONALD DWORKIN, FREEDOM'S LAW: THE MORAL READING OF THE AMERICAN CONSTITUTION 291–94 (1996); and Lawrence Lessig, *Fidelity in Translation*, 71 TEX. L. REV. 1165, 1170–71 (1993).

79. Oliver Wendell Holmes, Jr., *The Path of the Law*, 10 HARV. L. REV. 457, 469 (1897).

irrelevant.[80] There is even an originalist argument in support of this conclusion; as Lee Strang, a committed originalist, has written: "A reasonable person in the position of the Framers and Ratifiers would 'draw their Constitution loosely enough so that it might live and breathe and change with time.'"[81] Thus, there is reason to believe that the problem of changed circumstances is a serious one for original-expected-applications originalism.

Even Justice Scalia's jurisprudence acknowledges this flaw in original-expected-applications originalism. As we have seen, Justice Scalia professes adherence to original-expected-applications originalism; in particular, reliance on original expected applications is evident in his Fourth Amendment jurisprudence. For example, he wrote the opinion of the Court in *Wyoming v. Houghton*,[82] which contains a paradigmatic reliance on original expected applications: "In determining whether a particular governmental action violates this provision, we inquire first whether the action was regarded as an unlawful search or seizure under the common law when the Amendment was framed."[83] Yet Justice Scalia, like Justice White, acknowledges the need to retreat from original expected applications in the face of changed circumstances. Consider *Kyllo v. United States*.[84]

In the framing era, only a physical trespass was thought to be an unlawful invasion of the privacy of the home, and for that reason, in its first encounter with electronic surveillance, the Court held that wiretapping unaccompanied by a physical trespass to the home was not a "search" within the meaning of the Fourth Amendment.[85] As Justice Scalia observed, "Fourth Amendment jurisprudence was tied to common-law trespass."[86] Nevertheless, in *Kyllo*, Justice Scalia wrote the opinion of the Court holding that the use of a thermal imaging device that, although positioned on public property outside of a home, discloses "the relative heat of various rooms in the home,"[87] amounts to a "search" within the meaning of the Fourth Amendment:

> [I]n the case of the search of the interior of homes—the prototypical and hence most commonly litigated area of protected privacy—there is

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80. *See, e.g.*, BALKIN, *supra* note 11, at 10–16, 75–81; Dorf, *supra* note 23, at 1804–10; Mark D. Greenberg & Harry Litman, *The Meaning of Original Meaning*, 86 GEO. L.J. 569, 591–617 (1998).

81. Lee J. Strang, *Originalism and the "Challenge of Change": Abduced-Principle Originalism and Other Mechanisms by Which Originalism Sufficiently Accommodates Changed Social Conditions*, 60 HASTINGS L.J. 927, 952 (2009) (quoting FOREST MCDONALD, NOVUS ORDO SECLORUM: THE INTELLECTUAL ORIGINS OF THE CONSTITUTION 293 (1985)). To similar effect, see William Michael Treanor, *The Original Understanding of the Takings Clause and the Political Process*, 95 COLUM. L. REV. 782, 857–58 (1995).

82. 526 U.S. 295 (1999).

83. *Id.* at 299. To similar effect, see, for example, Virginia v. Moore, 553 U.S. 164, 168 (2008) (Scalia, J.).

84. 533 U.S. 27 (2001).

85. Olmstead v. United States, 277 U.S. 438, 463–66 (1928), *overruled by* Katz v. United States, 389 U.S. 347 (1967).

86. *Kyllo*, 533 U.S. at 31.

87. *Id.* at 35 n.2.

> a ready criterion, with roots deep in the common law, of the minimal expectation of privacy that *exists*, and that is acknowledged to be *reasonable*. To withdraw protection of this minimum expectation would be to permit police technology to erode the privacy guaranteed by the Fourth Amendment. We think that obtaining by sense-enhancing technology any information regarding the interior of the home that could not otherwise have been obtained without physical intrusion into a constitutionally protected area, constitutes a search—at least where (as here) the technology in question is not in general public use.[88]

Thus, advancing technology constituted a changed circumstance that required a departure from the framing-era understanding that an unlawful invasion of the security of the home required a physical trespass. Accordingly, even Justice Scalia is prepared to reject strong original-expected-applications originalism based on changed circumstances. The same is true of the Court's other professed originalist. Although Justice Thomas has never advanced a fully developed theory of constitutional interpretation, he also claims fealty to originalism.[89] Yet he joined Justice Scalia's opinion in *Kyllo*.

Also consider *Vernonia School District 47J v. Acton*.[90] Justice Scalia's opinion for the Court, addressing the constitutionality of random drug testing of high school athletes, first acknowledged that a mandatory urine test "constitutes a 'search' subject to the demands of the Fourth Amendment,"[91] and then stated,

> [I]n a case such as this, where there was no clear practice, either approving or disapproving the type of search at issue, at the time the constitutional provision was enacted, whether a particular search meets the reasonableness standard "is judged by balancing its intrusion on the individual's Fourth Amendment interests against its promotion of legitimate governmental interests."[92]

Applying that test, the Court upheld mandatory urinalysis of students engaged in interscholastic sports.[93]

As it happens, however, there were at least two candidates for a pertinent framing-era practice in *Acton*. On the one hand, the general framing-era rule was that searches of individuals were permitted only if incident to a valid arrest. As William Cuddihy concluded in his exhaustive analysis of the historical evidence, "by 1789, body searches were derivatives of the arrest process, and Americans had little recent experience with personal searches apart from that process."[94] A warrantless misdemeanor arrest was improper if the offense had not been committed in the presence of the person making the arrest or the arrestee was not

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88. *Id.* at 34 (emphasis in original) (internal quotations and citation omitted).
89. *See, e.g.*, Clarence Thomas, *Judging*, 45 U. KAN. L. REV. 1, 6–7 (1996).
90. 515 U.S. 646 (1995).
91. *Id.* at 652.
92. *Id.* at 652–53 (footnote omitted) (quoting Skinner v. Railway Lab. Execs.' Ass'n, 489 U.S. 602, 619 (1989)).
93. *Id.* at 665–66.
94. CUDDIHY, *supra* note 29, at 752.

actually guilty of the offense, and a warrantless felony arrest was not permitted unless a felony had in fact been committed and there was reasonable grounds to believe that the arrestee had committed the offense.[95] Indeed, just a few years before *Acton*, Justice Scalia had acknowledged the framing-era impropriety of a search of a person absent a basis to make an arrest.[96] Under this framing-era rule, the random drug tests at issue in *Acton* would be readily condemned. On the other hand, Justice Thomas, while joining Justice Scalia's opinion in *Acton*, in a subsequent case contended that the framing-era rule of in loco parentis, which afforded public schools virtually unfettered power over children in their charge, supports a rule granting equally broad discretion to contemporary public schools with respect to the search and seizure of students.[97]

Strikingly, in *Acton*, Justice Scalia applied neither of these framing-era rules. His opinion of the Court makes no express comment on the framing-era law of arrest, but it observes that outside of the context of a search "undertaken by law enforcement officials to discover evidence of criminal wrongdoing," the Court had held that searches unsupported by probable cause are thought constitutionally reasonable "'when special needs, beyond the normal need of law enforcement, make the warrant and probable-cause requirement impracticable.'"[98] As for the framing-era conception of in loco parentis, Justice Scalia observed that compulsory school attendance laws were uncommon in the framing era.[99] The implication, of course, is the framing-era concept of in loco parentis involved a voluntary delegation of parental authority to school officials, but the notion that parents voluntarily delegate their authority to public school officials in the contemporary regime of compulsory school attendance is doubtful at best.[100] Thus, Justice Scalia found the analogy to the common-law doctrine of in loco parentis instructive but incomplete, and relied on the doctrine only to the extent that it illuminated the nature of a student's privacy interests under a nonoriginalist balancing test.[101]

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95. *See, e.g.*, United States v. Watson, 423 U.S. 411, 418–21 (1976); Thomas Y. Davies, *The Fictional Character of Law-and-Order Originalism: A Case Study of the Distortions and Evasions in Framing-Era Arrest Doctrine in* Atwater v. Lago Vista, 37 WAKE FOREST L. REV. 239, 323–24 (2002).

96. *See* Minnesota v. Dickerson, 508 U.S. 366, 380–81 (1993) (Scalia, J., concurring).

97. *See* Safford Unified Sch. Dist. No. 1 v. Redding, 129 S. Ct. 2633, 2655–56 (2009) (Thomas, J., concurring in the judgment in part and dissenting in part). *Cf.* Brown v. Entm't Merchs. Ass'n, 131 S. Ct. 2729, 2751–59 (2011) (Thomas, J., dissenting) (arguing that framing-era practice recognizing broad parental authority means that merchants have no First Amendment right to communicate with children except through their parents).

98. Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646, 653 (1995) (quoting Griffin v. Wisconsin, 483 U.S. 868, 873 (1987)).

99. *Id.* at 652 n.1.

100. *Cf.* Morse v. Frederick, 551 U.S. 393, 424 (2007) (Alito, J., concurring) ("It is a dangerous fiction to pretend that parents simply delegate their authority . . . to public school authorities. It is even more dangerous to assume that such a delegation of authority somehow strips public school authorities of their status as agents of the State. Most parents, realistically, have no choice but to send their children to a public school and little ability to influence what occurs in the school.").

101. *Acton*, 515 U.S. at 655–56. Similarly, in his opinion of the Court rejecting Justice Thomas's analogy to the broad scope of framing-era parental authority when assessing the

Accordingly, changes from the historical context in which both of the potentially applicable framing-era rules evolved led Justice Scalia to regard neither as dispositive. Indeed, a consistent theme in Justice Scalia's Fourth Amendment originalism is his willingness to depart from framing-era rules on the basis of a pertinent change in circumstances.[102]

Justice Scalia's willingness to depart from framing-era practice is not limited to the Fourth Amendment. For example, writing for a three-justice plurality in *Burnham v. Superior Court*,[103] Justice Scalia embraced the framing-era rule that personal jurisdiction could be exercised whenever a defendant was physically served in the forum state consistent with due process,[104] but also defended the more recent emergence of jurisdictional doctrine that permits absent defendants to be haled into a forum state as a necessary response to "changes in the technology of transportation and communication, and the tremendous growth of interstate business activity."[105] Thus, in his view, the Due Process Clause did not freeze framing-era jurisdictional practice in place; such an approach, he acknowledged, "would be to deny every quality of the law but its age, and to render it incapable of progress or improvement."[106]

Similarly, in *Stop the Beach Renourishment, Inc. v. Florida Department of Environmental Protection*,[107] in response to Justice Kennedy's observation that in the framing era a "taking" of property within the meaning of the Fifth Amendment's prohibition on taking of public property without the payment of just compensation was understood to refer to physical appropriation of property through a legislature's exercise of the power of eminent domain,[108] Justice Scalia's opinion for a four-justice plurality (including Justice Thomas) took the position that a "taking" within the meaning of the Takings Clause nevertheless could be accomplished by a judicial decision that radically altered property rights, explaining that "the Framers did not envision the Takings Clause would apply to judicial action" only because "the Constitution was adopted in an era when courts had no power to 'change' the common law."[109] Thus, what Justice Scalia regarded as a pertinent change in the applicable legal context warranted adoption of an

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First Amendment rights of minors, Justice Scalia refused to rely on that framing-era practice because it involved legal recognition of the scope of parental authority rather than direct governmental restrictions on the ability of minors to obtain material otherwise protected by the First Amendment. *See Entm't Merchs. Ass'n*, 131 S. Ct. at 2736 n.3.

102. *See, e.g.*, Minnesota v. Dickerson, 508 U.S. 366, 382 (1993) (Scalia, J., concurring) (observing that since the framing era "concealed weapons capable of harming the interrogator quickly and from beyond arm's reach have become common—which might alter the judgment of what is 'reasonable' under the original standard"); California v. Acevedo, 500 U.S. 565, 583 (1991) (Scalia, J., concurring) ("[I]t may even be that changes in the surrounding legal rules (for example, elimination of the common-law rule that reasonable, good-faith belief was no defense to absolute liability for trespass . . .), may make a warrant indispensable to reasonableness where it once was not." (citations omitted)).

103. 495 U.S. 604 (1990).

104. *Id.* at 616–19.

105. *Id.* at 617.

106. *Id.* at 619 (quoting Hurtado v. California, 110 U.S. 516, 529 (1884)).

107. 130 S. Ct. 2592 (2010).

108. *Id.* at 2616 (Kennedy, J., concurring in part and concurring in the judgment).

109. *Id.* at 2606 (plurality opinion).

understanding of the concept of a "taking" unsupported by framing-era practice. In *Citizens United v. FEC*,[110] responding to an argument that framing-era practice did not support granting corporations First Amendment rights because corporations were regarded as subject to plenary regulation in the framing era,[111] Justice Scalia wrote: "Most of the Founders' resentment towards corporations was directed at the state-granted monopoly privileges that individually chartered corporations enjoyed. Modern corporations do not have such privileges . . . ."[112] Once again, Justice Scalia acknowledged that framing-era practice can be discounted if it is regarded as dependent on the historical context in which it developed. In addition, we have seen that Justice Scalia is willing to depart from framing-era practice when it comes to racial segregation.[113] We will see other examples of Justice Scalia's willingness to depart from framing-era practice in Part III below.

As for the Court's other professed originalist, while Justice Thomas may more often be faithful to original expected applications than Justice Scalia, he is also willing to depart from framing-era practice on what he regards as sufficient justification. For example, in addition to joining Justice Scalia's discussions of the need to move beyond framing-era practice in *Kyllo*, *Stop the Beach Renourishment*, and *Citizens United*, Justice Thomas has written that the Fourteenth Amendment, in his view, prohibits the government from making any use of race in decision making.[114] Yet, as we have seen, this view has little support in framing-era practice.[115] Nor has Justice Thomas articulated any originalist basis rooted in historical evidence of original meaning for identifying what should be regarded as a sufficient basis to depart from framing-era practice.

To be sure, as we have seen, there are occasions on which Justices Scalia and Thomas find framing-era practice controlling. The key point is not that on some occasions these Justices have departed from original expected applications, but rather that even they acknowledge that framing-era practice and understandings cannot be uncritically applied to contemporary circumstances that may render framing-era judgments obsolete or irrelevant. Once one has the option to depart from framing-era rules if there is adequate justification for doing so, however, strong original-expected-applications originalism supplies no reliable originalist technique for interpreting vague or ambiguous constitutional text. When many years have passed between the framing and the occasion for constitutional adjudication, any advocate with even a modicum of creativity will generally be able to identify some sort of changed circumstance. Yet strong original-expected-applications originalism offers no originalist methodology for evaluating claims based on changed circumstances. Consequently, in the face of a claim of changed

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110. 130 S. Ct. 876 (2010).

111. *Id.* at 948–52 (Stevens, J., dissenting).

112. *Id.* at 926 (Scalia, J., concurring) (footnote omitted).

113. *See supra* text accompanying notes 39–48.

114. *E.g.*, Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 751–52 (2007) (Thomas, J., concurring).

115. *See supra* text accompanying note 40. For a useful analysis of Justice Thomas's originalism that notes the difference in his approach to questions involving race and other issues, see SCOTT DOUGLAS GERBER, FIRST PRINCIPLES: THE JURISPRUDENCE OF CLARENCE THOMAS 193–94 (1999).

circumstances, this brand of originalism necessarily devolves into a nonoriginalist debate on the significance and meaning of the proffered claim of changed circumstances.[116] An originalism that treats framing-era practices and understandings as inevitably dispositive, in contrast, can be the touchstone for constitutional interpretation only if one is willing to ignore Holmes's admonition and rely on history even when the rationale for historical practice is later undermined by changed circumstances.

In short, the same sort of changed circumstances that nonoriginalists claim offer support for ascribing evolving content to the Constitution cause strong original-expected-applications originalism to collapse. As a result, strong original-expected-applications originalism cannot in practice be distinguished from nonoriginalism unless there is a genuinely originalist interpretative technique available for determining when framing-era practices and understandings should be rejected as outmoded. While strong original-expected-applications originalism offers no such technique, a weaker form of original-expected-applications originalism capable of accommodating changed circumstances has endeavored to come to grips with this problem.

B. Weak Original-Expected-Applications Originalism

One might agree that in a strong form in which framing-era practices and understandings are treated as interpretively binding, original-expected-applications originalism is untenable; but in a weaker form, it could still be of value as a starting point for constitutional interpretation. Such an originalism could, for example, place a burden of justification on those who advocate a departure from the framing-era baseline.[117]

1. Weak Original-Expected-Applications Originalism and Nonoriginalism

It is questionable whether, in practice, weak original-expected-applications originalism is any different from nonoriginalism. As we have seen, originalism requires that the meaning of constitutional text be fixed at the framing.[118] An originalism that uses framing-era understandings to flesh out vague or ambiguous constitutional text, but permits departure from framing-era understandings on what is regarded as adequate justification, seems to blur into nonoriginalism. Indeed, nonoriginalist adjudication often takes the same form as weak original-expected-applications originalism.

In its famously nonoriginalist decision in *Brown v. Board of Education*, for example, the Court began its discussion with framing-era practice and proceeded to explain that changed circumstances made reference to framing-era practice

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116. For a helpful albeit largely theoretical discussion of how the problem that changed circumstances present for originalism becomes more acute over time, see Samaha, *supra* note 19, at 1344–46.

117. For an argument along these lines, see Note, *Original Meaning and Its Limits*, 120 HARV. L. REV. 1279, 1292–1300 (2007).

118. *See supra* text accompanying notes 1–9.

inappropriate.[119] The same pattern is evident in most of the nonoriginalist decisions of the Court. When the Court held that the Eighth Amendment imposes limitations on capital punishment in *Furman v. Georgia*,[120] two Justices wrote strikingly nonoriginalist opinions in which they concluded that capital punishment had become inconsistent with the Eighth Amendment, but even these opinions started with framing-era practice and understandings, only to conclude that evolving social norms warranted a departure from the framing-era understanding.[121] Similarly, when the Court recognized a constitutional right to abortion under the Due Process Clause in *Roe v. Wade*,[122] it engaged in a lengthy inquiry into the history of abortion regulation up to and beyond the framing era,[123] concluding that advances in medical technology had made obsolete many of the judgments that had traditionally underlain abortion regulation in the framing era.[124] The Court then held that the only remaining and still-pertinent state interest in protecting human life was inadequate to sustain a prohibition on abortion prior to viability.[125] More recently, in *Lawrence v. Texas*,[126] in the course of invalidating a statutory prohibition on same-sex sodomy in private among consenting adults under the Due Process Clause, the Court canvassed framing-era practice, only to question its significance given that framing-era statutes were not directed at homosexual conduct and were rarely enforced with respect to private conduct.[127] The Court then embraced a nonoriginalist approach to due process in light of the broad terms of the constitutional text and the inability of the framers to anticipate social evolution.[128]

Whether one condemns or approves of these decisions, it should be plain that a methodology requiring some justification for a departure from framing-era practice when interpreting the Constitution is not unique to originalism; nor is it anything close to a guarantee that adjudication will be based on a historically fixed meaning of constitutional text. Once one agrees that framing-era practices and understandings are not conclusive, pretty much everything is fair game. Moreover, in such a jurisprudence, adjudication does not turn on historically fixed original meaning, but instead on a nonoriginalist evaluation of the arguments for departure from the framing-era understanding of vague or ambiguous constitutional text.

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119. Brown v. Bd. of Educ., 347 U.S. 483, 489–93 (1954).

120. 408 U.S. 238 (1972) (per curiam).

121. *See id.* at 258–306 (Brennan, J., concurring); *id.* at 333–69 (Marshall, J., concurring).

122. 410 U.S. 113 (1973), *modified*, Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833 (1992).

123. *Id.* at 129–52.

124. *Id.* at 147–50.

125. *Id.* at 162–64.

126. 539 U.S. 558 (2003).

127. *Id.* at 568–71, 578–79.

128. *Id.* at 578–79 ("Had those who drew and ratified the Due Process Clauses of the Fifth Amendment or the Fourteenth Amendment known the components of liberty in its manifold possibilities, they might have been more specific. They did not presume to have this insight. They knew times can blind us to certain truths and later generations can see that laws once thought necessary and proper in fact serve only to oppress. As the Constitution endures, persons in every generation can invoke its principles in their own search for greater freedom.").

2. Translating Original Expected Applications

To illustrate the difficulty of distinguishing weak original-expected-applications originalism from nonoriginalism, consider the approach of perhaps its most prominent academic advocate, Lawrence Lessig, who contends that the presuppositions underlying framing-era practices and understandings must be identified and then "translated" in light of contemporary understandings and circumstances.[129] Under this approach, one does not have to work very hard to repudiate an original expected application. When centuries have passed between the framing of constitutional text and the time that a court is required to interpret it, a good deal will have changed, and virtually any argument asserting that framing-era practices or understandings based on a now-obsolete presupposition can be sufficient, under Professor Lessig's methodology, to justify a repudiation of framing-era practice.

For example, Professor Lessig defends the famously nonoriginalist decision utilizing the Fifth Amendment's prohibition on compelling any person to be a witness against himself to regulate custodial police interrogation in *Miranda v. Arizona*,[130] arguing that although framing-era interrogation of criminal suspects was a part of the judicial process, once modern police forces undertook custodial interrogation, the framing-era presupposition that only the judicial process need be regulated in order to protect the right against compelled self-incrimination became obsolete.[131] He justifies the New Deal-era expansion in the scope of congressional power to regulate interstate commerce on the ground that the framing-era supposition that only a limited set of transactions need be regulated in order to protect the flow of interstate commerce had been made obsolete by an emerging understanding that a much broader realm of activity could have an impact on the national economy.[132] He similarly argues that framing-era suppositions about the character of discrimination that was thought sufficiently odious to offend the Equal Protection Clause have gradually expanded to include all forms of race discrimination, as well as discrimination on the basis of illegitimacy, sex, and, eventually, he predicts, sexual orientation as well.[133]

As these examples should demonstrate, once one starts playing the translation game, it is pretty easy to gin up some excuse for setting framing-era practices and understandings aside. As Professor Lessig's critics note, it will almost always be possible to identify some arguably relevant supposition that has changed since the framing era.[134] Moreover, once such an argument against framing-era practice is

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129. *See* Lessig, *supra* note 42, at 401–14; Lessig, *supra* note 78, at 1174–211; Lawrence Lessig, *Translating Federalism:* United States v. Lopez, 1995 SUP. CT. REV. 125, 131–35.

130. 384 U.S. 436 (1966).

131. *See* Lessig, *supra* note 78, at 1233–37.

132. *See* Lessig, *supra* note 42, at 453–72.

133. *See* Lawrence Lessig, *Fidelity and Constraint*, 65 FORDHAM L. REV. 1365, 1419–29 (1997).

134. *See, e.g.*, Larry Alexander, *All or Nothing at All? The Intentions of Authorities and the Authority of Intentions*, *in* LAW AND INTERPRETATION: ESSAYS IN LEGAL PHILOSOPHY 357, 370–75 (Andrei Marmor ed., 1995); Friedman & Smith, *supra* note 9, at 31; Klarman, *supra* note 17, at 394–412. An inquiry this freewheeling, one could add, injects a considerable risk

offered, it can be rejected only based on a nonoriginalist evaluation of the relevance of framing-era suppositions to contemporary circumstances. For his part, Lessig offers only two constraints imposed by his brand of original-expected-applications originalism—a changed reading of constitutional text cannot be based on a fact or belief that would have produced a different text in the first instance, nor can a changed reading transgress the institutional limitations on the judiciary to assess complex factual or policy issues or deeply contested ethical concepts.[135] It is hard to identify any nonoriginalist decision that offends the first limitation; as we have seen, nonoriginalists rely only on the type of vague or open-ended texts that accommodate evolving content. As for the second, Professor Lessig does not claim that this principle has any originalist justification; he identifies no historical evidence that this type of prudential concern was a part of the original meaning of any portion of the Constitution. Indeed, as we will see below, even when assessed in terms of original meaning, there is no constitutional text that requires the judiciary to defer to legislative policy or ethical choices. Nor is Lessig's second principle distinguishable from nonoriginalism. There is no necessary inconsistency between nonoriginalism and a prudent concern for the limited institutional capabilities of the judiciary.

The examples canvassed above in which Justice Scalia departed from framing-era practice reflect the inability to articulate an originalist methodology for adapting, or "translating," framing-era practice to contemporary circumstances. In *Kyllo*, for example, Justices Scalia and Thomas were willing to depart from the framing-era rule that required a physical trespass to constitute an invasion of a legally protected interest in the privacy of the home to prevent what they regarded as an erosion of constitutional protection as a consequence of technological advance.[136] Yet the framing-era requirement of a physical trespass necessarily enabled the trespasser—by utilizing all five senses from within the home—to learn a great deal more than can be revealed through a thermal image. Moreover, as then-Professor Posner once observed, a trespassory search and seizure involves healthy doses of force and coercion absent in electronic surveillance, of which the target is usually unaware.[137] Thus, although, in *Kyllo*, Justice Scalia wrote that the Court's holding "assures preservation of that degree of privacy against government that existed when the Fourth Amendment was adopted,"[138] we have no way of knowing whether, in the framing era, the limited intrusion on the home accomplished by a thermal imager would have been regarded an invasion of an interest too ephemeral

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of error into adjudication. *See* Steven G. Calabresi, *The Tradition of the Written Constitution: A Comment on Professor Lessig's Theory of Translation*, 65 FORDHAM L. REV. 1435, 1436–38 (1997); Cass R. Sunstein & Adrian Vermeule, *Interpretation and Institutions*, 101 MICH. L. REV. 885, 941–44 (2003).

135. *See* Lessig, *supra* note 78, at 1251–63.

136. *See supra* text accompanying notes 84–89. For a recent explication of *Kyllo* as reflecting an effort to maintain the framing-era equilibrium between security and order, see Orin S. Kerr, *An Equilibrium-Adjustment Theory of the Fourth Amendment*, 125 HARV. L. REV. 476, 496–99 (2011).

137. *See* Richard A. Posner, *The Uncertain Protection of Privacy by the Supreme Court*, 1979 SUP. CT. REV. 173, 185–88.

138. Kyllo v. United States, 533 U.S. 27, 34 (2001).

to merit legal protection—the argument that Justice Stevens advanced in dissent.[139] The Court's holding in *Kyllo* may be correct, but not based on the historical evidence that framing-era practice is properly "translated" to jettison the requirement of a physical trespass when a technological "trespass" by thermal image compromises the privacy of the home to a far lesser extent than a framing-era physical trespass. It may be normatively desirable to recognize Fourth Amendment protection for every aspect of the home that would have been free from official scrutiny in the framing era absent a physical trespass, but such a conclusion is again driven purely by a nonoriginalist concern with technological erosion of privacy, not the framing-era conception of a legally protected interest in the privacy of the home, which required a far greater intrusion on privacy than is accomplished by thermal imaging. Indeed, even Professor Lessig has acknowledged that the framers never "worked out what the amendment would protect in a world where perfectly noninvasive searches could be conducted. . . . [W]e need to make that choice."[140]

The same problem appears in *Acton*. We have no way of knowing how the framing-era practice that forbade search and seizure absent a basis to make an arrest, or the framing-era conception of school officials acting in loco parentis, is properly applied to searches of students at public schools. As we have seen, translating either the framing-era law of arrest or the framing-era conception of in loco parentis to the context of the contemporary public-school searches is perilous; neither is precisely analogous to the contemporary public school.[141] Whatever conclusion one draws, moreover, will not be based on the historically fixed meaning of constitutional text, but instead will be based on a nonoriginalist assessment of the significance of changed circumstances. Thus, *Acton*, like *Kyllo*, presents all the dangers of counterfactual historical analysis. Given the difficulties in translating framing-era practice to public schools operating under compulsory school attendance laws, historical evidence can supply no reliable basis for adjudication.

More recently, in *United States v. Jones*,[142] in an opinion by Justice Scalia, the Court held that attaching a GPS device to a vehicle and its subsequent use to monitor the movements of a vehicle was a "search" within the meaning of the Fourth Amendment; relying on the framing-era rule that "no man can set his foot upon his neighbour's close without his leave; if he does he is a trespasser,"[143] Justice Scalia reasoned that to "'assur[e] preservation of that degree of privacy against government that existed when the Fourth Amendment was adopted,'"[144] the Fourth Amendment should be "understood to embody a particular concern for government trespass upon the areas ('persons, houses, papers, and effects') it enumerates."[145] Yet, although Justice Scalia invoked the framing-era conception of trespass to support the Court's holding, it is doubtful that we can fairly equate the

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139. *Id.* at 41–46 (Stevens, J., dissenting).
140. LAWRENCE LESSIG, CODE AND OTHER LAWS OF CYBERSPACE 149–50 (1999).
141. *See supra* text accompanying notes 90–101.
142. 132 S. Ct. 945 (2012).
143. *Id.* at 949 (quoting Entick v. Carrington, 95 Eng. Rep. 807, 817 (C.P. 1765)).
144. *Id.* at 950 (quoting *Kyllo*, 533 U.S. at 34 (brackets in original)).
145. *Id.*

attachment and monitoring of a GPS device to anything that arose in the framing-era law of trespass. As Justice Alito noted in his separate opinion, "it is almost impossible to think of late-18th-century situations that are analogous to what took place in this case," such as "a case in which a constable secreted himself somewhere in a coach and remained there for a period of time in order to monitor the movements of the coach's owner," and, he added, "this would have required either a gigantic coach, a very tiny constable, or both."[146] Even in such a hypothetical, however, by using all his senses, the constable would have learned more than the limited information transmitted by a GPS device, and he could not have simultaneously informed his colleagues of his location in the manner that a GPS device instantaneously transmits data. Indeed, Justice Scalia ultimately disclaimed reliance on framing-era practice, writing: "[I]t is quite irrelevant whether there was an 18th-century analog."[147] Accordingly, Justice Scalia effectively acknowledged that the Court's holding was not simply an exercise in translating original expected applications.

Thus, a jurisprudence that relies on original expected applications to decide cases involving significantly different circumstances cannot claim to be doing no more than applying original expected applications; a judgment is required as to whether the change in circumstances warrants a departure from original expected applications. Yet, a jurisprudence that permits departure from framing-era understandings and practice as long as someone can think of a good reason for doing so means that adjudication is ultimately based not on historical evidence of original meaning, but rather on a nonoriginalist consideration of whether framing-era practices and understandings have become obsolete. This, of course, is the essence of nonoriginalism, which ascribes evolving content to vague or ambiguous constitutional text. If departures from framing-era practice are to be permitted by originalism, then there must be a distinctively originalist methodology for assessing the propriety of such departures. In its actual practice, original-expected-applications originalism fails this challenge. Semantic originalism, in contrast, claims to offer an originalism that can accommodate the challenge of changed circumstances.

II. SEMANTIC ORIGINALISM

Most originalists draw a distinction between the original meaning of constitutional text and its originally intended applications, arguing that only the former is interpretively binding.[148] Michael McConnell has even claimed that "no

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146. *Id.* at 958 & n.3 (Alito, J., concurring in the judgment).

147. *Id.* at 950 n.3.

148. *See*, *e.g.*, BALKIN, *supra* note 11, at 6–14; Randy E. Barnett, *Underlying Principles*, 24 CONST. COMMENT. 405, 410 (2007); Mitchell N. Berman, *Originalism and Its Discontents (Plus a Thought or Two About Abortion)*, 24 CONST. COMMENT. 383, 385–89 (2007); Steven G. Calabresi & Livia Fine, *Two Cheers for Professor Balkin's Originalism*, 103 NW. U. L. REV. 663, 668–72 (2009); Ronald Dworkin, *Comment*, *in* A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW, *supra* note 14, at 115, 119; Christopher R. Green, *Originalism and the Sense-Reference Distinction*, 50 ST. LOUIS U. L.J. 555, 580–82 (2006); McConnell, *supra* note 11, at 1284–87; Paulsen, *supra* note 11, at 2059–62; Rotunda, *supra*

reputable originalist . . . takes the view that the Framers' 'assumptions and expectation about the correct application' of their principles is controlling. . . . Mainstream originalists recognize that the Framers' analysis of particular applications could be wrong, or that circumstances could have changed and made them wrong."[149] Even Justice Scalia agrees that what is binding is "semantic intention" and not "the concrete expectations of lawgivers."[150] Thus, a semantic form of originalism is the predominant approach, in which constitutional interpretation is not based on the intentions of the framers or the original expected applications of constitutional text, but rather on the original meaning of the text stated at the level of generality found in the text.[151] Semantic originalism, by evading the problems said to pervade reliance on the original intentions of the framers popular among the previous generation of originalists, is sometimes referred to as the "New Originalism."[152]

The problems with this account emerge when semantic originalism is applied to the open-ended constitutional text that nonoriginalists claim as their domain. The original meaning of such text may be so indeterminate or stated at such a high level of generality that semantic originalism may be effectively indistinguishable from nonoriginalism.[153] Consider again the Fourth Amendment.

In *Jones*, after the Court asserted that it "[wa]s quite irrelevant whether there was an 18th-century analog" to the installation and use of a GPS device, the Court added: "Whatever new methods of investigation may be devised, our task, *at a minimum*, is to decide whether the action in question would have constituted a 'search' within the original meaning of the Fourth Amendment."[154] This sounds like semantic originalism but, in *Jones*, the Court offered no semantic evidence of "the original meaning of the Fourth Amendment"; instead, it relied solely on framing-era tort law which, of course, even the Court acknowledged did not address anything fairly analogous to the installation and use of a GPS device. Indeed, semantic originalism seems to offer little help in a case like *Jones* since, as we have seen, the original semantic meaning of the Fourth Amendment's prohibition on unreasonable search and seizures was so expansive—search or seizure was considered unreasonable either if it was deemed illegal or contrary to

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note 11, at 513–14; Solum, *supra* note 26, at 411–12.

149. McConnell, *supra* note 11, at 1284 (internal quotation marks omitted).

150. Scalia, *supra* note 33, at 144.

151. *See, e.g.*, BALKIN, *supra* note 11, at 14–16; BORK, *supra* note 14, at 144–51; DWORKIN, *supra* note 78, at 291–92; Jack M. Balkin, *Framework Originalism and the Living Constitution*, 103 NW. U. L. REV. 549, 557–60 (2009); Barnett, *supra* note 148, at 410–16; Calabresi & Fine, *supra* note 148, at 668–72; Aileen Kavanagh, *Original Intention, Enacted Text, and Constitutional Interpretation*, 47 AM. J. JURIS. 255, 271–79 (2002); James E. Ryan, *Laying Claim to the Constitution: The Promise of New Textualism*, 97 VA. L. REV. 1523, 1538–42 (2011); Solum, *supra* note 26, at 411–15; Strang, *supra* note 81, at 972–80.

152. *See*, *e.g.*, Barnett, *supra* note 12, at 620–29; Solum, *supra* note 5, at 22–24; Whittington, *supra* note 5, at 559–611. Some, however, claim that there is in reality little difference between semantic originalism and the brand of original-intention originalism popular in the 1970s and 1980s. *See, e.g.*, O'NEILL, *supra* note 12, at 127–32; Steven D. Smith, *That Old-Time Originalism*, *in* THE CHALLENGE OF ORIGINALISM, *supra* note 5, at 223, 234–36.

153. *See* Smith, *supra* note 23, at 721–24.

154. United States v. Jones, 132 S. Ct. 945, 950 n.3 (2012) (emphasis in original).

sound judgment.[155] Both formulations offer little more than a legal conclusion, however, and once original expected applications are rejected as the basis for assessing either illegality or sound judgment, the original semantic meaning offered by the Fourth Amendment's text seems so capacious that it produces an approach to constitutional interpretation little different from nonoriginalism.[156] The holding in *Jones* is likely defensible if one thinks that technological advance may not erode legal protections against any form of official scrutiny, but this is a nonoriginalist claim—it is not an original expected application, nor is it premised on any historical evidence about the original semantic meaning of the prohibition on "unreasonable search and seizure" divorced from original expected applications.

Richard Kay, himself an advocate of relying on the framers' intentions to determine original meaning, has suggested that once original expected applications of constitutional text are cast aside, original meaning is likely to be so indeterminate that originalism will no longer be of much use in constitutional adjudication.[157] There is surely something to Professor Kay's point. If the original expected applications of constitutional text are irrelevant, and if the original meaning of the more open-ended constitutional text on which nonoriginalists rely can only be defined at a high level of generality, unhelpful to the resolution of most constitutional disputes, it may be that semantic originalism will prove effectively useless. For example, Gary Lawson and Guy Seidman advocate a semantic originalism based not on what they call "historically concrete understandings"; instead they "conceive of the inquiry in hypothetical terms: What would a fully-informed public audience, in possession of all relevant information about the Constitution and the world around it, have understood the Constitution to mean?"[158] Other semantic originalists place greater weight on the framing-era public's understanding of the Constitution's text.[159] In either guise, these formulations may

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155. *See supra* text accompanying notes 30–31.

156. *See, e.g.*, Morgan Cloud, *Searching Through History; Searching for History*, 63 U. CHI. L. REV. 1707, 1743–47 (1996); Tracey Maclin, *Let Sleeping Dogs Lie: Why the Supreme Court Should Leave Fourth Amendment History Unabridged*, 82 B.U. L. REV. 895, 966–72 (2002); Sklansky, *supra* note 31, at 1807–13.

157. *See* Richard S. Kay, *Original Intention and Original Public Meaning in Constitutional Interpretation*, 103 NW. U. L. REV. 703, 719–25 (2009). For the expression of a similar view, see Smith, *supra* note 152, at 239–42.

158. Gary Lawson & Guy Seidman, *When Did the Constitution Become Law?*, 77 NOTRE DAME L. REV. 1, 25 (2001). For an elaboration, see Gary Lawson & Guy Seidman, *Originalism as a Legal Enterprise*, 23 CONST. COMMENT. 47 (2006).

159. *See, e.g.*, Barnett, *supra* note 12, at 621 ("the objective original meaning that a reasonable listener would place on the words used in the constitutional provision at the time of its enactment"); Michael J. Perry, *The Legitimacy of Particular Conceptions of Constitutional Interpretation*, 77 VA. L. REV. 669, 677 (1991) ("a constitutional provision's 'objective meaning' to the public at the time the provision was ratified" (emphasis omitted)). Indeed, some semantic originalists go as far as contending that in assessing original meaning, substantial weight should be afforded to longstanding or framing-era practice as providing powerful evidence of original meaning. *See, e.g.*, Calabresi & Fine, *supra* note 148, at 692–97; McConnell, *supra* note 11, at 1286–87. To the extent that framing-era practice is afforded such weight, this brand of originalism begins to resemble reliance on original expected applications, and accordingly encounters the problems canvassed in Part I

have an appealing ring, but it is unclear that they provide much concrete guidance for constitutional adjudication, especially when assessing claims that changed circumstances have rendered framing-era practices and understandings obsolete. If semantic originalism is to be considered of value in constitutional adjudication, we should expect evidence that it provides a vehicle for providing some important number of cases in an authentically originalist fashion.

No member of the Supreme Court has professed allegiance to a semantic originalism that treats original expected applications as nonbinding. Thus, although the jurisprudence of Justices Scalia and Thomas, for example, enables us to study in some detail original-expected-applications originalism in practice, there is no body of semantic originalism jurisprudence to be studied. The closest the Court has come to embracing semantic originalism is the decision in *Village of Euclid v. Ambler Realty Co.*,[160] in which the Court rejected due process and equal protection attacks on a zoning ordinance even though "zone laws are of modern origin,"[161] explaining:

> Regulations, the wisdom, necessity, and validity of which, as applied to existing conditions, are so apparent that they are now uniformly sustained, a century ago, or even half a century ago, probably would have been rejected as arbitrary and oppressive. Such regulations are sustained, under the complex conditions of our day, for reasons analogous to those which justify traffic regulations, which, before the advent of automobiles and rapid transit street railways, would have been condemned as fatally arbitrary and unreasonable. And in this there is no inconsistency, for while the meaning of constitutional guaranties never varies, the scope of their application must expand or contract to meet the new and different conditions which are constantly coming within the field of their operation. In a changing world, it is impossible that it should be otherwise. But although a degree of elasticity is thus imparted, not to the meaning, but to the application of constitutional principles, statutes and ordinances, which, after giving due weight to the new conditions, are found clearly not to conform to the Constitution, of course, must fall.[162]

Applying this approach, the Court upheld the challenged zoning law on the ground that the justifications advanced for separating municipalities into zones of less and more intensive uses of land "are sufficiently cogent to preclude us from saying, as it must be said before the ordinance can be declared unconstitutional, that such provisions are clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare."[163]

Euclid's brand of originalism, which holds the meaning of the Due Process and Equal Protection Clauses constant, while permitting them to be applied in novel ways in light of contemporary circumstances, sounds quite like semantic

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above. For a useful summary of the thinking of semantic originalists on this point, see Colby, *supra* note 23, at 728–31.

160. 272 U.S. 365 (1926).

161. *Id.* at 386.

162. *Id.* at 387 (emphasis omitted).

163. *Id.* at 395.

originalism. Yet, it is far from clear that *Euclid*'s originalism is any more confining than nonoriginalism. Historical evidence of original meaning seems to do no real analytical work in *Euclid*; the Court's decision was based wholly on an assessment of the contemporary rationale for zoning laws. Still, one might hesitate to draw any reliable conclusions about the difference between semantic originalism and nonoriginalism from a dataset consisting of one case. Given the infrequency with which semantic originalism can be found in the Court's jurisprudence, the Court's work does not enable anything like a complete assessment of semantic originalism in practice. Indeed, the paucity of semantic or "new" originalism in the Court's jurisprudence may itself suggest its lack of utility in the real world of constitutional adjudication—originalism surely seemed of little real analytical aid in *Euclid* given the high level of generality reflected in the original semantic meaning of the Due Process Clause as condemning "arbitrary and oppressive" regulations.[164] Still, a number of the scholarly advocates of semantic originalism have endeavored to demonstrate how it works in practice. The evidence from these scholarly treatments of semantic originalism, however, suggests that it is unable, in practice, to provide an authentically originalist vehicle for deciding cases based on historical evidence of original meaning.

A. Liberal Semantic Originalism

Consider Professor Balkin's version of semantic originalism. Balkin believes that original meaning sets the boundaries or "framework" for constitutional adjudication at the same level of generality that is to be found in the governing constitutional text.[165] Balkin's originalist framework for adjudication, however, provides no less leeway for nonoriginalist adjudication than is granted by nonoriginalist accounts.

For example, Professor Balkin advances an originalist argument for a constitutional right to abortion on the ground that the original semantic meaning of the Fourteenth Amendment's Equal Protection Clause embodied a broad equality principle that forbade the government to treat any identifiable class as a disfavored caste, and then proceeds to argue that a prohibition on abortion involves unconstitutional discrimination by subjecting women to the burden of carrying a pregnancy to term in the service of a governmental interest in protecting life—a burden not imposed on men.[166] One might question whether, as a matter of historically fixed original meaning, the Fourteenth Amendment contains a very robust anti-caste principle, given the evidence that it was originally understood to permit racial segregation.[167] But put that aside. Even crediting Balkin's account of original meaning, it is far from clear that abortion laws are fairly characterized as creating a disfavored caste.

The case for prohibiting abortion is not made in terms of subordinating women; rather, abortion opponents argue that the only way the government can vindicate its

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164. *Id.* at 387.

165. *See* BALKIN, *supra* note 11, at 3–4, 14–16, 23–34.

166. *See* Jack M. Balkin, *Abortion and Original Meaning*, 24 CONST. COMMENT. 291, 312–25 (2007).

167. *See supra* text accompanying note 40.

interest in the preservation of life—whether present or future—is to prohibit abortion, even though the regulation will have a greater physical impact on women.[168] We do not necessarily think of this kind of differential burden as involving discrimination or the creation of a subordinate caste. The approach the Court has taken in its equal protection jurisprudence is to treat laws as discriminatory only when "the decisionmaker . . . selected or reaffirmed a particular course of action at least in part 'because of,' and not merely 'in spite of,' its adverse effects on an identifiable group."[169] Applying this rule, the Court has held that efforts to discourage abortion do not amount to discrimination against women.[170] Professor Balkin is unhappy with this doctrine, but he offers no argument that this conception is inconsistent with the original meaning of the Fourteenth Amendment.[171]

There may well be good arguments on behalf of the view that abortion laws discriminate on the basis of sex,[172] though there are potent counterarguments as well.[173] For present purposes, however, what is most important is that even on Professor Balkin's account, there is nothing in the original meaning of the Fourteenth Amendment that produces a right to abortion. Balkin makes no argument that current doctrine's refusal to condemn laws that have an adverse impact on a discrete group as long as they are justified by some nondiscriminatory governmental interest is inconsistent with the original meaning of the Fourteenth Amendment. Whether abortion laws treat women as a subordinate caste is a question that Balkin endeavors to resolve not based on any historically fixed meaning of constitutional text, but based on a decidedly nonoriginalist view about what amounts to discrimination against women. The only guidance that Balkin finds in history is to identify an equality principle in the Fourteenth Amendment.[174] How this differs from nonoriginalist approaches to the Equal Protection Clause is entirely unclear. In *Brown*, for example, history did no more of the analytical work: explicitly declining to make any use of history, the Court nevertheless embraced the same equality principle that Balkin trumpets, and used it to conclude that separate-but-equal segregation effectively subordinated African Americans and was therefore unconstitutional.[175] History plays no greater role in Balkin's claim that

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168. *See, e.g.*, Calabresi & Fine, *supra* note 148, at 695–97.

169. Wayte v. United States, 470 U.S. 598, 610 (1985) (quoting Personnel Adm'r of Mass. v. Feeney, 442 U.S. 256, 279 (1979)).

170. *See* Bray v. Alexandria Women's Health Clinic, 506 U.S. 263, 271–72 (1993).

171. *See* Balkin, *supra* note 166, at 325.

172. *See, e.g.*, Sylvia A. Law, *Rethinking Sex and the Constitution*, 132 U. PA. L. REV. 955, 1016–28 (1984); Catharine A. MacKinnon, *Reflections on Sex Equality Under Law*, 100 YALE L.J. 1281, 1311–24 (1991); Reva Siegel, *Reasoning from the Body: A Historical Perspective on Abortion Regulation and Questions of Equal Protection*, 44 STAN. L. REV. 261, 348–80 (1992); Cass R. Sunstein, *Neutrality in Constitutional Law (With Special Reference to Pornography, Abortion, and Surrogacy)*, 92 COLUM. L. REV. 1, 31–44 (1992).

173. *See, e.g.*, Erika Bachiochi, *Embodied Equality: Debunking Equal Protection Arguments for Abortion Rights*, 34 HARV. J.L. & PUB. POL'Y 889, 907–46 (2011); Michael Stokes Paulsen, *The Worst Constitutional Decision of All Time*, 78 NOTRE DAME L. REV. 995, 1009 n.35 (2003).

174. *See* Balkin, *supra* note 166, at 311–25.

175. *See* Brown v. Bd. of Educ., 347 U.S. 483, 488–95 (1954).

abortion laws unconstitutionally discriminate against women. The analytical heavy lifting is performed by nonoriginalist claims about the meaning of discrimination. Balkin's originalism quacks an awful lot like a nonoriginalist duck.[176]

The same problem is evident in the other argument for a constitutional right to abortion that Professor Balkin advances—he claims that the Privileges or Immunities Clause of the Fourteenth Amendment[177] protects abortion because the original meaning of the clause was to secure rights regarded as fundamental aspects of citizenship, and because in recent decades the right to abortion has come to be regarded as a fundamental right of reproductive autonomy.[178] That the framing generation did not regard abortion as a fundamental right is immaterial; this brand of originalism, we are told, is "dynamic, depending on the emerging customs, expectations and traditions of the American people as a whole."[179] Balkin adds: "That we are not bound by the specific purposes of the adopters is especially important . . . in the case of textual commitments to unenumerated rights, for example, in the Ninth Amendment and the Privileges or Immunities Clause of the Fourteenth Amendment."[180]

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176. Conversely, Professor Balkin seems entirely willing to rely on original expected applications when it serves his purposes. He quarrels with the Supreme Court's holding that Congress lacks power under the Fourteenth Amendment to interpret what the Amendment prohibits in *City of Boerne v. Flores*, 521 U.S. 507 (1997). *See* Jack M. Balkin, *The Reconstruction Power*, 85 N.Y.U. L. REV. 1801, 1810–15 (2010). The historical evidence of original meaning on which he relies, however, does not involve the original semantic meaning of the Fourteenth Amendment's enforcement power, which does not obviously or unambiguously grant Congress interpretive power, *see* U.S. CONST. amend. XIV, § 5 ("The Congress shall have the power to enforce, by appropriate legislation, the provisions of this article."). Instead, he invokes the actions and stated beliefs of the framing-era Congress and its members as to the scope of congressional enforcement power. *See* Balkin, *supra* at 1821–23. It is, however, entirely unclear why, under Balkin's methodology, we should regard this evidence as reflecting anything more than original expected applications that are not interpretively binding. On this score, Professor Balkin tells us only that "[t]his evidence is important not because the intentions of the framers bind us today but because they are evidence of the constitutional structure that the three new amendments created—that is, how a reconstructed Constitution was supposed to work." *Id.* at 1823 (emphasis omitted). Yet, the same type of evidence is afforded no significance when it comes to segregation; the Reconstruction Congress was content to operate a segregated school system in the District of Columbia. *See* Klarman, *supra* note 40, at 1908. Nor does Balkin explain why the views of the ratifying states about "how a reconstructed Constitution was supposed to work" are to be discounted when it comes to segregation; as we have seen, framing-era practice in the ratifying states widely regarded racial segregation in public education as permissible. *See supra* text accompanying note 40. Perhaps most important, when he states his own view of the scope of congressional power, Balkin invokes not historical evidence but a variety of prudential considerations that he claims favor granting Congress an interpretive role. *See* Balkin, *supra* at 1824–31.

177. "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States . . . ." U.S. CONST. amend. XIV, § 1.

178. *See* BALKIN, *supra* note 11, at 215–18.

179. *Id.* at 211.

180. *Id.* at 343 n.18.

As Professor Balkin acknowledges, the claim that abortion has come to be regarded as a fundamental right is problematic; only four states had legalized abortion at the time of *Roe*, and Balkin concedes that it is hard to tell whether current support for *Roe* is in significant part a consequence of *Roe* itself rather than a reflection of any widespread belief about the fundamental character of the abortion right.[181] Support for *Roe* seems to have stabilized at around sixty percent;[182] it is far from clear that this is adequate to establish that abortion is currently regarded as a fundamental aspect of citizenship. But putting all this aside, it is striking how little work framing-era meaning performs in Balkin's analysis. On Balkin's account, history tells us only that the Fourteenth Amendment protects "fundamental" rights, leaving future generations entirely free to decide what they regard as fundamental. Accordingly, Balkin's claim that abortion should be regarded as a "privilege or immunity" of citizenship is not based on the historically fixed meaning of constitutional text, but instead on his view of contemporary thinking about the importance of the abortion right. It is entirely obscure how this differs from *Roe*'s nonoriginalist approach to abortion, in which the Court also concluded, without placing reliance on framing-era conceptions, that the Fourteenth Amendment protects "fundamental" rights and then proceeded to characterize abortion as involving such a fundamental right based on the Court's nonoriginalist view of the importance of reproductive autonomy once outmoded historical conceptions about abortion are put aside.[183]

As Justice Scalia once observed, once one posits the original meaning of constitutional text has "evolving content," there remains "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."[184] Under Balkin's

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181. *See id.* at 217.

182. *See* Charles M. Blow, Op-Ed., *Abortion's New Battle Lines*, N.Y. TIMES, May 1, 2010, at A19, *available at* http://www.nytimes.com/2010/05/01/opinion/01blow.html.

183. *See* Roe v. Wade, 410 U.S. 113, 147–54 (1973). The same is true of Professor Balkin's claim that the governmental interest in protecting life provides no sufficient justification for laws proscribing abortion on the ground that the law has not traditionally treated abortion as tantamount to murder. *See* Jack M. Balkin, *Original Meaning and Constitutional Redemption*, 24 CONST. COMMENT. 427, 522–27 (2007). Balkin makes no claim that the original meaning of the Fourteenth Amendment forbade government to erect barriers to the exercise of what were regarded as fundamental rights in the service of a sufficiently compelling governmental interest, nor does he claim that under the original meaning of the Fourteenth Amendment, the government must equate a practice to murder—even one involving what is thought to be a fundamental right—in order to proscribe it. Indeed, given that pre-*Roe* abortion laws typically provided for sanctions less onerous than those imposed on murder, it is far from clear that the government must equate abortion to murder in order to proscribe it, at least based on the available historical evidence of what is regarded as a sufficient basis for government regulation. An argument that the government's failure to equate abortion with murder sufficiently undermines the strength of the government's interest in proscribing abortion may be persuasive, but it is not based on any historically fixed meaning of the privileges or immunities of citizenship.

184. Scalia, *supra* note 13, at 861–62. To provide one more example from Professor Balkin's scholarship, he contends that the original meaning of the Constitution's Commerce

Fourteenth Amendment originalism, there is no discernable daylight between Balkin's semantic originalism and nonoriginalism. Both are committed to protecting "fundamental" rights and equality, and, in defining these conceptions, the historically fixed meaning of constitutional text plays no identifiable role. One also has to wonder whether an interpretive methodology that places at its center the views of the contemporary public about what rights should be regarded as fundamental can legitimately be labeled originalist. One can wonder as well whether this methodology makes much sense; presumably the politically accountable branches of government should be more reliable barometers of public sensibilities than the judiciary. As Justice Scalia once asked: "If the Constitution were . . . a novel invitation to apply current societal values, what reason would there be to believe that the invitation was addressed to the courts rather than to the legislature?"[185]

One can observe the same inability to offer an approach to constitutional adjudication distinct from that of nonoriginalism in the work of Professor Balkin's colleague, Akhil Amar. Although Professor Amar has never presented a fully developed theory of originalist constitutional interpretation, he seems to be a semantic originalist given his interest in using historical argument to apply the Constitution's text but without treating original expected applications as binding.[186]

Clause permitted federal regulation of intrastate activity that had effects in other states, and although acknowledging that these "spillover effects" were understood narrowly in the framing era, he contends that in a modern, nationalized economy it came to be understood that these spillover effects were far more pervasive and justified far greater federal regulation than was thought necessary in the framing era. *See* BALKIN, *supra* note 11, at 143–45. This differs little from Justice Holmes's nonoriginalist formulation: "[C]ommerce among the States is not a technical legal conception, but a practical one, drawn from the course of business." Swift & Co. v. United States, 196 U.S. 375, 398 (1905). In other words, on Balkin's view, like that of Holmes, any nonoriginalist argument explaining that intrastate activity has some practical consequence for the interstate economy will fall within the commerce power. On this account, the original meaning of the Constitution's text is simply an invitation to supply evolving content as the understanding of the interstate economic effects of regulated activity evolves.

185. Scalia, *supra* note 13, at 854. This concern is not unique to originalists such as Justice Scalia; the decidedly nonoriginalist John Ely made essentially the same point decades ago. *See* JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 64–69 (1980). Balkin attempts an answer to this objection by claiming that that judicial review slows the process of constitutional change "until the change in constitutional culture proves lasting," and therefore "channels and disciplines present-day majorities through supermajoritarian rules that cannot easily change overnight (but can change eventually); this prevents drastic changes in governance and keeps temporary majorities from altering or subverting the constitutional values of more temporally extended supermajorities." BALKIN, s*upra* note 11, at 326. Strikingly, Balkin describes this as one of the "features of living constitutionalism," *id.*, making it clear that he understands that one does not need originalism, but only a modicum of nonoriginalist prudence, to achieve such restraint. Beyond that, it would seem that more straightforward supermajoritarian requirements would be a better way of imposing restraint on transient majorities than leaving the assessment of current "constitutional culture" to a cloistered judiciary.

186. For helpful characterizations of Amar's scholarship along these lines, see Solum, *supra* note 11, at 932; and Adrian Vermeule & Ernest A. Young, *Hercules, Herbert, and Amar: The Trouble with* Intratextualism, 113 HARV. L. REV. 730, 744–45 (2000).

To the extent that he qualifies as an originalist, Professor Amar is plainly not of the original-expected-applications variety. For example, in connection with the Fourth Amendment's prohibition on unreasonable search and seizure, he has written: "'Reasonableness' is not some set of specific rules, frozen in 1791 or 1868 amber, but an honest and sensible textual formula . . . ."[187] It is difficult to imagine any nonoriginalist quarreling with this "formula" and for good reason—it is difficult to understand how it forecloses any nonoriginalist approach to the Fourth Amendment. Once one no longer ties "reasonableness" to framing-era practice, pretty much anything is fair game.

An example helps to make the point. Professor Amar opposes the rule providing for the exclusion of evidence obtained through a violation of the Fourth Amendment as inconsistent with the framing-era understanding that the remedy for an illegal search or seizure was a civil action for damages.[188] Professor Lessig, in contrast, argues that the exclusionary rule is now justified since the common-law damages remedy has come to be regarded as inadequate.[189] Indeed, when it concluded that the Constitution mandated that the states utilize the Fourth Amendment's exclusionary rule, the Supreme Court reasoned that experience had demonstrated that nonexclusionary remedies had failed to provide effective protection for Fourth Amendment rights.[190] The question whether civil damages actions would provide an adequate remedy for Fourth Amendment violations is a complex one which has spawned a rich literature.[191] For present purposes, however, the critical point is that once one pockets Professor Amar's concession that framing-era practice is not controlling, originalism is of no help in assessing the debate about whether the exclusionary rule is necessary to protect Fourth Amendment rights.[192] If Professor Lessig is correct that it has become apparent that

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187. AKHIL REED AMAR, THE CONSTITUTION AND CRIMINAL PROCEDURE: FIRST PRINCIPLES 44 (1997).

188. *See id.* at 20–31, 40–43.

189. *See* Lessig, *supra* note 78, at 1228–33.

190. *See* Mapp v. Ohio, 367 U.S. 643, 650–57 (1961).

191. *See, e.g.*, Randy E. Barnett, *Resolving the Dilemma of the Exclusionary Rule: An Application of Restitutive Principles of Justice*, 32 EMORY L.J. 937, 969–85 (1983); Donald Dripps, *Akhil Amar on Criminal Procedure and Constitutional Law: "Here I Go Down That Wrong Road Again"*, 74 N.C. L. REV. 1559, 1616–23 (1996); Daryl J. Levinson, *Making Government Pay: Markets, Politics, and the Allocation of Constitutional Costs*, 67 U. CHI. L. REV. 345, 369–72, 415–18 (2000); Tracey Maclin, *When the Cure for the Fourth Amendment Is Worse Than the Disease*, 68 S. CAL. L. REV. 1, 59–64 (1994); Daniel J. Meltzer, *Deterring Constitutional Violations by Law Enforcement Officials: Plaintiffs and Defendants as Private Attorneys General*, 88 COLUM. L. REV. 247, 283–86 (1988); Richard A. Posner, *Rethinking the Fourth Amendment*, 1981 SUP. CT. REV. 49, 53–68 (1981); Christopher Slobogin, *Why Liberals Should Chuck the Exclusionary Rule*, 1999 U. ILL. L. REV. 363, 394–423 (1999).

192. *Cf.* George C. Thomas III, *Remapping the Criminal Procedure Universe*, 83 VA. L. REV. 1819, 1837 (1997) (reviewing AMAR, *supra* note 187) ("[I]t is not clear to me why inferring a civil remedy regime is a more satisfying Fourth Amendment construction than inferring the remedy of exclusion. The Amendment mentions neither remedy expressly. The historical pedigree of a civil enforcement model is admittedly better than that of the exclusionary rule, but civil enforcement has thorny problems that Amar ignores or

civil damages actions provide an inadequate remedy for constitutional violations, nothing in Professor Amar's originalism warrants rejection of Professor Lessig's conclusion about the exclusionary rule. Professors Amar and Lessig can resolve their dispute only through the same nonoriginalist method that the Supreme Court employed—inquiring whether, under contemporary conditions, nonexclusionary remedies provide a sufficiently effective means for protecting Fourth Amendment rights.

Perhaps, however, the failure of Professors Amar and Balkin to develop an authentically originalist jurisprudence constitutes unsatisfactory evidence of a failure of semantic originalism. Professors Amar and Balkin have been described as "liberal" originalists because they advance originalist justifications for what are usually regarded as liberal positions.[193] For that reason, they could be thought unlikely to embrace a brand of originalism that would use original meaning as a constraint on what they might regard as progressive constitutional reform. Indeed, as Professor Balkin describes his version of semantic originalism, it merely sets the boundaries for nonoriginalist argument about the proper construction of vague or ambiguous constitutional text, and in that fashion reconciles originalism with living constitutionalism.[194] Thus, Balkin believes that "originalism and living constitutionalism . . . are actually flip sides of the same coin."[195] For this reason, Balkin's approach is vulnerable to the charge that it offers only "living constitutionalism . . . dressed up in originalist clothing."[196] A semantic originalist with less concern for reaching what are regarded as liberal results might provide more rigorous originalist constraints for constitutional adjudication that could produce a genuinely originalist approach to constitutional adjudication.

B. Libertarian Semantic Originalism

Consider the originalism of Randy Barnett, widely regarded as a leading libertarian legal scholar.[197] As a libertarian, Professor Barnett has perhaps more reason than liberals to develop a muscular originalism as a potent check on governmental power.

For example, Professor Barnett argues that the original meaning of the Commerce Clause[198] granted Congress authority to regularize or prohibit wrongful acts with respect to trade or exchange crossing state or national borders, but left

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minimizes." (footnote omitted)).

193. *See, e.g.*, Calabresi & Fine, *supra* note 148, at 664; Stein, *supra* note 17, at 400–01 & n.20.

194. *See* BALKIN, *supra* note 11, at 3–4, 22–23, 33–34, 277.

195. Balkin, *supra* note 151, at 551.

196. Nelson Lund, *The Second Amendment,* Heller*, and Originalist Jurisprudence*, 56 UCLA L. REV. 1343, 1372 (2009). To similar effect, see, for example, Michael Stokes Paulsen, *Does the Constitution Prescribe Rules for Its Own Interpretation?*, 103 NW. U. L. REV. 857, 879–81 (2009); and Smith, *supra* note 152, at 230–33.

197. *See, e.g.*, Steven G. Calabresi, *The Originalist and Normative Case Against Judicial Activism: A Reply to Professor Randy Barnett*, 103 MICH. L. REV. 1081, 1081–82 (2005) (reviewing BARNETT, *supra* note 11); Colby & Smith, *supra* note 7, at 305 n.310.

198. "The Congress shall have Power . . . To regulate Commerce with foreign Nations, and among the several States, and with Indian tribes . . . ." U.S. CONST. art. I, § 8, cl. 1, 3.

Congress powerless to regulate intrastate activity such as agriculture or manufacturing even if it produced goods later sent into interstate commerce.[199] Even Justice Scalia has rejected this view, relying on the Necessary and Proper Clause[200] to conclude that Congress may regulate intrastate activity when necessary to make regulation of interstate commerce fully effective, such as when it regulates the intrastate distribution of controlled substances because of the ease with which they can be diverted into the interstate market and the effects they can have on supply and demand in that market.[201] Barnett, for his part, does not doubt that the Necessary and Proper Clause can supplement congressional authority under the Commerce Clause, but he argues that the original meaning of the Clause requires that an exercise of congressional authority be more than merely convenient, though, he admits, not indispensable, and accordingly courts must scrutinize legislation under the Necessary and Proper Clause to ensure that it appropriately advances a legitimate federal power.[202] Barnett also argues that the original meaning of the Ninth Amendment[203] and the Privileges or Immunities Clause of the Fourteenth Amendment, taken together, offers general protection for individual liberty, and on that basis he claims that the Constitution erects a presumption of liberty that requires courts to insist that all legislation that restricts individual liberty be adequately justified.[204]

Some have argued that Professor Barnett has overstated the historical evidence in favor of his libertarian conception of original meaning.[205] Even putting this aside, however, what is most striking is that the mode of adjudication that Professor Barnett commends is anything but originalist. As a semantic originalist, Professor Barnett rejects framing-era practice as controlling.[206] Moreover, he makes no claim that the historical evidence of original meaning mandates a presumption of liberty. As for the Ninth Amendment, Barnett claims only that its original meaning was that "the rights retained by the people cannot be confined to the specific liberties identified by originalist materials," and, accordingly, "[w]e can protect the unenumerable rights retained by the people by shifting the background interpretive presumption of constitutionality whenever legislation restricts the liberties of the people" as "a way to protect the rights retained by the people

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199. *See* BARNETT, *supra* note 11, at 317–18.

200. "The Congress shall have Power . . . To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof." U.S. CONST. art. I, § 8, cl. 1, 18.

201. *See* Gonzalez v. Raich, 545 U.S. 1, 33–42 (2005) (Scalia, J., concurring in the judgment).

202. *See* BARNETT, *supra* note 11, at 173–90.

203. "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people." U.S. CONST. amend. IX.

204. *See* BARNETT, *supra* note 11, at 277–318.

205. *See, e.g.*, Calabresi, *supra* note 197, at 1087–88; Jack N. Rakove, *Conjuring with–and for–the People*, 1 N.Y.U. J.L. & LIBERTY 660, 664–69 (2005) (reviewing BARNETT, *supra* note 11); Douglas G. Smith, *Does the Constitution Embody a Presumption of Liberty?*, 2005 U. ILL. L. REV. 319, 328–37 (same).

206. *See* Barnett, *supra* note 148, at 405–09.

without having to list them."[207] There is, of course, more than a little daylight between Barnett's originalist claim that the Ninth Amendment contemplates unenumerated rights and the presumption he advocates against all government regulation of whatever stripe. The Ninth Amendment's original meaning, even on Barnett's view, falls short of a presumption of liberty, which is instead presumably offered as a nonoriginalist construction of the text, even though its original meaning requires no more than the recognition of some sort of unenumerated rights. Barnett's nonoriginalism is even more apparent when it comes to the Fourteenth Amendment, where he admits that "we have no original meaning to apply to the problem at hand and so are thrown back upon the technique of constitutional construction."[208] Thus, however appealing Barnett's presumption of liberty may be, it involves a nonoriginalist construction of a constitutional text, the original meaning of which stops well short of a presumption of liberty.

As for the mechanics of Professor Barnett's presumption of liberty, he argues that it requires a sufficient fit between legislative means and ends and the use of the least restrictive means assessed through a form of intermediate judicial scrutiny, though he makes no claim that this methodology was a part of the original meaning of any constitutional provision.[209] Indeed, it is highly doubtful that framing-era understandings of either the Ninth or Fourteenth Amendment can support any very robust requirement of heightened judicial scrutiny of government regulation in light of the ubiquity of regulation in American history from the framing through the ratification of the Fourteenth Amendment.[210] For example, as we have seen, prohibitions on abortion were among the many regulations prevalent in the framing era, even though the Court found their justifications to be in significant part obsolete by the time of *Roe v. Wade*.[211] Yet Professor Barnett tells us that he is "sympathetic" to Professor Balkin's "conclusions about the unconstitutionality of [prohibiting] abortion,"[212] which, as we have seen, do not rest on historical evidence of original meaning but rather on contemporary judgments about the character of abortion regulation.[213]

In any event, the leeway granted for nonoriginalist adjudication under Professor Barnett's presumption of liberty is enormous. Without claiming support in any historical evidence of original meaning, when applying the presumption of liberty, Barnett advocates the most common libertarian approach to regulation, regarding any restriction on liberty as unjustified unless the regulated activity has some

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207. BARNETT, *supra* note 11, at 259.

208. *Id.* at 321.

209. *See id.* at 336–45.

210. *See, e.g.*, WILLIAM J. NOVAK, THE PEOPLE'S WELFARE: LAW AND REGULATION IN NINETEENTH-CENTURY AMERICA 51–233 (1996).

211. *See supra* text accompanying notes 122–25. As Justice Rehnquist noted in dissent, "[b]y the time of the adoption of the Fourteenth Amendment in 1868, there were at least 36 laws enacted by state or territorial legislatures limiting abortion." Roe v. Wade, 410 U.S. 113, 174–75 (1973) (Rehnquist, J., dissenting).

212. Barnett, *supra* note 148, at 411.

213. *See supra* text accompanying notes 167–83.

harmful effect on others or that is necessary to protect the rights of others.[214] As Bernard Harcourt has observed, however, in recent years the libertarian "harm principle" has lost much of its bite as a variety of arguments have gained currency that endeavor to explain how seemingly victimless activities, such as drinking, prostitution, or pornography, actually do cause harm to others, or to society at large.[215] Accepting as he does that original expected applications of constitutional text are not interpretively binding, Barnett's approach does not foreclose acceptance of any of these nonoriginalist justifications for regulation, even though they could render his presumption of liberty effectively useless. Thus, Professor Barnett's approach to constitutional adjudication turns not on the framing-era meaning of constitutional text, but rather on contemporary policy debates over the wisdom of regulation. Professor Barnett's semantic originalism therefore offers little more originalist discipline for constitutional adjudication than that of Professors Amar and Balkin.[216] Once again, constitutional adjudication ultimately turns on assessments of a variety of nonoriginalist arguments about the wisdom of legislation, not the historically fixed meaning of constitutional text. Nonoriginalists should be pleased. Indeed, pretty much giving up the game, Barnett has written that his account "should be acceptable even to many nonoriginalists."[217] Indeed.

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214. *See* BARNETT, *supra* note 11, at 261–62, 348–50.

215. *See* Bernard E. Harcourt, *The Collapse of the Harm Principle*, 90 J. CRIM. L. & CRIMINOLOGY 109, 139–81 (1999).

216. An even more basic problem infects the approach of another leading libertarian originalist, Richard Epstein. A semantic originalist, he argues that constitutional interpretation should be based on the original public meaning of the text rather than the intentions of the framers as to the scope of permissible government power. *See* RICHARD A. EPSTEIN, TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN 19–29 (1985). Yet, when Professor Epstein offered his interpretation of the scope of governmental power in light of the Constitution's requirement that "private property" not be "taken for a public use, without just compensation," U.S. CONST. amend. V, he argued that because, in the framing era, many embraced the view of John Locke that governmental power could be legitimately exercised only to the extent that it offered protection for property rights of equivalent value to the property that the government demanded by taxation or otherwise, governmental power under the Fifth Amendment can be no greater. *See* EPSTEIN, *supra*, at 7–18. Epstein, however, makes no effort to demonstrate that the original public meaning of the words of the Fifth Amendment was to codify Locke; indeed, some believe that Epstein overstated the importance of Locke to early American legal thought. *See, e.g.*, Martin S. Flaherty, *History "Lite" in Modern American Constitutionalism*, 95 COLUM. L. REV. 523, 560–63 (1995). Others have argued that the original meaning of the Takings Clause was merely to require compensation for an exercise of the power of eminent domain. *See, e.g.*, Matthew P. Harrington, *"Public Use" and the Original Understanding of the So-Called "Takings" Clause*, 53 HASTINGS L.J. 1245, 1278–1301 (2002); Jed Rubenfeld, *Usings*, 102 YALE L.J. 1077, 1119–24 (1993). At best, Professor Epstein may have described the original intended application of the Takings Clause, but even then, he does not explain why the concept of equivalent exchange—if indeed necessary to avoid the compensation requirement as consequence of the original meaning of the term "taken"—could not evolve if the public came to understand that other kinds of governmentally funded benefits, such as welfare or education, also provided important if difficult to quantify value to taxpayers by enhancing social stability.

217. Barnett, *supra* note 12, at 617.

C. Conservative Semantic Originalism

For a strong semantic originalism, perhaps we should look not to liberals or libertarians. Because of their disregard for framing-era arrangements, liberal and libertarian semantic originalism produce weak originalism; and, as we have seen, weak originalism quickly bleeds into nonoriginalism. To find a strong semantic originalism that offers an approach to constitutional adjudication distinct from nonoriginalism, perhaps it makes sense to focus on a true conservative—one who looks to history as a means of constraint, rather than as a vehicle for liberal or libertarian reform. No better candidate comes to mind than Robert Bork, "the leading contemporary advocate of originalist strict construction."[218]

Like Professor Barnett, Judge Bork pushes the historical evidence hard to produce what at first blush seems a rigorous semantic originalism, although there are worms in the apple. For example, Bork agrees with Barnett that the Commerce Clause precludes congressional regulation of intrastate activity, although he is strangely silent on the Necessary and Proper Clause.[219] He also argues that the constitutional guarantee of due process is not a constraint on legislative power, but instead secures only fair adjudicative procedures,[220] albeit without grappling with some significant historical evidence to the contrary on which others have relied.[221] He argues that the Ninth Amendment protects only state-law rights,[222] but again without grappling with the considerable historical evidence to the contrary to which others point.[223] As for the constitutional guarantee of "equal protection of the law," Judge Bork argues that its original meaning was to protect only African Americans, or, at most, to mandate heightened judicial scrutiny of racial classifications, but requires no more than a rational basis for other classifications.[224] Yet, given that the Fourteenth Amendment's text makes no reference to race, a special rule for racial classifications seems more like an original expected application than original meaning defined at the level of generality found in the text. Bork also believes that the Fourteenth Amendment's Privileges or Immunities Clause should go unenforced because he regards it as insolubly ambiguous.[225] It is, of course, a

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218. Glenn H. Reynolds, *Penumbral Reasoning on the Right*, 140 U. PA. L. REV. 1333, 1338 (1992).

219. *See* BORK, *supra* note 14, at 56–57.

220. *See id.* at 31–32.

221. *See, e.g.*, James W. Ely, Jr., *The Oxymoron Reconsidered: Myth and Reality in the Origins of Substantive Due Process*, 16 CONST. COMMENT. 315 (1999); Frederick Mark Gedicks, *An Originalist Defense of Substantive Due Process: Magna Carta, Higher-Law Constitutionalism, and the Fifth Amendment*, 58 EMORY L.J. 585 (2009); Ryan C. Williams, *The One and Only Substantive Due Process Clause*, 120 YALE L.J. 408, 460–500 (2010).

222. *See* BORK, *supra* note 14, at 183–85.

223. *See, e.g.*, BARNETT, *supra* note 11, at 54–60, 234–52; DANIEL A. FARBER, RETAINED BY THE PEOPLE: THE "SILENT" NINTH AMENDMENT AND THE CONSTITUTIONAL RIGHTS AMERICANS DON'T KNOW THEY HAVE 21–44 (2007); Randy E. Barnett, *Kurt Lash's Majoritarian Difficulty: A Response to a Textual-Historical Theory of the Ninth Amendment*, 60 STAN. L. REV. 937, 940–54 (2008). For a scholarly account consistent with Bork's view, see KURT T. LASH, THE LOST HISTORY OF THE NINTH AMENDMENT 13–94 (2009).

224. *See* BORK, *supra* note 14, at 149–50, 182–83.

225. *See id.* at 166.

strange type of originalism that gives no effect to duly enacted constitutional text. The least likely account of the original meaning of any constitutional text is surely that it had no meaning at all. One has to wonder whether Bork's assessment of this clause is truly originalist, or is instead based on an ideological aversion to the leading originalist accounts of the clause—that it was intended to secure rights regarded as fundamental,[226] or imposed a nondiscrimination obligation with respect to such rights.[227] In any event, even crediting this view of the Privileges or Immunities Clause, it is plainly premised not on the original meaning of anything actually in the Constitution, but rather on prudential concerns about the risk of error that inheres in originalist interpretation in the face of conflicting evidence.[228]

Eventually, however, Judge Bork's originalism collapses. As a semantic originalist, Bork accommodates changed circumstances and understandings; he defends *Brown*, for example, by arguing that the framing generation did not fully understand the implications of the equality principal that it enshrined in the Fourteenth Amendment.[229] He defends enhanced First Amendment protection for the press against defamation liability beyond framing-era standards on the ground that subsequent experience has made plain that the press needs greater protection in order to play its essential role in republican government.[230] As we have seen in our consideration of Professor Lessig's approach, however, if historical understandings can be jettisoned whenever someone can argue that some relevant circumstance or presupposition has changed since the framing era, originalism turns into nonoriginalism pretty quickly. If the framing generation did not understand the full implications of the equality principle that it had constitutionalized when it comes to racial discrimination, maybe the same is true for discrimination on the basis of alienage, gender, or sexual orientation. After all, the original meaning of the text of the Equal Protection Clause, even on Bork's account, does not confine its reach to racial discrimination; and even if the framing generation expected that its reach would be confined to racial discrimination, Bork acknowledges that the framing generation's expectations about how the text would be applied are not binding.

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226. *See, e.g.*, McDonald v. City of Chicago, 130 S. Ct. 3020, 3085–86 (2010) (Thomas, J., concurring in part and concurring in the judgment); AMAR, *supra* note 77, at 163–230; BALKIN, *supra* note 11, at 195–200; BARNETT, *supra* note 11, at 60–68, 192–203; MICHAEL KENT CURTIS, NO STATE SHALL ABRIDGE: THE FOURTEENTH AMENDMENT AND THE BILL OF RIGHTS 57–91, 215–20 (1986).

227. *See, e.g.*, DAVID P. CURRIE, THE CONSTITUTION IN THE SUPREME COURT: THE FIRST HUNDRED YEARS, 1789–1888, at 342–51 (1985); John Harrison, *Reconstructing the Privileges or Immunities Clause*, 101 YALE L.J. 1385, 1397–432 (1992).

228. *Cf. McDonald*, 130 S. Ct. at 3030 (plurality opinion) (declining to adopt petitioners' submission on the original meaning of the Privileges or Immunities Clause after observing that "petitioners are unable to identify the Clause's full scope. Nor is there any consensus on that question among the scholars . . . ." (citation omitted)). I have elsewhere summarized what I regard as the confusing and conflicting evidence on the original meaning of this Clause. *See* Lawrence Rosenthal, *The New Originalism Meets the Fourteenth Amendment: Original Public Meaning and the Problem of Incorporation*, 18 J. CONTEMP. LEGAL ISSUES 361 (2009).

229. *See* BORK, *supra* note 14, at 81–82.

230. *See id.* at 168–69.

The point can be generalized beyond the context of equal protection. For example, if Judge Bork is correct that the framing generation did not grasp the implications of the First Amendment's protections for common law defamation liability, maybe the whole of framing-era law relating to free speech and freedom of the press must be jettisoned as well, once the centrality of free debate to republican government came to be fully understood.[231] Similarly, if Judge Bork is correct that the framing-era understanding of the constitutional guarantee of due process was that it had no application to legislation, perhaps this understanding is itself obsolete in light of changed circumstances. The text does not state that "due process" is only required in adjudication, and the framing-era understanding that the guarantee of due process was inapplicable to legislation could be regarded as no more than an original expected application. After all, the concept of due process evolved in England, where Parliament exercised supreme authority in the absence of a written constitution, and could have acquired a different meaning when transferred to the United States Constitution, which provides that it is the supreme law of the land to which even statutes must conform.[232] Perhaps the framing generation did not grasp the full implications of a written constitution for the concept of due process. Whether this argument persuades or not, there is nothing in Bork's originalism that enables one to reject it. If, as Bork contends, the framing generation did not understand the full implications of the equality principle it adopted when it came to racial segregation, or the free speech principle it adopted in the First Amendment, maybe the same is true for the prohibitions on deprivation of life, liberty, and property without due process of law, cruel and unusual punishment, unreasonable search and seizure, and so on.[233]

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231. For arguments along these lines about the original meaning of the First Amendment, see Stanley C. Brubaker, *Original Intent and the Freedom of Speech and Press*, *in* THE BILL OF RIGHTS: ORIGINAL MEANING AND CURRENT UNDERSTANDING 82, 88–89 (Eugene W. Hickok Jr. ed., 1991); and Lawrence Rosenthal, *First Amendment Investigations and the Inescapable Pragmatism of the Common Law of Free Speech*, 86 IND. L.J. 1, 26–32 (2011).

232. *See* Lawrence Rosenthal, *Does Due Process Have an Original Meaning? On Originalism, Due Process, Procedural Innovation . . . and Parking Tickets*, 60 OKLA. L. REV. 1, 28–34 (2007).

233. A similar problem infects Professor Strang's semantic originalism. He argues that for broadly framed constitutional text, a survey of framing-era understandings and practice makes it possible to abstract a general principle that can then be applied to contemporary issues in light of changed circumstances and understandings. *See* Strang, *supra* note 81, at 956–80. As an example, Professor Strang notes that the Equal Protection Clause was originally understood to outlaw the discriminatory laws targeting the newly freed slaves and to ensure that laws were enforced nondiscriminatorily, but it protected only what were regarded as civil and not political rights, a distinction that should be applied in light of contemporary circumstances. *Id.* at 989–90 & n.345. The constitutional text, however, does not codify a distinction between civil and political rights; thus, it is unclear why the distinction that the framing generation often drew between civil and political rights amounts to anything more than an original intended application. Even Professor Strang acknowledges, "the framers and ratifiers of the Equal Protection Clause adopted an abstract principle of equality. Their own conception of equality—under which segregation was consistent with equality—was flawed and is not binding on subsequent interpreters." *Id.* at 949 (footnote omitted). It is equally unclear how a series of original expected applications

Judge Bork is not the only conservative semantic originalist who encounters difficulty with semantic originalism's willingness to accommodate changed circumstances and understandings. Steven Calabresi and Saikrishna Prakash, for example, have argued that that congressional efforts to limit presidential control over the duties or removal of officials engaged in the administration or enforcement of the laws are unconstitutional, contending that the Constitution's vesting of "executive Power" in the President,[234] the President's constitutional obligation to "take Care that the Laws be faithfully executed,"[235] and the President's constitutional authority to "require the Opinion, in writing, of the principal Officer in each of the executive Departments, upon any Subject relating to the Duties of their respective Offices,"[236] confers on the President unfettered authority over all those involved in the administration or enforcement of the law.[237] Perhaps this textual argument persuades, but it is far from clear that if the President is able to remove some subordinate executive officials only for cause, then he is no longer vested with the "executive Power" or is unable to "take Care that the Laws be faithfully executed." Indeed, as then-Professor Elena Kagan demonstrated, the President is able to exercise quite substantial control over agencies involved in the administration and enforcement of the law even within a statutory framework that grants him less than plenary power over the officials in charge of those agencies.[238] Most scholars have found Article II no more than ambiguous on this point,[239] and the Supreme Court has rejected the Calabresi and Prakash reading of the text.[240] Professors Calabresi and Prakash, however, are not out of bullets if their textual argument does not carry the day; they bolster it with an originalist argument that the framing-era understanding of Article II granted the President complete control over executive functions, which were then understood to include the process by which laws were administered and enforced.[241]

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that are not interpretively binding and may even be later discarded altogether can nevertheless produce a general principle that somehow becomes interpretively binding. For example, on Professor Strang's view, it seems that the general principal governing the Equal Protection Clause would have to accommodate racial segregation since, as we have seen, the permissibility of racial segregation seems to have been the original understanding of the Fourteenth Amendment. *See supra* text accompanying note 40.

234. U.S. CONST. art. II, § 1, cl. 1.

235. *Id.* § 3.

236. *Id.* § 2, cl. 1.

237. *See* Calabresi & Prakash, *supra* note 11, at 559–99.

238. *See* Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2319–46 (2001).

239. *See, e.g.*, David M. Driesen, *Toward a Duty-Based Theory of Executive Power*, 78 FORDHAM L. REV. 71, 83–93 (2009); Robert B. Percival, *Presidential Management of the Administrative State: The Not-So-Unitary Executive*, 51 DUKE L.J. 963, 967–69 (2001); Peter M. Shane, *Independent Policymaking and Presidential Power: A Constitutional Analysis*, 57 GEO. WASH. L. REV. 596, 611–12 (1989); Peter L. Strauss, *The Place of Agencies in Government: Separation of Powers and the Fourth Branch*, 84 COLUM. L. REV. 573, 597–99 (1984).

240. *See, e.g.*, Morrison v. Olson, 487 U.S. 654, 685–96 (1988).

241. *See* Calabresi & Prakash, *supra* note 11, at 603–63. For a more recent restatement of this position, adducing additional historical evidence of framing-era practice in the wake of the Constitution's ratification, see STEPHEN G. CALABRESI & CHRISTOPHER S. YOO, THE

Some scholars have offered different interpretations of the historical evidence of the original understanding of Article II.[242] But even if it is correct that, in the framing era, the "executive Power" was understood to include unfettered presidential control over all officials engaged in the administration and enforcement of the laws, Congress might conclude that the subsequent growth in the power of the presidency to a level unknown in the framing era gives rise to fears of abuse of executive power that could undermine the public's confidence that the laws will be properly administered, that is, "faithfully executed," unless Congress exercises its power under the Necessary and Proper Clause to grant some executive officials—perhaps those exercising particularly sensitive responsibilities that might be better performed with some insulation from partisan political considerations—a measure of protection from partisan political influence. Such legislation need not be regarded as preventing the President from exercising "executive Power," even in terms of its original semantic meaning as identified by Professors Calabresi and Prakash. That is because legislation limiting the influence of partisanship in law enforcement would still vest in the President the power to supervise all officials engaged in the administration or enforcement of the laws in order to ensure that they properly discharge those responsibilities, while adhering as well to the limitations imposed by such a law on the influence of partisan politics in the administration and enforcement of the law. Martin Flaherty has advanced an argument along these lines.[243]

One may be unpersuaded by Professor Flaherty's argument, but there is no basis in semantic originalism that enables one to reject it as a justification for departing from the framing-era understanding with respect to presidential power. In contrast to the President's appointment power,[244] Article II has no Removals Clause that hardwires in the text a presidential prerogative to remove at will all subordinate executive officials. What is hardwired in the Constitution is that the "executive Power"—on Professors Calabresi and Prakash's account of original meaning, the power to administer and enforce the law—is vested exclusively in the President. Perhaps, however, some laws are best administered or enforced by officials at a remove from partisan warfare.

Although the framing generation may have seen little justification for insulating subordinate executive officials from plenary presidential power in light of the

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242. *See, e.g.*, Theodore Y. Blumoff, *Illusions of Constitutional Decisionmaking: Politics and Tenure Powers in the Court*, 72 IOWA L. REV. 1079, 1086–93 (1988); Gerhard Casper, *An Essay in Separation of Powers: Some Early Versions and Practices*, 30 WM. & MARY L. REV. 211, 212–42 (1989); Driesen, *supra* note 239, at 96–110; Martin S. Flaherty, *The Most Dangerous Branch*, 105 YALE L.J. 1725, 1755–1810 (1996); Abner S. Greene, *Checks and Balances in an Era of Presidential Lawmaking*, 61 U. CHI. L. REV. 123, 138–53 (1994); Lawrence Lessig & Cass R. Sunstein, *The President and the Administration*, 94 COLUM. L. REV. 1, 12–78 (1994); Shane, *supra* note 239, at 602–06, 613–17; Strauss, *supra*, note 239, at 599–608.

243. *See* Flaherty, *supra* note 242, at 1810–31, 1835–36; *see also* Martin S. Flaherty, *Relearning Founding Lessons: The Removal Power and Joint Accountability*, 47 CASE W. RES. L. REV. 1563, 1568–71, 1588–93 (1997). For an analogous argument focusing on the emergence of administrative agencies exercising much broader powers than were envisioned in the framing era, see Greene, *supra* note 242, at 153–79.

244. U.S. CONST. art. II, § 2, cl. 2.

checks and balances created through the Constitution's separation of legislative and executive powers, this assessment may have been overtaken by the growth in presidential power, as Professor Flaherty contends, or by the emergence of political parties with representatives in both the executive and legislative branches that undermined the efficacy of the formal separation of powers created by the Constitution.[245] Semantic originalism, in turn, does not require that the framers' expectations about the scope of presidential control over subordinate executive officers be treated as anything more than an "original expected application" that is not interpretively binding in light of changed circumstances or understandings. A president with the power to ensure that subordinate executive officials properly discharge their responsibilities on a nonpartisan basis or face dismissal for cause could still be vested with "the executive Power," the original meaning of which Professors Calabresi and Prakash tell us was simply the power to administer and enforce the law.[246] To be sure, there may be persuasive counterarguments supporting unfettered presidential authority over all executive functions,[247] but they are not rooted in the original meaning of Article II, at least once framing-era practices and understandings are discarded as a basis for fleshing out vagueness and ambiguity in original meaning because they are no more than original expected applications of constitutional text.

For his part, as a semantic originalist, Professor Calabresi agrees that original expected applications of constitutional text are not interpretively binding[248] and concedes that the Necessary and Proper Clause permits Congress to alter framing-era arrangements based on an evolving understanding of the manner in which federal power should be exercised.[249] He also agrees that while "the Necessary and Proper Clause does not permit Congress to tell the President how he ought to implement his own constitutional powers, it does enable Congress to structure the administration of federal law."[250] These, however, are the key points that could lead a semantic originalist to reject framing-era practices regarding presidential control over subordinate officers as reliable indicators of original meaning. Perhaps the growth in the scope of executive power and partisan political influence since the framing era means that Congress could conclude that only officials with a measure of insulation from partisan politics should administer or enforce the most sensitive laws. If this departs from framing-era practice, semantic originalism regards such

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245. *See, e.g.*, Daryl J. Levinson & Richard H. Pildes, *Separation of Parties, Not Powers*, 119 HARV . L. REV. 2311, 2316–25 (2006).

246. *See supra* text accompanying note 242.

247. *See, e.g.*, Steven G. Calabresi, *Some Normative Arguments for the Unitary Executive*, 48 ARK. L. REV. 23, 48–95 (1995).

248. *See* Calabresi & Fine, *supra* note 148, at 669–71; Steven G. Calabresi & Julia T. Rickert, *Originalism and Sex Discrimination*, 90 TEX. L. REV. 1, 7–9 (2011). Indeed, Professor Calabresi and a coauthor have written: "[T]he original meaning of a clause or text is [not] defined by the Framers' original expected applications. . . . [O]riginal expected applications are not enacted by the text, and legislators are often unaware of the implications of laws they enact. In so arguing, we agree with Yale law professor Jack Balkin." *Id.* at 3 (footnote omitted).

249. Calabresi & Fine, *supra* note 148, at 666.

250. Calabresi & Prakash, *supra* note 11, at 592.

departures as unremarkable. So it goes for pretty much all constitutional questions that do not have their answers hardwired into constitutional text.[251]

Judge Bork, for one, grasps the potential of semantic originalism to devour itself and has tried to devise a solution:

> No doubt there is a spectrum along which the adjustments of doctrine to take account of new social, technological, and legal developments may gradually become so great as to amount to the creation of a new principle. But that observation notes a danger; it does not justify letting

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251. For yet another example of the inability of conservative semantic originalism to resolve constitutional disputes once original expected applications are cast aside, consider Professor Calabresi's criticism of the decision recognizing a right of consenting adults to engage in homosexual sex in *Lawrence v. Texas*, 539 U.S. 558 (2003). He argues that the original meaning of the Fourteenth Amendment's Privileges or Immunities Clause was to afford protection to fundamental rights deeply rooted in history, subject to reasonable exercise of the police power, and because these fundamental rights, as well as the proper scope of the police power, must be based on framing-era conceptions, the recognition of a right to homosexual sex is indefensible. *See* Steven G. Calabresi, Lawrence*, the Fourteenth Amendment, and the Supreme Court's Reliance on Foreign Constitutional Law: An Originalist Reappraisal*, 65 OHIO ST. L.J. 1097, 1108–15 (2004). Calabresi, however, agrees that the framing generation's original expected applications of constitutional text are not binding because "fidelity to original meaning does not require fidelity to original expected application," Calabresi & Fine, *supra* note 148, at 672. It is therefore entirely unclear why the framing generation's view on what were thought to be deeply rooted rights and what was regarded as the proper scope of the police power is anything more than an original expected application that is not interpretively binding. In any event, it is difficult to understand why the right of consenting adults to engage in private heterosexual activity is not sufficiently rooted to qualify for protection even under Professor Calabresi's view of original meaning; and since he also concedes that the original meaning of the Privileges or Immunities Clause secured equality with respect to the exercise of protected rights, it is even more unclear what originalist justification there could be for a prohibition on private, consensual sexual activity on the part homosexuals but not heterosexuals once the framing generation's original expected applications are cast aside. Indeed, when he addresses the equality argument in support of the decision in *Lawrence*, Professor Calabresi makes only nonoriginalist arguments that invoke the extent of disagreement about whether sexual orientation discrimination is currently regarded as a form of invidious caste discrimination, federalism, and his view that the decriminalization of homosexual sex in most states is of limited probative value in assessing what should be regarded as a fundamental civil right. *See* Calabresi, *supra* at 1121–24. Similarly, presumably because he rejects reliance on original expected applications, when Professor Calabresi addresses Professor Balkin's claim that a prohibition on abortion amounts to discrimination against women, he is forced to rely not on original meaning, but instead on a series of nonoriginalist arguments. *See* Calabresi & Fine, *supra* note 148, at 695–98. This should be unsurprising; in a subsequent article, Professor Calabresi argued, much like Professor Balkin, that the original meaning of the Fourteenth Amendment included an anti-caste principle broad enough to encompass discrimination against women, even though the framers did not understand the Fourteenth Amendment to prohibit sex discrimination. *See* Calabresi & Rickert, *supra* note 248, at 47–60. Thus, the disagreement between Professors Calabresi and Balkin on abortion rests on their differing assessment of the strength of the nonoriginalist arguments likening laws prohibiting abortion to anti-caste legislation; originalism is of no help in resolving this dispute.

> the process slide out of control. Judges and lawyers live on the slippery slope of analogies; they are not supposed to ski it to the bottom. . . . When we say that social circumstances have changed so as to require the evolution of doctrine to maintain the vigor of an existing principle we do not mean that society's values are perceived by the judge to have changed so that it would be good to have a new constitutional principle.[252]

This admonition is little different than Professor Lessig's notion of constraint—changed reading of constitutional text cannot be based on the view that is inconsistent with the text itself.[253] As we have seen, however, this view does not differ meaningfully from that of nonoriginalists, who also regard constitutional text as binding. The problem for semantic originalism is that when the text states a principle at a sufficient level of generality that the answer to a constitutional question is not found in the text itself, virtually any changed reading can be justified without making a claim inconsistent with the text. For example, once one agrees that the Equal Protection Clause enshrines a principle as broad as equality, and concedes that the framing generation could have been wrong about how that principle should be applied to racial segregation, it seems no less possible that the framing generation might have been wrong as well about how to apply that principle to women, immigrants, or gays and lesbians. Once one starts down this road, the distinction between originalism and nonoriginalism effectively disappears.[254]

Some conservative originalists, evidently aware that mere admonitions to judges not to go beyond the original meaning of constitutional text are unlikely to foreclose latitudinarian construction when the text is written at a high level of generality, supplement semantic originalism with a default rule; given the primacy of representative government to our constitutional structure, they argue that challenged legislation not clearly inconsistent with constitutional text should be upheld.[255] This argument for deferentialism may persuade some in light of the Constitution's evident solicitude for majoritarianism; although even some originalists might respond that given the many countermajoritarian provisions in the Constitution, it is far from clear that majoritarianism should be regarded as the overriding constitutional value.[256] But whether or not a presumption of constitutionality rests on an attractive structural argument for deference to majoritarian judgments,[257] it is not originalist. The advocates of this approach identify no evidence that a presumption of constitutionality is anchored in the

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252. BORK, *supra* note 14, at 169.

253. *See supra* text accompanying note 135.

254. For a useful discussion along these lines, see Colby, *supra* note 23, at 755–64.

255. *See, e.g.*, Calabresi & Fine, *supra* note 148, at 699; Graglia, *supra* note 13, at 1044; Paulsen, *supra* note 11, at 2057. Justice Scalia also seems enamored of this view. *See* Boumediene v. Bush, 553 U.S. 723, 832–34 (2008) (Scalia, J., dissenting).

256. *See, e.g.*, Glenn Harlan Reynolds, *Sex, Lies and Jurisprudence: Robert Bork,* Griswold *and the Philosophy of Original Understanding*, 24 GA. L. REV. 1045, 1070–82 (1990).

257. I appropriate the term "structural argument" from Philip Bobbitt's typology of constitutional argument. *See* BOBBITT, *supra* note 9, at 74–92.

original meaning of the Constitution's text.[258] The Constitution authorizes federal courts to hear cases "arising under this Constitution,"[259] but that is as far as the text goes. There is no Presumption of Constitutionality Clause; nor do the advocates of that presumption argue that any portion of the Constitution had such an original meaning.[260] That conservative originalists must resort to such a presumption surely illustrates the failure of originalism to supply a method of constitutional adjudication distinct from that advocated by nonoriginalists.[261]

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258. *See* Colby, *supra* note 23, at 770–71.

259. U.S. CONST. art. III, § 2.

260. Philip Hamburger has marshaled evidence that during the framing era it was believed that a court should apply extant law unless it was manifestly in conflict with some higher authority, although the pertinent evidence is found in English law and American common law, with Hamburger only able to produce a single statement from a judge embracing this principle with respect to constitutional adjudication after the framing. *See* PHILIP HAMBURGER, LAW AND JUDICIAL DUTY 309–16 (2008). The probative value of this evidence is open to considerable doubt; the bulk of the evidence is found in common-law adjudication prior to the Constitution's framing. Moreover, Professor Hamburger acknowledges that judicial review in the United States under the Constitution acquired a fundamentally different character from judicial review in England, in which Parliament exercised sovereignty and therefore controlled the content of constitutional law. *See id.* at 395–406. One need go no further than *Federalist 78* to find evidence that the original meaning of the Constitution included a conception of judicial review as an essential part of the process by which governmental power was to be confined to the limits prescribed in the Constitution. *See* THE FEDERALIST NO. 78, at 393–97 (Alexander Hamilton) (Ian Shapiro ed., 2009). For illuminating reviews of historical evidence suggesting that in the wake of the framing, judicial review of the constitutionality of statutes was not invariably deferential, see William Michael Treanor, *Judicial Review Before* Marbury, 58 STAN. L. REV. 455, 496–97, 517, 540–41, 560–62 (2005) and Keith E. Whittington, *Judicial Review of Congress Before the Civil War*, 97 GEO. L.J. 1257, 1325–28 (2009). Perhaps more important, the evidence of deferentialism identified by Professor Hamburger is not linked to the original meaning of the constitutional text, and for that reason may reflect, at most, original intended applications rather than original meaning. Professor Calabresi, for example, despite advocating a presumption of constitutionality, acknowledges that "the Constitution is silent with regards to presumptions, so anything we say about presumptions must instead be derived from structural first principles." Calabresi, *supra* note 197, at 1088. Beyond that, if Professor Hamburger's deferentialism is taken seriously, then virtually nothing would be forbidden by the most open-ended constitutional provisions on account of their vagueness and ambiguity, an approach seemingly no more textually tenable than Judge Bork's suggestion that the same open-ended constitutional text be ignored.

261. Some conservative originalists advocate a different default rule; noting that, under the Constitution, the federal government exercises only delegated powers while the states exercise plenary powers except when limited by the Constitution, they argue that the presumption is against any novel exercise of federal powers and in favor of any traditional exercise of state power. *See, e.g.*, Kay, *supra* note 6, at 256; Lawson, *supra* note 11, at 1835. Again, this may be an attractive structural argument, but these accounts make no effort to tie the presumption to the original meaning of any constitutional text. At best, this default rule could be sustained only if open-ended grants of federal power, such as the Necessary and Proper Clause, or open-ended restrictions on state power, such as the Fourteenth Amendment's Privileges or Immunities, Due Process, and Equal Protection Clauses, were interpreted in light of framing-era practice rather than at the level of generality found in the

Thus, in actual practice, semantic originalism, like weak original-expected-applications originalism, becomes nonoriginalism. Once one acknowledges that any relevant change since the framing era can justify a departure from the manner in which constitutional text was understood and applied in the framing era, for all questions for which the answer is not already contained in constitutional text, constitutional adjudication turns not on original meaning, but instead on an assessment of the nonoriginalist arguments for departing from framing-era practice. Semantic originalists concede that the framing generation may have been wrong about how to apply vague or ambiguous constitutional text, but this is entirely consistent with nonoriginalism as well. Once again, in practice, the distinction between originalism and nonoriginalism collapses.

III. THE OMNIPRESENCE OF NONORIGINALISM IN CONSTITUTIONAL ADJUDICATION

One could argue that the thesis of this article is contradicted by its opening paragraphs. Although the preceding discussion may expose some inconsistencies among originalist judges and scholars, the reader may remain unconvinced that originalism has little role to play in constitutional litigation. After all, the claim that originalism, in practice, is unable to provide a genuinely originalist basis for constitutional adjudication is seemingly undermined by the decisions of recent years that many have identified as originalist in character.

Although there is no statistically acceptable method for identifying a random and statistically significant sample of ostensibly originalist judicial decisions and testing them to determine if they are truly originalist in character, likely the best one can do is to create a sample consisting of those judicial decisions that are widely regarded as originalist in character. Yet, an examination of what are likely the three most prominent opinions of recent years to deploy an ostensibly originalist methodology shows that even the assertedly originalist decisions of recent years, on inspection, turn on nonoriginalist considerations.

A. Crawford v. Washington

In *Crawford v. Washington*, Justice Scalia wrote the opinion of the Court, holding that, under the Sixth Amendment's requirement that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him,"[262] an accused must be given an opportunity to cross-examine anyone whose testimonial statements are offered as evidence.[263] Justice Scalia began his opinion by conceding that "[t]he Constitution's text does not alone resolve this case. One could plausibly read 'witnesses against' a defendant to mean those who actually testify at trial, those whose statements are offered at trial, or something in between."[264] To resolve the ambiguity, Justice Scalia examined framing-era practice, observing that the confrontation requirement developed in

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text; but as we have seen in Part I above, many are the problems with a strong original-expected-applications originalism that relies on framing-era practice as a means for fleshing out open-ended constitutional text.

262. 541 U.S. 36, 38 (2004) (quoting U.S. CONST. amend.VI).

263. *Id.* at 68–69.

264. *Id.* at 42–43 (citations omitted).

reaction to statutes, such as those enacted in England during the reign of Queen Mary, which authorized the use of statements previously given to investigators to be used as evidence at criminal trials, whether sworn or unsworn, and on this basis concluded that the confrontation requirement applied even to unsworn but otherwise testimonial statements given to investigators.[265] To so hold, the Court rejected the approach previously taken in *Ohio v. Roberts*[266] and its progeny, which excused a lack of confrontation when an out-of-court statement was admitted under a firmly rooted exception to the rule against hearsay or otherwise possessed adequate indicia of reliability.[267]

Because of its heavy reliance on framing-era practice, *Crawford* is widely characterized as an originalist decision,[268] although some quarrel with the Court's analysis of the relevant historical evidence.[269] Original-expected-applications originalism, however, cannot explain the decision in *Crawford*. To be sure, in terms of the original expected application of the confrontation requirement, Justice Scalia's opinion relies on original intended applications, noting that in the framing era, confrontation was accomplished through cross-examination.[270] But on the question of whether the statements of an unsworn police interviewee could be considered the "witness against" the accused within the meaning of the Confrontation Clause, original intended applications were of little use. Justice Scalia acknowledged that the confrontation requirement was understood in the framing era to prohibit compelled testimony in formal examinations conducted by judicial officers in the fashion utilized in continental civil law rather than the use of unsworn statements made in police interviews.[271] He nevertheless explained that the confrontation requirement should be extended to more informal proceedings unknown in the framing era:

> That interrogators are police officers rather than magistrates does not change the picture either. Justices of the peace conducting examinations under the Marian statutes were not magistrates as we understand that office today, but had an essentially investigative and prosecutorial function. England did not have a professional police force until the 19th century, so it is not surprising that other government officers performed the investigative functions now associated primarily with the police. The involvement of government officers in the production of testimonial evidence presents the same risk, whether the officers are police or justices of the peace.[272]

Accordingly, to explain why he went beyond framing-era practice, Justice Scalia invoked the now-familiar problem of changed circumstances which, as we have

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265. *Id.* at 50–68.
266. 448 U.S. 56 (1980).
267. *Crawford*, 541 U.S. at 60–68.
268. *See, e.g.*, Bibas, *supra* note 8, at 189–93; Scalia, *supra* note 8, at 871–72.
269. *See, e.g.*, Thomas Y. Davies, *What Did the Framers Know, and When Did They Know It? Fictional Originalism in* Crawford v. Washington, 71 BROOK. L. REV. 105 (2005).
270. *Crawford*, 541 U.S. at 53–56.
271. *Id.* at 43–50.
272. *Id.* at 53 (citations omitted).

seen, so often requires originalists to retreat to some form of weak original-expected-applications originalism or semantic originalism. Yet, as we have also seen, weak original-expected-applications originalism and semantic originalism are usually indistinguishable from nonoriginalism, and *Crawford* bears this out as well.

Justice Scalia's claim that the confrontation requirement must change with police practice is little different than the nonoriginalist argument for extending the Fifth Amendment's prohibition on compelling any person "to be a witness against himself"[273] to police interrogation so that the Constitution can evolve in tandem with investigative practice.[274] Yet, Justice Scalia had previously characterized the extension of the Fifth Amendment to "extrajudicial custodial interrogation" in *Miranda v. Arizona*[275] as "a doubtful proposition as a matter both of history and precedent;"[276] but, he made essentially the same move in *Crawford*, treating an unsworn interviewee who previously made statements to police officers but who does not actually testify in any official proceeding as a "witness against" an accused. There may be good reasons for this conclusion, but it is hardly required by the original meaning of the term "witness." The only historical evidence of original meaning identified by the Court in *Crawford* was the definition of "witness" found in the second edition of *Webster's American Dictionary*: "those who 'bear testimony,'" with "'testimony,' in turn," defined as "'[a] *solemn* declaration or affirmation made for the purpose of establishing or proving some fact.'"[277] Whether a statement made to police investigators outside of the confines of a formal judicial investigation has the requisite solemnity, however, is a question simply not resolved by this definition.[278] Instead, the question whether a police interviewee is a "witness" within the original meaning of the Sixth Amendment presents a classic example of textual vagueness or ambiguity requiring nonoriginalist construction.

In truth, it is hard to see what originalism adds to the mix in *Crawford*. Nothing more than textual argument is necessary to support the holding; after all, the approach of *Ohio v. Roberts* cannot be squared with the text of the Confrontation Clause. The textual requirement of confrontation is absolute: it admits of no exception for testimony falling within a firmly rooted hearsay exception or that otherwise reflects indicia of reliability. *Crawford* itself makes the point quite nicely: "Where testimonial statements are at issue, the only indicium of reliability sufficient to satisfy constitutional demands is the one the Constitution actually

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273. U.S. CONST. amend. V.

274. *See, e.g.*, Yale Kamisar, *A Dissent from the* Miranda *Dissents: Some Comments on the "New" Fifth Amendment and the Old "Voluntariness" Test*, 65 MICH. L. REV. 59 (1966), *reprinted in* POLICE INTERROGATION AND CONFESSION: ESSAYS IN LAW AND POLICY 41, 41–68 (1980).

275. 384 U.S. 436 (1966).

276. Dickerson v. United States, 530 U.S. 428, 447 (2000) (Scalia, J., dissenting) (citation omitted).

277. *Crawford*, 541 U.S. at 51 (quoting 2 NOAH WEBSTER, AN AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE 114 (1828)) (brackets in original) (emphasis added).

278. The view of one leading scholar is that "the Framers did not address whether the Confrontation Clause should apply to nontestimonial hearsay evidence because they never anticipated that informal hearsay statements could come to be viewed as valid evidence in criminal trials–as they have." Davies, *supra* note 269, at 107.

prescribes: confrontation."[279] Thus, the answer to the constitutional question posed by *Crawford* is hardwired into the Constitution itself—what the Sixth Amendment requires is not reliability but confrontation, and *Roberts* never claimed that the textual requirement of "confronting" adverse witnesses could be satisfied by the use of testimony from a witness the accused had never questioned. As we have seen, nonoriginalism no less than originalism treats constitutional text as binding. Inquiry into original meaning was accordingly beside the point in *Crawford*; the problem with *Roberts* was that its approach conflicted with the text of the Confrontation Clause. The only hard question in *Crawford* was whether to treat unsworn interviewees whose statements are later offered in evidence through the testimony of police investigators as "witnesses" subject to the confrontation requirement. The decision to extend the confrontation requirement to unsworn interviewees, however, relied on the same nonoriginalist rationale that the Court had earlier employed in *Miranda*.

One might respond that had the Court taken a consistently originalist approach to the Confrontation Clause, at least it might have avoided the error of *Roberts*. Even this position, however, cannot be sustained. The text of the Confrontation Clause is simple; the Court's error in *Roberts* was in ignoring the text. Inquiry into original meaning, as it turns out, may only complicate. In *Crawford*, it was Chief Justice Rehnquist who sought to preserve *Roberts*; he believed that the evidence from the framing-era was in conflict and argued that there were framing-era precedents suggesting that testimony accompanied by adequate indicia of reliability was considered admissible even if the witness had never been questioned by the accused.[280] This, of course, is an originalist argument, and Chief Justice Rehnquist, as it happens, was an originalist.[281] As Chief Justice Rehnquist's opinion in *Crawford* demonstrates, once one leaves the text behind and starts digging into the frequently conflicting and confusing historical evidence, things can get complicated. Rather than enhancing textual argument in *Crawford*, arguments based on framing-era meaning were at least as likely to confuse matters.

B. Apprendi v. New Jersey

Another seeming win for originalism was *Apprendi v. New Jersey*, in which the Court invalidated a New Jersey statute authorizing the sentencing judge to impose an enhanced sentence for offenses that the judge found to have been racially motivated.[282] The Court held that any factual finding that could increase the authorized sentence, other than the fact of a prior conviction, must be proved beyond a reasonable doubt to the satisfaction of a jury by virtue of the Due Process Clause and the Sixth Amendment's right to trial by jury.[283] The Court invoked

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279. *Crawford*, 541 U.S. at 68–69.

280. *See id.* at 72–74 (Rehnquist, C.J., concurring in the judgment).

281. *See* Harry M. Clor, *Chief Justice Rehnquist and the Balances of Constitutional Democracy*, 25 RUTGERS L.J. 557 (1994); Richard W. Garnett, *Chief Justice Rehnquist's Enduring, Democratic Constitution*, 29 HARV. J.L. & PUB. POL'Y 395 (2006); William H. Rehnquist, *The Notion of a Living Constitution*, 54 TEX. L. REV. 693 (1976).

282. 530 U.S. 466 (2000).

283. *Id.* at 490.

framing-era practice to support its holding, noting that in the framing era, criminal cases were decided by a jury and required proof of guilt beyond reasonable doubt, and in imposing these requirements, framing-era practice drew no distinction between the adjudication of guilt and factors bearing on the defendant's sentence.[284] Accordingly, the decision is usually characterized as originalist in character.[285] Under the New Jersey statute, however, the defendant's motive determined only the sentencing range rather than guilt or innocence, and, as the Court acknowledged, in the framing era there was no general understanding regarding the allocation of responsibility between judge and jury when it came to sentencing, since specific sentences were generally prescribed for each offense.[286] In dissent, Justice O'Connor made much of this point, arguing that in the framing era, there was no understanding about the manner in which facts that bore only on sentencing should be adjudicated.[287] To this point, the Court responded by relying on "the principles that emerged from the Framers' fears 'that the jury right could be lost not only by gross denial, but by erosion.'"[288]

Whatever the merit of the Court's concern for erosion of the jury right, it is not originalist. *Apprendi* cannot be justified in terms of original-expected-applications originalism since there was no framing-era understanding with respect to the manner in which discretionary sentencing authority could be exercised. In the framing era, "overt sentencing discretion was a new development that had not yet taken firm shape."[289] Indeed, when it addressed the question whether the enhanced penalty in the federal carjacking statute for offenses that result in death or serious bodily injury must be proven to a jury beyond reasonable doubt in the Term before *Apprendi*, the Court admitted that "the scholarship of which we are aware does not show that a question exactly like this one was ever raised and resolved in the period before the framing."[290] To be sure, there was no framing-era precedent for increasing the authorized sentence based on a finding made by a judge, but the Court did not claim that the original meaning of the pertinent constitutional

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284. *Id.* at 476–81.

285. *See, e.g.*, Barkow, *supra* note 8, at 1054–56; Jamal Greene, *Selling Originalism*, 97 GEO. L.J. 657, 689 (2009); Scalia, *supra* note 8, at 872.

286. *Apprendi*, 530 U.S. at 479–80. Some sentencing discretion was permitted for misdemeanors, but imprisonment was rarely imposed as a punishment for these offenses until the late eighteenth century. *Id.* at 480 n.7.

287. *Id.* at 525–29 (O'Connor, J., dissenting).

288. *Id.* at 483 (quoting Jones v. United States, 526 U.S. 227, 247–48 (1999)).

289. Bibas, *supra* note 8, at 196. What little sentencing discretion that existed seems to have involved downgrading felony sentences and imposing misdemeanor sentences, and there judges seem to have exercised broad sentencing discretion without need of juries, as they did when indeterminate sentencing emerged in the mid-nineteenth century, and with respect to factual allegations that could increase the authorized sentence, nineteenth-century courts invariably analyzed this question as nonconstitutional in character and reached results that were hardly uniform. *See* Stephanos Bibas, *Judicial Fact-Finding and Sentence Enhancements in a World of Guilty Pleas*, 110 YALE L.J. 1097, 1124–32 (2001). Beyond that, as the Court subsequently recognized, in the framing era judges generally had discretion in deciding whether to impose consecutive or concurrent sentences in cases involving multiple convictions. *See* Oregon v. Ice, 555 U.S. 160, 167–70 (2009).

290. Jones v. United States, 526 U.S. 227, 244 (1999).

provisions froze in place framing-era sentencing procedures. To the contrary, the Court stressed that there was no constitutional impediment to the emergence of sentencing discretion as a consequence of "the 19th-century shift in this country from statutes providing fixed-term sentences to those providing judges discretion within a permissible range . . . ."[291] Thus, whatever one's view of the Court's rationale, it cannot be supported by original expected applications. *Apprendi* addressed an issue that simply did not arise in the framing era, and as we have seen, original-expected-applications originalism is of no aid in such cases.[292]

Nor does *Apprendi* reflect semantic originalism. Even if the Court was correct that the framers feared that the jury right could be eroded by procedural innovation, the Court offered no criterion based on the framing-era meaning of constitutional text for identifying impermissible erosion. The Court acknowledged that as long as a judge's finding is not the basis to increase the legally authorized sentence, judges may exercise "broad discretion in sentencing,"[293] even though such discretion goes far beyond framing-era practice, and also has the potential to erode the jury right, as Justice O'Connor argued in dissent.[294] The Court's only response to this point was that "structural democratic constraints" are likely to circumscribe the extent of the discretion that legislatures will vest in sentencing judges.[295] This argument may be persuasive, but it is not originalist—it is a structural argument not linked to the original meaning of any constitutional text. To be sure, there was no framing-era precedent for increasing the authorized sentence based on a judge's finding, but as we have seen, semantic originalism rejects framing-era practice as the determinant of original meaning. Indeed, the Court's holding permits erosion of the jury's control over sentencing by allowing the exercise of judicial sentencing discretion as long as discretion is not tied to the sentencing judge's factual findings. Yet, the Court offered no historical evidence of original semantic meaning to support its rule about the permissible scope of sentencing discretion, nor could it, given that judicial sentencing discretion had not yet developed in the framing era, and therefore framing-era semantic meaning reflected no understanding about the extent to which the emergence of judicial sentencing discretion could be reconciled with the Constitution's text.[296]

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291. *Apprendi*, 530 U.S. at 481.

292. *See supra* Part I.A.1.

293. *Apprendi*, 530 U.S. at 481.

294. *Id.* at 546–49 (O'Connor, J., dissenting). For a more elaborate analysis along these lines, see Jonathan F. Mitchell, *Apprendi's Domain*, 2006 SUP. CT. REV. 297, 319–29.

295. *Apprendi*, 530 U.S. at 490 n.16.

296. Justice Thomas's separate opinion was no more originalist. It relied on nineteenth-century cases holding that facts that increased the authorized punishment, such as the value of stolen property, must be treated as elements of the offense to be alleged in the indictment and proven to a jury, although all of the pertinent authorities treated the matter as one of state law save an 1872 treatise, which stated the rule as based on the common law as well as constitutional requirements. *Id.* at 501–18 (Thomas, J., concurring). In this, Justice Thomas may have overstated the historical evidence, *see* Bibas, *supra* note 289, at 1128–32, but even putting that problem aside, this evidence could support an originalist argument only if linked to a claim that the original meaning of the Due Process Clause or the Sixth Amendment was to preserve framing-era practice. Yet, Justice Thomas did not advance such a claim. To the contrary, he joined the Court's opinion blessing the emergence of sentencing discretion

Thus, there is very little about *Apprendi* that qualifies as originalist. This should be unsurprising—since guilt and punishment went hand in hand in the framing era, the jury's verdict simultaneously determined both guilt and punishment; there was no need to develop a framing-era understanding about the role of the jury in sentencing because there was no distinction between the jury's verdict and the resulting sentence. In an era in which guilt and punishment are not so tightly linked, however, original meaning supplies no reliable guide for determining what role the jury should have in sentencing.[297] *Apprendi* is perhaps a classic example in which changed circumstances undermined reliance on framing-era practice or framing-era semantic meaning as a reliable guide for constitutional adjudication.

C. District of Columbia v. Heller

The same inability to utilize original meaning to resolve the critical issues pervades the ostensibly originalist decision in *District of Columbia v. Heller*,[298] where the Court addressed the question whether, in light of the Second Amendment's prefatory admonition, "[a] well regulated Militia, being necessary to the security of a free State," the Second Amendment recognition of "the right of the people to keep and bear arms"[299] conferred "an individual right to possess a firearm unconnected with service in a militia . . . ."[300] The majority came down on the individual-rights side, characterizing this as "the original understanding of the Second Amendment,"[301] while the dissenters concluded that the Second Amendment "secure[d] to the people a right to use and possess arms in connection with service in a well-regulated militia."[302] *Heller* has been described as "the most explicitly and self-consciously originalist opinion in the history of the Supreme Court."[303] Yet, it is hard to understand how the original meaning of the Second

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subsequent to the framing era despite its potential to erode the jury right, adding, "Of course the Fifth and Sixth Amendments did not codify common-law procedure wholesale." *Id.* at 500 n.1 (Thomas, J., concurring).

297. The same point emerged as the Court applied *Apprendi* to invalidate Washington's sentencing guidelines in *Blakeley v. Washington*, 542 U.S. 296 (2004). The Court held that even though the sentence in that case was within the statutorily authorized maximum, because it could not be lawfully imposed under the guidelines except on the basis of a factual finding made by the sentencing judge, it ran afoul of *Apprendi*. *See id.* at 303–04. Rejecting an argument that the use of sentencing guidelines to channel sentencing discretion within a statutorily authorized range did not involve impermissible erosion of the jury right, the Court wrote: "[T]he very reason the Framers put a jury-trial guarantee in the Constitution is that they were unwilling to trust government to mark out the role of the jury." *Id.* at 308. Yet, because sentencing discretion had yet to emerge, the framing era had developed no understanding about whether sentencing discretion would impermissibly erode the function of the jury if exercised on the basis of factual findings but not otherwise in terms of either an original expected application or original semantic meaning.

298. 554 U.S. 570 (2008).

299. U.S. CONST. amend. II.

300. *Heller*, 554 U.S. at 577.

301. *Id.* at 625.

302. *Id.* at 651 (Stevens, J., dissenting).

303. Cass R. Sunstein, *Second Amendment Minimialism:* Heller *as* Griswold, 122 HARV. L. REV. 246, 246 (2008) (footnote omitted).

Amendment spoke to the question before the Court. Once again, the problem of changed circumstances rears its ugly head.

In the framing era, the question whether there was a right to keep and bear arms unconnected to service in an organized militia would have been a non sequitur. As the Court acknowledged, in the framing era, the militia was not a select group that had been conscripted into a formal military organization, but rather "the body of all citizens capable of military service, who would bring the sorts of lawful weapons that they possessed at home to militia duty."[304] Thus, everyone thought capable of bearing arms was thought a part of the militia, and by ensuring that all those available to be called to militia service had a right to keep and bear arms that could be brought with them when called to duty, the Second Amendment was inextricably intertwined with militia service, even if it facilitated individual self-defense and other individual uses of arms as well. The Court, in other words, endeavored to use original meaning in order to address a question that never arose in the framing era. For that reason, reliance on original expected applications was a dead end.

Thus, *Heller* seems to reflect semantic originalism more than any original expected application of the Second Amendment. Indeed, in the vein of semantic originalism, when it addressed the District's reliance on the Second Amendment's preamble reflecting a limitation on Second Amendment rights to possession and use of arms in relation to service in an organized militia, the Court did not invoke framing-era practice, but instead reasoned that "[l]ogic demands that there be a link between the stated purpose and the command," adding that the "requirement of logical connection may cause a prefatory clause to resolve an ambiguity in the operative clause," but beyond that, "a prefatory clause does not limit or expand the scope of the operative clause."[305] As for the operative clause, the Court defined the right to "keep" arms as the right to "have" or possess them,[306] and the right to "bear" arms as the right to "carry[] for a particular purpose—confrontation,"[307] and then, finding no ambiguity, concluded that the preamble did not limit the scope of the operative right but merely "announces the purpose for which the right was codified: to prevent elimination of the militia."[308] Yet, the Court made no claim that its view of the logical relation between preamble and operative clause was familiar to the framing-era public, despite its admonition that "[n]ormal meaning may of course include an idiomatic meaning, but it excludes secret or technical meanings that would not have been known to ordinary citizens in the founding generation."[309]

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304. *Heller*, 554 U.S. at 627. The dissenters added that the first militia act, enacted in the same year that the Second Amendment was ratified, defined the militia as "every able-bodied white male citizen between the ages of 18 and 45" and required each "to 'provide himself with a good musket or firelock' and other specified weaponry." *Id.* at 672 (Stevens, J., dissenting) (footnote omitted) (quoting Act of May 8, 1792, ch. 33, 1 Stat. 271).

305. *Id.* at 577–78 (citations omitted).

306. *Id.* at 582–83.

307. *Id.* at 584.

308. *Id.* at 599.

309. *Id.* at 576–77. The view of Professors McGinnis and Rappaport that originalism entails the use of original interpretive methods would presumably warrant resort to a framing-era rule of construction even if unfamiliar to the public, but as we have seen, that

Given that the framing-era public never had occasion to consider whether the right to bear arms could be separated from militia service, the Court could not have made such a claim. Perhaps as a matter of ordinary semantic meaning, the Court's view about the relation between a preamble and an operative clause is sound, but this is a purely textual argument not based on historical evidence of original meaning.[310]

But put all this aside and assume that *Heller*'s handling of the preamble is defensible on originalist grounds despite the ahistorical character of the question whether the right to keep and bear arms could be separated from militia service. Even so, originalism offers no defense for the Court's decision to invalidate the District's handgun ban. After all, the District argued that it had not infringed the right to keep and bear arms because it permitted its residents to possess some types of "arms," such as long guns, even though it had banned handguns.[311] To this, the Court had neither a textual nor an originalist response—perhaps because the District had indeed identified an ambiguity in the Second Amendment. Instead, the Court wrote that "[t]he handgun ban amounts to a prohibition of an entire class of 'arms' that is overwhelmingly chosen by American society for that lawful purpose," and that the ban "extends, moreover, to the home, where the need for defense of self, family, and property is most acute."[312] The Court added that "[f]ew laws in the history of our Nation have come close to the severe restriction of the District's handgun ban. And some of those few have been struck down."[313] Handguns, the Court wrote, are considered "the quintessential self-defense weapon."[314] Rejecting Justice Breyer's proposed balancing test, the Court added: "We know of no other enumerated constitutional right whose core protection has been subjected to a freestanding 'interest-balancing' approach."[315] Nevertheless, despite having defined the original meaning of the right to "keep" arms as the right to "have" them and the right to "bear" arms as the right to "carry" them "in case of confrontation,"[316] the Court characterized as "presumptively lawful"[317] a number of

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view logically entails original-expected-applications originalism, *see supra* text accompanying notes 35–36, and, indeed, McGinnis and Rappaport embrace intentionalism as an original interpretive method, including reliance on original intended applications. *See* McGinnis & Rappaport, *supra* note 36, at 378–81. Yet, original-expected-applications originalism is particularly problematic in *Heller* given that the question whether Second Amendment rights existed independent from the needs of the militia would have had no meaning to the framing generation.

310. For a straightforward textual argument in favor of the position taken by the Court in *Heller*, see Nelson Lund, *D.C.'s Handgun Ban and the Constitutional Right to Arms: One Hard Question?*, 18 GEO. MASON U. C.R. L.J. 229, 236–40 (2008). There is, however, an argument that in the framing era, the phrase "bear arms" had a specifically military meaning, making the Second Amendment sufficiently ambiguous to warrant resort to the preamble. *See Heller*, 554 U.S. at 646–52 (Stevens, J., dissenting); Saul Cornell, Heller*, New Originalism, and Law Office History: "Meet the New Boss, Same as the Old Boss,"* 56 UCLA L. REV. 1095, 1101–10 (2009).

311. *Heller*, 554 U.S. at 629.

312. *Id.* at 628.

313. *Id.* at 629.

314. *Id.*

315. *Id.* at 634.

316. *Id.* at 592.

317. *Id.* at 627 n.26.

laws circumscribing the ability to possess or carry firearms, including "prohibitions on carrying concealed weapons" and "prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms."[318]

Commentators puzzling over this portion of the opinion have suggested that the Court adopted a categorical approach in which "core" Second Amendment interests receive something close to absolute protection while more peripheral interests are subject to greater regulation.[319] What is striking about this core-and-penumbra approach, however, is that nothing about it is originalist. As for original expected applications, the Court claimed no historical support for a core-and-penumbra approach; what is more, the regulations that the Court identified as presumptively lawful have little or no framing-era support. Prohibitions on carrying concealed weapons, for example, did not emerge in the United States until the 1810s and 1820s, in response to a surge in violent crime.[320] Laws prohibiting the possession of firearms by convicted felons became widespread only in the twentieth century, in response to a crime wave following the First World War.[321] The Court even acknowledged that there was little framing-era regulation aside from laws addressing gunpowder storage and the discharge of firearms.[322] Unsurprisingly, a number of originalists have objected to this portion of this opinion because of its lack of framing-era support,[323] and nonoriginalists have chided the Court for inconsistency.[324]

As for semantic originalism, as we have seen, it usually offers little meaningful difference from nonoriginalism, and *Heller* again proves the point. As we have seen, the historically fixed meaning of constitutional text played no role in the Court's ahistorical core-and-penumbra approach. The Court was forced to utilize a

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318. *Id.* at 626–27 (footnote omitted).

319. *See, e.g.*, Joseph Blocher, *Categoricalism and Balancing in First and Second Amendment Analysis*, 84 N.Y.U. L. REV. 375, 404–10 (2009); Solum, *supra* note 11, at 976–77.

320. *See, e.g.*, SAUL CORNELL, A WELL-REGULATED MILITIA: THE FOUNDING FATHERS AND THE ORIGINS OF GUN CONTROL IN AMERICA 138–44 (Oxford Univ. Press eds., 2000); Saul Cornell, *The Early American Origins of the Modern Gun Control Debate: The Right To Bear Arms, Firearms Regulation, and the Lessons of History*, 17 STAN. L. & POL'Y REV. 571, 581–85 (2006).

321. *See* C. Kevin Marshall, *Why Can't Martha Stewart Have a Gun?*, 32 HARV. J.L. & PUB. POL'Y 695, 698–728 (2009).

322. *Heller*, 554 U.S. at 631–34.

323. *See, e.g.*, Carlton F.W. Larson, *Four Exceptions in Search of a Theory:* District of Columbia v. Heller *and Judicial* Ipse Dixit, 60 HASTINGS L.J. 1371, 1373–79 (2009); Lund, *supra* note 196, at 1356–62.

324. *See, e.g.*, Philip J. Cook, Jens Ludwig & Adam M. Samaha, *Gun Control After* Heller*: Threats and Sideshows from a Social Welfare Perspective*, 56 UCLA L. REV. 1041, 1064–66 (2009); Rory K. Little, Heller *and Constitutional Interpretation: Originalism's Last Gasp*, 60 HASTINGS L.J. 1415, 1427 (2009); Reva B. Siegel, *Dead or Alive: Originalism as Popular Constitutionalism in* Heller, 122 HARV. L. REV. 191, 198–99 (2008); Mark Tushnet, Heller *and the Perils of Compromise*, 13 LEWIS & CLARK L. REV. 419, 429 (2009); Adam Winkler, Heller*'s Catch-22*, 56 UCLA L. REV. 1551, 1557–65 (2009).

nonoriginalist approach because of the ambiguity of the constitutional text on whether the right to keep and bear arms protects the possession and carrying of every type of arms or only requires that the people can possess and carry some type of arms. Given this ambiguity, resort to nonoriginalism was inescapable; even originalists concede that textual vagueness or ambiguity requires nonoriginalist construction.[325] The Court's core-and-penumbra approach may be preferable to Justice Breyer's balancing if one accepts the Court's view that rights receive too uncertain protection under balancing tests,[326] but that view is no more based on the historically fixed meaning of constitutional text than the interest balancing of Justice Breyer.

D. The (Limited) Place for Originalism in Practice

Accordingly, when it comes to cases of textual vagueness or ambiguity, where nonoriginalists claim license for their brand of constitutional adjudication, in actual practice, neither original expected applications nor semantic originalism are of much use. Instead, in the face of textual vagueness or ambiguity—precisely what gives rise to constitutional litigation in actual practice—nonoriginalism is where the action is.

This is not to suggest that original meaning plays no role in constitutional adjudication. As we have seen, some constitutional provisions, such as the Seventh Amendment, amount to textual commands to assess constitutional meaning by reference to framing-era practice.[327] Thus, Seventh Amendment adjudication centers on framing-era practice, even though the Court is often forced to engage in rough analogies when assessing whether the right to a jury trial applies to actions unknown at common law.[328] An originalist inquiry may be hard wired into the text in other ways; for example, when the Constitution uses a framing-era term of art, such as its prohibitions on "ex post facto Law[s],"[329] interpretation necessarily begins with the framing-era meaning of that term.[330] And, sometimes, a semantically plausible reading of the text can be ruled out by reference to its original meaning; to appropriate John Ely's example, some of the Constitution's

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325. *See supra* notes 26–27.

326. *See Heller*, 554 U.S. at 634–35.

327. *See supra* text accompanying notes 76–77.

328. *See, e.g.*, City of Monterey v. Del Monte Dunes, Ltd., 526 U.S. 687, 708–21 (1999); Chauffeurs, Local No. 391 v. Terry, 494 U.S. 558, 564–73 (1990); Granfinanciera, S.A. v. Nordberg, 492 U.S. 33, 40–65 (1989); Tull v. United States, 481 U.S. 412, 417–27 (1987); Curtis v. Loether, 415 U.S. 189, 192–97 (1974). Beyond this, despite its seeming textual commitment to originalism, the Seventh Amendment contains many latent complexities; for example, perhaps the modern liberalization in pleading and related procedural rules constitutes a changed circumstance that could warrant affording judges greater power to review the sufficiency of the evidence than was thought necessary under the more demanding procedural rules of the framing-era regime. *See* Brian T. Fitzpatrick, *Originalism and Summary Judgment*, 71 OHIO ST. L.J. 919, 928–32 (2010).

329. U.S. CONST. art. I, §§ 9, cl. 3, 10, cl. 1.

330. *See, e.g.*, Stogner v. California, 539 U.S. 607, 610–16 (2003); Carmell v. Texas, 529 U.S. 513, 521–30 (2000).

"provisions, such as the one requiring that the President be a 'natural born Citizen,' may need a reference to historical usage so as to exclude certain alternative constructions–conceivably if improbably here, a requirement of legitimacy (or illegitimacy!) or non-Caesarian birth."[331]

These, however, are the rare cases. The Seventh Amendment's textual reference to framing-era common law appears nowhere else in the Constitution. While there are a few framing-era terms of art in the Constitution, most of it remains accessible to the contemporary reader, and the meaning of its terms has, for the most part, changed little, if at all, since the framing era. Framing-era semantic meaning can occasionally resolve ambiguities; but the fact that the Constitution uses words the meaning of which are largely unchanged since the framing makes these problems rare; no one, for example, really needs to study history to know that the Natural Born Citizen Clause does not mean that only the legitimate or non-Caesarian born are eligible to serve as President.[332]

Originalism is unnecessary when a constitutional debate can be resolved by the text itself; originalism is of aid in constitutional adjudication if it can utilize original meaning to resolve textual vagueness or ambiguity. As we have seen, however, original-expected-applications originalism as a means of addressing textual vagueness or ambiguity is fraught with peril; even the framing generation may not have intended that its own understandings and practices be applied to radically altered circumstances. Semantic originalism is no more successful. For highly specific constitutional texts, original semantic meaning is sufficiently constraining, but as we have seen, textualism is no less likely to provide constraint in such cases. When the text is written at a high level of generality, in contrast, the original semantic meaning becomes so expansive that it cannot be distinguished from nonoriginalism. Semantic originalists, to be sure, commence constitutional adjudication with ritual incantations of original meaning, but at the end of the day, decidedly nonoriginalist conceptions of liberty, equality, or other nonoriginalist considerations do the analytical heavy lifting.

To be sure, history can be of aid to constitutional law. Just as Holmes famously denounced slavish adherence to historical practice, he also wrote, famously as well, that "a page of history is worth a volume of logic."[333] Indeed. In *McDonald v. City of Chicago*,[334] for example, a four-justice plurality, as it considered whether the Second Amendment's right to keep and bear arms is protected against the states by the Fourteenth Amendment's Due Process Clause, did not tether its inquiry to the original meaning of the Clause but instead employed a nonoriginalist test asking whether the Second Amendment was sufficiently "fundamental from an American perspective" to merit incorporation within the Fourteenth[335]—yet it nevertheless consulted history in an effort to determine whether Second Amendment rights had

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331. ELY, *supra* note 185, at 13.

332. There are, however, some close cases involving the Natural Born Citizen Clause in which historical evidence of original meaning may prove useful. *See* William T. Han, *Beyond Presidential Eligibility: The Natural Born Citizen Clause as a Source of Birthright Citizenship*, 58 DRAKE L. REV. 457, 460–76 (2010).

333. N.Y. Trust Co. v. Eisner, 256 U.S. 345, 349 (1921).

334. 130 S. Ct. 3020 (2010).

335. *Id.* at 3046 (opinion of Alito, J.).

gained widespread acceptance in national history.[336] In this sense, historical inquiry, though not conclusive, can provide valuable rigor to adjudication.[337] Consulting history as a guide, however, stops far short of originalism's insistence that historically fixed meanings of constitutional text control constitutional adjudication.

As the survey of recent ostensibly originalist decisions above makes plain, authentically originalist adjudication is something like the Loch Ness Monster—much discussed, but rarely encountered. In constitutional adjudication, nonoriginalism is where the action is.

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Some years ago, my onetime teacher, Laurence Tribe, in the course of noting Ronald Dworkin's claimed conversion to originalism, wrote, "[w]e are all originalists now,"[338] a seeming concession that evoked more than a little comment.[339] Perhaps Professor Tribe got it backwards.

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336. *Id.* at 3036–44 (opinion of the Court). This is not to suggest that the Court's treatment of history was impeccable; it was not. For example, to support its claim that the Congress that framed the Fourteenth Amendment considered Second Amendment rights fundamental, the Court cited the Freedmen's Bureau and Civil Rights Acts of 1866. *See id.* at 3040–41. Yet, there is powerful evidence that these statutes were antidiscrimination requirements rather than protection of substantive rights including the right to bear arms. *See* Nelson Lund, *Two Faces of Judicial Restraint (or Are There More?) in* McDonald v. City of Chicago, 63 FLA. L. REV. 487, 496–500 (2011); Rosenthal, *supra* note 228, at 381–84. In fact, the Court itself has long construed the Civil Rights Act as an antidiscrimination provision. *See, e.g.*, Gen. Bldg. Contractors Ass'n v. Pennsylvania, 458 U.S. 375, 384–91 (1982). Justice Thomas's separate opinion also involves a highly selective presentation of the pertinent historical evidence. *See* Lawrence Rosenthal & Joyce Lee Malcolm, *Colloquy Debate:* McDonald v. Chicago*: Which Standard of Scrutiny Should Apply to Gun Control Laws?*, 105 NW. U.L. REV. 437, 460–63 (2011). Indeed, the selective presentation of evidence in *McDonald* calls to mind the perils of "law office history," in which historical evidence of original meaning is assessed with an advocate's jaundiced eye that cherry-picks only the evidence supporting a predetermined conclusion. *See, e.g.*, Saul Cornell, *The People's Constitution vs. the Lawyer's Constitution: Popular Constitutionalism and the Original Debate over Originalism*, 23 YALE J.L. & HUMAN. 295, 334–37 (2011); Alfred H. Kelly, *Clio and the Court: An Illicit Love Affair*, 1965 SUP. CT. REV. 119, 155–58; Larry D. Kramer, *When Lawyers Do History*, 72 GEO. WASH. L. REV. 387, 402–07 (2003); John Phillip Reid, *Law and History*, 27 LOY. L.A. L. REV. 193, 197–204 (1993). There is some empirical evidence suggesting just this problem in the Court's use of historical evidence. *See* Smith, *supra* note 22, at 256–87.

337. For what is likely the classic statement of this position, see ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS 103–10 (Yale Univ. Press 2d ed. 1962).

338. Tribe, *supra* note 23, at 67.

339. *See, e.g.*, Gregory Bassham, *Justice Scalia's Equitable Constitution*, 33 J.C. & U.L. 143, 154 (2006); Berman, *supra* note 16, at 29 & n.72; Robert Henry, *Do Judges Think? Comments on Several Papers Presented at the* Duke Law Journal*'s Conference on Measuring Judges and Justice*, 58 DUKE L.J. 1703, 1709 (2009); Jeffrey Rosen, *Translating the Privileges or Immunities Clause*, 66 GEO. WASH. L. REV. 1241, 1244 (1998); Rosenthal,

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supra note 232, at 4; Bryan H. Wildenthal, *Nationalizing the Bill of Rights: Revisiting the Original Understanding of the Bill of Rights in 1866–67*, 68 OHIO ST. L.J. 1509, 1529 & n.63 (2007); R. George Wright, *Originalism and the Problem of Fundamental Fairness*, 91 MARQ. L. REV. 687, 688 & n.11 (2008).