READING OUR WRITTEN CONSTITUTION

JEFFERSON A. HOLT*

"[W]ords are the tools with which we work, the material . . . out of which the Constitution was written. Everything depends on our understanding of them."[1]

INTRODUCTION

The Constitution of the United States of America contains only 4,543 words.[2] Its twenty-seven Amendments add an additional 3,048 words.[3] Together, these 7,591 words comprise our Nation's great charter.[4] Although relatively brief,[5] the Constitution[6] is expansive in scope. Indeed, its broad terms are not unlike those often found in simple trust agreements.[7] While such language allows for needed flexibility, the lack of specificity in

* With gratitude and appreciation to Professor Patrick Wiseman of the Georgia State University College of Law, without whom this article would not have been possible.

[1]Garson Kanin, *Trips to Felix*, *in* FELIX FRANKFURTER: A TRIBUTE 34, 41–42 (Wallace Mendelson ed., 1964).

[2]Sol Bloom, *Constitution of the United States: Questions & Answers*, U.S. NAT'L ARCHIVES & RECS. ADMIN., http://www.archives.gov/exhibits/charters/constitution_q_and_a.html (last visited Feb. 20, 2015).

[3]*See* U.S. CONST. amends. I–XXVII.

[4]*See* Stephen Gardbaum, *The Myth and the Reality of American Constitutional Exceptionalism*, 107 MICH. L. REV. 391, 399 (2008).

[5]By way of comparison, "[t]he average state constitution is more than three times as long as the federal Constitution. . . . Only a few states have fewer than 10,000 words in their constitutions." DAVID R. BERMAN, STATE AND LOCAL POLITICS 77 (9th ed. 2000). Similarly, the median book length—about 64,000 words—is significantly longer than the Constitution. *See* Gabe Habash, *Average Book Length: Guess How Many Words Are in a Novel*, HUFFINGTON POST: HUFF POST BOOKS (Mar. 9, 2012, 10:34 AM), http://www.huffingtonpost.com/2012/03/09/book-length_n_1334636.html. Orwell's ANIMAL FARM—a relatively short read—totals 29,966 words. *Id.* At the other end of the spectrum, Tolstoy's WAR AND PEACE contains 544,406 words. *Id.*

[6]Unless otherwise indicated, the Constitution and its Amendments will be referred to throughout collectively as the "Constitution."

[7]*See* PHILIP BOBBITT, CONSTITUTIONAL INTERPRETATION 4 (1991) ("[A] written constitution is like a trust agreement. It specifies what powers the trustees are to have and it endows these agents with certain authority delegated by the settlor who created the trust.").

the Constitution also invites disagreement. Inevitably, words mean different things to different people at different points in time.

Recognizing that reasonable people will always disagree about what the broad language of the Constitution actually means in the context of an actual case or controversy, this article provides an overview of the most common approaches to arguing about and deciding cases based on the text of the Constitution. Part I provides some necessary background and begins by placing the Constitution in its proper historical context. Next, the nature of our Constitution as an enduring, foundational, and broadly framed document is discussed. Finally, Part I concludes with a brief review of the doctrine of judicial review and the related objections to a system that gives unelected judges the awesome power to have the last word on the Constitution.

Part II discusses the various approaches to reading and arguing about the words in the Constitution. It presents a typology of the most common approaches to constitutional argument, including historical, dynamic, textual, structural, doctrinal, and prudential forms of argument. Generally speaking, historical and dynamic arguments represent the main theoretical divide in constitutional interpretation. Accordingly, these methods will receive the most extensive treatment in the pages that follow.

Each subsection of Part II will describe the particular approach; identify and discuss at least one judicial opinion that used the approach in whole or in part to reach a legal conclusion; consider the benefits and shortcomings of the approach; and, where possible, place the approach in historical context. Where a particular approach contains more than one method of argument (e.g., historical argument based on original intent versus historical argument based on original meaning), the subtle nuances will be addressed in turn. Importantly, this article does not argue that one approach is "better" than others. Instead, what follows is a broad and objective overview intended to allow the reader to reach his or her own conclusions about the preferred approach to constitutional argument—if there is any such thing.

Nor is this article intended to summarize constitutional doctrine. Inevitably, though, the following discussion references a great deal of doctrine. It is not, however, the specific conclusion with which we are here concerned. Of greater interest to this study is the method used by the Justice to reach the ultimate conclusion. Put another way, this article seeks to demonstrate

the "how" and not the "what" of constitutional decision-making.

Even if the reader decides that no approach is better than the others, Part II serves as a useful catalog of the lawyer's toolkit in the context of constitutional advocacy. If nothing else, understanding how a particular judge decides constitutional questions allows the advocate to make the right arguments to the right person at the right time. More often than not—and especially in majority opinions of the Supreme Court—constitutional interpretation involves a blending of the various approaches detailed below.

Part III presents a single issue, the abortion debate, and analyzes the various opinions written in *Roe v. Wade*[8] through the lens of the approaches discussed in this article. It highlights particular language that evokes one method or the other, and also notes the methods that were not used. In a sense, this section is meant to illustrate the flexible nature of constitutional discussion and how, at any given time and with most issues, there really is something for everyone lurking in the words of the Constitution.

PART I. THE HISTORY, CHARACTER, AND REVIEW OF THE CONSTITUTION

A. The Historical Context of the Constitution

The Constitution emerged over time in the aftermath of the American Revolution.[9] Shortly after winning independence from the Crown, the states established the Articles of Confederation.[10] For a variety of reasons, this "firm league of friendship" soon proved to be an ineffective means of governance.[11] Even-

---

[8]410 U.S. 113 (1973).

[9]*See generally* GORDON S. WOOD, THE CREATION OF THE AMERICAN REPUBLIC, 1776–1787 (1998) (charting the development of American government during the Revolutionary era); Robert N. Clinton, *A Brief History of the Adoption of the United States Constitution*, 75 IOWA L. REV. 891 (1990) (providing an historical and doctrinal overview of how the Constitution evolved over the thirteen years between the Declaration of Independence and the convening of the first Congress).

[10]ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 9 (4th ed. 2011).

[11]*See* Clinton, *supra* note 9, at 893–96 ("Experience with the Articles of Confederation indicated many of its defects. These included lack of effective executive and judicial authority and the resulting Congressional inability to directly enforce or implement national law; state recalcitrance to or rejection of decisions of the Congress or the Court of Appeals; ponderous machinery for the resolution of interstate disputes; disputes between the states and Congress over the appropriate allocation of authority under the Articles and the lack of any effective mechanism to secure a

tually, delegates from five states met at the Annapolis Conference to propose amendments to the Articles.[12] The Annapolis Conference ultimately adjourned without action.[13] The Conference did, however, end with a call for a Constitutional Convention at Philadelphia in 1787.[14] Although initially convened for the limited purpose of amending the Articles, the Constitutional Convention quickly changed course.[15] After only four months in Philadelphia, a group of fifty-five men (thirty-four of whom had studied law) proposed an entirely new Constitution for the United States.[16]

A heated public debate ensued over the next two years.[17] On one side of the debate, the Antifederalists preferred a limited federal government and opposed ratification.[18] On the other

---

final resolution of such conflicts; and chronic financial crisis as states failed to honor congressional requisitions.").

[12]*Id.* at 897.

[13]*See id.*

[14]*Id.* To review the text of the Annapolis Convention, visit *Proceedings of Commissioners to Remedy Defects of the Federal Government: 1786*, AVALON PROJECT (2008), http://avalon.law.yale.edu/18th_century/annapoli.asp.

[15]*See* CHEMERINSKY, *supra* note 10, at 10 (noting that the first recorded vote at the Constitutional Convention adopted "a resolution 'that a national government ought to be established consisting of a supreme legislative, judiciary and executive'").

[16]*See* Bloom, *supra* note 2. To learn more about the debates at the Constitutional Convention, see THE RECORDS OF THE FEDERAL CONVENTION OF 1787 (Max Farrand ed., 1911), *available at* http://oll.libertyfund.org/titles/1785.

[17]Clinton, *supra* note 9, at 910–12. For a more detailed discussion of the ratification debate, see FEDERALISTS AND ANTIFEDERALISTS: THE DEBATE OVER RATIFICATION OF THE CONSTITUTION (John P. Kaminski & Richard Leffler eds., 1st ed. 1989).

[18]*See generally* THE ANTI-FEDERALIST PAPERS AND THE CONSTITUTIONAL CONVENTION DEBATES (Ralph Ketchem ed., 2003) (collecting various speeches, letters, and essays from the Constitutional Convention debates); THE COMPLETE ANTI-FEDERALIST (Herbert J. Storing & Murray Dry eds., 1981) (similarly collecting primary sources from the period in a seven-volume series). For more on the personalities behind the Antifederalist movement, see DAVID J. SIEMERS, THE ANTIFEDERALISTS: MEN OF GREAT FAITH AND FORBEARANCE (2003).

side, the Federalists sought to expand federal power and supported adoption of the new Constitution.[19] In the end, the Federalists won the debate.[20] The Constitution formally displaced the Articles on June 21, 1788, when New Hampshire became the ninth state to ratify its terms.[21] Although 124 amendments were offered by the state ratifying conventions, the first Congress and the states ratified only ten.[22] George Washington, who served as the President of the Constitutional Convention, was inaugurated as the Nation's first president on April 30, 1789.[23] But, it was not until February 2, 1790, the date in which the Supreme Court of the United States held its first session, that "our government under the Constitution became fully operative."[24]

B. The Character of Our Constitution: An Enduring Idea

The Constitution is a unique legal instrument because it was

---

[19]*See* Clinton, *supra* note 9, at 911. A close confidant of Washington, Alexander Hamilton played a significant role in organizing support for the Constitution. For an entertaining discussion of his influence and persistence during and after the Convention, see RON CHERNOW, ALEXANDER HAMILTON 219–42 (2004). For a brief but thoughtful treatment of James Madison, the other primary contributor to THE FEDERALIST and the "Father of the Constitution," see GARRY WILLS, JAMES MADISON (2002).

[20]WILLIAM F. CONNELLEY, JR., JAMES MADISON RULES AMERICA: THE CONSTITUTIONAL ORIGINS OF CONGRESSIONAL PARTISANSHIP 91 (2010) ("Ultimately, as we know, the Anti-Federalists lost the ratification battle, and the nation ratified the Federalist Constitution. Today we are, arguably, James Madison's America.").

[21]*See* Bloom, *supra* note 2; *see also* Gregory E. Maggs, *A Concise Guide to the Records of the State Ratifying Conventions as a Source of the Original Meaning of the U.S. Constitution*, 2009 U. ILL. L. REV. 457 (2009) (presenting an overview of the debates in the state ratifying conventions). The Constitution required ratification by at least nine states "for the Establishment of [the] Constitution between the States so ratifying the Same." U.S. CONST. art. VII. As a preliminary matter, it is important to note that neither the Framers nor the people of the states actually ratified the Constitution; instead, the states as independent sovereigns adopted the proposed constitution. *See* BOBBITT, *supra* note 7, at 4 ("The American innovation was not the writing *per se*, but rather the political theory whereby the state was objectified and made a mere instrument of the sovereign will that lay in the People. That, in turn, made a written constitution possible. And a written constitution made limited government possible."). This distinction is important in the context of several interpretive methods.

[22]*See* Bloom, *supra* note 2. For two modern accounts of the history and context of the Bill of Rights, see LEONARD W. LEVY, ORIGINS OF THE BILL OF RIGHTS (2001) and AKHIL REED AMAR, THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION (2000).

[23]Bloom, *supra* note 2.

[24]*Id.*

meant to endure the shifting tides of public opinion.[25] Unlike a statute, the Constitution cannot be changed through the ordinary legislative process.[26] As a result, altering the Constitution through the amendment process typically requires a broad consensus of parties with sharply varied interests.[27] According to one leading constitutional scholar, "a constitution represents an attempt by society to limit itself to protect the values it most cherishes."[28] Ultimately, simple human nature makes such limitations necessary because "the passions of the moment can cause people to sacrifice even the most basic principles of liberty and justice."[29] At the same time, limitations imposed by those long dead are more difficult to accept than those contemporaneously imposed by democratically elected representatives.[30] Even so, our Constitution has endured for more than 200 years.[31] During this time, Americans have experienced, among other things, the Industrial Revolution, the proliferation of rail, automobile, and air travel, and the Internet Age.

Additionally, the Constitution can be loosely characterized as a framework for good government. Undoubtedly, men like Hamilton and Madison thought they knew best—especially on

---

[25]*See* U.S. Const. pmbl. ("We the People of the United States, in order to . . . secure the Blessings of Liberty to ourselves and our Posterity, do ordain and establish this Constitution for the United States of America."). For a theoretical review of the amendment process, see RESPONDING TO IMPERFECTION: THE THEORY AND PRACTICE OF CONSTITUTIONAL AMENDMENT (Sanford Levinson ed., 1995).

[26]*See* U.S. CONST. art. V (detailing the amendment process). In short, the amendment process is rather cumbersome. It involves two procedural steps: proposal and ratification. *See id.* With regard to the former, only two-thirds of both houses of Congress or two-thirds of the state legislatures may propose a constitutional amendment. *See id.* Once proposed, a potential amendment must be ratified by three-fourths of the states. *See id.*

[27]*See* Stephen M. Griffin, *Constitutionalism in the United States: From Theory to Politics*, *in* RESPONDING TO IMPERFECTION, *supra* note 25, at 37, 52–54 (highlighting President Roosevelt's attempts at introducing constitutional amendments in furtherance of New Deal policies).

[28]CHEMERINSKY, *supra* note 10, at 7.

[29]*Id.* On this point, Chemerinsky offers the familiar mythological tale of Ulysses and the Sirens. *Id.* To avoid the temptation of the Sirens' deadly song, Ulysses ordered his sailors to bind him to the ship's mast. *Id.* Though Ulysses pleaded for release, his sailors followed his earlier command and saved his life. *Id.* Ultimately, Ulysses survived because "he recognized his weakness and protected himself from it." *Id.*

[30]*See* CHEMERINSKY, *supra* note 10, at 7–8. Indeed, in the context, Ulysses' attempt to avoid the Sirens' song, Ulysses bound only himself to the mast—not his children or their children. *See id.*

[31]*See* Bloom, *supra* note 2.

the topic of governance.[32] In proposing the Constitution, they sought to establish general principles that would guide succeeding generations.[33] Some of these principles are found in the explicit text of the Preamble to the Constitution, including the stated desire to "form a more perfect Union"[34] and "promote the general Welfare."[35] Others are found in the more specific provisions of the Constitution and include, for example, an emphasis on protecting private property,[36] the sanctity of the home,[37] and the right to a fair shot in the criminal justice system.[38]

Other guiding principles are not so readily apparent and require an even closer look. First, through its separation of powers and federalism provisions,[39] the Constitution serves as "a

---

[32]Their experiences during the Enlightenment Era necessarily informed the Founders in philosophical, legal, and political matters. *See, e.g.*, DARREN STALOFF, HAMILTON, ADAMS, AND JEFFERSON: THE POLITICS OF ENLIGHTENMENT AND THE AMERICAN FOUNDING 3 (2005) (noting that the United States "was forged in the crucible of the Enlightenment; no other nation bears its imprint as deeply"). Similarly, the Founders' "bad" experiences as English subjects likely gave them confidence in a belief that their way was the better way. *See* THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776) ("[W]henever any Form of Government becomes destructive of these ends, it is the right of the people to alter or to abolish it, and to institute new Government, laying its foundation on such principles, and organizing its powers in such form, as to them shall seem most likely to effect their safety and happiness."). For a useful collection of foundational primary sources, see *The American Constitution—A Documentary Record*, AVALON PROJECT (2008), http://avalon.law.yale.edu/subject_menus/constpap.asp.

[33]Here, the Founders were heavily influenced not only by their colonial experiences, but also by several foundational English documents that would have been familiar to most—if not all—English freemen in pre-Revolutionary America. *See* STALOFF, *supra* note 32, at 5–43. For a comprehensive treatment of the legal reforms that swept through England during the seventeenth century, see THE STUART CONSTITUTION, 1603–1688: DOCUMENTS AND COMMENTARY (J.P. Kenyon ed., 2d ed. 1986).

[34]This can be read to mean a Union that is "more perfect" than that established by the Articles of Confederation. *See* U.S. CONST. pmbl.

[35]*Id.*

[36]*See* U.S. CONST. amend. V ("[N]or shall private property be taken for public use, without just compensation.").

[37]*See* U.S. CONST. amend. III ("No Soldier shall, in time of peace be quartered in any house, without the consent of the Owner, nor in time of war, but in a manner to be prescribed by law."); U.S. CONST. amend. IV ("The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated . . . .").

[38]*See* U.S. CONST. amend. V (guaranteeing "due process of law"); U.S. CONST. amend. VI (creating, among other things, "[i]n all criminal prosecutions," the right to a speedy and public trial, the right to a jury trial, and the right to confront witnesses).

[39]*See* THE FEDERALIST NO. 51, at 290 (James Madison) (Robert A. Ferguson ed.,

framework for balancing liberty against power."[40] In this sense, the Constitution enables effective government while also discouraging the accumulation of too much power in one place. Second, it is also "an intentionally anti-majoritarian document" that operates to restrain the bare preferences of the majority.[41] Here, the Constitution places certain topics outside the realm of the standard political process.[42] Indeed, when constitutional principles are at stake, judicially enforceable rights serve as another necessary "auxiliary precaution" against tyranny.[43] But identifying these broad textual or thematic commands in the Constitution is only the first step. Determining what the commands mean in a concrete dispute is altogether another struggle.

Finally, it is important to note that the Constitution "is only a framework; it is not a blueprint."[44] As a result, much of the language contained in the Constitution is "majestically vague."[45] In other words, the Constitution speaks, for the most part, in

---

2003) ("In the compound republic of America, the power surrendered by the people, is first divided between two distinct governments, and then the portion allotted to each subdivided among distinct and separate departments."). Federalism is the vertical separation of powers between the federal government and the individual state governments. CHEMERINSKY, *supra* note 10, at 3–4. It emerges, in part, from the interplay between Article I, Section Eight and the Tenth Amendment. Article I, Section Eight enumerates the limited powers of Congress. *See* U.S. CONST. art. I, § 8. At the same time, the Tenth Amendment reserves to the states those "powers not delegated to the United States by the Constitution, nor prohibited by it to the States. . . ." U.S. CONST. amend. X. The next diffusion of power is "horizontal" in nature. *See* CHEMERINSKY, *supra* note 10, at 1–3. This separation of powers creates three co-equal branches of the federal government: the legislative, executive, and judicial branches. *See* U.S. CONST. art. I (legislative); U.S. CONST. art. II (executive); U.S. CONST. art. III (judicial); *see also* THE FEDERALIST NO. 47, at 268 (James Madison) (Robert A. Ferguson ed., 2006) ("The accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny."). For an interesting discussion regarding the interplay between federalism and the separation of powers, see Jessica Bulman-Pozman, *Federalism as a Safeguard of the Separation of Powers*, 112 COLUM. L. REV. 459 (2012), and Bradford R. Clark, *Separation of Powers as a Safeguard of Federalism*, 79 TEX. L. REV. 1321 (2001).

[40]*See* LAWRENCE H. TRIBE & MICHAEL C. DORF, ON READING THE CONSTITUTION 6 (1993).

[41]CHEMERINSKY, *supra* note 10, at 8.

[42]*See* TRIBE & DORF, *supra* note 40, at 6.

[43]*Id.*

[44]*Id.*

[45]*Id.* at 7.

broad outlines.[46] For better or worse, it does not provide a great amount of detail. Like the terms found in a typical trust agreement, the words used in the Constitution are meant to provide general guidance, while also allowing for some flexibility over time.[47] As a result, people may find it easy to agree about the broad principles captured in the Constitution, while also disagreeing about the detailed nuances that arise in applying those principles.[48] For example, the basic human desire for fairness makes it easy for most Americans to agree that no person should be denied "equal protection of the laws."[49] But, reasonable people disagree about whether the Fourteenth Amendment's Equal Protection Clause "requires race conscious affirmative action policies in order to remove the effects of past and present discrimination," or whether "a state that engages in affirmative action is violating that same guarantee."[50] While many variables may impact a person's position in the affirmative action debate, each of the various approaches to interpreting the Constitution will typically yield only one result.

C. A Brief Review of Judicial Review

Given the broad language used in the document, it is unfortunate that "the Constitution does not contain the instructions for its own interpretation."[51] Similarly, the Constitution also fails

---

[46]*See id.*

[47]A simple example helps to illustrate this point. Imagine for a moment a trust that requires the trustee to distribute funds to support the beneficiary's "healthy diet." This will vest the trustee with significant discretion to make distributions only after considering advancements in nutritional science. Next, assume that the trust made its first distribution in the 1950s. At that time, a "healthy diet" may have included regular servings of red meat and the occasional cigarette. If the beneficiary survived until today, a "healthy diet" probably looks much different. Aside from considering the known fact that red meat increases the risk for cardiovascular disease and cigarettes cause cancer, the trustee would also be forced to navigate the seemingly endless number of fad diets permeating today's world (e.g., gluten free and Paleo diets) in determining what constitutes a "healthy diet."

[48]*See* CHEMERINSKY, *supra* note 10, at 8.

[49]*See* BOBBITT, *supra* note 7, at xiv; U.S. CONST. amend. XIV, § 1, cl. 2. Chemerinsky offers a similar example involving the First Amendment's guarantee of freedom of speech. *See* CHEMERINSKY, *supra* note 10, at 8 ("[A]lthough people disagree about what speech should be protected and under what circumstances, there is almost universal agreement that there should be freedom of speech.").

[50]BOBBITT, *supra* note 7, at xiv.

[51]*Id.*

to define which governmental institution is to be the authoritative interpreter of the Constitution.[52] On this point, three viable alternatives emerge.[53] Proponents of the first option insist there should be no authoritative interpreter, and each branch should interpret the Constitution for itself within its own sphere.[54] Another approach suggests that different branches have the final say on certain topics.[55] The final approach contemplates that the judiciary should serve as the authoritative interpreter.[56] Of these three alternatives, the third option probably best describes our constitutional system today.[57]

While it is true that "all government officials and institutions are required to engage in constitutional interpretation" in one way or another,[58] early in our history, the Supreme Court se-

---

[52]*See* U.S. CONST. (omitting any direct reference to which branch has the final say in constitutional disputes); KEITH E. WHITTINGTON, POLITICAL FOUNDATIONS OF JUDICIAL SUPREMACY 1-5 (2007), *available at* http://press.princeton.edu/chapters/s8427.pdf.

[53]*See* CHEMERINSKY, *supra* note 10, at 26–30.

[54]This was the view of Presidents Jefferson and President Jackson. *See, e.g.*, Letter from Thomas Jefferson to Abigail Adams (Sept. 11, 1804), *in* 8 THE WRITINGS OF THOMAS JEFFERSON 308 n.1, 311 (Paul Leicester Ford ed., 1897) ("[N]othing in the Constitution has given . . . [the judiciary] a right to decide for the Executive, more than to the Executive to decide for them. . . . [T]he opinion which gives to the judges the right to decide what laws are constitutional, and what not, not only for themselves in their own sphere of action, but for the Legislature & Executive also, in their spheres, would make the judiciary a despotic branch."); Andrew Jackson, Veto Message, *in* 2 MESSAGES AND PAPERS OF THE PRESIDENT 576, 582 (James D. Richardson ed., 1896) ("The opinion of the judges has no more authority over Congress than the opinion of Congress has over the judges, and on that point the President is independent of both.").

[55]This view is captured by the Supreme Court in its political question jurisprudence. *See* CHEMERINSKY, supra note 10, at 131–51. When the Court decides a particular case presents a political question, it is essentially saying that another branch is better suited to address the question. *See, e.g.*, Vieth v. Jubelirer, 541 U.S. 267, 306–07 (2004) (finding a suit alleging a partisan gerrymander to be a nonjusticiable political question). For the classic statement of the political question doctrine, see Baker v. Carr, 369 U.S. 186, 217 (1962).

[56]CHEMERINSKY, *supra* note 10, at 29–30.

[57]*See id.* Of course, one could argue that our current system is a mix of the second and third alternatives. But, this necessarily relies on the fact that the Supreme Court has, in its role as the ultimate interpreter of the Constitution, deferred certain questions to the other branches. *See id.* at 131–51. Nothing in the Constitution requires the Court to refuse to pass judgment on political questions. *See* U.S. CONST. It has done so—wisely or unwisely—on its own accord.

[58]CHEMERINSKY, *supra* note 10, at 26.

cured for itself an important role as the ultimate arbiter of constitutional disputes.[59] In *Marbury v. Madison*, Chief Justice John Marshall wrote the now familiar: "[i]t is emphatically the province and duty of the judicial department to say what the law is."[60] While this statement seems obvious today,[61] it filled a major gap in the Constitution.[62] Simply stated, judicial review is "the means by which a court assures itself that the acts it has been asked to undertake . . . are in fact lawful, that is, that they are authorized and permitted by the Constitution."[63] The doctrine of judicial review has not been successfully challenged since *Marbury*, and the judiciary to this day exercises a strong voice in our constitutional system.

This is not to say that judicial review is without its critics.[64]

---

[59]*See* Marbury v. Madison, 5 U.S. (1 Cranch) 137, 138 (1803) ("An act of congress repugnant to the Constitution cannot become law. The courts of the [United] States are bound to take notice of the constitution."). *See generally* SYLVIA SNOWISS, JUDICIAL REVIEW AND THE LAW OF THE CONSTITUTION (1990) (discussing the doctrine of judicial review).

[60]5 U.S. (1 Cranch) at 177.

[61]It may have even been obvious then—or at least it was to Chief Justice Marshall. *See id.* at 176 ("The question, whether an act, repugnant to the constitution, can become the law of the land, is a question deeply interesting to the United States; but, happily, not of an intricacy proportioned to its interest. It seems only necessary to recognize certain principles, supposed to have been long and well established, to decide it.").

[62]To say that *Marbury* "created" the doctrine of judicial review in the United States probably is an overstatement. More accurately, *Marbury* recognized or acknowledged a doctrine that already existed. In fact, "[i]n the very midst of the generation that ratified the Constitution, Marshall's exercise of the power of judicial review was explicitly and universally taken as appropriate." BOBBITT, *supra* note 7, at 7 (citing the "Federalist papers, available legal precedent, action by the First Congress and all the other conventional sources of legal argument" to support the claim that judicial review as conceived in *Marbury* "is an integral part of the constitutional structure, was intended to be so, and has been confirmed as such countless times").

[63]*See id.* at 6.

[64]*See, e.g.*, Allan C. Hutchinson, *A 'Hard Core' Case Against Judicial Review*, 121 HARV. L. REV. F. 57, 58 (2008) (insisting that judicial review has no legitimate place in a democracy); Jeremy Waldron, *The Core of the Case Against Judicial Review*, 115 YALE L.J. 1346, 1353 (2006) (arguing that judicial review is democratically illegitimate and that representatives of the People are sufficiently capable of protecting individual rights). *But cf.* Richard H. Fallon, Jr., *The Core of an Uneasy Case for Judicial Review*, 121 HARV. L. REV. 1693, 1695 (2008) (suggesting that courts and legislatures both should have veto power over legislation that infringes on fundamental rights).

Indeed, some "question whether judicial review itself is authorized and permitted by the Constitution."[65] Such an argument attacks the legitimacy of the judiciary itself, questioning its institutional capacity to overturn the acts of popularly-elected representatives of the People.[66] One commentator summarizes this objection as follows:

> A Supreme Court decision that strikes down a statute on grounds of its unconstitutionality effectively casts a virtually unchallengeable veto against the acts of elected officials, despite the fact that the Court's members have not themselves been elected to do so nor have been authorized by the Constitution to do so. By thwarting the will of the prevailing majority it exercises an essentially anomalous role in a democracy.[67]

Others go further with their criticism,[68] but the mainstream arguments against judicial review all fall along similar lines.[69] Most importantly, the legitimacy objection—also known as the "Countermajoritarian Objection"[70]—is not lost on the members of the Supreme Court.[71] Aware of its limited institutional capital, the Court may seek to avoid constitutional questions if at all possible.[72] The Court accomplishes this through an interpretive doctrine known as the avoidance canon.[73] Generally speaking, the avoidance canon allows the Court to avoid answering constitutional questions unless it absolutely must.[74]

---

[65]BOBBITT, *supra* note 7, at 6 (internal quotation marks omitted).

[66]*See id.*

[67]*Id.*

[68]*See, e.g.*, ERIC J. SEGALL, SUPREME MYTHS: WHY THE SUPREME COURT IS NOT A COURT AND ITS JUSTICES ARE NOT JUDGES (2012) (arguing, in part, that the Supreme Court is not really a court and instead merely substitutes its ideological preferences for those of the political branches without legal justification).

[69]*See* sources cited *supra* note 64.

[70]*See* BOBBITT, *supra* note 7, at 6.

[71]*See* City of New Orleans v. Dukes, 427 U.S. 297, 303 (1976) ("[T]he judiciary may not sit as a superlegislature to judge the wisdom or desireability of legislative policy determinations made in areas that neither affect fundamental rights nor proceed along suspect lines."); *see also* ALEXANDER BICKEL, UNPUBLISHED OPINIONS OF MR. JUSTICE BRANDEIS 17 (1967) ("Brandeis . . . said: 'The most important thing we do is not doing.'").

[72]*See generally* ALEXANDER BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS (2d ed. 1986) (1962) (advocating a cautious and prudential approach to judicial review).

[73]*See* United States *ex rel*. Attorney General v. Delaware & Hudson Co., 213 U.S. 366, 408 (1909) ("[W]here a statute is susceptible of two constructions, by one of which grave and doubtful constitutional questions arise and by the other of which such questions are avoided, our duty is to adopt the latter.").

[74]*See generally* ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE

This article will proceed based upon the relatively settled understanding that the judiciary has the final say when it comes to assigning meaning to the words of the Constitution. Ultimately, after more than 200 years under a system of strong judicial review, the task of identifying "legitimate forms of constitutional argument" is more important than debating whether judicial review is still legitimate in and of itself.[75] By grounding arguments and decisions in accepted and predictable methods of constitutional argument, lawyers and judges do much to enhance the legitimacy of the judiciary—if not our legal system as a whole.[76]

PART II. METHODS OF CONSTITUTIONAL ARGUMENT

Constitutional interpretation is a tremendously important part of the American legal regime. Over the years, the Supreme Court has been called upon to answer many difficult questions about our system of governance and what it means in the daily lives of citizens. As a result, it should not come as a surprise that the literature regarding constitutional interpretation is vast.[77] The field of constitutional law has even developed its own lexicon,[78] familiar mostly to lawyers, law students, and a small group of well-informed citizens. Reconciling the judicial and academic literature on this point is an impossible task, and this article does

---

INTERPRETATION OF LEGAL TEXTS 247–51 (2012) (detailing the "constitutional-doubt canon").

[75]*See* BOBBITT, *supra* note 7, at 6–10 ("We must put aside our fascination with the mirage of the Countermajoritarian Objection. The doubt it casts on judicial review is an illusion created by the very ideologies that render it impossible to answer.").

[76]*See generally* PHILIP BOBBITT, CONSTITUTIONAL FATE: THE THEORY OF THE CONSTITUTION (1982) (detailing methods of constitutional argument that help give legitimacy to the process of judicial review). For the student interested in learning more about the methods of constitutional interpretation, this book, along with *Constitutional Interpretation*, *supra* note 7, provides a thorough and entertaining introduction to the topic. This article finds much of its structure and terminology in Bobbitt's work.

[77]*See, e.g.*, LACKLAND H. BLOOM, JR., METHODS OF INTERPRETATION: HOW THE SUPREME COURT READS THE CONSTITUTION (2009); WILLIAM DRAPER LEWIS, INTERPRETING THE CONSTITUTION (1937); KEITH E. WHITTINGTON, CONSTITUTIONAL INTERPRETATION: TEXTUAL MEANING, ORIGINAL INTENT, AND JUDICIAL REVIEW (1999); CHRISTOPHER WOLFE, HOW TO READ THE CONSTITUTION (1996); PHILOSOPHY OF LAW, A FIVE-VOLUME ANTHOLOGY OF SCHOLARLY ARTICLES, VOL. 3, CONSTITUTIONAL LAW AND ITS INTERPRETATION (Jules L. Coleman ed., 1994).

[78]*See* Jack M. Balkin & Sanford Levinson, *Constitutional Grammar*, 72 TEX. L. REV. 1771, 1775 (1994).

not attempt to (nor could it) exhaust the available materials on the subject. Instead, the discussion that follows will highlight the basics of the most commonly accepted forms of constitutional argument: historical, dynamic, textual, structural, doctrinal, and prudential. The reader interested in more detailed information—books, scholarly articles, or additional examples of each method in action in the courts—should consult the footnotes for a limited selection of further reading. In addition, Table I is provided in the Appendix as a brief overview of each method.

A. Historical Argument

The first method of argument, historical argument, also is commonly referred to as originalism.[79] It comes in three main varieties: original intent, original meaning, and original principle.[80] The original intent argument asks what the drafters or ratifiers of a particular constitutional provision intended it to mean.[81] The original meaning argument relies on the original public meaning of a constitutional provision at the time of its drafting.[82] In other words, what the text of the First Amendment meant to the reasonably informed citizen in 1791 is what it still means today. The original principle argument seeks to provide more flexibility over time by giving significant, but not dispositive, weight to the original principles found in the Constitution; in this sense, the original principle argument is not significantly different from many forms of dynamic argument.[83] A fourth theory, the original methods historical argument, suggests that modern readers should interpret the Constitution using the methods that the Framers would have used when construing the text of the document.[84] Because this method has not gained

---

[79]*Constitutional Topic: Constitutional Interpretation*, U.S. CONSTITUTION ONLINE, http://www.usconstitution.net/consttop_intr.html (last modified Jan. 24, 2010).

[80]*See* David F. Forte, *The Originalist Perspective*, THE HERITAGE GUIDE TO THE CONSTITUTION (2012), http://www.heritage.org/constitution/#!/introessays/3/the-originalist-perspective.

[81]"The subjective intention of the drafters or ratifiers of an authoritative text. Original intent denotes a legal fiction, since the idea of a collective but identical intent is something that cannot be said to exist in the preparation or adoption of a text." BLACK'S LAW DICTIONARY 881 (9th ed. 2009) (defining intent).

[82]*See* Rob Natelson, *Original Intent, Original Understanding, Original Meaning*, TENTH AMENDMENT CTR. (May 21, 2012), http://tenthamendmentcenter.com/2012/05/21/original-intent-original-understanding-original-meaning/.

[83]*See* Forte, *supra* note 80.

[84]*See generally* John McGinnis & Michael Rappaport, *Original Methods Originalism:*

much traction among judges or scholars, it will not be discussed here. Today, there is an intense debate over the legitimacy of historical argument.[85] As demonstrated below, however, historical argument has been and remains an important part of America's constitutional jurisprudence.

i. Original Intent Argument

Generally speaking, original intent arguments are based on the subjective intent of the drafters of a particular constitutional provision.[86] This approach has also been termed "original expected applications originalism."[87] Thus, the writings of men like James Madison and Alexander Hamilton, who were present at the Constitutional Convention, form the basis of original intent arguments regarding the text of the original Constitution.[88] Similarly, debates from the first Congress over ratification of the Bill of Rights might help shed light on the original intent of any one of the first ten amendments; just as the discussions held by the 40th Congress might hold sway regarding the original intent of the Fourteenth Amendment. This method of argument differs from original meaning textual argument discussed below because of a slight shift in perspective: original meaning textual argument seeks to determine the objective meaning of the text to a reasonably informed person at the time of enactment,

---

A New Theory of Interpretation and the Case Against Construction, 103 NW. U. L. REV. 751, 751 (2009) (arguing that "the Constitution should be interpreted using the interpretive methods that the constitutional enactors would have deemed applicable to it").

[85]*See* INTERPRETING THE CONSTITUTION: THE DEBATE OVER ORIGINAL INTENT (Jack N. Rakove ed., 1990); Richard S. Kay, *Adherence to the Original Intentions in Constitutional Adjudication: Three Objections and Responses*, 82 NW. U. L. REV. 226, 244 (1988). *Compare* Jamal Greene, *The Case for Original Intent*, 80 GEO. WASH. L. REV. 1620, 1680–82 (2012), *and* Randy E. Barnett, *The Relevance of the Framers' Intent*, 19 HARV. J.L. & PUB. POL'Y 403, 403 (1996), *with* Mitchell N. Berman, *Originalism is Bunk*, 84 N.Y.U. L. REV. 1 (2009).

[86]FRANK B. CROSS, THE FAILED PROMISE OF ORIGINALISM 1 (2013).

[87]*Id.* at 24 (internal quotation marks omitted).

[88]Even when a specific statement from a particular Framer is unavailable or unhelpful, original intent argument might still be effectively deployed in a broader sense by divining or inferring intent from circumstances at the time of adoption. *See, e.g.*, Knowlton v. Moore, 178 U.S. 41, 95 (1900) ("The necessities which gave birth to the Constitution, the controversies which preceded its formation, and the conflicts of opinion which were settled by its adoption, may properly be taken into view for the purpose of tracing to its source any particular provision of the Constitution in order thereby to be enabled to correctly interpret its meaning.").

whereas original intent historical argument focuses on, per Justice Scalia, "'what the original draftsmen intended.'"[89]

The Court has employed original intent argument for many years. In 1838, the Court stated that constitutional analysis necessarily relied on "the meaning and intention of the convention which framed and proposed it for adoption and ratification to the conventions of the people of and in the several states."[90] Chief Justice Marshall, who personally knew many of the Framers, regularly referenced their works as important sources from which constitutional meaning could be gleaned. Late in his career as Chief Justice, Marshall noted in *Cohens v. Virginia* that

> [t]he opinion of the *Federalist* has always been considered as of great authority. It is a complete commentary on our constitution; and is appealed to by all parties in the questions to which that instrument has given birth. Its intrinsic merit entitles it to this high rank; and the part two of its authors performed in framing the constitution, put it very much in their power to explain the views with which it was framed.[91]

Only a generation later, the Court relied almost exclusively on original intent arguments to hold that free or enslaved blacks were not "citizens" or "people of the United States" and thus did

---

[89]*See* JACK M. BALKIN, LIVING ORIGINALISM 7 (2011). This type of argument has also been referred to as the "good, old-fashioned kind" of originalism. *See* Raoul Berger, *Originalist Theories of Constitutional Interpretation*, 73 CORNELL L. REV. 350, 350–51 (1988) (describing, in a short space, original intent argument).

[90]Rhode Island v. Massachusetts, 37 U.S. 657, 721 (1838). This statement has appeared in three additional cases since 1838. *See* Utah v. Evans, 536 U.S. 452, 488–510 (2002) (Thomas, J., concurring in part and dissenting in part) (finding that statistical estimation techniques in census-taking do not comply with the constitutional requirement of an "actual enumeration" because of the "historical context, debates accompanying ratification, and subsequent early Census Acts"); McIntyre v. Ohio Elections Comm'n, 514 U.S. 334, 358–71 (1995) (focusing on the "practices and beliefs held by the Founders concerning anonymous political articles and pamphlets" in finding that the Constitution protects anonymous political leafleting); Pollock v. Farmers' Loan & Trust Co., 158 U.S. 601, 619 (1895) (striking a direct tax as unconstitutional based, in part, on records of the Constitutional Convention and a letter from James Madison on the subject).

[91]Cohens v. State of Virginia, 19 U.S. 264, 418 (1821); *see also* Cherokee Nation v. Georgia, 30 U.S. 1, 18 (1831) (rejecting claims brought by the Cherokee Nation because "the framers of our constitution had not the Indian tribes in view, when they opened the courts of the union to controversies between a state or the citizens thereof, and foreign states"); *id.* at 40–42 (Baldwin, J., concurring) (noting—in an eloquent and humble description of the role of judges as "executors" of the Constitution—a preference for the "true meaning and spirit of plain words" but acknowledging a willingness to "refer to the received opinion and fixed understanding of the high parties who adopted [the Constitution]").

not fall within the protective embrace of the Constitution.[92] Writing the opinion of the Court, Chief Justice Taney emphasized, among other things,[93] that blacks

> were at [the time of ratification] considered as a subordinate and inferior class of beings, who had been subjugated by the dominant race, and, whether emancipated or not, yet remained subject to their authority, and had no rights or privileges but such as those who held the power and the Government might choose to grant them.[94]

Rejecting the possibility that a shift in "public opinion or feeling" should have any role in a proper judicial inquiry, the Court insisted that the Constitution "speaks not only in the same words, but with the same meaning and intent with which it spoke when it came from the hands of its framers, and was voted on and adopted by the people of the United States."[95]

---

[92]Dred Scott v. Sandford, 60 U.S. 393, 404 (1856).

[93]Chief Justice Taney also looked behind the relatively clear words of the Declaration of Independence—that "all men are created equal"—and insisted that the Framers of that document could not possibly have meant what they said. *See id.* at 409–10 ("But it is too clear for dispute, that the enslaved African race were not intended to be included, and formed no part of the people who framed and adopted this declaration; for if the language, as understood in that day, would embrace them, the conduct of the distinguished men who framed the Declaration of Independence would have been utterly and flagrantly inconsistent with the principles they asserted; and instead of the sympathy of mankind, to which they so confidently appealed, they would have deserved and received universal rebuke and reprobation.").

[94]*Id.* at 404–05.

[95]*Id.* at 426. Here, Chief Justice Taney rejects dynamic forms of constitutional argument and seemingly endorses original intent as the only appropriate method of judicial construction:

> No one, we presume, supposes that any change in public opinion or feeling, in relation to this unfortunate race, in the civilized nations of Europe or in this country, should induce the court to give to the words of the Constitution a more liberal construction in their favor than they were intended to bear when the instrument was framed and adopted. Such an argument would be altogether inadmissible in any tribunal called on to interpret it. If any of its provisions are deemed unjust, there is a mode prescribed in the instrument itself by which it may be amended; but while it remains unaltered, it must be construed now as it was understood at the time of its adoption. It is not only the same in words, but the same in meaning, and delegates the same powers to the Government, and reserves and secures the same rights and privileges to the citizen; and as long as it continues to exist in its present form, it speaks not only in the same words, but with the same meaning and intent with which it spoke when it came from the hands of its framers, and was voted on and adopted by the people of the United States. Any other rule of construction would abrogate the judicial character of this court, and make it the

Justice Thomas is the flag-bearer of the original intent method today. His opinions concerning the Commerce Clause[96] and the Privileges or Immunities Clause,[97] among others,[98] are textbook examples of this method of argument. In *United States v. Lopez*, a case involving the Gun-Free School Zones Act of 1990, Justice Thomas agreed that Congress acted outside its enumerated power under the Commerce Clause when it attempted to criminalize possession of a firearm within 1,000 feet of a school.[99] In reaching his conclusion that mere possession of a gun was not commerce, Justice Thomas focused on what the word "commerce" meant to the Framers.[100] He noted the Eighteenth Century distinction between commerce, agriculture, and manufacturing (what he collectively called other "productive activities"), and that the distinction was found in records of the state ratifying conventions.[101] Throughout the opinion, Justice Thomas criticized the Court's modern approach to the Commerce Clause, which allows Congress to regulate anything that "substantially affects"[102] interstate commerce. To that end, Justice Thomas insisted that "the Framers could have drafted a

---

> mere reflex of the popular opinion or passion of the day. This court was not created by the Constitution for such purposes. Higher and graver trusts have been confided to it, and it must not falter in the path of duty.

Id.

[96]*See, e.g.*, Gonzales v. Raich, 545 U.S. 1, 57–74 (2005) (Thomas, J., dissenting) (discussing the cultivation and possession of medical marijuana grown in a private backyard that was never sold and that never crossed state lines); United States v. Morrison, 529 U.S. 598, 627 (2000) (Thomas, J., concurring) (finding the Violence Against Women Act to be unconstitutional); United States v. Lopez, 514 U.S. 549, 584–602 (1995) (Thomas, J., concurring) (supporting invalidation of the Gun-Free School Zones Act).

[97]*See, e.g.*, Saenz v. Roe, 526 U.S. 489, 528 (1999) (Thomas, J., dissenting) (noting that the majority's failure to "understand what the Framers of the Fourteenth Amendment thought that it meant . . . raises the specter that the Privileges or Immunities Clause will become yet another convenient tool for inventing new rights, limited solely by the 'predilections of those who happen at the time to be Members of this Court'").

[98]*E.g.*, M.L.B. v. S.L.J., 519 U.S. 102, 138 (1996) (Thomas, J., dissenting) ("The *Griffin* line of cases ascribed to—one might say announced—an equalizing notion of the Equal Protection Clause that would, I think, have startled the Fourteenth Amendment's Framers.").

[99]*Lopez*, 514 U.S. at 584 (Thomas, J., concurring).

[100]*Id.* at 586.

[101]*See id.*

[102]*See* Wickard v. Filburn, 317 U.S. 111, 125 (1942) ("But even if appellee's activity be local and though it may not be regarded as commerce, it may still, whatever its

Constitution that contained a 'substantially affects interstate commerce' Clause had that been their objective."[103] Continuing, Justice Thomas noted how Hamilton and others intended the Federal government to be one of limited powers, and how the substantially affects test works to frustrate that intent by giving Congress a "blank check."[104] In the end, allowing Congress nearly plenary authority under the Commerce Clause (through the substantially affects test) troubled Justice Thomas because it was "something we can assume the Founding Fathers never intended."[105]

The original intent argument is important, appropriately perhaps, because it is rooted in the history and traditions of Anglo-American law.[106] This traditional focus on finding the original intent of the lawgiver is, in part, derived from Western religious traditions, including the school of biblical literalism.[107] But, simply put, the original intent argument is popular because it "has force."[108] In fact, many Americans hold the Founders in such high regard that it seems appropriate to make their intent regarding the Constitution dispositive.[109] Even detractors acknowledge that original intent argument has a certain ideo-

---

nature, be reached by Congress if it exerts a substantial economic effect on interstate commerce and this irrespective of whether such effect is what might at some earlier time have been defined as 'direct' or 'indirect.'").

[103]*Lopez*, 514 U.S. at 588 (Thomas, J., concurring).

[104]*See id.* at 592, 602.

[105]*See id.* at 589.

[106]*See* Raoul Berger, *'Original Intention' in Historical Perspective*, 54 GEO. WASH. L. REV. 296, 299 (1986) (noting that the original intent method dates back some 600 years).

[107]For an in-depth treatment of this point, see Peter J. Smith & Robert W. Tuttle, *Biblical Literalism and Constitutional Originalism*, 86 NOTRE DAME L. REV. 693 (2011). For a brief discussion of the same topic, see Ed Brayton, *Dispatches from the Creation Wars*, SCIENCE BLOGS (Jan. 30, 2006), http://scienceblogs.com/dispatches/2006/01/30/constitutional-originalism-and/.

[108]*See* BOBBITT, *supra* note 76, at 9–10 (noting John Adams's insistence that "frequent recurrence to the fundamental principles of the constitution . . . [is] absolutely necessary to preserve the advantages of liberty and to maintain a free government. . . . The people have a right to require of their law givers and magistrates an exact and constant observance of them" (alterations in original)); *see also supra* notes 28–30 and accompanying text (discussing the story of Ulysses binding himself to the mast).

[109]*See* CROSS, *supra* note 86, at 3 ("Americans may treat the founders as giants or saints who created for us the Constitution that formed the backbone of our nation. . . . The Constitution becomes our secular idol and the founders the prophets.")

logical appeal, even if the Framers were fallible and their collective appeal is overly romanticized.[110]

Unmistakably, the original intent argument appears throughout the Court's opinions,[111] even when the particular opinion also relies on other methods of interpretation. And where an original intent is discernable and not the subject of serious debate, it serves to restrain judges to a pre-determined vision of what the Constitution allows or requires. Original intentionalists, like other originalists, take pride in their rejection of the Constitution as a "living" document.[112] On this point, proponents of original intent direct their opponents to the one sure

---

[110]*See generally id.* at 1–22 (describing various perspectives on the source of originalism's appeal to Americans).

[111]Bobbitt identifies at least five cases where debates from the Constitutional Convention played an important role in the outcome of the case. *See* Powell v. McCormack, 395 U.S. 486, 532–41, 550 (1969) (recounting the Constitutional and state ratifying conventions and recognizing "the Framers' understanding that the qualifications for members of Congress had been fixed in the Constitution" and, thus, Congress could not augment those baseline requirements to exclude a duly elected representative previously censured by Congress); Wesberry v. Sanders, 376 U.S. 1, 8–14 (1964) (addressing apportionment in the House of Representatives and noting that "[w]e do not believe that the Framers of the Constitution intended to permit the same vote-diluting discrimination to be accomplished through the device of districts containing widely varied numbers of inhabitants . . . [because this] would cast aside the principle of a House of Representatives elected 'by the People,' a principle tenaciously fought for and established at the Constitutional Convention"); Cramer v. United States, 325 U.S. 1, 22–26, 47–48 (1945) (reversing a naturalized German citizen's conviction for treason, in part, because the Framers intended to make such convictions exceedingly difficult to establish); Myers v. United States, 272 U.S. 52, 116–17 (1926) (invalidating a law denying the President plenary power to remove postmasters, in part, because "[t]he debates in the Constitutional Convention indicated an intention to create a strong executive . . . so as to avoid the humiliating weakness of the Congress during the Revolution and under the Articles of Confederation"), *abrogated by* Humphrey's Ex'r v. United States, 295 U.S. 602 (1935); Knowlton v. Moore, 178 U.S. 41, 100–06 (1900) (considering what uniformity is required in the exercise of the taxing power by looking to the drafting process during the Constitutional Conventions and to statements made during the ratification process). To review the original discussion in context, see BOBBITT, *supra* note 76, at 11 n.7–11.

[112]*See, e.g.*, BOBBITT, *supra* note 76, at 16 (University of Chicago law professor and author of POLITICS AND THE CONSTITUTION William Winslow Crosskey would pointedly ask his students, "'Did you ever see a "living" document?'"); Ushma Patel, *Scalia Favors "Enduring," Not Living, Constitution*, PRINCETON UNIV. (Dec. 11, 2012, 1:00 PM), http://www.princeton.edu/main/news/archive/S35/52/39O50/ ("'I have classes of little kids who come to the court, and they recite very proudly what they've been taught, "The Constitution is a living document." It isn't a living document! It's dead. Dead, dead, dead!' Scalia said, drawing laughs from the crowd. 'No, I don't say that. . . . I call it the enduring Constitution. That's what I tell them.'").

way to update the Constitution while also preventing so-called judicial activism: the amendment process.[113]

Despite its appeal, the original intent argument is fraught with flaws. Taken to its logical extreme, this method of argument can be used to perpetuate outdated prejudices society has long since rejected. To the modern reader, this problem leaps off the pages of the *Dred Scott* decision. Likewise, should the conception of "commerce" held by an agrarian, pre-industrial society prevent reasonable federal legislation intended to deal with the realities of the modern world? Normative considerations aside, many insist that history simply is too complicated[114] and, given this, judges may not be entirely competent historians.[115] Not only is history easily adapted to support any position, but despite their best efforts judges also sometimes just get it wrong.[116]

Similarly, even for the best historians the original intent of the Founders is elusive at best. First, who should qualify as a Framer of the original Constitution? Is it the men who attended the Constitutional Convention? The state ratifying conventions? Both?[117] Second, even if it were possible to agree on who qualifies as a framer of the particular constitutional provision at issue,

---

[113]*See* Richard A. Posner, *Past-Dependency, Pragmatism, and Critique of History in Adjudication and Legal Scholarship*, 67 U. CHI. L. REV. 573, 591 (2000) ("The only good reason for originalism is pragmatic and has to do with wanting to curtail judicial discretion and thus to transfer political power from judges to legislators, including the framers and ratifiers of constitutional provisions and amendments.").

[114]In fact, even the historians sometimes get it wrong. *See* STEPHEN BREYER, MAKING OUR DEMOCRACY WORK 77 (2010) ("In 2001 historians awarded the coveted Bancroft Prize to a professor whose book purported to prove that few eighteenth-century Americans possessed firearms. That fact made it unlikely that the Second Amendment was written to protect handgun owners. Yet after investigation cast doubt on the prizewinner's data, the historians, in 2002, took the prize away.").

[115]*See* David G. Savage, *'Original Intent' Matter of Opinions*, L.A. TIMES (July 13, 2008), http://articles.latimes.com/2008/jul/13/nation/na-scotus13 (detailing criticism of recent Supreme Court decisions using originalist methods).

[116]BOBBITT, *supra* note 76, at 11 n.9 (noting that Justice Jackson in Cramer v. United States, 325 U.S. 1, 22–26 (1945), "erroneously state[d] that the requirement of two witnesses to the same overt act [in a treason trial] was an original invention of the Convention of 1787 . . . [rather than] the British Treason Trials of 1695").

[117]From the original intentionalist's perspective, a possible answer to this question might be found in one of Madison's addresses to Congress in 1796:

> Whatever veneration might be entertained for the body of men who formed our Constitution, the sense of that body could never be regarded as the oracular guide in expounding the Constitution. As the instrument

it is unlikely that the group itself reached any sort of consensus about how the provision should apply in every given case.[118] Would one dissenting opinion be sufficient to destroy original intent? Does the majority opinion rule? What if there is no illuminating discussion in the records passed down through the years? Admittedly, the Framers may have agreed about how a particular provision would apply to a core fact pattern the provision was drafted to address. But, at the margins, it is impossible to imagine that the Framers even considered—much less agreed upon—how the provision should be applied to unanticipated fact patterns for time immemorial.[119] Thus, if original intent argument requires a court to determine how the "[F]ramers and ratifiers intend[ed] their intentions to be determined and applied[,]" then it is difficult to resist the conclusion that "[w]e do not know this and we cannot know it."[120]

For adherents to the original intent method, all this difficulty is compounded by the fact that even the Framers of the Constitution may not have intended their own intentions to be binding. For example, in a dispute carried out in a series of editorials, Madison and Hamilton debated the President's power to declare the United States a neutral party in a war between England and France.[121] Hamilton, writing under the pen name

---

> came from them it was nothing more than the draft of a plan, nothing but a dead letter, until life and validity were breathed into it by the voice of the people, speaking through the several State Conventions. If we were to look, therefore, for the meaning of the instrument beyond the face of the instrument, we must look for it, not in the General Convention, which proposed, but in the State Conventions, which accepted and ratified the Constitution.

JACK N. RAKOVE, ORIGINAL MEANINGS: POLITICS AND IDEAS IN THE MAKING OF THE CONSTITUTION 17–18 (1996).

[118]*See* SCALIA & GARNER, *supra* note 74, at 391–96 (addressing "[t]he false notion that the purpose of interpretation is to discover intent" and contending that, with a large body like a legislature, there can be no meeting of the minds).

[119]*See* BOBBITT, *supra* note 76, at 23–24 ("There is . . . Justice Rehnquist's sarcastic charge that 'if those responsible for [the Bill of Rights and the Fourteenth Amendment] could have lived to know that their efforts had enshrined in the Constitution the right of commercial vendors of contraceptives to peddle them to unmarried minors through such means as window displays and vending machines located in the men's rooms of truck stops . . . it is not difficult to imagine their reaction' when actually, it *is* difficult to imagine their reactions, much more difficult than to imagine their reactions to events contemporary with their own lives." (alteration in original) (footnote omitted)).

[120]*Id.* at 10.

[121]*See* ALEXANDER HAMILTON & JAMES MADISON, LETTERS OF PACIFICUS AND HELVIDIUS ON THE PROCLAMATION OF NEUTRALITY OF 1793, at 3–6, 53, 57 (Gordon

Pacificus, took a position contrary to one he had expressed only a few years earlier in Federalist No. 69.[122] Madison, writing as *Helvidius*, took Hamilton to task for this and derided Hamilton's willingness to, as we might say today, flip-flop on such an important issue.[123] But, Madison himself also is guilty of changing his mind. He did so in the context of the President's removal power[124] and, more notably, regarding the Bank of the United States.[125] Given that the Framers disagreed among themselves and at times changed their own minds, it is not difficult to conclude that a collective original intent is all but impossible to come by. Thus, the principal flaw of original intentionalism is that it requires a judicial imagination that is as unreasonable as it is creative. For the method to work, the interpreter must first establish what a particular Framer or group of Framers intended the Constitution to be, then assume that no one disagreed with that

---

L. Ford et al. eds., 1845), *available at* http://ia601403.us.archive.org/26/items/lettersofpacific00hami/lettersofpacific00hami.pdf. Hamilton supported President Washington's Proclamation of Neutrality by countering several objections to the Proclamation, and in response Madison attacked Hamilton's views and advocated a strict constructionist view in regard to executive power. *Id.*

[122]*Compare* THE FEDERALIST NO. 69 (Alexander Hamilton) (discussing the relatively limited power of the presidency as compared to the hereditary monarch), *with* HAMILTON & MADISON, *supra* note 121, at 5–52 (where Hamilton argues for more expansive presidential powers in the context of foreign affairs).

[123]HAMILTON & MADISON, *supra* note 121, at 77 ("Had it been foretold in the year 1788, when this work was published, that before the end of the year 1793, a writer, assuming the merit of being a friend to the constitution, would appear, and gravely maintain, that this function, which was to be *without consequence* in the administration of the government, might have the consequence of deciding on the validity of revolutions in favour of liberty, of putting the United States in a condition to become an associate in war—nay, of laying the *legislature* under an *obligation* of *declaring* war, what would have been thought and said of so visionary a prophet? The moderate opponents of the constitution would probably have disowned his extravagance. By the advocates of the constitution, his prediction must have been treated as an experiment on public credulity, dictated either by a deliberate intention to deceive, or by the overflowings of a zeal too intemperate to be ingenuous." (internal quotation marks omitted)).

[124]William R. Casto, *Pacificus and Helvidius Reconsidered*, 28 N. KY. L. REV. 612, 620 n.25 (2001).

[125]Kurt T. Lash, *Originalism, Popular Sovereignty, and Reverse Stare Decisis*, 93 VA. L. REV. 1437, 1448 (2007) (noting that Congressman Madison believed the First Bank of the United States was unconstitutional but that, only a couple of decades later, President Madison signed legislation authorizing the Second Bank of the United States). The national bank issue also suggests the Framers did not agree about the meaning of the Constitution among themselves. Madison and Hamilton, to name only two, held opposing views during the debate over the First Bank of the United States. *See* BALKIN, *supra* note 89, at 28.

position, and finally picture that same Framer today "at 300 years old, having lived the entire course of American history with unchanged views."[126] Because of these conceptual challenges, consistent critiques from the academy,[127] and the Senate's rejection in 1987 of originalist Judge Robert Bork as a nominee for the Supreme Court,[128] most originalists have softened their position in recent years. One variation of historical argument—original meaning—is discussed in the next section.

ii. Original Meaning Argument

Original meaning historical argument focuses on what the words of the Constitution meant to the reasonably informed person at the time a particular constitutional provision or amendment was drafted. Notable today mainly because of Justice Scalia's writings both on and off the bench, original meaning historical argument seeks to determine "how the text of the Constitution was originally understood."[129] It is important to distinguish, however, that this approach seeks to determine "the original meaning of the text, not what the original draftsmen intended."[130] Ultimately, proponents of original meaning textual argument are committed to the idea that "[t]he Constitution is a written instrument. As such its meaning does not alter. That which it meant when adopted, it means now."[131]

Several recent cases provide useful illustrations of the original meaning textual argument. The first of these cases is *Kelo v. City of New London*,[132] where the Court addressed the Fifth

---

[126]CROSS, *supra* note 86, at 27.

[127]*See, e.g.*, Berman, *supra* note 85, at 37–60 (criticizing original intentionalism, or what the author calls "hard originalism").

[128]*See* BOBBITT, *supra* note 7, at 83–108 (discussing the failed nomination of Judge Robert Bork, who during his Supreme Court confirmation hearings insisted that "[t]he only legitimate way . . . [to interpret the Constitution] is by attempting to discern what those who made the law intended").

[129]*See* ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 38 (Amy Gutmann et al. eds., 1997); *see also* McIntyre v. Ohio Elections Comm'n, 514 U.S. 334, 358–60 (1995) (Thomas, J., concurring) (providing an overview of the Court's use of original meaning in the context of the First Amendment).

[130]SCALIA, *supra* note 129, at 38.

[131]*See* South Carolina v. United States, 199 U.S. 437, 448 (1905), *overruled by* Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528 (1985).

[132]545 U.S. 469 (2005).

Amendment's Takings Clause.[133] Specifically, the Court considered whether a municipality seeking to eradicate urban blight through a comprehensive plan of economic re-development could, under the "public use" requirement of the Takings Clause, take land from one private owner and transfer it to another private owner upon payment of just compensation.[134] A majority of the Court answered this question in the affirmative, essentially deferring the determination of what constitutes a "public use" to the political branches.[135]

Justice Thomas disagreed with the majority opinion.[136] In a rather lengthy dissent, he employed the original meaning historical argument to illustrate why the public use requirement originally meant "that the government may take property only if it actually uses or gives the public a legal right to use the property."[137] In addition to discussing the entry on "use" from a dictionary published in 1773,[138] Justice Thomas focused on the limited nature of the public use requirement as expressed in contemporary legal treatises, including two written by Blackstone and Kent.[139] Finally, Justice Thomas set out a detailed account of "[e]arly American eminent domain practice" in the states, which typically limited use of the takings power to developing "roads, toll roads, ferries, canals, railroads, and public parks" and did not involve the passing of title from one private party to another.[140]

In conclusion, Justice Thomas noted that the Court was "faced with a clash of constitutional principle and a line of un-

---

[133]*Id.* at 472.

[134]*Id.*

[135]*See id.* at 482–84.

[136]*Id.* at 505–23 (Thomas, J., dissenting).

[137]*Id.* at 521.

[138]*Kelo*, 545 U.S. at 508; *see also* Nat'l Fed'n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566, 2644 (2012) (noting definitions of the word "regulate" from Founding Era dictionaries in support of the conclusion that the Affordable Care Act's individual mandate goes beyond mere regulation and "directs the creation of commerce").

[139]*Kelo*, 545 U.S. at 505, 510–11 (Thomas, J., dissenting).

[140]*Id.* at 511–12. Use of this evidence is complicated by the fact that it was not until passage of the Fourteenth Amendment that the Takings Clause applied to the states. *Id.* at 512. Justice Thomas parried this objection by noting that many states had a public use requirement in their own constitutions, and, thus, they still "shed light on the original meaning of the same words contained in the Public Use Clause." *Id.*

reasoned cases wholly divorced from the text, history, and structure of our founding document."[141] In such circumstances, he stated that the Court "should not hesitate to resolve the tension in favor of the Constitution's original meaning."[142]

Another example of the original meaning historical argument appears in *District of Columbia v. Heller*.[143] At issue in *Heller* was the constitutionality of a ban on possession of usable handguns in the home.[144] Five members of the Court struck down the handgun ban, reasoning that it violated the Second Amendment's operative command that "the right of the people to keep and bear Arms, shall not be infringed."[145]

Justice Scalia wrote the opinion of the Court.[146] In a discussion that is as much a history lesson as it is a judicial opinion, he considered the "meaning of the Second Amendment" by looking almost exclusively to evidence of its "original understanding."[147] Like Justice Thomas's opinion in *Kelo*, the *Heller* decision relies on a variety of sources to establish this understanding, including: dictionaries, state constitutional provisions, and relevant legal literature from the time.[148] Justice Scalia also cited seventeenth century disarmaments by Stuart Kings of England and the resulting English Bill of Rights in support of the conclusion that "[b]y the time of the founding, the right to have arms had become fundamental for English subjects."[149] In the end, the fact that members of the Founding Generation "understood the right to enable individuals to defend themselves" meant that such a right endured into the twenty-first century and included the ability to keep a modern handgun in the home.[150]

Of course, the dissenting opinions found conflicting evidence in the historical record.[151] Taken together, the dissenting

---

[141]*Id.* at 523.

[142]*Id.*

[143]554 U.S. 570 (2008).

[144]*Id.* at 573.

[145]*Id.* at 576, 635 (internal quotation marks omitted).

[146]*Id.* at 572.

[147]*Id.* at 576, 605–25. For an equally entertaining opinion addressing the historiography of the Confrontation Clause, see Crawford v. Washington, 541 U.S. 36, 42-45 (2004) (detailing "the original meaning of the Confrontation Clause" based on, among other things, lessons learned from the 1603 treason trial of Sir Walter Raleigh).

[148]*Heller*, 554 U.S at 581–82, 584–86, 591–98.

[149]*Id.* at 592–93.

[150]*See id.* at 592, 594.

[151]*See id.* at 660-61 (Stevens, J., dissenting); *id.* at 714–15 (Breyer, J., dissenting).

opinions support the general proposition that "the Second Amendment protects militia-related, not self-defense-related, interests."[152] Nevertheless, Justice Scalia de-emphasized the Second Amendment's prefatory clause—"A well-regulated Militia, being necessary to the security of a free State"—by reading it broadly and limiting its binding force.[153] Convinced that his understanding of the original understanding of the Second Amendment was correct, Justice Scalia concluded by noting that while reasonable people might disagree about what gun rights should mean in modern America, "what is not debatable is that it is not the role of this Court to pronounce the Second Amendment extinct."[154]

Like the original intent argument, the original meaning argument has generated a vibrant scholarly debate.[155] As an initial matter, original meaning is appealing because, unlike dynamic argument, the interpreter "at least knows what he is looking for: the original meaning of the text."[156] In this sense, the search for the original understanding potentially makes outcomes more predictable; history can sometimes be a relatively stable marker, especially when viewed alongside a dynamic standard like the "evolving standards of decency that mark the progress of a maturing society."[157] As discussed above, however, all historical sources—both primary and secondary—potentially contain a revisionist element that can distort judicial inquiry. But, even if the sources could speak to us across the ages with an unadulterated purity, it is highly unlikely that any original understanding ever existed in the first place. This is especially so when the Court does what it is often asked to do: resolve a contentious constitutional question about which reasonable minds differ.[158] As demonstrated by the splintered opinions in *Heller*, one is likely to find bits of history to support one side or the other of

---

[152]*See id.* at 681 (Breyer, J., dissenting).

[153]*See Heller*, 554 U.S. at 595–97 (majority opinion) (internal quotation marks omitted).

[154]*See id.* at 636.

[155]*Compare* Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849 (1989), *with* William Michael Treanor, *Taking Text Too Seriously: Modern Textualism, Original Meaning, and the Case of Amar's Bill of Rights*, 106 MICH. L. REV. 487 (2007).

[156]*See, e.g.*, SCALIA, *supra* note 129, at 45.

[157]*See id.* at 46 (internal quotation marks omitted).

[158]On this point, consider the extent to which there is any broadly accepted "understanding" among today's citizenry regarding the finer points of any provision of the Constitution.

any constitutional debate.

In addition to promoting predictable results, the original meaning argument also potentially promotes a related interest in stability. On the one hand, the Constitution is a governing charter meant to bind succeeding generations. Thus, it seems fitting that the Constitution "ought to be read as a still-photo command."[159] By ascribing to the constitutional provision at issue the meaning it had when it was adopted, judicial analysis is limited to a simple descriptive task that is wholly devoid of the aspirational characteristics of legislative decision-making. Like adherents to the original intent argument, the original-meaning originalists would also agree that the Constitution can be updated, but only through an amendment to the text itself.

On the other hand, the Constitution is written in broad, aspirational phrases. It is unlikely the framers of any constitutional provision meant to limit the meaning of the words to the contemporary understanding of those words. Dworkin, for example, argues that "[i]t is near inconceivable that sophisticated eighteenth-century statesmen, who were familiar with the transparency of ordinary moral language, would have used 'cruel' as shorthand for 'what we now think cruel.'"[160] Similarly, Tribe argues that "a text that has a strong transtemporal extension cannot be read in the same way as, say, a statute or regulation enacted at a given moment in time to deal with a specific problem."[161] In other words, because a Constitution is meant to endure, we must allow some flexibility to make sure that it does.[162]

While other objections to the original meaning historical argument abound, only a few will be briefly discussed here. First, many opponents note that the original understanding argument is incapable of overcoming the doctrine of stare decisis.[163] Put another way, even the original meaning of a constitutional provision will often bow to related precedent where the two are at odds.[164] This, however, proves little. No method of constitutional interpretation can ignore the heavy weight of a long line

---

[159]SCALIA, *supra* note 129, at 79–80.

[160]*Id.* at 121.

[161]*Id.* at 83–84.

[162]*See id.*

[163]*See id.* at 139.

[164]*See id.* at 138–39.

of precedent that is immediately on point.[165]

Second, it is conceptually difficult to reconcile a commitment to original meaning with the need to apply the Constitution to modern factual scenarios. For example, Justice Scalia in *Heller* summarily rejected the notion that "only those arms in existence in the 18th century are protected by the Second Amendment."[166] Continuing, he noted that because "the First Amendment protects modern forms of communications, and the Fourth Amendment applies to modern forms of search, the Second Amendment extends, prima facie, to all instruments that constitute bearable arms, even those that were not in existence at the time of the founding."[167] Although Justice Scalia insists this is not problematic, such reasoning requires the original-meaning originalist to look outside the original meaning of the text in order to reach a result in any given case and make subjective value judgments about which modern facts might fall within the scope of a centuries-old legal paradigm.

Worse still, the original understanding argument also "freez[es] a fixed set of rights into constitutional ice" based on a "faded snapshot of a bygone age."[168] If Holmes's notion that "[t]he life of the law has . . . been experience"[169] is to be taken seriously, then the original meaning argument is problematic because it removes all post-enactment experience from the judicial calculus and forces current generations to be "governed by the lights of those less enlightened."[170] Another recent variation of historical argument responds to this concern.

iii. Original Principle Argument

The original principle historical argument seeks a middle ground in the debate between originalists and living constitutionalists. The theory is relatively new and has seen little direct

---

[165]*See* SCALIA, *supra* note 129, at 138–39.

[166]*See* District of Columbia v. Heller, 554 U.S. 570, 582 (2008).

[167]*Id.* (citations omitted).

[168]SCALIA, *supra* note 129, at 81.

[169]OLIVER WENDELL HOLMES, JR., THE COMMON LAW 1 (1881) ("The life of the law has not been logic: it has been experience. . . . The law embodies the story of a nation's development through many centuries, and it cannot be dealt with as if it contained only the axioms and corollaries of a book of mathematics.").

[170]*See* Patrick Wiseman, Lecture at Ga. State Univ. 3 (Jan. 12, 2012) (on file with author).

application in the judicial context.[171] The original principle argument finds its most cogent expression in Jack Balkin's book *Living Originalism*.[172] Although Balkin refers to his approach as a type of originalism, it is difficult to classify it as such—at least in the traditional sense of that term.[173] In fact, Balkin claims that the concepts of original meaning and living constitutionalism are "compatible rather than opposed."[174] To that end, Balkin proposes a new method of constitutional framework he calls "*framework originalism*."[175]

Three main concepts supporting framework originalism merit brief discussion. The first is a concept Balkin calls "text and principle."[176] This method "requires fidelity to the original meaning of the Constitution, and in particular, to the rules, standards, and principles stated by the Constitution's text."[177] Thus, Balkin rejects an original intent method in favor of the original meaning method described in the preceding section.[178] Also, text and principle requires each succeeding generation to ascertain and implement the principles inherent in the text "and to build out constitutional constructions that best apply to the constitutional text and its associated principles in current circumstances."[179] Here, framework originalism acknowledges the fact that times do change, even if the broader meaning of the Constitution does not.

Second, in support of the text and principle concept, Balkin makes a key distinction between constitutional interpretation

---

[171]The phrase "original principle" appears in the context of a constitutional discussion in only a handful of Supreme Court cases. *See* Providence Bank v. Billings, 29 U.S. 514, 524 (1830) ("The power of legislation, and consequently of taxation, operates on all the persons and property belonging to the body politic. This is an original principle, which has its foundation in society itself.").

[172]*See* BALKIN, *supra* note 89. For the article that preceded the full-length text, see Jack M. Balkin, *Framework Originalism and the Living Constitution*, 103 NW. U. L. REV. 549 (2009). For brief summaries of Balkin's work, see Randy E. Barnett, *Welcome to the New Originalism: A Comment on Jack Balkin's Living Originalism*, 6 JERUSALEM REV. LEGAL STUD. 1 (2013), and Robert VerBruggen, *Book Review: 'Living Originalism,'* WASH. TIMES (Feb. 13, 2012), http://www.washingtontimes.com/news/2012/feb/13/the-original-living-constitution/?page=all.

[173]*See* BALKIN, *supra* note 89, at 3.

[174]*Id.*

[175]*Id.*

[176]*Id.*

[177]*Id.*

[178]*See id.*

[179]BALKIN, *supra* note 89, at 3.

and constitutional construction.[180] Interpretation involves the "ascertainment of meaning" from particular text, while construction entails the creation of doctrines and precedents by the judicial branch and the development of constitutional institutions by the political branches.[181] Thus, the Constitution can be viewed "as primarily a framework for governance, a skeleton on which much will later be built."[182] Given this framework, "[e]ach generation must do its part to keep the plan going and to ensure that it remains adequate to the needs and the values of the American people."[183]

Third, Balkin distinguishes between three types of constitutional language. The first type of language establishes determinate rules, such as the requirement that the president be thirty-five years old.[184] The second type of language creates standards, like the requirement that the government may not conduct "unreasonable searches and seizures."[185] The third involves constitutional principles, such as the Fourteenth Amendment's guarantee of equal protection under the law.[186] When the Constitution provides a fixed rule, discretion is limited, and one must look to the original understanding to determine the meaning of the rule. When standards or principles are at stake, the interpreter is required to engage in constitutional construction and flesh out the meaning of the Constitution in "our own circumstances in our own time."[187] To do this, Balkin suggests that judges look to "political and social movements that have changed our constitutional common sense . . . . [and] draw on a rich tradition of sources that guide and constrain interpretation, including pre- and post-enactment history, original expected application, previous constitutional constructions, structural and intertextual arguments, and judicial and nonjudicial precedents."[188]

Balkin's *Living Originalism* presents a comprehensive and

---

[180]*Id.* at 4–5.

[181]*Id.*

[182]*Id.* at 31; *see* KEITH E. WHITTINGTON, CONSTITUTIONAL CONSTRUCTION: DIVIDED POWERS AND CONSTITUTIONAL MEANING (1999).

[183]BALKIN, *supra* note 89, at 4.

[184]*Id.* at 6.

[185]*Id.*

[186]*Id.*

[187]*Id.* at 7. It is at this point where Justice Scalia and Balkin part ways. *See id.*

[188]*See* BALKIN, *supra* note 89, at 15–16; *see also id.* at 81–93 (discussing the role of social movements in constitutional interpretation).

useful framework for thinking about constitutional interpretation. But, its provenance is neither originalist nor, for that matter, grounded in any one method of constitutional interpretation. Statements appear throughout the text that could just as easily have been written by Justice Brennan in support of a living Constitution.[189] Additionally, the method offered by Balkin "use[s] . . . all of the familiar modalities of constitutional argument and produce[s] the same kinds of arguments that lawyers and judges normally make."[190] This reliance on a combination of methods to determine how to apply original standards and principles to modern problems seems to bring our inquiry back to square one. Moreover, when applied to specific constitutional contexts, framework originalism often produces results that would be more likely to follow from a dynamic rather than a historical method. For example, Balkin's views regarding federal power under the Commerce Clause sharply contrast those held by the original intent and the original understanding crowds.[191]

Admittedly, framework originalism does produce some results that are consistent with results produced by the more common methods of historical argument. For example, Justice Thomas and Balkin would probably agree that the Privileges or Immunities Clause was improperly circumscribed in the *Slaughter-House Cases*.[192] At the same time, they likely disagree about why this is so. On the one hand, Justice Thomas would point to the original intent and the original meaning of the Privileges or Immunities Clause.[193] On the other hand, Balkin would seek to

---

[189]*See, e.g.*, *id.* at 95 ("Each of us, in our own way, needs ways of talking about the Constitution that do not take existing arrangements as presumptively correct; that do not require us to bow down to the idol of the Constitution-in-practice."); *id.* at 96, 99 ("If the Constitution is to be 'our' Constitution, we must be able to see ourselves as part of a project that unites past, present, and future generations. . . . [T]he Constitution is ours if we are able to have faith that over time it will come to respect our rights and our values.").

[190]*Id.* at 129.

[191]*See id.* at 138–82 (discussing application of framework originalism to cases decided under the Commerce Clause). *See also* CROSS, *supra* note 86, at 1; SCALIA, *supra* note 129, at 38.

[192]*Compare* BALKIN, *supra* note 89, at 201 (noting an "original wrong turn in *Slaughter-House* and *Cruickshank*" and suggesting that "[f]idelity to original meaning requires taking the text of the privileges and immunities clause seriously"), *with* McDonald v. City of Chicago, 561 U.S. 742, 805–06 (2010) (Thomas, J., concurring) (insisting that the Privileges or Immunities Clause and not the Due Process Clause is the proper place to recognize a national right to keep and bear arms).

[193]*See, e.g.*, *McDonald*, 561 U.S. at 852–54.

determine "what construction make[s] the most sense today."[194] This does not necessarily make framework originalism wrong; it simply makes it "functionally indistinguishable from living constitutionalism."[195] With this in mind, we turn to a discussion of dynamic argument.

B. Dynamic Argument

Like historical argument, dynamic argument is a complex topic. However, unlike historical argument, dynamic argument is easier to discuss at a higher level of generality. For this reason, this section will not discuss the many slight variations of dynamic argument under individual sub-headings. Instead, it will introduce dynamic argument as a catch-all approach to interpreting the Constitution, note several of the most common varieties of dynamic argument, and discuss a few notable examples of dynamic argument. Finally, like the others to follow, this section will consider a few of the justifications for and objections to dynamic argument.

In its most basic form, dynamic argument relies on the notion that our Constitution "is one that evolves, changes over time, and adapts to new circumstances, without being formally amended."[196] It is our perspective today, given all that we know about the past and the present, which matters most in constitutional inquiry. Along those lines, Justice Holmes once stated:

> [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 ou[r] whole experience and not merely in that of what was said a hundred years ago*. The treaty in question does not contravene any prohibitory words to be found in the Constitution. The only question is whether it is forbidden by some invisible radiation from the general terms of the Tenth Amendment. We must consider what this country has become in deciding what that amendment has reserved.[197]

---

[194]BALKIN, *supra* note 89, at 207.

[195]VerBruggen, *supra* note 172.

[196]*See* DAVID A. STRAUSS, THE LIVING CONSTITUTION 1 (2010).

[197]Missouri v. Holland, 252 U.S. 416, 433–34 (1920) (emphasis added).

In popular culture, proponents of dynamic argument often refer to it as "living constitutionalism."[198] Opponents, on the other hand, deride dynamic argument as nothing more than judicial activism.[199] However it is characterized, it is impossible to deny that dynamic argument is an increasingly important part of our constitutional jurisprudence.[200]

Dynamic argument comes in many theoretical forms. The first and perhaps simplest of these forms claims that judges using a dynamic approach are simply doing what judges have always done: developing constitutional concepts in the tradition of the common law.[201] Instead of limiting the judge's role to that of historian, dynamic argument allows judges the freedom to "[r]eason[] from precedent, with occasional resort to basic notions of fairness and good policy."[202] The limitations inherent

---

[198]*See* STRAUSS, *supra* note 196, at 1. Dynamic argument might also be referred to as "organic" argument, just as living constitutionalism might be described as "vitalism." All of the names capture the same idea.

[199]*See, e.g.*, *Judicial Activism*, THE HERITAGE FOUNDATION (2015), http://www.heritage.org/initiatives/rule-of-law/judicial-activism (providing links to so-called cases of judicial activism and identifying several different types of judicial activism, including "Playing Legislator" and "Judicial Imperialism" and noting cases of constitutional interpretation whereby Justices supposedly employ a "Living Constitution" analysis).

[200]*See, e.g.*, McCreary Cnty. v. ACLU, 545 U.S. 844, 879 (2005) ("Indeterminate edges are the kind to have in a constitution meant to endure, and to meet 'exigencies which, if foreseen at all, must have been seen dimly, and which can be best provided for as they occur.'" (quoting McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 415 (1819))); Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 290 (1988) (Brennan, J., dissenting) ("'[O]ur Constitution is a living reality, not parchment preserved under glass . . . .'" (quoting Shanley v. Ne. Indep. Sch. Dist., 462 F.2d 960, 972 (5th Cir. 1972))).

[201]*See* STRAUSS, *supra* note 196, at 33–49 (describing a common law approach to constitutional adjudication); *see also* Trop v. Dulles, 356 U.S. 86, 100–01 (1958) (using a common law approach in developing the Cruel and Unusual Punishment Clause and noting that the Eighth Amendment "must draw its meaning from the evolving standards of decency that mark the progress of a maturing society"); David A. Strauss, *Common Law Constitutional Interpretation*, 63 U. CHI. L. REV. 877 (1996) (squaring originalist and textualist approaches within the broader common law milieu).

[202]*See* STRAUSS, *supra* note 196, at 43; *see also* BENJAMIN N. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 17 (1921) ("The great generalities of the constitution have a content and a significance that vary from age to age . . . . Interpretation, thus enlarged, becomes more than the ascertainment of the meaning and intent of lawmakers whose collective will has been declared. It supplements the declaration, and fills the vacant spaces, by the same processes and methods that have built up the customary law.").

in the common law system also work to limit the judge's discretion, and bad decisions will be overruled by a later decision or an amendment. In short, dynamic argument is proper because it "is what judges and lawyers do."[203]

Another form of dynamic argument, advanced by Philip Bobbitt, is known as "ethical" argument.[204] This type of argument "relies on a characterization of American institutions and the role within them of the American people. It is the character, or *ethos*, of the American polity that is advanced in ethical argument as the source from which particular decisions derive."[205] From this ethos certain "rules may be derived, whether they are embodied in the text or not."[206] Consequently, the ethical approach puts as much emphasis on what is not said in the Constitution as on what is specifically enumerated.[207] It looks to many, if not all, of the various approaches to constitutional interpretation, even when they appear to conflict.[208] It reasons from specific text to create general principles that are easily and consistently applicable to later cases.[209] And it relies on the "constitutional conscience" of the decision maker when different strains of argument conflict.[210] In other words, the Constitution provides more than a collection of words or a snapshot in time. It gives us "a constitutional motif, a cadence of our rights, so that once heard we can supply the rest on our own."[211]

There is also a moral approach to dynamic argument. This approach, which finds expression in the work of Ronald Dworkin,[212] recognizes that lawyers and judges "instinctively

---

[203]*See* STRAUSS, *supra* note 196, at 43.

[204]BOBBITT, *supra* note 76, at 94.

[205]*Id.*

[206]*Id.* at 126.

[207]*See id.* at 144–45.

[208]*See id.* at 94 ("[W]e expect the creative judge to employ all the tools that are appropriate, often in combination, to achieve a satisfying result."); *id.* at 124 ("[N]o sane judge or law professor can be committed solely to one approach."); BOBBITT, *supra* note 76, at 139 ("[N]one of these modes can be shown to be necessarily illegitimate.").

[209]*See id.* at 142–67.

[210]*Id.* at 167–77; *see id.* at 128 ("The constitutional sense on which these arguments are based is probably more highly refined and sensitive among the Court than among any other nine persons in the country.").

[211]*Id.* at 177. Bobbitt would resolve the abortion issue, discussed *infra* Part III, by deriving from the Constitution a general rule that the "[g]overnment may not coerce intimate acts" (i.e., carrying a child to term). *See id.* at 159–60.

[212]*See generally* RONALD DWORKIN, FREEDOM'S LAW: THE MORAL READING OF THE

treat the Constitution as expressing abstract moral requirements that can only be applied to concrete cases through fresh moral judgments."[213] Proponents of the moral approach acknowledge that most judges avoid openly admitting their decisions are influenced by moral judgments; even when those moral judgments are not based on their own subjective moral beliefs but are instead the result of a good faith effort to "find the best conception of constitutional moral principles . . . that fits the broad story of America's historical record."[214] This tendency to repress an outward reliance on collective morality often causes judges to "try to explain their decisions in other—embarrassingly unsatisfactory—ways."[215] Methodologically, a useful distinction between concepts and conceptions arises from Dworkin's work. Here, Dworkin argues that certain constitutional *concepts*, like equal protection under the law, are properly read to bind later generations.[216] But, from there each generation should apply the broad concept based on its own contemporary *conception* of the issue.[217] Thus, returning to the equal protection example, it is our modern conception of equality—not that of those living in 1868—that should serve as the interpretive guidepost when considering cases or controversies under the Equal Protection Clause.

The final variation of dynamic argument finds its modern expression in the academic and judicial writings of Justice Stephen Breyer.[218] This variation, known as the pragmatic approach, relies on "textual language, history, context, relevant traditions, precedent, purposes, and consequences" when construing ambiguous constitutional text.[219] When the language is

---

AMERICAN CONSTITUTION (1996) (discussing the so-called moral approach).

[213]*Id.* at 3.

[214]*See id.* at 11.

[215]*Id.* at 4; *see also* BOBBITT, *supra* note 76, at 106 ("My complaint, therefore, is not that the Court . . . is wrongly deciding but that they are wrongly explaining."); *id.* at 137 ("Ignoring the existence of ethical arguments has had other costs as well: not only candor, but simplicity too is sacrificed.").

[216]*See* RONALD DWORKIN, LAW'S EMPIRE 70–72 (1986).

[217]*See id.*

[218]*See* BREYER, *supra* note 114, at 80; *see also, e.g.*, United States v. Lopez, 514 U.S. 549, 615–31 (1995) (Breyer, J., dissenting) (dissenting from the Court's invalidation of the Gun Free School Zones Act and outlining pragmatic view of the Commerce Clause).

[219]BREYER, *supra* note 114, at 81.

especially open-ended and the question is a close one, the interpreter focuses on purposes and consequences.[220] More specifically, the interpreter should begin with the text and remain faithful to original constitutional purposes by "imaginatively reconstructing" and applying those purposes to modern scenarios, all while creating a workable solution that promotes basic constitutional objectives such as democracy, liberty, and federalism.[221] By focusing on how the judicial decision will affect the living, the pragmatic approach gives less weight to the will of those long since dead.

Despite these variations, all forms of dynamic argument acknowledge that the very same words in the Constitution can mean different things at different points in time. Notably, the Supreme Court's own jurisprudence confirms the evolving nature of the Constitution. By examining the evolution of several lines of cases, it becomes clear that attitudinal shifts in society may have at least some impact on what the Constitution means. Although these cases typically involve individual liberties—sexual privacy,[222] women's rights,[223] and economic rights[224]—

---

[220]*See id.*

[221]*See id.*

[222]*Compare* Bowers v. Hardwick, 478 U.S. 186, 196 (1986) (upholding Georgia law criminalizing sodomy), *with* Lawrence v. Texas, 539 U.S. 558, 578–79 (2003) (striking Texas sodomy law). Note in *Lawrence* how Justice Kennedy recognizes "an emerging awareness that liberty gives substantial protection to adult persons in deciding how to conduct their private lives in matters pertaining to sex." *Lawrence*, 539 U.S. at 572. In other words, modern conceptions are as important as traditional values. Also pay careful attention to the framing of the issues in *Bowers* and *Lawrence*. In *Bowers*, the Court asked "whether the Federal Constitution confers a fundamental right upon homosexuals to engage in sodomy." *Bowers*, 478 U.S. at 190. In *Lawrence*, however, the Court broadened its inquiry to consider "whether petitioners' criminal convictions for adult consensual sexual intimacy in the home violate their vital interests in liberty and privacy protected by the Due Process Clause of the Fourteenth Amendment." *Lawrence*, 539 U.S. at 564. This suggests that how the question is asked might very well dictate the answer in some cases.

[223]*Compare* Bradwell v. Illinois, 83 U.S. 130, 139–42 (1872) (Bradley, J., concurring) (approving of Myra Bradwell's exclusion from the Illinois state bar on grounds that she was a married woman because "the peculiar characteristics, destiny, and mission of woman [allow] the legislature to ordain what offices, positions, and callings shall be filled and discharged by men, and shall receive the benefit of those energies and responsibilities, and that decision and firmness which are presumed to predominate in the sterner sex"), *with* United States v. Virginia, 518 U.S. 515, 555–58 (1996) (requiring the traditionally all-male Virginia Military Institute to admit women who, aside from the fact that they were women, could otherwise satisfy enrollment requirements).

[224]*Compare* Lochner v. New York, 198 U.S. 45, 64–65 (1905) (striking a law that limited the number of hours bakers could work and recognizing a broad freedom

change sometimes occurs in less compelling subject areas like federal civil procedure.[225] This is not to say that every time the Court reverses itself the Constitution has magically morphed into something it was not the day before.[226] Judges are human and, as such, make mistakes. Still, one cannot help but find changing societal attitudes lingering in the background of many of the Court's decisions—especially those in the individual liberties context.

Nowhere is this more evident than in cases involving race. In 1883, the Court found no Equal Protection Clause infirmities in an Alabama law that made it a crime for any "white person and any negro . . . [to] intermarry or live in adultery or fornication with each other."[227] The Court reasoned that the law did not improperly discriminate on the basis of race because the law punished whites and blacks who decided to marry equally, without a facial preference to either spouse.[228] Several generations later, the Court struck down a nearly identical Virginia statute on equal protection and due process grounds.[229] According to the Court, by 1967 denying the right to marry the person of one's choosing on account of skin color was "so directly subversive of the principle of equality at the heart of the Fourteenth Amendment" that it violated the Due Process Clause.[230] Similarly, and notwithstanding the earlier 1883 decision, the *Loving* Court declared "[t]here can be no doubt that restricting the freedom to marry solely because of racial classifications violates the central meaning of the Equal Protection Clause."[231] It is important to note the shift to general principles as applied in *Lov-*

---

to contract), *and* Adkins v. Children's Hosp., 261 U.S. 525, 560–62 (1923) (striking state minimum wage law protecting women), *with* W. Coast Hotel v. Parrish, 300 U.S. 379, 398–99 (1937) (upholding constitutionality of a state minimum wage law and, in part, clearing the way for New Deal legislation).

[225]*Compare* Swift v. Tyson, 41 U.S. 1, 20–22 (1842) (allowing for the development of an independent federal common law), *with* Erie R.R. Co. v. Tompkins, 304 U.S. 64, 79–80 (1938) (overruling *Swift v. Tyson* and the judicial practice of applying independent federal common law in diversity cases).

[226]For an interesting article about overruled Supreme Court decisions, see Albert P. Blaustein, *"Overruling" Opinions in the Supreme Court*, 57 MICH. L. REV. 151 (1958).

[227]Pace v. Alabama, 106 U.S. 583, 583–85 (1883).

[228]*Id.* at 585.

[229]Loving v. Virgina, 388 U.S. 1, 2 (1967).

[230]*Id.* at 12.

[231]*See id.*

ing. No longer was the Court concerned with the detailed question of whether the statute applied equally to the races.[232] That the law discriminated on the basis of race in any way, in and of itself, was sufficient to make the Virginia law unconstitutional.[233] This type of shift is the essence of dynamic argument.

Another famous case involving racial discrimination, *Brown v. Board of Education*,[234] provides an even clearer example of dynamic argument. Presented with a challenge to the doctrine of "separate but equal" established in *Plessy v. Ferguson*,[235] an undivided Court held that "in the field of public education the doctrine of 'separate but equal' has no place."[236] The Court added that "[s]eparate educational facilities are inherently unequal."[237] In reaching its conclusion, the Court made several important observations, each of which will be detailed at length and in their original form here to capture the powerful nature of the words chosen by the Court.[238] First, the Court looked to the past for guidance, but ultimately found history unhelpful:

> Reargument was largely devoted to the circumstances surrounding the adoption of the Fourteenth Amendment in 1868. It covered exhaustively consideration of the Amendment in Congress, ratification by the states, then existing practices in racial segregation, and the views of proponents and opponents of the Amendment. This discussion and our own investigation convince us that, although these sources cast some light, it is not enough to resolve the problem with which we are faced. *At best, they are inconclusive*.[239]

Second, given the unreliable nature of the historical record, the Court noted that it would be required to view the question through a modern lens and not limit itself to the paradigm of an earlier time:

> In approaching this problem, we cannot turn the clock back to 1868 when the Amendment was adopted, or even to 1896 when

---

[232]*See id.*

[233]*See id.*

[234]347 U.S. 483 (1954). For an in-depth look at this case and the fight for racial equality in America's schools, see RICHARD KLUGER, SIMPLE JUSTICE: THE HISTORY OF *BROWN V. BOARD OF EDUCATION* AND BLACK AMERICA'S STRUGGLE FOR EQUALITY (First Vintage Books ed. 2004).

[235]163 U.S. 537 (1896).

[236]*See Brown*, 347 U.S. at 495.

[237]*Id.*

[238]*See generally id.* at 483 (explaining the shift in analysis from *Plessy* and holding that "separate but equal" violates the U.S. Constitution).

[239]*Id.* at 489 (emphasis added).

> *Plessy v. Ferguson* was written. We must consider public education in the light of its full development and its present place in American life throughout the Nation. Only in this way can it be determined if segregation in public schools deprives these plaintiffs of the equal protection of the laws.[240]

Finally, the Court seemed aware that its holding would upset the traditional state of things in many parts of the country. But, given the increasingly formal and important role of education in 1954,[241] it was of little consequence that, in 1868, "[e]ducation of Negroes was almost nonexistent, and practically all of the race were illiterate,"[242] or that state-sponsored school segregation had been the status quo for many decades.[243] In the end, the Court reached a conclusion grounded in its own modern conception of equality—not on account of, but perhaps in spite of, the customs of an earlier time.[244]

Of course, there are many other examples of dynamic argument found in the Court's modern jurisprudence, especially during Earl Warren's tenure as Chief Justice.[245] But, even without additional case presentations, one gets the general idea. Against the background provided above, it is possible to consider the validity of dynamic argument. First, proponents insist that dynamic argument is necessary to make the Constitution's broad guarantees a meaningful reality in today's complex world. Similarly, it seems the Framers—many of whom had studied law and were familiar with the trust law concept of ascertainable standards—intentionally chose broad language to leave room for growth over time. So, if the Framers had intended only certain types of punishment to constitute "cruel and unusual punishment" unless and until the Constitution was amended, then they could have left us with a simple list of approved punishments.

---

[240]*Id.* at 492–93.

[241]*Id.* at 493 ("Today, education is perhaps the most important function of state and local governments. . . . [I]t is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education. Such an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms.").

[242]*See Brown*, 347 U.S. at 490.

[243]*See id.* at 489–93.

[244]*See id.* at 493–96.

[245]*See generally* Morton J. Horwitz, *The Warren Court and the Pursuit of Justice*, 50 WASH. & LEE L. REV. 5 (1993) (describing the constitutional revolution that occurred during Chief Justice Earl Warren's tenure on the Supreme Court from 1953 to 1969).

Dynamic argument may also offer a more thorough approach to constitutional interpretation. This is most evident in the living constitutionalist's willingness to consider history as a source of meaning. To be sure, few (if any) supporters of dynamic argument suggest that history is irrelevant. On the contrary, most probably adhere to the view that "[w]hat it *meant* might be relevant to what it *means*," while also insisting that history should not be dispositive.[246] As a result, history may be inconclusive; it may support the modern conception; or it might conflict with the modern conception. In the final alternative, dynamic argument contemplates that judges have a choice, based on other available evidence and a good faith application of judicial reason, between the views of yesterday and today.[247]

A common criticism of dynamic argument, discussed in further detail below, is that it fails to restrain judges to their proper interpretive role. But, even the most committed living constitutionalist recognizes some limits. The first limitation appears in the text itself in the form of determinate rules.[248] For example, it is doubtful anyone would contend—with a straight face, at least—that any ethical, moral, or pragmatic considerations would allow for an eighteen-year-old president when the Constitution explicitly precludes "any person . . . who shall not have attained to the Age of thirty five Years."[249] Viewed in this light, it is evident that only certain constitutional provisions are serious candidates for dynamic argument.

The second limitation is found in human nature itself. Where a clause allows for judicial discretion, proponents of dy-

---

[246]*See* Wiseman, *supra* note 170 (emphasis added); *see also* Baldwin v. New York, 399 U.S. 117, 124–25 (1970) (Harlan, J., dissenting in part and concurring in part) ("It is, of course, true that history should not imprison those broad guarantees of the Constitution whose proper scope is to be determined in a given instance by a blend of historical understanding and the adaptation of purpose to contemporary circumstances.").

[247]In this sense, dynamic argument reduces dead hand control, allows the living to control their own world, and enhances public acceptance of the constitutional constraints. *Cf.* Letter from Thomas Jefferson to James Madison (Sept. 6, 1789), *in* 6 THE WORKS OF THOMAS JEFFERSON 3, 3–4 (Paul Leicester Ford ed., 1904), *available at* http://memory.loc.gov/cgi-bin/query/r?ammem/mtj:@field(DOCID+@lit(tj06 0008)) ("I set out on this ground which I suppose to be self evident, '*that the earth belongs in usufruct to the living*;' that the dead have neither powers nor rights over it.").

[248]*See* U.S. CONST. art. II, § 1 cl. 4.

[249]*Id.*

namic argument insist that, in the run of cases, judges will exercise that discretion in good faith. Abuses of discretion, including the explicit or implicit application of personal moral beliefs to the question before the court, exist as the exception and not the rule. Similarly, even broad constitutional provisions are susceptible only to a range of available interpretations.[250] Judicial holdings that fall unreasonably outside this range are potentially subject to correction by the people as ultimate sovereigns through the Article V amendment process.[251] And although the amendment process is cumbersome, several amendments have in the past been added to the Constitution to override specific Supreme Court holdings.[252]

Dynamic argument is not without its own shortcomings.[253] As noted above, the most consistent critique of dynamic argument is its tendency allow for too much judicial discretion.[254] Critics ground this objection in several related concepts. First, if the Constitution was intended to bind later generations to certain broad concepts, the flexibility inherent in dynamic argument is "incompatib[le] with the whole antievoluntionary purpose of a Constitution."[255]

Second, deciding that the Constitution is "alive" is different from deciding how it lives. Even if one accepts the possibility that the meaning of the Constitution changes over time, it may be difficult to establish any objective "guiding principle of the evolution."[256] Thus, opponents point to the many splintered approaches to dynamic argument discussed above as evidence of

---

[250]*See* Wiseman, *supra* note 170.

[251]*See* U.S. CONST. art. V.

[252]*See* U.S. CONST., amend. XI (preserving state sovereign immunity and reversing Chisholm v. Georgia, 2 U.S. 419 (1793)); U.S. CONST., amends. XIII–XIV (prohibiting slavery, requiring equal protection under the laws for all persons, and abrogating Dred Scott v. Sandford, 60 U.S. 393 (1857)); U.S. CONST. amend. XVI (establishing the income tax and reversing United States v. Pollack v. Farmers' Loan and Trust Co., 157 U.S. 429 (1895)). For an interesting line of decisions regarding the Eleventh Amendment and state sovereign immunity that seems to stray from the text of the Amendment, see Hans v. Louisiana, 134 U.S. 1, 10, 17, 21 (1890) (extending state sovereign immunity to suits brought by a state's own citizens), and Alden v. Maine, 527 U.S. 706, 712, 759–60 (1999) (5–4 decision) (affirming *Hans* based, in part, on structural arguments).

[253]*See generally* William H. Rehnquist, *The Notion of a Living Constitution*, 54 TEX. L. REV. 693 (1976) (analyzing the idea of a living constitution and the obstacles it presents).

[254]*See* SCALIA, *supra* note 129, at 44–45.

[255]*See id.*

[256]*See id.* at 45. ("What is it that the judge must consult to determine when, and in

its impracticability.[257] Similarly, acceptance of a dynamic approach may allow for knee-jerk reactions to public crises that compromise the very liberties the Constitution was intended to protect.[258]

Third, by relying on judges to determine what the Constitution *ought* to mean in our time, the work of the judge begins to look more like the work of a legislator.[259] Just as living constitutionalists say that judges are not competent historians, originalists insist that judges are not competent representatives of public opinion.[260] Instead of a panel of unelected judges, so goes the argument, all one needs to ensure that the American system remains flexible is the amendment process, "a ballot box[,] and a legislature."[261] To suggest otherwise would bring an end to a government of laws and replace it with a government of men.[262]

Despite these objections—which should be taken seriously by anyone interested in preserving democracy, liberty, and

---

what direction, evolution has occurred? Is it the will of the majority, discerned from newspapers, radio talk shows, public opinion polls, and chats at the country club? Is it the philosophy of Hume, or of John Rawls, or of John Stuart Mill, or of Aristotle?").

[257]*See id.*

[258]*See, e.g.*, Cheryl K. Chumley, *N.Y. Mayor Michael Bloomberg: Constitution 'Must Change' to Give Government More Power*, WASH. TIMES (Apr. 23, 2013), http://washingtontimes.com/news/2013/apr/23/ny-mayor-michael-bloomberg-constitution-must-chang/ (detailing New York Mayor Michael Bloomberg's contention in the wake of the 2013 Boston Marathon bombing that "our laws and our interpretation of the Constitution . . . have to change" in order to protect citizens from harm in the "complex world" in which we now live).

[259]*See* SCALIA, *supra* note 129, at 39 ("Should there be . . . a constitutional right to die? If so, there is. Should there be a constitutional right to reclaim a biological child put out for adoption by the other parent? Again, if so, there is. If it is good, it is so.").

[260]*See* SCALIA & GARNER, *supra* note 74, at 407.

[261]*See id.* at 406, 410.

[262]*See* Dred Scott v. Sandford, 60 U.S. 393, 621 (1856) (Curtis, J., dissenting) ("[W]hen a strict interpretation of the Constitution, according to the fixed rules which govern the interpretation of laws, is abandoned, and the theoretical opinions of individuals are allowed to control its meaning, we have no longer a Constitution; we are under the government of individual men, who for the time being have power to declare what the Constitution is, according to their own views of what it ought to mean."); *see also* Abraham Lincoln, First Inaugural Address (Mar. 4, 1861), *in* INAUGURAL ADDRESSES OF THE PRESIDENTS OF THE UNITED STATES, S. DOC. NO. 101–10, at 95 (1989) ("[T]he candid citizen must confess that if the policy of the Government upon vital questions affecting the whole people is to be irrevocably fixed by decisions of the Supreme Court . . . the people will have ceased to be their own rulers, having to that extent practically resigned their Government into the hands of that eminent tribunal.").

transparency—dynamic argument is a legitimate method of constitutional interpretation. When used properly by judges to construe broad constitutional standards in good faith, it can help accommodate seismic shifts in the American ethos. We turn next to the starting point for any method of interpretation: the text of the Constitution itself.

C. Textual Argument

As its name suggests, textual argument is grounded in the text of the Constitution. Two main varieties of textual argument emerge from the cases. The first, the strict textual argument, limits the words of the Constitution to their narrowest meaning. Today, the strict textual argument has been displaced by the second variety of textual argument that seeks to determine the reasonable or common meaning of the text. This method, the contemporary meaning textual argument, asks what the words of the Constitution mean to the "man on the street" at the time of the particular case or controversy. This method is like the original meaning argument, but seeks to uncover a modern (as opposed to an original) understanding of the text. In addition to describing these two methods of textual argument, this section concludes with a brief discussion of several important canons of construction that can be applied in the constitutional context.

1. Strict Textual Argument

The first brand of textual argument is known as the strict textual argument or, more colloquially, "strict construction."[263] A strict textual argument limits the words of the Constitution to their most narrow sense.[264] Put another way, only the words of the particular clause at issue are of any significance, and the reader is limited to the most literal meaning of those words when considering how to apply the text.[265] Generally speaking, extrinsic evidence, inferences, or even references to nearby text that might put the words in proper context[266] are all strictly off limits.[267]

---

[263]*See generally* Randy E. Barnett, *Constitutional Clichés*, 36 CAP. U. L. REV. 493, 496–500 (2008) (discussing strict construction of the Constitution).

[264]*See* SCALIA & GARNER, *supra* note 74, at 355 ("[I]n the 19th century, a 'strict' construction came to mean a narrow, crabbed reading of a text.").

[265]*See id.*

[266]*See infra* notes 271–73 and accompanying text.

[267]*See* SCALIA & GARNER, *supra* note 74, at 355. *But see* Williams v. Florida, 399 U.S.

The strict textual argument is displayed in several of the concurring opinions in *New York Times Co. v. United States*, a 1971 case involving the First Amendment's admonition that "Congress shall make no law . . . abridging the freedom . . . of the press."[268] At issue in this case was whether the United States could legally enjoin two national newspapers from publishing information contained in classified reports on the policy in Vietnam.[269] In a brief per curiam opinion, the Court held that the United States could not enjoin publication because it failed to carry the "heavy burden of showing justification for . . . such a restraint."[270]

Justice Black and Justice Douglas wrote separately to concur in the opinion. Justice Black noted that, during oral argument, counsel for the government had noted his well-known position regarding the First Amendment that "no law means no law, and that should be obvious."[271] Taking a similar stance, Justice Douglas wrote that "[i]t should be noted at the outset that the First Amendment provides that 'Congress shall make no law . . . .' That leaves, in my view, no room for governmental restraint on the press."[272] Although the strict textual argument

---

78, 113 (1970) (Black, J., concurring in part and dissenting in part) ("'Strict construction' of the words of the Constitution does not mean that the Court can look only to one phrase, clause, or sentence in the Constitution and expect to find the right answer. Each provision has clear and definite meaning, and various provisions considered together may have an equally clear and definite meaning. It is only through sensitive attention to the specific words, the context in which they are used, and the history surrounding the adoption of those provisions that the true meaning of the Constitution can be discerned.").

[268]N.Y. Times Co. v. United States, 403 U.S. 713, 717, 720–21 (1971).

[269]*Id.* at 714.

[270]*Id.*

[271]*Id.* at 717–18. Justice Black reinforced his strict textual argument with an original intent argument, noting that "[n]o one can read the history of the adoption of the First Amendment without being convinced beyond any doubt that it was injunctions like those sought here that Madison and his collaborators intended to outlaw in this Nation for all time." *Id.* at 719.

[272]*Id.* at 720. *But cf. N.Y. Times Co.*, 403 U.S. at 761 (Blackmun, J., dissenting) ("The First Amendment, after all, is only one part of an entire Constitution. Article II of the great document vests in the Executive Branch primary power over the conduct of foreign affairs and places in that branch the responsibility for the Nation's safety."). Similarly, the press is not exempt from regulatory laws of general applicability. *See* CHEMERINSKY, *supra* note 10, at 1212–14 (noting that the Court "consistently has refused to find that the protection of freedom of the press entitles [the press] to exemptions from . . . antitrust statutes, labor laws, and liability under state contract law").

has been applied or recognized in other constitutional contexts,[273] the concurrences discussed above provide paradigmatic examples.

Despite its outward simplicity, scholars[274] and jurists often deride the strict textual argument.[275] For example, Justice Story noted that the words of the Constitution should "be taken in their natural and obvious sense, and not in a sense unreasonably restricted or enlarged."[276] In finding that the Commerce Clause authorized a national bank even though the word "bank" does not appear in the Constitution, Chief Justice Marshall noted that "we must never forget that it is a *constitution* we are expounding."[277] More recently, even jurists who take pride in their commitment to the text of the Constitution reject the strict textual argument. The most vocal member of this group, Justice Scalia, has written that

> [t]extualism should not be confused with so-called strict constructionism, a degraded form of textualism that brings the whole philosophy into disrepute. I am not a strict constructionist, and no one ought to be . . . . A text should not be construed strictly, and it should not be construed leniently; it should be construed reasonably, to contain all that it fairly means.[278]

---

[273]*See, e.g.*, Coleman v. Alabama, 399 U.S. 1, 14 (1970) (Douglas, J., concurring) (noting that a "strict construction of the Constitution requires the result reached" in a case involving the right to counsel under the Sixth Amendment); Ohio & M.R. Co. v. Wheeler, 66 U.S. 286, 290 (1861) (recognizing a strict construction of Article III in the early decisions of the Court).

[274]Morrell E. Mullins, Sr., *Coming to Terms With Strict and Liberal Construction*, 64 ALB. L. REV. 9, 15 n.26 (2000) (detailing the "vigorous" academic criticism of strict construction in the constitutional context).

[275]*See id.*

[276]Martin v. Hunter's Lessee, 14 U.S. (1 Wheat.) 304, 326 (1816).

[277]McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 407 (1819) ("A constitution, to contain an accurate detail of all the subdivisions of which its great powers will admit, and of all the means by which they may be carried into execution, would partake of the prolixity of a legal code, and could scarcely be embraced by the human mind. It would, probably, never be understood by the public. Its nature, therefore, requires, that only its great outlines should be marked, its important objects designated, and the minor ingredients which compose those objects, be deduced from the nature of the objects themselves. That this idea was entertained by the framers of the American constitution, is not only to be inferred from the nature of the instrument, but from the language.").

[278]*See* SCALIA, *supra* note 129, at 23; *see also* Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 188 (1824) ("As men, whose intentions require no concealment, generally employ the words which most directly and aptly express the ideas they intend to convey, the enlightened patriots who framed our constitution, and the people who adopted it, must be understood to have employed words in their natural sense,

Ultimately, "strictness" is in the eye of the beholder. Thus, the strict textual argument as a method of constitutional interpretation is—like many other methods of argument—ambiguous and malleable. Some worry the strict textual arguments can be used to reach pre-determined results in the name of a commitment to the text,[279] while others insist the method involves nothing more than "propaganda and rhetoric."[280] Although the latter group's argument may prove too much, it is likely that "[s]trict constructionism understood as a judicial straitjacket is a long-outmoded approach deriving from a mistrust of all enacted law."[281] As a result, modern textualists typically fall within one of two more moderate schools of thought. The first of these schools, the original meaning historical argument, was described in the section above. The second, the contemporary meaning textual argument, is the subject of the following section.

2. Contemporary Meaning Argument

Contemporary meaning textual arguments also begin with the text. The frame of reference is, however, considerably different from the original meaning historical argument. A contemporary meaning argument focuses on what Justice Story termed the "fair meaning of the words of the text."[282] But, instead of looking at what the reasonably informed person thought about the provision at the time of its drafting, the contemporary meaning argument focuses on how "the construed term [i]s commonly understood today."[283] It is in this sense that "the interpretation of the text is the one given by the man in the street."[284]

---

and to have intended what they have said.").

[279]*See* Steve Gey, *Almost an Age of Justice*, 14 FLA. ST. U. L. REV. 381, 386 (1986) ("Justice Black shared with other strict constructionists the tendency to apply extraconstitutional values in a case and then attribute the result to the requirements of a 'clear' constitutional text.") (reviewing BERNARD SCHWARTZ, THE UNPUBLISHED OPINIONS OF THE WARREN COURT (1985)).

[280]Anthony D'Amato, *Can Any Legal Theory Constrain Any Judicial Decision?*, 43 U. MIAMI L. REV. 513, 527 (1989) ("'Strict constructionism' may be a theory, but as such it works on the level of propaganda and rhetoric. . . . [Judge Bork, purportedly a strict constructionist,] came out any way he wanted to, and simply added the usual justificatory strict constructionist arguments.").

[281]SCALIA & GARNER, *supra* note 74, at 356.

[282]*See* JOSEPH STORY, 1 COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 407, at 390–92 n.1 (1st ed. 1833), *available at* https://archive.org/details/commentariesonco01stor (critiquing reliance on the framers' supposed intent).

[283]BOBBITT, *supra* note 76, at 33.

[284]*Id.* at 32.

At their core, contemporary meaning arguments "rest on a sort of ongoing social contract, whose terms are given their contemporary meanings continually reaffirmed by the refusal of the People to amend the instrument."[285]

Justice Hugo Black is the foremost contemporary meaning textualist of the modern era. Several of Justice Black's opinions illustrate this seemingly simple approach. The first, *Youngstown Sheet & Tube Co. v. Sawyer*[286] involved President Truman's attempted takeover of striking steel mills during the Korean War.[287] The question before the Court was whether the President acted "within his constitutional power when he issued an order directing the Secretary of Commerce to take possession of and operate most of the Nation's steel mills."[288]

At first glance, this question could be a complicated one requiring consideration of the complex system of governance established by the Constitution. But, Justice Black's opinion struck down President Truman's seizure in relatively few pages.[289] Refusing to recognize any "aggregate" powers that might be implied in favor of the President on account of three separate provisions in Article II,[290] Justice Black focused instead on a single provision in the text in Article I: "that '[a]ll legislative Powers herein granted shall be vested in a Congress of the United States.'"[291] Thus, the question became whether the seizure was legislative in nature.[292] If it was, then the President was not authorized to act.[293] After admitting that "theater of war" was an expanding concept, Justice Black emphasized the fact that the

---

[285]*See id.* at 26.

[286](*Steel Seizure*), 343 U.S. 579 (1952).

[287]*Id.* at 582.

[288]*Id.*

[289]The opinion for the Court fills only eight pages in the United States Reports. *See id.* at 582–89. "Although the considerations relevant to the legal enforcement of the principle of separation of powers seem to me more complicated and flexible than any appear from what Mr. Justice BLACK has written, I join his opinion because I thoroughly agree with the application of the principle to the circumstances of this case." *Id.* at 589 (Frankfurter, J., concurring).

[290]"Particular reliance is placed on provisions in Article II which say that 'the executive Power shall be vested in a President[]'; that 'he shall take Care that the Laws be faithfully executed'; and that he 'shall be Commander in Chief of the Army and Navy of the United States.'" *Id.* at 587 (majority opinion) (quoting U.S. CONST. art. II, §§ 1–3).

[291]*Steel Seizure*, 343 U.S. at 588 (quoting U.S. CONST. art I, § 1).

[292]*See id.*

[293]*See id.*

power to adopt public policies—taking property for public use, regulating the labor market, and managing the economy—fell soundly within Congress's powers, at least as they were understood at the time of the seizure.[294] The opinion also highlighted the fact that President Truman's order sounded more "like a statute" than an executive order.[295]

Finally, Justice Black noted that "[i]t would do no good to recall the historical events, the fears of power and the hopes for freedom that lay behind" the Framers' chosen allocations of power.[296] For Justice Black, addressing the original intent or original meaning of the powers of Congress and the President would only pile on.[297] For him, the answer to the question was a simple one necessitated by the text of a single sentence in the Constitution and contemporary law-making practices.[298]

Another example of contemporary meaning argument appears in Justice Black's dissenting opinion in *Katz v. United States*.[299] In *Katz*, the Court considered whether the Fourth Amendment's prohibitions against unreasonable searches and seizures and warrantless searches applied to the wiretapping of a conversation conducted from within a public telephone booth.[300] Noting the importance of the right to privacy, a majority of the Court held that it did.[301]

Justice Black refused to expand the language of the Fourth Amendment, even to "reach a result that many people believe to be desirable."[302] The main thrust of Justice Black's argument was that "[a] conversation overheard by eavesdropping, whether by plain snooping or wiretapping, is not tangible and, under the normally accepted meanings of the words, can neither be searched nor seized."[303] And while he used other methods of

---

[294]*Id.* at 587–88.

[295]*Id.* at 588.

[296]*Id.* at 589.

[297]*See Steel Seizure*, 343 U.S. at 587.

[298]*See id.* Interestingly, Justice Black invited President Truman to his home for a barbeque after deciding this case. JEFFREY ROSEN, THE SUPREME COURT: THE PERSONALITIES AND RIVALRIES THAT DEFINED AMERICA 1–2 (2006). At some point during the gathering, President Truman remarked, "Hugo, I don't much care for your law, but, by golly, this bourbon is good." *Id.* at 2. One finds it hard to imagine such an interaction between the President and a Supreme Court Justice today.

[299]*See* 389 U.S. 347, 364 (1967) (Black, J., dissenting).

[300]*Id.* at 349–50 (majority opinion).

[301]*Id.* at 359.

[302]*Id.* at 364 (Black, J., dissenting).

[303]*Id.* at 365.

interpretation to reach this result,[304] the common understanding of the text seemed most important.[305] In a stinging rebuke of those willing to find meaning in the Constitution that is not supported by its text, Justice Black wrote:

> Since I see no way in which the words of the Fourth Amendment can be construed to apply to eavesdropping, that closes the matter for me. In interpreting the Bill of Rights, I willingly go as far as a liberal construction of the language takes me, but I simply cannot in good conscience give a meaning to words which they have never before been thought to have and which they certainly do not have in common ordinary usage. I will not distort the words of the Amendment in order to 'keep the Constitution up to date' or 'to bring it into harmony with the times.' It was never meant that this Court have such power, which in effect would make us a continuously functioning constitutional convention.[306]

A textualist to his core, Justice Black expressed grave concerns about the "ingenuity of language-stretching judges."[307]

Other cases in many different contexts have made use of the contemporary meaning argument.[308] In short, the contemporary meaning argument is useful because it is simple. It identifies the text at issue, and then seeks to determine what those words mean to a reasonably informed person. It refuses any construction that the words cannot bear in common parlance, and thus anchors the meaning of the Constitution to the paradigm of the people most affected by the Constitution: those citizens living at the time of the decision. And while no single understanding is ever likely to be gleaned from a country with more than 300 million people, such an understanding probably is

---

[304]*Id.* at 365–66 (noting the original intent and understanding of the Fourth Amendment).

[305]*See Katz*, 389 U.S. at 366 ("Rather than using language in a completely artificial way, I must conclude that the Fourth Amendment simply does not apply to eavesdropping.").

[306]*Id.* at 373.

[307]*Id.* at 366.

[308]*See, e.g.*, Gonzales v. Raich, 545 U.S. 1, 69 (2005) (Thomas, J., dissenting) ("Moreover, even a Court interested more in the modern than the original understanding of the Constitution ought to resolve cases based on the meaning of words that are actually in the document. Congress is authorized to regulate 'Commerce,' and respondents' conduct does not qualify under any definition of that term."); United States v. Vuitch, 402 U.S. 62, 72 (1971) (noting the "modern understanding of the word 'health,' which includes psychological as well as physical well-being" and a related dictionary definition, in upholding statute against due process attack).

more discernable to us than one found only in the history books.

More importantly, the contemporary meaning textual argument serves to restrain judges. Most citizens probably do not have the time or resources to dispute a judicial conclusion about the meaning of a word drawn from the historical record. On the other hand, the average citizen probably knows that, for example, the word "girl" does not refer to a young person of either sex (even though it did in the fourteenth century).[309] In other words, it is easier for the average citizen to understand (and potentially object to) an opinion that relies on the modern understanding of a word as opposed to an understanding lost to the ages. This, in turn, creates accountability in the judicial process.

On the other hand, relying on modern understanding might frustrate the original intentions—or at least the original understanding—of the enacting generation. Relying on the simple example provided above, imagine for a moment that a governing charter enacted in the fourteenth century said "No girl may vote until the age of eighteen." To an individual living in the fourteenth century, this obviously meant that no young person of either sex could vote until the age of eighteen. But, a fair reading (indeed, the only reading) based on a modern understanding of the word "girl" is that the provision should apply only to young females.[310] The result of all this is that the choice between the original meaning and the contemporary meaning textual methods ultimately is a normative one based on whose values the interpreter deems more important—the enacting generation or the current generation.

Thus, "[o]ne corollary of the [contemporary meaning] approach is a disregard of precedent."[311] To recognize a contemporary meaning when that meaning conflicts with the original meaning, the interpreter must be willing to depart from or distinguish precedent. The flip side of this observation is that "[t]extual arguments also do not allow the mid-course corrections that are the indispensable navigational devices of common law development; language simply does not change that quickly."[312] So, although a few selected words may update over

---

[309]MERRIAM-WEBSTER, http://www.merriam-webster.com/dictionary/girl (defining "girl") (last visited Feb. 21 2015).

[310]Of course, we must ignore, for the sake of providing a simple example, the equal protection problems such a provision would create.

[311]*See* BOBBITT, *supra* note 76, at 33.

[312]*Id.* at 37.

time, most do not.[313] As a result, it seems that "textual arguments are inappropriate vehicles for accommodating arguments in areas where conceptual change has outpaced absorption into everyday language."[314] Whether this is a good thing ultimately depends on your own values regarding the nature of the Constitution as a living document.

3. Textual Consistency (and the Other Canons of Construction)

The Constitution is an independent and self-contained document. Unlike most statutes, which often must be construed to fit within a broader (and sometimes tangled) legislative scheme, the Constitution need only be reconciled against itself and the judicial precedents that emerged from its text. For this reason, arguments based on textual consistency within the Constitution can be very effective. While other methods of statutory construction can and should be imported into the constitutional context when appropriate to help shed light on the meaning of ambiguous text, they will not be discussed here.[315] Also, any discussion of the canons of construction should not be confused with the existence of a constitutional "canon."[316] The latter canon typically involves the accepted and authoritative collection of sources—usually landmark judicial opinions that have come to represent significant "constitutional moments"[317]—from which constitutional meaning is often derived.

Arguments based on textual consistency often fall under the

---

[313]*See id.*

[314]*Id.* at 36.

[315]For a brief summary of the canons in list form, see WILLIAM N. ESKRIDGE ET AL., CASES AND MATERIALS ON LEGISLATION: STATUTES AND THE CREATION OF PUBLIC POLICY 847–48 (4th ed. 2007) (detailing the Supreme Court's canons of statutory interpretation, including "textual canons" and "constitution-based canons").

[316]*See generally* Jack M. Balkin & Sanford Levinson, *The Canons of Constitutional Law*, 111 HARV. L. REV. 963, 975–76, 1019 (1998) (explaining the different forms of canon as "pedagogical canon"—the key cases one might use to learn the foundations of constitutional law—and "academic theory canon" or "theory construction" which is an interpretation of the reasoning found within key constitutional cases and materials).

[317]*See generally* Daniel Taylor Young, *How Do You Measure a Constitutional Moment? Using Algorithmic Topic Modeling to Evaluate Bruce Ackerman's Theory of Constitutional Change*, 122 YALE. L. J. 1990, 1997–98 (2013) (arguing that landmark moments in American history and constitutional interpretation are "constitutional moments" that shape our interpretation and understanding of constitutional law throughout our history).

heading of the "Whole Act Rule."[318] Under the Whole Act Rule, a particular word or provision within an act (or, here, a Constitution) should be read in a way that promotes consistency with the rest of its text.[319] This means that clues should be taken from other words in the document; that there is a presumption against redundancy and in favor of consistency; and that a variation in terms was intentional and meaningful.[320] There are two main forms of consistency arguments, technical and conceptual. Technical consistency arguments identify grammatical consistencies or inconsistencies in the text. Conceptual consistency arguments seek to reconcile broader ideas found in the Constitution.

Chief Justice John Marshall gives us an excellent example of a textual consistency argument in *McCulloch v. Maryland*.[321] The main question presented *McCulloch* will be detailed in the discussion of structural argument found in the next section,[322] however, in one part of the opinion, Chief Justice Marshall sought to determine the expansiveness of the word "necessary" in the Necessary and Proper Clause.[323] In support of his broad reading of the term, the Chief Justice conducted what he called a "philological analysis."[324] He noted that, in another part of the Constitution, the Framers had inserted the word "absolutely" in front of necessary.[325] From this Chief Justice Marshall reasoned that, in the Necessary and Proper Clause, because there was "no qualification of the necessity[,] it need not be absolute; it may be taken in its ordinary grammatical sense. The word *necessary*, standing by itself, has no inflexible meaning; it is used in a sense more or less strict, according to the subject."[326] Stated another

---

[318]ESKRIDGE ET AL., *supra* note 315, at 862; *see also* SCALIA & GARNER, *supra* note 74, 167–82 (detailing the "Whole-Text Canon," the "Presumption of Consistent Usage" canon, the "Surplusage Canon," and the "Harmonious-Reading Canon")

[319]*See* ESKRIDGE ET AL., *supra* note 315, at 862.

[320]*Id.* at 862–66.

[321]*See* 17 U.S. (4 Wheat.) 316, 317 (1819).

[322]*See infra* Part II.D.

[323]*See McCulloch*, 17 U.S. (4 Wheat.) at 323–26; *see also* U.S. CONST., art. I, § 8, cl. 18 (establishing Congress's power "[t]o make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers").

[324]*McCulloch*, 17 U.S. (4 Wheat.) at 387.

[325]*Id.* at 343; *see also* U.S. CONST., art. I, § 10, cl. 2 ("No state shall, without the consent of the Congress, lay any imposts or duties on imports or exports, except what may be *absolutely necessary* for executing it's inspection Laws . . . ." (emphasis added)).

[326]*McCulloch*, 17 U.S. (4 Wheat.) at 387–88.

way, "necessary" should be read broadly, while "absolutely necessary" should be read strictly. Although his analysis is potentially subject to challenge, it remains the hallmark interpretation of the Necessary and Proper Clause two centuries later.[327]

An appeal to conceptual consistency appears in an example often provided by Justice Scalia as a critique of dynamic argument.[328] This example, which involves the death penalty and the Eighth Amendment, is less technical than the analysis found in *McCulloch* and instead highlights the need for conceptual consistency across different provisions of the Constitution.[329] To understand Justice Scalia's critique, it is necessary to understand two concepts. To begin, the Eighth Amendment prohibits "cruel and unusual punishments."[330] At the same time, the Fifth Amendment states that "[n]o person shall . . . be *deprived of life* . . . without due process of law" and that "[n]o person shall be held to answer for a *capital . . . crime*, unless on a presentment or indictment of a Grand Jury."[331]

Taken together, Justice Scalia argues, these provisions conclusively establish that the death penalty could not possibly be "cruel and unusual punishment" under the Eighth Amendment because "*its use is explicitly contemplated in the Constitution*."[332] Justice Scalia criticizes three other Justices who have taken the position that the death penalty, notwithstanding the textual evidence of its constitutionality, is unconstitutional or has become unconstitutional over time.[333] Without resolving who holds the high ground in this debate, Justice Scalia's example demonstrates an important argumentative technique that seeks to reconcile related concepts found in different parts of the Constitution.[334] This method, like the more technical one found in *McCulloch*, can be persuasive when properly deployed. A related method of argument, structural argument, builds on these consistency concepts.

---

[327]*See id.*

[328]*See, e.g.*, SCALIA, *supra* note 129, at 46.

[329]*See id.*

[330]U.S. CONST. amend. VIII.

[331]U.S. CONST. amend. V. (emphasis added); *see also* U.S. CONST. amend. XIV.

[332]SCALIA, *supra* note 129, at 46.

[333]*Id.* at 46 n.62 (citing Callins v. Collins, 510 U.S. 1141 (1994) (Blackmun, J., dissenting from denial of certiorari); Gregg v. Georgia, 428 U.S. 153, 227 (1976) (Brennan, J., dissenting); *Gregg*, 428 U.S. at 231 (Marshall, J., dissenting)).

[334]*See* SCALIA, *supra* note 129, at 46.

D. Structural Argument

Structural arguments rely on the major relational structures found in the Constitution.[335] The advocate making a structural argument "looks to the overall constitutional arrangement of offices, powers, and relationships, or what used to be called 'the meaning of the Constitution as a whole.'"[336] For the most part, structural arguments are "factless and depend on deceptively simple logical moves from the entire Constitutional text rather than from one of its parts."[337] Generally speaking, the major relational structures found in the Constitution are federalism, separation of powers, and democracy.[338] A successful structural argument will identify why one or more of these concepts mandates a particular outcome.[339]

A simple illustration of structural argument is found in *McCulloch v. Maryland*.[340] The dispute in *McCulloch* arose from a tax imposed by the state of Maryland on the Second Bank of the United States.[341] The Court considered two issues: first, whether Congress had the authority under the Constitution to create a bank and, if so, whether Maryland could constitutionally impose a tax on that bank for the privilege of operating within its borders.[342] Chief Justice Marshall, writing for the Court, sided with

---

[335]*See* SOTIRIOS A. BARBER & JAMES E. FLEMING, CONSTITUTIONAL INTERPRETATION: THE BASIC QUESTIONS 120 (2007); *see also* BOBBITT, *supra* note 76, at 74. *See generally* J. Harvie Wilkinson III, *Our Structural Constitution*, 104 COLUM. L. REV. 1687 (2004) (discussing the structural nature of the Constitution).

[336]BARBER & FLEMING, *supra* note 335, at 127.

[337]BOBBITT, *supra* note 76, at 74. A structural argument is distinguished from a textual argument because "the passages that are significant are not those of express grants of power or particular prohibitions but instead those which, by setting up structures of a certain kind, permit us to draw the requirements of the relationships among structures." *Id.* at 80.

[338]BARBER & FLEMING, *supra* note 335, at 117. Upon closer examination, other principles begin to emerge, including "the electorate's assigned central role in the federal government; the existence of a federal court system as one of the agencies for redress of citizen's grievances; 'the economic structure of nationhood'; the structure of 'national unity'; [and] the concept of 'citizenship.'" BOBBITT, *supra* note 76, at 79.

[339]For the classic work on structural argument, see CHARLES L. BLACK, JR., STRUCTURE AND RELATIONSHIP IN CONSTITUTIONAL LAW 7 (1969); *see also* Vince Blasi, *Creativity and Legitimacy in Constitutional Law*, 80 YALE L.J. 176 (1970) (book review).

[340]McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316 (1819).

[341]*Id.* at 317–20.

[342]*Id.* at 401, 425.

Federal government on both questions.[343] In short, the Court concluded that Congress could establish a national bank, and Maryland could not impose a special tax on the bank simply for the privilege of operating within its state lines.[344]

The Court reached its conclusion, in part, using a textual argument based on the Supremacy Clause.[345] Chief Justice Marshall's reasoning went a step further, however, and incorporated a structural argument to suggest that Maryland's tax did more than violate an isolated textual command:

> If we apply the principle for which the state of Maryland contends, to the constitution, generally, we shall find it capable of changing totally the character of that instrument. We shall find it capable of arresting all the measures of the government, and of prostrating it at the foot of the states . . . . This was not intended by the American people. They did not design to make their government dependent on the states.[346]

Noting that "the power to tax involves the power to destroy," Marshall found Maryland's tax incompatible with the structure of our federal system.[347] In this sense, *McCulloch* stands for the proposition that states cannot use an otherwise lawful power (i.e., taxing) to indirectly obstruct Congress's will, even where a state law does not directly contradict a federal law.[348]

Another set of cases involving the balance of power between the federal and state governments illustrates the use of structural argument. Considering whether the minimum wage and maximum hour provisions of the Fair Labor Standards Act could be constitutionally applied to the states as employers, the Court in

---

[343]*See id.* at 424, 436.

[344]*Id.* at 436 ("[T]he states have no power, by taxation or otherwise, to retard, impede, burden, or in any manner control, the operations of the constitutional laws enacted by congress to carry into execution the powers vested in the general government.").

[345]*See id.* at 436 ("This is, we think, the unavoidable consequence of that supremacy which the constitution has declared.").

[346]*See McCulloch*, 17 U.S. (4 Wheat.) at 432.

[347]*Id.* at 431.

[348]There have been modern implementations of Marshall's structural theory from *McCulloch*. *See, e.g.*, Heart of Atlanta Motel v. United States, 379 U.S. 241, 247, 261 (1964) (upholding Congress's authority to regulate the local incidents of interstate commerce under the public accommodation section of the Civil Rights Act of 1964); *see also* BARBER & FLEMING, *supra* note 335, at 122 ("*Heart of Atlanta* thus registered what *McCulloch* had implied a hundred and forty-five years earlier: Congress's version of economic health (and other national ends) is a more important constitutional objective than state autonomy in areas (like race, education, and public morality) that are not (directly) within Congress's powers.").

National League of Cities v. Usery held that it could not.[349] In reaching its conclusion, the majority noted that "in many articles of the Constitution the necessary existence of the States, and, within their proper spheres, the independent authority of the States, is distinctly recognized."[350] The Court continued, stating "Congress has sought to wield its power in a fashion that would impair the States' ability to function effectively in a federal system. This exercise of congressional authority does not comport with the federal system of government embodied in the Constitution."[351] Convinced that the Constitution as a whole prevented Congress from requiring "States as States" to pay workers a minimum wage, five members of the Court signed on to the traditional government function exception created in *National League of Cities*.[352]

The Supreme Court quickly changed course. Only nine years later, in another 5-4 decision, the Court overruled *National*

---

[349]Nat'l League of Cities v. Usery, 426 U.S. 833, 852 (1976), *overruled by* Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528 (1985). Other cases illustrating structural perspectives include United States v. Lopez, 514 U.S. 549, 551 (1995) (Commerce Clause); New York v. United States, 505 U.S. 144, 159 (1992) (Tenth Amendment); and Hammer v. Dagenhart, 247 U.S. 251 (1918) (Commerce Clause).

[350]*Nat'l League of Cities*, 426 U.S. at 844; *see also* Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528, 547 (1985) ("The central theme of *National League of Cities* was that the States occupy a special position in our constitutional system and that the scope of Congress' authority under the Commerce Clause must reflect that position.").

[351]*Nat'l League of Cities*, 426 U.S. at 852 (citations omitted). *But cf. id.* at 858, 860 (Brennan, J., dissenting) ("My Brethren do not successfully obscure today's patent usurpation of the role reserved for the political process by their purported discovery in the Constitution of a restraint derived from sovereignty of the States on Congress' exercise of the commerce power. . . . [They have] manufactured an abstraction without substance, founded neither in the words of the Constitution nor on precedent.").

[352]*Id.* at 854–55 (majority opinion). In a good example of the development of doctrinal argument, the Court later summarized the elements required to establish state immunity under the traditional government function test in *Garcia*, 469 U.S. at 537 (quoting Hodel v. Va. Surface Mining & Reclamation Ass'n, 452 U.S. 264, 287–88 (1981)) ("First, it is said that the federal statute at issue must regulate 'the "States as States."' Second, the statute must 'address matters that are indisputably "attribute[s] of state sovereignty."' Third, state compliance with the federal obligation must "directly impair [the States'] ability "to structure integral operations in areas of traditional governmental functions."' Finally, the relation of state and federal interests must not be such that 'the nature of the federal interest . . . justifies state submission.'" (alterations in original)).

League of Cities in *Garcia v. San Antonio Metropolitan Transit Authority*.[353] Addressing precisely the same issue from *National League of Cities*, the Court held that "the attempt to draw the boundaries of state regulatory immunity in terms of 'traditional governmental function' is not only unworkable but is also inconsistent with established principles of federalism and, indeed, with those very federalism principles on which *National League of Cities* purported to rest."[354] The Court then relied on a bold structural argument (with a touch of historical argument) known today as "procedural federalism":

> [T]he Framers chose to rely on a federal system in which special restraints on federal power over the States inhered principally in the workings of the National Government itself, rather than in discrete limitations on the objects of federal authority. State sovereign interests, then, are more properly protected by procedural safeguards inherent in the structure of the federal system than by judicially created limitations on federal power.[355]

In other words, Senators represent the states in Congress. Those Senators have a voice in the legislative process. Consequently, if a state does not favor a particular piece of legislation, its Senators can oppose the legislation.[356] After *Garcia*, according to the Court, "the principal means . . . to ensure the role of the States in the federal system *lies in the structure of the Federal Government itself*" and not, as the majority in *National League of Cities* would have had it, in a judicially manufactured test inspired by that same structure.[357]

Structural argument thus presents a valuable opportunity for the advocate knowledgeable enough to make arguments about the Constitution as a whole. As illustrated by Chief Justice

---

[353]*Garcia*, 469 U.S. at 531.

[354]*Id.*

[355]*Id.* at 551; *see also* Anne C. Dailey, *Federalism and Families*, 143 U. PA. L. REV. 1787, 1809–10 (1995) (discussing process theory).

[356]This simple syllogism ignores the potential effects of the Seventeenth Amendment, which moved responsibility for choosing Senators from the state legislatures to the people, on our system of government. *See generally Garcia*, 469 U.S. at 554 ("We realize that changes in the structure of the Federal Government have taken place since 1789, not the least of which has been the substitution of popular election of Senators by the adoption of the Seventeenth Amendment in 1913, and that these changes may work to alter the influence of the States in the federal political process."); Todd J. Zywicki, *Beyond the Shell and Husk of History: The History of the Seventeenth Amendment and Its Implications for Current Reform Proposals*, 45 CLEV. ST. L. REV. 165 (1997) (discussing the effect of the Seventeenth Amendment).

[357]*See Garcia*, 469 U.S. at 531, 550 (emphasis added).

Marshall in *McCulloch*, justifying a particular result based on how it will affect complex constitutional features like federalism, separation of powers, or democratic interests has a significant persuasive effect. Similarly, "one good reason for adopting structural approaches is that they *are* more satisfying, being truer approximations of the interaction of actual reasons yielding actual results than are doctrinal or textual approaches."[358]

On the other hand, structural arguments are relatively indeterminate.[359] It is one thing to identify the structural components of the Constitution; it is quite another to reason from those structural components to a correct or preferred result. If nothing else, the "cases manifesting . . . [structural argument] show a history, perhaps a tradition, of disagreement over structural questions."[360] For example, everyone can easily agree that federalism is one of the key structural components of our Constitution. But, it might be more difficult to agree about what federalism actually requires or permits.[361] This suggests that it simply is not enough to "solve structural questions by pointing to structures."[362]

The *National League of Cities-Garcia* turnabout illustrates this point. In the first of those cases, a sharply divided Court found that constitutional structures *necessitated* substantive judicial intervention to protect state sovereignty in traditional government functions.[363] Only nine years later, a similarly divided Court found judicial oversight *unnecessary* because the operation of those very same structures provided the states with sufficient procedural protection against Congressional overreach.[364] Thus, while we may be able to objectively identify our constitutional structures, it is difficult to determine what those structures

---

[358]BOBBITT, *supra* note 76, at 85.

[359]*See id.* at 84 (noting one commentator's critique that "structural methods are only useful in Charles Black's hands."). Indeed, the same could be said of Chief Justice Marshall, who had personal relationships with many of the Framers and likely believed he had an intimate understanding of how constitutional structures were meant to interact.

[360]BARBER & FLEMING, *supra* note 335, at 121.

[361]*See generally* ERWIN CHEMERINSKY, ENHANCING GOVERNMENT: FEDERALISM FOR THE 21ST CENTURY 1–4 (2008) (describing the constitutional doctrines that have been developed in offering an alternative approach to constitutional federalism).

[362]*See* BARBER & FLEMING, *supra* note 335, at 121.

[363]*See* Nat'l League of Cities v. Usery, 426 U.S. 833, 854–55 (1976).

[364]*See* Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528, 556 (1985).

mean (or ought to mean) without resorting to external philosophical judgments.[365]

Additionally, structural arguments generally "offer no firm basis for personal rights."[366] In fact, it appears that "[w]hile structural approaches are very powerful for some kinds of questions, particularly intergovernmental issues, they are not adequate . . . to the task of protecting human rights."[367] Some commentators disagree[368] and suggest that structural norms can help "identify individual and minority rights claimed to be essential to full citizenship."[369] In any event, given the difficulty of crafting a successful structural argument even in response to a run-of-the-mill structural issue involving federalism or separation of powers, the advocate probably should resort to structural argument in the individual rights context only as a last resort.

Ultimately, structural argument probably invites more questions than answers.[370] But, by filling in some of the gaps created by a particular structural argument using other methods of argument (e.g., textual[371] and historical[372]), the advocate can present a coherent, compelling argument that makes his or her conclusion difficult to resist. Unsurprisingly, it can be rather difficult to quibble with an argument that persuasively claims to promote

---

[365]BARBER & FLEMING, *supra* note 335, at 132–33.

[366]BOBBITT, *supra* note 76, at 85.

[367]*Id.* at 89.

[368]*See, e.g.*, CHARLES L. BLACK, JR., A NEW BIRTH OF FREEDOM: HUMAN RIGHTS, NAMED AND UNNAMED xix (1999); JOHN HART ELY, DEMOCRACY AND DISTRUST 7–8 (1980).

[369]*See* BARBER & FLEMING, *supra* note 335, at 117.

[370]*See id.* at 128 ("How should we read the framers' intentions regarding issues like state power as a counterpoise to federal power and the virtues of large republics relative to small? What form of democratic self-government does the Constitution establish? Framers aside, what's the best conception of democracy, and has democracy in fact flourished better in small areas (e.g., in state and local governments) as opposed to large (in the national government)? What are the basic differences and relationships between procedural and substantive rights, and can there be good reasons for judicially protecting one kind but not the other? What are the respective roles of legislatures and courts in protecting rights . . . [and] structures of government?").

[371]*See* McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 407, 432 (1819) (coupling a structural argument with textual arguments based on Congress's enumerated powers and the Necessary and Proper clause).

[372]*See* Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528, 550–52 (1985) (offering structural and historical justifications for abandoning the traditional government function test in favor of procedural federalism).

"the structure and spirit of our institutions."[373]

E. Doctrinal Argument

A doctrinal argument is a distinct method of constitutional argument based upon judicial elaboration of broad or ambiguous text. The existing 552 volumes of the United States Reports contain numerous Court-created doctrines, which help explain and apply certain provisions of the Constitution. These judge-made doctrines are, until overruled by the Court or eradicated by amendment, as important as the words of the Constitution itself. In its simplest form, a doctrinal argument "is almost wholly based on precedent and is derived from the doctrines that have accreted around various constitutional provisions."[374] Thus, a doctrinal argument depends on "dispassionate, disinterested justices who arrive at decisions by a process of reason applied to doctrine . . . [including] precedent, institutional doctrines, and doctrines of construction."[375]

Constitutional law is replete with examples of doctrine created to elaborate on the broad concepts found in the Constitution. These appear in a variety of contexts too numerous to account for here. One easily discernable doctrinal phenomenon is

---

[373]*See* Slaughter-House Cases, 83 U.S. 36, 78 (1872).

[374]BOBBITT, *supra* note 76, at 41. This form of argument is often referred to as a "substantive" doctrinal argument. Another form of a doctrinal argument focuses not on "what" the judges decide but instead "how" the judges reach that decision. *Id.* at 43. This method of interpretation is most often attributed to the legal process scholars Henry Hart and Albert Sacks. *Id.* at 42. In their seminal work, *The Legal Process*, Hart and Sacks concluded "that decisions which are the duly arrived-at-result of duly established procedures ought to be accepted as binding upon the whole society." *Id.* at 42. In other words, judicial decisions have force because they result from a rational process that is "based upon some rule, principle, or standard." *Id.* But, it is one thing to say that a decision must be based on some rational process. It is another matter to determine what that process should entail in order to be "rational." For example, should the Court agree to use only certain methods of constitutional interpretation? Should there be a minimum amount of time during which the Court must consider the questions it addresses? How would one communicate to the Court that these are important values? Like structural argument, a process-based doctrinal argument probably creates more questions than answers. In this context, another important legal process work is Hart and Wechsler's *Federal Courts and the Federal System*. *Id.* at 43. Bobbitt refers to this text as "the most influential casebook in Constitutional law" and notes that by 1979 it had become the "book most frequently cited by the Supreme Court both generally and in constitutional opinions." *See* BOBBITT, *supra* note 76, at 43.

[375]*Id.* at 47.

the "balancing test," which is ubiquitous in constitutional adjudication despite its noticeable absence from the text itself.[376] Among the most doctrinally rich constitutional provisions in the Constitution are the Equal Protection Clause,[377] the Takings Clause,[378] and the First Amendment.[379] Together, these provisions account for only seventy-one words. Yet, many modern law schools offer full-semester classes addressing the doctrine generated by the Court to explain each of these clauses.

The Court's most famous Spending Clause case offers a helpful example of a doctrinal argument. In *South Dakota v. Dole*,[380] the Court considered Congress's authority to "lay and collect Taxes, Duties, Imposts, and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States."[381] At issue in this case was whether Congress could condition a small portion of a state's federal highway funds grant on the state's willingness to increase the drinking age to

---

[376]*See generally* T. Alexander Aleinikoff, *Constitutional Law in the Age of Balancing*, 96 YALE L.J. 943 (1987) (noting that while balancing is much younger than the Constitution itself, "balancing now dominates major areas of constitutional law"); Louis Henkin, *Infallibility Under Law: Constitutional Balancing*, 78 COLUM. L. REV. 1022 (1978) (detailing and critiquing various types of balancing while noting that although balancing does not appear in the Constitution, it "is here to stay").

[377]Happily, sometimes the Court will sometimes neatly summarize the development of a particular doctrine in a single opinion. *See, e.g.*, City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 439–42 (1985) (describing equal protection doctrine); *see also* United States v. Carolene Prods. Co., 304 U.S. 144, 152 n.4 (1938) (initially suggesting possibility that "tiered" review is appropriate in equal protection context). For an interesting article summarizing an approach to the Equal Protection Clause that is less doctrinal in nature, see James E. Fleming, *"There Is Only One Equal Protection Clause": An Appreciation of Justice Stevens's Equal Protection Jurisprudence*, 74 FORDHAM L. REV. 2301 (2006) (arguing that Justice Stevens's less doctrinal framework is the best approach to constitutional analysis).

[378]On many occasions one must take a macro view of many cases to understand a particular area of the Court's jurisprudence. This is particularly so in the takings context. *See, e.g.*, Dolan v. City of Tigard, 512 U.S. 374, 391 (1994) (establishing "rough proportionality" test); Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1030–31 (1992) (requiring "total takings" analysis that incorporates pre-existing nuisance principles); Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 441 (1982) (establishing per se takings rule); Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104, 124 (1978) (establishing takings balancing test).

[379]Often it is necessary to resort to lengthy treatises to begin developing an understanding of the complex doctrines developed by the Court. *See* CHEMERINSKY, *supra* note 10, at 949–1312 (detailing First Amendment doctrine in six sections).

[380]483 U.S. 203 (1987).

[381]*Id.* at 206 (quoting U.S. CONST., art. I, § 8, cl. 1).

twenty-one.[382] The Court held that Congress could.[383] But, along the way, the Court also established—partly from the Constitution and existing precedent and partly from whole cloth—a wide-ranging five-factor test.[384] Under what is known today as the *Dole* test, to withstand constitutional scrutiny congressional spending conditions must: (1) be in pursuit of the general welfare; (2) be unambiguous; (3) be related to the federal interest in particular national projects or programs; (4) not run afoul of other constitutional provisions; and, (5) not be so coercive as to pass the point at which "pressure turns into compulsion."[385]

The *Dole* test is interesting for several reasons. First, it demonstrates how willing the Supreme Court is to expand on the Constitution by creating doctrines only loosely related to its text. Second, it provides a clear opportunity for creativity in advocacy: if the text is ambiguous, and a helpful test might be established, an advocate would do well to propose that test to a court. However, the inability to account for the "right" doctrinal rule is the Achilles heel of doctrinal argument. It is all well and good to propose that the Court adopt a test to clarify ambiguous text, but what such a test looks like necessarily is informed by other methods of interpretation: historical evidence, textual cues, or structural themes. As one scholar notes, "[i]t is reasoning from purpose that gives doctrinalism its power; it can't provide purpose."[386] At the same time, "doctrinal argument can

---

[382]*Id.* at 211.

[383]*Id.* at 211–12.

[384]*Id.* at 207–08, 211.

[385]*Id.* at 207–08, 211.

[386]BOBBITT, *supra* note 76, at 55. To illustrate this point, Bobbitt provides a touching story about a Holmes Lecture given by Hart at Harvard in 1963:

> Hart began his third lecture by discussing the appropriate roles for legislatures and courts. He then emphasized the necessity of reason in judicial decisions and called for more attention to this quality. . . . Then Hart said, "Suppose we were to decide that the commitments in the Constitution mean that every American is entitled, within the limits of conditions, to an equal opportunity to develop and to exercise his capacities as a responsible human being who is also a social being; and that the overriding purpose of all actions taken by the authority of society as a whole through the processes of government and law is to make that opportunity as meaningful as possible." If we accept this value, it then becomes possible to solve the subsidiary problems of choosing the means of reaching this end through reason. Then Hart paused and when he continued he said he had realized on the very eve of the lecture that he could not offer a general resolution, that he could give no principle by which such values

easily sink into mere formalism because the doctrine is severed from the animating text."[387] In the context of the Spending Clause, this objection essentially asks "so what if the spending condition is 'coercive,' as long as it is related to the general welfare?"

More problematically, the original purpose for a doctrine may erode over time, or the stated justifications may no longer be legitimate.[388] This phenomenon presents both an opportunity and a threat, depending on which side of the doctrine your advocacy position falls. When doctrine becomes outdated, the Court is left with a decision between adhering to outdated doctrine in the name of stare decisis, breaking new ground and establishing new doctrine, or abrogating the existing doctrine altogether and returning to the text. Given all this, a doctrinal argument is most useful when a doctrine already exists and is based on neutral and noncontroversial principles.[389] When there is no existing doctrine or the original purposes behind the existing doctrine lack legitimacy, it may be necessary to resort to other methods of interpretation in establishing a new rule.

F. Prudential Argument

Prudential arguments acknowledge the limited institutional capital of the judiciary and are "actuated by the political and economic circumstances surrounding the decision."[390] Justice Brandeis best summarized this approach when he stated "[t]he most important thing we do is not doing."[391] In other words,

---

> could be justified. He said that his answers were, he now saw, less conclusive than he had hoped. And then, in a hushed and crowded Ames courtroom, he sat down. In this we confront the *integrity* and the *impotence* of doctrinal argument.

Id. at 55–57.

[387]*Id.* at 54.

[388]*Id.* at 55 ("Doctrinal argument faces its true crisis when the old purposes for the development of the doctrine have been obscured or mooted, or have simply withered away, or when there is no consensus as to the discernable purpose."). For an example of this staleness principle at work, compare Plessy v. Ferguson, 163 U.S. 537, 550–51 (1896) (finding separate but equal railcar accommodations to satisfy the Fourteenth Amendment's command that all persons be afforded equal protection of the law), with Brown v. Bd. of Educ., 347 U.S. 483, 493 (1954) (changing course and deciding that, in the context of public education, separate but equal was inherently unequal).

[389]*See* BOBBITT, *supra* note 76, at 57.

[390]*Id.* at 61.

[391]BICKEL, *supra* note 71, at 17. Bickel provided further exposition of the prudential form of argument in a later essay entitled "The Passive Virtues." Alexander

more important than what or how a court decides, is whether it should even decide the constitutional question in the first place.[392] The most common manifestations of prudential argument are found in decisions resting on the avoidance canon,[393] the political question doctrine,[394] and other inquiries involving

M. Bickel, *The Supreme Court 1960 Term Foreword: The Passive Virtues*, 75 HARV. L. REV. 40 (1961).

[392]*See* BOBBITT, *supra* note 76, at 63; *see also* Ashwander v. Tenn. Valley Auth., 297 U.S. 288, 345 (1936) (Brandeis, J., concurring) ("'It must be evident to any one that the power to declare a legislative enactment void is one which the judge, conscious of the fallibility of the human judgment, will shrink from exercising in any case where he can conscientiously and with due regard to duty and official oath decline the responsibility.'" (quoting THOMAS M. COOLEY, 1 CONSTITUTIONAL LIMITATIONS 332 (8th ed. 1927))).

[393]*See supra* notes 72–74 and accompanying text. For a modern application of the rule, see Jones v. United States, 529 U.S. 848, 850–51, 857–58 (2000) (holding that a federal arson statute purporting to apply to any property used in interstate commerce did not apply to the intentional destruction of an owner-occupied private residence not used for any commercial purpose, in part, to avoid the constitutional question). For a statement of the canon by two of the Court's most famous jurists, see Blodgett v. Holden, 275 U.S. 142, 148 (1927) (Holmes, J., concurring) ("[T]he rule is settled that as between two possible interpretations of a statute, by one of which it would be unconstitutional and by the other valid, our plain duty is to adopt that which will save the Act."); Parsons v. Bedford, 28 U.S. (3 Pet.) 433, 448–49 (1830) ("No court ought, unless the terms of an act rendered it unavoidable, to give a construction to it which should involve a violation, however unintentional, of the constitution.").

[394]Baker v. Carr, 369 U.S. 186, 217 (1962) ("Prominent on the surface of any case held to involve a political question is found a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question.").

standing,[395] ripeness,[396] and mootness.[397] Through these doctrines the Court has developed a decisional framework that gives it the flexibility to avoid answering difficult questions.

Because prudential argument is relatively straightforward, a brief discussion of two cases will suffice to demonstrate its use. The first case, *Korematsu v. United States*,[398] involved the arrest of a Japanese-American during World War II.[399] The petitioner, Mr. Korematsu, was arrested for refusing to leave his home in California to report to an "assembly or relocation center" (or, as the dissenting justices phrased it, a "concentration camp").[400] Although a majority of the Court technically reached a conclusion and, in an opinion written by Justice Black, held that the military's classifications based solely on race satisfied strict scrutiny, the Court's resolution of the issue is better characterized as a refusal to act.[401] The Court justified its non-action on grounds

---

[395]The standing doctrine as a prudential tool was first introduced by Justice Brandeis in a case involving the Nineteenth Amendment. *See* Fairchild v. Hughes, 258 U.S. 126, 129–30 (1922) ("Plaintiff has only the right, possessed by every citizen, to require that the government be administered according to law and that the public moneys be not wasted. Obviously this general right does not entitle a private citizen to institute in the federal courts a suit to secure by indirection a determination whether a statute, if passed, or a constitutional amendment, about to be adopted, will be valid.").

[396]Abbott Labs. v. Gardner, 387 U.S. 136, 148–49 (1967) ("Without undertaking to survey the intricacies of the ripeness doctrine it is fair to say that its basic rationale is to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements over administrative policies, and also to protect the agencies from judicial interference until an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties. The problem is best seen in a twofold aspect, requiring us to evaluate both the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration."), *abrogated by* Califano v. Sanders, 430 U.S. 99 (1977).

[397]*See* Powell v. McCormack, 395 U.S. 486, 495–500 (1969) (discussing the mootness doctrine and refusing to apply it to a situation involving Congress's exclusion of a duly elected representative); *see also* Transcript of Oral Argument at 3–8, Fisher v. Univ. of Tex. (2012) (No. 11-345), *available at* http://www.supremecourt.gov/oral_arguments/argument_transcripts/11-345.pdf (discussing whether a rejected student's equal protection challenge to a university's admissions policies were moot when the student ultimately declined to attend the university and had, by the time the case reached the Supreme Court, graduated from another institution).

[398]323 U.S. 214 (1944).

[399]*Id.* at 216, 231–32.

[400]*Id.* at 221, 230.

[401]*See id.* at 223–24.

that it could not substitute its own judgment for that of the military[402] or Congress[403] in a time of war. Justice Frankfurter wrote separately to note that while "the Constitution does not forbid the military measures now complained of," the Court's decision "does not carry with it approval of that which Congress and the Executive did. That is their business, not ours."[404]

Justice Jackson wrote a powerful dissent.[405] He suggested that the Court should not have even taken the case in the first place,[406] set a dangerous precedent by doing so,[407] and blindly placed the Court's imprimatur on racial discrimination all because the military said it was required.[408] Clearly, Justice Jackson

---

[402]*See id.* at 218–20 ("'[W]e cannot reject as unfounded the judgment of the military authorities and of Congress that there were disloyal members of that population, whose number and strength could not be precisely and quickly ascertained. We cannot say that the war-making branches of the Government did not have ground for believing that in a critical hour such persons could not readily be isolated and separately dealt with, and constituted a menace to the national defense and safety, which demanded that prompt and adequate measures be taken to guard against it.' . . . [W]hen under conditions of modern warfare our shores are threatened by hostile forces, the power to protect must be commensurate with the threatened danger." (quoting Hirabayashi v. United States, 320 U.S. 81, 99 (1943))).

[403]*Id.* at 223–24 ("Congress, reposing its confidence in this time of war in our military leaders—as inevitably it must—determined that they should have the power to do just this. There was evidence of disloyalty on the part of some, the military authorities considered that the need for action was great, and time was short. We cannot—by availing ourselves of the calm perspective of hindsight—now say that at that time these actions were unjustified.").

[404]*Korematsu*, 323 U.S. at 225 (Frankfurter, J., concurring).

[405]*Id.* at 242–48 (Jackson, J., dissenting).

[406]*See id.* at 245 ("[M]ilitary decisions are not susceptible of intelligent judicial appraisal.").

[407]*See id.* ("But even if they were permissible military procedures, I deny that it follows that they are constitutional. If, as the Court holds, it does follow, then we may as well say that any military order will be constitutional and have done with it.").

[408]*Id.* at 245–46 ("[A] judicial construction of the due process clause that will sustain this order is a far more subtle blow to liberty than the promulgation of the order itself. A military order, however unconstitutional, is not apt to last longer than the military emergency. . . . But once a judicial opinion rationalizes such an order to show that it conforms to the Constitution, or rather rationalizes the Constitution to show that the Constitution sanctions such an order, the Court for all time has validated the principle of racial discrimination in criminal procedure and of transplanting American citizens. The principle then lies about like a loaded weapon ready for the hand of any authority that can bring forward a plausible claim of an urgent need. . . . A military commander may overstep the bounds of constitutionality, and it is an incident. But if we review and approve, that passing incident becomes the doctrine of the Constitution.").

found the military's policy reprehensible.[409] But, his dissent is a thought-provoking example of how the Court might, in certain cases, be at its best when it remains silent.[410] Indeed, though Justice Jackson said he would reverse and release Mr. Korematsu from detention now that the case was before the Court, he closed by noting that he did not intend to "suggest that the courts should have attempted to interfere with the Army in carrying out its task."[411] Thus, the majority opinion and Justice Jackson's dissenting opinions represent two species of prudential argument: decide the case but do not change the status quo, or do not decide the case and leave the status quo intact.[412] Which is the proper course is difficult to say. On one hand, it is the Court's job to say what the law is. At the same time, the Supreme Court has significant (problematic for some[413]) discretion to decide which cases it decides on the merits. In any event, *Korematsu* is an extraordinary example of the fact "that the Court has an enormous influence on events when it declines to strike down a law and that this influence is by no means the same as when the Court declines to discuss the issue."[414]

A more recent decision involving an element of prudential argument is *National Federation of Independent Business v. Sebelius* (*NFIB*).[415] In one of the most politically charged cases of this century, Chief Justice Roberts began by recounting the various principles at stake in the petitioners' attempt to invalidate the individual mandate contained in the Patient Protection and Affordable Care Act (ACA).[416] The Chief Justice noted that the

> [m]embers of this Court are vested with the authority to interpret the law; we possess neither the expertise nor the prerogative to make policy judgments. Those decisions are entrusted to our Nation's elected leaders, who can be thrown out of office if the people disagree with them. It is not our job to protect the

---

[409]*See id.* at 242–48.

[410]*See Korematsu*, 323 U.S. at 242–48.

[411]*Id.* at 248.

[412]*See id.* at 221–22, 246–47.

[413]Richard L. Revesz, *Nonmajority Rules and the Supreme Court*, 136 U. PA. L. REV. 1067, 1068–69 (1988) (discussing the Supreme Court's "rule of four" and suggesting it "raises serious questions about [the Justices'] respect for substantive legal doctrines"); *see also* ERWIN CHEMERINSKY, THE CONSERVATIVE ASSAULT ON THE CONSTITUTION 211–15 (2010) (criticizing the Court's application of standing rules in a section entitled "Closing the Courthouse Doors").

[414]BOBBITT, *supra* note 76, at 73.

[415]132 S. Ct. 2566 (2012).

[416]*Id.* at 2577–80.

people from the consequences of their political choices.[417]

Although he rejected the Commerce Clause argument offered in support of the individual mandate—thus potentially narrowing its scope—Chief Justice Roberts upheld the individual mandate because it could "reasonably be characterized as a tax."[418] Given the charged political climate and the composition of the Court at the time, many thought the Court would strike the ACA in its entirety.[419] However, by joining the less conservative members of the Court to uphold the law, Chief Justice Roberts did much to advance (or at least limit damage to) the Court's reputation as an apolitical body. In the words of one columnist, the Chief Justice's "genius was in pushing this health care decision through without attaching it to the coattails of an ugly, narrow[,] partisan victory."[420] It remains to be seen what will come of *NFIB*'s take on the Commerce Clause. And whether that part of the decision was correct or is a good thing for America remains a matter of reasonable dispute. But, no matter your politics or your preferred approach to reading the Constitution, everyone likely agrees that the Supreme Court is no place for partisanship.[421] Prudential arguments play a key role in bringing this principle to life.

As demonstrated above, prudential arguments flow from the Court's recognition of its role as a non-political branch. After all, it is the Court's job to say what the law is, not to make law on its own accord. But, sometimes it is necessary for the Court to act in order to enforce the Constitution (and protect the individual), as many wish it had in *Korematsu*.[422] Consequently, there is

---

[417]*Id.* at 2579.

[418]*Id.* at 2593, 2600.

[419]Peter Ferrara, *Why the Supreme Court Will Strike Down All of Obamacare*, FORBES (Apr. 5, 2012, 4:50 PM), http://www.forbes.com/sites/peterferrara/2012/04/05/why-the-supreme-court-will-strike-down-all-of-obamacare/; Bob Drummond, *Obama Health Law Seen Valid, Scholars Expect Rejection*, BLOOMBERG (June 22, 2012, 12:15 PM), http://www.bloomberg.com/news/articles/2012-06-22/law-experts-say-health-measure-legal-as-some-doubt-court-agrees.

[420]Tom Scocca, *Obama Wins the Battle, Roberts Wins the War*, SLATE (June 28, 2012, 11:59 AM), http://www.slate.com/articles/news_and_politics/scocca/2012/06/roberts_health_care_opinion_commerce_clause_the_real_reason_the_chief_justice_upheld_obamacare_.html.

[421]*See id.*

[422]Dorothy Ehrlich, *Courageous Hero Inspires America to Become More Beautiful*, ACLU OF N. CAL. (May 11, 2005), https://www.aclunc.org/blog/opinion-courageous-hero-inspires-america-become-more-beautiful.

a fine line between deference to the political branches and abdication of duty, and the careful advocate will keep the distinction in mind. In the end, prudential argument probably is most effective when the constitutional question is close and the political fallout of a decision one way or the other is likely to be significant. It is less so when the conclusion is clear and no one is likely to remember the issuance of the opinion. When the conditions are right, though, prudential arguments can be used as a powerful reminder that the political branches—and not the courts—are best suited to change the status quo.

PART III. SOMETHING FOR EVERYONE, A BRIEF CASE STUDY

The issue of abortion presents a unique opportunity to view the methods of judicial interpretation in action. The first landmark case addressing the abortion issue, *Roe v. Wade*,[423] provides a representative example of nearly all the methods of constitutional argument addressed in Part II. In its simplest form, the question in *Roe* was whether the Constitution protected a woman's right to terminate a pregnancy without state intervention.[424] Ultimately, five members of the Court found a limited fundamental right to abortion during the first two trimesters of a pregnancy, but left it to the states to decide how to regulate later-term abortions.[425]

Before proceeding to *Roe*, however, it is necessary to briefly discuss one of the Court's earlier decisions. In *Griswold v. Connecticut*,[426] the Court considered whether a state could prohibit the use of contraceptives by a married couple.[427] This case, like *Roe*, implicated the Fourteenth Amendment's Due Process Clause, which provides that "no State shall make or enforce any law which . . . deprive[s] any person of life, liberty, or property, without due process of law."[428] Although the text of this Amendment does not speak directly to a right to use contraceptives or any broad right of privacy, the Court found both such rights to be "created by several fundamental constitutional guarantees."[429] Focusing on the Court's fundamental rights precedents

---

[423]410 U.S. 113 (1973).
[424]*See id.* at 116–17, 153.
[425]*Id.* at 154, 164–165.
[426]381 U.S. 479 (1965).
[427]*Id.* at 480–81.
[428]U.S. CONST., amend. XIV, § 1.
[429]*Griswold*, 381 U.S. at 485.

(a doctrinal approach) and so-called "penumbras, formed by emanations"[430] of various other constitutional provisions (a dynamic approach that involved ethical, moral, and pragmatic elements), the Court held that a state could not prohibit the use of contraceptives without violating the Constitution.[431] This decision, which acknowledged "a right of privacy older than the Bill of Rights"[432] (an original principle approach), set the stage for what was to come in *Roe*.

Eight years after *Griswold*, Justice Blackmun delivered the opinion of the Court in *Roe*. Interestingly, this opinion demonstrates all but a few of the interpretive methods. First, Justice Blackmun presented several historical arguments, mostly aimed at establishing some form of original understanding regarding abortion.[433] The opinion considered attitudes from the Greek and Roman eras, the origins and implications of the Hippocratic Oath, common law treatises from Bracton, Coke, and Blackstone, English statutory law, and early American law.[434] Justice Blackmun used these sources in support of a historical distinction regarding the "quickening" of a fetus and to suggest that criminal abortion laws, when and if present prior to the twentieth century, were enforced with little vigor.[435] Then, wrapping up his original meaning argument, Justice Blackmun concluded that "at the time of the adoption of our Constitution, and throughout the major portion of the 19th century, abortion was viewed with less disfavor than under most American statutes currently in effect."[436]

Justice Blackmun then offered a contemporary meaning argument. He focused on the positions of three professional associations: the American Medical Association, the American Public Health Association, and the American Bar Association.[437] In a related and nearby dynamic argument, Justice Blackmun noted the erosion of Victorian ideals pertaining to sexual promiscuity and advances in medical technology that made modern abortions less dangerous to the mother.[438]

---

[430]*Id.* at 484.
[431]*See id.* at 485.
[432]*Id.* at 486.
[433]Roe v. Wade, 410 U.S. 113, 129–41 (1973).
[434]*See id.*
[435]*See id.*
[436]*See id.* at 140.
[437]*Id.* at 144–47.
[438]*Id.* at 147–52.

Next, the majority opinion accounted for a lack of textual support for a right to abortion by making a purely doctrinal argument: "[i]n a line of decisions, however, going back . . . [to 1891], the Court has recognized that a right of personal privacy, or a guarantee of certain areas or zones of privacy, does exist under the Constitution."[439] Then, reasoning from this precedent, the Court reached a conclusion grounded in dynamic approach: the judge-made right to privacy "is broad enough to encompass a woman's decision whether or not to terminate her pregnancy."[440]

Shortly thereafter, on both textual and historical grounds, the Court rejected the contention that a fetus has any due process rights as a "person" under the Fourteenth Amendment, relying on an appeal to consistency.[441] The Court identified more than a dozen uses of the word "person" throughout the Constitution, and concluded "in nearly all these instances, the use of the word is such that it has application only postnatally. None indicates, with any assurance, that it has any possible prenatal application."[442] The historical portion of this conclusion involved the fact that during the nineteenth century, "legal abortion practices were far freer than they are today."[443] Accordingly, the drafters of the Fourteenth Amendment, because they knew that fetuses were being aborted at the time they drafted the Amendment, could not possibly have intended it to apply to a fetus. Similarly, a reasonably informed person at the time would not have taken "person" to mean "fetus."

After establishing that the right to an abortion is found within the broad outlines of the Constitution, the Court considered whether that right was subject to any limitations. In an interesting but possibly unnecessary attempt at judicial humility, Justice Blackmun demonstrated a form of prudential argument. In doing so, he noted that the Court would not "resolve the difficult question of when life begins. When those trained in the respective disciplines of medicine, philosophy, and theology are unable to arrive at any consensus, the judiciary, at this point in the development of man's knowledge, is not in a position to

---

[439]*See Roe*, 410 U.S. at 152.
[440]*See id.* at 153.
[441]*See id.* at 158.
[442]*Id.* at 157.
[443]*Id.* at 158.

speculate as to the answer."[444] Query, however, whether this is exactly what the Court did by establishing the trimester model discussed below. This is important to ask not for any overtly political reason, but instead only to question the Court's genuineness in advancing this prudential argument. That this statement is in tension with the Court's ultimate doctrinal holding suggests that it may be better—if nothing else for the sake of consistency and intellectual honesty—to leave some arguments on the table.

Lastly, in reaching a conclusion about permissible limitations on the abortion decision, the Court developed what would become known as the trimester model. Under this new doctrine, states were prohibited from interfering with the abortion decision during the first trimester.[445] During the second trimester, states could advance an interest in the health of the mother by regulating abortion in ways that were "reasonably related to maternal health."[446] Finally, during the third trimester, or the "stage subsequent to viability," states could regulate and even prohibit abortion (except where required to save the mother's life) to advance an interest in protecting unborn human life.[447]

Two of the three concurring opinions are worthy of brief note. The first opinion, written by Justice Stewart, paints a clear dynamic vision of the Constitution as a living document. Justice Stewart noted that the meaning of liberty in the Fourteenth Amendment "must be broad indeed."[448] In support of this ethical contention, the opinion suggests that the scope of liberty cannot be limited by precise terms of the Constitution. Instead, it must be "left to gather meaning from experience . . . [because] the statesmen who founded this Nation knew too well that only a stagnant society remains unchanged."[449]

The next opinion, written by Chief Justice Burger, presents a more pragmatic version of dynamic argument. Rejecting the parade of horribles offered by some abortion opponents, the Chief Justice concluded that the Court's holding, though correct because it struck down two statutes that prevented abortions even when they were medically necessary, would be limited in

---

[444]*See id.* at 159.

[445]*Roe*, 410 U.S. at 164.

[446]*Id.*

[447]*Id.* at 164–65.

[448]*See id.* at 168 (Stewart, J., concurring); *see also id.* at 209–21 (Douglas, J., concurring) (giving an in-depth historical analysis on the fundamental right of privacy under the Ninth and Fourteenth Amendments).

[449]*Id.* at 169 (Stewart, J., concurring).

reach because of the ethical standards observed by practicing physicians.[450] Specifically, Chief Justice Burger noted that the "vast majority of physicians observe the standards of their profession, and act only on the basis of carefully deliberated medical judgments relating to life and health. Plainly, the Court today rejects any claim that the Constitution requires abortions on demand."[451]

Also worthy of note is the Chief Justice's concern over the Court's use of contemporary medical and scientific data. Although he did not explain precisely why he was "somewhat troubled" by such data and ultimately concluded that the Court did not exceed "the scope of judicial notice accepted in other contexts,"[452] one cannot help but sense Chief Justice Burger's doubts about the incomplete nature of the Court's inquiry into the contemporary understanding of the Constitution and its relationship to abortion at the time.[453] On this point, the majority's discussion of contemporary meaning only included the opinions of several trade organizations representing the views of the professional class. It goes without saying that the views of the American Bar Association (one of the trade organizations) regarding constitutional meaning probably vary significantly from the views of many ordinary Americans. Why one view should trump the other in the Supreme Court's analysis is a question worth considering.

The two dissenting opinions also demonstrate several methods of argument. First, Justice White's opinion offers a stinging critique of the majority's appeal to dynamic argument. In a brief dissent, Justice White complained that "[t]he Court simply fashion[ed] and announce[ed] a new constitutional right for pregnant women and, with scarcely any reason or authority for its action, invest[ed] that right with sufficient substance to override most existing state abortion statutes."[454] In his mind, the Court should have left this question to the people.[455] Thus, even though he would have reached the question and reversed the decision below (instead of simply refusing certiorari or avoiding

---

[450]*See Roe*, 410 U.S. at 207–08 (Burger, C.J., concurring).

[451]*Id.*

[452]*Id.* at 208.

[453]*See id.* at 207–08.

[454]*Id.* at 221–22 (White, J., dissenting).

[455]*Id.* at 222.

the merits on standing or the like), Justice White offered a textbook prudential argument in favor of volleying the question back to the political branches:

> In a sensitive area such as this, involving as it does issues over which reasonable men may easily and heatedly differ, I cannot accept the Court's exercise of its clear power of choice by interposing a constitutional barrier to state efforts to protect human life and by investing women and doctors with the constitutionally protected right to exterminate it. This issue, for the most part, should be left with the people and to the political processes the people have devised to govern their affairs.[456]

Finally, Justice Rehnquist's dissent offered several objections to the majority's holding. The first objection involved the contemporary understanding of privacy. Refusing to accept the majority's broad conception of privacy, Justice Rehquist insisted that "[a] transaction resulting in an operation such as this is not 'private' in the ordinary usage of that word."[457] He then suggested the majority compromised its judicial trust by developing a complicated doctrine that "partakes more of judicial legislation than it does of a determination of the intent of the drafters of the Fourteenth Amendment."[458] On this point, Justice Rehnquist remarked with incredulity that the five-Justice majority had in effect created "a right that was apparently completely unknown to the drafters of the Amendment."[459] In conclusion, he pointed out the fact that in 1868 there were thirty-six laws on the books that limited abortion.[460] In the end, Justice Rehnquist stated that "[t]he only conclusion possible from this history is that the drafters did not intend to have the Fourteenth Amendment withdraw from the States the power to legislate with respect to this matter"[461]—as though this ended the matter once and for all.

In *Roe v. Wade* it took the Supreme Court fewer than one hundred pages to demonstrate almost all of the various methods of constitutional interpretation. Of those addressed in Part II, only strict textual argument and structural argument do not

---

[456]*See Roe*, 410 U.S. at 222.
[457]*Id.* at 172 (Rehnquist, J., dissenting).
[458]*Id.* at 174.
[459]*Id.*
[460]*Id.* at 174–75.
[461]*Id.* at 177.

make an explicit appearance in any of the *Roe* opinions.[462] The strict textual approach probably did not appear because by 1973 this approach to reading the Constitution had faded from mainstream acceptance. Similarly, a structural argument did not appear because, as mentioned above, such arguments typically are less than helpful in the individual rights context. Twenty years later, the Court affirmed the essential holding of *Roe* in *Planned Parenthood v. Casey*.[463] Although the composition of the Court changed significantly by 1992, the interpretive methods found in *Casey* are just as diverse as those found in *Roe*.[464] If *Roe* and *Casey* are any indication, it seems that there always will be something for everyone when it comes to finding answers to difficult constitutional questions.

CONCLUSION

What does the Constitution require? What does it permit? Should it provide an answer to every question? These questions have no easy answers. This is especially so given the difficulty of choosing between the various approaches to reading the Constitution. But in the end, a choice may not be necessary. Each of the various methods of constitutional interpretation is flawed, but each also offers certain benefits the others do not. Awareness of this not only gives the advocate opportunities to present compelling arguments, but it also provides the judge with a broad framework within which to make sound constitutional decisions.

Whatever else may be said about each method in isolation, constitutional interpretation should always begin with the text. Equally, though, what it meant should always inform what it means, even if the original intent or original understanding is not given dispositive weight. Judges and advocates must always consider whether the judiciary is competent to act; but when a case involving ambiguous text is properly before a court, it is difficult to deny that the court should be given the freedom to reason from precedent, create judicial doctrines, and apply old text to new situations in good faith. Similarly, the broad outlines and relational structures found in the Constitution should have a place in the judicial calculus, when appropriate. As should the

---

[462]*See Roe*, 410 U.S. at 129–41 (majority opinion) (demonstrating the lack of explicit structural and textual arguments within the opinion).

[463]505 U.S. 833, 846 (1992).

[464]*Compare id.* (employing diverse methods of constitutional interpretation), *with Roe*, 410 U.S. at 129–41 (using no explicit structural and textual approaches).

mundane and everyday meaning of the text to the ordinary person on the street. In this sense, the process of constitutional interpretation becomes a "fusion of horizons" (to borrow a term from the field of hermeneutics),[465] in which notions of historical and contemporary meaning converge to guide interpretive outcomes.[466] Or, to use Balkin's phraseology, originalism and living constitutionalism really are compatible and have come to represent "two sides of the same coin."[467] Majority opinions authored by Justices of the Supreme Court will often demonstrate this blending of methods, usually only implicitly and most often in a search for compromise. Compelling though they may be, concurrences and dissents tend to make use of fewer methods. This is probably on account of the need to make a persuasive point rather than the need to gain the votes of a majority of the Court.

Ultimately, reading our written Constitution can be a difficult task. In 1616, King James I remarked to the judges of Star Chamber, "I bid you do justice boldly, yet I bid you do it fearfully . . . . And remember you are no makers of law, but interpreters of law . . . . [Y]our interpretations must be always subject to common sense and reason."[468] Fortunately, these words ring true nearly four centuries later. Thus, it seems that if common sense and reason are the ends, then each of the methods of interpretation provides a useful way to achieve those ends. In this sense, no method of interpretation is illegitimate; all are properly a part of the legal toolkit. At the same time, adherence to one method at the cost of all others may compromise the legitimacy of the judicial process, especially when that method conflicts with widely accepted modern conceptions. The same can be said of an appeal to one method or another in order to achieve a pre-determined or desired outcome. As in most things, consistency is key. By working within the same decisional framework consistently and without regard to the type of question asked, judges preserve precious institutional capital and promote the rule of law.

---

[465]For a primer on legal hermeneutics, see LEGAL HERMENEUTICS: HISTORY, THEORY, AND PRACTICE (Gregory Leyh ed., 1992), *available at* http://publishing.cdlib.org/ucpressebooks/view?docId=ft4779n9h2&chunk.id=d0e71&toc.depth=1&toc.id=&brand=ucpress.

[466]*See generally* HANS-GEORG GADAMER, TRUTH AND METHOD (2d rev. ed. 2004) (providing a descriptive theory of hermeneutics and contending that meaning is derived from a fusion of historical and contemporary understandings).

[467]BALKIN, *supra* note 89, at 21.

[468]THE STUART CONSTITUTION, *supra* note 33, at 84–85.

TABLE I: METHODS OF CONSTITUTIONAL ARGUMENT

Historical Argument	
Original Intent	Asks what the framers of a particular constitutional provision intended it to mean.
Original Meaning	Asks what a constitutional provision meant to a reasonably informed person at the time of its drafting.
Original Principle	Looks to original meaning to identify original principles that can be applied to modern factual scenarios.
Dynamic Argument	
Common Law	Reasons from precedent to identify fair and reasonable outcomes that are consistent with broad textual commands.
Ethical	Relies on a characterization of American institutions and the role within them of the American people to create broad rules.
Moral	Identifies broad concepts in the Constitution and applies those concepts based on a modern conception of the issue.
Pragmatic	Imaginatively reconstructs and applies original principles to modern situations in search of a workable result.
Textual Argument	
Strict Construction	Reads the text of the constitution in its most limited sense and resists external evidence.
Contemporary Meaning	Asks what a constitutional provision means to a reasonably informed person at the time of dispute before the Court.
Consistency	Seeks to identify technical or conceptual consistencies within the text and highlight intentional variation.
Structural Argument	
Identifies various structural relationships in the Constitution and reasons from those relationships to a particular result; focuses on federalism, separation of powers, and democracy.	
Doctrinal Argument	
Relies on the creation of and later adherence to judge-made rules to help clarify ambiguous constitutional language; typically looks to balancing tests and multi-factor or multi-element tests.	
Prudential Argument	
Insists that the Court has limited institutional competence to decide questions that remove issues from the public debate and avoids answering constitutional questions when possible.	