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1585 Massachusetts Avenue
Cambridge, MA 02138
(617) 495-3694
hlpr@mail.law.harvard.edu
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Democracy Broadly Understood

Exclusionary Originalism as Anti-Constitutionalist: *Dobbs* and *Bruen* as Threats to Constitutionalism

*Vicki C. Jackson**

Introduction

"Originalism" is in ascent, at least rhetorically. Its rise may be attributed to an odd constellation of political power,[1] misplaced reverence for a romanticized past,[2] the celebritization of judges,[3] and the effects of bold assertions

* Vicki C. Jackson. I thank my colleague, Stephen Sachs, for having invited me to speak about *Dobbs* at a panel of the Federalist Society held in January 2023, and those present at that panel for their thoughtful questions and comments. For helpful discussion of the issues and/or comments on a prior draft, I am very grateful to Mark Tushnet, Bob Taylor, Lincoln Caplan, Judith Resnik, Reva Siegel, Stephen Sachs, Frank Michelman, Martha Minow, Will Baude, Rachel Bayefsky, Katharine Young, and Oren Tamir; for helpful discussion of a draft presented at a faculty workshop, I thank John Manning, Lucien Bebchuk, Guy Charles, Chris Desan, John Goldberg, Jim Greiner, Liz Kamali, Louis Kaplow, Gerry Neuman, Nick Stephanopoulos, Rosalie Abella, and other colleagues. I am also grateful for the very able research assistance of Dino Hadziahmetovic, Harvard JD 2024, Jim Pennell, Harvard JD expected 2025, and Jenna Bao, Harvard JD expected 2026, and the helpful work of the editors of this journal. In recent years originalism's proponents have claimed "victory" in the intellectual and juridical debate. The fluidity of our constitutional law, and its ongoing responsiveness to scholarly and social movements, mean that failures to respond critically to positive claims that "our law" is originalism, and to extreme versions of past-focused forms of interpretation, may enable such positive claims and normative practices to become more deeply entrenched. Hence, this critique, grounded in arguments some of which I have not seen previously in the literature.

[1] Although arguments about original meanings of text become significant in constitutional contests within a few years the Constitution's adoption, *see* Jonathan Gienapp, The Second Creation 1106-14, 1195, 1267, 5988-95 (Kindle 2018), originalism as a driving philosophy was developed as a political and legal tool in the 1980s to respond to the Warren Court; political figures, including Attorney General Meese, as well as judges and academics, promoted it; and campaigns for judicial appointments, under different presidential administrations, sought to populate the federal bench with originalists. *See, e.g.,* Robert Post & Reva Siegel, *Originalism as a Political Practice: The Right's Living Constitution*, 75 Fordham L. Rev. 545, 547 (2006) (arguing that while attention to original understandings was a longstanding aspect of U.S. constitutional adjudication, "claims about original understanding changed significantly in the era that the Rehnquist Court was formed [when] [c]ritics of the Warren Court began to argue that determining the original understanding of the Constitution's framers was the only legitimate way of interpreting the Constitution…"); Jamal Greene, *Selling Originalism*, 97 Geo. L.J. 657, 674-75 (2009) (exploring motivations and organized campaign for the "reactive originalism" that developed in response to Warren Court decisions); *cf.* Lincoln Caplan, The Tenth Justice 81-154, 201-09 (1987) (describing legal agenda advanced by Reagan Justice Department officials Edwin Meese, Bradford Reynolds, and Charles Fried).

[2] *See, e.g.*, Jill Lepore, *The Commandments: The Constitution and Its Worshippers*, New Yorker (Jan. 17, 2011); Sanford Levinson, Constitutional faith 13-14 (2011) (describing beliefs of some at Founding and in later times that the Constitution was divinely inspired). On why "reverence" is misplaced, see generally Thurgood Marshall, *Reflections on the Bicentennial of the Constitution*, 101 Harv. L. Rev. 1 (1987).

[3] *See, e.g.*, Susanna Sherry, *Our Kardashian Court (And How to Fix It),* 106 Iowa L. Rev. 181, 182 (2020); *Requiem for the Constitution?*, Federalist Soc'y Blog (Feb. 18, 2016), https://fedsoc.org/commentary/fedsoc-blog/requiem-for-the-constitution [https://perma.cc/84W7-QASP]; Peter Shamshiri, *The Enduring Myth of Robert Bork, Conservative Martyr*, Balls &

of its triumph or acceptance.[4] The attention to and attraction of "originalism" may reflect a yearning for positivist certainty in resolving constitutional questions through determinate metrics independent of a judge's personal preferences.[5] But no theory of interpretation will avoid the need to have judges with judgment.[6]

The Court's decisions in *Dobbs v. Jackson Women's Health*[7] and *New York State Rifle & Pistol Ass'n v. Bruen*,[8] deploy a meta-approach of exclusionary reliance on "original understandings" or "history and tradition" around the time of constitutional enactments as the only legitimate source(s) in constitutional adjudication. I call both such past-focused approaches "exclusionary originalism."[9] As it operates in the United States under its particular

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Strikes (Nov. 29, 2021); Craig S. Lerner & Nelson Lund, *Judicial Duty and the Supreme Court's Cult of Celebrity*, 78 Geo. Wash. L. Rev. 1255, 1260-63 (2010); Richard L. Hasen, *Celebrity Justice: Supreme Court Edition*, 19 Green Bag 2D 157, 157-67 (2016).

[4] *See, e.g.,* Adam Winkler, *Heller's Catch 22*, 56 UCLA L. Rev. 1551, 1557 n.30 (2009) (identifying various sources describing *Heller* as the "triumph of originalism"); *see also* William Baude, *Is Originalism Our Law?,* 115 Colum L. Rev. 2349, 2352 (2015) (proclaiming acceptance as "our law" of what he describes as "inclusive" originalism).

[5] Much of the argument for originalism in its early modern days focused on its asserted benefits in constraining judicial discretion, and drew on objections to empowering nine life-tenured judges to "make law" that constrains contemporary legislatures (sometimes invoking Learned Hand, "it would be most irksome to be ruled by a bevy of Platonic Guardians, even if I knew how to choose them, which I assuredly do not." Learned Hand, The Bill of Rights 73 (1958)). For a related argument—that law can be "found" by judges, not "made"—see generally Stephen Sachs, *Finding Law,* 107 Calif. L Rev. 527 (2019).

[6] *Cf.* Mark Tushnet, *Heller and the Critique of Judgment*, 2008 Sup. Ct. Rev. 61, 61-62, 77-80 (2009) (offering a defense of Justice Breyer's reliance on judicial "judgment" in constitutional adjudication); Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. Cin. L. Rev. 849, 865 (1989) (arguing for a theory and complaining about the absence of an agreed-on theory of constitutional interpretation, but noting that "[w]e do not yet have an agreed-upon theory for interpreting statutes, either. I find it perhaps too laudatory to say that this is the genius of the common law system; but it is at least its nature."). The relationship of judicial judgment to judicial theories of interpretation raises quite difficult issues, that I do not here seek to resolve. I am tentatively of the view that no single "theory" can adequately guide constitutional adjudication across its entire domain, and that any comprehensive approach to constitutional adjudication must account for the role of judicial judgment. But to establish this would require a quite different and longer piece of work.

[7] 142 S. Ct. 2228 (2022).

[8] 142 S. Ct. 2111 (2022).

[9] My terminology differs from that of Mitchell N. Berman, who describes two forms of "strong" originalism: "exclusive originalism" and "lexical originalism." Mitchell N. Berman, *Originalism is Bunk,* 84 NYU L. Rev. 1, 10 (2009). "Exclusive originalism" contemplates that "whatever may be put forth as the proper focus of interpretive inquiry (framers' intent, ratifiers' understanding, or public meaning), that object should be the sole interpretive target or touchstone;" "lexical originalism" means "that interpreters must accord original meaning (or intent or understanding) lexical priority when interpreting the Constitution but may search for other forms of meaning (contemporary meaning, best meaning, etc.) when the original meaning cannot be ascertained with sufficient confidence." *Id.* "Soft originalism" for Berman "maintains merely that the proper originalist object (whatever it may be) should count among the data that interpreters treat as relevant;" "moderate" originalism would give presumptive (but only presumptive) weight to original understandings. *Id.* at 10-11. My term "exclusionary originalism" is different from Berman's "exclusive originalism": "Exclusionary originalism" embraces both Berman's "exclusive" and "semantic" originalisms. I define the term "exclusionary originalism" to embrace not only "originalism" as such but also methods of interpretation that rely on "history and traditions," when analysis is limited to or gives primacy to traditions around the time of enactment of constitutional text, as in *Dobbs*. This is a distinctive, contestable use of "history and tradition." *See* Poe v. Ullman, 367 U.S. 497, 542 (Harlan, J., dissenting) (asserting that the constitution's "tradition is a living thing"); Sherif Gergis, *Living Traditionalism,* 98 NYU L. Rev.

constitution, exclusionary originalism is incompatible with the very purpose of having a constitution. The attraction of these historical moment-based approaches to interpretation—seemingly displacing the need for independent judgment by the courts— is like the alluring song of the Sirens, which caused men to lose their judgment and crash, fatally, into the surrounding rocks.

The basic idea of exclusionary originalism is that what judges need to know to properly interpret a constitutional provision is what happened in a particular past time—how the words used and sentence structure would have been understood by the public (or other relevant actors) at the time of enactment, or based on what "traditions" existed at or around the time of enactment.[10] If this can be ascertained, moreover, that is *all* the exclusionary originalist judge needs to know; she need not concern herself with alternative present views, or evolving understandings of constitutional principles, or the reasons for the challenged government action (except to the extent that they

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1477, 1477-78, 1529-39 (2023) (arguing that "traditions" can change and approaches based on tradition must be open to such change).

Note that the effects of "strong" versions of originalism will vary depending on the interpreters' sense of ambiguity: if contested terms in the Constitution have "original public meanings" that are ambiguous, or multiple, some originalists would then resort to "construction," *see, e.g.* Keith Whittington, *The New Originalism*, 2 Geo J. L. Pub. Pol'y 599, 611-12 (2004), which can include a wide variety of sources or, alternatively, to deferral to current government action. *Cf.* Ryan Doerfler, *High-Stakes Interpretation*, 116 Mich. L. Rev. 523, 576-79 (2018) (suggesting that higher stakes cases make it more difficult to know what a correct interpretation of a statute is, but doubting applicability of this insight to explain what some see as the much more flexible, less text-oriented interpretation of the Constitution). The exclusionary originalism/traditionalism seen in *Dobbs* and *Bruen* is coupled with a tendency towards finding single answers to complex historical questions. This univocal orientation magnifies the effects of "strong" original meaning methodologies. On why constitution-making and the constitutions they produce should not be understood as the univocal expression of consent by a hypothesized "people," see Vicki C. Jackson, *Constituent Power or Degrees of Legitimacy*, 12 Vienna J. Int'l Const. L. 319, 322-23, 333, 336 (2018); *see also* Sergio Verdugo, *Is it Time to Abandon the Theory of Constituent Power*?, 21 Intl' J. Const. L. 14, 20 (2023) (arguing that the theory of "constituent power" is "historically irrelevant or misleading, as there is no such thing as a unified people acting with a single voice").

[10] Many versions of originalism have developed since the 1970s. *See, e.g.*, Thomas A. Colby & Peter J. Smith, *Living Originalism*, 59 Duke L. J. 239, 240 (2009) ("claims that originalism has a unique ability to produce determinate and fixed constitutional meaning, and thus that only originalism properly treats the Constitution as law and properly constrains judges . . . stumble when one considers the rapid evolution and dizzying array of versions of originalism"); James A. Fleming, *The Balkanization of Originalism*, 67 Md. L. Rev. 10, 11-12 (2007) (arguing that originalism "began with conventional 'intention of the Framers' originalism . . . became 'intention of the ratifiers' originalism. . . . [includes] 'original expectations and applications' originalism . . . [then for leading originalists shifted to] 'original meaning' originalism . . . [then] 'the new originalism' . . . 'abstract' originalism . . . [and] Balkin's 'method of text and principle,' a form of abstract originalism"); Berman, *supra* note 9, at 14 (offering a matrix of 72 permutations of different strands of originalist thought, some placing weight on the drafters' intent, more placing weight on "public understandings"). Who that "public" is for purposes of "original public meaning" might be viewed as all adults, all eligible voters, all actual ratifiers, etc.; references to original understandings often do not delve into who counts in that "public" or actively consider those whose views and understandings may have been submerged or not reflected in, e.g., dictionaries, newspapers, and public speeches. *Cf.* Reva Siegel, *Memory Games:* Dobbs*'s Originalism as Anti-Democratic Living Constitutionalism—and Some Paths of Resistance*, 101 Tex. L. Rev. 1127, 1201-03 (2023) (arguing to "democratize constitutional memory" by "recovering voices" of those formally excluded from constitution-making moments to pluralize ideas of public meanings). As to history and tradition, contrast *Dobbs*' approach to determining what traditions are relevant, with Justice Harlan's view "[*t]hat tradition is a living thing*." Poe v. Ullman, 367 U.S. 497, 542 (1961) (Harlan, J., dissenting) (emphasis added).

correspond with justifications for earlier practices), or the consequences of different interpretive alternatives, or the political theory of representative democracy. The past is what matters, what controls; judges are not responsible, the past is.

This is, to be clear, a particularly virulent form of *judicial* exclusionary originalism that I attack, not the work of particular originalist scholars. The adverse effects of exclusionary originalism (whether of highly specific originalist approaches to meaning or of exclusionary reliance on traditions from periods when the fundamental equality of women and African Americans was denied), are illustrated by the Court's recent decisions in *Dobbs* and *Bruen*. Its implications for gender and racial equality are most decidedly not benign, nor are they unforeseeable by-products of an approach that gives dispositive weight to laws and customs adopted in a less egalitarian time. And, the more remote in time from original enactments, the more exclusionary originalist/traditionalist approaches are likely to deviate from other conventional sources of constitutional judgment.

A return to constitutional basics will illuminate why exclusionary versions of originalism/traditionalism are incompatible with constitutionalism in the United States. Below, I describe a set of general purposes of having a written constitution at a conceptual level. Given those purposes, I argue, both the old age and the difficulty of amending our very old Constitution are important features that should influence how good judges approach its interpretation.

Exclusionary originalism/traditionalism—that is, narrow forms of past moment-based interpretation of our difficult to amend constitution—are inconsistent with the very purposes of a constitution. Such exclusionary forms of historical moment-based interpretation—whether a search for "original public meanings," as in *Heller* and *Bruen*, or a focus on "history and tradition" that likewise considers only past understandings at specific past periods in time,[11] as in *Dobbs*—suffer from three defects: Conceptually, they reflect misunderstandings of the very purposes of adopting and amending an entrenched constitution. Normatively, they lack a defensible foundation in constitutional values and principles, including republican democracy,[12] the rule of

[11] A caveat on vocabulary and categorization: I understand there is debate about whether *Dobbs* should be viewed as an originalist opinion as such, or rather as an instantiation of a narrowly historical approach to defining substantive liberties by asking whether the liberty was "deeply rooted in the Nation's history and tradition" by reference to what laws existed at some point in the past. *See, e.g.*, Ilan Wurman, *Opinion*, *Hard to Square Dobbs and Bruen with Originalism*, Denver Post: The Conversation (July 12, 2022), https://www.denverpost.com/2022/07/12/roe-vs-wade-originalism-dobbs-bruen-abortion-guns [https://perma.cc/N3NK-BCN2]; *cf.* Randy E. Barnett & Lawrence B. Solum, *Originalism after* Dobbs, Bruen *and* Kennedy*: The Role of History and Tradition*, 118 Nw. U. L. Rev. 433, 462, 472 (2023) (concluding that *Dobbs*'s focus on 1868 makes it a "hybrid" of originalist and conservative traditionalism, while *Bruen*'s use of historical tradition is squarely within the originalist framework of identifying the content of the right as of the time the relevant constitutional provision was enacted). In this paper, I will use the words "originalism" or "originalist" to embrace both originalism and a highly past-focused search for tradition, as both seek to constrain judicial discretion by focusing attention exclusively or primarily on very specific past decision or practices.

[12] *See* U.S. Const. Art. I, §2; Art IV (Guaranty Clause); Amend. XVII (direct election of senators); Art. II (providing for representative decisions re selection of presidential electors).

law,[13] liberty,[14] equality,[15] justice,[16] and the general welfare.[17] And empirically, their effects are to facilitate conditions of worsening violence,[18] to magnify the continued anti-democratic effects of past practices of political inequality,[19] and to encourage disingenuous rather than more candid forms of judicial reasoning.[20] To be an "originalist" or "traditionalist" in the United States in the **exclusionary** sense of the terms, is to be anti-constitutionalist, rather than pro-constitutionalist.

Part I furthers explains what is meant by "exclusionary originalism," as it has emerged in the Court's recent decisions in *Bruen* and *Dobbs*. Part II sets forth a conceptual understanding of what the purposes of a constitution are, including the U.S. Constitution, and explains why exclusionary originalism in the United States today is inconsistent with these purposes at a conceptual level. Part III briefly addresses normative justifications for exclusionary originalism and finds them wanting, and goes on to explain how exclusionary originalism produces dangerously illiberal and antidemocratic effects; other approaches do not guarantee their avoidance but offer a broader range of vantage points from which to argue and persuade.

While recognizing that more moderate versions of what Professor William Baude calls "inclusive originalism" are better than exclusionary originalism,[21] Part IV argues that a jurisprudence of multi-valenced constitutionalism is an account more grounded in the actual interpretive practices of the Court over time.[22] Multi-valenced interpretation calls for the exercise

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[13] *See* U.S. Const. Art. VI (Supremacy Clause), Art. I § 8 (providing for calling forth militia to execute the laws); Art II § 3 (take care that the laws are faithfully executed); Article III (establishing the judicial power).

[14] U.S. Const. pmbl; Amend. V; Amend. XIV.

[15] U.S. Const. Amends. XIV; XV; XIX; XXIV.

[16] U.S. Const. pmble

[17] *Id.*; U.S. Const. Art. I, § 8 (power to pay debts and provide for common defense and general welfare).

[18] *See* New York State Rifle & Pistol Ass'n, Inc. v. Bruen, 142 S. Ct. 2111, 2163-68 (2022) (Breyer, J., dissenting) (demonstrating the terrible effects of gun violence). The tide of violence and impacts on bystanders would appear to be in tension with the constitutional goal of "domestic tranquility." U.S. Const. pmbl.

[19] It does so by giving weight to laws enacted by electorates that excluded women and person of color in determining constitutional meaning. *See* Siegel, *supra* note 10, at 1128, 1193 ("*Dobbs* locates constitutional authority in imagined communities of the past. . ..associated with old status hierarchies," while ignoring evidence of public resistance to mid-19th century abortion bans); Miranda McGowan, *The Democratic Deficit of Dobbs*, 55 Loy. U. Chi. L.J. (2023) (manuscript at 30-31), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4417440 [https://perma.cc/HJU2-HC8L] (only 10% of adult population -- all male, white and propertied -- voted on Constitution). For discussion of the Court's argument from enactment of the 19th Amendment and women's voting in the century since, see *infra* text accompanying notes 53-56*; see also infra* text accompanying note 102.

[20] Cf. David A. Strauss, *Originalism, Precedent, and Candor*, 22 Const. Commentary 299, 301, 308-09 (2005) ("Judgments about morality and social policy in fact play a role in originalist constitutional interpretation… . One great advantage of a precedent-based approach to constitutional interpretation is that it is candid about those influences in a way originalism is not.").

[21] *See* Baude, *supra* note 4, at 2354 (arguing that an "inclusive" version of originalism is our law); *see also* Berman, s*upra* note 9, at 11 n.24 (discussing "moderate originalism").

[22] Multi-valenced interpretation is my term. *See generally* Vicki C. Jackson, *Multi-Valenced Constitutional Interpretation and Constitutional Comparisons: An Essay in Honor of Mark Tushnet*, 26 Quinnipiac L. Rev. 599 (2008). Others now refer to this as "pluralist" interpretation, *see* Richard H. Fallon, Jr., *Selective Originalism and Judicial Role Morality*, 102 Tex. L. Rev. 221, 241

of constitutional judgment—constrained by the text, and informed by constitutional structure, original understandings of text and structure, evolving understandings of constitutional principles as illuminated by precedent, history, tradition, and experience, by respect for the role of representative democratic processes, and by the importance of protecting individual rights and freedoms. This jurisprudence of judgment is built on a conception of the role of the courts in U.S. constitutional democracy, a sense of institutional self-restraint and epistemic modesty, and an appreciation of the competences (and limitations) of the common law lawyers who argue before and staff U.S. courts. It depends as much on basic attitudes of judicial restraint, and respect for other levels and branches of government, as on any more particular theory of interpretation.

I. Exclusionary Originalism defined and critique foreshadowed

Looking to the text, the purposes and original understanding of a constitutional provision is perfectly unexceptionable, indeed, a salutary and sensible starting point for analysis of a legal issue arising thereunder. Written law uses words to convey meaning and articulate norms. To ignore those words and what they may have been supposed to mean is inconsistent with respect for the agency of those who were the law makers. But the need to be attentive to the words of the text one is interpreting, as they were initially understood, does not dictate an interpretive method for constitutional adjudication, nor does it fix how those words should be applied at the time and in the context of the issue presented.[23]

Original understandings of the Constitution's text have long been invoked as part of a multi-valenced hermeneutical tradition, co-existing with more purposive, structural, prudential and precedent-oriented approaches for decades.[24] Originalism as a full-grown all-inclusive theory, privileging original understandings over all other sources, does not emerge until the later decades of the 20th century, when some jurists, public officials and scholars came to promote it.[25] Likewise, "history and tradition" have long been an aspect of our

(2023); Barnett & Solum, *supra* note 11, at 451, which in some versions may come close to what others call "purposive" interpretation, see generally Aharon Barak, Purposive Interpretation in Law (Sari Bashi transl. 2005).

[23] This is not to endorse an unmitigated "presentism" in constitutional interpretation. *Cf.* Barak, Purposive Interpretation, *supra* note 22, at 112, 155, 284-85 (discussing role of "contemporary" meaning as compared to their meaning at the time of adoption); Ronald Dworkin, Law's Empire 254-58, 379-80, 397-99 (1986) (arguing for interpretation based on moral justification and "fit," with "fit" reflecting the "brute facts of legal history"). As I suggest below, connections to the past are part of what a constitution provides, and some "living constitution" approaches might give too little weight to the past.

[24] *See generally.* Mark Tushnet, *The United States: Eclecticism in the Service of Pragmatism*, *in* Interpreting Constitutions: A Comparative Study 7 (Jeffrey Goldsworthy ed., 2007); Jackson, *supra* note 22; Phillip Bobbit, Constitutional Interpretation (1991); Richard H. Fallon, Jr., *A Constructivist Coherence Theory of Constitutional Interpretation,* 100 Harv. L. Rev. 1189 (1987).

[25] On its origins in works by scholars opposed to *Brown v. Board of Education* and then in Republican Party positions and practices yoking originalism to the causes of social conservatism,

interpretive tradition. But "history and tradition" in the widely quoted words of Justice Harlan embraced the living character of our tradition—in his words, attending both to the traditions we accepted and those we rejected, and viewing tradition as "a living thing."[26] For Justice Scalia, the role of history and tradition (like that of originalism) was to assist in what he elsewhere called the task of constitutions to "obstruct modernity"[27] and thus, needed to be narrowly defined at its most "specific level."[28] The 2008 decision in *Heller* was widely viewed as a significant moment in the history of constitutional interpretation, one in which both the majority and the lead dissent rested primarily on their divergent evaluations of historical evidence of original understandings.[29] But not until the recent decisions in *Dobbs* and *Bruen* has the full force of the exclusionary edges of originalism and time-fixed history and tradition approaches been so sharply felt.

Both originalism and "history and tradition" approaches were justified, in part, on the grounds that judges needed to be constrained by something in their decision-making and by views (implicit or explicit) that looking to a single defined past source would be a better constraint than more multivalenced approaches. But the indeterminacy of original meanings is well illustrated by the divisions in the *Heller* Court over the original meaning of the

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see Reva Siegel, *Foreword: Equality Divided*, 127 Harv. L. Rev. 1, 28 n.139 (2013); Reva Siegel, *Dead or Alive: Originalism as Popular Constitutionalism in* Heller, 122 Harv. L. Rev. 191, 212-26 (2008); Post & Siegel, *supra* note 1, at 555-60.

[26] As Justice Harlan wrote: "Due process has not been reduced to any formula … [I]t has represented the balance which our Nation, built upon postulates of respect for the liberty of the individual, has struck between that liberty and the demands of organized society. … The balance of which I speak is the balance struck by this country, having regard to *what history teaches are the traditions from which it developed as well as the traditions from which it broke. That tradition is a living thing*." Poe v. Ullman, 367 U.S. 497, 542 (1961) (Harlan, J., dissenting) (emphasis added). This passage has been quoted in subsequent opinions. Moore v. City of E. Cleveland, 431 U.S. 494, 501 (1977) (Powell, J., announcing the Court's judgment in an opinion joined by three others); Planned Parenthood of Se. Pa v. Casey, 505 U.S 833, 849-50 (1992) (O'Connor, Souter and Kennedy, Joint Opinion). This conception stands in great contrast to *Dobbs*' approach to determining what traditions are relevant, which focused primarily on the time around which the 14th amendment was enacted. *See* McGowan, *supra* note 19, at 36-48 (noting differing conceptions of "history and tradition" depending on whether actual practices are considered).

[27] *Antonin Scalia, Modernity and the Constitution*, in Constitutional Justice Under Old Constitutions 313 (Eivind Smith ed., 1995).

[28] Michael H. v. Gerald D., 491 U.S. 110, 123-27, 127 n.6 (1989) (Scalia, J., announcing the Court's judgment in an opinion joined by Rehnquist, C.J. and in all parts other than note 6 by O'Connor and Kennedy, JJ.) ("We refer to the most specific level at which a relevant tradition protecting, or denying protection to, the asserted right can be identified" in determining whether a claimed fundamental liberty right is rooted in history and tradition). Justice Scalia was joined on this point by only the Chief Justice. *Id.* at 113. Justice O'Connor, joined by Justice Kennedy, disagreed with the "most specific level" test, 491 U.S. at 132, as did Justice Stevens, who concurred only in the judgment, *id.* Four justices dissented. *See id*. at 138-41 (Brennan, J. dissenting) (arguing that Scalia's "tradition and history" test is inconsistent with precedent and does not provide an "objective boundary" because "reasonable people can disagree about the content of particular traditions," and that there are "good reasons for limiting the role of 'tradition' in interpreting the Constitution's deliberately capacious language").

[29] *Compare, e.g.*, District of Columbia v. Heller, 554 U.S. 570, 582, 593-94 (2008) (treating the phrase "keep and bear arms" as not necessarily implying militia usage, and as including two separate and individual rights, and placing weight on Blackstone's British treatise) *with id.* at 646-52, 662-65 (Stevens, J., dissenting) (treating "keep and bear arms" as "a unitary right to possess arms if needed for military purposes," relying in part on state law provisions of the time concerning militias, the purpose clause, and disagreeing with the bearing of Blackstone's treatise).

Second Amendment.[30] In addition, there is a wide range of constitutional law thus far wholly unaffected by originalism, as Richard Fallon's recent work on originalism's "selectivity" about stare decisis demonstrates with respect to the First Amendment, the Fourth Amendment, and other constitutional issues.[31] The argument from constraint is not sustainable.

There is, moreover, considerable disagreement among scholars who call themselves "originalists" about what the term means; originalism's many faces include some that acknowledge an important role for other sources.[32] Justice Scalia at one time characterized himself as a "faint-hearted originalist," embracing a role for precedent.[33] In some iterations—Jack Balkin's "living originalism"—originalism is very close indeed to what I would call multi-valenced interpretation.[34] In some, including Will Baude's "inclusive originalism," it embraces not only substantive meanings that would have been understood at times of founding or amendment but also the interpretive sources/approaches that would have been expected at such founding times.[35] Baude argues that it is still "originalist" in that methods must have been originally understood to include interpretive sources relied. Given the capaciousness of the sources invoked in our oldest and most iconic constitutional decisions,[36] which I take to represent what members of the founding

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[30] *See supra* note 29. Women's understandings of sexual or reproductive liberty in the 18th and mid-19th centuries were largely unwritten, for reasons including strong social taboos on discussing such topics, explained by McGowan, *supra* note 19, at 50; the actual practice of abortion availability in the early years of the Republic is discounted by the Court as irrelevant, while the Court at the same time dismissed objections to the anti-abortion statutes of the mid-19th century as motivated by bias, *see* Siegel, *supra* note 10, at 1184-85.

[31] *See* Fallon, *supra* note 22, at 248-64 (identifying many areas whose controlling doctrine is not originalist); *see generally* Mila Sohoni, *The Puzzle of Procedural Originalism*, 72 Duke L. J. 941 (2023) (identifying constitutional issues of procedure, including corporate citizenship for diversity jurisdiction, not grounded in originalist approaches).

[32] *See* Whittington, *supra* note 9, at 611 (distinguishing interpretation, which requires resort to original understandings of text, from "construction" where text is not dispositive and a broader range of sources may be considered: noting as well the possibility that "the principles that the founders meant to embody in the text were fairly abstract . . . [or] meant to delegate discretion to future decisionmakers to act on a given subject matter"); Baude, *supra* note 4, at 2355 (describing how "inclusive originalism" embraces sources -- such as "precedent, policy, or practice" -- that original understandings would have considered appropriate).

[33] Scalia, *supra* note 6, at 861-64.

[34] *See generally* Jack M. Balkin, Living Originalism (2014). On multiple versions of originalism, see Berman, *supra* note 9, at 14.

[35] Baude, s*upra* note 4, at 2355 ("Under inclusive originalism, the original meaning of the Constitution is the ultimate criterion for constitutional law, including of the validity of other methods of interpretation or decision. This means that judges can look to precedent, policy, or practice, but only *to the extent that the original meaning incorporates or permits them*."). For Baude, although "the text may have originally been expected to apply in a particular way to a particular circumstance, that does not mean that its original meaning always must apply in the same way;" and inclusive originalism permits a doctrine of stare decisis. *Id.* at 2356, 2358. *Cf.* Steven Sachs, *Originalism: Standard and Procedure*, 135 Harv. L. Rev. 777, 807 (2022) (arguing that "thoroughgoing originalists can accept these rules because—and to the extent that—they have their own pedigree in Founding-era law").

[36] *See, e.g.,* McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 415 (1819) (arguing that this "constitution [is] intended to endure for ages to come, and consequently, to be adapted to the various *crises* of human affairs," and employing structure, purpose, history (including political precedents), political theory concerning how representation legitimizes law, reasoning from the adverse consequences of a contrary decision, and text); Martin v. Hunter's Lessee, 14 U.S. (1 Wheat.) 304, 326 (1816) ("The instrument was … [intended] to endure through a long lapse

generation would have understood interpretation to entail, it would embrace much of what I think multi-valenced interpretation embraces.[37]

My target is neither Professor Balkin's nor Professor Baude's work, nor many other forms of what some call "moderate" originalism.[38] Rather, my target is the "exclusionary originalism" deployed in opinions like *Bruen, Heller*, and *Dobbs*. Let me identify the elements, briefly here; some of these are elaborated later, in Part III.

Only the Past Counts: First, there is an insistence that only events occurring and understandings expressed by those participating in acts of drafting and ratification at a particular moment, or over a limited period, in the past "count." Later Court decisions, if erroneous from the "original meanings" or "history and tradition" perspectives, do not.[39] Thus, *Heller* dismissed the Supreme Court's own prior understandings of the Second Amendment as "dictum,"[40] and re-interpreted its prior decision in *Miller* to mean only that the Second Amendment "does not protect those weapons not typically possessed

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of ages, … . It could not be foreseen what new changes and modifications of power might be indispensable to effectuate the general objects of the charter; and restrictions and specifications, which, at the present, might seem salutary, might, in the end, prove the overthrow of the system itself;" and considering the language of the text, its place in the overall structure, the Framers' intention, the purposes behind some provisions (e.g. for diversity jurisdiction), policy considerations favoring the uniformity of interpretations of federal law, precedent, "historical fact[s]," and the purposes of the constitution, writ large); Marbury v. Madison, 5 U.S. (1 Cranch) 137, 163-65, 173-78 (1803) (relying on a theory of law and of the "very essence of civil liberty" to determine whether a remedy would exist; discussing textual interpretation and the meaning to be attributed to specific words used (dividing appellate and original jurisdiction); and making assertions about the nature and purpose of the constitution, as a great exertion and thus intended to establish "principles" as permanent, and as implying a "theory" that the written constitution is supreme over contrary written law). On the role of "spirit" in founding era constitutional interpretation, see Saikrishna Prakash, *Spirit* (Feb. 2024 draft) (forthcoming, draft on file with author).

[37] Professor Baude provides a rigorous account of "liquidation" of meaning that goes well beyond a single decision by a divided court, and leaves the door open for the possibility that previously 'liquidated' understandings could be revised. William Baude, *Constitutional Liquidation*, 71 Stan. L. Rev. 1, 54 (2019) (concluding, on whether "liquidation" is necessarily permanent, that "the analogy to precedent suggests that liquidation is not necessarily permanent"). I take it, for example, that if one views *Plessy* and its progeny on segregation as having "liquidated" one meaning of the Equal Protection clause through judicial decisions and government practices thereafter, that meaning could be reliquidated for strong enough reasons thereafter.

[38] Nor am I addressing here the asserted distinction between constitutional "interpretation" with respect to original meanings, and constitutional "construction," where a question cannot be answered by resort to original meanings, *see* Keith E. Whittington, *Constructing a New American Constitution*, 27 Const. Comment. 119, 119-25 (2010); Lawrence B. Solum, *The Interpretation–Construction Distinction*, 27 Const. Comment. 95, 100-08 (2010), nor the distinction between original meaning and original expected applications, *see, e.g.,* Balkin, *supra* note 34, at 6-7. An attractive conceptualization of another distinction (that does not require the level of skilled historical analysis some originalists contemplate) is offered by David Strauss, who has argued that the choice of general language in the Constitution should be understood as a choice not to entrench specific applications or original understandings but to leave these for future development. *See* David A. Strauss, *Common Law, Common Ground, and Jefferson's Principle*, 112 Yale L. J. 1717, 1736 (2003).

[39] On the challenge for originalists of how to determine, either in an 'originalist' or other principled way, what lines of authority are or are not protected by stare decisis, see generally Fallon, *supra* note 22.

[40] District of Columbia v. Heller, 554 U.S. 570, 625 n.25 (2008) (dismissing as "gratuitous[] . . . dictum" statements in *Lewis v. United States*, 445 U.S. 55 (1980), which rejected a constitutional challenge to a felon-in-possession law, and asserted that "[t]hese legislative restrictions on the use of firearms are neither based upon constitutionally suspect criteria, nor do they trench upon any constitutionally protected liberties," citing *Miller* in support).

by law-abiding citizens for lawful purposes, such as short-barreled shotguns."[41] Yet the *Miller* Court was quite clear in associating Second Amendment rights with militia service.[42] *Heller* ignores *Miller*'s clear implication that the Second Amendment protects the right to bear arms that have some "'reasonable relationship to the preservation or efficiency of a well regulated militia,'" as well as the decisions of "hundreds" of lower court judges applying and extending *Miller*, according to Justice Stevens' dissent.[43]

More dramatically, the Court in *Bruen* focuses almost entirely on prior history, both in defining the scope of conduct protected by the Second Amendment and the permissibility of any efforts to regulate such conduct, without considering the weight of the government's reasons for the regulation or the changed circumstances of society that bear on the scope of the rights protected. If a regulation does not in scope and justification resemble a reasoned exception to presumptive gun freedom at the time of the founding or the Fourteenth Amendment's enactment, it is irrelevant—even if it has been in force since the early 20th century.[44] The opinion gives no regard to the government's current reasons, in the context of New York State's concern for densely populated urban jurisdictions like NYC.

Restrictions that were reasonable and justified at the founding, in a mostly rural country—whether in the 1780s or the 1860s—are not appropriate as the exclusive measures of determining and implementing the constitutional status of firearms regulations today in the 2020s, given the basic goals of the Constitution (including not only protecting the liberty to bear arms, but also promoting the general welfare, establishing justice, and ensuring "domestic tranquility").[45] Moreover, the exclusion of women and minority groups from electoral power during the period that "counts" under the Court's analysis may well preclude finding historical analogues for urgently justified limitations on gun ownership today.[46] The possibility that conduct related to

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[41] *Id.* at 625.

[42] United States v. Miller, 307 U.S. 174, 177 (1939) ("In the absence of any evidence tending to show that possession or use of a 'shotgun having a barrel of less than eighteen inches in length' at this time has some reasonable relationship to the preservation or efficiency of a well regulated militia, we cannot say that the Second Amendment guarantees the right to keep and bear such an instrument."). The *Miller* Court went on to associate the Second Amendment with Congress's authority in Article I, Section 8, to provide for "organizing, arming and disciplining" the militias, which the states were expected to maintain and train, and consisting primarily of civilians, rather than a standing army. *Id.* at 178-79. As described in *Miller*, bearing firearms was a duty of able-bodied men, failures of which could result in sanction. *Id.* at 179-80.

[43] *See Heller*, 554 U.S. at 637-38 (Stevens, J., dissenting) (quoting *Miller,* 307 U.S. at 178); *id.* at 639 ("Even if the textual and historical arguments on both sides of the issue were evenly balanced, respect for the well-settled views of all of our predecessors on this Court, and for the rule of law itself, … would prevent most jurists from endorsing such a dramatic upheaval in the law.").

[44] *See* N.Y. State Rifle & Pistol Ass'n, v. Bruen, 142 S. Ct. 2111, 2169, 2189 (2022) (Breyer, J., dissenting).

[45] On the role of courts in implementing the constitution, see generally Richard H. Fallon, Jr., *The Supreme Court, 1996 Term—Foreword: Implementing the Constitution*, 111 Harv. L. Rev. 54 (1997).

[46] The Court granted certiorari in U.S. v. Rahimi, 61 F.4th 443 (5th Cir 2023), *cert. granted*,—U.S.—(June 30, 2023) (holding that under *Bruen*, a statute, barring someone who is the subject of a domestic violence restraining order from possessing a handgun, was unconstitutional, although before *Bruen* the court of appeals had upheld the law). Just as this essay was going to print, the Supreme Court reversed, rejecting the Second Amendment challenge, and

"rights" is immune from regulation unless the regulation is analogous to one at the time the constitutional text was enacted, notwithstanding the gravity of the government's interest,[47] moreover, is not characteristic of other areas of constitutional law, including First Amendment free speech issues,[48] and a number of areas of constitutional criminal procedure.[49]

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concluding that the ban was analogous to Founding era laws designed to prevent dangerous persons from misusing firearms. United States v. Rahimi, No. 22-915 (U.S., June 21, 2024). This essay does not reflect analysis of this decision.

[47] *See Bruen*, 142 S. Ct. at 2127 (disavowing the approach taken in the courts of appeals of applying intermediate scrutiny to evaluate the constitutionality of regulations of rights to have and carry guns, and stating that the answers can be found only in the presence of a historical analogue: "[G]overnment must affirmatively prove that its firearms regulation is part of the historical tradition that delimits the outer bounds of the right to keep and bear arms"); *id.* at 2130 ("[G]overnment must … justify its regulation by demonstrating that it is consistent with the Nation's historical tradition of firearm regulation."). *See also id.* at 2136 ("[N]ot all history is created equal. 'Constitutional rights are enshrined with the scope they were understood to have *when the people adopted them*.'") (quoting *Heller*, 554 U.S. at 634–635). Absence of past government regulation implied a constitutional prohibition of such regulation. For the *Bruen* Court, "when a challenged regulation addresses a general societal problem that has persisted since the 18th century, the lack of a distinctly similar historical regulation addressing that problem is relevant evidence that the challenged regulation is inconsistent with the Second Amendment;" the Court dismissed arguments that urban gun violence today poses distinct problems, noting that the "District in *Heller* addressed a perceived societal problem—firearm violence in densely populated communities" but "employed a regulation—a flat ban on the possession of handguns in the home—that the Founders themselves could have adopted [but did not adopt] to confront that problem." *Id.* at 2131. *See also id.* at 2133 (suggesting that in resolving whether a past regulation was "analogous" to one challenged today, as the Court's history-only test requires, courts should consider "two metrics: how and why the regulations burden a law-abiding citizen's right to armed self-defense"). This test posed a challenge in the lower courts for such newly recognized reasons to regulate as to protect victims of domestic violence from physical injury from firearms. *See Rahimi*, 61 F.4th 443 (5th Cir 2023), *rev'd,* No. 22-915 (U.S., June 21, 2024) (describing the *Bruen* test to encompass the principles underlying past and present laws, *id* at 7-8; Sotomayor, J., concurring, at 2-3).

[48] The extension of intermediate scrutiny and strict scrutiny, both of which employ means-ends tests, to regulation of speech is well established. *See generally* Ashutosh Bhagwat, *The Test that Ate Everything: Intermediate Scrutiny in First Amendment Jurisprudence*, 2007 U. Ill. L. Rev. 783 (2007); *see also Bruen*, 142 S. Ct. at 2176 (Breyer, J., dissenting) ("Judges, of course, regularly use means-end scrutiny, including both strict and intermediate scrutiny, when they interpret or apply the First Amendment.").

[49] For judicial balancing of interests concerning the constitutionality of laws to protect asserted victims of rape, see *Michigan v. Lucas*, 500 U.S. 145, 149-50 (1991) (reversing a state court determination that precluding a defendant from presenting evidence of past sexual contact with the complainant when the defendant failed to give statutorily-required notice of his intent to do so had violated the Sixth Amendment right of confrontation: "[t]o the extent that it operates to prevent a criminal defendant from presenting relevant evidence, the defendant's ability to confront adverse witnesses and present a defense is diminished. This does not necessarily render the statute unconstitutional. '[T]he right to present relevant testimony is not without limitation. The right "may, in appropriate cases, bow to accommodate other legitimate interests in the criminal trial process."' … The Michigan statute represents a valid legislative determination that rape victims deserve heightened protection against surprise, harassment, and unnecessary invasions of privacy."). For similar reasoning with respect to the constitutionality of warrantless searches, see, e.g., *Birchfield v. North Dakota*, 579 U.S. 438, 461-66, 474 (2016) (upholding the constitutionality of warrantless "breath tests", but not warrantless blood tests, for drunkenness incident to arrest; the longstanding exception for warrantless searches incident to arrest should apply here because the physical intrusion of a breath test is minor and the state has a "paramount interest" in highway safety and preventing drunk driving in light of the problem of drunk driving that arose with wide use of motor vehicles). The Court's willingness in *Birchfield* to consider both the degree of intrusion and "paramount interest" behind the government's desire to use breathalyzer tests, and the Court's attention to the government interest in affording rape victims heightened

Finally, exclusionary originalism's focus only on views that were present at the time of constitutional enactment and its ensuing disregard for the views of other courts (including the 11 courts of appeals that had developed a two-step process for applying *Heller*)[50] or prior Supreme Courts (as in *Dobbs* overruling of *Roe*, *Casey* and their progeny) fails to provide respect for prior Courts and judges who are part of the constitutional tradition.[51] Indeed, the evident contempt for prior Courts and judges on the face of the *Dobbs* opinion further evinces this characteristic.[52] Such attitudes disrupt expectations of stability and respect for judicial decisions, ordinarily sought to be protected by the rule of law.

Assumed Authority of Unrepresentative Lawmakers and Underinclusive "Publics": The effects of such an exclusive focus on the past are magnified by unexamined assumptions of the continued, undifferentiated authority of long-ago generations of constitution-makers and legislators, with no effort to imaginatively reconstruct that past in light of the situation of those excluded from participation. Consider, again, *Dobbs*. That women were disenfranchised in most places, for most of the time period in which the enactments considered relevant to original meaning (or tradition) occurred, goes essentially unmentioned in the Court's construction of the "liberty" protected by the Constitution's liberty clauses. Women in the United States were not members of the bodies drafting the original Constitution or the Fourteenth Amendment; nor were they allowed to vote for those members; and their histories and understandings are not necessarily well reflected in the source materials considered by the Court.[53]

The *Dobbs* Court provides appendices showing that states enacted prohibitions on abortion beginning in 1825 (the overwhelming majority having done so by 1910) but fails to note that as late as 1910 women had full suffrage rights in only 5 states.[54] The Court does refer to women's obtaining the

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protection in *Lucas,* undermine *Bruen*'s claim that constitutional rights are simply not subject to "means-ends" analysis.

[50] *Bruen,* 142 S. Ct. at 2174-75 (Breyer, J., dissenting).

[51] *Cf.* Howard McBain, The Living Constitution 11 (1928) ("[T]he American constitution . . . is the document as amended and interpreted to date, . . . which went into effect in 1789 . . . . [A]part from amendments by which the actual words of the constitution have been altered or added to, a living constitution cannot remain static. Our constitution has . . . developed by the growth of custom, by the practices of political parties, by the action or inaction of Congress or the President, and especially by judicial interpretation.")

[52] *See infra* note 136 (quoting *Dobbs* majority's scathing language).

[53] *See* Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2247-56 (2022) (referring to state constitutional provisions, scholarly treatises including Bracton, Coke, Hale, and Blackstone, law reviews, and court decisions of the late 19th and early 20th centuries). Wyoming was the first state to allow women to vote, and did so in 1869; women's suffrage in federal elections was not secured until 1920. *See* Eleanor Flexner, Century of Struggle: The Women's Rights Movement in the United States 159-62, 305-24 (1971). *See also* Karen Morin, *Political Culture and Suffrage in an Anglo-American Women's West,* 19 Women's Rts. L. Rep. 17, 18-19 (1997) (describing work by historians including Joan Wallach Scott showing how "public, institutionalized forms of politics and government such as voting rights are limited in the extent to which they can reflect women's status historically").

[54] *See Dobbs*, 142 S. Ct. at 2252-53; Katie Anastas, *Timeline and Map of Woman Suffrage Legislation State by State 1838-1919,* Mapping Am. Soc. Movements Project, https://depts.washington.edu/moves/WomanSuffrage_map.shtml [https://perma.cc/2V4P-FLCS]. *Cf.* Reva B. Siegel, *How "History and Tradition" Perpetuates Inequality: Dobbs on Abortion's Nineteenth*

vote in 1920, but only to argue that "for more than a century after 1868—including 'another half-century' after women gained the constitutional right to vote in 1920 …—it was firmly established that laws prohibiting abortion like the Texas law at issue in *Roe* were permissible exercises of state regulatory authority."[55] Equating the continued existence of such laws (after women obtained the vote) with those laws having majority support is an error, given the difficulties of gaining access to legislative agendas and of overcoming burdens of inertia.[56]

The limited participation (i.e., only by white men) in these constitution-making and -amending episodes provide additional reasons for today's interpreters to focus on the general principles of Section 1 of the Fourteenth Amendment, rather than more specific 18th or 19th century expectations. *Dobbs* emphasized that a law regulating abortion is "entitled to a 'strong presumption of validity,'" and "must be sustained if there is a rational basis on which the legislature could have thought it would serve legitimate state interests," citing a case widely regarded as an extreme form of judicial deference through attribution of imagined purposes.[57] *Dobb*s also indicated that "legitimate interests include respect for and preservation of prenatal life at all stages of development,"[58] if so, it is hard to see any limit on states prohibiting

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Century Criminalization, 60 Hous. L. Rev. 901, 906 (2023) (arguing that *Dobbs* and *Bruen*'s "tradition-entrenching methods … intensify the gender biases of a constitutional order that for the majority of its existence denied women a voice in lawmaking").

[55] *Dobbs*, 142 S. Ct. at 2260. It appears that the majority treats enactment of anti-abortion statues as "firmly establish[ing]" that they were permissible exercises of authority. *See id.* at 2253-54 ("Th[e] overwhelming consensus [of anti-abortion statutes] endured until the day *Roe* was decided….The inescapable conclusion is that a right to abortion is not deeply rooted in the Nation's history and traditions. On the contrary, an unbroken tradition of prohibiting abortion on pain of criminal punishment persisted from the earliest days of the common law until 1973."). Many similarly unbroken traditions, lasting much longer, e.g., of blasphemy laws, have been found unconstitutional. *See infra* note 147. And, according to Justice Harlan, "tradition" is something living, *see supra* notes 10, 26; if so, developments in the 1960s, towards liberalizing abortion regimes in the states, and even state laws after *Roe* is decided, may be relevant to evaluating the tradition. *But cf.* Gergis, *supra* note 9, at 1547, 1526 (questioning whether abortion laws enacted after properly bear on what is a tradition, if they were compelled by judicial precedent, but also noting that had the abortion issue been reached two decades later than *Roe*, the trend of liberalization in the states might have been more pronounced.). For a claim that the record of *non-enforcement* of abortion laws that did exist before the 14th Amendment and the presence in the 1850s of arguments for a woman's right to terminate her pregnancy both undercut *Dobbs*' historical reasoning, see Aaron Tang, *Lessons from Lawrence: How "History" Gave us Dobbs--and how History Can Help Overrule It*, 133 Yale L.J. F. 65, 85-90 (2023).

[56] *See, e.g.,* Strauss, *supra* note 38, at 1727-28; Rosalind Dixon, Responsive Judicial Review 2, 6, 60 (2023) (discussing reasons for legislative inertia that can subvert enactment into law of public majority's views). *Cf.* John Hart Ely, Democracy and Distrust 167 (1980) (arguing that statutes discriminating against women and enacted before they could vote should be invalidated). Ely wrote the leading criticism of *Roe,* though he later indicated that he had "changed [his] mind about the propriety of inferring a general constitutional right to 'privacy,'" but still had "qualms" about its application to *Roe* and *Griswold*. John Hart Ely, On Constitutional Ground 455 n.3 (1996).

[57] *Dobbs*, 142 S. Ct at 2284 (citing Williamson v. Lee Optical of Okla., Inc., 348 U.S. 483, 491 (1955)). *Williamson* famously recognized that the law it sustained based on a hypothetical rational purpose might impose a "needless, wasteful requirement in many cases." 348 U.S. at 487. For critiques, see, e.g., David Strauss, *Why is Lochner Wrong?,* 70 U. Chi. L. Rev. 373, 386 (2003) (describing outcome of *Williamson* as "nearly indefensible").

[58] *Dobbs*, 142 S. Ct. at 2284. The Court's language here, as well as the citation to *Williamson*, signal a very relaxed form of review. The conclusion that restrictions on abortion are subject only

all abortions. Had women participated in constitution-making in 1787-89, or constitution-amending in 1866-68, would the word "liberty" have been understood to have as little application to women's bodies and lives as the Court in *Dobbs* suggested (in treating the condition of being involuntarily pregnant by virtue of state law as no different from having to comply with economic regulations subject to the same relaxed "rational basis" review)? Without suggesting that nineteenth century actors would have come up with *Roe*'s trimester framework, or *Casey*'s "undue burden" standard for pre-viability abortions, it is the Court's failure to appreciate the degree of intrusion on women's lives and liberty that I focus on.[59] Women who had suffered, or seen other women suffer, through involuntary pregnancy might well argue that states should need very strong reasons indeed to impose the physical intrusions and risks of suffering and death on the lives and liberties of pregnant women. Yet not a word of the unrepresentative, exclusionary character of the bodies that enacted the Fourteenth Amendment, and state restrictions on abortion at the time, is considered by the majority. As the joint dissent in *Dobb*s does note, the "'people' did not ratify the Fourteenth Amendment. Men did. So it is perhaps not so surprising that the ratifiers were not perfectly attuned to the importance of reproductive rights for women's liberty, or for their capacity to participate as equal members of our Nation."[60]

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to relaxed rational basis review is stunning, if one takes the bifurcation of constitutional review at all seriously as a matter of principle. Regulation of economic interests in ordinary commercial settings may be justifiably subject to a lower standard of review: although the production of goods and services, and work, are very important, people can change jobs, corporations can take on new identities, adopt new work styles, organizational forms and the like, without losing control of their own bodies or respect for their humanity. For other efforts to justify a more relaxed standard of review for ordinary economic regulation, see Susanna Sherry, *Property Is the New Privacy: The Coming Constitutional Revolution (reviewing* Richard Epstein, The Classic Liberal Constitution *(2014)*), 128 Harv. L. Rev. 1452, 1475 n.93 (2015) (summarizing theories in support of the distinction). Being subject to discrimination on account of one's race or religion, which is much harder to change (and should not be changed under state compulsion if one is to respect any core of human autonomy) and bearing a child (and its attendant physical risks and enduring consequences) are associated with life-long identities and are more centrally related to personal liberty and autonomy; indeed, serious arguments have been advanced that coerced continuation of pregnancy is in principle a form of slavery prohibited by the 13th Amendment, *see, e.g.,* Michele Goodwin, *Involuntary Reproductive Servitude: Forced Pregnancy, Abortion, and the Thirteenth Amendment*, 2022 U. Chi. Legal F. 191, 197-98, 210-19 (2022); Andrew Koppelman, *Forced Labor: A Thirteenth Amendment Defense of Abortion*, 84 Nw. U. L. Rev. 480, 483-518 (1990), or may violate the Nineteenth Amendment, *see, e.g.*, Akhil Reed Amar, America's Unwritten Constitution: The Precedents and Principles We Live By 291-306 (2012). It is possible that what is motivating some members of the Court is an unarticulated belief that a fetus is a person or that unborn life *requires* constitutional protection—a proposition rejected by the entire Court in the past. But even such a reversal on the status of the fetus would not justify the Court's "rationality only," "leave it to the democratic process" approach. For discussion of the jurisprudence of countries that do recognize a government obligation to protect fetal life, see *infra* text accompanying notes 175-81

[59] Notwithstanding speculation about motivation in the prior footnote, the Court's opinion in *Dobbs* seems clear enough that states have authority to decide whether or not to regulate abortion. On why the scope of regulation should not be left entirely to democratic majorities under relaxed "rational basis" review, see *infra* text accompanying notes 162-163.

[60] *Dobbs,* 142 S. Ct. at 2324-25 (Breyer, Sotomayor, and Kagan JJ., dissenting). *See also* Joseph Blocher & Eric Ruben, *Originalism-by-Analogy and Second Amendment Adjudication*, 133 Yale L. J. (forthcoming 2023) (manuscript at 58), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4408228 (quoting female Michigan Supreme Court Justice on how the "glaring flaw in *any* analysis of the United States' historical tradition of firearm regulation . . . is that no

Of course, conditions for decision-making at the 18th century Founding or the enactment of the Fourteenth Amendment were so different from those of today that this question probably cannot be answered with anything but the purest speculation. What women—still subject to "coverture" laws in some jurisdictions and lacking the educational and economic opportunities of their male counterparts[61]—would have thought, had they been included and free to reach their own opinion, would be relevant in terms of a historic starting point for understanding constitutional meanings. That women did not serve as active voting participants in these constitutional moments should caution against attributing too much weight to specific eighteenth or nineteenth century understandings of liberty as applied to women's reproductive freedoms.

Consequences of Alternative Interpretations Are Irrelevant: Exclusionary originalism's focus only on past understandings in interpreting constitutional language (that has an ascertainable original public meaning),[62] also means that the consequences of decisions are irrelevant; the original public meaning must operate as a constraint, and thus the consequences of different, plausible alternative interpretations need not be considered.[63] An iconic example of anti-consequentialism in constitutional adjudication is *INS v. Chadha*,

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such analysis could account for what the United States' historical tradition of firearm regulation *would have been* if women and nonwhite people had been able to vote for the representatives who determined those regulations.") (quoting State v. Philpotts, 194 N.E. 3d 371, 373 (Ohio 2022) (Brunner, J., dissenting)); Siegel, *supra* note 10, at 1193. It is interesting to note a recent study finding that 84% of the 24 state legislatures and DC that have more than a third of their members female have "supported abortion access," while only 15% of the 26 states with less than a third of their members female have done so. Press Release, National Partnership for Women and Families, *Lack of Representation by Women in State Legislatures Threatens Abortion Access* (Nov. 28, 2023), https://nationalpartnership.org/news_post/lack-of-representation-women-state-legislatures-threatens-abortion-access/ [https://perma.cc/S7RJ-FH6L].

[61] *See* Allison Anna Tait, *The Return of Coverture*, 114 Mich. L. Rev. First Impressions 99, 101 n.7 (2016) (noting enactment of Married Women's Property Acts beginning in mid-19th century, and stating "[w]hile married women gained property rights pursuant to these statutes, many coverture rules remained in place until late into the twentieth century, such as head of household rules"); Bryan Caplan, *The Decline of Coverture*, EconLib: EconLog (Apr. 13, 2010), https://www.econlib.org/archives/2010/04/the_decline_of_1.html [https://perma.cc/PCM4-WX4E] (quoting Ilya Somin as writing that "by 1880, most if not all states had abolished coverture in so far as it prevented married women from owning property and entering into contracts independently of their husbands. … Some other aspects of coverture persisted on into the 20th century (for example limits on the ability of spouses to sue each other for torts), with considerable variation between states."); *see also* Elizabeth York Enstam, *Women and the Law*, Tex. State Hist. Ass'n (Mar. 31, 2021), https://www.tshaonline.org/handbook/entries/women-and-the-law [https://perma.cc/U883-8FJT] ("Until 1967 . . . Texas law put a wife's salary, bonuses, and wages under her husband's control to the extent that technically only he could 'contract her services to another.'… [A]n employer who wished to comply strictly could not hire a woman without consulting her husband."). *Cf.* Reva Siegel, *"The Rule of Love": Wife Beating as Prerogative and Privacy*, 105 Yale L.J. 2117, 2120-70 (1996) (exploring how law, through doctrines of privacy, protected husbands who used physical force against their wives even as the right to chastise was being abandoned in the mid-19th century).

[62] On the distinction between constitutional "interpretation", which for some requires resort only to original meaning, and constitutional "construction," see Keith E. Whittington, *Originalism: A Critical Introduction*, 82 Fordham L. Rev. 375, 403-04 (2013); Whittington, *The New Originalism, supra* note 9.

[63] In *Dobbs*, there were three interpretations of the nature of the pregnant woman's right to terminate a pregnancy: for the majority it was indistinguishable from ordinary liberty interests, *see id.* at 2283; for the Chief Justice, it was a right to have a reasonable opportunity to decide whether to terminate, *see id.* at 2310-11 (Roberts, C.J., concurring in the judgment); for the dissenters, it was a right to decide to terminate a pregnancy up to viability, *see id.* at 2348-50 (Breyer,

in which the Chief Justice disclaimed the relevance of any advantages that the legislative veto might have, resting on originalist and formalist evaluation of the constitutional arguments.[64] One sees this in *Heller,* as well, where Justice Scalia wrote: "The very enumeration of the right takes out of the hands of government—even the Third Branch of Government—the power to decide on a case-by-case basis whether the right is really worth insisting upon. . . . Constitutional rights are enshrined with the scope they were understood to have when the people adopted them, whether or not future legislatures or (yes) even future judges think that scope too broad. We would not apply an 'interest-balancing' approach to the prohibition of a peaceful neo-Nazi march through Skokie. …;" the Court endorses a similar claim in *Bruen.*[65]

But, as Justice Breyer's dissent in *Bruen* argued, such a view is inconsistent with both strict scrutiny and intermediate scrutiny as used in U.S. equal protection, substantive due process and, in some instances, First Amendment law.[66] And the many constitutional courts in other countries that apply proportionality review to rights claims would also disagree with Scalia's absolutist view of rights and case-by-case adjudication of whether sufficient government interests justify the asserted infringement on rights.[67]

Kagan and Sotomayor dissenting) (arguing for adherence to *Roe-Casey* regime). None of these could be ruled out based on the text concerning "liberty."

[64] INS v. Chadha, 462 U.S. 919, 944 (1983) ("[T]hat a given law or procedure is efficient, convenient, and useful in facilitating functions of government, standing alone, will not save it if it is contrary to the Constitution. Convenience and efficiency are not the primary objectives—or the hallmarks—of democratic government…"). See further discussion *infra* note 214.

[65] District of Columbia v. Heller, 554 U.S. 570, 634-35 (2008) (rejecting interest balancing as inconsistent with the idea of a constitutional right and citing *National Socialist Party of America v. Skokie*, 432 U.S. 43 (1977)); New York State Rifle & Pistol Ass'n, Inc. v. Bruen, 142 S. Ct. 2111, 2131, 2133 n.7 (2022) (arguing that the Second Amendment already struck a balance to be uncovered through reasoning by analogy). This effort to displace responsibility and obscure the balancing the Court is engaged in has, not surprisingly, produced "occluded and unprincipled reasoning" in lower courts that have sought to apply *Bruen*, according to Blocher & Rubin, *supra* note 60, at 45. Interestingly, in the Skokie case cited by *Heller*, the holding was not about whether the city could prohibit the march as such; rather the U.S. Supreme Court held that any order prohibiting the march had to be subject to immediate appellate review in order adequately to protect First Amendment interests; absent such immediate appellate review, the state courts erred in refusing to stay a lower court order enjoining the march. *See National Socialist Party of America v. Skokie*, 432 U.S. at 44. The lower courts, state and federal, subsequently held that the Nazi march was protected but over dissents. Two justices dissented from the Supreme Court's denial of certiorari in *Smith v. Collin*, 439 U.S. 916 (1978) (Blackmun and White, JJ., dissenting) (urging plenary consideration of whether there are limits to free speech applicable there); Village of Skokie v. National Socialist Party of America, 69 Ill. 2d 607, 619 (1978) (Clark, J., dissenting). Moreover, in understanding "our" constitutional practice, it is not irrelevant that in *R.A.V. v. St. Paul*, 505 U.S. 377 (1992), while five justices concluded that a municipal hate speech ordinance was categorically unconstitutional as a content and viewpoint based discrimination, four Justices would have applied strict scrutiny and found the purposes of the challenged ordinance to have been sufficiently compelling—to "hel[p] to ensure the basic human rights of members of groups that have historically been subjected to discrimination." *Id.* at 403 (White, J., concurring in the judgment).

[66] *Bruen*, 142 S. Ct. at 2176 (Breyer, J., dissenting). *See* Richard H. Fallon, Jr, *Strict Judicial Scrutiny*, 54 UCLA L. Rev. 1267, 1330-32 (2007) (describing strict scrutiny as requiring consideration of the proportionality of a regulatory measure in light of inter alia the effects of other measures that would intrude less deeply on constitutional rights); *see also* Vicki C. Jackson, *Constitutional Law in an Age of Proportionality*, 124 Yale L. J. 3094, 3130-34, 3136-41, 3172-83 (2015).

[67] *See* Canada Charter of Rights and Freedoms, §1; Robert Alexy, A Theory of Constitutional Rights 394-422 (2010) (transl. by Julian Rivers) (discussing proportionality review

II. Conceptual Incompatibilities Between Constitutionalism and Originalism under an Old and Hard to Amend Constitution

Conceptually, deployment of an originalist or "history and tradition" method as an exclusionary interpretive tool under a very difficult-to-amend and very old constitution—as in *Heller, Bruen*, or *Dobbs*—is inconsistent with the very purposes of a constitution.

A. Constitutions protect individual rights while at the same time they promote the general welfare

A political constitution for a territorial polity necessarily, as a conceptual matter, has (and claims) as an overarching purpose the establishment of a system of governance designed to advance the well-being of the people. That is, a constitution presents itself as good and just, as something that should be welcomed by the people to whom it claims to apply.[68] To do so, constitutions must be both rights protecting (and in that sense government-constraining), providing for what the government must not do, and government-enabling, providing for what the government ought or is empowered to do. Government needs to be effective enough to protect rights and to secure the material well-being of the population.[69] An instrument that rigidly locked in governance methods or understanding of rights, from the 18th century onward, would not have the flexibility to serve this basic constitutional purpose centuries later.

Governments, the U.S. Declaration of Independence tells us, are "instituted" in order "to secure" "certain unalienable Rights" of "Life, Liberty and the pursuit of Happiness."[70] This rights-protecting function of instituted

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in Germany); *see also* McCloy v. New South Wales, (2015) 257 CLR 178 (Austr. High Ct) (proportionality review and implied freedom of political communication); Evelyn Douek, *All Out of Proportion: The Ongoing Disagreement About Structured Proportionality in Australia*, 47 Fed. L. Rev. 551, 552 (2019).

[68] *See* Jackson, *supra* note 9, at 331 (contrasting Fuller's view of the empirical unlikelihood of unjust laws being written down and publicized with Robert Alexy's view that "'what is implicitly claimed in framing a constitution …[is] that it is just'"). *Cf.* Lon Fuller, *The Morality of Law: A Reply to Professors Cohen and Dworkin*, 10 Vill. L. Rev. 655, 664 (1965) (suggesting that complying with requirements of public notice and understandability will tend for reasons of "motivational affinity" to lead lawmakers to avoid obviously unjust laws); Ronald Dworkin, *Philosophy, Morality and Law—Observations Prompted by Professor Fuller's Novel Claims*, 113 U. Pa. L. Rev. 668, 671-72 (1965) (treating Fuller's argument that law must be public as implying that an abusive leader will hesitate to "pursu[e] evil by legislation").

[69] *See* Vicki C. Jackson & Yasmin Dawood, *Constitutionalism and Effective Government: Rights, Institutions, Values,* in Constitutionalism and a right to effective government? (Jackson & Dawood eds., 2022). On rights and the need for government to structure politics to be democratic, see generally Mark Graber, *Constructing Constitutional Politics: Thaddeus Stevens, John Bingham and the Forgotten Fourteenth Amendment* (U. Md. L. Stud. Rsch. Paper No. 2014–37), https://ssrn .com/abstract=2483355. On the constitutional requirement that governments act to provide protection, see Robin West, *Toward an Abolitionist Interpretation of the Fourteenth Amendment*, 94 W. Va. L. Rev. 111, 126-37 (1991).

[70] The Declaration of Independence (U.S. 1776) ("We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness.—That to secure these rights, Governments are instituted among Men…").

government entails affirmative obligations: to establish and maintain courts to ensure that no deprivations of life, liberty, or property take place without "due process of law"; to provide warrants and other forms of supervision to ensure that only "reasonable" searches are made; to hold elections so that orderly representative self-government can occur; to secure the "equal protection" of the laws to all, regardless of irrelevant differences in heritage; as well as to enact other laws providing for the national defense, the common welfare, justice, tranquility and liberty.

Nick Barber argues that the purpose of constitutionalism is intimately related to the purpose of a state and that the purpose of a state, "an aspect of its nature[,] … [is that] it exists to advance the well-being of its members. A state that fails to advance its people's well-being is not merely a state that acts badly, but an institution that has failed to achieve its defining point, like a hospital that fails to treat the sick or a prison that fails to confine criminals."[71] On this account, a political constitution for a state "fails to achieve its defining point" if it is not understood as designed to enable the state to advance the well-being of its members. An enlightenment project, constitutions simply are, conceptually, political instruments for the governance and well-being of a people.[72]

Constitutional self-descriptions are generally in accord with this claim, though not every constitution includes aspirational or goal-pronouncing terms.[73] European historian Linda Colley has called attention to the draft constitution for Corsica, which predated the U.S. Constitution by decades. Her translation of its opening is that "The General Diet of the People of Corsica, legitimate Masters of themselves […] Having reconquered its Liberty, wishing to give durable and permanent form to its government by transforming it into a constitution, *suited to assure the well-being of the nation*,"

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[71] N. W. Barber, The Principles of Constitutionalism 5-6 (2018). *See also* Carl Friedrich, Constitutional Government and Democracy 57 (4th ed. 1968) ("[A] constitutional system which cannot function effectively, which cannot act with dispatch and strength, cannot live."); Sotirios A. Barber, *Fallacies of Negative Constitutionalism*, 75 Fordham L. Rev. 651, 655-62 (2006); Sotirios A. Barber & James Fleming, Constitutional Interpretation: The Basic Questions ch. 4 (2007).

[72] *See* Barber, The Principles of Constitutionalism, *supra* note 71, at 10 ("[T]he founder of a state should ensure that it possesses the institutional capacities necessary for the advancement of the well-being of its members …. The principles of constitutionalism are directed towards ensuring that the state possesses an institutional structure that has the capacity to effectively advance the well-being of its members.").

[73] The Australian Constitution, for example, contains no ringing founding aspirations, except for its declaration of the polity as a "commonwealth," a word connoting the "pursuit of a common good …that cultivates citizens who care for the public good…" Michael J. Sandel, 2004 Commonwealth Humanities Lecture: Are We Still a Commonwealth? Markets, Morals and Civic Life (June 10, 2004), https://www.vote-auction.net/legal/Markets_Morals_and_Civic_Life.pdf [https://perma.cc/59VU-E8PG]. Canada's 1867 Constitution Act, as a formal matter enacted as a British statute, declared a Union among provinces, explaining that "such a Union would conduce to the Welfare of the Provinces and promote the Interests of the British Empire," linking provincial welfare with imperial interests. Constitution Act, 1867 (whereas clauses), 30 & 31 Victoria, c. 3 (U.K.) The first section of the 1982 Charter of Rights and Freedoms, however, is more normatively aspirational in tone, as it "guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society." Canadian Charter of Rights and Freedoms, enacted as Schedule B to the Canada Act 1982, 1982, c. 11, § 1 (U.K.).

ordains various propositions.[74] In addition to the Preamble of the U.S. Constitution and its goal-setting language (of justice, tranquility, the general welfare, common defense, and liberty), consider the Constitution of Ireland: its preamble sets forth such goals as "seeking to promote the common good, with due observance of Prudence, Justice and Charity, so that the dignity and freedom of the individual may be assured, true social order attained, the unity of our country restored, and concord established with other nations."[75] The Constitution of South Africa's Preamble asserts that the Constitution is being adopted to, inter alia, "[i]mprove the quality of life of all citizens and free the potential of each person…."[76] In Argentina, the constitution has "the object of constituting the national union, ensuring justice, preserving domestic peace, providing for the common defense, promoting the general welfare, and securing the blessings of liberty to ourselves, to our posterity, and to all men in the world who wish to dwell on Argentine soil."[77] Even constitutions of illiberal, undemocratic regimes purport to recognize and embrace the public-regarding purposes of a constitution,[78] in ways consistent with Barber's claims about the very purpose and nature of a political constitution.

Even if one does not accept that this is a necessary characteristic of all constitutions, it plainly is a characteristic of the U.S. Constitution,[79] whose purposes, set forth in the Preamble,[80] have already been referred to.[81]

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[74] Linda Colley, The Gun, the Ship, and the Pen 18-19 (2021) (emphasis added); *see also* Mathew Wills, *The Real First Written Constitution*, JSTOR Daily (Aug. 3, 2018), https://daily.jstor.org/the-real-first-written-constitution/ [https://perma.cc/2BLQ-BJ9P] (quoting from historian Dorothy Carrington's translation of the 1755 Constitution of Corsica: "'The General Diet of the People of Corsica, legitimately Master of itself […] Having reconquered its Liberty, wishing to give durable and constant form to its government, reducing it to a constitution from which the *Felicity* of the Nation will derive.'") (emphasis added). The connection between a good constitution and good government is emphasized as well in the U.S. Federalist Papers. *See, e.g.,* The Federalist No. 62 (James Madison) ("A good government implies two things: first, fidelity to the object of government, which is the happiness of the people; secondly, a knowledge of the means by which that object can be best attained.").

[75] Const. Ireland pmbl.

[76] Const S. Africa pmbl.

[77] Const. Argentina pmbl.

[78] *See* Const. Democratic People's Republic of Korea (2019) pmbl. (asserting that the constitution is inspired by the leadership of Kim il Sung and Kim-Jung IL to "tak[e] care of the people and lea[d] them through … noble benevolent politics"). That even such an abhorrent regime invokes such language in its constitution confirms the conceptual point about what a constitution is. For quantitative analyses of tendencies in constitutional preambles, see Tom Ginsburg, et al., *"We the Peoples": The Global Origins of Constitutional Preambles*, 46 Geo. Wash. Int'l L. Rev. 305, 321-28 (2014).

[79] *See* Martin v. Hunter's Lessee, 14 U.S. (1 Wheat.) 304, 348 (1816) ("The constitution of the United States was designed for the common and equal benefit of all the people of the United States. The judicial power was granted for the same benign and salutary purposes.").

[80] U.S. Const. prmbl ("[T]o form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defense, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity.").

[81] *See supra* note 80; *see also supra* text at notes 12-17. Sotirios Barber has gone so far as to argue that James Madison "affirms the superiority of ends to institutional means when he says in Federalist 45 that 'the real welfare of the … people, is the supreme object to be pursued; and … no form of government whatever has any other value than as it may be fitted for the attainment of this object.'" Sotirios A. Barber, Constitutional Failure 18 (2014). But for Madison, institutional means were of central importance; the question is how to interpret what the Constitution provides.

But, how to link interpretation with constitutional goals? Should interpretation be affected by the goals of a constitution? To fail to do so is a failure in the constitutional role of the interpreter. But are there circumstances in which there is less need, or less room, for judicial interpretation to help the constitution evolve towards its goals? With respect to a relatively new constitution in a democracy, or one that is reasonably possible to amend with some regularity, there are plausible arguments that interests in promoting the general welfare and protecting individuals can best be achieved by adherence primarily to the text as understood by its enactors. With such a new or regularly amended constitution, changing technological, economic, or social phenomena would likely have been considered by the people and that consideration reflected in the constitution's text. In these circumstances it might be reasonable to think that the public, operating through structured channels of heightened deliberation about their constitution or its amendment, are as likely to reach judgments that advance the goals of constitutionalism as are the courts, except in relatively unusual circumstances.[82]

But exclusionary originalism's willful blindness to the consequences of an interpretation under this U.S. Constitution—very old, and very difficult to amend—is incompatible with constitutional purposes to protect people's rights and improve people's well-being or welfare. The constitutional role of judges engaged in judicial review, whether it is viewed as restrained or more active, as deferential to the political branches or not, entails some judicial responsibility for the constitutional well-being of the polity. Exclusionary originalism treats judges as responsible only for a proper historic interpretation of words, at the time they were enacted into a legal instrument, whether in a constitution or in a will.[83] Reveling in a refusal to consider consequences, as is implicit in recent decisions and as one sees on the surface in *Chadha* in rejecting concerns for what is "efficient, convenient, and useful in facilitating functions of government" in deciding on constitutional questions,[84] defies

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[82] *See, e.g.*, Ely, Democracy and Distrust, *supra* note 56, at 4-7, 72, 75-88; *cf.* Dixon, *supra* note 56, at 64 (arguing that democratic support for minority rights should ordinarily be sufficient for recognition of the right); *see generally* Stephen Gardbaum, *Comparative Political Process Theory*, 18 Intl J. Const. L. 1429 (2020).

[83] If an interpretation based on originalist grounds has disastrous consequences for the polity (as some believe is true of both *Dobbs* and *Bruen*), exclusionary originalists can disclaim responsibility, urging that it is not their decision but the law, which can be remedied by amendment. But the remedy by way of amendment is increasingly illusory: according to Robert Dahl, as of the 2000 Census, an amendment could be blocked by the 34 Senators from the smallest 17 states, which had *less than 8%* of the population, and, even if passed by both houses of Congress, a proposed amendment could then be blocked by the legislatures of the 13 smallest population states (with *under 4% of the entire population)*. Robert A. Dahl, How Democratic is the American Constitution? 161 (2d ed., 2003). *See also* Vicki C. Jackson, *The Democratic Deficit of U.S. Federalism? Red State, Blue State, Purple,* 46 Fed. L. Rev. 645, 665 (2018). Similar percentages are reflected in more recent data: According to the 2020 census, the total resident population for 50 states and D.C. is 331,449,281. The 13 smallest states (Wyoming, Vermont, Alaska, North Dakota, South Dakota, Delaware, Montana, Rhode Island, Maine, New Hampshire, Hawaii, West Virginia, and Idaho) have a population of 14,618,613. 14,618,613/331,449,281 = 4.41%. The 17 smallest states (including also Nebraska, New Mexico, Kansas, and Mississippi) have a population of 24,596,798. 24,596,798/331,449,281 = 7.41%. With special thanks to Dino Hadziahmatovic for the 2020 calculations.

[84] *See* INS v. Chadha, 462 U.S. 919, 944 (1983).

the basic constitutional purpose of facilitating governance that promotes the general welfare.

B. Amendment, Interpretation, Attachment and Durability

Second, a constitution, unlike an ordinary statute, is designed as an organic instrument, to last over time.[85] This idea appears in both *Marbury v. Madison* and *McCulloch v. Maryland*: in *Marbury*, the Court explained, it being "a very great exertion" to write a constitution, it should "not be frequently repeated; " and in *McCulloch*, the Court emphasized that the constitution in question was designed to "endure for ages to come" and thus "to be adapted to the various *crises* of human affairs."[86] Entrenched constitutions are designed to last over time; the U.S. Constitution's durability was viewed by Madison as a vehicle for generating some degree of attachment and national identity.[87]

Metaphors of organic life contemplate both the growth and the endurance of a constitution, whether in the Canadian "living tree" metaphor, discussed below, or Justice Holmes' more generic metaphor in *Missouri v. Holland*.[88] There, he wrote, "when 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."[89]

The Federalist Papers argued the need to develop "attachment and reverence" for the political system established by the constitution, because government cannot be respected and respectable without sustaining some degree of stability.[90] But exclusionary originalism is not necessary to promote

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[85] I treat this as a conceptual, not normative, feature. Constitution-drafters, except in the situation of interim constitutions, envision their constitution lasting for longer than the typical electoral cycle for filling legislative or executive positions. This aspiration for longevity is suggested by the large number of constitutions that have provisions that are in effect 'eternity clauses,' *see* Rivka Weill, *Secession and the Prevalence of Both Militant Democracy and Eternity Clauses Worldwide,* 40 Cardozo L. Rev. 905, 948-67 (2018). Whether constitutional longevity is normatively desirable depends on other normative features of a particular constitution, which would need to be considered in evaluating whether stability of constitutional framework offers net benefits.

[86] Marbury v. Madison, 5 U.S. (1 Cranch) 137, 176 (1803); McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 415 (1819).

[87] *See* The Federalist No. 49 (James Madison) (discussing "reverence" for the law as reason to reject proposal for easier calling of constitutional conventions than that proposed in the Constitution).

[88] 252 U.S. 416 (1920). On the "living tree" see *infra* text accompanying notes 221-28.

[89] *Missouri v. Holland*, 252 U.S. at 433.

[90] The Federalist No. 62 (James Madison) (describing the "great injur[ies]" from unstable government and rapid changes in the law, and concluding that "the most deplorable effect of all is that diminution of *attachment and reverence* which steals into the hearts of the people, towards a political system which betrays so many marks of infirmity … No government, any more than an individual, will long be respected without being truly respectable; nor be truly respectable, without possessing a certain portion of order and stability.") (emphasis added). *See also* The Federalist No. 49, *supra* note 87.

constitutional attachment or the constitution's role in providing a focal point or symbol for connection within a heterogenous community. Indeed, as a difficult-to-amend constitution ages it can become an obstruction to such attachments.[91]

According to Professor Emily Pears, American political theory at the Founding identified three important mechanisms of developing political attachment to the country: a utilitarian calculation of the benefits of belonging to a large nation; a sense of cultural belonging around a national identity; and active participation in the government itself.[92] If at one time constitutional amendment was an active mode of participation, it has become much less so and has been to some extent displaced by political contestation and adjudication around the meaning of the existing constitution. Such contestation can be a powerful mode of enhancing constitutional—and thus governmental—legitimacy.[93] Yet exclusionary originalism dramatically narrows the role of contemporary contestation.

Mythologizing the wisdom of particular founders may contribute (for some) to such emotional attachments, but many forms of interpretation can and do give weight to the views of founders like Madison. However, exclusionary originalist approaches focus on identifying a singular original public meaning derived from sources including 18th century dictionaries, or 18th century British cases,[94] or singular 'traditions' identified through the presence or absence of state laws over a hundred years ago. The arcanity of these approaches and the frequent ambiguity of their results make them highly unlikely to help in securing this kind of attachment or in facilitating the Constitution's role as national symbol or focal point, especially when used after the first generations following adoption of a constitution or amendment. Moreover, the

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[91] Indeed, some scholars believe that some people are overly attached to the Constitution, creating irrational emotional resistance to its amendment that contributes to the diminished role of the amendment process in sustaining constitutional legitimacy. *See* Sanford Levinson, Our Undemocratic Constitution 16-20, 159-66 (2006). For an earlier discussion of constitutional "veneration" by Professor Levinson, see generally Sanford Levinson, *Veneration and Constitutional Change: James Madison Confronts the Possibility of Constitutional Amendment*, 21 Tex. Tech. L. Rev. 2443 (1990).

[92] Emily Pears, *Chords of Affection: A Theory of National. Political Attachments in the American Founding,* 6 Am. Pol. Thought 1, 8-24 (2017). For further discussion, *see generally* Emily Pears, Cords of Affection: Constructing Constitutional Union in early American Political Thought (2022).

[93] On the role of constitutional adjudication in securing the legitimacy of the newly independent India and its constitution, see generally Rohit De, A People's Constitution: The Everyday Life of Law in the Indian Republic (2018).

[94] *See, e.g.*, District of Columbia v. Heller, 554 U.S. 570, 577-78, 578 n.3, 581-85 (2008). The Court gave weight to a 1716 British case limiting the effect of preambles and rejected the relevance of an 1826 British case treating preambles as having more effect, because it was decided after the Second Amendment came into force. The *Heller* Court did not discuss the fact that what it is interpreting is a constitution, not an ordinary statute, and that 18th and 19th century Britain did not have a written constitution enforceable by courts as against the national legislature (and still does not). Statutory interpretation, where judicial errors of interpretation can be readily corrected through ordinary legislative majorities, is quite distinct from constitutional interpretation under a difficult-to-amend instrument.

farther out in time one goes, the more people are likely to be, like Thomas Jefferson, wary of the "dead hand" of the past.[95]

Furthermore, attachment to the idea of the Constitution appears to exist at far higher levels than knowledge of the constitutional text.[96] Indeed, attachment appears to be somewhat unconnected to the Constitution's content,[97] which suggests that a wide range of interpretive approaches would be compatible with sustaining those constitutional attachments that do exist.[98] What may be important is that those approaches do not contradict the text and offer interpretations plausibly connected to the text for reasons that are public-regarding and understandable.

Constitutions generally provide for their own amendment, as a tool to sustain their legal effects over time. Amending provisions reflect a sensible humility about the ability of people at one time to correctly design governance

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[95] *See generally* Adam M. Samaha, *Dead Hand Arguments and Constitutional Interpretation*, 108 Colum. L. Rev. 606 (2008). For interesting discussion of why the force of originalism should fade over time, and of countervailing arguments (including analogy to a random method to constrain effects of bias in decisions), see Adam M. Samaha, *Originalism's Expiration Date*, 30 Cardozo L. Rev. 1295, 1344-63 (2008).

[96] On Americans' lack of knowledge about the Constitution's content, see, e.g., *Americans are Poorly Informed About Basic Constitutional Provisions*, Annenberg Pub. Pol. Ctr. (Sept. 12, 2017), https://www.annenbergpublicpolicycenter.org/americans-are-poorly-informed-about-basic-constitutional-provisions/ [https://perma.cc/JYP8-EHK6] (summarizing results of the annual Annenberg Constitution Day Civics Survey); Richard J. Hardy et al., *Constitution Day*, 18 Honors Prac. 45, 46-47 (2022) (summarizing studies on public ignorance of the Constitution); Ilya Somin, *Originalism and Political Ignorance*, 97 Minn. L. Rev. 625, 640-47 (2012) (discussing high levels of political ignorance in the modern era and arguing similar or even greater levels of political ignorance existed during eighteenth and nineteenth centuries). Somin argues that widespread political ignorance pose challenges to theories of "original meaning" that implicitly rely on public political knowledge during the founding era, *id.* at 630, but argues that originalism could be modified by, for example, relying more on the intent of the drafters and of the knowledge elites at the time, *id.* at 653-54, or by "interpreting ambiguous parts of the Constitution in ways that are more literal and intuitive … [or] by relying less on interpretation and more on construction," *id.* at 665.

[97] *See* Nicholas O. Stephanopoulos & Mila Versteeg, *The Contours of Constitutional Approval*, 94 Wash. U. L. Rev. 113, 113 (2016) ("First, people highly approve of their constitutions—the federal charter more so than its state counterparts. Second, approval is unrelated to what constitutions say; it does not budge as their provisions become more or less congruent with respondents' preferences.") But, they find, approval is related to familiarity with the constitution. *Id.* at 158. *See also* Mila Versteeg, *Unpopular Constitutionalism*, 89 Indiana L.J. 1133, 1155 (2014) (finding wide variances between public held values, as measured in surveys of values, and actual provisions of constitutions).

[98] Experimental studies have shown that attachment to the U.S. Constitution appears to act as a brake on popular support for substantive change that would be favored if achieved by statute; the study finds a similar (albeit smaller) effect on public support for changing state constitutions as compared to effecting the same substantive change by statute. *See* James R. Zinks & Christopher T. Dawes, *The Dead Hand of the Past? Toward an Understanding of 'Constitutional Veneration'*, 38 Pol. Behav. 535, 554-46, 553-58 (2016) (reporting on experimental data). Zinks and Dawes hypothesize that because state constitutions are changed more frequently than the federal constitution, the status quo bias in favor of their continuing unamended is lessened. *Id.* at 553. Alternatively, as Stephanopoulos & Versteeg suggest, approval of constitutions is linked to knowledge about them; people may be less knowledgeable about their state constitutions as compared to the federal constitution. Stephanopoulos & Versteeg, *supra* note 97, at 117, 145. For discussion of how approaches to state constitutions are distinct from those to the federal constitution, see Jessica Bulman-Pozen & Miriam Seifter, *State Constitutional Rights and Democratic Proportionality*, 123 Colum. L. Rev. 1855, 1891-95, 1897 (2023) (noting, approvingly, that some state courts read constitutions in more holistic than clause-bound ways, meaningfully analyze the government's actual reasons for its actions, and balance competing interests).

for later times. They also reflect aspects of building more affective attachments to constitutions and the states they govern, by enabling the people acting collectively to change the formal text. If people in each generation cannot view themselves and their understandings as reflected in the constitution's text, a constitution can lose legitimacy and, over time, the capacity to bind.

With respect to the United States' difficult-to-amend, older constitution, this process of producing inter-generational respect and engagement occurs in important part through political mobilizations about constitutional meaning and contests in adjudication. As Holmes went on to say in the above passage from *Missouri v. Holland*, "[t]he case before us must be considered in the light of our whole experience and not merely in that of what was said a hundred years ago."[99] If that was true when he wrote in 1920, it is all the more so true in 2023—more than a century later; with a population enriched by massive streams of immigration throughout the 20th century;[100] with increased access to voting for African Americans beginning in the 1960s;[101] and with the participation of women after the 19th amendment in a gradual but still incomplete process of becoming more equal participants in American democratic institutions.[102]

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[99] Missouri v. Holland, 252 U.S. 416, 433 (1920).

[100] Immigration has dramatically expanded the population since the Constitution was first accepted and since its amendment following the Civil War. *See* Jeanne Batalova, *Frequently Requested Statistics on Immigrants and Immigration in the United States*, Migration Pol'y Inst. (Mar. 13, 2024), https://www.migrationpolicy.org/article/frequently-requested-statistics-immigrants-and-immigration-united-states [https://perma.cc/4DE7-U3G6] ("Immigrants and their U.S.-born children number approximately 90.8 million people, or 27 percent of the total civilian noninstitutionalized U.S. population in 2023."); Charles Hirschman & Elizabeth Mogford, *Immigration and the American Industrial Revolution From 1880 to 1920*, 38 Soc. Sci. Res. 897, 897 (2009) ("Immigrants and their children comprised over half of manufacturing workers in 1920, and if the third generation (the grandchildren of immigrants) are included, then more than two-thirds of workers in the manufacturing sector were of recent immigrant stock.")

[101] *See* Voting Rights Act, 52 U.S.C. § 10101 et seq (1965).

[102] This process is still ongoing. Although the 118th Congress was heralded for its record number of women members, the total of 28% of the Congress being female falls far short of a truly egalitarian result. See Rebecca Leppert & Drew DeSilver, *118th Congress has a record number of women*, Pew Rsch. Ctr. (Jan. 3, 2023), https://www.pewresearch.org/short-reads/2023/01/03/118th-congress-has-a-record-number-of-women/ [https://perma.cc/PR2C-A3MQ] (noting that the 28% figure represents a 59% increase over the percentage of women ten years before). Nationally, women were 33% of state legislators in 2023, a record high. *Women in State Legislatures 2023*, Nat'l Conf. State Legislatures (updated Feb. 22, 2023), https://www.ncsl.org/womens-legislative-network/women-in-state-legislatures-for-2023 [https://perma.cc/6KML-PG5K].

Groups that have been disadvantaged and excluded not uncommonly need more than one generation of participation to even begin to start approaching equal power and influence in democratic legislatures. The total number of African Americans as full voting members of the 118th Congress is 62 out of 535, or 11.58% of total voting membership—still below the percentage of the population that identify as African American. *See* Jennifer E. Manning, Cong. Rsch. Serv., R47470, Membership of the 118th Congress: A Profile 7 (June 7, 2024); Mohamad Moslimani et al., *Facts about the U.S. Black Population*, Pew Research Center (Jan. 18, 2024), https://www.pewresearch.org/social-trends/fact-sheet/facts-about-the-us-black-population/ [https://perma.cc/G5UF-RC9Y](stating that in 2022, an estimated 14.1% of the population self-identify as Black); see also Katherine Schaeffer, *U.S. Congress Continues to Grow in Racial, Ethnic Diversity*, Pew Rsch. Ctr. (Jan. 9, 2023), https://www.pewresearch.org/short-reads/2023/01/09/u-s-congress-continues-to-grow-in-racial-ethnic-diversity/ [https://perma.cc/M7HF-962W]. Ten years earlier in the 113th Congress, it was 42 out of 535, or under 8%. *Id.* In the 107th Congress, in 2001—over a quarter century after the Voting Rights Act—the number of African-Americans as voting members of Congress was 36—or under 7%. *Id.*

In the United States, the difficulties in achieving constitutional amendment are well known. The difficulties derive in part from a rigorous amending formula,[103] in part from the increasingly anti-majoritarian effects of the equal suffrage rule of the Senate, and in part from long-term demographic changes that result in a small minority of the population being able to block change desired by large majorities.[104] Cultural attitudes of attachment to the Constitution as a writing symbolic of the nation, as well as pride in the nation, may play a role as well.[105] In U.S. constitutional culture around the federal constitution, citizens and organized political movements in society now depend on judicial interpretation as a means by which they maintain their attachment to

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There were no African American members of the House from 1901-1929, and none in the Senate from 1881—1967; in the 89th Congress, which enacted the Voting Rights Act of 1965, there were 6 African American members—just over 1% of the members of Congress, at a time when the 1960 Census found that African-Americans were over 10% of the total population. *See* Ida A. Brudnick & Jennifer E. Manning, Cong. Rsch. Serv., RL30378, African American Members of the U.S. Congress: 1870-2020 6-8 (Dec. 15, 2020); *Black-American Members by Congress*, U.S. House of Representatives: History, Art & Archives (last visited Feb. 29, 2024), https://history.house.gov/Exhibitions-and-Publications/BAIC/Historical-Data/Black-American-Representatives-and-Senators-by-Congress/ [https://perma.cc/CP4A-U5J2]; U.S. Census Bureau, 1960 Census of the Population: Race of the Population of the United States, by States, PC(S1)-10 (Sept. 7, 1961), https://www2.census.gov/library/publications/decennial/1960/pc-s1-supplementary-reports/pc-s1-10.pdf [https://perma.cc/5SWC-YGCP]. These totals exclude the nonvoting members in the House of Representatives (currently 6). Manning, *supra*, at 1 n.1. With special thanks to Dino Hadziahmetovic for his research help on this data.

[103] On the unusual rigor of the U.S. amending formal, see Donald S. Lutz, *Toward a Theory of Constitutional Amendment*, 88 Am. Pol. Sci. Rev. 355, 362 (1994) (describing the U.S. Constitution as the second-most-difficult to amend in the world); Donald S. Lutz, Principles of Constitutional Design 170 (2006) (indicating that the U.S. Constitution is the world's most difficult to amend). *See also, e.g.*, Zachary Elkins, Tom Ginsburg, & James Melton, The Endurance of National Constitutions 101 (2009) (describing the United States as "one of the most inflexible" constitutions in the world); Richard Albert, *The World's Most Difficult Constitution to Amend?*, 110 Cal. L. Rev. 2005, 2007-08 (2022) (showing that U.S. constitution ranks as among the hardest to amend in the world on a wide range of scholarly evaluations and stating that "the distinction of topping the global charts on constitutional rigidity is cause for alarm"); Astrid Lorenz, *How to Measure Constitutional Rigidity: Four Concepts and Two Alternatives*, 17 J. Theoretical Pol. 341, 360-361 (2005) (ranking U.S. Constitution as second most difficult to amend after Belgian constitution). Other scholars, with different perspectives on the substantive issues, also agree that the difficulty of amendment legitimately should bear on the Court's interpretive approach. *See, e.g.,* Jeffrey S. Sutton, *What Should be National and What Should be Local in American Judicial Review,* 2022 Sup. Ct. Rev. 191, 192-93, 195 (2023).

[104] *See supra* note 83 (citing current data); Jackson, *Democratic Deficit*, *supra* note 83 at 649 n. 20 (reporting that the ratio between large and small population states in the 1790 Census was 13:1 (or 10:1 if counting only "free white men"),while in 2018 the ratio was 67:1).

[105] For an argument that "amendment culture," that is, the propensity to amend or not, matters to the rate of amendment at least as much as the rigidity of the amending formula, see Tom Ginsburg & James Melton, *Does the Constitutional Amendment Rule Matter at All? Amendment Cultures and the Challenges of Measuring Amendment Difficulty*, 13 Int'l J. Const. L. 686, 687-711 (2015). This is a relatively new area of research. *Compare* Danko Tarabar & Andrew T. Young, *What Constitutes a Constitutional Amendment Culture?,* 66 Eur. J. Pol. Econ. 1, 16 (2021) (agreeing with Ginsburg and Melton that formal rigidity of the rules for amendment are not significant, and finding that individualism, uncertainty avoidance and long term orientations are associated with amendment rate differences and that when they are considered, "amendment culture" is no longer significant in explaining amendment rates) *with* George Tsebelis, *The Time Inconsistency of Long Constitutions: Evidence From the World,* 56 Eur. J. Pol. Rsch. 820, 827-29, 836-37 (2017) (arguing that cultural attitudes do not explain rates of constitutional change, which are better accounted for by the length of constitutions, with shorter constitutions experiencing less change over time). On the impact of national pride in support for a constitution, see Stephanopoulos & Versteeg, *supra* note 97, at 148, 159.

and the legitimacy of the Constitution as a binding instrument.[106] "Originalism" is not our law;[107] the Constitution is—as is a commitment to finding paths of continuity to connect current decisions to the constitutional text.

While there is something to the idea that newcomers join an ongoing polity with the inherited "acquis" of its fundamental law, [108] part of that "acquis" is the role of judicial interpretation in translating that fundamental law over time and generations to enable the Constitution to continue to serve its fundamental purposes. If the Constitution were to be construed only in accord with its original 1789, or even 1866-70, meanings as understood at that time, women might still be subject to the financial decisions or even coercive force of their husbands; same-sex couples could be criminally sanctioned for their relationships; African-Americans and city-dwellers might remain at the mercy of malapportioned state legislatures; and racial segregation in public schools might be allowed.[109] A constitution that permitted these abuses

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[106] For exploration of the role of social movements (and at times competing social movements) in influencing constitutional understandings, see generally, e.g., Jack M. Balkin & Reva B. Siegel, *Principles, Practices, and Social Movements*, 154 U. Penn. L. Rev. 927 (2006); Reva B. Siegel, *Constitutional Culture, Social Movement Conflict and Constitutional Change: The Case of the de facto ERA*, 94 Calif. L. Rev. 1323 (2006); Reva B. Siegel, *Equality Talk: Antisubordination and Anticlassification Values in Constitutional Struggles Over Brown*, 117 Harv. L. Rev. 1470 (2004) (discussing how social movement conflict shaped modern understandings of race discrimination). For an effort to identify how "indicators of public opinion" operate within Supreme Court adjudication, see generally Tom Donnelly, *Popular Constitutional Argument*, 73 Vand. L. Rev. 73 (2020).

[107] *See, e.g.,* Eric J. Segall, *Originalism Off the Ground: A Response to Professors Baude and Sachs*, 34 Const. Commentary 313, 320 (2019) (arguing that much of the Warren Court's caselaw prioritized policy/justice arguments over original meaning: "[A]n entire era of Warren Court constitutional law was based mostly on justice and fairness while often ignoring or minimizing text and history."); Justice Antonin Scalia, *Foreword*, 31 Harv. J.L. & Pub. Pol'y 871, 871 (2008) ("[I]t would be foolish to pretend that that philosophy [of constitutional interpretation known as originalism] has become…the dominant mode of interpretation in the courts"); *see also* Fallon, *supra* note 22, at 302 ("We do not have an originalist Supreme Court, committed to deciding all or nearly all cases based on original constitutional meanings, but at most a selectively originalist one."); Barry Friedman & Scott B. Smith, *The Sedimentary Constitution*, 147 U. Pa. L. Rev. 1, 13-33 (1998). *But cf.* Baude, *supra* note 4, at 2352 (suggesting that what he describes as "inclusive" originalism is "our law").

[108] *Cf. Acquis*, Eur-Lex, https://eur-lex.europa.eu/EN/legal-content/glossary/acquis.html [https://perma.cc/YL9V-TF5C] (defining the term "European Union (EU) acquis" to mean the "collection of common rights and obligations that constitute the body of EU law, …. incorporated into the legal systems of EU Member States," including "the case-law developed by the Court of Justice of the European Union") .

[109] *See* Fallon, *supra* note 22, at 254-55 ("Post-*Brown* cases, mostly without close attention to original meanings or understandings of the Fourteenth Amendment, have . . . decreed that sex-based classifications are impermissible unless substantially related to important governmental purposes; [and] laid down the one-person, one-vote principle"); David Strauss, The Living Constitution 12-18 (2010). There are no sure things; the text above is a speculation on what might be legally permissible were exclusionary originalism followed, not necessarily what is likely to have resulted. Note that some originalists, including Justice Scalia, have been explicit in saying that the Constitution does not forbid discrimination based on sex. *See infra* note 202 (quoting Justice Scalia). On the other hand, it has become a strong norm for judges to assert that *Plessy* was wrong when decided. *See* Planned Parenthood of Se. Pa v. Casey, 505 U.S 833, 863 (1992) (joint opinion of Justices O'Connor, Kennedy and Souter); Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll., 143 S. Ct. 2141, 2160 (2023) ("By 1950, the inevitable truth of the Fourteenth Amendment had thus begun to reemerge: Separate cannot be equal."). But *Plessy*'s regime was "our law" for almost six decades. Despite efforts to establish *Brown*'s compatibility with the original, specific understandings of how the Amendment would affect segregation of the races, I am not fully persuaded that it is the best reading of "original"

would not retain the esteem or respect of a goodly part of its population. And a country that tolerated such practices in the post-WWII human rights era would not have achieved the kind of normative influence in the world that the United States, and its Constitution, have had for a good part of that period.[110] Constitutions, then, need to evolve over time—to a greater degree than the formal amendment procedures of the US Constitution have allowed—to sustain the connection to and regard of their people.

C. Generality, specificity and the importance of text

Third, a corollary of the purpose of constitutions to outlast their own initial adoption is that constitutions combine specificity in text with generality.[111] David Strauss observes this combination in the U.S. Constitution and praises its balance between specificity and generality.[112] To be sure, specificity on such matters as the principal organs of government; how representatives are allocated; or how often elections should be held—has virtues in laying down rules for the political system that in many respects facilitate a representative government becoming effective.[113] Whether they are optimal is highly doubtful; but despite plausible arguments that the allocation in the Senate is inconsistent with equality principles of representation that apply to both the federal and state governments, it would be inconsistent with treating the Constitution as law to interpret away the specific requirement of "equal suffrage in the Senate"

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specific understandings that school segregation was to be abolished by its enactment. See the exchange between Professors McConnell and Klarman, beginning with Michael McConnell, *Originalism and the Desegregation Decisions*, 81 Va. L. Rev. 947, 947 (1995). And if a very abstract approach to "original public understanding" of "equal protection" is adopted (under which unequal treatment of women or minority groups is generally understood to be prohibited), then "originalism" becomes very similar to purposivism and the way is open for evolving understandings (including concerns for consequences) of how the Equal Protection clause applies, in a way inconsistent with (at least some older) originalist claims of constraint and fixedness of meaning. Jack Balkin's "originalism" might be viewed as illustrative.

[110] *Cf.* David S. Law & Mila Versteeg, *The Declining Influence of the United States Constitution,* 87 NYU L. Rev. 762, 779-809, 850-55 (2012) (describing declining influence of the U.S. Constitution).

[111] N. W. Barber offers another dichotomous way of looking at what constitutions do. He argues that constitutions exist in part to provide responses to disputes, but can do so in two different ways: through strategies of resolving those disputes in the constitution or through strategies of providing accommodation to enable those disputes to be resolved later. N.W. Barber, *Resolution and Accommodation in the Good Constitution*, in Constitutionalism and a Right to Effective Government? 23, 23-24 (Vicki C. Jackson & Yasmin Dawood eds., 2022). On this view, *Bruen* and *Heller* might be read as cases that treat the Second Amendment as having resolved many issues; and *Dobbs* as a case holding that the Constitution does not resolve much about government regulation of abortion, allowing different accommodations to be reached through democratic processes in different states. To evaluate the cases within this framework, one would need a theory for determining when resolution, and when accommodation and deferral, are better strategies. One would also need a theory for how courts (as opposed to constitution-makers) should determine when a specific resolution has already been provided and when answers have been left to the future. And, if issues are left to the future, one needs a theory to determine whether it is future courts or future political decisionmakers or both who may decide. Constructing such an account lies beyond the goals of this paper.

[112] Strauss, *supra* note 38, at 1736.

[113] *See* Cass Sunstein, *Constitutionalism and Secession*, 58 U. Chi. L. Rev. 633, 637-43 (1991) (discussing the democratic benefits of fixing some structures and rules in advance).

found in Article I, Article V and the 17th amendment.[114] Very specific text is treated as more constraining; more general provisions are understood at the level of principle and accordingly interpreted. [115]

The U.S. Constitution—like many others—includes provisions that are in their nature quite general, nowhere more clearly so than in the Equal Protection Clause. The meaning and scope of such a clause is not self-evident,[116] and plainly requires interpretation. Adopting general language signals a principle, not a narrow rule. Principles, to maintain respect, need to be interpreted in ways that make sense to the people governed by them. According to the Constitute Project, 187 national constitutions currently in force include a general guarantee of equality[117]—that is, a reference "to equality before the law, the equal rights of men, or non-discrimination."[118] While such general statements may have some common original understanding that becomes an accepted part of continued understandings,[119] they necessarily leave much to later development and interpretation by the courts. The presence of such general and open-ended constitutional provisions, Strauss suggests, implies a commitment to interpretation over time, in ways that people now living find

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[114] For discussion of the competing arguments from the rule of law, on the one hand, and from democratic consent, on the other, for treating as unamendable the Constitution's special procedural provision for amending the equal suffrage in the Senate rule, see Vicki C. Jackson, *Unconstitutional Constitutional Amendments*, *in* Demokratie-Perspektiven: Festschrift für Brun-Otto Bryde 73-74 (Michael Bäuerle et al eds., 2013).

[115] When Elena Kagan declared in her confirmation hearing that "we are all originalists", she alluded to the differences between the Constitution's "very specific rules" and its "broad principles," which were "meant to be interpreted over time." *See* 111th Cong. 61-62 (2010) (statement of Elena Kagan). *Cf.* Sutton, *supra* note 103, at 195 ("The more general a constitutional guarantee, the more room to contest its application.").

[116] *See generally* Peter Westen, *The Empty Idea of Equality*, 95 Harv. L. Rev. 537 (1982). To the extent that the specific language of "protection" in the Equal Protection Clause might have been thought to establish positive obligations of protection on the part of government, the Court has not embraced this view. *See, e.g.*, DeShaney v. Winnebago Cnty. Dep't of Soc. Servs., 489 U.S. 189 (1989); United States v. Morrison, 529 U.S. 598 (2000); *cf.* Town of Castle Rock, Colo. v. Gonzales, 545 U.S. 748 (2005) (refusing to recognize a property interest protected by the Due Process clause in police enforcement of a restraining order).

[117] *See Equality Provisions*, Constitute Project (last visited June 18, 2024), https://www.constituteproject.org/constitutions?key=equal [https://perma.cc/V7DC-WPJ2] (showing that there are 198 constitutional instruments that include such general provisions, of which 11 are draft constitutions, for a total of 187). By whatever count of the number of countries in the world, this is well over 90%. There are presently 193 members of the UN; the Vatican and Palestine are non-member states with observer status, which makes 195; and there are contests about another half-dozen areas which have been recognized as states by some other UN members; those with the most support in recognition by others are Kosovo, Taiwan, and Western Sahara. *See United Nations*, About Us, https://www.un.org/en/about-us [https://perma.cc/JZC2-TGLQ]; *Countries not in the United Nations 2024*, World Population Rev., https://worldpopulationreview.com/country-rankings/countries-not-in-the-un [https://perma.cc/DJV4-2HGA].

[118] *General guarantee of equality*, Constitute Project https://www.constituteproject.org/topics/equal?lang=en [https://perma.cc/EY47-3WGG].

[119] I agree with Whittington, *Originalism: A Critical Introduction*, *supra* note 62, at 386, that even such large and abstract ideas may have an original purpose that remains an important constraint: interpreting equal protection as not applying to a subordinated racial group would go beyond the bounds of that original understanding as it has been developed and reiterated over the years. The constraining force that such original understandings has derives not only from their origins but also from their continued normative valence. *Cf. generally* Jed Rubenfeld, *Reading the Constitution as Spoken*, 104 Yale L.J. 1119 (1995) (exploring "paradigm cases," why "core prohibitions [of rights] must be honored," and value of honoring core commitments over time).

relatable to the text, thereby negating a fundamental assumption of exclusionary originalism.[120]

Strauss has argued that the text is important because it serves as a focal point for contestation. I agree. The text of a national constitution may come to serve as a symbol of the country, and a potential source of popular attachment to their system of government. Interpretations should be plausible elaborations of constitutional text in order to help maintain the connection between the public and its foundational law.[121] Provisions that appear to instantiate general principles (e.g., "equal protection" in the Fourteenth Amendment), rather than discrete rules (e.g., jury trials required in "suits at common law, where the value in controversy shall exceed twenty dollars" in the Seventh Amendment)—allows the symbolic, expressive role of the text to be fulfilled through many different interpretive approaches, as long as they accept the text as both a constraint and a focal point—as I believe Professor Strauss does and as do many other scholars not committed to highly constraining versions of originalism.[122]

D. Changing the status quo ante

Fourth, the purposes of adopting a new written constitution may well include—and of enacting a constitutional amendment very likely will include—*changing* aspects of the prior basic governing law.[123] Interpretive

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[120] Strauss, *supra* note 109, at 7-31, 11-14. *Cf.* Hanna Lerner, Making Constitutions in Deeply Divided societies 39 (2011) (arguing that constitution-making may provide "an opportunity for formulating ambiguous and opaque provisions," which in fact embody a decision to defer controversial choices on foundational issues to the future).

[121] For this reason, the Court's conclusion in *Heller*—that the Second Amendment's opening words "A well-regulated militia being necessary to the security of a free state," had essentially no bearing on the "operative" meaning of that Amendment—is for many readers shocking, and the Court's explanation from historical sources unpersuasive as applied to interpreting so brief (and entrenched) a constitutional document. Had *Heller* not sapped those words of most of their meaning, it would have been quite relevant to examine the kinds of firearms regulations that other "free" and democratic states (or free and democratic states with citizen militias) have had. *Cf.* Marbury v. Madison, 5 U.S. (1 Cranch) 137, 174 (1803) ("It cannot be presumed that any clause in the constitution is intended to be without effect …").

[122] *See* David A. Strauss, *Legitimacy, "Constitutional Patriotism," and the Common Law Constitution*, 126 Harv. L. Rev. F. 50, 50 (2013) ("It is a fixed point of our legal system that the text of the Constitution is binding, … [I]t is never acceptable explicitly to ignore a provision of the text… [Y]ou cannot say about a provision of the text—as you can about a precedent—that it has been overruled by later legal developments or overtaken by events.").

[123] Making a new constitution or amending an existing one often implies some form of basic change in the legal order, its substance or its political foundation. *Cf. generally* David Landau, *Personalism and the Trajectories of Populist Constitutions*, 16 Ann. Rev. L. & Soc. Sci. 293 (2020) (discussing constitutional changes as aspect of major populist-inspired takeovers). Some amendments might be viewed not as transformative but as primarily preservative of pre-existing rights (e.g., the Seventh Amendment preserving jury trial rights in civil common law suits worth more than $20), or corrective (the view of the Eleventh Amendment as overcoming the Court's earlier interpretation of the original Constitution, *see* William Fletcher, A *Historical Interpretation Of The Eleventh Amendment: A Narrow Construction Of An Affirmative Grant Of Jurisdiction Rather Than A Prohibition Against Jurisdiction,* 35 Stan L. Rev. 1033, 1061-62 (1983)); for some, e.g., Ran Hirschl, Towards Juristocracy (2007), adopting judicial review can be a form of hegemonic preservation of existing power holders. But even so, new constitutions and amendments often represent a significant change in the controlling legal regime.

approaches that measure meaning based on laws existing at the time of enactment, as in *Dobbs*, are in considerable tension with this goal. The Court's reliance on the state of the law at the time of the Fourteenth Amendment's enactment—a body of law made largely without the participation of women, who nonetheless are clearly 'persons' and 'citizens' for 14th Amendment purposes—would limit the Amendment's constitutional function of changing the basic law by establishing new standards of constitutional conduct and protection. Ceteris paribus, it would be a mistake to read formal constitutional changes narrowly, like statutes in derogation of the common law, given both the greater deliberation and effort typically required to change the constitution and the typical motivation for constitutional amendment–which is to change an unsatisfactory legal status quo.

In this sense, constitutional change differs from common law or even most statutory changes. It is simply not the case that constitutional law is no different from property law, notwithstanding Professors Baude and Sachs' suggestion that "originalism demands no more than ordinary lawyer's work."[124] The nature of the work required in interpreting an amendment like the Fourteenth must acknowledge some serious degree of change in the basic, foundational law. If a constitution is a "living tree," not to be interpreted with the severity of an ordinary statute,[125] then interpreting a constitutional provision is a very special kind of lawyer's work.

The U.S. Court has been variable in its approach to interpreting amendments. Some amendments, at least over time, have been taken by the Court to represent large-scale change going well beyond the words of the text.[126] Other amendments, with seemingly far broader language, have been read both expansively on some issues and quite narrowly on others, as if the Court sees its task as resisting the force of the amendment's purposes. Thus, for example, in

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[124] William Baude & Stephen Sachs, *Originalism and the Law of the Past*, 37 Law & Hist Rev. 809, 801-11 (2019); *see also id.* at 810 ("Whether and how past law matters today is a question of current law, not one of history. This may be easier to see in the case of property or statutes, but constitutional law is no different: giving current force to past rules is simply our way of allocating authority in the present.").

[125] *See* McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 407, 415 (1819) (distinguishing constitutional text from the "prolixity of a legal code" and explaining that constitutions are "intended to endure for ages to come, and consequently, to be adapted to the various crises of human affairs"); *see also* Barak, *supra* note 22, at 184-85, 189-91 (objective understanding of purpose of constitution's text is more central in constitutional interpretation); David A. Strauss, *Common Law Constitutional Interpretation*, 63 U. Chi. L. Rev. 877, 889-90 (1996) (arguing that constitutional interpretation "has less in common [with statutory interpretation] than we might think;" in implicit contrast to an older and difficult-to-amend constitution, he suggests, "a recent statute enacted by the people's representatives is plausibly an authoritative command of the sovereign that should be followed for that reason"); *infra* text accompanying notes 221-28 (discussing Canada's "Living Tree" doctrine and Madison's comments distinguishing constitutional and statutory interpretation). *Cf.* Dieter Grimm, Constitutionalism: Past, Present and Future 14-15 (2016) (discussing the distinctiveness of constitutions in "produc[ing] legitimate state power" with universal effect).

[126] *See, e.g.,* Hans v. Louisiana, 134 U.S. 1 (1890) (interpreting the Eleventh Amendment, whose text applies only to suits by out of state or foreign citizens against states, to bar suits by in-state citizens against their states in federal court); Alden v. Maine, 527 U.S. 706 (1999) (treating the Eleventh Amendment as standing for a principle of state sovereign immunity that bars federal statutory suits in state courts against unconsenting states, even though text of the amendment applies only to the federal judicial power).

the *Slaughter-House Cases*, the Court initially read the Fourteenth Amendment narrowly, in light of what it saw as its predominant purpose; the Court limited the scope of the "privileges or immunities of citizens of the United States," treated a challenge to a law granting a monopoly to a business competitor as raising no issue under the Due Process Clause, and viewed the Equal Protection Clause as primarily concerned with the "existence of laws in the States where the newly emancipated negroes resided, which discriminated with gross injustice and hardship against them as a class."[127] Indeed, with respect to all the provisions of the Fourteenth Amendment invoked by plaintiffs, the Court said, "the one pervading purpose found in them all, lying at the foundation of each, and without which none of them would have been even suggested … [is] the freedom of the slave race."[128] Over time, this Amendment came to stand for a much broader principle of liberty, which came to be a major source of successful business challenges to state regulation. But, with respect to its emancipatory purposes for the "freedom of the slave race," the Court came to take a quite narrow view. In *The Civil Rights Cases* in 1883, the Court erected "state action" as a major barrier to congressional legislation to secure equal rights under the Fourteenth Amendment, invalidating a public accommodations law as seeking to regulate private not state action, ignoring the states' role in encouraging segregated facilities to operate and under-reading the power given to Congress to abolish slavery, in all its badges and incidents.[129] And in *Plessy v. Ferguson*, the Court upheld racial segregation imposed by law in public transportation, ignoring both the *Slaughter-House Cases'* characterization of the overriding purpose of the Amendment and Justice Harlan's more accurate characterization of the nature of the law in question.[130] This failure to give full effect to the anti-subordination purposes of the Civil War amendments in the decades after their enactment contributed to the unjust racial hierarchy that long prevailed in the United States.[131]

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[127] 83 U.S. (16 Wall.) 36, 78-81 (1872).

[128] *Id.* at 71.

[129] The Civil Rights Cases, 109 U.S. 3, 24-25 (1883); *id*. at 26 (Harlan, J., dissenting) (expressing "an earnest conviction that the court has departed from the familiar rule requiring, in the interpretation of constitutional provisions, that full effect be given to the intent with which they were adopted"). Harlan's opinion did not narrowly focus on the text of the Thirteenth and Fourteenth Amendments but was more forcefully purposive in character, emphasizing the "substance and spirit of the recent amendments of the Constitution" to understand the "mischiefs to be remedied:" "[S]ince slavery . . . was the moving or principal cause of the adoption of that amendment, and since that institution rested wholly upon the inferiority, as a race, of those held in bondage, their freedom necessarily involved immunity from, and protection against, all discrimination against them, because of their race, in respect of such civil rights as belong to freemen of other races. Congress, therefore . . . may enact laws to protect that people against the deprivation, on account of their race, of any civil rights enjoyed by other freemen in the same State." *Id*. at 26-36.

[130] Plessy v. Ferguson, 163 U.S. 537, 551 (1896) (upholding racial segregation in public transportation and indicating that it was only in the minds of the "colored race" that separation implied inferiority). In so reasoning, the Court ignored what—as Justice Harlan in dissent, *id.* at 557, 562, said—"[e]very one knows" was the purpose of segregation laws adopted by the state: to brand members of the formerly enslaved group as subordinated. Justice Harlan's more sociologically realistic understanding of the motivation and caste-creating consequences of legally-mandated racial segregation were ultimately embraced by the Court in *Brown*, 347 U.S. 483.

[131] Not everyone agrees with the anti-subordination view of the purposes of the post-Civil War amendments. *See, e.g.*, Students for Fair Admissions, Inc. v. President & Fellows of Harvard

When an amendment occurs, especially under a constitution so difficult to amend as our own, it should not ordinarily be seen as a breach in the fabric of the Constitution to be judicially repaired,[132] but rather, as having the potential to chart a new, more just, or effective course towards a "more perfect" state of affairs. The *Dobbs* Court's detailed investigation of statutes existing at the time of the ratification of the Fourteenth Amendment, in order to limit the scope of protection afforded by its Due Process Clause,[133] ignores this fundamental feature of a constitutional change—that is, of introducing a new principle that will, going forward in the future, govern relationships between states and their citizens. Perhaps some originalists would say that the error in this part of the opinion was in looking for original "expected applications" rather than original meaning.[134] Perhaps. But a larger error comes from the exclusionary originalists' desire to interpret the words of the Constitution—even those plainly invoking large and abstract principles—only in a historical moment-focused way, without regard to developing understandings and social changes since—thereby excluding from the process of sustaining the Constitution as "ours" those admitted to full citizenship after the time of enactment, who are part of much later generations.

The exclusionary impulses of the Court's recent forms of originalism are combined with an unattractive and perhaps related disrespect for the views of lower court federal judges and of past members of the Supreme Court. Blocher and Ruben say that the methodology in *Bruen* is inconsistent with that employed in over one thousand cases decided in the lower courts since *Heller*.[135] The *Dobbs* Court was scathing in its critique of prior Courts,[136]

Coll., 143 S. Ct. 2141, 2185-88 (2023) (Thomas, J., concurring) (disagreeing with the "anti-subordination" view of the Fourteenth Amendment's purpose). Interestingly, Justice Thomas appears here to treat the existence of segregation laws at or soon after the Amendment's enactment as irrelevant to its interpretation.

[132] *See* United States v. Morrison, 529 U.S. 598, 652 (2000) (Souter, J., dissenting) ("Amendments that alter the balance of power between the National and State Governments, like the Fourteenth, or that change the way the States are represented within the Federal Government, like the Seventeenth, are not rips in the fabric of the Framers' Constitution, inviting judicial repairs."); Vicki C. Jackson, *Holistic Interpretation:* Fitzpatrick v. Bitzer *and Our Bifurcated Constitution*, 53 Stan. L. Rev. 1259, 1296 n.135 (2001).

[133] *See* Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2252-53 (2022) (describing number of state laws that existed at the time of the 14th Amendment's enactment that banned abortions); *see also id.* at 2253, 2260 (describing enactment of anti-abortion laws through the 1950s). The Court did not treat the liberalization of abortion laws of the 1960s or the changes in state laws following *Roe* as relevant to "history and tradition".

[134] *See, e.g.*, Jack M. Balkin, *Abortion and Original Meaning*, 24 Const. Comment. 291, 292–307, 321, 338–39 (2007); *see also* William N. Eskridge Jr. et al., *The Meaning of* Sex*: Dynamic Words, Novel Applications, and Original Public Meaning*, 119 Mich. L. Rev. 1503, 1531-33 (2021); Blocher & Ruben, *supra* note 60, at 34-35.

[135] Blocher & Ruben, *supra* note 60, at 15.

[136] *See, e.g.*, *Dobbs*, 142 S. Ct. at 2243 (describing *Roe* as "egregiously wrong from the start," with "exceptionally weak" reasoning, and "damaging consequences"). The Court continued in this vein, *id.* at 2265, 2275, writing:

> *Roe* was on a collision course with the Constitution from the day it was decided, *Casey* perpetuated its errors. . .. [W]ielding nothing but "raw judicial power," *Doe*, 410 U.S. at 222 (White, J., dissenting), the Court usurped the power to address a question of profound moral and social importance that the Constitution unequivocally leaves for the people. … *Casey*'s "undue burden" test has proved to be unworkable.

notwithstanding support for the *Roe* or *Casey* regime from a clear majority of the Justices who sat on the Court from *Roe* through *Dobbs*.[137] The *Dobbs* majority's arrogant disconnectedness from other judges does not seem a necessary feature of exclusionary originalism, though some might argue that if all that is required is that the final judicial decisionmaker take an otherwise unmediated look at history then this might promote lack of regard for the views of other judges. But it is hard to understand why Supreme Court justices are not more attentive to the fact that they exist as part of a larger federal judicial system. An aspect of exclusionary originalism that is inconsistent with the overall purposes of a constitution is its failure to invite participation by living later generations, by other judges, and by other constitutional actors, in the project of interpretation.

E. Multiple purposes, multiple understandings

Fifth, and finally, constitutions have multiple purposes and are often subject to multiple and conflicting understandings, both in their inception and thereafter. The U.S. Constitution, according to its preamble, seeks to promote the general welfare and secure the blessings of liberty; it seeks to establish justice, promote tranquility, provide for the common defense and secure liberty to our posterity.[138] Constitutions are not only about the pursuit of the general welfare, but also are importantly about the protection of individual rights and, in much of the world (including the United States) about

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"[P]lucked from nowhere," 505 U.S., at 965 (opinion of Rehnquist, C.J.), it "seems calculated to perpetuate give-it-a-try litigation" before judges assigned an unwieldly and inappropriate task. Lehnert v. Ferris Faculty Assn., 500 U. S. 507, 551 (1991) (Scalia, J., concurring in judgment in part and dissenting in part).

[137] Of the twenty-four justices during this time period, *see Justices, 1789 to Present*, U.S. Supreme Court, https://www.supremecourt.gov/about/members_text.aspx [https://perma.cc/3M6Z-AGB9], fifteen joined opinions supporting or applying the *Roe* or *Casey* regime. These fifteen, however, include Chief Justice Burger, who, though joining *Roe,* wrote a separate concurrence, Doe v. Bolton, 410 U.S. 179, 207-08 and note* (1973) (Burger, C.J. concurring in both *Roe* and *Doe*), suggesting he would support a regime requiring two physicians' agreement that termination was necessary to protect the pregnant woman's health (as broadly construed in United States v. Vuitch, 402 U.S. 62, 71-72 (1971) (interpreting statute allowing abortions for reasons of "health" to include "mental health," defined as "psychological … well-being")); in 1986 Chief Justice Burger renounced *Roe*, Thornburg v. American College of Obstetricians and Gynecologists, 476 U.S. 747, 782 (1986) (Burger, C.J. dissenting). Chief Justice Roberts rejected the *Roe-Casey* "viability" holdings but argued there was no need to decide whether to reject their principle that a pregnant woman had a right to choose; any such right, he wrote, would require only a "reasonable opportunity to choose," which was provided by the Mississippi 15-week deadline. *Dobbs*, 142 S. Ct. at 2310, 2314-15 (Roberts, C.J., concurring in the judgment).

[138] As part of the Constitution's text the Preamble needs no practice-based argument to warrant its inclusion among relevant legal sources, but it has been referred to, gently, in such cases as *Greer v. Spock*, 424 U.S. 828, 837, 837 n.8 (1976) and *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 838 (1995). *See also,* Jacobson v. Massachusetts, 197 U.S. 11, 22 (1905) ("[T]he preamble indicates the general purposes for which the people ordained and established the Constitution, . . .[but is not] the source of any substantive power conferred on the government of the United States"); Estelle v. Jurek, 450 U.S. 1014, 1020 (1981) (Rehnquist, J., dissenting from denial of certiorari).

advancing representative democratic government.[139] They are about enabling effective and workable governance of a polity while at the same time protecting the basic rights of the human beings who make up its members.[140] They are about establishing peaceable alternatives to violence for the resolution of public law disputes, offering a framework within which those who lose particular contests—whether over elections, legislation, or adjudication—are likely to accept their losses as legitimate. They are about enabling the national government effectively to deal with transnational developments.

These multiple purposes call for a certain skepticism about claims or arguments that assume that a single interpretive source—especially one located in the remote past—will be suitable for all constitutional questions. Exclusionary originalism, however, implies only a single approach to this raft of issues likely to arise over time, at least where there is an ascertainable "original" public meaning to the words of the text. Exclusionary originalism has a tendency to drive its practitioners to identify a singular such meaning, in order to realize the hope for "constraint" from its application.[141] But it is entirely possible that a constitutional text was, and is, understood quite differently by large segments of the population. Consider the different evaluation of originalist meanings found in the majority (five justice) and dissenting (four justice) opinions of the Court in *Heller*. The Court compounds the problem of suppressing one of those originalist understandings in *Bruen*: its insistence that to justify regulation of possession of common weapons for self-defense there must be an historic exception that is analogous in both how it operated and the rationale for why it existed as an exception[142] ignores (or perhaps capitalizes on) the fact that if one understood the Amendment (per Justice Stevens) to relate to maintaining a militia, there might be less need to justify regulation of all kinds of individual gun possession as an "exception."

Second, constraint of judges is hardly the only or even the main purpose of having a constitution or of constitutional adjudication.[143] To be sure, judges, like all public officials, are bound by the Constitution; they must strive for impartiality and avoid reliance on subjective personal views. But in determining

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[139] *Cf.* Mitchell Berman, *Our Principled Constitution*, 166 U. Pa. L. Rev. 1325, 1386-89 (2018) (arguing that the U.S. Constitution contains principles, which matter in constitutional adjudication; these principles concern its text, enactment purposes and intentions, judicial precedent, historical practice, distribution of government power, democracy and sovereignty, thought and expression, liberty and autonomy, equality and dignity, and legality).

[140] *See* Jackson & Dawood, *supra* note 69 at 3-6; *see also* Gillian Metzger, *What Does Effective Government Have to Do with the Constitution?*, in Constitutionalism and a Right to Effective Government? 153, 156-58 (Vicki C. Jackson & Yasmin Dawood eds., 2022).

[141] *Cf.* Lawrence B. Solum, *Originalism and Constitutional Construction*, 82 Fordham L. Rev. 453, 456 (2013); Lawrence B. Solum, *We Are All Originalists Now*, *in* Constitutional Originalism: A Debate 1, 12, 18 (2011) (explaining the "textual constraint thesis"). *See also supra* note 9 (noting that the effects of strong versions of originalism as fixed meanings will depend on the degree to which its practitioners recognize the ambiguity and multivocal character of constitutional texts); Jack N. Rakove, Original Meanings 9-10 (1996) (arguing that "behind the textual brevity of any clause there once lay a spectrum of complex views and different shadings of opinion").

[142] *See* New York State Rifle & Pistol Ass'n, Inc. v. Bruen, 142 S. Ct. 2111, 2133 (2022) (explaining that the "how and why" of contemporary regulations must be similar to older ones).

[143] *See* Part II *passim*.

what the constitution means for issues that arise before them, the common law tradition out of which the courts grew contemplates use of the wide range of sources noted earlier in determining what that constraint is. Courts must apply "judgment," not will; but their judgment is better informed, and arguably better (or no less) constrained,[144] by more multi-valenced approaches than by exclusionary originalism.

Internal constraints (per Baude)[145] on judges must arise from the expectation that judges will seek to give the best interpretation of the Constitution as law and will engage in a good faith effort at consistency in their approach to interpretation; if in one case they give great weight to original meanings, there would need to be a persuasive reason why in another case they do not. But in this as in so much else in judging we are far more dependent on basic attitudes of judges, and on their internal judicial conscience, than on external evaluation. The role of external evaluations, indeed, may primarily be to promote an internal expectation for judges to develop some consistency of approach in applying the various sources of constitutional adjudication.

The larger point is this: given the range of goals that constitutions have, a constitutionally responsible actor should be concerned that performance of their role advances those goals. As Professor Fallon has suggested, one "aim of constitutional interpretation [is] to achieve a functionally workable and morally just body of law."[146] A focus only on the past is unlikely to fulfill this and other goals of a constitution.

III. Why Exclusionary Originalism is not a "Lesser Evil": Normative and Empirical Concerns

I begin with a caveat, reminding readers that this is a critique of the exclusionary originalism seen in recent U.S. Supreme Court cases, not of all theories that denote themselves originalist. I go on to discuss why the nature of written constitutions allows for evolution; the irrationality of the distinction in exclusionary originalism between physically embodied and relational change; the need for interpretation of the Constitution to take some account of consequences; and why the rule of law requires evolution in U.S. constitutional doctrine. (In so doing I return to some critiques made earlier, in Part I.)

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[144] *See* Adam M. Samaha, *Looking Over a Crowd—Do More Interpretive Sources Mean More Discretion?*, 92 NYU L. Rev. 554, 558-616 (2017) (arguing that the logic of adding more sources is to further constrain discretion, as long as judges do not "spin" or "cherry pick" their sources). His analysis also implies that the problem of lax rules and willful judges will produce discretion under any approach to interpretation so that empirically it is hard to say whether more sources as such will more tightly constrain discretion or not. *Id.* at 615.

[145] *See* William Baude, *Originalism as a Constraint on Judges*, 84 U. Chi. L. Rev. 2213, 2214-15 (2017).

[146] Fallon, *supra* note 24, at 1214 n.117. *Cf.* Frank I. Michelman, Constitutional Essentials: On the Constitutional Theory of Political Liberalism ch. 2 (2022) (explicating Rawls on how a constitution, if citizens could be expected to accept it as reasonable, provides a "liberal principle of legitimacy" justifying expected compliance with laws made pursuant to its procedures).

A. Not Critiquing All of Originalism

Originalism has become a more inclusive club since its early days, when it was justified primarily as a basis for constraining judicial discretion.[147]

[147] As discussed in Baude, *supra* note 145, at 2215-17, a number of scholars no longer ground normative arguments for originalism primarily in its possibilities for constraint. This seems wise because, as Professor Fallon has shown, *see generally* Fallon, *supra* note 22, originalist methods are deployed by the Court in a highly selective way with respect to stare decisis. By virtue of this selectivity, these methods are not constraining. There are many examples. At the Founding and throughout the nineteenth century and early twentieth century—including after enactment of the Fourteenth Amendment—if existing laws (including common law) are to be taken as the measure of what an amendment permitted or prohibited (to "firmly establish[]," see *supra* note 55, the scope of a constitutional right), the First Amendment was not understood to prohibit many regulations of speech that are condemned by today's doctrine. The Sedition Acts were enacted soon after the First Amendment, and were not clearly put to rest as unconstitutional until New York Times Co. v. Sullivan, 376 U.S. 254 (1964). *See also* Heidi Kitrosser, *Interpretive Modesty*, 104 Geo. L.J. 459, 491 (2016) ("[I]t is far from clear that 'the right to criticize government' is the original meaning of the First Amendment."). And laws prohibiting blasphemy were not finally resolved as unconstitutional until 1952. *See* Burstyn v. Wilson, 343 U.S. 495, 504-05 (1952) (invalidating as unconstitutional a New York statute, similar to others that had existed in the nineteenth century, prohibiting any "religion, as that word is understood by the ordinary, reasonable person, [from being] treated with contempt, mockery, scorn and ridicule," and holding that "the state has no legitimate interest in protecting any or all religions from views distasteful to them which is sufficient to justify prior restraints upon the expression of those views."). As late as 1942, the Court had suggested that bans on "profane" language were permissible. Chaplinsky v. New Hampshire, 315 U.S. 568, 572 (1942); *see also* Roth v. United States, 354 U.S. 476, 482 (1957) ("The guaranties of freedom of expression in effect in 10 of the 14 States which by 1792 had ratified the Constitution, gave no absolute protection for every utterance. Thirteen of the 14 States provided for the prosecution of libel, and all of those States made either blasphemy or profanity, or both, statutory crimes.") (footnote omitted). On *Dobb*'s reasoning, the meaning of freedom of speech could not have extended to those areas then subject to regulation (or, regulations like these would be regarded as constitutional). *Dobbs* itself, in overruling *Roe*—a case originally decided 7:2 and repeatedly reaffirmed—relied in part on *Geduldig v. Aiello*, 417 U.S. 484 (1974), a case decided 6:3 whose premises had been rejected by Congress's enacting the Pregnancy Discrimination Act of 1978. *Dobbs*' methodology has not been (and probably should not be) consistently applied by the Court across important rights, and thus the arguments for originalism based on constraint fail. *See also* Jud Campbell, *Natural Rights and the First Amendment*, 127 Yale L.J. 246, 247, 249-56, 262-64 (2017) (arguing that original understandings of free speech and freedom of the press had "multi-faceted meanings" and disagreements over applications not well-reflected in contemporary constitutional doctrine).

A second reason originalism is not constraining, as has been widely noted, is that history will often not yield clear answers: collective decision-making is rarely univocal in its understandings so there may be no singular 'original' understanding, *see* Richard H. Fallon, Jr., *The Chimerical Concept of Original Public Meaning*, 107 Va. L. Rev. 1421, 1497 (2021) ("Contested constitutional provisions rarely if ever have single original public meanings, ascertainable as a matter of historical and linguistic fact, that are capable of resolving reasonably disputable issues such as those in virtually all constitutional cases that come before the Supreme Court."); moreover, accurate history is very difficult to do well. *See also* Paul Brest, *The Misconceived Quest for Original Understanding,* 60 B.U. L. Rev. 204, 212-22 (1980). So, for example, Aaron Tang argues that the *Dobbs* Court erred substantially in its count of states banning abortion in 1868, at the time the Fourteenth Amendment was ratified. Aaron Tang, *After Dobb: History, Tradition, and the Uncertain Future of a Nationwide Abortion Ban*, 75 Stan L. Rev. 1091, 1092 (2023). He writes: "[A]s many as 21 states,"—out of the 37 in the Union when the Fourteenth Amendment was adopted in 1868—and not "the nine *Dobbs* suggests, permitted pre-quickening abortion." *Id.* at 1127, 1092, 1098. While some of his examples are debatable, his example from Alabama is noteworthy: "The majority counted Alabama as banning all abortions, … when its Supreme Court actually held [in 1857] that [an 1841] Alabama law simply codified the common law rule of punishing only abortions performed on a quickened fetus." *Id.* at 1099. For Tang's disagreement with John Finnis and Robert George on how to read this case, *see id.* at 1131-32; *see also id*. at 1099 (arguing that, due to other errors of inclusion made by the majority, "when the Fourteenth Amendment was ratified, the actual number of states that banned abortion at all stages

Justice Scalia famously characterized his "faint-hearted" brand of "originalism" as the "lesser evil" when compared with what he called "nonoriginalist" approaches. As Justice Scalia himself acknowledged, the dividing line between "faint-hearted originalis[m]" and "moderate nonoriginalis[m]" was fairly slim.[148] That is not so for the newly minted "exclusionary originalism" that has emerged in *Heller*, and especially in *Dobbs* and *Bruen*.

I do not undertake here an evaluation and response to the range of "originalist" theories now on offer.[149] There is something attractive and law-like in starting out interpreting a constitutional provision, as it applies to a new issue, with an understanding of its text, context, and purpose at the time of enactment. I do not think there is large disagreement between most originalists and most nonoriginalists on this as a starting point. The crunch points between originalism and other interpretive approaches—multi-valenced or pluralist approaches, moral theories, purposive theories, or democratic-process theories—lie in the degree to which initial understandings (to the extent they can be ascertained) are controlling, and at what level of specificity, as against subsequent developments;[150] the level of specificity question, in particular, will bear importantly on how constraining an approach to interpretation is. But most constitutional scholars and most judges will pay (at least some) attention to the text and original understandings.

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in pregnancy was not 28 of 37, as the *Dobbs* majority asserts, but as few as 16"). Moreover, if original meanings are to be determined not only by what laws are on the books at a time but also by other evidence of practice, Miranda McGowan has argued that "throughout the nineteenth century abortion providers could provide services to women without legal consequences" and that "the affirmative legal protections *Dobbs* demands could not have existed for reasons having nothing to do with approval of abortion and everything to do with women's formal and informal exclusion from political participation" and related norms of censoring discussion relating to sex. McGowan, *supra* note 19, at 37-50; *see also supra* note 55. *Compare Bruen*, 142 S. Ct. at 2141-42 & n.10 (discussing an *unsuccessful* prosecution under the Statute of Northampton to suggest that a British criminal ban did not contribute to establishing a tradition of regulation, except where the defendant had some specific intent to terrify others) *with id.* at 2183 (Breyer, J., dissenting) (arguing that other sources suggested that the Statute of Northumberland did not include the limitation on intent that the majority attributed to it but simply prohibited the carrying of arms in public, because they would terrify people).

[148] Scalia, *supra* note 6, at 862.

[149] *See supra* note 9.

[150] The distinction between "original meaning" and "expected application," which plays an important role in Jack Balkin's "living originalism," resonates with a distinction in Australian constitutional law between connotation (original meaning, general concepts) and denotation (applications to particular objects). *See, e.g.*, Jeffrey Goldsworthy, *Australia: Devotion to Legalism*, *in* Interpreting Constitutions: A Comparative Study 106, 122-23, 150-52 (Jeffrey Goldsworthy ed., 2006). Despite its appeal, this distinction poses challenges for genuine efforts accurately to understand what past, historical understandings are. Why? Human beings tend to think concretely about the meaning of general terms, and thus efforts to ascertain a meaning unconnected to specific applications are fraught. Inferring general meaning from discussions about particulars will necessarily lead to articulations of the purposes of a constitutional text, which can be illuminated but not necessarily defined by the most immediate objects of its attention. Once interpretation moves to the level of a general purpose, it becomes less tethered to the concrete ideas its originators had and must take into account changes in the context in which the original purpose is to be given effect—in ways ruled out by exclusionary originalism.

B. Law Need Not Remain Static to Remain the Law

Many originalists and nonoriginalists recognize methodologies that permit evolution over time. Once originalists assert that originalism embraces the use of interpretive sources of a kind that would have been regarded as permissible at the time of enactment, as Baude, Sachs, and some others do, then the possibility of evolution arises.[151] Some originalists write as if a written law implies that the meanings of an instrument are entirely fixed at the time it is written. This just is not so, across a range of legal activities. The common law, often reflected in written case decisions, and the dominant mode of law at the Founding, had shown a strong capacity for innovation and reshaping itself. Statutory law is typically supposed to be more stable, but that stability depends in part on the specificity or generality of its terms; anti-trust law, for example, has seen significant shifts in the Court's doctrine;[152] administrative law even accommodated differing administrations interpreting the same statute differently under the *Chevron* doctrine (while it lived).[153] And it has been conventional, and correct, to see constitutional law as another domain in which constitutional meaning can evolve over time by virtue of judicial decisions, so long as the judges respect the existing text of the Constitution, which can be changed only by formal amendment.

C. Exclusionary Originalism Irrationally Distinguishes between Physical and Relational Innovation

Exclusionary originalists on the Court are willing to accept evolutionary extensions to new physical products (like stun guns, or electronic surveillance) with respect to the scope and meaning of individual rights. The same cannot be said as readily about evolutionary extensions to new understandings of gendered roles and individual relationships—like rights of nonmarital fathers, or to same-sex marriage, or to terminate an unwanted pregnancy.[154]

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[151] *See supra* notes 32, 35, 37 (discussing the idea of original meaning as modified in accord with what original legitimate interpretive sources would allow, and liquidation).

[152] *See, e.g.*, Stephen D. Susman, *Business Judgment vs Antitrust Justice*, 76 Geo. L.J. 337, 342 (1987) (indicating that a number of "traditional per se areas have been sharply limited by the emphasis given [by the Court] to the new economics"); William N. Eskridge Jr. & John Ferejohn, *Super-Statutes*, 50 Duke L.J. 1215, 1231-37 (2001) (discussing Sherman Act); Bus. Elec. Corp. v. Sharp Elec. Corp., 485 U.S. 717, 731-32 (1988) (Justice Scalia explaining for the Court that the phrase "restraint of trade" in the Sherman Act adopted the common law potential for dynamic change in meaning).

[153] Chevron, U.S.A., Inc. v. NRDC, 467 U.S. 837, 843-44 (1984). After this article was sent to press, *Chevron* was overruled. Loper Bright Enterprises v. Raimondo, 2024 WL 3208360, No. 22-451 (U.S. June 28, 2024). Time does not permit analysis of *Loper Bright*'s impact on administrative law here; the Court appears to preserve *Skidmore* "respect'… [for] Executive Branch interpretations," *id.* at *15, *17, and recognizes that Congress may confer "discretionary authority on agencies," *id.* at *17, while stating that courts must independently determine the "best" reading of a statute, *id.* at *16. *Cf.* NLRB v. J. Weingarten, Inc., 420 U.S. 251, 264-65 (1975) (upholding a revised interpretation by the agency "in the light of significant developments in industrial life believed by the Board to have warranted a reappraisal of the question").

[154] Perhaps "new technologies" are thought to be identifiable with more objectivity than new social relations. But it is hard to see why this would provide a persuasive basis for a sharp

These changes in gendered roles and relationships are, I think, what the plurality in *Casey* was trying to get at in its discussion of stare decisis. It is true that the physical facts of pregnancy have not changed, but women's abilities to see themselves as equal members of the society and to participate equally in "public" activities—economic, political, and social—formerly reserved to men is a major change in relationships that reverberates throughout constitutional law. So, too, has knowledge of fetal development changed, in ways that may bear on the interests at stake. Failing to see changes in human relationships, and human understandings, as a basis for evolving interpretation, disables the Constitution from serving as a continued instrument for protecting the rights and well-being of living human beings.[155]

D. Exclusionary Originalism Rules Out Concerns for Consequences that Responsible Judges Should Take Account Of

I agree with Professor Fallon that adopting an interpretive theory should be based, in part, on concerns whether the results of that theory over the range of issues to which it applies will enable constitutional law to promote what he calls "the rule of law, political democracy, and appropriately specified substantive rights."[156] As argued earlier, it is in the nature of constitutions to provide a framework for governance and rights protection that is beneficial to the people of the polity. Originalist methods that focus narrowly on laws and social

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distinction between technological and relational developments. Both new technologies and new economic and social structures have both been thought to warrant changes in constitutional doctrine. *See* Lawrence Lessig, *Understanding Changed Readings: Fidelity and Theory,* 47 Stan. L. Rev. 395, 415-19, 454-55 (1995); Deborah Hellman, *Equal Protection in the Key of Respect*, 123 Yale L.J. 3036, 3047-48 (2014) (discussing role of "social meaning" in constitutional adjudication, including *Brown v. Bd of Education*); Kyllo v. United States, 533 U.S. 27, 33-34 (2001) (Justice Scalia, writing for the Court, acknowledging that "the degree of privacy secured to citizens by the Fourth Amendment has been . . . [a]ffected by the advance of technology"); West Coast Hotel v. Parrish, 300 U.S. 379, 398-99 (1937) (upholding minimum wage legislation to "reduce the evils of the 'sweating system'" and the "social problem[s]" and "unparalleled demands for relief which arose during the recent period of depression"); *cf.* William N. Eskridge Jr., *Reliance Interests in Statutory and Constitutional Interpretation*, 76 Vand. L. Rev. 681, 688 (2023) ("Assumptions held by a social group can be just as concrete and knowable as classic private reliance, and they are potentially more important.")

[155] For a related argument about the role of changed expectations in human relationships in the context of applying stare decisis to arguably erroneous decisions, see Seana Shifrin, *Reliance Arguments, Democratic Law and Inequity*, Jurisprudence (forthcoming 2023) (manuscript at 13, 19) https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4489676 (arguing relevance of whether the precedent sought to be overruled has resulted in "substantial, concrete, and life-sculpting reliance," reversal of which would "significantly and disproportionately affect[] a subset of the population, who will be substantially and disproportionately burdened by the government's reversal of its prior mistake," in a way that will "generate or reinforce a persistent inequity … resistant to the standard cycles and methods of democratic correction"). *See also* Nina Varsava, *Precedent, Reliance and Dobbs*, 136 Harv. L. Rev. 1845, 1863-1902 (2023) (criticizing Court's failure to recognize degree of "tangible" reliance by those pregnant at the time of *Dobbs*, and its dismissal of intangible, societal and systemic elements of reliance on the availability of legal abortions); Rachel Bayefsky, *Tangibility and Tainted Reliance in Dobbs*, 136 Harv. L. Rev. F. 384, 385 (2023) (arguing that the Court in *Dobbs* should have at least "acknowledged the reality of the reliance interests it was turning aside").

[156] Richard H. Fallon, Jr., *How to Choose a Constitutional Theory,* 87 Calif. L. Rev. 535, 562 (1999).

understandings in 1789, 1791, or 1868, are privileging perspectives on law held by a small minority of the adult population—one that for the most part excluded women and racial minorities. That alone undermines the present legitimacy of, and is reason to be doubtful of, the method. But exclusive attention to those sources also makes it more likely that interpretations will be arrived at that do not advance the overarching purposes of the Constitution.

In *Dobbs*, the Court's failure to recognize as a *fundamental* part of liberty the freedom from physical encroachment on one's body caused by pregnancy and related restrictions on one's liberties—its treatment of the termination decision as an ordinary liberty subject to any arguably rational regulation—is remarkably indifferent to pregnant persons' health and well-being, and to their interests in avoiding what scholars have called the totalitarian takeover by the government of a person's life for state ends.[157]

There are clearly different views on abortion in different parts of the United States. So why not, per *Dobbs*, leave the decision to state lawmakers subject only to rational basis review? That women are allowed to vote does not guarantee any particular level of protection for reproductive rights, nor does it dictate how a fetus will be viewed. Although some public opinion polls show a gender gap in whether people identify as pro-life or pro-choice,[158] legislatures in some states have recently imposed very significant bans or restrictions on abortion.[159] If the actions of the state legislatures reflects public views, then we must assume that in some states a majority of the people's elected representatives in that state today favor restrictions on abortion.[160] And there

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[157] *See* Jed Rubenfeld, *Usings,* 102 Yale L.J. 1077, 1142 (1993) ("*Roe* protects against a specifically political danger: the danger of totalitarian state intervention into our lives. No single prohibition in our entire legal system has consequences that so thoroughly *take over, physically occupy*, and *put to use* an individual's entire existence as do those of a law prohibiting abortion."); Jed Rubenfeld, *The Right of Privacy*, 102 Harv. L. Rev. 737, 737 (2019) (from abstract) ("A few legal prohibitions, such as that of abortion, have such profound affirmative consequences that their real effect is to direct a person's existence along a very particular path and substantially shape the totality of her life. Such laws … are properly viewed as totalitarian in nature. They implicate the right to privacy not because the supposed 'fundamentality' of the conduct they forbid, but rather because of the degree to which their actual consequences dictate the course of a person's life."). To be sure, for some opponents of abortion fetal life demands equal concern. But for both proponents and opponents, these are interests of great magnitude, not comparable to interests in the regulation of wages and hours.

[158] According to a Gallup Poll in 2023, 55% of women identified themselves as "pro-choice," while 41% identified themselves as "pro-life"; men were evenly split (with 48% identifying as "pro-life" and 47% identifying as "pro-choice." *See Abortion Trends by Gender*, Gallup, https://news.gallup.com/poll/245618/abortion-trends-gender.aspx [https://perma.cc/C9FJ-X2DK]. *See also id.* (graph showing about 40% of women indicated their belief that abortion should be legal in all circumstances, with 27% of men so indicating).

[159] Fourteen states are reported to have banned abortions, and at least another five states have enacted time limits of six weeks since *Dobbs*, a period that may be well before many women know that they are pregnant; a sixth, in Florida, is under challenge. Mabel Felix & Laurie Sobel, *A Year After Dobbs: Policies Restricting Access to Abortion in States Even Where It's Not Banned*, Kaiser Fam. Found. (June 22, 2023). Some other states have enacted 12-week, 15-week, 18-week, or 22-week gestational limits. *Id.* According to Kaiser, the states banning abortion altogether are: Alabama, Arkansas, Idaho, Kentucky, Louisiana, Mississippi, Missouri, North Dakota, Oklahoma, South Dakota, Tennessee, Texas, West Virginia, and Wisconsin. *Id.* More detailed analysis is required to determine the precise parameters of these bans and of any exceptions that they may include for protecting the life or health of the pregnant person.

[160] *See* Gallup, *supra* note 158; *see also After Roe Fell: Abortion Laws by State*, Ctr. for Reprod. Rts., https://reproductiverights.org/maps/abortion-laws-by-state/ [https://perma.cc/

are substantial arguments for leaving more room for democratic political decision-making on significant issues affecting rights.[161] But to leave the issue of the nature and scope of abortion restrictions entirely to state legislatures, subject only to thin rational basis review,[162] is inconsistent with the Constitution's purposes to protect liberty and equality. Constitutionalism and treating the constitution as law simply do not allow democratic decision-making to control on all issues; rather, part of democratic constitutionalism is to secure individual rights from arbitrary majoritarian measures, both to respect individuals' abilities to control their own lives and also to enable all citizens—including those who can become pregnant—to participate on terms of equality in the public sphere (including its representative and voting processes). Those who are pregnant and want to terminate are a very small minority at any point in time, and one whose interests are not necessarily well represented in the political process.[163] Yet they have very fundamental interests—in bodily integrity, health, and life—in being able to decide whether to continue. This question of constitutional law should not be determined based only on what was prohibited or permitted in 1868 by existing law.

To do so would be inconsistent with an important strand of what "our law" is. U.S. constitutional law has long reflected a "continuum" of liberties,[164] determined on the basis not only of what framing eras understood but on the "living tradition" Justice Harlan described. To be sure, there are cases that reject claims of individual right on originalist or traditionalist grounds;[165] but it would simply be incorrect to say that originalism—especially exclusionary originalism—is our law. Constitutional law has come to include rights of

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AT7U-YMKR]; Rebecca Goldman, *Abortion Rights and Access One Year After Dobbs*, League of Women Voters (last updated Aug. 2, 2023), https://www.lwv.org/blog/abortion-rights-and-access-one-year-after-dobbs [https://perma.cc/3ZH9-6S3P] (stating that in the first year after *Dobbs*, 14 states enacted abortion bans from conception); *but cf. supra* note 60 (noting correlation between low percentage of women in state legislatures and more restrictive abortion laws).

[161] *See, e.g.,* Ruth Bader Ginsburg, *Some Thoughts on Autonomy and Equality in Relation to Roe,* 63 N.C. L. Rev. 375, 385-86, 385 n.81 (1985); Mary Ann Glendon, Abortion and Divorce Law in Western Law: American Failures, European Challenges 1-63 (1989); Jeremy Waldron, *Legislating with Integrity*, 72 Fordham L. Rev. 373, 382-85 (2003).

[162] *See supra* text accompanying note 57. The Court included as a legitimate interest under traditional rational basis review "respect for and preservation of prenatal life at all stages of development." Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2284 (2022). Query whether a complete ban of abortion would be "irrational" in promoting this interest.

[163] Although Professor Ely argued that vis-à-vis women, fetuses were less well protected in the political process, *see* Ely, On Constitutional Ground, *supra* note 56, at 289, under current constitutional law it is clear that women are persons protected by constitutional rights and that fetuses are not. *See, e.g.*, *Planned Parenthood v. Casey*, 505 U.S. at 979 (Scalia, J., dissenting) ("The States may, if they wish, permit abortion on demand, but the Constitution does not require them to do so."); Roe v. Wade, 410 U.S 113, 158 (1973) (rejecting argument that a fetus is a person, on the grounds, inter alia, that existing state laws do not treat a fetus as equivalent to a person for most purposes). As discussed below, text accompanying notes 175-81, even in some countries that recognize a government obligation to protect fetal life the right to terminate pregnancy under some circumstances has also been recognized.

[164] Poe v. Ullman, 367 U.S. 497, 543 (1961) (Harlan, J., dissenting) (quoted in *Casey, Roe, Moore v. City of East Cleveland*, 431 U.S 494 (1977), and by Justices in other cases as well).

[165] *See, e.g.,* Michael H v. Gerald D., 491 U.S. 110 (1989); Bowers v. Hardwick, 478 U.S. 1186 (1986), *overruled by* Lawrence v. Texas, 539 US 558 (2003); Washington v. Glucksberg, 521 U.S. 702 (1997).

parents over children;[166] bodily autonomy of prisoners subject to punishment;[167] rights of access to contraceptives;[168] rights of intimate relations among adult couples;[169] extended protections of freedom of speech;[170] the re-understanding of the "liberty" protected by the Fifth Amendment (enacted when slavery was still in full legal force in the United states and when "coverture" doctrines deprived married women of separate legal status) to impose on the federal government the same anti-discrimination rules drawn from the Equal Protection Clause of the Fourteenth Amendment as apply to the states.[171] Being able to control one's body against the burdens of pregnancy is far more central to individual life and liberty than being able to decide where to "walk, stroll, or loaf,"[172] or even how long each day to work (and for how much),[173] in light of the very substantial intrusion on bodily integrity and health and significant risks to life that even a normal pregnancy entails.[174]

Finding that a fundamental interest in controlling one's own body during pregnancy exists does not necessarily resolve the question of what regulation is permissible nor prevent all government regulation on behalf of fetal life. Even under *Roe* and *Casey,* prohibitions on abortion after viability, with exceptions for threats to the pregnant woman's life or health, were permitted. And as discussed below, regimes other than those of *Roe* or *Casey* have been justified by courts in other constitutional democracies, without denying the fundamentality of a woman's interest in her own body.

A number of countries recognize both an obligation to protect the life of the "unborn" **and** the freedom of pregnant women to terminate pregnancies in the early part of pregnancy, or in the presence of reasons going beyond threats to the woman's life and including threats to the mental or physical health of the woman, or where pregnancies result from criminal acts.[175]

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[166] *See* Meyer v. Nebraska, 262 U.S. 390 (1923); Pierce v. Soc'y of Sisters, 268 U.S. 510 (1925); Troxel v. Granville, 530 U.S. 57 (2007). When not arrayed against parents' rights, grandparents' relationships have received constitutional protection as well. *See* Moore v. City of East Cleveland, 431 U.S. 494 (1977).

[167] Skinner v. Oklahoma, 316 U.S. 535 (1942).

[168] Griswold v. Connecticut, 381 U.S. 479 (1965); Eisenstadt v. Baird, 405 U.S. 438 (1971).

[169] *Lawrence,* 539 U.S. at 564-67; Obergefell v. Hodges, 576 U.S. 644 (2015).

[170] *See, e.g.*, Cohen v. California, 403 U.S. 15 (1971); Buckley v. Valeo, 424 U.S. 1 (1976); Citizens United v. FEC, 558 U.S. 310 (2010) (extending First Amendment protection to campaign funding).

[171] *See* Bolling v. Sharpe, 347 U.S. 497 (1954); Adarand Constructors v. Pena, 515 U.S. 200 (1995). On coverture, see *supra* note 61; Bradwell v. State, 83 U.S. 130, 141 (1873) (Bradley, J., concurring in the judgment) (noting the "maxim … that a woman had no legal existence separate from her husband" and noting that "many of the special rules of law flowing from … this cardinal principle still exist in full force in most States").

[172] Roe v. Wade, 410 U.S. 179, 213 (1973) (Douglas, J., concurring)

[173] *Compare* Lochner v. New York, 198 U.S. 45 (1905) *and* Adkins v. Child.'s Hosp., 261 U.S. 525 (1923) *with* West Coast Hotel Co. v. Parrish, 300 U.S. 379 (1937) and United States v. Darby, 312 U.S. 100 (1941).

[174] Whole Woman's Health v. Hellerstedt, 579 U.S. 582, 618 (2016) ("Nationwide, childbirth is 14 times more likely than abortion to result in death…."). Once a child is born, moreover, some adults might hesitate to turn the infant over to "safe havens" even if permitted by state law, because of concerns over the uneven quality of life in state foster care. For a brief overview, see Sarah A. Font and Elizabeth T. Gershoff, *Foster Care: How We Can, and Should, Do More for Maltreated Children,* 33 Soc. Policy Rep. 1 (2020).

[175] In many countries a shorter period for pregnant women to exercise the choice to terminate is provided than in *Roe* and *Casey*, sometimes at around 12 weeks (though sometimes

Suggestions that recognition of constitutional interests for the life of the unborn would negate any claim of rights by the pregnant woman to terminate are thus unfounded, or at least, posit a connection that is not necessarily so.

Consider two examples. In Germany the Constitutional Court in 1975 held that the Constitution imposes an obligation on the government to protect fetal life from 14 days after conception, but also held that exceptions to an abortion ban must be provided if pregnancy poses a threat to the woman's life or a substantial threat to her health and could be provided "in the case of other extraordinary burdens for the pregnant woman, …especially the cases of the eugenic (cf. Section 218b, No. 2, of the Penal Code), ethical (criminological), and of the social or emergency indication for abortion."[176] In the German abortion decision following unification of East and West Germany,[177] the Constitutional Court in 1993 indicated it would uphold an approach permitting the pregnant woman to choose whether to terminate within the first trimester, provided she had had counseling ahead of time; as Professor Neuman explained, the Court indicated that "[t]he interest in fetal life conflicted with other constitutionally protected interests, including the human

longer); sometimes abortion is allowed only in the presence of justifying reasons, including mental or physical health of the pregnant woman or other comparable reasons. *See Law and Policy Guide: Gestational Limits*, Ctr. for Reprod. Rts., https://reproductiverights.org/maps/worlds-abortion-laws/law-and-policy-guide-gestational-limits/ [https://perma.cc/3ABZ-3G49]; *infra* text accompanying notes 175-81 below (discussing German and Colombian constitutional law on abortion). Canada has had no criminal law time limits on the performance of abortions since the decision in R v. Morgentaler, [1988] 1 SCR 30, but its abortion rate, and distribution of abortions performed (great majority in first trimester) are similar to those in the United States under *Casey*. *See* Vicki C. Jackson, Constitutional Engagement in a Transnational Era 211 (2010) (observing that for some years, Canada's abortion rate appeared lower than that in the United States, citing sources from 1999 to 2007, and in both countries 90% of abortions performed were in the first trimester). On more recent data, see Michael J. New, *No, U.S. pro-lifers should not look to Canada's example*, Nat'l Rev. (Aug. 2022), https://www.nationalreview.com/corner/no-u-s-pro-lifers-should-not-look-to-canadas-example/ [https://perma.cc/9CYL-MCJ4] (reporting 2019 data indicating that the U.S, abortion rate was 11.4 abortions per thousand women of childbearing age, only slightly higher than Canada's 2020 abortion rate of 10.1 abortions per thousand women of childbearing age). Other data from the Guttmacher Institute show that between 2015 and 2019, the abortion rate in both the U.S. and Canada was 12 per every thousand women between the ages of 15 and 49. *See* Jonathan Marc Bearak et al., *Country-specific estimates of unintended pregnancy and abortion incidence: a global comparative analysis of levels in 2015–2019*, BMJ Global Health 8 (2022).

[176] Bundesverfassungsgericht [BVergG] [Federal Constitutional Court] Feb. 25, 1975, 39 Entscheidungen des Bundesverfassungsgerichts [BVerfGE] 1 [First West German Abortion Decision], *translated in* Robert E. Jonas & John D. Gorby, *West German Abortion Decision: A Contrast to Roe v. Wade,* 9 John Marshall J. Prac. & Proc. 605, 648 (1976). In other words, what made the 1975 statute unconstitutional was its treatment of all first-trimester abortions as permissible; this did not sufficiently respect unborn life, because there was no third-party evaluation of whether there was a reason of sufficient gravity to warrant terminating the pregnancy. However, the Court also indicated, a number of "indications" could constitutionally provide the basis for such action. *See, e.g., id.* at 646. As Professor Neuman explains, "The Court recognized … that in certain exceptional circumstances, continuing a pregnancy would be too much to expect. The statute itself included two such 'indications' for legal abortion, based on threats to the woman's life or health and on severe birth defects", which exceptions the Court approved. Gerald L. Neuman, *Casey in the Mirror: Abortion, Abuse and the Right to Protection in the United States and Germany*, 43 Am. J. Comp. L. 273, 275 (1995). In addition, the Court "also proposed an indication for pregnancy resulting from crimes against the woman, and more broadly for a 'general situation of need' indication when continuation of the pregnancy would impose extreme hardship on the woman comparable in intensity to the other three indications." *Id.*

[177] Judgment of May 28, 1993, BVergF, 88BVerfGE 203 (Ger.).

dignity of the pregnant woman, her own right to life and bodily integrity, and her right of personality," and that "[i]n striking the balance between these conflicting interests, the legislature had some room for discretion … ".[178] This decision also emphasized that the obligation to protect unborn life requires positive action by governments to prevent discrimination against pregnant women or families with children, to provide family assistance and other forms of support, and to assure ready access to counseling centers.[179]

In Colombia, the Constitutional Court recognized a general constitutional obligation on the part of the government to protect life, including fetal life, but also concluded that "life" and "right to life" are different: "Even though the legal system protects the fetus it does not grant it the same level or degree of protection as it grants to a human person."[180] The court struck down a general ban on all abortions, and held that where pregnancy results from rape or incest, or where there is a risk to the health and life of the pregnant woman, or if there are medically certified malformations of the fetus, the pregnant woman had the right to choose to have the pregnancy terminated.[181] As these examples illustrate, recognizing a fundamental interest for a pregnant person to terminate a pregnancy under circumstances involving early pregnancy, or threats to her life and health, would not necessarily entail a *Roe* regime.

In states that have banned almost all abortions since *Dobbs*, the law interferes with health care for such medical problems as miscarriage and ectopic pregnancies, inflicting physical and mental health risks on women.[182] These risks arise not only for those who want to terminate an unwanted pregnancy early in gestation, but also for those suffering serious health problems

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[178] Neuman, *supra* note 176, at 279.

[179] For a more complete description of these positive obligations, see *id.* at 279-83.

[180] Corte Constitucional [C.C.] [Constitutional Court of Colombia], Mayo 10, 2006, Sentencia C-355/06, *translated in* Manuel José Cepeda Espinosa & David Landau, Colombian Constitutional Law: Leading Cases 73 (2017).

[181] Cepeda & Landau, *supra* note 180, at 73-79 (describing and excerpting C-355 decision of 2006). More recently, the Constitutional Court of Colombia abandoned its constitutional "reasons" regime for application of the criminal law and established a 24-week period during which pregnant women could chose to terminate, *see* C.C., Febrero 21, 2022, Sentencia C-055/22 (Colom.), *translated in* Reva Siegel & Linda Greenhouse, *Abortion: Rights in Motion - Global Constitutionalism 2022* (Nov. 23, 2022) (Lucia Baca trans.). Some observers believe that the change was motivated by years of obstruction to compliance with the prior ruling, e.g., as in Decision T-388 of 2009, where a health insurer refused to accept the opinion of several doctors that an abortion was medically necessary and would not authorize the procedure without a court order, *see* Cepeda & Landau, *supra* note 180, at 80 (discussing C.C., Mayo 28, 2009, Sentencia T-388/09 (Colom.)).

[182] *See, e.g.*, Britni Frederiksen et al., *A National Survey of OBGYNs' Experiences After Dobbs*, Kaiser Fam. Found. (June 21, 2023), https://www.kff.org/womens-health-policy/report/a-national-survey-of-obgyns-experiences-after-dobbs/ [https://perma.cc/468X-3RET] (reporting that "one in five office-based OBGYNs (20%) report they have personally felt constraints on their ability to provide care for miscarriages and other pregnancy-related medical emergencies since the *Dobbs* decision. In states where abortion is banned, this share rises to four in ten OBGYNs (40%)" and that "[m]ost OBGYNs (68%) say the ruling has worsened their ability to manage pregnancy-related emergencies"). There is a well-established association of improved maternal health and morbidity in countries with more permissive abortion regimes. *See* Gilda Segh et al., *Induced Abortion: Estimated Rates and Trends Worldwide*, 370 Lancet 1338, 1343-44 (Oct. 13, 2007); Iqbal Shah & Elisabeth Ahman, *Unsafe abortion: global and regional incidence, trends, consequences, and challenges*, 31 (12) J. Obstetr. & Gynaec. Can. 1149, 1150-51 (2009); Jackson, s*upra* note 175, at 211 & accompanying n.98.

but whose physicians may be unwilling to treat them because of their fear of criminal prosecution,[183] and, going forward, also from how these new laws may impair the training of physicians in obstetrics and gynecology. While the laws of other constitutional democracies comparably committed to equality suggests a range of alternatives to the *Roe/Casey* regime,[184] the *reasoning* behind such regimes recognizes the unusual intrusiveness and burdensomeness of pregnancy in ways inconsistent with *Dobbs*' treatment of coercive pregnancy regulation as comparable to ordinary commercial regulation.

For women and girls, unacceptable harms, injuries or even deaths are likely to occur as result of laws allowed under the *Dobbs regime*.[185] Over the long run, these effects may well turn legal and political institutions away from *Dobbs*' constitutional vision. In speculating in this way, I draw a loose comparison, explained below, to what happened in Ireland, when the public and the courts were confronted with unacceptable threats to the lives of individual women and girls. It would be ironic indeed—though from my perspective, welcome—if *Dobbs* ends up contributing to the death of originalism, at least in its more exclusionary forms.

How might this occur? As/if women and girls die or suffer tragic health consequences from the unavailability of reproductive medical care attributable to post-*Dobbs* state laws, the consequences of *Dobbs*' methodology may come to be seen as antithetical to the overarching purposes of a constitution, to promote the well-being of the people to whom it applies, into the future. This in turn may well lead to such declining support for the *Dobbs* regime that it will change, in challenges to whatever small number of states retain its more draconian versions. Consider events in Ireland, a majority-Catholic democratic country with protected freedoms of expression and of personal liberty (e.g. from detention) that had also protected "unborn life" in its constitution. Two highly publicized incidents seemed to have significant impacts in moving that country's constitutional commitments away from abortion bans—one in the early 1990s, involving the rape and pregnancy of a 14 year old girl (the "X case"), [186] and another in 2012, involving a 31 year old married dentist who

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[183] *See* Frederiksen et al., *supra* note 182 ("[o]ver four in ten (42%) OBGYNs report that they are very or somewhat concerned about their own legal risk when making decisions about patient care and the necessity of abortion"); *Human Rights Crisis: Abortion in the United States After Dobbs*, Hum. Rts. Watch (Apr. 18, 2023), https://www.hrw.org/news/2023/04/18/human-rights-crisis-abortion-united-states-after-dobbs#_ftnref13 [https://perma.cc/DKL3-EK36].

[184] *See supra* text accompanying notes 176-81 (on Germany and Colombia). Ireland is discussed below. Even this small number of examples show that within liberal democratic constitutional democracies respect for pregnant women's decisional autonomy does not necessarily lead to a *Roe* regime; there are variations in approaches other equality seeking constitutional democracies have developed. But the "rational basis" only approach—treating regulation of abortion a involving no greater rights-based interests than ordinary economic regulation—invites complete bans or bans excepting only procedures where the pregnant woman's life is threatened. Such relative diminution in the value of the life of the pregnant person, as compared to that of the unborn child, is not widely tolerated today in other liberal democratic countries.

[185] *See supra* notes 182-83, *infra* note 195. Injuries had already begun to occur as the result of pro-life forces' efforts to expand existing laws, e.g., to control pregnant women's bodies. *See* Michele Goodwin, Policing the Womb: Invisible Women and the Criminalization of Motherhood 15-23, 28-48, 109-12 (2020).

[186] The material in the following two paragraphs is drawn from Vicki C. Jackson & Mark Tushnet, Comparative Constitutional Law 214-19 (3d ed. 2014) (relying in part on J.M.

died in hospital of sepsis after several days of the hospital's refusal to perform a much needed abortion.[187]

To explain further: The Irish pro-life anti-abortion movement had had early success in constitutionalizing the unborn's right to life in a 1983 referendum adding the 8th amendment to the Constitution, a movement prompted by an Irish Supreme Court decision upholding the right of married couples to use contraceptives.[188] However, in 1992, after the X case, in three simultaneous referenda, the Irish public 1) rejected efforts to further restrict access to abortion (rejecting a proposed amendment that would have provided that suicide risks did not justify abortion) and 2) adopted two amendments constitutionalizing the right to receive information in Ireland about abortion services elsewhere and to travel elsewhere to obtain abortion.[189]

Kelly, The Irish Constitution (1994)). In 1983, fearful that the Irish Supreme Court might adopt the U.S. approach to abortion law, pro-life/anti-abortion people mobilized and succeeded in a referendum in adding the Eighth Amendment (Article 40) to the Irish Constitution: "The State acknowledges the right to life of the unborn and, with due regard to the equal right to life of the mother, guarantees in its laws to respect and, as far as practicable, by its laws to defend and vindicate that right." In practice, Irish women went to England for their abortions. *See id.* at 215. Pro-life forces tried to ban advertising for abortion services, an ongoing effort during Maastricht Treaty negotiations. *See id.* at 215-16. But, the X case happened: "A fourteen-year-old young woman ['X'] … was sexually assaulted and made pregnant by the father of a friend whom she had been visiting. She and her parents decided they should go to Great Britain for an abortion." *Id.* at 216. They contacted the Irish police to explore whether they should try to obtain DNA evidence from the aborted fetus for use as evidence in prosecuting the rapist. The police asked the public prosecutor who, upon learning of X's plans for an abortion, "went to court—but not to prosecute the rapist." *Id.* Instead, the prosecutor sought and, shortly after the Maastricht Treaty was signed, obtained a judicial order barring her from leaving the country; the judge indicated that the travel plans posed a "real and imminent danger to the life of the unborn," and that the risk that X would commit suicide was "much less." The February 1992 judge's order created a public furor, in the midst of the government's effort to obtain public approval in a vote on whether to ratify the Maastricht Treaty. (One-third of the public had voted against the 1983 "right to life" amendment, but the easy availability of abortions abroad may have eased pressure for reform in Ireland.) Although European Union treaties ordinarily protected the right to travel, anti-abortion proponents argued that a special provision (previously sought by Ireland), denying any effect of the EU agreements on the Irish "right to life" amendment, also authorized a travel ban. *Id.* at 216-17.

"Claiming that the order violated her constitutional right to travel, X and her parents immediately appealed. After lifting the injunction against travel, in March the Irish court issued its opinion. Att'y Gen. v. X, [1992] 1 Irish Rep. 1." Id. at 217. Only two justices agreed that X had a right to travel to England and "to do whatever was lawful there," *id.*, including having an abortion; two other justices saw the case as presenting a conflict of constitutional rights—between X's right to travel and the fetus's right to life. As the court's chief justice explained, "if there were a stark conflict between the right of a mother of an unborn child to travel and the right to life of the unborn child, the right to life would necessarily have to take precedence over the right to travel." *Id.* However, in a surprising development, these four justices then said that X would have been entitled to have an abortion in Ireland—because she was suicidal, which created a "real and substantial" risk to her own life that would justify an abortion in Ireland—and thus she was free to travel to have one in England. *Id.*

Adverse press coverage and negative political reaction in Ireland to the initial effort to prevent her abortion were intense, *id.* at 216; it is significant that at this time, Ireland had the highest available ratings for protecting political and civil liberties. *See* Freedom House, Freedom in the World, The Annual Survey of Political Rights and Civil Liberties, 1992-93 37, 283 (1993), https://freedomhouse.org/sites/default/files/2020-02/Freedom_in_the_World_1992-1993_complete_book.pdf [https://perma.cc/S4MU-55D7].

[187] *See infra* notes 191-92.

[188] McGee v Att'y Gen., [1974] Irish Rep. 284 (Irish Supreme Court 1974) (Ir.); *see* Jackson & Tushnet, supra note 186.

[189] See Constitution of Ireland, https://www.irishstatutebook.ie/eli/cons/en/ (explaining that "three proposals were put to the people, the Twelfth, Thirteenth and Fourteenth

Almost two decades later, in *A, B, and C v. Ireland*,[190] the European Court of Human Rights ruled that it was permissible for Ireland to ban abortion except to protect the life of the mother, given that a part of the regime was that women could leave and get lawful abortions elsewhere. But, the Court held, Ireland needed to enact a law to determine when abortion is lawful so doctors would know. Two years later, however, with no legislation yet enacted, a 31-year old dentist from India, living in Ireland, died of septicemia after being denied an abortion for several days in hospital because the doctors wanted to wait until the fetal heartbeat stopped, despite her repeated requests to terminate, and her increasing pain and failing health.[191] The incident generated much protest and critique of Ireland's failure to enact legislation in response to the *A,B, and C* judgment; an investigation concluded that medical uncertainty over whether aborting prior to fetal death would be subject to criminal prosecution was a factor in the woman's death; soon thereafter, Ireland adopted the Protection of Life During Pregnancy Act of 2013, providing a procedure by which eligibility for lawful abortion could be determined.[192] But Irish sentiment in favor of more reform gained momentum and, following the recommendation of a Citizens Assembly convened to deliberate the matter, in another 2018 referendum the public approved a constitutional amendment replacing the text previously introduced by the 8th amendment with an authorization to regulate the termination of pregnancy by statute.[193] It was followed by enactment of legislation in 2018 allowing abortions within the first 12 weeks of pregnancy, and later in certain other conditions.[194]

Amendments. The people rejected the Twelfth (which dealt with the right to life of the unborn) and approved the Thirteenth and Fourteenth…"). In 2002 another proposed amendment restricting abortion (prohibiting threat of suicide as a basis for abortion) was again rejected at an Irish referendum. *See The Irish Constitution*, Citizens Info. (visited July 27, 2023), https://www.citizensinformation.ie/en/government-in-ireland/irish-constitution-1/constitution-introduction/ [https://perma.cc/MWF7-DHMS]; Karen Birchard, *Irish Referendum result*, 359 Lancet 955, 955 (2002).

[190] A, B and C v. Ireland, Eur. Ct. H.R. 25579/05 (2010).

[191] *See* Vandita Agrawal, *Ireland Murders Pregnant Indian Dentist*, India Times (Nov. 16, 2012), https://www.indiatimes.com/europe/ireland-murders-pregnant-indian-dentist-47214.html [https://perma.cc/TR9D-HMH6] (describing how Savita Halappanavar died from septicemia after doctors at University Hospital Galway refused to terminate her pregnancy despite her family's pleas to save her life; reporting that the family was told "this is a Catholic country" in explaining why they would not proceed as long as there was a fetal heartbeat); Henry McDonald, *Irish Abortion Laws to Blame for woman's death, say parents*, Guardian (Nov. 15, 2012), https://www.theguardian.com/world/2012/nov/15/irish-abortion-law-blame-death [https://perma.cc/6QWA-GNAY] (reporting objections of the deceased's mother that they were a Hindu family and should not be subject to Catholic views on abortion and reporting on galvanized pro-choice protests following the death).

[192] On the reaction in 2012, see "Woman Dies after Abortion Request 'Refused' at Galway Hospital," BBC News (14 Nov. 2012), https://www.bbc.com/news/uk-northern-ireland-20321741 [https://perma.cc/VQ8Y-V7DZ]. On the 2013 statute, see Protection of Life During Pregnancy Act, 2013, https://www.irishstatutebook.ie/eli/2013/act/35/enacted/en/print [https://perma.cc/4RQS-68KP].

[193] *See* Rebecca McKee, *The Citizens' Assembly Behind the Irish Abortion Referendum*, Involve (May 30, 2018), https://involve.org.uk/resources/blog/opinion/citizens-assembly-behind-irish-abortion-referendum [https://perma.cc/AMG9-T32S].

[194] Health (Regulation of Pregnancy) Act 2018 (Act 31 of 2018) Section 12 (authorizing terminations in the first 12 weeks of pregnancy); Sections 9-11 (authorizing later abortions if two physicians determine that there is a risk to the life, or of serious harm to the health of the pregnant woman, and "the foetus has not reached viability;" or where a single physician certifies

The injuries that I fear will result from approaches allowed by the *Dobbs* regime might have a similar galvanizing effect on public opinion and constitutional law here. Of course, no constitutional text need be repealed in the United States for this to occur; but the need for a reform of the national constitutional rule arises because of the great difficulty of national constitutional amendment and the likelihood that there will be some states whose abortion laws will continue to wreak harm.[195] At some point perhaps U.S. constitutional law will again recognize the very fundamental and deeply personal interests those who become pregnant have in deciding whether to continue their pregnancies. But I am saddened to think that tragedies may be needed over some long period of time to fully bring home the errors the Court has made.

E. Exclusionary Originalism is Inconsistent with the Rule of Law

In the early years after a constitution or amendment are adopted, exclusionary originalism is not likely to pose a serious rule of law problem; original understandings and expected application are likely to converge with general public understandings and social changes are likely to be small enough that adhering to exclusionary originalism will not undermine the constitution's purposes. Likewise, if the amendment or constitution was recently democratically

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that there is "an immediate risk to the life, or of serious harm to the health, of the pregnant woman;" or two physicians certify that there is "a condition affecting the foetus that is likely to lead to the death of the foetus either before, or within 28 days of, birth").

[195] *See, e.g.*, Eleanor Klibanoff, *Texas Supreme Court blocks order allowing abortion; woman who sought it leaves state*, Tex. Trib. (Dec. 11 2023), https://www.texastribune.org/2023/12/11/texas-abortion-lawsuit-kate-cox/ [https://perma.cc/X26R-VDKN]; Greer Donley, *What Happened to Kate Cox Is Tragic, and Completely Expected,* N.Y. Times (Dec. 17, 2023), https://www.nytimes.com/2023/12/17/opinion/kate-cox-abortion-texas-exceptions.html [https://perma.cc/7GY7-UYL2]. In the Texas case, Ms. Cox's doctors were unwilling to perform an abortion due to Texas' law, even though they advised that continuing pregnancy (with a child with trisomy 18, "a lethal fetal deformity") would threaten Cox's health and future fertility, in light of her two prior caesarian deliveries. Klibanoff, *supra*. Even though she had been "in and out of the emergency room," the Texas Supreme Court ruled that she did not meet the state's standards for an abortion. *Id. See also* Donley, *supra* ("Since *Dobbs* . . . numerous women around the country have shared Ms. Cox's experience. They, too, have been forced to travel for abortion care in the middle of a medical crisis, wait until their health deteriorated toward death or give birth to a child who died in their arms."). *See generally* Greer Donley & Caroline M Kelly, *Abortion Disorientation*, 74 Duke L.J. (draft, forthcoming 2024), https://scholarship.law.pitt.edu/fac_articles/587 [https://perma.cc/F53W-D7UT] (providing examples of "post-Dobbs tragedies" because of 'overbreadth of abortion definitions,' e.g., difficulties in distinguishing abortion from other forms of reproductive health care and ensuing risks to pregnant women's health, as in responses to miscarriage or ectopic pregnancies). For detailed descriptions of other pregnant women (apart from Ms. Cox) in medical emergencies whose lives or health were threatened by Texas' law, including one who developed sepsis (like Savita Halappanavar, *see supra* note 191), spent time in the ICU, and nearly died before an abortion was performed, see *Hearing Wrap-up: Zurawaski v. Texas*, Ctr. for Reprod. Rts. (July 21, 2023), https://reproductiverights.org/zurawski-v-state-of-texas-hearing-wrap-up/ [https://perma.cc/Q5BW-LQZJ] (describing testimony of individual plaintiffs in pending case challenging Texas' definition of medical emergency for purposes of abortion law). It is possible that such events would trigger legislative responses within those U.S. states with harsh laws that would obviate the need for constitutional challenge. In Ireland, much of the relevant constitutional change after the decisions in the *McGee*, *X*, and *A B and C* cases were secured through referenda, though the cases also clearly played a role. *See supra* text at notes 186-94. However, in the United States, partisan gerrymandering of state legislatures and problems of democratic inertia, *see supra* note 56, may delay any such responses for long periods of time.

enacted, the purported tension between democracy and constitutionalism in invalidating enacted statutes is diminished. Neither of these remains true, however, over time.

Over time, the discordance between public understandings of basic constitutional ideas and original anticipated applications—as is likely to arise from exclusionary originalism—could threaten the rule of law as the plausibility of adhering to only original understandings declines.[196] Moreover, courts build legitimacy over time in part by showing respect for their predecessors. The *Dobbs* Court's manifest scornful disrespect for the repeated decisions of its predecessor courts,[197]and its disregard of stare decisis are not likely to inspire respect for law. The Supreme Court cannot long sustain its own legitimacy by tearing down that of the overall system. A Court that engages in repeated instances of overruling long controlling lines of decision may contribute to an environment in which future Courts feel less constrained to continue precedents in effect, thereby diminishing the idea that law exists apart from the views of individual judges.[198]

IV. Fighting something with something: multi-valenced interpretation as an alternative

The main aim of this essay has been to explain why and how exclusionary originalism—à la *Dobbs a*nd *Bruen*—is antithetical to constitutionalism in the United States. Taking criteria of evaluation suggested by originalist scholars,[199] exclusionary originalism does poorly on most measures. That

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[196] *See* Strauss, *supra* note 109, at 30 (contrasting the force of "general understanding" of recent constitutional enactments with the "fad[ing]" grounds to adhere to such understandings over time). *Cf.* Barak, *supra* note 22, at 339-85 (arguing that "subjective" and "objective" purpose bear on statutory and constitutional interpretation, but that the weight of subjective purpose in constitutional interpretation is more substantial right after it comes into force but diminishes over time, and that over time, unlike in interpreting statutes, the objective purpose should predominate).

[197] For quotations from the *Dobbs* majority opinion illustrating this point, see *supra* note 136; *see also* Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2301 note * (2022) (Thomas, J., concurring) (referring to the "facial absurdity" of *Griswold*'s reasoning and, at 2301, arguing that *Griswold* and other substantive due process cases should be overruled). The risks to the legitimacy of the Court and its adjudicatory role are magnified by the context of its many procedural departures from sound appellate practice, including deciding questions broader than those on which review was granted, as the Chief Justice claimed occurred in *Dobbs* itself, 142 S. Ct. at 2310 (Roberts, C.J., concurring in the judgment); the increasing practice of granting certiorari before judgment, thereby avoiding having the benefit of lower court consideration of the questions and issuing important decisions without full briefing on the shadow docket, *see* Stephen Vladeck, The Shadow Docket: How the Supreme Court Uses Stealth Rulings to Amass Power and Undermine the Republic 123-25, 129-228 (2023); and of the perception of ethics violations by members of the Court.

[198] The Court's willingness to disregard the considered consensus in views in the lower courts, *see supra* text accompanying note 50, is likewise concerning from this perspective.

[199] *See, e.g.*, Whittington, *A Critical Introduction*, *supra* note 62, at 391-94 (discussing commitment to judicial restraint); William Baude & Stephen E. Sachs, *Grounding Originalism*, 113 Nw. U. L. Rev. 1455, 1460 (2019) (grounding conceptions of constitutional law "in actual legal practice"); Baude, *supra* note 145, at 2218-2222 (discussing internal and external constraints on judicial discretion). To be clear, these are criteria proposed for evaluating originalism as a general approach as compared with nonoriginalist approaches. A key distinction among originalists is

originalism cannot be justified, as formerly argued, as promoting judicial restraint is suggested by frequent divisions among the justices about original understandings.[200] For those who measure the benefits or justness of outcomes by their protection of liberty,[201] originalism in its exclusionary mode is certainly not liberty- (or equality-) enhancing for women; indeed, Justice Scalia believed that the Constitution afforded no special protection against gender discrimination.[202] The ideas that originalism respects decisions of authorized decisionmakers,[203] and that past decisions embodied in the Constitution's text deserve to be binding because adopted under a supermajority rule,[204] are reasons for special respect for original understandings soon after a constitution—or constitutional amendment—is made, but less and less so the more remote in time those decisionmakers become, and the less representative they have become vis-à-vis those now understood to be included in the polity. Indeed, the value attributed to authorized decisionmakers by virtue of past electoral decisions is, over time, increasingly in tension with current electoral decisions.

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whether long established methods of interpretation can be seen as part of how the Constitution was originally understood. *Compare* Baude, *supra* note 4, at 2355 (defining "inclusive originalism" to mean "that judges can look to precedent, policy, or practice, but only to the extent that the original meaning incorporates or permits them") *and* Stephen Sachs, *Originalism as a Theory of Legal Change*, 38 Harv. J. L & Pub Pol'y 817, 852-63, 875 (2015) (emphasizing the Constitution as "original law" which would include lawful methods of changing constitutional meaning since the original enactment) *and* John O. McGinnis & Michael B. Rappaport, *Original Methods Originalism: A New Theory of Interpretation and the Case Against Construction*, 103 Nw. U. L. Rev. 751, 751-52 (2009) (defining "original methods originalism" to require constitutional interpretation "using the interpretive methods that the constitutional enactors would have deemed applicable to it [meaning that] many of the key questions …—such as whether intent or text should be its focus, whether legislative history should be considered, and whether words should be understood statically or dynamically—are answered based on the content of the interpretive rules in place when the Constitution was enacted") *with* Randy E. Barnett, *The Misconceived Assumption About Constitutional Assumptions*, 103 Nw. U. L. Rev. 615, 660 (2009) (arguing that the "original methods" approach is needlessly confusing" and "[i]t is enough to say that those who enacted a constitution expected that it would be followed or interpreted according to its meaning"; "even if a majority of those who approved a constitution had other methods of interpretation in mind, their assumed or expected methods did not thereby become a part of the meaning of the text") *and* Caleb Nelson, *Originalism and Interpretive Conventions*, 70 U. Chi. L. Rev. 519, 525 (2003) (concluding "that there is at least some sense in which members of the founding generation expected the Constitution's meaning to be invariant over time").

[200] *See, e.g., supra* note 29 (conflicting views of original meaning in *Heller*); *cf.* Whittington, *A Critical Introduction*, *supra* note 62, at 394-95 (noting that the judicial restraint justification offered by originalists has faded); Baude, *supra* note 145, at 2214 ("[O]riginalist scholars today are much more equivocal about the importance and nature of constraining judges").

[201] *See, e.g.,* Randy E. Barnett, Restoring the Lost Constitution: The Presumption of Liberty 63-83, 241 (2013); Randy E. Barnett, The Structure of Liberty: Justice and the Rule of Law 200 (1998).

[202] See Interview by Calvin Massey with Justice Scalia, *Legally Speaking – the Originalist*, Cal. Lawyer. 33 (Jan. 2011), https://podcast.uctv.tv/webdocuments/legally-speaking/11_01LegallySpeaking_Scalia.pdf [https://perma.cc/2RFR-LC4D] ("Certainly the Constitution does not require discrimination on the basis of sex. The only issue is whether it prohibits it. It doesn't. Nobody ever thought that that's what it meant. Nobody ever voted for that. If the current society wants to outlaw discrimination by sex, we have things called legislatures, and they enact things called laws.").

[203] *See* Baude & Sachs, *supra n*ote 124, at 811-13.

[204] *See* John O. McGinnis & Michael B. Rappaport, *Originalism and Supermajoritarianism: Defending the Nexus*, 102 Nw. U. L. Rev. Colloquy 18, 27 (2007); John O. McGinnis & Michael B. Rappaport, *Our Supermajoritarian Constitution*, 80 Tex. L. Rev. 703, 791, 796-99, 802-05 (2002).

Values of democracy and authority that began in relative harmony (on the supposition that for its time the procedures for adopting the Constitution and the post-Civil War amendments were relatively democratic) have become more separated over time. These arguments, diminished by the passage of time, simply cannot carry the burden of justifying exclusionary originalism. Respect for past decisions (of constitution-makers and interpreters, in judicial and political precedents) can be manifested in degrees, rather than as an on-off switch.

Professor Baude has made a distinct argument, which is that originalism just *is* our positive law. Arguments from actual practice have appeal: If the Court is doing something that it has been doing for a long time, has come to be regarded as a legitimate third branch of government, generally gets compliance with its decisions, and is looked to in order to resolve significant disagreements, that is a real accomplishment. A host of Burkean-related arguments about accumulated wisdom and practice suggest that its practices should not be lightly departed from. But, on the content of what "our" positive law of constitutional interpretation is, it is a mistake to confuse fidelity to text with fidelity to very specific original meanings (as understood by many originalists).[205]

I agree that it would be inconsistent with widespread understandings of the constitution as law in the United States to argue that a law or practice wholly inconsistent with the plain, clear meaning of text is nonetheless constitutional. A twenty-five year old cannot be President. But Baude and Sachs are, I think, saying something different—trying both to enlarge originalism's

[205] To the extent that defenses of originalism are grounded in claims about positive practice, it invites the critique that it makes what is "the law" entirely subject to the changing interpretive practices of the particular group judges who make up the Court—in short, to the kind of judicial discretion that so animated the rise of originalism in the 1980s. *Cf.* Scalia, *supra* note 107, at 872-73 (bemoaning the fact, as he saw it, that "[t]he interpretive philosophy of the 'living Constitution'—a document whose meaning changes to suit the times, as the Supreme Court sees the times—continues to predominate in the courts, and in the law schools" but expressing hope that with new judges in the future, the "truth" would emerge) (footnote omitted). I do not think this critique is fully met by Baude and Sachs' emphasis on limiting interpretive approaches or sources to those that would originally have been contemplated to interpret the constitution or part thereof at issue. Interpretive norms themselves may change, over the course of regular lawful processes of adjudication, and in ways that come to be accepted, as a positive matter. *Cf.* Frank Michelman, *Constitutional Fidelity/Democratic Agency*, 65 Fordham L. Rev. 1537, 1540 (1997) (recommending "draw[ing] the rule of recognition from the actual historical practice of the country"); Baude & Sachs, *supra* note 199, at 1460 (discussing the role of "actual legal practice"). Why, then, would one privilege only original methodologies or sources that would have been accepted at the original time of enactment, if application of those methods or sources lead courts to accept additional ones? Moreover, how to characterize the history of an interpretive norm will not be free from reasonable disagreement. Consider here the role of empirical data, which could be described as both an innovation, or as a continuous development of an originalist method of considering the consequences of alternative interpretations that can be dated back to *Marbury* and *McCulloch*. Baude and Sachs' work might be described as establishing that "our constitutional law" requires plausible *continuity* over time, but not necessarily "originalism" in the popular sense of privileging meanings of the text as they existed at the time of enactment. *Cf.* Charles I. Barzun, *The Positive U-Turn*, 69 Stan. L. Rev. 1323, 1349-50 (2017) (arguing that there may be "customary" support for an interpretive practice that has been around for a while without having to show that the practice dates to a founding or that judges feel the need to justify their interpretive practices by showing their connection to the founding).

territory as the interpretive tool by which we know what the Constitution's text means (in which case the differences between their originalism and multi-valenced interpretation may become quite small) and to lay a basis for defending more narrow versions of originalism. But a "positivist" claim about what "our" interpretive practices "are" in fact is, however, unpersuasive in justifying the exclusionary originalism we see in *Dobbs* and *Bruen*.

How is the Constitution's text interpreted? To begin with, the norms and practices of "our" constitutional interpretation include the norm: no overt contradiction of text. Second, interpreters have traditionally considered a range of sources to ascertain constitutional meaning—text, original meanings, purpose, structure, history (including precedents, both judicial and political) and experience, changed contexts that affect understandings of how constitutional principles apply, the consequences of alternative interpretations. The weight and role of these factors vary depending on the issue. But for much of U.S. history, most constitutional lawyers and citizen activists have assumed that the text has an appropriate degree of flexibility, suitable for a difficult to amend constitution. That is what "our" practice has been. There is less flexibility where the text is more specific; so the distinction between specific and general provisions is important. And our constitutional adjudication typically makes plausible claims of its own continuity with the text.[206]

Original understandings, where they can be ascertained, may be viewed a starting point, [207] but only that: Starting points themselves can be re-understood reflexively in light of other relevant factors within the canon of legitimate sources of decision;[208] starting-out views can be modified by good enough reasons within that canon. Clarity and ambiguity often exist on a spectrum. If original understandings are less clear, tentative first impressions can be more easily modified; if original understandings are more clear, more may be required to modify initial impressions. This approach gives some degree of primacy to ascertainable original understandings, but would permit an interpreter to say, for example, that given the exclusion of women and people of color from drafting and enactment of most of the Constitution, interpretations that disadvantage those groups should be disfavored. Once an issue has been decided, countervailing considerations intervene of what should be considered the law, including costs to the stability of law and respect for its integrity if explanations for change are not sufficiently persuasive. Such a sequenced multi-valenced approach would give some weight to the authority of

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[206] *Cf.* Strauss, *supra* note 125, at 925-32 (discussing typically incrementalist character of constitutional adjudication).

[207] Professor Baude lists four possibilities of the role of original understandings in interpretation. Baude, *supra* note 4, at 2354-55 (describing 1) exclusive originalism; 2) inclusive originalism (including methods)—under both of which original meanings once ascertained control; 3) originalism as one factor among many in a pluralistic approach; and 4) originalism as entirely irrelevant). I suggest a fifth above.

[208] *See* Fallon, *supra* note 24, at 1238-40 (discussing "interdependencies" among the different sources). This interdependence implies that, under U.S. interpretive practice, ambiguity in constitutional text may be found based not only on linguistic or dictionary meanings but also on understanding of purposes and consequences of different readings.

the past; it makes descriptive sense of *Brown*;[209] of *Frontiero v. Richardson*;[210] of substantive due process; and a host of other areas of jurisprudence.

To be candid, I am not sure how often different outcomes will emerge from pluralist, multi-valenced approaches as compared with "inclusive originalism."[211] Much would depend on how readily the inclusive originalist finds ambiguity in the materials on original meaning, and on whether an "original" method would include stare decisis, and the kinds of arguments from political theory and consequences we see in both *Marbury* and *McCulloch*.[212] As Professor Fallon explains, the drive for coherence will end up shading the conclusions drawn about different factors, in ways that will generally, if not always, promote agreement among the sources.[213] It is likely for this reason that there are so few cases, in Baude's *Is Originalism Our Law* article, in which the Court concludes that original understandings of the text trump contrary other interpretive sources.[214]

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[209] Although Baude points out that the questions the Court asked on re-argument in *Brown* went to original understandings of the Fourteenth Amendment, those questions did not necessarily reflect an assumption that if there were an ascertainable original understanding on the constitutionality of segregation that would dispose of the matter; the Court's third question simply asked the parties to address what it should do if questions about original understanding "do not dispose of the issue." *See* Baude, *supra* note 4, at 2380 (quoting the three questions on which the Court requested briefing, the third of which is: "On the assumption that the answers to questions 2(a) and (b) do not dispose of the issue, is it within the judicial power, in construing the Amendment, to abolish segregation in public schools?"). The *Brown* Court found that there was no "certainty" on original understandings about school segregation, because views were likely quite divided; it went on to suggest that it was not surprising that the Amendment's history was "inconclusive" given the changed context of public education from 1868 to the time of the *Brown* decision. Brown v. Bd. of Educ., 347 U.S. 483, 489-90 (1954). For rejection of arguments about changed contexts of urban violence on the application of the Second Amendment, see *New York State Rifle & Pistol Ass'n, Inc. v. Bruen*, 142 S. Ct. 2111, 2131-32 (2022).

[210] 411 U.S. 677 (1973).

[211] As to differences among the less originalist approaches, "purposive" interpretation readily shades into Jack Balkin's "living originalism." *See* Jack Balkin, *The American Constitution is 'Our Law,'* 25 Yale J.L. & Humans. 113, 132 (2013). John Hart Ely's "representation reinforcement" account, *see* Ely, Democracy and Distrust, *supra* note 56, at 73-103, has recently been expanded upon in ways that may create more overlaps with "purposive" or "living originalist" accounts. *See also* Dixon, *supra* note 56, at 38. Metaphorically, a way to think about a key difference between originalist and more pluralist accounts of constitutional interpretation is whether the constitutional tree is not only rooted in the place it began—which most serious theories of constitutional interpretation accept—but also that its limbs and branches (and roots) must retain their relative size and shape over time, regardless of age, subsequent developments, and surroundings.

[212] *See supra* note 36.

[213] Fallon, *supra* note 24, at 1239-43. *See also* Richard Primus, *Is Theocracy our Politics*?, 115 Colum. L. Rev. Sidebar 44, 56-58 (2016) (discussing the role of good faith but "motivated reasoning" in which judges find, in the "regularly messy, unbounded and multivocal" originalist sources, an original meaning that coheres with their own "preferred dispositions").

[214] *See* Baude, *supra* note 4, at 2374-75. Perhaps the closest case of those he discusses is INS v. Chadha, 462 U.S. 919 (1983), where there had been several decades of practice in which Congress enacted legislative veto statutes, a practice which the Court gave little weight to in prioritizing what it took to be the original meaning of the Constitution's law-enacting procedures. Two comments. First, the Executive Branch had expressed its disagreement with the constitutionality of legislative vetos. *See, e.g.*, Memorandum from the Assistant Attorney General for the Office of Legal Counsel on the Constitutionality of Legislative Veto Devices to the Attorney General (Mar. 4, 1981) (noting that Presidents and Attorneys General have consistently taken the view that such provisions are unconstitutional since Woodrow Wilson's presidency). Thus, the course of practice, while open and repeated over time, may not have met either Baude's requirements for "liquidation" or Frankfurter's requirements for a historic "gloss," *see* Youngstown Sheet &

Thirty-five years ago Professor Fallon wrote, "Assessed as a descriptive theory of contemporary constitutional interpretation, originalism fails spectacularly. Originalism cannot account for much of our constitutional practice of at least the last 50 years".[215] That remains true today.[216] Originalism—as popularly understood to fix, in some fairly specific way, the meanings of operative provisions of the Constitution today to how they were understood when they were first enacted—is simply not our law.[217]

What *is* our law is an approach to judging that considers multiple sources,[218] views the text as a reasonably hard constraint, and operates on assumptions that adjudication must plausibly connect to strands in past adjudications.[219] This is something less rigorous than an interpretive theory—our sitting justices have always had multiple approaches, making it unlikely that any finely conceived interpretive theory can be said to prevail—but more rigorous than an undisciplined "anything goes" approach.

More than judges with theories, we need judges with judgment about the constitutional role of adjudication in providing a degree of flexibility in implementing this very old and very hard to amend constitution. We need

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Tube Co. v. Sawyer, 343 U.S. 579, 610-11 (1952) (Frankfurter, J., concurring). Second, it is not clear how "originalist" the majority opinion was about the meaning of the key words—"Order, Resolution, or Vote to which the Concurrence of the Senate and House of Representatives may be necessary"—found in Article I, Section 7. Rather, it drew inferences from the perceived purpose of this language, to prevent Congress from enacting laws without the President by retitling a bill as something else. But did that concern apply where a law had been properly enacted under Article I, authorizing a single house veto of subsequent administrative action? After explaining why the "Order, Resolution or Vote" language was included by reference to the Convention's records, the opinion interprets that text as having a plain meaning to invalidate "legislative vetoes" unless by new legislation passed by both houses and presented to the President. But, as Justice White's dissent points out, "the constitutionality of the legislative veto is anything but clearcut … [D]isagreement stems from the silence of the Constitution on the precise question: The Constitution does not directly authorize or prohibit the legislative veto." *Chadha*, 462 U.S. at 976-77 (White, J., dissenting). The material cited by the majority, in other words, did not demonstrate a clear original understanding on whether action vetoing action proposed by an executive department was comparable to an "order, resolution or vote" as referred to in Article I, Section 7, Clause 3, when that action was authorized by a law that fully met the enactment requirements of Article I. Rather, the majority reasoned by virtue of maxims of statutory interpretation, inferring that because the Constitution specified several circumstances in which a single house could act alone, any other action required resort to the lawmaking procedures of Section 7. (The application of this maxim in the Court's jurisprudence seems quite discretionary. *See, e.g.*, Nixon v. Fitzgerald, 457 U.S. 731 (1982) (notwithstanding that the only explicit constitutional immunity given to federal officials was for members of Congress, holding that the President also had an immunity for civil liability for acts done within the outer perimeter of his office).) Had the Court in *Chadha* instead relied on more general separation of powers analysis, discussion of the consequences of the ruling for maintaining both legislative and executive powers—and whether Congress acted appropriately under the Necessary and Proper clause—would have been sensible.

[215] Fallon, *supra* note 24, at 1213. *See also* Scalia, *supra* note 107, at 871 (stating, in 2008, that it would be "foolish" to proclaim that originalism is the dominant interpretive mode); Sohoni, *supra* note 31, at 955 (describing modern originalism as "[m]aking a sharp break with the pluralistic mode of constitutional interpretation that had long prevailed," in insisting that "adherence to original meaning" is the "'o*nly* legitimate way of interpreting the Constitution'").

[216] And true in many of the same areas that Fallon identified in 1987, including Free Speech, Equal Protection, and the Fourth Amendment, Fallon, *supra* note 24, at 1206, 1213, and the unaccounted-for role of precedent, *see generally* Fallon, *supra* note 22.

[217] *See* sources cited *supra* note 107.

[218] *See* Tushnet, *supra* note 24, at 27-47.

[219] Cf. Aharon Barak, Judicial Discretion 113-51 (Yadin Kaufman transl., 1989) (discussing the judicial "zone of reasonableness").

judges with a sense of the Court as an institution both within the judiciary as a whole and within a scheme of representative government, with a corresponding sense of self-restraint.[220] And we need judges who are conscientious in trying themselves to think with some consistency across issues, in a system of multi-valenced interpretive practice.

To aid in thinking about this approach, there is wisdom in the words of the Privy Council in *The Persons* case, which concerned the interpretation of the constitution of Canada (enacted as a formal matter as a statute by the British Parliament). The question was whether women could be treated as "persons" eligible for appointment to the Canadian Senate under the British North America Act 1867, the Canadian constitution. The justices on the Canadian Supreme Court believed that the common law understanding that women were incapable of holding public office was incorporated into the meaning of the word "person" in the 1867 Act:[221] "Passed in the year 1867, the various provisions of the [1867] B.N.A. Act . . . bear to-day the same construction which the courts would, if then required to pass upon them, have given to them when they were first enacted"; and at the time, "women were under a legal incapacity to hold public office."[222] It thus held that a woman could not be a Senator.

But at that time, Canadian Supreme Court decisions were subject to review by the Privy Council. And the Privy Council saw *constitutional* interpretation as distinct, declaring that "there are statutes and statutes;" statutes that are constitutions are different from ordinary statutes.[223] As a constitutional statute, the British North America Act 1867 "planted in Canada a *living tree* capable of growth and expansion within its natural limits."[224] True, there had been no women appointed previously; but the novelty of the exercise did not decide the matter, the Privy Council wrote, because "customs … [can] develop into traditions … stronger than law" that "remain unchallenged long after the reason for them has disappeared."[225] Their Lordships "[did] not think it right to apply rigidly . . . the decisions and the reasoning … which commended themselves … to those who had to apply the law in different circumstances, in different centuries,"[226] to the interpretation of the word persons. Accordingly,

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[220] Judges are not typically trained as historians. They are trained as lawyers, in analyzing legal instruments, and in considering arguments on all sides in rendering advice, crafting arguments, and reaching judgments. At a time of increased political polarization, the distinctive virtues of common law judging—of a "rational traditionalism" based on "humility" and "skeptical of people's ability to make abstract judgments," Strauss, *supra* note 125, at 889, have particular appeal. *See also* William D. Popkin, *A Common Law Lawyer on the Supreme Court: The Opinions of Justice Stevens,* 1989 Duke L.J. 1087, 1091 (arguing that common law judging manifests judicial self-restraint in light of the views of other constitutional actors, and deliberation in decision-making with attention to particular facts, which both "constrains the breadth" of decisions and "implements substantive dignity values by paying genuine heed to the litigants' claims").

[221] Reference re meaning of the Word Persons, [1928] SCR 276 (Supreme Court of Canada). This decision was overturned by the Privy Council, see text accompanying notes 223-27.

[222] *Id.* at 282-83 (Anglin, C.J.C.)

[223] Edwards v. Att'y Gen. of Canada ("The Persons Case"), 1929 UKPC 86, 94 (P.C.) (appeal taken from Can.).

[224] *Id.* at 94 (emphasis added).

[225] *Id.* at 92.

[226] *Id.* at 93.

the Privy Council held, the word "persons" would allow the appointment of female persons to serve in the Canadian Senate.[227]

The Privy Council's idea that there is something distinctive about constitutional interpretation can be found in the writings of James Madison as well. As quoted by Baude, Madison "emphasized the 'reasonable medium between expounding the Constitution with the strictness of a penal or other ordinary Statute, and expounding it with a laxity, which may vary its essential character.'"[228]

As these sources suggest, there is a middle ground in constitutional interpretation between being narrowly bound to past understandings and pursuing goals developed through moral or political principles unconnected to the constitution. A "living tree" has roots that constrain how far its growth can go; interpreting the U.S. Constitution to enable a parliamentary system, with Cabinet members also serving in the Congress, and with presidential terms longer than four years subject to losing the confidence of one or both houses, is beyond what the root structure of the U.S. Constitution could reasonably be understood to permit. And, Madison suggests, while statutes—or some statutes—must be interpreted strictly, the Constitution requires a different approach, but not one that "may vary its essential character."

Original understandings of constitutional words are illuminating about the purpose and context of a provision. Subsequent developments will need to be understood in light of these original understandings. In this respect, it makes sense to say, as did Justice Kagan, "we are all originalists."[229] But the evil of exclusionary originalism is its effort to rule out of bounds consideration of subsequent developments, of changes in understanding that arise from changes in context, of the course of judicial decisions and of practice in the political branches, and consideration of the consequences of alternative understandings in light of the purposes of the text, as ongoing sources of constitutional meaning and understanding. It is the exclusion of these ongoing sources of meaning that makes exclusionary originalism/traditionalism incompatible with constitutionalism in the United States.

I have suggested a multi-valenced jurisprudence of judgment drawing on all of the traditional sources of constitutional adjudication found in such venerable decisions as *McCulloch v. Maryland*. This is not an unbounded approach, in which it is imagined that the constitution simply floats in the sky wherever the current winds of popular thinking or views of five Supreme Court justices would send it.[230] Rather, it views the Constitution as a "living tree,"[231] with roots to which it must stay connected. The *Dobbs* dissenters view the Constitution as linking generations together, when they write that

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[227] *Id.* at 99.

[228] Baude, *supra* note 37, at 67 (quoting James Madison writing to Spencer Roane).

[229] *See supra* note 115.

[230] *Cf.* Aharon Barak, *Foreword, A Judge on Judging: The Role of a Supreme Court in a Democracy*, 116 Harv. L. Rev. 16, 51-53 (2002) (arguing that judges must interpret constitutions "with objectivity" and "giv[e] expression to the values of the constitution as they are understood by the culture and tradition of the populace in its progress through history").

[231] *See Edwards*, 1929 UKPC at 94. As Jack Balkin has written, "the Constitution is more than the dead hand of the past, but is a continuing project that each generation takes on. It is a

its "meaning gains content from the long sweep of our history and from successive judicial precedents—each looking to the last and each seeking to apply the Constitution's most fundamental commitments to new conditions."[232] There is an obligation to connect judgments with the past; the text is a constraint; but its meaning draws on the multiple strands of our constitutional development. Justices who consider multiple sources, and take seriously the obligation to weigh them together and against each other, may indeed be more (or no less) internally constrained than those who seek to tether themselves only to long-ago history.

In the jurisprudence of exclusionary originalism, the issues that judges focus on—historical evidences of 18th or 19th century meanings, including conflicting evidence,[233] and evaluating the meaning of a silent historical record—may end up being far-removed from the contemporary needs and concerns of constitutionalism. The hope that, by focusing judges only on such far-removed forms of evidence judicial bias and predispositions will be tempered, is a false hope. Rather, such analyses result in a jurisprudence that tends to obscure the value choices that inform interpreters' evaluation of historical evidence, and that appears to reflect indifference to urgent constitutional concerns of both government power and individual rights, on issues that matter greatly in our society today. Exclusionary originalism in the United States today is antithetical to "our Constitution" and to constitutionalism.

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great work that spans many lifetimes, a vibrant multi-generational undertaking, in which succeeding generations pledge faith in the constitutional project." Balkin, *supra* note 134, at 303.

[232] Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2326 (2022) (Breyer, Kagan, and Sotomayor, JJ., dissenting).

[233] *See supra* note 29.