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The Role of International Law in U.S. Constitutional Interpretation: Original Meaning, Sovereignty and the Ninth Amendment

*Elizabeth Price Foley*¹

The topic of this symposium—the role of international law in U.S. constitutional interpretation—is intensely controversial. But make no mistake about it: As with most issues of U.S. constitutional law, the controversy is mostly political. Accepting this fact, the goal of this essay is to explore the possibility of a political middle ground that recognizes a legitimate role for international law in U.S. constitutional interpretation (something liberals desire), but only insofar as is consistent with original meaning (something conservatives desire). I will then discuss briefly the specific example of the Ninth Amendment, exploring how this Amendment’s original meaning may have contemplated the application of early international law principles relating to sovereignty.

I. THE ROLE OF INTERNATIONAL LAW—JUST ANOTHER CHAPTER IN THE ONGOING “CULTURE WAR”

A. How the Culture War Has Affected Law Generally

One of the problems with U.S. constitutional law generally is that every major intellectual gray area has been hijacked by ideologues with a broader political axe to grind. Issues as seemingly innocuous as abstention, standing, and the Eleventh Amendment thus have become battlegrounds in an ongoing culture war between the far right and far left.

Zealots of the far right and far left obviously want to win the ongoing culture war, a political goal that does not necessarily require fidelity to a written text or its underlying delicate intellectual compromise, brokered by a long-dead founding generation. And you can-

¹ Professor of Law, Florida International University College of Law. This article is based substantially on a talk presented at a symposium to dedicate the new building for the FIU College of Law on Feb. 9, 2007.

not really blame them. Why not take the easy route and try to get a majority of the Court to simply “reinterpret” the Constitution in a manner consistent with one’s preferred ideology? It provides a much swifter and more satisfying victory. But, of course, this path to easy constitutional victory is fraught with hazards of its own. It imposes intense and sustained political attention and pressure on the Court. It should come as no surprise, then, that Court nominations and opinions have become increasingly contentious, vitriolic and fractured. And when majority opinions do somehow miraculously emerge, all too often these precedents have the half-life of a fruit fly.

The American public is painfully aware of the political game being played with the Constitution. A recent poll showed that eighty-five percent of Americans think partisan backgrounds influence a judge’s decisions, and more than half think judges actually decide cases based on personal beliefs rather than legal precedent or the Constitution.²

These events are not considered to be normatively desirable. Nearly three out of four Americans think judges need to be more insulated from outside political pressure and make decisions based on their reading of the law.³ A decisive super-majority of Americans thus do not consider judges to be just another type of politician. And yet, in the eyes of many, law and politics have become synonymous. This, in turn, has undermined respect for law and the courts.⁴

B. How the Culture War Has Affected U.S. Constitutional Interpretation

The broader culture war has spawned two main interpretive camps in the realm of U.S. constitutional law: (1) the so-called “living Constitution” adherents, who think that constitutional language should be viewed as fluid, open to re-interpretation according to mod-

² Press Release, Syracuse Univ., Maxwell Sch. of Citizenship and Pub. Affairs, Maxwell Poll: Partisan Politics Colors Americans’ View of U.S. Courts, (Oct. 19, 2005), at 1, *available at* http://sunews.syr.edu/story_details.cfm?id=2632. For the full text of the poll results, see *Judges and the American Public’s View of Them*, Maxwell Sch. of Citizenship and Pub. Affairs, Syracuse Univ. (Oct. 2005), *available at* <http://www.maxwell.syr.edu/news/MaxwellPoll.pdf>.

³ *Judges and the American Public’s View of Them*, Maxwell Sch. of Citizenship and Pub. Affairs, Syracuse Univ. (Oct. 2005), *available at* <http://www.maxwell.syr.edu/news/MaxwellPoll.pdf>.

⁴ See ELIZABETH PRICE FOLEY, LIBERTY FOR ALL: RECLAIMING INDIVIDUAL PRIVACY IN A NEW ERA OF PUBLIC MORALITY 5, 201 n.14 (2006) (discussing results of a 2005 poll by the American Bar Association, which indicated widespread public dissatisfaction with the judicial branch).

ern preferences and norms;⁵ and (2) the so-called “originalists,” who think that constitutional language should be viewed as fixed, revealing a set of first principles that must be honored regardless of modern exigencies or preferences.⁶

The living Constitution shibboleth has great rhetorical appeal because it suggests that those who disagree with it must necessarily support a dead Constitution. After all, who wouldn’t prefer a living Constitution to a dead one? Rhetoric aside, however, it requires one to accept that the Constitution rests on a foundation of sand. Modern adherents of the living Constitution theory⁷ argue unabashedly that there are no fixed principles that should guide constitutional interpretation.⁸ Everything of importance is open to reinterpretation according to the preferences of the day. Judges are required to take important phrases in the text—such as Commerce, Privileges or Immunities, Due Process, or Equal Protection—and assume that there are no underlying principles that can or should be ascertained in interpreting their meaning. Because no underlying principles can be ascertained, judges should feel free to ascribe whatever meaning they think is appropriate for the times. This is, of course, subjectivism run amok. It

⁵ See generally Charles A. Reich, *Mr. Justice Black and the Living Constitution*, 76 HARV. L. REV. 673 (1963). For a critique of the living Constitution approach, see William H. Rehnquist, *The Notion of a Living Constitution*, 54 TEX. L. REV. 693 (1976), reprinted in 29 HARV. J.L. & PUB. POL’Y 401 (2006). See also Edwin Meese III, *A Return to Constitutional Interpretation from Judicial Law-Making*, 40 N.Y.L. SCH. L. REV. 925 (1996).

⁶ See generally Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849 (1989). For an insightful critique of Justice Scalia’s self-professed version of originalism, see Randy E. Barnett, *Scalia’s Infidelity: A Critique of ‘Faint-Hearted’ Originalism*, 75 U. CIN. L. REV. 7 (2006). For a critique of originalism generally, see Paul Brest, *The Misconceived Quest for Original Understanding*, 60 B.U. L. REV. 204 (1980).

⁷ I intentionally say “modern” living Constitution adherents here, to distinguish them from those of the founding generation, such as Thomas Jefferson, who appears to have accepted a different version of the living Constitution idea. To Jefferson, constitutional principles could not be discarded when inconvenient or unfashionable. These principles were articulated in sufficiently broad and amorphous language as to permit the principles to adapt to modern times. In his words, “Time indeed changes manners and notions, and so far we must expect institutions to bend to them. But time produces also corruption of principles, and against this it is the duty of good citizens to be every on the watch, and if the gangrene is to prevail at last, let the day be kept off as long as possible.” LIBERTY FOR ALL, *supra* note 4, at xi. Jefferson also declared, “Our peculiar security is in the possession of a written Constitution. Let us not make it a blank paper by construction.” *Id.* at 1 (letter from Jefferson to Wilson Nicholas, 1803).

⁸ Perhaps one of the boldest proponents of the “living Constitution” theory is Professor Bruce Ackerman, who asserts that changed understandings and desires from one generation to the next can result in legitimate constitutional “amendment” in a way that does not require resort to the amendment processes specified in Article V. See generally BRUCE ACKERMAN, *WE THE PEOPLE: FOUNDATIONS* (1991). For a critique of Ackerman’s attempt to legitimate the New Deal Court’s “reinterpretation” of the Commerce Clause, see Elizabeth C. Price, *Constitutional Fidelity and the Commerce Clause: A Reply to Professor Ackerman*, 48 SYRACUSE L. REV. 139, 157-67 (1998).

makes constitutional law synonymous with politics in its rawest, ugliest form.

The living Constitution approach has the benefit of allowing the Constitution to morph into whatever seems expedient or desirable at any given moment. But it creates three distinct social harms. First, it allows the judiciary to discard fundamental, structural features of Constitution that were designed to protect individual liberty (e.g., federalism and limited government). Second, it undermines respect for the Constitution itself as a meaningful set of principles divorced from political ideology. I have found this problem to be especially acute with young lawyers. Many young law students come into constitutional law as bright-eyed and bushy-tailed idealists, only to leave with a cynical view that the Court's disregard of text and its historical context has transformed the Constitution into a politically manipulable document with very little or no real fixed meaning. To me, this is a real and substantial societal loss. Third, the living Constitution theory encourages political lethargy. It does so because it not only allows but expects the judiciary to fix modern problems by simply doing an interpretive about-face. If the Constitution is malleable enough to change with the times (without a formal amendment), there is obviously no need for We the People to get involved: the Court will fix the problem and we can all get on with our busy lives—taking our kids to soccer, eating our chicken nuggets, and paying our bills.

In this world of politically expedient constitutional reinterpretation, ordinary Americans are missing in action, cut out of any political dialogue that precedes constitutional change. We have effectively given our proxy to the political extremists, who wield it on our behalf by convincing our Supreme Court that constitutional change does not require our formal involvement, Article V notwithstanding. The resulting political lethargy—which is, by the way, even greater among minority groups⁹—is dangerous to the proper functioning of our republican form of government.

So if the living Constitution theory is as bad as I claim it is, what makes originalism any better? First, I confess that I find the originalism label to be a bit misleading. Contrary to most Americans' understanding—including law students and law professors—there are several different kinds of originalism, and they present markedly different approaches to constitutional interpretation.¹⁰ In either case, how-

⁹ See LIBERTY FOR ALL, *supra* note 4, at 202 n.18.

¹⁰ For a general discussion about the various shades of original intent originalism, see RANDY E. BARNETT, RESTORING THE LOST CONSTITUTION: THE PRESUMPTION OF LIBERTY 92-94 (2004); see also Daniel A. Farber, *The Originalism Debate: A Guide for the Perplexed*, 49 OHIO ST. L.J. 1085, 1085-87 (1989) (describing various versions of original intent originalism).

ever, the originalists share the belief that constitutional text matters, and that the text can and should be interpreted by reference to the principles, political philosophy and events that motivated the proposal and ratification of the text.

One of the biggest problems originalism faces is that its votaries too often pretend that there is an answer to most or all questions of constitutional interpretation that can be answered by simply polling the Founders or their generation on any given issue. This is problematic because, in most instances, the issues presented for judicial resolution are issues that were either not foreseen by the founding generation (e.g., the Internet and its relationship to the First Amendment) or, if they were foreseen, were not specifically debated and resolved in any definitive way.

One need look no further than the modern Supreme Court's fundamental rights jurisprudence to see this problematic aspect of originalism rear its ugly head. To qualify as a fundamental right, modern substantive due process jurisprudence generally requires that the activity in question be one that is "deeply rooted in our nation's history and tradition."¹¹ It then attempts to answer the "deeply rooted" inquiry by looking back to see whether early common or statutory law allowed or condemned the activity in question. An historical prohibition of X, therefore, will equal no fundamental right to do X.¹²

¹¹ *Washington v. Glucksberg*, 521 U.S. 702, 720-21 (1997). The Court reasoned:

Our established method of substantive-due-process analysis has two primary features: First, we have regularly observed that the Due Process Clause specially protects those fundamental rights and liberties which are, objectively, 'deeply rooted in this Nation's history and tradition.' Second, we have required in substantive-due-process cases a 'careful description' of the asserted fundamental liberty interest. Our Nation's history, legal traditions, and practices thus provide the crucial 'guideposts for responsible decisionmaking,' that direct and restrain our exposition of the Due Process Clause.

Id. at 720-21 (internal citations omitted).

¹² This was evident in the majority opinion in *Glucksberg*, in which the Court rejected the assertion that individuals have a substantive liberty to receive the aid of a physician in committing suicide. *See id.* at 723. The Court explained:

[W]e are confronted with a consistent and almost universal tradition that has long rejected the asserted right, and continues explicitly to reject it today, even for terminally ill, mentally competent adults. To hold for respondents, we would have to reverse centuries of legal doctrine and practice, and strike down the considered policy choice of almost every State.

Id. The Court's recent decision in *Lawrence v. Texas* did not employ this typical "deeply rooted" analysis in striking down the Texas anti-sodomy law on substantive due process grounds, but this is apparently because the majority in *Lawrence* did not find the right of intimate associa-

The requirement that fundamental rights have a deep history of acknowledgement and acceptance has been driven and defended principally by self-confessed originalists on the Court.¹³ They opine that this substantive limitation on the recognition of fundamental rights is necessary to prevent the judiciary from substituting its subjec-

tion to be “fundamental.” See *Lawrence v. Texas*, 539 U.S. 558, 586 (2003) (Scalia, J., dissenting). Justice Scalia argued:

Though there is discussion of “fundamental propositions,” and “fundamental decisions,” nowhere does the Court’s [majority] opinion declare that homosexual sodomy is a ‘fundamental right.’ under the Due Process Clause; nor does it subject the Texas law to the standard of review that would be appropriate (strict scrutiny) if homosexual sodomy were a “fundamental right.” Thus, while overruling the outcome of *Bowers*, the Court leaves strangely untouched its central legal conclusion: “Respondent would have us announce . . . a fundamental right to engage in homosexual sodomy. This we are quite unwilling to do.” Instead the Court simply describes petitioners’ conduct as “an exercise of their liberty”—which it undoubtedly is—and proceeds to apply an unheard-of form of rational-basis review that will have far-reaching implications beyond this case.

Id. (internal citations omitted). Justice Scalia added:

The Court today does not overrule this holding. Not once does it describe homosexual sodomy as a “fundamental right” or a “fundamental liberty interest,” nor does it subject the Texas statute to strict scrutiny. Instead, having failed to establish that the right to homosexual sodomy is “‘deeply rooted in this Nation’s history and tradition,’” the Court concludes that the application of Texas’s statute to petitioners’ conduct fails the rational-basis test, and overrules *Bowers*’ holding to the contrary. “The Texas statute furthers no legitimate state interest which can justify its intrusion into the personal and private life of the individual.”

Id. at 594 (Scalia, J. dissenting) (internal citations omitted).

¹³ See, e.g., *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 952-53 (1992) (Rehnquist, J., concurring in part and dissenting in part) (criticizing the characterization of abortion as a ‘fundamental’ right because of its historical prohibition); *Lawrence*, 539 U.S. 558, 593 (Scalia, J., dissenting) (sharply criticizing the *Lawrence* majority’s failure to employ the “deeply rooted” inquiry). In *Bowers*, the Supreme Court stated:

It is obvious to us that neither of these formulations would extend a fundamental right to homosexuals to engage in acts of consensual sodomy. Proscriptions against that conduct have ancient roots. Sodomy was a criminal offense at common law and was forbidden by the laws of the original 13 States when they ratified the Bill of Rights. In 1868, when the Fourteenth Amendment was ratified, all but 5 of the 37 States in the Union had criminal sodomy laws. In fact, until 1961, all 50 States outlawed sodomy, and today, 24 States and the District of Columbia continue to provide criminal penalties for sodomy performed in private and between consenting adults. Against this background, to claim that a right to engage in such conduct is “deeply rooted in this Nation’s history and tradition” or “implicit in the concept of ordered liberty” is, at best, facetious . . .

Bowers v. Hardwick, 478 U.S. 186, 192-93 (1986) (internal citations omitted). The *Bowers* decision was explicitly overruled in *Lawrence*, 539 U.S. 558 (2003), but as I explain the previous footnote, the *Lawrence* majority did not apply (much less overrule) the “deeply rooted” fundamental rights analysis, suggesting that the right to intimate association recognized in *Lawrence* is not considered to be a fundamental right.

tive countermajoritarian preferences for those of the more politically accountable branches of government.¹⁴ Yet this approach is breathtakingly non-originalist.

First, notice what is going on here, as a matter of constitutional interpretation: We are presumptively limiting fundamental rights status to those activities that were explicitly allowed by early common and statutory law. And of course, a right that is not a “fundamental” right is really no right at all, since it will be subject to rationality review, which requires the Court to uphold any restriction on the exercise of the non-fundamental right so long as the restriction serves some arguably rational purpose.¹⁵

Employing early common and statutory law as a litmus test for the presumption for or against fundamental rights status puts the proverbial cart before the constitutional horse. If X was prohibited by common or statutory law in the early days, the argument goes, we must assume that the founding generation—unless they specifically singled out X as a constitutional right in the text—must have wanted to allow the prohibition of X to continue. Laws against suicide and assisted suicide, for example, have been on the books since the early days of the republic, as have laws against sodomy. These activities, therefore, cannot qualify as fundamental rights.¹⁶

This supposedly originalist analytical framework is patently ridiculous, since the Constitution was written in the broad language of principles; it does not overrule common law or invalidate statutes by

¹⁴ See, e.g., *Glucksberg*, 521 U.S. at 720. In *Glucksberg*, the Court explained:

[W]e have always been reluctant to expand the concept of substantive due process because guideposts for responsible decisionmaking in this uncharted area are scarce and open-ended. By extending constitutional protection to an asserted right or liberty interest, we, to a great extent, place the matter outside the arena of public debate and legislative action. We must therefore exercise the utmost care whenever we are asked to break new ground in this field, lest the liberty protected by the Due Process Clause be subtly transformed into the policy preferences of the members of this Court.

Id. (internal citations and quotations omitted).

¹⁵ See, e.g., *Romer v. Evans*, 517 U.S. 620, 631 (1996) (“[I]f a law neither burdens a fundamental right nor targets a suspect class, we will uphold the legislative classification so long as it bears a rational relation to some legitimate end.”).

¹⁶ See *Glucksberg*, 521 U.S. at 710-15, 728 (cataloguing the historical prohibition against suicide and assistance with suicide and concluding that this history required a finding that physician-assisted suicide was not a fundamental right); *Bowers*, 478 U.S. at 193-94 (cataloguing the historical prohibitions against sodomy); *Lawrence*, 539 U.S. at 568-70 (reconsidering the nature of the historical prohibitions against sodomy). See also *supra* note 13 (exploring how the majority of the Court in *Lawrence v. Texas* did not appear base their holding on fundamental rights analysis).

name. We would be well advised to recall Chief Justice Marshall's sage observation about constitutional interpretation:

A constitution, to contain an accurate detail of all the subdivisions of which its great powers will admit, and of all the means by which they may be carried into execution, would partake of the prolixity of a legal code, and could scarcely be embraced by the human mind. It would probably never be understood by the public. Its nature, therefore, requires, that only its great outlines should be marked, its important objects designated, and the minor ingredients which compose those objects be deduced from the nature of the objects themselves. That this idea was entertained by the framers of the American constitution, is not only to be inferred from the nature of the instrument, but from the language. . . . [W]e must never forget, that it is a constitution we are expounding.¹⁷

Along these lines, the Fourteenth Amendment's Equal Protection Clause did not mention the existing Jim Crow laws by name or even segregation of public schools, but its underlying principle was undoubtedly antithetical to these laws.¹⁸ So when it comes to broad language elsewhere in the constitutional text such as the word "liberty" in the Due Process Clauses, why would a so-called originalist conclude that the text endorses the validity of common or statutory prohibitions in existence at the time of the text's ratification? The answer, of course, is that we should not. Our interpretive task, properly understood, should be to ascertain the principles that animate the constitutional text—in this case, the Due Process Clauses—and then compare these principles against specific laws to determine constitutional compatibility.¹⁹

¹⁷ *McCulloch v. Maryland*, 17 U.S. 316, 407 (1819).

¹⁸ See *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954) (declaring racial segregation in public schools to be violative of the Equal Protection Clause). See also Michael W. McConnell, *Originalism and the Desegregation Decisions*, 81 VA. L. REV. 947, 1093 (1995) ("[I]t is clear beyond peradventure that a very substantial portion of the Congress [from 1871-1875], including leading framers of the [Fourteenth] Amendment, subscribed to the view that school segregation violates the Fourteenth Amendment. At a minimum, therefore, the scholarly consensus must be corrected to admit that this interpretation is within the legitimate range of interpretation on originalist grounds.").

¹⁹ If one studies the history of the Due Process Clauses, it becomes clear that they embraced the concept of procedural fairness, much the same as the "law of the land" clause of the Magna Carta. In this sense, the very concept of "substantive" due "process" is oxymoronic, both as a textual and contextual matter. This is not to say, however, that there is no textual basis in the Constitution for the recognition of unenumerated rights. The Privileges or Immunities Clause of the Fourteenth Amendment and/or the Ninth Amendment provide adequate textual and contextual support.

Self-professed originalists' use of the "deeply rooted" litmus test for fundamental rights is even more perverse when one considers that the old common and statutory law prohibitions that are being elevated to near-constitutional status are often laws that the original colonies inherited from Great Britain, which had a very different conception of government than our newly minted Constitution. In Britain, for example, the legislative branch (Parliament) had plenary power; it was a Leviathan that even possessed the power to define and redefine the unwritten British Constitution. The British vision of parliamentary supremacy was a reflection of the fact that the British people trusted their Parliament more than they trusted their monarch or the monarch's courts. In the newly independent States, as well as the U.S., the people trusted none of their elected governors, preferring to subject all branches of the government, including the legislature, to a series of elaborate checks and balances to keep them within their proper bounds.

My point is this: Why give any interpretive relevance at all to common and statutory law that existed at the time of the ratification of the relevant constitutional language? Yes, many of these common law doctrines and statutes are hundreds of years old. But does this make them presumptively constitutional? Surely not, for one important reason: Their ancient ancestry, rather than granting an imprimatur of constitutional acceptability, should make them inherently suspect, as they are byproducts of a system of government that embraced plenary legislative power—a norm that Americans clearly rejected. Colonial legislatures were mini-Parliaments, inheritors of the British acceptance of legislative supremacy. They passed many laws, and these laws were considered presumptively unassailable under then-existing visions of legislative supremacy.

After the Constitution was ratified, moreover, these colonial and early state laws generally could not be ruled unconstitutional because the early Supreme Court, in *Barron v. Baltimore*, declared that the Bill of Rights was not binding upon the States.²⁰ Indeed, because the Supreme Court did not begin the process of "selective" incorporation of the Bill of Rights until the early- to mid-twentieth century, there was no legal basis for claiming that longstanding state laws violated the Constitution. In a perverse sense, therefore, the Supreme Court's delay in recognizing a constitutional source for the protection of unenumerated rights caused these early laws to *become* "deeply rooted."

²⁰ 32 U.S. 243 (1833). For greater elaboration on the analytical defects of *Barron*, see LIBERTY FOR ALL, *supra* note 4, at 27-33.

Yet self-professed originalists on the Court today see no apparent problem with freezing this early statutory/common law into place and allowing it to drive our definition of fundamental rights. This so-called originalist approach is at odds with both the broadly worded text of the Constitution as well as the deeper principles animating the text, both of which support a more generous conceptualization of individual rights.

I feel free to say all of these bad things about both living constitutionalists as well as the originalists because I do not consider myself to have a horse in this political race, so to speak. I feel no emotional or intellectual attachment to either liberal or conservative ideologies, and I would simply like, as an ordinary American with some specialized knowledge on constitutional law, to work towards an interpretive approach without regard to the political desirability of the outcomes that may flow there from.

My own biases in constitutional interpretation, however, do exist, and I think it is important to reveal them up front. First, I do consider myself to be an originalist, though as you can see by the preceding discussion of modern substantive due process jurisprudence, I have many quarrels with the apparently outcome-oriented tactics of many self-confessed originalists. But I do start from the position that text matters. I do not think judges are free to discard the text when it proves inconvenient or uncomfortable. Any perceived pragmatic problems posed by the constitutional text should be overcome only by the amendment processes specified in Article V.²¹ So if the constitutional text explicitly gives Congress a power to regulate bananas, it would be illegitimate for the judiciary to interpret this as also giving Congress a power to regulate oranges. And it would certainly be illegitimate to interpret it more broadly as a power to regulate all fruit or food products more generally. But it's precisely this "latitude of construction"—as several prominent framers called it²²—that has become an accepted *modus operandi* in constitutional interpretation.

²¹ U.S. CONST. art. IV (requiring that proposed constitutional amendments be approved by two-thirds of both houses of Congress and ratified by three-quarters of the States).

²² The first real debate about accepting a latitude of constitutional construction occurred in the context of considering the constitutionality of the first national bank. Several prominent framers, most notably Madison and Jefferson, argued against a latitude of construction of the Necessary and Proper Clause so broad as to grant Congress a power to create the national bank. See James Madison, Speech in Congress Opposing the National Bank, in 2 ANNALS OF CONG. 1949 (1791); see also Thomas Jefferson, *Opinion on the Constitutionality of a National Bank* (1791), in 1 DOCUMENTS OF AMERICAN CONSTITUTIONAL AND LEGAL HISTORY 115, 117 (Melvin I. Urofsky & Paul Finkelman eds., 2002).

Of course it is clear that Hamilton's latitudinarian approach to interpreting the Necessary and Proper Clause ultimately prevailed (not Madison's or Jefferson's). See *McCulloch v. Maryland*, 17 U.S. 316 (1819). But this does not alter the conclusion that an interpretation of constitu-

Second, I believe that interpreting constitutional text requires understanding and honoring the historical context and political philosophy that animated the writing of the words. What identified problems were the words designed to solve? What did ordinary Americans think the words were accomplishing? In this sense, I would align myself most closely with original meaning originalists. But regardless of the specific originalist label one wishes to attach, my basic approach clearly rejects the living Constitution theory.

Yet acknowledging that constitutional interpretation requires a judge to ascertain the principles animating an often-amorphous text does not mean that a judge should try to divine the subjective thoughts or beliefs of the founders. Indeed, it does not even require the judge to ascertain what a majority of founders thought on the issue (if indeed they thought about it at all).

Instead, it means that judges should try to understand the problems with antecedent forms of government that the founding generations were trying to solve, as well as their general political philosophy about the nature of government itself—its purposes and its limits. These generic principles can then provide the appropriate philosophical backdrop for ascribing meaning to an otherwise ambiguous text.

It is this type of originalism which I think most Americans can embrace. It does not freeze statutory, common, or even constitutional law into place, but recognizes that a judge's job in interpreting the Constitution is to honor the original vision of government—the relationship between the people and their elected governors—that is embodied in the text and the principles that animated that text. This interpretive approach allows the Constitution's broad words to be interpreted to cover new technologies and events never dreamed of by the founding generation, but only so long as the principles themselves are not discarded when they prove politically or pragmatically inconvenient. In this narrower sense, the Constitution is a living document, not because its text can be ignored or reinterpreted to fit modern political preferences, but because the text itself and its underlying principles are generally broad enough to accommodate modern applications.

In order to work, however, this interpretive method necessarily requires that succeeding generations of Americans (most particularly lawyers) be educated in the founding generations' political philosophy—something which simply does not happen today, even in law

tional text that is inconsistent with its historical context is illegitimate. One need look no further than the New Deal Court's "reinterpretation" of the commerce power to see another, more recent example of such illegitimate latitudinarian interpretation. See Price, *supra* note 8, at 157-67.

schools. Indeed, in most law schools, constitutional law has been condensed into a single-semester, four credit-hour course, leaving professors with barely enough time to teach the main constitutional cases, much less a meaningful exegesis of the political philosophy of the relevant founding generations and the problems they were trying to solve. All the average law student gets to see, therefore, is a bunch of constitutional law cases that (not surprisingly) appear to be products of the politics of their day.

This is a deep shame, since the original Constitution and subsequent amendments have often been motivated by a desire to solve specific perceived problems, and they are often the product of a shared political philosophy that can provide important first principles to aid constitutional interpretation. Without a significant grounding in the founding generations' political philosophy, students simply cannot see how far these cases have drifted from original understandings. Students come to learn, in other words, that constitutional law is just politics—and they assume that there is really nothing that can be done to remedy this, even though they almost uniformly seem to think this approach is normatively undesirable.

II. THE DEBATE ABOUT THE ROLE OF INTERNATIONAL LAW IN U.S. CONSTITUTIONAL INTERPRETATION

What does all of the preceding mean for the debate about the role international law should play in interpreting the U.S. Constitution? It means that the two interpretive approaches being passionately espoused are equally unattractive. The living constitutionalists think that the U.S. should take into account international law when interpreting the Constitution.²³ Originalists, on the other hand, argue that judges generally should not rely on international law as an aid to interpreting the U.S. Constitution.²⁴

²³ See, e.g., Ruth Bader Ginsburg, "A Decent Respect to the Opinions of Humankind": The Value of a Comparative Perspective in Constitutional Adjudication, 1 FIU L. REV. 27, 36 (2006). As Justice Ginsburg explained her view:

The notion that it is improper to look beyond the borders of the United States in grappling with hard questions, I earlier suggested, has a close kinship to the view of the U.S. Constitution as a document essentially frozen in time as of the date of its ratification. I am not a partisan of that view. U.S. jurists honor the Framers' intent "to create a more perfect Union," I believe, if they read the Constitution as belonging to a global 21st century, not as fixed forever by 18th-century understandings.

Id. at 36.

²⁴ Seventh Circuit judge Frank Easterbrook puts it this way:

Is it possible that there is a middle ground, one that would recognize a legitimate role for the use of international law that is consistent with the founding generations' understanding of the government they established? I think the answer is yes. To the extent that the text or historical context animating portions of the U.S. Constitution reflect an acceptance of international law principles, an originalist should consult these international law principles. These international law principles would be not only salient to the originalist's interpretive quest, but indeed indispensable to it.

A. Which International Law Is Relevant?

A more contentious issue involves precisely which international law principles matter: modern ones, or ones that existed at the time of the founding? As an originalist, the answer must necessarily be the international law principles that existed, were known and animated U.S. constitutional text at the time the relevant text was ratified. This approach would thus exclude modern international law and all its specifics.²⁵ If one embraces the notion of fidelity to constitutional text, this is a normatively desirable outcome. After all, international law has come a very long way from the original Law of Nations well known to the founding generation and written about by philosophers

There are two ways to commit the United States to international norms. The first is the Treaty Clause: the President plus two-thirds of the Senate may bind courts and citizens of the United States to a proposition on which they agree with other nations. The second is the Law of Nations Clause, which says that Congress may 'define and punish Piracies and Felonies committed on the high Seas, and Offences against the Law of Nations'. This requires a majority in each chamber plus the President, or two-thirds in each chamber to override a veto.

There is no corresponding power in the judiciary to make any norm of international law binding within the United States. . . . [T]he judiciary [cannot] insist that the government itself is bound by norms from outside our borders, and which our elected representatives have not adopted and are not allowed to change.

Frank H. Easterbrook, *Foreign Sources and the American Constitution*, 30 HARV. J.L. & PUB. POL'Y 223 (2006). See also Curtis A. Bradley & Jack L. Goldsmith, *Customary International Law as Federal Common Law: A Critique of the Modern Position*, 110 HARV. L. REV. 815 (1997) (arguing against acceptance of customary international law as binding federal law); Roger P. Alford, *The United States Constitution and International Law: Misusing International Sources to Interpret the Constitution*, 98 AM. J. INT'L L. 57 (2004) (offering a comprehensive criticism of the use of international law in interpreting the U.S. Constitution); John O. McGinnis & Ilya Somin, *Should International Law Be Part of Our Law?*, 59 STAN. L. REV. 1175 (2007) (discussing the "democratic deficit" that results when U.S. courts rely on international law).

²⁵ But cf. Harold Hongju Koh, *Paying "Decent Respect" to World Opinion on the Death Penalty*, 35 U.C. DAVIS L. REV. 1085 (2002) (arguing for the use of modern international law principles to compel the determination that the death penalty violates the Eighth Amendment).

such as Grotius,²⁶ Pufendorf,²⁷ Burlamaqui,²⁸ and Vattel.²⁹ It is these early international law principles—not the modern international law offshoots that subsequently have developed—that originalists can and should consult in interpreting the U.S. Constitution.

Living constitutionalists will not like this because it does not achieve the desired goal of incorporating modern international law into the U.S. Constitution. And given the political nature of constitutional discourse these days, many originalists will not like this either, since it would require them to consult and sometimes be bound by international law principles, allowing the camel's nose to enter the interpretive tent.

Extreme positions aside, however, what would it mean if early international law principles were deemed to be a legitimate source of interpretive material for the U.S. Constitution? The full explication is well beyond this short essay and would likely take many years to play out jurisprudentially. But I will offer one example involving the Ninth Amendment that I have discovered in my own research and which I explore in more detail in my recent book.³⁰

B. The Ninth Amendment and the Early Law of Nations

The early international law—the Law of Nations—that was in place at the time of the founding, offered a very rich and well-developed conception of sovereignty. To label someone as “sovereign” under the Law of Nations meant that that the person(s) in whom sovereignty lodged was all-powerful.³¹ After all, sovereignty was term borrowed from Biblical reference to God, the original sovereign.³² More specifically, to be sovereign under the Law of Nations

²⁶ See e.g., HUGO GROTIUS, *THE RIGHTS OF WAR AND PEACE* (A.C. Campbell trans., 1901) (1625).

²⁷ See, e.g., EMMERICH DE VATTEL, *THE LAW OF NATIONS OR THE PRINCIPLES OF NATURAL LAW* (Charles G. Fenwick trans., 1916) (1758).

²⁸ See, e.g., J.J. BURLAMAQUI, *THE PRINCIPLES OF NATURAL LAW* (Thomas Nugent trans., 2003) (1748).

²⁹ See, e.g., 2 SAMUEL VON PUFENDORF, *DE JURE NATURAE ET GENTIUM LIBRI OCTO* (C.H. Oldfather & W.A. Oldfather eds. & trans., 1934) (1688).

³⁰ See *LIBERTY FOR ALL*, *supra* note 4, at 41-64.

³¹ See *id.* at 219 n.2 (citing numerous early Law of Nations sources defining the nature of sovereignty).

³² See JEAN BODIN, *ON SOVEREIGNTY: FOUR CHAPTERS FROM THE SIX BOOKS OF THE COMMONWEALTH* 46 (Julian H. Franklin ed. & trans., 1992) (1576). Bodin argued:

Since there is nothing greater on earth, after God, than sovereign princes, and since they have been established by Him as His lieutenants for commanding other men, we need be precise about their status so that we may respect and revere their majesty in complete obedience, and do them honor in our thoughts and our speech. Con-

was to be legally autonomous, answerable to none.³³ And all sovereigns were considered to be equal under the Law of Nations, and hence entitled to equal respect in the international community (i.e., by other sovereigns).³⁴

Under the Law of Nations, moreover, there was only one perceived limit to sovereign power. Because all sovereigns were equal, they were not permitted to harm other sovereigns, except in self-defense.³⁵ Violation of this non-aggression principle was a violation of the Law of Nations—and indeed, it is easy to see how this rudimentary harm principle is the seed from which the whole body of modern international law has sprouted.

So what does this one example of early international law principles mean for U.S. constitutional interpretation? Its potential relevance is as follows. If the U.S. is a government of limited powers (as it was undoubtedly meant to be),³⁶ this suggests that We the People, in forming our social compact (i.e., the Constitution) were the original source of sovereign power—a conclusion long accepted by the Supreme Court.³⁷ More specifically, whatever powers the people did not give to the newly formed U.S. government, we either gave to our state governments, or kept to ourselves. This is clearly the message of the Tenth Amendment.³⁸ So by enumerating certain individual rights—e.g., in the first nine amendments—the citizenry carved out specific areas where our new, elected governors had “no power” over

tempt for one's sovereign prince is contempt toward God, of whom he is the earthly image.

Id.

³³ See GROTIUS, *supra* note 26, at 62 (defining a sovereign as a person “whose actions are not subject to the controul [sic] of any other power, so as to be annulled at the pleasure of any other human will.”); PUFENDORF, *supra* note 29, at 1055 (saying of sovereignty that “no greater liberty, setting aside the sovereignty of God, can be understood as belonging to individual men, than the ability to dispose of their actions, strength, and faculties at their own judgment . . . ‘To do with impunity what one fancies is to be a king.’”); BODIN, *supra* note 32, at 4 (“For he is absolutely sovereign who recognizes nothing, after God, that is greater than himself. . . . [A] sovereign prince [] is answerable only to God.”).

³⁴ See, e.g., BURLAMAQUI, *supra* note 28, at 196 (“[L]et us observe that the natural state of [sovereign] nations in respect to each other, is that of society and peace. This society is likewise a state of equality and independence, which establishes a parity of right between them; and engages them to have the same regard and respect for one another.”).

³⁵ See LIBERTY FOR ALL, *supra* note 4, at 220 n.3 (citing numerous sources).

³⁶ See *Loan Ass'n v. Topeka*, 87 U.S. 655, 663 (1874) (“The theory of our governments, State and National, is opposed to the deposit of unlimited power anywhere. The executive, the legislative, and the judicial branches of these governments are all of limited and defined powers.”).

³⁷ See, e.g., *Vanhorne's Lessee v. Dorrance*, 2 U.S. 304, 308 (1795) (“The Constitution is the work or will of the People themselves, in their original, sovereign, and unlimited capacity.”).

³⁸ U.S. CONST. amend. X (“The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.”).

us. These rights are, in other words, areas in which We the People have retained our original sovereignty: sovereignty to speak, worship God as we see fit, bear arms, and even be kings and queens of our own castles by having freedom from unreasonable searches and seizures, etc.

After specifying all of the areas of retained sovereignty that we could foresee were important, We the People then stated, in the Ninth Amendment, that the enumeration of these specific rights – by defining areas of no legitimate governmental power—“shall not be construed to deny or disparage others retained by the People.”³⁹

The Ninth Amendment is thus a statement of what I have called “residual individual sovereignty.”⁴⁰ It says that just because the Constitution enumerates some specific areas of individual sovereignty (i.e., rights), those enumerations are not to be construed to mean that there are no other rights deserving of constitutional protection. This basic conception of the meaning of the Ninth Amendment is quite consistent with the context in which the Bill of Rights was ratified. After all, the great fear articulated by the Federalists was that a Bill of Rights would be “dangerous” because enumerating some rights would necessarily imply that the existence of greater governmental power to restrict individual liberty than originally granted.⁴¹ Relatedly, the Anti-

³⁹ *Id.* at amend. IX (“The enumeration in the Constitution of certain rights shall not be construed to deny or disparage others retained by the people.”).

⁴⁰ LIBERTY FOR ALL, *supra* note 4, at 13-15. I should, however, acknowledge the strong influence here of Joseph Story, who used the phrase “residuary sovereignty.” 3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 752 (1833). Justice Story wrote:

Being an instrument of limited and enumerated powers, it follows irresistibly, that what is not conferred, is withheld, and belongs to the state authorities, if invested by their constitutions of government respectively in them; and if not so invested, it is retained BY THE PEOPLE, as part of their residuary sovereignty.

Id. (capitals in original).

⁴¹ THE FEDERALIST No. 84 (Alexander Hamilton). Hamilton explained:

I go further and affirm that bills of rights, in the sense and to the extent in which they are contended for, are not only unnecessary in the proposed Constitution but would even be dangerous. They would contain various exceptions to powers which are not granted; and, on this very account, would afford a colorable pretext to claim more than were granted. For why declare that things shall not be done which there is no power to do?

Id. See also Speech of James Wilson before the Pennsylvania Ratifying Convention (Nov. 28, 1787), in 1 THE FOUNDERS’ CONSTITUTION, at 454. Wilson argued against an express bill of rights:

In a government possessed of enumerated powers, such a [bill of rights] would be not only unnecessary, but preposterous and dangerous. . . . If we attempt an enume-

Federalists insisted on a Bill of Rights precisely because they feared that the enumerated powers would be interpreted too broadly, thereby encroaching upon individual liberty.⁴² Both Federalists and Anti-Federalists, in other words, were ardent in their insistence that governmental powers not be so broadly interpreted as to invade the realm of sovereignty retained by the people.

Madison's careful attempt to prevent this widespread fear from becoming a reality was embodied in the Ninth Amendment. In his words:

It has been objected also against a bill of rights, that, by enumerating particular exceptions to the grant of power, it would disparage those rights which were not placed in that enumeration; and it might follow by implication, that those rights which were not singled out, were intended to be assigned into the hands of the General Government, and were consequently insecure. This is one of the most plausible arguments I have ever heard urged against the admission of a

ration [of rights], every thing that is not enumerated is presumed given. The consequence is, that an imperfect enumeration would throw all implied power into the scale of the government, and the rights of the people would be rendered incomplete.

Id.

⁴² See Speech of John Smilie before the Pennsylvania Ratifying Convention (Nov. 28, 1787), in 1 *THE FOUNDERS' CONSTITUTION*, at 456. Smilie argued that only a bill of rights could stave off tyranny:

So loosely, so inaccurately are the powers which are enumerated in this constitution defined, that it will be impossible, without a [bill of rights], to ascertain the limits of authority, and to declare when government has degenerated into oppression. In that event the contest will arise between the people and the rulers: "You have exceeded the powers of your office, you have oppressed us," will be the language of the suffering citizen. The answer of the government will be short—"We have not exceeded our power; you have no test by which you can prove it." Hence, sir, it will be impracticable to stop the progress of tyranny.

See also Letter from Richard Henry Lee to Samuel Adams (Oct. 5, 1787), in 1 *THE FOUNDERS' CONSTITUTION*, at 448. Lee concurred in this:

The corrupting nature of power, and its insatiable appetite for increase, hath proved the necessity, and procured the adoption of the strongest and most express declarations of that *Residuum* of natural rights, which is not intended to be given up to Society; and which indeed is not necessary to be given up for any good social purpose. In a government therefore, when the power of judging what shall be for the *general welfare*, which goes to the every object of human legislation; and where the laws of such Judges shall be the *supreme Law of the Land*: it seems to be of the last consequence to declare in most explicit terms the reservations above alluded to.

Id. (emphasis in original).

bill of right into this system; but, I conceive, that it may be guarded against. I have attempted it, as gentlemen may see by turning to the last clause of the fourth resolution [the original Ninth Amendment].⁴³

If the Ninth Amendment is a statement that individuals have certain additional rights other than the ones specifically enumerated elsewhere in the Constitution, then it is fair to say that the Ninth Amendment is a place-marker for the concept of residual rights—i.e., residual individual sovereignty. This is an apt label because individual rights, by definition, are conceptually the flip side of governmental powers. Rights, in other words, are those areas where government has no power over us, where we, as individuals, retain the power to follow our own conscience and preferences. If Bill has a right to do X, this is conceptually no different, under the American conception of negative rights, than saying that the government has no power to interfere with Bill when he engages in X. If the government has no power over Bill when he engages in X, then ipso facto the power over X resides with Bill. Bill's right to do X is thus an example of Bill's residual individual sovereignty—a power he retains, as an individual, to do X if he wishes.

Some areas of individual sovereignty are of course enumerated specifically in the text of the Constitution, such as the rights to speech, assembly, bearing of arms, and so forth. Other areas of individual sovereignty, however, were textually acknowledged to exist by the Ninth Amendment, though the impossibility of their complete enumeration was obvious.⁴⁴ Whether specifically enumerated or not, the Constitu-

⁴³ The last clause of Madison's fourth proposal (the original version of the Ninth Amendment) read:

The exceptions here or elsewhere in the Constitution, made in favor of particular rights, shall not be so construed as to diminish the just importance of other rights retained by the people, or as to enlarge the powers delegated by the Constitution; but either as actual limitations of such powers, or as inserted merely for greater caution.

James Madison, Speech to the House of Representatives (June 8, 1789), in DOUGLAS KMIEC ET AL., *THE AMERICAN CONSTITUTIONAL ORDER: HISTORY, CASES AND PHILOSOPHY* 123 (2d ed. 2004).

⁴⁴ Cf. Speech by James Wilson to the Pennsylvania Ratification Convention (Oct. 28, 1787), in 1 *THE FOUNDERS' CONSTITUTION*, at 454. Wilson contended:

There are two kinds of government—that where general power is intended to be given to the legislature, and that where the powers are particularly enumerated. . . . [W]hen general legislative powers are given, then the people part with their authority, and, on the gentleman's principle of government, retain nothing. But in a government like the proposed one, there can be no necessity for a bill of rights, for, on my principle, the people never part with their power. Enumerate all the rights of men! I am sure, sir, that no gentlemen in the late Convention would have attempted such a thing.

tion thus accepts that individuals retained a great realm of sovereignty even after they ceded certain specific powers to their governors. The social compact entered into grants only certain powers to our governors, and We the People, both collectively and individually, retain the great residuum of power.

The Ninth Amendment is thus a critical textual statement about the limitations on governmental power, and concomitantly, the expansiveness of residual individual sovereignty. It is an express instruction to the other branches of government—most notably the judiciary—not to construe the existence of specifically enumerated rights to mean that there are no others worthy of constitutional status and hence, judicial protection. Sadly, this rather clear textual message has been consistently ignored. In Robert Bork’s famous Senate confirmation hearings, he characterized the Ninth Amendment as an undecipherable “inkblot”—an interpretation that has been routinely embraced.⁴⁵

Rights not specifically enumerated within the constitutional text have indeed been denied or disparaged. They have been formally classified as second-class rights—a red-headed cousin, if you will, of the judicially favored enumerated rights. And perhaps most ironic of all, the jurisprudential presumption against recognition of unenumerated rights is embraced by self-identified originalists such as Bork.

One of the originalists’ primary excuses for this bizarre interpretive behavior is that there are no discernible standards for ascertain-

Id.

⁴⁵ Judge Bork stated in the Senate confirmation hearings:

I do not think you can use the Ninth Amendment unless you know something of what it means. For example, if you had an amendment that says, “Congress shall make no” and then there is an inkblot, and you cannot read the rest of it, and that is the only copy you have, I do not think the court can make up what might be under the inkblot.

Randy E. Barnett, *Reconceiving the Ninth Amendment*, 74 CORNELL L. REV. 1, 1 (1988) (quoting *Testimony of Robert Bork*, WALL ST. J., Oct. 5, 1987, at 22, col. 1). See also John Hart Ely, *The Ninth Amendment*, in 1 THE RIGHTS RETAINED BY THE PEOPLE: THE HISTORY AND MEANING OF THE NINTH AMENDMENT 179 (Randy E. Barnett ed., 1989). Professor Ely remarks:

Occasionally a commentator will express a willingness to read [the Ninth Amendment] for what it seems to say, but this has been, and remains, a distinctly minority impulse. In sophisticated legal circles mentioning the Ninth Amendment is a sure-fire way to get a laugh (“what are you planning to rely on to support that argument, Lester, the Ninth Amendment?”)

Id. Recent constitutional scholarship, however, increasingly challenges the orthodox inkblot view. See RANDY E. BARNETT, RESTORING THE LOST CONSTITUTION: THE PRESUMPTION OF LIBERTY 234-52 (2004); DANIEL A. FARBER, RETAINED BY THE PEOPLE: THE “SILENT” NINTH AMENDMENT AND THE CONSTITUTIONAL RIGHTS AMERICANS DON’T KNOW THEY HAVE (2007); Calvin R. Massey, *Federalism and Fundamental Rights: The Ninth Amendment*, 38 HASTINGS L.J. 305 (1987).

ing the existence of unenumerated residual rights.⁴⁶ But this is where understanding the original Law of Nations could help. It suggests a framework for giving meaning to the Ninth Amendment—for removing the proverbial inkblot—that is based upon originalist principles.

If the Ninth Amendment is a statement about residual individual sovereignty, then it requires that judges interpreting it understand what sovereignty meant to the founding generation. The early international law texts provide this meaning rather clearly. As elaborated earlier, under the Law of Nations as it existed at the founding, saying that someone had sovereignty meant that they could do as they pleased, so long as they did not harm other sovereigns (except in self-defense). If the Ninth Amendment is a place-marker for the concept of residual individual sovereignty, then it means that individuals have other areas of sovereignty, not specifically enumerated, that are by nature too numerous to list. We the People have kept the great residuum of power for ourselves, ceding only what was necessary for government to carry out its limited functions.

This residual sovereignty resides with each of us, giving us great liberty to act as we please, subject only to the limitation originally understood to be placed upon sovereigns: that we exercise our sovereignty so as not to harm others. When viewed this way, the Ninth Amendment becomes understandable and meaningful. It suggests that there is implicitly a harm principle that should guide judicial construction of claims of unenumerated rights.

How precisely to define harm is a question I spend a good deal of time on in my book and I will not repeat it here.⁴⁷ Suffice it to say that there is a relatively rich literature from the founding era regarding the kinds of harms that were and normatively should be considered to be legally cognizable. The larger point—for purposes of this article—is that an originalist understanding of the Ninth Amendment would require consultation and fidelity to the conception of sovereignty embodied in the Law of Nations in existence at the time the Ninth Amendment was ratified. This, in turn, provides one relatively small example of a situation in which acknowledging and incorporating international law principles should be considered essential to the task of interpreting the U.S. Constitution.

⁴⁶ See RESTORING THE LOST CONSTITUTION, *supra* note 45, at 235 (“The fear of the Ninth Amendment, even by committed textualists/originalists, results in part from its apparently open-ended reference to unenumerated rights.”).

⁴⁷ SEE LIBERTY FOR ALL, *supra* note 4, at 48-59.