SCHOOL OF LAW
CASE WESTERN RESERVE UNIVERSITY

Case Western Reserve Law Review

Volume 60 | Issue 4

2010

Diachronic Constitutionalism: A Remedy for the Court's Originalist Fixation

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DIACHRONIC CONSTITUTIONALISM: A REMEDY FOR THE COURT'S ORIGINALIST FIXATION

The intellectual vanguard of the 1980s movement for originalism marched under the banner of judicial restraint.[1] The Supreme Court's power and willingness to shape modern social policy grew radically between the New Deal era of the 1930s and the Warren-Court era of the 1960s,[2] provoking a backlash by the closing decades of the twentieth century. In the 1980s, judges, legal scholars, and ordinary citizens began complaining more frequently and in greater numbers that politically motivated judicial activism was "unraveling . . . the theoretical underpinnings of constitutional law" and making Court decisions increasingly unstable and unpredictable.[3]

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[1] *See* Thomas B. Colby & Peter J. Smith, *Living Originalism*, 59 DUKE L.J. 239, 289 (2009) ("'A central concern of originalism is that judges be *constrained* by the law rather than be left free to act according to their own lights, a course that originalists regard as essentially lawless.'" (quoting Steven D. Smith, *Law Without Mind*, 88 MICH. L. REV. 104, 106 (1989))).

[2] *See* HERMAN BELZ, A LIVING CONSTITUTION OR FUNDAMENTAL LAW? 9 (1998).

[3] Sheldon D. Pollack, *Unraveling the Constitution*, 24 SOCIETY 56, 56 (1987). This backlash arguably had a more forceful presence among the lay general public than within the legal profession and the judiciary, where it was largely confined to conservative judges and think tanks. *See* Jamal Greene, *Selling Originalism*, 97 GEO. L.J. 657, 680–82 (2009) (noting that originalism as a political method to restrain the judiciary was "*non gratus* within much of the legal academy" though the public extensively "debat[ed this] constitutional methodology"). President Reagan's Attorney General, Edwin Meese III, played a critical role in popularizing

The originalist solution to the problem of an out-of-control judiciary was for judges to limit their application of constitutional provisions to the original meaning of the law contained in the Constitution's written text.[4] Judge Robert Bork, one of originalism's most outspoken defenders at the time, neatly summarized his creed as follows: "Either the Constitution and statutes are law, which means that their principles are known and control judges, or they are malleable texts that judges may rewrite to see that particular groups or political causes win."[5] If they are the latter, as Bork feared they had become, then the Court's constitutional doctrine would be as fickle as the American electorate.[6] Originalism was to be the anchor that prevented the Court from subverting its own constitutional authority.

In the early 1990s, the Court—under the influence of recently appointed self-avowed originalists Justices Antonin Scalia and Clarence Thomas—began to incorporate originalist principles into its interpretation of constitutional provisions.[7] Yet the Court's "turn to history"[8] did not mitigate the "unraveling" of constitutional jurisprudence as the originalists of the 1980s had promised it would. During the first decade of the twenty-first century, many of the most divisive and contentious Supreme Court decisions have resulted from competing historical exegeses of the Constitution's text among different Justices.[9] These cases have recently been provoking the

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and politicizing originalism. *See id.*

[4] *See* BELZ, *supra* note 2, at 229 (detailing the evolution of a concept establishing a written constitution with objective, discoverable meaning).

[5] ROBERT H. BORK, THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW 2 (1991).

[6] *See id.* at 11 ("We may . . . expect a constitutional law that lurches suddenly in one direction or another as one faction or another gains the upper hand, a constitutional law that is seen as too crucial a political weapon to be left to nonpolitical judges, and certainly too important to be left to the actual Constitution.").

[7] *See, e.g.*, New York v. United States, 505 U.S. 144, 174–77 (1992) (holding that the Tenth Amendment prohibits Congress from "commandeering" the functions of state legislatures); Harmelin v. Michigan, 501 U.S. 957, 994–96 (1991) (Scalia, J., plurality opinion) (holding that a prison sentence of life without the possibility of parole did not constitute "cruel or unusual punishment" under the Eighth Amendment for non-capital offenses). The opinions in each of these cases were based heavily on historical arguments.

[8] Robert W. Gordon, *The Past as Authority and as Social Critic: Stabilizing and Destabilizing Functions of History in Legal Argument*, *in* THE HISTORIC TURN IN THE HUMAN SCIENCES 339, 357 (Terrence J. McDonald ed., 1996) [hereinafter HISTORIC TURN] (detailing different political justifications for relying on the original meaning of the Constitution); *see also* LAURA KALMAN, THE STRANGE CAREER OF LEGAL LIBERALISM 139–43 (1996) (detailing the onset of "historicity" within academia including literature, social sciences, and the law).

[9] *See, e.g.*, Giles v. California, 128 S. Ct. 2678 (2008) (holding that the California Supreme Court's theory of a certain exception to the Confrontation Clause of the Sixth Amendment was erroneous because it had not been "established at the time of the founding" and was never articulated by any court until 1985 (quoting Crawford v. Washington, 541 U.S. 36, 54 (2004))); Boumediene v. Bush, 128 S. Ct. 2229 (2008) (holding that aliens captured abroad by

same charges of judicial recklessness that Bork leveled at the nonoriginalist Justices of his day.[10]

Originalists have responded to this criticism by revising their doctrine's conception of textual meaning. The "old originalism" of the 1980s and early 1990s focused on the original *intentions* of the framers or ratifiers of constitutional provisions.[11] By the 2000s, it had become increasingly "subject to withering criticisms, based on questions about the evidentiary basis for the [framers'] imputed intentions and about the difficulties of aggregating what might have been disparate intentions or thoughts by framers and ratifiers, among others."[12] "New originalism," however, would focus on the original *public understanding* of those provisions—"what constitutional provisions were understood to mean by ordinary, albeit reasonably well-informed, readers of the terms at the time the terms were embedded in the Constitution."[13] Original meaning thus conceived was supposed to be more determinable and objective and therefore less susceptible to diametrically opposed but equally plausible interpretations.

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the U.S. military and detained at Guantanamo Bay and designated "enemy combatants" are not thereby barred from seeking writs of habeas corpus or invoking protections in the Suspension Clause because, inter alia, the framers intended the habeas privilege to be "one of the few safeguards of liberty" in the Constitution before even adopting a Bill of Rights and because "settled precedents or legal commentaries in 1789" support this holding); Virginia v. Moore, 128 S. Ct. 1598 (2008) (holding that a state statute that expands the traditional definition of probable cause in the Fourth Amendment is not thereby incorporated into that amendment so as to constitutionally bind law-enforcement officers of that state because, inter alia, there is no evidence that the framers intended this); Morse v. Frederick, 551 U.S. 393, 411–22 (2007) (Thomas, J., concurring) (arguing that the Court, instead of merely holding that the free speech rights of public high school students established in *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503 (1969), does not protect the right of a student to unfurl a banner containing the words "BONG HiTS 4 JESUS," should have overturned *Tinker* altogether because the long-standing principle of in loco parentis, which governed such students' conduct since the nineteenth century, did not afford any such rights); Cent. Va. Cmty. Coll. v. Katz, 546 U.S. 356, 359, 363 (2006) (holding that "a proceeding initiated by a bankruptcy trustee to set aside preferential transfers by the debtor to state agencies is [not] barred by sovereign immunity" because, inter alia, the framers intended the Bankruptcy Clause to carve out a limited exception to such immunity "in the bankruptcy arena").

[10] *See, e.g.*, Cass R. Sunstein, *Second Amendment Minimalism:* Heller *as* Griswold, 122 HARV. L. REV. 246, 271 (2008) ("It is possible that . . . originalist inquiries . . . will mask judgments that have a pragmatic component and that are driven by a sense of consequences and justifications.").

[11] *See* Mark Tushnet, Heller *and the New Originalism*, 69 OHIO ST. L.J. 609, 609 (2008) [hereinafter Tushnet, *New Originalism*] (noting that commentators ascribe "old" originalism to Justice Steven's dissent in *Heller*).

[12] *Id.*

[13] *Id.*

In 2008, the Court held for the first time in *District of Columbia v. Heller*[14] that the Second Amendment guarantees individual citizens the right to own and use firearms for the purpose of personal self-defense, at least within the home.[15] *Heller* drew considerable controversy not only because of its implications for the politically polarizing issue of gun control but also because it has laid bare to legal scholars and historians alike the failure of the originalist project to constrain the judiciary.[16] Because *Heller* concerned a Washington, D.C. law, however, the Court did not have the opportunity to address whether this new individual right is binding on the states as well as on the federal government.[17] The Court was given that opportunity two years later in *McDonald v. City of Chicago*.[18] In a plurality opinion, the Court "incorporated"[19] the right established in *Heller* through the Due Process Clause of the Fourteenth Amendment[20] using, ironically, the same "living constitutionalist" substantive due process analysis that the Warren Court used in its incorporation decisions.[21]

Justice Scalia's majority opinion in *Heller* is widely cited as a paradigm example of the "new originalism" in practice.[22] Professor Lawrence Solum describes *Heller* as "represent[ing]

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[14] 128 S. Ct. 2783 (2008).

[15] *See id.* at 2797.

[16] *See, e.g.*, Saul Cornell, *Originalism on Trial: The Use and Abuse of History in* District of Columbia v. Heller, 69 OHIO ST. L.J. 625, 627 (2008) [hereinafter Cornell, *Originalism on Trial*] ("Both of the forms of originalism employed in *Heller* fall short of the standards historical scholarship demands."); Tushnet, *New Originalism*, *supra* note 11, at 617 (stating that new originalism "fails to deliver on its claim about eliminating judicial subjectivity, judgment, and choice"); *see also* Sunstein, *supra* note 10 and accompanying text.

[17] Washington, D.C. is "a federal enclave, not a part of a state." Michael P. O'Shea, District of Columbia v. Heller*: Federalism and the Implementation of the Right to Arms*, 59 SYRACUSE L. REV. 201, 202 (2008).

[18] 130 S. Ct. 3020 (2010).

[19] For a comprehensive overview of the incorporation issue, see Richard L. Aynes, *Unintended Consequences of the Fourteenth Amendment and What They Tell Us About Its Interpretation*, 39 AKRON L. REV 289 (2006); Erwin Chemerinsky, *The Supreme Court and the Fourteenth Amendment: The Unfulfilled Promise*, 25 LOY. L.A. L. REV. 1143 (1992); Robert Eugene Cushman, *The Social and Economic Interpretation of the Fourteenth Amendment*, 20 MICH. L. REV. 737 (1922); John Raeburn Green, *The Bill of Rights, the Fourteenth Amendment and the Supreme Court*, 46 MICH. L. REV. 869 (1948); Alex B. Lacy, Jr., *The Bill of Rights and the Fourteenth Amendment: The Evolution of the Absorption Doctrine*, 23 WASH. & LEE L. REV. 37 (1966); William L. Richter, *One Hundred Years of Controversy: The Fourteenth Amendment and the Bill of Rights*, 15 LOY. L. REV. 281 (1968–69).

[20] U.S. CONST. amend XIV, § 1, cl. 3 ("nor shall any State deprive any person of life, liberty, or property, without due process of law").

[21] For more background information on substantive due process jurisprudence and its relationship to living constitutionalism, see Erwin Chemerinsky, *Substantive Due Process*, 15 TOURO L. REV. 1501 (1999); Thomas C. Grey, *Do We Have an Unwritten Constitution?*, 27 STAN. L. REV. 703 (1975); Charles A. Reich, *Mr. Justice Black and the Living Constitution*, 76 HARV. L. REV. 673 (1963); Peter J. Rubin, *Square Pegs and Round Holes: Substantive Due Process, Procedural Due Process, and the Bill of Rights*, 103 COLUM. L. REV. 833 (2003).

[22] Tushnet, *New Originalism*, *supra* note 11, at 609.

the most important and extensive debate on the role of original meaning in constitutional interpretation among the members of the contemporary Supreme Court."[23] Solum uses the concrete example of *Heller* to help illustrate his own more abstract theory of original meaning, a theory he elaborates fully in *Semantic Originalism*.[24] In that article, Solum seeks to justify the "new originalism"—and originalism in general—as the interpretive theory that is not only best suited to helping judges determine the *positive* constitutional rules of law that bind them but also *normatively* superior in its ability to ensure that their reasoning remains faithful to those rules of law.[25]

This Note uses Solum's argument in *Semantic Originalism* to expose the one fallacy that undermines originalism in both its "old" and "new" varieties: the fixation of the Constitution's meaning at the time of framing and ratification.[26] Solum labels this idea the "fixation thesis."[27] His purpose in *Semantic Originalism* is to demonstrate the superiority of the "new" over the "old" originalism by claiming that, unlike the multifarious and often-conflicting intentions of the framers and ratifiers, the Constitution's original public understanding is a positive linguistic fact—a "semantic content" that judges can discover by gathering and analyzing historical evidence.[28] Because such a meaning is both discoverable and determinable, Solum maintains, it is "part of the supreme law of the land," and judges are duty-bound by it.[29] This Note argues, on the contrary, that the historical fixation on the Constitution's textual meaning *guarantees* that such meaning can never be determined as a matter of absolute fact and that judges using originalist interpretive methodologies *inevitably* use their own subjective discretion when deciding constitutional cases.

Historically fixed meaning precludes judicial restraint and objectivity is because it is *synchronic* in nature. The term "synchronic" was coined by the linguist Ferdinand Saussure, who

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[23] Lawrence B. Solum, District of Columbia v. Heller *and Originalism*, 103 NW. U. L. REV. 923, 924 (2009) [hereinafter Solum, Heller *and Originalism*].

[24] Lawrence B. Solum, *Semantic Originalism* (Ill. Pub. Law & Legal Theory Research Papers Series No. 07-24, 2008), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1120244 [hereinafter Solum, *Semantic Originalism*].

[25] *See id.* at 10 ("[T]he reasons . . . for seriously doubting [new originalist] arguments are rooted in widely shared but clearly erroneous assumptions about what is at stake in debates about originalism.").

[26] *See id.* at 2 ("The central claim of Semantic Originalism is that constitutional law includes rules with content that are fixed by the original public meaning of the text—the conventional semantic meaning of the words and phrases in context.").

[27] *See id.* ("The fixation thesis is the claim that semantic content of the Constitution (the *linguistic meaning* of the Constitution) is fixed at the time of adoption.").

[28] *See id.* at 36.

[29] *Id.* at 8.

distinguished synchronic meaning from diachronic meaning.[30] Synchronic meaning concerns meanings as they "exist at a certain point in time and are systematically related to one another at that point" whereas diachronic analysis is concerned with "relations between entities changing over time."[31] This Note proposes a diachronic theory of constitutional meaning that aims to bridge the divide between historical fact and normative law—a divide that the fixation thesis requires originalists to recognize—by allowing judges to inquire into how the decisions that the Constitution requires them to make are in a constant state of flux, even though the Constitution's text remains constant unless and until it is amended.

The diachronic method makes use of three different conceptions of meaning that Solum introduces and distinguishes in *Semantic Originalism*: semantic meaning, applicative meaning, and teleological meaning.[32] Semantic meaning "refers to the semantic content of an utterance," applicative meaning "refers to the application of a general utterance to a particular case," and teleological meaning "refers to the purpose for an utterance."[33] Solum argues in *Semantic Originalism* that judges can only apply the law of the Constitution faithfully if they restrict their interpretation to its historically fixed semantic meaning.[34]

Professor Jose Joel Alicea criticizes Solum's "thin" conception of original meaning as being inadequate for the purpose of binding judges to the popular sovereignty on which the Constitution's authority is founded.[35] This conception, according to Alicea, "allows for broad latitude in constitutional construction."[36] Solum discusses a variety of different theories upon which judges base their constructions of constitutional provisions,[37] but he is "agnostic" as to which, if any, of these theories is most compatible with his overall conception of originalism.[38] What these theories share in common,

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[30] *See* Roy Harris, *Linguistics After Saussure*, *in* THE ROUTLEDGE COMPANION TO SEMIOTICS AND LINGUISTICS 118, 124 (Paul Cobley ed., 2001).

[31] *Id.*

[32] Solum, *Semantic Originalism*, *supra* note 24, at 63–64.

[33] *Id.*

[34] *See* Jose Joel Alicea, Originalism in Crisis: The Movement Toward Indeterminate Originalism 123 (May 22, 2010), *available at* http://ssrn.com/abstract=1613065 ("Interpretation, in [Solum's] view, consists only in discerning the semantic meaning of the text.").

[35] *See generally id.* at 58–64 (distinguishing "thick" from "thin" original meaning"). Solum's "very minimal conception of interpretation . . . allows for broad latitude in constitutional construction." *Id.* at 123–34.

[36] *Id.* at 124.

[37] *See* Solum, *Semantic Originalism*, *supra* note 24, at 75–80.

[38] E-mail from Lawrence B. Solum, John E. Cribbet Professor of Law & Philosophy, University of Illinois to the Author (July 14, 2009, 13:39 EST) [hereinafter Solum Correspondence] (on file with author); *see also* Solum, *Semantic Originalism*, *supra* note 24, at

however, is an inability to "be justified on the basis of the semantic content of the [C]onstitution." *Id.* As such, all of these theories lack the historical pedigree by which originalists insist judges are bound. Alicea maintains that only a "thick" conception of original meaning, one that embraces applicative and teleological meaning in addition to semantic meaning, is capable of salvaging originalism's integrity as an interpretive methodology that ensures judicial deference to popular sovereignty.[39]

The diachronic method emphasizes a further distinction regarding such meaning that Solum and Alicea both overlook: the distinction between *historical* teleological meaning and *structural* teleological meaning. Historical teleological meaning refers to the immediate political motives behind a provision's initial adoption whereas structural teleological meaning refers to the normative position that an individual provision occupies within the Constitution's overall structural framework.

Both conceptions of teleological meaning are synchronic in nature. Historical teleological meaning is fixed in the past during the period leading up to the provision's ratification and as such remains constant fact regardless of the circumstances of a particular contemporary case. Structural teleological meaning is fixed in the present at the very moment of decision in a case, is specific to that case, and inheres as the particular application of the provision among multiple conceivable applications that is most faithful to the popular sovereignty on which the Constitution's entire legitimacy is premised.[40] Whereas the synchronic interpretive method originalists employ guides judges, *in vain*, toward the discovery of semantic content, the diachronic method guides them toward the ascertainment of structural teleological meaning.

In one sense, structural teleological meaning under the diachronic method is a form of applicative meaning, because it indeed "refers to the application of a general utterance to a particular case."[41] Yet it provides constitutional judicial decisions a basis for legitimacy that Solum's "agnosticism" fails to provide.[42] A provision's meaning under Alicea's "thick" originalism is no less fixed and synchronic

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80 ("I do not take a position on the question as to which theory of construction is best . . . .").

39 Alicea, *supra* note 34, at 63 ("Originalism, because it is committed to popular sovereignty, must embrace thick original meaning.").

40 *See id.*

41 Solum, *Semantic Originalism*, *supra* note 24, at 64.

42 *See supra* notes 35–39 and accompanying text.

than it is under Solum's "thin" original meaning.[43] As such, it allows judges to consult a provision's teleological meaning only in its historical sense, not in its structural sense.[44]

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[43] Alicea attempts to expose a logical fallacy in Solum's assumption that the fixation thesis is the defining characteristic of originalism:

> Solum's [argument asserts] a conclusion that does not follow from its premises. The structure of his argument is:
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> 1) all originalists agree on the fixation thesis;
>
> 2) all originalists do not agree on any other aspect of originalist theory; therefore,
>
> 3) the fixation thesis is what defines a theory as originalist.
>
> This conclusion rests on two implicit and false assumptions. First, it assumes that just because all originalists agree on the fixation thesis but do not agree on any other aspect of originalism, that they all agree that the fixation thesis is what defines originalism. But it is entirely possible that all originalists agree that there is more to originalism than the fixation thesis even while they disagree on what that additional desiderata might be. . . .
>
> Second, it draws a normative conclusion from what Solum asserts are factual premises. The fact, if true, that all originalists agree on the fixation thesis but do not agree on any other elements of originalist theory does not mean that the fixation thesis is what constitutes originalism. What defines originalism is a normative question. It is an assertion of what *ought* to be considered originalism.

Alicea, *supra* note 34, at 127–28. Alicea's criticism, assuming it is valid, does not follow logically or compel the further conclusion that a particular interpretive methodology that does not recognize the fixation thesis can nevertheless be originalist. All it proves is that the fixation thesis is a necessary, but not a sufficient, characteristic of originalism.

[44] Jack Balkin makes a critical distinction between original meaning and original expected application. *See* Jack M. Balkin, *Original Meaning and Constitutional Redemption*, 24 CONST. COMMENT. 427, 429 n.6 (2007) [hereinafter Balkin, *Redemption*] ("Here, just as in debates about constitutional interpretation, we should distinguish the original meaning of words from their original expected application. Textualists, purposivists and intentionalists alike all begin with the original meaning of statutory words as best they can determine it. They disagree among themselves about how and whether to recognize gaps, ambiguities or vagueness in statutory language. They also disagree about what to do in the case of gaps, ambiguities or vagueness."); Jack M. Balkin, *Abortion and Original Meaning*, 24 CONST. COMMENT. 291, 296 (2007) [hereinafter Balkin, *Abortion*] ("Original expected application asks how people living at the time the text was adopted would have expected it would be applied using language in its ordinary sense (along with any legal terms of art)."). Balkin argues that "[a]n originalism that strongly distrusts delegation to future generations and demands that open-ended provisions must be closely connected to original expected application is defective," Balkin, *Redemption*, *supra* at 464, because it is "inconsistent with so much of our existing constitutional traditions," including "constitutional guarantees of sex equality for married women . . . , constitutional protection of interracial marriage . . . , the constitutional right to use contraceptives, and . . . the modern scope of free speech rights under the First Amendment." Balkin, *Abortion*, *supra*, at 297–98 (footnotes omitted). In place of original expected application, Balkin proposes a method of "text and principle," which "views most, if not all of these achievements as plausible constructions of constitutional principles that underlie the constitutional text and that must be fleshed out in doctrine." *Id.* at 299. Much of the Constitution's text, Balkin notes, contains not determinate rules but abstract principles. *See* Balkin, *Redemption*, *supra*, at 491. Balkin's text and principle method is a form of "thick" originalism: although the judicial application of the principles contained in a provision's text can change over time due to evolving social and political norms,

Judges ascertain structural teleological meaning by analyzing the position that the provision at issue occupies in the Constitution's contemporary structural framework at the moment of decision. But structural teleological meaning acknowledges the dual nature of this framework that results from the Constitution's writtenness.[45] A constitution is first and foremost not a document but a system by which political power—between the various branches of government, between the federal government and state governments, and between the sovereign "We the People" and the political institutions governing on its behalf—is allocated.[46] Codifying such a framework of power allocations into a written document does not automatically guarantee that the actually existing power allocations will conform to that document indefinitely.[47] The diachronic method, therefore distinguishes two different understandings of the Constitution's structure: the "Newtonian" understanding and the "Darwinian" understanding.[48] The Newtonian understanding assumes that the very writtenness of that structure is sufficient to fix it for all time and, as such, is fundamentally synchronic. The Darwinian understanding, on the other hand, acknowledges that the structure can change in spite of its writtenness and is therefore fundamentally diachronic.[49]

The diachronic method instructs the judge interpreting a constitutional provision to analyze the provision's position within the Constitution's Newtonian blueprint, to consider any subsequent

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the principles themselves "do not change without subsequent amendment," Balkin, *Abortion*, *supra* at 293, and are therefore synchronic.

[45] *See* Grey, *supra* note 21, at 703 ("In reviewing laws for constitutionality, should judges confine themselves to determining whether those laws conflict with norms derived from the written Constitution? Or may they also enforce principles of liberty and justice when the normative content of those principles is not to be found within the four corners of our founding document? . . . [T]hat is perhaps the most fundamental question we can ask about our fundamental law.").

[46] *See* Laurence H. Tribe, *Taking Text and Structure Seriously: Reflections on Free-Form Method in Constitutional Interpretation*, 108 HARV. L. REV 1221, 1235–36 (1995).

[47] James Madison's comment about the inadequacy of "parchment barriers" to protect liberty in a republic expresses this very point. *See* THE FEDERALIST NO. 48 (J. Madison), *available at* http://www-management.wharton.upenn.edu/raff/documents/Feb08/Federalist_Number_48.pdf/ ("[A] mere demarcation on parchment of the constitutional limits of the several departments, is not a sufficient guard against those encroachments which lead to a tyrannical concentration of all the powers of government in the same hands.").

[48] *See* Morton J. Horwitz, *The Meaning of the Bork Nomination in American Constitutional History*, 50 U. PITT. L. REV. 655, 657 (1989).

[49] Historian Michael Kammen traces critical turning point in the intellectual history of constitutional jurisprudence that shattered the public's faith in the mechanistic or "Newtonian" Enlightenment model of constitutional structure and ushered in a more organic or "Darwinian" understanding to the late nineteenth century. *See* MICHAEL KAMMEN, A MACHINE THAT WOULD GO OF ITSELF: THE CONSTITUTION IN AMERICAN CULTURE (1986), *cited in* Bruce Ackerman, *The Living Constitution*, 120 HARV. L. REV. 1737, 1793 (2007).

changes to the Constitution's contemporary Darwinian framework, and, where such changes are present, to determine their legitimacy by critically questioning their effect on the sovereign power of "We the People" proclaimed in the Constitution's preamble in relation to the political institutions that govern it in its behalf. To correctly construe a provision in conformity with its structural teleological meaning in a given case, the judge must preserve the relative political power of the popular sovereign where it remains undiminished and restore it where it has been diminished.

Part I concisely summarizes Solum's argument in *Semantic Originalism* and introduces the *synchronic* conception of meaning that every type of originalist shares. It then demonstrates how the fixing of meaning at the time of framing and ratification provides judges with multiple opportunities to use unconstrained discretion in deciding cases. Part I also introduces Solum's distinction between the "interpretation" of a provision's semantic meaning and the "construction" of a provision as applied law in a particular case.[50] Judges employ subjective discretion both during interpretation, when they gather and synthesize historical data to determine synchronic meaning,[51] and again during construction, when, after deciding that a part of the text cannot be determined with certainty, they supplement their interpretation with non-historical (but nonetheless synchronic) principles of their own choosing.[52] Finally, Part I argues that even honest judges who sincerely wish to be constrained in

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[50] Solum's use of the interpretation-construction distinction is "deeply indebted" to the work of Keith Whittington and Randy Barnett. *See* Solum, *Semantic Originalism*, *supra* note 24, at 67 (citing RANDY E. BARNETT, RESTORING THE LOST CONSTITUTION: THE PRESUMPTION OF LIBERTY (2004); KEITH WHITTINGTON, CONSTITUTIONAL INTERPRETATION: TEXTUAL MEANING, ORIGINAL INTENT, AND JUDICIAL REVIEW (1999); KEITH WHITTINGTON, CONSTITUTIONAL CONSTRUCTION: DIVIDED POWERS AND CONSTITUTIONAL MEANING (1999)). Solum, however, "deploy[s] their distinction in a framework informed by work in the philosophy of language on semantics and pragmatics." *Id.* He writes:

> My version of their distinction is closely related to theirs, but it may differ in some respects and I do not claim either that Whittington's version of the distinction is equivalent to Barnett's or that my version is the equivalent to theirs. But whatever subtle differences there may be, the distinction between interpretation and construction expresses an important insight of the New Originalism: *interpretation gleans meaning whereas construction resolves vagueness.*

Id. (emphasis added).

[51] *See* Solum, *Semantic Originalism*, *supra* note 24, at 68 ("The activity of constitutional interpretation has as its object the recognition of the semantic content of the constitutional context.").

[52] *See id.* (explaining that the activity of constitutional construction "has as its object the supplementation of the semantic context of the constitutional text based on the context of constitutional utterance").

their interpretation are incapable of doing so using originalist methodologies.

Part II introduces *District of Columbia v. Heller*[53] and shows how both Justice Scalia's majority opinion (an example of the "new originalism") and Justice Stevens's dissent (an example of the "old originalism") exemplify the multiple opportunities for bias and discretion.

Part III introduces a diachronic method of constitutional interpretation that abandons the fixation thesis and its conception of synchronic meaning as positive fact. The diachronic method accepts the inevitability that judges will use some degree of discretion in hard constitutional cases, but it guides the exercise of that discretion so as to constrain judges in ways that maximize their accountability to the popular sovereign by positing structural teleological meaning as the object of their interpretive endeavor. Part III sets forth the multi-step process by which judges compare and ascertain a provision's structural teleological meaning in a particular case by identifying structural anachronisms—contradictions between a provision's place within the Constitution's Newtonian structural blueprint as amended at the time the provision at issue was adopted and its place within the Constitution's Darwinian structural reality in the present.

Finally, Part IV introduces *McDonald v. City of Chicago* and summarizes the debate between Justices Alito, Thomas, and Stevens[54] over incorporation of the Second Amendment. As a "sequel" to and component of *Heller*, *McDonald* not only further develops the Court's Second Amendment jurisprudence; it provides a far

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[53] 128 S. Ct. 2783 (2008) (considering a Second Amendment challenge to the District of Columbia's gun control statute).

[54] There were two additional opinions in *McDonald*—a concurrence by Scalia and a dissent by Breyer—which do not formally weigh in on the incorporation debate at the center of the case but rather "re-litigate" the debate in *Heller* over meaning of the Second Amendment and, more generally, the methodological viability of originalism. *See McDonald*, 130 S. Ct. at 3050 (Scalia, J., concurring) ("I write separately only to respond to some aspects of Justice Stevens's dissent. Not that aspect which disagrees with the majority's application of our precedents to this case, which is fully covered by the Court's opinion. But much of what Justice Stevens writes is a broad condemnation of the theory of interpretation which underlies the Court's opinion, a theory that makes the traditions of our people paramount. He proposes a different theory, which he claims is more "cautiou[s]" and respectful of proper limits on the judicial role. It is that claim I wish to address." (alteration in original) (citations omitted)); *Id.* at 3120 (Breyer, J., dissenting) ("I shall therefore separately consider the question of 'incorporation.' I can find nothing in the Second Amendment's text, history, or underlying rationale that could warrant characterizing it as 'fundamental' insofar as it seeks to protect the keeping and bearing of arms for private self-defense purposes."). Stevens dedicates a large portion of his own dissent to this secondary debate. *See id.* at 3116 (Stevens., J., dissenting) (criticizing Scalia's "broader claim" that "his preferred method of substantive due process analysis, a method 'that makes the traditions of our people paramount,' is both more restrained and more facilitative of democracy than the method I have outlined." (citations omitted)).

more thorough indictment of originalism as a methodology incapable of constraining even honest judges, and it provides an equally thorough indictment of "living constitutionalism" as an alternative methodology. In his lone concurrence, Thomas criticized Alito for perpetuating the liberal tradition of living constitutionalism on which the Court based its substantive due process incorporation decisions throughout the twentieth century.[55] Stevens, meanwhile, abandoned the old originalist focus on framer intent that informed his interpretation of the Second Amendment in his dissent in *Heller*.[56] In Stevens's view, Alito erroneously classified this right as the type of "fundamental liberty interest" that is appropriately incorporated through the Due Process Clause.[57]

McDonald also paints a far more complete picture of the structural analysis that informs the diachronic method than does *Heller* alone. Part IV therefore concludes with a diachronic analysis of the provisions at issue in *Heller* and *McDonald*, an analysis that accounts for the added complication in assessing the *combined* structural teleological meaning of two separate amendment provisions that were adopted at different times subsequent to the founding. The proper combined structural teleological meaning of the Second and Fourteenth Amendments, it concludes, is that the individual—at least if he or she was "born or naturalized in the United States,"[58] has a right "to keep and bear arms"[59] not only for personal self-defense but also for the purpose of participating in a collective war of resistance against the future tyranny of a state or federal standing army as part of a general United States citizen militia.

I. THE FIXATION THESIS AND SYNCHRONIC MEANING

Solum's purpose in *Semantic Originalism* is to provide both a positive analytical basis for the "new originalism" rooted in the philosophy of language[60] and a normative justification of new originalism as the interpretive method that most effectively restrains

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[55] *Id.* at 3059 (Scalia., J., concurring) ("I cannot agree that it is enforceable against the States through a clause that speaks only to 'process.'").

[56] *Id.* at 3090 (Stevens., J., dissenting) ("This is a substantive due process case."); *id.* at 3119 ("The fact that we have a written Constitution does not consign this Nation to a static legal existence.").

[57] *Id.* at 3102 ("[R]ather than evaluate liberty claims on an abstract plane, the Court has 'required in substantive-due-process cases a "careful description" of the asserted fundamental liberty interest.'" (quoting Washington v. Glucksberg, 521 U.S. 702, 721 (1997))).

[58] U.S. CONST. amend. XIV, § 1, cl. 1.

[59] U.S. CONST. amend. II.

[60] *See* Solum, *Semantic Originalism*, *supra* note 24, at 26 (noting that, in particular, new originalism provides "groundwork in the philosophy of language for original public meaning originalism").

the judiciary from exceeding its proper constitutional role.[61] The foundational premise upon which Solum constructs his argument is that the textual meaning of a constitutional provision is a positive linguistic *fact* that judges are duty-bound to ascertain and then translate into legal *rules*.[62] *Semantic Originalism*, therefore, presents a formal, schematic description of the interpretive process by which judges produce "new originalist" opinions. Such judges first gather and synthesize "evidence"[63] of a provision's meaning during the historical period in which it was ratified and then use this raw "factual" material to fashion rules of law to apply to the circumstances of the case before them.[64]

Solum sets forth four "theses" that govern this process.[65] The *fixation thesis* holds that "the semantic content . . . of any given constitutional provision is fixed at the time of ratification."[66] The *clause meaning thesis* holds that the original public meaning of the new originalism, not the originally intended meaning of the old, is the most proper and objective form of synchronic meaning[67] and provides

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[61] Solum lists four reasons why the "old originalist" conception of meaning is inadequate. *See id.* at 41–50. The "collective intentions problem" concerns the fact that constitutional provisions were "not uttered [much less ratified] by an individual [but] by a collectivity," and not every individual included in this collectivity necessarily had the exact same intentions as to the provision's meaning. *Id.* at 42. The "collective recognition problem" concerns the fact that "citizens and officials" during the time of ratification and since most likely do not all share "common knowledge" of the exact same intentions behind any particular constitutional provision. *Id.* at 49. *See also generally* MICHAEL SUK-YOUNG CHWE, RATIONAL RITUAL: CULTURE, COORDINATION, AND COMMON KNOWLEDGE 3 (2001) (using game theory principles to illustrate how, in order for a group of individuals to coordinate their actions collectively as a group, they require not only a common message from a single source but also "knowledge of others' knowledge, knowledge of others' knowledge of others' knowledge, and so on"). The "publicity problem" concerns the fact that neither the framers nor the ratifiers all made available to the public each of their intentions as to a provision's meaning. *See* Solum, *Semantic Originalism*, *supra* note 24, at 49 ("Common knowledge requires publicity."). Finally, the "intentional state problem" concerns the fact that the framers may not necessarily "have intended that their audience grasp their intentions." *See id.* at 50.

[62] *See* Lawrence B. Solum, *A Reader's Guide to Semantic Originalism and a Reply to Professor Griffin* 3 (Ill. Pub. Law & Legal Theory Research Papers Series No. 08-12, 2008), *available at* http://ssrn.com/abstract=1130665 [hereinafter Solum, *Reader's Guide*] ("The first step is the recognition or discovery of the linguistic meaning of the text . . . [and] [t]he second step is the translation of the linguistic meaning into a rule of law.").

[63] Solum, *Semantic Originalism*, *supra* note 24, at 36 ("Meanings in the semantic sense are facts determined by the evidence.").

[64] *See* Solum, *Reader's Guide*, *supra* note 62, at 3 (arguing that the "translation of the linguistic meaning into a rule of law" is the second of a four-step process of moving from the constitutional text's semantic content "to the decision of a case").

[65] *See* Solum, *Semantic Originalism*, *supra* note 24, at 2–10.

[66] *Id.* at 2.

[67] *See id.* at 5. Solum relies on the theories of linguist Paul Grice to distinguish between the originalists' two separate conceptions of synchronic meaning. *See* Solum, *Semantic Originalism*, *supra* note 24, at 34–35. Grice distinguishes "speakers meaning"—"the illocutionary uptake that the speaker intended to produce in the audience on the basis of the audience's recognition of the speaker's intention"—from "sentence meaning"—"the

various "modification" techniques for judges to use when interpreting textual language that is less than straightforward.[68] The *contribution thesis* "claims that the semantic content of the . . . Constitution" is not itself "law" but "contributes to the content of . . . law."[69] Finally, the *fidelity thesis* imposes a moral duty on courts to be faithful to the semantic content of the constitutional text when applying the law to the facts of contemporary cases.[70]

Of these four theses, only the clause-meaning thesis is unique to the new originalism. The fixation thesis is common to all forms of originalist jurisprudence,[71] the contribution thesis emerges from the fixation thesis by logical necessity,[72] and some aspect of the fidelity

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conventional semantic meaning of the words and phrases that constitute the [speaker's] utterance." *Id.* (emphasis omitted). He applies this distinction to the originalist context by contrasting "framers' meaning"—the meaning that a constitutional provision's drafters intended and that "old originalists" recognize—to "clause meaning"—the provision's meaning as it was publicly understood at the time it was ratified and that "new originalists" recognize. *Id.* at 5, 35, 39.

[68] *See id.*

[69] *Id.* at 6. Solum is quick to point out that synchronic meaning does not exclusively determine legal application, a view he terms "*the extreme version of the contribution thesis*." *Id.* The extreme version is implausible due to certain "familiar facts about the relationship of the constitutional text and the full set of constitutional rules," *id.*, such as the vagueness of many key phrases of the Constitution's text. *See id.* at 6–7. In place of the extreme version Solum offers the "moderate version," which stands for the proposition that "the semantic content of the [C]onstitution has the force of law, and is part of 'the supreme Law of the Land.'" *Id.* at 7 (quoting U.S. CONST. art. VI, cl. 2). The "basic intuition behind the moderate version" is that the Constitution's synchronic meaning "provides a substantial and constraining portion of its legal content." *Id.* If there are certain valid reasons why courts should apply "supplementary rules of constitutional law that are inconsistent with the semantic content," their power to do so under the moderate version is "narrow and not wide" and is "limited to exceptional cases of constitutional necessity." *Id.* Solum thus distinguishes the moderate version from a "weak version," which "den[ies] the claim that the semantic content of the Constitution has the direct force of law, and instead affirm[s] that [the] only contribution that [such content] can make is indirect." *Id.* at 7–8 (footnote omitted).

[70] *See id.* at 8–9.

[71] Solum elaborates on this commonality as follows:

> Originalism is best conceived as a family of theories. Members of the family may differ on the question as to *how* the "origins" (the framing and/or ratification) fix meaning, but they agree on *when* it was fixed (the period of "origination"). Originalists may disagree about *why* the original meaning is normatively significant and they may also differ on *whether* original meaning always trumps other considerations (such as historical practice or precedent), but they agree *that* the original meaning does *have* substantial normative force.

Id. at 11. Solum does not necessarily claim that the fixation thesis is originalism's *defining characteristic*, but it is easy to interpret *Semantic Originalism* as claiming just that. *See* Alicea, *supra* note 34, at 127 ("[It] is entirely possible that all originalists agree that there is more to originalism than the fixation thesis even while they disagree on what that additional desiderata might be.").

[72] *See* Lawrence B. Solum, *Incorporation and Originalist Theory*, 18 J. CONTEMP. LEGAL ISSUES 409, 411–12 (2009) [hereinafter Solum, *Incorporation*] ("Although almost all

thesis is shared by originalists other than Solum, who are not making the specific claim that a provision's semantic content is exclusively a positive *linguistic* fact.[73] What all originalist theories share, therefore, is a *synchronic* conception of constitutional meaning, which posits such meaning as a fact about the past that is wholly separate from—and therefore binding upon—the judge's application of the provision as law in the present.

In Solum's formulation, if after the judge has exhausted every effort to "interpret" the provision's synchronic meaning, the text still "yields semantic content that is vague, ambiguous, or contains gaps or contradictions,"[74] the judge may legitimately rectify these deficiencies with an ahistorical "construction"—a heuristic alternative to portions of a provision's semantic content that the judge designates as indeterminate.[75] Constructions may take the form of any number of normative principles that judges select at their own discretion.[76] This Note, however, argues that synchronic meaning is *inherently indeterminate* as a guide to judicial application in contemporary cases and that the "interpretation" of a provision's synchronic meaning—and even the judge's decision that this meaning is in whole or in part indeterminate—is no less discretionary and subject to bias than its "construction."

A. Synchronic Meaning

The fixation thesis has two functions. On one level, it serves as a canon of interpretation that prevents judges from allowing their own contemporary understanding of the English language to influence their interpretation of centuries-old texts.[77] It therefore narrowly

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self-identified originalists affirm some version of the fixation thesis and the contribution thesis, originalists have taken a variety of positions about the question as to *what* fixes original meaning and *why* original meaning does or should contribute to and constrain constitutional doctrine.").

[73] *See* Solum, *Semantic Originalism*, *supra* note 24, at 4 ("But [the fixation thesis] finds additional and independent support in a second warrant: the claim that semantic content is fixed at the time of origin plays a crucial role in all (or almost all) of the normative justifications for originalism." (footnote omitted)).

[74] *Id.* at 69.

[75] *See id.*

[76] *See* Solum, *Incorporation*, *supra* note 72, at 442 ("The content of theories of constitutional construction is outside the core commitments of originalism to the fixation thesis . . . .").

[77] Solum uses the example of the term "domestic violence," which appears in Article IV of the Constitution to illustrate this point. *See* Solum, *Semantic Originalism*, *supra* note 24, at 3 (citing U.S. CONST. art. IV, § 4). Article IV states that "[t]he United States shall guarantee to every State in this Union a Republican Form of Government, and shall protect each of them against Invasion; and on Application of the Legislature, or of the Executive (when the

restricts the definition of the "meaning" judges interpret to "semantic meaning," which "refers to the semantic content of an utterance."[78] On another level, the fixation thesis imposes upon judges a normative duty to defer to the will of the popular sovereign that is the Constitution's author instead of imposing their own political convictions from the bench in violation of popular sovereignty.[79]

Solum considers the latter, normative function to be superfluous to the reasoning necessary to justify his claim.[80] *Semantic Originalism* rests squarely on the notion that the meanings of constitutional provisions are synchronic linguistic facts that courts can and should determine a priori before making normative legal decisions.[81] Solum insists that judges exercise a meticulous kind of due diligence in the interpretation phase so as to avoid as much as possible the need to use constructive techniques.[82] Such due diligence is only possible, he argues, under the new originalism.[83]

Legislature cannot be convened) against domestic Violence." U.S. CONST. art. IV, § 4. The phrase's "contemporary semantic meaning" is "'physical, sexual, psychological, and economic abuse that takes place in the context of an intimate relationship, including marriage.'" Solum, *Semantic Originalism*, *supra* note 24, at 3–4 (quoting Human Rights Watch, Bhutanese Refugee Women in Nepal: Glossary, http://www.hrw.org/reports/2003/nepal0903/3.htm (last visited Aug. 31, 2010)). Yet because that meaning was most likely "unknown in the late eighteenth century," a judge who interprets the term as it is most commonly understood today makes a grave error.

[78] Solum, *Semantic Originalism*, *supra* note 24, at 63–64.

[79] *See* Alicea, *supra* note 34, at 55–58.

[80] *See id.*

[81] *See id.* at 18.

[82] That is, before a judge can legitimately resort to construction, he must determine in good faith that the constitutional provision (or portion thereof) he is interpreting is in fact either "indeterminate" or underdeterminate." *See* Solum, *Semantic Originalism*, *supra* note 24, at 75. Solum defines these terms by making the following distinction:

> The Constitution is determinate with respect to a given case if and only if the set of results that can be squared with the semantic content of the Constitution contains one and only one result.
>
> The Constitution is indeterminate with respect to a given case if and only if the set of results in the case that can be squared with the semantic content of the Constitution is identical with the set of all imaginable results.
>
> The Constitution is underdeterminate with respect to a given case if and only if the set of results in the case that can be squared with the semantic content of the Constitution is a nonidentical subset of the set of all imaginable results.

Id. (citing Lawrence B. Solum, *On the Indeterminacy Crisis: Critiquing Critical Dogma*, 54 U. CHI. L. REV. 462, 473 (1987) [hereinafter Solum, *Indeterminacy Crisis*].

[83] *See* discussion *supra* note 61 (discussing Solum's four reasons why old originalism is inadequate).

1. New Originalism and the Clause Meaning Thesis

To provide courts with a formal framework to discover original public meanings, Solum proposes a "clause meaning thesis."[84] He defines clause meaning as "(1) conventional semantic meaning, (2) as modified by (a) context, (b) the division of linguistic labor, (c) constitutional implicature, and (d) constitutional stipulations."[85] "Conventional semantic meaning," which is the starting point for determining clause meaning, refers to the way in which "a competent speaker of American English at the time [a provision] was adopted" would have understood the text of a provision.[86] Courts can determine conventional semantic meaning by determining the historical "common usage" of a provision's words and phrases[87] with the aid of "newspapers, political pamphlets, and a variety of other general sources" from the time of a provision's adoption.[88]

A provision's conventional semantic meaning, however, is only an "approximation" of its clause meaning.[89] Solum provides four additional "modifications" to conventional semantic meaning, which he claims provide a "fuller version of the conception of clause meaning."[90] The first of these is "the publicly available context of constitutional utterance,"[91] which "includes the whole constitutional text"[92] and "may include facts about the general point or purpose of the provision (as opposed to 'the intention of the author')."[93]

Solum acknowledges, however, "that some of the words and phrases that comprise the constitutional text are 'terms of art,' the meaning of which is accessible only to a specialist audience."[94] The meaning of the term "letters of marque and reprisal,"[95] for example, is something that an average citizen with no legal training living in 1789 would not necessarily have known.[96] Solum's second modification

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[84] *Id.*

[85] *Id.* (footnotes omitted).

[86] *Id.* at 51.

[87] *See id.*

[88] *Id.*

[89] *See id.* at 52 (noting that the approximation of clause meaning determines sentence and expression meaning in terms of conventional semantic meaning).

[90] *Id.*

[91] *Id.* at 53.

[92] *Id.*

[93] *Id.*

[94] *Id.* at 54.

[95] *Id.* (quoting U.S. CONST. art I, § 8, cl. 11).

[96] Lawyers in the eighteenth century were not formally trained as they are today, and the professional distance between a lawyer and a layperson may not have been so great back then as to preclude popular understanding of such a term. *See* LAWRENCE M. FRIEDMAN, A HISTORY OF AMERICAN LAW 53–59 (3d ed. 2005).

addresses this problem by proposing that courts "recognize a division of linguistic labor."[97] Whenever a particular word or phrase in a constitutional provision was likely a specialist term of art that ordinary citizens would not have understood, courts should interpret its clause meaning as "those who were members of the relevant group and those who shared the understandings of the members of the relevant group" would have understood it.[98]

The third and fourth modifications, constitutional implicature and constitutional stipulation, respectively, are far less prominent in Solum's analysis of clause meaning.[99] Constitutional implicature is an application of Paul Grice's notion of "conversational implicature"—the idea that "we can mean things implicitly that we do not say explicitly"—to constitutional meaning.[100] Solum cites John Marshall's argument in *McCulloch v. Maryland*[101] "that the power to transport and deliver the mail can be implied from the power to establish post offices and postal roads" as an example.[102] Constitutional stipulations are terms like "Senate" and "House of Representatives," which refer to concepts that did not exist prior to the Constitution's adoption.[103]

2. The Separation of Synchronic Meaning from Applicative Law

Solum considers new originalism superior to old originalism because, while the individual intentions of various framers and ratifiers are often "multitudinous and inaccessible . . . [they] could rely on the accessibility of the public meaning . . . of the words, phrases, and clauses that constitute the Constitution."[104] But even judges who practice the "old originalism," as Justice Stevens does in his dissent in *Heller*,[105] must use similar interpretive tactics to those Solum associates with the "new originalism" wherever the text fails to yield material that is sufficiently translatable into clear, unmistakable legal rules.[106] This Note, therefore, singles out the

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[97] Solum, *Semantic Originalism*, *supra* note 24, at 55.

[98] *Id.*

[99] *See id.* at 56–58.

[100] *Id.* at 56.

[101] 17 U.S. 316 (1819).

[102] Solum, *Semantic Originalism*, *supra* note 24, at 57 (citing *McCulloch*, 17 U.S. (4 Wheat.) at 417).

[103] *Id.* at 57–58.

[104] *Id.* at 5.

[105] *See* Cornell, *Originalism on Trial*, *supra* note 16, at 625 (2008) ("Justice Scalia's majority opinion employed original public meaning originalism, while Justice Stevens'[s] dissent used the more traditional method of originalism . . . .").

[106] *See* Saul Cornell, Heller, *New Originalism, and Law Office History: "Meet the New Boss, Same as the Old Boss,"* 56 UCLA L. REV 1095 (2009).

fixation thesis as the weakness that fatally undermines the viability of originalism, new or old, as an objective interpretive methodology and thereby completely undercuts its normative justification as a guarantor of judicial deference to popular sovereignty.

As long as judges interpret the Constitution's meaning synchronically, as the fixation thesis demands they do, it does not matter whether they seek the framers' intended meaning, the original public meaning, or any other subcategory of synchronic meaning; they must by necessity exercise unconstrained discretion when gathering and synthesizing evidence of the synchronic meaning meant to constrain them and when "construing"[107] those portions of the text they find to be indeterminate.

3. The Finite Diachronic Time Window

Because the fixation of constitutional meaning forces judges to separate the continuous flow of historical time into arbitrary categories that are wholly isolated from one another, "history" becomes but one of several tools judges use to interpret and apply constitutional provisions, and other such tools, such as "structure," are deemed by implication to be non-historical.[108] But no originalist, not even Solum, would claim that a provision's textual meaning is literally frozen at the very indivisible instant the ratifiers ratify it the way the image contained in a still photograph is frozen at the very instant the photographer takes the picture. He instead argues that such meaning is "fixed by patterns of usage in the United States during the period of framing and ratification."[109]

One might distinguish these two conceptions of fixation by labeling the former "pure synchronic fixation" and the latter "finite diachronic fixation." Pure synchronic fixation is indeed analogous to a still photograph in that it captures meaning during an instantaneous event in time whereas finite diachronic fixation is analogous to a motion picture in that it *contains* meaning within certain chronological boundaries. Finite diachronic fixation therefore allows some room for the contemporary interpreter to consider how a text's

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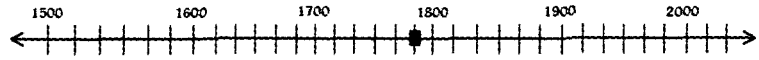
[107] *See* Solum, *Semantic Originalism*, *supra* note 24, at 69.

[108] Justice Scalia alluded to this consequence of synchronic fixation in his *McDonald* concurrence when he criticized Justice Stevens for beginning his dissent "with a brief nod to history" before summarily deciding that "historical inquiry unavailing." *See* McDonald v. City of Chicago, 130 S. Ct. 3020, 3052 (2010) (Scalia, J., concurring) ("The idea that interpretive pluralism would *reduce* courts' ability to impose their will on the ignorant masses is not merely naive, but absurd. If there are no right answers, there are no wrong answers either.").

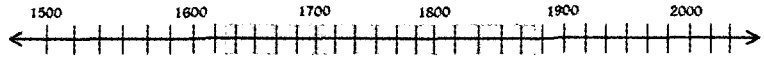
[109] Solum Correspondence, *supra* note 38. An old originalist, by comparison, would agree with most of this statement but would replace "patterns of usage" with "evidence of framer intent."

meaning has evolved between one moment in historical time and another.

Pure Synchronic Fixation



Finite Diachronic Fixation



This Note will therefore use the term "synchronic" to refer to pure synchronic and finite diachronic fixation alike so as to distinguish both from a non-fixed, purely diachronic conception of meaning that willingly considers the evolution of the way in which texts are understood between the historical period in which they originate and the present.

Synchronic meaning under the originalist fixation thesis is distinguished by the *exclusion* of any evidence of evolution in meaning that predates or postdates the period within which the interpreter restricts his inquiry.[110] This exclusionary rule gives such meaning the appearance of greater scholarly objectivity because it separates the modern interpreter's own ordinary understanding of a text's language—which his personal experience has informed—from his professional discovery of that text's historical meaning. This separation is illusory, however, as there is no objective "mechanical yardstick" upon which a judge can rely in setting these temporal boundaries.[111] The interpreting judge, therefore, cannot simply forget

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[110] The textual *sources* judges may consult when determining synchronic meaning need not have been written or published within this historical timeframe. Originalist Justices quite often rely on secondary sources by contemporary authors in making their interpretive claims. In *Heller*, for instance, Justice Scalia uses Historian Joyce Lee Malcolm's 1994 book *To Keep and Bear Arms* to forge the key link in his reasoning connecting the natural-law right of self-preservation found in Blackstone's *Commentaries* to the Anglo-Saxon institution of the popular militia that he claims informed the adoption of the Second Amendment in 1791. *See* Dist. of Columbia v. Heller, 128 S. Ct. 2783, 2798 (2008). The fixation thesis requires only that the source be *probative* of the meaning that a constitutional provision had within that fixed timeframe.

[111] Old originalists like Stevens in *Heller*, for example, tend to restrict their inquiry to the narrow window of time during which a provision's adoption and ratification was being debated, because they focus on the subjective intent of the actual framers and ratifiers. *See* McDonald v. City of Chicago, 130 S. Ct. 3020, 3117 (2010) (Stevens, J., dissenting) ("In *Heller*, Justice Scalia preferred to rely on sources created much earlier and later in time than the Second Amendment itself; I focused more closely on sources contemporaneous with the Amendment's

his contemporary understanding of language while gathering evidence of past understandings; the fixation of meaning merely precludes him from acknowledging that the former invariably guides the latter.

B. Subjectivity and Discretion Under the Fixation Thesis

Synchronic meaning—whether formulated as framers' meaning or clause meaning—is not law but merely "contributes" to law,[112] existing as a kind of raw linguistic material, devoid of normative content, which carries no legal consequence until a judge processes and refines it into applied legal rules.[113] Judges who write originalist opinions therefore have multiple opportunities to employ unconstrained, subjective discretion. In the "interpretation" phase, they have ample leeway to select the pieces of historical evidence to support their assertions as to a provision's synchronic meaning and to "modify" the "conventional semantic meaning" of a provision in ways that support the outcomes they already desire by manipulating the context within which they interpret it.[114] In the "construction" phase, they may bring in contemporary or wholly abstract arguments from policy or principle to further achieve their desired outcomes.[115] The personal honesty or cynicism of a particular judge, moreover, is

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drafting and ratification. No mechanical yardstick can measure which of us was correct, either with respect to the materials we chose to privilege or the insights we gleaned from them." (footnote omitted) (citation omitted)). New originalists like Scalia, on the other hand, often allow themselves a far wider timeframe because the original public understanding they seek to discover is in large part a social fact that requires a far broader context to be fully grasped. *See id.*

[112] *See supra* note 69 and accompanying text.

[113] *See* Alicea, *supra* note 34, at 122 ("The claim that judges ought to be restrained in the exercise of judicial authority is a normative argument. Solum wishes to avoid normative arguments for most of his theory [and therefore] hopes to establish a theory which originalists and nonoriginalists alike can accept because it should not require them to acknowledge normative arguments they may disagree with.").

[114] *See* Steven K. Green, *Bad History: The Lure of History in Establishment Clause Adjudication*, 81 NOTRE DAME L. REV. 1717, 1730 (2006) ("Despite their commitment to objectivity, historians also understand—in a manner that is apparently incongruous to many jurists—that history is not objective. Any exploration into history is selective, and all (good) accounts of history are interpretive. The difference is that historians recognize the selective and interpretive aspect to their craft—jurists often act as if such 'shortcomings' are inconsistent with a historical analysis instead of being part of the undertaking. The misplaced search for historical 'facts' prevents any acknowledgment of the inherently selective and interpretive nature of historical research. Relatedly, jurists often fail to understand the indeterminacy of the historical record. Again, concrete historical 'facts' or 'truths' rarely exist." (footnotes omitted)).

[115] *See* H. Jefferson Powell, *Rules for Originalists*, 73 VA. L. REV. 659, 677 (1987) ("If the founders, as you understand them, always agree with you, it is logically possible that you are in incredible harmony with them. It is considerably more likely that your reconstruction of their views is being systematically warped by your personal opinions on constitutional construction."); *see also* discussion *supra* note 50 and accompanying text.

of no consequence in the process of interpreting or construing synchronic meaning. Such meaning is inherently incapable of constraining the judge's opinion because it provides no determinate basis for such restraint. Thus, even the most honest judges who genuinely desire external constraints on their reasoning find themselves bereft of any objective guidance, while more unscrupulous judges are able to use the appeal to history to mask their unprincipled activism with considerable plausibility.[116]

1. Subjective Interpretation

The cynical use of history by judges as a means of ignoring precedent with plausible legitimacy is an accusation that long predates the Court's originalist "turn to history"[117] in the 1990s. Historian Alfred Kelly complained of this practice in his 1965 article *Clio and the Court*,[118] terming it "law-office history."[119] Historians and lawyers often use the term today to describe "bad history [that] attempts to subordinate plausible interpretations of the past to the demands of the politics of the present."[120]

Kelly observed that the Court's use of "law-office history" as a precedent-breaking device was far less frequent in the early twentieth century than it had become by the 1960s, when he was writing.[121] In the early 1900s, "[t]he Court was dominated by an activist philosophy . . . as it adjusted the constitutional system to the exigencies of the industrial revolution and the new capitalism."[122] It therefore had at its disposal two judicial devices that "all but eliminated the need to resort to history for this purpose: substantive due process and a 'sovereign prerogative of choice' in state-federal relations."[123] The Court's "renewed activism in the field of civil liberties and state-federal

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[116] *See* Alicea, *supra* note 34, at 123–24. Alicea faults Solum for defining "interpretation" so narrowly as to give judges seemingly unlimited latitude in actually applying the law of a constitutional provision. *Id.* ("[B]y defining interpretation to mean only the discovery of the semantic content of the text and by omitting his own theory of constitutional legitimacy, Solum creates a very minimal conception of interpretation that allows for broad latitude in constitutional construction.").

[117] *See* sources cited *supra* note 8.

[118] 1965 SUP. CT. REV. 119.

[119] *Id.* at 125; *see also* Mark Tushnet, *Interdisciplinary Legal Scholarship: The Case of History-in-Law*, 71 CHI.-KENT L. REV. 909 (1996). Tushnet characterizes this practice not as "law-office history," but rather as "'history-in-law,' or history indexed to law rather than to the practice of history by accredited historians." Tushnet, *New Originalism*, *supra* note 11, at 610.

[120] Neil M. Richards, *Clio and the Court: A Reassessment of the Supreme Court's Uses of History*, 13 J.L. & POL. 809, 818 (1997).

[121] Alfred H. Kelly, *Clio and the Court: An Illicit Love Affair*, 1965 SUP. CT. REV. 119, 128.

[122] *Id.*

[123] *Id.*

relations" after 1937 "created a new crisis in the theory of judicial review, as the Court came under severe attack from its conservative enemies."[124] By the 1950s, Kelly concluded, the Court's reputation for unrestrained activism and disregard for the democratic process had so diminished its prestige that it turned increasingly to historical arguments to justify its interventionist decisions.[125]

Other historians of Kelly's generation were confident that the judicial use of history could in fact play a positive role in adjudication and that "law-office history" did not have to be its inevitable result.[126] This, of course, has been the implied claim of modern originalism since its inception in the 1970s as a conservative backlash against the liberal "activism" of the Warren Court.[127] But the methodological contradiction between the "traditional Anglo-American system of advocacy" and the "equally time-honored techniques of the scholar-historian" that Kelly identified as the defining characteristic of "law-office history"[128] is no mere curable defect that one can attribute to a judge's bad faith in applying the law impartially or his lack of formal training as a professional historian; it is the inevitable byproduct of the synchronic fixation of constitutional meaning as positive fact that originalist interpretation mandates.

The assumption that the history discipline is even capable of producing facts that are sufficiently objective and determinate as to allow for the type of judicial constraint originalism promises to deliver is one that many historians a century ago would have shared but that historians today have largely rejected. This contemporary reality is the subject of Peter Novick's *That Noble Dream*,[129] which traces the development of the American history profession's attitude toward scientific truth and objectivity from the late nineteenth century through the 1980s. Before World War I, historians were supremely confident in the capacity of their discipline to be free of substantial

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[124] *Id.* at 130.

[125] *Id.* at 131 ("The historically oriented opinion, in short, may well be the successor to the sociologically oriented opinion of substantive due process days.").

[126] *See* Paul L. Murphy, *Time to Reclaim: The Current Challenge of American Constitutional History*, 69 AM. HIST. REV. 64, 77–78 (1963) ("If the Court is intent upon building new and dramatic legal structures to meet the requirements of a dynamic society, the historian can at least furnish it with complementary modern architectural materials, so that it does not have to rely upon scrap lumber, salvage bricks, and raw stones for its buildings.").

[127] *See* Richards, *supra* note 120, at 825 ("According to the conservative originalists, because the Constitution, the social compact of the American nation, was not lost in the mists of time, much of the meaning of its text could be uncovered through the use of historical inquiry.").

[128] Kelly, *supra* note 121, at 155.

[129] PETER NOVICK, THAT NOBLE DREAM: THE "OBJECTIVITY QUESTION" AND THE AMERICAN HISTORICAL PROFESSION 382–88, 597–98, 609–10 (1988).

subjective impartiality.[130] Novick summarizes this early confidence as follows:

> The objective historian's role is that of a neutral, or disinterested judge; it must never degenerate into that of advocate or, even worse, propagandist. The historian's conclusions are expected to display the standard judicial qualities of balance and evenhandedness. As with the judiciary, these qualities are guarded by the insulation of the historical profession from social pressure or political influence, and by the individual historian avoiding partisanship or bias—not having any investment in arriving at one conclusion rather than another. Objectivity is held to be at grave risk when history is written for utilitarian purposes. One corollary of all this is that historians, as historians, must purge themselves of external loyalties: the historian's primary allegiance is to the "objective historical truth," and to professional colleagues who share a commitment to cooperative, cumulative efforts to advance toward that goal.[131]

The cumulative effect of the political, economic, and social upheavals of the twentieth century, however, severely undermined the consensus among historians that their discipline was epistemologically equipped to meet this standard of unbiased objectivity.[132] Since the 1960s, therefore, historical objectivity has been stuck in a permanent state of crisis:

> During the decade of the sixties the ideological consensus which provided the foundation for this [objectivist] posture collapsed, and it was not to be reconstructed in subsequent decades. The political culture lurched sharply left, then right; consensus was replaced first by polarization, then by fragmentation; affirmation, by negativity, confusion, apathy, and uncertainty. The consequences of all this turmoil for the idea of historical objectivity were various, and often contradictory.[133]

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[130] *Id.* at 2.
[131] *Id.*
[132] *Id.* at 415.
[133] *Id.*

While Novick does not "think that the idea of historical objectivity is true or false, right or wrong," he finds it "not just essentially contested, but essentially confused."[134]

Despite the history profession's ongoing objectivity crisis, not all histories are created equal. As in any academic discipline, the peer-review process among historians results in professional consensuses regarding the relative merits of various assertions about the past.[135] Such consensuses, however, can be of no help to originalist judges in their efforts to derive a judicial holding from a provision's synchronic meaning, because such judges themselves decide the "historians' rules of evidence and inference"[136] that govern the process through which they find that meaning.[137]

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[134] *Id.* at 6.

[135] Holocaust denial is the most salient example of this practice. For a fascinating account of how scholarly consensus within the historical discipline has influenced the *legal* consequences of denying the holocaust as an historical fact, see generally RICHARD J. EVANS, LYING ABOUT HITLER: HISTORY, HOLOCAUST, AND THE DAVID IRVING TRIAL (2001) and D.D. GUTTENPLAN, THE HOLOCAUST ON TRIAL (2001).

[136] NOVICK, *supra* note 129, at 10.

[137] In determining synchronic meaning, originalist judges act more in a fact-finding capacity than in an adjudicating capacity. As "amateur historians," Buckner F. Melton, Jr., *Clio at the Bar: A Guide to Historical Method for Legists and Jurists*, 83 MINN. L. REV. 377, 385 (1998), they weigh evidence of synchronic meaning the way a jury weighs evidence of a defendant's criminal guilt or civil liability at trial. Because they lack formal professional training in the methodology of the historical discipline, they tend to freely corroborate their analysis of primary sources from the time of ratification with secondary sources by contemporary historians whom they claim to be authorities in particular areas within the discipline. *See* Matthew J. Festa, *Applying a Useable Past: The Use of History in Law*, 38 SETON HALL L. REV. 479, 543–48 (2009). If Novick's account of the history profession's current objectivity crisis is correct, the methodology historians use to ascertain facts and truth about the past would probably not satisfy the standards governing the admissibility of scientific expert testimony set forth in *Daubert v. Merrell Dow Pharmaceuticals*, 509 U.S. 579 (1993), extended to nonscientific expert testimony in *Kumho Tire v. Carmichael*, 526 U.S. 137 (1999), and applied to the recently amended Federal Rule of Evidence 702. *See* Festa, *supra* at 546 n.329. The *Daubert* test sets forth five "factors for trial judges to consider when determining" such reliability: (1) whether the methodology can be tested; (2) whether it has been subjected to peer review and publication; (3) its known or potential rate of error and whether means exist for controlling its operation; (4) the extent to which it has been accepted within the disciplinary community; and (5) whether the expert testimony has been conducted independent of the litigation in which it is presented. FED. R. EVID. 702, cmt. 6. Although *Daubert* establishes a flexible inquiry instead of a "definitive checklist or test," *Daubert*, 509 U.S. at 593, the only factor that historical works seem to satisfy consistently is the second one regarding peer review and publication. There is no directly empirical means for testing factual assertions about the past, barring, perhaps, the invention of time travel. There is no quantitative procedure for knowing or predicting the rate of historical error. The current breakdown in consensus among historians as to objectivity means that no single historian's methodology is commonly accepted by the history community. *See* NOVICK, *supra* note 129, at 573 (describing how the incorporation of outside disciplinary methodologies into the history profession during the 1960s and 70s has fragmented the historical discipline into "little more than a congeries of groups, some quite small . . . which can speak only imperfectly to each other." (alteration in original) (quoting William J. Bouwsma, *Specialization, Departmentalization and the Humanities*, ACLS NEWSL. (Am. Council of Learned Societies, New York, N.Y.), Summer–Fall 1985, at 2)). Finally, the fact that originalist judges in practice obtain their historical evidence when deciding

A close analysis of the process by which judges produce originalist opinions confirms Novick's observation about the dubious nature of the assumption of nineteenth-century objectivist historians that "[w]hatever patterns exist in history are 'found' and not 'made.'"[138] The data from which historians primarily infer their facts—texts—are qualitatively different from the data that natural and social scientists most commonly use.[139] Not only do historians gather and assemble certain textual data and exclude others, they also infer from this chosen data various historical propositions and weave them into broader narratives about the past.[140] This latter process, to some degree, may include elements of fiction that are largely absent in the methodologies of more "fact-based" disciplines.[141]

When they interpret the Constitution, therefore, originalist judges have ample leeway to select the pieces of historical evidence to support their assertions as to a provision's synchronic meaning and to "modify" the "conventional semantic meaning" of a provision in ways that support the outcomes they already desire by manipulating the context within which they interpret it.[142]

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a typical case in a synthesized form from litigants and interested outside parties during oral argument and in briefs means that the historical research they rely upon is rarely prepared independently of the litigation. *See* Jane S. Schacter, *The Confounding Common Law Originalism in Recent Supreme Court Statutory Interpretation: Implications for the Legislative History Debate and Beyond*, 51 STAN. L. REV. 1, 45–49 (1998) (examining the "distinctive role of amicus briefs in interpretive legislation at the Supreme Court and what these briefs suggest about interest group influences at the court").

[138] NOVICK, *supra* note 129, at 2.

[139] *See* Dominick LaCapra, *History, Language, and Reading: Waiting for Crillon*, 100 AM. HIST. REV. 799, 804 (1995) (discussing how historians conduct research through the review of archival information and the interpretation of texts).

[140] A typical historical argument takes a series of facts about the past and weaves them into a story that has particular ideological implications—a "moral of the story" that the historian consciously fashions out of the primary data he or she consciously chooses or rejects. *See generally* HAYDEN WHITE, METAHISTORY: THE HISTORICAL IMAGINATION IN NINETEENTH-CENTURY EUROPE 29–31 (1975) (describing the various techniques of emplotment, argument, and ideological implication that historians, in crafting narratives about the past, have employed since the founding of the modern history profession in the 1800s).

[141] *See* NATALIE ZEMON DAVIS, FICTION IN THE ARCHIVES: PARDON TALES AND THEIR TELLERS IN SIXTEENTH-CENTURY FRANCE 3–4 (1987) (discussing how a writer's subjective choices augment real facts with fictional elements). Davis uses medieval French fact summaries drafted by attorneys on behalf of criminal defendants seeking pardons from the King to illustrate the necessarily fictive quality of recounting the past. *Id.* The judicial context of Davis's study highlights the subjective nature of any retelling of historical facts. Even the modern U.S. judicial system, which, unlike that of medieval France, is supposedly governed by "laws" and not "men," Marbury v. Madison, 5 U.S. (1 Cranch) 137, 163 (1803), cannot dispose of a controversy if the facts giving rise to it are in dispute. This point is no less true in the originalist context, where the facts in question concern the meaning of a constitutional provision.

[142] *See* Powell, *supra* note 115, at 683 ("History yields interpretations, not uninterpreted facts.").

2. Discretionary Construction

In Solum's view, originalism is distinct from and superior to living constitutionalism because the former subordinates "construction" to "interpretation" whereas the latter does the reverse.[143] "The linguistic meaning of a constitutional utterance," he writes, "is not the conclusion of a normative argument—it is a fact determined by conventional semantic meaning and the rules of syntax at the time of utterance."[144] For this reason, construction is something originalist judges practice only after "the meaning discovered by constitutional interpretation *runs out*."[145]

There are two aspects of a judge's construction of synchronic meaning that has "run out" that guarantee such construction will be no less plagued by subjectivity and bias than the interpretation that precedes it. First, the fact that a provision's synchronic meaning has "run out" logically precludes its historically fixed semantic content from even informing, much less constraining, the judge's construction of it: if it were otherwise, then "construction" as Solum defines it would not be necessary in the first place.

Solum provides a "quick and dirty survey" of various theories the Court might use in construing a provision[146] but "do[es] not take a position on the question as to which theory of construction is best or even on the question as to what are the sound criteria for evaluating [such theories]."[147] He simply maintains that judges have no choice but to look beyond the linguistic fact of a provision's synchronic meaning when, after a good faith attempt to interpret the its semantic content, they find that it has "run out."[148] By failing to put forth any standard for determining what means of construction most faithfully defers to the text's synchronic meaning, Solum "allows great latitude for constitutional construction."[149]

Second, a judge's very determination that a provision's synchronic meaning has "run out" is a discretionary act that, as a matter of logic, cannot be constrained a priori by the provision's semantic content

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[143] *See* Solum, *Reader's Guide*, *supra* note 62, at 36 ("Originalism has constitutional interpretation as its domain: the semantic content of the constitution is its original public meaning. Living constitutionalism has constitutional construction as its domain: the vague provisions of the constitution can be given constructions that change over time in order to adapt to changing values and circumstances.").

[144] *Id.* at 41.

[145] Solum, *Semantic Originalism*, *supra* note 24, at 69 (emphasis added).

[146] *Id.* at 76.

[147] *Id.* at 80.

[148] *See id.* at 87 ("A theory of construction simply has to take the stage once interpretation exits the scene.").

[149] Alicea, *supra* note 34, at 134.

because if it could be so constrained, then that semantic content would not be indeterminate in the first place. In practice, judges typically make this determination when attempting to apply eighteenth-century provisions like those in the Bill of Rights to modern circumstances.

A timely example can be seen in the Court's oral argument in *Schwarzenegger v. Entertainment Merchants Association*.[150] This case involves a First Amendment challenge to a California law prohibiting the sale of violent video games to minors.[151] Justice Scalia argued that the law clearly contravened the synchronic meaning of the First Amendment's Free Speech Clause:

> California's regulation of violent expression in video games, Scalia urged, was a "prohibition which the American people never . . . ratified when they ratified the First Amendment." Portrayals of violence, Scalia said, were understood by the framers to be part of the freedom of speech the First Amendment protected. For Scalia, that was the end of the matter.[152]

Justice Alito followed with the sarcastic remark that "'what Justice Scalia wants to know is what James Madison thought about video games' and if 'he enjoyed them'"[153]:

> Alito pointed out that video games are a "new medium that cannot possibly have been envisioned when the First Amendment was ratified" and that it was "entirely artificial" to say that the framers meant to protect violent video games in which children act out violence because the framers would have accepted violent portrayals in books.[154]

This exchange exhibits a dispute over where the First Amendment's semantic content "runs out" within the context of a contemporary controversy that the ratifying generation in 1791 could not possibly have foreseen. Scalia resolves the question of whether the First Amendment protects the sale of violent video games to minors affirmatively in the interpretation phase, and the question of its proper construction is therefore moot as far as he is concerned.

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[150] 556 F.3d 950, *cert. granted*, 130 S. Ct. 2398 (2010).

[151] Posting of David H. Gans to Text and History, Justices Scalia, Alito Square Off on Originalism, http://theusconstitution.org/blog.history/?p=2281 (Nov. 4, 2010).

[152] *Id.* (alteration in original).

[153] *Id.*

[154] *Id.*

Alito's comment in response, however, does not assert the opposite interpretation but simply denies the adequacy of the First Amendment's synchronic meaning alone in guiding the Court toward a faithful application of it to the facts of the case. To Alito, that synchronic meaning has "run out," and the constitutionality of the California law will ultimately have to be determined by construction.

The fixation thesis thereby forces judges to use subjective discretion not only in selecting and manipulating historical evidence of a provision's synchronic meaning but also in deciding when that synchronic meaning "runs out" and compensating for those portions of that meaning they declare to be indeterminate with constructive devices of their own choosing which, *by logical necessity*, bears no relationship to that meaning. Whether judges honestly attempt to discover synchronic meaning and come up short or whether they cynically manipulate it to suit their own agendas, they end up writing subjective, discretionary opinions, because the fixation thesis has stripped such meaning of any genuine capacity for determinacy that could possibly constrain them.

II. *DISTRICT OF COLUMBIA V. HELLER*: THE FIXATION THESIS IN PRACTICE

District of Columbia v. Heller[155] illustrates better than any other originalist decision written in the 2000s the failure of originalism to constrain the judiciary.[156] The subjectivity and unguided discretion that Justices Scalia and Stevens exhibit demonstrate vividly the fatal consequences of the separation the fixation thesis forces between the fact of a provision's meaning and the law that is actually applied in the case. Both Justices interpret the Second Amendment synchronically and, as a result, write opinions that are diametrically opposed in their ultimate conclusions.[157] Part II introduces *Heller* by

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[155] 128 S. Ct. 2783 (2008).

[156] *See* William G. Merkel, The District of Columbia v. Heller *and Antonin Scalia's Perverse Sense of Originalism*, 13 LEWIS & CLARK L. REV. 349, 356 (2009) ("In the case of the five justices who voted for a private right to arms, they highlight the inevitable failure of originalism to live up to its neutral pretensions.").

[157] Scalia, writing for the Court, concludes that the Second Amendment protects the right of individual citizens to own firearms, finding the right to be rooted in a long-recognized natural right of self-defense that the amendment merely codified. *See Heller*, 128 S. Ct. at 2797 ("Putting [the] textual elements [of the Second Amendment] together . . . , we find that they guarantee the individual right to possess and carry weapons in case of confrontation."); *id.* ("[I]t has always been widely understood that the Second Amendment . . . codified a *pre-existing* right."). Stevens, in his dissent, emphasizes on the words "a well-regulated militia" in the amendment's preamble to argue that the words "the people" in the operative clause "remind us that it is the collective action of individuals having a duty to serve in the militia that the text directly protects and, perhaps more importantly, that the ultimate purpose of the Amendment

providing a brief overview of the legal and historical context in which it was litigated and then closely analyzes the shortcomings of the synchronic reasoning that characterizes Scalia's majority opinion and and Stevens's dissent.

Justice Breyer wrote a separate dissent in which he cites examples of eighteenth-century gun restrictions to "impeach" the historical evidence upon which Scalia relies.[158] Most of Breyer's dissent, however, is dedicated to demonstrating the contemporary infeasibility of Scalia's holding.[159] For that reason, Breyer's dissent is of little relevance to the discussion in Part II, although it will be addressed below in Part IV.

A. The Origins of Heller

The Second Amendment's preamble[160] reads: "A well regulated Militia, being necessary for the security of a free State."[161] The operative clause that follows declares that "the right of the people to keep and bear Arms, shall not be infringed."[162] No other provision of the Constitution contains an "opening clause . . . that seems to set out its purpose."[163] The relationship between the Second Amendment's two clauses, therefore, has been at the center of legal debates over the amendment's meaning, which, in turn, have mirrored the political disagreement between gun control advocates and gun rights supporters.[164]

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was to protect the States' share of the divided sovereignty created by the Constitution." *Id.* at 2787 (Stevens, J., dissenting).

[158] *Id.* at 2848 (Breyer, J., dissenting) ("[C]olonial history itself offers important examples of the kinds of gun regulation that citizens would then have thought compatible with the 'right to keep and bear arms,' whether embodied in Federal or State Constitutions, or the background common law.").

[159] *Id.* at 2851 ("[A]doption of a true strict-scrutiny standard for evaluating gun regulations would be impossible.").

[160] Justice Scalia uses the term "prefatory clause" instead of "preamble" to refer to the words "A well-regulated militia being necessary to the security of a free state." *Id.* at 2789 (majority opinion) ("The Second Amendment is naturally divided into two parts: its prefatory clause and its operative clause."). The prefatory clause, he claims at the outset of his opinion, "does not limit the [operative clause] grammatically, but rather announces a purpose." *Id.*

[161] U.S. CONST. amend. II.

[162] *Id.*

[163] Sanford Levinson, Comment, *The Embarassing Second Amendment*, 99 YALE L.J. 637, 644 (1989).

[164] *See* Andrew J. McClurg, *"Lotts" More Guns and Other Fallacies Infecting the Gun Control Debate*, 11 J. ON FIREARMS & PUB. POL'Y 139, 143 (1999) ("Collectivists find support for their interpretation in the linguistic structure of the Amendment, arguing that the 'well regulated Militia' preamble serves to restrict the clause relating to the right to keep and bear arms. Individualists such as Eugene Volokh rebut the linguistic argument by noting that the first thirteen words of the Amendment are merely its justification clause, an introduction of sorts to the operative 'right to keep and bear arms' clause.").

The controversy surrounding the Second Amendment's meaning is often cast as a dispute between those who believe it protects only a collective right[165] and those who believe it protects an individual right,[166] but the reality is far less simple. Those who support robust gun regulations tend to read the preamble as limiting the appropriate construction of the operative clause's "right of the people to keep and bear arms" to purposes related in some way to military service.[167] The "well-regulated militia" of the preamble, under this understanding, refers exclusively to state-organized military units with hierarchical chains of command similar to those found in branches of the national military.[168] Adherents of this interpretation also often claim that the Second Amendment is a "states rights" provision that exists to preserve the states' sovereignty from federal encroachment and was thus never intended to protect individuals.[169] Those who oppose gun control policies have tended to emphasize the historical context of the term "militia" as a popular institution that was part of a "civic-republican tradition."[170] The purpose of this militia was not only to assist in national defense but also was "to check potential abuses by a tyrannical government armed with . . . a standing army."[171]

Before *Heller*, the Supreme Court had not reviewed the Second Amendment since its 1939 decision in *United States v. Miller*.[172] In a short opinion written by Justice McReynolds, the Court upheld

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[165] *See, e.g.*, Lawrence Delbert Cress, *A Well-Regulated Militia: The Origins and Meaning of the Second Amendment*, *in* THE BILL OF RIGHTS: A LIVELY HERITAGE 55 (Jon Kukla ed., 1987).

[166] *See, e.g.*, Robert E. Shalhope, *The Armed Citizen in the Early Republic*, 49 LAW & CONTEMP. PROBS. 125, 126 (1986), *reprinted in* WHOSE RIGHT TO BEAR ARMS DID THE SECOND AMENDMENT PROTECT? 27 (Saul Cornell & Robert E. Shalhope eds., 2000) [hereinafter WHOSE RIGHT?].

[167] Cress, *supra* note 165.

[168] *See* Glenn Harlan Reynolds, *A Critical Guide to the Second Amendment*, 62 TENN. L. REV. 461, 475 (1995) ("One commonplace assertion of newspaper editorialists and others who discuss the Second Amendment in the popular press is that the National Guard is the 'militia' protected by that Amendment.").

[169] Stevens exhibits this understanding in his *Heller* dissent. *See* Dist. of Columbia v. Heller, 128 S. Ct. 2783, 2831 (2008) (Stevens, J., dissenting) ("The proper allocation of military power in the new Nation was an issue of central concern for the Framers. The compromises they ultimately reached, reflected in Article I's Militia Clauses and the Second Amendment, represent quintessential examples of the Framers' 'splitting the atom of sovereignty.'"); *see also* Glenn Harlan Reynolds & Don B. Kates, Jr., *The Second Amendment and States Rights: A Thought Experiment*, 36 WM. & MARY L. REV. 1737 (1995) (arguing that taking the Second Amendment seriously as a state's right has enormous implications, which have not been addressed by anti-gun advocates).

[170] David C. Williams, *Civic Republicanism and the Citizen Militia: The Terrifying Second Amendment*, 101 YALE L.J. 551, 552 (1991).

[171] Brent J. McIntosh, *The Revolutionary Second Amendment*, 51 ALA. L. REV. 673, 674 (2000).

[172] 307 U.S. 174 (1939).

a federal law prohibiting the possession of sawed-off shotguns on the ground that the Second Amendment was drafted "[w]ith obvious purpose to assure the continuation and render possible the effectiveness" of the militia and therefore "must be interpreted and applied with that end in view."[173] McReynolds dedicated the end of his opinion to a brief exploration of the historical meaning of the Second Amendment militia:

> The signification attributed to the term Militia appears from the debates in the Convention, the history and legislation of Colonies and States, and the writings of approved commentators. These show plainly enough that the Militia comprised all males physically capable of acting in concert for the common defense. "A body of citizens enrolled for military discipline." And further, that ordinarily when called for service these men were expected to appear bearing arms supplied by themselves and of the kind in common use at the time.[174]

This dictum sends an ambiguous mixed message as to whether the Court understood the Second Amendment right to keep and bear arms to be an individual right or a state's right. As a result, both gun control advocates and gun rights supporters relied on *Miller* to support their respective positions before *Heller* expressly resolved the issue.[175]

The legal academy, however, did not begin to show serious interest in this discussion until Sanford Levinson published *The Embarrassing Second Amendment* in 1989.[176] In this article, Levinson "took constitutional scholarship to task for ignoring the subject of the Second Amendment"[177] and made the controversial claim that the Amendment gives citizens not only the individual right to own guns for self-protection but also the right to resist a government that becomes tyrannical.[178] Levinson's thesis received further refinement

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[173] *Id.* at 178.

[174] *Id.* at 179.

[175] For a list of commentators on both sides of the debate appealing to *Miller*, see ANDREW J. MCCLURG ET AL., GUN CONTROL AND GUN RIGHTS 169–70 (2002).

[176] *See* Levinson, *supra* note 163, at 656 ("I do not want to argue that the state is necessarily tyrannical; I am not an anarchist. But it seems foolhardy to assume that the armed state will necessarily be benevolent."); Levinson's "pedigree" in the legal academy did much to heighten the profile of Second Amendment scholarship. *See* Carl T. Bogus, *Fresh Looks: The History and Politics of Second Amendment Scholarship: A Primer*, 76 CHI.-KENT L. REV. 3, 12 (2000).

[177] Saul Cornell, *Introduction* to WHOSE RIGHT?, *supra* note 166, at 18.

[178] Levinson, *supra* note 163, at 656 ("The American political tradition is, for good or ill, based in large measure on a healthy mistrust of the state. The development of widespread

from historian Joyce Lee Malcolm.[179] Malcolm's book *To Keep and Bear Arms*[180] collapsed the individual-collective rights dichotomy by tracing the development of the colonial American militia, as the framers would have supposedly understood it, back to its English common-law roots as a civic association of freeborn subjects whose collective duty to bear arms in defense of country was derived from the individual right of each to bear arms in defense of self, family, and property.[181] Levinson and Malcolm's arguments provided the paradigm in the 1990s for what has come to be called the "Standard Model of the Second Amendment"—a consensus among legal scholars that "the Bill of Rights protects both an individual right and a collective right to bear arms."[182]

Historians have since criticized the Standard Model, however, for severely oversimplifying the complexity of the debates surrounding the ratification of the Bill of Rights and for ignoring ample primary evidence of that complexity.[183] For example, historian and political scientist Jack Rakove mockingly calls Second Amendment scholarship "the highest stage of originalism" because followers of the Standard Model "place their greatest reliance on [the amendment's] framers and adopters for arguments about its meaning."[184] David Konig, another historian, more recently wrote that Second Amendment scholars "must be [more] careful . . . to distinguish between what a political community chose to elevate to the level of a legal or constitutional protection and what it did not."[185]

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suffrage and greater majoritarianism in our polity is itself no sure protection, at least within republican theory. The republican theory is predicated on the stark contrast between mere democracy, where people are motivated by selfish personal interest, and a republic, where civic virtue, both in citizens and leadership, tames selfishness on behalf of the common good. In any event, it is hard for me to see how one can argue that circumstances have so changed as to make mass disarmament constitutionally unproblematic."). Levinson takes seriously comments by gun rights supporters that the violent repression of demonstrators in Tiananmen Square by the Chinese government, which had occurred while he was writing the article, would have never been possible if the demonstrators had the right to own automatic rifles. *See id.* at 656–57.

[179] *See* WHOSE RIGHT, *supra* note 166, at 18.

[180] JOYCE LEE MALCOLM, TO KEEP AND BEAR ARMS: THE ORIGINS OF AN ANGLO-AMERICAN RIGHT (1994).

[181] *See generally id.*

[182] WHOSE RIGHT, *supra* note 166, at 18.

[183] *See id.* at 19.

[184] Jack N. Rakove, *The Second Amendment: The Highest Stage of Originalism*, *in* Carl T. Bogus, *The History and Politics of Second Amendment Scholarship: A Primer* [hereinafter Bogus, *History and Politics*], *in* THE SECOND AMENDMENT IN LAW AND HISTORY 74–75 (Carl T. Bogus & Michael A. Bellesiles eds., 2000). The term is an adaptation of Lenin's characterization of imperialism as the highest stage of capitalism. *Id.*

[185] David Thomas Konig, *Arms and the Man: What Did the Right to "Keep" Arms Mean in the Early Republic?*, 25 LAW & HIST. REV. 177, 185 (2007).

At the heart of the historians' critique of the Standard Model is the charge that it is "law-office history"[186] of the worst variety.[187]

This battle between lawyers and historians over the methodology of Second Amendment scholarship had been raging for well over a decade when attorney Robert A. Levy began recruiting plaintiffs to challenge the constitutionality of a Washington, D.C. gun-control statute, and thereby create a Second Amendment test case for the Supreme Court.[188] The statute prohibited all D.C. residents except certain law-enforcement officials from owning handguns and required all residents who owned shotguns or rifles "to keep them unloaded and either disassembled or fitted with trigger locks," effectively precluding the ability to fire instantly at a hostile intruder.[189]

Levy wanted the Court to hold that the statute violates the Second Amendment because that amendment "protects an individual right to possess a firearm unconnected with service in a militia, and to use that arm for traditionally lawful purposes, such as self-defense within the home."[190] The U.S. Court of Appeals for the District of Columbia struck down the statute on this theory.[191] At the time, however, only one other court of appeals, the Fifth Circuit, had adopted the individual rights theory.[192] Nine others had held that the right to bear arms was a collective right.[193] The split made it practically inevitable

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[186] *See supra* notes 117–25 and accompanying text.

[187] *See* Bogus, *History and Politics*, *supra* note 184, at 14 (citing Saul Cornell, *Commonplace or Anachronism: The Standard Model, the Second Amendment, and the Problem of History in Contemporary Constitutional Theory*, 16 CONST. COMMENT. 221 (1999)).

[188] *See* Paul Duggan, *Lawyer Who Wiped Out D.C. Ban Says It's About Liberties, Not Guns*, WASH. POST, Mar. 18, 2007, at A1, *available at* http://www.washingtonpost.com/wp-dyn/content/article/2007/03/17/AR2007031701055.html. Levy modeled his strategy after the efforts of Thurgood Marshall and the NAACP to challenge school segregation. *See* Adam Liptak, *Carefully Plotted Course Propels Gun Case to Top*, N.Y. TIMES, Dec. 3, 2007, at A16, *available at* http://www.nytimes.com/2007/12/03/us/03bar.html?_r=1&scp=1&sq=%22robert+a.+levy%22&st=nyt&oref=slogin. He systematically sought out the most politically sympathetic plaintiffs, selecting for gender, racial, economic, and age diversity. *See* Duggan, *supra*.

[189] *Id.*

[190] Dist. of Columbia v. Heller, 128 S. Ct. 2783, 2789 (2008).

[191] *See* Parker v. Dist. of Columbia, 478 F.3d 370, 395, 399–401 (D.C. Cir. 2007), *aff'd sub nom. Heller*, 128 S. Ct. 2783 (2008).

[192] *See* United States v. Emerson, 270 F.3d 203, 260 (5th Cir. 2001) (holding that the Second Amendment "protects the rights of individuals, including those not then actually a member of any militia or engaged in active military service or training, to privately possess and bear their own firearms"); *see also* Robert Barnes & David Nakamura, *D.C. Case Could Shape Gun Laws*, WASH. POST, Sept. 5, 2007, at A1 (noting the Fifth Circuit as the only other federal circuit court to recognize an individual right to own guns).

[193] *See* Silveira v. Lockyer, 312 F.3d 1052, 1061 (9th Cir. 2002); United States v. Wright, 117 F.3d 1265, 1272 (11th Cir. 1997); United States v. Rybar, 103 F.3d 273, 286 (3d. Cir. 1996); Love v. Pepersack, 47 F.3d 120, 124 (4th Cir. 1995); Thomas v. Members of City Council, 730 F.2d 41, 42 (1st Cir. 1984) (per curiam); Quilici v. Morton Grove, 695 F.2d 261, 270–71 (7th Cir. 1982); United States v. Oakes, 564 F.2d 384, 387 (10th Cir. 1977); United States v. Warin, 530 F.2d 103, 106 (6th Cir. 1976); United States v. Decker, 446 F.2d 164, 167

that the Supreme Court would step in to settle the issue once and for all.[194]

In comparison to the overabundance of academic literature on the meaning of the Second Amendment, however, the Court had very little of its own precedent to rely upon.[195] The handful of prior decisions all held that "the Second Amendment pertains only to citizen service in a government-organized and regulated militia" and had never been incorporated under the Fourteenth Amendment.[196] The

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(8th Cir. 1971).

[194] *See* Barnes & Nakamura, *supra* note 192.

[195] The Court had considered the Second Amendment in four cases prior to *Heller*. *See* Robert J. Spitzer, *Lost and Found: Researching the Second Amendment*, 76 CHI.-KENT L. REV. 349, 351 (2000) (noting that there were only four Supreme Court decisions holding that the Second Amendment only applies to militia). The four Supreme Court cases are: United States v. Miller, 307 U.S. 174, 178 (1939) (upholding a federal law prohibiting the possession of sawed-off shotguns on the ground that the Second Amendment was drafted "[w]ith obvious purpose to assure the continuation and render possible the effectiveness" of the militia and therefore "must be interpreted and applied with that end in view"); Miller v. Texas, 153 U.S. 535, 538 (1894) (holding that a Texas law "forbidding the carrying of weapons, and authorizing the arrest without warrant of any person violating such law" did not violate the Second Amendment); Presser v. Illinois, 116 U.S. 252, 264–65 (1886) (holding that an Illinois statute that "forb[ade] bodies of men to associate together as military organizations, or to drill or parade with arms in cities and towns unless authorized by law" does not violate the Second Amendment right to bear arms); and United States v. Cruikshank, 92 U.S. 542, 553 (1876) (holding that the Second Amendment "has no other effect than to restrict the powers of the national government").

[196] Spitzer, *supra* note 195, at 351.

Because it concerned an anti-handgun ordinance in Washington, D.C., a federal territory, *Heller* provided the Court the opportunity to review the right set forth in the Second Amendment *only* as it applied to action by the federal government, *not* as it applied to state or local governments. In *McDonald v. City of Chicago*, 130 S. Ct. 3020 (2010), the Court reviewed the constitutionality of a Chicago city ordinance prohibiting handgun ownership that was similar to the ordinance at issue in *Heller*. Before the Court could decide whether the ordinance was invalid under the Second Amendment standard it had set forth in *Heller*, it had to decide two preliminary questions: (1) whether to incorporate the Second Amendment via the Fourteenth Amendment, as it had done with most of the other rights provisions in the Bill of Rights, and (2) whether to keep with its decades-long tradition of grounding such incorporation in the Fourteenth Amendment's Due Process Clause or whether to ground it instead in the Fourteenth Amendment's Privileges or Immunities Clause, which had been virtual dead letter since the Court's 1873 decision in *The Slaughterhouse Cases*. In a plurality decision, the Court held that the individual Second Amendment right it had established in *Heller* was "incorporated" by the Due Process Clause of the Fourteenth Amendment and is therefore "fully applicable to the states." *Id.* at 3026. This Note discusses *McDonald* in depth in Part IV.

Solum addresses the issue of Second Amendment incorporation in a recent paper. *See* Solum, *Incorporation*, *supra* note 72. His main proposal in that article is for the Court to incorporate the Second Amendment via the Privileges or Immunities Clause of the Fourteenth Amendment instead of the Due Process and Equal Protection Clauses in order to avoid having to extend the individual right to bear arms to non-U.S. citizens. *See id.* at 7. That Solum reaches this conclusion using the very same process of "semantic originalism" that Part I of this Note summarizes and critiques, *see id.* at 1–6, further demonstrates the inherent subjectivity of that method. Even if one were to give Solum the benefit of the doubt and assume that he sought, *a priori*, neither the exclusion of noncitizens from Second Amendment protection nor any other particular result, it is clear from the article how easy it would be for a judge who *has* such a

debate in *Heller* between Stevens and Scalia over the meaning of the Second Amendment, thus, closely resembles the longstanding debate between those who adhere to the 'Standard Model" and those who criticize it.

B. Scalia's Opinion for the Court

Justice Scalia begins his opinion by stating that the Second Amendment's preamble,[197] or "prefatory clause,"[198] given its subordinate role in the sentence, "does not limit the [operative clause[199]] grammatically, but rather announces a purpose."[200] "[A]part from that clarifying function," Scalia maintains, "a prefatory clause does not limit or expand the scope of the operative clause."[201] He therefore begins his interpretation with an analysis of the operative clause[202] and "[returns subsequently] to the prefatory clause [only] to ensure that [his] reading of the operative clause is consistent with the announced purpose."[203]

In doing so, Scalia provides himself ample latitude with which to interpret the "right of the people to keep and bear arms" contained in the operative clause without having to concern himself with the context that the preamble provides for it. The liberties he takes as a result illustrate dramatically the subjectivity and discretion inherent in the originalist search for synchronic meaning. His ultimately narrow construction of the Second Amendment as protecting only the right of individuals keep weapons that are currently "in common use"[204] for "protection of [their] home[s] and famil[ies]"[205] and allowing for "longstanding prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of

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preconceived bias to use either "interpretation," "construction," or a combination of the two to make his reasoning appear more impartial.

[197] "A well regulated Militia, being necessary to the security of a free State . . . ."

[198] *See supra* note 160 and accompanying text.

[199] "[T]he right of the people to keep and bear arms shall not be infringed."

[200] *Heller*, 128 S. Ct. at 2789. Justice Scalia observes further that "[t]he Amendment could be rephrased, 'Because a well regulated Militia is necessary to the security of a free State, the right of the people to keep and bear Arms shall not be infringed.'" *Id.*

[201] *Id.*

[202] *See id.* at 2790–99. Scalia, however, acknowledges the "clarifying function" that the prefatory clause serves and reserves it as a means of "resolv[ing] . . . ambiguit[ies]." *Id.* at 2789.

[203] *Id.* at 2789.

[204] *Id.* at 2817.

[205] *Id.*

arms,"[206] moreover, demonstrates the additional, non-historical subjectivity and discretion to which the fixation thesis forces judges to resort when resolving the semantic indeterminacies that synchronic meaning inevitably yields.

1. Interpretation

"The first salient feature of the operative clause," Scalia begins his interpretation by noting, "is that it codifies a 'right of the people.'"[207] In every other provision of the Constitution containing the words "the people," he continues, "the term unambiguously refers to all members of the political community."[208] "The militia" of the preamble, he adds, by way of contrast, "consisted of a subset of 'the people'—those who were male, able bodied, and within a certain age range."[209] The idea that the Second Amendment protects the right of the people to keep and bear arms *only* as part of the "militia," he concludes, "fits poorly with the operative clause's description of the holder of that right as 'the people.'"[210] Scalia's analysis therefore begins with "a strong presumption that the Second Amendment right is exercised individually and belongs to all Americans."[211]

Scalia then turns his attention to the words "keep and bear arms" and attempts to determine the phrase's "conventional semantic meaning"[212] in 1791 by consulting eighteenth-century American dictionaries.[213] He concludes, for example, that the word "arms" extended then, as it does today, "to weapons that were not specifically designed for military use and were not employed in a military capacity."[214]

"Putting all of these textual elements together," Scalia finds "that they guarantee the individual right to possess and carry weapons in case of confrontation.[215] In interpreting "the right of the people to keep and bear Arms" in its entirety, however, Scalia is unable to rely

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[206] *Id.* at 2816–17.

[207] *Id.* at 2790.

[208] *Id.*

[209] *Id.* at 2791.

[210] *Id.*

[211] *Id.*

[212] In Solum's formulation, "conventional semantic meaning" refers to the way in which "a competent speaker of American English at the time [a provision] was adopted" would have understood its text. *See* Solum, *Semantic Originalism*, *supra* note 24, at 51.

[213] *See Heller*, 128 S. Ct. at 2791–93.

[214] *Id.* at 2791. One dictionary provided the following sentence as an example of how "arms" could be used: "Servants and labourers shall use bows and arrows on *Sundays*, & c. and not bear other arms." *Id.* (quoting 1 TIMOTHY CUNNINGHAM, A NEW AND COMPLETE LAW DICTIONARY (1771)).

[215] *Id.* at 2797.

upon conventional semantic meaning alone. Citing "the historical background of the Second Amendment,"[216] he stipulates that "it has always been widely understood that the Second Amendment, like the First and Fourth Amendments," did not establish a new right but rather "codified a *pre-existing* right."[217] Characterizing the Second Amendment this way provides Scalia the opportunity to peer far further back in time than 1791 in search of the amendment's "publicly available context."[218]

Seizing this opportunity, Scalia immediately launches into a broad historical narrative that begins in England "[b]etween the Restoration and the Glorious Revolution,"[219] using Joyce Malcolm's book[220] as his principal guide.[221] He notes that experiences like the forced disarming of Protestants under King James II "caused Englishmen to be extremely wary of concentrated military forces run by the state and to be jealous of their arms."[222] As a result, the 1689 Declaration of Right contained "an assurance from William and Mary . . . that Protestants would never be disarmed."[223] This right, Scalia claims, "has long been understood to be the predecessor to our Second Amendment."[224] Although it "was an individual right not available to the whole population, given that it was restricted to Protestants . . . it was secured to them as individuals, according to 'libertarian political principles,' not as members of a fighting force."[225]

Scalia then consults William Blackstone's *Commentaries* in order to link this seventeenth-century English right to the adoption of the Second Amendment in the United States a century later.[226] The Court, he observes, has long recognized Blackstone as "the preeminent authority on English law for the founding generation."[227] Blackstone "cited the arms provision of the [1689] Bill of Rights as one of the

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[216] *Id.*

[217] *Id.*

[218] In Solum's formulation, "publicly available context "includes the whole constitutional text" and "may include facts about the general point or purpose of the provision (as opposed to 'the intention of the author')." *See* Solum, *Semantic Originalism*, *supra* note 24, at 53–54.

[219] *Heller*, 128 S. Ct. at 2798.

[220] *See generally* MALCOLM, *supra* note 180 and accompanying text.

[221] *See Heller*, 128 S. Ct. at 2798.

[222] *Id.*

[223] *Id.*

[224] *Id.* (citing EDWARD DUMBAULD, THE BILL OF RIGHTS AND WHAT IT MEANS TODAY 51 (1957); WILLIAM RAWLE, A VIEW OF THE CONSTITUTION OF THE UNITED STATES OF AMERICA 122 (1825)).

[225] *Id.* (citing LOIS G. SCHWOERER, THE DECLARATION OF RIGHTS, 1689, at 283 (1981); GEORG JELLINEK, THE DECLARATION OF THE RIGHTS OF MAN AND OF CITIZENS 49 & n.7 (Max Farrand trans., 1901)).

[226] *Heller*, 128 S. Ct. at 2798.

[227] *Id.* at 2798 (quoting Alden v. Maine, 527 U.S. 706, 715 (1999)).

fundamental rights of Englishmen" and believed it to be derivative of "'the natural right of resistance and self-preservation.'"[228]

The Second Amendment, however, is a provision of American, not English law, so Scalia next turns to "the most important early American edition of Blackstone's *Commentaries*,"[229] which was published in 1803 by "the law professor and former Antifederalist St. George Tucker."[230] In his annotated comments to that volume, Tucker mentions a "right of self-preservation" that early Americans understood "as permitting a citizen to 'repe[l] force by force' when 'the intervention of society in his behalf, may be too late to prevent an injury.'"[231]

Scalia's use of Blackstone and Tucker is a highly ironic example of what Solum refers to as the "division of linguistic labor."[232] In Solum's formulation, "ordinary citizens would recognize a division of linguistic labor and defer to the understanding of . . . term[s] of art that would be the publicly available meaning to those who were members of the relevant group and those who shared the understandings of the members of the relevant group."[233] Scalia cites Tucker's comments to Blackstone's *Commentaries*, however, not as evidence of some arcane original meaning of the Second Amendment available only to a trained specialist elite but as evidence that the American public *at large* would have understood the Second Amendment to codify the "natural right of resistance and self-preservation"[234] that Blackstone himself cited as a "fundamental right[] of Englishmen."[235] Scalia relies on this evidence at the end of his opinion as proof that "the inherent right of self-defense has been central to the Second Amendment right."[236]

Having thus completed his interpretation of the operative clause's synchronic meaning, Scalia moves on to the preamble. He begins his interpretation of "a well-regulated militia" by citing Justice McReynolds's dictum in *United States v. Miller*[237] that "the Militia comprised all males physically capable of acting in concert for the

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[228] *Id.* (quoting 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 139 (1765)).

[229] *Id.* at 2799.

[230] *Id.*

[231] *Id.* (citing 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 145–146, n.42 (1803)).

[232] *See* Solum, *Semantic Originalism*, *supra* note 24, at 55.

[233] *Id.* at 55.

[234] *Heller*, 128 S. Ct. at 2798.

[235] *Id.*

[236] *Id.* at 2817.

[237] 307 U.S. 174 (1939)

common defense."[238] The District of Columbia, therefore, erroneously interprets "a well-regulated militia" to mean only a *state-organized* militia:

> Unlike armies and navies, which Congress is given the power to create, the militia is assumed by Article I already to be *in existence.* Congress is given the power to "provide for calling forth the militia," and the power not to create, but to "organiz[e]" it—and not to organize "a" militia, which is what one would expect if the militia were to be a federal creation, but to organize "the" militia, connoting a body already in existence. This is fully consistent with the ordinary definition of the militia as all able-bodied men. From that pool, Congress has plenary power to organize the units that will make up an effective fighting force . . . . To be sure, Congress need not conscript every able-bodied man into the militia, because nothing in Article I suggests that in exercising its power to organize, discipline, and arm the militia, Congress must focus upon the entire body. Although the militia consists of all able-bodied men, the federally organized militia may consist of a subset of them.[239]

"[T]he adjective "well-regulated," he infers, "implies nothing more than the imposition of proper discipline and training."[240]

Turning next to "the security of a free state," Scalia interprets the original public understanding of the phrase as "the 'security of a free polity,' not security of each of the several States,"[241] using Justice Joseph Story's nineteenth-century constitutional treatise as evidence.[242] He then lists three different reasons why the ratifying public in 1791 considered the militia to be 'necessary to the security of a free state": "First . . . it is useful in repelling invasions and suppressing insurrections. Second, it renders large standing armies unnecessary . . . . Third, when the able-bodied men of a nation are trained in arms and organized, they are better able to resist tyranny."[243]

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[238] *Heller*, 128 S. Ct. at 2799 (citing *id.* at 179).

[239] *Id.* at 2800 (citations omitted).

[240] *Id.*

[241] *Id.*

[242] *Id.* (citing 1 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 208 (1833) ("[T]he word 'state' is used in various senses [and in] its most enlarged sense, it means the people composing a particular nation or community.").

[243] *Id.* at 2800–01.

Having completed his interpretation of the *semantic meaning*[244] of each clause of the Second Amendment in isolation from the other, Scalia announces "the purpose for which the right [declared in the operative clause] was codified: to prevent elimination of the militia."[245] Yet just because "a well-regulated militia being necessary to the security of a free state" was "the reason that right—unlike some other English rights—was codified in a written Constitution," Scalia immediately adds, does not mean "that preserving the militia was the only reason Americans valued the ancient right."[246] Most Americans at the time "undoubtedly thought it even more important for self-defense and hunting."[247]

Scalia's preliminary declaration that the Second Amendment's "prefatory clause does not limit or expand the scope of [its] operative clause"[248] is no mere accident. It serves the critical function of severing the operative clause and right it contains from the preamble so as to isolate the former as the *exclusive* semantic content governing Scalia's adjudication of the case and to relegate the latter to the status of a mere *historical teleological meaning*,[249] albeit one that happens to be written into the text of the amendment. The preamble serves no greater function than to "ensure that [his] reading of the operative clause is consistent with," but not necessarily *identical to*, "the announced purpose."[250]

2. *Construction*

Near the end of his opinion, Scalia justifies his invalidation of the D.C. gun control ordinance by stating that "the enshrinement of constitutional rights necessarily takes certain policy choices off the table."[251] Under Scalia's interpretation of the Second Amendment, "right of the people to keep and bear arms," however, "elimination the militia"[252] is not automatically included among those policy choices, because the militia is mentioned in the preamble and therefore comprises no part of the substance of the enforceable right. The only specific policy choice Scalia ultimately declares

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[244] Semantic meaning, in Solum's formulation, "refers to the semantic content of an utterance." Solum, *Semantic Originalism*, *supra* note 24, at 64.

[245] *Heller*, 128 S. Ct. at 2801.

[246] *Id.*

[247] *Id.*

[248] *Id.*

[249] Historical teleological meaning, under the Author's proposed diachronic interpretive method, refers to the immediate political motives behind a provision's initial adoption.

[250] *Id.* at 2789.

[251] *Id.* at 2822.

[252] *See id.* at 2801.

unconstitutional in *Heller* is the one immediately at issue in the case: "the absolute prohibition of handguns held and used for self-defense in the home."[253]

Scalia does, however, provide an extensive list of the various restrictions and regulations that the government may lawfully place on gun ownership and use. These include "prohibitions on the possession of firearms by felons and the mentally ill,"[254] "laws forbidding the carrying of firearms in sensitive places such as schools and government buildings,"[255] "laws imposing conditions and qualifications on the commercial sale of arms,"[256] and "prohibiti[ons on] the carrying of 'dangerous and unusual weapons.'"[257] Even though this list already seems to give the government sufficient latitude to legislate the individual Second Amendment out of practical existence, Scalia adds that the Court "identif[ies] these presumptively lawful regulatory measures only as examples; [its] list does not purport to be exhaustive."[258]

Scalia bases the items on his list of permissible restrictions and regulations not on his interpretation of the Second Amendment's synchronic meaning but on the contemporary policy considerations that inform his post-interpretive construction of the amendment. Thus, although Scalia's observation that "the [Second Amendment] right helped to secure the ideal of a citizen militia, which might be necessary to oppose an oppressive military force if the constitutional order broke down,"[259] may have been a necessary logical step in his interpretation of its synchronic meaning, this observation in no way constrains his construction of the amendment.

C. Stevens's Dissent

Justice Stevens's analysis of the relationship between the Second Amendment's two clauses is the exact converse of Scalia's. "The Second Amendment," he states early in his dissent, "was adopted to protect the right of the people of each of the several States to maintain a well-regulated militia."[260] Rejecting Scalia's generalist understanding of the militia as "those who were male, able bodied,

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[253] *Id.*

[254] *Id.* at 2816–17.

[255] *Id.* at 2817.

[256] *Id.*

[257] *Id.* (quoting 4 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 148–49 (1769)).

[258] *Id.* at 2817 n.26.

[259] *Id.* at 2801.

[260] *Id.* at 2822 (Stevens, J., dissenting).

and within a certain age range,"[261] Stevens specifies that "the power of Congress to disarm the *state* militias and create a national standing army posed an intolerable threat to the *sovereignty of the several States*."[262] Stevens thereby seeks to refute any contention that the amendment's synchronic meaning includes an individual right to own and use guns.[263]

1. Interpretation

Stevens's opinion, in contrast to Scalia's, exhibits an old originalist interpretive methodology that seeks to uncover the intentions of the framers and ratifiers as they debated the adoption of the Bill of Rights. He does not do so because he is a doctrinaire originalist—he is not.[264] He does so because he wishes to fight Scalia on Scalia's own originalist turf. Stevens's claim that *United States v. Miller*[265] "was faithful to the text of the Second Amendment and the purposes revealed in its drafting history" betrays, on its own terms, his awareness of *Miller*'s ambiguity as a precedent clarifying the "applicative meaning"[266] of the Second Amendment "right of the people to keep and bear arms."[267]

Stevens's interpretation focuses on the phrase "the people" in the operative clause and argues that it shows the Second Amendment contemplates collective, not individual action, much like "the right of the people to peaceably assemble" in the First Amendment."[268] Such language "remind[s] us that it is the collective action of individuals having a duty to serve in the militia that the text directly protects."[269] But, Stevens adds, "perhaps more importantly, ["the people" indicates] that the ultimate purpose of the Amendment was to

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[261] *Id.* at 2791 (majority opinion).

[262] *Id.* at 2822 (Stevens., J., dissenting) (emphasis added).

[263] *Id.* at 2823 ("The opinion the Court announces today fails to identify any new evidence supporting the view that the Amendment was intended to limit the power of Congress to regulate civilian uses of weapons.").

[264] *Id.* at 2824 ("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." (citation omitted)).

[265] 307 U.S. 174 (1939).

[266] In Solum's formulation, applicative meaning "refers to the application of a general utterance to a particular case." Solum, *Semantic Originalism*, *supra* note 24, at 63–64.

[267] *See* discussion *supra* notes 172–75.

[268] *Heller*, 128 S. Ct. at 2827 (Stevens, J., dissenting) ("In the First Amendment, no words define the class of individuals entitled to speak, to publish, or to worship; in that Amendment it is only the right peaceably to assemble, and to petition the Government for a redress of grievances, that is described as a right of 'the people.'").

[269] *Id.*

protect the States' share of the divided sovereignty created by the Constitution."

This latter assertion is something of a leap in logic from the former, but it lays the foundation for Stevens's exploration of the context of the Second Amendment's ratification. Stevens discusses "two themes" that preoccupied the debate over the original Constitution.[270] "'On the one hand,'" he explains, "'there was a widespread fear that a national standing Army posed an intolerable threat to individual liberty and to the sovereignty of the separate States.'"[271] "On the other hand, the Framers recognized the dangers inherent in relying on inadequately trained militia members 'as the primary means of providing for the common defense during the Revolutionary War.'"[272] The "well-regulated militia" of the Second Amendment, Stevens argues, refers to a compromise that the Framers reached "[i]n order to respond to those twin concerns."[273]

This compromise would "split[] the atom of sovereignty"[274] between state and federal military power. Under such an interpretation, "Congress would be authorized to raise and support a national Army and Navy, and also to organize, arm, discipline, and provide for the calling forth of "the Militia."[275] "The President, at the same time, was empowered as the 'Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States, when called into the actual service of the United States.'"[276]

Stevens notes that the power of the federal government over the militia was more limited than its power over the Army and Navy:

> Although Congress would have the power to call forth, organize, arm, and discipline the militia, as well as to govern "such Part of them as may be employed in the Service of the United States," the States respectively would retain the right to appoint the officers and to train the militia in accordance with the discipline prescribed by Congress.[277]

This limitation, however, "did not prove sufficient to allay fears about the dangers posed by a standing army."[278] Although Article I

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[270] *Id.* at 2831.
[271] *Id.* (quoting Perpich v. Dep't of Def., 496 U.S. 334, 340 (1990)).
[272] *Id.* at 2832 (citation omitted) (quoting *Perpich*, 496 U.S. at 340).
[273] *Id.*
[274] *Id.* at 2831 (internal quotation marks omitted).
[275] *Id.* at 2832 (citing U.S. CONST. art. I, § 8, cls. 12–16).
[276] *Id.* (quoting U.S. CONST. art. II, § 2).
[277] *Id.* (quoting U.S. CONST. art I, § 8, cl. 16) (footnote omitted).
[278] *Id.*

"empowered Congress to organize, arm, and discipline the militia, it did not prevent Congress from providing for the militia's *dis*armament."[279] This apparent loophole, Stevens argues, was of paramount concern to the Anti-federalists in 1791 during the debate over the Bill of Rights.[280]

2. *Construction*

Stevens emphasizes militias to the extent that he does, not to seriously evaluate the relevance of the framers' concerns in the twenty-first century, but to disassociate the right to keep and bear arms from other provisions in the Bill of Rights that clearly protect individual citizens[281] and to emphasize its association with service to the state.[282] The strained emphasis he puts on *state* sovereignty, however, calls into question his attitude toward *popular* sovereignty.

The allocation of sovereignty within the Constitution's structural framework is a question that has divided judges and legal scholars since the nation's founding. An early example of this can be found in the debates between Justices Jay, Wilson, and Iredell in *Chisholm v. Georgia*,[283] a case whose outcome is commonly believed to have led to the adoption of the Eleventh Amendment as a guarantee of a state's "sovereign immunity" from suit by one of its citizens.[284] Most of Europe's inhabitants, wrote Jay, were governed by legal systems that had ancient, feudal origins and characterized them not as citizens but as subjects.[285] In these societies, therefore, the power of the sovereign was defined specifically by the subjects' lack thereof.[286] The United States, by contrast, was governed by a written Constitution whose official author was "We the People" and which guaranteed to each state a republican form of government.[287] Republics differed from

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[279] *Id.* at 2832–33.

[280] *See id.* at 2833 (discussing the Anti-federalists' efforts to include a constitutional provision that would prohibit Congress from disarming the state militias).

[281] *See id.* at 2827 ("Although the abstract definition of the phrase 'the people' could carry the same meaning in the Second Amendment as in the Fourth Amendment, the preamble of the Second Amendment suggests that the uses of the phrase . . . refer[] to a collective activity.").

[282] *See id.* at 2844 ("In 1901 the President revitalized the militia by creating 'the National Guard of the several States'; meanwhile, the dominant understanding of the Second Amendment's inapplicability to private gun ownership continued well into the 20th century." (citation omitted) (internal quotation marks omitted)).

[283] 2 U.S. (2 Dall.) 419 (1793).

[284] *See generally* Randy E. Barnett, *The People or the State:* Chisholm v. Georgia *and Popular Sovereignty*, 93 VA. L. REV. 1729 (2007).

[285] *Chisholm*, 2 U.S. (2 Dall.) at 472–73 (opinion of Jay, J.).

[286] *Id.*

[287] *See* U.S. CONST. art. IV, § 4 ("The United States shall guarantee to every State in this Union a Republican Form of Government, and shall protect each of them against Invasion; and on Application of the Legislature, or of the Executive (when the Legislature cannot be

monarchies in that they were the products of compacts between individuals and their government under which each citizen was "a joint tenant[] in the sovereignty."[288]

Justice Wilson noted the conspicuous absence of the word "sovereign" anywhere in the Constitution's text,[289] but he inferred from the language of the preamble that the true sovereign of the United States is "the people" of the United States and, like Jay, maintained that the role of the states in the new federal framework is to secure the rights of their individual citizens as co-equal partners in self-government.[290]

Justice Iredell, however, put forth a different conception of sovereignty under the Constitution whereby the states themselves are the original sovereign and, as such, are analogous to the king in a monarchy:

> Every State in the Union in every instance where its sovereignty has not been delegated to the United States, I consider to be as compleatly [sic] sovereign, as the United States are in respect to the powers surrendered. The United States are sovereign as to all the powers of Government actually surrendered: Each State in the Union is sovereign as to all the powers reserved. It must necessarily be so, because the United States have no claim to any authority but such as the States have surrendered to them: Of course the part not surrendered must remain as it did before.[291]

The Court has understood the Eleventh Amendment to have written Iredell's state-oriented understanding of sovereignty into the Constitution ever since it construed the Amendment that way in the late nineteenth century case of *Hans v. Louisiana*.[292] Yet the

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convened) against domestic Violence.").

[288] *Chisholm*, 2 U.S. (2 Dall.) at 472.

[289] *Id.* at 454 (opinion of Wilson, J.) ("To the Constitution of the United States the term SOVEREIGN, is totally unknown. There is but one place where it could have been used with propriety. But, even in that place it would not, perhaps, have comported with the delicacy of those, who ordained and established that Constitution. They might have announced themselves 'SOVEREIGN' people of the United States: But serenely conscious of the fact, they avoided the ostentatious declaration.").

[290] "Let a state be considered as subordinate to the people. But let everything else be subordinate to the state. The latter part of this position is equally necessary with the former." *Id.* at 26.

[291] *Id.* at 435 (opinion of Iredell, J.).

[292] 134 U.S. 1 (1890). Justice Bradley wrote for the Court in *Hans* that *Chisholm* "created such a shock of surprise throughout the country" through, specifically, its rejection of the principle that a state's status as a sovereign entity entitled it to refuse to consent to a suit that

amendment itself does not mention sovereignty at all,[293] and *Hans* and its progeny have long been criticized as erroneously standing for the principle that the state, like the king, can do no wrong.[294]

Justices Scalia's majority opinion in *Heller* establishing an individual Second Amendment right is no less deferential to this statist conception of sovereignty than Stevens's state-empowering dissent is. Scalia's narrow construction of the "right of the people to keep and bear arms" as a personal right of self-defense confined to the home completely discards the function of the militia as an unorganized armed "subset of the people."[295] It diminishes the people's sovereign power by restricting the weapons government is

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a citizen filed against it, "that, at the first meeting of Congress thereafter, the Eleventh Amendment . . . was almost unanimously proposed . . . and adopted . . . ." *Id.* at 11. *Hans* bears a close and highly controversial relationship to the Fourteenth Amendment and the Civil War that produced it. The case arose out of an 1884 federal lawsuit by a citizen of Louisiana against the state of Louisiana to recover unpaid interest on bonds the state had issued to him. Hans himself was but one of many private citizens who held bonds that southern states had issued in the early aftermath of the Civil War and who became increasingly frustrated with the efforts of their state debtors in the post-Reconstruction years to repudiate their obligations by fiat. Louisiana had gone so far as to amend its own constitution in order to escape its debt obligations. Edward A Purcell, Jr., *The Particularly Dubious Case of* Hans v. Louisiana: *An Essay on Law, Race, History, and the Federal Courts*, 81 N.C. L. REV. 1927, 1934 (2003). These citizen bondholders began suing their own state governments in federal court in increasing numbers to force them to honor their obligations at the very moment the Court was beginning to use the Eleventh Amendment to deny federal jurisdiction over suits by these bondholders against their state governments to compel payment. *Id.* From the amendment's adoption in 1795 through the 1877 Hayes-Tilden compromise that formally ended Reconstruction, the Court had enforced such debt instruments under the Contract Clause. *Id.* (citing BENJAMIN FLETCHER WRIGHT, JR., THE CONTRACT CLAUSE OF THE CONSTITUTION (1938)). After 1877, however, the Court abruptly reversed course and began using the Eleventh Amendment as a basis to deny federal jurisdiction over such cases. *Id.* at 1935.

[293] *See* U.S. CONST. amend XI ("The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.").

[294] Professor Edward Purcell argues that the sudden doctrinal shift evident in *Hans* was motivated in large part by the growing influence of racist sentiments among Americans generally and within the American legal profession in particular after the failure of Reconstruction, and that the doctrine of state sovereign immunity that emerged in *Hans* represented the culmination of a decade-long backlash against the Fourteenth Amendment and its protection of the individual rights of African Americans against discriminatory state laws. *See* Purcell, *supra* note 292, at 2001–14. Put another way, *Hans* did not constitutionalize the principle of state sovereignty that Justice Iredell had advocated a century prior but rather the principle of "states rights" that southern politicians began promulgating in the 1830s as the national dispute over slavery began to intensify. *See generally* Michael Les Benedict, *Abraham Lincoln and Federalism*, 10 J. ABRAHAM LINCOLN ASS'N 1 (1988); John V. Orth, *The Truth about Justice Iredell's Dissent in* Chisholm v. Georgia *(1793)*, 73 N.C. L. REV. 255 (1994); *see also* Patrick McKinley Brennan, *Against Sovereignty: A Cautionary Note on the Normative Power of the Actual*, 82 NOTRE DAME L. REV. 181, 183 (2006) ("If it is the Court's claim that sovereignty is not only a fact of our political-legal world, but a fact to be encouraged, this claim will require substantiation: it is by no means self-evident that governments we create can enjoy the predicate "sovereign.").

[295] *See* Dist. of Columbia v. Heller, 128 S. Ct. 2783, 2791 (2008).

precluded from regulating to handguns or other firearms currently "in common use."[296] It is an interpretation that envisions individual, private gun ownership primarily as a means of *security*, not as a bulwark of *liberty*, and certainly not as a prerogative of *sovereignty*.

The diachronic method set forth in Part III of this Note adopts Justices Jay and Wilson's understanding of "We the People" as the proper repository of sovereignty under the United States Constitution and therefore the proper object of an American judge's fidelity in interpreting it. The fixation thesis is incapable of guiding judges toward this end because it precludes them from looking to the ever-changing constitutional structure by forcing them to interpret only the synchronic meaning of constitutional provisions.

III. THE DIACHRONIC METHOD

Part I has shown that originalism's synchronic paradigm posits a constitutional provision's semantic meaning as a reified linguistic fact—a *thing* that judges can simply locate and then apply as law[297]—and that this synchronicity *itself* precludes any genuinely objective basis for such a application.[298] Part II has demonstrated the failure of synchronic meaning to provide judges with objective guidelines to constrain them by examining the interpretive reasoning processes that Justices Scalia and Stevens employ in *Heller*. The diachronic method seeks to solve this dilemma by enabling judges to make four specific inquiries that are forbidden to them under the fixation thesis: (1) How has the Constitution's whole structural framework changed over time between the founding and today?; (2) How legitimate are these wholesale structural changes?; (3) How has the position that the provision at issue occupies within the Constitution's changing structural framework changed over time between the founding and today?; and (4) What contemporary application of the provision at issue has the greatest tendency to (a) preserve the legitimate aspects of the existing whole structural framework and (b) correct the illegitimate aspects of that framework?

Instead of engaging judges in an inevitably futile search for determinate *semantic* meanings of the provisions they interpret,[299] the diachronic method directs judges' attention to those provisions' *teleological* meanings, which, in Solum's formulation, "refer[] to the

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[296] *Id.* at 2817.

[297] *See* Alicea, *supra* note 34, at 121–24.

[298] *See* discussion *supra* Part I.B.

[299] *See* Solum, *Semantic Originalism*, *supra* note 24, at 63–64 (distinguishing "semantic or linguistic meaning," which "refers to the semantic content of an utterance," from "applicative meaning," which "refers to the application of a general utterance to a particular case").

purpose for an utterance."[300] It distinguishes, however, between two separate forms of teleological meaning: *historical* teleological meaning, which refers to the immediate political motives behind a provision's initial adoption, and *structural* teleological meaning, which refers to the normative position that an individual provision occupies within the Constitution's overall structural framework.

Both variations of teleological meaning are synchronic. Historical teleological meaning possesses a *past* synchronicity because it concerns the subjective motivations and principles of the ratifying generation.[301] Structural teleological meaning possesses a *present* synchronicity because it concerns the objective purpose of the provision immediately at issue in a contemporary case within the contemporary separation and allocation of power that comprises the Constitution's structure at the time of decision.

Examples of historical teleological meaning are numerous: The Free Speech Clause of the First Amendment was originally motivated by the founding generation's principled hatred of England's practice of prior restraint;[302] The Establishment Clause of the First Amendment was originally motivated by the principle that one should not pay taxes to support an established state church whose theological

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[300] *Id.* at 64.

[301] One should be careful not to confuse "framers' meaning," which in Solum's formulation refers to "the meaning that was originally intended by the Framers," Solum, *Semantic Originalism*, *supra* note 24, at 39, with historical teleological meaning. In his analysis of *Heller*, Solum writes that "[w]hile Justice Scalia inquired into the semantic content of the [Second Amendment's] operative clause, Justice Stevens focused on the [amendment's] purpose or teleological meaning." Solum, Heller *and Originalism*, *supra* note 23, at 957. Solum appears convinced that because Stevens, like Justice Breyer, is not typically known for being an originalist, his dissent in *Heller* is wholly unconcerned with the "framer's meaning" of the Second Amendment. *See id* at 958 ("Neither Justice Stevens nor Justice Breyer was characterized as an originalist prior to authoring their dissenting opinions in *Heller*. It is an open question whether Stevens or Breyer would deny the clause meaning thesis because they affirm its rival—which we might call *the framers' meaning thesis*—but the evidence for an affirmative answer to that question is scanty at best."). Yet Stevens makes it unambiguously clear in his dissent that he is making an interpretive claim about the Second Amendment's *semantic* meaning. *See Heller*, 128 S. Ct. at 2831 (Stevens, J., dissenting) ("When each word in the text is given full effect, the Amendment is most naturally read to secure to the people a right to use and possess arms in conjunction with service in a well-regulated militia. So far as appears, no more than that was contemplated by its drafters or is encompassed within its terms."). A provision's historical teleological meaning differs from its "framers' meaning" in that the former concerns the political and moral considerations that drove the broader community at the time of ratification to consent to the provision's adoption whereas the latter concerns only the semantic content of the provision's text *as informed by* the subjective intentions of the provision's drafters and ratifiers. Historical teleological meaning thus *includes* those subjective intentions as an aspect—perhaps a particularly informative aspect—of the broader community's political motivations for consenting to a provision's adoption, but it is in no way limited to them. Jack Balkin provides many examples of other aspects of historical teleological meaning in elaborating his "text and principle" method of interpretation. *See supra* text accompanying note 44.

[302] *See* GEOFFREY R. STONE ET AL., CONSTITUTIONAL LAW 1049–54 (5th ed. 2005).

doctrine he does not share;[303] The Fourth Amendment's protection against unreasonable searches and seizures arose out of widespread opposition in 1791 to England's practice of issuing general writs of assistance, which enabled government officials to search anybody's property without specifying the property's owner or the object of the search;[304] and The Equal Protection Clause of the Fourteenth Amendment arose out of the desire of radical Republicans in Congress in the aftermath of the Civil War to formally make the newly freed slaves full United States citizens on par with whites.[305]

A provision's historical teleological meaning, while synchronic, is not as indeterminate and hence not as intensely polarizing as its synchronic semantic meaning, because the former does not share the latter's normative role as a limitation on judicial discretion. The mere fact that colonial opposition to the Crown's prior restraint policies prompted the First Amendment's free speech provision does not, without more, foreclose the possibility that this provision, *as law*, prohibits Congress from *additional* means of abridging free speech. Yet, by the same token, a provision's historical teleological meaning tells us little if anything about either that provision's contemporary normative place within the Constitution as a whole or its appropriate *consequences* in a given case.

A provision's structural teleological meaning, by contrast, concerns not the human motivations of its framers but rather its own contemporary normative place in the contemporary framework as the consequence of a judge's decision in a specific case. Such meaning does not merely *inform* judges of its proper application in a given case; it is *identical* to that proper application. In short, it is nothing other than the *ideal holding* of the case in which it is at issue, the holding that is objectively correct as a matter of law regardless of what the court in fact holds.

The zero-sum struggle between opposing social and political interests that takes shape around high-impact constitutional litigation takes the legal form of a contest between two mutually incompatible, *partisan* articulations of structural teleological meaning.[306] But the

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[303] *See id.* at 1485–93 (citing Everson v. Bd. Of Ed., 330 U.S. 1 (1947)).

[304] *See* Thomas Y. Davies, *Recovering the Original Fourth Amendment*, 98 MICH. L. REV. 547, 619–68 (1999).

[305] *See* STONE ET AL., *supra* note 302, at 457–60.

[306] In *Heller*, for example, a remarkably vast and diverse array of political advocacy organizations and ideologically driven individuals submitted amicus briefs for both the petitioner and the respondent. Among those submitting briefs in favor of the respondent were: (1) former U.S. Attorney General Edwin Meese III, *see* Brief for Amici Curiae Former Senior Officials of the Department of Justice in Support of Respondent, *Heller*, 128 S. Ct. 2783 (No. 07-290), *available at* http://www.gurapossessky.com/news/parker/documents/07-290bsac

politically contested status of structural teleological meaning does not make this meaning indeterminable in the manner of the synchronic *semantic* meaning that originalists seek. Lurking beneath the

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FormerSeniorOfficialsoftheDepartmentofJustice.pdf; (2) the Cato Institute and Joyce Malcolm, *see* Brief of the Cato Institute and History Professor Joyce Lee Malcolm as Amici Curiae in Support of Respondent, *Heller*, 128 S. Ct. 2783 (No. 07-290), *available at* http://www.gurapossessky.com/news/parker/documents/07-290bsacCatoInstituteandHistory ProfessorJoyceLeeMalcolm.pdf; (3) the National Rifle Association, *see* Brief for the National Rifle Association and the NRA Civil Rights Defense Fund as Amici Curiae in Support of Respondent, *Heller*, 128 S. Ct. 2783 (No. 07-290), *available at* http://www.gurapossessky .com/news/parker/documents/07-290bsacNationalRifleAssociation.pdf; (4) Pink Pistols, *see* Brief for Pink Pistols and Gays and Lesbians for Individual Liberty as Amici Curiae in Support of Respondent, *Heller*, 128 S. Ct. 2783 (No. 07-290), *available at* http:// www.gurapossessky.com/news/parker/documents/07-290bsacPinkPistols.pdf; (5) Jews for the Preservation of Firearms Ownership, *see* Brief of Amicus Curiae Jews for the Preservation of Firearms Ownership in Support of Respondent, *Heller*, 128 S. Ct. 2783 (No. 07-290), *available at* http://www.gurapossessky.com/news/parker/documents/07-290bsjpfo.pdf; (6) the Congress of Racial Equality, *see* Brief of Amicus Curiae Congress of Racial Equality In Support of Respondent, *Heller*, 128 S. Ct. 2783 (No. 07-290), *available at* http://www.gurapossessky .com/news/parker/documents/07290bsacCongressofRacialEquality.pdf; (7) the American Center for Law and Justice, *see* Amicus Brief of the American Center for Law and Justice Support of Respondent, *Heller*, 128 S. Ct. 2783 (No. 07-290), *available at* http://www.gurapossessky.com /news/parker/documents/07290bsacAmericanCenterforLawandJustice.pdf; and (8) the Eagles Forum, *see* Brief of Amicus Curiae Eagle Forum Education & Legal Defense Fund In Support of Respondent, *Heller*, 128 S. Ct. 2783 (No. 07-290), *available at* http://www.gura possessky.com/news/parker/documents/07290bsacEagleForumELDF.pdf.

Those supporting the petitioners included: (1) other former Justice Department officials, *see* Brief for Former Department of Justice Officials as Amici Curiae Supporting Petitioners, *Heller*, 128 S. Ct. 2783 (No. 07-290), *available at* http://www.gurapossessky.com/news/parker /documents/BriefforFormerDOJOfficialsasAmiciCuriae.pdf; (2) the National Network to End Domestic Violence, *see* Brief Amici Curiae of National Network to End Domestic Violence et al. in Support of Petitioners, *Heller*, 128 S. Ct. 2783 (No. 07-290), *available at* http:// www.gurapossessky.com/news/parker/documents/07-290tsacNationalNetworkToEndDomestic Violence.pdf; (3) a variety of religious advocacy groups, *see* Brief Supporting Petitioners of Amici Curiae American Jewish Committee et al., *Heller*, 128 S. Ct. 2783 (No. 07-290), *available at* http://www.gurapossessky.com/news/parker/documents/07-290tsacAmericanJewish Committee.pdf; (4) the American Bar Association, *see* Brief of the American Bar Association as Amicus Curiae Supporting Petitioners, *Heller*, 128 S. Ct. 2783 (No. 07-290), *available at* http://www.gurapossessky.com/news/parker/documents/DistrictofColumbiav.Heller.American BarAssociationbrief.pdf; (5) the Brady Center, *see* Brief for Brady Center to Prevent Gun Violence et al. as Amici Curiae Supporting Petitioner, *Heller*, 128 S. Ct. 2783 (No. 07-290), *available at* http://www.gurapossessky.com/news/parker/documents/07-290tsacBradyCenter .pdf; (6) the NAACP Legal Defense Fund, *see* Brief of Amicus Curiae the NAACP Legal Defense & Educational Fund, Inc. In Support of Petitioners, *Heller*, 128 S. Ct. 2783 (No. 07-290), *available at* http://www.gurapossessky.com/news/parker/documents/07-29tsacNAACP Legal.pdf; (7) the American Public Health Association, *see* Brief for American Public Health Association et al. as Amici Curiae in Support of Petitioners, *Heller*, 128 S. Ct. 2783 (No. 07-290), *available at* http://www.gurapossessky.com/news/parker/documents/07-290acAmerican PublicHealthAssociation.pdf; (8) a number of prominent Second Amendment historians, *see* Brief of Amici Curiae Jack N. Rakove et al. in Support of Petitioners, *Heller*, 128 S. Ct. 2783 (No. 07-290), *available at* http://www.gurapossessky.com/news/parker/documents/07-290tsa jackn.rakove.pdf; and (9) three English and linguistics professors, *see* Brief for Professors of Linguistics and English Dennis E. Baron, Ph.D., et al. in Support of Petitioners, *Heller*, 128 S. Ct. 2783 (No. 07-290), *available at* http://www.gurapossessky.com/news/parker/documents/07 -290tsacProfessorsOfLinguistics.pdf.

surface of most political disagreements over a provision's structural teleological meaning is the question of popular sovereignty.[307] The most salient example of this fact can be seen in the debate between Alexander Meiklejohn and Robert Bork over the structural teleological meaning of the First Amendment's Free Speech Clause. Meiklejohn claims that the First Amendment, like the Tenth, does not so much guarantee individual rights as "protect the governing 'powers' of the people from abridgment by the agencies which are established as their servants."[308] In this sense, the First Amendment is unique among the Constitution's enumerated rights provisions in that it is absolute.[309] Bork, on the other hand, argues that holding the First Amendment to be absolute would in fact undermine the popular sovereignty principle to which Meiklejohn appeals because it would enable radical political minorities to advocate the overthrow of the political system to which the majority consented.[310]

Nobody disputes the fact that the people are sovereign *on paper*, but there is intense disagreement as to what such popular sovereignty means *in practice* in hard cases where specific constitutional rights guarantees or grants of power are immediately at issue.

A. The Structural Duality of Written Constitutions

The various competing articulations of the relationship of popular sovereignty to specific rights guarantees or grants of power are premised upon competing understandings of the Constitution's

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[307] The political struggle over a provision's structural teleological meaning illustrates the contradiction inherent in our Constitution between democracy, which operates according to the rule of the majority, and popular sovereignty, which assumes a single, unified "general will." *See* Robert Post, *Democracy, Popular Sovereignty, and Judicial Review*, 86 CAL. L. REV. 429, 437 (1998) ("Constitutional theory . . . must distinguish between democracy and . . . popular sovereignty. We can define popular sovereignty as the subordination of the state to the popular will, as that will is recognized by such procedural criteria as majoritarianism or the amendment mechanism of Article V. . . . Particular expressions of the popular will may or may not be consistent with the requirements of democratic self-governance. If the people were duly to enact a constitutional amendment that abolishes the vote and awards lifetime and hereditary tenure to federal officials, the amendment would exemplify popular sovereignty, but it would nevertheless be manifestly antidemocratic.").

[308] Alexander Meiklejohn, *The First Amendment Is an Absolute*, 1961 SUP. CT. REV. 245, 254.

[309] *Id.* ("In the field of our governing 'powers,' the notion of 'due process' is irrelevant.").

[310] Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1, 31 (1971) ("Speech advocating forcible overthrow of the government contemplates a group less than a majority seizing control of the monopoly power of the state when it cannot gain its ends through speech and political activity [and is] thus not 'political speech' as that term must be defined by a Madisonian system of government."); *see also* Cass R. Sunstein, *Free Speech Now*, 59 U. CHI. L. REV. 255, 257 (1992) ("[A]n effort to root freedom of speech in a conception of popular sovereignty . . . protect[s] speech that should not be protected [and] invalidate[s] democratic efforts to promote the principle of popular sovereignty under current conditions.").

structure.[311] But the political passions that drive these competing articulations lead their proponents to overlook the dual meaning of "structure" that is unique to *written* constitutions such as our own.[312] By codifying it in writing, the framers of the original Constitution sought to improve upon, *though not to replace*, the unwritten English constitution they had been raised to venerate but which, in their eyes, had failed them so thoroughly as to necessitate a Revolutionary War for independence from Britain.[313] The colonists understood the word "constitution" not as a "deliberately contrived design of government and a specification of rights beyond the power of ordinary legislation to alter" but rather the "existing . . . arrangement of governmental institutions, laws, and customs together with the principles and goals that animated them."[314] The rights that the colonists accused the British of violating were *natural* rights that predated and existed independently of the type of positive law they would have considered logically capable of being codified in writing.[315] The written Constitution was not an innovation designed to substitute positive law for natural law as the basis of inalienable rights but to supplement natural law with a formal delineation of a "fundamental law" rooted in the sovereignty of the people that expressly authorized,

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[311] *See, e.g.*, Akhil Reed Amar, *Guaranteeing a Republican Form of Government: The Central Meaning of Republican Government: Popular Sovereignty, Majority Rule, and the Denominator Problem*, 65 U. COLO. L. REV. 749, 761 (1994) ("We have been told that the Preamble's reference to 'the People' is essentially meaningless; that the Ninth Amendment's reference to 'the People' implicates only individual rights like privacy; and that the Tenth Amendment's reference to 'the People' involves only states' rights. What we miss is how all these references to 'the People' are embodiments of the Constitution's unitary structure and overarching spirit of popular sovereignty—of the people's right to 'ordain' and 'establish,' and their 'reserved' and 'retained' rights to alter or abolish, their Constitution."); James A. Gardner, *Consent Legitimacy, and Elections: Implementing Popular Sovereignty Under the Lockean Constitution*, 52 U. PITT. L. REV. 189, 208–09 (1990) ("The explicit designation of Congress as the supreme lawmaker; the provision for popular election of legislative representatives; the requirement of ratification by special popular conventions; the reservation by the people of unenumerated rights in the ninth and tenth amendments; and the general structure of the body of the Constitution itself, which purports to dictate both the form of government and the scope of powers granted, all point strongly to a Lockean notion of popular sovereignty based on consent of the governed." (footnotes omitted)).

[312] *See, e.g.*, Stephen R. Munzer & James W. Nickel, *Does the Constitution Mean What It Always Meant?*, 77 COLUM. L. REV. 1029, 1030 (1977) ("No progress can be made in understanding what the Constitution is unless we recognize that our constitutional system is a unique, intricate product of text and institutional practice and that the notions of 'meaning,' 'interpretation,' and 'fidelity' to the Constitution must reflect that duality.").

[313] *See* Suzanna Sherry, *The Founders' Unwritten Constitution*, 54 U. CHI. L. REV. 1127, 1156 (1987) ("[T]he notion of the Constitution as popularly enacted positive law did not serve to replace the earlier idea of fundamental law as inherent and declared rather than enacted, but instead merely complemented the older tradition.").

[314] BERNARD BAILYN, THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION 67–68 (1967).

[315] Sherry, *supra* note 313, at 1156.

indeed commanded, the people's representatives to invalidate contrary positive law:

> By 1787, then, Americans had a clear vision of the nature of a constitution as a species of fundamental law. Like natural law and laws or traditions that had existed since time immemorial, it could be used to invalidate positive law, but again like natural law and those long-established laws and traditions, a constitution was not itself seen as positive, enacted law but rather as a declaration of first principles.[316]

The highly politicized structural disagreements that today accompany high-impact constitutional judicial decisions often directly inform the reasoning of the Justices themselves.[317] Such reasoning tends erroneously to treat the constitutional text exclusively as positive law and thereby ignore the structural duality that results from the Constitution's writtenness.[318]

Morton Horwitz places this structural duality at the center of the originalism-living constitutionalism debate that defined the 1987 Bork nomination, a debate Horwitz characterizes as the product of a long-unresolved "argument between an eighteenth century Newtonian Constitution and a nineteenth century Darwinian Constitution.[319]

> The Newtonian view of the universe was a perfect machine set in motion by a deist God at the beginning of time. Everything subsequent was determined by the operation of physical laws, present at the beginning and themselves never changing. The Newtonian Constitution corresponded to these physical laws, and like them was meant to last for all

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[316] *Id.* at 1146.

[317] Historian John Phillip Reid places these contemporary political disagreements at the center of the process by which "law-office history," *see* discussion *supra* Part I.B.1, is produced. *See* John Phillip Reid, *Law and History*, 27 LOY. L.A. L. REV. 193, 204 (1993) ("Although their opinions may be confused, the judges generally are not. When they tell their law clerks to find them some 'history' supporting a point of law they plan to promulgate, their interest lies in authority, not in evidence. This use of history is not to learn about the past, but merely to support an outcome. . . . In almost every instance when history is employed, the decision has already been formulated. Unprofessional history is used to explain the decision, to make the decision more palatable, or, in most cases, to justify the decision." (footnote omitted)).

[318] *See* Jeremy Waldron, Torture and Positive Law: Jurisprudence for the White House 1 (unpublished manuscript), *available at* http://escholarship.org/uc/item/23d27577?query=positive;hitNum=1# (criticizing Bush administration lawyers for enabling the torture practices typified by Abu Ghraib by characterizing prohibitions against torture as "positive law" instead of as "a legal archetype . . . which is emblematic of our larger commitment to break the link between law and brutality").

[319] *See* Horwitz, *supra* note 48, at 657.

> time. The Newtonian worldview of the framers certainly encouraged this sort of imagery. By contrast, the Darwinian ideal of the nineteenth century, the idea of evolution, supposed the unfolding of gradual but inevitable change in the Constitution. As society changed, the Constitution would change, adapting to the environment in which it flourished.[320]

The Newtonian Constitution is a fundamentally synchronic model of the Constitution's structure because it assumes that the very writtenness of that structure is sufficient to fix it for all time. The Darwinian Constitution, on the other hand, is a fundamentally diachronic model of the Constitution's structure because it acknowledges that the structure can change in spite of its writtenness.[321]

1. The "Newtonian" Constitution

A particularly apt description of the structure of the Newtonian Constitution is Laurence Tribe's portrayal of "a constitutive text that purports, in the name of the People of the United States of America, to bring into being a number of distinct but interrelated institutions and practices, at once legal and political, and to define the rules governing those institutions and practices"[322]:

> Read in isolation, most of the Constitution's provisions make only a highly limited kind of sense. Only as an interconnected whole do these provisions meaningfully constitute a frame of government for a nation of states. Although the first three Articles of the Constitution broadly correspond to the three great governmental institutions created by the Constitution, each of these three Articles contains numerous cross-references to the other two, so that the interdependent nature of the governmental structure thereby created is obvious. Like any blueprint of a complex architectural edifice, moreover, the whole constituted by these three Articles is plainly more than the sum of its parts. There is no way to avoid at least some reading between the lines if one is to make coherent sense of the edifice in its entirety.[323]

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[320] *Id.*

[321] *See* KAMMEN, *supra* note 49 and accompanying text.

[322] Tribe, *supra* note 46, at 1235.

[323] *Id.* at 1235–36.

This conception, not surprisingly, is very pleasing to the textualist sensibilities of originalists because it allows for a purely semantic understanding of the Constitution's structure.[324] Under the Newtonian model, the people remain sovereign for all time simply because the Preamble all but says so, and judges must simply refer to the relationships among the eternally fixed meanings of the Constitution's substantive textual provisions to understand how.[325]

2. The "Darwinian" Constitution

Under the Darwinian model, by contrast, the fact of popular sovereignty is in no way guaranteed to last indefinitely. The German jurist Carl Schmitt distinguished the sociological fact of sovereignty from the legal norm of sovereignty by positing that the true sovereign is "he who decides on the exception" to established legal rules and norms, deciding when a state of emergency calls for the legitimate violation of those rules and norms and then acting in violation of them in order ultimately to restore them.[326] The sovereign may take a wide variety of forms, it can be a king, a parliament, or "the people," but its defining characteristic is not its abstract *right* to "decide on the exception" but its actually existing *power* to do so.[327] Even were one to assume that "We the People" had this power at the time of the founding and exercised it in the very act of creating the United States government via a written Constitution, the mere codification of "We the People" as sovereign in the Constitution's preamble does not guarantee that that power remains perpetually in the hands of "We the People."[328]

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[324] Justice Scalia exhibits a synchronic, Newtonian approach to structure in Heller when he discusses the relationship of the words "the people" in the Second Amendment to other provisions containing that phrase. Dist. of Columbia v. Heller, 128 S. Ct. 2783, 2790 (2008) ("Three provisions of the Constitution refer to 'the people' in a context other than 'rights'—the famous preamble ('We the people'), § 2 of Article I (providing that 'the people' will choose members of the House), and the Tenth Amendment (providing that those powers not given the Federal Government remain with 'the States' or 'the people'). Those provisions arguably refer to 'the people' acting collectively—but they deal with the exercise or reservation of powers, not rights. Nowhere else in the Constitution does a 'right' attributed to 'the people' refer to anything other than an individual right.").

[325] *See* Samuel Freeman, *Original Meaning, Democratic Interpretation, and the Constitution*, 21 PHIL. & PUB AFF. 3, 29 (1992) ("Originalism is not part of American constitutional law; it is a revisionary thesis that relies on philosophical claims regarding the nature of democracy and the character of a written constitution.").

[326] CARL SCHMITT, POLITICAL THEOLOGY: FOUR CHAPTERS ON THE CONCEPT OF SOVEREIGNTY 5 (George Schwab trans., MIT Press 1985).

[327] *Id.* at 18 ("The connection of actual power with the legally highest power is the fundamental problem of the concept of sovereignty.").

[328] *See* Everett McKinley Dirksen, *The Supreme Court and the People*, 66 MICH. L. REV. 837, 838 (1968) ("Freedom lost is not easily regained. Those who have taken a right from the people rarely restore it willingly. Throughout our long history as a nation we have seen the

The notion of a constitution that is not set in stone but is in fact capable of growth and decay did not begin with either the "living constitutionalism" of the Warren era or with nineteenth-century Darwinism; it is part of a much older tradition that predates the founding and that characterized the understanding of the term "constitution" that Britons and colonial Americans held toward the unwritten English constitution.[329] Historian John Phillip Reid identifies the methodology that English common lawyers practiced well into the eighteenth century when interpreting and construing Britain's "ancient constitution" as "forensic history":

> As a forensic technique, ancient constitutionalism was less history than advocacy, more imagination than scholarship, yet real enough to be the basic tool for both constitutional argumentation and for the defense of collective liberty. The forensic strengths of the methodology are striking. To gain polemical advantage when contending for a legal doctrine or against the exercise of power, one needed only: (1) to postulate a timeless continuity—an ancient constitution whose origins and functions were lost in infinity; or (2) to postulate a customary tradition that had been practiced from an era to which "the memory of man runneth not to the contrary." Once these premises were in place, any government innovations to which one objected could be challenged as subversive of the ancient constitution or of established legal custom. If there had been alterations in constitutional government that had not been denied—substantial departures from earlier constitutional practice—they could be dismissed as matters of mere form, not amounting to fundamental change. . . . What mattered was not recent practices or changing customs, but rather the timeless "first principles" of ancient constitutionalism. With the quality of timelessness, the ancient constitution was

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rights of the people protected by our legislatures, both federal and state. We have witnessed the experimentation and the change that the people have made or brought about through their legislatures. But always it has been the people through their legislatures or at the polls that made the change.").

[329] *See* Reid, *supra* note 317, at 205–06 ("Sometimes called the gothic constitution, the ancient constitution was the suppositive aboriginal political structure of Anglo-Saxon society, the origins of which are discoverable in the mythology of the forests of prehistoric Germany.").

> always available as a standard when arguments were made for correcting the rivulets of erroneous details.[330]

Unlike "law office history,"[331] which Reid considers "antithetical to the use of history to ascertain objective truth,"[332] "forensic history" offers at least the potential to successfully "separate history used to screen a judge's activism from history that fixes the limits of decision."[333]

Reid's point is subtle. His recognition that the ancient constitutionalists used forensic history "less [as] history than advocacy"[334] may appear at face value to be an admission that it too is mere "judicial activism," but it is in fact a tacit acknowledgment that every judicial decision that limits governmental power is itself an affirmative assertion of power with concrete structural consequences that are entirely distinct from the rule or norm promulgated in the decision.[335] It was in this sense that "the ancient constitution was shaped by subjective, not objective, proof."[336]

B. Structural Anachronisms

The structural duality of our written Constitution results in countless structural *anachronisms*, contradictions between a "Newtonian" structure expressly set forth in the text and a "Darwinian" structure that has deviated from it without the sovereign people's formal consent.[337] A structural anachronism is *legitimate* if, in spite of lacking such popular consent, it leaves intact the people's

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[330] *Id.* at 207.

[331] *See* Kelly, *supra* note 121, at 122 n.13 ("By 'law-office' history, I mean the selection of data favorable to the position being advanced without regard to or concern for contradictory data or proper evaluation of the relevance of the data proffered.").

[332] Reid, *supra* note 317, at 201 (quoting Wilcomb E. Washburn, *The Supreme Court's Use and Abuse of History*, ORG. AM. HISTORIANS NEWSL., Aug. 1983, at 7, 9).

[333] *Id.* at 220.

[334] *Id.* at 207.

[335] *See id.* at 206 ("The further that a governmental command deviated from the supposed model of the ancient constitution of liberty, the more it could be opposed as unconstitutional, or, at least, challenged as an act of "power" rather than an act or "right.").

[336] *Id.*

[337] *See* Akhil Reed Amar, *The Consent of the Governed: Constitutional Amendment Outside Article V*, 94 COLUM. L. REV. 457, 501 (1994) [hereinafter Amar, *Article V*] ("The distinction between procedures for constitutional change authorized by our existing Constitution (Article V and majority rule popular sovereignty) and procedures prohibited by it (a 'coup,' however peaceful and popular) is vital. Citizens, lawmakers, and judges who have taken oaths to support our Constitution may—and in some cases must—cooperate in implementing the legal procedures under Article V and majority rule popular sovereignty. Even if oath-takers ratify a 'new Constitution,' they are not in the process violating or betraying the old one, but acting in pursuance of its deepest norms, practicing what it preaches, flattering and honoring its framers by legally imitating them.").

sovereignty as a *sociological* fact—its actual power vis-à-vis the government that normatively governs it in a fiduciary capacity.[338] It is *illegitimate* insofar as it diminishes this actual power and thereby transfers it to the government.[339]

The judge's purpose in adjudicating a particular case under the diachronic method is to discern the structural teleological meaning of the provision at issue by identifying every structural anachronism that is relevant to that provision and construing the provision so as to *preserve* the people's sovereign power where the anachronism is

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[338] Carl Schmitt's discussion of "democratic legitimacy" in his treatise *Constitutional Theory* is helpful in illustrating this point:

> *Democratic legitimacy* . . . rests on the idea that the state is the political unity of a *people*. The people are the subject of every definition of the state; the state is the political status of a people. They type and form of state existence is determined according to the principle of democratic legitimacy through the free will of the people.
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> The people's constitution-making will is bound to no particular process. However . . . , the current practice of democratic constitutions elaborated certain methods, whether it is the election of a constitution-making assembly or it is a popular vote. These methods are frequently bound up with the idea of democratic legitimacy, so that one inserts a certain process into the concept of legitimacy. One only designates as truly democratic such constitutions that have found the consent of a majority of enfranchised state citizens in the secret ballot procedure. . . . The tacit consent of the people is also always possible and easy to perceive. A conclusive action is discernible in the mere participation in public life a constitution provides, for example, an action through which the people's constitution-making will expresses itself clearly enough. That is valid for the participation in elections, which brings with it a certain political condition.
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> . . . .
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> In this way, therefore, the character of democratic legitimacy can be attributed to the most diverse constitutions in that it is based on the people's ever-present, active constitution-making power, even if that power is only tacit.

CARL SCHMITT, CONSTITUTIONAL THEORY 138–39 (Jeffrey Seitzer, ed. & trans., Duke Univ. Press 2008).

[339] Left unchecked, the progressive diminution of the popular sovereign's power will so severely undermine the Darwinian structural integrity of the Constitution as to destroy permanently the normative force of the printed words that make up its Newtonian framework. Sanford Levinson and Jack Balkin describe three types of "constitutional crises" in which such an outcome is imminent. *See* Sanford Levinson & Jack M. Balkin, *Constitutional Crises*, 157 U. PA. L. REV. 707, 714 (2009) ("[A] constitutional crisis refers to a turning point in the health and history of a constitutional order, and we identify three different types of constitutional crises. The first two types were identified by Machiavelli in the quotation that begins this Article. Type one crises arise when political leaders believe that exigencies require public violation of the Constitution. Type two crises are situations where fidelity to constitutional forms leads to ruin or disaster. Type three crises involve situations where publicly articulated disagreements about the Constitution lead political actors to engage in extraordinary forms of protest beyond mere legal disagreements and political protests: people take to the streets, armies mobilize, and brute force is used or threatened in order to prevail. If a central purpose of constitutions is to make politics possible, constitutional crises mark moments when constitutions threaten to fail at this task.").

legitimate and to *restore* this power where the anachronism is illegitimate.

1. "Newtonian" Amendments and "Darwinian" Transformations

The diachronic method's conception of structural teleological meaning as the applicative ideal toward which judges ought to strive when interpreting and construing constitutional provisions is grounded in the forensic-historical idea of the judiciary as an autonomous political agent with a subjective free will of its own that openly justifies its assertion of power by appealing to "timeless" constitutional principles.[340] The writtenness of the American Constitution, however, adds a new wrinkle to the judicial process of correcting structural imbalances through adjudication. The Constitution's express vesting of sovereignty in "We the People"[341] and textual proclamation of federalism and separation of powers that delineates the Constitution's basic structure substantially complicates the legitimacy of a U.S. court's appeal to "timeless" principles, because the principles that expressly inform our Constitution's structure are not timeless at all; they date from 1789, the year the Constitution was ratified. Because this structure and these principles were codified in writing, judges cannot legitimately ignore the text and assert, as the *sole* justification for their decision, an unapologetically advocacy-laden, subjective account of the Constitution's proper structure in the manner of the ancient constitutionalists.

American judges using forensic history in interpreting constitutional provisions can therefore, at best, posit an original structure as informed by the 1789 text (with reference to the

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[340] *See* Reid, *supra* note 317, at 206–07 ("The concept of timelessness allowed the advocate for certain legal principles or legal institutions to place those principles or institutions in the context of continual constitutionality even if repudiated by the Crown or rendered inoperative by nonusage.").

[341] The word "sovereign," as Justice Wilson noted during the first decade after the founding, appears nowhere in the text of the original Constitution. *See* Chisholm v. Georgia, 2 U.S. (2 Dall.) 419, 454 (1793) (opinion of Wilson, J.) ("To the Constitution of the United States the term SOVEREIGN, is totally unknown."); *see also* discussion *supra* notes 283–94. Yet the structure of the text itself logically precludes the possibility that sovereignty might be vested in the federal government or in the several states *instead* of in the people themselves:

> [Popular sovereignty in the American Constitution] is reinforced by the fact that Article I begins "All legislative powers *herein granted* shall be vested in a Congress of the United States. Granted by whom? Surely not the Congress itself, and there is little to support the idea that the grant of authority comes from the other branches or the states. Quite clearly, the grant comes from the people, since the Preamble shows that they are the only ones who are speaking through the text.

Alicea, *supra* note 34, at 49.

individual respective historical teleological meanings of its various provisions) and then argue persuasively that the contemporary structure has deviated from the original structure and that their decisions have the effect of correcting that structural deviation.[342] In short, their reasoning must impliedly mix the engineering and biology constitutional metaphors that Horwitz identifies.[343] Any "Darwinian" mutation from the baseline structural blueprint for the "Newtonian" perpetual motion machine that the framers built in 1789 is a *defect*, and the proper function of the judiciary is to identify and undo such mutations and thereby restore that perpetual motion machine to its original "factory conditions."

The German legal scholar Georg Jellinek, writing about the American judicial system a century ago, provides a useful comparative analysis of the process of constitutional change under the two respective structural models:

> By constitutional amendment, I mean change in the text of the constitution through a purposeful act of will; by constitutional transformation, I mean change that allows the text to remain formally unchanged and is caused by facts that need not be accompanied by an intention or awareness of the change. . . .
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> Not without reason have people in America described the courts as the third house of the legislature. In deciding on the constitutionality of laws, the judge is subject to the enormous pressure of public opinion, often split along party lines, which in a democracy forces itself with irresistible power upon anyone in public life; thus in many cases the judge's view of

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[342] The Tenth Amendment cases that characterized the "New Federalism" of the Rehnquist Court are in some sense an attempt at interpreting the Constitution's Newtonian structure in its entirety using forensic history. *See, e.g.*, Alden v. Maine, 527 U.S. 706, 743 (1999) ("In light of the historical record it is difficult to conceive that the Constitution would have been adopted if it had been understood to strip the States of immunity from suit in their own courts and cede to the Federal Government a power to subject nonconsenting States to private suits in these fora."); Printz v. United States, 521 U.S. 898, 907 (1997) ("[T]he Constitution was originally understood to permit imposition of an obligation on state *judges* to enforce federal prescriptions, insofar as those prescriptions related to matters appropriate for the judicial power. That assumption was perhaps implicit in one of the provisions of the Constitution, and was explicit in another. In accord with the so-called Madisonian Compromise, Article III, § 1, established only a Supreme Court, and made the creation of lower federal courts optional with the Congress—even though it was obvious that the Supreme Court alone could not hear all federal cases throughout the United States."); *see also* Daniel A. Farber, *Pledging a New Allegiance: An Essay on Sovereignty and the New Federalism*, 75 NOTRE DAME L. REV. 1133 (2000) (discussing the main tenets of the New Federalism creed and showing how they are faithfully mirrored in current Eleventh Amendment doctrine).

[343] *See* Horwitz, *supra* note 48, at 657.

> the law in question, as objective as he may think himself, is politically colored. . . .
>
> The development of the constitution provides us with the great doctrine—the great significance of which has not yet been sufficiently appreciated—that legal precepts are incapable of actually controlling the distribution of power in a state. Real political forces move according to their own laws, which act independently of any legal forms.[344]

A formal constitutional amendment, then, is analogous to a mechanical upgrade of the "Newtonian" constitutional *machine* whereas an unwritten constitutional "transformation" is analogous to a genetic mutation in the "Darwinian" constitutional *organism.*

2. Transformations "from Above" and "from Below"

Constitutional transformations may come about "from above," through governmental action, or "from below," through social, economic, or technological change. The paradigm example of transformation "from above" is the New Deal constitutional "revolution" of the 1930s,[345] in which the President worked with Congress to enact social and economic legislation on a hitherto unprecedented scale, presided over the birth of an administrative and regulatory state that radically expanded the power of the federal government, and coerced the courts into abandoning the traditional principles of federalism that stood in the way of these reforms.[346] Another key example is the radical expansion during the twentieth century of executive power in the form of the national security state that culminated in the creation of permanent standing army.[347] The judiciary itself is also a major source of transformations "from above," and the express recognition of the transformative effects of adjudication on the Constitution's Darwinian structure is perhaps the

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[344] Georg Jellinek, *Constitutional Amendment and Constitutional Transformation, in* WEIMAR: A JURISPRUDENCE OF CRISIS 54, 57 (Arthur J. Jacobson & Bernhard, eds., 2000).

[345] *See* Jack M. Balkin, *Framework Originalism and the Living Constitution*, 103 NW. U. L. REV. 549, 562 (2009) [hereinafter Balkin, *Framework*] ("Landmark precedents like the New Deal decisions became durable precisely because so much of the developing structure of governance depended on their construction of the Constitution."); Ackerman, *supra* note 49, at 1796 ("[I]t was only during the New Deal that the new organicism triumphed decisively in our constitutional law.").

[346] *See generally* Cass R. Sunstein, *Constitutionalism After the New Deal*, 101 HARV. L. REV. 421, 421 (1987) (tracing the "present failures" of the administrative state to "the New Deal's failure to incorporate the original constitutional commitment to checks and balances into regulatory administration").

[347] *See* Balkin, *Framework*, *supra* note 345, at 566–67.

one innovation that most emphatically sets the diachronic method apart from both originalism and living constitutionalism.[348]

Transformations "from below," by contrast, are far more incremental in character and far less noticeable as they occur. Scientific and technological developments since the founding have historically tended to shift the balance of power between the sovereign people and their representative government without any action by government entities.[349] It is likely, for example, that scientific advances in criminal investigations in the late nineteenth and early twentieth centuries led to the Court's adoption of the Fourth Amendment exclusionary rule in 1914.[350] The recent revolution in information technology, moreover, has created opportunities for government surveillance that threaten to eviscerate the Fourth Amendment's privacy protections entirely.[351]

These two types of transformations are not mutually exclusive but in fact reinforce each other in a reciprocal fashion. The effect of new technologies such as the automobile on the American legal system during the twentieth century is unprecedented.[352] The

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[348] Balkin acknowledges this transformative aspect of judicial decisions but incorporates it into his own peculiar conception of "construction," which differs the interpretation-construction of Whittington and Solum, *see supra* text accompanying note 50, in that it posits the judiciary as but one of several "political actors" that effect constitutional change over time. *See* Balkin, *Framework*, *supra* note 345, at 559–69. The transformative activity in which courts engage, Balkin approvingly maintains, "rationalizes and supplements constitutional construction by the political branches and responds to changes in political and cultural values in the nation as a whole." *Id.* at 569. The diachronic method, by contrast, directs judges to reject any such presumption of legitimacy non-judicial transformations "from above" and critically question the extent to which such transformations have diminished the people's sovereign power.

[349] Jack Balkin has written numerous articles on the effect of technological change on the Constitution's "Darwinian" structure. *See, e.g.*, Jack M. Balkin, *The Future of Free Expression in a Digital Age*, 36 PEPP. L. REV. 427 (2009) (arguing that the Progress Clause of Article I, Section 8, should be read today in concert with the First Amendment); Jack M. Balkin, *The Constitution in the National Surveillance State*, 93 MINN. L. REV. 1 (2008) (arguing that the national surveillance state raises problems not only for the Constitution, but also for the rule of law itself); Jack M. Balkin, *How New Genetic Technologies Will Transform* Roe v. Wade, 56 EMORY L.J. 843 (2007) (arguing that women in the twenty-first century, possess a right to abortion as a necessary but not sufficient condition for securing their equal citizenship under the Fourteenth Amendment); Jack M. Balkin, *Digital Speech and Democratic Culture: A Theory of Freedom of Expression for the Information Society*, 79 N.Y.U. L. REV. 1 (2004) (arguing that digital technologies alter the social conditions of speech and therefore should change the focus of free speech theory).

[350] *See* B.J. George Jr., *Scientific Investigation and Defendants' Rights*, 57 MICH. L. REV. 37, 47 (1958) (citing Weeks v. United States, 232 U.S. 383 (1914)).

[351] *See* PRIVACY PROTECTION STUDY COMM'N, PERSONAL PRIVACY IN AN INFORMATION SOCIETY (1977) (analyzing the effect of computer technology on the relationships between individuals and various record-keeping organizations), *available at* http://epic.org/privacy/ppsc1977report/.

[352] *See* Arthur Selwyn Miller, *Technology, Social Change, and the Constitution*, 33 GEO. WASH. L. REV. 17, 45 (1964) ("Technology . . . works toward the 'consolidation of power'; it thus runs counter to a number of the basic themes and purposes of the American Constitution

explosion of statutes regulating or criminalizing increasingly commonplace conduct, furthermore, has multiplied the situations in which law enforcement officers have probable cause to make searches and arrests.[353] The combined effect of these two tendencies on the individual's legal susceptibility to being searched by law enforcement agents is on full display in *Atwater v. City of Lago Vista*.[354]

At issue in *Atwater* was "whether the Fourth Amendment forbids a warrantless arrest for a minor criminal offense [that is] punishable only by a fine."[355] The petitioner, Gail Atwater, "was driving her pickup truck in Lago Vista, Texas, with her 3-year-old son and 5-year-old daughter in the front seat."[356] A local police officer pulled her over after noticing that neither she nor her two children were wearing seatbelts.[357] Under Texas law, police officers who stop motorists for minor offenses like seatbelt violations may, at their discretion, either issue a citation or make a full custodial arrest, with or without a warrant.[358] The officer who pulled Atwater over chose the latter option and took her into custody.[359] Her two children narrowly avoided having to accompany their mother to the police station for booking because a family friend "learned what was going on and soon arrived to take charge of the children."[360] Atwater and her husband sued the City of Lago Vista, alleging that the city had "violated [her] Fourth Amendment 'right to be free from unreasonable seizure.'"[361]

In his opinion for the Court, Justice Souter put the burden on Atwater to "cite[] . . . particular evidence that those who framed and ratified the Fourth Amendment sought to limit peace officers'

(of 1787)" (footnote omitted)); William Fielding Ogburn, *Technology and Governmental Change*, 9 J. BUS. U. CHI. 1, 11 (1936) ("The advantage of a larger central government by consolidation of these smaller local governing units is easily argued. The advantages of consolidation are not difficult to see in dealing with crime, where the narrow boundary lines of city governments are quite inadequate to hold the criminal. He has learned the use of the automobile in making his escape, and his search for hide-outs has taken him into outlying regions where police surveillance is weak or non-existant [sic].").

[353] *See, e.g.*, Anil Kalhan, *The Fourth Amendment and Privacy Implications of Interior Immigration Enforcement*, 41 U.C. DAVIS L. REV. 1137, 1218 (2008) ("As . . . new interior [immigration] enforcement initiatives proliferate, . . . it is important to more directly consider and appreciate the social value of preserving zones in society where immigration and citizenship status remain invisible and irrelevant, and private.").

[354] 532 U.S. 318 (2001).

[355] *Id.* at 323.

[356] *Id.*

[357] *Id.* at 323–24.

[358] *Id.* at 323.

[359] *Id.* at 324.

[360] *Id.*

[361] *Id.* at 325.

warrantless misdemeanor arrest authority to instances of actual breach of the peace"[362] or at least that "her claimed rule has ever become 'woven . . . into the fabric' of American law."[363] In holding that Atwater failed to meet this burden, Souter cited the modern-day institutional inconveniences that would result from invalidating the police conduct at issue or from establishing the unconstitutionality of warrantless arrests for *fine-only* offenses as a bright-line rule:

> One line, [Atwater] suggests, might be between "jailable" and "fine-only" offenses, between those for which conviction could result in commitment and those for which it could not. The trouble with this distinction, of course, is that an officer on the street might not be able to tell. It is not merely that we cannot expect every police officer to know the details of frequently complex penalty schemes but that penalties for ostensibly identical conduct can vary on account of facts difficult (if not impossible) to know at the scene of an arrest. Is this the first offense or is the suspect a repeat offender? Is the weight of the marijuana a gram above or a gram below the fine-only line? Where conduct could implicate more than one criminal prohibition, which one will the district attorney ultimately decide to charge? And so on.
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> But Atwater's refinements would not end there. She represents that if the line were drawn at nonjailable traffic offenses, her proposed limitation should be qualified by a proviso authorizing warrantless arrests where "necessary for enforcement of the traffic laws or when [an] offense would otherwise continue and pose a danger to others on the road." . . . The proviso only compounds the difficulties. Would, for instance, either exception apply to speeding? At oral argument, Atwater's counsel said that "it would not be reasonable to arrest a driver for speeding unless the speeding rose to the level of reckless driving." But is it not fair to expect that the chronic speeder will speed again despite a citation in his pocket, and should that not qualify as showing that the "offense would . . . continue" under Atwater's rule? And why, as a constitutional matter, should we assume that

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[362] *Id.* at 336.
[363] *Id.* at 340.

> only reckless driving will "pose a danger to others on the road" while speeding will not?[364]

Souter's reasoning makes logical sense only in the context of two constitutional "transformations" that have occurred since the adoption of the Fourth Amendment in 1791: the proliferation of state and local traffic laws in the twentieth century and the "frequently complex penalty scheme" that accompanied it (transformation "from above") and the development of nationally linked computer databases that make it possible in the first place for a police officer to promptly determine whether a motorist he has stopped is a "chronic speeder" (transformation "from below").

3. Legitimacy and Constitutional Change

The diachronic method's ability to guide judges in their interpretation of the Constitution toward holdings that uphold the people's sovereign power at the moment of decision is premised upon the assumption that judges are capable of distinguishing legitimate anachronisms that leave the people's sovereign power intact from illegitimate anachronisms that diminish it. This neat, concise statement, however, is a mere "approximation"[365] of the legitimacy inquiry that misleadingly suggests a unanimous public agreement as to whether and how, and to what extent the individual rights guarantees and grants of power contained in the text of constitutional amendments have altered the overall structure originally set forth in 1789. These questions have answers that are far from self-evident, but which materially determine not only the *legitimacy* of particular structural anachronism but also the very fact of its *existence*.

a. The Diachronic "Newtonian" Blueprint and Implied Structural Alteration

The amendment process set forth in Article V of the original Constitution expressly provides a mechanism by which "We the People" can alter the Constitution with *per se legitimacy*.[366] A

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[364] *Id.* at 348–49 (alteration in original) (footnotes omitted) (citations omitted).

[365] The Author's use of the word "approximation" is an adaptation of Solum's use of the term to refer to the raw semantic materials of a provision's "clause meaning" before it is modified by "publicly available context" or a "division of linguistic labor." *See* Solum, *Semantic Originalism*, *supra* note 24, at 52–54.

[366] Some have argued, in fact, that even some proposed Article V amendments may be illegitimate despite having cleared the supermajoritarian hurdles that Article V imposes on changes to the Constitution's Newtonian framework. *See* William L. Marbury, *The Limitations upon the Amending Power*, 33 HARV. L. REV. 223, 225 (1919) ("It is not conceivable that the people, when they conferred upon the legislatures of three fourths of the states the power to

properly diachronic interpretation of an individual constitutional provision must therefore take into account the ambiguous *temporal* relationship between two or more textual provisions of the Constitution, each of which were adopted at different times. It is possible that at least some Article V amendments have effected *implied structural alterations* to the Constitution's Newtonian structural blueprint, superseding the version of that blueprint that existed prior to the amendment without expressly stating so.[367] Courts must not only, as Professor Tribe would put it, "read between the lines" when they interpret the "Newtonian" structural blueprint from which "Darwinian" transformations deviate; they must interpret this blueprint *diachronically* and critically examine *temporal* as well as *spatial* relationships between individual provisions. The addition of a temporal dimension to the "Newtonian" structural blueprint significantly increases the judge's susceptibility to infection by political bias. His particular understanding of whether, how, and to what extent an amendment provision impliedly alters the structure originally set forth in the 1789 text betrays his ideological sympathies and exposes him unavoidably as either conservative, liberal, or revolutionary, but never neutral.

The most salient example of this tendency is the controversy over the incorporation of the Bill of Rights via Section 1 of the Fourteenth Amendment.[368] Raoul Berger, an early conservative pioneer of originalism, insists that the Fourteenth Amendment was never intended to and does not in fact alter or supersede the structure of federalism that the framers of the 1789 text had created.[369] Berger's

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amend this Constitution, intended to authorize the adoption of any measures, under the guise of amendments, the effect of which would be to destroy, wholly or in part, any of the members of this perpetual Union."). *But see* William. L. Frierson, *Amending the Constitution of the United States: A Reply to Mr. Marbury*, 33 HARV. L. REV. 659, 660 (1920) ("The only security against the adoption of ill-advised or, if you please, revolutionary amendments is that, in the last analysis, the states themselves are the judges of the necessity for proposed amendments, and the action of three fourths of those states is required. No better security, however, could be devised. It is hardly conceivable that three fourths of the states will ever agree to a change in the fundamental law which will, to any essential extent, deprive a state of its sovereignty.").

[367] The Constitution's contemporary Newtonian blueprint contains twenty-seven provisions that were added to the original 1789 Newtonian blueprint at different historical moments. It is thus logically impossible for a judge to interpret the entire written Newtonian structure synchronically, because different provisions relate to and affect one another across time.

[368] This controversy takes center stage in *McDonald v. City of Chicago*, 130 S. Ct. 3020 (2010), as Part IV of this Note will demonstrate.

[369] *See* RAOUL BERGER, GOVERNMENT BY JUDICIARY: THE TRANSFORMATION OF THE FOURTEENTH AMENDMENT (1977) (arguing that the Fourteenth Amendment was not intended to make the Bill of Rights binding upon the states); Raoul Berger, *Incorporation of the Bill of Rights: A Nine-Lived Cat*, 42 OHIO ST. L.J. 435 (1981) (arguing that the historical record proves

thesis provoked a torrent of criticism from other scholars who accused him of justifying his hostility toward individual civil liberties with shoddy and incomplete historical analysis of the Amendment's framing.[370]

b. The Legitimacy of "Darwinian" Transformations

Those who approve of a particular transformation will often justify it post hoc by claiming that a majority of voting Americans who lived through it "ratified" it at the ballot box.[371] But the role of the judiciary in interpreting and enforcing the Constitution would be entirely superfluous if courts were mere rubber stamps that defer automatically to a majority's approval of a transformation at any given time.[372] The highest duty of any court interpreting a constitution in which the people are sovereign is to ensure that the actual political *power* that forms the corpus of this textually proclaimed sovereignty remains in the people's hands and is not usurped by the state.[373] If the majority of Americans supporting a particular unwritten

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that the Fourteenth Amendment was intended to have no further effect than to constitutionalize the Civil Rights Act of 1866).

[370] *See, e.g.*, Richard L. Aynes, *On Misreading John Bingham and the Fourteenth Amendment*, 103 YALE L.J. 57 (1993); Akhil Reed Amar, *The Bill of Rights and the Fourteenth Amendment*, 101 Yale L.J. 1193, 1205–12 (1992); Michael Kent Curtis, *Further Adventures of the Nine Lived Cat: A Response to Mr. Berger on Incorporation of the Bill of Rights*, 43 OHIO ST. L.J. 89 (1982); Michael Kent Curtis, *The Bill of Rights as a Limitation on State Authority: A Reply to Professor Berger*, 16 WAKE FOREST L. REV. 45 (1980); *see also* Alfred Avins, *Incorporation of the Bill of Rights: The Crosskey-Fairman Debates Revisited*, 6 HARV. J. LEGIS. 1 (1968); Robert J. Kaczorowski, *Searching for the Intent of the Framers of the Fourteenth Amendment*, 5 CONN. L. REV 368 (1972).

[371] This is precisely how Balkin justifies the twentieth-century New Deal and civil rights judicial revolutions as legitimate, albeit unratified, constitutional changes. *See* Jack M. Balkin, *How Social Movements Change (or Fail to Change) the Constitution*, 39 SUFFOLK U. L. Rev. 27, 65 (2005) ("[W]e see potentially democratic and popular elements at work in constitutional change through judicial review: constitutional norms change because public opinion changes, national political parties get behind particular ideas, and the judiciary eventually responds to this change."); Jack M. Balkin, *Respect-Worthy: Frank Michelman and the Legitimate Constitution*, 39 TULSA L. REV. 485, 492 (2004) ("[W]hat makes the Constitution legitimate is that everyone in the political community can, at least in theory, reasonably give their respect to the governmental system in place as they understand it and interpret it.").

[372] The so-called "countermajoritarian difficulty" has been a focus of constitutional scholars at least since Alexander Bickel introduced it in the 1960s. *See* ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS 16 (1962); Alexander M. Bickel, *Forward: The Passive Virtues*, 75 HARV. L. REV. 40 (1961).

[373] *See* Amar, *Article V*, *supra* note 337, at 500 ("Popular sovereignty majority rule is every bit as much a part of our Constitution, in word and deed, as Article V. Yet the legal objection does capture one key difference: the popular sovereignty amendment path is legally higher than Article V. Article V is not inalienable; popular sovereignty is. Article V could be amended away, but popular sovereignty cannot. Article V only supplements, but can never supplant, majority rule popular sovereignty.").

transformation is uninformed or "hoodwinked" when a transformation that *structurally* diminishes the people's sovereignty in relation to their government occurs, then one cannot convincingly argue that the people knowingly consented to (or "ratified") a forfeiture of their sovereign power.

The question of a transformation's legitimacy is ultimately, therefore, a question not of normative law but of sociological fact. It is a question that forces the judge to critically assess the existing balance of political power between the governing state and the governed people and to derive from that assessment a judicial holding that, more than *any* conceivable alternative holding, maintains the latter's political supremacy over the former. Such a holding is the structural teleological meaning of the provision at issue in the case being decided.

C. A Note on Discretion

What makes the diachronic method superior to originalism is that it both constrains judges by forcing them to be cognizant of how the original meaning has in fact evolved and allows them the discretion to decide whether the *direction* in which it has evolved is itself faithful to the original meaning and, if not, which direction will make it more faithful under very different historical conditions. Such discretion, like all discretion, may be prone to abuse, but the type of discretion that the diachronic method enables is far less susceptible to bias than the unbound subjectivity that originalist reasoning necessitates given the fixation thesis's reduction of textual meaning to a positive, non-legal fact. The diachronic method, by contrast, forces judges to directly address the hard, uncomfortable questions that originalism allows them to evade—questions that force them to put their political cards on the table face up, for the sovereign public to see. Part IV will demonstrate how this is so using the debate over whether and how to incorporate the Second Amendment in *McDonald v. City of Chicago*[374] as an example.

IV. *HELLER* REVISITED: *MCDONALD V. CITY OF CHICAGO* AND THE DIACHRONIC SECOND AMENDMENT

The ink had barely dried on the *Heller* opinion in the early summer of 2008 when Otis McDonald, a seventy-four-year-old African American retired engineer and resident of Chicago's Morgan Park

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[374] 130 S. Ct. 3020 (2010).

neighborhood,[375] filed a lawsuit[376] in federal court against the City of Chicago challenging the constitutionality of a municipal handgun prohibition similar to the Washington, D.C. ordinance the Supreme Court had just invalidated.[377] The factual circumstances giving rise to *McDonald v. City of Chicago*[378] were virtually identical to those giving rise to *Heller*.[379] Yet the *Heller* lawsuit concerned an anti-handgun ordinance in Washington, D.C., a federal enclave.[380] As such, it provided the Court the opportunity to review the right set forth in the Second Amendment *only* as it applied to action by the federal government, *not* as it applied to state or local governments.[381] The prohibition at issue in *McDonald*, however, was not federal law but a local city ordinance.[382]

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[375] For more biographical information about Otis McDonald, *see* Mary Katherine Ham, *Meet Otis McDonald: The Man Behind the SCOTUS Chicago Gun Case*, WKLY. STANDARD, Mar. 2, 2010, http://www.weeklystandard.com/blogs/meet-otis-mcdonald-man-behind-scotus-chicago-gun-case.

[376] *See* Complaint, McDonald v. City of Chicago, No. 08CV3645, 2008 WL 2571757 (N.D. Ill. June 26, 2008) [hereinafter *McDonald* Complaint].

[377] *McDonald*, 130 S. Ct. at 3027.

[378] 130 S. Ct. 3020 (2010).

[379] *Compare* Complaint at 2, Parker v. District of Columbia, 311 F. Supp. 2d 103 (D. D.C. 2004) (No. CIV.A.03-0213 EGS) ("Plaintiff Dick Anthony Heller is a natural person and a citizen of the United States and of the District of Columbia. Mr. Heller resides in a high-crime neighborhood and is a Special Police Officer of defendant District of Columbia. As a Special Police Officer, Mr. Heller is licensed to and does carry a handgun in the course of his employment at the Thurgood Marshall Judicial Center in Washington, D.C., providing security for the federal judiciary. Mr. Heller lawfully owns various firearms located outside the District of Columbia, including handguns and long guns, and presently intends to possess a functional handgun and long gun for self-defense within his own home, but is prevented from doing so only by defendants' active enforcement of unconstitutional policies complained of in this action. Mr. Heller applied to defendant District of Columbia for permission to possess a handgun within his home but was refused. Mr. Heller fears arrest, criminal prosecution, incarceration, and fine if he were to possess a functional handgun and/or long gun within his home."), *with McDonald* Complaint, *supra* note 376, at 1, 3 ("Plaintiff Otis McDonald is a natural person and a citizen of the United States, residing in Chicago, Illinois. Mr. McDonald resides in a high-crime neighborhood and is active in community affairs. As a consequence of trying to make his neighborhood a better place to live, Mr. McDonald has been threatened by drug dealers. . . . Mr. McDonald lawfully owns a handgun, which he keeps outside the City of Chicago. Mr. McDonald presently intends to possess the handgun within his home for self-defense, but is prevented from doing so only by Defendants' active enforcement of the policies complained of in this action. Mr. McDonald applied for permission to possess a handgun within his Chicago home. On June 13, 2008, that application was refused pursuant to the policies complained of in this action. Mr. McDonald fears arrest, criminal prosecution, incarceration, and fine if he were to possess a handgun within his home. Mr. McDonald owns a shotgun which he keeps in his Chicago home. This shotgun is lawfully registered pursuant to the Chicago Municipal Code. Mr. McDonald fears arrest, criminal prosecution, incarceration, and fine if he were to continue to possess the shotgun in his Chicago home without re-registering it annually as required by the Chicago Municipal Code.").

[380] O'Shea, *supra* note 17, at 202.

[381] *McDonald*, 130 S. Ct. at 3026.

[382] CHICAGO MUN. CODE § 8-20-040(a) (1982) ("All firearms in the City of Chicago shall be registered in accordance with the provisions of this chapter. It shall be the duty of a person owning or possessing a firearm to cause such firearm to be registered. No person shall within

The complaint in *McDonald* therefore did not simply cite the Second Amendment and *Heller* as the legal basis for the claim; it cited the Second and Fourteenth Amendments in tandem to make three distinct assertions as to why *Heller* is binding against the Chicago city government: (1) "At a minimum, the Second Amendment guarantees individuals a *fundamental right* to possess a functional, personal firearm, including a handgun, within the home";[383] (2) "The Second Amendment right is *incorporated* as against the states and their political subdivisions pursuant to the *Due Process Clause* of the Fourteenth Amendment;"[384] and (3) "The Second Amendment right to keep and bear arms is a *privilege and immunity of United States citizenship* which, pursuant to the Fourteenth Amendment, states and their political subdivisions may not violate."[385]

The District Court dismissed the complaint summarily,[386] and the Court of Appeals for the Seventh Circuit affirmed.[387] The Supreme Court granted certiorari because the Seventh Circuit's refusal to apply *Heller* to state and local laws, while consistent with some other circuit-level decisions on the issue,[388] was in conflict with the Ninth Circuit's recent holding in *Nordyke* v. *King*[389] that the states are "bound by the Second Amendment through the Fourteenth Amendment's Due Process Clause."[390] In his petition for certiorari, McDonald asserted that the he had lost at the appellate level because the court did not apply the Supreme Court's "test for selective incorporation of enumerated rights," as the Ninth Circuit in *Nordyke* had, but instead erroneously relied upon "inapposite *pre-incorporation era* precedent barring direct application of the Bill of Rights to the states."[391]

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the City of Chicago, possess, harbor, have under his control . . . or accept any firearm unless such person is the holder of a valid registration certificate for such firearm. No person shall, within the City of Chicago, possess, harbor, have under his control . . . or accept any firearm which is unregisterable under the provisions of this chapter."); *id.* § 8-20-050 (1982) ("No registration certificate shall be issued for any of the following types of firearms: . . . (c) handguns . . .").

[383] *McDonald* Complaint, *supra* note 376, at 6 (emphasis added).

[384] *Id.* at 9 (emphasis added).

[385] *Id.* (emphasis added).

[386] McDonald v. City of Chicago, No. 08CV03645, 2008 WL 2571757 (N.D. Ill. June 26, 2008).

[387] Nat'l Rifle Ass'n of Am., Inc. v. City of Chicago, 567 F.3d 856 (7th. Cir. 2009).

[388] *See, e.g.*, Maloney v. Cuomo, 554 F.3d 56 (2d Cir. 2009).

[389] 563 F.3d 439 (9th Cir. 2009).

[390] Petition for Writ of Certiorari at 3, McDonald v. City of Chicago, 130 S. Ct. 3020 (2010) (No. 08-1521).

[391] *Id.* (emphasis added).

Because the Court had grounded all of its prior decisions "incorporating" Bill of Rights provisions as to the states in the Fourteenth Amendment, one might naturally assume that by "pre-incorporation era" McDonald meant the period of time prior to that amendment's adoption in 1868. The precedents that the Seventh Circuit Court of Appeals cited in dismissing McDonald's claim,[392] however, all post-date the Fourteenth Amendment. McDonald was instead referring to the Court's twentieth-century practice of "selective incorporation,"[393] whereby it has examined the applicability to the states of each separate Bill of Rights claim, in separate cases, under the doctrine of substantive due process.[394]

If the Second Amendment stands out as a provision that Supreme Court judicial review has barely touched since its adoption, the Fourteenth Amendment stands out for the extreme opposite reason: the Court's grounding of its selective incorporation jurisprudence in the amendment's Due Process Clause[395] has produced a century's worth of precedents too numerous to count.[396] In each of these cases,

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[392] United States v. Cruikshank, 92 U.S. 542 (1876), Presser v. Illinois, 116 U.S. 252 (1886), and Miller v. Texas, 153 U.S. 535 (1894).

[393] *See generally* Louis Henkin, *"Selective Incorporation" in the Fourteenth Amendment*, 73 YALE L.J. 74 (1963) (examining selective incorporation's credentials and considering its implications).

[394] For a critical overview of substantive due process, see Chemerinsky, *supra* note 21.

[395] U.S. CONST. amend XIV, § 1, cl. 3.

[396] *See, e.g.*, Johnson v. Louisiana, 406 U.S. 356, 92 S. Ct. 1620 (1972) (holding that the Due Process Clause does not require unanimous jury verdicts in state criminal trials); Schilb v. Kuebel, 404 U.S. 357 (1971) (incorporating the Eighth Amendment prohibition against excessive bail); Benton v. Maryland, 395 U.S. 784 (1969) (incorporating the Sixth Amendment's Double Jeopardy Clause); Duncan v. Louisiana, 391 U.S. 145 (1968) (incorporating the Sixth Amendment right to a jury trial in criminal cases); Washington v. Texas, 388 U.S. 14 (1967) (incorporating the Sixth Amendment's compulsory process guarantee); Klopfer v. North Carolina, 386 U.S. 213 (1967) (incorporating the Sixth Amendment guarantee of a speedy trial); Pointer v. Texas, 380 U.S. 400 (1965) (incorporating the Sixth Amendment right to confront an adverse witness); Aguilar v. Texas, 378 U.S. 108 (1964) (incorporating the Fourth Amendment's warrant requirement); Malloy v. Hogan, 378 U.S. 1 (1964) (incorporating the Fifth Amendment Self-Incrimination Clause); Ker v. California, 374 U.S. 23 (1963) (Fourth Amendment); Gideon v. Wainright, 372 U.S. 335 (1963) (incorporating the Sixth Amendment right to counsel and holding that states must provide public defenders to indigent defendants whom they prosecute); Robinson v. California, 370 U.S. 660 (1962) (incorporating the Eighth Amendment guarantee against cruel and unusual punishment); Mapp v. Ohio, 367 U.S. 643 (1961) (incorporating the Fourth Amendment exclusionary rule previously applied to federal courts in Weeks v. United States, 232 U.S. 383 (1914)); Wolf v. Colorado, 338 U.S. 25 (1949) (incorporating Fourth Amendment guarantee of freedom from unreasonable searches and seizures but declining to incorporate the exclusionary rule against the states), *overruled by Mapp*, 367 U.S. 643; *In re* Oliver, 333 U.S. 257 (1948) (incorporating the Sixth Amendment right to a public trial); Adamson v. California, 332 U.S. 46 (1947) (declining to incorporate the Self-Incrimination Clause of the Fifth Amendment), *overruled in part by Malloy*, 378 U.S. 1; Everson v. Board of Ed. of Ewing, 330 U.S. 1 (1947) (incorporating the First Amendment's Establishment Clause); Betts v. Brady, 316 U.S. 455 (1942) (declining to incorporate the Sixth Amendment right to counsel), *overruled by Gideon*, 372 U.S. 335; Cantwell v. Connecticut, 310 U.S. 296 (1940) (Free Exercise Clause);

the Court's decision whether to "incorporate" the right at issue turned not on competing *interpretations* of the Fourteenth Amendment but solely on competing *constructions* of the word "liberty" in "nor shall any state deprive any person of life, liberty, or property, without due process of law."[397] Justice Harlan explained the basic principles underlying substantive due process incorporation in his 1961 dissent in *Poe v. Ullman*[398]

> The history of the Amendment also sheds little light on the meaning of the provision. . . . [I]t is not the particular enumeration of rights in the first eight Amendments which spells out the reach of Fourteenth Amendment due process, but rather, as was suggested in another context long before the adoption of that Amendment, those concepts which are considered to embrace those rights "which are . . . *fundamental*; which belong . . . to the citizens of all free governments" for "the purposes [of securing] which men enter into society."
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> . . . [T]he full scope of the liberty guaranteed by the Due Process Clause cannot be found in or limited by the precise terms of the specific guarantees elsewhere provided in the Constitution. This "liberty" is not a series of isolated points pricked out in terms of the taking of property; the freedom of speech, press, and religion; the right to keep and bear arms; the freedom from unreasonable searches and seizures;

Palko v. Connecticut, 302 U.S. 319 (1937) (declining to incorporate the Double Jeopardy Clause of the Fifth Amendment), *overruled by Benton*, 395 U.S. 784; De Jonge v. Oregon, 299 U.S. 353 (1937) (freedom of assembly); Grosjean v. Am. Press Co., 297 U.S. 233 (1936) (invalidating a state tax law on First Amendment grounds); Snyder v. Massachusetts, 291 U.S. 97 (1934) (holding that the denial of defendant's request to be present when the jury viewed the crime scene was not a denial of due process under the Fourteenth Amendment); Powell v. Alabama, 287 U.S. 45 (1932) (holding that defendants were denied their right to counsel in violation of the Fourteenth Amendment); Gitlow v. New York, 268 U.S. 652 (1925) (sustaining defendant's conviction under criminal anarchy statute but assuming that the Fourteenth Amendment's due process clause incorporates freedom of speech); Near v. Minnesota *ex rel.* Olson, 283 U.S. 697 (1931) (expressly incorporating the First Amendment speech and press guarantees); Twining v. New Jersey, 211 U.S. 78 (1908) (holding that Fifth Amendment freedom from self-incrimination was not part of concept of due process and thus could be abridged by the states), *overruled in part by Malloy*, 378 U.S. 1.

[397] *See generally* Solum, *Incorporation*, *supra* note 72, at 436–42 (considering the implications of the interpretation-construction distinction for Fourteenth Amendment incorporation).

[398] 367 U.S. 497 (1961).

> and so on. It is a rational continuum which, broadly speaking, includes a freedom from all substantial arbitrary impositions and purposeless restraints and which also recognizes, what a reasonable and sensitive judgment must, that certain interests require particularly careful scrutiny of the state needs asserted to justify their abridgment.[399]

Harlan anticipated the criticism that this doctrine would allow judges unrestrained discretion in their decisions:

> If the supplying of content to this Constitutional concept has of necessity been a rational process, it certainly has not been one where judges have felt free to roam where unguided speculation might take them. 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.* A decision of this Court which radically departs from it could not long survive, while a decision which builds on what has survived is likely to be sound. No formula could serve as a substitute, in this area, for judgment and restraint.[400]

This, in short, is the philosophy of living constitutionalism, the intellectual nemesis that originalism first arose in reaction against in the 1970s.[401]

If *Heller* demonstrates the failure of synchronic *interpretation* to constrain judges, *McDonald* demonstrates the same for the living constitutionalism inherent in the Court's synchronic *construction*[402]

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[399] *Id.* at 542–43 (Harlan, J., dissenting) (citations omitted).

[400] *Id.* at 542 (emphasis added).

[401] *See* Grey, *supra* note 21, at 709 ("Our characteristic contemporary metaphor is "the living Constitution"—a constitution with provisions suggesting restraints on government in the name of basic rights, yet sufficiently unspecific to permit the judiciary to elucidate the development and change in the content of those rights over time.").

[402] This Note has thus far discussed the concept of synchronic meaning only as the product of the originalist fixation thesis. According to Saussurean linguistic theory, synchronic meanings "exist at a certain point in time and are systematically related to one another at that point." *See* Harris, *supra* note 30, at 118. For an originalist interpreting a certain provision of the Constitution, that point in time is not really an indivisible instant but rather an extended "finite diachronic" time window demarcating the "time of ratification" within which historical evidence of the provision's meaning is admissible. *See* discussion *supra* Part I.A.3. The meaning that a living constitutionalist judge construing a provision like the Due Process Clause applies to a case is pure synchronic meaning because it consists of the judge's own conception of how the nation's political and social values and principles have evolved over time but is fixed permanently in the decision and is thereafter binding as precedent unless and until the decision is subsequently overturned.

of the Fourteenth Amendment's Due Process Clause. Whereas *Heller* features a debate over past meanings, *McDonald* features a clash of political value judge judgments in the here and now. *McDonald* is a plurality decision. Justice Alito's opinion for the Court, joined by Chief Justice Roberts and Justices Scalia and Kennedy, incorporated the Second Amendment through the Due Process Clause and struck down the Chicago law.[403] Justice Stevens, joined by Justices Ginsburg, Breyer, and Sotomayor, wrote an opinion upholding the validity of substantive due process incorporation finding that the Second Amendment should not be incorporated.[404] Justice Thomas's opinion rejected substantive due process incorporation and chose instead to apply the Second Amendment to the states through the Privileges or Immunities Clause.[405] Because Thomas agreed with the substantive result of the Alito plurality, he joined it in every respect other than Alito's selection of the Due Process Clause as the vehicle of incorporation.[406] For that reason, Alito's opinion has become law, and the individual Second Amendment right established in *Heller* now applies to the states.

Part IV opens with an overview of the legal and historical context surrounding the adoption of the Fourteenth Amendment and the subsequent debate over its relationship to the Bill of Rights. It continues with a brief synopsis of Justice Alito's majority opinion, Justice Thomas's concurrence, and Justice Stevens's dissent. It concludes with the Author's attempt at applying the diachronic method set forth in Part III to the complex issues in *McDonald* that result from the head on collision in that case between an "originalist" Second Amendment and a "living constitutionalist" Fourteenth Amendment. This diachronic approach to the Second and Fourteenth Amendments yields a *combined* structural teleological meaning for the two provisions that unapologetically acknowledges the essential role of an armed citizenry in preserving the substance of the popular sovereignty on which the Constitution's very structural integrity is premised and "integrates" the popular militia of the

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[403] McDonald v. City of Chicago, 130 S. Ct. 3020, 3050 (2010).

[404] *Id.* at 3107 (Stevens, J., dissenting).

[405] *Id.* at 3084 (Thomas, J., concurring).

[406] *Id.* at 3059 (plurality opinion) ("Applying what is now a well-settled test, the plurality opinion concludes that the right to keep and bear arms applies to the States through the Fourteenth Amendment's Due Process Clause because it is 'fundamental' to the American 'scheme of ordered liberty' and 'deeply rooted in this Nation's history and tradition.' I agree with that description of the right. But I cannot agree that it is enforceable against the States through a clause that speaks only to 'process.' Instead, the right to keep and bear arms is a privilege of American citizenship that applies to the States through the Fourteenth Amendment's Privileges or Immunities Clause." (citations omitted) (quoting Duncan v. Louisiana, 391 U.S. 145, 149 (1968); Washington v. Glucksberg, 521 U.S. 702, 721 (1997))).

eighteenth century depicted in *United States v. Miller*[407] through the Fourteenth Amendment's Citizenship[408] and Equal Protection[409] Clauses into a General Militia of the United States.

A. The Fourteenth Amendment, the Bill of Rights, and the States

The unacknowledged source of the doctrinal turbulence that pervades *McDonald* is a disagreement among the Justices as to whether and to what degree the Fourteenth Amendment impliedly altered the position that the Bill of Rights had hitherto occupied in relation to the Newtonian structural blueprint originally set forth in the 1789 text. Prior to the Civil War, Americans disagreed over whether the adoption of the Bill of Rights in 1791 *itself* impliedly altered that structural blueprint. In 1833, Chief Justice Marshall answered this question firmly in the negative, holding in *Barron v. Baltimore*[410] that the Bill of Rights was binding only against the federal government, not against the states.[411]

The foundation for Marshall's conclusion was the system of dual sovereignty that came into being when the Constitution was ratified, whereby the relationship between a state and its citizens was wholly severed as a matter of law from the relationship between the federal government and *its* citizens:

> The constitution was ordained and established by the people of the United States for themselves, for their own government, and not for the government of the individual states. Each state established a constitution for itself, and, in that constitution, provided such limitations and restrictions on the powers of its particular government as its judgment dictated. The people of the United States framed such a government for the United States as they supposed best adapted to their situation, and best calculated to promote their interests. The powers they conferred on this government were to be exercised by itself; and the limitations on power, if

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[407] 307 U.S. 174 (1939).

[408] U.S. CONST. amend XIV, § 1, cl. 1 ("All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. . . .").

[409] U.S. CONST. amend XIV, § 1, cl. 4 ("[Nor shall any state] deny to any person within its jurisdiction the equal protection of the laws.").

[410] 32 U.S. (7 Pet.) 243 (1833).

[411] *Id.* at 250–51 ("We are of opinion that the provision in the fifth amendment to the constitution, declaring that private property shall not be taken for public use without just compensation, is intended solely as a limitation on the exercise of power by the government of the United States, and is not applicable to the legislation of the states.").

> expressed in general terms, are naturally, and, we think, necessarily applicable to the government created by the instrument. They are limitations of power granted in the instrument itself; not of distinct governments, framed by different persons and for different purposes.[412]

Abolitionists and others during the antebellum period, however, refused to recognize *Barron* as legitimate.[413] Although it was then well understood that most state constitutions contained their own bills of rights guaranteeing the same protections as the federal Constitution guaranteed, the country's intensifying polarization over the slavery issue after *Barron* made it clear that such state protections were meaningless to free African Americans and their abolitionist allies when a state wished to persecute them.[414]

The disagreement among antebellum Americans over whether and to what extent the Bill of Rights impliedly altered the Newtonian federalist structure of the 1789 Constitution was intimately intertwined with national disagreements over the nature

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[412] *Id.* at 247.

[413] Justice Thomas provides examples of this refusal in his *McDonald* concurrence:

> [During the antebellum era], some appear to have believed that the Bill of Rights *did* apply to the States, even though this Court had squarely rejected that theory. Many others believed that the liberties codified in the Bill of Rights were ones that no State *should* abridge, even though they understood that the Bill technically did not apply to States.

McDonald v. City of Chicago, 130 S. Ct. 3020, 3080 (2010) (Thomas, J., concurring) (citing Raleigh & Gaston R.R. Co. v. Davis, 19 N.C. 451, 458–62 (1837) (right to just compensation for government taking of property); Rohan v. Swain, 59 Mass. 281, 285 (1850) (right to be secure from unreasonable government searches and seizures); State v. Buzzard, 4 Ark. 18, 28 (1842) (right to keep and bear arms); State v. Jumel, 13 La. Ann. 399, 400 (1858) (same); Cockrum v. State, 24 Tex. 394, 401–04 (1859) (same)). There is ample scholarship discussing radical egalitarian criticism of *Barron* during the antebellum era. *See, e.g.*, Garrett Epps, *The Antebellum Political Background of the Fourteenth Amendment*, 67 LAW & CONTEMP. PROBS. 175 (2004); Louisa M. A. Heiny, *Radical Abolitionist Influence on Federalism and the Fourteenth Amendment*, 49 AM. J. LEGAL HIST. 180 (2007); Katherine Hessler, *Early Efforts to Suppress Protest: Unwanted Abolitionist Speech*, 7 B.U. PUB. INT. L.J. 185 (1998); Robert J. Kaczorowski, *Revolutionary Constitutionalism in the Era of the Civil War and Reconstruction*, 61 N.Y.U. L. REV. 863 (1986); Kurt T. Lash, *The Origins of the Privileges or Immunities Clause, Part I: "Privileges and Immunities" as an Antebellum Term of Art*, 98 GEO L.J. 1241 (2010); Randy E. Barnett, *Whence Comes Section One? The Abolitionist Origins of the Fourteenth Amendment* (Georgetown Public Law Research Paper No. 10-06, 2010), *available at* http://ssrn.com/abstract=1538862.

[414] For more background on the antebellum suppression of abolitionist dissent, see Hessler, *supra* note 413, at 190 ("[I]n response to the dissemination of anti-slavery literature, 'the states of Georgia and Louisiana passed laws declaring the death penalty for anyone distributing literature "exciting to insurrection" or with "a tendency to produce discontent among the free population . . . or insubordination among the slaves."'" (quoting HOWARD ZINN, DECLARATIONS OF INDEPENDENCE: CROSS-EXAMINING AMERICAN IDEOLOGY 94 (1990))).

and meaning of citizenship within that structure.[415] An express definition of citizenship appeared nowhere in the original constitutional text, and the Court would not weigh in definitively on the issue until 1857, when the political failure of the Missouri Compromise forced it to resolve the ambiguous political status of African Americans in the now infamous *Dred Scott* decision.[416] The foundational premise of Chief Justice Taney's opinion in that case is an express identification of citizenship with sovereignty:

> The words "people of the United States" and "citizens" are synonymous terms, and mean the same thing. They both describe the political body who, according to our republican institutions, form the sovereignty, and who hold the power and conduct the Government through their representatives. They are what we familiarly call the "sovereign people," and every citizen is one of this people, and a constituent member of this sovereignty.[417]

Using a synchronic style of reasoning that substantially prefigures contemporary originalism, Taney concluded that the Constitution's "true intent and meaning when it was adopted"[418] was to exclude

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[415] *See* Lash, *supra* note 413, at 1251–52 ("[A]fter the Founding an individual rights bearer could be both a citizen of the United States and a citizen of a particular state. This created a situation where the same right could have a different nature and scope depending on who asserted the right and against whom the right was asserted. For example, because the Federal Bill of Rights originally bound only the federal government, in 1791 one might have had an *individual* right against a *federal* law forbidding criticism of the government but only a local *majoritarian* right against a *state* law forbidding the same act. One might argue—and many did—that the natural right to freedom of expression is abridged in both cases, but historically, one's enforceable legal protection differed depending on whether the asserted right ran against the state (as a matter of state citizenship) or against the federal government (as a matter of federal citizenship)." (footnotes omitted)).

[416] Dred Scott v. Sandford, 60 U.S. 393 (1857).

[417] *Id.* at 404.

[418] *Id.* at 405 ("In discussing this question, we must not confound the rights of citizenship which a State may confer within its own limits, and the rights of citizenship as a member of the Union. It does not by any means follow, because he has all the rights and privileges of a citizen of a State, that he must be a citizen of the United States. He may have all of the rights and privileges of the citizen of a State, and yet not be entitled to the rights and privileges of a citizen in any other State. For, previous to the adoption of the Constitution of the United States, every State had the undoubted right to confer on whomsoever it pleased the character of citizen, and to endow him with all its rights. But this character of course was confined to the boundaries of the State, and gave him no rights or privileges in other States beyond those secured to him by the laws of nations and the comity of States. Nor have the several States surrendered the power of conferring these rights and privileges by adopting the Constitution of the United States. Each State may still confer them upon an alien, or any one it thinks proper, or upon any class or description of persons; yet he would not be a citizen in the sense in which that word is used in the Constitution of the United States, nor entitled to sue as such in one of its courts, nor to the privileges and immunities of a citizen in the other States. The rights which he would acquire would be restricted to the State which gave them.").

African Americans from the sovereign "We the People" and to thereby preclude them from ever being citizens of the United States.[419]

Dred Scott thus did not articulate any unified positive theory of United States citizenship but rather "used the idea negatively, in exclusionary fashion, to indicate who was not under the umbrella of rights and privileges and status, and thus to entrench the subjection of the Negro in the Constitution."[420] The initial draft of the Fourteenth Amendment, like the Civil Rights Act of 1866 after which it was modeled, "was equally negative."[421] It initially opened with a clause prohibiting any state from "abridg[ing] the privileges or immunities of citizens of the United States."[422] Only as an "afterthought," did the amendment's framers insert before this Privileges or Immunities Clause, a clause affirmatively defining who in fact *was* a citizen of the United States.[423] In short, "*Dred Scott* was effectively, which is to say constitutionally, overruled by a definition of citizenship in which race played no part."[424]

Although the Fourteenth Amendment may undisputedly have overruled *Dred Scott*, there was far less of a consensus in the immediate aftermath of its adoption as to whether it overturned *Barron*.[425] A mere five years after the Fourteenth Amendment was adopted, the Court rejected this interpretation in *The Slaughterhouse Cases*.[426] Writing for a five-Justice majority, Justice Miller completely distinguished the privileges and immunities of state citizenship from those of federal citizenship, and held that the

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[419] *Id.* at 410 ("[I]t is too clear for dispute, that the enslaved African race were not intended to be included, and formed no part of the people who framed and adopted [the declaration of Independence]; for if the language, as understood in that day, would embrace them, the conduct of the distinguished men who framed the Declaration of Independence would have been utterly and flagrantly inconsistent with the principles they asserted; and instead of the sympathy of mankind, to which they so confidently appeared, they would have deserved and received universal rebuke and reprobation.").

[420] Alexander M. Bickel, *Citizenship in the American Constitution*, 15 ARIZ. L. REV. 369, 373 (1973).

[421] *See id.*

[422] *Id.* (quoting U.S. CONST. amend XIV, § 1, cl. 2).

[423] *Id.* at 374.

[424] *Id.* For more information on the relationship between *Dred Scott* and the adoption of the Civil War amendments, see PAUL FINKELMAN, *DRED SCOTT V. SANDFORD*: A BRIEF HISTORY WITH DOCUMENTS (1997); MARK A. GRABER, *DRED SCOTT* AND THE PROBLEM OF CONSTITUTIONAL EVIL (2006); Bickel, *supra* note 420; Earl M. Maltz, *Fourteenth Amendment Concepts in the Antebellum Era*, 32 AM. J. LEGAL HIST. 305 (1988).

[425] For an in depth exploration of the controversy surrounding the implications of the Fourteenth Amendment on *Barron* in the first few years following its adoption in 1868, see Bryan H. Wildenthal, *Nationalizing the Bill of Rights: Revisiting the Original Understanding of the Fourteenth Amendment in 1866–67*, 68 OHIO ST. L.J. 1509 (2007); Michael Kent Curtis, *The Fourteenth Amendment and the Bill of Rights*, 14 CONN. L. REV. 237 (1981).

[426] 83 U.S. 36 (1873).

Fourteenth Amendment prohibited states from abridging only the latter category.[427] Furthermore, the *Slaughterhouse* Court defined that category to include only those rights "which owe their existence to the Federal government, its National character, its Constitution, or its laws."[428] In subsequent cases, including the three Second Amendment cases upon which the Seventh Circuit based its dismissal of McDonald's appeal,[429] the Court repeatedly excluded various Bill of Rights provisions from even this subcategory, to the point where the Privileges or Immunities Clause ceased to serve any apparent applicative function.[430]

Barron, *Dred Scott*, *Slaughterhouse*, and their respective receptions vividly demonstrate the nineteenth-century understanding of constitutional rights as structural in character, an understanding greatly at odds with the modern practice of analyzing specific rights in isolation that is typical of the Court's twentieth-century substantive due process incorporation holdings.[431]

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[427] *Id.* at 78.

[428] *Id.* at 79.

[429] United States v. Cruikshank, 92 U.S. 542 (1875); Presser v. Illinois, 116 U.S. 252 (1886); and Miller v. Texas, 153 U.S. 535 (1894).

[430] Justice Field, joined by three other Justices, wrote a dissent in *Slaughterhouse* that criticized *Miller*'s narrow construction as "a vain and idle enactment, which accomplished nothing, and most unnecessarily excited Congress and the people on its passage." *The Slaughterhouse Cases*, 83 U.S. at 96 (Field, J., dissenting).

[431] The substantive due process reasoning by which the Court has incorporated Bill of Rights provisions throughout the twentieth century, while nominally grounded in the amendment's Due Process Clause, has never recognized the clause as merely a "shorthand for the first eight amendments of the Constitution [which] thereby incorporates them" wholesale, automatically. Wolf v. Colorado, 338 U.S. 25, 26 (1949) (citing Hurtado v. California, 110 U.S. 516 (1884); Twining v. New Jersey, 211 U.S. 78 (1908); Brown v. Mississippi, 297 U.S. 278 (1936); Palko v. Connecticut, 302 U.S. 319 (1937); Adamson v. California, 332 U.S. 46 1947)). Instead, the Court inquires whether a particular right that a plaintiff seeks to vindicate under the Due Process Clause, whether expressly enumerated in a provision of the Constitution's text or not, "is a "fundamental liberty interest"—a vague and malleable principle derived from the natural law tradition that bears no necessary relationship to the Newtonian structural blueprint, and, therefore, bears no necessary relationship to the power of the popular sovereign. The substantive due process incorporation inquiry, like originalist textual interpretation, is synchronic in nature, but whereas the latter is defined by its *past* synchronicity in that it is fixed by the historically ratified text, the former is defined by its *present* synchronicity in that it is fixed by the judge's own moral and philosophical considerations in the here and now instead of by a historically determined allocation of constituent political power. Justice Kennedy's recent articulation of the substantive due process liberty interest in *Lawrence v. Texas*, 539 U.S. 558 (2003), neatly captures its essence:

> Liberty protects the person from unwarranted government intrusions into a dwelling or other private places. In our tradition the State is not omnipresent in the home. And there are other spheres of our lives and existence, outside the home, where the State should not be a dominant presence. Freedom extends beyond spatial bounds. Liberty presumes an autonomy of self that includes freedom of thought, belief, expression, and certain intimate conduct. The instant case involves liberty of the person both in its spatial and more transcendent dimensions.

Incorporation of the Bill of Rights by the Fourteenth Amendment is historically a liberal doctrine,[432] situated firmly in the tradition of the living Constitution,[433] which Bork, Berger, and other early conservative proponents of originalism found particularly distasteful.[434] Their hostility had several causes. First, incorporation severely constrained the police powers of the states and thereby substantially accelerated of the Court's abandonment of traditional dual-sovereignty federalism that began during the New Deal.[435]

. . . .

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

Id. at 562, 578–79.

[432] It should be noted, however, that *substantive due process*—the vehicle by which the Court has incorporated Bill of Rights provisions to apply to the states—began in the late 1800s as a fundamentally *conservative* doctrine, rooted in the liberty of contract, which served the economic and political interests of America's nascent industrial ruling class. This *economic* form of substantive due process so dominated the federal judiciary by the early 1900s that constitutional historians have come to name that entire era of the Court's jurisprudence after the case that expressly promulgated it, *Lochner v. New York*, 198 U.S. 45 (1905). *See* Frank R. Strong, The *Economic Philosophy of Lochner: Emergence, Embrasure and Emasculation*, 15 ARIZ. L. REV. 419, 419 (1973) ("The great significance of *Lochner v. New York* lies in the fact that it was the focal point in a judicial move to fasten on the country by constitutional exegesis unsanctioned by the Constitution a pattern of economic organization believed by the Court to be essential to the fullest development of the nation's economy.").

[433] Insofar as the Court expressly identified itself with "living constitutionalism," this tradition is of very recent vintage, dating from the Warren era. *See* Horwitz, *supra* note 48, at 660 ("The Warren Court combined two very different strands of ideas—the living Constitution and fundamental rights. *Brown v. Board of Education* was justified in terms of a living Constitution. Not that *Plessey v. Ferguson* was wrong in 1896, the Court argued, but rather *Plessey v. Ferguson* had become erroneous because of what separate but equal facilities had come to represent. In this sense, *Brown v. Board of Education* is the ultimate expression of the idea of a living Constitution. The most famous opinion of the Warren Court was thought by its proponents to be justifiable only in terms of a living Constitution." (footnotes omitted)).

[434] *See* Alicea, *supra* note 34, at 12 ("For Bork, the exercise of judicial review was only legitimate if it could be grounded in principles derived from and defined by the original intentions of the Founders and/or the text of the Constitution."); *id.* at 14 ("[Berger] linked popular sovereignty to the fact that the Constitution was a written document: 'A judicial power to revise the Constitution transforms the bulwark of our liberties into a parchment barrier.'" (quoting BERGER, *supra* note 369, at 403)).

[435] This view was, in fact, the intellectual basis for the state sovereignty new federalism jurisprudence that the Rehnquist Court exhibited in the 1990s. *See* Brent E. Simmons, *The Invincibility of Constitutional Error: The Rehnquist Court's States' Rights Assault on Fourteenth Amendment Protections of Individual Rights*, 11 SETON HALL CONST. L.J. 259, 260 (2001) ("The Rehnquist Supreme Court is engaged in an aggressive judicial campaign to dismantle federal protection for individual rights, claiming to restore a 'balance of power' between states and the federal government." (footnote omitted)).

Second, during the Warren-era, the Court began construing new *types* of rights from Bill of Rights provisions that were social and economic in nature and were thus unhinged from the traditional, property-based constructions to which the Court had limited itself prior to the New Deal.[436] William Rehnquist savagely criticized the Warren Court's expansion of rights, accusing it of being "based upon the proposition that federal judges, perhaps judges as a whole, have a role of their own, quite independent of popular will, to play in solving society's problems."[437]

B. The Clash of Synchronicities: McDonald *and the Unmasking of Judicial Subjectivity*

Each of the three main opinions in *McDonald* exhibit competing ideological attitudes regarding the Fourteenth Amendment's effect, if any, in impliedly altering the Constitution's Newtonian structural blueprint. These differences reveal far more about each Justice's attitude toward popular sovereignty than their respective statuses as originalists or living constitutionalists reveal. The irony of *Heller* is that it created a new right that the Court had never before recognized

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[436] *See* Horwitz, *supra* note, 48, at 660–61 ("In 1937, virtually every New Dealer believed that rights discourse was the language of conservatism, the language of the protection of private property, the language of freedom of contract under *Lochner*. They felt that conceptions of rights of the individual against the state had been deployed primarily to keep the state from regulating the strong in order to keep them from oppressing the weak. Progressives from *Lochner* on had spent thousands of pages attacking rights."). The Court first formulated its modern living constitutionalist discourse of rights, however, during this era in a footnote to its decision in *United States v. Carolene Products Co.*, 304 U.S. 144 (1938):

> There may be narrower scope for operation of the presumption of constitutionality when legislation appears on its face to be within a specific prohibition of the Constitution, such as those of the first ten amendments, which are deemed equally specific when held to be embraced within the Fourteenth.
>
> It is unnecessary to consider now whether legislation which restricts those political processes which can ordinarily be expected to bring about repeal of undesirable legislation, is to be subjected to more exacting judicial scrutiny under the general prohibitions of the Fourteenth Amendment than are most other types of legislation. On restrictions upon the right to vote; on restraints upon the dissemination of information; on interferences with political organizations; as to prohibition of peaceable assembly.
>
> Nor need we enquire whether similar considerations enter into the review of statutes directed at particular religious or national or racial minorities: whether prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry.

Id. at 152 n.4 (citations omitted).

[437] William H. Rehnquist, *The Notion of a Living Constitution*, 54 TEX. L. REV. 693, 698 (1976).

by means of the very originalist interpretive methodology that arose in reaction against the Warren-era practice of creating new rights that the Court had never before recognized.[438] The inevitable result in *McDonald* was that conservative originalists had to choose between standing by their principled opposition to the Court's abandonment of traditional federalism by the limiting the scope of that right to federal gun regulations or betraying their principles and applying it to state and local gun regulations under the liberal incorporation doctrine of the living constitutionalists. That *Heller* arose in Washington, D.C. instead of a state or one of its political subdivisions was a lucky accident for Justice Scalia and his originalist allies; the Court could construe the Second Amendment to protect the rights of individual citizens to "keep and bear arms" on their own property to defend it against common criminals—a result that affirmed the conservative and libertarian attitude that "a man's home is his castle"[439]—without having to worry about whether and under what specific clause the Fourteenth Amendment "incorporated" that individual right to apply to the states.

The incorporation inquiry, however, precludes originalists and living constitutionalists alike from interpreting the underlying rights provision at issue in isolation from its role within the Constitution's overall structural framework. A close reading of a particular judge or constitutional scholar's interpretation of the Fourteenth Amendment reveals a discernible set of ideological assumptions about whether and to what extent the amendment has impliedly altered the Constitution's Newtonian structural framework from its previous state.

In its own "selective incorporation" jurisprudence, the Court has made such inquiries as whether the right at issue is "implicit in 'the concept of ordered liberty'"[440] or "so rooted in the traditions and conscience of our people as to be ranked as fundamental."[441] This cautionary approach to incorporation suggests a *liberal* attitude toward the Fourteenth Amendment's alteration of the original Newtonian blueprint that emphasizes gradual, evolutionary progress.

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[438] As an unapologetic living constitutionalist, Justice Stevens has no trouble identifying the *Heller* right as such in his *McDonald* dissent. *See* McDonald v. City of Chicago, 130 S. Ct. 3020, 3103 (2010) (Stevens, J., dissenting) ("The question in this case . . . is not whether the Second Amendment . . . has been incorporated into the Fourteenth Amendment. It has not been. The question, rather, is whether the particular right asserted by petitioners applies to the States because of the Fourteenth Amendment itself, standing on its own bottom.").

[439] *See* Dist. of Columbia v. Heller, 128 S. Ct. 2783, 2810 (2008) ("[T]he founding generation 'were for every man bearing his arms about him and keeping them in his house, his castle, for his own defense.'" (quoting Cong. Globe, 39th Cong., 1st Sess., 362, 371 (1866) (Sen. Davis))).

[440] Wolf v. Colorado, 338 U.S. 25, 27 (1949).

[441] Snyder v. Massachusetts, 291 U.S. 97, 105 (1934).

Justice Hugo Black maintained a "total incorporation" theory, which held that the framers of the Fourteenth Amendment intended it to apply the entire Bill of Rights to the states wholesale.[442] Black's interpretation is fundamentally *revolutionary* in character because it has the Fourteenth Amendment overturning the original Newtonian structural framework, as elucidated by Chief Justice Marshall in *Barron v. Baltimore*,[443] in its entirety. Finally, Raoul Berger a generation ago provoked widespread outrage from his academic colleagues with his claim in *Government by Judiciary* that the framers of the Fourteenth Amendment intended to leave wholly intact the Court's 1833 holding in *Barron* that the Bill of Rights are not binding against the states.[444] Berger's thesis therefore exhibits a fundamentally *conservative* attitude toward the question of the Fourteenth Amendment's "implied structural alteration"[445] of the Constitution's original Newtonian blueprint.

Each of the three *McDonald* opinions discussed below exhibit, respectively, these three ideological attitudes toward the structural relationship between the Fourteenth Amendment and the Bill of Rights, but they in no way resemble the ideological reputations of their authors.

1. Alito's Opinion for the Court

Justice Alito declares early in his opinion that "the constitutional Amendments adopted in the Civil War's aftermath fundamentally altered the federal system."[446] After briefly acknowledging *Slaughterhouse* as a precedent precluding him from incorporating the Second Amendment through the Privileges or Immunities Clause, Alito launches into an extended history of the Court's selective substantive due process incorporation. The traditional question the

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[442] *See* Adamson v. California, 332 U.S. 46, 71 (Black., J., dissenting) ("My study of the historical events that culminated in the Fourteenth Amendment, and the expressions of those who sponsored and favored, as well as those who opposed its submission and passage, persuades me that one of the chief objects that the provisions of the Amendment's first section, separately, and as a whole, were intended to accomplish was to make the Bill of Rights, applicable to the states. With full knowledge of the import of the *Barron* decision, the framers and backers of the Fourteenth Amendment proclaimed its purpose to be to overturn the constitutional rule that case had announced.").

[443] 32 U.S. 243 (1833).

[444] *See* discussion *supra* notes 368–70.

[445] In the Author's formulation, implied structural alteration refers to the ambiguous *temporal* relationship between two or more textual provisions of the Constitution, each of which were adopted at different times. *See* discussion *supra* Part III.B.3.a The way one interpreting the Constitution's overall Newtonian structural blueprint characterizes this relationship reveals certain ideological assumptions about the teleological role of subsequently amended provisions within that framework that can be liberal, conservative, or revolutionary. *See id.*

[446] McDonald v. City of Chicago, 130 S. Ct. 3020, 3021 (2010).

Court asked when deciding whether to incorporate a Bill of Rights provision was whether the provision protected a "fundamental liberty interest."[447]

Alito offers several examples of the various ways the Court has defined such an interest in different cases. These examples include rights that are "of such a nature that they are included in the conception of due process of law,"[448] "immutable principles of justice which inhere in the very idea of free government which no member of the Union may disregard,"[449] "rights that are 'the very essence of a scheme of ordered liberty'" and essential to "a fair and enlightened system of justice,"[450] and "principle[s] of natural equity, recognized by all temperate and civilized governments, from a deep and universal sense of its justice."[451] Alito concludes his analysis with the observation that "the [modern] governing standard is not whether any 'civilized system [can] be imagined that would not accord the particular protection[, but] whether a particular Bill of Rights guarantee is fundamental to *our* scheme of ordered liberty and system of justice."[452]

The basis of Alito's holding is that the natural right of self-defense on which *Heller* is premised is indeed a "fundamental liberty interest" only because, in his estimation, the Court's cumulative substantive due process jurisprudence over the previous century has been so "capacious [and] hazily defined" as to be essentially meaningless as a guide in applying the law.[453] *McDonald* rests ultimately not on

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[447] *See, e.g.*, Wolf v. Colorado, 338 U.S. 25, 27–28 (1949) (holding that "core of the Fourth Amendment" was implicit in the concept of ordered liberty and thus "enforceable against the States through the Due Process Clause" but that the exclusionary rule, which applied in federal cases, did not apply to the states), *overruled by* Mapp v. Ohio, 367 U.S. 643 (1961).

[448] *McDonald*, 130 S. Ct. at 3032 (citing Twining v. New Jersey, 211 U.S. 78, 99 (1908)).

[449] *Id.* (citing *Twining*, 211 U.S. at 102).

[450] *Id.* (citing Palko v. Connecticut, 302 U.S. 319, 325 (1937)).

[451] *Id.* (citing Chicago, B. & Q. Ry. Co. v. Chicago, 166 U.S. 226, 238 (1897)).

[452] *Id.* at 3034 (citing Duncan v. Louisiana, 391 U.S. 145, 149, n.14 (1968)).

[453] *Id.* at 3053 ("[I]f the 'careful description' requirement is used in the manner we have hitherto employed, then the enterprise of determining the Due Process Clause's 'conceptual core' is a waste of time."). Thomas aptly points out in his concurrence that there is no consistent standard uniting all of the Court's decisions incorporating Bill of Rights provisions. *See id.* at 3062 (Thomas, J., concurring) ("The one theme that links the Court's substantive due process precedents together is their lack of a guiding principle to distinguish 'fundamental' rights that warrant protection from nonfundamental rights that do not."). The entire edifice of due process incorporation has, by 2010, collapsed into nothing more than a "legal fiction":

> While this Court has at times concluded that a right gains "fundamental" status only if it is essential to the American "scheme of ordered liberty" or "'deeply rooted in this Nation's history and tradition'", the Court has just as often held that a right warrants Due Process Clause protection if it satisfies a far less measurable range of criteria. Using the latter approach, the Court has determined that the Due Process Clause applies rights against the States that are not mentioned in the Constitution at

any particular distinction between rights articulated in previous incorporation cases but on stare decisis and the fact that the Court had, by the twenty-first century, already incorporated every other provision of the Bill of Rights via the Due Process Clause:

> Unless we turn back the clock or adopt a special incorporation test applicable only to the Second Amendment, municipal respondents' argument must be rejected. Under our precedents, if a Bill of Rights guarantee is fundamental from an American perspective, then, unless *stare decisis* counsels otherwise, that guarantee is fully binding on the States . . . .[454]

Alito's observation that the Fourteenth Amendment "fundamentally altered the federal system" therefore exhibits a *liberal* ideological attitude toward the amendment's implied alteration of the Constitution's Newtonian structural blueprint. While he may not share formally Justice Black's "total incorporation" theory,[455] he acknowledges that total incorporation has, by 2010, become a *fait accompli*, and refuses to "turn back the clock."[456]

2. Thomas's Concurrence

Justice Thomas begins his concurrence by observing that the adoption of the Fourteenth Amendment "significantly altered our system of government" by overturning Justice Taney's analysis of citizenship under the Constitution in *Dred Scott.* He then discusses the "circular reasoning"[457] that the Court, relying on *The Slaughterhouse Cases*, used in *United States v. Cruikshank*[458] to hold that the Second Amendment does not apply against the states via the Privileges or Immunities Clause:

> [T]he Court [in *Cruikshank*] held that members of a white militia who had brutally murdered as many as 165 black Louisianians congregating outside a courthouse had not deprived the victims of their privileges as American citizens to peaceably assemble or to keep and bear arms. According to

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all, even without seriously arguing that the Clause was originally understood to protect such rights.

Id. at 3061–62 (citations omitted).

[454] *Id.* at 3046 (plurality opinion).

[455] *See* Adamson v. California, 332 U.S. 46, 71 (Black., J., dissenting).

[456] *McDonald*, 130 S. Ct. at 3046.

[457] *Id.*

[458] 92 U.S. 542 (1875).

> the Court, the right to peaceably assemble codified in the First Amendment was not a privilege of United States citizenship because "[t]he right . . . existed long *before* the adoption of the Constitution." Similarly, the Court held that the right to keep and bear arms was not a privilege of United States citizenship because it was not "in any manner dependent upon that instrument for its existence." In other words, the reason the Framers codified the right to bear arms in the Second Amendment—its nature as an inalienable right that pre-existed the Constitution's adoption—was the very reason citizens could not enforce it against States through the Fourteenth.[459]

The *Slaughterhouse* Court's distinction between rights that preexist the adoption of the Constitution and "privileges or immunities," which depend on its adoption for their existence was, in Thomas's opinion, wrong from the very start. Thomas's sees in *McDonald* "an opportunity to reexamine, and begin the process of restoring, the meaning of the Fourteenth Amendment agreed upon by those who ratified it."[460]

Thomas concludes, after a lengthy new originalist exegesis of the Fourteenth Amendment's original public meaning, that "the ratifying public understood the Privileges or Immunities Clause to protect constitutionally enumerated rights, including the right to keep and bear arms" and that "the right to keep and bear arms was understood to be a privilege of American citizenship guaranteed by the Privileges or Immunities Clause."[461] Thomas declines to propose, as a substitute for the distinction between federal rights the *Slaughterhouse* Court established, a test for determining which Bill of Rights provisions or unenumerated rights are "privileges or immunities" of United States citizens.[462] He notes, however, that he would not restrict the scope privileges or immunities incorporation to the individual rights contained in the Bill of rights alone.[463] The superiority of privileges or

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[459] *McDonald*, 130 S. Ct. at 3060 (Thomas, J., concurring) (citations omitted).

[460] *Id.* at 3063.

[461] *Id.* at 3076.

[462] *Id.* at 3084 ("I do not endeavor to decide in this case whether, or to what extent, the Privileges or Immunities Clause applies any other rights enumerated in the Constitution against the States. Nor do I suggest that the *stare decisis* considerations surrounding the application of the right to keep and bear arms against the States would be the same as those surrounding another right protected by the Privileges or Immunities Clause. I consider *stare decisis* only as it applies to the question presented here." (footnote omitted)).

[463] *Id.* at 3084 n.20 ("I see no reason to assume that the constitutionally enumerated rights protected by the Privileges or Immunities Clause should consist of all the rights recognized in the Bill of Rights and no others. Constitutional provisions outside the Bill of Rights protect

immunities incorporation over due process incorporation is its fidelity to the original public understanding of the Fourteenth Amendment:

> To be sure, interpreting the Privileges or Immunities Clause may produce hard questions. But they will have the advantage of being questions the Constitution asks us to answer. I believe those questions are more worthy of this Court's attention—and far more likely to yield discernable answers—than the substantive due process questions the Court has for years created on its own, with neither textual nor historical support.[464]

Thomas's observation that the Fourteenth Amendment "significantly altered our system of government" therefore exhibits a *revolutionary* ideological attitude toward the Amendment's effect on the Constitution's Newtonian structural blueprint.

3. Stevens's Dissent

Justice Stevens approaches the issue of incorporating the Second Amendment as an unapologetic living constitutionalist, and thereby abandons the old originalist interpretive stance that characterized his dissent in *Heller*.[465] While Stevens acknowledges that "the enactment of the Fourteenth Amendment profoundly altered our legal order,"[466] he maintains that "it 'did not unstitch the basic federalist pattern woven into our constitutional fabric.'"[467] Notwithstanding his

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individual rights, see, *e.g.*, Art. I, 9, cl. 2 (granting the 'Privilege of the Writ of Habeas Corpus'), and there is no obvious evidence that the Framers of the Privileges or Immunities Clause meant to exclude them. In addition, certain Bill of Rights provisions prevent federal interference in state affairs and are not readily construed as protecting rights that belong to individuals. The Ninth and Tenth Amendments are obvious examples, as is the First Amendment's Establishment Clause, which 'does not purport to protect individual rights.'").

[464] *Id.* at 3086.

[465] *Id.* at 3098–99 (Stevens, J., dissenting) ("[A] rigid historical methodology is unfaithful to the Constitution's command. For if it were really the case that the Fourteenth Amendment's guarantee of liberty embraces only those rights 'so rooted in our history, tradition, and practice as to require special protection,' then the guarantee would serve little function, save to ratify those rights that state actors have *already* been according the most extensive protection. That approach . . . promises an objectivity it cannot deliver and masks the value judgments that pervade any analysis of what customs, defined in what manner, are sufficiently 'rooted'; it countenances the most revolting injustices in the name of continuity, for we must never forget that not only slavery but also the subjugation of women and other rank forms of discrimination are part of our history; and it effaces this Court's distinctive role in saying what the law is, leaving the development and safekeeping of liberty to majoritarian political processes. It is judicial abdication in the guise of judicial modesty." (citations omitted) (footnotes omitted)).

[466] *Id.* at 3093.

[467] *Id.* (citing Williams v. Florida, 399 U.S. 78, 133 (1970)).

reputation of late as one of the Court's most liberal Justices in recent memory,[468] Stevens shows himself in *McDonald* to exhibit a deeply *conservative* attitude toward the effect of the Fourteenth Amendment on the Constitution's Newtonian blueprint.

Yet Stevens clearly is no Raoul Berger—he does not claim that the Fourteenth Amendment left *Barron* wholly intact.[469] His rejection of incorporation in *McDonald* stems from the distinct conception of "liberty" that emerged from the Court's substantive due process doctrine through its development over the course of the twentieth century.[470] The very first paragraph of his dissent provides an insightful clue as to the structural implications of Stevens's understanding of liberty:

> In [*Heller*], the Court answered the question whether a federal enclave's "prohibition on the possession of usable handguns in the home violates the Second Amendment to the Constitution." The question we should be answering in this case is whether the Constitution "guarantees individuals a fundamental right," enforceable against the States, "to possess a functional, personal firearm, including a handgun, within the home." That is a different—and more difficult—inquiry than asking if the Fourteenth Amendment "incorporates" the Second Amendment. The so-called incorporation question was squarely and, in my view, correctly resolved in the late 19th century.[471]

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[468] Stevens's reputation for liberalism has grown as he neared his retirement. *See* Robert Barnes, *Justice John Paul Stevens Announces His Retirement from Supreme Court*, WASH. POST, Apr. 10, 2010, http://www.washingtonpost.com/wp-dyn/content/article/2010/04/09/AR2010040902312.html ("The success Stevens enjoyed in putting together slim majorities for liberal outcomes made way for stinging dissents in which he has accused the current court of ignoring years of precedent."); Jeffrey Rosen, *The Dissenter*, NY TIMES, Sept. 23, 2007, § 6 (Magazine), *available at* http://www.nytimes.com/2007/09/23/magazine/23stevens-t.html (describing Stevens as "the oldest and arguably most liberal justice" on the Court).

[469] *See* discussion *supra* notes 368–70, 444–45.

[470] Stevens quotes Justice Douglas's opinion in *Griswold v. Connecticut*, 381 U.S. 479 (1965), in articulating this conception. *See McDonald*, 130 S. Ct. at 3098 (Stevens, J., dissenting) ("While the relevant inquiry may be aided by resort to one or more of the provisions of the Bill of Rights, it is not dependent on them or any of their radiations. The Due Process Clause of the Fourteenth Amendment stands . . . on its own bottom.' Inclusion in the Bill of Rights is neither necessary nor sufficient for an interest to be judicially enforceable under the Fourteenth Amendment. This Court's 'selective incorporation' doctrine, is not simply 'related' to substantive due process; it is a subset thereof." (alteration in original) (footnote omitted) (citing *Griswold*, 381 U.S. at 500)).

[471] *Id.* at 3103.

Stevens further down expresses his belief that "substantive due process analysis generally requires us to consider the term 'liberty' in the Fourteenth Amendment, and that this inquiry may be informed by but does not depend upon the content of the Bill of Rights."[472] The "fundamental liberty interests" of substantive due process jurisprudence are

> inseparable from the customs that prevail in a certain region, the idiosyncratic expectations of a certain group, or the personal preferences of their champions, may be valid claims in some sense; but they are not of constitutional stature. Whether conceptualized as a "rational continuum" of legal precepts or a seamless web of moral commitments, the rights embraced by the liberty clause transcend the local and the particular.[473]

"A rigid historical test," Stevens concludes, "is inappropriate in this case, most basically, because our substantive due process doctrine has never evaluated substantive rights in purely, or even predominantly, historical terms."[474]

Stevens's deliberate neglect of the Second Amendment's history allows him to ignore its place in the Constitution's Newtonian structural blueprint after 1791. He must therefore form some basis on which to distinguish Bill of Rights guarantees that are liberty interests from those that are not. He addresses this problem by noting that the Court's substantive due process precedents do not "seek a categorical understanding" of due process liberty but rather "have elucidated a conceptual core"[475]:

> The clause safeguards, most basically, "the ability independently to define one's identity," "the individual's right to make certain unusually important decisions that will affect his own, or his family's, destiny," and the right to be respected as a human being. Self-determination, bodily integrity, freedom of conscience, intimate relationships, political equality, dignity and respect—these are the central values we have found implicit in the concept of ordered liberty.

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[472] *Id.* at 3096.
[473] *Id.* (quoting Poe v. Ullman, 367 U.S. 487, 543 (1961) (Harlan, J., dissenting)).
[474] *Id.* at 3097.
[475] *Id.* at 3101.

> Another key constraint on substantive due process analysis is respect for the democratic process. If a particular liberty interest is already being given careful consideration in, and subjected to ongoing calibration by, the States, judicial enforcement may not be appropriate. When the Court declined to establish a general right to physician-assisted suicide, for example, it did so in part because "the States [were] currently engaged in serious, thoughtful examinations of physician-assisted suicide and other similar issues," rendering judicial intervention both less necessary and potentially more disruptive. Conversely, we have long appreciated that more "searching" judicial review may be justified when the rights of "discrete and insular minorities"—groups that may face systematic barriers in the political system—are at stake. Courts have a "comparative . . . advantage" over the elected branches on a limited, but significant, range of legal matters.[476]

These "liberty interests" all share the common characteristic of being *entitlements* that the people enjoy by the grace of the Court rather than core attributes of republican liberty and democratic self-governance that form the substance of popular sovereignty in our written Constitution.

It is only in this context that Stevens's assertion that "firearms have a fundamentally ambivalent relationship to liberty"[477] makes any sense. Under Stevens's conception of liberty, the narrow individual right to keep certain firearms in the home for the purpose of personal self-defense that *Heller* establishes is, if anything, a *security* interest that courts can weigh against the public order that the government provides to citizens through its "monopoly on legitimate violence"[478]:

> In evaluating an asserted right to be free from particular gun-control regulations, liberty is on both sides of the equation. Guns may be useful for self-defense, as well as for hunting and sport, but they also have a unique potential to facilitate death and destruction and thereby to destabilize ordered liberty. *Your* interest in keeping and bearing a certain firearm may diminish *my* interest in being and feeling safe

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[476] *Id.* (alterations in original) (quoting Roberts v. United States Jaycees, 468 U.S. 609, 619 (1984); Fitzgerald v. Porter Mem'l Hosp., 523 F.2d 716 (7th Cir. 1975); Washington v. Glucksberg, 521 U.S. 702, 735 (1997); United States v. Carolene Prods. Co., 304 U.S. 144, 153 n.4 (1938)).

[477] *Id.* at 3107.

[478] *Id.* at 3108.

> from armed violence. And while granting you the right to own a handgun might make you safer on any given day—assuming the handgun's marginal contribution to self-defense outweighs its marginal contribution to the risk of accident, suicide, and criminal mischief—it may make you and the community you live in less safe overall, owing to the increased number of handguns in circulation.[479]

The right of an individual citizen to own a gun, under this formulation, is *antithetical* to liberty if it at all undermines the power of the state to maintain public safety and order. Stevens, ironically, quotes John Locke's *Second Treatise of Government* out of context in order to make the fundamentally Hobbesian claim that "the power a man has in the state of nature 'of doing whatsoever he thought fit for the preservation of himself and the rest of mankind, he gives up,' to a significant extent, 'to be regulated by laws made by the society.'"[480]

C. The Diachronic Method and McDonald

The three main opinions in *McDonald* each erroneously afford the Fourteenth Amendment more structural significance than the Second within the Constitution's Newtonian framework. The Second Amendment appears in each opinion as an isolated rights guarantee that in no way affects the structure of that framework after 1791.[481] The Fourteenth Amendment, by contrast, appears as a "meta-right," which, for one reason or another, enhances the power of the federal courts to invalidate certain state laws.[482]

The reason for this is the synchronic nature of both the living constitutionalism Alito and Stevens exhibit and the originalism that Thomas exhibits.[483] The diachronic method, by contrast, would analyze the Second and Fourteenth Amendments equally as different provisions that have certain normative implications for the allocation of political power between the sovereign people and the state and

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[479] *Id.*

[480] *Id.*

[481] Scalia, moreover, lobs off the Second Amendment's preamble in his *Heller* opinion so as to be bound only by the synchronic meaning of its operative clause in construing the right at issue. *See* Dist. of Columbia v. Heller, 128 S. Ct. 2783, 2789–91 (2008); discussion *supra* notes 248–50.

[482] Howard Jay Graham elucidates this view in his article *Our Declaratory Fourteenth Amendment. See* Howard Jay Graham, *Our Declaratory Fourteenth Amendment*, 7 STAN. L. REV. 3, 4–5 (1954) ("[T]he Fourteenth Amendment, like the Bill of Rights which the Fathers added to the original Constitution in 1791, was regarded by its framers and ratifiers as declaratory of the previously existing law and Constitution." (footnote omitted)).

[483] *See* discussion *supra* note 402.

federal governments that operate on their behalf, within the Constitution's Newtonian structural framework.

Because both provisions were added *at different times* to the Constitution after the adoption of the founding framework in 1789, the analysis would proceed *sequentially* and *cumulatively* in two stages. First, the judge would analyze the position the Second Amendment occupies within the Newtonian framework of 1791—the 1789 framework as structurally altered by the adoption two years later of the Bill of Rights—and then identify its structural teleological meaning within that framework through the identification of legitimate and illegitimate Darwinian transformations and the anachronisms they produce. During this first stage, the judge would ignore for the time being the Fourteenth Amendment and any further alterations it may have caused to the 1789 Newtonian framework.

Second, the judge would conduct a similar analysis of the position that the Fourteenth Amendment occupies within the 1868 Newtonian framework—the 1791 framework as structurally altered by its adoption[484]—in order to gain the *combined* structural teleological

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[484] Given the adoption of three intervening amendments between the adoption of the Bill of Rights in 1791 and the adoption of the Fourteenth Amendment in 1868, it would be more precise to refer to an analysis of the "1865 Newtonian framework," as that is the year the preceding Thirteenth Amendment was adopted. The Eleventh Amendment's temporal relationship to both prior and subsequent Newtonian structural blueprints has in fact plagued the Court for over a century as a result of its construing the amendment as a "state sovereign immunity" provision. *See* Chisholm v. Georgia, 2 U.S. (2 Dall.) 419 (1793) (upholding, by a four-to-one majority, Supreme Court jurisdiction under Article III, Section 2 of the Constitution and the Judiciary Act of 1789 over a suit by a South Carolina executor against the state of Georgia to collect payment on debts dating from the Revolutionary War); Hans v. Louisiana, 134 U.S. 1 (1890) (denying federal court jurisdiction over a suit by a Louisiana citizen against the state of Louisiana to collect unpaid interest on bonds that the state had issued him on the ground that the Eleventh Amendment was adopted in order to overturn the results of *Chisholm* and expressly write the principle of state sovereign immunity in federal court into the Constitution); *Ex Parte* Young, 209 U.S. 123 (1908) (allowing suits against state officials by citizens in federal court to enjoin such officials from enforcing a state law that violates a federal constitutional right); Principality of Monaco v. Mississippi, 292 U.S. 313 (1934) (holding that state sovereign immunity in federal court applies to suits by foreign countries against states even though the text of the Eleventh Amendment specifically refers to the "citizens or subjects" of foreign countries); Edelman v. Jordan, 415 U.S. 651 (1974) (limiting the scope of *Ex Parte Young* by holding that the Eleventh Amendment sovereign immunity prohibits a federal court could from ordering a state to retroactively pay back funds unconstitutionally withheld from parties to whom they were due) Fitzpatrick v. Bitzer, 427 U.S. 445 (1976) (holding that Congress has the power to abrogate the Eleventh Amendment sovereign immunity of the states if it does so pursuant to its power under Section 5 of the 14th Amendment to enforce upon the states the guarantees of that amendment); Pennsylvania v. Union Gas Co., 491 U.S. 1 (1989) (extending Congress's power to abrogate established in *Fitzpatrick* to Acts of Congress passed pursuant to any power delegated to it in Article I of the Constitution); Seminole Tribe of Fla. v. Florida, 517 U.S. 44 (1996) (overturning *Union Gas* and holding that the Fourteenth Amendment differs from Article I in its express limitations on state power and enhancement of federal power and that Congress, therefore, has no power to abrogate Eleventh Amendment state sovereign immunity under Article I); *see also* discussion *supra* notes 283–94.

meaning of the Second and Fourteenth Amendments and thereby resolve the incorporation issue in *McDonald* in the manner that most faithfully maintains or restores the political power of the popular sovereign in relation to the state that governs on its behalf.

1. The Second Amendment's Structural Teleological Meaning Within the 1791 Newtonian Framework

There is a general consensus among judges, legal scholars, and historians alike that the Anglo-Saxon idea of the popular militia as a substitute for a permanent standing army and, as such, a defining characteristic of a free country, formed the substantial part of intellectual antecedent for the adoption of the Second Amendment in 1791.[485] [T]he Militia," Scalia writes in *Heller*, "comprised all males physically capable of acting in concert for the common defense."[486] Stevens's dissent in that case shares this understanding of the militia but suggests that the federalist separation of powers in the 1789 Newtonian framework codified the "well-regulated militia" of the Second Amendment into an exclusively state-organized institution that derives its authority not from the sovereignty of the people but from the sovereignty of the states:

> [T]he words "the people" in the Second Amendment refer back to the object announced in the Amendment's preamble. They remind us that it is the collective action of individuals having a duty to serve in the militia that the text directly protects and, perhaps more importantly, that the ultimate

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[485] *See generally* McIntosh, *supra* note 171. McIntosh summarizes the decline of this conception of the militia in the nineteenth century:

> There was . . . an era of American history during which the Second Amendment's right to bear arms was widely perceived to reserve to the citizenry the profound ability to "alter or abolish" their government. The ability to raise a standing army, reserved to the federal government by the Constitution, was considered a grave threat to popular liberty, justified only by its necessity for defense against foreign aggressors. The right to bear arms, subsequently enshrined in the Bill of Rights, was intended to check potential abuses by a tyrannical government armed with such a standing army.
>
> The Second Amendment is no longer interpreted to protect the right of the populace to retain the means necessary for popular overthrow of an oppressing government. The individualist vision of the Second Amendment, as derived from a Reconstruction-era reinterpretation of the Amendment, is now predominant in policy makers' minds. The right to bear arms as a right of revolution, like the ability of the populace to practice that right, is a distant memory.

Id. at 674–75 (footnotes omitted).

[486] Dist. of Columbia v. Heller, 128 S. Ct. 2783, 2799 (2008).

> purpose of the Amendment was to protect the States' share of the divided sovereignty created by the Constitution.[487]

In Stevens's view, the purpose of the Second Amendment is apparently to protect the states from federal overreach, not to protect the people from government overreach.

Any disagreement between Scalia and Stevens in *Heller* over the correct meaning of "a well-regulated militia," however, is obscured by Scalia's willful demotion of the Second Amendment's preamble in his interpretation of its operative clause.[488] By manipulating the Amendment's historical teleological meaning in order to create a foundation for a right of self-defense that is strictly personal in nature, Scalia avoids having to address Stevens's sovereignty-based interpretation of the Amendment's prefatory clause.[489]

The vertical separation of powers between the federal government and the states not is an end in itself but a means of ensuring liberty and popular sovereignty.[490] A proper diachronic reading of the Second Amendment would therefore acknowledge that the state-organized militia Stevens writes of is legitimate only insofar as its Newtonian existence as a check on federal power is not diminished by Darwinian transformations that have transpired after 1791.

The "Darwinian" history of the Second Amendment militia between 1791 and today reveals this entire "Newtonian" inquiry to be moot. State militias at the time of the Second Amendment's ratification were by and large popular institutions. "The institutional mechanisms created in the first years of Independence," historian David Konig explains, "represented efforts to resort to the ultimate source of sovereignty—the people—as a collective source of protecting liberty from power . . . [, and] the new state constitutions gave meaning to words by linking them to implementation through popular participation and mobilization."[491] *The Federalist Papers* contain repeated references to the militia as serving this function. In

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[487] *Id.* at 2827 (Stevens, J., dissenting).

[488] *See id.* at 2789 (majority opinion) ("The Second Amendment is naturally divided into two parts: its prefatory clause and its operative clause. The former does not limit the latter grammatically, but rather announces a purpose.").

[489] *See id.* at 2836 (Stevens, J., dissenting) ("The history of the adoption of the Amendment thus describes an overriding concern about the potential threat to state sovereignty that a federal standing army would pose, and a desire to protect the States' militias as the means by which to guard against that danger.").

[490] *See, e.g.*, Victoria Nourse, *The Vertical Separation of Powers*, 49 DUKE L.J. 749 (1999) (arguing that function alone cannot predict important changes in structural incentives and thus serves as a poor proxy for assessing real risks to governmental structure).

[491] David Thomas Konig, *Why the Second Amendment Has a Preamble: Original Public Meaning and the Political Culture of Written Constitutions in Revolutionary America*, 56 UCLA L. REV 1295, 1317 (2009) [hereinafter Konig, *Preamble*].

The Federalist No. 26, Alexander Hamilton cast the militia in the following light:

> It is not easy to conceive a possibility that dangers so formidable can assail the whole union as to demand a force considerable enough to place our liberties in the least jeopardy, especially if we take into our view the aid to be derived from the militia, which ought always to be counted upon as a valuable and powerful auxiliary.[492]

James Madison, meanwhile, argued in *The Federalist No. 46* that "a standing army of 25,000 to 30,000 men would be offset by 'a militia amounting to near a half a million citizens with arms in their hands, officered by men chosen from among themselves.'"[493]

A mere decade or two after the Constitution's ratification, however, the popular citizen-militias envisioned in the early state constitutions and *The Federalist Papers* ceased to be a reality and were replaced by far smaller state-organized militias that were little other than state standing armies.[494] In the words of historian Lawrence Delbert Cress, "[t]he ideological assumptions of revolutionary republicanism would no longer play an important role in the debate over the republic's military requirements."[495] Today, the United States "technically continues to have a national 'general' militia, consisting of all able-bodied males between the ages of [seventeen] and [forty-five] years of age who are not members of the National Guard or the Naval Militia."[496] Some state laws, furthermore, "contain provisions establishing general 'unorganized' militias[, but] for practical purposes . . . , these 'organizations' have ceased to play any real role in national defense."[497]

For most of the nation's history, therefore, the people's sovereign power has lain exposed and vulnerable to the tyranny of federal and state standing armies alike, and the decline of the popular general militia in the early nineteenth century clearly qualifies as an illegitimate Darwinian transformation from above that a contemporary judge would have to rectify when interpreting the

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[492] THE FEDERALIST NO. 26, at 173 (A. Hamilton) (Mentor ed. 1961), *quoted in* William S. Fields & David T. Hardy, *The Militia and the Constitution: A Legal History*, 136 MIL. L. REV. 1, 33 (1992).

[493] Fields & Hardy, *supra* note 492, at 33 (quoting THE FEDERALIST NO. 46, at 299 (J. Madison) (Mentor ed. 1961)).

[494] *See id.* at 42.

[495] *Id.* (quoting LAWRENCE DELBERT CRESS, CITIZENS IN ARMS: THE ARMY AND THE MILITIA IN AMERICAN SOCIETY TO THE WAR OF 1812, at 176 (1982)).

[496] *Id.* at 42 n.160.

[497] *Id.* (citation omitted).

Second Amendment diachronically. The right of individuals to keep and bear arms as part of a liberty-preserving popular militia is problematic by modern standards, however, because of its inherent unenforceability by a court: in the event that a formerly free republican government is usurped by a tyrannical, authoritarian regime that oppresses its people with a permanent standing army, any court in which a particular citizen might seek a remedy for the violation of this right would an agent of that regime.[498]

In the eighteenth century, however, "[t]he judiciary was not expected to play the major role of enforcing individual rights that it has grown to assume; it was but one of the many mechanisms foreseen as guarantors of liberty."[499] The colonists at the time of independence, in fact, were acutely suspicious of judicial power in light of their recent experiences with Crown-appointed judges.[500] The uniquely powerful role of juries in the American legal system, particularly in criminal trials, is a product of this eighteenth-century suspicion.[501] Just as a jury might check a judge's power with a "nullifying" verdict, the popular citizen militia might check the power of government generally by taking up arms in the event of tyranny.[502]

The inherent unenforceability of such right is further complicated by an additional Darwinian transformation that has intervened between 1791 and today: the invention of modern weapons whose destructive capacity dwarfs anything eighteenth-century Americans could have imagined.[503] A common argument put forth by opponents of an individual Second Amendment right to own firearms for the purpose of collective, civic self-defense against government tyranny goes as follows:

> 1) "The prefatory clause was drafted with the purpose of arming the populace of its time to fulfill a military role."

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[498] *See* Konig, *Preamble*, *supra* note 491, at 1317–18.

[499] *Id.* at 1319.

[500] *Id.*

[501] *See* Irwin A. Horowitz & Thomas E. Willging, *Changing Views of Jury Power: The Nullification Debate: 1787–1988*, 51 LAW & HUM. BEHAVIOR 165 (1991).

[502] Konig, *Preamble*, *supra* note 491, at 1322–23.

[503] John Zulkey, Note, *The Obsolete Second Amendment: How Advances in Arms Technology Have Made the Prefatory Clause Incompatible with Public Policy*, 2010 U. ILL. J.L. TECH. & POL'Y 213, 216 (2010) ("When the Second Amendment was drafted, no distinction existed between arms suitable for personal ownership and those reserved for military use; the same muskets and rifles used by the militias were also privately owned. For the militia to achieve its purpose in defending the state, it was essential that the citizenry arm themselves with weapons sufficient to fight off a contemporary military. Today, allowing private ownership of military weapons would be disastrous, but the most advanced firearms available at the time of the framing were perfectly appropriate for individual ownership." (footnote omitted)).

> 2) "To fulfill that military role, a populace requires contemporary military weapons."
>
> 3) "At the time of the framing, firearms were rudimentary enough that there was little danger of a lone madman or terrorist wreaking massive havoc with them."
>
> 4) "But times have changed and weapons technology has advanced . . . ."
>
> 5) "Therefore, having outlived its purpose, the prefatory clause has become obsolete and should be excised."[504]

This argument closely mirrors the contention of Justices Breyer and Stevens that the Second Amendment protects, if anything, a security interest rather than a liberty interest.[505] Breyer, in fact, proposes a special "balancing inquiry"[506] in his *Heller* dissent that is premised on this very assumption:

> [A]ny attempt *in theory* to apply strict scrutiny to gun regulations will *in practice* turn into an interest-balancing inquiry, with the interests protected by the Second Amendment on one side and the governmental public-safety concerns on the other, the only question being whether the regulation at issue impermissibly burdens the former in the course of advancing the latter.
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> I would simply adopt such an interest-balancing inquiry explicitly. The fact that important interests lie on both sides of the constitutional equation suggests that review of gun-control regulation is not a context in which a court should effectively presume either constitutionality (as in rational-basis review) or unconstitutionality (as in strict scrutiny). Rather, "where a law significantly implicates competing constitutionally protected interests in complex

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[504] *Id.* at 214–15.

[505] *See, e.g.*, McDonald v. City of Chicago, 130 S. Ct. 3020, 3109 (Stevens, J., dissenting) ("I do not doubt for a moment that many Americans feel deeply passionate about firearms, and see them as critical to their way of life as well as to their security. Nevertheless, it does not appear to be the case that the ability to own a handgun, or any particular type of firearm, is critical to leading a life of autonomy, dignity, or political equality: The marketplace offers many tools for self-defense, even if they are imperfect substitutes, and neither petitioners nor their *amici* make such a contention. Petitioners' claim is not the kind of substantive interest, accordingly, on which a uniform, judicially enforced national standard is presumptively appropriate.").

[506] *See* Dist. of Columbia v. Heller, 128 S. Ct. 2783, 2852 (2008) (Breyer, J., dissenting).

> ways," the Court generally asks whether the statute burdens a protected interest in a way or to an extent that is out of proportion to the statute's salutary effects upon other important governmental interests.[507]

Stevens makes a similar argument in his *McDonald* dissent:

> The liberty interest asserted by petitioners is . . . dissimilar from those we have recognized in its capacity to undermine the security of others. To be sure, some of the Bill of Rights' procedural guarantees may place "restrictions on law enforcement" that have "controversial public safety implications." But those implications are generally quite attenuated. A defendant's invocation of his right to remain silent, to confront a witness, or to exclude certain evidence cannot directly cause any threat. The defendant's liberty interest is constrained by (and is itself a constraint on) the adjudicatory process. The link between handgun ownership and public safety is much tighter. The handgun is itself a tool for crime; the handgun's bullets *are* the violence.
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> Similarly, it is undeniable that some may take profound offense at a remark made by the soapbox speaker, the practices of another religion, or a gay couple's choice to have intimate relations. But that offense is moral, psychological, or theological in nature; the actions taken by the rights-bearers do not actually threaten the physical safety of any other person. Firearms may be used to kill another person. If a legislature's response to dangerous weapons ends up impinging upon the liberty of any individuals in pursuit of the greater good, it invariably does so on the basis of more than the majority's "'own moral code.'" While specific policies may of course be misguided, gun control is an area in which it "is quite wrong . . . to assume that regulation and liberty occupy mutually exclusive zones—that as one expands, the other must contract."[508]

Justice Scalia harshly—and correctly—criticizes Breyer and Stevens's conception of the Second Amendment as a security interest to be balanced against gun regulation as a countervailing security

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[507] *Id.*

[508] *McDonald*, 130 S. Ct. at 3110 (Stevens, J., dissenting) (alteration in original) (footnote omitted) (citations omitted).

interest as enabling "a judge-empowering 'interest-balancing inquiry' that 'asks whether the statute burdens a protected interest in a way or to an extent that is out of proportion to the statute's salutary effects upon other important governmental interests.'"[509]

> We know of no other enumerated constitutional right whose core protection has been subjected to a freestanding "interest-balancing" approach. 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. A constitutional guarantee subject to future judges' assessments of its usefulness is no constitutional guarantee at all.[510]

Scalia, however, misses the irony of having created the premise from which this interest-balancing idea logically stems by narrowing his holding in *Heller* to personal self-defense within the home.

Once the Second Amendment right of resistance against tyranny is rooted in the possible future need for citizens to preserve the constitutional order by force of arms, it becomes far easier to imagine a rational basis-strict scrutiny continuum where certain types of gun restrictions more blatantly hinder citizens from defending their constitutional liberties than others and are thus scrutinized more closely. The Court might distinguish, for example, between laws prohibiting all felons from owning or carrying firearms and laws prohibiting only felons who were convicted of particularly violent offenses from doing the same.

The type of collective armed struggle against a usurper government that would emulate the function of the eighteenth-century militia under modern conditions does not need the highly destructive weaponry of the U.S. military to succeed now or in the future any more than the Viet Cong needed such weapons to fight off the U.S. military or the Algerian resistance needed them to defeat the French in previous decades. All a popular guerilla-style resistance needs to win is the weapons commonly used by a typical infantry unit and an undying determination.[511] The Court might apply a strict scrutiny test that protects any weapons that would aid such a resistance should it ever become necessary but exclude from protection any highly

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[509] *Heller*, 128 S. Ct. at 2821 (majority opinion).

[510] *Id.*

[511] *See* Anthony James Joes, *Guerilla Warfare*, *in* 2 ENCYCLOPEDIA OF VIOLENCE, PEACE, & CONFLICT 75–87 (Lester R. Kurtz & Jennifer E. Turpin eds., 1999).

destructive weapons that (a) do not confer any substantial advantage upon such a resistance over and above less-destructive weapons but (b) would give extremist individuals and groups undue political leverage over the majority of the citizenry if they ever fell into their hands. Such a balancing test would preserve the people's sovereign power both from government usurpation and from coercion by terrorists and extremists. In so doing, it would adequately address Scalia's legitimate criticism of the "freestanding 'interest-balancing' approach"[512] that Justice Breyer proposes in his *Heller* dissent.

2. *The Fourteenth Amendment's Structural Teleological Meaning Within the 1868 Newtonian Framework*

Because the structural teleological meaning of the Second Amendment, however, concerns the Amendment's relationship to the Constitution's 1791 Newtonian framework, it applies only to the federal government, not the states. Even though the contemporary "Darwinian" reality is that the people's sovereign power remains vulnerable to state and federal power alike, at this first stage of the two-part diachronic analysis of the issue posed in *McDonald*, the inability of federal courts to enforce federal rights against state governments that Chief Justice Marshall promulgated in *Barron*[513] still holds, as does the exclusionary conception of United States citizenship that Chief Justice Taney promulgated in *Dred Scott*.[514] The second stage of the analysis, however, examines the extent to which the Fourteenth Amendment's adoption in 1868 altered the Netwonian structural framework of 1791 and any subsequent Darwinian transformations to *that* framework in order to arrive at the combined structural teleological meaning of the Second and Fourteenth amendments.

Section 1 of the Fourteenth Amendment begins: "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside."[515] This language, on its face, nullifies Taney's explication of citizenship in *Dred Scott*.[516] Whereas Taney's account of citizenship is *jurisdictional* in character, the Fourteenth Amendment's definition is *geographical*: a United States citizen is a person who is born or naturalized *in* the United States, not *by* the United States. Whereas

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[512] *Heller*, 128 S. Ct. at 2821.

[513] *See* Barron *ex rel.* Tiernan v. Mayor of Baltimore, 32 U.S. 243, 250–51 (1833).

[514] *See supra* text accompanying note 418.

[515] U.S. CONST. amend. XIV, § 1, cl. 1.

[516] *See* Bickel, *supra* note 420, at 373.

Taney envisions the possibility of a United States citizen being an *alien* under the laws of a particular state, the Fourteenth Amendment makes every United States citizen automatically a citizen of whichever state they happen to live in. Because the opening Citizenship Clause expressly makes state citizenship subordinate to national citizenship, it effectively nationalizes the "Newtonian" citizen militias of the several states into a single Newtonian citizen militia of the United States. Section 1 concludes with a clause prohibiting states from denying "to any person within its jurisdiction the equal protection of the laws."[517] The Equal Protection Clause effectively "integrates" the national citizen militia—it now includes African Americans, women, and others who were traditionally excluded from the popular militia's ranks. However, Section 1 also contains the words "No State shall make or enforce any law which shall abridge the privileges or immunities of *citizens* of the United States."[518] The Privileges or Immunities Clause appears to exclude *aliens* from the national citizen militia.

The Fourteenth Amendment, therefore, seems to have altered the Constitution's Newtonian framework, and the role of the Second Amendment within that framework, by (1) expressly nationalizing citizenship and, with it, the citizen militias of the several states; (2) "integrating" the national citizen militia; but (3) excluding noncitizens from federal protection against state abridgment of the right to participate in this national citizen militia. The final step in determining the combined structural teleological meaning of the Second and Fourteenth Amendments under the diachronic method is to examine any Darwinian transformations that have transpired between 1868 and today.

3. The Combined Structural Teleological Meaning of the Second and Fourteenth Amendments Within the 2010 Darwinian Framework

The combined structural teleological meaning of the Second and Fourteenth Amendments that a judge employing diachronic method in *McDonald* would arrive at takes, as its Newtonian starting point, the following presuppositions: the Constitution protects the right of (1) individual (2) United States citizens (3) to possess any firearms that are powerful enough to enable a national citizen-militia to successfully a wage collective popular war of resistance against a future Constitution-destroying state or federal government tyranny, (4) primarily for the purpose of participating in such a war of

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[517] U.S. CONST. amend. XIV, § 1, cl. 4.

[518] *Id.* (emphasis added).

resistance should it ever become necessary, but (5) also for the purposes of personal safety or lawful recreation.

Yet certain Darwinian transformations may have transpired since 1868 that judges will have to critically consider before making a final decision. One such transformation may be the fact that resident aliens and even undocumented immigrants currently make up an unprecedented portion of the U.S. population.[519] Excluding them from the Second Amendment right to bear arms as part of the national citizen militia may hinder the solidarity and cohesion that would be necessary in the event of a popular national struggle against federal or state tyranny.[520]

Whether this is so hinges, of course, on whether including noncitizens as a kind of "popular foreign legion" in the citizen militia would add to or diminish the sovereign power of the citizenry itself in relation to the state and federal institutions that govern it on its behalf. This is a heavily fact-intensive inquiry. In a political climate in which immigration is a highly polarizing issue,[521] it will require judges to

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[519] *See* JEFFREY S. PASSEL & ROBERTO SURO, PEW HISPANIC CTR., RISE, PEAK & DECLINE: TRENDS IN U.S. IMMIGRATION, 1992–2004 (2005), *available at* http://www.ilw.com/articles/2005,1205-passel.pdf; Jorge Durand et. al, *The New Era of Mexican Migration to the United States*, 86 J. AM. HIST. 518 (1999); Rachel M. Friedberg & Jennifer Hunt, *The Impact of Immigrants on Host Country Wages, Employment and Growth*, J. ECON. PERSP., Spring 1995, at 23; Douglas S. Massey, *The New Immigration and Ethnicity in the United States*, 21 POPULATION & DEV. REV. 631 (1995); Rubén G. Rumbaut, *Origins and Destinies: Immigration to the United States Since World War II*, 9 SOC. F. 583 (1994).

[520] For an informed perspective on the effect of unprecedented transnational human migration on traditional notions of citizenship, sovereignty, and nationalism, see Stephen Castles, *Citizenship and the Other in the Age of Migration*, *in* NATIONS AND NATIONALISM: A READER 301 (Philip Spencer & Howard Wollman eds., 2005); TRANSNATIONAL DEMOCRACY: POLITICAL SPACES AND BORDER CROSSINGS (James Anderson ed., 2002); Peter Marden, *Mapping Territoriality: The Geopolitics of Sovereignty, Governance, and the Citizen*, *in* MIGRATION GLOBALISATION, AND HUMAN SECURITY 47 (David T. Graham & Nana K. Poku eds., 2000); T. Alexander Aleinikoff, *International Law, Sovereignty, and American Constitutionalism: Reflections on the Customary International Law Debate*, 98 AM. J. INT'L L. 91 (2004); Enid Trucios-Haynes, *LatCrit Theory and International Civil and Political Rights: The Role of Transnational Identity and Migration*, 28 U. MIAMI INTER-AM. L. REV. 293 (1997); Myron Weiner, *Ethics, National Sovereignty and the Control of Immigration*, 30 INT'L MIGRATION REV. 171 (1996); Laurence Whitehead *The Alternatives to 'Liberal Democracy': A Latin American Perspective*, 40 POL. STUD. 146 (1992).

[521] This Note goes to press in the wake of the 2010 midterm election, in which the Republican Party retook the House of Representatives and substantially diminished the Democratic lead in the Senate. Some have opined that immigration was "a key 'wedge' issue that [has] helped power Republicans to victory." Stewart J. Lawrence, *Court Sends Mixed Signals on Arizona Immigration Law*, COUNTERPUNCH, Nov. 3, 2010, http://www.counterpunch.org/lawrence11032010.html. Yet others have pointed to evidence indicating that anti-immigration politics, particularly in states with large Latino voting populations, may have hurt certain Republican candidates at the polls in an otherwise Republican-friendly election cycle. *See* Elise Whitman, *Tancredo, Angle, Whitman Lose After Anti-Illegal Immigration Campaigns*, WASH. INDEPENDENT, Nov. 3, 2010, *available at* http://washingtonindependent.com/102448/tancredo-angle-whitman-lose-after-anti-illegal-immigration-campaigns; Ruben Navarette, Jr., *Republicans Can't Talk About Immigration Enforcement*, SFGATE.COM, Nov. 3, 2010,

approach with extraordinary care. The Author will leave it to the reader to decide for him or herself how best to resolve the issue.

CONCLUSION

The fixation thesis is the weak link in the originalist chain. Its alienation of textual meaning from normative law transforms both into "Rorschach tests"[522]—categories that judges interpret subjectively even if they are not consciously trying to manipulate what it is they see. One can presume both Justice Scalia and Justice Stevens innocent in their treatments of the Second Amendment in *Heller*, but the same specter of doctrinal instability would result if one presumed each of them guilty of the most aggravated form of "law-office history." This Note has demonstrated the inherent inadequacy of the fixation thesis as a constraint on judges by closely following the respective originalist interpretive processes of Justices Scalia and Stevens in *Heller* to diametrically opposed legal conclusions. It has proposed in place of the originalist fixation thesis a diachronic method of interpreting and applying constitutional provisions that requires judges to pay critical attention to change over time on the Constitution's structure while recognizing the duality of that structure that results from the Constitution's writtenness. Finally, it has applied the diachronic method to the complicated task of interpreting two separate provisions—each of which was ratified at a different point on history—in tandem, which the Court faced in *McDonald*.

McDonald demonstrates in no uncertain terms that originalism—whether "old" or "new"—has failed to resolve the "indeterminacy crisis" currently plaguing constitutional law.[523] It also, however, demonstrates the enduring validity of the early originalists' critique of the "living constitutionalism" that characterizes substantive due process incorporation analysis. Jack Balkin's remark that "[o]riginal

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http://www.sfgate.com/cgi-bin/article.cgi?f=/c/a/2010/11/02/EDL11G5MD9.DTL. For a more general overview of the impact of the 2010 election on immigration politics, see Jason Marczak, *2010 Elections: Implications for Immigration Reform*, AM. Q., Nov. 3, 2010, http://www.americasquarterly.org/node/1975.

[522] *See* Dominick LaCapra, *Rethinking Intellectual History and Reading Texts*, 19 HIST. & THEORY 245, 275 (1980) ("The historian who reads texts either as mere documents or as formal entities (if not as Rorschach tests) does not read them historically precisely because he or she does not read them as texts.").

[523] *See* Solum, *Indeterminacy Crisis*, *supra* note 82, at 462 ("What I call the indeterminacy thesis goes roughly like this: the existing body of legal doctrines—statutes, administrative regulations, and court decisions—permits a judge to justify any result she desires in any particular case. Put another way, the idea is that a competent adjudicator can square a decision in favor of either side in any given lawsuit with the existing body of legal rules.").

meaning originalism and living constitutionalism . . . are two sides of the same coin"[524] is, *unfortunately*, true. Although originalism may have been "born of contempt for the notion of a living constitution of evolving meaning,"[525] the originalist conception of what exactly comprises the "fact" of a provision's synchronic meaning has undergone an evolution of its own over the past generation.[526] What began in the 1970s as "a theory of popular sovereignty in which '[s]ociety consents to be ruled undemocratically within defined areas by certain enduring principles believed to be stated in, and placed beyond the reach of majorities by, the Constitution'"[527] has since transmogrified into "the principle that '[t]he Constitution was written to be understood by the voters.'"[528] The shifting parameters of originalist jurisprudence demonstrate how it is no less political a practice than the living constitutionalism of the Warren Court it has come to supplant.[529]

Insofar as the "living constitution" is an "Orwellian euphemism [that] promotes and applauds lawless judicial decisions . . . that have no conceivable basis in the [Newtonian] structure of the real Constitution,"[530] it bears a *present synchronicity* whereby judges fashion "fundamental liberty interests" out of their own political values at the moment of their decision, without considering the "transformative" impact their decisions themselves may have on power of the popular sovereign in relation to the State that governs on its behalf. But insofar as "original meaning" "block[s] judges from even considering" subsequent Darwinian transformations to the Newtonian structure fixed by the text,[531] it bears a *past synchronicity*

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[524] Balkin, *Framework*, *supra* note 345, at 549.

[525] Colby & Smith, *supra* note 1, at 267.

[526] *Id.* at 266 ("Many originalists . . . changed their focus from seeking to *limit* judicial power in order to *empower* legislatures to seeking to *expand* judicial power in order to *limit* legislatures.").

[527] Alicea, *supra* note 34, at 12 (alteration in original) (quoting Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1, 3 (1971)).

[528] Dist. of Columbia v. Heller, 128 S. Ct. 2783, 2788 (alteration in original) (quoting United States v. Sprague, 282 U.S. 716 (1931)).

[529] *See* Robert Post & Reva Siegel, *Originalism as Political Practice: The Right's Living Constitution*, 75 FORDHAM L. REV. 545, 569 (2006) ("Although the jurisprudence of originalism could not be more hostile to the idea of living constitutionalism, the political practice of originalism actually exemplifies that idea. The political practice of originalism seeks to vivify the Constitution by infusing it with the outlook of an insurgent political movement. The political practice of originalism actually succeeds in the goal postulated by liberals for a living constitutionalism, which is to keep the Constitution in touch with contemporary values.").

[530] Edward Whelan, Brown *and Originalism: There's More Than One Way to Get It Right*, NAT'L REV. ONLINE, May 11, 2005, http://old.nationalreview.com/comment/whelan200505110758.asp.

[531] Bruce G. Peabody, *Reversing Time's Arrow: Law's Reordering of Chronology, Causality, and History*, 40 AKRON L. REV. 587, 619 (2007).

whereby judges are incapable of *construing* provisions in a manner calculated to maintain that power where it is undiminished by such transformations or restore it where it is so diminished.

Ronald Dworkin aptly characterized the notion "that some judges obey the Constitution and others disregard it" as a "crude popular mistake."[532] At best, one can say that some judges *try harder* to obey the Constitution than others, but those judges who interpret the Constitution synchronically by falsely separating "the past" from "the present" are cutting corners. While the diachronic method is no panacea for the indeterminacy crisis, it offers judges who sincerely want to apply the Constitution faithfully and justly an epistemological tool to guide them in their efforts.

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