

6-1-2015

With All Deliberate Speed: NLRB v. Noel Canning and the Case for Originalism

Adam Lamparello
Indiana Institute of Technology

Follow this and additional works at: <https://ecommons.udayton.edu/udlr>



Part of the [Law Commons](#)

Recommended Citation

Lamparello, Adam (2015) "With All Deliberate Speed: NLRB v. Noel Canning and the Case for Originalism," *University of Dayton Law Review*. Vol. 40: No. 1, Article 2.

Available at: <https://ecommons.udayton.edu/udlr/vol40/iss1/2>

This Article is brought to you for free and open access by the School of Law at eCommons. It has been accepted for inclusion in University of Dayton Law Review by an authorized editor of eCommons. For more information, please contact mschlangen1@udayton.edu, ecommons@udayton.edu.

WITH ALL DELIBERATE SPEED NLRB V. NOEL CANNING AND THE CASE FOR ORIGINALISM¹

Adam Lamparello^{*}

I. INTRODUCTION	2
II. <i>NATIONAL LABOR RELATIONS BOARD V. NOEL CANNING</i> : CONSTITUTIONAL AMBIGUITY, AND THE BATTLE BETWEEN LIVING CONSTITUTIONALISM AND ORIGINALISM.....	7
<i>A. Justice Breyer’s Majority Opinion</i>	8
1. Interpreting the Plain Language.....	9
2. History and Practice.....	9
<i>B. Justice Scalia’s Concurrence</i>	11
1. The Plain Language	11
2. History and Practice.....	13
III. LIVING CONSTITUTIONALISM VERSUS ORIGINALISM: WHICH ONE IS BETTER SUITED FOR DEMOCRACY?	14
<i>A. When Is the Constitution’s Text Ambiguous?</i>	14
<i>B. Living Constitutionalism and Ambiguity</i>	15
1. Value Judgments Are for Courts, Not Legislatures	16
2. Constitutional Meaning and the “Smell Test”	18
3. Ambiguity, Individual Rights, and Democracy	20
4. Outcomes Trump Process	22
<i>C. Originalism and Ambiguity</i>	25
1. Value Judgments Are for Legislatures, Not Courts	26
2. Constitutional Meaning.....	27
3. Ambiguity, Individual Rights, and Democracy	29
4. Process and Equality Trump Outcomes	31
IV. WITH ALL DELIBERATE SPEED: ENSURING EQUALITY AND LIBERTY THROUGH LOCAL DEMOCRATIC PROCESSES.....	36
<i>A. Beyond One Person, One Vote: The Right to Meaningful Democratic Participation</i>	36
<i>B. Voters as Lawmakers in a More Local—and Direct— Democracy</i>	38
1. Local Democracies Can Respond to Uniquely Local Policy Needs.....	39

¹ This article is the second in a two-part series, and argues for stronger democratic processes and more citizen participation in lawmaking. See Adam Lamparello, *Restoring Constitutional Equilibrium*, 39 DAYTON L. REV. 229 (2014).

^{*} Assistant Professor of Law, Indiana Tech Law School.

2. Local Democracies Enhance Political Equality and Participation by Diverse Groups.....	40
3. Can Local Democracies Create Certain Categories of Unenumerated Rights Without Undermining Centralized State Democracy?	41
4. Citizens Can Be Lawmakers, Not Just Voters	42
5. Why Originalism Fits with Democracy	43
C. <i>Can Local Democracies Worsen Inequality?</i>	43
V. CONCLUSION	45

“[O]riginalism has become the prevailing approach to constitutional interpretation.”²

“[The Supreme Court] need[s] to accept democracy, a strong democracy, as a Constitutional value . . . or we are not going to have one.”³

I. INTRODUCTION

Record numbers of Americans are renouncing their citizenship.⁴ California’s citizens have amassed enough signatures to place on the 2016 ballot a proposal to divide California into six separate states.⁵ At least thirty-four states recently called for a second constitutional convention.⁶ Several states have ignored or enacted laws defying the Supreme Court of the United States’ precedent.⁷ One politician in Texas has discussed secession and spoken of becoming an “independent nation.”⁸ Former Supreme Court Justice John Paul Stevens has responded to this crisis by calling for the addition of six constitutional amendments, several of which

² R. George Wright, *Originalism and the Problem of Fundamental Fairness*, 91 MARQ. L. REV. 687, 688 (2008) (citation omitted) (internal quotation marks omitted).

³ Michael Waldman, *Political Accountability, Campaign Finance, and Regulatory Reform*, 18 N.C. BANKING INST. 83, 90 (2013); see also Lani Guinier, *Demosprudence through Dissent*, 122 HARV. L. REV. 4, 16 (2008) (“Demosprudence through dissent attempts to understand the democracy-enhancing potential implicit and explicit in the practice of dissents.”).

⁴ See Paul L. Caron, *Record Numbers of Citizens are Renouncing Their U.S. Citizenship*, TAXPROF BLOG (Aug. 6, 2014), http://taxprof.typepad.com/taxprof_blog/2014/08/record-numbers-of-americans.html.

⁵ See Zeninor Enwemeka, *Plan to Split California into Six States May Make 2016 Ballot*, BOSTON.COM (July 15, 2014, 5:05PM), <http://www.boston.com/news/nation/2014/07/15/plan-split-california-into-six-states-may-make-ballot/xEFMhxj4XXjW470DI6M7SN/story.html>.

⁶ See Scott Bomboy, *Unraveling Part of a New Constitution Convention Riddle*, CONSTITUTION DAILY (April 7, 2014), <http://blog.constitutioncenter.org/2014/04/unraveling-part-of-a-new-constitution-convention-riddle/>.

⁷ See Editorial, *Bad Medicine for Women*, N.Y. TIMES, Nov. 7, 2012, at A26, available at http://www.nytimes.com/2012/11/07/opinion/abortion-battles-in-arizona-and-ohio.html?_r=0 (discussing attempts by the states to restrict previability abortions in contravention of *Roe v. Wade*).

⁸ See Oliver Darby, *Texas Politician Says State is Preparing to Become ‘Independent Nation’ in Case Union ‘Falls Apart’*, THE BLAZE (Sept. 7, 2013 8:51 AM), <http://www.theblaze.com/stories/2013/09/07/texas-politician-says-state-is-preparing-to-become-independent-nation-in-case-union-falls-apart/>.

expand federal authority.⁹ That, in a nutshell, is the problem. This Article argues that, to remedy the imbalance in power between the federal and state government, democracy should be more localized, not centralized.

The average size of political districts in the United States is 720,188.¹⁰ In California, the statewide population is more than thirty-seven million, but the district size is less than 720,000.¹¹ The Table below shows the differences between the total and district populations of twenty-five states:

State ¹²	Population	Average Population Per District
Alabama	4,822,023	688,860
Arizona	6,553,255	728,139
Arkansas	2,949,131	728,980
Colorado	5,187,582	741,083
Delaware	917,092	917,092
Georgia	9,919,945	708,568
Idaho	1,595,728	797,864
Indiana	6,537,334	726,370
Kansas	2,885,905	721,476
Louisiana	4,601,893	766,982
Maryland	5,884,563	735,570
Michigan	9,883,360	705,954

⁹ See Ilya Shapiro, *Amending Justice Stevens: How and Why We Shouldn't Change the Constitution Like This*, FORBES (Apr. 23, 2014, 12:32 AM), <http://www.forbes.com/sites/ilyashapiro/2014/04/23/amending-justice-stevens-how-and-why-we-shouldnt-change-the-constitution-like-this/>.

¹⁰ See ROYCE CROCKER, HOUSE APPORTIONMENT 2012: STATES GAINING, LOSING, AND ON THE MARGIN, CONGRESSIONAL RESEARCH SERVICE 1, 1 (August 23, 2013), available at <http://fas.org/sgp/crs/misc/R41584.pdf>.

¹¹ *Id.* at 2.

¹² *Id.* at 2-4.

Minnesota	5,379,139	768,448
Mississippi	2,984,926	746,232
Montana	1,005,141	1,005,141
Nevada	2,758,931	689,733
New Jersey	8,864,590	738,716
New York	19,570,261	724,824
North Dakota	699,628	699,628
Oklahoma	3,814,820	762,964
Pennsylvania	12,763,536	709,085
South Carolina	4,723,723	674,818
Tennessee	6,456,243	717,360
Utah	2,855,287	713,822
Virginia	8,185,867	744,170

If states were divided into local, or mini-democracies, citizens might have a stronger voice in governance. If mini-democracies were comprised of members of different races, ethnicities, income brackets, and sexual orientations instead of homogenous and entrenched majorities, laws might reflect the diverse perspectives of its citizens. If wealthy citizens and corporations could not buy access to lawmakers, inequality might lessen. Most importantly, if the Supreme Court rejected living constitutionalism and allowed local lawmakers to craft their own unenumerated-rights jurisprudence, citizens might be allowed to meaningfully self-govern. Is any of this possible? Yes. The Constitution—and originalism—makes it possible. Right now, however, the concept of local democracies and participatory governance is little more than an aspiration.

This is due, in significant part, to the prevalence of living constitutionalism and a Supreme Court that does not embrace democracy as a constitutional value. First, as evidenced most recently in *NLRB v. Noel Canning*, living constitutionalists often manipulate and sometimes disregard

the Constitution's text to reach preferred outcomes.¹³ The effect, no matter how desirable the outcome, is to create a centralized, top-down, and paternalistic form of governance. Most citizens, however, do not want a mother and father. They want autonomy, the right to create their own unenumerated-rights jurisprudence, and the opportunity to be a legitimate majority. Citizens want the right to be divided, not forcibly united, on policy issues that affect uniquely local concerns, and to meaningfully participate in self-governance. They have neither. Instead, in today's democracy, citizens have neither political nor democratic equality. Votes are counted, but they have no impact. Voices are heard, but money talks.

Additionally, the Supreme Court has not embraced democracy as a core constitutional value, or recognized each citizen's fundamental *right* to meaningfully participate in governance. Indeed, the Court has removed many issues from democratic and legislative debate, giving Congress far-reaching authority to regulate purely intrastate activities,¹⁴ and allowing money to corrupt the electoral and political process.¹⁵ As a result, most citizens, particularly those of traditionally underrepresented groups, do not have equality—or liberty—in an empowering sense. Democracy has become a privilege for the wealthy, a mere aspiration for the middle class, and a pipe dream for the poor. As democracy becomes more illusory and inequality widens, the “American Dream” is becoming just that: a dream.

This Article argues that originalism can strengthen democracy because it rejects a jurisprudence that is predicated on subjective values, and eschews broad judicial power.¹⁶ In doing so, originalism preserves the

¹³ See generally *NLRB v. Canning*, 134 S. Ct. 2550 (2014).

¹⁴ See *Gonzales v. Raich*, 545 U.S. 1, 40–41 (1945) (holding that the government can criminalize home-grown marijuana even where the state has made it legal); *Wickard v. Filburn*, 317 U.S. 111, 127–28 (1942) (Scalia, J., concurring) (holding that an individual's local and purely intrastate growth of wheat can be taxed because the aggregate effect of this activity has an effect on interstate commerce).

¹⁵ See, e.g., *Citizens United v. Fed. Election Comm'n*, 588 U.S. 310, 337 (2010) (invalidating limits on corporate campaign expenditures 30 days prior to a general election, and 60 days prior to a primary election).

¹⁶ See Morgan Clous, *A Conclusion in Search of a History to Support It*, 43 TEX. TECH L. REV. 29, 35 (2010). As Professor Clous explains, even Justice Scalia recognizes that originalism is not perfect:

[O]riginalism [is] not without its warts. Its greatest defect, in my view, is the difficulty of applying it correctly. Not that I agree with, or even take very seriously, the intricately elaborated scholarly criticisms to the effect that (believe it or not) words have no meaning. They have meaning enough But what is true is that it is often exceedingly difficult to plumb the original understanding of an ancient text. Properly done, the task requires the consideration of an enormous mass of material—in the case of the Constitution and its Amendments, for example, to mention only one element, the records of the ratifying debates in all the states. Even beyond that, it requires an evaluation of the reliability of that material—many of the reports of the ratifying debates, for example, are thought to be quite unreliable. And further still, it requires immersing oneself in the political and intellectual atmosphere of the time—somehow placing out of mind knowledge that we have which an earlier age did not, and putting on beliefs, attitudes, philosophies, prejudices and loyalties that are not those of our day. It is, in short, a task sometimes better suited to the historian than the lawyer.

Id. (quoting Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849, 856–57 (1989)).

structural integrity of governance—separation of powers, decentralization, and checks and balances—thereby facilitating bottom-up lawmaking. Of course, originalism takes on many forms, but most originalists would agree that moral readings of the Constitution are inherently subjective and therefore an impermissible basis upon which to interpret the text.¹⁷ Indeed, originalists focus on reasonably construing the Constitution's text, not searching for possible, but highly improbable ways to define a particular word or phrase. Originalists consider the text's underlying purposes, but they do not base decisions on broad notions of liberty or invent legal fictions to ascribe meaning that the text will not support.¹⁸ This is not to say, of course, that originalism is perfect or to deny that some judges use originalism to advance personal ideology. It is to say that, when applied correctly, originalists would rather stay out of the debate rather than crash the party.¹⁹

Originalists also approach ambiguity with caution and often defer to the political and democratic process where reasonable people may disagree about constitutional meaning or the wisdom of federal or state policy. In doing so, originalists remain committed to the Constitution's structural vision while also safeguarding enumerated individual rights. Thus, originalism creates an environment where unenumerated rights can be resolved at the state and local levels through citizen participation and collective public deliberation. This allows citizens to realize equality, liberty, and autonomy in an authoritative, not paternalistic, sense.²⁰ Put differently, originalism respects democracy as a core constitutional value.

The biggest problem facing originalists is that, by deferring to the states on divisive policy matters, it may allow misguided individuals, or religious zealots like Chief Justice Roy Moore of the Supreme Court of Alabama, to make dumb laws.²¹ How do you fix that? It cannot be fixed by federalizing democracy but by restructuring democracy at the state level to

¹⁷ See ROBERT H. BORK, *THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF LAW* 176–77, 351–55 (1990) (interpreting the Constitution with a moral philosophy risks reading subjective values into the Constitution); see also Lawrence Lessig, *Fidelity in Translation*, 71 *TEX. L. REV.* 1165, 1171–74 (1993) (adopting a broader view of originalism that considers context when interpreting the Constitution).

¹⁸ See, e.g., Brian C. Goebel, *Who Decides if There is "Triumph in the Ultimate Agony?" Constitutional Theory and the Emerging Right to Die with Dignity*, 37 *WM. & MARY L. REV.* 827, 843–45 (1996) (discussing the evolution of the substantive due process doctrine).

¹⁹ See, e.g., *Washington v. Glucksberg*, 521 U.S. 702, 705–06 (1997) (declining to find a right to assisted suicide under the Fourteenth Amendment, and instead deferring to the states for resolution through the democratic process).

²⁰ See, e.g., James E. Fleming, *Securing Deliberative Autonomy*, 48 *STAN. L. REV.* 1, 21–22 (1995).

²¹ See Countrycat, *AL House Passes New Abortion Restrictions after Dumbest Debate Since Last Week*, LEFT IN ALABAMA (March 5, 2014, 9:01 AM), <http://www.leftinalabama.com/diary/10814/al-house-passes-new-abortion-restrictions-after-dumbest-debate-since-last-week> (discussing a recently enacted law banning previability abortions and making no exceptions for rape or incest); see also Ginger K., *Against All Reason: Alabama Outlaws Sex Toys*, WHY EVOLUTION IS TRUE (April 5, 2014, 8:05 AM), <http://whyevolutionistrue.wordpress.com/2014/04/05/against-all-reason-alabama-outlaws-sex-toys/>.

minimize the likelihood that such laws will be passed and giving the minority adequate means of legislative redress if such laws are passed. If diverse groups of citizens had political power, politicians in Alabama might think twice before banning sex toys, and abortion foes in Mississippi might hesitate before taking the inane step of requiring abortion providers to have hospital admitting privileges.²² To achieve greater equality in governance, however, it is not enough to simply defer to the states. Democracy within the states must be more local. Citizens deserve a voice in self-governance, not a view from the nosebleed seats.

Part II discusses the Supreme Court's decision in *Canning* and contrasts Justice Breyer's opinion, which reflects the living constitution philosophy, with Justice Scalia's concurrence, which embraces originalism. If there are any uncertainties that exist regarding whether originalism or living constitutionalism is better for democracy, an analysis of *Canning* will provide the answer. Part III analyzes the theoretical underpinnings of both originalism and living constitutionalism and argues that originalism is more consistent with principles of equality and fundamental fairness. Part IV argues for a local, community-based democracy that allows citizens to participate directly—and more meaningfully—in lawmaking. Ultimately, as former Supreme Court Justice Sandra Day O'Connor explains, "[t]he challenge we face in this century is not to identify the people who deserve the benefit of democracy and the Rule of Law, but to ensure that everyone deserves it and its benefits."²³

II. NATIONAL LABOR RELATIONS BOARD V. NOEL CANNING: CONSTITUTIONAL AMBIGUITY, AND THE BATTLE BETWEEN LIVING CONSTITUTIONALISM AND ORIGINALISM

Two of the most debated questions between living constitutionalism and originalism involve the Court's approach to resolving constitutional ambiguities, and whether, if a provision is ambiguous, the Court should loosely interpret the Constitution to achieve more desirable policy results.²⁴ Living constitutionalists argue that the Constitution is a dynamic or evolving document and that constitutional meaning changes over time based on the needs of contemporary societies.²⁵ Thus, historical practices in the years

²² See Sandhya Somashekhar, *Admitting-Privileges Laws Have Created High Hurdle for Abortion Providers to Clear*, WASH. POST (Aug. 10, 2014), http://www.washingtonpost.com/national/2014/08/10/62554324-1d88-11e4-82f9-2cd6fa8da5c4_story.html.

²³ Sandra Day O'Connor, *Remarks at the Inaugural Sandra Day O'Connor Distinguished Lecture Series*, 41 TEX. TECH L. REV. 1169, 1169 (2009).

²⁴ See James E. Fleming, *Living Originalism and Living Constitutionalism as Moral Readings of the American Constitution*, 92 B.U. L. REV. 1171, 1175 (2012); see also Martin H. Redish & Matthew B. Arnould, *Judicial Review, Constitutional Interpretation, and the Democratic Dilemma: Proposing a "Controlled Activism" Alternative*, 64 FLA. L. REV. 1485, 1491 (2012); Stephen E. Sachs, *The "Unwritten Constitution" and Unwritten Law*, 2013 U. ILL. L. REV. 1797, 1802 (2013).

²⁵ See Fleming, *supra* note 25, at 1183 (discussing the underlying philosophy of living constitutionalism). See generally AKHIL REED AMAR, *AMERICA'S UNWRITTEN CONSTITUTION: THE*

following the Constitution's adoption, and a consideration of broad constitutional values, can guide courts when interpreting a particular provision, even if that provision is facially unambiguous.²⁶ At its core, living constitutionalists are pragmatic in the sense that they strive to achieve the most desirable, or fairest, result in a particular case.

Originalism embraces the opposite view. It places primary value on and interprets the text based on an original understanding of the words.²⁷ In addition, originalists consider the original purposes underlying a particular provision and do not give weight to the Founders' intentions and expectations.²⁸ As a result, originalists view interpretation as a largely semantic endeavor, ascribe meaning based on conventional usage, and consider clause-specific, but not overarching, constitutional values.²⁹ Consequently, constitutional meaning does not change because times have changed, and the underlying purposes of a particular provision are never interpreted in a manner that would give the text a distorted meaning.³⁰ Put differently, originalists are anchored, but not stuck in the past, just as they are responsive to, but not overly influenced by, the present.

In *Canning*, the Court considered whether the Recess Appointments Clause allowed the president to fill vacancies before a congressional recess had actually started, or required that vacancies occur during a recess.³¹ The Court's unanimous opinion masked the deep philosophical divisions among the Justices.

A. Justice Breyer's Majority Opinion

Justice Breyer's opinion embraced the living constitutionalist view, in that it disregarded the most natural—and probable—reading of the Recess Appointments Clause to achieve a result that the text would arguably not allow. The clause provides that “[t]he President shall have Power to fill up all Vacancies that may happen during the Recess of the Senate, by granting Commissions which shall expire at the End of their next Session.”³² A

PRECEDENTS AND PRINCIPLES WE LIVE BY (Basic Books, 2012); LAWRENCE H. TRIBE, *THE INVISIBLE CONSTITUTION* 7 (Geoffrey R. Stone, Oxford Univ. Press, 2008).

²⁶ See Fleming, *supra* note 25, at 1183–84; see also Fleming, *supra* note 20, at 71 (arguing that “deliberative democracy and deliberative autonomy have structural roles to play in our scheme of deliberative self-governance, and that both are integral to our dualist constitutional democracy”).

²⁷ See Lawrence B. Solum, *Originalism and the Unwritten Constitution*, 2013 U. ILL. L. REV. 1935, 1941 (2013).

²⁸ See Steven G. Calabresi, *A Critical Introduction to the Originalism Debate*, 31 HARV. J.L. & PUB. POL'Y 875, 886–87 (2008).

²⁹ See Michael J. Phillips, *The Slow Return of Economic Substantive Due Process*, 49 SYRACUSE L. REV. 917, 957 (1999) (“But it just as clearly is wrong when [the Court] use[s] judicially-concocted doctrines like substantive due process to invalidate democratically-created laws.”); George Thomas, *Two Cheers for Eighteenth-Century Constitutionalism in the Twenty-First Century*, 67 MD. L. REV. 222, 226 (2007).

³⁰ See, e.g., Thomas, *supra* note 29, at 225–26.

³¹ *NLRB v. Noel Canning*, 134 S. Ct. 2550, 2556 (2014).

³² U.S. CONST. art. II, § 2, cl. 3.

critical question was whether the phrase “vacancies that may happen” referred “only to vacancies that first come into existence during a recess, or does it also include vacancies that arise prior to a recess but continue to exist during the recess?”³³

1. Interpreting the Plain Language

Writing for a five-member majority, Justice Breyer held that the clause authorized the president to make appointments both during and before the recess.³⁴ Justice Breyer based his conclusion on the fact that “the linguistic question here is not whether the phrase can be, but whether it *must be*, read more narrowly.”³⁵ The appropriate inquiry was “whether the Clause is ambiguous,”³⁶ which existed if there was “at least a permissible reading of a ‘doubtful’ phrase.”³⁷

Applying this framework, Justice Breyer acknowledged “the most natural meaning of ‘happens’ as applied to a ‘vacancy’ (at least to a modern ear) is that the vacancy ‘happens’ when it initially occurs.”³⁸ The plain language, therefore, appeared to preclude appointments that occurred before a recess. Justice Breyer disagreed, holding this was “not the only possible way to use the word.”³⁹ The clause could also be interpreted to “mean vacancies that may happen to be or may happen to fall during a recess,”⁴⁰ although a literal reading of the clause “permits, though it does not naturally favor, our broader interpretation.”⁴¹ On this basis, Justice Breyer concluded that the clause was ambiguous.⁴² As a result, it was permissible to “go on to consider the Clause’s purpose and historical practice.”⁴³

2. History and Practice

Justice Breyer emphasized that “*in interpreting the Clause, we put significant weight upon historical practice*”⁴⁴ and cited authority that historical practices exceeding twenty years are entitled to substantial weight.⁴⁵ Indeed, the “Court has treated practice as an important interpretive factor *even when the nature or longevity of that practice is subject to*

³³ *Canning*, 134 S. Ct. at 2556.

³⁴ *Id.* at 2567.

³⁵ *Id.* at 2568 (emphasis added).

³⁶ *Id.*

³⁷ *Id.* (citing *Okanogan, Methow, San Poelis (or San Poil), Nespelem, Colville, & Lake Indian Tribes or Bands of Wash. v. United States*, 279 U.S. 655, 690 (1929)) [hereinafter *The Pocket Veto Case*]).

³⁸ *Id.* at 2567.

³⁹ *Id.*

⁴⁰ *Id.* at 2554 (citation omitted) (internal quotation marks omitted).

⁴¹ *Id.* at 2567.

⁴² *See id.* at 2568.

⁴³ *Id.*

⁴⁴ *Id.* at 2559.

⁴⁵ *Id.*

dispute, and even when that practice began after the founding era.”⁴⁶

After reviewing historical practice over a 200-year period, Justice Breyer concluded that “[t]he Clause’s purpose strongly supports the broader interpretation.”⁴⁷ Justice Breyer relied, for example, on a letter to President John Adams from his Attorney General, Charles Lee, supporting this view, and the fact that “President Adams seemed to endorse the broader view of the Clause in writing.”⁴⁸ Nonetheless, Breyer acknowledged that the Court was “not aware of any appointments he made in keeping with that view.”⁴⁹

Justice Breyer also relied on a state law enacted in 1842 that arguably authorized prerecess appointments⁵⁰ and on “[t]he tradition of applying the Clause to pre-recess vacancies [that] dates at least to President James Madison.”⁵¹ He conceded, though, there existed no “undisputed record of Presidents George Washington, John Adams, or Thomas Jefferson making such an appointment.”⁵² Justice Breyer also cited the opinions of various attorneys general throughout history, particularly the opinion of Attorney General Bates, who advised President Lincoln that the issue of prerecess appointments was “settled . . . as far . . . as a constitutional question can be settled.”⁵³

Justice Breyer recognized, however, that there was “sporadic disagreement with the broad interpretation.”⁵⁴ In 1863, for instance, the Senate Judiciary issued a report concluding that a vacancy “must have its inceptive point after one session has closed and before another session has begun.”⁵⁵ That same year, the Pay Act also provided “no money shall be paid . . . as salary, to any person appointed during the recess of the Senate, to fill a vacancy . . . which . . . existed while the Senate was in session.”⁵⁶ Justice Breyer distinguished this negative history by noting that forty years later, “the Senate . . . abandoned its hostility [to the broader interpretation].”⁵⁷ In a 1905 senate report, Senator Tillman remarked in a committee meeting that “[w]hatever that report may have said in 1863, I do not think that has been the view the Senate has taken of the issue.”⁵⁸

⁴⁶ *Id.* at 2560 (emphasis added).

⁴⁷ *Id.* at 2568.

⁴⁸ *Id.* at 2570.

⁴⁹ *Id.*

⁵⁰ *Id.* at 2568 (quoting H.R. Exec. Doc. No. 72, 27th Cong., 3rd Sess., at 22 (1842)) (“[W]hen any vacancy shall take place in the office of any lieutenant colonel, it shall be the duty of the colonel of the regiment in which such vacancy may happen to order an election to be held at the several precincts in the battalion in which such vacancy *may happen*”).

⁵¹ *Id.* at 2570.

⁵² *Id.*

⁵³ *Id.* at 2571 (internal quotation marks omitted).

⁵⁴ *Id.*

⁵⁵ *Id.* at 2572.

⁵⁶ *Id.* at 2614 (Scalia, J., concurring) (internal quotation marks omitted).

⁵⁷ *Id.* at 2572 (majority opinion).

⁵⁸ *Id.* (internal quotation marks omitted).

In addition, Justice Breyer provided examples of how a strict application of the clause would lead to undesirable consequences—a principal justification for living constitutionalists—and thus frustrating the clause’s broader purposes.⁵⁹ Importantly, however, Justice Breyer acknowledged “that both interpretations carry with them some risk of undesirable consequences,”⁶⁰ but concluded that “the narrower interpretation risks undermining constitutionally conferred powers more seriously and more often.”⁶¹ Consequently, based on a review of the historical record, Justice Breyer concluded that “we have enough information to believe that the Presidents since Madison have made many recess appointments filling vacancies that initially occurred prior to a recess”⁶² and found that the opinions of many attorneys general agreed with this conclusion.⁶³

Finally, Justice Breyer held that the clause’s purposes also supported a broader interpretation. Although presidential appointments typically require the advice and consent of the Senate,⁶⁴ the Founders drafted the clause to accommodate the president’s need for the “assistance of subordinate officers when the Senate, due to its recess, cannot confirm them.”⁶⁵ This was of particular importance in the years following the Constitution’s adoption, because of “the Senate’s practice, particularly during the Republic’s early years, of meeting for a single brief session each year.”⁶⁶ As such, “[i]n light of some linguistic ambiguity, the basic purpose of the Clause, and the historical practice we have described, we conclude that the phrase ‘all vacancies’ includes vacancies that come into existence while the Senate is in session.”⁶⁷

B. Justice Scalia’s Concurrence

1. The Plain Language

In his concurrence, joined by Chief Justice Roberts and Justices Alito and Thomas, Justice Scalia wrote that “no reasonable reader would have understood the Recess Appointments Clause to use the word ‘happen’ in the majority’s ‘happen to be’ sense, and thus to empower the President to fill all vacancies that might *exist* during a recess, regardless of when they arose.”⁶⁸ Indeed, “[t]he majority adds that this meaning is most natural ‘to a modern ear’ . . . but it fails to show that founding-era ears heard it

⁵⁹ *Id.* at 2568–69.

⁶⁰ *Id.* at 2569.

⁶¹ *Id.*

⁶² *Id.* at 2571.

⁶³ *Id.*

⁶⁴ *Id.* at 2592 (Scalia, J., concurring).

⁶⁵ *Id.* at 2568.

⁶⁶ *Id.* at 2559.

⁶⁷ *Id.* at 2573.

⁶⁸ *Id.* at 2606 (Scalia, J., concurring).

differently.”⁶⁹ Justice Scalia stated as follows:

“Happen” meant then, as it does now, “[t]o fall out; to chance; to come to pass.” Thus, a vacancy that *happened* during the Recess was most reasonably understood as one that *arose* during the recess. It was, of course, possible in certain contexts for the word “happen” to mean “happen to be” rather than “happen to occur,” as in the idiom “it so happens.” But that meaning is not at all natural when the subject is a vacancy, a state of affairs that comes into existence at a particular moment in time.⁷⁰

In Justice Scalia’s view, had the Founders intended the alternative interpretation advocated by Justice Breyer, “[t]he Clause easily could have been written to convey that meaning clearly: It could have referred to ‘all Vacancies that may exist during the Recess,’ or it could have omitted the qualifying phrase entirely and simply authorized the President to ‘fill up all Vacancies during the Recess.’”⁷¹ Likewise, a “reasonable reader might have wondered, why would any intelligent drafter intending the majority’s reading have inserted the words ‘that may happen’—words that, as the majority admits, make the majority’s desired reading awkward and unnatural, and that must be effectively read out of the Clause to achieve that reading?”⁷²

Justice Scalia also explained that “the majority’s reading not only strains the Clause’s language but distorts its constitutional role, which was meant to be subordinate,”⁷³ and “nothing more than a supplement to the general method of advice and consent.”⁷⁴ Indeed, if “the Clause had allowed the President to fill *all* pre-existing vacancies during the recess by granting commissions that would last throughout the following session, it would have been impossible to regard it—as the Framers plainly did—as a mere codicil to the Constitution’s principal, power-sharing scheme for filling federal offices.”⁷⁵ Justice Scalia wrote as follows:

On the majority’s reading, the President would have had no need *ever* to seek the Senate’s advice and consent for his appointments: Whenever there was a fair prospect of the Senate’s rejecting his preferred nominee, the President could have appointed that individual unilaterally during the

⁶⁹ *Id.*

⁷⁰ *Id.* (citing 1 SAMUEL JOHNSON, A DICTIONARY OF THE ENGLISH LANGUAGE 913 (2d ed. 1755) (citation omitted)).

⁷¹ *Id.*

⁷² *Id.* at 2606–07 (Scalia, J., concurring).

⁷³ *Id.* at 2607.

⁷⁴ *Id.* (internal quotation marks omitted).

⁷⁵ *Id.*

recess, allowed the appointment to expire at the end of the next session, renewed the appointment the following day, and so on *ad infinitum*.⁷⁶

Consequently, a narrower interpretation of the Clause was consistent with the Clause's text and underlying purpose.

2. History and Practice

Justice Scalia also found that “[e]ven if the Constitution were wrongly thought to be ambiguous on this point, a fair recounting of the relevant history does not support the majority’s interpretation.”⁷⁷ For example, “Washington’s and Adams’ Attorneys General read the Constitution to restrict recess appointments to vacancies arising during the recess, and there is no evidence that any of the first four Presidents consciously departed from that reading.”⁷⁸ In addition, although Justice Breyer’s reading “was first defended by an executive official in 1823, [it] was vehemently rejected by the Senate in 1863, and was vigorously resisted by legislation in place from 1863 until 1940.”⁷⁹ In fact, such an interpretation was “arguably inconsistent with legislation in place from 1940 to the present.”⁸⁰ In addition, Justice Scalia criticized the majority’s reliance on the executive branch’s actions throughout history, stating that he could “conceive of no sane constitutional theory under which this evidence of ‘historical practice’—which is actually evidence of a long-simmering inter-branch conflict—would require us to defer to the views of the Executive Branch.”⁸¹

Ultimately, as Justice Scalia concluded, “[w]hat the majority needs to sustain its judgment is an ambiguous text and a clear historical practice. What it has is a clear text and an at-best-ambiguous historical practice.”⁸² Notwithstanding, “[t]he majority replaces the Constitution’s text with a new set of judge-made rules to govern recess appointments.”⁸³ This was particularly troublesome because the coordinate branches “take their cues from this Court. We should therefore take every opportunity to affirm the primacy of the Constitution’s enduring principles over the politics of the moment.”⁸⁴ Instead, the majority interpreted the Recess Appointments Clause to embrace an “adverse-possession theory of executive power (a characterization the majority resists but does not refute) will be cited in

⁷⁶ *Id.*

⁷⁷ *Id.* at 2610.

⁷⁸ *Id.* at 2616–17.

⁷⁹ *Id.* at 2617.

⁸⁰ *Id.*

⁸¹ *Id.*

⁸² *Id.*

⁸³ *Id.*

⁸⁴ *Id.*

diverse contexts, including those presently unimagined, and will have the effect of aggrandizing the Presidency beyond its constitutional bounds and undermining respect for the separation of powers.”⁸⁵

III. LIVING CONSTITUTIONALISM VERSUS ORIGINALISM: WHICH ONE IS BETTER SUITED FOR DEMOCRACY?

In *Canning*, Justices Breyer and Scalia arrived at the same result but through very different theories of constitutional interpretation. Both opinions underscore the stark differences between living constitutionalism and originalism and the impact that each theory has on ensuring a properly functioning democratic process. To be sure, living constitutionalism and originalism part ways on nearly every aspect of interpretation, including whether a clause is ambiguous, how the Court should resolve ambiguity, and whether a consideration of history and purpose adds significant value to determining meaning.

A. When Is the Constitution's Text Ambiguous?

Few would doubt that the Founders could not possibly foresee or provide answers to the complex legal issues that future societies would face. The Constitution's text, which in many parts is broadly phrased, leaves to future generations the task of resolving ambiguities in light of new and complex problems.

Indeed, many of the Constitution's structural and individual rights provisions are (1) broadly phrased and sometimes, but not always ambiguous; (2) ambiguous on their face but nonetheless yield determinate meaning; and, (3) facially unambiguous but difficult to apply in various contexts.⁸⁶ The First Amendment, for example, prohibits Congress from enacting any law “abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble,”⁸⁷ but it provides no answer on whether a corporation has free speech rights.⁸⁸ The Seventh Amendment states that “[i]n Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved,”⁸⁹ but the

⁸⁵ *Id.* at 2617–18.

⁸⁶ For example, in *Loving v. Virginia*, the Court unanimously held that bans on interracial marriage were unconstitutional despite arguments that interracial marriages would lead to a variety of social ills and depart from the history and tradition of marriage. *Loving v. Virginia*, 388 U.S. 1, 12 (1967). In *United States v. Windsor*, the Court also held, despite substantial disagreement among the states, that the government could not prohibit same-sex couples from receiving federal benefits. *United States v. Windsor*, 133 S. Ct. 2675, 2695 (2013).

⁸⁷ U.S. CONST. amend. I (“Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.”).

⁸⁸ *See, e.g.*, *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 393 (2010).

⁸⁹ U.S. CONST. amend. VII (“In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.”).

words “common law” can have different meanings.⁹⁰ Likewise, the Thirteenth Amendment prohibits slavery and involuntary servitude,⁹¹ but the courts have struggled to identify the circumstances within which an individual is, in fact, subject to involuntary servitude.⁹² The Fourteenth Amendment’s language, which protects people from being “deprive[d] . . . of life, liberty, or property without due process of law,”⁹³ appears on its face to be unambiguous, but the Court has held that it protects substantive as well as procedural rights.⁹⁴

Given these questions, a threshold question for living constitutionalists and originalists is whether ambiguity actually exists. In addition, if an ambiguity does exist, but the purposes and historical practices relating to a particular provision can lead reasonable people to arrive at different outcomes, the Court must decide why one outcome should be preferred over another, or whether deference to the coordinate branches and democratic process is more appropriate. Finally, even if the Constitution is not ambiguous, questions arise about whether the Court should simply interpret the words as written, or consider other factors, such as historical practice, broader purposes, and the desirability of a particular outcome, to reach a different outcome.

B. Living Constitutionalism and Ambiguity

Living constitutionalism achieves arguably good results in some cases, but that depends on each reader’s perspective. The problem, as evidenced in *Canning*, is how living constitutionalists get there. To begin with, living constitutionalists reject the “conventional constitutional doctrine that where reasonable people disagree the government can adopt one position or the other.”⁹⁵ Instead, they often believe the Court can—and should—achieve the most desirable outcomes in each case despite the presence of reasonable disagreement about what the text means, whether historical practice is suggestive of meaning, and whether underlying (or overarching) values actually support a particular result. Most importantly, living constitutionalists are willing to manipulate, and in some cases

⁹⁰ See, e.g., *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687, 708–09 (1999).

⁹¹ U.S. CONST. amend. XIII, § 1 (“Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.”).

⁹² See Michael Scimone, Comment, *More to Lose Than Your Chains: Realizing the Ideals of the Thirteenth Amendment*, 12 N.Y. CITY L. REV. 175, 181 (2008) (“While the term ‘slavery’ had a commonly understood definition, the meaning of ‘involuntary servitude’ was subject to wider interpretation; a great deal of debate in Congress concerned the scope of this term.”).

⁹³ See U.S. CONST. amend. XIV, § 1 (“No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.”).

⁹⁴ See, e.g., *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 846 (1992).

⁹⁵ *Id.* at 851.

disregard, the text to achieve a desired outcome, although reasonable disagreements exist about what is in fact desirable and even where ambiguities do not in fact exist.⁹⁶

That was the problem with Justice Breyer's majority opinion in *Canning*, and it is also the problem with living constitutionalism. The answers it provides serve to complicate, rather than clarify, ambiguity because the desirability of a particular result depends largely on each justice's personal predilections and involves a consideration of factors that are inherently subjective. Most importantly, living constitutionalism gives judges unrestrained power to change what the Constitution says, and in so doing, change nature of governance.⁹⁷

1. Value Judgments Are for Courts, Not Legislatures

Living constitutionalism is based primarily on non-quantifiable value judgments because a focus on outcomes, not on process, is the culprit that drives the jurisprudence of living constitutionalists. Admittedly, although this is an unavoidable part of interpretation, living constitutionalism makes value judgments a central, and sometimes dispositive, aspect of determining meaning—even where the text is not ambiguous.⁹⁸ For example, living constitutionalists often base a decision upon broader principles or values, such as liberty, that are themselves ambiguous—a historical record that is subject to differing interpretations.⁹⁹ As such, these sources do not necessarily, or even typically, bring clarity to an otherwise ambiguous text. Instead, they pile ambiguity atop ambiguity. This produces muddled legal doctrines that do not effectively guide future litigants, upset the careful balance between judicial review and democratic governance, and create a case-by-case ad hoc approach to decision making. Ultimately, if living constitutionalism is to have a presence in democracy, it should be among elected officials, who require the flexibility to experiment with new solutions as unforeseen problems arise. As discussed below, the Court has rejected a legislatively driven living constitutionalism, yet

⁹⁶ See Burt Neuborne, *Serving the Syllogism Machine: Reflections on Whether Brandenburg Is Now (or Ever Was) Good Law*, 44 TEX. TECH L. REV. 1, 41–43 (2011) (criticizing logical foundations of both living constitutionalism and originalism).

⁹⁷ See Bradley P. Jacob, *Back to Basics: Constitutional Meaning and "Tradition,"* 39 TEX. TECH L. REV. 261, 274 (2007) (“[U]nder the living Constitution theory, the written document does not protect against tyranny imposed by five out of nine judges, appointed for life and, absent the extraordinary remedy of impeachment, accountable to no one.”).

⁹⁸ See Jack M. Balkin, *Framework Originalism and the Living Constitution*, 103 NW. U. L. REV. 549, 592 (2009) (discussing one criticism of living constitutionalism, namely, “that it is insufficiently legal – that it gives too much power to cultural and political influences, the national political process, political mobilization, and partisan entrenchment, rather than reasoned development of doctrine by courts”).

⁹⁹ See William H. Rehnquist, *The Notion of a Living Constitution*, 29 HARV. J.L. & PUB. POL’Y 401, 403 (2006) (explaining that “the substitution of some other set of values for those which may be derived from the language and intent of the framers”).

welcomed living constitutionalism into its deliberations.

The problem with relying on broad constitutional values is that they require living constitutionalists to make not one, but a series, of value judgments. For instance, broad notions of liberty and equality depend on independent—and subjective—decisions regarding the value of competing policy objectives, such as whether individuals, groups, institutions, or the process itself should benefit most from a decision. Some courts might believe that it is more valuable to defer to the legislative branches when reasonable people can disagree about a statute’s meaning.¹⁰⁰ Other courts might look to a statute’s effect on individuals or institutions and place those interests above the alternative views, no matter how reasonable.¹⁰¹ As a result, whatever the outcome, living constitutionalists cannot claim that their decisions are objectively more desirable as a matter of constitutional law or policy. Furthermore, they cannot dispute that this approach gives courts an unconstrained power to identify what result is most desirable and to rely on overarching values that serve to make ambiguities in the text only more ambiguous.

This approach is particularly troublesome where, as in *Canning*, the text could not reasonably be construed as ambiguous. At the outset of his majority opinion, Justice Breyer conceded “the most natural meaning of ‘happens’ as applied to a ‘vacancy’ (at least to a modern ear) is that the vacancy ‘happens’ when it initially occurs.”¹⁰² Justice Breyer created an ambiguity, however, by holding that ambiguity necessarily exists where “at least a permissible reading of a ‘doubtful’ phrase”¹⁰³ existed, such that a narrower construction, even if more consistent with conventional usage, could be avoided. To achieve this result, Justice Breyer interpreted “happens” to mean “happens to be,” which reflects the primary criticism of living constitutionalism: it leads to a manipulation of the text.¹⁰⁴

Under this standard, nearly every clause or provision could be considered ambiguous. Of course, as with many laws, it is certainly possible to discern more than one meaning from a word or phrase. By their very nature, laws use broad phrases such as “reasonable” or “substantial” to

¹⁰⁰ See Aharon Barak, *A Judge on Judging: The Role of a Supreme Court in a Democracy*, 116 HARV. L. REV. 16, 50–51 (2002) (summarizing the nonaccountability argument, which states that “it is inappropriate for the judge, who is not accountable to the public, to exploit constitutional vagueness and ‘majestic generalities’ by giving expression to his or her subjective beliefs; [i]n such circumstances, the opinion of the legislature, which reflects the will of the majority, should receive preference”).

¹⁰¹ See Bruce Fein & Burt Neuborne, *The Case for Independence: Why Should We Care About Independent and Accountable Judges*, 61 OR. ST. B. BULL. 9, 11 (2001) (“[T]o believe that judges can interpret the Constitution or laws without at times resorting to values and policy preferences is to indulge in delusion. In hard cases, a degree of judicial ‘law making’ is inevitable because there is no universal consensus about how to resolve textual ambiguities, either among judges, lawyers, professors, scholars or politicians.”).

¹⁰² *NLRB v. Noel Canning*, 134 S. Ct. 2550, 2567 (2014).

¹⁰³ *Id.* at 2568 (citing *The Pocket Veto Case*, 279 U.S. 655, 690 (1929)).

¹⁰⁴ See *id.* at 2567.

establish a legal standard. Laws cannot be defined to a mathematical certainty. The question should not be whether another interpretation is possible, but whether, based on a reasonable reading of the text, the interpretation reflects the most probable meaning. This would prevent courts from viewing any possible disagreement as an occasion to create ambiguity.

For example, if odds makers state that the New York Yankees have a one-in-a-million chance of winning the World Series, most would interpret this statement to mean that the Yankees will probably not win the World Series. Some, guided by optimism, may interpret this to mean that the Yankees might possibly win the World Series. Does the mere presence of an alternative interpretation mean that ambiguity necessarily exists about whether the Yankees will win the World Series? As a matter of constitutional interpretation, the answer is obviously no. If the answer was yes, then the text would not constrain the judiciary in any meaningful way.

Put differently, the Court should not only look to whether other interpretations are possible but also analyze whether those interpretations are reasonable based on how the words are commonly defined and understood. If this standard were applied in *Canning*, no ambiguity would have existed, and Justice Scalia would have authored the majority opinion.

2. Constitutional Meaning and the “Smell Test”

This is not to say that the broader purposes underlying or historical practices relating to a particular provision are never relevant or useful to constitutional meaning. However, purpose and practice should help to clarify the text’s meaning, not give the text an interpretation that its language will not support.

Canning underscores this point. In his majority opinion, Justice Breyer’s analysis of the historical record revealed that, during different periods in history, members of the executive and legislative branches held different views concerning the validity of prerecess appointments.¹⁰⁵ Justice Breyer reached his conclusion by emphasizing certain periods of history over others, making inferences from evidence that was at best suggestive, and giving less weight to parts of the historical record.¹⁰⁶ In other words, Justice Breyer not only created a constitutional ambiguity but also based his conclusion on a historical record that itself was ambiguous. The majority opinion did not clarify the meaning of the Recess Appointments Clause. Instead, it demonstrated what five members of the Court thought that it should mean. The majority opinion, in a nutshell, reveals the problem with

¹⁰⁵ *Canning*, 134 S. Ct. at 2616–17 (Scalia, J., concurring).

¹⁰⁶ *Id.* at 2571–72 (noting “sporadic disagreement” regarding interpretation of the Clause, but that the Senate later “abandoned its hostility”) (majority opinion).

living constitutionalism.

What's more, relying on the historical record when a clause is not ambiguous begs a series of questions. Why, for instance, was the opinion of Madison's attorney general more important than the fact that Madison himself did make prerecess appointments? Why is a letter written by an attorney general entitled to any weight at all when a president did not follow that advice? Why was it less important that Presidents Washington and Jefferson also did not make prerecess appointments? Besides, even if historical practices support an outcome that the Court deems most desirable, should those practices take precedence over text that is unambiguous and, thus, have the effect of creating ambiguity where none exists? Conversely, if historical practices suggest the meaning of a particular clause, but those practices no longer lead to desirable results, should the Court rely more on the text even if it is ambiguous? *Canning* provides no answers to these questions. That, too, is the problem.

Historical practices also thrust living constitutionalists into a contradiction. If meaning changes over time to account for contemporary realities, then how can past practices, principally those from different centuries and contexts, be valuable in determining present meaning? Should historical practice have significant value, modest value, or no value at all? Are there any criteria for determining when historical practice is conclusive and not merely suggestive?

Addressing another issue, living constitutionalists cannot satisfactorily explain how the broader values or purposes underlying a particular constitutional provision should intersect with the words. After all, the meaning of a word or phrase is not necessarily discernable from the values it embraces, just like a reasonable construction of the words does not always reflect the Constitution's overarching values. This does not mean that a particular outcome is unjust but simply that purpose itself, in some cases, is not a reliable source by which to interpret the text. As one example, the Eighth Amendment's prohibition on the imposition of cruel and unusual punishment reflects the Founders' broader purpose of preventing punishments that cause torture or gratuitous pain.¹⁰⁷ Yet neither the text nor its purposes reasonably answer the question of whether a minor convicted of first-degree murder can be sentenced to life without parole.¹⁰⁸ Despite these ambiguities, and the division among lower courts and the states in *Miller v. Alabama*, the Court—by a 5-4 vote—answered this question in the

¹⁰⁷ U.S. CONST. amend. VIII (“Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.”).

¹⁰⁸ See, e.g., John Stinneford, *The Original Meaning of “Unusual”: The Eighth Amendment as a Bar to Cruel Innovation*, 102 NW. U. L. REV. 1739, 1757–59 (2008) (describing Justice Scalia's interpretation of the Eighth Amendment from an originalist's perspective).

negative.¹⁰⁹

Ultimately, living constitutionalism's emphasis on value judgments and legal sources that yield indeterminate answers conflates the meaning of a provision with a search for the best outcome. This turns constitutional interpretation into a normative, rather than linguistic, endeavor and risks divorcing the meaning of a provision from a reasonable construction of its words. The result in at least some cases, including *Canning*, is that clarity can be turned into ambiguity.

3. Ambiguity, Individual Rights, and Democracy

Living constitutionalists encounter the most problems when interpreting the individual rights' provisions in the Bill of Rights. Specifically, living constitutionalists assume, but cannot prove, that the broad values it embraces—such as liberty and privacy—are a legitimate source of constitutional rights when they are not supported by a reasonable construction of the text. As one case in point, although the Declaration of Independence states that the right to life, liberty, and the pursuit of happiness are inalienable rights,¹¹⁰ it does not follow, when interpreting a specific provision, that those values are a legitimate source by which to resolve or, as the Court has done, to create new rights.

When the Court adopts such an approach, it undermines and sometimes preempts the democratic process. In *Griswold v. Connecticut*, the Court invalidated a law banning contraception based on a judicially created right to privacy that has no basis whatsoever in the Fourteenth Amendment.¹¹¹ Instead, the Court held that this right originated from unwritten constitutional “penumbras, [that were] formed by emanations from those guarantees [in the text] that help give them life and substance.”¹¹² Furthermore, in *Roe v. Wade*, the Court held that the right to privacy was “broad enough” to encompass the right to terminate a pregnancy in the first trimester.¹¹³

In *Planned Parenthood of Southeastern Pennsylvania v. Casey*, the Court relied on another judicially created doctrine—substantive due process—and a broad but undefined conception of liberty to reaffirm *Roe*.¹¹⁴ In a manner similar to Justice Breyer's opinion in *Canning*, the majority acknowledged that the right itself “cannot be found in . . . the precise terms

¹⁰⁹ *Miller v. Alabama*, 132 S. Ct. 2455, 2460 (2012).

¹¹⁰ THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

¹¹¹ *Griswold v. Connecticut*, 381 U.S. 479, 481–82, 485–86 (1967).

¹¹² *Id.* at 484.

¹¹³ *Roe v. Wade*, 410 U.S. 113, 153 (1973).

¹¹⁴ *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 846–48 (1992) (discussing the “substantive liberties protected by the Fourteenth Amendment” and stating that “[i]t is a promise of the Constitution that there is a realm of personal liberty which the government may not enter”).

of the specific guarantees elsewhere provided in the Constitution.”¹¹⁵ In other words, no ambiguity existed. To reach this result then, the Court held that it was not limited by the rights in the Constitution but could instead identify new rights based on broader notions of liberty and privacy.¹¹⁶ Thus, despite the Fourteenth Amendment’s unambiguous language, which protected against the “depriv[ation] . . . of life, liberty, or property without *due process of law*,”¹¹⁷ the majority relied on broad principles of liberty to create a right that even it acknowledged did not exist in the Constitution.¹¹⁸

Liberty is a dangerous source of constitutional law because it is a constitutional value, and not an individual right in any of the amendments. Furthermore, no constitutional basis exists to conclude that the courts—particularly unelected judges—are better suited to decide how liberty should be expressed in law or how it should intersect with other constitutional values. In fact, when liberty is used to change—or circumvent—the text, it vests the Court with an unprecedented amount of lawmaking power.¹¹⁹ Indeed, the Court itself has long recognized the inherent problems in such a jurisprudence:

In considering such a majestic term as “liberty” and applying it to present circumstances, how are we to do justice to its urgent call and its open texture—and to the grant of interpretive discretion the latter embodies—without injecting *excessive subjectivity or unduly restricting the States’ “broad latitude in experimenting with possible solutions to problems of vital local concern?”*

. . . .

The Framers did not express a clear understanding of the term to guide us, and the now-repudiated *Lochner* line of cases attests to the dangers of judicial overconfidence in using substantive due process to advance a broad theory of the right or the good By its very nature, the meaning of liberty cannot be “reduced to any formula; its content

¹¹⁵ *Id.* at 848 (quoting *Poe v. Ullman*, 367 U.S. 497, 543 (1961)).

¹¹⁶ *Id.* (“Neither the Bill of Rights nor the specific practices of States at the time of the adoption of the Fourteenth Amendment marks the outer limits of the substantive sphere of liberty which the Fourteenth Amendment protects.”).

¹¹⁷ U.S. CONST. amend. XIV, § 1 (emphasis added).

¹¹⁸ *Casey*, 505 U.S. at 846 (acknowledging that “a literal reading of the Clause might suggest that it governs only the procedures by which a State may deprive persons of liberty”).

¹¹⁹ See William T. Barrante, *A Jurisdictional View of the United States Constitution*, 83 CONN. B.J. 217, 228 (2009) (“Jurisdictional lines are of little value unless they are respected. Judges who look to the original meaning of a constitutional provision are closer to abiding by those lines than judges who believe the Constitution is open-ended.”).

cannot be determined by reference to any code.”¹²⁰

In response to this problem, the Court’s living constitutionalists have reformulated liberty in equally undefinable phrases, including “‘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.’”¹²¹ If these “rights” are so fundamental, then why do they not encompass the people’s right, when the Constitution is silent or ambiguous, to determine the policies under which they will be governed?

Part of the reason that living constitutionalists embrace a robust, outcome-driven jurisprudence relates to their belief that democracy is inherently dysfunctional because majority rule leads to intolerable abuses.¹²² They see the Court as an inherently democratic institution because it safeguards minority rights. Of course, no one would seriously question the Court’s role in protecting the minority from tyrannical majorities. As discussed below, though, the Court is not really protecting minority rights or groups when it prohibits Congress from placing limits on individual and corporate campaign contributions. Moreover, in cases such as *Roper*, *Casey*, and *Miller*, where the vote was 5-4, the Court’s decisions seem to be less about protecting minority rights and more about individual judgments on what the Constitution should allow, although reasonable minds could disagree as to what it did allow, and that is yet another problem.

4. Outcomes Trump Process

Without fair processes, the results are not legitimate. Admittedly, *Griswold*, *Roe*, and *Casey* reached desirable outcomes and reflected a pragmatic view that such outcomes were not achievable through the democratic or political processes in many states. Given the history of abortion laws in states such as Alabama and Mississippi, as well as the laws passed by these and other states after *Roe*, the Justices were unquestionably correct that, if they did not do something, nothing would be done.¹²³ However, that is the point. The fact that the majorities in Alabama and Mississippi decided to outlaw abortion does not mean that the minority gained special protections simply because the policy of prohibiting all abortions was undesirable. Of course, it would be different if the processes

¹²⁰ *McDonald v. City of Chicago*, 130 S. Ct. 3020, 3099–100 (2010) (Stevens, J., dissenting) (emphasis added) (citations omitted).

¹²¹ *Id.* at 3101 (emphasis added) (citation omitted) (quoting *Roberts v. United States Jaycees*, 468 U.S. 609, 619 (1984); *Fitzgerald v. Porter Memorial Hospital*, 523 F.2d 716, 719 (7th Cir. 1975)).

¹²² Allan Ides, *The American Democracy and Judicial Review*, 33 ARIZ. L. REV. 1, 20 (1991) (“In Chemerinsky’s words, ‘[t]he Constitution purposely is an antimajoritarian document reflecting a distrust of government conducted entirely by majority rule.’”) (quoting ERWIN CHERMERSKY, *INTERPRETING THE CONSTITUTION 2* (1987)).

¹²³ See generally Dave Jolly, *Alabama Supreme Court Ruling Could End Legal Abortion in America*, GODFATHER POLITICS (April 21, 2014), <http://godfatherpolitics.com/15255/alabama-supreme-court-ruling-end-legal-abortion-america/>.

by which these outcomes were reached were unfair or dysfunctional. It would also be different if the law itself violated one of the individual rights provisions. Neither was true in *Roe*. What was true in *Roe* was that the Court manipulated the decision-making process to arrive at a preferred outcome.

On the other hand, the Court has made no attempt to fix inequalities that render the democratic process dysfunctional. In fact, the Court has done the opposite. In *Citizens United v. Federal Election Commission* and *McCutcheon v. Federal Election Commission*, the Court invalidated congressional legislation that placed limits on corporate and individual campaign contributions.¹²⁴ In doing so, the Court rejected the argument that the interest of reducing favoritism and undue influence in the legislative process justified limitations on contribution amounts.¹²⁵ The Court held that the only sufficiently compelling reason for limiting campaign contributions is the prevention of actual or apparent *quid pro quo* corruption, which is defined as “a direct exchange of an official act for money.”¹²⁶ Thus, contributions that enhance access to and responsiveness by public officials are perfectly acceptable, even though this is precisely what leads to political and democratic inequality.¹²⁷

These decisions dealt democracy a severe setback. The First Amendment was ambiguous on the question of whether corporations should be considered people or whether money was the equivalent of speech.¹²⁸ As one scholar explains, “[t]he framers seem to have had no coherent theory of free speech and appear not to have been overly concerned with the subject.”¹²⁹ Furthermore, the Court’s decisions prohibited the coordinate branches from addressing obvious inequities in both the electoral and the democratic process. Both *Citizens United* and *McCutcheon* were bad for democracy, although the Court ironically relied on democratic principles to invalidate the statutes in both cases.¹³⁰

Put differently, if true ambiguity in the text and historical record does exist, the Court should consider the outcome of a particular decision, particularly upon the federal and state processes by which laws are made. Where living constitutionalists err, as evidenced in *Canning*, *Roe*, and

¹²⁴ *McCutcheon v. Fed. Election Comm’n*, 134 S. Ct. 1434, 1442 (2014); *Citizens United v. Fed. Election Comm’n*, 558 U.S. 310, 318, 372 (2010).

¹²⁵ *McCutcheon*, 134 S. Ct. at 1441

¹²⁶ *Id.*

¹²⁷ *See id.*

¹²⁸ U.S. CONST. amend. XIV, § 1.

¹²⁹ On “Originalism” and the First Amendment (or Alternatively, “Please Don’t Throw Me into the Briar Patch”), LESSIG (Oct. 15, 2013), <http://www.lessig.org/2013/10/on-originalism-and-the-first-amendment-or-alternatively-please-dont-throw-me-into-the-briar-patch/>.

¹³⁰ *See McCutcheon*, 134 S. Ct. at 1449 (“To require one person to contribute at lower levels than others because he wants to support more candidates or causes is to impose a special burden on broader participation in the democratic process.”).

Casey, is that they focus on substantive outcomes, even where the Constitution is not ambiguous. If the political and democratic process does not provide the minority with a meaningful opportunity to participate in and effectuate legislative change, then the minority does not have liberty or autonomy in a meaningful sense.

To be sure, although the majority in *Citizens United* and *McCutcheon* was more closely aligned with originalism than living constitutionalism,¹³¹ both decisions demonstrate that the Court is not overly concerned with—and does not place a high value on—ensuring a fair and functional democracy.¹³² In fact, adopting this approach in campaign finance cases would not be inconsistent with the text, history, or purposes of the First Amendment, which the Founders emphasized was “the opportunity for free political discussion *to the end* that government may be *responsive to the will of the people*.”¹³³ Interpreting this ambiguity to give wealthy individuals and corporations the right to donate millions of dollars to candidates for public office is no different than interpreting an ambiguity to prohibit all fifty states from authorizing the death penalty for a child rapist,¹³⁴ or to require the states to provide abortion services. No matter how desirable the result, these decisions lead to centralized, paternalistic, and undemocratic governance.

Likewise, in *Clinton v. City of New York*, a majority of living constitutionalists relied on the Presentment Clause to invalidate the Line Item Veto Act, which attempted to reduce excessive government spending by giving the president authority to veto specific provisions in duly-enacted legislation.¹³⁵ Justice Scalia dissented, arguing that the Presentment Clause was sufficiently ambiguous to justify deferring to the coordinate branches and allowing them to experiment with legislation that would have likely reduced overspending in Washington.¹³⁶ Interestingly, Justice Kennedy concurred and placed a heavy emphasis on liberty and separation of powers principles.¹³⁷ He argued that citizens had a strong interest in ensuring that

¹³¹ In both cases, the majority consisted of Justices Scalia, Thomas, Roberts, Kennedy, and Alito. Although not all are considered to be originalists, particularly Justice Kennedy, they traditionally interpret the Constitution in a manner that is more consistent with the text and its original meaning.

¹³² See Matthew Michael Calabria, *Remembering Democracy in the Debate Over Election Reform*, 58 DUKE L.J. 827, 853–55 (2009) (discussing the Supreme Court’s failure to focus on democracy as an important constitutional value).

¹³³ *Stromberg v. California*, 283 U.S. 359, 369 (1931) (emphasis added).

¹³⁴ See *Kennedy v. Louisiana*, 554 U.S. 407, 450–51 (2008).

¹³⁵ *Clinton v. City of New York*, 524 U.S. 417, 448 (1998).

¹³⁶ *Id.* at 464–65 (Scalia, J., dissenting in part) (“As much as the Court goes on about Art. I, § 7, therefore, that provision does not demand the result the Court reaches.”).

¹³⁷ See *id.* at 450–51 (Kennedy, J., concurring). Justice Kennedy stated as follows:

In recent years, perhaps, we have come to think of liberty as defined by that word in the Fifth and Fourteenth Amendments and as illuminated by the other provisions of the Bill of Rights. The conception of liberty embraced by the Framers was not so confined. They used the principles of separation of powers and federalism to secure liberty in the fundamental political sense of the term,

the coordinate branches operated within the power delegated to them under the Constitution, and that each branch functioned as an effective check on the other.¹³⁸ Nevertheless, given that the Constitution's Presentment Clause was ambiguous on this question, the Court seemed to make a curious decision to focus on abstract principles of governance, rather than current realities about the dysfunctional process. After all, would the Founders object to allowing the government to experiment with solutions that addressed process-based dysfunction? Would such a result betray originalism? No. In the face of ambiguity, deferring to members of the coordinate branches who are well versed in the politics of lawmaking is fundamentally democratic.

The point is that process matters. Without procedural equality—or equal access to and participation in lawmaking—citizens lack liberty and autonomy in a substantive sense. After all, corporation A is not more virtuous than corporation B because it gives millions to candidates who believe in marriage equality. The fact that corporations can give millions of dollars to political candidates, and Congress can do nothing about it, is the problem. It taints the lawmaking processes with the stain of inequality, and that precludes middle and lower-income citizens from realizing liberty in a democratic sense.

C. Originalism and Ambiguity

Originalism, like living constitutionalism, often reaches good outcomes. In *Canning* and many other cases, such as *Riley v. California*, originalists and living constitutionalists arrived at the same outcome.¹³⁹ The critical difference, though, is how they get there. For true originalists, process matters more than the outcome. In addition, when originalists and living constitutionalists disagree about the outcome, the differences in both approaches are obvious.

Contrary to the beliefs of some commentators, originalists are not stuck in the eighteenth century. They understand that the Founders could not anticipate every problem that might arise in the future, and they

quite in addition to the idea of freedom from intrusive governmental acts. The idea and the promise were that when the people delegate some degree of control to a remote central authority, one branch of government ought not possess the power to shape their destiny without a sufficient check from the other two. In this vision, liberty demands limits on the ability of any one branch to influence basic political decisions.

Id.

¹³⁸ *Id.*

¹³⁹ See *Riley v. California*, 134 S. Ct. 2473, 2493–95 (2014) (all nine Justices held that warrantless searches of an arrestee's cell phone incident to arrest violated the Fourth Amendment); *NLRB v. Canning*, 134 S. Ct. 2550, 2617–18 (2014) (Scalia, J., concurring) (concurring in the judgment but criticizing “the novel framework adopted by the [majority],” and lamenting “the damage done [by the majority opinion] to our separation of powers jurisprudence”) (brackets added).

recognize that, in many areas, the Constitution is ambiguous. Thus, when interpreting the text, originalists do not give weight to the Founders' expectations or intentions.¹⁴⁰ Instead, they construe the text in a manner that is consistent with an original understanding of the words and its underlying purposes.¹⁴¹ Simply stated, originalists begin with the words and are bound by "semantic intentions."¹⁴²

The primary difference between originalists and living constitutionalists involves meaning and ambiguity. When originalists analyze the text, they do not search for every possible interpretation that the text may support. Originalists search for the most probable interpretation by giving the text a meaning that its words can reasonably bear, in light of what the Founders understood those words to mean. Hence, the original meaning may include "idiomatic meaning, but [originalism] excludes secret or technical meanings that would not have been known to ordinary citizens in the founding generation."¹⁴³ This approach unites the text with its underlying original purposes to arrive at an interpretation that fully protects, but does not create, substantive rights. Unlike living constitutionalists, originalists will not rely on broader purposes alone to support a construction that, while possible, is inconsistent with common understanding and usage.

1. Value Judgments Are for Legislatures, Not Courts

Originalists place high worth on the structural integrity of government, above all in relation to separation of powers, bottom-up federalism, and a republican form of government.¹⁴⁴ For originalists, the people are better suited to decide the question of whether the Constitution is ambiguous or silent.¹⁴⁵ Accordingly, originalism strives "to appropriately constrain the judiciary by confining it to the interpretation of legal text"¹⁴⁶ and eschews reasoning that is based on unwritten values or undefinable principles. Indeed, originalism treats "as binding the judgments made by the framers and ratifiers when adopting constitutional text."¹⁴⁷ In so doing, originalism "is said to lead to desirable outcomes by protecting legal commitments that reflect fundamental values,"¹⁴⁸ but also by avoiding the creation of additional values it cannot be reasonably construed to contain.

Does originalism really lead to less subjectivity? In part, yes, but it

¹⁴⁰ See Lawrence Rosenthal, *Originalism in Practice*, 87 IND. L.J. 1183, 1186–87 (2012).

¹⁴¹ *Id.* at 1186.

¹⁴² *Id.* at 1210.

¹⁴³ *Id.* at 1183.

¹⁴⁴ See generally Jack Landau, *Some Thoughts about State Constitutional Interpretation*, 115 PENN ST. L. REV. 837 (2011). See George A. Nation III, *We the People: The Consent of the Governed in the Twenty-First Century: The People's Unalienable Right to Make Law*, 4 DREXEL L. REV. 319 (2012).

¹⁴⁵ See Rosenthal, *supra* note 140, at 1186.

¹⁴⁶ *Id.*

¹⁴⁷ *Id.*

¹⁴⁸ *Id.* at 1186–87.

does not preclude some subjectivity, or value judgment, based on a consideration of contemporary problems. The difference lies in the *types* of value judgments that originalists make, which differentiates their view of meaning and purpose from living constitutionalists. For example, originalists reject the notion that constitutional meaning changes based on a contemporary understanding of what the words or purposes can or should mean.¹⁴⁹ In *Canning*, Justice Breyer interpreted the Recess Appointments Clause based upon a “permissible reading” or “possible way to use the word,” while acknowledging that it was not the most natural reading of the clause.¹⁵⁰ Originalists reject that approach. They believe it invites judges to interpret the text based on what they believe it could or should mean, rather than what it was understood to mean.

Put differently, original understanding precludes judges from relying on possible, but tenuous and imprecise, interpretations and confines judges to an interpretation that reflects the text’s most probable meaning. As a result, the outcome is more likely to reflect the purposes underlying a particular provision and preclude judges from distorting the text to reach “desirable” outcomes or to create additional rights. In this way, original understanding is less subjective; it does not allow value judgments to inform meaning, and it does not permit courts to find ambiguities where none exist.

2. Constitutional Meaning

Originalists do not seek to change the original meaning of the Constitution’s text but instead apply that meaning to contemporary—and changed—circumstances. Thus, originalists do not limit the scope of inquiry to circumstances of which the Founders were aware, or could have foreseen, at the time of the Constitution’s adoption. Instead, they apply the original meaning and purpose of a provision to contemporary problems. Hence, although constitutional meaning does not change, the scope of what a particular provision protects may change, provided it is consistent with the original meaning.

With respect to historical practice, originalists take a more cautious approach because, like legislative history, historical practice is often inconclusive. In some circumstances, it may help to guide a court in discerning the original meaning and purpose of the text. However, it should not be used to arrive at conclusions, such as the majority’s opinion in *Canning*, that justify an implausible interpretation of the text.

¹⁴⁹ See, e.g., Lawrence Rosenthal, *Does Due Process Have an Original Meaning? On Originalism, Due Process, Procedural Innovation . . . and Parking Tickets*, 60 OKLA. L. REV. 1, 5(2007) (stating that, “by the 1990s originalists had largely acknowledged the force of these objections and embraced the view that the Constitution should be construed in light of the generally understood meaning of its text at the time it was adopted rather than by reference to the likely intentions of the drafters or ratifiers”).

¹⁵⁰ This footnote is blank.

As a result, when confronted with actual constitutional ambiguity, originalism reduces, but does not eliminate, subjectivity. Of course, given the broad phrasing in most of the individual rights provisions, a degree of subjectivity is unavoidable. However, originalism limits subjective value judgments by providing a workable framework within which to connect meaning and purpose and, thereby, create a cohesive doctrine. The Fourth Amendment's prohibition against unreasonable searches and seizures,¹⁵¹ for instance, requires courts to define the term "reasonable," which is inherently ambiguous. To give "reasonable" its most probable meaning in this context, originalists would consider the Founders' original understanding of what "reasonable" meant in light of the Fourth Amendment's original purposes. Although those purposes are not entirely clear, most agree that the Fourth Amendment was intended to protect against the broad general warrants that had been used in England to seize evidence.¹⁵²

A probable construction of "reasonable," therefore, would prohibit searches that extend beyond the object of the search, or the necessities created by unforeseen or exigent circumstances.¹⁵³ In the Court's most recent Fourth Amendment case, *Riley v. California*, the Court interpreted reasonableness in precisely this manner and unanimously held that warrantless searches of any arrestee's cell phone were per se unreasonable.¹⁵⁴ In its opinion, the Court connected reasonableness with the Fourth Amendment's original purpose, placing particular emphasis on the fact that warrantless cell phone searches allowed law enforcement to rummage through an extraordinary amount of private information that had no relation to the reason for the arrest.¹⁵⁵

Of course, this philosophy certainly involves value judgments to the extent that it required the Justices to consider whether the Fourth Amendment's original purpose—to prohibit general warrants—was implicated by the search of an arrestee's modern cell phone. In *Riley*, the Court had to consider whether the arrestee had a privacy interest in his cell phone, whether the search of a cell phone was akin to (or even broader than) the search of a home, whether law enforcement had a justifiable reason for conducting such searches, and whether those reasons outweighed the arrestee's privacy interest, if any.¹⁵⁶ However, these value judgments were properly framed against the backdrop of original meaning and purpose, and not in and of themselves sufficient grounds upon which to base the decision.

¹⁵¹ See U.S. CONST. amend. IV ("The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.").

¹⁵² See, e.g., *Riley v. California*, 134 S. Ct. 2473, 2494 (2014).

¹⁵³ See *id.* at 2483.

¹⁵⁴ *Id.* at 2494.

¹⁵⁵ *Id.* at 2492.

¹⁵⁶ See *Riley*, 134 S. Ct. at 2484-2490.

This highlights a fundamental difference between originalism and living constitutionalism. Originalists go through a three-step analysis that involves the text itself, the original understanding of what the words meant, and the original purposes underlying the provision. Living constitutionalists largely disregard the second step. Instead, living constitutionalists search for a possible construction of the words based on original or contemporary understandings and then apply broader purposes that often extend beyond the purposes of a particular provision. In *Griswold*, *Roe*, and *Casey*, for example, the Court disregarded the Fourteenth Amendment's original intent—to protect procedural due process—and based its decision on broader notions of liberty and privacy to create substantive rights.

The types of value judgments that this approach engenders are fundamentally different from the value judgments that originalists use. In cases such as *Roe*, the Court was completely unanchored from the Constitution's text and the underlying principles of the Fourteenth Amendment itself. Furthermore, the overarching principles on which the Court relied—liberty and privacy—are inherently ambiguous and depend on each justice's subjective understanding of what they mean in a particular context. The consequences of living constitutionalism, then, are that it centralizes power in the judiciary and enables courts to decide issues that are properly left to the democratic process.

3. Ambiguity, Individual Rights, and Democracy

A significant criticism of originalism is that it leads to draconian, or unjust, results.¹⁵⁷ Undoubtedly, originalism does result in narrower decisions that would certainly not have recognized many of the “rights” or doctrines that the Court has created.¹⁵⁸ The problem with this argument is that it presupposes that a Court's role is to ensure the most just outcome in a particular case, even where the Constitution is ambiguous, silent, or the clause at issue does not support the result deemed by living constitutionalists to be the most desirable. It also presupposes that unwise or “dumb” policies should be invalidated even where the Constitution does not proscribe the federal or state governments from adopting such policies. Furthermore, living constitutionalists would allow courts to base decisions on broader concepts, such as liberty, although the use of those concepts fails to meaningfully constrain judges and results in decisions driven by normative considerations.

This approach shows little, if any, concern for democracy as a desirable outcome in and of itself, or of bottom-up lawmaking as a

¹⁵⁷ See Lee J. Strang, *Originalism and the Aristotelian Tradition: Virtue's Home in Originalism*, 80 *FORDHAM L. REV.* 1997, 2007 (2012).

¹⁵⁸ See, e.g., *Griswold v. Connecticut*, 381 U.S. 479, 484–86 (1965) (recognizing a substantive right to privacy under the Fourteenth Amendment).

constitutional value. Ultimately, living constitutionalists' primary criticism of originalism is based on a view of judging that is inconsistent with the structural values that the Constitution envisions—decentralization, federalism, and democracy as the primary source of law. Indeed, it is one thing to protect the minority against tyrannical majorities, but it is quite another to not protect a legitimate majority against its own right to legislate free from the threat of a judicial veto.

Of course, living constitutionalists have attempted to justify their approach to interpretation by arguing, among other things, that the Constitution contains unwritten or invisible rights, and that its provisions should be interpreted in a holistic, not clause-dependent, manner.¹⁵⁹ However, these arguments seek to justify an outcome-driven, values-laden paradigm that would allow judges to disregard any reasonable interpretation in favor of a purpose-based jurisprudence that depends on the predilections of individual judges.

That demonstrates why originalism is superior not only as a method of interpretation but also as vehicle for strengthening democracy. When originalism enforces the Constitution's written constraints, but leaves ambiguity—or reasonable disagreements about meaning—to the democratic process, it enables bottom-up lawmaking and gives the people, not courts, the authority to meaningfully participate in self-governance.¹⁶⁰ This is vital to achieving the type of liberty and autonomy that the Founders envisioned, namely, that “[g]overnments are instituted among Men, deriving their just powers from the *consent of the governed*.”¹⁶¹ Although an independent judiciary is an indispensable part of a constitutional democracy, the people's consent depends on the judicial power being exercised in a manner that respects the constraints on its authority. Thus, if the Court changes the Constitution into a living document that unilaterally removes an issue from the democratic process, it is acting outside the scope of its authority, and certainly not with the consent or will of the people. Put differently, living constitutionalism transforms the Court from a democratic institution that protects basic liberties to one that compromises the structural provisions—decentralization and federalism—that prevent one branch from unilaterally infringing on those liberties. That is precisely what the Court is doing when it manipulates or disregards the Constitution. The Court is infringing on the people's right to define the unenumerated rights under which they will be

¹⁵⁹ See, e.g., Akhil Reed Amar, *Intratextualism*, 112 HARV. L. REV. 747, 792 (1999) (“If philologic intratextualism is best at proving what a word or phrase might mean, a different brand of intratextualism tries to show what the document as a whole is best read as meaning.”).

¹⁶⁰ See generally Randy Barnett, *The Wages of Crying Judicial Restraint*, 36 HARV. J.L. & PUB. POL'Y 925 (2013).

¹⁶¹ DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776) (emphasis added).

governed.¹⁶²

Originalism strives to ensure a system of vertical and horizontal federalism that protects fundamental rights but preserves the structural integrity of the government, particularly a system of checks and balances, decentralization, and democratic rule.

4. Process and Equality Trump Outcomes

Where both the text and its underlying purposes are ambiguous, and reasonable people can disagree about policies that are most desirable, originalism defers to the democratic process. Importantly, however, does originalism inadvertently result in undemocratic decisions that fail to protect minority rights or protect against tyrannical majorities? No, because originalism does not allow outcomes to dictate interpretation and does not always lead to what some might deem the best outcome. By reasonably interpreting the Constitution's text, originalists allow rights to evolve from the bottom-up, which gives the people a voice in democratic self-governance. In this way, originalism promotes the core values upon which the people's consent—and will—are based: liberty, equality, and autonomy. Thus, originalism recognizes that process matters more than outcomes; procedural equality ensures that neither the government nor the courts become a tyrannical and unaccountable supermajority. In doing so, originalism also ensures substantive equality and a more self-determinative form of liberty. Consequently, it would be wrong to argue that originalism is focused on judicial restraint. Broadly speaking, originalism embraces judicial activism—if it makes democracy work better.

Indeed, if the process by which an outcome is reached is tainted, then the outcome itself, as it was in *Roe* and *Casey*, should not be viewed as legitimate. It is akin to cheating on a final examination. The student who achieves the highest grade—but obtained a copy of the questions beforehand—certainly reached a desirable outcome. However, when the professor discovers that the student cheated, the outcome is anything but desirable. The question with respect to constitutional interpretation is whether courts should be allowed to cheat for the purpose of reaching more progressive results. Originalism would say no. Proponents of fair and transparent democratic processes would agree. After all, unlike elected officials, there is no penalty for cheating at the Supreme Court.

Does this mean that originalism leads to draconian results? It

¹⁶² See U.S. CONST. amend. IX (“The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.”). Although beyond the scope of this article, the Ninth Amendment does not give the judiciary the authority to identify those rights, but entrusts the evolution of those rights to the democratic process. See Nelson Lund & John O. McGinnis, *Lawrence v. Texas and Judicial Hubris*, 102 MICH. L. REV. 1555, 1580–81 (2004).

depends on the values deemed most worthy of protection and the processes viewed as essential to securing liberty and equality. The answer is certainly yes for those who believe that:

- The First Amendment does not protect a right to burn the American flag, a corporation's right to free speech, or a magazine's right to publish a parody of a religious minister;
- The Second Amendment does not permit individuals to own firearms;
- The Fourth Amendment does not permit law enforcement to take a suspect's DNA without a warrant, but does allow the government to track and record cell phone metadata without a warrant;
- The Fifth Amendment's Takings Clause allows the government to seize private property for quasi-public use;
- The Eighth Amendment permits a court to invalidate laws authorizing the death penalty for child rape and to categorically prohibit the death penalty;
- The Ninth Amendment gives courts, not citizens, the power to identify unenumerated rights;
- The Fourteenth Amendment includes the right to abortion, including partial-birth abortion and assisted suicide, and prohibits the citizens of Michigan from amending the state constitution to prohibit race-conscious policies in higher education;
- The Commerce Clause authorizes regulation of purely intrastate activity, allows the government to prohibit states from using medical marijuana to treat cancer sufferers, and permits the government to penalize individuals for not purchasing health care;
- The treaty power allows the federal government to use the Chemical Weapons Convention Implementation Act to prosecute a woman who tried to poison her husband's mistress; and
- The Court was correct to invalidate a New York law that limited the number of hours a baker could work each week.

For those who believe that some or all of these results are problematic, then living constitutionalism—not originalism—leads to draconian and unjust results.

Of course, an argument can be made that some of these decisions are not consistent with, and cannot be attributed to, originalism. For example, originalists would not necessarily conclude that corporations are people for First Amendment purposes.¹⁶³ In addition, as Justice Clarence Thomas and some scholars have suggested, the Privileges and Immunities Clause may provide a basis upon which to conclude that abortion rights are in fact protected under the Fourteenth Amendment.¹⁶⁴ Currently, however, there is little support for this view at the Supreme Court. An argument can also be made that the Court's decisions involve a complex array of factors that extend beyond originalism or living constitutionalism.

Certainly, some decisions cannot be classified as the product of either originalism or living constitutionalism. This is certainly true, but each justice's interpretive philosophy supplies the framework by which to assess the constitutionality of a law, including the values placed on different sources of legal authority. Although many decisions do escape categorization, it is usually not difficult to discern what aspects of interpretation—the text, the historical purpose, or the broader values—the Court emphasized in reaching its decision. Part of the reason that scholars can often predict how the Court will rule relates to an assessment of each justice's approach to constitutional interpretation.

Admittedly, though, in some cases, originalism will not lead to the fairest or most progressive result. Originalists would have likely ruled against affirmative action programs in higher education,¹⁶⁵ allowed states to execute minors and outlaw abortion,¹⁶⁶ upheld bans on same-sex marriage

¹⁶³ See *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652, 660 (1990) (holding that corporations could not use treasury money to make independent expenditures to support or oppose candidates in elections for state offices.) The majority in *Austin*, which noted that “[c]orporate wealth can unfairly influence elections[,]” included Justice Rehnquist who, although not technically an originalist, was certainly opposed to living constitutionalism and other interpretations that sought to ascribe meaning that the text would not support. *Id.*; see, e.g., Amanda D. Johnson, *Originalism and Citizens United: The Struggle of Corporate Personhood*, 7 RUTGERS BUS. L.J. 187, 187–89 (2010) (discussing the difficulties of applying originalism to corporate speech).

¹⁶⁴ See Christian B. Corrigan, Comment, *McDonald v. City of Chicago: Did Justice Thomas Resurrect the Privileges and Immunities Clause from the Dead? (And did Justice Scalia Kill it Again?)*, 60 U. KAN. L. REV. 435, 450–51 (2001) (discussing Justice Thomas' concurrence, which held that the Second Amendment applied to the states and suggested that the Privileges and Immunities Clause may protect certain rights).

¹⁶⁵ See Douglas G. Smith, *Originalism and the Affirmative Action Decisions*, 55 CASE W. RES. L. REV. 1, 39 (2004) (discussing the color-blind approach that Justice Thomas, an originalist, would apply).

¹⁶⁶ See *Roper v. Simmons*, 543 U.S. 551, 607–16 (2005) (Scalia, J., dissenting); see also *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 998–99 (1992) (Scalia, J., concurring in part and dissenting in part). In dissenting in part against the majority, Justice Scalia cited former President Abraham Lincoln's inaugural address when arguing that the Court's decision impermissibly overreached into a matter that should have been resolved democratically: “The candid citizen must confess that if the policy of the Government upon vital questions affecting the whole people is to be irrevocably fixed by decisions of the Supreme Court . . . the people will have ceased to be their own rulers, having to that extent practically resigned their Government into the hands of that eminent tribunal.” *Id.* at 997 (alteration in original) (quoting Abraham Lincoln, President of the United States, First Inaugural Address (Mar. 4, 1861), reprinted in INAUGURAL ADDRESSES OF THE PRESIDENTS OF THE UNITED STATES, S. Doc. No. 101–10, p. 133, 139 (1989)).

and laws prohibiting sodomy,¹⁶⁷ and would allow school-sponsored prayer in public schools.¹⁶⁸ However, at the same time, originalists would not invalidate state laws that established race-based admissions programs, eliminated the death penalty, extended marriage to same-sex couples, and prohibited school prayer. Originalists would let the people decide, because, on all of these questions, the Constitution is ambiguous. It is the fight (the process) that must be fair. The resulting policy must only be constitutional.

The Court's muddled Establishment Clause doctrine, and the 5-4 decisions in many of its Fourteenth Amendment rulings, underscores this fact.¹⁶⁹ However, contrary to originalism's harshest critics, it would not—and does not—lead to draconian results that would enshrine racism, sexism, homophobia, and all other forms of discrimination into the Constitution.¹⁷⁰ For example, originalists were members of the Court that unanimously struck down segregation in *Brown v. Board of Education* and invalidated bans on interracial marriage in *Loving v. Virginia*.¹⁷¹ This is not to say that originalists are always “correct” or that originalism is perfect. The difference is that originalism places a high value on process, restraint, rule of law, and autonomy of citizens to make law through the democratic means.

Ultimately, whatever result one prefers among the examples cited above, they cannot be considered objectively wrong or unjust. In fact, among those examples, both “liberals” and “conservatives” would likely identify at least one case where the result is draconian or absurd, just as liberals and conservatives are both susceptible to charges that they are impermissibly activist. Moreover, living constitutionalism, which embraces a robust view of the Commerce Clause and Takings Clause, is also subject to the charge that it leads to unjust results. In other words, it depends on one's perspective. It does not depend on law, and that is the point.

¹⁶⁷ *United States v. Windsor*, 133 S. Ct. 2675, 2696 (2013) (Scalia, J., dissenting); *Lawrence v. Texas*, 539 U.S. 558, 605 (2003) (Scalia, J., dissenting). In his dissenting opinion, Justice Scalia stated as follows:

We might have covered ourselves with honor today, by promising all sides of this debate that it was theirs to settle and that we would respect their resolution. We might have let the People decide. But that the majority will not do. Some will rejoice in today's decision, and some will despair at it; that is the nature of a controversy that matters so much to so many. But the Court has cheated both sides, robbing the winners of an honest victory, and the losers of the peace that comes from a fair defeat. We owed both of them better. I dissent.

Windsor, at 2711.

¹⁶⁸ *Engel v. Vitale*, 370 U.S. 421, 445 (1962) (Stewart, J., dissenting).

¹⁶⁹ Lisa Langendorfer, *Establishing a Pattern: An Analysis of the Supreme Court's Establishment Clause Jurisprudence*, 33 U. RICH. L. REV. 705, 705 (1999) (“The Establishment Clause has been greatly litigated, with more than seventy cases decided by the United States Supreme Court since the 1940s, yet the Court has been unable to agree for any amount of time on a standard method for determining if the Establishment Clause has been violated.”).

¹⁷⁰ See, e.g., Charles R. Kesler, *Thinking About Originalism*, 31 HARV. J.L. & PUB. POL'Y 1121, 1125–26 (2008).

¹⁷¹ *Brown v. Bd. of Educ.*, 347 U.S. 483, 495 (1954); *Loving v. Virginia*, 388 U.S. 1, 11–12 (1967).

When reasonable people can disagree about the desirability of a result, and the Constitution does not provide an answer, democracy should be a fundamental constitutional value. Between originalism and living constitutionalism, there can be no question about what theory strikes the right balance between enforcing, rather than creating, fundamental rights, and respecting, rather than undermining, democratic values. Of course, there is one exception. Living constitutionalists might be on better footing if an outcome-driven jurisprudence was justified on the basis that the democratic process in a particular state could not reasonably lead to a change in the status quo.¹⁷² Political gerrymandering, for example, might cause some districts to overwhelmingly favor a particular party, such that elections are little more than a formality.¹⁷³ If that were the case, then living constitutionalists should acknowledge process-based malfunction as a basis for valuing outcomes over process. Rarely, however, do living constitutionalists make this argument. Furthermore, even if that were the case, living constitutionalism would be a short-term solution. Recognizing that the political process is broken is a reason to adopt a democracy-enhancing jurisprudence, not to give wealthy individuals and corporations the power to corrode whatever fragile foundation remains.

Why should democracy be a constitutional value? Because equality, not liberty, is the most important human value. Without political and procedural equality, substantive equality is more difficult to attain, and autonomy is not fully realized. If liberty means anything, it should mean the right to have a voice in governance and to make policy choices that result from individual, not judicial, predilection. Currently, however, the Court's approach to democracy is ironic. On one hand, the Court's substantive-rights jurisprudence has protected, even discovered, rights that have questionable, if not nonexistent, support from the Constitution's text. On the other hand, the Court's process-based jurisprudence has allowed wealthy individuals and corporations to donate millions to political candidates and gain favorable access to elected officials. Something is terribly wrong with this picture. The Founders did not write the Constitution to create a separate but equal democracy, or a system of governance where the elite depend on democracy's dysfunction to maintain that power. In addition, living constitutionalism, although protecting minority rights in some cases, does not strengthen the processes by which a politically powerless minority can achieve political equality.

Why originalism and not minimalism, which argues that courts

¹⁷² See Guy-Uriel E. Charles, *Democracy and Distortion*, 92 CORNELL L. REV. 601, 653 (2007).

¹⁷³ See Gary S. Stein, *An Unpublicized Scandal: New Jersey's Non-Competitive Congressional Districts*, N.J. LAWYER, Aug. 2008, at 10, 12 ("The two political parties, acting through the constitutionally created redistricting commission, have usurped the public's function and effectively have selected New Jersey's congressional delegation for the next decade.").

should make decisions on the narrowest grounds possible? Although valuable across a broad spectrum of cases, minimalism only fixes part of the problem. It still gives courts the final word on matters involving constitutional ambiguity. In many ways, it is like fixing a flat tire on a car with a corroded engine. The car may look functional, but it cannot travel anywhere. Minimalism is not the solution to the inequality that plagues democracy. To be sure, nothing is inherently wrong with majority rule provided that the minority is engaged in a fair fight. The path to fairness and equality is through more decentralization and through governance at a more local level.

IV. WITH ALL DELIBERATE SPEED: ENSURING EQUALITY AND LIBERTY THROUGH LOCAL DEMOCRATIC PROCESSES

It may seem contradictory to argue that the Court's decisions should, to the best extent possible, focus on repairing the democratic process. If, as originalists would argue, the Court should not focus on outcomes—no matter how desirable—then repairing the democratic process cannot itself justify any outcome. That is true, except for the fact that decisions strengthening democracy are fundamentally different from the types of outcomes sought by living constitutionalists. They are process-based outcomes and enhance citizens' ability to meaningfully participate in self-governance.

Furthermore, a democracy-enhancing jurisprudence would not create new substantive rights or require the Court to manipulate or disregard the text to achieve desired outcomes. In fact, such an approach would reflect both judicial restraint and activism, in the sense that the Court would confine itself to a reasonable interpretation of the text but actively enhance the processes by which the people can participate in the deliberations that produce law. What follows below is an introduction to the concept of a local democracy, and the issues that this system of governance would implicate.

A. Beyond One Person, One Vote: The Right to Meaningful Democratic Participation

If elected officials are only accountable to a small segment of wealthy voters, then the right to vote means nothing. Former Supreme Court Justice Sandra Day O'Connor states:

It is all too easy to confuse democracy with the mere right to vote. But the invisible process of democracy is as important to the Rule of Law as the actual casting of individual votes. The process of democracy forces society to come together and deliberate . . . [Democracy] elevates

the importance of debate . . . [and] common understanding. And instead of sending the message that individuals are isolated and unable to convey their message through any means other than violence, democracy tolerates and encourages differences.¹⁷⁴

As Justice O'Connor explained, "[t]he challenge we face in this century is not to identify the people who deserve the benefit of democracy and the Rule of Law, but to ensure that everyone deserves it and its benefits."¹⁷⁵

Indeed, meaningful participation should be an important constitutional value. This would require, of course, an egalitarian and accessible lawmaking process for all citizens. In other words, it would require that *Citizens United* and *McCutcheon* be overturned, a result that would not require the Court to manipulate or disregard the Constitution's text. To be sure, the First Amendment is ambiguous on the issue of whether corporations are people and thus entitled to First Amendment rights. In addition, the First Amendment does not answer the question of whether Congress's authority to enact regulations is limited to the expression of speech through money. Given these ambiguities, the Court could have chosen an outcome that made democracy fairer and empowered citizens to be relevant participants in the electoral process. Certainly, both living constitutionalism and originalism can justify a decision that resolves ambiguity in favor of a stronger democracy—a goal that originalists count among their highest.

When the processes by which laws affecting liberty are made do not involve collective public deliberation, however, and are disproportionately influenced by those with wealth and undue influence, law and deprivation themselves are less legitimate. The law does not truly reflect the will of the people or consent of the governed. It is a law originating from an unaccountable majority, which also exists where living constitutionalists create rights. Neither is democratic in a real sense, but both cause inequality.

This is not to say that citizens are entitled to equal outcomes or that democracy should have winners and losers. Of course, complete equality will never be possible, but when inequality is so substantial that power is concentrated among the wealthy, then citizens are disconnected from the very process by which the scope of their rights and liberties is decided. In other words, the fight is not fair. Indeed, a democracy that sells access to the highest bidder is like a magician who dazzles the audience with a daring stunt that defies imagination. The stunt, however, is an illusion. In such a

¹⁷⁴ O'Connor, *supra* note 23, at 1170.

¹⁷⁵ *Id.* at 1169.

system, the wealthy live in a functional democracy, whereas middle- and lower-income citizens reside in a dysfunctional plutocracy. The point is that originalism has less utility if the processes to which it defers are defective. Right now, they are defective, and part of making democracy more egalitarian lies in localizing parts of the lawmaking process.

B. Voters as Lawmakers in a More Local—and Direct—Democracy

Democracy can be defined in many ways. Indirect forms of democracy, such as representative government, enact laws through elected officials.¹⁷⁶ More direct forms of democracy allow citizens to initiate the lawmaking process through ballot initiatives or amendments to the state constitution.¹⁷⁷ This type of direct democracy includes the following:

The most important forms of direct democracy at the state and local level are designed to allow interested citizens (1) to draft and initiate legislation and constitutional amendments for the approval of qualified voters (the power of initiative) and (2) to ask that laws adopted by state and local legislative bodies be referred to voters for approval or rejection (the power of popular referendum). Before an initiative or popular referendum can be placed on a ballot for approval or rejection, certain procedural requirements must be satisfied, including, most important, obtaining and filing petitions describing the action to be taken and containing a specified number of qualified voters' signatures. The third form of direct democracy is designed to allow legislative bodies to refer laws or proposed constitutional amendments to the voters for their approval (the power of legislative referendum); this is the least controversial form of direct democracy. Under all three forms of direct democracy, voters decide whether to adopt or reject the matters initiated or referred.¹⁷⁸

Neither indirect nor direct forms of democracy, however, are sufficient in themselves to ensure greater citizen access and participation in governance. Admittedly, ballot initiatives and referendums allow citizens to directly participate in lawmaking, but this occurs on a statewide basis, often involving tens of millions of voters from vastly different parts of a particular state. Furthermore, given the pervasive influence of money in politics,

¹⁷⁶ Kevin F. Ryan, *Madisonian Constitutionalism and the Challenge of Civic Education*, 34 VT. B.J. 8, 10 (2008).

¹⁷⁷ See generally John Gildersleeve, *Editing Direct Democracy: Does Limiting the Subject Matter of Ballot Initiatives Offend the First Amendment*, 107 COLUM. L. REV. 1437, 1469–70 (2007) (discussing ballot initiatives and their role in democracy).

¹⁷⁸ Paul F. Eckstein, *The Debate Over Direct Democracy at the Arizona Constitutional Convention*, 48 ARIZ. ATT'Y 32, 33 (2012) (internal citations omitted).

ballot initiatives are often less about public debate and more about the ensuing advertising frenzy that distorts more than it discloses. Thus, do ballot initiatives truly go beyond one person, one vote, and meaningfully involve citizens in the lawmaking process? Do ballot initiatives reflect uniquely local policy needs that may be of particular concern in one area of the state, but not in another? The answer to both questions is no. Ballot initiatives and referendums are valuable tools to realize democratic change, but they are more akin to fancy window dressing than they are to real structural change.

The sheer size of the population in New York City, for example, which is home to 8.4 million people,¹⁷⁹ prevents citizens from having open, forthright, and local deliberations with elected officials. Town hall meetings and question-and-answer sessions might offer a local feel to democracy, but most of the time, citizens are passive audience participants and relegated to a single question to which many politicians have a prepared answer.¹⁸⁰ In short, democracy today lacks meaningful interactions between the people and their representatives, which prohibits honest policy deliberations and the inclusion of diverse perspectives.

1. Local Democracies Can Respond to Uniquely Local Policy Needs

The solution to this problem goes beyond simply reforming the current democratic structure. It requires that democracy be more local, such that citizens of diverse backgrounds, income groups, and viewpoints are lawmakers, not merely voters, and that they reflect the racial, ethnic, and socioeconomic backgrounds of those whom they represent. A local democracy that goes beyond the state level and into towns and municipalities, where some issues traditionally entrusted to statewide governance are delegated to smaller communities, can fundamentally transform lawmaking without undermining the Constitution's structural design. On some matters of policy, states should be subdivided into separate districts, or mini-democracies, and have the authority to enact laws that, while limited in territorial reach, reflect the unique policy needs and geographic and economic makeups of that district.

Think about it: Why can't abortion be lawful in New Orleans, Louisiana, but unlawful in Lafayette? Why can't the death penalty be lawful in Fort Wayne, Indiana, but unlawful in Bloomington? Laws that make sense for the residents of Beverly Hills might not work for citizens residing in South Central Los Angeles. Local intrastate democracies are

¹⁷⁹ See *Population: Current Population Estimates*, NYCPLANNING (2014), <http://www.nyc.gov/html/dcp/html/census/popcur.shtml> (last visited Mar. 4, 2015).

¹⁸⁰ See, e.g., Alix Spiegel, *How Politicians Get Away with Dodging the Questions*, NPR (Oct. 3, 2012, 3:33 AM), <http://www.npr.org/2012/10/03/162103368/how-politicians-get-away-with-dodging-the-question>.

based on the premise that no law—or majority—is entirely legitimate if the voices responsible for its passage do not reflect the diverse racial, ethnic, and socioeconomic makeup of their constituents but instead are answerable to the those making the largest corporate expenditures. The solution, however, is not to give the judiciary more power. It is to further decentralize the democratic process.

The states already incorporate local democracy into lawmaking, in areas such as education, land use, and health and welfare.¹⁸¹ Thus, this approach would not involve a dramatic restructuring of the state democratic process but would entrust local communities with more decisions that affect the rights and responsibility of its constituents. In so doing, the balance between federal and state power would be preserved, but the power imbalance within states would be alleviated. Majority rule would reflect the diverse perspectives of all citizens, and the minority will have a realistic chance to effectuate changes in the law and produce better laws for discreet portions of the states. Currently, even at the state level, minority rights are about as protected as an innocent person on Texas's death row and as broken as democracy itself.¹⁸²

2. Local Democracies Enhance Political Equality and Participation by Diverse Groups

As democracy gets more local, each person's voice matters more, and the likelihood that diverse perspectives within a community will be expressed increases. Indeed, local democracies are valuable in so far as they unite people in common interests that transcend the boundaries of race, socioeconomic status, and ideology. When uniquely local problems affect everyone, political partisanship becomes secondary to purposeful legislative solutions. And that is precisely the point. To give citizens a meaningful voice in democracy, they should have a voice regarding laws that will directly and uniquely affect their community's interests. That creates an atmosphere where common interests result in shared governance—and a democracy where the incentive is to solve, rather than politicize, a problem.

Thus, some areas over which mini-democracies can have jurisdiction include the following:

- Reasonable restrictions on individual and corporate campaign contributions;

¹⁸¹ See, e.g., Patricia E. Salkin, *The Quiet Revolution and Federalism: Into the Future*, 45 J. MARSHALL L. REV. 253, 254 (2012) (discussing the importance of local governance in land use to ensure that policies respond to uniquely local needs).

¹⁸² See, e.g., *Innocence: New Evidence that Texas May Have Executed an Innocent Man*, DEATH PENALTY INFORMATION CENTER, <http://www.deathpenaltyinfo.org/innocence-new-evidence-texas-may-have-executed-innocent-man> (last visited Mar. 4, 2015).

- Firearm restrictions in response to local gun violence;
- Abortion; and,
- Penalties for certain criminal offenses.

This type of governance will allow them to participate more directly in creating rights in areas that are not preempted by the federal government or essential for the efficient administration of government, and upon which the Constitution is silent or ambiguous.

Of course, how mini-democracies would be organized in each state would depend on many factors, including the size, demographic makeup, and populations of each state. Given that most, if not all, states already give local governments and municipalities jurisdiction over matters such as land use and education, the concept itself is not foreign or unworkable. The challenge, as discussed below, will be to identify the issues that should be entrusted to local jurisdictions but will not have a disruptive effect on state or national governance. One proposal might be to divide states into smaller districts in a manner similar to electoral districting, while expressly prohibiting the type of political gerrymandering that would undermine the entire point of localizing democracy. After all, the goal is to create mini-democracies where constituents within a district are affected by uniquely local concerns, not to concentrate homogenous groups so that specific policy choices irrespective of local concerns are entrenched in different areas of a state. If that happened, then mini-democracies would become another way by which to concentrate power and suppress minority rule, thus undermining the entire purpose of more localized democracy.

3. Can Local Democracies Create Certain Categories of Unenumerated Rights Without Undermining Centralized State Democracy?

Like its federal counterpart, states must still retain a central lawmaking body that has exclusive jurisdiction over various aspects of economic and social policy. A state cannot, for example, have ten different economic systems or income tax statutes, or courts of fifty different jurisdictions that have vastly different case laws. Furthermore, local democracy will not work if, as with electoral districting, smaller jurisdictions are created to ensure that those in power retain influence over the legislative process.

Thus, for local or mini-democracies to work, smaller governments within each state must have the authority to enact laws that apply exclusively to their jurisdiction, whose representatives reflect the geographic and economic makeup of their diverse constituents, and whose laws cannot be trumped by state or federal law. For that to happen, local governance would be limited to categories of laws that (1) involve unenumerated rights;

(2) are not in areas over which the federal government has exclusive or primary lawmaking power, or that require full compliance by all citizens of each state; (3) are not in areas where the state owes full faith and credit to the laws of other states;¹⁸³ and, (4) would not undermine or unnecessarily complicate the efficiency by which basic services are provided.

Given these constraints, what types of laws can local democracies have jurisdiction over without transgressing on traditional state and federal powers? When, in fact, should the states be allowed to internally disagree about policy choices? The answer relates to the very reasons justifying the existence of mini-democracies: to respond to the uniquely local policy concerns that affect citizens in distinct geographic areas and to give citizens who are affected the right to pass remedial measures that might not succeed statewide. The second justification relates to unenumerated rights. If citizens are to have the liberty to determine the scope and nature of rights not delineated in the Constitution, they should be able to do so in a manner where they have the greatest degree of autonomy.

4. Citizens Can Be Lawmakers, Not Just Voters

If local democracies were divided in a similar manner, they would be infinitesimal in size compared to the state as a whole. In California, for example, the state wide population is more than thirty-seven million, but the district size is less than 720,000.¹⁸⁴ The average population of political districts in the United States is 720,188.¹⁸⁵ The smaller population would facilitate more participatory and principled lawmaking because elected representatives would more fully represent the racial, ethnic, and socioeconomic diversity of their constituents. In addition, elected representatives would be more responsive to their constituents' policy preferences, and laws would better reflect the constituents' diverse perspectives, and the uniquely local issues that affect a particular district.

In this way, local democracies can facilitate greater equality in governance, enable more legitimate majorities, and embody the will of the people. Furthermore, wealth and name recognition would not be the nearly insurmountable barrier to seeking elected office as it is in statewide and national campaigns, which would facilitate greater accountability and give broad array of diverse candidates the opportunity to seek public office. As a result, mini-democracies would prevent incumbents from having such an

¹⁸³ See U.S. CONST. art. IV, § 1 ("Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records, and Proceedings shall be proved, and the Effect thereof."); see also Pamela K. Terry, *E Pluribus Unum? The Full Faith and Credit Clause and Meaningful Recognition of Out-of-State Adoptions*, 80 *FORDHAM L. REV.* 3093, 3097-3107 (2012) (discussing the history and purpose of the Full Faith and Credit Clause).

¹⁸⁴ CROCKER, *supra* note 10, at 2.

¹⁸⁵ *Id.* at 1.

overwhelming advantage during elections, and would foster a more substantive debate about public policy.

5. Why Originalism Fits with Democracy

Originalism is a vital component in ensuring that citizens have the autonomy in each mini-democracy to create substantive law. Imagine, for example, if courts took a living constitutionalist approach to assessing the validity of locally enacted laws. Local democracies would not be permitted to enact restrictions on the possession and use of many firearms, to require religious corporations to comply with laws requiring them to include contraception coverage for employees, to regulate individual and corporate campaign expenditures, or to authorize a life-without-parole sentence for a juvenile. Indeed, living constitutionalism would frustrate the very liberty interests that decisions such as *Casey* claimed to protect and reintroduce a paternalistic form of governance that restricts the rights of citizens to meaningfully participate in creating unenumerated rights.

This is not to say that an originalist jurisprudence would give local democracies carte blanche to enact laws that violate the Constitution. It is to say, however, that laws upon which reasonable people may disagree and that are not prohibited by a reasonable construction of the text in light of original meaning purpose would be changeable only through the local democratic process. In other words, a local democracy changes the decision maker but does not alter constitutional meaning or give citizens power that they would not otherwise have. Instead, it gives citizens the right to create and be governed by laws that more directly reflect the will and consent of the people through more direct and meaningful participation.

C. Can Local Democracies Worsen Inequality?

If local democracies were non-diverse, used to concentrate power, and entrench majorities, then inequality would worsen. In fact, the whole point of decentralizing power would be frustrated, as the current problems with democracy would simply shift to a more local level. Thus, ensuring that local democracies are diverse, and that limits are placed on individual and corporate campaign contributions, is essential.

Some might argue that an emphasis on procedural equality will result in substantive inequality because citizens in different districts will have laws that vary in the degree to which they protect individual rights. That may be true, but it is already true among the states. Some states have death penalty, some have legalized marijuana, and seven have no income tax.¹⁸⁶ Thus, as long as those laws are within federal and state constitutional

¹⁸⁶ See *States with and Without the Death Penalty*, DEATH PENALTY INFORMATION CENTER, <http://www.deathpenaltyinfo.org/states-and-without-death-penalty> (last visited Mar. 4, 2015); Matt

constraints and subject to reasonable disagreement regarding their efficacy, the disparity would be no different than when citizens of one state travel to another.

Furthermore, different intrastate laws would likely result in fairer and more just laws—and protection for minority rights—because of their limited reach. Indeed, one of the criticisms against the Court’s use of living constitutionalism in cases like *Kennedy v. Louisiana* and *Roe* is that the Justices are essentially making law for an entire country without regard to the policy and cultural differences among the states. Localizing democracy is consistent with this view because it ensures that different policy choices will not have such a broad impact that they negatively impact a greater number of people. In so doing, minority rights are better protected because, where abortion is outlawed, women choosing to have an abortion can travel to other areas *in that state* where abortion services are provided.

In fact, the United States Court of Appeals for the Fifth Circuit recently came to the same conclusion. In two separate holdings, the Fifth Circuit underscored the distinction between laws that have *intrastate* and *interstate effects*. In *Planned Parenthood of Greater Tex. Surgical Health Services v. Abbott*, the Fifth Circuit upheld a state law requiring an abortion provider to have hospital admitting privileges within thirty miles of a site that provides abortion access.¹⁸⁷ In so holding, the Fifth Circuit explained that “an increase of travel of less than 150 miles for some women is not an undue burden under *Casey*.”¹⁸⁸ This holding was based on language in *Casey* that “the incidental effect of making it more difficult or more expensive to procure an abortion” does not impose an undue burden and is thus constitutional.¹⁸⁹

In *Jackson Women’s Health Organization v. Currier*, however, the Fifth Circuit invalidated a state law in Mississippi that also required abortion providers to have hospital admitting privileges because the effect would have been to effectively close its only abortion clinic.¹⁹⁰ In so doing, the Fifth Circuit rejected the state’s argument that women could simply travel to

Ferner, *2 States Now Allow Recreational Marijuana Sales to Adults—And Our Minds Are Blown*, HUFFINGTON POST (July 8, 2014, 10:03 AM), http://www.huffingtonpost.com/2014/07/08/washington-marijuana-sales_n_5545187.html (last updated July 10, 2014, 4:34 PM); Dan Dzombak, *These States Have No Income Tax*, (April 26, 2014), available at: <http://usatoday.com/story/money/personalfinance/2014/04/26/these-states-have-no-income-tax/8116161/>.

¹⁸⁷ *Planned Parenthood of Greater Tex. Surgical Health Services v. Abbott*, 748 F.3d 583, 587 (5th Cir. 2014).

¹⁸⁸ *Id.* at 598.

¹⁸⁹ *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 874 (1992) (“The fact that a law which serves a valid purpose, one *not* designed to strike at the right itself, has the incidental effect of making it more difficult or more expensive to procure an abortion cannot be enough to invalidate it.”) (emphasis added).

¹⁹⁰ See *Jackson Women’s Health Org. v. Currier*, No. 13–60599, 2014 U.S. App. LEXIS 14591, at *30–31 (5th Cir. July 29, 2014).

neighboring states where abortion was legal and accessible.¹⁹¹ The Fifth Circuit stated as follows:

Today, we follow the principle announced by the Supreme Court nearly fifty years before the right to an abortion was found in the penumbras of the Constitution and hold that Mississippi may not shift its obligation to respect the established constitutional rights of its citizens to another state. Such a proposal would not only place an undue burden on the exercise of the constitutional right, but would also disregard a state's obligation under the principle of federalism—applicable to all fifty states—to accept the burden of the non-delegable duty of protecting the established federal constitutional rights of its own citizens.¹⁹²

Thus, the constitutional difference between two identical laws that both affected a fundamental right was whether they had the de fact effect of eliminating the right itself. Thus, local democracies that enact different laws would not offend principles of federalism. By ensuring, for example, that citizens still have access to abortion *within* a particular state, the state is not depriving its citizens of a fundamental right or ignoring Supreme Court precedent. Making citizens leave the state, however, is an entirely different matter because it would allow state governments to simply legislate away fundamental rights. Thus, the balance that local democracies would strike—promoting autonomy and participation in government but ensuring that rights are not extinguished statewide—creates a system of majority rule where the majority is not too powerful, and where minority is better protected. Indeed, the rights that a majority has defeated in one district may be fully protected in another, and the majority in one district may be the minority in another. In this way, mini-democracies have an inherent system of checks and balances.

V. CONCLUSION

There are reasons why some Californians want to divide the state into six parts, why many states want a constitutional convention, and why some are openly defying the federal judiciary. Democracy is in deep trouble. Average citizens do not have a meaningful role in governance because the lawmaking process is too distant from and unresponsive to the citizens it is designed to serve. However, permanently dividing a state, or worse seceding, is not required and certainly not advisable. Localizing democracy within the states—creating an intrastate federalism—will help to

¹⁹¹ *Id.* at *6–7, 27.

¹⁹² *Id.* at *2–3.

repair democracy without resulting in drastic territorial changes. Citizens must recognize that the problem is not limited to overreaching by the federal government. The problem is inequality, and it extends beyond Washington and into the power structures and political juggernauts that dominate in many states.

Indeed, a large part of the problem results from the inefficiency and unresponsiveness of centralized state governance, which in some places is accessible to only those who can buy a seat at the table or who are connected to the political elite. The sheer size of many states has also made it more akin to an impersonal bureaucracy, not a democracy. California has a population of over thirty-seven million, Texas has a population of over twenty-five million, and New York has a population size of nearly twenty million.¹⁹³ In fact, thirty-six of fifty states have a population of a least two million people.¹⁹⁴

Furthermore, when driving through New York, for example, it becomes apparent that some parts of the state bear no physical or demographic relation to others. New York City and Ithaca look more like different countries than different parts of the same state. That, of course, is a good thing because it reflects New York's diversity and rich culture. Democracy should do the same thing by meaningfully involving diverse groups and cultures in the lawmaking process.

The Founders anticipated that local democracy would protect citizen autonomy but did not anticipate that some local democracies would govern populations that were ten times larger than the entire United States' population in the Founders' era. Some might say that this sounds like an argument for living constitutionalism. In a way, it is—the federal and state legislatures should be permitted to experiment with solutions that would make the government more accessible to its people. More importantly, the Supreme Court should not stop them from doing so. By localizing democracy in some areas, states can respond effectively to the federalization of democracy and restore lawmaking power to its citizens in a principled way. Furthermore, by adopting an originalist jurisprudence, the Court can assume an active role in promoting democracy and self-governance. After all, if, as some living constitutionalists say, the inalienable right to life, liberty, and happiness implies a fundamental right to privacy, sexual freedom, and abortion, then surely it also implies a right to have one's voice in democracy rise above a whisper.

¹⁹³ See *States Ranked by Size and Population*, IPL2, <http://www.ipl.org/div/stateknow/popchart.html> (last visited Mar. 4, 2015).

¹⁹⁴ *Id.*