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WHY THE LATE JUSTICE SCALIA WAS WRONG: THE FALLACIES OF CONSTITUTIONAL TEXTUALISM

by
*Ken Levy**

The late Justice Scalia emphatically rejected the notion that there is a general "right to privacy" in the Constitution, despite the many cases that have held otherwise over the past several decades. Justice Scalia's skepticism was rooted in two theories: "Constitutional Textualism"—or just plain "Textualism"—and "Originalism." He insisted that when interpreting the Constitution, judges should confine themselves to the words of the Constitution. This is Textualism. If the words are at all unclear, then judges need to consult historical sources to determine their original meaning—that is, their meaning at the time of ratification. The application of these words to new cases, even cases that the ratifiers could not have foreseen, should then clearly follow. This is Originalism. Justice Scalia concluded that when we apply these theories to the Fifth and Fourteenth Amendments, the only rational conclusion we may draw is that they protect just procedural due process, not substantive due process.

Textualism, however, is simply wrong. The correct way to interpret the Constitution requires much more than an attempt to determine the meaning of constitutional terms. The Constitution's meaning also incorporates other considerations, including the moral, social, and political norms of contemporary society. When we read the constitutional text in light of these "extra-textual" norms—in other words, when we refrain from reading the Constitution through the myopic lens of Textualism—we can then see how the Constitution does indeed protect a general right to privacy even though it does not explicitly pronounce this right as such.

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* Holt B. Harrison Associate Professor, LSU Law School. I would like to thank Prof. Seana Shiffrin for inspiring this paper 15 years ago in her excellent Substantive Due Process seminar at Columbia Law School. Over the years, I have come to appreciate that seminar, and Prof. Shiffrin's challenging and insightful teaching style, more and more. I would also like to thank participants at Loyola Chicago's Sixth Annual Constitutional Law Colloquium (Nov. 6, 2015), the 2015 Law & Society Association Annual Meeting (May 28–31, 2015), Barry University School of Law's ACS Constitutional Law Scholars Forum (Mar. 20, 2015), and LSU Law School's faculty (Oct. 7, 2014) for allowing me to present earlier drafts of this article. Finally, I would like to thank Paul Baier, Ian Bartrum, Michael Coenen, and John Devlin for offering me very helpful feedback on a topic that is still slightly outside my comfort zone.

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I. INTRODUCTION

The United States Supreme Court's "right-to-privacy" jurisprudence has generated three reactions. First is the late Justice Scalia's pessimistic view that the Court has simply invented the doctrine of substantive due process.[1] According to Justice Scalia, the Court should derive all constitutional doctrines and values directly from the Constitution itself. It should tell us what the Constitution *really says*, independently of what the Court *wants* it to say. But this is not what the Court has done. On the contrary, the Court has read its own value preferences into the Due Process Clause of the Fourteenth Amendment ("DPC") and the first ten Amendments.

Second is the fatalistic view that the Court has no choice but to engage in this kind of doctrinal invention. Because the text of provisions like the DPC and first ten Amendments provides little guidance as to how

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[1] *See, e.g.*, Obergefell v. Hodges, 135 S. Ct. 2584, 2630 (2015) (Scalia, J., dissenting) ("What possible 'essence' does substantive due process 'capture' . . . ? It stands for nothing whatever, except those freedoms and entitlements that this Court *really* likes."); United States v. Windsor, 133 S. Ct. 2675, 2706 (2013) (Scalia, J., dissenting) ("The majority never utters the dread words 'substantive due process,' perhaps sensing the disrepute into which that doctrine has fallen . . . ."); Antonin Scalia, *Common-Law Courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws*, in A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 3, 24–25 (Amy Gutmann ed., 1997) ("My favorite example of a departure from text . . . pertains to the Due Process Clause found in the Fifth and Fourteenth Amendments of the United States Constitution . . . . Well, it may or may not be a good thing to guarantee additional liberties, but the Due Process Clause quite obviously does not bear that interpretation. By its inescapable terms, it guarantees only process. Property can be taken by the state; liberty can be taken; even life can be taken; but not without the *process* that our traditions require—notably, a validly enacted law and a fair trial. To say otherwise is to abandon textualism, and to render democratically adopted texts mere springboards for judicial lawmaking."); *see also* P.R. BAIER, THE CONSTITUTION AS CODE 3 (2015) ("Justice Antonin Scalia is a contemporary Justinian insisting that his colleagues on the Supreme Court of the United States have committed crimes against the Constitution by going beyond its text as originally understood by its Framers of 1787, by those who added the Bill of Rights of 1791, and by the citizens of the several states who ratified both.").

they should be interpreted, the justices—if they are to interpret at all, which is their constitutional duty—must make the best sense they can of these provisions. And making the best sense they can ultimately requires the judges to engage their own moral and political convictions, to read the DPC and Amendments in the manner that they think best comports with their own views of what is fair, just, and good. So the task of interpreting the Constitution inevitably involves invention. Rather than lamenting this fact, then, we might as well resign ourselves to it.

While the pessimists and the fatalists differ in their attitudes, they do actually agree on the object of these attitudes. They agree that the Court has primarily *invented* the values that it has attributed to the DPC and Amendments. But there is yet a third view that rejects this proposition, that maintains that the Court's substantive-due-process jurisprudence is characterized primarily by *discovery* rather than invention. On this more optimistic view, the right to privacy was already *lurking* long ago in the Constitution before anybody even recognized it. It was there all along, implicit in the text of the DPC and first ten Amendments, just waiting to be dug up and brought out into the open for all to see. But its time had not yet come. It had to await the particularly discerning and perspicacious minds that would finally inhabit the Court during the 1960s and 1970s, the period when the Court decided the most central right-to-privacy cases, *Griswold v. Connecticut*[2] and *Roe v. Wade*.[3]

So who is right—the "invention camp" or the "discovery camp"? In Parts III through V, I will argue that both are actually to some extent correct. The proper method of constitutional interpretation, which I will refer to as the "method of reasonable inference" or just "Inferentialism," requires both discovery and invention. Inferentialism licenses reasonable inferences from explicitly stated constitutional propositions. It directly opposes "Constitutional Textualism"—more commonly referred to as just "Textualism"—Justice Scalia's (and many of his followers') theory that the meaning of the Constitution lies entirely in its words. Inferentialism opposes Textualism insofar as the assumptions that determine whether a given inference from constitutional propositions is reasonable are generally *not* stated in the Constitution. Instead, these assumptions generally derive from such "extra-textual" considerations as extant moral, social, and political norms. To the extent that these extra-textual assumptions inform constitutional interpretation, many, if not most, judges and constitutional scholars at least tacitly subscribe to Inferentialism over Textualism.

The theory that contemporary norms not merely do but *should* guide constitutional interpretation is normally referred to as the "Living Constitution," but I will refer to it as the "Dynamic View" because this term

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[2] 381 U.S. 479 (1965).

[3] 410 U.S. 113 (1973).

more clearly captures the central point that the Constitution's meaning is not *static*.[4] On the Dynamic View, the Constitution actually *requires* each judge, when faced with a case concerning the right to privacy, to look forward, not backward; to anticipate and evaluate the moral, social, and political consequences of both possible decisions before choosing between them. While this position may initially sound counterintuitive, it is ultimately a much more realistic theory of constitutional interpretation than both Textualism and Originalism.

II. THE POPULAR THEORY OF CONSTITUTIONAL INTERPRETATION

In this Part, I will spell out what I take to be the average layperson's—or "pre-law-school"—view of how the Supreme Court should interpret the Constitution in general and provisions like the DPC in particular. Call it the "Popular Theory of Constitutional Interpretation" or "Popular Theory" for short. I undertake this task because it will provide a useful standard against which to measure the Court's DPC jurisprudence in the remainder of the Article.

At the heart of the Popular Theory is the principle that the Court should follow the Constitution no matter what, no matter where it leads. The Constitution is the nation's sacred text. Most Americans revere the Constitution to the same extent that devout Christians revere the Bible.[5] Some feel that the Constitution cannot be wrong; others that, even if it can, it should still be followed anyway. Strict adherence to the Constitution—that is, judicial adherence regardless of policy consequences and contrary preferences—is an article of faith, a commitment that it would be unthinkable to give up, a value as basic and fundamental to our national political morality as individual freedom.[6]

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[4] *See generally* DAVID A. STRAUSS, THE LIVING CONSTITUTION (2010). I prefer to call it the Dynamic View because it applies not to the entire Constitution but only to the parts that were deliberately left open-ended—especially the Bill of Rights. *See infra* Parts V and VI.

[5] *See* JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 13 (1980) (referring to the Constitution as "the interpretivist's Bible"); Richard R. Beeman, *Perspectives on the Constitution: A Republic If You Can Keep It*, NAT'L CONST. CTR., http://constitutioncenter.org/learn/educational-resources/historical-documents/perspectives-on-the-constitution-a-republic-if-you-can-keep-it (last visited Dec. 21, 2016) ("[The Constitution] has in itself become our nation's most powerful symbol of unity—a far preferable alternative to a monarch or a national religion . . . ."); Adam Liptak, *Tea-ing up the Constitution*, N.Y. TIMES (Mar. 13, 2010), http://nyti.ms/1yWsxG7 (referring to the Constitution as "the nation's sacred text").

[6] *See* Liptak, *supra* note 5 ("[I]f there is a central theme to [the Tea Party's] understanding of the Constitution, it is that the nation's founders knew what they were doing and that their work must be protected."); Cass R. Sunstein, *Now Who Wants to Change the Constitution?*, BLOOMBERG (June 2, 2014), https://www.bloomberg.com/view/articles/2014-06-02/now-who-wants-to-change-the-constitution ("In 1816,

The Popular Theory that the Constitution should be followed "come hell or high water" itself breaks down into four principles. First is the "Rule of Law Principle," the idea that we are "a government of laws and not of men,"[7] and therefore that the Constitution should determine what the Court says rather than vice versa. When a case is brought before the Court, we want the Court to deliver the *correct* decision, the constitutionally mandated solution, the decision that the Constitution leaves it no real choice to deliver, *not* the solution that the justices subjectively prefer.[8]

Laypeople—that is, people who are not constitutional scholars—frequently protest Supreme Court decisions.[9] And one might argue that this fact is inconsistent with attributing the rule-of-law value to laypeople because it shows that they would prefer their own values to be represented rather than that the Constitution be followed. But laypeople tend unwittingly to identify these two desiderata. They tend to treat the Constitution as a document which commands the Supreme Court simply to "do the right thing"—nothing more (and nothing less). So when the Court issues a decision that they think is wrong, *morally* wrong, they conclude that the Court must therefore have diverged from the morally-correct-

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specifically rejecting Madison's hope for veneration, Jefferson lamented, 'Some men look at constitutions with sanctimonious reverence, and deem them like the arc of the covenant, too sacred to be touched.' He feared a situation in which people would 'ascribe to the men of the preceding age a wisdom more than human, and suppose what they did to be beyond amendment.'").

[7] MASS. CONST. art. XXX ("In the government of this Commonwealth, the legislative department shall never exercise the executive and judicial powers, or either of them: The executive shall never exercise the legislative and judicial powers, or either of them: The judicial shall never exercise the legislative and executive powers, or either of them: to the end it may be a government of laws and not of men."); Scalia, *supra* note 1, at 17 ("It is the *law* that governs, not the intent of the lawgiver. That seems to me the essence of the famous American ideal set forth in the Massachusetts constitution: A government of laws, not of men. Men may intend what they will; but it is only the laws that they enact which bind us."); *id.* at 25 ("Long live [textualism]. It is what makes a government a government of laws and not of men.").

[8] *See* STEPHEN BREYER, ACTIVE LIBERTY: INTERPRETING OUR DEMOCRATIC CONSTITUTION 116 (2005) ("[Textualists and originalists] fear that, once judges become accustomed to justifying legal conclusions through appeal to real-world consequences, they will too often act subjectively and undemocratically, substituting an elite's views of good policy for sound law."); Scalia, *supra* note 1, at 39 ("[I]t is known and understood that if [the] logic [of Supreme Court cases] fails to produce what in the view of the current Supreme Court is the *desirable* result for the case at hand, then, like good common-law judges, the Court will distinguish its precedents, or narrow them, or if all else fails overrule them, in order that the Constitution might mean what it *ought* to mean. . . . If it is good, it is so. Never mind the text that we are supposedly construing; we will smuggle these new rights in, if all else fails, under the Due Process Clause . . . .").

[9] Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 999 (1992) (Scalia, J., dissenting) (lamenting "the marches, the mail, the protests aimed at inducing us to change our opinions" about abortion).

decision-licensing Constitution. In the end, then, laypeople's complaint that the Court's decision in a given case is wrong is not merely a complaint that the Court made the morally incorrect decision but also a complaint that the Court's interpretation of the Constitution must *therefore* be flawed.

The second principle—the "Passive Middleman Principle"—falls into two parts, a positive part and a negative part. First, as we have seen, the Constitution should be the ultimate source of the Court's decisions. But because the Constitution itself cannot write or talk, we can have only indirect access to its true import. What it "says" must first pass through the filter or medium of the Court.[10] Only after it has passed—hopefully unchanged—through the Court may it proceed directly to the rest of us. So what the justices should do is nothing more than act as a "passive middleman" between the Constitution and the people—that is, passively and mechanically deliver to them what the Constitution says.[11] The Court should act as nothing more than a vessel or mouthpiece or expositor or messenger or servant of the Constitution. Second, what the justices should *not* do is actively *re*-create the Constitution, impose upon it their own values, substitute its value judgments with their own. In interpreting the Constitution, they should not twist or massage or distort any of the provisions to suit their own particular preferences. They should not try to trick the public into thinking that the Constitution says something when it really does not. Again, they should simply "tell it like it is"—whether they like it or not.

At this point, however, one may raise an objection: what if either the constitutional language is ambiguous or the chosen method of constitutional interpretation is imperfect and, as a result, we end up with two or more different interpretations? What is the Court to do then? The third principle—the "Right Answer Principle"—answers this question by assuming that when it comes to a constitutional question—that is, a question addressed by or implicating the Constitution—the Constitution does not "underdetermine" the appropriate outcome; that the Constitution in conjunction with the "proper" method of interpreting the Constitution (whatever that amounts to) uniquely determines an answer to this question.[12] In other words, if it ever seems that the Constitution is equally consistent with at least two different outcomes, then whoever has come to

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[10] Of course, lower courts also interpret the Constitution. I am concentrating in this paper on the Supreme Court, especially because the concept of substantive due process started with it and needs its continued support to survive.

[11] *See* Liptak, *supra* note 5 ("[A] few constitutional scholars say . . . that the Supreme Court should have no more monopoly on the meaning of the Constitution than the pope has on the meaning of the Bible.").

[12] *See* RONALD DWORKIN, LAW'S EMPIRE 6–9 (1986) [hereinafter DWORKIN, LAW'S EMPIRE]; RONALD DWORKIN, A MATTER OF PRINCIPLE 119–45 (1985); RONALD DWORKIN, TAKING RIGHTS SERIOUSLY 279–90 (1977).

this conclusion has misinterpreted the Constitution. If interpreted correctly, the Constitution will deliver one and only one answer. So the job of the Court is to interpret the Constitution correctly, to apply the correct "decoding" procedures to it, and thereby to discover the correct constitutional result. And, in principle at least, this job may always be performed for constitutional questions.

But what if the Constitution is silent about a particular matter? What, then, is the Court to do? The fourth principle—the "Universal Application Principle"—avoids this problem by simply assuming that such a situation could never arise in the first place. There are no "gaps" or "holes" in the Constitution. There is nothing that it has left undecided. Instead, for each and every case that comes before the Court, there is a constitutional provision or set of constitutional provisions that speaks directly to it and clearly decides the outcome. The Constitution has not only anticipated the full space of possible cases that may come before the Court; it has also provided a decision for every one of these cases. So when a case comes before the Court, all the Court really needs to do is consult the Constitution, see what it says with regard to that kind of case, and then report its finding to the rest of the world. In this way, one may think of the Court as nothing more than a translator of a special kind of hieroglyphics—"constitutional hieroglyphics." Many of us may not have the proper code or "decoding device" for interpreting constitutional language. But the Court does. So whenever it needs to determine what the Constitution says on a particular issue, it should merely apply the decoder to the constitutional language and see what output the process yields.

While attorneys and legal scholars generally regard the Popular Theory of Constitutional Interpretation as overly simplistic, and—at points—simply false, professional criticisms leveled against various Court decisions often presuppose some of the principles contained in the Popular Theory. The Court, for example, continues to receive condemnation for its decision in *Roe v. Wade*.[13] In *Roe*, the majority famously and controversially held that:

> (1) the Constitution protects a person's fundamental "right to privacy";[14]
>
> (2) the right of a pregnant woman in the first trimester to receive an abortion falls within this right to privacy;[15]

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[13] 410 U.S. 113 (1973).

[14] *Id.* at 152 ("The Constitution does not explicitly mention any right of privacy. In a line of decisions, however, going back perhaps as far as *Union Pac. R.R. Co. v. Botsford*, 141 U.S. 250, 251 (1891), the Court has recognized that a right of personal privacy, or a guarantee of certain areas or zones of privacy, does exist under the Constitution.").

[15] *Id.* at 163 ("[F]or the period of pregnancy prior to [the end of the first trimester], the attending physician, in consultation with his patient, is free to

and therefore

(3) a pregnant woman (in the first trimester) has a fundamental right to receive an abortion.[16]

Many scholars, attorneys, and observers of the Court argued that this decision was deceitfully argued.[17] The Court's arguments for premises (1) and (2) were not honest endeavors faithfully to interpret what the Constitution says about abortion. Instead, they were nothing more than transparent attempts to twist and manipulate the provisions of the Constitution to bring about the conclusion that they wanted independently of the Constitution—namely, proposition (3). This kind of criticism presupposes that the Court's decisions should *genuinely* follow the Constitution. And this principle itself takes us back to the Popular Theory that the Constitution should be followed wherever it leads, not where we want it to lead.

Still, despite some potential overlap between the Popular Theory and many attorneys' approach to constitutional interpretation, it is unclear where attorneys would stand with regard to the third (Right Answer) and fourth (Universal Application) principles above. When combined, the third and fourth principles yield the idea that the Constitution, interpreted properly, uniquely determines a certain outcome for every case that comes before it. Many attorneys would probably reject this suggestion. They would argue, first, that it is a bit simpleminded to think that there is just one correct theory of constitutional interpretation.[18] Second, even if it were universally agreed that there is only one correct method of constitutional interpretation, it is still highly unlikely that this method, whatever it is, would uncontroversially yield unique outcomes in many, no less all, cases. After all, there are an infinite number of possible cases. And it is highly unlikely that the Constitution, a finite document of less than 5000 words, is sufficiently elaborate to deal with all of them.

It would be too hasty, however, to assume that attorneys generally adopt the position just described. For example, most judges—including

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determine, without regulation by the State, that, in his medical judgment, the patient's pregnancy should be terminated. If that decision is reached, the judgment may be effectuated by an abortion free of interference by the State.").

[16] *Id.* at 164 ("To summarize and to repeat: 1. A state criminal abortion statute . . . that excepts from criminality only a *life-saving* procedure on behalf of the mother, without regard to pregnancy stage and without recognition of the other interests involved, is violative of the Due Process Clause of the Fourteenth Amendment.").

[17] *See, e.g.*, Paul Stark, *Even Abortion Backers Admit* Roe vs. Wade *Was a Terrible Decision*, LIFENEWS.COM (Dec. 20, 2012), http://www.lifenews.com/2012/12/20/even-abortion-backers-admit-roe-vs-wade-was-a-terrible-decision/ (citing prominent legal experts' criticisms of the reasoning in *Roe v. Wade*).

[18] DWORKIN, LAW'S EMPIRE, *supra* note 12, at 260–61.

Supreme Court justices—write in their decisions as though they fully accept the Right Answer Principle and the Universal Application Principle. They write, that is, as though there *is* a proper way to interpret the Constitution and that this interpretive approach yields one outcome rather than another. So either they genuinely subscribe to these principles or they believe that constitutional jurisprudence requires at least the *appearance* of subscribing to these principles.

III. TEXTUALISM VS. INFERENTIALISM

What can we legitimately say is *in* the Constitution, is already *there*, and not simply injected or inserted into it by some crafty justices? One answer to this question—*Textualism*—is the theory that the Constitution contains only what is explicitly stated in each of its provisions.[19] So the only propositions that can rightly be said to be *constitutional* are those that derive directly from the explicit text of the Constitution.[20]

Notice, because there are a finite number of explicitly stated propositions in the Constitution, and because this finite number of propositions does not cover all logical, political, or moral space, a view of the Constitution that takes only explicitly stated propositions to be in the Constitution must inevitably hold that the Constitution is full of "gaps" or "holes," actual and potential cases about which the Constitution is simply silent. Textualism, then, is incompatible with the Universal Application Principle, which (again) denies that there are any gaps in the Constitution. This is precisely the point that Justice Scalia made when he said, "[w]e should get out of this area [abortion and substantive due process], where we have no right to be, and where we do neither ourselves nor the country any good by remaining."[21] In other words, abortion falls into one

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[19] *See* Paul Brest, *The Misconceived Quest for the Original Understanding*, 60 B.U. L. REV. 204, 205–06 (1980) ("Textualism takes the language of a legal provision as the primary or exclusive source of law (a) because of some definitional or supralegal principle that only a written text can impose constitutional obligations, or (b) because the adopters intended that the Constitution be interpreted according to a textualist canon, or (c) because the text of a provision is the surest guide to the adopter's intentions." (footnote omitted)).

[20] *See* Scalia, *supra* note 1, at 22–23 ("The text is the law, and it is the text that must be observed. . . . '[W]hen counsel talked of the intention of a legislature, I was indiscreet enough to say I don't care what their intention was. I only want to know what the words mean.'") (citing Justice Frankfurter); *id.* at 24 ("Words do have a limited range of meaning, and no interpretation that goes beyond that range is permissible.").

[21] Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 1002 (1992) (Scalia, J., dissenting); *see also* Obergefell v. Hodges, 135 S. Ct. 2584, 2628 (2015) (Scalia, J., dissenting) ("Since there is no doubt whatever that the People never decided to prohibit the limitation of marriage to opposite-sex couples, the public debate over same-sex marriage must be allowed to continue."); *id.* at 2631 (complaining that the majority's decision to legalize gay marriage "takes from the People a question

of the many gaps lying between the various provisions in the first ten Amendments. The Constitution does not mention a general right to privacy; therefore it is up to Congress and/or the state legislatures, not the judiciary, to create it.

(Justice Scalia's perennial demands for greater precision and bright lines were completely unsuited to the highly imprecise Constitution, especially the Bill of Rights. His increasing awareness of this mismatch, of the chasm between the nation's most important document and his legal sensibilities, probably explains why his opinions, especially his dissents, became increasingly exasperated and insulting.)

Textualism, however, is not the only possibility. There is an alternative to Textualism that also seems perfectly plausible. It is the view that we may combine certain explicitly stated propositions together to yield propositions that are not explicitly stated. The most obvious form of this combination is *logical deduction.*[22] If explicit proposition *p1* and explicit proposition *p2 logically entail* proposition *p3*, then proposition *p3* should be said to be just as much *in* the Constitution as *p1* and *p2*. For example, while the proposition that Socrates is mortal is not explicitly mentioned in the propositions "Socrates is a man" and "All men are mortal," it is still logically entailed by the latter two propositions and therefore may be said to be "contained" within their conjunction. For this reason, logical deduction is available to Textualists. If propositions *p1* and *p2* are explicitly stated in the Constitution, and if *p1* and *p2* together logically entail proposition *p3*, then the Textualist may hold, consistent with her theory of constitutional interpretation, that *p3* is explicitly stated in the Constitution as well.

But there is a less obvious form of this combinatorial reasoning that may also be said to yield the same kind of result. I will refer to it simply as

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properly left to them"); United States v. Windsor, 133 S. Ct. 2675, 2711 (2013) (Scalia, J., dissenting) ("A reminder that disagreement over something so fundamental as marriage can still be politically legitimate would have been a fit task for what in earlier times was called the judicial temperament. 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. . . . [T]he 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."); LOUIS MICHAEL SEIDMAN, OUR UNSETTLED CONSTITUTION: A NEW DEFENSE OF CONSTITUTIONALISM AND JUDICIAL REVIEW 32 (2001) ("A frequent reaction . . . is to argue that when no constitutional settlement is possible, the matter should be remitted to democratic decision making. . . . Remitting the question to democratic politics is *itself* a constitutional decision that reflects a contested constitutional settlement. For example, Justice Antonin Scalia has argued that in the face of disagreement, we should remit issues like homosexual marriage and euthanasia to collective, majoritarian politics." (footnote omitted)).

[22] *See Classical Logic*, STAN. ENCYCLOPEDIA PHIL. (Aug. 28, 2013), http://plato.stanford.edu/entries/logic-classical/#3.

Inferentialism. Inferentialism is reasoning by *reasonable inference.* Proposition *p3* constitutes a reasonable inference from explicit propositions *p1* and *p2* if together they make *p3* seem more likely, plausible, or persuasive than *p3* otherwise was on its own.[23]

Consider, for example, individual rights. It is a brute fact of contemporary constitutional jurisprudence that if a given justice thinks that a particular right *R1* is fundamental, she must show that *R1* is in the Constitution. This is an easy enough task if the Constitution explicitly protects *R1.* But if it does not, then the justice must either show that an explicitly stated proposition *logically entails R1* or use Inferentialism. If she chooses the latter route, she must show that it would be either *strange* or *inexplicable* to acknowledge that while rights *R2, R3,* and *R4* are protected by the Constitution, *R1* is not. Therefore to avoid strange or inexplicable results, we should conclude that there is more to the Constitution than "meets the eye," that *R1* is in the Constitution even though it does not explicitly mention *R1.* Notice, then, that Inferentialism rests on the assumption that the Constitution should be interpreted in such a way as to avoid strange or inexplicable results.

Inferentialism raises two preliminary questions. First, from where does the Court get the notions of strangeness or inexplicability in the first place? Surely, they do not come from the constitutional text itself. The Constitution does not explicitly state what it takes to be a strange or inexplicable result. (This omission explains why Textualists reject Inferentialism in the first place.) So the basis of these judgments must come from outside the text. And the most common outside sources are common sense, judicial custom or conventions, and precedent.[24]

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[23] *See* McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 407 (1819) ("[A constitution's] nature . . . requires, that only its great outlines should be marked, its important objects designated, and the minor ingredients which compose those objects be deduced from the nature of the objects themselves.").

[24] Justice Scalia compromised his Textualism/Originalism by acknowledging stare decisis—the canon that precedent should generally be followed, even if it diverges from the original meaning of the constitutional text. *See* STRAUSS, *supra* note 4, at 17 ("'I'm an originalist—I'm not a nut,' [Justice Scalia] says. That way of putting it is disarming, but it seems fair to respond: if following a theory consistently would make you a nut, isn't that a problem with the theory?"); James E. Ryan, *Does It Take a Theory? Originalism, Active Liberty, and Minimalism,* 58 STAN. L. REV. 1623, 1631 (2006) (reviewing STEPHEN BREYER, ACTIVE LIBERTY: INTERPRETING OUR DEMOCRATIC CONSTITUTION (2005) & CASS R. SUNSTEIN, RADICALS IN ROBES: WHY EXTREME RIGHT-WING COURTS ARE WRONG FOR AMERICA (2005)) ("Justice Scalia—much more so than Justice Thomas—is willing to dilute his originalism with a healthy dollop of stare decisis. He acknowledges that stare decisis is 'not part of' his originalist philosophy but is instead a 'pragmatic exception to it.'" (footnote omitted)).

As I have stated, one of my main interests in this Article is to determine whether the right-to-privacy doctrine is constitutionally legitimate.[25] Just pointing to the great number of cases that simply assume this doctrine to be constitutionally legitimate will not help to answer this question. The constitutional legitimacy of the right to privacy ultimately depends not on the number of cases that have relied on it but rather on the arguments that have been made for it. And these arguments can generally be found in the ultimate source of this doctrine, the decision that arguably gave birth to it: *Griswold v. Connecticut*.[26] So in determining whether the right-to-privacy doctrine is constitutionally legitimate—a question that I still take to be unresolved despite the fact that so many post-*Griswold* cases have simply taken this point for granted—we need to go to its "roots." We need to examine *Griswold* itself.

The second preliminary question raised by Inferentialism is whether a proposition arrived at by reasonable inference from two or more propositions explicitly stated in the Constitution can also be said to be in the Constitution. If we accept reasonable inference as a valid method of constitutional exposition, then the answer is yes. But we need to be careful. By accepting reasonable inference as a valid method of constitutional exposition, we open up the possibility that a great number of non-explicitly-stated propositions can be said to be in the Constitution. Indeed, this point helps to show that the Universal Application Principle (which, again, says that the Constitution has the resources to answer *every* question that comes before the Court) *depends* on our accepting Inferentialism as a valid method of constitutional interpretation. Only Inferentialism can plug the many gaps that Textualism leaves open.

Rather than deciding in the abstract whether we should accept Inferentialism as a valid method of constitutional interpretation, I think that we should look at this kind of reasoning "in action" and see whether we find it to be successful. Justice Douglas's decision in *Griswold* provides one of the strongest arguments for the conclusion that there is a general right of privacy in the Constitution and therefore one of the strongest possible exemplifications of this kind of reasoning. So in the next Part, I will explicate his arguments for (1)—again, the proposition that the Con-

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[25] *See* BREYER, *supra* note 8, at 66–67 ("By privacy, I mean a person's power to control what others can come to know about him or her. . . . [A]n array of different values underlies the need to protect personal privacy from the 'unwanted gaze.' Some emphasize the values related to an individual's need to be left alone, not bothered by others . . . . Others emphasize the way in which important personal relationships, of love and friendship, depend upon trust, which, in turn, implies a sharing of information not available to all. Others find connection between personal privacy and individualism . . . . Still others . . . find connections between privacy and equality . . . . [A]lmost everyone finds in them important relationships to an individual's dignity, and almost all Americans accept the need for legal rules to protect that dignity.").

[26] 381 U.S. 479 (1965).

stitution protects a person's fundamental right to privacy. I will then argue that his defense of this proposition is successful. If I am correct, this result will lend plausibility to Inferentialism and some implausibility to the more "gappy" Textualist approach.

IV. *GRISWOLD V. CONNECTICUT* AND THE BIRTH OF THE RIGHT TO PRIVACY

The primary intuition driving Justice Douglas's opinion in *Griswold* is the belief that married persons have a fundamental right to use contraceptives in their sexual relations with one another. But he could not simply state his intuition without justifying it. Nor could he justify this conclusion on exclusively moral grounds. Instead, given his role as a Supreme Court justice, he had to justify this conclusion by purporting to find it in the Constitution. The main problem with this task, of course, is that there is no provision in the Constitution explicitly protecting a married couple's right to use contraception. The words "marriage" and "contraception" (and all derivatives and synonyms) are simply absent. So Justice Douglas had to be somewhat creative. He had to find a way to make it plausible that this right *does* exist in the Constitution even though it is not explicitly stated there. And the only way to accomplish this task was to derive this right from a proposition that *is* explicitly stated in the Constitution. In other words, he had to use the method of reasonable inference.

As Justice Douglas saw it, the most direct route to the conclusion that he desired—again, that a married couple has a fundamental right to use contraception—requires four main steps:

> Step I: justify use of the method of reasonable inference.
>
> Step II: justify the assumption that there are "peripheral" or "penumbral" rights in the Constitution—that is, rights that are not themselves explicitly stated in the Constitution but lie very close to rights that *are* explicitly stated in the Constitution.
>
> Step III: show that there is, in particular, a penumbral right of privacy in the Constitution.
>
> Step IV: locate the particular right of married couples to use contraception within this more general right of privacy.

I will now explicate each of these steps.

Step I: Justice Douglas begins his substantive argument by addressing the principal obstacle to the conclusion that he ultimately wishes to reach. This obstacle is the fact that a general right to privacy is not explicitly mentioned in the Constitution. Justice Douglas responds to this obstacle by suggesting that even though certain rights such as "[t]he right to educate a child in a school of the parents' choice—whether public or private

or parochial" and "the right to study any particular subject or any foreign language" are not explicitly mentioned in the First Amendment, the First Amendment has still "been construed to include certain of those rights."[27]

More generally, then, Justice Douglas's argument rests on two assumptions. First, Justice Douglas assumes that the method of reasonable inference is a valid method of constitutional interpretation because it has already been employed and accepted by the Court in other contexts. One might certainly ask whether these earlier uses of reasonable inference were themselves legitimate. But Justice Douglas did not delve into this matter. His first assumption was that if, for better or worse, the Court has accepted such reasoning on previous occasions, then there is no good reason not to accept such reasoning on this occasion.

Justice Douglas's second assumption is that the method of reasonable inference can lead to rights not explicitly stated in the Constitution. More precisely, he assumes the following proposition:

> (4) Rights in the Constitution (from which the more general right to privacy will be inferred) include not only those rights explicitly stated in the Constitution but also those rights that may be found in the Constitution through the method of reasonable inference.

Perhaps the strongest argument for (4) is the Ninth Amendment. The Ninth Amendment provides: "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people."[28]

In other words, the people of the United States may still have certain rights that the Constitution fails explicitly to mention. The mere fact that certain rights are explicitly included in the text does not mean that the people lack all other rights not explicitly mentioned.

Because the Ninth Amendment constitutes such a strong argument for the method of reasonable inference, and because the method of reasonable inference is so central to Justice Douglas's entire project, it is rather surprising that he does not make more of it. Instead, all he does is slip it into his list of privacy rights (see Step III below) without any explanation of what it means or why we should consider it to be a privacy right as well. This omission arguably constitutes a significant weakness in Justice Douglas's four-step argument.[29] (I will say more about the Ninth Amendment in Part V below.)

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[27] *Id.* at 482.

[28] U.S. CONST. amend. IX.

[29] To remedy this weakness, Justice Goldberg emphasized "the relevance of that Amendment to the Court's holding" in his concurrence (which was joined by Chief Justice Warren and Justice Brennan). *See Griswold*, 381 U.S. at 487.

Step II: Justice Douglas offers two different kinds of justification for the Court's prior statements that certain peripheral or penumbral rights exist in the Constitution.[30] First, "[w]ithout those peripheral rights the specific rights would be less secure."[31] Two examples that Justice Douglas offers here in defense of this "security" justification are the rights of freedom of speech and press.[32] The activities of writing and speaking would be more vulnerable to governmental intervention if the government were allowed to interfere with certain other closely related activities such as reading, publishing, thinking, or teaching. The easier it would be for the government to encroach on the latter activities, the easier it would be for the government to encroach on the former activities. So if we are to maximize the First Amendment rights of freedom of speech and press, it is necessary to provide protection for these other closely related activities as well. The Constitution mandates giving each of the rights that it explicitly states maximal protection. Therefore the Constitution mandates giving each of the "surrounding" or "subsidiary" rights optimal protection as well.[33]

Second, the existence of peripheral rights is "necessary in making the express guarantees fully meaningful."[34] Justice Douglas offers the following example: "The right of 'association,' like the right of belief, is more than the right to attend a meeting; it includes the right to express one's attitudes or philosophies by membership in a group or by affiliation with it or by other lawful means."[35] Justice Douglas's suggestion here is that the right to attend a meeting by itself is of little importance. The right to attend a town hall meeting, for example, would be much less meaningful if the attendees were told that they must merely "shut up and listen."[36] If the right to attend a meeting is to be of any value to us, it must be conjoined with certain other rights. And one of these other rights is the "right to express one's attitudes or philosophies . . . ."[37]

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[30] It should be noted that Justice Douglas does not seem to recognize a difference between these two justifications. Instead, he simply moves without transition from one to the other.

[31] *Griswold*, 381 U.S. at 482–83.

[32] *Id.* at 483.

[33] *See* U.S. CONST. art. I, § 8, cl. 18 ("The Congress shall have Power . . . [t]o make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.").

[34] *Griswold*, 381 U.S. at 482.

[35] *Id.* (internal citations omitted).

[36] Presumably, Justice Douglas would accept the converse as well: if we had the right to express ourselves but *did not* have the right to attend meetings, then the former right would amount to nothing more than the right to speak to oneself—a right that is of much less value.

[37] *Griswold*, 381 U.S. at 483.

Put another way, the sum is greater than the parts. While each right by itself is of little worth, together they combine to form a right of great consequence—that is, the right of association. The Constitution, then, mandates joining the rights that it explicitly states with whatever other unstated rights will *give* these stated rights their greatest possible value.

Step III: Justice Douglas claims that both kinds of justifications above entail that the right to privacy is a penumbral right in the Constitution.[38] In other words, we may conclude that there is a right to privacy in the Constitution because such a right, if it existed, would provide greater security and greater value to certain rights explicitly stated in the Constitution. These explicitly stated rights include:

> The right of association contained in the penumbra of the First Amendment . . . . The Third Amendment in its prohibition against the quartering of soldiers "in any house" in time of peace without the consent of the owner . . . . The Fourth Amendment explicitly affirms the "right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." The Fifth Amendment in its Self-Incrimination Clause enables the citizen to create a zone of privacy which government may not force him to surrender to his detriment.[39]

Unfortunately, Justice Douglas does not actually defend his claim that both justifications support the right of privacy. He does not actually explain *how* a right of privacy helps to secure these other explicitly stated rights or *how* it makes them more meaningful.

Still, we can figure out this explanation on our own. If we did not recognize a general right of persons to keep the government from intruding in their private affairs and activities, then two things would follow. First, it would be that much easier for the government to narrow the scope of the right of association, the Third Amendment prohibition against quartering of soldiers, the Fourth Amendment right against search and seizure, and the Fifth Amendment right against self-incrimination. For example, without official recognition of the right to privacy, it might very well be argued that the right of association would be just as weak in the home as it is in public places. So if, in certain circumstances, the government has a sufficiently compelling justification to prohibit a particular kind of public meeting, then it has a sufficiently compelling justification to prohibit the same kind of meeting from taking place in a person's home. But if the right to privacy is officially recognized, then this justification is sufficient only for the former and not for the latter. The government's justification for intruding on the meeting in the private home has to be even more compelling. In this way, once the

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[38] *Id.* at 484–85.

[39] *Id.* at 484.

right to privacy is recognized, the right of association provides that much greater security from government intervention.

The second result that would follow from our not recognizing a general right to privacy is that the specific rights listed above would lose much of their meaningfulness, their value, to us. If, for example, there were no acknowledged right of privacy, then the Third Amendment prohibition against quartering of soldiers would be far less meaningful to us. Standing alone, without the right to privacy, the Third Amendment suggests nothing more than that the government cannot force any citizen to live with a soldier during peacetime. Of course, this guarantee has some value to us. Few homeowners would want to be put into this kind of situation. Still, we want much more than mere freedom from being forced into a roommate situation with soldiers. We want the government to stay out of our homes *completely*. We want the government to guarantee not merely that it will not force us to live with soldiers but also that it will not force us to live with any *other* unwanted strangers. The home is one of the few places in our lives where we can escape almost entirely from the public and the government's eye. So standing alone, without the right to privacy, the Third Amendment gives us some of what we value. But conjoining the Third Amendment with the right to privacy injects that much more "life and substance" into the Third Amendment.[40]

Step IV: Having taken himself to have established the existence of a general right to privacy in the Constitution, Justice Douglas proceeds to offer what amounts to two different arguments for the conclusion that the right of married couples to use contraceptives falls within this more general right and therefore is protected by the Constitution.

First, Justice Douglas contends that marriage lies "within the zone of privacy created by several fundamental constitutional guarantees" and is, as a result, a "protected freedom."[41] He then eloquently justifies this claim:

> We deal with a right of privacy older than the Bill of Rights—older than our political parties, older than our school system. Marriage is a coming together for better or for worse, hopefully enduring, and intimate to the degree of being sacred. It is an association that promotes a way of life, not causes; a harmony in living, not political faiths; a bilateral loyalty, not commercial or social projects. Yet it is

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[40] The right to privacy offers a more general justification, in addition to preventing the forced quartering of soldiers, for the Third Amendment: to prevent the government from intruding its way into our most private space, our homes, without a compelling reason.

[41] *Griswold*, 381 U.S. at 485.

> an association for as noble a purpose as any involved in our prior decisions.[42]

It is an interesting question whether the right of marriage would be constitutionally protected if a general right to privacy were found *not* to be in the Constitution. On the one hand, Justice Douglas's four-step argument would seem to suggest not. On the other hand, the passage cited just above seems to suggest the very opposite—that is, that even if there were no constitutionally protected right of privacy, the right of marriage would *still* be constitutionally protected.

Second, Justice Douglas asks rhetorically, "[w]ould we allow the police to search the sacred precincts of marital bedrooms for telltale signs of the use of contraceptives? The very idea is repulsive to the notions of privacy surrounding the marriage relationship."[43] This observation draws a strong connection between the privacy of marriage and the privacy of the home. It suggests that (a) the former should be protected to the same extent that the latter should be protected (b) *because* the latter should be protected. So the marital right to privacy is at least as strong as, and derives from, the right to privacy in the home. And the right to privacy in the home itself derives from the Third and Fourth Amendments in conjunction with the general right to privacy that Justice Douglas has just found to exist in the Constitution (in Step III above). Therefore, by transitivity, the marital right to privacy ultimately derives from the Third and Fourth Amendments in conjunction with the general right to privacy.

V. THE TEXTUALIST ARGUMENT AND A NEGATIVE DEFENSE OF INFERENTIALISM

Of the four steps in Justice Douglas's argument, the Textualist will object most strongly to Step I. She will argue that the method of reasoning by reasonable inference is illegitimate, that it amounts to a tool of *invention*, a device by which justices may surreptitiously plant their own moral beliefs and preferences into the Constitution and then pretend that they have been there all along, just "beneath the surface." What the debate between the Textualist and the Inferentialist is really about, then, is what it means to say that a given proposition p is in the Constitution, to say that it is (in) *there*.

On the one hand, according to the Textualist, p is in the Constitution if and only if

(5) p is explicitly stated in the Constitution.

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[42] *Id.* at 486.

[43] *Id.* at 485–86.

On the other hand, according to the Inferentialist, *p* is in the Constitution if and only if

> (6) either (5) is the case, *p* may be logically deduced from propositions that are explicitly stated in the Constitution, or *p* may be reasonably inferred from other propositions that are explicitly stated in the Constitution.

In this Part, I will provide a negative defense of Inferentialism. I hope to show that the Textualist's position about what it means for a given proposition to be in the Constitution—that is, proposition (5) above—is overly restrictive. In the following Parts, I will provide a more positive defense of Inferentialism by advocating a specific version of Inferentialism, what I will refer to as the "Dynamic View" of constitutional interpretation.

Perhaps the principal reason that the Textualist rejects proposition (6) above is because the method of reasonable inference requires the Inferentialist to employ assumptions that lie outside the Constitution. Suppose three things:

> (a) the Constitution explicitly says *p1* and *p2*,
>
> (b) the Constitution does not explicitly say *p3*, and
>
> (c) neither *p1* and *p2* together nor *p1* and *p2* in conjunction with the rest of the explicit text of the Constitution logically entails *p3*.

In order for a given Inferentialist to derive *p3* from *p1* and *p2*—that is, in order for her to argue that *p3* is as much in the Constitution as *p1* and *p2*—she must show that *p3* may be *reasonably inferred* from *p1* and *p2*. But in order to show that *p3* may be reasonably inferred from *p1* and *p2*, the Inferentialist must supply a missing premise, a premise that will fill the logical gap between *p1* and *p2* on the one hand and *p3* on the other. And given (a) through (c) above, this premise must come from *outside the Constitution*. Therefore the "end product"—*p3*— must fall outside the Constitution as well. Call this the "Textualist Argument."

In support of the Textualist Argument, consider again Justice Douglas's arguments that there is a general right to privacy in the Constitution. The Textualist will underscore the fact that Step III, the part of Justice Douglas's overall argument in which he concludes that there must be a general right to privacy in the Constitution, rests not only on certain explicitly stated rights in the Constitution but also on two further assumptions—the "security justification" and the "value justification." And neither of these two assumptions comes from the Constitution itself. Nowhere does the Constitution explicitly endorse either the security justification or the value justification. The Textualist infers from these omissions that the conclusion that these extra-textual assumptions help to yield—namely, the existence of a general right to privacy—cannot be said to exist in the Constitution either.

The Textualist Argument, then, rejects the Inferentialist's central tenet that certain propositions that are derived in part from extra-textual

assumptions are themselves in the Constitution. According to the Textualist, this suggestion is thoroughly *paradoxical*; if the propositions were genuinely in the Constitution, then they would *not* rely on propositions *outside* the Constitution in the first place. Instead, they would be derivable entirely from the text of the Constitution alone.

While the Textualist Argument may at first seem clever, it is actually self-refuting. First, what the Textualist fails to realize is that even if we confine ourselves to the text of the Constitution alone, *we must still employ extra-textual assumptions in all of our constitutional interpretation.* The very assumption that Textualism (or Originalism) is the appropriate method of constitutional interpretation is *itself* an extra-textual assumption. Nowhere does the Constitution support Textualism (or Originalism) over any other method of interpretation or explicitly say how it should be interpreted.[44] So Textualism is self-contradictory. The Textualist cannot simultaneously adopt Textualism as a theory of constitutional interpretation *and* refrain from employing extra-textual assumptions in interpreting the Constitution. To do the former is already to do the latter.[45]

Second, even if we granted the Textualist this one extra-textual assumption—that is, that the proper method by which to interpret the Constitution is Textualism—the Textualist would still have to employ other extra-textual assumptions as well. After all, the text of the Constitution must be interpreted. And while the Textualist would like to think that the words bear their meanings "on their face," they do not. Some of the words that the Constitution uses—words like "right," "unreasonable," "probable cause," "due process," "excessive," "cruel and unusual," and "equal protection"—are normative and open-ended. Their meaning and

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[44] *See* BREYER, *supra* note 8, at 117 ("[T]he more 'originalist' judges cannot appeal to the Framers themselves in support of their interpretive views. The Framers did not say specifically what factors judges should take into account when they interpret statutes or the Constitution."); Erwin Chemerinksy, *The Misguided Debate Over Constitutional Interpretation*, AM. CONST. SOC'Y: BLOG (Sept. 16, 2013), http://www.acslaw.org/acsblog/the-misguided-debate-over-constitutional-interpretation ("[T]here is no indication that the framers wished originalism to be followed and many reason [sic] to believe that they did not.").

[45] *See* BREYER, *supra* note 8, at 118 ("[L]iteralist arguments often try to show that that approach will have favorable *results*, for example, that it will deter judges from substituting their own views about what is good for the public for those of Congress or for those embodied in the Constitution. They argue, in other words, that a more literal approach to interpretation will better control judicial subjectivity. Thus, while literalists eschew consideration of consequences case by case, their interpretive rationale is consequentialist in this important sense."); Ryan, *supra* note 24, at 1637 ("[U]nless there are deontological reasons to support one theory over another (and it's hard to think of any), arguing from consequences is the only option. Originalists, for example, assert that their approach promotes the rule of law, which is a consequentialist argument.").

scope are not at all obvious or apparent.[46] (I will return to this point in Part VII.)

Even what might be regarded as the clearest words in the Constitution must still be interpreted. Consider this provision in the Constitution:

> No Person except a natural born Citizen, or a Citizen of the United States, at the time of the Adoption of this Constitution, shall be eligible to the Office of President; neither shall any Person be eligible to that Office who shall not have attained to the Age of thirty five Years, and been fourteen Years a Resident within the United States.[47]

Unlike the open-ended normative words used throughout the Bill of Rights, this passage seems to be just about as clear and straightforward as

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[46] *See* BAIER, *supra* note 1, at 19 ("The fourteenth amendment guarantees liberty, equality, due process of law. These are words that do not define themselves. Judges fill in these linguistic gaps."); BREYER, *supra* note 8, at 18 ("Certain constitutional language . . . reflects 'fundamental aspirations and . . . 'moods,' embodied in provisions like the due process and equal protection clauses, which were designed not to be precise and positive directions for rules of action.'" (citation omitted)); ELY, *supra* note 5, at 12–13 ("One might admit that a number of constitutional phrases cannot intelligibly be given content solely on the basis of their language and surrounding legislative history, indeed that certain of them seem on their face to call for an injection of content from some source beyond the provision . . . . [T]he constitutional document itself, the interpretivist's Bible, contains several provisions whose invitation to look beyond their four corners . . . cannot be construed away."); *id.* at 38 ("On candid analysis . . . the Constitution turns out to contain provisions instructing us to look beyond their four corners."); STRAUSS, *supra* note 4, at 9–10 ("The list of questions . . . that cannot be settled just by reading the words of the Constitution—is long . . . . [T]he provisions of the Constitution that get fought over, inside and outside the courts, are not so clear."); Ian Bartrum, *Two Dogmas of Originalism*, 7 WASH. U. JURIS. REV. 157, 170 (2015) (referring to the phrases "equal protection of the laws" and "cruel and unusual punishments" as "inherently vague" and "problematic"); *id.* at 186 ("[T]he Eighth Amendment cannot speak for itself, and so requires an interpreter. In our legal tradition, that job lies primarily with the judge, who draws upon her expertise and experience as a constitutional practitioner to fill in the gaps in constitutional law." (footnote omitted)); *id.* at 188 ("When [the text] is aspirationally vague or otherwise underdetermined, we must accept that the law leaves questions of explication to its designated interpreter—the constitutional judge."); Jeremy Waldron, *Vagueness in Law and Language: Some Philosophical Issues*, 82 CALIF. L. REV. 509, 527 (1994) ("The mere fact that terms like 'unreasonable' or 'excessive' invite us to make value judgments does not in itself undermine the determinacy of their meanings. On the contrary, it is part of the meaning of these words to indicate that a value judgment is required, a function which the words perform quite precisely."); *id.* at 539 ("[S]ometimes the point of a legal provision may be to start a discussion rather than settle it, and this may be particularly true of the constitutional provisions that aim at restricting and governing legislation." (footnote omitted)).

[47] U.S. CONST. art. II, § 1, cl. 5.

a constitutional passage can get.[48] If any part of the Constitution wears its meaning on its face, it is this provision. And yet—it doesn't. We still need to employ extra-textual assumptions to understand what Article II, Section I, Clause 5 means.

Consider, for example, the words "natural born Citizen," a phrase that became especially prominent in the 2016 presidential election.[49] It is normally taken to mean born in the United States. But how do we know it does not mean delivered through natural processes rather than artificial processes like Caesarian section?[50] Likewise, as long as we are speaking of birth, how do we know that the requirement that a person have "attained to the Age of thirty five Years" is to be measured from the date of the person's birth, as we normally assume, rather than from the date of her conception (nine months earlier)?

The most likely response to both of these questions is that we must interpret all constitutional provisions with a minimal degree of reasonableness or common sense and that this minimal common sense clearly

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[48] *See* STRAUSS, *supra* note 4, at 7 ("Many provisions of the U.S. Constitution are quite precise and leave no room for quarreling, or for fancy questions about interpretation. The president must be thirty-five years old."); Bartrum, *supra* note 46, at 173 (referring to the Presidental Age Requirement as an "easy case"); Michael C. Dorf, *Truth, Justice, and the American Constitution*, 97 COLUM. L. REV. 133, 170 (1997) (reviewing RONALD DWORKIN, FREEDOM'S LAW: THE MORAL READING OF THE AMERICAN CONSTITUTION (1996) & DENNIS PATTERSON, LAW AND TRUTH (1996)) ("In virtually any case we can imagine arising under the Presidential age requirement, the resolution of the question seems clear. Either someone has 'attained to the Age of thirty five Years,' or has not." (footnote omitted)).

[49] *See, e.g.*, Robert Clinton, *Ted Cruz Isn't a 'Natural Born' Citizen*, U.S. NEWS & WORLD REP. (Jan. 27, 2016), http://www.usnews.com/opinion/articles/2016-01-27/ted-cruz-is-not-a-natural-born-citizen-according-to-the-constitution ("As expected, the question of whether Sen. Ted Cruz is eligible to hold the office of the president based on his Canadian birth is now front-and-center thanks to Cruz's GOP presidential nominee rival Donald Trump. Constitutional scholars are dusting off their crystal balls as they are asked to discern what the Founding Fathers really meant by 'natural born' citizen.").

[50] *See* Brest, *supra* note 19, at 207 ("[T]o attempt to read a provision without regard to its linguistic and social contexts will either yield unresolvable indeterminacies of language or just nonsense. Without taking account of the possible purposes of the provisions, an interpreter . . . would not know whether the phrase, 'No person except a natural born Citizen . . . shall be eligible to the Office of President,' disqualified persons born abroad or those born by Caesarian section.") (footnotes omitted); Michael Anthony Lawrence, *The Potentially Expansive Reach of* McDonald v. Chicago*: Enabling the Privileges or Immunities Clause*, 2010 CARDOZO L. REV. DE NOVO 139, 148–49 (2010) ("[I]n strictly textual terms an interpretation under Article II, Section 1, Clause 5 ('No person except a natural born Citizen . . . shall be eligible to the Office of President') that no person born by Caesarian-section delivery is eligible to be President is also plausible. We understand the ludicrousness of such an interpretation, though, relative to the surrounding context.").

rules out these alternative interpretations.[51] Unfortunately, however, both of these claims—the claim that we must interpret constitutional provisions with a modicum of common sense and the claim that the alternative interpretations proposed above fail to meet this minimal standard—are themselves extra-textual. The Constitution never explicitly asserts either of them. So if the Textualist accepts these two claims, then she is once again violating her theory. If she *rejects* these two claims, then she is vulnerable to all kinds of *absurd* constitutional interpretations, including the two proposed just above.

I conclude that if we are to interpret the Constitution at all, then no matter what method of interpretation we employ—even if it is the strictest textualism—extra-textual assumptions must inevitably be employed. So if the employment of extra-textual assumptions is the strongest objection that the Textualist may raise against the Inferentialist, then she is in a very weak position. She herself commits this sin just as much as the Inferentialist.

At this point, the Textualist must concede the impossibility of "pure" constitutional interpretation; constitutional interpretation without extra-textual assumptions is clearly untenable and impractical. We have a Constitution, we must follow it to the best extent we can, and this following requires interpretation.[52] We might as well, then, make the best of it. (I will return to this point in Part VII.)

In addition to the two criticisms that I have leveled above against the Textualist, I offer two more. The first of these—and therefore the third overall—starts with the fact that Textualists sometimes fall back on what

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[51] *See* STRAUSS, *supra* note 4, at 41 ("If a practice or an institution has survived and seems to work well, those are good reasons to preserve it; that practice probably embodies a kind of rough common sense, based in experience, that cannot be captured in theoretical abstractions."); Scalia, *supra* note 1, at 23 ("A text should not be construed strictly, and it should not be construed leniently; it should be construed reasonably, to contain all that it fairly means."); *id.* at 37–38 (endorsing "reasonable construction" over "strict construction"); Brief of William N. Eskridge, Jr. et al. as Amici Curiae in Support of Respondents at 2–3, King v. Burwell, 135 S. Ct. 2480 (2015) (No. 14-114) ("Textualism does not require courts to read statutory provisions in a vacuum. To the contrary, it is a 'fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme.'" (citation omitted)).

[52] *See* SEIDMAN, *supra* note 21, at 32–33 ("[A] thoroughgoing skeptic might take the view that there is nothing worth saying about one [constitutional] resolution as opposed to another. There will be a struggle of some sort, and things will come out the way they come out. . . . [But] [l]etting things come out the way they come out is also a constitutional settlement—and a particularly unattractive one, at that. . . . For anyone within a society, committed to a position on the issues that divide it, this sort of passivity has little to recommend it. . . . Unless we are ready to give up not just on constitutional law but on all of our political commitments, there is no escape from the effort to structure the settlement in a way that will vindicate those commitments.").

are really "Originalist" arguments. Originalism is a theory of constitutional interpretation which says that the meanings of the words in the Constitution should be determined by looking backward either to the Framers' intent or to the public understanding of the words back when they were written.[53] Textualism does not necessarily entail Originalism, but many, if not most, Textualists are Originalists. And, as it happens, Originalism receives far more attention (and therefore criticism) than Textualism.

One Originalist argument suggests that if the following two claims are true—(a) *p* is fairly close in content to a proposition that is explicitly stated in the Constitution and (b) *p* is not itself explicitly stated in the Constitution—then we have good evidence that the Framers deliberately left *p* out.[54] Clearly, the Framers carefully considered what the Constitution should say. And the fact that *p* is close in content to one of the Constitution's carefully stated propositions makes it reasonable to assume that *p* did cross their minds as well. So the fact that *p* is *not* stated in the Constitution suggests that this was *not* an inadvertent oversight on their part but rather a deliberate omission. Far from reasoning *p* into the Constitution, then, we should instead take its absence to constitute evidence that the Framers meant to leave it out. This argument is Originalist insofar as it assumes that our conclusions regarding what propositions and doctrines are in the Constitution should be determined at least in part by what propositions and doctrines the Framers intended to include in the Constitution.[55]

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[53] *See* STRAUSS, *supra* note 4, at 3 ("Originalism is the antithesis of the idea that we have a living constitution. It is the view that constitutional provisions mean what the people who adopted them—in the 1790s or 1860s or whenever—understood them to mean. . . . The Constitution requires today what it required when it was adopted, and there is no need for the Constitution to adapt or change, other than by means of formal amendments."); *id.* at 10 ("The core idea of originalism is that when we give meanings to the words of the Constitution, we should use the meanings that the people who adopted those constitutional provisions would have assigned."); Eric A. Posner, *Why Originalism Is So Popular*, NEW REPUBLIC (Jan. 13, 2011), http://www.newrepublic.com/article/politics/81480/republicans-constitution-originalism-popular ("Originalists believe that the Constitution—the set of rules that structure and limit government—has the meaning that was ascribed to the original document by those who drafted and ratified it, as modified by the various amendments, as understood by those who drafted and ratified them."); Ryan, *supra* note 24, at 1628 ("Justice Scalia's basic idea is that courts can and should rely on the original meaning of the constitutional text in order to decide the outcome in at least some constitutional cases." (footnote omitted)).

[54] The canon of construction is referred to as *expressio unius est exclusio alterius*, which means "the express mention of one thing excludes all others." *Expressio unius est exclusion alterius*, BLACK'S LAW DICTIONARY (10th ed. 2014).

[55] *See* ROBERT H. BORK, THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW 183–84 (1990) ("[W]hatever purpose the ninth amendment was intended to serve, the creation of a mandate to invent constitutional rights was not

Unfortunately for the Textualist-Originalist, however, this very same reasoning can be used to reach the opposite conclusion. Assume with the Textualist-Originalist that, where p is a proposition whose content lies very close to the content of at least one explicitly stated constitutional provision, the absence of p is evidence that the Framers did not want p to be in the Constitution. Well, the Framers never explicitly stated that the Constitution does *not* contain a general right to privacy. So by the assumption above, the absence of this proposition must indicate that they *did* intend the Constitution to contain this right. In other words, by the Textualist-Originalist assumption above, if the Framers did not want a general right of privacy in the Constitution, then they would have said so. So the fact that they did *not* say so suggests that they *did* want a general right of privacy in the Constitution. Clearly, the Textualist-Originalist would reject this conclusion. But it derives from the very same assumption that she used to argue that a general right to privacy does not exist in the Constitution. Therefore we may consider the argument I have just made to constitute a *reductio ad absurdum* of the Textualist-Originalist's argument.

Finally, the Ninth Amendment itself is a formidable argument against the Textualist. Indeed, Justice Scalia was so threatened by the Ninth Amendment that he insisted it should just be ignored.[56] This was not very Textualist of him; just the opposite. Apparently, Justice Scalia's

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one of them. . . . Surely, if a mandate to judges had been intended, matters could have been put more clearly. James Madison. . . who wrote with absolute clarity elsewhere, had he meant to put a freehand power concerning rights in the hands of judges, could easily have drafted an amendment that said something like [this]. . . . Had so momentous a role for judges been contemplated, it would have been the center of discussion. It would not, as is the fact, have gone wholly unmentioned. . . . If [the Ninth Amendment] meant what [John Hart] Ely and others have suggested, it would have stated that the enumeration of certain rights 'shall not be construed to mean that judges may not find that other rights exist and are protected by this Constitution.'").

[56] *See* Troxel v. Granville, 530 U.S. 57, 91–92 (2000) (Scalia, J., dissenting) ("[T]he Constitution's refusal to 'deny or disparage' other rights is far removed from affirming any one of them, and even further removed from authorizing judges to identify what they might be, and to enforce the judges' list against laws duly enacted by the people. . . . I do not believe that the power which the Constitution confers upon me *as a judge* entitles me to deny legal effect to laws that (in my view) infringe upon what is (in my view) that unenumerated right."); Jennifer Senior, *In Conversation: Antonin Scalia*, N.Y. MAG. (Oct. 6, 2013), http://nymag.com/news/features/antonin-scalia-2013-10 ("You know, in the early years, the Bill of Rights referred to the first eight amendments. They didn't even count the ninth. The Court didn't use it for 200 years. If I'd been required to identify the Ninth Amendment when I was in law school or in the early years of my practice, and if my life depended on it, I couldn't tell you what the Ninth Amendment was.").

meta-constitutional position was that when the facts inconveniently threaten your constitutional theory, simply pick different facts.[57]

Again, the Ninth Amendment provides: "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people."[58] The Ninth Amendment is an explicit constitutional provision—and therefore a provision that the Textualist, by her own theory, must accord the utmost respect—directly suggesting that the people may have rights that are not explicitly stated in the Constitution. So the mere fact that the Constitution explicitly protects only rights *R1* through *R15* does not mean that there are not other rights like *R16* and *R17* that the people also possess. The mere fact that *R16* and *R17* are not explicitly stated in the Constitution does not mean that the people still do not have them.[59]

The Textualist is likely to respond that what we are talking about here are not just any old rights but *constitutional* rights—that is, rights that are in the Constitution. And while the Ninth Amendment clearly leaves open the possibility that people may have rights beyond those explicitly stated in the Constitution, it does not say that these rights are *constitutionally* protected. So the Ninth Amendment fails to present the threat to Textualism that the argument just above suggests.[60]

Still, there is no good reason to believe that the other rights to which the Ninth Amendment refers must be *non-constitutional.* On the contrary, its suggestion that that these other rights are "retained by the people"

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[57] *Cf.* ELY, *supra* note 5, at 38 ("Justice Black's response to the Ninth Amendment was essentially to ignore it. Usually more than willing to return to the original understanding when intervening precedent stood in his way, he displayed a curious contentment with the crabbed interpretations of his predecessors on this point. Of course it really isn't curious at all—he didn't like the jurisprudential implications of such an open-ended provision .... But Black most of all shouldn't behave this way. He urged us, correctly, to behave like lawyers rather than dictators or philosopher kings and thus to heed the directions of the various constitutional clauses.... [H]e was a man who spent his life railing against people who ignored the language and purpose of constitutional clauses because they didn't like where they led." (footnotes omitted)).

[58] U.S CONST. amend. IX.

[59] *See* BREYER, *supra* note 8, at 117–18 ("Professor [Bernard] Bailyn concludes that the Framers added [the Ninth Amendment] to make clear that 'rights, like law itself, should never be fixed, frozen, that new dangers and needs will emerge, and that to respond to these dangers and needs, rights must be newly specified to protect the individual's integrity and inherent dignity.'").

[60] *See* BORK, *supra* note 55, at 183 ("[N]othing about [the Ninth Amendment] suggests that it is a warrant for judges to create constitutional rights not mentioned in the Constitution."); *id.* at 184 ("One suggestion ... supported by some historical evidence, is that the people retained certain rights because they were guaranteed by the various state constitutions, statutes, and common law. Thus, the enumeration of certain rights in the federal Constitution was not to be taken to mean that the rights promised by the state constitutions and laws were to be denied or disparaged.").

lends some support to the conclusion that they are implied by, and therefore in, the Constitution. "[T]he people" is short for the "people of the United States." And arguably the only kinds of rights that would (a) belong to the entire national body and (b) be important enough to reference in a constitutional amendment would be rights that are of constitutional magnitude.[61]

VI. A POSITIVE DEFENSE OF INFERENTIALISM: THE DYNAMIC VIEW

So far, we have looked at two different approaches to constitutional interpretation, Textualism and Inferentialism. In the previous Part, I offered some reasons to doubt Textualism. In this Part and the following Parts, I would like to offer some more positive reasons for embracing a particular version of Inferentialism, what I will refer to as the "Dynamic View" of constitutional interpretation.[62]

Think back to 1868, the year that the Fourteenth Amendment was ratified, and consider the following question: if the case of *Griswold v. Connecticut* had come before the Court just then, should the Court have decided it in more or less the same way that the 1965 Court did? Should it too have found a general right to privacy "lurking" in the Due Process Clause ("DPC")? There are three ways to answer this question:

> (7) No. There never was and never has been a right to privacy in the Constitution. It was simply *inserted* into the Constitution in 1965. But it does not—and never did—really belong or exist there.
>
> (8) No. At the time, there was no right to privacy in the Constitution. Instead, the right to privacy entered the Constitution at a later time in our nation's development.
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> (9) Yes. If the right to privacy was in the Constitution in 1965, then it was there in 1868. (Conversely, if it was not there in 1965, then it was never there). The job of the Court is to tell us what the Consti-

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[61] *See* ELY, *supra* note 5, at 38 ("In fact, the conclusion that the Ninth Amendment was intended to signal the existence of federal constitutional rights beyond those specifically enumerated in the Constitution is the only conclusion its language seems comfortably able to support."); Thomas B. McAffee, *The Original Meaning of the Ninth Amendment*, 90 COLUM. L. REV. 1215, 1222 (1990) ("The new orthodoxy . . . holds that the ninth amendment refers to constitutional rights as we generally think of them today—legally-enforceable, affirmatively defined limitations on governmental power on behalf of individual claimants. . . . The proponents of this reading for the most part contend that the ninth amendment embodies the tradition of an unwritten fundamental law of constitutionally enforceable individual rights, most frequently including the right to privacy." (footnote omitted)).

[62] Justice Scalia asked what the justification is for "formally treat[ing]" the Constitution "like the common law." Scalia, *supra* note 1, at 40. I will answer Justice Scalia's question in this Part.

> tution says, whether the Court likes it or not and whether we (the nation) like it or not.

(7) falls closest to Textualism, and (8) and (9) are equally consistent with the Inferentialist's position. The Inferentialist could adopt either of the latter two positions. I will concentrate the remainder of this Part and the next Part on the debate between partisans of (8)—call them the "Dynamics" because they see the Constitution as a dynamic (living, growing, changing) document[63]—and the partisans of (9)—call them the "Statics" because they see the Constitution as already fixed and fully formed at the time of ratification.

Another way to put the difference between the Dynamics and the Statics is in terms of the intrinsic-extrinsic distinction. According to the Statics, the meaning of the Constitution and each of its provisions, such as the DPC, is fully *intrinsic*. The text itself and the Framers' intent determine all the meaning that is there. There is nothing more to it, no

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[63] *See* McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 415 (1819) (asserting that the Constitution is "intended to endure for ages to come, and consequently, to be adapted to the various *crises* of human affairs. To have prescribed the means by which government should, in all future time, execute its powers, would have been to change, entirely, the character of the instrument . . . . It would have been an unwise attempt to provide, by immutable rules, for exigencies which, if foreseen at all, must have been seen dimly, and which can be best provided for as they occur."); BAIER, *supra* note 1, at 10 ("There is a universality in going beyond text to shape the living law—either of France's *code civil*, America's bill of rights, or Canada's charter of rights and freedoms."); STRAUSS, *supra* note 4, at 1 ("A 'living constitution' is one that evolves, changes over time, and adapts to new circumstances, without being formally amended."); *id.* at 34–35 ("[I]f you think the Constitution is just the document that is under glass in the National Archives, you will not begin to understand American constitutional law. The written Constitution is a short document that has been amended only a handful of times. By comparison, the United States has over two centuries of experience grappling with the fundamental issues—constitutional issues—that arise in a large, complex, diverse, changing society. . . . [T]hose lessons are routinely embodied in the cases that the Supreme Court decides and also, importantly, in the traditions and understandings that have developed outside the courts. Those precedents, traditions, and understandings form an indispensable part of what might be called our small-*c* constitution: the constitution as it actually operates, in practice. That small-*c* constitution—along with the written Constitution in the archives—is our living Constitution."); Chemerinksy, *supra* note 44 ("[W]e should remember that we are doing more than honoring the words on parchment in the National Archives or the intent of the framers who drafted them. . . . We are celebrating a living document that in the words of John Marshall endures because it is adapted to the ever changing world in which we live."); Posner, *supra* note 53 ("The [alternative to Originalism] is that the Constitution evolves with the times. Judges and elected officials interpret and reinterpret it in light of their own changing values, and these interpretations pile up and form a body of political and judicial precedent . . . ."); Scalia, *supra* note 1, at 41 ("The argument most frequently made in favor of The Living Constitution is a pragmatic one: Such an evolutionary approach is necessary in order to provide the 'flexibility' that a changing society requires; the Constitution would have snapped if it had not been permitted to bend and grow.").

other information that goes into this meaning. To be sure, other information might serve an *evidentiary* purpose, helping us to see what the text might itself mean or what the Framers' intent might be. But this other information at best only helps us to understand what the DPC says independently of this information. This information does not actually *constitute* part of the meaning of the DPC.

The Static View of the Constitution implies that it would be possible at least in principle for the Court in 1868 to have suspended their adjudicative practices for a year or so, go into a back room, and discover everything that there is to know about the Constitution, unpack everything the Constitution says and therefore could ever say with regard to any given case that is brought before it—with the exception of future and therefore currently unknowable amendments. In principle, then, we did not need to wait until 1965 to learn the answer. The 1868 Court could have told us whether there was a right to privacy in the Constitution and therefore whether married couples have a right to use contraception.[64]

The Dynamics, however, regard this counterfactual claim as false. In addition to the text and possibly the Framers' intent, there are other considerations that judges may use to interpret the Constitution, considerations that do not merely shed light on the Constitution but actually constitute a part of its meaning. And these considerations may not be derived merely from a study of constitutional text and American history.[65]

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[64] Justice Scalia made this very point about same-sex marriage: "When the Fourteenth Amendment was ratified in 1868, every State limited marriage to one man and one woman, and no one doubted the constitutionality of doing so. . . . [I]t is unquestionable that the People who ratified that provision did not understand it to prohibit a practice that remained both universal and uncontroversial in the years after ratification. We have no basis for striking down a practice that is not expressly prohibited by the Fourteenth Amendment's text, and that bears the endorsement of a long tradition of open, widespread, and unchallenged use dating back to the Amendment's ratification." Obergefell v. Hodges, 135 S. Ct. 2584, 2628 (2015) (Scalia, J., dissenting) (footnote omitted).

[65] *See* Ian Bartrum, *Constructing the Constitutional Canon: The Metonymic Evolution of* Federalist 10, 27 CONST. COMMENT 9, 38 (2010) ("[I]t is the practice—not facts about the text, or any particular theory—that ultimately gives rise to constitutional meanings."); Bartrum, *supra* note 46, at 160 ("[T]he historical fixation of semantic meaning, even if theoretically possible (which I would not concede), is not a significant feature of the language games that make up the practice of constitutional law."); *id.* at 166 ("[A] more fundamental problem with the originalist . . . approach to textual interpretation: meaning is simply not a matter of theory—it is quite decidedly a matter of practice. . . . [I]n the practice of constitutional law we generally do not worry about discovering what the ratifiers intended, but rather work to better understand the text that they enacted." (footnote omitted)); *id.* at 168 ("[A]ctual constitutional practitioners do not make regular—much less exclusive—recourse to speaker's meaning when following the rules of the constitutional language game. Thus, speaker's meaning is not the exclusive, nor even the primary, source of the text's semantic meaning."); *id.* at 171 ("[W]e simply do not, as a practical matter, go around trying to 'fix' historical meanings; we rather play the only constitutional

Instead, these considerations involve facts that the Court in 1868 could not possibly have known about—primarily how constitutional jurisprudence and social, moral, and political norms would develop. According to the Dynamics, all of these "external" considerations may enter into the actual meaning of the DPC. So the meaning of the DPC keeps changing, developing, evolving. It is, in a sense, chameleon-like, always reflecting at least in part the stage of American society that it finds itself in.[66]

The Dynamic View certainly makes the project of constitutional interpretation much more difficult. There are three reasons. First, there will be many more matters to consider than with the Static View—namely, what exactly *is* the social, moral, and political background.

Second, this background information is typically quite complicated. For example, it would be inaccurate to suggest that the nation's *political* context—what the American people feel is politically correct about any given issue and what political theories are generally accepted—is ever settled and therefore easily ascertained and incorporated into a judge's interpretation of the Constitution. On the contrary, most political issues—at least the ones that the Court would consider—are still hotly contested as different sides vie for their own particular views of what is fair, just, and good.[67]

Third, what applies to our moral context applies to the other contexts—social and political—as well. Each of them will similarly involve different controversies and therefore be subject to competing characterizations and theories. The upshot of this complexity is that Dynamic judges who believe that these contexts enter into the meaning of the Constitution and its various provisions must ultimately resort to their own *interpretations* of these contexts. The task of Dynamic constitutional interpretation is multi-layered. It requires each Dynamic judge to determine not merely the proper textual and historical interpretation of any given constitutional provision but also the proper interpretation of the social, moral, and political norms in which the constitutional provisions are being read and applied. They must do their best to carefully apply both constitutional text and precedents to novel, previously unanticipated situations in order to reach what they regard as the more just result. And what they regard as the more just result will largely depend on their normative evaluation of the anticipated consequences of each possible decision. If a given justice, for example, believes that a certain interpreta-

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language game we can: our own.").

[66] *See* BORK, *supra* note 55 and accompanying text.

[67] *See* SEIDMAN, *supra* note 21, at 7 ("The challenge for a modern theorist is to formulate a general approach to constitutional law that takes into account the intractable nature of our political disagreements instead of attempting to suppress them. . . . It is obvious . . . that [political] commitments are appropriately contestable and that disagreements with regard to them cannot be settled by any theoretical construct.").

tion of the Patient Protection and Affordable Care Act[68] will lead to net positive consequences for the health care system, democracy, and/or the rule of law, she will likely adopt it. Conversely, if she believes that the same interpretation will lead to net negative consequences, she will likely reject it. The important point is that the justice's predictions and moral evaluations of these predictions will largely influence, if not determine, her ultimate decisions.[69]

Assuming Inferentialism, which view should we accept, the Static (proposition (9) above) or the Dynamic (proposition (8) above)? Which view qualifies as the more plausible approach to the Constitution? Notice, the text of the Constitution itself does not answer these questions. So whichever way we answer these questions, we must once again resort to assumptions that lie outside the Constitution.[70]

There are five considerations that should incline us toward the Dynamic View over the Static View. All five considerations suggest that in order to interpret the Constitution, in order to figure out what it means, we must step outside of it. And the notion that we must step outside the Constitution in order to determine what it means is just to say that the meaning of the Constitution is constituted in part by propositions that it *does not* explicitly state.

First, there is a strong *pragmatic* reason for choosing the Dynamic View over the Static View. If we were talking about the proper method of interpreting a newspaper article or even a run-of-the-mill statute written

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[68] Patient Protection and Affordable Care Act, Pub. L. No. 111–148, § 124 Stat. 119 (2010).

[69] *See* BREYER, *supra* note 8, at 6 (emphasizing "the importance of a judge's considering practical consequences, that is, consequences valued in terms of constitutional purposes when the interpretation of constitutional language is at issue."); *id.* at 18 ("Since law is connected to life, judges, in applying a text in light of its purpose, should look to *consequences*, including 'contemporary conditions, social, industrial, and political, of the community to be affected.'" (citation omitted)); *id.* at 74 ("[T]he Constitution authorizes courts to proceed 'practically' when they examine new laws in light of the Constitution's enduring values."); STRAUSS, *supra* note 4, at 33 ("Where the precedents leave off, or are unclear or ambiguous, the opinion will make arguments about fairness or good policy: why one result makes more sense than another, why a different ruling would be harmful to some important social interest."); *id.* at 34 ("On a day-to-day basis, American constitutional law is about precedents, and when the precedents leave off, it is about commonsense notions of fairness and good policy."); *id.* at 35 ("[Evolutionary] development, characteristic of our living Constitution, is often messy. . . . It involves the exercise of judgment. It explicitly involves arguments and considerations that aren't narrowly or distinctively legal, like judgments about fairness and good policy."); James R. Maxeiner, *Scalia & Garner's* Reading Law*: A Civil Law for the Age of Statutes?*, 6 J. CIV. L. STUD. 1, 23 (2013) ("Those charged with applying the law, within its limits, are responsible for reaching decisions that not only comply with the letter of the law, but that also fulfill the goal of law to achieve justice and good policy.").

[70] *See supra* note 46 and accompanying text.

in 1868, then we should adopt the Static View over the Dynamic View. Our interpretations of these texts should be informed solely by the actual text itself, the authors' intent, and the background social, moral, and political context in which the authors chose the language that they did to express themselves. Newspaper articles are soon forgotten, and statutes can always be either ignored, revoked, replaced, or struck down. So if we do not like what any of them say, we do not have to interpret them differently. We may instead simply reject them in one form or another and then move on. But the same cannot be said about the Constitution. Unlike newspaper articles and statutes, it may not be forgotten, ignored, revoked, replaced, or struck down. The Constitution has the unique status of being "the supreme Law of the Land."[71] For better or worse, then, we are stuck with it for the long haul, inescapably bound by its edicts into the indefinite future. Given this situation, given that we cannot simply put the Constitution aside in one way or another when it does not suit our wishes, we should make the best of it. We should make the Constitution the best document it can be.[72] We should continue to mold it into a tool that serves *our* purposes, the purposes of modern-day Americans. In the end, it is we who own the Constitution, not the Constitution which owns us. As President Theodore Roosevelt once said, "The Constitution was made for the people, not the people for the Constitution."[73]

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[71] U.S. CONST. art. VI, cl. 2.

[72] Cass Sunstein refers to this theory of constitutional interpretation as "Perfectionism." CASS R. SUNSTEIN, RADICALS IN ROBES: WHY EXTREME RIGHT-WING COURTS ARE WRONG FOR AMERICA 32 (2005). Perhaps the most prominent Perfectionist is Ronald Dworkin. *See supra* note 12; *see also* RONALD DWORKIN, FREEDOM'S LAW: THE MORAL READING OF THE AMERICAN CONSTITUTION (1996).

[73] *The Roosevelts: An Intimate History* (Episode 2 at 24:39–40) (PBS television broadcast Sept. 14, 2014); *see also* BAIER, *supra* note 1, at 6 ("'No body of men 200 years ago could determine what our problems are today. That is, I suppose, what we have courts for'—'to construe the Constitution in the light of current problems.'") (quoting Justice Harry A. Blackmun); *id.* at 20 ("'Above all in the field of constitutional law, the method of free decision has become, I think, the dominant one today. *The great generalities of the constitution have a content and a significance that vary from age to age.*'" (footnote omitted)); BREYER, *supra* note 8, at 73 (warning "against adopting an overly rigid method of interpreting the Constitution—placing weight upon eighteenth-century details to the point at which it becomes difficult for a twenty-first-century court to apply the document's underlying values."); *id.* at 129 ("[T]extualist and originalist doctrines may themselves produce seriously harmful consequences—outweighing whatever risks of subjectivity or uncertainty are inherent in other approaches."); *id.* at 131 ("Whatever 'subjectivity-limiting' benefits a more literal, textual, or originalist approach may bring, and I believe those benefits are small, it will also bring with it serious accompanying consequential harm."); SEIDMAN, *supra* note 21, at 16 ("A 'right' of people alive in 1789 to establish constitutional principles interferes with the 'right' of people alive in the twenty-first century to govern themselves."); *id.* ("The problem is made even more serious by the fact that the initial rules were not established by all the people living in the United States in 1789. Indeed, the majority of people—including women, slaves, and nonproperty

We have already seen one example of a justice making the DPC the best that it can be. Justice Douglas creatively combined the DPC, the First, Third, Fourth, and Fifth Amendments, and the changing sexual mores in our culture to find a general right to privacy and a more particular right of married couples to use contraception in the Constitution.[74] He was not saying merely that the Constitution *should* contain a right to privacy. He was saying that the Constitution *does* contain a right to privacy, that this right is actually *in* there. By importing modern sexual mores into the meaning of the Constitution, Justice Douglas made the Constitution a better document than it would have been had he confined its meaning to the sexual mores prevalent in the culture when the Bill of Rights were ratified or when the Fourteenth Amendment was ratified.

Justice Douglas made the Constitution better in three respects. Because Justice Douglas's interpretation of the Constitution harmonized more with modern beliefs and attitudes toward marital sex, and because most believe that these modern notions are right or at least closer to the moral truth than were the moral beliefs of 18th-century Americans, Jus-

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holders—had no role in the decision."); STRAUSS, *supra* note 4, at 2 ("[A]n unchanging constitution would fit our society very badly. Either it would be ignored or, worse, it would be a hindrance, a relic that would keep us from making progress and prevent our society from working in the way it should."); *id.* at 18 ("The framers or ratifiers of the Constitution had, at best, understandings about *their* world. How do we apply those understandings to *our* world? . . . . [O]riginalists have yet to come to grips with the most obvious and famous issue, one raised by Thomas Jefferson, among others. The world belongs to the living, Jefferson said. Why should we be required to follow decisions made hundreds of years ago by people who are no longer alive?"); *id.* at 21 ("Suppose we know what the original understandings are. Suppose we know for certain, for example, that the Second Amendment was understood to guarantee individual citizens the right to keep firearms in their homes for self-defense. . . . The founders (on this hypothesis) wanted to establish this right—in *their* society. . . . It does not follow that the founders would want the same thing in *our* society."); *id.* at 24 ("The most fundamental problem with originalism is the one that Thomas Jefferson, among others, identified in the earliest days of the Constitution. 'The earth belongs . . . to the living,' Jefferson wrote to James Madison in 1789. One generation cannot bind another . . . . Why do we submit to the decisions of the much more distant and alien founders?"); *id.* at 25 ("[O]riginalists—who believe that the understandings of people long dead should govern, in principle, every aspect of constitutional law—have not given Jefferson a satisfactory answer."); *id.* at 30 ("[E]ven if they are clear, as time passes, the reasons for adhering to the original understandings begin to fade."); Chemerinksy, *supra* note 44 ("There is an obvious reason why originalism never has—and hopefully never will—be followed by a majority of the Court: it makes no sense to be governed in the 21st century by the intent of those in 1787 (or 1791 when the Bill of Rights was adopted or 1868 when the Fourteenth Amendment was ratified)."); Sunstein, *supra* note 6 (stating that, according to Jefferson, "[w]hen 'new discoveries are made, new truths disclosed, and manners and opinions change with the change of circumstances, institutions must advance also, and keep pace with the times'").

[74] *See supra* notes 26–43 and accompanying text.

tice Douglas's creative interpretation of the Constitution (a) brought it that much closer to the right attitude toward sexuality and sexual relations, (b) gave the Court greater credibility in the area of sexuality jurisprudence, and (c) opened the door to a good number of other decisions that expanded sexual freedom even further, a development that most Americans, the people for whom the Constitution was written in the first place, regard as positive.[75]

The second justification for adopting the Dynamic View is what we might call *authenticity*. In interpreting a constitutional provision, we want to be as faithful as possible not merely to the text of the Constitution but also to its *spirit*. The Constitution *does* in fact have a spirit, a striving nature that goes beyond the sum of its words. The Constitution was written primarily to attain two goals: to improve the structure of government prescribed by the infamous Articles of Confederation and to protect certain individual rights against majoritarian encroachment.[76] Given these purposes, it is quite natural to infer that the Framers regarded the Constitution as nothing more than a means to these two ends. So whenever we try to interpret the Constitution, we must always keep in mind *why* it was

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[75] *Cf.* BREYER, *supra* note 8, at 68 ("The legal circumstance and the technological circumstance taken together mean (1) a complex set of preexisting laws (2) applied in rapidly changing circumstances. That application means changed, perhaps diminished, privacy protection, with the *extent* to which protection diminishes varying depending upon individual circumstances. To maintain preexisting protection, we must look for new legal bottles to hold our old wine.").

[76] *See id.* at 5 ("My thesis is that courts should take greater account of the Constitution's democratic nature when they interpret constitutional and statutory texts."); *id.* at 6 ("[I]ncreased emphasis upon [the democratic] objective by judges when they interpret a legal text will yield better law—law that helps a community of individuals democratically find practical solutions to important contemporary social problems."); *id.* at 8–9 ("... I see the [Constitution] as creating a coherent framework for a certain kind of government. Described generally, that government is democratic; it avoids concentration of too much power in too few hands; it protects personal liberty; it insists that the law respect each individual equally; and it acts only upon the basis of law itself."); *id.* at 28 ("[W]e can find in the Constitution's structural complexity an effort to produce a form of democracy that would prevent any single group of individuals from exercising too much power, thereby helping to protect an individual's (modern) fundamental liberty."); *id.* at 34 ("[O]ur constitutional history has been a quest for ... workable democratic government protective of individual personal liberty. Our central commitment has been to 'government of the people, by the people, for the people.'" (citation omitted)); *id.* at 134 ("[The Constitution] is a document that trusts people to solve [community] problems for themselves. And it creates a *framework* for a government that will help them do so. That framework foresees democratically determined solutions, protective of the individual's basic liberties. It assures each individual that the law will treat him or her with equal respect. It seeks a form of democratic government that will prove workable over time." (footnote omitted)).

written, its ultimate raisons d'être. Its essentially *instrumentalist* nature animates and informs all of the document's text.[77]

Regarding the third justification, suppose that the Constitution *had* an explicit aspirational provision, a provision which encouraged judges to make it the best that it can be. Then, contrary to what Statics claim, judges who adopted the Dynamic View would actually be more faithful to the constitutional text than judges who adopted a Static View. The true "activists" would be the Statics, the true "conservatives" the Dynamics. Well, as it turns out, there *is* such an aspirational provision in the Constitution, a provision in the Constitution that *does* suggest that judges should follow not merely the text but also the spirit of the Constitution. It is called the *Preamble.* The Preamble states:

> We the People of the United States, in Order to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defence, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity, do ordain and establish this Constitution for the United States of America.[78]

Because the Preamble to the Constitution is composed of nothing *but* goals, it authorizes judges to make the Constitution the best it can be, to interpret each provision with a view toward maximizing these goals, the goals for which all of these provisions were ultimately written in the first place.

The fourth justification for adopting the Dynamic View over the Static View is also—like the third justification—*textual.* I suggested above in Parts I and VI that the Constitution—especially the Bill of Rights—

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[77] *See* Bartrum, *supra* note 46, at 165 ("[C]onstitutional explication is its own language game, which is neither quite figurative nor exactly like a literal one-to-one conversation. Here a legal text, submitted for ratification to hundreds of thousands of 'the People,' is at the center of a complex communicative practice exercised within a unique and controverted social context."); John O. McGinnis & Michael B. Rappaport, *Our Supermajoritarian Constitution*, 80 TEX. L. REV. 703, 707 (2002) ("[T]he ultimate purpose of [the Constitution is] to establish a well-functioning republic. As [James] Madison explained in *The Federalist No. 10* . . . the 'great object to which our inquiries are directed' is 'to secure the public good and private rights against the danger of a [majority] faction, and at the same time to preserve the spirit and form of popular government.'" (citation omitted)); Asifa Quraishi, *Interpreting the Qur'an and the Constitution: Similarities in the Use of Text, Tradition, and Reason in Islamic and American Jurisprudence*, 28 CARDOZO L. REV. 67, 111–12 (2006) ("Supreme Court Justice William Brennan . . . insisted that the ultimate purpose of the Constitution is to promote and protect certain fundamental values, the highest being that of human dignity. . . . Justice Brennan insisted that it is the responsibility of all those who govern the constitutional community to continuously recognize and accept the limitations placed on their powers in order to preserve human dignity." (footnotes omitted)).

[78] U.S. CONST. pmbl.

contains several words that are normative and largely open-ended.[79] Words like "unreasonable," "probable cause," "due process," "excessive," "cruel," and "equal protection" are highly abstract and subject to competing interpretations. Reasonable people might very well disagree on where the line between reasonable and unreasonable searches and seizures, probable and non-probable cause, due and non-due process, excessive and non-excessive bail, cruel and non-cruel punishment, and equal and unequal protection should be drawn. Each disagreement has generated different theories that argue for drawing the lines in different places. But not only are these theories themselves hotly contested; even if everybody settled on one particular theory, that theory would still fail to tell courts how or where exactly the line should be drawn in future cases. In the end, we can never really make the Constitution's normative terms—or therefore the lines distinguishing their instantiation from their non-instantiation—fully determinate. We can at best only make them increasingly determinate, bring them increasingly close to the asymptote of complete determinacy. Moreover, this increasing determinacy cannot be brought about all at once. Instead, it must be brought about gradually, on a case-by-case basis.[80]

Because such terms are inherently and therefore inescapably indeterminate, they fail to give judges interpreting the Constitution much guidance regarding how to apply them. Of course, they do give some minimal guidance. For example, the "cruel and unusual punishments" clause of the Eighth Amendment clearly tells the judge to strike down any punishment that is cruel and unusual.[81] But it still leaves entirely open the contours of cruelty and unusualness.[82] Indeed, this clause ex-

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[79] *See supra* note 46 and accompanying text.

[80] *See* SUNSTEIN, *supra* note 72, at 29 ("Minimalists . . . favor narrow rulings over wide ones. They like to decide cases one at a time. They prefer decisions that resolve the problem at hand without also resolving a series of other problems that might have relevant differences.").

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

[82] *See* STRAUSS, *supra* note 4, at 11 ("Of course, the meaning of the word 'cruel' (or the phrase 'cruel and unusual') is not clear in the way that 'January 20' is clear."); Waldron, *supra* note 46, at 526 ("What makes a form of punishment cruel? It is, presumably, the point of punishment to be unpleasant; so a cruel punishment would seem to be one that is more unpleasant than it ought to be. But . . . people disagree about how unpleasant punishment ought to be."); *id.* at 528–29 ("In ordinary language, the descriptive meaning of 'cruel' invites us to focus our evaluation specifically on the degree or quality of the suffering experienced by the prisoner and perhaps on the disposition and attitude of those inflicting it. Beyond that, 'cruel' remains indeterminate. We know that it has negative and condemnatory connotations, and we know that it tells us something about the gravity of the suffering experienced. . . . By ascribing one or other of [alternative] meanings to a term that is used in a legal or constitutional context, we are saying, in effect, 'do not allow pain to be inflicted maliciously' or 'do not allow the infliction of extreme pain.' Since we may disagree substantively about the merits of these latter principles—particularly in a

emplifies the Dynamic View more clearly and explicitly than any other constitutional provision. The Supreme Court's test for "cruel and unusual" is nothing less than the "*evolving* standards of decency."[83]

The judge might respond that because the words do not give her sufficient guidance, she will simply avoid the task of interpreting them altogether. But then what? The Eighth Amendment forbids "cruel and unusual punishments." To avoid interpreting this clause any further is to avoid rather than follow the Constitution and thereby to *allow* cruel and unusual punishments. The judiciary has the duty—not just the privilege or the opportunity—to follow the Constitution as best it can. So when it is faced with such vague language, it may not avoid interpreting it.[84]

Precedent tends to bring normative terms like "cruel and unusual" increasingly closer to the asymptote of complete determinacy. But because complete determinacy will never be reached, the judge will always have some—and usually much—room to make one of several competing judgments about how to extend further the already-somewhat-drawn line between cruel and non-cruel. So the open-ended nature of normative, constitutional terms not merely allows but *forces* judges to be non-Textualists, to be *inventors* rather than *discoverers*. By charging judges with the duty of interpreting inherently indeterminate language, the Constitution leaves judges with *no choice but to choose*, no choice but to step outside the Constitution and color in these terms without any explicit constitutional guidance.[85] Indeed, it is as if the Constitution were deliberately trying to refute Textualism by making it impossible to practice.

Or maybe not just "as if." Maybe it just *is* the case that the Framers of the Constitution (and the Bill of Rights in particular) were deliberately trying to force every judge into Inferentialism. The presence of normative, open-ended terms in the Bill of Rights suggests that, contrary to Tex-

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penal context—the word 'cruel' is bound to become an arena for our wider moral and political disagreements.").

[83] *See, e.g.*, Kennedy v. Louisiana, 554 U.S. 407, 435 (2008) ("The constitutional prohibition against excessive or cruel and unusual punishments mandates that the State's power to punish 'be exercised within the limits of civilized standards.' Evolving standards of decency that mark the progress of a maturing society counsel us to be most hesitant before interpreting the Eighth Amendment to allow the extension of the death penalty." (internal citations omitted)); Scalia, *supra* note 1, at 40 ("As our opinions say in the context of our Eighth Amendment jurisprudence (the Cruel and Unusual Punishments Clause), its meaning changes to reflect 'the evolving standards of decency that mark the progress of a maturing society.'" (footnote omitted)).

[84] *See* Bartrum, *supra* note 46, at 183 (suggesting that "there could be no constitutional law" with respect to "hard cases of unknown or vague original meaning, in which we simply cannot identify 'speaker's meaning' with any real certainty" and that "[t]his result seems very much at odds with many natural law approaches, which would instead charge the judge with reasoning her way to a just rule." (footnotes omitted)).

[85] *See supra* notes 40, 46, 70, and 79 and accompanying text.

tualists, the Framers *wanted* interpreters of the Constitution to exercise some creative judgment and *not* to act as the passive, mechanical translators that the Passive Middleman Principle (in Part II) suggests. In other words, the Framers *wanted* the Constitution's meaning to grow and develop as the nation grew and developed.[86] So if we are to be *genuinely faithful* to the Framers' intent, we *must* look outside the Constitution in our effort to understand what it says. They drafted the Constitution in such a way that its text paradoxically *invites* us to follow it by moving outside it. We have, then, yet another argument—an Originalist argument—in favor of Inferentialism.

The fifth justification for adopting the Dynamic View over the Static View is that the former springs from a more realistic philosophy of language than does the latter. According to philosophers, words do not exist in a vacuum. Instead, their meanings are largely determined by context.[87]

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[86] *See* BREYER, *supra* note 8, at 131–32 ("Literalism has a tendency to undermine the Constitution's efforts to create a framework for democratic government—a government that, while protecting basic individual liberties, permits citizens to govern themselves, and to govern themselves effectively. Insofar as a more literal interpretive approach undermines this basic objective, it is inconsistent with the most fundamental original intention of the Framers themselves."); STRAUSS, *supra* note 4, at 25 ("[T]alk of 'fidelity' just raises the question of what fidelity requires. It may require adapting the Constitution to modern circumstances, à la the living Constitution, rather than adhering to the original understandings."); Bartrum, *supra* note 65, at 12–13 ("I suggest that we are all, as participants in the constitutional conversation, constantly constructing constitutional meaning—even when we are simply 'interpreting' the text. But our construction is not unconstrained in a coarse realist sense. Instead, we are guided ex ante by the rules of constitutional grammar, and we are answerable ex post to a faceless and proletarian norm-giver: the practice."); *id.* at 15 ("[C]onstitutional text is not the only—nor often even a particularly helpful or determinative—source of constitutional meaning. On most occasions, indeed, in almost all the controversial cases, the text is barely even a starting point for a much broader argument in which we make assertions of history, structure, doctrine, prudence, and constitutional ethos. And it is this grammar, this evolving body of organically constructed rules and conventions, which establishes the boundaries of reasonable interpretation . . . ."); Bartrum, *supra* note 46, at 171 ("[I]t is difficult to imagine that the ratifiers whose intentions so concern originalists could have thought that, as a practical matter, we would use the text in the stilted and technical ways that [they hypothesize] . . . . [I]t is much easier and more reasonable to suppose that the ratifiers thought *we* would interact with the text in much the same way . . . ."); Posner, *supra* note 53 ("[T]he drafters and ratifiers of the Constitution understood that a constitution must change with the times: the structure of government that makes sense in 1780s will not make sense decades and centuries later. Otherwise, the dead hand of the past will constrain future generations or (more likely) future generations will slough off the old Constitution, generating political instability, just as the Founding generation repudiated the Articles of Confederation.").

[87] *See generally* Ian C. Bartrum, *Wittgenstein's Poker: Contested Constitutionalism and the Limits of Public Meaning Originalism* at 2 (Aug. 22, 2016) (unpublished manuscript), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2827799 ("[I]n constitutional

So one and the same word or sentence may mean two entirely different things if uttered in two different contexts. This point is especially obvious for homonyms (words with at least two different meanings) and indexicals ("linguistic expression[s] whose reference can shift from context to context").[88] But it is also true of non-indexicals. Suppose, for example, that I utter the sentence, "Joe shredded the Constitution." In one context, this sentence will mean that Joe went to the National Archives, somehow gained access to the original copy of the Constitution, and took some scissors to it. In another context, it will mean that Joe, a powerful public official, violated several provisions of the Constitution. Which of these two very different interpretations is correct will depend almost entirely on context.

VII. OBJECTIONS AND REPLIES

In this Part, I will anticipate and respond to three objections against the Dynamic View.[89]

Objection #1: The Dynamic View just cannot be right. To say that the meaning of the Constitution can change over time is to say one of two things. It is to say either (a) that the Framers somehow anticipated in 1787 what the Constitution would mean at future points and incorporated all of these future meanings into it or (b) that the Constitution was not fully written at the time of ratification but rather has continued and continues to be written even now. But both of these claims are simply

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discourse, I think it is more accurate to say that today's 'constructions' (and their assimilation over time) will necessarily reshape and reconstitute the conventions . . . that govern tomorrow's 'interpretation.' This means that the words alone are often not resource enough to ground a definitive act of interpretation; we must also know a great deal about the constructed conventional context in which they were written if we hope to give an authentic account of speaker's intent. And, once we are beyond the words themselves, it seems to me that we are taking the first few steps across the border between interpretation and construction."); Keith S. Donnellan, *Reference and Definite Descriptions*, 75 PHIL. REV. 281 (1966); H.P. Grice, *Meaning*, 66 PHIL. REV. 377 (1957); Saul Kripke, *Speaker's Reference and Semantic Reference*, 2 MIDWEST STUD. IN PHIL. 255 (1977). Indeed, even Justice Scalia agreed with this point. *See* Scalia, *supra* note 1, at 20–21 ("I think it not contrary to sound principles of interpretation, in [] extreme cases, to give the totality of context precedence over a single word."); *id.* at 37 ("In textual interpretation, context is everything, and the context of the Constitution tells us not to expect nit-picking detail, and to give words and phrases an expansive rather than narrow interpretation—though not an interpretation that the language will not bear.").

[88] *See Indexicals*, STAN. ENCYCLOPEDIA PHIL. (Jan. 16, 2015) http://plato.stanford.edu/entries/indexicals/ (examples of indexicals include "I," "here," "there," "this," and "now").

[89] For these and other arguments against the Dynamic View, see BORK, *supra* note 55, at 167–70.

false. (a) is false because the Framers could not possibly have had the kind of clairvoyance required to anticipate future meanings.[90] And (b) is false because, with the exception of 27 (ratified) amendments, no additional words have been added to or subtracted from the Constitution since its ratification in 1787.

Reply: Objection #1 most likely articulates what many may find to be rather counterintuitive about the Dynamic View. It explains why many resist the notion that the Constitution is a "living" document, highly adaptive to the changing conditions around it.[91] (It may also be the case that many who support this theory do not realize that it has this counterintuitive implication.) Those who resist the notion of a "living" Constitution are most likely wedded to the view that the meaning of the Constitution derives entirely from its words. And because its words have not changed over the past two-hundred-plus years (again, with the exception of supplemental amendments), neither has its meaning. But this underlying semantic theory—Textualism—is precisely the assumption that the Dynamic View requires us to give up. Again, the Dynamic View suggests that the meaning of the Constitution derives only *partly* from its text, including the overall structure of the Constitution. The rest of this meaning derives from sources *outside* the text and structure.

Of course, Textualists will reject this approach. But they need to explain *why*. They need to show *why* we should accept Textualism over the Dynamic View. And Objection #1 above simply fails to deliver this explanation. Instead, it begs the question against the Dynamic View. It simply assumes without any explanation that Textualism is correct and the Dynamic View incorrect.

Some advocates of the Dynamic View respond to Objection #1 in a different way. Instead of entirely rejecting the Static View, they instead note a distinction between the *meaning* and *application* of constitutional provisions. Given this distinction, they actually *agree* with the Statics that the meaning of constitutional provisions have not changed over time. They disagree, however, with the key proponents of the Static View—

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[90] *See* STRAUSS, *supra* note 4, at 1–2 ("The written U.S. Constitution . . . was adopted more than 220 years ago. . . . Meanwhile, the world has changed in incalculable ways. The United States has grown in territory, and its population has multiplied several times. Technology has changed, the international situation has changed, the economy has changed, social mores have changed—all in ways that no one could have foreseen when the Constitution was drafted."); *id.* at 23 ("Our society and economy are incomparably more complex and interconnected. What could have been the understanding, in 1787, about what Congress's Commerce Clause power should be in a society that looks like ours today, with today's means of transportation and communication, and today's institutions of trade and finance? A society like ours would have been literally, almost inconceivable at that time.").

[91] *See supra* notes 62 and 66 and accompanying text.

Originalists—about the *application* of these unchanging provisions. While Originalists think that they should be applied exactly as the Framers did or would have applied them, some Dynamics argue that the application of these provisions may change over time.

Suppose, for example, that the Supreme Court were to find that the death penalty is cruel and unusual. There would be two ways to interpret this decision. The first way is that the Court interpreted the meaning of the words *cruel and unusual* differently than the Framers, none of whom repudiated the death penalty, in which case the meanings of these words have changed over time. (I am assuming that the Court would not dare say that the Framers simply misunderstood the meaning of their very own terms "cruel and unusual.") The second way of interpreting this decision is that the Court interpreted the meaning of the words *cruel and unusual* in the same way as the Framers but applied these words in a very different manner. Advocates of the "living" Constitution generally opt for the latter: same meaning, different application[92]—if only to establish some common ground with their Originalist opponents.[93] But when it comes to constitutional interpretation, the distinction between (a) different meanings and (b) same meanings but different applications is a distinction without a difference. Indeed, the reason that the applications are different is very arguably because the meanings of the terms have changed. If the Court finally found the death penalty to be cruel and unusual punishment, this would mean that, for the Court, the scope—and therefore *meaning*—of *cruel and unusual* had expanded beyond what the Framers understood.

Objection #2: Even to advocate that justices interpret constitutional provisions in such a way as to make them the best that they can be reduces to "judicial legislation."[94] The Dynamics are essentially advocating that judg-

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[92] *See* Ryan, *supra* note 24, at 1629 ("[T]he language used in many constitutional provisions establishes general principles that are enduring but nonetheless invite different applications in different contexts. The Founders themselves would have recognized, as we should, that their specific expectations did not settle the meaning of these general principles enshrined in the text." (footnote omitted)).

[93] *See* Posner, *supra* note 53 ("[O]riginalism has made significant inroads. The left wing of the Supreme Court long resisted originalism but has allowed itself to be sucked into it. . . . Meanwhile, many liberal law professors have thrown in the towel, endorsing originalism or a version of it but arguing that the original sources indicate liberal rather than conservative constitutional norms.").

[94] *See* STRAUSS, *supra* note 4, at 2 ("A living constitution is, surely, a manipulable constitution. If the Constitution is not constant—if it changes from time to time—then someone is changing it. And that someone is changing it according to his or her own ideas about what the Constitution should look like. The 'someone,' it's usually thought, is some group of judges. So a living constitution would not be the Constitution at all; in fact it is not even law any more. It is just a collection of gauzy ideas that appeal to the judges who happen to be in power at a particular time and

es treat the Constitution as a "blank slate," as an empty piece of paper on which they may write down their own value preferences and then pretend that they derived these values from the Constitution rather than imposed them upon it. Clearly, the Constitution does not say—and we would not want it to say—that whenever a case comes before the Court, each member of the Court should decide the case according to her own particular beliefs about what is fair, just, and good. Such broad discretionary authorization would wreak havoc. It would allocate far greater power to the judiciary than to the legislative branch and thereby upset the Constitution's carefully constructed separation of powers.[95]

Reply: Objection #2 is misguided. First, nowhere does the Dynamic View suggest or imply that judges or justices should impose their own subjective views on to the text. Again, it suggests that they should consult not their own particular preferences but rather precedent, legislative history, and the social, moral, and political norms around them.[96] Of course, this

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that they impose on the rest of us."); *id.* at 31 ("A proponent of the living Constitution is open to . . . withering objections . . . that the living Constitution is infinitely flexible and has no content other than the views of the person who is doing the interpreting. Living constitutionalism means that the restraints are off, and anything goes."); Scalia, *supra* note 1, at 44 ("[P]roponents of The Living Constitution [do not] *follow* the desires of the American people in determining how the Constitution should evolve. They follow nothing so precise; indeed, as a group they follow nothing at all."); *id.* at 46 ("For the evolutionist . . . every question is an open question, every day a new day. . . . Under the Living Constitution the death penalty may have *become* unconstitutional. And it is up to each Justice to decide for himself (under no standard I can discern) when that occurs.").

[95] *See* Obergefell v. Hodges, 135 S. Ct. 2584, 2629 (2015) (Scalia, J., dissenting) (complaining that the majority's decision to legalize gay marriage "is a naked judicial claim to legislative—indeed, *super*-legislative—power; a claim fundamentally at odds with our system of government. Except as limited by a constitutional prohibition agreed to by the People, the States are free to adopt whatever laws they like, even those that offend the esteemed Justices' 'reasoned judgment.' A system of government that makes the People subordinate to a committee of nine unelected lawyers does not deserve to be called a democracy. . . . [T]o allow the policy question of same-sex marriage to be considered and resolved by a select, patrician, highly unrepresentative panel of nine is to violate a principle even more fundamental than no taxation without representation: no social transformation without representation."); Scalia, *supra* note 1, at 40–41 ("One would suppose that the rule that a text does not change would apply a fortiori to a constitution. If courts felt too much bound by the democratic process to tinker with statutes . . . how much more should they feel bound not to tinker with a constitution. . . . It certainly cannot be said that a constitution naturally suggests changeability; to the contrary, its whole purpose is to prevent change—to embed certain rights in such a manner that future generations cannot readily take them away. . . . Neither the text of such a document nor the intent of its framers . . . can possibly lead to the conclusion that its only effect is to take the power of changing rights away from the legislature and give it to the courts.").

[96] *See supra* Part VI.

consultation will itself require interpretation.[97] But one's interpretation of the norms around her does not necessarily involve any subjective value-imposition.

Second, Objection #2 fundamentally assumes that a theory of constitutional interpretation cannot be legitimate if it either allows or encourages "outcome-determinative" reasoning—that is, reasoning that is designed to disguise the real reasons or motivations for the judge's decision. The outcome determines the reasoning rather than the reasoning the outcome. The latter is preferable to the former because only the latter involves a good-faith effort to interpret the Constitution. Whether or not this rejection of outcome-determinative reasoning is correct,[98] the Textualist is not really entitled to it in the first place and is therefore not in a position to dismiss the Dynamic View. The Textualist is not entitled to repudiate outcome-determinative thinking for two simple reasons: (a) this repudiation is not in the constitutional text and (b) the Textualist uses outcome-determinative thinking as well. Regarding (b), the entire theory of Textualism is itself mostly motivated by a single outcome: avoiding judicial legislation.[99]

Third, it is true that the Dynamic View's requirement of layered interpretation in conjunction with the fact that there is no such thing as a fully value- or perspective-neutral interpretation means that no judge's interpretation of the Constitution will be fully objective. But then the impossibility of pure objectivity is not just a problem for the Dynamic View. It is a problem for every other theory of interpretation as well—including Textualism and Originalism.[100] No theory of constitutional interpretation

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[97] *See* Scalia, *supra* note 1, at 45 ("What is it that the [Dynamic] judge must consult to determine when, and in what direction, evolution [of the Constitution] has occurred? Is it the will of the majority, discerned from newspapers, radio talk shows, public opinion polls, and chats at the country club? Is it the philosophy of Hume, or of John Rawls, or of John Stuart Mill, or of Aristotle? . . . [E]volutionists divide into as many camps as there are individual views of the good, the true, and the beautiful.").

[98] Louis Michael Seidman argues that no theory of constitutional interpretation can succeed unless it explicitly admits, if not embraces, the fact that judges routinely engage in politically motivated, outcome-determinative decision making. *See* SEIDMAN, *supra* note 21, at 10–11 ("Many skeptics have complained that [the] manipulability of constitutional doctrine means that judicial judgments are inevitably political. To the extent that one thinks of constitutional law as providing a politically neutral method of resolving our disputes, this criticism is on target. But the skeptics have failed to notice that this fact about constitutional argument can also be a virtue. . . . [T]here is a sense in which this theory of constitutional law is actually no more than a description of what we have been doing all along. . . . [M]y claim is that this characterization of constitutionalism shows the practice in its best, most defensible light.").

[99] *See supra* note 94 and accompanying text.

[100] *See* BREYER, *supra* note 8, at 124 ("'[S]ubjectivity' is a two-edged criticism, which the literalist himself cannot escape. The literalist's tools—language and structure, history and tradition—often fail to provide objective guidance in . . . truly

can fully escape the fact that a judge's subjective biases and prejudices will color her interpretations and therefore her opinions. So this argument cancels out. Because it applies to every plausible theory of constitutional interpretation, it cannot be used against any of them.[101]

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difficult cases . . . ."); *id.* at 127 ("[T]he 'textualist,' 'originalist,' and 'literalist' approaches themselves possess inherently subjective elements. Which linguistic characteristics are determinative? Which canons shall we choose? Which historical account shall we use? Which tradition shall we apply? And how does that history, or that tradition, apply now? Significantly, an effort to answer these questions can produce a decision that is not only subjective but also *unclear*, lacking transparency about the factors that the judge considers truly significant."); SEIDMAN, *supra* note 21, at 7 ("Judges regularly insist on the political neutrality of their role, but most ordinary citizens are not fooled. . . . It requires more faith than most people can muster to suppose that it is mere coincidence when Justice Antonin Scalia, a conservative Republican, regularly finds conservative principles embedded in the Constitution, while Justice Ruth Bader Ginsburg, a liberal Democrat, regularly discovers liberal principles lurking in the same document."); STRAUSS, *supra* note 4, at 17 (arguing that Justice Scalia's "fainthearted, or qualified, or sometime originalism"—that is, originalism except "when it leads to implausible results"—itself leads to the very problem that originalism is supposed to avoid: judges imposing their own values); *id.* at 20–21 ("When historical materials are vague or confused, as they routinely will be, there is an overwhelming temptation for a judge to see in them what the judge wants to see in them . . . . Time and again, judges—and academics, too—have found that the original understandings said pretty much what the person examining them wanted them to say. A central criticism of the idea of a living constitution is that it is too manipulable—that a living constitution amounts to substituting judges' own views for the Constitution itself. Originalism, it turns out, is vulnerable to the same criticism."); *id.* at 28–29 ("[Originalism] . . . does not confine judges or other constitutional interpreters. It leaves them free to decide cases based mostly on their own values. . . . Originalism, so understood, cannot even claim the one advantage it purports to have over living constitutionalism."); *id.* at 45–46 ("Originalism, as applied to the controversial provisions of the U.S. Constitution, is shot through with indeterminacy . . . . In the face of that indeterminacy, it will be difficult for any judge to sideline his strongly held views about the issue. But originalism forbids the judge from putting those views on the table and openly defending them. Instead, the judge's views have to be attributed to the framers, and the debate has to proceed in pretend-historical terms, instead of in terms of what is, more than likely, actually determining the outcome."); *id.* at 79 ("The usual [originalist] maneuver is . . . changing the level of generality . . . . [O]nce that kind of maneuver is allowed, originalists can justify anything, and the principal claim of originalists—that their approach, unlike living constitutionalism, really limits judges—becomes obviously false."); Ryan, *supra* note 24, at 1636 ("Justice Breyer is . . . correct that originalists have plenty of opportunity to be willful and to hide their willfulness by saying, essentially, 'the ratifiers made me do it.'").

[101] What's more, self-proclaimed Originalists often abandon Originalism when it does not lead them to the constitutional decisions that they prefer for policy or political reasons. *See* Chemerinksy, *supra* note 44 ("Even the justices who most advocate originalism abandon it when it does not serve their purposes. Justices Scalia and Thomas, for example, are adamantly opposed to affirmative action and simply choose to ignore that the original intent of the equal protection clause was to allow race-conscious programs to benefit minorities. The Congress that ratified the

Likewise, it cannot be argued against the Dynamic View that a judge might abuse it, that she might sneak her own personal prejudices or policy preferences into the Constitution under its cover, because every other theory of constitutional interpretation—including Textualism and Originalism—is subject to this kind of abuse. What Ronald Dworkin says with regard to his own "moral reading" of the Constitution applies to the Dynamic View as well: it "is a strategy for lawyers and judges acting in good faith, which is all any interpretive strategy can be."[102]

Finally, I have already argued that the Constitution leaves judges with no choice but to make assumptions that are not explicitly stated in the Constitution in order to interpret it.[103] Judges simply cannot follow the Constitution without seeking extra-textual guidance. To this extent, the Constitution does indeed force judges to become legislators of sorts, to *create* the law.[104] But this creative license should hardly give us cause for worry. Such creative license encourages judges to think and to justify their thinking—both good things. (I will further develop this point in the next Part.)

Moreover, this creative license labors under three constraints. The first constraint is that there is only so much room for creation in the first place. Judges do not simply declare that the law is whatever they want it to be; they do not just make it all up.[105] Instead, they must generally

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Fourteenth Amendment, however, adopted many such efforts."); Ryan, *supra* note 24, at 1625 ("The left has nipped at the heels of originalism, by pointing out that originalists like Justices Scalia and Thomas do not always practice what they preach." (footnote omitted)).

[102] DWORKIN, *supra* note 72, at 11.

[103] *See supra* note 85 and accompanying text.

[104] *See* Scalia, *supra* note 1, at 10 ("It is only in this century, with the rise of legal realism, that we came to acknowledge that judges in fact 'make' the common law, and that each state has its own.").

[105] *See* BREYER, *supra* note 8, at 18–19 ("A judge, when interpreting . . . open-ended provisions, must avoid being 'willful, in the sense of enforcing individual views.' A judge cannot 'enforce whatever he thinks best.' 'In the exercise of' the 'high power' of judicial review, says Justice Louis Brandeis, 'we must be ever on our guard, lest we erect our prejudices into legal principles.'" (citations omitted)); SEIDMAN, *supra* note 21, at 21 ("The indeterminacy critique runs up against the experiential reality that most judges feel constrained by constitutional doctrine. Once a background culture has been specified, it is simply not true that actors feel completely unconstrained when they follow rules." (footnotes omitted)); STRAUSS, *supra* note 4, at 36 ("The principal concern about living constitutionalism is that it amounts to giving a blank check to judges and other interpreters. But the common law has, for centuries, restrained judges; in fact, it restrains judges more effectively than originalism does."); Bartrum, *supra* note 65, at 16–17 ("[A] canonical text can[not] mean whatever one wants it to mean at any particular place and time. The practitioner must still use the text properly: she must follow the rules, and her usages must be understood and ratified within the relevant community, for her to make any legitimate assertion of constitutional meaning." (footnote omitted)); Ryan, *supra* note

choose between two alternatives, two different interpretations of whatever texts are in question (constitutional language, statutory language, precedents, etc.). These texts determine the boundaries of the decisions that the judges may issue.[106]

The second constraint is anticipated consequences for constitutional values and constitutional interpretation itself. As Justice Breyer says:

> I believe that when a judge candidly acknowledges that, in addition to text, history, and precedent, consequences also guide his decision-making, he is more likely to be disciplined in emphasizing, for example, constitutionally relevant consequences rather than allow-

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24, at 1636 ("It is a relief to see Justice Breyer striking back at the claim—made over and again by Justice Scalia and conservative politicians—that anyone who is not an originalist must be in favor of unprincipled decisionmaking[sic]. For too long, Justice Scalia has been allowed to paint a caricature of nonoriginalists as jurists who are dying to impose their personal preferences on an unwitting nation. It is about time that one of his colleagues called him on it. Justice Breyer is correct that nonoriginalists can strive to be restrained and consistent.").

[106] *See* BREYER, *supra* note 8, at 118–19 ("I would ask whether it is true that judges who reject literalism necessarily open the door to subjectivity. They do not endorse subjectivity. And under their approach important safeguards of objectivity remain. For one thing, a judge who emphasizes consequences, no less than any other, is aware of the legal precedents, rules, standards, practices, and institutional understanding that a decision will affect. He or she also takes account of the way in which this system of legally related rules, institutions, and practices affects the world."); *id.* at 124 ("Under [an interpretive approach that emphasizes consequences] language, precedent, constitutional values, and factual circumstances all constrain judicial subjectivity."); DWORKIN, LAW'S EMPIRE, *supra* note 12, at 246–50, 256–57 (suggesting that judges must carve a third route between unrestricted creativity and mechanistic rule-following, a middle passage that is bounded not only by the language and principles of precedent but also by the judge's "instincts," background knowledge, political convictions, and theory of political morality); STRAUSS, *supra* note 4, at 39–40 ("[E]ven when the outcome is not clear, and arguments about fairness or good policy come into play, the precedents will usually limit the possible outcomes that a judge can reach. . . . The judge might decide between those two options based on her ideas about good policy. But that is different from the judge simply enacting her policy views, because the precedents might (and, in this case, do) foreclose a wide range of more extreme outcomes, however appealing those outcomes might be to the judge. . . . In other words, even where the precedents are not decisive, and judgments about fairness or social policy come into play, they come into play only in the narrow range left open by the precedents."); Bartrum, *supra* note 46, at 189 ("[J]udges are, in fact, bounded in their decision-making by a complex and evolving body of interpretive norms . . . which define and legitimate their published opinions. . . . [I]n a very real sense, judges must speak fluently in our constitutional language, and opinions that depart to radically from the inherited interpreted norms (think here, perhaps, of *Dred Scott v. Sandford*) are very much like assertions offered in a foreign tongue. In truth, these evolving practical norms, built and adapted over centuries of lived democratic experience, better keep judges within the contours of our collected political wisdom than any external normative theory ever could." (footnote omitted)).

> ing his own subjectively held values to be outcome determinative. In all these ways, a focus on consequences will itself constrain subjectivity.[107]

Textualists are simply wrong to suggest that judges should not let anticipated consequences factor into their interpretations of the Constitution. Even if this point has some plausibility with respect to policy consequences,[108] it is not plausible with respect to constitutional consequences.

The third constraint is the *self-imposed* limitations that judges place on themselves from humility, respect for other perspectives, personal integrity, conscience, theoretical convictions, and concern for appearance, reputation, consistency, and historical legacy.[109] Judges know that, and how, they are supposed to justify their decisions, and few would risk violating any of these legal or self-imposed limits merely in order to "get one past" the American people.[110]

Objection #3: Many Textualists will still not be happy at this point. They will still not be convinced that Inferentialism or the Dynamic View is correct. And I suspect that they still will not be convinced because there is (at least) one lingering concern of theirs that still has not been addressed. This concern takes us back to the Universal Application Principle and the Right Answer Principle in Part II.

Again, the two principles together say that for any case that comes before the Court, there is a correct way to interpret the Constitution, and

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[107] BREYER, *supra* note 8, at 120; *see also* Maxeiner, *supra* note 69, at 22 ("The German system . . . practices textualism, but rejects its pure form and takes the poison of purposivism. It seeks to do justice in individual cases or to provide pragmatic solutions. One would expect that Germany would be [a] cesspool of renegade judges imposing their individual ideas of justice; yet the German system is not. To the contrary, it is known for separating policy and law, and stressing legal certainty.").

[108] *But see supra* note 69 and accompanying text.

[109] *See* BREYER, *supra* note 8, at 19 ("How, then, is the judge to act between the bounds of the 'willful' and the 'wooden'? The tradition answers with an *attitude* . . . of interpretation, or of the Constitution. . . . [I]t calls for restraint, asking judges to 'speak . . . humbly as the voice of the law.'"); *id.* at 37 ("The principle of active liberty—the need to make room for democratic decision-making—argues for judicial modesty in constitutional decision-making, a form of judicial restraint."); *id.* at 71 ("The nature of the law-revision problem together with the process of democratic resolution counsels a special degree of judicial modesty and caution. That is because a premature judicial decision risks short-circuiting, or preempting, the 'conversational' lawmaking process—a process that embodies our modern understanding of constitutional democracy."); *id.* at 119–20 ("[E]ach judge's individual need to be consistent over time constrains subjectivity. As Justice O'Connor has explained, a constitutional judge's initial decisions leave 'footprints' that the judge, in later decisions, will almost inevitably follow." (footnote omitted)).

[110] *See* STRAUSS, *supra* note 4, at 45 ("[B]ecause it is legitimate to make judgments about fairness and policy, in a common law system those judgments can be openly avowed and defended—and therefore can be openly criticized.").

this correct interpretation will yield a correct decision for the case in question.[111] I suspect that the Textualist is unhappy with Inferentialism because it seems to suggest the opposite—that is, that it opposes both principles.

Reply: If my hypothesis here about the Textualist is correct, then the Textualist is being a bit hypocritical. Given that Textualism implies a gappy Constitution, Textualism is in tension with both the Right Answer Principle and the Universal Application Principle—specifically, with the notion that the Constitution provides a *right* answer for *every* case that comes before it. What about the cases that fall into one of the many gaps, one of the many areas for which the Constitution fails to offer any explicit text? And even the cases that fall clearly into the space of a constitutional provision do not always, or even usually, lend themselves to clearly right answers. The text, or the correct application of the text, is often perfectly ambiguous between two different interpretations.[112]

Why might the Textualist think that Inferentialism is incompatible with the Right Answer Principle? The intuition underlying the Textualist's objection here is that the Inferentialist approach is saddled with the problem of *underdetermination.* According to the Textualist, there are many different ways in which to employ the Inferentialist approach. For any given case, different Inferentialists might very well choose to combine different constitutional provisions and to import different extratextual assumptions into their reasoning.[113] And there is no reason to think that one particular Inferentialist approach is better than another. So the Inferentialist approach in general underdetermines which particular interpretation should be adopted in any given case. It is equally compatible with a number of different interpretations. Because these different interpretations will lead to different outcomes in any given case, or at least the same outcome with different reasoning, it follows that none of these interpretations is uniquely correct, that there are no right answers on the Inferentialist approach to constitutional interpretation.

I offer four responses to this argument. First, Inferentialism is perfectly consistent with the Right Answer Principle. The Textualist is making the following false assumption:

> (10) The Right Answer Principle entails that if Inferentialism is correct, then there is only one correct Inferentialist approach to any given question of constitutional interpretation.

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[111] *See supra* note 12 and accompanying text.

[112] *See supra* notes 46 and 79 and accompanying text.

[113] Justice Harlan's concurrence in *Griswold v. Connecticut,* 381 U.S. 479, 499–502 (1965) (Harlan, J., concurring), provides a good example of an alternative Inferentialist defense of the right-to-privacy doctrine.

But we have no good reason to accept proposition (10). Instead, the Right Answer Principle may be perfectly compatible with the notion that there are a *number* of different yet equally correct Inferentialist approaches to the Constitution and therefore a *number* of different ways to arrive at the same decision for a given case. In other words, the Right Answer Principle may be perfectly compatible with the notion that the Constitution—specifically, its text, the Framers' intent, and the relevant background social, moral, and political norms—often *overdetermine* which decision is correct. If so, there is still one and only one right decision in any given case. It is just that this right answer can be reached by a number of different paths of reasoning. So correct constitutional reasoning may be multiple rather than singular.

Second, even if we were to concede proposition (10), the Textualist would conclude that this concession actually undermines Inferentialism. But this conclusion itself presupposes something else:

> (11) The correct theory of constitutional interpretation must be compatible with the Right Answer Principle.

It is not clear that proposition (11) is correct. It may at first seem that we must accept proposition (11) because of the way we speak. We often refer to "the meaning" of the Constitution or a constitutional provision as if there is only one. But not only is there is no good reason to think that any particular constitutional provision must have only one meaning. We have already seen good reason to think that many constitutional provisions most likely have multiple possible meanings. I am speaking once again of the provisions that contain open-ended, normative language. It is up to each justice and ultimately the Court itself—not necessarily the constitutional text itself or the structure of the Constitution—to determine which of these multiple possible meanings each provision ultimately ends up with.

One might wonder how I can so cavalierly dismiss the Right Answer Principle. After all, is not the overall project of constitutional interpretation just to find what the Constitution *really* means? In a word, the answer is no. There are three reasons. First, as I have just stated, it may very well be the case that not every constitutional provision has an objectively correct interpretation.

Second, even if every provision *did* have such a correct interpretation—call the right interpretation of any given provision "*RI*"—there is no guarantee that we could *discover RI*. And even if we did somehow obtain such a guarantee, this guarantee still would not be sufficient for the Right Answer Principle. In addition to this first guarantee that we could discover *RI*, we would also need a second guarantee that we could *know* that *RI* is the correct interpretation. In other words, it is not enough that we can discover *RI*. It must also be the case that we may *know* that we have discovered *RI*. Without this latter knowledge, our epistemic position would be analogous to the epistemic position of a person who has found

gold but cannot distinguish gold from fool's gold. Just as she has discovered gold without *knowing* that she has discovered gold (that is, without knowing that the substance that she has found is gold), we would be in the position of knowing *RI without knowing that we knew RI* (that is, without knowing that *RI* is the correct interpretation). And while there are objective tests that can distinguish between gold and fool's gold and therefore tests that can help an individual to *know* which exactly she has discovered, there are no objective tests that can help a judge to *know* which interpretation of the Constitution is objectively correct and therefore to *know that she knows* the correct interpretation.

Third, given that we may never know that we know what the Constitution really says, we really cannot expect the Court to deliver such "constitutional truths" to us. So instead of evaluating the Court on this basis, we should focus more on what we *do* know the Court *can* deliver—namely, constitutional *justification, arguments* in support of the knowledge claims that it purports to reach. In other words, we should base our evaluations of the Court more on the quality of its reasoning than on the presumed truth or falsity of the conclusions that it draws from its reasoning. We should ultimately seek from the Court not constitutional truth (if such there even be) but rather evidence that, whether the Court arrives at answers we like, it is genuinely grappling—genuinely struggling in good faith—with the constitutional text, American history, and plausible conceptions of our most deeply valued civic and political principles.[114]

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[114] *See* SEIDMAN, *supra* note 21, at 8–9 ("[A] constitution that unsettles creates no permanent losers. By destabilizing whatever outcomes are produced by the political process, it provides citizens with a forum and a vocabulary that they can use to continue the argument. . . . [A]n unsettled constitution helps build a community founded on consent by enticing losers into a continuing conversation. . . . Unsettlement does not promise losers that they will eventually get their way. It promises them only that they will have a continued opportunity to engage their opponents in a good-faith, open-ended discussion about what is to be done. . . . [I]t still makes sense to ask whether a particular form of constitutional law allows a community to live in peace by offering reasons that make sense to its members for why political divisions should not lead to a severing of ties."); *cf. Ideas: The Science of Morality-Part 2* (CBC RADIO BROADCAST Oct. 10, 2012), http://www.cbc.ca/player/play/2289397638:

> I think that there can be a direction to changes in moral thought that are not random . . . but people thinking and arguing and trying to justify their views. And some views stand up very well to this kind of clash, and other views get tossed out, if not by the individuals who hold them, then by their children or by their grandchildren. So I think that, certainly, something like moral progress is possible—that is, all people with many different values coming together and sorting out what they can all stand by and what's kind of parochial. And so, I do believe in moral progress. Whether or not there is any truly objective truth out there, I don't know. But I don't think that that's the most important thing.

VIII. CONCLUSION

My goal in this Article has been to determine whether there is a right to privacy in the Constitution. It might seem at first as though this goal may be satisfied merely by evaluating the kind of arguments that Justice Douglas offers in *Griswold*, which I summarized in Part IV. But things are not nearly so simple. Even if we accepted Justice Douglas's—or any other—arguments for the right-to-privacy doctrine, our task would not be finished. Despite all appearances, the right-to-privacy doctrine depends not only on these kinds of constitutional arguments but also on Inferentialism and the Dynamic View. No matter how strong Justice Douglas's or any other justice's arguments for the existence of a right to privacy in the Constitution might be, we still cannot accept these arguments unless we also accept these broader, underlying theories of constitutional interpretation.

Only when we recognize Inferentialism's superiority over Textualism and the Dynamic View's superiority over the Static View may we realize just how wrong Justice Scalia was about substantive due process. Whether *he* liked it or not, substantive due process, including a general right to privacy, *is* in the Constitution. Fortunately, this view has become so entrenched that Justice Scalia was not able to read it out of the Constitution and thereby return us to an era in which the government fails sufficiently to respect and protect individuals' dignity and autonomy. Substantive due process is here to stay. And that is a very good thing.

Justice Scalia[115] and Cass Sunstein[116] trace substantive due process all the way back to *Dred Scott v. Sandford*,[117] the infamous case in which the Court held that even free African-Americans were not citizens of the United States and therefore were not "entitled to all the rights, and privileges, and immunities, guarantied by [the Constitution] to the citizen[,]"[118] including the right to sue in federal court.[119] My response is that the "sins" of a previous Court are *not* necessarily visited upon a subsequent Court. The fact that a constitutional doctrine began with a poorly decided case does not necessarily make it a bad doctrine any more than the fact that the Constitution itself explicitly tolerated slavery[120]—and still

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[115] *See* Scalia, *supra* note 1, at 24.

[116] *See* SUNSTEIN, *supra* note 72, at 85.

[117] 60 U.S. 393 (1857).

[118] *Id.* at 403.

[119] *Id.* at 454.

[120] *See* U.S. CONST. art. 1, § 2, cl. 3 ("Representatives and direct Taxes shall be apportioned among the several States which may be included within this Union, according to their respective Numbers, which shall be determined by adding to the whole Number of free Persons, including those bound to Service for a Term of Years, and excluding Indians not taxed, three fifths of all other Persons."); U.S. CONST. art. 1, § 9, cl. 1 ("The Migration or Importation of such Persons as any of the States

does in the Thirteenth Amendment (for criminals)[121]—makes it a bad document.

now existing shall think proper to admit, shall not be prohibited by the Congress prior to the Year one thousand eight hundred and eight, but a Tax or duty may be imposed on such Importation, not exceeding ten dollars for each Person."); U.S. CONST. art. 4, § 2, cl. 3 ("No Person held to Service or Labour in one State, under the Laws thereof, escaping into another, shall, in Consequence of any Law or Regulation therein, be discharged from such Service or Labour, but shall be delivered up on Claim of the Party to whom such Service or Labour may be due.").

[121] 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.").