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## The Gravitational Force of Originalism

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## THE GRAVITATIONAL FORCE OF ORIGINALISM

RANDY E. BARNETT\*

**ABSTRACT:** In Part I of this essay, prepared for the Fordham conference on “The New Originalism and Constitutional Law,” I describe four aspects of the New Originalism: (1) The New Originalism is about identifying the original public meaning of the Constitution rather than the original framers intent; (2) The interpretive activity of identifying the original public meaning of the text is a purely descriptive empirical inquiry; (3) But there is also a normative tenet of the New Originalism that contends that the original public meaning of the text should be followed; (4) Distinguishing between the activities of interpretation and construction identifies the limit of the New Originalism, which is only a theory of interpretation. In Part II, I then discuss how originalism can influence the outcome of such cases as *D.C. v. Heller*, *McDonald v. Chicago*, and *NFIB v. Sebelius*. I suggest that, so long as there are justices who accept the relevance of original meaning, originalism can exert a kind of “gravitational force” on legal doctrine even when, as in *McDonald* and *NFIB*, the original meaning of the Constitution appears not to be the basis of a judicial decision.

### INTRODUCTION

The New Originalism has made quite a splash since my essay, “An Originalism for Nonoriginalists” appeared in 1999.<sup>1</sup> To a remarkable degree constitutional scholars in recent years, especially younger ones, have grasped its basic tenets even if they do not find themselves in complete agreement with the approach. In this essay, I will summarize the main features of the New Originalism and explain why originalism has proven to be significant in litigation, even in cases in which original meaning is not being debated or seems wholly irrelevant.

In Part I, I describe what is distinctive about the New Originalism. First, the New Originalism is about identifying the original public meaning of the Constitution and not the original framers intent. The New Originalism stands for the proposition that “the meaning of a written constitution should remain the same until it’s properly changed.” Second, I will explain that the interpretive activity of identifying the

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<sup>1</sup>Randy E. Barnett, *An Originalism for Nonoriginalists*, 45 LOY. L. REV. 611 (1999).

original public meaning of the text is an empirical inquiry. Third, I want to discuss the normative justification for following the original public meaning of the text. Fourth and finally I want to identify the *limits* of originalism by distinguishing two distinct activities: First, the activity of “constitutional interpretation” that seeks to identify the communicative content of the text and, second, the activity of “constitutional construction” that seeks to supply the implementing rules and procedures by which this content can be applied to particular cases and controversies.

Then, in Part II, I discuss how and why originalism seems to influence the outcome of cases in which it appears to be playing no role – cases such as the constitutional challenge to the Affordable Care Act. In this Part, I suggest that originalism has a kind of “gravitational force” that affects legal doctrine in significant ways. Or at least that this force can affect such doctrine even when the original meaning of the Constitution appears not to be the basis of a judicial decision provided there are justices who accept the relevance of originalism.

## I. WHAT IS THE NEW ORIGINALISM?

### A. *Original Public Meaning v. Original Framers’ Intent*

The Old Originalism purported to interpret the text of the Constitution according to the intentions of its framers. This approach was subject to two objections that I, for one, found persuasive: The first was the practical. How do you systematically identify what a diverse group of people thought about any particular issue? As a result of this problem of “collective intent,” and because new constitutional cases typically involved factual situations unknown to the framers, old originalists typically engaged in a hypothetical and counter-factual inquiry into how the framers *would have* addressed an issue had they thought of it. Back before I was an originalist, I called this “channeling the framers” – as in “Oh Framers, would you think the thermal imaging of a house to detect increased heat generated by marijuana cultivation is a ‘search’?”<sup>2</sup>

The second concern was normative. Why exactly should we the living, here today, be bound by the framers intentions? I called this the “Framers as Wardens” model, but it was more commonly called the “dead hand” problem – as in “what

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<sup>2</sup>See Randy E. Barnett, *The Relevance of Framers Intent*, 19 HARV. J. OF L. & PUB. POL’Y 403, 405 (1996) (discussing “channeling the framers”).

justification is there for us to be ruled by the dead hand of the past?”<sup>3</sup> For these reasons, I and others declined to become originalists.

Then along came the New Originalism.<sup>4</sup> Rather than attempt to identify some collective intentions of the framers, the New Originalism looked to identify the original public meaning of the words of the text. In other words, it seeks the meaning actually communicated to the public by the words on the page. This is like the objective or “reasonable” meaning of a contract at the time of its formation. Such an inquiry looks to three different sources of communicative content of language:

First it looks to the *semantic meaning* of the words on the page.<sup>5</sup> For example, what was the generally accepted meaning of the word “commerce” at the time of its enactment? Did the word “arms” in the Second Amendment refer to weapons, or did it refer to the limbs to which our arms are attached?

Second, it looks to *constitutional implicature*, or what the semantic meaning of the Constitution implies in fact.<sup>6</sup> For example, the Ninth Amendment says that “The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.”<sup>7</sup>

For the sake of argument, assume that the historical evidence establishes that the original semantic meaning of “rights ... retained by the people” was natural rights, by which was meant liberty rights.<sup>8</sup> Even so, the Ninth Amendment is literally just a rule of construction that expressly enjoins one, and only one, particular constitutional construction: any claim that, because some rights have been

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<sup>3</sup>*Id.* at 403-407 (describing the model of “framers as wardens”).

<sup>4</sup>The phrase “New Originalism” was coined by Keith Whittington, one of its principal architects. See Keith E. Whittington, *The New Originalism*, 2 GEO. J.L. & PUB. POL’Y 599 (2004).

<sup>5</sup>The scholar who did the most to stress the “semantic” aspect of originalism was Lawrence Solum. See e.g. Lawrence B. Solum, *Semantic Originalism* (November 22, 2008). Illinois Public Law Research Paper No. 07-24. Available at SSRN: <http://ssrn.com/abstract=1120244> or <http://dx.doi.org/10.2139/ssrn.1120244>.

<sup>6</sup>See Randy E. Barnett, *The Misconceived Assumption about Constitutional Assumptions*, 103 NW. U. L. REV. 615, 619-22 (2009) (describing the communicative phenomenon of constitutional implicature).

<sup>7</sup>See *id.* at 622-26 (explaining implicature in the context of the Ninth Amendment). The next several paragraphs summarizes the analysis presented there.

<sup>8</sup>See Randy E. Barnett, *The Ninth Amendment: It Means What it Says*, 85 TEX. L. REV. 1 (2006); and Randy E. Barnett, *Kurt Lash’s Majoritarian Difficulty*, 60 STAN. L. REV. 937 (2008).

enumerated, another unenumerated right may be denied or disparaged. Or, to put it another way, a right that is not enumerated may not be denied or disparaged *on the grounds that* other rights were enumerated. (By the way, I think this is exactly what Footnote Four of *U.S. v. Carolene Products* does.<sup>9</sup>)

The Ninth Amendment does not actually expressly state that there *are* “other rights” and that these other rights may not be denied or disparaged.<sup>10</sup> But the original meaning of the Ninth Amendment implies more than what it expressly says. In particular, it implies, first, that there are rights that are retained by the people and, second, that these rights should not be denied or disparaged. The rule of construction included in the Constitution would make no sense – and its presence in the first ten amendments would be inexplicable – except on the assumption that there *are* rights retained by the people that ought not be denied or disparaged. Taken together, then, these two implied propositions enjoin the denial or disparagement of natural rights, even where such a denial is not being justified on the grounds that other rights were enumerated. This is the reason why so many who read the text of the Ninth Amendment think it is saying exactly this. Because it *is*, just not expressly.

Of course, such a meaning might have been communicated expressly rather than by implication. To see how, consider the following provision that was proposed by Representative Roger Sherman as a member of the House Select Committee tasked with drafting amendments that became what we now call the Bill of Rights: “The people have certain natural rights which are retained by them when they enter into Society. . . . Of these rights therefore they Shall not be deprived by the Government of the united States.”<sup>11</sup> Although Sherman’s proposal is not what the

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<sup>9</sup>See *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938) (“[t]here may be narrower scope for operation of the presumption of constitutionality when legislation appears on its face to be within a *specific prohibition* of the Constitution, such as those of the *first ten amendments*....” [emphases added]).

<sup>10</sup>In this sense, a more accurate, though less pithy, title for my *Texas Law Review* article, *supra* at note 8, would have been: “The Ninth Amendment: It Means What it Says Expressly and What it Implies in Fact.” The point of the concept of implicature is that one is really “saying” what is implicated, in the sense of actually communicating the unexpressed message.

<sup>11</sup>*Roger Sherman’s Draft of the Bill of Rights*, in RANDY E. BARNETT, 1 THE RIGHTS RETAINED BY THE PEOPLE: THE HISTORY AND MEANING OF THE NINTH AMENDMENT 351 (1989). The omitted portion of Sherman’s proposal (indicated by the ellipses) gave a nonexclusive list of examples of these individual natural “retained” rights:

Such are the rights of Conscience in matters of religion; of acquiring property, and of pursuing happiness & Safety; of Speaking, writing and publishing their Sentiments with decency and freedom; of peaceably assembling to consult their common good, and of applying to Government by petition or remonstrance for redress of grievances.

Ninth Amendment eventually said expressly, the words of the Amendment imply to a normal speaker of English both the existence of natural rights that are retained by the people and an injunction against the deprivation of those rights, while making a further point about how *not* to read the Bill of Rights. In other words, Sherman's proposal is part of the original—implied-in-fact—meaning of the Ninth Amendment. Or so I contend.

Finally, to ascertain the original public meaning of the text, the New Originalism looks to the *publicly available communicative context* of these words to resolve problems of ambiguity.<sup>12</sup> For example, when Article IV empowers the government of the United States “to . . . protect . . . [every state] . . . against domestic violence,”<sup>13</sup> the publicly available context reveals this to be a reference to riots not spouse abuse. Publicly available context might also explain why, although the Constitution does not expressly reference slavery as a purely semantic matter, the public would know that the words “other persons” in the Three Fifth's Clause of Article I, Section 2 was a reference to slaves.<sup>14</sup>

So my first point about the New Originalism is that it seeks the original public meaning of the text rather than the original framers intent. This means that the New Originalism is more practical than the old originalism insofar as it seeks to establish an empirical fact about the objective meaning of the text at a particular point in time, rather than a *counterfactual* reconstruction of the subjective intentions of an individual or group.

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*Id.*

<sup>12</sup>See, e.g., Lawrence B. Solum, *Originalism and Constitutional Construction*, \_\_ Fordham L. Rev. \_\_, \_\_ (2013) (“Public meaning Originalists believe that the communicative content of the constitutional text is fixed at the time of origin by the conventional semantic meaning of the words and phrases in the context that was shared by the drafters, ratifiers, and citizens.”).

<sup>13</sup>U.S. CONST. ART. IV, Sec. 4 (“The United States shall guarantee to every State in this Union a Republican Form of Government, and shall protect each of them against Invasion; and on Application of the Legislature, or of the Executive (when the Legislature cannot be convened), against domestic Violence.”).

<sup>14</sup>Although some “constitutional abolitionists,” such as Lysander Spooner, argued to the contrary, most others, like Salmon P. Chase, accepted the contextual evidence of original public meaning. See Randy E. Barnett, *Whence Comes Section One? The Abolitionist Origins of the Fourteenth Amendment*, 3 J. LEG. ANALYSIS 165 (2011); Randy E. Barnett, *From Antislavery Lawyer to Chief Justice: The Remarkable and Largely Forgotten Career of Salmon P. Chase*, 63 CASE WESTERN L. REV. (forthcoming).

B. *Originalism's Descriptive Claim: Identifying Original Public Meaning is an Empirical Inquiry*

Which brings me to my second point about the New Originalism. It seeks to discover an empirical fact about the world.<sup>15</sup> Because we are so accustomed to thinking that our choice of interpretations is normative – which in a sense it is – it is important for me to stress that the New Originalism seeks to identify what a reasonable speaker of English would have understood the words of the text to mean at the time of its enactment. This is as much an empirical inquiry as it would be to ascertain what the words I am *now* using mean *today*.

When we choose to use language, the meaning of our words is determined by the social practice or convention that is language. We can hold whatever private idiosyncratic meaning of words we may wish in our minds. But unless we disclose our idiosyncratic meanings to others – or the communicative context suggests otherwise – the words we choose to use will convey the conventional meaning that ordinarily attaches to these words. So “yes” ordinarily means *yes* to a normal speaker of English, and “no” means *no*, despite our secret desire or wish that “yes” means *no*, or perhaps even that “yes” means *yellow*.

This is important to keep in mind because the empirical nature of the inquiry entails that it can potentially be resolved by appeals to evidence. This is not to say that the objective meaning of words is *always* discoverable. Sometimes there are ambiguities in linguistic usage that cannot be resolved. But if language is to work, this is likely to be a relatively rare occurrence. And, more importantly, when confronting conflicting interpretive claims about meaning, there is (à la Gertrude Stein) a *there* there potentially to resolve the conflict.

When faced with whether “domestic violence” in Article IV refers to riots or spouse abuse, or whether the word “arms” in the Second Amendment refers to weapons or the limbs to which our hands are attached, we are making a claim about reality, not merely a statement of our normative preferences. This is the reason why so much of the Constitution, such as how many senators are allotted to each state, is so *uncontroversial*. The objective original public meaning of what Sandy Levinson has called the “hard-wired” parts of the Constitution is simply so clear that its meaning can rarely even be questioned.<sup>16</sup>

Given the empirical nature of ascertaining original public meaning, the New Originalism ought to be practiced more rigorously than was the old originalism.

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<sup>15</sup>It was Larry Solum’s seminal work on “semantic originalism” that first made this point so clearly. *See* Solum, *supra* note 5.

<sup>16</sup>*See, e.g.,* SANFORD LEVINSON, OUR UNDEMOCRATIC CONSTITUTION: WHERE THE CONSTITUTION GOES WRONG (AND HOW WE THE PEOPLE CAN CORRECT IT) 107 (2008)

Historians, for example, were often critical of originalist scholarship for “cherry-picking” quotes to support one’s views, so that “I say Madison said X, you say Hamilton said Y,” now what? Some anti-originalist historians also objected that intentions are just too hard to identify with enough specificity to resolve a current case or controversy – though this has not prevented these same nonoriginalist historians from filing amicus briefs asserting their own opinions about the original intentions behind, say, the right to keep and bear arms, or the power to regulate commerce among the several states.

In contrast, establishing the semantic meaning of the words in the text, given the publically available context, requires a survey of relevant usage. The search for original public meaning should be as systematic and comprehensive as possible with respect to any source one surveys, reporting deviant as well as predominate usage. For example, in my article on the original meaning of the Commerce Clause in the *University of Chicago Law Review*,<sup>17</sup> I surveyed *every* use of the term “commerce” at the Philadelphia convention, the Federalist Papers, and the ratification debates. Then, in a sequel in the *Arkansas Law Review*,<sup>18</sup> I added a comprehensive survey of *all* 1500-plus uses of the term “commerce” in the *Pennsylvania Gazette* over an 85 year period. I found that, contrary to my expectation, usage of the word “commerce” was remarkably uniform.

We are searching for an empirical fact: What information would these words on the page have conveyed to the reasonable speaker of English in the relevant audience at the time of enactment? In this inquiry, the linguistic usage by opponents as well as proponents of the Constitution is relevant, as are even private letters.

### *C. Originalism’s Normative Claim: We Should Follow Original Meaning*

Third, having stressed that the original public meaning is an empirically objective fact, I now want to acknowledge that the New Originalism does *also* make a *normative* claim and it is this: the original meaning of the text provides the law that legal decision makers are bound by or *ought* to follow. This *is* a normative and not a description claim, which then poses the normative question: Just why should we follow the communicative content of the Constitution at the time of its enactment?

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<sup>17</sup>See Randy E. Barnett, *The Original Meaning of the Commerce Clause*, 68 U. CHI. L. REV. 101 (2001).

<sup>18</sup>See Randy E. Barnett, *New Evidence of the Original Meaning of the Commerce Clause*, 55 ARK. L. REV. 847 (2003)



New Originalists do not all give the same answer to this question,<sup>19</sup> so let me briefly summarize mine. I start with the proposition that the Constitution was put in writing so it could provide *the law that governs those who govern us*. A written constitution cannot serve this purpose if the very people who are to be governed by it can themselves, alone or in combination, alter the meaning of the constraints imposed upon them. None of us can alter the meaning of the statutes or regulations imposed upon us without going through the amendment process, and neither can our rulers, who are supposed to be our agents.

As John Marshall wrote in *Marbury v. Madison*:

The powers of the Legislature are defined and limited; and that those limits may not be mistaken or forgotten, the Constitution is written. To what purpose are powers limited, and to what purpose is that limitation committed to writing, if these limits may at any time be passed by those intended to be restrained?<sup>20</sup>

But you don't have to take John Marshall or my word on the subject. The Supremacy Clause of the Constitution in Article VI provides that "*This Constitution . . . shall be the supreme law of the land.*"<sup>21</sup> For present purposes, of greatest importance is the reference to "*this Constitution.*" This is a direct reproach to those who think that "the Constitution" is a broader concept, which may or may not include the text of the written constitution. No, the Constitution that is the supreme law of the land is *this one*, the written one, not a constitution provided by the Supreme Court of the United States.

The Supremacy Clause then expressly says that "the judges in every state *shall be bound* thereby," which means that the text of the Constitution is the "law of the land" that binds state judges[, who under the original Constitution were the only lower courts to consider federal question cases unless and until Congress established inferior federal courts]. Article VI then goes on to say more about who is bound by

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<sup>19</sup>Keith Whittington, for example, grounds his commitment to original meaning on popular sovereignty. See KEITH E. WHITTINGTON, CONSTITUTIONAL INTERPRETATION: TEXTUAL MEANING, ORIGINAL INTENT, AND JUDICIAL REVIEW 110-159 (1999). My own views on popular sovereignty have evolved as I discovered the concept of individual popular sovereignty that existed at the time of the Founding. See Randy E. Barnett, *The People or the State? Chisholm v. Georgia and Popular Sovereignty*, 93 VA. L. REV. 1179 (2007). As I intend to explain in the future, I now think that popular sovereignty is entirely consistent with grounding the normative basis for originalism on the protection of natural rights.

<sup>20</sup>*Marbury v. Madison*, 5 U.S. 137, 176 (1803) (Marshall, C.J.).

<sup>21</sup>U.S. CONST., Art. VI.

“this Constitution”: “The Senators and Representatives before mentioned, and the members of the several state legislatures, and all executive and judicial officers, both of the United States and of the several states, shall be bound by oath or affirmation, to support *this Constitution*.”<sup>22</sup>

So *this Constitution* is the law that governs those who govern us. And this Constitution cannot serve this purpose of those who are supposed to be governed by it – including federal and state judges – can, on their own, change the rules that apply to them.

Indeed, one succinct way to define the New Originalism is the proposition noted above in the Introduction: that the express and implied public meaning of the words on the page *should remain the same until properly changed*. And the proper way to change “this Constitution” is provided in Article V. Judges are not allowed to update the text of the Constitution by changing the meaning it had at the time of enactment.

Let me conclude this section by noting that, to the extent we are engaging in a normative debate about how we ought to interpret the Constitution, the burden of persuasion does not rest solely on originalists. Nonoriginalists should also be able to articulate how they think “this Constitution” should be interpreted *and why*. For example, just why do *they* think we are stuck with two Senators per state notwithstanding that so much has changed since the Founding, including views of democracy and the need for one-man one-vote. On *their* theory of interpretation, why can’t judges just update the number of Senators each state gets? To paraphrase what Jeff Foxworthy says about rednecks, when a nonoriginalist undertakes to answer this question seriously, in the end, he or she just might be a New Originalist.

#### D. *The Limits of Originalism: Interpretation v. Construction*

Having insisted that the meaning of “this Constitution” is the publicly available meaning at the time of enactment, I wish now to stress that the New Originalism is then far more modest than the old originalism about the amount of information actually conveyed by the words on the page – even when broadened to include publicly available context and constitutional implicature. The New Originalism takes seriously the distinction between *ambiguity* and *vagueness* of language.<sup>23</sup>

Language is *ambiguous* when it has more than one sense. When one says “this feather is light,” one might be referring to its weight or one might be referring

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<sup>22</sup>*Id.*

<sup>23</sup>This section summarizes the analysis presented in RANDY E. BARNETT, RESTORING THE LOST CONSTITUTION: THE PRESUMPTION OF LIBERTY 89-130 (2004).

to its color. But, unless one is being poetic, one does not ordinarily mean both at the same time. In contrast, language is *vague* insofar as it has a core meaning that is clear, but a penumbral meaning where it may not be clear whether or not it applies to a particular object. So a white feather is clearly a light feather, and a black feather is clearly not. But how dark a shade of grey a feather must be before we cease calling it light and start calling it dark is not always clear.<sup>24</sup>

The New Originalism claims that, except for some special cases, ambiguity can usually be resolved by reference to evidence of context. So context makes clear that “arms” in the Second Amendment refers to weapons not the limbs to which our hands are attached; “domestic violence” refers to riots not spouse abuse. With respect to vagueness, however, the original meaning of the text can run out – by which I mean, the text simply does not specify whether a particular item is in or out. For example, whether a particular search is “reasonable” or a particular punishment is “cruel.”

When original meaning runs out, constitutional “interpretation” strictly speaking is over, and some new *non*interpretive activity must supplement the information revealed by interpretation. New Originalists refer to this activity as “constitutional construction,” as distinct from “constitutional interpretation,”<sup>25</sup> but it does not matter what labels one applies to distinguish these two activities so long as we recognize that they are two *different* activities.

For present purposes, the most important thing to note about constitutional construction is that, while the activity of construction might be constrained by the original meaning of the text, the activity of construction is needed precisely when that *communicative meaning is not sufficiently determinate to dictate a unique application*, so extra guidance must be supplied by some nonoriginalist methodology.

By adopting the interpretation-construction distinction, the New Originalism frankly acknowledges that the text of “this Constitution” does not provide definitive answers to all cases and controversies that come before Congress or the courts. In this sense, the framers and ratifiers of the Constitution locked some things into their text, and delegated other matters to future decision makers. While the Constitution is the law that governs those who govern us, as we all know *constraining* government officials was not its only purpose; the Constitution was enacted also to *empower* them. The vague terms in the Constitution empower legislatures and judges to put flesh on the bones of the text, *provided they don’t break any of the bones*. For example, although the Constitution says nothing about “time, place, and manner”

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<sup>24</sup>See E. Allan Farnsworth, “*Meaning*” in the Law of Contracts, 76. YALE L.J. 939, 953-56 (1967) (distinguishing linguistic ambiguity from vagueness).

<sup>25</sup>This distinction and terminology was first introduced into the discussion of originalism by Keith Whittington. See WHITTINGTON, *supra* note 19, at 6-7.

regulations of speech, this body of constructed doctrine is an effort to flesh out the contours of the rights of freedom of speech, press and assembly. Devising doctrine to effectuate what this Constitution says does not violate a judge's oath, it fulfills it.

Because the New Originalism is a theory of constitutional interpretation, how constitutional construction is to be done is beyond the scope of originalism, except to note that a construction is *improper* if it contradicts or undercuts what this Constitution *does* say. So originalists can and do disagree on how extra-originalist constitutional construction is to be done. This disagreement is often informed by what each thinks makes a constitution legitimate and binding. So those who rest constitutional legitimacy on the "consent of the governed" might take one approach to construction, while those who – like me – rest constitutional legitimacy on effectively protecting the rights retained by the people might take another.

But, this open-endedness notwithstanding, I want to stress that the New Originalism still has bite. Despite the fact that the original meaning of the text may sometimes or even often be "underdeterminate," this does not entail that it is wholly indeterminate. The recent dispute between "living originalist" Jack Balkin and me about the meaning of "commerce" in the Commerce Clause illustrates that it matters a great deal whether the original meaning of "commerce" was the trade or transportation of persons and things from one place to another, as I believe the evidence shows; or "social interaction," as Jack contends.<sup>26</sup> And the fact Balkin and I may disagree does not refute the claim that there was a fact of the matter we are seeking to establish by resorting to evidence of usage. To repeat, with the New Originalism, there is a *there* there. Interested third parties can read my articles, then read Jack's, then read my critique of his use and omission of evidence, then read his reply. They can then reach their own conclusions about who is right.

## II. THE GRAVITATIONAL FORCE OF ORIGINALISM

Of course, the New Originalism has developed a lot on the past fifteen years, and continues to develop further. My goal in Part I was to provide a concise and accessible overview of the current state of the art. But to this some may respond, "So what?" Courts pay very little attention to original meaning, it might be said, and even the conservatives on the Court seem little inclined to discuss it, much less adhere to it. One response to this reaction is simply that it is far too court- or litigation-centric; one's view of constitutional interpretation should not be so dependent on what judges may or may not think, or how they write their opinions.

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<sup>26</sup>Compare JACK BALKIN, LIVING CONSTITUTIONALISM 138-82 (2012) (claiming that "commerce" originally meant "interaction" at the time of enactment); with Randy E. Barnett, *Jack Balkin's Interaction Theory of "Commerce,"* 2012 ILL. L. REV. 623 (denying that "commerce" meant "interaction" at the time of enactment).

Originalism claims to be the right way to read the Constitution for whoever cares to read the Constitution accurately, be they legislators, judges, or citizens. If courts do not adhere to the original meaning of the Constitution when they should, then originalism serves the important purpose of providing a basis for normatively critiquing their failure.

In this Part, however, I want to address this challenge on its own terms by explaining why originalism does matter to courts and in litigation. My point is simple and stems from the description of the New Originalism that I provided in Part I. Originalism matters when lower courts, but especially when the Supreme Court, are engaged in constitutional interpretation, properly limited to discussing the meaning of the text of the Constitution.

One reason why this seems rare, is that 99.9% of constitutional cases, the courts are not engaged in constitutional interpretation but are, instead, engaged in interpreting the meaning – perhaps even the original meaning – of its previous decisions or doctrines. In other words, because in 99.9% of constitutional cases, courts are engaged in constitutional construction, they pay little heed to the text, and how it should best be interpreted.

Once one understands the descriptive distinction between the activities of interpretation and construction, and acknowledges that originalism is only a method of interpretation, it becomes easy to see why the criticism that originalism is generally ignored by courts is very wide of the mark. When courts, and especially the Supreme Court, *are* engaged in interpretation strictly speaking, originalism assumes center stage.

#### *A. Writing on a Blank Slate: D.C. v. Heller*

Consider *District of Columbia v. Heller*.<sup>27</sup> Prior to *Heller*, the Supreme Court had discussed the meaning of the Second Amendment at any length just once before, in the ambiguous 1939 case of *Miller v. U.S.*<sup>28</sup> Although I believe that *Miller* was entirely consistent with interpreting the original. So, when the Supreme Court finally decided to take up the issue in *Heller*, there was no precedent that clearly dictated the result. Consequently, the justices were pretty much writing on a clean slate.

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<sup>27</sup>*District of Columbia v. Heller*, 554 U.S. 570 (2008).

<sup>28</sup>*United States v. Miller*, 307 U.S. 174 (1939). Although I believe that *Miller* was entirely consistent with interpreting the original meaning of the Second Amendment as protecting an individual right to arms, gun control proponents managed to sow enough doubt over the meaning of this opinion that we might consider it to be ambiguous. Indeed, until the 2001 case of *United States v. Emerson*, 270 F.3d 203 (5th Cir. 2001), every lower federal appellate court found that *Miller* had adopted a collective rights reading of the amendment.

Moreover, since the 1980s, a substantial body of scholarship had developed examining the original meaning of the Amendment. And, the politics of the Second Amendment was such that the Court could reach either decision without bringing down the pillars of the temple.

So the default position of the justices was to decide on the basis of the original meaning of the Second Amendment. The five in the majority explicitly adopted an “original public meaning” approach to the text, carefully parsing the sentence, clause by clause, word by word. “In interpreting this text,” wrote Justice Scalia, “we are guided by the principle that ‘[t]he Constitution was written to be understood by the voters; its words and phrases were used in their normal and ordinary as distinguished from technical meaning.’”<sup>29</sup> He then made it clear that “[n]ormal meaning may of course include an idiomatic meaning, but it excludes secret or technical meanings that would not have been known to ordinary citizens in the founding generation.”<sup>30</sup>

Justice Stevens’s dissenting opinion was more ambiguous. On the one hand he attempted to refute the original public meaning analysis of Justice Scalia.<sup>31</sup> But from this he then affirmatively appealed to original framers intent.<sup>32</sup> Ironically, most of the historians and law professors who filed briefs on behalf of the government based their arguments on original framers intent, seemingly oblivious to the powerful left-critique of this version of originalism in the 1980s that led to its abandonment by most originalists.<sup>33</sup> Apparently not really understanding the original public meaning approach, or the interpretation-construction distinction, their originalist analysis, along with Justice Stevens, was unresponsive to the New Originalist analysis of the majority.

This was reminiscent of the old joke about how *not* to plead in the alternative in criminal cases: “Ladies and Gentlemen of the jury, my client who sits here before

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<sup>29</sup>554 U.S. at 576 (quoting *United States v. Sprague*, 282 U. S. 716, 731 (1931) ).

<sup>30</sup>*Id.* at 576-77. *See also id.* at 614, (post-Civil War debates “do not provide as much insight into its original meaning as earlier sources.”); and *id.* at 625 “We conclude that nothing in our precedents forecloses our adoption of the original understanding of the Second Amendment. ”).

<sup>31</sup>*See, e.g., id.* at 649 (Stevens, J. dissenting) (“The stand-alone phrase ‘bear arms’ most naturally conveys a military meaning unless the addition of a qualifying phrase signals that a different meaning is intended.”).

<sup>32</sup>*See id.* at 667 n. 33, (“what is striking about the Court’s discussion is its failure to refute Oliver’s description of the meaning of the Amendment or the intent of its drafters.”).

<sup>33</sup>*See* Brief of *Amici Curiae* Jack N. Rakove, Saul Cornell, David T. Konig, William J. Novak, Lois G. Schwoerer et al. in Support of Petitioners, *District of Columbia v. Heller*, 554 U.S. 570 (2008) (No. 07-290).

you did not commit this crime; some one else did it. But if he *did* commit it, he was insane at the time.” So, originalism is to be rejected because it is a fools errand to reconstruct the collective intentions of those who framed, or perhaps those who ratified, the original Constitution, much less the Congress who proposed the Second Amendment and the state legislators who voted to ratify it. But, as it happens, historians can offer their expert scholarly opinions that the right protected was a collective right of states to have a militia, or an individual right to bear arms in a militia, or whatever.

*Heller* represents a clear case of the “gravitational force” of originalism.<sup>34</sup> Not only did the five justices in the majority join Justice Scalia’s explicitly originalist opinion, but Justice Stevens never disputed that this was an appropriate basis to decide the case. He merely purported to disagree with the originalist conclusions of the majority. Though a bit more equivocal, Justice Breyer joined the opinion of Justice Stevens, and purported to supplement it with an analysis of the proper scrutiny to be used to evaluate gun laws. (Justice Breyer’s approach in dissent has been well received by lower courts, which will necessitate a return engagement to the Supreme Court.)

This is not to say that Justice Scalia’s opinion was without any flaws from an originalist perspective. While his textual analysis was pretty state of the art, he then qualified his conclusion in a much-noted passage in which he writes:

Although we do not undertake an exhaustive historical analysis today of the full scope of the Second Amendment , nothing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms.<sup>35</sup>

I agree this passage is unsatisfactory. Why exactly are these laws all right under the original meaning of the Amendment? It just seems ad hoc.

Without delving too deeply into this specific issue, let me offer the following diagnosis of the problem. For all the importance of his role in developing and

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<sup>34</sup>By “gravitational force,” I am not making a Dworkinian claim about the analytic force or pull of legal reasoning. Cf. RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* 121 (1977) (If Hercules “classifies some event as a mistake, then he does not deny its specific authority but he does deny its gravitational force, and cannot consistently appeal to that force in other arguments”). Instead, I am making a socio-cultural claim about the influence of originalist interpretation on even nonoriginalist doctrinal construction. But the ideas are similar.

<sup>35</sup>554 U.S. at 626-27.

promoting original public meaning originalism, Justice Scalia simply has not internalized the distinction between interpretation and construction. Indeed, recently he made clear his objection to making such a distinction.<sup>36</sup>

But this stance creates a problem for him. Because he has only one tool in his tool box – original public meaning interpretation – he is forced to try to identify the contours of the original public meaning of the individual right to arms so it excludes these and other laws.<sup>37</sup> Such a move is appropriate if, and only if the evidence supports a conclusion that the original public meaning of a term or phrase was so limited. But the evidence, which I consider overwhelming,<sup>38</sup> that the original meaning of the right to keep and bear arms was of the same individualistic nature as the individual rights of speech, press, and assembly, is simply inadequate to draw such lines.

As with the First Amendment’s protection of the “freedom of speech,” the proper approach to this problem is to identify the right, in this case the individual’s right to possess and carry weapons, including firearms. This will lead to the conclusion that complete bans on firearms in common use for individual and collective self defense are unconstitutional, and likely other conclusions as well. But then one must acknowledge that, like the right of freedom of speech, this protected liberty – like all liberty – may be reasonably regulated, provided that such regulations are not unduly burdening the right or serving as a mere pretext for restricting its exercise. The way this was done historically was to realistically assess regulations of liberty to see if they were irrational, arbitrary or discriminatory.

Because we are dealing with a fundamental right, we cannot accept the legislatures word or even its good faith, the approach of modern “rational basis” scrutiny. A more realistic assessment is required. So when considering, for example, the constitutionality of bans on so-called military-style assault weapons, or restrictions on the capacity of magazines, the Court should ask, at minimum, whether these or other measures are *actually* rational – to articulate the end they are seeking to accomplish, then assesses whether the means adopted actually match up with the purported end. Would they actually have prevented a mass shooting or ameliorated real crimes?

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<sup>36</sup>See ANTONIN SCALIA & BRYAN A GARNER, *READING LAW: THE INTERPRETATION OF LEGAL TEXTS* 14-15 (2012). For a response, see Solum, *supra* note 12, at \_\_\_\_.

<sup>37</sup>Alternatively, he can rely on stare decisis. See Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849, 861 (1989) (“almost every originalist would adulterate it with the doctrine of stare decisis”). For my criticism of this approach, see Randy E. Barnett, *Scalia’s Infidelity: A Critique of Faint-Hearted Originalism*, 73 CINC. L. REV. 7 (2006).

<sup>38</sup>See Randy E. Barnett, *Was the Right to Keep and Bear Arms Conditioned on Service in an Organized Militia?*, 83 TEX. L. REV. 237 (2004).



This heightened “rationality review” could help ensure that the reason being articulated is the real reason for the law. For example, “assault weapons” are a made-up category of weapons that is based solely on cosmetic features that make them look like the fully automatic weapons used by the military. Banning them leaves other rifles that are functionally identical in their lethality and rate of fire completely legal. Moreover, far more powerful hunting rifles are left untouched by the law, as are shotguns. This is simply irrational and therefore unconstitutional.

Deciding on the appropriate kind and degree of scrutiny of laws purporting to reasonably regulate the exercise of a fundamental constitutional right is a matter, not of interpretation, but of construction. Whether the exemptions listed by Justice Scalia are actually reasonable or rational, follows from the constructions the Court adopts to protect the abstract rights that are identified by the original meaning of the text.

### *B. Contending with Precedent: McDonald v. Chicago*

In *Heller*, the Court was writing on a relatively clean slate. Only a single case, *Miller*, had any bearing on the meaning of the text of the Second Amendment. By contrast, when the Court was called upon to decide whether the individual right to keep and bear arms applied to the states, the Court needed to confront whether to reverse a precedent of long-standing vintage: *The Slaughter-House Cases*,<sup>39</sup> which had greatly limited the scope of the Privileges or Immunities Clause of the Fourteenth Amendment. Because of this and other Nineteenth Century cases, when the Court later decided to apply most of the rights contained in the first ten amendments to the states, it did so via the Due Process Clause of the Fourteenth Amendment, rather than the Privileges or Immunities Clause.

There is a widespread academic consensus that the original meaning of the “privileges or immunities of citizens of the United States,” included at least the personal guarantees enumerated in the first eight amendments.<sup>40</sup> In *City of Chicago v. McDonald*,<sup>41</sup> when answering the question of whether the individual right to keep and bear arms that it had identified in *Heller* applied as well to the states, the Court faced a choice of whether to expressly adhere to this original meaning or, instead, apply its later doctrine by which it “incorporates” into the Due Process Clause of the

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<sup>39</sup>The Slaughter-House Cases, 83 U.S. 36 (1873).

<sup>40</sup>No one has been more influential in sparking this consensus than Michael Kent Curtis. See MICHAEL KENT CURTIS, NO STATE SHALL ABRIDGE: THE FOURTEENTH AMENDMENT AND THE BILL OF RIGHTS (1986).

<sup>41</sup>McDonald v. City of Chicago, 130 S.Ct. 3020 (2010).

Fourteenth Amendment, those rights it deems to be deeply rooted in the tradition and history of the American people. The original meaning of the Privileges or Immunities Clause was urged by petitioners as the proper basis of the decision in its brief and at oral argument, and in this claim it was supported by amici. Despite this, in *McDonald*, a plurality of four justices, including the self-described originalist Justice Scalia, opted to follow precedent rather than original meaning and apply the doctrine of substantive due process.

Still, *McDonald* illustrates the gravitational force of originalism. For one thing, the key fifth vote, provided by Justice Thomas, was entirely based on original meaning.<sup>42</sup> Justice Thomas refused to join the plurality opinion based on precedent to constitute a majority for that position. Secondly, as Justice Thomas demonstrated, the conclusion reached by the plurality was entirely consistent with the original meaning of the Privileges or Immunities Clause. *McDonald* is not, therefore, a case where a majority of the Court was willing to contradict the original meaning of the text by relying on *stare decisis*. Thirdly, Justice Alito's majority opinion did not reject originalism, but instead asserted its agnosticism:

The municipal respondents and some of their amici ... contend that the phrase 'privileges or immunities' is not naturally read to mean the rights set out in the first eight Amendments.... A number of scholars have found support for the total incorporation of the Bill of Rights.... We take no position with respect to this academic debate.<sup>43</sup>

For these three reasons, although the plurality in *McDonald* did not choose to decide the case on the basis of original meaning, that meaning could be said to have exerted a gravitational force on the outcome.

In one important respect, however, the plurality's decision did represent a fear of adhering to original meaning. At oral argument it became clear that members of the plurality were concerned about where adopting the original meaning of the Privileges or Immunities Clause might lead. In particular, they were apparently concerned that the scope of this meaning might include the protection of some unenumerated rights. For example, during rebuttal, Justice Alito asked pointedly whether the original meaning of "Privileges or Immunities" included "the right to contract" – a not-so-subtle reference to the liberty of contract protected by the Court in *Lochner v. New York*.<sup>44</sup>

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<sup>42</sup>See 130 S.Ct. at 3058-59 (Thomas, J. concurring).

<sup>43</sup>130 S. Ct. at 3033 n. 10 (Alito, J.).

<sup>44</sup>See Transcript of Oral Argument at 64, *McDonald*, 130 S.Ct. 3020 (No. 08-1521) ("Well, does it include the right to contract? . . . Isn't that an unenumerated right?") (question by Alito, J.).

That the plurality was willing to stick with its substantive due process precedent can be explained by its belief that it had sufficiently limited, indeed neutered, that doctrine with the approach it adopted in *Glucksberg*,<sup>45</sup> so it was far safer to apply that test to the right to keep and bear arms than it was to open a potential can of worms by adhering the original meaning of the text.<sup>46</sup> In short, it was precisely because the original meaning of the privileges or immunities of citizens of the United States was both sufficiently definite and objectionable to the members of the plurality – as it was to the four dissenters for similar reasons – that the plurality decided to stick with precedent.

Still, as was noted above, the plurality could not bring itself to repudiate original meaning and, indeed, it relied upon it at crucial parts of its opinion. It did so, however, by bowdlerizing its sources to read that the right to arms was protected by the original meaning of the Fourteenth Amendment *as a whole*, rather than by the Privileges or Immunities Clause in particular. For example, Justice Alito wrote that “Senator Jacob Howard, who spoke on behalf of the Joint Committee on Reconstruction and sponsored the Amendment in the Senate, stated that *the Amendment* protected all of ‘the personal rights guaranteed and secured by the first eight amendments of the Constitution.’”<sup>47</sup> In fact, in this speech, Senator Howard was expressly explaining the meaning of the Privileges or Immunities Clause in the proposed amendment. “To these privileges and immunities, whatever they may be – for they are not and cannot be fully defined in their entire extent and precise nature – to these should be added the personal rights guaranteed and secured by the first eight amendments of the Constitution.”<sup>48</sup>

Likewise, Justice Alito wrote that “Representative John Bingham, the principal author of the text of §1, said that *the Amendment* would ‘arm the Congress . . . with the power to enforce the bill of rights as it stands in the Constitution today.’”<sup>49</sup> Like Howard, however, Bingham was explaining the meaning of “privileges or immunities.” Indeed, when he made the statement quoted by Justice Alito on February 28<sup>th</sup>, Bingham was defending a precursor to the Fourteenth

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<sup>45</sup>See *Washington v. Glucksberg*, 521 U.S. 702 (1997).

<sup>46</sup>For my critique of the is approach to protecting fundamental rights, see Randy E. Barnett, *Scrutiny Land*, 106 MICH. L. REV. 1479 (2008) (describing and criticizing the “Glucksberg Two-Step”).

<sup>47</sup>130 S. Ct. at 3033, n. 9 (Alito, J.) (quoting Cong. Globe, 39th Cong., 1st Sess., 2765 (1866) (Emphasis added).

<sup>48</sup>See Cong. Globe, 39th Cong., 1<sup>st</sup> sess., 2765 (May 23, 1866).

<sup>49</sup>130 S. Ct. at 3033 n. 9 (Alito, J.) (quoting Cong. Globe, 39th Cong., 1st Sess., 1088) (Emphasis added).

Amendment that read: “The Congress shall have power to make all laws which shall be necessary and proper to secure to the citizens of each state all privileges and immunities of citizens in the several states....”<sup>50</sup>

But this sort of faint-hearted originalism is nothing new. Indeed, the term “faint-hearted originalist” was coined by Justice Scalia himself in an essay in which he identified not just one, but several circumstances in which he would abstain from following original meaning.<sup>51</sup> And Justice Scalia is not alone in this regard. Even many originalist scholars claim that precedent, or *stare decisis*, should trump original meaning under certain circumstances.

While I am on record disagreeing with Justice Scalia,<sup>52</sup> and with those who would allow *stare decisis* to trump originalism,<sup>53</sup> this is a debate within originalism and among originalists.

### *C. Originalism in the Background: Sebelius v. NFIB*

I was one of the lawyers representing the National Federation of Independent Business in its constitutional challenge to Affordable Care Act (ACA). Before that I had filed with the Cato Institute amicus briefs in all the other major challenges to the ACA. In none of the briefs to which I was a party did we assert the original meaning of the Commerce or Necessary and Proper Clauses as a basis for the decision in the case. Nor did we contest the constitutionality of the various mandates that the Act imposed on insurance companies despite my own belief that the Affordable Care Act’s regulation of insurance contracts exceeded the original meaning of these Congressional powers.<sup>54</sup> We did not do so because we believed that the Court would have considered itself bound by its 1944 precedent in *South-Eastern Underwriters* in which it held that contracts for insurance can be regulated by Congress under the Commerce Clause.<sup>55</sup>

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<sup>50</sup>Cong. Globe, 39th Cong., 1st sess., 1088 (February 28, 1866).

<sup>51</sup>See Scalia, *supra* note 36.

<sup>52</sup>See Randy E. Barnett, *supra* note 36.

<sup>53</sup>See Randy E. Barnett, *Trumping Precedent With Original Meaning: Not As Radical as it Sounds*, 22 CONST. COMMENTARY 257 (2005); and Randy E. Barnett, *It’s a Bird, It’s a Plane, No, It’s Super-Precedent: A Reply to Farber and Gerhard*, 90 Minn. L. Rev. 1232 (2006).

<sup>54</sup>Though it is. See Randy E. Barnett, *Commandeering the People: Why the Individual Health Insurance Mandate is Unconstitutional*, 5 N.Y.U. J. OF L. & LIBERTY 581, 583-87 (2010) (discussing the original meaning of the Commerce Clause).

<sup>55</sup>See *United States v. South-Eastern Underwriters*, 322 U.S. 533 (1944).

Instead, we contended that the assertion of a power to compel that individuals engage in economic activity, so that Congress may then regulate it, was unprecedented and, therefore, was unjustified by existing precedents. And we argued that the individual insurance mandate was an improper means for Congress to execute its commerce power over insurance companies. Given that original meaning was not even asserted by the parties, it is no surprise that the opinions of both Chief Justice Roberts and the four dissenting justices did not rely on original meaning *per se*. Instead, these five justices accepted our contention that the power to mandate economic activity was unprecedented, and that it did not fall under the Commerce Clause or the Necessary and Proper Clause.

Rather than assert and rely upon original meaning, these five justices stuck with the New Federalism of the Rehnquist Court, or what my colleague Lawrence Solum has dubbed a “constitutional gestalt.”<sup>56</sup> The New Federalism of the Rehnquist Court did not question the existence of what law professors call “the New Deal Settlement.” But it did reject the prevailing constitutional gestalt among law professors that the New Deal and Warren Courts “settled” that Congress has a plenary power over the national economy, subject only to whatever express prohibitions are found in the Constitution and, perhaps, some additional unenumerated fundamental rights. Or put another way, that the Commerce and Necessary and Proper Clauses together amount to a National Problems Power in Congress.

In contrast, according to the Rehnquist Court, although all the powers that were approved by the New Deal and Warren Courts are now to be taken as constitutional and are to be upheld as “settled” precedents, any claim of additional new powers still needs to be justified. Put another way, the expansion of congressional power authorized by the New Deal and Warren Courts established a new high water mark of constitutional power. Going any higher than this requires special justification.

This constitutional gestalt can be summarized as “this far and no farther” – provided “no farther” is not taken as an absolute but merely as establishing a baseline beyond which serious justification is needed.<sup>57</sup> As Chief Justice Rehnquist observed in *Morrison*, “*thus far* in our Nation’s history our cases have upheld Commerce Clause regulation of intrastate activity only where the activity is economic in

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<sup>56</sup>See Lawrence B. Solum, *The Legal Effects of NFIB v. Sebelius and the Constitutional Gestalt* (Georgetown Pub. Law and Legal Theory, Research Paper No. 12-152) available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2152653](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2152653).

<sup>57</sup>For a similar assessment of the Rehnquist Court’s New Federalism, see John Valauri, *Baffled by Inactivity: The Individual Mandate and the Commerce Power*, 10 GEO. J. L. & PUB. POL’Y 51, 63 (2112) (describing the “thus far method and justification of constitutional line drawing”).

nature.”<sup>58</sup> This is why the general acceptance of our claim that the individual insurance mandate was unprecedented was so crucial to the unexpected legal success we enjoyed. Accepting our claim that the mandate was unprecedented placed the burden of justification on the government.

Which brings me to a second tenet of the constitutional gestalt of the New Federalism: Any purported justification that would lead to an unlimited reading of Congress’s Article I, Section 8 powers would improperly contradict what, in *United States v. Lopez*,<sup>59</sup> Chief Justice Rehnquist identified as the “first principles” of our constitutional law. In what has become a famous passage, he wrote:

We start with first principles. The Constitution creates a Federal Government of enumerated powers. See Art. I, § 8. As James Madison wrote: “The powers delegated by the proposed Constitution to the federal government are few and defined. Those which are to remain in the State governments are numerous and indefinite.” The Federalist No. 45.... This constitutionally mandated division of authority “was adopted by the Framers to ensure protection of our fundamental liberties.” *Gregory v. Ashcroft*.... “Just as the separation and independence of the coordinate branches of the Federal Government serve to prevent the accumulation of excessive power in anyone branch, a healthy balance of power between the States and the Federal Government will reduce the risk of tyranny and abuse from either front.” *Ibid.*<sup>60</sup>

This is why the claim that “health care is a national problem” and other similar rationales offered by the government and many law professors fell on five deaf ears. All these rationales, if accepted, would lead to a national police power qualified only by the Bill of Rights (as are state police powers). And this was contrary to the constitutional gestalt of the Rehnquist Court’s New Federalism.

As I explain elsewhere,<sup>61</sup> I believe the reason why so many law professors missed the boat on how the claims would be decided is that many have not appreciated this alternative reading of the New Deal settlement adopted by the Rehnquist Court. Because of this, these professors think that the only alternative to their constitutional gestalt is a return to the pre-New Deal gestalt of holding Congress to the original meaning of its powers under Article I, Section 8, a course they are

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<sup>58</sup>*United States v. Morrison*, 529 U.S. 598, 613 (2000).

<sup>59</sup>*United States v. Lopez*, 514 U.S. 549 (1995).

<sup>60</sup>*Id.* at 552 (citation information omitted).

<sup>61</sup>See Randy E. Barnett, *Who Won the Health Care Case (and Why Did So Many Law Professors Miss the Boat)?*, 65 FLA. L. REV. (forthcoming 2013).

properly confident there are not five votes to take.

Others have rationalized the distinction in *Lopez* and *Morrison* between “economic” and “noneconomic” activity as identifying the outer boundary of the plenary power over national economic regulation. In other words, they have internalized this distinction within their constitutional gestalt. They read *Lopez* and *Morrison* as generally consistent with the pre-existing view of the New Deal settlement.

Still others may have thought that whatever alternative gestalt was implicit in the New Federalism was abandoned by the Court in the *Raich* case when Justices Kennedy and Scalia voted to uphold the Controlled Substances Act. Moreover, two of the three Justices in the dissent in *Raich* had been replaced by Justices with little or no pre-existing commitment to finding any limits on the enumerated powers of Congress, leaving only Justice Thomas to be open to the argument that the individual mandate exceeded the powers of Congress.

If you held any of these views, the challenge to the individual insurance mandate was an easy case for you. After all, the Affordable Care Act was a comprehensive scheme to regulate the national economy. The individual insurance mandate was easily characterized as both necessary to this scheme and did not violate any express prohibition of the Constitution. End of story. Moreover, anyone who suggested anything to the contrary was advocating the undoing of the New Deal Settlement and a return to the bad old pre-New Deal constitutional gestalt of the evil *Lochner* Era, for which there were not five votes on the Court.

All of this missed, first, the possibility that the Rehnquist Court’s New Federalism represented an alternate constitutional gestalt of “this far and no farther” without a justification that would undermine the enumerated powers scheme and, second, that there might still be five Justices on the Court who subscribed to this gestalt.

Assuming you accept my description of the Rehnquist Court’s constitutional gestalt, however, you may well object: Why this far and no farther? Why draw the line at this point? Isn’t this arbitrary? Besides, where is all this in the Constitution? Law professors said the same thing about the economic-noneconomic activity line the Court drew in *Lopez v. United States*. Why draw that line? Where is that line in the text of the Constitution?

Here is where I think the growth of originalism since the 1980s enters the picture. Unlike the *Heller* case which was argued and decided on originalist grounds, in our challenge to the ACA we made no originalist claims whatsoever. But the original meaning of the Constitution still played a role because it lies behind the Rehnquist Court’s New Federalism exerting a gravitational force that we can see now extends to the Roberts Court too.

Simply put, the role played by originalism is this: During the New Deal era, Americans acquiesced to an enormous expansion of federal power and the Supreme

Court eventually expanded its interpretation of federal power accordingly. This expansion is now settled precedent. But with respect to the Article I, Section 8 powers of Congress, the powers upheld by the New Deal and Warren Courts violated the original meaning of the Constitution and this expansion was, therefore, illegitimate on originalist grounds. Because of this, any further expansion must be justified, and any purported justification that would essentially eliminate the enumerated powers scheme in the original Constitution is unacceptable or improper.

Until *NFIB*, we could not be certain whether the *Raich* case represented a repudiation of the “this far and no farther” approach of the New Federalism (though I believed there were strong hints in both *Comstock*<sup>62</sup> and *Bond*<sup>63</sup> that a majority had not abandoned the constitutional gestalt of the Rehnquist Court). *NFIB v. Sebelius* is significant, therefore, because it shows that the Rehnquist Court’s constitutional gestalt of this far and no farther still has five votes in the Roberts Court. And it does, I believe, at least in part because of the gravitational force of originalism, a force that can affect even constitutional decisions and doctrines that are not expressly justified on the basis of original public meaning.

#### CONCLUSION

The claim that originalism exerts a gravitational force on the Supreme Court’s doctrine is obviously contestable. Other explanations of the doctrines and decisions I have discussed are possible. And, even if true, I am hardly claiming that originalism’s gravitational force is irresistible. Obviously, it was not strong enough to reverse either the *Slaughter-House Cases* or *South-Eastern Underwriters*, much less *Darby*,<sup>64</sup> *Jones & Laughlin Steel*,<sup>65</sup> or *Wickard*,<sup>66</sup> although it might well have been powerful enough to keep even the New Deal Court from expressly adopting the view that Congress has a plenary power over the “national economy” or a National Problems Power.<sup>67</sup> After all, though the gravitational force of the Sun is not strong

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<sup>62</sup>United States v. Comstock, 560 U.S. \_\_\_\_ (2010).

<sup>63</sup>Bond v. United States, 564 U.S. \_\_\_\_ (2011).

<sup>64</sup>United States v. Darby, 312 U.S. 100 (1941).

<sup>65</sup>NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937).

<sup>66</sup>Wickard v. Filburn, 317 U.S. 111 (1942).

<sup>67</sup>See BARRY CUSHMAN, *RETHINKING THE NEW DEAL COURT: THE STRUCTURE OF A CONSTITUTIONAL REVOLUTION* 220-25 (1998) (describing how the justices considered and rejected adopting a candid statement of this position in *Wickard*). Cushman quotes from a letter by Justice Jackson to then-Circuit Court Judge Sherman Minton: “If we were to be brutally frank, as you suggest,



enough to cause the earth to plunge into its fiery depths, it is still powerful enough to keep the Earth in its orbit.

Of course, the gravitational force of originalism is dependent in part on the current composition of the Court. A lot will depend on future retirements, future elections, and the future intellectual debates over the proper method of constitutional interpretation. If another Justice Breyer replaces one of the more conservative five, we can expect that gravitational force to diminish greatly. But I would not expect it to disappear altogether. The Supreme Court has rarely in its history expressly repudiated original meaning. Perhaps the closest it came to this was in *The Minnesota Mortgage Case*.<sup>68</sup> Pledging adherence to the original meaning of the text, as Justice Stevens did in *Heller*, while allowing other considerations like precedent to take priority, as Justice Scalia did in *McDonald*, is the homage that vice pays to virtue. Even that is a force to be reckoned with.

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I suspect what we would say is that in any case where Congress things there is an effect on interstate commerce, the Court will accept that judgment. When we admit that it is an economic matter, we pretty much nearly admit that it is not a matter which courts may judge.” *Id.* at 221. Yet, a majority of the Court has never actually said this. Such reticence may be attributed the gravitational force of originalism.

<sup>68</sup>Home Building & Loan Association v. Blaisdell, 290 U.S. 398 (1934)