Free Speech Originalism: Unconstraining in Theory and Opportunistic in Practice

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Abstract

Courts should not apply originalism in freedom of expression cases. Originalists claim that originalism prevents judges from imposing their own views. It does not—not in theory and not in practice. Instead, as the treatment of hate speech bans suggests, it is not principles but outcomes that determine whether and which version of originalism is used. Moreover, a true originalist First Amendment would likely lead to impoverished free speech protections.

Part I provides background on original public meaning originalism, the iteration of originalism currently favored by scholars. It also explains how the theory falls short of its original promise of limiting judicial discretion and instead tends to entrench the privilege of historically powerful groups.

Part II explains why originalism as a theory particularly fails when applied to free speech cases: because the original meaning of the First Amendment is notoriously elusive, it enables judges to select an interpretation that yields their desired outcome. Moreover, what little we can confidently conclude about the original meaning suggests a cramped view of free speech protections at the Founding and at Reconstruction.

Part III demonstrates that free speech originalism in practice is an opportunistic affair. Actual judging provides at least two additional occasions to exercise discretion: deciding whether to use originalism and which version to use. Part III starts by exploring how sometimes the Supreme Court applies originalism to speech cases but more often it does not, especially in its deregulatory "free speech Lochnerism" decisions. Part III next demonstrates that different types of originalism applied to hate speech bans can yield different outcomes, further demonstrating how originalism provides cover for motivated results—results that too often favor the powerful at the expense of the marginalized.

Although there exists an extensive literature on both originalism and hate speech, this Article makes several novel contributions: surprisingly few scholars have considered free speech originalism and fewer still, if any, with an eye

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toward questions of power and privilege. The analysis of original meaning extends beyond the Founding to include Reconstruction, an era regularly overlooked. Finally, the originalist analysis of hate speech is the first of its kind.

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Introduction

We are living in the age of originalism, or at least an originalist-friendly Supreme Court.[1] Not only has originalism taken over Second Amendment cases,[2] but it has gained a strong foothold in First Amendment religion cases, with originalism now the dominant

1 Justice Thomas, Justice Gorsuch, Justice Kavanaugh, and Justice Barrett all self-identify as originalists. Mike Rappaport, *The Year in Originalism*, L. & Liberty (Mar. 24, 2021), https://lawliberty.org/the-year-in-originalism/ [https://perma.cc/P9PX-654W] ("[T]here are now four avowed originalists on the Court—Thomas, Gorsuch, Kavanaugh, and Barrett."). Chief Justice Roberts and Justice Alito regularly join originalist decisions such as *New York State Rifle & Pistol Ass'n v. Bruen*, 597 U.S. 1, 17 (2022) (striking New York gun regulation on the grounds that it was not "consistent with this Nation's historical tradition of firearm regulation").

2 *See, e.g.*, *Bruen*, 597 U.S. at 24 ("The government must then justify its regulation by demonstrating that it is consistent with the Nation's historical tradition of firearm regulation.").

approach for resolving Establishment Clause disputes.[3] Originalism has also been creeping into First Amendment freedom of expression cases.[4] In fact, the Supreme Court recently observed that before it would recognize speech as unprotected, "the government must generally point to historical evidence about the reach of the First Amendment's protections."[5] This Article argues that this trend should be resisted. Originalism is a highly problematic theory to determine the scope of our rights and is particularly ill-suited to speech rights.

Although some parts of the U.S. Constitution are clear on their face, such as the requirement that the President be thirty-five years old,[6] others like "Congress shall make no law . . . abridging the freedom of speech, or of the press"[7] are not. They articulate abstract principles that need to be interpreted. Originalism offers one approach to constitutional interpretation. Though many different versions of originalism exist, the two central tenets of almost every version are that the meaning of a constitutional provision was fixed at its adoption and that this fixed original meaning should constrain judicial interpretation.[8]

One of the main selling points of originalism is that it will curb judicial discretion.[9] Originalists complain that unelected judges too often infuse their constitutional decisions with their own views and simply make up rights with no constitutional foundation, like the right to abortion.[10] Originalism, they say, will prevent this by tethering the Constitution to its original meaning. Originalism as a theory, however, fails to curtail judicial discretion in deciding cases. Part I starts by

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3 *See, e.g.*, Kennedy v. Bremerton Sch. Dist., 597 U.S. 507, 534–35 (2022) ("In place of *Lemon* and the endorsement test, this Court has instructed that the Establishment Clause must be interpreted by 'reference to historical practices and understandings.'" (quoting Town of Greece v. Galloway, 572 U.S. 565, 576 (2014))).

4 *See infra* Section III.A.1.

5 *Bruen*, 597 U.S. at 24 (emphasis omitted).

6 U.S. Const. art. II, § 1 ("No Person . . . shall be eligible to the Office of President . . . who shall not have attained to the Age of thirty five Years . . . .").

7 U.S. Const. amend. I.

8 *See infra* Section I.B; Randy E. Barnett & Evan D. Bernick, *The Letter and the Spirit: A Unified Theory of Originalism*, 107 Geo. L.J. 1, 3–4 (2018) ("Originalists hold that: (1) the meaning of a provision of the Constitution was *fixed* at the time it was enacted (the 'Fixation Thesis'); and (2) that fixed meaning ought to constrain constitutional decisionmakers today (the 'Constraint Principle')." (emphasis omitted)).

9 *See* Keith E. Whittington, *The New Originalism*, 2 Geo. J.L. & Pub. Pol'y 599, 602 (2004) ("By rooting judges in the firm ground of text, history, well-accepted historical traditions, and the like, originalists hoped to discipline them.").

10 *See infra* note 20; Dobbs v. Jackson Women's Health Org., 597 U.S. 215, 231 (2022) (overruling *Roe v. Wade* on the grounds that the right is neither specifically listed in the Constitution nor "deeply rooted in this Nation's history and tradition" (quoting Washington v. Glucksberg, 521 U.S. 702, 721 (1997))); Michael W. McConnell, *Active Liberty: A Progressive Alternative to Textualism and Originalism?*, 119 Harv. L. Rev. 2387, 2401 (2006) ("For many informed people . . . the Supreme Court's decision in *Roe* is the *über*-example, the 800-pound gorilla, of unrestrained judging.").

summarizing well-known reasons why determinate outcomes are elusive for even the newest versions of originalism, which focus on original public meaning.[11] Part I then turns to the less explored point that originalism allows judges to entrench existing hierarchies, all while claiming inevitability. Given originalism's roots as a challenge to *Brown v. Board of Education*,[12] that may be a feature rather than a bug.[13]

Part II surveys the First Amendment's original public meaning at the Founding as well as at Reconstruction—an era regularly overlooked. It argues that the theory of originalism applied to freedom of expression is especially ill-advised because we can confidently conclude little about the original meaning of the First Amendment.[14] This uncertainty allows originalist judges to reach outcomes that best fit their preexisting views. Moreover, what we do know suggests a narrow, shallow First Amendment protection so that an originalist approach to freedom of expression would slash existing free speech protections.

As Part III explores, originalism in practice is an opportunistic affair. First, sometimes the Supreme Court applies originalism in speech cases, as it did when it froze the categories of unprotected speech to those dating to the Founding, shutting out hate speech from consideration; sometimes the Supreme Court does not, as when it expanded free speech protections for corporations to such a degree that scholars describe our current era as one of free speech Lochnerism.[15] Second, when the Supreme Court does perform an originalist analysis, it applies one particular version when another might lead to a different outcome. In fact, although the "original expected applications" strand applied to unprotected categories ultimately precludes hate speech bans, a different strand focusing on "original public meaning" might well permit them.[16] The upshot is that originalism often provides cover for predetermined outcomes while maintaining the guise that the Constitution required them—and more often than not, what the Constitution seems to require benefits the powerful and privileged.

I. Originalism's Failure to Constrain

Modern originalism arose in response to what its proponents viewed as the excesses of the Warren and Burger Courts.[17] They viewed

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11 *See infra* Section I.A.

12 347 U.S. 483 (1954).

13 *See infra* Section I.B.

14 *See infra* Section II.A.1.

15 *See infra* Section III.A.

16 *See infra* Section III.B.

17 *See* Robert Post & Reva Siegel, *Originalism as a Political Practice: The Right's Living Constitution*, 75 Fordham L. Rev. 545, 554–55 (2006) ("No politically literate person could miss the

these Courts' groundbreaking decisions—which ended segregation[18] and established women's right to abortion[19]—as illegitimate judicial lawmaking with no explicit foundation in the Constitution.[20] Originalism, they say, would prevent such judicial activism.[21]

Originalism's basic premise is that the meaning of a constitutional provision is fixed at the time of adoption (the "fixation thesis"),[22] and that the fixed meaning should control constitutional interpretation today (the "constraint principle").[23] That is, we should understand constitutional provisions in the same way as the generation that approved the provision.[24] Proponents claim that interpreting ambiguous provisions[25] in this manner curtails judicial discretion and prevents unelected judges from infusing the Constitution with their own personal values.[26] Instead, proponents continue, it promotes fidelity to the Constitution, a document ratified by a supermajority.[27] Consequently, if the Due Process Clause of the Fourteenth Amendment was not understood as creating a

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point that the Reagan Administration's use of originalism marked, and was meant to mark, a set of distinctively conservative objections to the liberal precedents of the Warren Court.").

18 *See* Brown v. Bd. of Educ., 347 U.S., 483, 495 (1954).

19 *See* Roe v. Wade, 410 U.S. 113, 154 (1973).

20 *See, e.g.*, Jack M. Balkin, *Abortion and Original Meaning*, 24 Const. Comment. 291, 291 (2007) ("*Roe*'s critics [argue] that there is no constitutional basis for abortion rights or for a right of 'privacy'; the right is completely made up out of whole cloth . . . ."); Dobbs v. Jackson Women's Health Org., 597 U.S. 215, 268 (2022) (criticizing *Roe v. Wade* as an exercise of "raw judicial power" (quoting *Roe*, 410 U.S. at 222 (White., J. dissenting))).

21 *See* Jeremy K. Kessler & David E. Pozen, *Working Themselves Impure: A Life Cycle Theory of Legal Theories*, 83 U. Chi. L. Rev. 1819, 1845 (2016) ("Constraining judges through text and history was held out to be the theory's central virtue and objective.").

22 Lawrence B. Solum, *The Fixation Thesis: The Role of Historical Fact in Original Meaning*, 91 Notre Dame L. Rev. 1, 1 (2015) ("The meaning of the constitutional text is fixed when each provision is framed and ratified: this claim can be called the *Fixation Thesis*.").

23 *Id.* ("[T]he *Constraint Principle* . . . holds that the original meaning of the constitutional text should constrain constitutional practice.").

24 *See* Lawrence B. Solum, *Originalism and Constitutional Construction*, 82 Fordham L. Rev. 453, 461 (2013) ("Together, the Fixation Thesis and the Constraint Principle form the core of originalism.").

25 Textually straightforward provisions such as the President's age requirement generally do not generate controversy. *See* Cong. Rsch. Serv., R5129, Modes of Constitutional Interpretation 1, 1 n.8 (2018).

26 *See* Thomas B. Colby & Peter J. Smith, *Living Originalism*, 59 Duke L.J. 239, 243 (2009) ("[O]riginalists further contend that the determinacy provided by reliance on constitutional text, or at least on some objective guidepost for the fixed meaning of the constitutional text, is essential to constraining judges' ability to impose their own views under the guise of constitutional interpretation.").

27 *See* Kurt T. Lash, *Originalism, Popular Sovereignty, and* Reverse *Stare Decisis*, 93 Va. L. Rev. 1437, 1440, 1444 (2007) ("[T]he most common and most influential justification for originalism [is] popular sovereignty and the judicially enforced will of the people."); Andrew Coan, *The Dead Hand Revisited*, 70 Emory L.J. Online 1, 2 (2020) ("This argument from popular sovereignty is originalism's trump card.").

right to abortion during Reconstruction, then there is no constitutional right to abortion.[28]

Notably, there is no single theory of modern originalism,[29] as there are at least two generations of originalism (old and new originalism)[30] and multiple strands within new originalism.[31] First-generation originalists focused on the intent of the Framers of the Constitution.[32] The focus then migrated to the intent of the ratifiers, as they made the Constitution binding.[33] With second-generation "new originalism," the focus shifted again, this time to general public meaning.[34] In particular, today's originalist enterprise for many is to uncover the understanding of a hypothetical reasonable citizen of the era.[35]

Despite these updates, originalism still fails to deliver on its original promise of curtailing judicial discretion.[36] Although some originalist scholars are walking back claims about the ability[37]—and even

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28 *See* John O. McGinnis & Michael Rappaport, *Original Interpretive Principles as the Core of Originalism*, 24 CONST. COMMENT. 371, 371 (2007) (describing "the constitutional right to abortion" as "the poster child for imposition of the judiciary's own idiosyncratic values").

29 *See* Colby & Smith, *supra* note 26, at 258 ("[T]here is no single, formal, canonical version of originalism.").

30 *See* Whittington, *supra* note 9, at 599 ("The 'old originalism' flourished from the 1960s through the mid-1980s. The 'new originalism' has flourished since the early 1990s.").

31 *See* Scott Soames, *Originalism and Legitimacy*, 18 GEO. J.L. & PUB. POL'Y 241, 242 (2020) ("Originalism is a family of theories . . . .").

32 *See* Barnett & Bernick, *supra* note 8, at 4.

33 *Cf.* Whittington, *supra* note 9, at 610 ("It is the adoption of the text by the public that renders the text authoritative, not its drafting by particular individuals.").

34 *See* Amy Barrett, *Introduction: The Interpretation/Construction Distinction in Constitutional Law*, 27 CONST. COMMENT. 1, 1 (2010) ("The defining characteristic of new originalism is its argument that the original public meaning of the Constitution's text should control its interpretation.").

35 *See* Colby & Smith, *supra* note 26, at 245 ("[S]everal of the most prominent academic proponents of originalism . . . seek to determine how the words of the Constitution 'would have been understood by a hypothetical, objective, reasonably well-informed reader of those words and phrases, in context, at the time they were adopted, and within the political and linguistic community in which they were adopted.'" (emphasis omitted) (quoting Vasan Kesavan & Michael Stokes Paulsen, *The Interpretive Force of the Constitution's Secret Drafting History*, 91 GEO. L.J 1113, 1132 (2003))).

36 *See* Mark Tushnet, Heller *and the New Originalism*, 69 OHIO ST. L.J. 609, 617 (2008) ("The new originalism, like the old, fails to deliver on its claim about eliminating judicial subjectivity, judgment, and choice."). Note that originalism now focuses on judicial constraint rather than judicial restraint. *See* Thomas B. Colby, *The Sacrifice of the New Originalism*, 99 GEO. L.J. 713, 751 (2011) ("[A]lthough originalism in its New incarnation no longer emphasizes judicial restraint—in the sense of deference to legislative majorities—it continues to a substantial degree to emphasize judicial constraint—in the sense of promising to narrow the discretion of judges." (emphasis omitted)).

37 *See, e.g.*, Randy E. Barnett, *The Gravitational Force of Originalism*, 82 FORDHAM L. REV. 411, 419 (2013) ("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.").

desirability[38]—of originalism to limit judicial discretion, most proponents still maintain originalism yields objective, empirical outcomes.[39] In reality, originalism allows judges to be outcome driven (and usually antiprogressive) while claiming objectivity.[40] More specifically, judicial discretion is inevitable because courts cannot easily uncover the original meaning from a much earlier historical era, especially an original meaning that will determine how a case today should be decided. Original public meaning is not only elusive but may also be undesirable: even if it could provide clear answers, the regressive views of an elite group of long-dead people should not necessarily control.

A. Elusiveness of Original Public Meaning

Despite proponents' continued insistence that theirs is an objective, empirical inquiry,[41] "new originalism" fails to constrain judges in any meaningful way.[42] When Justice Alito warned against "the natural human tendency to confuse what [an] Amendment protects with our own ardent views,"[43] he could just as well be talking about public meaning originalism. There are many reasons why judges are poorly positioned to uncover the meaning of words written by people two centuries ago and apply it to the case before them without exercising considerable discretion. A few are examined below.

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38 *See* William Baude, *Originalism as a Constraint on Judges*, 84 U. Chi. L. Rev. 2213, 2214 (2017) ("[O]riginalist scholars today are much more equivocal about the importance and nature of constraining judges."). Having obtained greater control of the judiciary, conservatives' calls for judicial restraint have receded. The goal of curtailing judges has been replaced with embracing fidelity to the Constitution, even if it means unelected judges must overrule the political branches. *See* Whittington, *supra* note 9, at 609.

39 *See* Colby, *supra* note 36, at 750 ("[W]hen it comes to the potential to constrain the Judiciary, and to produce objective, determinable right and wrong answers to specific constitutional questions, originalism no longer offers any appreciable advantage over nonoriginalism. . . . And yet, most New Originalists still do make that promise, at least to some degree.").

40 *See* D.A. Jeremy Telman, *Originalism as Fable*, 47 Hofstra L. Rev. 741, 744–45 (2018) (book review) ("[O]riginalists act in bad faith when they camouflage their policy preferences with the false judicial modesty of originalism. At least non-originalists are transparent and openly acknowledge that judges exercise constitutional powers of legal discretion." (footnote omitted)).

41 *See, e.g.*, Barnett & Bernick, *supra* note 8, at 10 (describing the search for original public meaning as "an empirical investigation of linguistic usage").

42 Colby, *supra* note 36, at 769 (noting that new originalists "continue to insist that originalism is meaningfully constraining . . . because to do otherwise would undermine . . . the very mission of their theory").

43 Dobbs v. Jackson Women's Health Org., 597 U.S. 215, 239 (2022); *see also* Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. Cin. L. Rev. 849, 863 (1989) (complaining that "the main danger in judicial interpretation of the Constitution . . . is that the judges will mistake their own predilections for the law").

1. Inevitable Uncertainty

The original public meaning of a constitutional provision turns on the generally accepted meaning of words used by the Constitution,[44] yet contemporaneous texts like dictionaries, letters, newspapers, and other writings do not yield a single answer.[45] For example, dictionaries, one "of the most popular sources of interpretive evidence,"[46] define words, not phrases like "freedom of speech,"[47] and, in any event, offer multiple definitions.[48] Dictionaries of the era also tended to be prescriptive rather than descriptive, and therefore may not accurately reflect the general public meaning.[49] In fact, Samuel Johnson's and Noah Webster's dictionaries were each works of a single person and so reflected that person's idiosyncratic views.[50] One empirical study concluded that dictionary definitions "would lead users to the wrong judgment about 'ordinary meaning' fairly often, once in every three to five cases."[51]

Consulting more wide-ranging documents may complicate rather than clarify. Legal documents, including judicial opinions, summaries of the Constitutional Convention, the ratification debates, and the Federalist papers, may reveal that some phrases have both ordinary and legal meanings.[52] Expanding the categories of documents, therefore, only provides more materials from which to cherry pick.[53]

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44 *See* Jack M. Balkin, *Original Meaning and Constitutional Redemption*, 24 CONST. COMMENT. 427, 445 (2007).

45 *See* Krista M. Pikus, *When Congress Is Away the President Shall Not Play: Justice Scalia's Concurrence in* NLRB v. Noel Canning, 114 MICH. L. REV. FIRST IMPRESSIONS 41, 43 (2015) ("Common sources for the 'new originalism' method include dictionaries, letters, and historical writings.").

46 Kevin P. Tobia, *Testing Ordinary Meaning*, 134 HARV. L. REV. 726, 743 (2020).

47 Thomas R. Lee & James C. Phillips, *Data-Driven Originalism*, 167 U. PA. L. REV. 261, 283 (2019) ("Dictionaries typically define individual words, not phrases . . . [therefore] we may often miss the import of a given constitutional term if we just separately look up its component words in the dictionary.").

48 *See id.* at 286 ("[I]f there are alternative senses of a given term, a dictionary would list both of them. And it wouldn't tell you which one is the one likely to be understood in a given linguistic context.").

49 *See id.* at 286; Eleanor Miller & Heather Obelgoner, *Effective but Limited: A Corpus Linguistic Analysis of the Original Public Meaning of Executive Power*, 36 GA. ST. U. L. REV. 607, 609 (2020) ("[N]either dictionaries nor legal texts accurately reflect generalized public meaning.").

50 *See* Lee & Phillips, *supra* note 47, at 285.

51 Tobia, *supra* note 46, at 735.

52 *See* Lee & Phillips, *supra* note 47 at 279 (describing Randy Barnett's attempt to uncover the semantic meaning of "commerce" by "conducting a systematic linguistic survey of the constitutional record" including dictionaries, the Constitutional Convention, ratification debates, the Federalist Papers and judicial opinions).

53 *See* Tobia, *supra* note 46, at 789 ("Republican [judicial] appointees tend to construe dictionary definitions broadly when interpreting the terms 'keep,' 'bear,' and 'arms,' but narrowly when interpreting the terms 'cruel,' 'unusual,' and 'punishment.'"); Matthew D. Bunker, *Originalism 2.0 Meets the First Amendment: The "New Originalism," Interpretive Methodology, and Freedom of*

The move to uncovering original meaning based on a corpus linguistic analysis does not eliminate these problems either.[54] In this data-driven approach, computers rather than individuals analyze large data sets of writing to arrive at definitions[55]: "By reviewing lines of text from both sophisticated legal documents and more general writings from the era, researchers can potentially gain insight into the original meaning of a word by tracking the frequency and contextual usages most commonly associated with historical words and phrases across all genres of text."[56] Setting aside the fact that "ordinary meaning sometimes diverges from ordinary use," as one experiment found,[57] the analysis may still yield inconclusive or multiple meanings, and a large data set cannot necessarily determine which one of several possibilities should control.[58]

Another reason why the original fixed meaning may be difficult to pinpoint is that a consensus about meaning never existed.[59] Among historians, the idea of consensus was "discredited more than a generation ago."[60] In other words, the original public meaning cannot be discovered

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Expression, 17 Commc'n L. & Pol'y 329, 345 (2012) ("The New Originalist range of relevant materials is sufficiently large—and a contemporary understanding of how representative they were of a 'reasonable person' assessment of the particular issue is sufficiently imprecise—that the judge is afforded vast interpretive latitude to draw from historical sources that are both unrelated to constitutional text and, presumably, congenial to the judge's own preferences.").

54 *See* Lawrence M. Solan, *Can Corpus Linguistics Help Make Originalism Scientific?*, 126 Yale L. J.F. 57, 61 (2016) ("[T]here are many original public meanings of an expression, and the corpus does not provide much help in selecting among them.").

55 *See generally* Lee & Phillips, *supra* note 47, at 289–93. *See also* Matthew Jennejohn, Samuel Nelson & D. Carolina Núñez, *Hidden Bias in Empirical Textualism*, 109 Geo. L.J. 767, 769 (2021) ("In essence, the corpus linguistics method allows a user to search a large body of text, or corpus, for a particular word to identify patterns in usage that reveal information about a word's meaning.").

56 Miller & Obelgoner, *supra* note 49, at 610.

57 Tobia, *supra* note 46, at 790.

58 *See* Solan, *supra* note 54, at 64 (acknowledging that "[l]ike the lexicographer," an originalist employing corpus linguistics analysis "will have other choices to make about how narrowly or broadly, thinly or thickly, to construe a relevant word").

59 *See* Saul Cornell, *Meaning and Understanding in the History of Constitutional Ideas: The Intellectual History Alternative to Originalism*, 82 Fordham L. Rev. 721, 723–24 (2013) ("Most originalists assume the existence of a constitutional consensus where none existed and gather evidence in an arbitrary and highly selective fashion.").

60 Saul Cornell, *"To Assemble Together for Their Common Good": History, Ethnography, and the Original Meanings of the Rights of Assembly and Speech*, 84 Fordham L. Rev. 915, 918–19 (2015); Richard H. Fallon, Jr., *The Chimerical Concept of Original Public Meaning*, 107 Va. L. Rev. 1421, 1436 (2021) ("[N]o historian believes that any important document possesses a single intent or meaning." (quoting Eric Foner, The Second Founding: How the Civil War and Reconstruction Remade the Constitution, at xxiv (2019))).

because usually there is no universally accepted original public meaning, just contested meanings.[61]

Compounding this problem for the Bill of Rights is uncertainty surrounding the relevant time period.[62] Should it be the Founding, when the Amendments were adopted, or Reconstruction, when the Fourteenth Amendment made possible the application of the rights to the states?[63] Perhaps it ought to reflect some synthesis of both?[64] Or perhaps what should control is the Reconstruction era understanding of the original meaning?[65]

Yet another problem is that the excavation of the original meaning is a historical enterprise,[66] and judges are not trained historians.[67] As H. Jefferson Powell observed, even for the best-intentioned judge, "the limits imposed by time and training almost always will compel her to rely on secondary literature that she has little ability to evaluate or critique historically."[68] Judges will inevitably get history wrong, especially where the historical record is scant, ambiguous, or contradictory.[69]

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61 *See* Bret Boyce, *Originalism and the Fourteenth Amendment*, 33 WAKE FOREST L. REV. 909, 971 (1998) ("Historical inquiry into the original understanding of a provision may sometimes reveal that . . . [i]ts very vagueness enabled it to mean all things to all persons: No single original meaning ever existed.").

62 *See* Jamal Greene, *Fourteenth Amendment Originalism*, 71 MD. L. REV. 978, 988 (2012) ("There is little reason, in principle, for an originalist to privilege the meaning of an incorporated right circa 1791 over its meaning in any other year prior to 1868."); Kurt T. Lash, *Respeaking the Bill of Rights: A New Doctrine of Incorporation*, 97 IND. L.J. 1439, 1440 (2022) ("[D]oes the original Free Speech Clause have a different meaning and scope than the 'incorporated' Free Speech Clause?").

63 *Cf.* Barry Friedman, *Reconstructing Reconstruction: Some Problems for Originalists (and Everyone Else, Too)*, 11 U. PA. J. CONST. L. 1201, 1209 (2009) ("[W]ith a few notable exceptions . . . [originalists] have devoted little if any attention to the Second Founding.").

64 *See, e.g.*, Lash, *supra* note 62, at 1441 ("There is only one Freedom of Speech Clause—the one the people spoke into existence in 1791 but then respoke in 1868." (emphasis omitted)).

65 *See* Greene, *supra* note 62, at 985 ("[W]hose view of the Bill of Rights' original understanding is the one that controls—that of the modern judge or that of the Fourteenth Amendment ratifying generation?").

66 *See* Jonathan Gienapp, *Historicism and Holism: Failures of Originalist Translation*, 84 FORDHAM L. REV. 935, 956 (2015) ("[I]n order to genuinely recover the original meaning of the constitutional text, originalists of any stripe must behave as historians.").

67 *See* Cornell, *supra* note 59, at 722 n.6 (collecting articles criticizing originalists' "Use and Abuse of History"); Saul Cornell, *Reading the Constitution, 1787–91: History, Originalism, and Constitutional Meaning*, 37 L. & HIST. REV. 821, 822 (2019) [hereinafter Cornell, *Reading the Constitution*] ("Despite paying lip service to ideas about reading the Constitution historically, originalism continues to invoke the authority of history without actually engaging in a genuinely historical practice.").

68 H. Jefferson Powell, *Rules for Originalists*, 73 VA. L. REV. 659, 661 (1987).

69 *See* Tushnet, *supra* note 36, at 609–10 ("The new originalism, like the old, presents a simulacrum of historical inquiry, because it is a lawyer's enterprise dressed up as a historian's."); Jack N. Rakove, Commentary, *Confessions of an Ambivalent Originalist*, 78 N.Y.U. L. REV. 1346, 1348 (2003) ("I was, and remain, skeptical about the capacity of lawyers and jurists to pursue these

2. *Meaning as Principle*

Even if there were a single, uniform view of a particular constitutional provision that judges were capable of uncovering, it might not help answer the constitutional question at issue because, odds are, the provision articulates a principle. Indeed, much of the U.S. Constitution—one of the shortest constitutions in the world[70]—states general principles rather than detailed rules.[71] Principles, however, provide broad guidelines, not answers to specific questions.[72] In these cases, constitutional meaning has "run out."[73]

Exacerbating this problem is that most constitutional cases present issues that did not exist when the constitutional provision was adopted.[74] Even if the Second Amendment protects the highly specific right to bear arms for self-defense in the home, that interpretation does not answer the question of whether that right extends to semiautomatic weapons, which did not exist in the eighteenth century—a time of mostly single-shot weapons.[75]

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inquiries on terms that would pass the professional muster of historians."); Helen Irving, *Outsourcing the Law: History and the Disciplinary Limits of Constitutional Reasoning*, 84 FORDHAM L. REV. 957, 959–60 (2015) ("Judges are not 'qualified' to act as historians.").

70 At 4,400 words, the U.S. Constitution is the world's oldest and shortest written constitution among major governments (excluding micronations). *Fascinating Facts About the U.S. Constitution*, CONSTITUTIONFACTS.COM, https://www.constitutionfacts.com/us-constitution-amendments/fascinating-facts/ [https://perma.cc/K455-CLQG].

71 *See* Randy E. Barnett, *The Original Meaning of the Commerce Clause*, 68 U. CHI. L. REV. 101, 108 (2001) (noting that "the framers frequently used abstract language").

72 *See* Robert J. Delahunty & John Yoo, *Saving Originalism*, 113 MICH. L. REV. 1081, 1097 (2015) (book review) ("Furthermore, even when the original public meaning of a clause was at first and still is now agreed upon, the applications of that clause might be uncertain, especially (but not only) when the original meaning is highly abstract and indeterminate." (emphasis omitted)).

73 *See* Heidi Kitrosser, *Interpretive Modesty*, 104 GEO. L.J. 459, 462 (2016) ("Once the text runs out, that is, once it ceases to tell us precisely what to do—either because it encodes a standard or principle subject to multiple applications, or because it establishes a thin rule and beyond that is silent—originalist interpretation can do no more work.").

74 *See* Powell, *supra* note 68, at 664–65 ("[T]he vast majority of contemporary constitutional disputes involve facts, practices, and problems that were not considered or even dreamt of by the founders.").

75 *See* Christopher Ingraham, *What 'Arms' Looked Like When the 2nd Amendment Was Written*, WASH. POST (June 13, 2016, 4:01 PM), https://www.washingtonpost.com/news/wonk/wp/2016/06/13/the-men-who-wrote-the-2nd-amendment-would-never-recognize-an-ar-15/ [https://perma.cc/662Y-Y75T] ("Of course, semiautomatic firearms technology didn't exist in any meaningful sense in the era of the founding fathers. . . . The typical firearms of the day were muskets and flintlock pistols. They could hold a single round at a time . . . ."); Eric Ruben, *Law of the Gun: Unrepresentative Cases and Distorted Doctrine*, 107 IOWA L. REV. 173, 206 (2021) ("By the eighteenth century, the matchlock was widely replaced by the flintlock, a more reliable design. Yet, like the matchlocks that preceded them, these founding-era guns were muzzle-loaders that were slow to load . . . ." (footnote omitted)); Joseph Blocher & Eric Ruben, *Originalism-by-Analogy and Second Amendment Adjudication*, 133 YALE L.J. 99, 153 (2023) ("Americans in 1791 generally owned muzzle-loading flintlocks, 'liable to misfire' and incapable of firing multiple shots." (quoting

To address this dilemma, new originalists urge a distinction between interpretation and construction.[76] Uncovering the fixed and discoverable original meaning is called constitutional *interpretation*.[77] Applying this meaning, often a principle, to specific cases is termed constitutional *construction*.[78] "In the 'construction zone,' adjudicators candidly acknowledge that there is no single correct answer to be gleaned from constitutional text and history."[79]

What guides, or restrains, judges in the construction zone? It depends on which originalist you ask, multiplying the available originalisms for deployment. Some originalists would fill the construction gap with default rules that reflect their policy preferences such as a presumption of deference to the political branches[80] or to the states.[81] A few accept that provisions written at higher levels of abstraction are inherently open-ended, and consequently, originalism itself must be recognized as fairly open-ended.[82]

Often construction relies upon "original expected applications," which is how the people of the relevant era would have or did apply the

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Randolph Roth, *Why Guns Are and Are Not the Problem: The Relationship Between Guns and Homicide in American History*, *in* A Right to Bear Arms? The Contested Role of History in Contemporary Debates on the Second Amendment 113, 117 (Jennifer Tucker et al. eds., 2019))); *cf.* Franklin E. Zimring, *Handgun Control, the Second Amendment, and Judicial Legislation in the D.C. Circuit: A Note on* Parker v. District of Columbia, 11 New Crim. L. Rev. 312, 315 (2008) (noting two differences "between historic and modern handguns—concealability and the capacity for automatic fire").

76 *See* Colby, *supra* note 36, at 731 ("The recognition that the Constitution often enacts broad principles, rather than narrow rules of decision, has fostered another significant development in originalist thought: the emergence of a distinction between 'constitutional interpretation' and 'constitutional construction.'").

77 *See* Solum, *supra* note 24, at 457 ("'Constitutional interpretation' is the activity that discerns the communicative content (linguistic meaning) of the constitutional text.").

78 *See id.*, at 457 ("'Constitutional construction' is the activity that determines the content of constitutional doctrine and the legal effect of the constitutional text.").

79 Kitrosser, *supra* note 73, at 463; *see also* Barrett, *supra* note 34, at 1 ("[N]ew originalists do not contend that the Constitution's original public meaning is capable of resolving every constitutional question."); Christina Mulligan, *Diverse Originalism*, 21 U. Pa. J. Const. L. 379, 388 (2018) ("Many originalists have grown more accepting of and comfortable with the notion that some constitutional terms and phrases are underdetermined, vague, ambiguous, or open-textured.").

80 *See* Michael Stokes Paulsen, *How to Interpret the Constitution (and How Not to)*, 115 Yale L.J. 2037, 2057 (2006) (arguing courts should defer to the political branches where constitutional meaning does not yield a determinant result).

81 *See* Gary Lawson, *Dead Document Walking*, 92 B.U. L. Rev. 1225, 1234 (2012) (proposing that "[i]n the event that there is any uncertainty about what this Constitution means in any specific application, resolve the uncertainty against the existence of federal power and in favor of the existence of state power" (emphasis omitted)).

82 *See* Solum, *supra* note 24, at 458 ("[T]he construction zone is ineliminable: the actual text of the U.S. Constitution contains general, abstract, and vague provisions that require constitutional construction for their application to concrete constitutional cases.").

broad principle to specific cases.[83] Some originalists explicitly invoke original expected applications.[84] Others acknowledge the need for construction yet claim that their construction derives from empirical, objective guidance from history such as the "spirit of the provision"—which often simply boils down to original expected applications.[85] After all, "It is difficult to conceive of better evidence of the 'semantic intention' behind constitutional text than how that text was expected to be applied."[86]

In sum, even originalists acknowledge the difficulty of deciding a case without some degree of judicial discretion. Ultimately, originalism is as value laden as alternatives like the living constitutional theory. The main difference is that living constitutionalists are much more transparent about the values that inform their decision.[87] Yet even those originalist scholars and judges who concede that construction is inevitable still regularly claim a mantle of objectivity and insist that their guidelines do not reflect personal preferences.[88]

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83 Jack M. Balkin, *Nine Perspectives on Living Originalism*, 2012 U. Ill. L. Rev. 815, 818 (2012) (defining original expected applications as "how people at the time of adoption would have intended or expected the text to be applied").

84 *See* McGinnis & Rappaport, *supra* note 28, at 371 ("[T]he Constitution's original meaning is informed by, but not exhausted by, its original expected applications. In particular, the expected applications can be strong evidence of the original meaning.").

85 For example, Barnett and Bernick argue for construction informed by the spirit of the provision. Barnett & Bernick, *supra* note 8, at 34 ("A rule must be applied [in the construction zone]. . . . We hold that that rule must be informed by the Constitution's original spirit."). They insist this is an empirical endeavor. *Id.* at 34 ("[T]he inquiry into the law's spirit is no less grounded in empirical facts than inquiry into the law's letter."). But then they suggest that the spirit can be gleaned from "consulting what was said about them both in public and in private" and by examining "those functions that the Framers, Ratifiers, and members of the public understood particular provisions to serve." *Id.* at 34–35. As a practical matter, the original understanding of the function of a provision seems to overlap with original expected applications.

86 Jamal Greene, *Selling Originalism*, 97 Geo. L.J. 657, 663 (2009); Balkin, *supra* note 83, at 822 ("Today most conservative originalists agree with me that we are not bound by original expected applications, only by original meaning. But the way they cash out original meaning often leads them to model it fairly closely on original expected applications . . . .").

87 *See* Eric J. Segall, *The Concession That Dooms Originalism: A Response to Professor Lawrence Solum*, 88 Geo. Wash. L. Rev. Arguendo 33, 46 (2020) ("Whereas most Living Constitutionalists concede judges inevitably have that discretion, Originalists today still often claim that only their theory can limit the power of runaway federal judges."). In addition, because living constitutionalism advocates interpreting the Constitution with an eye toward current values, it necessarily articulates those values. *See* Lawrence B. Solum, *Originalism Versus Living Constitutionalism: The Conceptual Structure of the Great Debate*, 113 Nw. U. L. Rev. 1243, 1244 (2019).

88 *See, e.g.*, *supra* notes 39, 42 and accompanying text. Yet somehow, their "unbiased and objective" analysis of history yields answers that match their preferences. For example, the self-described "good faith" analysis of libertarians Barnett and Bernicki led them to conclude first, that the Second Amendment does not allow gun regulations that Scalia approved in *Heller* and second, that Congress lacks authority to regulate activities that substantially affect interstate commerce. Barnett & Bernick, *supra* note 8, at 38–39, 44–45. *But see, e.g.*, Saul Cornell, *"Infants"*

B. Regressiveness of Original Public Meaning

Even if there were agreement on the original meaning of the Constitution, and this consensus were readily discoverable, it still should not automatically dictate the outcome of constitutional cases today. Apart from the fact that the original generation may not have been originalist,[89] it is less, not more, democratic for our constitutional rights to be controlled by the views of citizens long dead rather than the values of citizens alive now.[90] Most problematic is that the retrograde views of the hypothetical reasonable Founding-era citizen would reinforce the historical privilege of some and the historical marginalization of many.[91] Unfortunately, these asymmetrical effects may be a feature rather than a bug of originalism.[92]

The supermajoritarian justification for originalism fails twice over because originalism cedes control not only to a long dead generation,

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and Arms Bearing in the Era of the Second Amendment: Making Sense of the Historical Record, 40 YALE L. & POL'Y REV. INTER ALIA 1, 3 (2021) ("[T]hose who live by the originalist sword may also perish by it: for much of American history, gun regulations were much more onerous and robust than gun-rights advocates have credited.").

89 *See* Bunker, *supra* note 53, at 333 ("[A] strong originalism might be regarded as self-refuting since it ignores the actual intent of the framing generation—that the Constitution be interpreted according to the legal norms of the time, which were by no means exclusively originalist in nature."); Farah Peterson, *Expounding the Constitution*, 130 YALE L.J. 2, 80 (2020) (arguing the Founding generation "had confidence in the Constitution's durability not because they assumed that future generations would or could derive a fixed and timeless meaning from its words, but because they expected judges would interpolate the text to govern the 'unforeseen'"); Saul Cornell, *President Madison's Living Constitution: Fixation, Liquidation, and Constitutional Politics in the Jeffersonian Era*, 89 FORDHAM L. REV. 1761, 1774 (2021) ("[T]he legal methods used to interpret [the Constitution] were contested throughout this period and no consensus ever emerged."); Jack Rakove, *The Framers of the Constitution Didn't Worry About 'Originalism*,' WASH. POST (Oct. 16, 2020, 3:43 PM), https://www.washingtonpost.com/outlook/originalism-constitution-founders-barrett/2020/10/16/1906922e-0f33-11eb-8a35-237ef1eb2ef7_story.html [https://perma.cc/FF5U-9NAN] (arguing that the Framers would not "have thought of themselves as 'originalists'").

90 This is known as the dead hand problem. Originalists insist that it is undemocratic for unelected, unaccountable judges to determine the scope of constitutional protections rather than the supermajority who approved the United States Constitution. The problem, as Christian Mulligan points out, is that the people in that supermajority are all dead, and "why [should] the values and views of dead people . . . govern living individuals who now exist in a wildly different cultural context"? Mulligan, *supra* note 79, at 394; *see also* Coan, *supra* note 27, at 11 ("For those defenders of originalism who view popular sovereignty as paramount, the only principled response to the dead hand problem is probably to abandon originalism altogether.").

91 *See* Greene, *supra* note 86, at 659 (asking "how rote obedience to the commitments of voters two centuries distant and wildly different in racial, ethnic, sexual, and cultural composition can be justified on democratic grounds" (emphasis omitted)).

92 *See id.* at 832 ("[T]he modern GOP's constitutional 'originalism' grew directly out of resistance to *Brown*."). *See generally* Calvin TerBeek, *"Clocks Must Always Be Turned Back":* Brown v. Board of Education *and the Racial Origins of Constitutional Originalism*, 115 AM. POL. SCI. REV. 821 (2021).

but also to that generation's ruling elite.[93] Moreover, originalism ties the scope of constitutional protections to a time when prejudices based on race, sex, and religion, among other characteristics, were widespread, which helps entrench the power of those already privileged in society.[94] Unfortunately, the origins and demographics of originalism supporters suggest this is precisely what was intended.

To start, it is not true that a supermajority ratified the Constitution. Large swaths of Americans were excluded from the ratifying conventions.[95] Native Americans were excluded.[96] African Americans were excluded.[97] Women of all races were excluded.[98] Non-Christians were unlikely to be plentiful.[99]

This undemocratic exclusion is not resolved by arguing that the original meaning stems from the understanding of an imagined reasonable person from the same era rather than the actual ratifiers, who may not be representative.[100] The understanding of the theoretical reasonable person will undoubtedly be the understanding of a white Christian man, as this elite group of men created and controlled most materials originalists use to glean meaning,[101] and their understanding may differ

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93 *See* Coan, *supra* note 27, at 3 ("It is *de rigueur* for critics of originalism to point out that originalism is not, in fact, rule by the people but rather rule by dead, white, male landowners."); Boyce, *supra* note 61, at 914 ("To the extent that the Constitution as originally understood sought to entrench the power of oligarchic constituent minorities, its authority in a modern democratic society is problematic.").

94 *Cf.* Michael S. Lewis, *Evil History: Protecting Our Constitution Through an Anti-Originalism Canon of Constitutional Interpretation*, 18 U.N.H. L. Rev. 261, 266 (2020) (book review) ("[A]n originalist methodology [should] confront the full brunt of our past, both good and evil. Very few do.").

95 *See* Jamal Greene, *Originalism's Race Problem*, 88 Denv. U. L. Rev. 517, 518 (2011) ("Voting for delegates to the state conventions largely excluded women, Indians, blacks, and those who did not own property.").

96 *Id.*

97 *Id.*

98 *Id.*

99 *Cf.* Mulligan, *supra* note 79, at 397 ("[I]f the Framers were indifferent or hostile to certain people's interests, one could reasonably surmise, in the absence of further evidence, that those interests were likely not advanced by the Constitution.").

100 *Cf.* Jack N. Rakove, *Joe the Ploughman Reads the Constitution, or, the Poverty of Public Meaning Originalism*, 48 San Diego L. Rev. 575, 584 (2011) ("[The] interpretive goal [of public meaning originalists] is to understand how an informed reader of the time would have understood the legal commands it issued. . . . [They suppose] that the imagined reader of the past exists in a disinterested world, detached from political commitments. . . . Exactly who this imaginary reader is nonetheless remains something of a mystery . . . .").

101 *See* Mulligan, *supra* note 79, at 392 ("The overwhelming majority of evidence of original meaning comes from the speech and writings of elite white men—largely because the Constitution was itself written by elite white men, and because elite white men produced most published writing, and the most writing about the Constitution in the founding era."). For example, for his originalist analysis of "commerce," Randy Barnett surveyed every use of "commerce" gleaned from the Philadelphia Convention, the Federalist Papers, the ratification debates, and eight years of the

from Americans whose understandings were not consulted or even memorialized.[102] "To the extent that white women and people of color interpreted the Constitution differently, those interpretations are less likely to have been recorded and identified."[103]

Moreover, even if the originalism enterprise did not start with the reasonable meaning as understood by white Christian men, it would probably end up there, given that the judiciary deciding the question of what a reasonable person believes is itself mostly white Christian men.[104] It has been repeatedly documented that when faced with a reasonable person test,[105] the "reasonable person" often shares the same attributes and assumptions as the judge.[106] This may well be an unconscious process, but it occurs nonetheless.[107] For example, when analyzing whether a reasonable person would conclude that the government was endorsing Christianity in violation of the Establishment Clause,[108] Christian and non-Christian judges arrive at different conclusions.[109] Similarly, when

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Pennsylvania Gazette—all texts produced predominantly by elite white Christian men. Barnett, *supra* note 37, at 416.

102 *Cf.* Saul Cornell, *The People's Constitution vs. the Lawyer's Constitution: Popular Constitutionalism and the Original Debate Over Originalism*, 23 YALE J.L. & HUMANS. 295, 303 (2011) ("Recovering how the Constitution might have been read by ordinary Americans requires moving beyond the familiar canonical texts consulted by Originalist scholarship.").

103 Mulligan, *supra* note 79, at 392.

104 As of 2019, sitting federal judges were overwhelmingly white (73%) and male (80%). Danielle Root, Jake Faleschini & Grace Oyenubi, *Building a More Inclusive Federal Judiciary*, CTR. AM. PROGRESS (Oct. 3, 2019), https://www.americanprogress.org/issues/courts/reports/2019/10/03/475359/building-inclusive-federal-judiciary/ [https://perma.cc/J83F-2CVR]. Meanwhile, a 2017 study found that 78.4% of circuit judges were Christian and 19% Jewish. *Id.*

105 *Cf.* Colby, *supra* note 36, at 724 ("In essence, [originalism] became a reasonable person test . . . .").

106 *Cf.* Cornell, *Reading the Constitution*, *supra* note 67, at 833 (describing how the 1980s enthusiasm for German reception theory, where imagined readers were key, cooled when "studies of actual readers demonstrated that erroneous assumptions and ideological bias invariably distorted the ideal readers constructed by modern scholars").

107 *See* James C. Phillips, *Which Original Public?*, 25 CHAP. L. REV. 333, 336 (2022) ("But using an objective standard for the average, ordinary, or competent person at the time a constitutional provision is adopted will mean that a judge's personal views or intuition, consciously or unconsciously, will be doing a lot more work in discerning meaning."); *see also* Rakove, *supra* note 100, at 586 ("An imaginary originalist reader who never existed historically can never be a figure from the past; the reader remains only a fabrication of a modern mind. How the existence of such a figure can offer a constraint on the excesses of judicial discretion seems equally a fabrication as well.").

108 The endorsement test, which was used to determine whether a government action violated the Establishment Clause, asked whether a reasonable person, aware of the history and context of the challenged religious activity or display, would conclude that the government was endorsing religion. McCreary County v. ACLU of Ky., 545 U.S. 844, 866 (2005).

109 *See* Gregory C. Sisk, Michael Heise & Andrew P. Morriss, *Searching for the Soul of Judicial Decisionmaking: An Empirical Study of Religious Freedom Decisions*, 65 OHIO ST. L.J. 491, 572 (2004) (finding that Jewish judges were significantly more likely to find an Establishment Clause violation compared with Christian judges); *cf.* Jay D. Wexler, *The Endorsement Court*, 21 WASH. U. J.L. & POL'Y 263, 285 (2006) ("It is very difficult for judges who are themselves not, for the

analyzing whether a reasonable person would find that an employer had created a sexually or racially hostile work environment in violation of Title VII,[110] male and female judges,[111] and white and black judges[112] reach different conclusions. This bias will undoubtedly also play a role when judges discern what a reasonable eighteenth-century citizen would understand a particular constitutional provision to mean, never mind how it applies to a specific set of facts.[113] Thus, whether due to the written sources or the interpreter of those sources, courts' original public meaning (and application of it) is likely to reflect the original understanding of a reasonable man who is white and Christian, among other traits.[114]

But even if none of this were true, originalism still facilitates the entrenchment of hierarchies because it ties constitutional protections to time periods marked by inequalities.[115] Today, we reject the view that

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most part, members of minority traditions to understand those perceptions and to empathize with them.").

110 Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e to e-17. An employer violates Title VII with conduct that is "severe or pervasive enough to create an objectively hostile or abusive work environment—an environment that a reasonable person would find hostile or abusive." Harris v. Forklift Sys., Inc., 510 U.S. 17, 21 (1993).

111 *See, e.g.*, Sue Davis, Susan Haire & Donald R. Songer, *Voting Behavior and Gender on the U.S. Courts of Appeals*, 77 JUDICATURE 129, 131 (1993) (finding that even when controlling for political affiliation and region, female judges are more likely than male judges to support employment discrimination claimants); Theresa M. Beiner, *Diversity on the Bench and the Quest for Justice for All*, 33 OHIO N.U. L. REV. 481, 485 (2007) (summarizing studies of political scientist Nancy Crowe as finding that in split sex discrimination appeal decisions, among white Democrats, 90% of female judges supported the claimant compared with 76% of male ones, and that among white Republicans, the numbers were 53% for female judges compared to 28% for male); Christina L. Boyd, Lee Epstein & Andrew D. Martin, *Untangling the Causal Effects of Sex on Judging*, 54 AM. J. POL. SCI. 389, 401 (2010) ("[F]emale and male judges differ significantly in their treatment of Title VII sex discrimination suits.").

112 *See, e.g.*, Pat K. Chew & Robert E. Kelley, *Myth of the Color-Blind Judge: An Empirical Analysis of Racial Harassment Cases*, 86 WASH. U. L. REV. 1117, 1134 (2009) (summarizing political scientist Nancy Crowe as finding "African American judges held for plaintiffs . . . over twice as often in race discrimination cases, as compared to White judges"); *see also id.* at 1149, 1156 (finding that African American judges are more likely to find racial harassment than white judges, regardless of party: 47% of African American Democratic judges versus 27.1% of white Democratic judges and 43% of African American Republican judges versus 16.6% of white Republican judges).

113 *Cf.* Tushnet, *supra* note 36, at 609 n.4 ("What would a reasonably well-informed contemporary have understood the terms to mean? Well, just about what I understand them to mean, because [I can pretend that I have cleansed my mind of all post-adoption knowledge and then assert that] I am reasonably well-informed." (alteration in original)).

114 One could also be privileged along other dimensions, including sexual orientation and gender identity.

115 This is true even without the original Constitution's explicitly racist provisions. "It is not just that people of African descent were not represented at Philadelphia or at the state ratifying conventions, but that the Constitution that emerged from those conventions preserved and protected both slavery itself and slavery's institutional infrastructure." Greene, *supra* note 95, at 518–19. The infamous Three-Fifths Clause increased the slave states' power by counting powerless

women must remain in the private sphere of home and childrearing.[116] Yet, given that separate spheres ideology dominated during Reconstruction, the original meaning of the Equal Protection Clause arguably did not extend to equality between the sexes.[117] When asked whether the Equal Protection Clause barred discrimination on the basis of sex, Justice Scalia replied, "It doesn't. Nobody ever thought that that's what it meant. Nobody ever voted for that."[118] Nor is this simply one idiosyncratic view.[119] Congress passed laws limiting married women's rights fairly soon after the Fourteenth Amendment's ratification—with no apparent controversy.[120] The Fourteenth Amendment itself discriminates against women in its second section by extending suffrage protections to male voters only, not female ones.[121] Why should we tie our constitutional rights to eras that held beliefs we now find repugnant? In an understatement, Christine Mulligan noted, "Originalism has a difficult relationship with race and gender."[122]

For some number of originalists, its regressive tendencies may be part of its appeal.[123] Political scientist Calvin TerBeek has documented

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slaves for representatives and electoral vote purposes; the Fugitive Slave Clause mandated the return of escaped slaves; and the Importation Clause precluded any slave trade ban until 1808. Greene, *supra* note 95, at 519.

116 *Contra* Bradwell v. Illinois, 83 U.S. 130, 141 (1872) (Bradley, J., concurring) ("The paramount destiny and mission of woman are to fulfil [sic] the noble and benign offices of wife and mother. This is the law of the Creator.").

117 *See* Maxine Eichner, *The Privatized American Family*, 93 Notre Dame L. Rev. 213, 250 n.236 (2017) ("The central convention in separate-spheres ideology, which emerged toward the middle of the nineteenth century, was its strong demarcation between the realm of home, on the one hand, and the realm of work, on the other.").

118 University of California Television, *Legally Speaking: Antonin Scalia*, YouTube (Mar. 17, 2011), https://youtu.be/KvttIukZEtM?si=LKdJsP9C0bw0LHBD&t=1021 [https://perma.cc/EU2H-ZQZJ]; Stephanie Condon, *Scalia: Constitution Doesn't Protect Women or Gays From Discrimination*, CBS News (Jan. 4, 2011, 5:33 PM), https://www.cbsnews.com/news/scalia-constitution-doesnt-protect-women-or-gays-from-discrimination/ [https://perma.cc/DFZ9-MQHG]; Although Justice Scalia did not take this position in *United States v. Virginia*, 518 U.S. 515, 566–68 (1996) (Scalia, J., dissenting), he still dissented from the holding that the categorical exclusion of women from Virginia's preeminent public university violated the Equal Protection Clause.

119 *See* Friedman, *supra* note 63, at 1214 ("[O]riginalists who seek to make the case for gender equality . . . consistent with the original understanding are swimming upstream."); Ward Farnsworth, *Women Under Reconstruction: The Congressional Understanding*, 94 Nw. U. L. Rev. 1229, 1230 (2000) ("The [Fourteenth] Amendment was understood not to disturb the prevail- ing regime of state laws imposing very substantial legal disabilities on women, particularly married women."). *See generally id.*

120 *See* Farnsworth, *supra* note 119, at 1258.

121 *See* U.S. Const. amend. XIV, § 2 ("[W]hen the right to vote . . . is denied to any of the male inhabitants of such State . . . .").

122 Mulligan, *supra* note 79, at 380.

123 This is not true for all originalists, but the fact that originalism regularly reaches conservative outcomes harmful to disadvantaged groups and yet is not a dealbreaker is telling. *See* Ethan Dawson, *Serving Only to Oppress: An Intersectional and Critical Race Analysis of Constitutional*

how "the modern GOP's constitutional 'originalism' grew directly out of resistance to *Brown* [*v. Board of Education*]," the landmark Supreme Court decision that ended de jure segregation.[124] Because direct attacks on the Fourteenth Amendment were too obvious,[125] conservatives instead argued that *Brown* was unfaithful to the Reconstruction Amendment's original intent.[126] For this reason, Reva Siegal and Robert Post have argued originalism began as a political practice: "The political practice of originalism thus reflected (and continues to reflect) conservative commitments that are not determined by objective and disinterested historical research into the circumstances of the Constitution's ratification."[127] In short, it is no accident that originalism arose in conservative circles.[128]

Nor is it a coincidence that staunch supporters are overwhelmingly conservative.[129] An empirical survey of public attitudes about originalism found that supporters of originalism tend to be conservative, white Christian men.[130] Not all, obviously—Clarence Thomas is a devoted originalist, and so apparently is Amy Coney Barrett—but

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Originalism Inflicting Harm, 11 IND. J.L. & SOC. EQUAL. 294, 300–02 (2023) ("When historically marginalized or disadvantaged groups seek equality in greater society, an originalist argument against such rights has been typical.").

124 TerBeek, *supra* note 92, at 832. TerBeek adds that conservatives then "rewrote their own history" in part "to erase the uncomfortable racial origins of modern originalism." *Id.*

125 *See id.* at 827 ("But, like interposition, a sustained attack on the Fourteenth Amendment's validity was too transparent.").

126 *See id.* at 827–28; *see also, e.g.*, BARRY GOLDWATER, THE CONSCIENCE OF A CONSERVATIVE 29 (1960) ("The [Fourteenth] [A]mendment was not intended to, and therefore it did not outlaw racially separate schools."); Alfred Avins, *Literacy Tests, The Fourteenth Amendment and District of Columbia Voting: The Original Intent*, 1965 WASH. U. L.Q. 429, 462 ("[I]t was not the original intent of the framers of the fourteenth amendment to forbid English-language or other literacy tests . . . .").

127 Post & Siegel, *supra* note 17, at 556–57.

128 *Cf.* James E. Fleming, *The New Originalist Manifesto*, 28 CONST. COMMENT. 539, 544 (2013) (book review) ("The old originalism is an *ism*—a conservative ideology that emerged in reaction to the Warren Court (and early Burger Court).").

129 *See* Friedman, *supra* note 63, at 1210 ("Though there are originalist stirrings on the ideological left, in the main the enterprise of original understanding has been one for conservatives.").

130 Among originalists polled, 86% were white compared with 2% who were black and 4% who were Hispanic. 57% of originalists were men. Jamal Greene, Nathaniel Persily & Stephen Ansolabehere, *Profiling Originalism*, 111 COLUM. L. REV. 356, 371 (2011). Religion-wise, 52% were born-again/evangelical, representing only one strand of Christianity. *Id.* at 373. In contrast, only 17% of the nonoriginalists were born again/evangelical. *Id.* Additionally, 76% of the originalists believe in the literal truth of the Bible, and 87% agree that public schools should be permitted to start each day with a prayer. *Id.* at 372, 380.

most.[131] Moreover, allies are overwhelmingly politically conservative[132]: 76% of originalists described themselves as conservative (with only 6% self-identifying as liberal)[133] and 85% as Republican or leaning Republican.[134] Certainly, their views are politically conservative. For example, 83% of originalists in this survey agree that "[w]e have gone too far in pushing equal rights in this country," and 91% did not think that same-sex marriages should be legal.[135] Thus, apart from a few liberals trying to reclaim it,[136] originalism is generally a conservative theory of constitutional interpretation. But again, it should surprise no one that "a theory of constitutional interpretation where the scope of constitutional protection is pinned to a time rife with hierarchies based on race, religion, sex, etc., is likely more appealing to those who have historically been privileged along these dimensions."[137]

Granted, because of its malleability, originalist decisions are not inevitably regressive,[138] but originalism facilitates those decisions, thereby allowing conservatives to reach their preferred outcomes while denying that their preferences played any role.[139] Instead, they claim that the fixed meaning of the Constitution made them do it.

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131 *See* Mulligan, *supra* note 79, at 391 ("Compared to the rest of the legal academic community, originalists tend to hold conservative or libertarian political philosophies, tend to be white, and tend to be male.").

132 *See* Greene et al., *supra* note 130, at 360 ("It should come as little surprise that originalists share the characteristics traditionally associated with political conservatives.").

133 Fifteen percent report that they are slightly conservative, 46% conservative, and 15% extreme conservative. *Id.* at 374. No originalist identified as extreme liberal, while 3% said they were liberal and 3% slightly liberal. *Id.* Seventeen percent chose moderate. *Id.*

134 Thirty-four percent of originalists self-identified as leaning Republican, 14% as not strong Republican, and 37% as strong Republican. *Id.*

135 *Id.* at 376, 379.

136 *See, e.g.*, Balkin, *supra* note 20, at 292 (arguing for a "right to abortion based on the original meaning of the constitutional text" (emphasis omitted)).

137 Caroline Mala Corbin, *Justice Scalia, the Establishment Clause, and Christian Privilege*, 15 First Amend. L. Rev. 185, 216 (2017); *see also* Mary Anne Case, *The Ladies? Forget About Them. A Feminist Perspective on the Limits of Originalism*, 29 Const. Comment. 431, 448 (2014) ("The substantive rules that were in place and reaffirmed by the Framers of both the original Constitution and the post-Civil War Amendments with respect to women are, for both personal and ideological reasons, rules I don't want to live with.").

138 *See* Colby, *supra* note 36, at 763–64 (explaining that fidelity to the Constitution that is defined at a high level of generality does not preclude finding a constitutional right to abortion—one of the very conclusions that sparked the popularity of modern originalism in the first place).

139 *Compare* Barnett, *supra* note 37, at 415 ("Originalism . . . seeks to establish an empirical fact about the objective meaning of the text at a particular point in time."), *with* Jennejohn et al., *supra* note 55, at 771 ("To continue ignoring this issue [of hidden bias] is to risk infecting judicial decisionmaking with the structural biases endemic to American society—and embedded in its linguistic patterns—under the guise of an ostensibly neutral, objective interpretive approach.").

II. Free Speech Originalism

Applying originalism to the First Amendment is particularly ill-advised. Because First Amendment speech protections are stated at a high level of generality, judges, at best, have only a broad principle to decide specific cases, making "construction" inevitable.[140] At a minimum, then, free speech originalism will allow judges to reach their preferred conclusion while claiming the Constitution required it.

To the extent there was any historical consensus, the original understanding—whether at the Founding or at Reconstruction—was far narrower than our conception of free speech today.[141] A detailed review of how these generations understood the First Amendment is beyond the scope of this Article, but a truly originalist analysis would completely reshape First Amendment doctrine and result in a severely diminished constitutional right.

Complicating matters is that there are two First Amendment provisions that protect expression today: the Free Speech Clause and the Press Clause.[142] For the Founding generation, the Press Clause was the more significant clause;[143] "Press" referred to the printing press and therefore protected publications, the era's only mass media.[144] Today, the Press Clause has been subsumed into the Free Speech Clause and, therefore, lacks any distinct vitality.[145] I refer to First Amendment protection to cover both clauses but note that equating or conflating the two clauses (as courts do) already departs from the original meaning. My main goal, however, is not to provide a detailed analysis of each separate clause's original meaning, but to emphasize that protection at these earlier times was contested and ultimately quite limited.

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140 *See* Barrett, *supra* note 34, at 1–2 ("When the original public meaning of the text establishes a broad principle rather than a specific legal rule, interpretation alone cannot settle a dispute. In that event, the need for construction arises. The First Amendment is a classic example.").

141 *See* Lawrence Rosenthal, *First Amendment Investigations and the Inescapable Pragmatism of the Common Law of Free Speech*, 86 Ind. L.J. 1, 13 (2011) ("The framing-era conception of freedom of speech and the press was anything but capacious, at least by contemporary standards.").

142 *See* U.S. Const. amend. I ("Congress shall make no law . . . abridging the freedom of speech, or of the press.").

143 *See* Rosenthal, *supra* note 141, at 15 (noting that although all state constitutions protected freedom of the press at the Founding, only Pennsylvania and Vermont explicitly protected freedom of speech).

144 Ashutosh Bhagwat, *Posner, Blackstone, and Prior Restraints on Speech*, 2015 BYU L. Rev. 1151, 1165; Jud Campbell, *Natural Rights and the First Amendment*, 127 Yale L.J. 246, 270 (2017) ("In eighteenth-century English, 'the press' was a reference to printing; the term did not refer to journalists until the nineteenth century.").

145 *See* RonNell Andersen Jones & Sonja R. West, *The Fragility of the Free American Press*, 112 Nw. U. L. Rev. 567, 573 (2017) (noting that the Supreme Court does not interpret the Press Clause "in any manner that might distinguish it from the Speech Clause").

A. Narrow Contested View During Founding

When historians describe the Founding-era debates over the scope of First Amendment protection for speech, they typically recount a very narrow band of protection.[146] Everyone agreed that the First Amendment banned prior restraints, where the government would license or censor speech before publication.[147] Some, however, would have stopped there.[148] Others believed the First Amendment should cover certain natural rights without specifying exactly what they comprised.[149] Regardless of the amendment's precise scope, almost no one denied that those rights could be curbed to promote the general welfare.[150] This is a far cry from modern jurisprudence, where public interests, even strong ones, are routinely rejected as sufficient grounds for limiting speech.

Protections that are taken for granted today find little historical support. For example, notably absent from the early debates is any indication that content-based regulations are presumptively unconstitutional under the First Amendment.[151] On the contrary, these neutrality requirements "are twentieth-century innovations."[152] Nor is there much evidence that the First Amendment initially reached commercial advertisements or corporate speech generally, to highlight just a couple of examples.[153]

1. Coverage Limited

The Founding generation agreed that the First Amendment barred prior restraints. Some would limit it to prior restraints, reading the First Amendment as codifying the English common law as espoused by Blackstone, whose Commentaries were enormously influential during this period.[154] According to Blackstone:

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146 *See, e.g.*, Christopher Wolfe, *Originalist Reflections on Constitutional Freedom of Speech*, 72 SMU L. Rev. 535, 535 (2019) (describing the "real meaning" of the Free Speech and Press Clauses as "much narrower than the modern understanding of free speech").

147 *See, e.g.*, Tyler Broker, *Free Speech Originalism*, 81 Alb. L. Rev. 45, 48 (2018).

148 *See, e.g.*, *id.*

149 *See* Campbell, *supra* note 144, at 269 ("For the Founders, however, mentioning a 'freedom to do something' naturally alluded to natural rights, without any need for further clarification or consistent terminology.").

150 *See* Jud Campbell, *The Emergence of Neutrality*, 131 Yale L.J. 861, 879–80 (2021).

151 *Cf.* Reed v. Town of Gilbert, 576 U.S. 155, 163 (2015) ("Content-based laws . . . are presumptively unconstitutional and may be justified only if the government proves that they are narrowly tailored to serve compelling state interests.").

152 Campbell, *supra* note 150, at 865.

153 *See infra* notes 317–26 and accompanying text.

154 *See* Rosenthal, *supra* note 141, at 13 ("Blackstone's account was enormously influential in colonial-era American law, which largely accepted this view of the power to punish expression thought to be harmful.").

> The liberty of the press is indeed essential to the nature of a free state: but this consists in laying no previous restraints upon publications, and not in freedom from censure for criminal matter when published. . . . [T]o punish (as the law does at present) any dangerous or offensive writings, which, when published, shall on a fair and impartial trial be adjudged of a pernicious tendency, is necessary for the preservation of peace and good order.[155]

Not only did many contemporaries agree with Blackstone's view, but so did state law and state judicial decisions.[156] Consequently, many scholars argue that this was the original meaning of the First Amendment.[157] Indeed, Ashutosh Bhagwat writes that "the First Amendment's history as reaching only prior restraints on speech has a long pedigree and strong support."[158] If accurate, most of our free speech jurisprudence is at odds with the original meaning of the First Amendment.

Some scholars highlight the downfall of seditious libel after the 1735 trial of John Peter Zenger as evidence that Blackstone's views did not fully capture the First Amendment's original public meaning.[159] In that prosecution—the last colonial sedition trial[160]—Zenger was acquitted on the grounds that his diatribes against the governor were true despite the judge instructing the jury that truth was not a defense.[161] To the extent Zenger's trial might suggest a broader meaning of the First Amendment, its scope broadened only slightly to provide certain safeguards for seditious libel, including a jury determination of seditiousness, truth as a defense, and a requirement of malicious intent.[162] Then again, the demise of seditious libel against the increasingly unpopular British colonial government did not necessarily mean that it was a dead letter against the United States government of we the people.[163]

The contentious debates surrounding the passage of the Sedition Act of 1798[164]—often examined for insight into the First Amendment's

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155 4 William Blackstone, Commentaries *151–52 (emphasis omitted).

156 *See* Rosenthal, *supra* note 141, at 15 ("[N]o state had departed from Blackstone either by judicial decision or statute with respect to either freedom of speech or the press.").

157 *See, e.g.*, Wolfe, *supra* note 146, at 536 ("That is, the common law understanding of freedom of the press as expressed in Blackstone was what the founders wrote into the First Amendment.").

158 Bhagwat, *supra* note 144, at 1153.

159 *See, e.g.*, Rosenthal, *supra* note 141, at 17.

160 *See id.* at 14 ("As a practical matter, the Zenger trial seems to have led to the demise of seditious libel in colonial America; the Zenger prosecution appears to have been the last of its kind in the colonies.").

161 *See id.*

162 *See* Bhagwat, *supra* note 144, at 1170–71.

163 *See* Rosenthal, *supra* note 141, at 14.

164 An Act in Addition to the Act, Entitled "An Act for the Punishment of Certain Crimes Against the United States," ch. 74, § 2, I Stat. 596 (1798); *see* Kurt T. Lash & Alicia Harrison,

original meaning—also fail to offer definitive answers. Passed by a Federalist administration and used against their political rivals,[165] the Act proscribed "any false, scandalous and malicious writing or writings against the government of the United States, or either house of the Congress of the United States, or the President of the United States, with intent to defame"[166] and incorporated all the post-Zenger safeguards.[167] "[I]t seems that by 1798, undiluted Blackstonism was too much for even the advocates of seditious libel to stomach."[168]

The successful passage of the Sedition Act comports with the narrow-but-not-quite-Blackstonian view of the First Amendment, as does the fact that the courts roundly rejected challenges to the law.[169] If this view represents the meaning of the First Amendment, then it offers very little protection,[170] especially because the baseline assumption remained that speech harmful to the public good could be punished.

At the same time, the fierce political debates surrounding the Sedition Act suggest a lack of consensus on the meaning of the First Amendment. Supporters—usually Federalists—insisted the Sedition Act was perfectly constitutional.[171] Detractors—usually anti-Federalist Democratic-Republicans—vociferously disagreed.[172] At the very least, this disagreement underscores the difficulty of ascertaining meaning from two centuries ago.

Then again, opposition to the Sedition Act did not necessarily equate to an expansive view of the First Amendment. Many Democratic-Republicans opposed it on the grounds that the federal government lacked the power to pass it. For example, St. George Tucker, publisher of the preeminent early American version of Blackstone's Commentaries,

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Minority Report: John Marshall and the Defense of the Alien and Sedition Acts, 68 OHIO ST. L.J. 435, 447–48 (2007).

165 *See* Lash & Harrison, *supra* note 164, at 444 ("In the summer of 1798, party politics and a looming war with France spurred the enactment of the Alien and Sedition Acts by the Fifth Congress of the United States." (footnote omitted)); Jonathan Gienapp, *The Foreign Founding: Rights, Fixity, and the Original Constitution*, 97 TEX. L. REV. ONLINE 115, 127 (2019); *see also* Wolfe, *supra* note 146, at 537 ("[The Framers] understood that democracy was an experiment, and, witnessing the French Revolution, they were not blindly optimistic that it would inevitably work out. In that world—so foreign to us and our sensibilities—sedition was not a marginal annoyance but a very real threat.").

166 Ch. 74, § 2, I Stat. 596.

167 *See* Bhagwat, *supra* note 144, at 1174.

168 *See* Rosenthal, *supra* note 141, 19–20.

169 *See* Michael Kent Curtis, *Teaching Free Speech from an Incomplete Fossil Record*, 34 AKRON L. REV. 231, 244 (2000) ("Judges, including Supreme Court justices, trotted around their circuits and lectured grand juries on the constitutionality of the Sedition Act.").

170 *See* Solum, *supra* note 24, at 504 ("[I]t might be the case that the seemingly vague phrase 'freedom of speech' was a phrase of art, understood by lawyers to refer to a specific rule—perhaps the rule against prior restraints.").

171 *See* Curtis, *supra* note 169, at 243.

172 *See id.*

disagreed with Blackstone's hardline view yet nonetheless thought that *states* had the power to punish seditious libel.[173] Jefferson likewise believed that although the federal government possessed no enumerated power to regulate speech, state governments had ample power to do so.[174] Thus, "unlike modern speech libertarians, Jefferson recognized the legitimacy of suppressing seditious speech—he merely wanted it done by the states, not the federal government."[175]

Other foes of the Sedition Act envisioned broader protection for speech but were not precise about its scope. Madison, for example, belonged to the camp that believed citizens must be able to criticize their government in a republic but conceded the difficulty of drawing the line "between the liberty and licentiousness of the press."[176]

Given all these various positions—and this only scratched the surface—it is unlikely consensus ever existed over what exactly the First Amendment covered. "Benjamin Franklin probably came closest to stating the truth of the matter when he said in 1789 regarding the First Amendment that 'few of us' had any 'distinct Ideas of its Nature and Extent.'"[177] And if, as historian Leonard W. Levy confirmed, many Framers lacked a clear idea, never mind a shared one, then the general population probably had not reached an agreement about the First Amendment's meaning either.[178]

2. Regulations for Common Good Welcome

An alternative originalist view of the First Amendment sees the Press Clause as codifying the common law positive right against prior restraints of the press with perhaps some safeguards, while the Speech Clause codifies the natural rights of speaking, writing, and publishing. Under this view, persuasively advanced by Jud Campbell, the *scope* of coverage remains contested, but there was consensus that the *depth* of protection was fairly shallow.[179]

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173 *See, e.g.*, Rosenthal, *supra* note 141, at 21.

174 *See* Wolfe, *supra* note 146, at 536; Campbell, *supra* note 150, at 880 ("Most critics of the Sedition Act of 1798 . . . accepted the legality of sedition prosecutions but argued that they had to take place at the state level. That was Thomas Jefferson's position." (footnote omitted)).

175 Wolfe, *supra* note 146, at 536.

176 Rosenthal, *supra* note 141, at 20 (quoting James Madison, *The Virginia Report of 1799–1800*, *in* Freedom of the Press From Zenger to Jefferson 197, 214 (Leonard W. Levy ed., 1966)).

177 Bhagwat, *supra* note 144, at 1179 (quoting Benjamin Franklin, *An Account of the Supremest Court of Judicature in Pennsylvania*, *in* 10 The Writings of Benjamin Franklin 37 (Albert Henry Smyth ed., 1907)).

178 *See id.* at 1180 ("[F]ew [Framers] clearly understood what they meant by the free speech-and-press clause, and we cannot know that those few represented a consensus." (quoting Leonard Levy, Emergence of a Free Press 268 (1985))).

179 *See generally* Campbell, *supra* note 144.

Rights in the eighteenth century did not mean the same thing as rights in the twenty-first century.[180] Today, we think of rights as a shield against government overreach.[181] But in the eighteenth century, "early Americans did not think that individual liberty was protected primarily through limiting government; rather they assumed that liberty was often best protected by empowering government 'in the right kind of way.'"[182] Unrepresentative government institutions might threaten liberty, but representative government institutions like legislatures and juries were trusted to protect rights.[183]

The eighteenth century also recognized two kinds of rights: positive rights and natural rights.[184] Positive rights were those that were defined concerning the government,[185] and "specified things that the government had to do or could not do."[186] In contrast, natural rights were innate human capacities that people could exercise on their own, without any government involvement.[187] These are the rights every person possesses in the state of nature.[188] Furthermore, according to Campbell, the "freedom to do something" was immediately understood

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180 *See* Jud Campbell, *Compelled Subsidies and Original Meaning*, 17 First Amend. L. Rev. 249, 262 (2018) ("[T]he Founders thought very differently about rights than we do today."); Gienapp, *supra* note 165 at 119 (criticizing originalists for "all too often filter[ing] the subject through modern sensibilities, convinced that Founding-era Americans conceived of rights much as we long have").

181 *See* Campbell, *supra* note 144, at 253 ("[N]atural rights at the Founding scarcely resembled our modern notion of rights as determinate legal constraints on governmental authority.").

182 Gienapp, *supra* note 165, at 119 (emphasis omitted) (quoting Jonathan Gienapp, The Second Creation: Fixing the American Constitution In the Founding Era 165–66 (2018)). According to social contract theory, people left the risky state of nature and formed government in order to better protect their rights. Jud Campbell, *The Invention of First Amendment Federalism*, 97 Tex. L. Rev. 517, 526–27 (2019) ("All individuals, social-contract theory posited, surrendered some of their 'natural rights' . . . for the greater security of those rights as a whole.").

183 *See* Gienapp, *supra* note 165, at 119–20 ("For most at the Founding, protecting rights was a matter not of disabling government but rather of creating and empowering representative political institutions. Whereas unrepresentative government posed a threat to liberty, representative government was the peculiar bulwark of liberty."); *id.* at 123 (noting that "Founding-era Americans" celebrated "legislatures and juries" as "genuinely representative of the people's interests").

184 *See* Campbell, *supra* note 180, at 262; *see also* Nicholas C. Ulen, *Corporations, Natural Rights, and the Assembly Clause: An Originalist Critique of Corporate Speech Jurisprudence*, 10 Wake Forest J.L. & Pol'y 25, 37 (2019) ("Natural law theorists believed that an entirely separate, almost transcendental, body of law existed apart from the body of positive law that governed societies.").

185 *See* Campbell, *supra* note 180, at 262 ("[P]ositive rights were defined explicitly in terms governmental authority. The rights to a jury trial and to habeas corpus, for instance, were positive rights because they were procedures provided by the government." (footnote omitted)).

186 Campbell, *supra* note 150, at 876.

187 *See* Campbell, *supra* note 180, at 262 ("Natural rights were all the things that we could do simply as humans, without the intervention of a government.").

188 *See* Campbell, *supra* note 144, at 268.

as the freedom to exercise a natural right.[189] In the case of freedom of speech, it meant the natural right to speak, write, and publish.[190]

A critical feature of natural rights was their ready restriction by competing interests. To start, natural rights came with certain inherent limits—these rights never extended to interfering with the natural rights of others.[191] The government, meanwhile, could limit natural rights if two conditions were met. First, the people must consent to the limit, either directly or through their representatives.[192] Second, the limit must advance the public good.[193] Moreover, the assessment of public good was to be made by the legislature, not the judiciary.[194] Thus, "the First Amendment . . . left ample room for the government to regulate speech in promotion of the public good, so long as it respected customary legal protections as well."[195]

The lone exception was inalienable natural rights: "Unlike ordinary natural rights, which were regulable to promote the public good, certain *inalienable* natural rights imposed more determinate constraints on legislative power."[196] Campbell argues one such right was the "freedom to make well-intentioned statements of one's thoughts"[197]—essentially freedom to express opinions in good faith.[198]

Apart from that exception, natural rights ended where the public good began.[199] Consequently, limits on speech deemed harmful to the general welfare were commonplace, including bans on blasphemy and swearing.[200] Although people might dispute what constituted the

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189 *Id.* at 269 ("For the Founders, however, mentioning a 'freedom to do something' naturally alluded to natural rights . . . .").

190 *See id.* at 253.

191 *See id.* at 271 ("At a minimum, natural law required that individuals not interfere with the natural rights of others."); Ulen, *supra* note 184, at 40 ("[T]o the extent that exercising one's individual liberties would infringe upon another's protected rights, the sovereign had both the necessary authority and duty to step in and prevent the infringement . . . .").

192 *See* Campbell, *supra* note 180, at 263 ("First, natural rights could be restricted only when the people themselves consented to the restriction, either in person or through their political representatives.").

193 *See id.* at 264 ("Second, the government could restrict natural rights only when doing so promoted the public good . . . .").

194 *See* Campbell, *supra* note 144, at 253 ("And assessing the public good—generally understood as the welfare of the entire society—was almost entirely a legislative task, leaving very little room for judicial involvement.").

195 *Id.* at 313.

196 *Id.* at 280.

197 *Id.* at 283.

198 *See id.* at 310 ("Indeed, the Founders constantly mentioned that the inalienable right to speak was limited to those who spoke with decency and truth.").

199 *See id.* ("[S]tate governments routinely and uncontroversially restricted plenty of speech that did not directly violate the rights of others.").

200 *See* Campbell, *supra* note 182, at 529 ("Unsurprisingly, then, English and American law recognized plenty of limitations on speech through rules against defamation, blasphemy, perjury,

common good, they did not dispute that the government could regulate speech for the common good.[201]

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This brief excursion into the Founding era suggests that the original meaning of the First Amendment vis-à-vis freedom of speech was contested and narrow. Apart from banning prior restraints, there may have been no consensus regarding what kind of expression the First Amendment covered. To the degree there was any consensus beyond prior restraints, it may be that the First Amendment protected the natural rights of reading, writing, and publishing.[202] However, the legislature could regulate these rights if they detracted from the public good.[203] In other words, even if coverage was broad, the protection was shallow outside of a few areas, like good faith opinions and prior restraints.

Ultimately, the First Amendment's original meaning, lacking both clarity and consensus, will not constrain judges today. Other than protecting against prior restraints, the First Amendment, at most, provides some basic principles, and their application to today's cases falls in the ever-manipulable construction zone, not the interpretation zone. Although proponents may employ analogies to support broader coverage and deeper protection, the same can be done in the other direction. And the latter may be more persuasive, given the widely accepted view that the government may regulate for the common good.

Indeed, this history does not establish a Founding era pedigree for much of today's doctrine. If as narrow as Blackstone, or Blackstone-plus, then many fewer regulations would implicate the First Amendment. Even assuming a broader original meaning that encompasses citizens' natural rights of writing, speaking, and publishing, the First Amendment would probably not reach, for example, corporate advertising or corporate speech in general, as corporations are artificial entities, not natural people with natural rights.[204] Also in question is whether natural rights include "speech" such as money expenditures.[205] Finally, today's default presumption that any content regulation is unconstitutional unless it

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profane swearing, and so forth."); Note, *Blasphemy and the Original Meaning of the First Amendment*, 135 HARV. L. REV. 689, 690 (2021) ("[T]he original public meaning of the First Amendment, whether in 1791 or in 1868, allowed for criminalizing blasphemy." (footnote omitted)).

201 *See* Campbell, *supra* note 144, at 277 ("Yet while the Founders broadly agreed that governmental power should be defined and exercised only to promote the general welfare, they often disagreed passionately about the details.").

202 *See id.* at 253.

203 *See id.* at 310.

204 *See infra* Section III.A.2.

205 *Cf.* Eric J. Segall, *Originalist Fiction as Constitutional Faith*, U. CHI. L. REV. ONLINE, JAN. 6, 2020, at 3 ("The First Amendment's original meaning cannot tell us whether mandatory union dues implicate strong free speech concerns.").

passes strict scrutiny contradicts the Founding's starting presumption that any natural right can be limited for the public good.[206] The bottom line is that "[i]f the Supreme Court wanted to apply only those legal rules that the Founders recognized (or likely would have recognized), a huge swath of modern case law would have to go."[207] Even if some curtailment of the Free Speech Clause might be beneficial, its wholesale retrenchment would not.[208]

B. Narrow Contested View During Reconstruction

Perhaps the fixed original meaning of the Free Speech Clause should not be tied to the Founding but to Reconstruction.[209] Scholars and courts have regularly overlooked the Reconstruction Amendments in construing freedom of expression protections,[210] even though the enactment of the Fourteenth Amendment is what makes the First Amendment applicable to the states.[211] Nevertheless, moving the clock forward does not offer greater clarity or support a more expansive First Amendment.[212]

It is true that after the Civil War, Blackstone did not have the same purchase as he did at the beginning of the century when his view that the First Amendment prohibited only prior restraints remained "alive and well."[213] In the antebellum 1830s, Justice Story wrote that "[t]he doctrine laid down by Mr. Justice Blackstone, respecting the liberty of the press, has not been repudiated (so far as is known) by any solemn decision of any of the state courts, in respect to their own municipal

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206 *See supra* notes 186–90 and accompanying text; *see also* Claudia E. Haupt & Wendy E. Parmet, *Public Health Originalism and the First Amendment*, 78 WASH. & LEE L. REV. 231, 258 (2021) ("In 1791 . . . the police power was widely accepted as limiting individual rights in order to advance health, safety, or morals.").

207 Campbell, *supra* note 144, at 256.

208 *See infra* notes 304–54 and accompanying text (discussing Free Speech Lochnerism).

209 *See* Haupt & Parmet, *supra* note 206, at 237 (arguing that because the First Amendment was not incorporated until the Fourteenth Amendment, "it is quite unclear why an originalist would look . . . to the 1790s, rather than the 1860s").

210 *See* William M. Carter, Jr., *The Second Founding and the First Amendment*, 99 TEX. L. REV. 1065, 1067 (2021) ("[C]ourts have generally ignored the Second Founding in interpreting the First Amendment.").

211 *See* Leo E. Strine, Jr. & Nicholas Walter, *Originalist or Original: The Difficulties of Reconciling* Citizens United *with Corporate Law History*, 91 NOTRE DAME L. REV. 877, 889 (2016) ("Because the First Amendment was incorporated against the states via the Due Process Clause of the Fourteenth Amendment, it may be argued that the relevant time period for analyzing . . . [speech regulations] is not 1789–91, but 1866–68.").

212 *See* Rosenthal, *supra* note 141, at 24 ("Nevertheless, by the time of the Fourteenth Amendment's ratification, developments in First Amendment jurisprudence had not been dramatic."); *see* Campbell, *supra* note 150, at 883 ("At least in its basic outlines, the law of expressive freedom remained stable throughout the nineteenth century.").

213 Rosenthal, *supra* note 141, at 23.

jurisprudence."[214] Later in the century, according to a treatise revised by Oliver Wendell Holmes, the strict Blackstonian view was increasingly superseded by one where truth was a recognized defense.[215] Yet this shift from strict Blackstone to a slightly less strict version is not a significant change. The Sedition Act itself, after all, had already incorporated truth as a defense, among other protections.[216]

Similarly, the First Amendment natural rights to speak, write, and publish were still viewed as regulable in service of the public good. Thomas Cooley¾whose treatise was described by the *Heller*[217] Court as "massively popular,"[218] and by Lawrence Rosenthal as "the leading treatise of the Reconstruction era"[219]¾wholeheartedly rejected the hardline Blackstone view,[220] yet still maintained that speech could be restricted "in those cases of publications injurious to private character, or public morals or safety."[221] According to Cooley, speech is protected "so long as it is not harmful in its character,"[222] and truth is a defense to libelous speech if "published with good motives and for justifiable ends."[223] Consequently, despite some evolution,[224] the idea that harmful speech could be regulated consistent with the First Amendment still prevailed during Reconstruction.[225] To be sure, it was not universal, but it was widely held.

Moreover, free speech doctrine saw little change in the latter half of the nineteenth century.[226] Just as courts upheld the Sedition Act, courts prior to Reconstruction upheld laws criminalizing abolitionist

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214 *Id.* at 23–24, 24 n.104 (alteration in original) (quoting 3 Joseph Story, Commentaries on the Constitution of the United States 731–32 (1833)).

215 *See id.* at 24 (describing a trend toward recognizing truth as a defense for defamation claims in the 1873 revision of Kent's *Commentaries on American Law*).

216 Sedition Act of 1798, ch. 74, § 2, I Stat. 596 (1798).

217 District of Columbia v. Heller, 554 U.S. 570 (2008).

218 *Id.* at 616.

219 Rosenthal, *supra* note 141, at 25.

220 *See id.*; David M. Rabban, Free Speech In Its The Forgotten Years 197 (1997) (arguing that Cooley "reject[ed] the application of the English common law of bad tendency to speech on matters of public affairs" although he acknowledged that it survived in the United States in other areas).

221 Rosenthal, *supra* note 141, at 25 (quoting Thomas M. Cooley, A Treatise on the Constitutional Limitations Which Rest upon the Legislative Power of the States of the American Union 429–30 (1868)).

222 *Id.*

223 *Id.*

224 It may be that what counted as regulable harmful speech evolved, "or at least a stronger showing of bad tendency had become required to overcome the speaker's liberty interests." *Id.* at 29.

225 *See id.* at 24 ("Throughout the nineteenth century, the bad-tendency test continued to predominate in thinking about the First Amendment . . . .").

226 Even into the early twentieth century, Blackstone's exceedingly narrow view of the First Amendment still appeared in Supreme Court decisions. *See, e.g.*, Patterson v. Colorado, 205 U.S. 454, 462 (1907).

speech.[227] And courts during the Reconstruction era upheld laws criminalizing anti-Reconstruction speech, such as former confederate officer and Mississippi newspaper editor William McCardle's vitriolic and virulently racist harangues against Northerners and African Americans.[228] In rejecting McCardle's freedom of expression claim, the federal district court trying his case concluded that while the Speech and Press Clauses protected the right to criticize the government, "this does not sanction any abuse made of either."[229] As Wendy Swanberg has observed, today it may seem "preposterous" to imprison a journalist for extreme editorials, but to nineteenth century jurists, it was a "perfectly logical" punishment for abusing the right to free speech.[230]

Indeed, Reconstruction-era courts treated free speech defenses with disdain. David Rabban's comprehensive book details how "[a] pervasive judicial hostility to virtually all free speech claims" characterized judicial decisions before World War I, where "[j]udges in both federal and state courts overwhelmingly invoked the alleged 'bad tendency' of speech to deny claims of abridgment in numerous doctrinal settings."[231] According to Rabban, this "bad tendency" test reigned supreme between the Civil War and World War I.[232]

Although "libertarian notions of free speech are very difficult (though not impossible) to find in American law prior to the twentieth century,"[233] the courts alone do not determine the meaning of constitutional provisions, and the general population did not always share their narrow view. For example, Michael Kent Curtis noted court decisions "ignored the substantial popular understanding—strengthened in the debate over the Sedition Act and the crusade against slavery—that a broad right to discuss public questions was a privilege of American

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227 *See* Michael Kent Curtis, Free Speech, "The People's Darling Privilege": Struggles for Freedom of Expression in American History 416 (2000) ("Likewise, no Southern court struck down bans on antislavery speech as a violation of its state's constitution. . . . Nor did the United States Supreme Court ever void any Southern statute banning antislavery speech.").

228 *See id.* at 340 (noting that McCardle "used racist language with a frequency and slant that are chilling today"). *See generally* Wendy Swanberg, Ex Parte McCardle *and the First Amendment During Reconstruction*, *in* A Press Divided: Newspaper Coverage of the Civil War 333 (David B. Sachsman ed., 2014) (describing how *McCardle* represented the politics of the rebel South during Reconstruction era).

229 *Id.* at 340. The Supreme Court never decided the merits because Congress stripped the Court of jurisdiction after oral arguments. *Id.* at 348–49. *See generally Ex parte* McCardle, 74 U.S. (7 Wall.) 506 (1868).

230 Swanberg, *supra* note 228, at 334.

231 Rabban, *supra* note 220, at 2; *see also id.* at 15 ("[N]o group of Americans was more hostile to free speech claims before World War I than the judiciary, and no judges were more hostile than the justices on the United States Supreme Court.").

232 *Id.* at 132.

233 Swanberg, *supra* note 228, at 334–35.

citizens."[234] At the same time, the views of the courts cannot be ignored. Certainly, a reasonable and informed citizen of the Reconstruction era would take legal doctrine into account, and therefore consider it important that the courts still clung to the narrowest view. As in earlier days, universal consensus about the scope of protection was nonexistent.

William M. Carter, Jr. argues that the Reconstruction Amendments and the "the Second Founding" they represent effected a significant change in freedom of speech.[235] The Reconstruction Amendments were designed to dismantle the Slave Power permitted by the First Founding,[236] and this fundamental reordering of society required re-envisioning the First Amendment. Previously, "[t]he American slave regime severely punished Blacks' freedom of speech and speech about Black freedom."[237] That is, "the suppression of the constitutional right of free speech [was] a tool to maintain slavery and racial subjugation."[238] No more. The First Amendment would no longer exclude African Americans from its protection.[239] Nor would it sanction the criminalization of abolitionist speech, as it often had prior to Reconstruction.[240]

As momentous as this shift was, it did not necessarily change the doctrinal scope of the First Amendment; instead, it merely extended narrow First Amendment rights to more people. Nor did it necessarily displace the presumption that speech may be restricted to promote the

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234 Curtis, *supra* note 227, at 388. Abolitionists often opposed the "bad tendency" test because opponents regularly claimed that antislavery speech had a natural tendency to incite slaves to violence and rebellion, even if it did not explicitly advocate revolt. *Id*. at 207–08, 211.

235 Carter, *supra* note 210, at 1083 ("The active denial of, and lack of effective protection for, enslaved persons' and abolitionists' rights of freedom of speech, conscience, and assembly was one of the primary legacies of the First Founding's constitutional order that the Second Founding was designed to eliminate."); *see also* Curtis, *supra* note 227, at 357 ("The Civil War was a second American revolution.").

236 *See* Carter, *supra* note 210, at 1071–72 ("The Reconstruction Amendments and statutes enacted pursuant thereto were also intended to dismantle the overarching Slave Power that the Second Founding's Framers believed had perverted the nation since the First Founding.").

237 *Id.* at 1084.

238 *Id.* at 1087.

239 *See id.* at 1072 ("One incident of the Slave Power was the denial of freedom of speech, conscience, and assembly to enslaved and free Blacks and their abolitionist allies.").

240 *See id.* at 1084 ("Mississippi's Slave Code, for example, authorized a sentence ranging from imprisonment at hard labor for up to twenty-one years to the death penalty for 'using language having a tendency to promote discontent among free colored people, or insubordination among slaves.'" (quoting J. Clay Smith Jr., *Justice and Jurisprudence and the Black Lawyer*, 69 Notre Dame L. Rev. 1077, 1107 (1994))); *see also id.* at 1087 (noting that Senator Charles Sumner had complained that "[n]obody in the Slave States can speak or print against Slavery, except at the peril of life or liberty" (quoting Cong. Globe, 36th Cong., 1st Sess. 2597 (1860) (statement of Sen. Charles Sumner))); Curtis, *supra* note 169, at 252 (describing how the North Carolina Supreme Court upheld the conviction and imprisonment of a minister for distributing an antislavery book).

public welfare. Rather, it reflected a radical reconception of what the public welfare did, or did not, require.[241]

Ultimately, the Fourteenth Amendment's passage does not significantly alter earlier conclusions about the First Amendment. First, there still was no consensus about the scope of the First Amendment at Reconstruction.[242] Thus, the principal critique of originalism still stands as applied to the First Amendment: it fails to curtail judges' discretion in deciding cases even as originalists continue to claim otherwise.[243] Second, even if the First Amendment's coverage widened slightly, it did not widen enough to justify much of today's doctrine.[244] The meaning of the First Amendment evolved and perhaps expanded but "[t]hat is not to say that the public meaning of free speech and a free press was anything close to libertarian—the bad tendency test was firmly established at the start of the twentieth century."[245]

III. Unprincipled Application

The judicial practice of originalism reveals yet more layers of discretion at play, further undercutting any claim that originalism prevents judges from smuggling in their own preferences. Actual judging provides at least two additional junctions for the exercise of discretion: first, judges may choose whether or not to apply originalism; second, they may choose which version of originalism to apply.[246] Notably, the Supreme Court rarely issues originalist free speech decisions, which undermines any claim that the Constitution demands the particular outcome of its originalist analysis when it occasionally does. Moreover, the existence of so many varieties of originalism allow judges to apply the version that yields their desired outcome.[247] Consequently, originalism in practice does not constrain courts, even assuming that originalism in theory might. Whether courts exploit this flexibility

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241 *Cf.* Carter, *supra* note 210, at 1079 ("Enslaved Blacks, abolitionists, and the Reconstruction Framers believed that the First Founding's constitutional order would have to be changed in order to eliminate slavery. . . . [And] that the end of slavery would and should represent a new constitutional order, not merely a continuation of the existing order . . . .").

242 *See* Curtis, *supra* note 227, at 357 ("[T]he most we can hope to achieve [about the meaning of free speech during Reconstruction] is probability and a hypothesis that is stronger than its competitors.").

243 In addition, regardless of scope, the First Amendment only articulates an abstract principle.

244 *Cf.* Stephen M. Griffin, *Optimistic Originalism and the Reconstruction Amendments*, 95 Tul. L. Rev. 281, 285 (2021) ("[T]he painful reality [is] that relative to the point of view of Americans in the twenty-first century, nineteenth-century constitutional law had many unfortunate aspects.").

245 Rosenthal, *supra* note 141, at 29–30.

246 *See* Colby & Smith, *supra* note 26, at 291–92.

247 *See id.* at 292–93.

consciously or unconsciously, no one should take seriously the claim that a court's originalist conclusion about the First Amendment was driven by original public meaning alone.[248] Unfortunately, the Court's decisions usually work to entrench power imbalances, as is evident in its treatment of hate speech.

A. Occasional Originalism

The Supreme Court's free speech decisions seldom turn on an originalist analysis—and often do not even undertake one—probably because as described above, even the most expansive original conception of free speech offers much less protection than current doctrine. But instead of abandoning this approach for all free speech cases, the Supreme Court occasionally pens a decision that turns on originalism (or at least purports to).[249] Indeed, it was dispositive for a trio of cases in which the Court declared that it was freezing the categories of unprotected speech to those that have existed since the Founding.[250] This new rule effectively precludes expanding unprotected categories beyond what white Christian men found sufficiently harmful two hundred years ago, thereby making it impossible to recognize something like hate speech as an unprotected category.[251]

Although the Supreme Court insisted on looking to the eighteenth century to decide whether the government can outlaw certain categories of harmful speech, it failed to do so when expanding protection in ways that might raise the eyebrows of even the most reasonable eighteenth-century citizen, such as protecting a corporation's commercial speech, or really, any corporate speech, including compelled commercial disclosures.[252] The Court's decisions equating expenditures to speech have likewise also escaped meaningful originalist analysis.[253] This originalism avoidance has enabled what many have termed free speech

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248 *See* Friedman, *supra* note 63, at 1234 ("Generalizing, one ought properly to be skeptical of any interpretive methodology that so consistently seems to yield results favored by any particular political ideology.").

249 *See* Genevieve Lakier, *The Invention of Low-Value Speech*, 128 HARV. L. REV. 2166, 2168 (2015) ("The idea that the low-value categories of speech have always existed, and always existed beyond the scope of constitutional concern, is a historical myth or what we might call an 'invented tradition.'").

250 *See* United States v. Stevens, 559 U.S. 460, 465 (2010); Brown v. Ent. Merchs. Ass'n, 564 U.S. 786, 792 (2011); United States v. Alvarez, 567 U.S. 709, 717 (2012).

251 Or more accurately, what the Supreme Court has determined those citizens to consider beyond First Amendment protection.

252 *See infra* notes 319–24 and accompanying text.

253 *See infra* notes 335–45 and accompanying text.

Lochnerism, a development that hampers the regulation of powerful entities in the public interest.[254]

1. Selective Originalism: The Court Uses Originalism

Creating an outlier in its free speech jurisprudence, the Supreme Court has adopted an originalist approach to unprotected categories of speech. These categories lie outside the protection of the First Amendment, such that the government may ban them in their entirety without triggering any free speech scrutiny.[255] Established examples include incitement, defamation, true threats, fighting words, and obscenity.[256]

Before its turn to originalism, the Supreme Court described unprotected categories as those with "such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality."[257] In other words, the free speech value of the category is extremely slight and greatly outweighed by the harm it creates.[258] According to the main theories of the Free Speech Clause, free speech value might include helping our search for knowledge, facilitating democratic self-governance, or promoting individual autonomy.[259]

Yet, in *United States v. Stevens*,[260] the Supreme Court outright refused to even consider the government's argument that depictions of animal cruelty should be added to the list of unprotected categories of speech on the grounds that it contributes little or nothing to free speech goals while inflicting great harm.[261] The Court did not explicitly invoke an originalist approach, but it repeatedly emphasized that the officially recognized unprotected categories date to the passage of the Bill of Rights. For example, it wrote that "[f]rom 1791 to the present" certain

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254 *Cf.* Jeremy K. Kessler & David E. Pozen, *The Search for an Egalitarian First Amendment*, 118 Colum. L. Rev. 1953, 1963 (2018) ("An aggressive, libertarian First Amendment, it is increasingly recognized, has the potential to crowd out egalitarian norms across the social field, propagating inequalities of sex, gender, race, and religion along with inequalities of fiscal and cultural capital.").

255 After *R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992), however, viewpoint-based restrictions on speech, including unprotected categories of speech, will trigger strict scrutiny.

256 *See* United States v. Alvarez, 567 U.S. 709, 717–18 (listing unprotected categories).

257 Chaplinsky v. New Hampshire, 315 U.S. 568, 572 (1942) (describing fighting words).

258 *Cf. id.* (describing fighting words as "no essential part of any exposition of ideas" and "not in any proper sense communication of information or opinion safeguarded by the Constitution" (quoting Cantwell v. Connecticut, 310 U.S. 296, 309 (1940))).

259 *See* Caroline Mala Corbin, *Compelled Disclosures*, 65 Ala. L. Rev. 1277, 1291–92 (2014) (describing theories).

260 559 U.S. 460 (2010).

261 *See id.* at 469. Congress had criminalized the creation, sale, or possession of photographs or videos where "a living animal is intentionally maimed, mutilated, tortured, wounded, or killed" unless the depiction had "serious religious, political, scientific, educational, journalistic, historical, or artistic value." *Id.* at 465 (quoting 18 U.S.C. § 48).

"historic and traditional categories long familiar to the bar" have been unprotected, and that these "narrowly limited classes of speech" have "never been thought to raise any Constitutional problem."[262] In contrast, although banning cruelty to animals also dates to the colonial era,[263] the Court was "unaware of any similar tradition excluding depictions of animal cruelty."[264] (Of course, the Court failed to acknowledge that the technology used to capture depictions of animal cruelty, like photography and video, did not exist at the time.) The Court essentially held that an unprotected category must date to the Founding, and it would not entertain any new ones.

Besides refusing to weigh the harms of depicting animal cruelty against its free speech value, the Court denies ever relying upon such a balancing test.[265] Instead, the Court denigrates the balancing approach—the approach it previously used for determining unprotected categories—as "a free-floating test" that is "startling and dangerous."[266] The Court admits that it has sometimes described historically unprotected categories as having slight free speech value and high harm, but "such descriptions are just that—descriptive. They do not set forth a test."[267]

In subsequent cases, including *Brown v. Entertainment Merchants Ass'n*[268] and *United States v. Alvarez*,[269] the Court reaffirmed *Stevens*' holding that unprotected categories of speech are "confined to the few 'historic and traditional categories [of expression] long familiar to the bar.'"[270] The Court allows that there may be undiscovered categories that have existed since the Founding,[271] designating them as belonging to "a long (if heretofore unrecognized) tradition of proscription."[272] The Court does not, however, explain how a longstanding and

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262 *Id.* at 468–69.

263 *See id.* at 469 (noting that bans date to "the early settlement of the Colonies").

264 *Id.* (emphasis omitted).

265 *See id.* at 471 ("When we have identified categories of speech as fully outside the protection of the First Amendment, it has not been on the basis of a simple cost-benefit analysis."); *id.* at 472 ("Our decisions . . . cannot be taken as establishing a freewheeling authority to declare new categories of speech outside the scope of the First Amendment.").

266 *Id.* at 470; *see also* United States v. Alvarez, 567 U.S. 709, 717 (2012) ("[T]his Court has rejected as 'startling and dangerous' a 'free-floating test for First Amendment coverage . . . [based on] an ad hoc balancing of relative social costs and benefits.'" (alterations in original) (quoting *Stevens*, 559 U.S. at 470)).

267 *Stevens*, 559 U.S. at 471.

268 564 U.S. 786 (2011).

269 567 U.S. 709 (2012).

270 *Id.* at 717 (alteration in original); *see also supra* note 249 and accompanying text.

271 *See Stevens*, 559 U.S. at 472 ("Maybe there are some categories of speech that have been historically unprotected, but have not yet been specifically identified or discussed as such in our case law.").

272 *Brown*, 564 U.S. at 792.

traditional category of unprotected speech can be both centuries old and still unknown.[273]

Under its new rule, which it has recently reaffirmed,[274] the Supreme Court has refused to recognize depictions of animal cruelty,[275] extremely violent videos vis-à-vis minors,[276] and intentional lies about receiving military honors as unprotected categories of speech.[277] Lower courts concluded the same with categories ranging from knowingly false campaign information,[278] to cyberbullying,[279] to discredited sexual orientation conversion "therapies" for minors.[280]

One of the ironies marking the Court's trio of cases on unprotected categories of speech is that the two most ardent originalists at the time, Justice Scalia and Justice Thomas,[281] joined Justice Alito's *Alvarez* dissent, which argued that the Stolen Valor Act's[282] ban on lies about receiving military honors should have been constitutional.[283] In making its case, the dissent is not altogether clear whether it is claiming that the law passes strict scrutiny,[284] or that lies about receiving military medals ought to be viewed as an unprotected category of speech; it may be a bit of both.

In arguing to uphold the Stolen Valor Act, the dissent parts ways with the rule that unprotected categories must date to the Founding, writing that "[w]e have also described as falling outside the First Amendment's protective shield certain false factual statements that were neither illegal nor tortious at the time of the Amendment's adoption."[285]

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273 *See id.*

274 *See supra* note 5 and accompanying text.

275 *See Stevens*, 559 U.S. at 472.

276 *See Brown*, 564 U.S. at 795 ("California's argument would fare better if there were a long-standing tradition in this country of specially restricting children's access to depictions of violence, but there is none.").

277 *See* United States v. Alvarez, 567 U.S. 709, 718 (2012) ("Absent from those few categories where the law allows content-based regulation of speech is any general exception to the First Amendment for false statements.").

278 *See* Care Comm. v. Arneson, 638 F.3d 621, 633–34 (8th Cir. 2011).

279 *See* People v. Marquan M., 19 N.E.3d 480, 485 (N.Y. 2014) (noting that cyberbullying does not fall into any unprotected category recognized in *Stevens*, *Alvarez*, and *Brown*).

280 *See* Otto v. City of Boca Raton, 981 F.3d 854, 865 (11th Cir. 2020) ("No one has argued that the [conversion therapy bans] fall into these categories of unprotected speech, and we do not see how they could.").

281 One survey from 2012 found that 30.4% (17 out of 56) of Justice Scalia's free speech opinions contained originalism; for Justice Thomas, it was 29.4% (10 out of 34). Derigan Silver & Dan V. Kozlowski, *The First Amendment Originalism of Justices Brennan, Scalia and Thomas*, 17 Commc'n L. & Pol'y 385, 402, 408 (2012).

282 Stolen Valor Act of 2005, 18 U.S.C. § 704.

283 *See* United States v. Alvarez, 567 U.S. 709, 739 (2012) (Alito, J., dissenting).

284 *See infra* note 288.

285 *Alvarez*, 567 U.S. at 747.

The dissent also tracks the discredited balancing test by arguing that lies about receiving military honors inflict both tangible and nontangible harms while lacking all free speech value.[286] As to harms, the dissent writes, not only do the lies "debase the distinctive honor of military awards," but an imposter taking undeserved credit is, to quote a legitimate Medal of Honor recipient, akin to a "slap in the face of veterans who have paid the price and earned their medals."[287] Granted, avoiding these harms may amount to a compelling government interest, but the Court never applies strict scrutiny.[288]

Next, the dissent expends paragraphs on the low free speech value of false statements of fact and especially outright lies about receiving a military medal of honor,[289] bluntly concluding that "[t]he lies covered by the Stolen Valor Act have no intrinsic value."[290] Thus, the dissent addresses each requirement of the discredited balancing test. Yet, apart from acknowledging that certain lies have long been constitutionally forbidden,[291] its analysis does not explore the original meaning of the First Amendment vis-à-vis lies, especially lies about receiving military honors.

My argument is not that these holdings are necessarily incorrect but that the Court's inconsistent reliance on originalism appears outcome determinative. Unprotected categories of speech are one of the only areas of free speech where the Court's interpretation of original meaning controls. This approach, however, effectively precludes creating new categories of unprotected speech such as hate speech and constitutionalizes the priorities of the eighteenth-century elite. Those of the Founding generation who controlled and shaped the law were vulnerable to defamation and understood its potential damage, and so defamation is unprotected.[292] In contrast, hate speech, not even a concept in that era, will never be an unprotected category because the

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286 *See id.* at 743.

287 *Id.*

288 To be fair, the dissent also argues that alternative means of protecting the integrity of the medals advanced by the majority were not sufficient, suggesting a *sub silento* tailoring analysis. *See id.* at 744–45.

289 *See id.* at 746–50.

290 *Id.* at 750; *see also id.* at 753 ("Neither of the two opinions endorsed by Justices in the majority claims that the false statements covered by the Stolen Valor Act possess either intrinsic or instrumental value.").

291 *See id.* at 747–48 (mentioning that laws forbidding fraud, perjury, and defamation date to the Founding, but also noting the constitutionality of criminal statutes "with no close common-law analog" such as falsely claiming to be a federal official).

292 *Cf.* Mari J. Matsuda, *Public Response to Racist Speech: Considering the Victim's Story*, 87 MICH. L. REV. 2320, 2375–76 (1989) ("When the legal mind understands that reputational interests . . . must be balanced against first amendment interests, it recognizes the concrete reality of what happens to people who are defamed. Their lives are changed. Their standing in the community, their opportunities, their self-worth, their free enjoyment of life is limited.").

Court's originalism controls.[293] Even in this one area, originalist Justices did not want to be bound by its unwelcome conclusion that people may lie about receiving military honors. That is, in addition to the broader inconsistency of sometimes relying on originalism and sometimes not, even within a doctrinal area that relies on originalism, at least some originalist Justices demurred when it did not yield their desired outcome.

2. Originalism Avoidance: The Court Avoids Originalism

The *Alvarez* dissent previews a more widespread phenomenon in First Amendment decisions: the Supreme Court generally avoids originalism. At least the *Alvarez* dissent gestured to what was happening at the Founding.[294] Most cases do not. If the Supreme Court were truly committed to originalism, it would consistently perform a thorough originalist analysis, even if it ultimately follows precedent. Yet the cases that expanded First Amendment protections often fail to engage with the original meaning at all or do so minimally. In short, "the 'originalist' Justices are only opportunistically originalist. When original meaning does not support the result they want to reach, they tend to ignore it."[295]

The dearth of originalist analysis is apparent in several strands of cases where the Roberts Court expanded free speech protection, including regulation of economic activities and campaign finance.[296] The ever-expanding Free Speech Clause is even finding its way into antidiscrimination law.[297] The unfortunate pattern that emerges is that attempts to regulate in favor of those less powerful have fallen in the name of free speech. Missing in most of these decisions is any serious effort to uncover whether the original meaning of the Free Speech Clause compels those conclusions.

One realm where originalism avoidance is particularly stark is in the cases that helped usher in "free speech Lochnerism."[298] *Lochner v. United*

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293 It is no wonder originalism holds greater appeal to the privileged.

294 *See* United States v. Alvarez, 567 U.S. 709, 741 (2012) (Alito, J., dissenting).

295 Andrew Koppelman, *Phony Originalism and the Establishment Clause*, 103 Nw. U. L. Rev. 727, 729 (2009) (footnote omitted).

296 *See* Yasmin Dawood, *Election Law Originalism: The Supreme Court's Elitist Conception of Democracy*, 64 St. Louis U. L.J. 609, 610 (2020) ("In recent years, the Court majority has become increasingly hostile to the regulation of campaign finance and has acted strenuously against measures meant to level the playing field.").

297 *See, e.g.*, *infra* notes 344–48 and accompanying text (discussing *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission*).

298 *See* William French, Note, *This Isn't* Lochner*, It's the First Amendment: Reorienting the Right to Contract and Commercial Speech*, 114 Nw. U. L. Rev. 469, 472 (2019) ("[T]he fact that *Lochner* is so universally derided has proved irresistible for Justices seeking to condemn the expanding protections for commercial speech on similar grounds. . . . And because the label of '*Lochner*' sparks such a visceral reaction, these comparisons have taken hold in the corresponding scholarship as well.").

States,[299] a 1905 case considered part of the anticanon, declared unconstitutional a labor law protecting bakery workers from exploitation.[300] During the *Lochner* era, the Supreme Court enshrined laissez-faire economics by invalidating scores of economic regulations based upon the substantive due process right to contract.[301] This doctrine was eventually repudiated in the 1930s, with economic regulations triggering no more than rational basis scrutiny under the Fourteenth Amendment.[302]

The libertarian, deregulatory impulses behind those business-friendly decisions are now reappearing in free speech decisions:[303] The Supreme Court has been striking down regulations in the name of free speech, with the lower courts following suit.[304] As Amanda Shanor aptly summarizes: "In the First Amendment context, plaintiffs across the country are increasingly invoking the Free Speech Clause as a shield against what a generation ago would have been viewed as ordinary economic regulation subject to lax, if any, constitutional review."[305] Companies have attacked on First Amendment grounds minimum wage requirements,[306] informational disclosures,[307] food warnings and

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299 198 U.S. 45 (1905).

300 *See* Amanda Shanor, *The New* Lochner, 2016 Wis. L. Rev. 133, 135 (2016) ("[A] growing number of scholars, commentators, and judges have likened aspects of recent First Amendment jurisprudence to *Lochner v. New York*'s anticanonical liberty of contract." (footnote omitted)).

301 *See* Amanda Shanor, *Business Licensing and Constitutional Liberty*, 126 Yale L. J.F. 314, 315 (2016) ("Often called the *Lochner* era, that period from the end of the Gilded Age through much of the Great Depression has come to symbolize the judicial striking down of economic regulation.").

302 *See* W. Coast Hotel Co. v. Parrish, 300 U.S. 379, 390 (1937).

303 *See* Shanor, *supra* note 300, at 134 ("[T]he First Amendment has emerged as a powerful deregulatory engine.").

304 *See, e.g.*, Thompson v. W. States Med. Ctr., 535 U.S. 357, 357 (2002) (striking on free speech grounds federal prohibitions on the commercial advertisement or promotion of compounded drugs); Sorrell v. IMS Health Inc., 564 U.S. 552, 557 (2011) (striking down law limiting pharmaceutical company's use of doctor's prescription information); *see infra* note 313 for lower court decisions.

305 Shanor, *supra* note 301, at 316; *see also* Leslie Kendrick, *First Amendment Expansionism*, 56 Wm. & Mary L. Rev. 1199, 1208–09 (2015) ("These claims mirror *Lochner*-era claims in their structure: they posit a constitutional right, held by business interests (be they sole proprietors or corporate entities), which immunizes them from government regulation, often regulation that relies upon state interests in public health, safety, and welfare.").

306 *See* Int'l Franchise Ass'n v. Seattle, 803 F.3d 389, 389–90, 408 (9th Cir. 2015) (rejecting a business challenge to a Seattle ordinance raising the city's minimum wage).

307 *See* Am. Meat Inst. v. USDA, 760 F.3d 18, 21 (D.C. Cir. 2014) (en banc) (challenging the USDA-mandated country of origin label on certain meat).

disclosures,[308] safety regulations,[309] the requirement to post workers' rights information,[310] as well as antidiscrimination laws.[311] Businesses have likewise mounted challenges against union fees.[312] Moreover, many free speech challenges to what were previously considered routine economic regulations are succeeding.[313] And because most human interactions, including commercial ones, are conducted via speech, there seems to be no limit to potential claims.[314]

The same deregulatory drive has also manifested in campaign finance regulations, where federal, state, and local governments have attempted to limit the corrupting influence of money in politics. The risk of deregulation is that those with the most money will exert an outsized influence on government, leading to politicians representing their donors' interests rather than their constituents'.[315] Nevertheless,

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308 *See* Monster Beverage Corp. v. Herrera, No. EDCV 13-00786, 2013 WL 4573959, at *11–12 (C.D. Cal. Aug. 22, 2013) (successfully challenging mandatory warnings for highly caffeinated energy drinks); N.Y. State Rest. Ass'n v. N.Y.C. Bd. of Health, 556 F.3d 114, 114–15, 131–34 (2d Cir. 2009) (rejecting restaurant association's free speech challenge to city law requiring certain restaurants to post calorie content information on menus).

309 *See* Vivid Ent., LLC v. Fielding, 965 F. Supp. 2d 1113, 1124–27 (C.D. Cal. 2013) (rejecting adult entertainment company's free speech challenge to county ordinance implementing a condom requirement in pornography production).

310 *See* Nat'l Ass'n of Mfrs. v. NLRB, 717 F.3d 947, 959 (D.C. Cir. 2013) (holding that businesses cannot be compelled to post notice of labor laws under the Free Speech Clause).

311 *See* Elane Photography, LLC v. Willock, 309 P.3d 53, 58–59 (N.M. 2014) (photographer challenging on free speech grounds a New Mexico Human Rights Act requirement that businesses serve same-sex customers); Masterpiece Cakeshop, Ltd. v. Colo. C.R. Comm'n, 584 U.S. 617, 621–25 (2018) (bakery claiming that public accommodation law requiring them to serve same-sex couple violates free speech); s*ee also* 303 Creative LLC v. Elenis, 600 U.S. 570, 577–80 (2023) (website company arguing that antidiscrimination law violates its free speech right).

312 *See* Janus v. Am. Fed'n of State, Cnty., & Mun. Emps., Council 31, 585 U.S. 878, 882–86 (2018) (holding that mandatory union fees for public sector employees violate the First Amendment, even if just for collective bargaining services).

313 *See, e.g.*, Nat'l Ass'n of Mfrs. v. SEC, 748 F.3d 359, 373 (D.C. Cir. 2014) (requiring producers to disclose whether minerals are "conflict free" violated manufacturers' First Amendment rights); R.J. Reynolds Tobacco Co. v. FDA, 696 F.3d 1205, 1208 (D.C. Cir. 2012) (striking an FDA regulation requiring graphic tobacco warning labels as violating the tobacco companies' First Amendment rights); Telescope Media Grp. v. Lucero, 936 F.3d 740, 747–48 (8th Cir. 2019) (holding that the Minnesota Human Rights Act prohibiting sexual orientation discrimination in places of public accommodation violated videographers' free speech); Brush & Nib Studios, LC v. City of Phoenix, 448 P.3d 890, 895 (Ariz. 2019) (holding Phoenix's antidiscrimination law violated stationary store's speech in violation of the First Amendment by forcing them to produce wedding invitations for same-sex couples).

314 *See* Kendrick, *supra* note 305, at 1212 ("[C]ountless activities involve 'speech.'").

315 *Cf.* FEC v. Mass. Citizens for Life, Inc., 479 U.S. 238, 257 (1986) ("Direct corporate spending on political activity raises the prospect that resources amassed in the economic marketplace may be used to provide an unfair advantage in the political marketplace.").

the Supreme Court has repeatedly struck attempts to regulate money in elections.[316]

These cases were not originalist decisions. Well into the mid-twentieth century, the Supreme Court considered regulations of commercial speech—like advertising or labels whose main goal is to make a sale[317]—as economic regulations that triggered no free speech scrutiny.[318] When the Court first extended limited free speech protection to commercial speech, its justification was not grounded in an originalist analysis.[319] The case which established the doctrinal framework for commercial speech likewise makes no attempt to link the original meaning of the Free Speech Clause to protection for commercial speech.[320] Nor does the Court's more recent decision in *Sorrell v. IMS Health Inc.*,[321] which hints that commercial speech ought to be protected against content-based regulations to the same degree as noncommercial speech.[322]

A similar absence pervades the cases establishing free speech protection for the noncommercial speech of corporations. Although many people believe that the Supreme Court granted corporate "persons" free speech rights equivalent to that of natural people in

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316 *See* Randall v. Sorrell, 548 U.S. 230, 262 (2006) (striking Vermont spending and contribution limits); FEC v. Wis. Right to Life, Inc., 551 U.S. 449, 457, 482, 491 (2007) (striking federal limits on "electioneering communications"); Citizens United v. FEC, 558 U.S. 310, 318–19, 372 (2010) (striking federal limits on corporate expenditures); Ariz. Free Enter. Club's Freedom Club PAC v. Bennett, 562 U.S. 1282 (2011) (striking Arizona public financing scheme); McCutcheon v. FEC, 572 U.S. 185, 192–93 (2014) (striking federal aggregate limits on contributions); Thompson v. Hebdon, 589 U.S. 1, 2–6 (2019) (striking Alaska's individual contributions limits).

317 The Supreme Court has defined commercial speech as speech that does no more than propose a commercial transaction. *See, e.g.*, Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n, 447 U.S. 557, 562 (1980); *see also* Martin H. Redish, *Commercial Speech, First Amendment Intuitionism and the Twilight Zone of Viewpoint Discrimination*, 41 Loy. L.A. L. Rev. 67, 75 (2007) (defining commercial speech as "expression advocating purchase").

318 *See* Valentine v. Chrestensen, 316 U.S. 52, 54 (1942) ("[T]he Constitution imposes no . . . restraint on government as respects purely commercial advertising.").

319 *See* Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc., 425 U.S. 748, 763 (1976); *see also id.* at 763–64 (emphasizing the benefits to audiences as consumers and as voters to a free flow of commercial information). *Bigelow v. Virginia*, 421 U.S. 809 (1975), which protected speech that was partially political and partially commercial, *id.* at 822, also lacked any originalist analysis.

320 *See Cent. Hudson*, 447 U.S. at 566 (describing the "four-part analysis" that developed for commercial speech cases, which approximates intermediate scrutiny).

321 564 U.S. 552 (2011).

322 Rather than apply the *Cent. Hudson* test for commercial speech, *Sorrell* spent some time explaining how the commercial speech regulation was content- and speaker-based, and must pass heightened scrutiny because "[c]ommercial speech is no exception." *Id.* at 566; *see also* Matal v. Tam, 582 U.S. 218, 251 (2017) (Kennedy, J., concurring) ("'Commercial speech is no exception,' the Court has explained, to the principle that the First Amendment 'requires heightened scrutiny whenever the government creates a regulation of speech because of disagreement with the message it conveys.'" (quoting *Sorrell*, 564 U.S. at 566)).

Citizens United v. FEC,[323] corporate free speech rights had been recognized decades earlier in *First National Bank of Boston v. Bellotti*,[324] and had been cemented by later decisions[325]—none of which turn on an originalist analysis.[326]

Citizens United, a Roberts Court decision, expanded corporate speech rights by striking laws that limited election expenditures.[327] Overruling previous decisions,[328] *Citizens United* held the government could not limit corporate "independent expenditures," thereby allowing businesses to spend as much as they like from their general treasury on speech advocating for specific candidates ("express advocacy"), including political advertisements for a candidate close to an election ("electioneering communications").[329] In the fifty-page majority opinion, precedent was repeatedly invoked,[330] while originalism received one paragraph—nothing more than a nod toward originalism.[331] Although

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323 558 U.S. 310 (2010).

324 435 U.S. 765, 777 (1978) (holding that a corporation's speech on political issues was as protected as any other political speech because "[t]he inherent worth of the speech in terms of its capacity for informing the public does not depend upon the identity of its source, whether corporation, association, union, or individual").

325 Citing *Bellotti*, the Court held that a law barring ConEd from including political advocacy in its billing envelops violated the Free Speech Clause. Consol. Edison Co. v. Pub. Serv. Comm'n, 447 U.S. 530, 533–35 (1980). Citing *Bellotti* again, the Court held it violated the Free Speech Clause to require a utility company to include third party speech in its billing envelops. Pac. Gas & Elec. Co. v. Pub. Utils. Comm'n, 475 U.S. 1, 8–9, 20–21 (1986).

326 Chief Justice Burger's concurrence in *Bellotti* does invoke originalism. He argues that the Framers did not mean to limit freedom of the press to any particular group (like newspapers), and that if the First Amendment covers media corporations (like newspapers) then it should cover other corporations. *Bellotti*, 435 U.S. at 795, 798–800 (Burger, J., concurring). No one joined him.

327 *See Citizens United*, 558 U.S. at 339 ("Section 441b's prohibition on corporate independent expenditures is thus a ban on speech."). The Court had previously distinguished campaign *contributions*, i.e., giving money to a political candidate or entity (some of which still can be limited) from campaign *expenditures*, i.e., spending money on speech advocating the election or defeat of a candidate. *Citizens United* held that the McCain-Feingold Bipartisan Campaign Reform Act of 2002 restrictions on corporate-funded *expenditures* violated the free speech rights of corporations and unions. *Id.* at 365.

328 *See id.* (overruling Austin v. Mich. State Chamber of Com., 494 U.S. 652, 655 (1990) (upholding laws barring independent expenditures by corporations)); McConnell v. FEC, 540 U.S. 93, 203–09 (2003) (upholding laws banning corporations from spending general funds on electioneering).

329 *See Citizens United*, 558 U.S. at 311–12.

330 *See, e.g.*, *id.* at 342 ("The Court has recognized that First Amendment protection extends to corporations.") (citing multiple cases, including *Bellotti*); *see also id.* at 343 (describing previous decisions).

331 *See* Jonathan A. Marcantel, *The Corporation as a "Real" Constitutional Person*, 11 U.C. Davis Bus. L.J. 221, 230 (2011) ("[A]lthough the [*Citizens United*] Court invoked the concept of 'original understanding' of the Constitution, the Court did not attempt to analyze the language of the Constitution or documents contemporaneous to the drafting and ratification of the Constitution or its amendments to support its position."). Rather than an originalist analysis, the Court made an originalist claim that it was irrelevant that the modern corporation (including the modern

Justice Scalia's concurrence mentioned originalism, it was primarily to rebut the originalist critique mounted by Justice Stevens's dissent.[332]

Citizens United also belongs to a line of cases that extends First Amendment protection to expenditures, a position that the Supreme Court has not supported with originalist bona fides. The Supreme Court first equated spending money with speaking in *Buckley v. Valeo*,[333] arguing that expensive mass media was indispensable to modern day political campaigns,[334] and therefore limiting independent expenditures on political communications limited speech itself.[335] Although *Buckley* protected individuals' right to fund political speech,[336] *Citizens United* extended that right to corporations.[337] *Buckley* makes no reference to the original meaning of the First Amendment and neither do subsequent decisions that expand *Buckley*'s reach. Recently, for example, in *Janus v. AFCME*,[338] the Court struck down mandatory union dues for public employees as violating the Free Speech Clause,[339] dealing such a potentially severe blow to the continued vitality of public sector unions[340] that Justice Kagan accused the Court of "weaponizing the First Amendment."[341] Other than an acontextual Jefferson quotation,[342]

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media corporation) was unknown at the Founding. The Court implies but does not clearly articulate that if the original understanding extends the First Amendment to media corporations like newspapers that disseminate political ideas, then it ought to extend to nonmedia corporations that disseminate political ideas. *See Citizens United*, 558 U.S. at 353. Basically, coverage for *The New York Times* must mean coverage for Exxon. Except that it does not necessarily follow; for example, *The Times* can invoke the Press Clause in a way that Exxon cannot.

332 *See Citizens United*, 558 U.S. at 385–90 (Scalia, J., concurring).

333 424 U.S. 1 (1976).

334 *See id.* at 19 ("[V]irtually every means of communicating ideas in today's mass society requires the expenditure of money. . . . The electorate's increasing dependence on television, radio, and other mass media for news and information has made these expensive modes of communication indispensable instruments of effective political speech.").

335 *See id.* at 18–19.

336 Specifically, *Buckley* struck down a cap on independent expenditures for individuals. *See id.* at 51.

337 *See Citizens United*, 558 U.S. at 365.

338 585 U.S. 878 (2018).

339 The Court had previously held it was unconstitutional to force non-union members to contribute money to be used for ideological political advocacy. Abood v. Detroit Bd. of Educ., 431 U.S. 209, 235–36 (1977). *Janus* held that it was unconstitutional compelled speech to require nonmembers to contribute union dues ("fair share fees") that were used for bread-and-butter collective bargaining activities, like negotiating wages and benefits. *Janus*, 585 U.S. at 893 (finding mandatory agency fees amounts to compelled speech in violation of the Free Speech Clause).

340 *See* Jessica Levinson, *Supreme Court Decision on* Janus v. AFSCME *Likely to Permanently Weaken Public Unions*, NBC News (Feb. 26, 2018, 4:36 PM), https://www.nbcnews.com/think/opinion/supreme-court-decision-janus-v-afscme-likely-permanently-weaken-public-ncna851376 [https://perma.cc/CXT9-VXR3].

341 *Janus*, 585 U.S. at 955 (Kagan, J., dissenting).

342 The Supreme Court quotes Thomas Jefferson on compelled financial support of *religion* to bolster their conclusion: "As Jefferson famously put it, 'to compel a man to furnish contributions

the Supreme Court's discussion of originalism is cabined to rejecting the union's originalist claim about public employees lacking free speech rights; the Court makes no originalist arguments to support equating union dues with speech.[343]

The same pattern appears in another alarming development: free speech challenges to antidiscrimination law. Christian-owned businesses are increasingly arguing that it violates their free speech rights to serve LGBTQ customers.[344] In *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission*,[345] for example, a bakery claimed, first, that baking a wedding cake was expressive conduct protected by the Free Speech Clause, and, second, that requiring them to create a wedding cake for a same-sex couple violated the Free Speech Clause by compelling them to express a message contrary to their beliefs.[346] Though the Supreme Court sided with the bakery on free exercise grounds,[347] Justice Thomas, joined by Justice Gorsuch, championed the free speech claim without ever mentioning originalism.[348]

Many reasons may underlie the absence of originalist analysis in these cases. Originalism was not yet in fashion when the earliest ones were decided. Even when originalism became ascendent for conservative justices, it can be difficult to garner five votes, so close cases will settle on the narrowest holding that a majority will join. Still, the Roberts Court—the Court that has made original understanding the touchstone for unprotected categories of speech as well as the religion clauses of

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of money for the propagation of opinions which he disbelieves and abhor[s] is sinful and tyrannical.'" *Id.* at 893 (quoting Thomas Jefferson, *A Bill for Establishing Religious Freedom*, *in* 2 PAPERS OF THOMAS JEFFERSON 545 (J. Boyd ed., 1950)). The irony is that when it comes to the actual compelled financial support of religion, the Supreme Court ignores Jefferson and his strong separation of church and state views. *See, e.g.*, Trinity Lutheran Church of Columbia, Inc. v. Comer, 582 U.S. 449, 466–67 (2017) (mandating direct cash grant to a church with no mention of Jefferson).

343 Citing *Garcetti v. Ceballos*, 547 U.S. 410, 410 (2006), which held there was no free speech protection for public employee speech made pursuant to official duties, because the union hoped the Court might be receptive to an originalist argument that the Free Speech Clause did not reach public employees. *Janus*, 585 U.S. at 901. The Supreme Court concluded that the union failed to offer sufficient evidence to support its claim. *Id.* at 903–04 ("The Union offers no persuasive founding-era evidence that public employees were understood to lack free speech protections."). It further observed that the historical evidence of speech limits on public employees was inapposite because, unlike this case, those involved employee speech that might threaten important government interests. *Id.* Moreover, the Court noted, nothing like modern day unions existed at the Founding; therefore, "the Union cannot point to any accepted founding-era practice that even remotely resembles the compulsory assessment of agency fees from public-sector employees." *Id.* at 904–05.

344 *See supra* notes 311, 313.

345 584 U.S. 617 (2018).

346 *See id.* at 632–33.

347 *See id.* at 638.

348 *See id.* at 654–67 (Thomas, J., concurring).

the First Amendment[349]—has not buttressed its expansive view of First Amendment freedom of expression with originalist analysis.

B. Multiple Originalisms and Hate Speech Bans

In addition to inconsistent invocation of originalism, the Supreme Court does not always rely on the same type of originalism.[350] Because there are so many versions of originalism,[351] judges may pick the one (or the amalgam) that results in their preferred outcome,[352] all while claiming that the original meaning dictates the outcome.[353] In the most prominent example of free speech originalism—the Supreme Court's originalist justification for freezing unprotected categories of speech—the Court's analysis relies heavily on original expected applications. A different strand of originalism, however, might generate a different conclusion.

The constitutional fate of hate speech bans illustrates this flexibility. Original expected applications originalism and original public meaning originalism produce different results when applied to hate speech. Or, more realistically, original expected applications yields one result while original public meaning reveals a principle that could go either way. That is, although the original expected applications approach the Supreme Court adopted in *Stevens* suggests that any law barring hate speech violates the First Amendment, the original public meaning is not as conclusive.

Although there are myriad definitions of hate speech,[354] I will slightly modify Mari Matsuda's proposal by defining hate speech as speech that denigrates or dehumanizes a person based on a constitutionally protected characteristic like race, ethnicity, nationality, sex, sexual orientation, gender identity, or religion and that subordinates one group to

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349 *See, e.g.*, Kennedy v. Bremerton Sch. Dist., 597 U.S. 507, 534–35 (2022).

350 *Cf.* Boyce, *supra* note 61, at 914 ("The Court's originalists, it is argued, have failed to apply a consistent originalist methodology . . . .").

351 *See* Andrew Koppelman, *Originalism, Abortion, and the Thirteenth Amendment*, 112 COLUM. L. REV. 1917, 1919 (2012) ("[O]riginalism has fragmented into an enormous number of different theories.").

352 *See* Colby & Smith, *supra* note 26, at 240 ("[C]laims that originalism has a unique ability to produce determinate and fixed constitutional meaning . . . stumble when one considers the rapid evolution and dizzying array of versions of originalism . . . .").

353 *See id.* at 247 ("[O]riginalists can and often do move from one version of originalism to another as they decide different issues, thus allowing them to reach results that they personally prefer, all the while claiming (and likely mistakenly believing) that they are being guided by nothing more than the external constraint of history.").

354 *See, e.g.*, *Hate speech*, BLACK'S LAW DICTIONARY (11th ed. 2019) (Black's Law Dictionary defines hate speech as "[s]peech whose sole purpose is to demean people on the basis of race, ethnicity, gender, religion, age, disability, or some other similar ground, esp. when the communication is likely to provoke violence").

another.[355] Racist speech meant to maintain white supremacy is perhaps the most familiar type of hate speech. Classic examples include burning a cross in a black family's front yard or using the n-word as an epithet. (The boundaries may not be sharp, but neither are they for many well-accepted categories like "fighting words," or "intentional infliction of emotional distress.")[356] At its core, racist hate speech "is the structural subordination of a group based on an idea of racial inferiority."[357]

1. Original Expected Applications

The Supreme Court's trio of cases on unprotected categories, using original expected applications, generally precludes a hate speech ban. Original expected applications originalism seeks to identify "how people living at the time the text was adopted would have expected it would be applied."[358] Some of the best evidence of how the Founding generation expected a constitutional provision be applied is how it was, in fact, applied. For example, if segregation was commonly practiced immediately after the Reconstruction Amendments were passed, then the original expected applications of the Equal Protection Clause probably does not bar segregation.[359] Or if the government regularly sponsored Christian prayers during the Founding era, then arguably Christian legislative prayers do not violate the Establishment Clause today.[360]

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355 Matsuda focuses on racist hate speech, which she describes as having three characteristics: "1. The message is of racial inferiority; 2. The message is directed against a historically oppressed group; and 3. The message is persecutorial, hateful, and degrading." Matsuda, *supra* note 292, at 2357.

356 One wonders why racist hate speech has not been accepted as a type of fighting words or intentional infliction of emotional distress. *See* Richard Delgado, *Words That Wound: A Tort Action for Racial Insults, Epithets, and Name-Calling*, 17 HARV. C.R.-C.L. L. REV. 133, 152–57 (1982) (discussing cases where courts concluded that racist insults were not sufficiently outrageous). The latter was precluded by the Roberts Court decision in *Snyder v. Phelps*, 562 U.S. 443, 458 (2011), which granted protection to speech that intentionally inflicts emotional distress on a private individual so long as it implicates a matter of public concern. There, homophobic hate speech at a soldier's funeral (e.g., "God hates f[**]s") was held to address the important topic of "homosexuality in the military." *Snyder*, 562 U.S. at 447–48, 454. By analogy, the Supreme Court could find that "God hates n—s" to address the important topic of race in America.

357 Matsuda, *supra* note 292, at 2358 ("[R]acist speech proclaims racial inferiority and denies the personhood of target group members. . . . Racism is more than race hatred or prejudice. It is the structural subordination of a group based on an idea of racial inferiority. Racist speech is particularly harmful because it is a mechanism of subordination, reinforcing a historical vertical relationship.").

358 Balkin, *supra* note 20, at 296.

359 *See supra* notes 124–28 and accompanying text (explaining that the ability to make exactly this argument sparked the modern originalist movement).

360 *See* Town of Greece v. Galloway, 572 U.S. 565, 578 (2014) (upholding Christian prayers before town meetings in part because "[t]he Congress that drafted the First Amendment would have been accustomed to invocations containing explicitly religious themes of the sort respondents find objectionable").

Relying on original expected applications, the *Stevens* Court held that if and only if evidence establishes that a category of speech fell outside the protection of the First Amendment at the Founding would the category do so now.[361] Thus, the unprotected categories of speech today are identical to those in the Founding era, no more and no less.[362] The *Stevens* Court's analysis of unprotected categories is brief.[363] First, it announces there are certain categories of unprotected speech that date to the Bill of Rights. "'From 1791 to the present' . . . the First Amendment has 'permitted restrictions upon the content of speech in a few limited areas.'"[364] Next, it insists that this list is fixed and has never changed: "[The First Amendment] has never 'include[d] a freedom to disregard these traditional limitations.'"[365] It then lists the unprotected categories.[366] Finally, it concludes by vilifying its previously employed balancing test as absurd and denies ever relying upon it. "[A] free-floating test for First Amendment coverage . . . is startling and dangerous."[367]

In so ruling, the Supreme Court made no attempt to document the actual meaning of the First Amendment at the Founding, or how that meaning justifies excluding these particular categories from First Amendment protection. It was enough that these were the categories of speech that fell outside the First Amendment in 1791.[368]

Andy Koppelman has nicknamed this type of original expected applications analysis as "I Have No Idea Originalism," as it fails to articulate the original meaning or even the principle behind a particular constitutional provision.[369] "The argument is essentially, 'I have no idea what this provision means. But whatever it means, it can't prohibit this, because the [Framing generation] approved of it.'"[370] Or vice versa: whatever the First Amendment means, it cannot recognize this as an unprotected category because the Framing generation did not.[371]

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361 *See* United States v. Stevens, 559 U.S. 460, 472 (2010).

362 Some of them may not have been discovered yet, *see supra* notes 270–73 and accompanying text, but the universe of unprotected categories is complete.

363 *See Stevens*, 559 U.S. 460 at 468–70.

364 *Id.* at 468.

365 *Id.* (alteration in original) (quoting R.A.V. v. City of St. Paul, 505 U.S. 377, 383 (1992)).

366 *See id.*

367 *Id.* at 470.

368 Actually, there is a slight nuance in that these unprotected categories have been outside the First Amendment *since* the Founding (as opposed to simply *at* the Founding). However, there is no discussion in *Stevens* or other cases on what role the continuity of the unprotected status plays, if any.

369 Koppelman, *supra* note 295, at 737.

370 "Framing generation" was substituted for "Framers," *id.* at 737, but the main point stands.

371 Prioritizing different original practices might also result in different outcomes. In *Brown*, the majority struck a ban on sales of violent video games to minors by reviewing practices vis-à-vis violent speech, while Justice Thomas, in dissent, looked to practices vis-à-vis minors, namely

Giving the Supreme Court the benefit of the doubt on its history,[372] its original expected applications analysis points to the unconstitutionality of hate speech bans. *Stevens* and its progeny make clear that the Court will not recognize as unprotected any category of speech that was not an unprotected category during the Founding era, and admittedly missing from that list is hate speech. Consequently, hate speech is fully protected by the Free Speech Clause, and any laws targeting it are content-based and therefore presumptively unconstitutional.[373] Thus, the Supreme Court's purportedly originalist analysis yields free speech protection for what most would agree is odious speech.

The Supreme Court even went a step further in *R.A.V. v. City of St. Paul*,[374] which involved a cross burned on a black family's lawn.[375] At issue was a St. Paul, Minnesota law barring hate speech on the basis of race, color, creed, religion, or gender.[376] The Supreme Court of Minnesota interpreted the law to fall into one of the Supreme Court's recognized categories of unprotected speech, namely fighting words, and upheld the law on this basis.[377]

The U.S. Supreme Court reversed.[378] Writing for the majority, avowed originalist Justice Scalia announced a new rule: content-based regulations of speech *within* an unprotected category will nevertheless trigger strict scrutiny in the same way that content-based regulations of fully protected speech do.[379] And in the case before it, banning hate speech fighting words failed strict scrutiny.[380]

Even as the Court carved out exceptions to its new rule (with nary a mention of this rule or its exceptions existing at the Founding),[381] it refused to recognize St. Paul's law as satisfying any of them.[382] For example, one exception to the newly minted rule would allow banning a subset of the unprotected category if it represented the very worst of

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"speech to minor children bypassing their parents." Brown v. Ent. Merchants Ass'n, 564 U.S. 786 (2011) (Thomas, J., dissenting).

372 A benefit it does not deserve. *See* Lakier, *supra* note 249, at 2168.

373 A ban on hate speech is content-based and, therefore, presumptively unconstitutional. *See supra* note 151 and accompanying text. Of course, as Jud Campbell has demonstrated, "these neutrality principles are new." Campbell, *supra* note 150, at 865.

374 505 U.S. 377 (1992).

375 *See id.* at 379.

376 *See id.* at 380.

377 *See id.* at 380–81.

378 *See id.* at 396.

379 *See id.* at 377–78.

380 *See id.* at 395–96 (holding that the government's goal is compelling but content-neutral alternatives existed, namely banning all fighting words rather than just hateful ones).

381 *See id.* at 387.

382 *See id.* at 391.

that category.[383] Nevertheless, Justice Scalia flatly rejected the idea that hate speech might constitute the very worst kind of fighting words, even though it is difficult to imagine what better supercharges fighting words than overt racism.[384]

R.A.V., which was decided before the Court's originalist trio of cases on unprotected speech,[385] might be excused for its paltry originalism analysis.[386] *Matal v. Tam*,[387] in contrast, is of more recent vintage,[388] and it accepts the "originalist" reasoning of the earlier cases to conclude that a racial slur was fully protected speech.[389] Any interest in preventing hateful demeaning speech conflicts with the First Amendment's goal of protecting "speech expressing ideas that offend."[390]

Originalism barely surfaced in *Matal v. Tam*. More to the point, the Court's superficial original expected applications analysis for unprotected categories was only one of several originalist analyses available. Rigidly applying expected applications will always result in the protection of speech that was not blacklisted at the Founding.[391] A different originalist analysis, based upon the original public meaning of the First Amendment, or at least the original principle for deciding when categories fell outside it, might lead to a different result, as the next section explores. Instead, the Court opted for an approach that effectively

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383 *See id.* at 388 ("To illustrate: A State might choose to prohibit only that obscenity which is the most patently offensive in its prurience . . . ." (emphasis omitted)).

384 *See id.* at 424 (Stevens, J., concurring) ("This . . . judgment—that harms caused by racial, religious, and gender-based invective are qualitatively different from that caused by other fighting words—seems to me eminently reasonable and realistic.").

385 The case is notable for reshaping doctrine in order to strike down hate speech bans. *See id.* at 415 (Blackmun, J., concurring) ("[T]he Court manipulated doctrine to strike down an ordinance whose premise it opposed, namely, that racial threats and verbal assaults are of greater harm than other fighting words.").

386 The *R.A.V.* Court mentions that certain unprotected categories date to the Bill of Rights, *id.* at 382–83, but it offers no discussion of original meaning or attempt to ground its various new rules and exceptions in that original meaning.

387 582 U.S. 218 (2017).

388 In *Tam*, the federal government refused to grant trademarks "which may disparage . . . persons, living or dead, institutions, beliefs, or national symbols, or bring them into contempt, or disrepute." 15 U.S.C. § 1052. While the terms of this "disparagement" clause were much broader than hate speech, *Tam* involved a refusal to issue a trademark for "[s]lants," "a derogatory term for persons of Asian descent." *Matal*, 582 U.S. at 223. The music group seeking registration, "The Slants," wanted to reclaim the word, much like the LGBTQ community have with the word "queer." *Id.* at 228.

389 *Matal*, 582 U.S. at 247.

390 *Id.* at 246. The Court continues: "Speech that demeans on the basis of race . . . is hateful; but the proudest boast of our free speech jurisprudence is that we protect the freedom to express 'the thought that we hate.'" *Id.* (quoting United States v. Schwimmer, 279 U.S. 644, 655 (1929) (Holmes, J., dissenting)).

391 Or more precisely, the Founding as it is envisioned by the Court's historical analysis.

guarantees protection for hate speech, even if it is degrading, demeaning, and dehumanizing.

2. *Original Public Meaning*

Switching from original expected applications to original public meaning—or the original meaning as best we can identify today—might well change the outcome. The original public meaning at the Founding, with its limited scope and emphasis on promoting the public good, intimates that the First Amendment should not protect hate speech. Furthermore, the original public meaning of the First Amendment at Reconstruction, a time when ending the historical oppression of black Americans figured prominently, does not indicate otherwise. What follows is not a definitive exhumation of original public meaning, but an exploration that nonetheless suggests that a different originalism may yield a different outcome.

a. Minimal First Amendment Coverage

It is entirely possible that based on original meaning, the First Amendment would not reach hate speech at the Founding or at Reconstruction, such that laws barring it would spark no constitutional inquiry. Although hate speech may not have been specifically recognized as unprotected, this failure signifies little when so much, if not most, speech was unprotected.

As discussed in Section II.A, the First Amendment at the Founding may have covered no more than prior restraints and certain additional protections against seditious libel. If coverage were that minimal, then most speech restrictions would not trigger First Amendment review at all.

Even assuming the Founding era viewed the First Amendment as reaching the natural right to speak, write, and publish,[392] it also understood that these rights had inherent limits. "At a minimum, natural law required that individuals not interfere with the natural rights of others."[393] Yet that is exactly what hate speech does. Hate speech tends to silence its targets, interfering with *their* natural right to speak, write, and publish.[394]

The power dynamics of hate speech facilitates this silencing. Situating hate speech in the nation's history of racial subordination, critical race theorists argue that hate speech is not simply an expression

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392 *See supra* notes 187–90 and accompanying text.

393 Campbell, *supra* note 144, at 271.

394 *See* Susan M. Gilles, *Images of the First Amendment and the Reality of Powerful Speakers*, 24 CAP. U. L. REV. 293, 295–96 (1995) ("The hate speaker claims to be silenced, when his speech in fact silences.").

of dislike but an assertion of power: "In reality, those who hurl racial epithets do so because they feel empowered to do so. Indeed, their principal objective is to reassert and reinscribe that power."[395] Reminiscent of the Klan's "reign of terror,"[396] a cross burned on your front lawn warns that your presence here, in a white neighborhood, is neither deserved nor welcomed.[397] Unsurprisingly, the Jones family in *R.A.V.* was the first black family in their working-class St. Paul neighborhood.[398]

Victims like the Jones family well understand that hate speech may foreshadow violence, and so the safest course is silence.[399] Any response might make them targets for further attacks, and not just expressive ones.[400] As *R.A.V.*'s Laura Jones noted, "If you're black and you see a cross burning, you know it's a threat, and you imagine all the church bombings and lynchings and rapes that have gone before, not so long ago . . . A burning cross is a way of saying, 'We're going to get you.'"[401] These sentiments were echoed by another victim from a different Supreme Court case, who explained that "[he] was 'very nervous' . . . because 'a cross burned in your yard . . . tells you that it's just the first round.'"[402] Targets of hate speech may also be too

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395 Richard Delgado & David H. Yun, *Pressure Valves and Bloodied Chickens: An Analysis of Paternalistic Objections to Hate Speech Regulation*, 82 CAL. L. REV. 871, 884 (1994) (footnote omitted).

396 Virginia v. Black, 538 U.S. 343, 352–53 (2003) ("Burning a cross in the United States is inextricably intertwined with the history of the Ku Klux Klan. . . . The Klan fought Reconstruction and . . . imposed 'a veritable reign of terror' throughout the South." (quoting STETSON KENNEDY, SOUTHERN EXPOSURE 31 (1991))).

397 *See* Mayo Moran, *Talking About Hate Speech: A Rhetorical Analysis of American and Canadian Approaches to the Regulation of Hate Speech*, 1994 WIS. L. REV. 1425, 1464 ("[H]ate speech is often a punishment for targets presuming to go where they do not belong.").

398 *See* Tamar Lewin, *Hate-Crime Law Is Focus of Case on Free Speech*, N.Y. TIMES (Dec. 1, 1991), https://www.nytimes.com/1991/12/01/us/hate-crime-law-is-focus-of-case-on-free-speech.html [https://perma.cc/E3PK-KEAZ]. Before the Jones' neighbor burned the cross on their lawn in the middle of the night, their tires had been slashed. *Id.*

399 *See* Matsuda, *supra* note 292, at 2330–31 ("Members of target-group communities tend to know that racial violence and harassment is widespread, common, and life-threatening; that 'the youngsters who paint a swastika today may throw a bomb tomorrow.'" (quoting GA. STATE ADVISORY COMM. TO THE U.S. COMM. ON CIVIL RIGHTS, PERCEPTIONS OF HATE GROUP ACTIVITY IN GEORGIA 3 (1982))).

400 *See* Delgado & Yun, *supra* note 395, at 885 ("The idea that talking back is safe for the victim . . . simply does not correspond with reality. It ignores the power dimension to racist remarks [and] forces minorities to run very real risks . . . .").

401 Lewin, *supra* note 398.

402 Virginia v. Black, 538 U.S. 343, 350 (2003) (quoting James Jubilee, whose neighbor in Virginia Beach, Virginia, attempted to burn a cross in his yard).

shocked to respond,[403] or they may consider it futile.[404] The result is still silence.

Although this silencing effect is most obvious with racist cross burnings,[405] it is true for a range of hate speech. Charles Lawrence laments that "members of subordinated groups . . . must learn the survival techniques of suppressing and disguising rage and anger at an early age."[406] In short, hate speech, which are attacks by the powerful against those who are not, intrudes on the silenced victims' own natural right to speak.[407] Thus, if the original public meaning of the First Amendment encompasses natural rights, it should exclude hate speech because of the inherent limits of natural rights.[408] And this analysis does not even consider how hate speech's dehumanization likewise infringes on their targets' natural rights.[409]

The Reconstruction Amendments bolster the notion that the First Amendment does not reach hate speech, especially racist hate speech. Recall that although the contours of free speech doctrine changed little, the specifics changed in response to the profound constitutional reordering brought about by the Reconstruction Amendments. The Second Founding, after all, was meant to end slavery and the historical degradation and subjugation of black Americans.[410] In addition to creating new rights, these Amendments modified existing ones like freedom of expression.

Even a Supreme Court hostile to Reconstruction agreed that the Thirteenth Amendment's declaration that "neither slavery, nor involuntarily servitude . . . shall exist in the United States" put an end to

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403 *See* Charles R. Lawrence III, *If He Hollers Let Him Go: Regulating Racist Speech on Campus*, 1990 DUKE L.J. 431, 452 ("Women and minorities often report that they find themselves speechless in the face of discriminatory verbal attacks. . . . Fear, rage, shock, and flight all interfere with any reasoned response.").

404 *See* Delgado & Yun, *supra* note 395, at 885 ("What would be the answer to 'N[**]ger, go back to Africa. You don't belong [here]'?").

405 Even the Supreme Court understood that "often the cross burner intends that the recipients of the message fear for their lives." *Black*, 538 U.S. at 357. Justice Thomas argued that burning a cross with the intent to intimidate was not even speech but terrorist conduct: "[T]his statute prohibits only conduct, not expression. And, just as one cannot burn down someone's house to make a political point and then seek refuge in the First Amendment, those who hate cannot terrorize and intimidate to make their point." *Id.* at 394 (Thomas, J., dissenting).

406 Lawrence, *supra* note 403, at 455.

407 *See* Charles J. Ogletree, Jr., *The Limits of Hate Speech: Does Race Matter?*, 32 GONZ. L. REV. 491, 502 (1997) ("Rather than promoting speech . . . [hate] speech produces silence.").

408 *See supra* note 191 and accompanying text (explaining that natural rights end when their exercise would interfere with the natural rights of others).

409 *See* Moran, *supra* note 397, at 1464 ("The unofficial [critical race] narrative describes, as one of the most distinctive and profound harms of hate speech, the denial of the target's humanity.").

410 *See* Carter, *supra* note 210, at 1114 ("The Second Founding's aim was to create a new constitutional order that dismantled slavery in all of its aspects.").

all—private or government—"badges and incidents of slavery."[411] Jennifer Mason McAward argues that the original public meaning of "incident," and sometimes "badge" as well,[412] both terms of art,[413] captures the specific disabilities that "necessarily accompanied the institution of slavery,"[414] ranging from the inability to own property or testify in court to denial of education or the right to speak.[415] But, "the term 'badge' can also be a metonym for the kinds of attitudes or behaviors that were constitutive of slavery as an American institution."[416] Foremost among them is white supremacy[417]: "Racial supremacy and American slavery went hand in hand."[418] Thus, if the Thirteenth Amendment took aim at anything that facilitated slavery,[419] racist hate speech should be within its sights. With its purpose and effect of furthering racial subordination and white supremacy, racist hate speech is the embodiment of a lingering "badge[] and [] incident[] of slavery."[420]

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411 The Civil Rights Cases, 109 U.S. 3, 27–28 (1883) ("[T]he thirteenth amendment . . . clothes Congress with power to pass all laws necessary and proper for abolishing all badges and incidents of slavery in the United State[s] . . . .").

412 *See* Jennifer Mason McAward, *Defining the Badges and Incidents of Slavery*, 14 U. PA. J. CONST. L. 561, 575 (2012).

413 *See id.* at 566.

414 *Id.* at 575.

415 Senator James Harlan argued the Thirteenth Amendment banned slavery as well as its necessary incidents, "including 'the prohibition of the conjugal relation,' the 'abolition . . . of the parental relation,' the inability to 'acquir[e] and hol[d] property,' the deprivation of 'a status in court' and 'the right to testify,' the 'suppression of the freedom of speech and of the press,' and the deprivation of education." *Id.* at 573 (alterations in original) (quoting CONG. GLOBE, 38th Cong., 1st Sess. 1439 (1864) (statement of Sen. Harlan)).

416 Darrell A.H. Miller, *The Thirteenth Amendment, Disparate Impact, and Empathy Deficits*, 39 SEATTLE U. L. REV. 847, 856 (2016).

417 *See* Edward H. Kyle III, *Symbolism and the Thirteenth Amendment: The Injury of Exposure to Governmentally Endorsed Symbols of Racial Superiority*, 25 MICH. J. RACE & L. 77, 95 (2019) ("[T]he intention of the Thirteenth Amendment was not merely the ending of literal slavery, but also an ending to those elements that allowed the institution of slavery to exist. . . . [T]he philosophy of racial supremacy was identified as one such element.").

418 *Id.* ("The foundation of the moral acceptance of American slavery was the belief that the enslaved race was so inferior to the enslaving race that its subjugation was not only morally correct, it was a natural state that benefited the enslaved.").

419 *See* Mehmet K. Konar-Steenberg, *Root and Branch: The Thirteenth Amendment and Environmental Justice*, 19 NEV. L.J. 509, 527 (2018) ("Statements by the amendment's supporters lend support to the idea that the amendment was intended to go beyond slavery and address racial subordination."). Senator Wilson of Massachusetts insisted the Thirteenth Amendment "obliterat[ed] the last lingering vestiges of the slave system; its chattelizing, degrading and bloody codes; its dark, malignant barbarizing spirit; all it was and is, everything connected with it." *Id.* (alterations in original). And Senator Charles Sumner argued it abolished slavery "root and branch . . . in the general and the particular . . . in length and breadth and then in every detail." William M. Carter, Jr., *Race, Rights, and the Thirteenth Amendment: Defining the Badges and Incidents of Slavery*, 40 U.C. DAVIS L. REV. 1311, 1343 (2007).

420 *Cf.* Jones v. Alfred H. Mayer Co., 392 U.S. 409, 440–41, 445 (1968) (Douglas, J., concurring) ("The true curse of slavery is . . . [that it] produced the notion that the white man was of superior

Meanwhile, if the Fourteenth Amendment's Equal Protection Clause was meant to eliminate caste systems and guarantee full and equal citizenship for all Americans, then expression attempting to preserve the racial hierarchy at the heart of slavery violates that ideal.[421] And certainly there is historical support for this original meaning. For example, Darren Hutchinson argues that "[t]he history of Congressional Reconstruction supports an emancipatory construction of the Equal Protection Clause."[422] After all, the Fourteenth Amendment was enacted to combat the Black Codes—the Southern states' attempt to recreate racial subordination as best they could.[423]

Whether the Reconstruction Amendments barred hate speech is not dispositive, as my focus is not the direct effect of the Reconstruction Amendments but the way they inform the First Amendment. Reasonable citizens of the era may well have understood that the Reconstruction Amendments—the Thirteenth Amendment's ban on all indicia of slavery, together with the Fourteenth Amendment's promise of equality—modified the scope of the First Amendment to leave hate speech outside its walls.

Finally, the Reconstruction meaning of the First Amendment should be informed by the United States' newest citizens,[424] who would no doubt agree that the driving impetus of the Reconstruction Amendments was their freedom and equality.[425] For the reasonable Reconstruction African American, speech was not only valuable in itself "but also worth protecting as a means to achieving a goal; the end of slavery and the formation of a constitutional order wherein Blacks would be full participants, and freedom rather than subjugation would

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character, intelligence, and morality. . . . Some badges of slavery remain today. While the institution has been outlawed, it has remained in the minds and hearts of many white men.").

421 *See* Charles R. Lawrence III, *Crossburning and the Sound of Silence: Antisubordination Theory and the First Amendment*, 37 VILL. L. REV. 787, 792 (1992) ("When hate speech is employed with the purpose and effect of maintaining established systems of caste and subordination, it violates [the Equal Protection Clause's] core value [of full and equal citizenship].").

422 Darren Lenard Hutchinson, *Undignified: The Supreme Court, Racial Justice, and Dignity Claims*, 69 FLA. L. REV. 1, 15 (2017); *see also* Cass R. Sunstein, *The Anticaste Principle*, 92 MICH. L. REV. 2410, 2439 (1994) ("Originally the Fourteenth Amendment to the Constitution was understood as an effort to eliminate racial caste—emphatically not as a ban on distinctions on the basis of race.").

423 *See* Hutchinson, *supra* note 422, at 13–14.

424 *Cf.* Guyora Binder, *Did the Slaves Author the Thirteenth Amendment? An Essay in Redemptive History*, 5 YALE J.L. & HUMANS. 471, 483 (1993) ("African-Americans were, of course, excluded from the political process, voiceless before the law, and absent from the nation's constitutive myths.").

425 *Cf.* James Gray Pope, *Section 1 of the Thirteenth Amendment and the Badges and Incidents of Slavery*, 65 UCLA L. REV. 426, 435 (2018) ("African American leaders . . . insisted that the [Thirteenth Amendment's] abolition of slavery necessarily entailed not only outlawing the full-fledged conditions of slavery and servitude, but also eliminating each and every element of the slave system.").

be the default state."[426] In short, neither the Founding nor the Reconstruction understanding of the First Amendment seems to reach hate speech.

b. Shallow First Amendment Protection

Even assuming hate speech falls inside rather than outside the First Amendment's ambit under the original public meaning, protection would be fairly shallow because natural rights could be curtailed if their exercise undermined the public good. Indeed, some defined natural rights to exclude any right that would harm the general welfare.[427] Even under the broader definition, no one questioned the government's prerogative to regulate for the public good. "[W]hether inherently limited by natural law or qualified by an imagined social contract, retained natural rights were circumscribed by political authority to pursue the general welfare."[428]

As a result, speech deemed harmful to society—such as blasphemy and swearing—could be and regularly was restricted, even if it did not directly interfere with the rights of others.[429] "[T]hough the Founders broadly acknowledged that speaking, writing, and publishing were among their natural rights, governmental limitations of expressive freedom were commonplace."[430] Even plays that might be "morally corrupting" could be banned.[431]

Hate speech is corrosive to the public good. At the very least, "Because hate speech frequently silences its victims—those who, more often than not, are already heard the least—the community loses the benefit of the victims' voices."[432] Consequently, as a matter of free speech, hate speech eliminates a distinctive, much needed viewpoint from the marketplace of ideas and undermines democracy by impoverishing public discourse.[433]

Hate speech also reenacts hierarchies that subvert the necessary and fundamental assumption of our democracy: all people are created

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426 Carter, *supra* note 210, at 1109.

427 *See* Campbell, *supra* note 144, at 274–75.

428 *Id.* at 276.

429 *See id.* at 276–77.

430 *Id.* at 276.

431 *Id.* at 277.

432 N. Douglas Wells, *Whose Community? Whose Rights?—Response to Professor Fiss*, 24 CAP. U. L. REV. 319, 320 (1995).

433 *See* Ogletree, *supra* note 407, at 501 (noting that in many other countries, hate speech is "regarded as hindering [democracy] by closing off the spaces in which minorities are able to participate in public debate"); Lawrence, *supra* note 421, at 801 ("A burning cross not only silences people like the Joneses, it impoverishes the democratic process and renders our collective conversation less informed.").

equal.[434] In other words, "the spread of bigotry signals a diminution of egalitarian ideals in society."[435] And this does not remotely exhaust the harms of hate speech as it fails to detail the psychological harm to targets as well as the severe curtailment of their liberty.[436] It also overlooks the perpetuation of discrimination and promotion of violence.[437] In short, the elimination of hate speech would enhance the public welfare.

Although the right to articulate one's opinion was considered an inalienable natural right, it never extended to lies or views made in bad faith, a category that could readily encompass hate speech.[438] Indeed, racist hate speech is more akin to a slap in the face than a conversational gambit[439]: burning a cross on a black family's front yard is not an invitation to discuss the role of race in the United States.[440] As Charles Lawrence III argued, "The racial invective is experienced as a blow, not a proffered idea, and once the blow is struck, it is unlikely that dialogue will follow."[441]

In sum, hate speech laws do not necessarily clash with the original public meaning of the First Amendment, which envisioned narrow and shallow free speech protection. To start, hateful speech was unlikely to be considered within the ambit of the First Amendment. Even assuming the First Amendment covered natural rights as well as prior restraints, natural rights did not extend to interfering with the rights of others, and inalienable natural rights did not extend to statements made in bad faith. Moreover, given the innumerable harms of hate speech, it would

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434 *Cf.* Delgado, *supra* note 356, at 157 ("Racial insults . . . conjure up the entire history of racial discrimination in this country.").

435 Alexander Tsesis, *The Empirical Shortcomings of First Amendment Jurisprudence: A Historical Perspective on the Power of Hate Speech*, 40 Santa Clara L. Rev. 729, 772 (2000).

436 *See supra* notes 406–09 and accompanying text; Matsuda, *supra* note 292, at 2337 ("In order to avoid receiving hate messages, victims have had to quit jobs, forgo education, leave their homes, avoid certain public places . . . and otherwise modify their behavior and demeanor.").

437 *See* Richard Ashby Wilson & Molly K. Land, *Hate Speech on Social Media: Content Moderation in Context*, 52 Conn. L. Rev. 1029, 1033 (2021) ("The data now available on social media . . . allow researchers to empirically test whether there are visible, measurable harms resulting from hate speech. Studies thus far indicate that speech that denigrates and generates discriminatory animus against social groups such as immigrants or religious minorities does increase the risk of real-world violence against them."). *See generally* Tsesis, *supra* note 435, at 740–55 (describing how racist propaganda that became embedded in culture facilitated atrocities against Jews in Germany, and against African Americans and Native Americans in the United States).

438 *See supra* notes 197–98 and accompanying text.

439 *See* Lawrence, *supra* note 403, at 452 ("The experience of being called 'n[**]ger,' 'sp[*]c,' 'J[*]p,' or 'k[*]ke' is like receiving a slap in the face.").

440 *See* Lawrence, *supra* note 421, at 796 ("The primary intent of the cross burner in *R.A.V.* was not to enter into a dialogue with the Joneses, or even with the larger community."); Delgado & Yun, *supra* note 395, at 885 ("Racist speech is rarely a mistake, rarely something that could be corrected or countered by discussion.").

441 Lawrence, *supra* note 403, at 452.

be considered acceptable for the legislature to bar it to advance the public good.

Of course, given the inevitable construction that must occur, this is not the only potential conclusion. But in contrast to the Supreme Court's original expected applications originalism, an original public meaning originalism does not foreclose the constitutionality of hate speech laws. Thus, the claim that originalism guarantees that Justices merely apply the one true meaning of the Constitution to the case before them, or even curtails judicial discretion much at all, cannot stand.

Does the possible constitutionality of a hate speech ban under the original meaning of the First Amendment give lie to my claim that originalism is a theory of the privileged? Perhaps. But it more likely demonstrates how malleable it is. My main point is that originalism has either been ignored or deployed by conservatives to reach their preferred outcome all while claiming impartiality and inevitability. The reality is that we will never see the current Supreme Court uphold hate speech bans under an originalist theory. As quick as some Justices are to equate lying about military medals to "a slap in the face,"[442] a majority seems woefully blind to how hate speech actually better fulfills the analogy.[443]

Conclusion

Despite originalists' claims to the contrary, an originalist First Amendment, both in theory and in practice, provides little meaningful constraint on judges. The Roberts Court has avoided originalism in its free speech Lochnerism decisions yet has embraced it, or at least one strand of it, in its unprotected categories decisions that effectively preclude hate speech bans. A different strand focused on original public meaning may yield a contrary result, especially given the inherent limits of natural rights, as well as widespread acceptance that the people through their legislatures may limit speech in the public interest. Indeed, faithful adherence to the First Amendment's true original meaning might completely reshape freedom of expression jurisprudence, explaining why it is generally avoided. In the end, First Amendment originalism will no doubt serve to legitimize decisions that further entrench the powerful and ignore the needs of the marginalized.

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442 *See supra* note 287.

443 *See supra* notes 439–41 and accompanying text.