COMMON LAW CONSTITUTIONALISM AND THE PROTEAN FIRST AMENDMENT

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Not unlike the Greek god Proteus, a famous shape-shifter, the First Amendment seems to change its form and shape over time, through a process of dynamic judicial construction, to promote and safeguard the ongoing project of democratic deliberation. In fact, the First Amendment's text plays virtually no meaningful role in protecting expressive freedom in the contemporary United States. Despite containing four distinct clauses (the Speech, Press, Assembly, and Petition Clauses), only the Free Speech Clause seems to do any meaningful jurisprudential work. The Press, Assembly, and Petition Clauses have fallen into desuetude; they generate little constitutional litigation and very few Supreme Court decisions. Textualist jurists, including Justices Neil Gorsuch, Clarence Thomas, Antonin Scalia, and Hugo Black, routinely claim that they must strictly follow the text as written when interpreting the Constitution. Curiously, however, these self-described textualist and originalist jurists do not follow this interpretative approach when applying the First Amendment. Instead, First Amendment interpretation is invariably purposive, dynamic, and of the "living tree" stripe. This phenomenon raises important and interesting questions about the relevance and efficacy of constitutional text in securing both expressive freedom and fundamental rights more generally. In the U.S., and abroad as well, expressive freedom depends much more on social, cultural, and political norms and traditions than on constitutional text. The protean First Amendment strongly suggests that—notwithstanding the vociferousness with which conservative judges, legal scholars, and lawyers advance textualist claims—the process of constitutional adjudication is, in its essence, a common law enterprise. Simply put, text can constrain only insofar as it provides a plausible basis for a judicial decision that accords with the contemporary constitutional sensibilities of We the People.

I. INTRODUCTION: THE FIRST AMENDMENT AS A NON-TEXTUAL TEXT

The First Amendment, like the Greek god Proteus, changes its shape to meet the perceived necessities of safeguarding the ongoing process of democratic deliberation.[1] Despite containing four distinct clauses related to

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[1] Although multiple theories exist for extending strong legal protection to expressive activities, the dominant and most enduring account rests on the relationship of speech, assembly, association, petition, and a free press to the ongoing process of democratic self-government. *See* ALEXANDER

particular forms of expressive freedom[2]—namely express protections for speech, press, assembly, and petition[3]—the federal courts appear to have "forgotten" three of the amendment's four clauses.[4] Indeed, the First Amendment's text has little, indeed almost nothing, to do with the contemporary metes and bounds of expressive freedom in the United States. The First Amendment instead stands for the proposition "that debate on public issues should be uninhibited, robust, and wide-open" and, consistent with this approach, the public discourse that informs the act of voting on election day "may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials."[5] To serve these constitutional goals, the amendment's meaning depends far less on its language than on its broader and more general purposes.

Proteus, the son of Poseidon, served as Poseidon's "shepherd of the sea."[6] Homer styles Proteus the "Old Man of the Sea" and also notes that Proteus

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MEIKLEJOHN, FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT 26 (1948) ("The principle of the freedom of speech springs from the necessities of the program of self-government."); *see also* CASS R. SUNSTEIN, DEMOCRACY AND THE PROBLEM OF FREE SPEECH 18 (1993) (positing that a "well-functioning system of free expression" is essential to achieving "the central constitutional goal of creating a deliberative democracy").

2 Throughout this Article, I will use the phrase "expressive freedom" as a shorthand for the various, and differentiable, forms of expressive activity that the First Amendment, at least on its face, protects—including the freedoms of speech, press, assembly, and petition. All four activities involve distinct modalities of expression – communication – and all of them contribute in important and distinctive ways to the process of democratic deliberation (which is essential to the project of democratic self-government). As Professor Ash Bhagwat persuasively argues, the First Amendment "was intended to give citizens—ordinary people—the tools to engage in political debate, to organize themselves in associations, to assemble for a variety of purposes including consulting together regarding the issues of the day, and to call for action from elected officials through formal petitions." ASHUTOSH BHAGWAT, OUR DEMOCRATIC FIRST AMENDMENT 161-62 (2020). Free speech is an important but hardly the only form of expressive freedom necessary to sustain democratic deliberation. *See generally* CASS SUNSTEIN, REPUBLIC.COM 153 (2001) (arguing that "the free speech principle should be read in light of the commitment to democratic deliberation" meaning that "a central point of the free speech principle is to carry out that commitment").

3 U.S. CONST. amend. I.

4 BHAGWAT, *supra* note 2, at 4.

5 N.Y. Times Co. v. Sullivan, 376 U.S. 254, 270 (1964); *see* Snyder v. Phelps, 562 U.S. 443, 460-61 (2011) (acknowledging that "[s]peech is powerful" and "can stir people to action, move them to tears of both joy and sorrow and—as it did here—inflict great pain" but that it is better "to protect even hurtful speech on public issues" than to "stifle public debate").

6 CHARLES L. "PIE" DEFOUR, KREWE OF PROTEUS: THE FIRST HUNDRED YEARS 5 (1981) (describing Proteus as the "'shepherd of the sea'" and explaining that he was "the herdsman of Poseidon's seals"); *see also* EDITH HAMILTON, MYTHOLOGY 38 (1942) (discussing Proteus and the god's powers).

possessed the gift of prophecy.[7] Thomas Bulfinch explains that, in addition to the gift of prophecy, "[h]is peculiar power was that of changing his shape at will."[8] Proteus, as it turns out, was a rather reluctant fortune teller; a person seeking to know the future would have to first catch Proteus and compel him to spill the beans. To avoid capture, Proteus would change his shape and form.[9] From this mythological god comes the modern concept of something being "protean"—meaning changeable rather than fixed in form.

This Article will show that the First Amendment's shape, like that of Proteus, is far from fixed. More broadly, it will posit that *all* constitutional text is, at least in theory, protean rather than fixed in form. Judge Guido Calabresi, in a strikingly bold but ultimately unsuccessful argument, urged judges to exercise an "updating" role with respect to statutes that they routinely exercise over the common law.[10] Consideration of the First Amendment's departure from a text-based exegesis highlights how federal judges routinely perform an updating role of the sort that Judge Calabresi advocates for statutes[11]—but with respect to the Constitution itself. And, despite decrying "updating" of the Constitution's text, conservative Justices have embraced this practice with real brio in the context of expressive freedom.[12]

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[7] MAUREEN ALDEN, PARA-NARRATIVES IN THE ODYSSEY: STORIES IN THE FRAME 23 (2017) (noting that Proteus was known as the "Old Man of the Sea"); DUFOUR, *supra* note 6, at 5 (describing Proteus as "the Old Man of the Sea"); *see* HOMER, THE ODYSSEY 56-57 (George H. Palmer trans. 1892) (noting that Proteus was the son of Poseidon and the "old man of the sea").

[8] THOMAS BULFINCH, BULFINCH'S MYTHOLOGY 173 (1913); HAMILTON, *supra* note 6, at 42.

[9] *See* BULFINCH, *supra* note 8, at 191 ("Proteus, waking and finding himself captured, immediately resorted to his arts, becoming first a fire, then a flood, then a horrible wild beast, in rapid succession."); HAMILTON, *supra* note 6, at 299 ("But to hold him—that was another matter. [Proteus] had the power of changing his shape at will, and there in our hands he became a lion and a dragon and many other animals, and finally even a high-branched tree.").

[10] GUIDO CALABRESI, A COMMON LAW FOR THE AGE OF STATUTES 3-5, 178-80, 190-91 (1982).

[11] *Id.* at 163-71.

[12] *See infra* text and accompanying notes 217 to 230. I should emphasize that I am not referring to monumental shifts in constitutional meaning, of the scope associated with Professor Bruce Ackerman's "constitutional moments," but instead am claiming that judicial construction of constitutional meaning constitutes a quotidian judicial activity. *See* BRUCE ACKERMAN, WE THE PEOPLE, VOLUME 2: TRANSFORMATIONS 4-17, 408-21 (1998) (describing and discussing the concept of "constitutional moments," which are points of inflection when the Supreme Court ratifies a major de facto amendment of the United States Constitution presaged by strong, empirically observable shifts in the nation's political life, beliefs, and constitutional commitments). In a sense, any construction of language necessarily involves ascribing meaning to particular words, and words only have meaning in the context of a particular interpretive community. *See* STANLEY FISH, IS THERE A TEXT IN THIS CLASS?: THE AUTHORITY OF INTERPRETIVE COMMUNITIES 14 (1980) ("Indeed, it is interpretive communities, rather than either text or the reader, that produce meanings and are responsible for the emergence of formal features."). Even if a judge claims that he/she/they is merely following the "plain meaning" or "the original understanding" of a particular constitutional

The protean nature of the First Amendment is perhaps best exemplified by how little practical or legal effect the actual words of the amendment possess.[13] For starters, an amendment that begins rather specifically, namely "*Congress* shall make no law,"[14] now applies to all government entities—federal, state, and local—and no one bats an eye at this radical expansion in the amendment's potential scope of application.[15] Indeed, to even raise this point today is to invite being accused of linguistic pedantry of the worst sort.[16]

Yet, the words are unmistakably *there*—and they are unique in *all* the provisions of the Bill of Rights. No other Bill of Rights provision is self-evidently directed solely at the legislative branch of the national government.[17]

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turn of phrase, that exercise involves *that judge*, and *no one else*, conjuring legal effects from the words. *See id.* at 13-16. Fish explains that "An interpretive community is not objective because as a bundle of interests, of particular persons and goals, its perspective is interested rather than neutral; but by the very same reasoning, the meanings and texts produced by an interpretive community are not subjective because they do not proceed from an isolated individual but from a public and conventional point of view." *Id.* at 14.

[13] *See* BHAGWAT, *supra* note 2, at 3 (arguing that "essentially all of modern discourse and modern law focuses on only one of the remaining provisions, freedom of speech").

[14] U.S. CONST. amend. I (emphasis added); *see* ERIC BARENDT, FREEDOM OF SPEECH 49 (2d ed. 2005) ("Textual arguments have been ignored in other respects. The First Amendment literally only applies to the laws of Congress, but it has never seriously been suggested that executive and police orders are immune from judicial review."); *see also* DAVID A. STRAUSS, THE LIVING CONSTITUTION 9 (2010) ("And then there is the first word of the First Amendment, which is 'Congress'; so the courts, or the president, or the City of Chicago can freely abridge my freedom of speech? That can't be right, and, under clearly established law, it is not right."). Professor Barendt quite accurately notes that "[r]arely has such an apparently simple legal text produced so many problems of interpretation." BARENDT, *supra*, at 48. Making a related but distinct point, Professor Strauss characterizes the Supreme Court's free speech jurisprudence as "a tremendous success story in American constitutional law" but cautions that "these successful principles" are the product of a "the living, common law Constitution" rather than the text or original understanding. STRAUSS, *supra*, at 52-53.

[15] *See infra* text and accompanying notes 75 to 102; *see also* STRAUSS, *supra* note 14, at 56 (observing that "[t]he first word of the amendment is 'Congress'" but noting that "[n]o one today would suggest that the president or the courts may infringe free speech").

[16] *See, e.g.*, SANFORD LEVINSON & JACK M. BALKIN, DEMOCRACY AND DYSFUNCTION 145 (2019) (lamenting that "[i]t is now regarded as simply naïve to point to the text of the Constitution and its assignment to Congress of the power to 'declare war'"). The First Amendment's "Congress shall make no law" language has become even less relevant than the express textual assignment of the war power to Congress. That said, however, the growth of the imperial presidency, despite clear textual guardrails meant to forestall such a development, clearly constitutes a blown constitutional call by the nation's governing institutions. Indeed, Professor Sandy Levinson argues that things have reached an absolute nadir today, insisting on paying attention to the Constitution's specific assignment of joint responsibility for the war power to both Congress and the President provokes yawns rather than concern from the law faculty at a leading (arguably *the* leading) national law school. *See id.* at 173-75.

[17] *See* STRAUSS, *supra* note 14, at 56 (noting that the text of the First Amendment "could have been drafted" broadly and "without limiting the prohibition to a certain branch of the government" to better resemble literally *all* the other rights-granting provisions of the Bill of Rights).

As Professor David Strauss has observed, the First Amendment could have been written broadly, like other provisions of the Bill of Rights. However, "it wasn't" and "the First Amendment alone singles out Congress."[18] Strauss is surely correct to posit that "[i]f we focus just on the text, the case for protecting free speech against government infringement generally is actually somewhat weak."[19]

The First Amendment's status as an atextual text merely starts with "Congress shall make no law." More generally, an amendment that specifies *four* separate forms of expressive freedom—speech, press, assembly, and petitionh—as been read and applied as if it contained *only one* (namely speech). The Supreme Court has essentially ignored the Press, Assembly, and Petition Clauses, analyzing virtually all First Amendment claims through the lens of the Speech Clause.[20] Thus, it turns out that James Madison had no need to bother including the Press, Assembly, and Petition Clauses because, as interpreted and applied by the federal courts, these three clauses are entirely redundant and quite superfluous.[21]

Despite the obsession of many contemporary federal judges with the text and original understanding of the Constitution and Bill of Rights,[22] many of

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[18] *Id.*

[19] *Id.*

[20] BHAGWAT, *supra* note 2, at 3 (lamenting that "essentially all of modern discourse and modern law focuses on only one" of the First Amendment's clauses, namely "freedom of speech"). Professor Bhagwat accurately observes that the Press, Assembly, and Petition Clauses "have been almost entirely forgotten." *Id.*

[21] *See generally* AKHIL REED AMAR & LES ADAMS, THE BILL OF RIGHTS PRIMER: A CITIZEN'S GUIDEBOOK TO THE AMERICAN BILL OF RIGHTS 39 (2013) (observing that the "[f]ormulation of an initial draft of a bill of rights was under the leadership of James Madison, who had initially been lukewarm to the idea of adding a declaration of rights to the Constitution").

[22] For an iconic illustrative example, see ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 23-25, 37-47 (1997). Justice Scalia strenuously objects to "The Living Constitution," an approach that he describes as embracing the idea that the Constitution "grows and changes from age to age, in order to meet the needs of a changing society" and argues that the only legitimate approach to constitutional interpretation involves consideration of "the original meaning of the text." *Id.* at 38. *But cf.* STEPHEN G. BREYER, ACTIVE LIBERTY: INTERPRETING OUR DEMOCRATIC CONSTITUTIONS 115-20, 127-32 (2005) (rejecting originalism and textualism, characterizing both approaches pejoratively as forms of "literalism," and arguing that literalist constitutional interpretation is both anti-democratic and suffers from "inherently subjective elements" that undermine this approach's ability to generate predictable, principled results and positing that courts would better advance constitutional values by engaging in dynamic and purposive constitutional interpretation that reads constitutional text in a way that best enables the process of democratic self-government). Using considerably more direct language to make this same point, Scalia quipped, incident to a law school lecture, that the Constitution is "not a living document" but rather is "dead, dead, dead." Katie Glueck, *Scalia: The Constitution Is 'Dead'*, POLITICO (Jan. 29, 2013, 8:26 AM EST), https://www.politico.com/story/2013/01/scalia-the-constitution-is-dead-086853 [https://perma.cc/ZE8Q-UFL5].

these very same judges are firmly and fiercely committed to giving the First Amendment a dynamic and purposive interpretation.[23] Thus, like Proteus, the form and shape of the First Amendment bends and changes over time—yielding over a dozen three, four, and five part tests that the Justices will deploy to frame and decide cases involving expressive freedom in particular contexts. What's more, the test count is growing—with the Supreme Court adopting new interpretative schemes with each passing term of Court.[24] Strictly speaking,

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[23] *See* Laurence H. Tribe, *Comment, in* A MATTER OF INTERPRETATION, *supra* note 22, at 65, 79-82 (observing that despite Justice Scalia's claim that the First Amendment "ought to be read as a still-photo command that Congress not abridge such speech rights of Englishmen as were then extant" that Scalia's approach to deciding First Amendment cases "has in fact been guided by a conception of the First Amendment more like my own," meaning an approach that "evolve[s] over time"). Professor Tribe is assuredly correct when he asserts that Justice Scalia "has not interpreted the freedom of speech as a mere codification of the memories (or perhaps the 'memories,' mixing hope and desire with actual recollection)" strictly tied to "a certain moment in the late eighteenth century." *Id.* at 81. Such a conception would surely not have encompassed protection for violent video games, for example – something that would have constituted commercial entertainment rather than speech well into the twentieth century. *Compare* Brown v. Ent. Merchs. Ass'n, 564 U.S. 786, 799 (2011) (invalidating a ban on selling violent video games to minors "[b]ecause the Act imposes a restriction on the content of protected speech") *with* Mutual Film Corp. v. Indus. Comm'n of Ohio, 236 U.S. 230, 243-44 (1915) ("We immediately feel that the argument is wrong or strained which extends the guaranties of free opinion and speech to the multitudinous shows which are advertised on the bill-boards of our cities and towns and which regards them as emblems of public safety . . . and which seeks to bring motion pictures and other spectacles into practical and legal similitude to a free press and liberty of opinion."). *Mutual Film Corporation*'s refusal to extend any First Amendment protection to motion pictures, assimilating them with "the theatre, the circus, and all other shows and spectacles" and rejecting the film company's argument that all of these entertainments must enjoy "the same immunity from repression or supervision as the public press," *Mutual Film Corp.*, 236 U.S. at 243, surely reflected a well-settled and long-standing understanding of the First Amendment's proper scope of application. Accordingly, Justice Scalia's purposive application of the amendment to invalidate California's child-protection law was inconsistent with over 150 years of Supreme Court precedent limiting the amendment's scope to political or ideological speech. *See, e.g.*, Valentine v. Chrestensen, 316 U.S. 52, 55 (1942) (refusing to afford any First Amendment protection to a flyer that, in part, promoted a submarine tourist attraction). Indeed, as late as 1949, a thoughtful lawyer would have believed a dormant Commerce Clause challenge more likely to succeed as a basis for invalidating a ban on commercial advertisements on panel trucks than the First Amendment's Free Speech or Free Press Clauses. *See, e.g.*, Ry. Express Agency, Inc. v. New York, 336 U.S. 106, 111 (1949) (rejecting the plaintiff's argument that a local regulation banning third-party commercial advertisements on panel trucks operated in New York City violated the Due Process Clause, the Equal Protection Clause, and/or the Commerce Clause; the company's lawyers did not bother to make any claims under the First Amendment's Free Speech Clause, deeming the dormant Commerce Clause objection more plausible). Justice Scalia, by way of contrast, had no problem with affording commercial speech broad and deep constitutional protection. *See, e.g.*, City of Cincinnati v. Discovery Network, Inc., 507 U.S. 410, 428-31 (1993) (featuring Justice Scalia joining a sweeping majority opinion holding that commercial speech cannot be regulated more aggressively than non-commercial speech unless it contributes to a regulatory problem in a distinctive way that non-commercial speech does not).

[24] The Supreme Court's latest decision on the speech rights of public-school students while off campus provides an illustrative example. *See* Mahanoy Area Sch. Dist. v. B.L., 141 S. Ct. 2038 (2021). Rather than apply any of its pre-existing precedents and tests involving student speech rights, Justice Stephen Breyer, writing for the majority, fashioned a completely new test to govern whether public school authorities could impose discipline on a student for speech activity taking place off-campus, but directed toward an audience comprised largely of students, faculty, and staff members at the

none of these tests have much, if anything, to do with the actual text of the First Amendment.[25]

If constitutional adjudication is, at bottom, a common law endeavor rather a species of statutory interpretation, this should not really come as a great surprise. The common law grows interstitially on a case-by-case basis.[26] Contract, tort, and property are, to an important degree, the domain of the judges rather than the legislators.[27] There is a pronounced tendency on the part of judges to disclaim responsibility for potentially controversial results—and a concomitant desire to ground potentially controversial results in constitutional text.[28] This habit of judicial fig-leafing with constitutional text

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public school: "Given the many different kinds of off-campus speech, the different potential school related and circumstance-specific justifications, and the differing extent to which those justifications may call for First Amendment leeway, we can, as a general matter, say little more than this: Taken together, these three features of much off-campus speech mean that the leeway the First Amendment grants to schools in light of their special characteristics is diminished." *Id.* at 2046.

The general governing test for on-campus student speech, *Tinker*, merited mention in applying this open-ended balancing test, *see id.* at 2047-48, but only insofar as the majority concluded that the disruption associated with B.L.'s social media rant did not seriously affect or impede the Mahanoy Area Public High School's regular operations.

[25] *See* STRAUSS, *supra* note 14, at 9, 52-56 (arguing that the First Amendment's literal text and the Framers' original understanding of it have been equally irrelevant to the development of First Amendment doctrine). Rather than text or the original understanding, Strauss argues that "[w]e owe these [expressive freedom] principles to the living, common law Constitution" and First Amendment jurisprudence rests almost exclusively on "a series of judicial decisions and extrajudicial developments, over the course of the twentieth century." *Id.* at 53.

[26] *See* OLIVER WENDELL HOLMES, JR., THE COMMON LAW 36-37 (1881) (arguing that the law "will become entirely consistent only when it ceases to grow" and positing that common law judges "have a right to reconsider the popular reasons, and, taking a broader view of the field, to decide anew whether those reasons are satisfactory" when deciding whether to maintain, amend, or abolish a common law rule). Justice Holmes is remarkably explicit in his legal realist account of the common law process: "The felt necessities of the time, the prevalent moral and political theories, intuitions of public policy, avowed or unconscious, even the prejudices which judges share with their fellow-men, have had a good deal more to do than the syllogism in determining the rules by which men should be governed." *Id.* at 1.

[27] CALABRESI, *supra* note 10, at 3-4, 52 (noting the power of common law courts to modify common law rules and observing that "there is an important common law, judicial, function in the updating of outworn laws").

[28] *See, e.g.*, Griswold v. Connecticut, 381 U.S. 479, 484-85 (1965) (observing that "specific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance" and invoking the First, Third, Fourth, Fifth and Ninth Amendments to require judicial recognition of a "zone of privacy created by several fundamental constitutional guarantees"). Many commentators have criticized Justice William O. Douglas's invocation of "penumbras" from specific provisions of the Bill of Rights as deeply unpersuasive. *See, e.g.*, CALABRESI, *supra* note 10, at 8 (arguing that "the *constitutional* basis for its [the Connecticut statute's] invalidity was tenuous, to say the least, especially at the time the decision was made" and explaining that "[p]enumbras of constitutional prohibitions and rights to privacy were much mentioned, but

often exists at a level of generality that the text can plausibly support. But efforts to ground discretion in text do not change the fact that the judges, not the text, are calling the constitutional shots.[29]

Of course, this may well be a design feature rather than a bug. Meaning this: If a choice must be made between a First Amendment tethered in time to 1791, in which each of the specific clauses actually do particular—but largely irrelevant in the twenty-first century—jurisprudential work and, on the other hand, a world in which the literal language of the First Amendment is taken to represent a more general principle that a just government should not censor "We the People,"[30] with the precise details to be worked out over time by the federal courts through the accumulation of precedents that define the precise metes and bounds of expressive freedom, a very good case can be made in favor of the latter over the former.[31] If our goal is creating and sustaining the conditions necessary for democratic self-government to function, a dynamic First Amendment should be preferred (and strongly) to a static (or statist) First Amendment.

To be clear, I do not suggest that attention to the specific textual clauses should displace the larger and more general understanding of the First Amendment as a bulwark against government censorship. Instead, it is entirely possible, and more desirable normatively, for the federal courts to undertake both projects simultaneously. Taking this approach would enhance and improve the scope and vibrancy of expressive freedom in the contemporary United States.

Nevertheless, there's something deeply incongruous about a judiciary staffed with a great many self-described textualist jurists simply disregarding the First Amendment's plain language when interpreting and applying it. The

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these concepts had not been, and were not soon to be, applied by the Court in principled fashion in other closely related cases"). Regarding *Griswold*'s constitutional predicate, Calabresi posits that "[i]n the end, the case was its own justification." *Id.* at 9.

[29] CHARLES EVANS HUGHES, ADDRESSES OF CHARLES EVANS HUGHES: 1906-1916, at 179, 185 (2d ed. 1916) (address of May 3, 1907 to the Elmira Chamber of Commerce) (observing that "[w]e are under a Constitution, but the Constitution is what the judges say it is").

[30] *See* SUNSTEIN, *supra* note 2, at 157-58 (positing that, under the First Amendment, "government's burden is greatest when it is regulating political speech" because regulations of political speech are most likely to reflect "illegitimate considerations, such as self-protection, or giving assistance to powerful private groups" and are therefore both "biased" and "harmful"). As Sunstein states the proposition, "[c]ontrols on public debate are uniquely damaging, because they impair the process of deliberation that is a precondition for political legitimacy." *Id.* at 158.

[31] *See* Tribe, *supra* note 23, at 79-82 (arguing that the First Amendment should be read to establish a general principle of freedom of expression and expressive activity rather than as a highly circumscribed guarantee tethered entirely to government practices regarding toleration of expressive freedoms in 1791).

original understanding of the First Amendment does not fare much better. The Alien and Sedition Acts of 1798, enacted by a Congress that contained a good many delegates from the Federal Convention in Philadelphia and also members personally familiar with Bill of Rights debates of 1789,[32] probably better reflects what the Framers of the First Amendment understood it to mean—perhaps nothing more than Blackstone's construction of freedom of speech as involving only rules against press licensing and prior restraints.[33]

To provide a concrete example of a doctrine that is difficult—indeed probably impossible—to reconcile with the original understanding, consider the robust protection that the Supreme Court has afforded to commercial speech (meaning: advertising to promote the sales of goods and services[34]). The robust protection of commercial speech under the First Amendment simply did not exist from 1791 to 1980 and cannot easily be reconciled with how the generation that wrote the First Amendment understood it and applied

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[32] Alien Act, ch. 66, 1 Stat. 577 (July 6, 1798); Sedition Act, ch. 74, 1 Stat. 596 (July 14, 1798); *see* 3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES §§ 1885-1886 (1833) (discussing the Alien and Sedition Acts and observing that the Sedition Act's "constitutionality was deliberately affirmed by the courts of law," as well as "in a report made by a committee of congress" and "by a majority" of state governments).

[33] BHAGWAT, *supra* note 2, at 16-17, 25; *see* 4 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 151-53 (1769) ("The [l]iberty of the [p]ress 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."); *id.* (opining that "[t]o subject the press to the restrictive power of a licenser, as was formerly done, both before and since the revolution, is to subject all freedom of sentiment to the prejudices of one man, and make him the arbitrary and infallible judge of all controverted points in learning, religion, and government" but cautioning that "to 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, of government and religion, the only solid foundations of civil liberty"); STORY, *supra* note 32, at §§ 1878, 1883-1889 (1833) (discussing the limited scope of "the freedom of the press" under the First Amendment and its relation to Blackstone's conception of press freedom); Citizens United v. Fed. Election Comm'n, 558 U.S. 310, 335 (2010) (holding that an FEC administrative review process of political advertising "function[ed] as the equivalent of prior restraint by giving the FEC power analogous to licensing laws implemented in 16th- and 17th-century England, laws and governmental practices of the sort that the First Amendment was drawn to prohibit").

[34] *See* Bolger v. Youngs Drug Prods. Corp., 463 U.S. 60, 66-68 (1983) (holding that the "core notion" of commercial speech relates to expression that "does no more than propose a commercial transaction") (internal citations and quotations omitted); Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447, 455-56 (1978) (declining to set forth a clear analytical framework for deciding when a lawyer's speech is commercial rather than non-commercial in nature and positing that the distinction rests on little more than the application of "commonsense"); *see also* Ronald J. Krotoszynski, Jr., *Into the Woods: Broadcasters, Bureaucrats, and Children's Television Programming*, 45 DUKE L.J. 1193, 1212-13 (1996) ("Although the Supreme Court has a well-developed jurisprudence with which to analyze governmental burdens on 'commercial' speech, it never has defined precisely what constitutes commercial speech, nor has it provided a set of analytical tools one can use to accurately and efficiently separate commercial speech from non-commercial speech.").

it.[35] First Amendment protection of commercial speech seems (very) hard to explain or justify in either originalist or more broadly normative terms.[36]

Other examples abound—for example, the use of the First Amendment to constitutionalize civil service protections and to abolish the spoils system which, since time immemorial, state and local governments used to control access to government employment and contracts.[37] As Justice Lewis Powell observed in *Elrod*, the spoils system constituted "a practice as old as the Republic" and "a practice which has contributed significantly to the democratization of American politics."[38] If political patronage violated the First Amendment, as the framing generation understood it, it's very odd that no one noticed this fact until 1976.

Even if the Constitution's structural provisions may be, as Justice Scalia so emphatically argued, "dead, dead, dead,"[39] the Free Speech Clause of the First Amendment is very much *alive*—and this is precisely as it should be. But this begs the important question of whether the "living" First Amendment's actual

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[35] *See supra* note 23.

[36] GREGORY P. MAGARIAN, MANAGED SPEECH: THE ROBERTS COURT'S FIRST AMENDMENT 50-57 (2017). Professor Magarian argues that "[t]he *Lochner* era and the commercial speech doctrine converge because First Amendment limits on commercial speech regulations might seem to resurrect *Lochner*." *Id.* at 53; *see* Leslie Kendrick, *First Amendment Expansionism*, 56 WM. & MARY L. REV. 1199, 1206-09 (2015) (discussing "First Amendment opportunism" and positing that a growing proportion of contemporary First Amendment "claims mirror *Lochner*-era claims in their structure" because "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"); *see also* Frederick Schauer, *Commercial Speech and the Perils of Parity*, 25 WM. & MARY BILL RTS. J. 965 (2017) (criticizing the broad protection afforded commercial speech under contemporary First Amendment doctrine and arguing against the expansion of the First Amendment rights of commercial speakers).

[37] Heffernan v. City of Paterson, 578 U.S. 266, 268 (2016) ("The First Amendment generally prohibits government officials from dismissing or demoting an employee because of the employee's engagement in constitutionally protected political activity."); *see* Branti v. Finkel, 445 U.S. 507, 517 (1980) (prohibiting the discharge of government employees who lack policy-making authority or process confidential information based on their political beliefs and associations); *see also* Elrod v. Burns, 427 U.S. 347, 349 (1976) (holding, for the first time, that the First Amendment generally prohibits a government employer from making an employee's partisan identity a basis for hiring and firing decisions).

[38] *Elrod*, 427 U.S. at 376 (Powell, J., dissenting).

[39] *See supra* note 22. Note that the relatively static interpretation of structural provisions in the Constitution is more a function of judicial common law practice than of the text itself. If my thesis that all constitutional interpretation is more common law than statutory in nature is correct, the specificity of the text or its relationship to rights versus structure simply is not the controlling, or even the most important, factor in informing judicial decision making and reason giving. Instead, the behavior of judges is the most dispositive factor in determining the relevance, or irrelevance, of constitutional text.

text can and should do more serious work in safeguarding the marketplace of political ideas.[40]

This Article will proceed in six additional parts. Part II considers whether constitutional text can perforce constrain government behavior. Building on the more general point that constitutional text often does not and probably cannot effectively define, much less actually secure, fundamental human rights, Part III shows how the First Amendment's text is largely irrelevant to "First Amendment" jurisprudence in the contemporary United States.

Part IV, using a comparative legal analysis, demonstrates how constitutional text, as well as *the absence* of constitutional text, does not prefigure the scope and vibrancy of expressive freedoms in other constitutional democracies that feature judicial review of government actions that trench on expressive freedoms—Australia, for example, lacks a constitutional free speech guarantee, yet Australia's highest judicial tribunal, the High Court of Australia, has recognized an "implied freedom" of political and governmental communication as a structural necessity in a polity that practices democratic self-government.[41] Part V asks whether we need to rethink more generally the salience of text to the scope and meaning of constitutional rights.

Part VI draws on Chief Justice John Marshall's theory of constitutional interpretation, as well as on Judge Guido Calabresi's theory of judicial "updating," to ground an argument about the centrality of judges, whose decisions invariably are informed by legal, social, and broader cultural expectations within a particular polity, to constitutional law and constitutional interpretation more specifically. Simply put, despite widespread assumptions about the salience of text to constitutions and constitutionalism, constitutional law is fundamentally a species of common, not statutory, law.[42] Advocates of textualism and originalism have failed to engage with this rather basic empirical

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[40] *See* BHAGWAT, *supra* note 2, at 4-9.

[41] *See infra* text and accompanying notes 124 to 159; *see also* Austl. Cap. Television Pty. Ltd. v. Commonwealth, (1992) 177 CLR 106 (Austl.); Nationwide News Pty. Ltd. v. Wills, (1992) 177 CLR 1 (Austl.). For a relevant general discussion of Australia's implied freedom of political and governmental communication, see Adrienne Stone, *The Limits of Constitutional Text and Structure Revisited*, 28 U.N.S.W. L.J. 842 (2005).

[42] *See* STRAUSS, *supra* note 14, at 33-34 (explaining that in most cases presenting constitutional questions "the text of the Constitution will play, at most, a ceremonial role" because "American constitutional law is about precedents, and when the precedents leave off, it is about commonsense notions of fairness and good policy"). Strauss argues that "[t]he common law is a system built not on an authoritative, foundational, quasi-sacred text like the Constitution" but instead rests on "precedents and traditions that accumulate over time." *Id.* at 3.

truth—instead claiming, much like the House of Lords prior to 1966,[43] that courts lack any legitimate power to alter or rescind their prior text-based rulings. Finally, Part VII provides a brief summary of the main arguments and synthesizes the lessons that the protean First Amendment can teach about the limited ability of constitutional text, standing alone, to constrain bad government behavior.

II. EXPRESS CONSTITUTIONAL RIGHTS (INCLUDING THE FIRST AMENDMENT): INEFFECTIVE "PARCHMENT BARRIERS," ESSENTIAL BULWARKS AGAINST TYRANNY, OR POTENTIALLY BOTH?

The protean nature of the First Amendment raises a larger, and quite important, question about constitutional design: Does text matter? Assuming that text does matter—at least in some instances—should we be concerned when courts purporting to interpret and apply that text choose to ignore it (and, in the case of the First Amendment and expressive freedoms, do so more or less completely)? These questions implicate longstanding arguments about the importance of constitutional text, particularly in the context of safeguarding fundamental human rights, that go all the way back to the Federal Convention, which took place in Philadelphia, Pennsylvania, during the summer of 1787.

For example, one might posit that the specificity of constitutional text will prefigure its ability to bind both the political branches and the judiciary. In the alternative, one might believe that structural provisions might be less susceptible to creative judicial interpretation and application than rights provisions—and therefore potentially do a better job of delimiting how government institutions and actors operate.[44] From this vantage point, the

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[43] *See* [1966] 1 Weekly L.R. 1234 (H.L.) (Eng.); *see also* CALABRESI, *supra* note 10, at 185-86 n.12 (discussing the House of Lords announcing that it could, contrary to its past claims to the contrary, alter or abolish prior precedents and would take such action going forward); W. Barton Leach, *Revisionism in the House of Lords: The Bastion of Rigid Stare Decisis Falls*, 80 HARV. L. REV. 797, 798-99, 803 (1967) (discussing and describing the House of Lords's change of heart regarding its power to overturn prior precedents and observing that "the House of Lords with grace and dignified simplicity has removed the artificial block to judicial law reform set up by its predecessors").

[44] *See* John F. Manning, *Separation of Powers as Ordinary Interpretation*, 124 HARV. L. REV. 1939, 1943-49, 2005-17, 2021-24, 2040 (2011) (arguing that the federal courts should more strictly enforce specific structural requirements and rules than more general provisions, such as the Vesting Clauses of Articles I, II, and III that allocate powers among the three branches of the national government). Of course, whether even structural provisions provide effective constraints will depend on whether independent courts exist that have the institutional strength to enforce them against backsliding political branches. *See* Ronald J. Krotoszynski, Jr. & Atticus DeProspo, *Against Congressional Case*

limiting power of constitutional text exists on a continuum or spectrum that depends critically on context. Good reasons exist to question whether either of these postulations actually hold true. The better view might well be that constitutional text means what judges say that it means—nothing more and nothing less.[45] For the moment, however, and for the sake of argument, let us assume that the question is a debatable one and that a legal text might bind the institutions of government (at least in some contexts).

James Madison, generally a strong proponent of the written draft Constitution—which seems to reflect at least some degree of faith in text as means of constraining the behavior of the institutions of government—nevertheless famously opposed the inclusion of a written bill of rights at the Federal Convention and, for a time, during the ratification debates in the states. When his friend and mentor, Thomas Jefferson, later offered his strenuous objection to the draft constitution's failure to include a written bill of rights, Madison responded that textual guarantees of fundamental human rights were of little—if any—practical utility because they could not, by themselves, constrain a government bent on disregarding them.[46]

In Madison's view, written rights provisions simply do not work: "[E]xperience proves the inefficacy of a bill of rights on those occasions when its controul is most needed."[47] He observed that "[r]epeated violations of these parchment barriers have been committed by overbearing majorities in every State" and such violations would likely occur at the federal level as well because "[w]herever the real power in a Government lies, there is the danger of

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Snatching, 62 WM. & MARY L. REV. 791, 806 & 806 n. 48 (2021) (arguing that specific limits "on the structure and function of the three branches presuppose[ ] a federal judiciary able and willing to make its judgments stick" and positing that "specific constitutional strictures" will actually limit how Congress and the President behave only if the Article III courts have the institutional power to enforce those limits).

45 *See* FISH, *supra* note 12, at 13-16 (arguing that interpretive communities imbue text, or words, with meaning and that the symbols that comprise words have no necessary or inherent meaning outside of an interpretive community); HUGHES, *supra* note 29, at 185 (arguing that judges, rather than the literal words of the Constitution, define the Constitution's meaning and scope of application).

46 *See* Letter from James Madison to Thomas Jefferson (Oct. 17, 1788), https://founders.archives.gov/documents/Madison/01-11-02-0218 [https://perma.cc/82RA-QG6R] (last visited June 30, 2021); *see also* RICHARD LABUNSKI, JAMES MADISON AND THE STRUGGLE FOR THE BILL OF RIGHTS 104-05, 160-64 (2006) (stating that Madison believed "a bill of rights written on paper would not deter [the] majority"). It was left to Alexander Hamilton to defend the omission of a Bill of Rights to the public. *See* THE FEDERALIST NO. 84, at 510, 512-14 (Alexander Hamilton) (Clinton Rossiter ed., 1961) ("I go further and affirm that bills of rights . . . are not only unnecessary in the proposed Constitution but would even be dangerous.").

47 Letter from James Madison to Thomas Jefferson, *supra* note 46.

oppression" and "[w]herever there is an interest and power to do wrong, wrong will generally be done."[48]

Thus, Madison had "never thought the omission [of a written bill of rights] a material defect, nor been anxious to supply it even by *subsequent* amendment, for any other reason than that it is anxiously desired by others."[49] Madison posited that federalism would serve as a more reliable safeguard of the people's rights and liberties than an extensive list of human rights.[50]

Of course, Madison fails to explain why *structural* provisions will prove any more efficacious than rights provisions. Delimiting the specific powers of the national government, after all, is no less a "parchment barrier" than rights provisions. What is more, a national government vested with broad powers, including a general power to tax and spend for the general welfare, could, if it wished to do so, consistently move the boundaries of federalism over time in favor of the central government. Indeed, this is arguably precisely what has happened from 1788 to the present. If Madison's argument rests on a theory that state governments could effectively and reliably check ever-broader federal assertions of authority, obvious and immediate problems of collective action and transaction costs arise.

Some structural provisions, such as vesting the state legislatures with the power to select members of the federal Senate, perhaps do provide a self-executing check on the expansion of the federal government's authority.[51] But the actions of the national government in the early years of the Republic,

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[48] *Id.*; *see infra* text and accompanying notes 177 to 184; *see also* FISH, *supra* note 12, at 13-17 (arguing that words have meaning only within the context of specific interpretative communities and that meaning results from a process of contesting meaning that possesses both objective and subjective elements but is neither entirely objective or subjective in character).

[49] Letter from James Madison to Thomas Jefferson, *supra* note 46.

[50] *See id.* (arguing that "the limited powers of the federal Government and the jealousy of the subordinate Governments, afford a security which has not existed in the case of the State Governments").

[51] Even this claim is highly contestable. *See* STRAUSS, *supra* note 14, at 132-36 (explaining that the direct election of U.S. senators significantly antedated the ratification of the Seventeenth Amendment and that "[b]eginning in the 1830s . . . people who wanted to be elected to the Senate began appealing directly to the voters of the state to vote, in state legislative elections, for candidates who were pledged to support them for the Senate"). In other words, constitutional change, with direct popular input on the persons who would serve in the federal Senate, came about through state law reform prior to April 8, 1913 (the Seventeenth Amendment's date of ratification). Thus, "[b]y 1911, a year before the Seventeenth Amendment was proposed, over half the states had adopted the Oregon system," which involved public pledges by candidates for the state legislature to support particular U.S. Senate candidates. *Id.* at 133-34.

including the creation of a national bank[52] and the Louisiana Purchase,[53] provided almost immediate and convincing evidence of the limited utility and efficacy of structure as an effective check against mission creep by the federal government.[54]

Making a different argument in support of the omission of a bill of rights, Alexander Hamilton, in *Federalist No. 84*, posits that written rights guarantees were at best superfluous and, at worst, dangerous.[55] Defending the failure to include a bill of rights, he argued that such guarantees are not needed when a government has limited, clearly defined powers because "the Constitution ought not to be charged with the absurdity of providing against the abuse of an authority which was not given."[56] Written rights guarantees, moreover, "would even be dangerous" because "[t]hey would contain various exceptions to powers which are not granted" thereby "afford[ing] a colorable pretext to claim more than were granted."[57] As Hamilton puts it, "[f]or why declare that things shall not be done which there is no power to do?"[58] Thus, Hamilton argued that express rights-granting constitutional provisions were unnecessary for a limited constitution, whereas Madison argued that express rights provisions would not, and probably could not, limit a government bent on violating them.

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52 ALFRED H. KELLY, WINFRED A. HARBISON & HERMAN BELZ, THE AMERICAN CONSTITUTION: ITS ORIGINS AND DEVELOPMENT 129-31 (6th ed. 1983) (describing and discussing the fierce debate between Alexander Hamilton and Thomas Jefferson, as members of George Washington's cabinet, over the federal government's authority to charter and maintain a national bank).

53 *Id.* at 147-50 (discussing the Louisiana Purchase and Jefferson's initial belief that a constitutional amendment would be necessary to render it lawful and his ultimate acceptance of a common law approach to the Constitution under which "the power to acquire territory was inherent in the very existence of the United States as a sovereign nation—a proposition that challenged the [Democratic-]Republican theory of the Union as a compact among the states"). Professors Kelly, Harbison, and Belz posit that the Louisiana Purchase, and the constitutional arguments that it engendered within the ostensibly "strict construction[ist]" Jefferson Administration, reflect the salience of "new theories and principles" that "embody values in the political culture"—and also perhaps a "cautionary reminder that practice must temper theory." *Id.* at 148-50. Even in the early years of the Republic, a "distinctively American form of constitutional politics" arose, one "based on rhetoric and principles that have the power to influence public opinion because they express fundamental values." *Id.* at 150. In a word, constitutional practice in the U.S. has travelled the common law methodological path for a very long time—dating back to the Washington and Jefferson Administrations.

54 The Seventeenth Amendment provides an instructive example. Direct election of U.S. Senators in a great many states antedated its ratification. *See* STRAUSS, *supra* note 14, at 133-34. As Strauss puts it, "[t]he Seventeenth Amendment . . . did not bring about the direct election of senators; it ratified a practice of de facto direct election that had been instituted by other means." *Id.* at 135. In other words, a common law evolution occurred that had effectively re-written the *structural* rules governing how most members of the U.S. Senate would come to hold that office – "[t]he living Constitution was the real agent of change" rather than the formal amendment process. *Id.* at 136.

55 FEDERALIST NO. 84, *supra* note 46, at 513-14.

56 *Id.* at 514.

57 *Id.* at 513.

58 *Id.*

Like Madison's questionable claim that constitutional text related to federalism and structure would effectively constrain the national government, Hamilton's argument lacks persuasive force. A power to tax, for example, implies the power to destroy.[59] On this count, Marshall, not Holmes, has the better of this argument: Congress routinely has used usurious taxes as a means of regulating where its direct regulatory authority, at least at the time when Congress enacted the "tax," might have been open to serious constitutional doubts.[60] Indeed, the validity of the Affordable Care Act's mandate for individual citizens to enter the private insurance market ultimately rested on Congress's constitutional taxing authority.[61] Thus, if Congress possesses the power to tax and spend for the general welfare, it could easily and foreseeably use these constitutional powers just like Louisiana's state government under Huey P. Long to impose discriminatory taxes on newspapers critical of the government.[62]

Madison won the battle but lost the war. The ratification conventions in several states, notably including New York and Virginia,[63] made the inclusion of a bill of rights an absolute condition for agreeing to ratify the proposed draft

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[59] McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 431 (1819) (observing that "the power to tax involves the power to destroy" and that "the power to destroy may defeat and render useless the power to create"). *But cf.* Panhandle Oil Co. v. Knox, 277 U.S. 218, 223 (1928) (Holmes, J., dissenting) ("The power to tax is not the power to destroy while this Court sits.").

[60] *See, e.g.*, United States v. Kahriger, 345 U.S. 22 (1953) (upholding a plainly regulatory enactment to impose confiscatory federal taxes on commercial gambling operations). Provided that a federal tax could produce some revenue, a regulatory purpose and effect will not render the "tax" unconstitutional. *See id.* at 28 & 28 n.4; United States v. Sanchez, 340 U.S. 42, 44-45 (1950) (upholding confiscatory taxes on marijuana sales); Sonzinsky v. United States, 300 U.S. 506, 513 (1937) (upholding usurious taxes on the sale of sawed-off shotguns in part because "[e]very tax is in some measure regulatory"). *But cf.* Bailey v. Drexel Furniture (Child Labor Tax Case), 259 U.S. 20, 36-38 (1922) (invalidating a "tax" collected by the Department of Labor that appeared to function as a direct proscription against the use of child labor); *Kahriger*, 345 U.S. at 38 (Frankfurter, J., dissenting) (arguing in dissent that "when oblique use is made of the taxing power as to matters which substantively are not within the powers delegated to Congress, the Court cannot shut its eyes to what is obviously, because designedly, an attempt to control conduct which the Constitution left to the responsibility of the States, merely because Congress wrapped the legislation in the verbal cellophane of a revenue measure").

[61] U.S. CONST. art. I, § 8, cl. 1; *see* NFIB v. Sebelius, 567 U.S. 519, 563-74 (2012) (Opinion of Roberts, C.J.) (upholding the individual mandate as a constitutionally-valid exercise of the taxing power).

[62] Grosjean v. American Press Co., 297 U.S. 233, 240-41 (1936); *see* Gerard N. Magliocca, *Huey P. Long and the Guarantee Clause*, 83 TUL. L. REV. 1, 41 n.183 (2008) ("In *Grosjean v. American Press Co.*, the Justices struck down the Senator's advertising tax on newspapers."). For a discussion of Long's sustained attack on the press, see RICHARD C. CORTNER, THE KINGFISH AND THE CONSTITUTION: HUEY LONG, THE FIRST AMENDMENT, AND THE EMERGENCE OF MODERN PRESS FREEDOM IN AMERICA (1996).

[63] BHAGWAT, *supra* note 2, at 6-7 (explaining the history behind the ratification conventions in New York and Virginia).

constitution.[64] As Akhil Amar and his co-author explain, the Antifederalists "were militant advocates for the inclusion of a bill of rights in the new Constitution" and were "suspicious of the extraordinary powers that were to be granted to the federal government by a constitution lacking a bill of rights that would clearly and unequivocally protect certain rights and freedoms."[65] Notwithstanding misgivings about the efficacy of such provisions, the Constitution's proponents (notably including James Madison) found it both politically necessary and expedient to agree to quickly consider and adopt a bill of rights once the re-organized national government came into operation.[66]

Even though Madison ultimately gave up his opposition to including a bill of rights in the Constitution, and in fact introduced the first draft of the amendments that became the Bill of Rights in the House of Representatives on June 8, 1789,[67] his arguments against the efficacy of "parchment barriers" should give a thoughtful person pause. To what extent do the actual words of a constitutional provision matter? Do those words effectively constrain the government? Under Madison's view, written rights guarantees, standing alone, do not and simply cannot prevent the government from abusing its powers.[68]

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64 *See* GERARD N. MAGLIOCCA, THE HEART OF THE CONSTITUTION: HOW THE BILL OF RIGHTS BECAME THE BILL OF RIGHTS 32-34 (2018) (discussing the compromise that permitted ratification to proceed and observing that Madison and other proponents of ratification "wisely concluded that ratification would occur only if the Virginia convention was allowed to propose" a bill of rights that would be considered expeditiously in the first meeting of Congress); *see also* KELLY, HARBISON & BELZ, *supra* note 52, at 110 ("Unwilling to appear less solicitous of liberty than their opponents, Federalists in several states informally agreed to accept subsequent inclusion of a bill of rights as a condition of ratification.").

65 AMAR & ADAMS, *supra* note 21, at 38 (discussing the Antifederalists' suspicion of the broad powers given to the federal government).

66 *See* KELLY, HARBISON & BELZ, *supra* note 52, at 121-22 (explaining that "Federalists had won in several states by promising a series of constitutional amendments embodying a bill of rights," that "[m]any members of the first Congress now felt a moral obligation to fulfill these promises," and, accordingly, "[i]n September 1789 Congress submitted twelve proposed amendments to the states.").

67 1 ANNALS OF CONG. 440-60 (1789) (Joseph Gales Ed., 1834) (explaining the importance of this amendment to James Madison); *see* MAGLIOCCA, *supra* note 64, at 38 (noting that James Madison introduced a resolution on June 8, 1789, that set forth the proposed amendments that would come to comprise the Bill of Rights). Madison had collected a file of proposed amendments from the state ratifying conventions, as well as state legislatures, and attempted to propose amendments that were responsive to most of the requests and, in particular, to requests supported by multiple states. *See* AMAR & ADAMS, *supra* note 21, at 39-40; *see also* 2 BERNARD SCHWARTZ, THE BILL OF RIGHTS: A DOCUMENTARY HISTORY 983 (Leon Friedman et al. eds., 1971). As Professors Amar and Adams explain, "Madison had begun work with a file of nearly one hundred suggested amendments (not counting duplications) proposed by eight states to be considered for inclusion in a bill of rights." AMAR & ADAMS, *supra* note 21, at 40.

68 *See* THE FEDERALIST NO. 84, *supra* note 46, at 513-14 (arguing that "bills of rights, in the sense and to the extent in which they are contended for, are not only unnecessary in the proposed Constitution, but would even be dangerous").

Instead, he believed that the careful use of structural design elements – notably including the separation of powers and federalism—in shaping governing institutions would provide a more durable and efficacious means of securing individual liberty and safeguarding against tyranny.[69]

Madison's point seems, at best, rather dubious. If the efficacy of text depends on whether those who interpret it take it seriously, the efficacy of text depends on whether its interpreters prove out to be faithful stewards—and not on the inherent power of the text itself to compel respect and compliance. It is certainly true that many judges, lawyers, and legal scholars alike invoke constitutional text as if the words and phrases in the Constitution, Bill of Rights, and subsequent amendments possess talismanic powers. Even so, however, one cannot credibly deny that constitutional text does not perforce have a constraining effect. Consider that China, Cuba, and North Korea all have written constitutions—none of which effectively limit the government's exercise of coercive powers over citizens of those nations.[70] What's more, provisions on structure and institutional design are no more binding on the institutions of government and not self-evidently less susceptible to being evaded or ignored than are rights-granting provisions.

Simply put, a written constitution, interpreted and enforced by an independent judiciary, may devolve into a mere "parchment barrier" if those holding the reins of government power systematically attack and successfully destroy the institutional independence of the national courts. Thus, although

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[69] The United Kingdom's constitution reflects this approach—it relies on structure rather than text to safeguard liberty. The contemporary U.K. lacks a judicially enforceable Bill of Rights and acts of Parliament are not subject to judicial review by the Supreme Court of the United Kingdom. *See* RONALD J. KROTOSZYNSKI, JR., PRIVACY REVISITED: A GLOBAL PERSPECTIVE ON THE RIGHT TO BE LEFT ALONE 117-20 (2016) (explaining how the Parliament has the authority to make any laws). To this day, "the doctrine of parliamentary sovereignty (or supremacy) remains an important, if no longer absolutely defining, characteristic of the British constitution." *Id.* at 120.

[70] ROBERT L. MADDEX, CONSTITUTIONS OF THE WORLD vii (3d ed. 2008) ("The governments of China, Cuba, North Korea, and Vietnam remain single-party dictatorships, and Saudi Arabia remains an absolute monarchy."); SUE VANDER HOOK, COMMUNISM 131 (Holly Saari et al. eds., 2011) (observing that "[t]he constitutions of Cuba, North Korea, and Vietnam all promise similar freedoms and human rights" but cautioning that "[m]any historians and human rights advocates have proclaimed Communist constitutions as mere propaganda."); *see* Tom Ginsburg, Nick Foti & Daniel Rockmore, *"We the Peoples": The Global Origins of Constitutional Preambles*, 46 GEO. WASH. INT'L L. REV. 305, 314 (2014) (noting "the relative importance of the constitution as a symbol, as opposed to a legally operative text, in socialist countries"); Ronald J. Krotoszynski, Jr., *The Irrelevant Wasteland: An Exploration of Why* Red Lion *Doesn't Matter (Much) in 2008, the Crucial Importance of the Information Revolution, and the Continuing Relevance of the Public Interest Standard in Regulating Access to Spectrum*, 60 ADMIN. L. REV. 911, 919-20 n. 27, 936-37 (2008) (discussing official state censorship in China, Cuba, and North Korea despite constitutional guarantees that ostensibly safeguard freedom of speech and press in these nations).

Hungary, Poland, Russia, and Turkey all have written constitutions that once possessed more than a modicum of constraining legal force on the executive and legislative branches of government, these documents largely have fallen into desuetude as effective checks on the scope of these governments' powers today.[71] In all four countries, the political branches have used constitutionally-available political controls over the judiciary, including the national constitutional courts, to effectively negate and cancel the judiciary's ability to exercise a meaningful power of judicial review to enforce constitutionally-protected human rights. Although this has not (yet) happened in the United States, the fact remains that Congress and the President enjoy constitutional authority to reduce, or even destroy, the ability of the federal courts to interpret and enforce the Constitution and Bill of Rights.

Madison's skepticism about the potential efficacy of written rights provisions, mere "parchment barriers," seems justified. The effective constraining force of constitutional text crucially depends on context, the specificity of the provisions, the willingness of political actors to respect such guarantees voluntarily, and the ability and willingness of the courts to enforce compliance when the political branches disregard constitutional constraints. It is simply not credible to assert that text inevitably will constrain government actions on its own and without regard to any consideration of how the governing institutions within a particular polity interact with each other. One would be going too far to say text never matters and invariably constitutes a mere "parchment barrier"; at the same time, however, one cannot simply assume that constitutional text will, on its own and regardless of context, effectively secure fundamental human rights on the ground—or, for that matter, delimit both the structure and function of a nation's governing institutions.

At the end of the day, the ability of text to limit the scope of government action will depend on factors completely independent of the text itself—notably including the existence of an independent judiciary, the salience of the right (or institutional constraint) that text safeguards within a particular political community,[72] the willingness of the legislature and executive to refrain from

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[71] *See* Kim Lane Scheppele, *Autocratic Legalism*, 85 U. CHI. L. REV. 545, 549-52, 562, 568, 570 (2018) (exploring how anti-liberal autocrats deconstruct constitutional curtailments); Kim Lane Scheppele, *The Rule of Law and the Frankenstate: Why Governance Checklists Do Not Work*, 26 GOVERNANCE: AN INT'L J. OF LAW, POL'Y, ADMIN. & INSTS. 559, 560-61 (2013) (explaining how Hungary's Prime Minister, Viktor Orbán, with 34% of the popular vote from the 2010 election, could and did fundamentally change the Hungarian constitutional structure).

[72] For example, do citizens expect government to respect a particular fundamental right or are they more or less indifferent to whether the government burdens or abridges a particular right?

violating a particular right, as well as their willingness to respect judicial decisions enforcing a particular right, and the willingness of ordinary people to assert the right—through constitutional litigation if necessary. As the following part will demonstrate, the First Amendment's salience in the contemporary U.S. has far more to do with the general expectation of expressive freedom within the body politic, the reticence of legislators and executive branch officers to be seen as engaged in official censorship of the marketplace of political ideas, and the willingness of courts to issue strong judgments calling out violations when and if they occur than it does with the amendment's text.

The alacrity with which courts move to disallow government efforts at censorship probably constitutes the most important of these factors. Aggressive judicial protection of expressive freedom both vindicates and reinforces the salience of these freedoms within the body politic. Indeed, it might well be that expressive freedom in the U.S. would not look much different today if the First Amendment, as such, did not even exist. Australia and Israel demonstrate that courts vested with a power of judicial review can and will protect the marketplace of political ideas based on the inexorable link between free and open public debate and a project of democratic self-government—and a citizenry's expectation of a free and open marketplace of political ideas.[73] In the United States, we have an express textual provision that safeguards speech, but it should not be particularly surprising if the formal text of this provision proves to be less important than the imperative of a free and open marketplace of political ideas to the use of elections to confer legitimacy on the government and its institutions.

III. TEXTUALISM AND ORIGINALISM IN CONSTITUTIONAL INTERPRETATION AND ADJUDICATION: THE FIRST AMENDMENT AS AN EXEMPLAR OF COMMON LAW CONSTITUTIONALISM IN ACTION

What is true of constitutional text in general seems to hold doubly true of the First Amendment. As this Part will show—hopefully with convincing clarity—the scope of expressive freedom in the contemporary United States has little to do with either the precise language and wording of the First Amendment or with the "original intent" of the Framers of the Bill of Rights. Instead, "the First Amendment" almost entirely consists of rules and doctrines created from whole constitutional cloth by judges engaged in an ongoing project of common law constitutionalism.

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[73] *See infra* text and accompanying notes 145 to 171.

Despite its iconic status in the contemporary United States,[74] most federal judges, most of the time, simply ignore the First Amendment's actual text. The full text of the amendment provides:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.[75]

Focusing for the moment on the language related to the protection of expressive, rather than religious freedoms, the Free Speech Clause is the only provision that routinely does significant doctrinal work today.[76] Indeed, one can count the number of modern Supreme Court cases interpreting and applying the Press, Assembly, and Petition Clauses on two hands.[77] The Press

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[74] Under the "Preferred Position" Doctrine, the Supreme Court has held that the federal courts have a special obligation to enforce the First Amendment with particular vigilance. *See* Thomas v. Collins, 323 U.S. 516, 530 (1945) (noting "the preferred place given in our scheme to the great, the indispensable democratic freedoms secured by the First Amendment"); Murdock v. Pennsylvania, 319 U.S. 105, 115 (1943) ("Freedom of press, freedom of speech, freedom of religion are in a preferred position."). Writing in *Thomas*, Justice Wiley Rutledge explained that the First Amendment's "priority gives these liberties a sanctity and a sanction not permitting dubious intrusions." *Thomas*, 323 U.S. at 530. The Supreme Court's use of the "preferred position" characterization has waned in more recent opinions, but it still appears from time to time. *See, e.g.*, Emp. Div., Dep't of Hum. Res. v. Smith, 494 U.S. 872, 895 (1990) (O'Connor, J., concurring in part and dissenting in part) ("The compelling interest test effectuates the First Amendment's command that religious liberty is an independent liberty, *that it occupies a preferred position*, and that the Court will not permit encroachments upon this liberty, whether direct or indirect, unless required by clear and compelling governmental interests of the highest order[.]") (emphasis added) (internal quotations omitted) (citing Wis. v. Yoder, 406 U.S. 205, 215 (1972)), superseded by Statute as stated in Ramirez v. Collier, 142 S. Ct. 1264 (2022).

[75] U.S. CONST. amend. I.

[76] BHAGWAT, *supra* note 2, at 3-6 (explaining the central importance of the Free Speech Clause in contemporary First Amendment jurisprudence and discussing the Supreme Court's exclusive reliance on the Free Speech Clause in constitutional litigation today.

[77] *See id.* at 4 (describing the Assembly Clause as "irrelevant" and noting that "it has not been relied upon by the Supreme Court since 1983!"); JOHN D. INAZU, LIBERTY'S REFUGE: THE FORGOTTEN FREEDOM OF ASSEMBLY 61-62 (2012) (describing the right to assemble as "largely forgotten" and observing that "[t]he Court, in fact, has not addressed a freedom of assembly claim in thirty years"); *see also* Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 45, 55 (1983) (featuring a few passing references to the Assembly Clause in a decision that rests primarily on the Free Speech Clause). Professor Inazu correctly posits that "[w]ith *Perry*, even cases involving protests or demonstrations could now be resolved without reference to assembly." INAZU, *supra*, at 62. In point of fact, that is precisely how things have come to rest today. In the 2020s, the First Amendment protects collective public protests not as instantiations of the right "to assemble" but rather as just another form or species of "speech." The federal courts' studied neglect of the Assembly Clause largely corresponds to a concomitant lack of sufficient legal protection for collective speech activity (aka "assembly") in public. *See* Tabatha Abu El-Haj, *The Neglected Right of Assembly*, 56 UCLA L. REV. 543, 564-65 (2009) (discussing and strongly criticizing the Supreme Court's failure to enforce and protect the right to assemble as a free-standing and independent expressive freedom).

Clause has not generated major decisions in decades.[78] A leading scholar (arguably *the* leading scholar) of the Assembly Clause characterizes the provision as "forgotten."[79]

Lodging a quite similar complaint regarding the Petition Clause, I have lamented "the Supreme Court's unfortunate and highly circumscribed jurisprudence of the Petition Clause, which to date has largely failed to give the clause much, if any, independent legal significance."[80] In fact, the Petition Clause constitutes "little more than a footnote in modern Supreme Court jurisprudence."[81] At worst, it would be fair to say that the Petition Clause does not do any meaningful jurisprudential work to secure expressive freedoms in the contemporary United States; at best, one might credibly posit that it does *very little* such work. Professor Ash Bhagwat shares this view, observing that "the Petition Clause has disappeared from constitutional litigation."[82] He goes even further, positing that "[p]etitioning is thus dead," at least "as a tool of modern American democracy at the national level."[83]

So, what gives? When federal courts fail to invoke and apply particular constitutional texts, such as the Petition Clause, the provision effectively withers and eventually fades away into total and complete desuetude. To be sure, the language remains in the Constitution—but because it does no jurisprudential work, it ceases to play any meaningful role in our collective constitutional imaginations.[84] For example, with respect to the Petition Clause today, Professor Bhagwat is undoubtedly correct when he balefully posits that "few people even know it exists."[85] And the Press and Assembly Clauses have suffered the same fate as the Petition Clause—these First Amendment

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78 RonNell Andersen Jones & Sonja R. West, *The U.S. Supreme Court's Characterizations of the Press: An Empirical Study*, 100 N.C. L. REV. 375, 391-92 (2021) (documenting empirically, explaining, and critiquing the steep decline in references to the First Amendment's Press Clause in the Supreme Court's published decisions from 1820-2015); RonNell Andersen Jones & Sonja R. West, *The Fragility of the Free American Press*, 112 NW. UNIV. L. REV. 567, 579 (2017).

79 INAZU, *supra* note 77, at 7-10, 149-53, 185-86.

80 RONALD J. KROTOSZYNSKI, JR., RECLAIMING THE PETITION CLAUSE: SEDITIOUS LIBEL, "OFFENSIVE" PROTEST, AND THE RIGHT TO PETITION THE GOVERNMENT FOR A REDRESS OF GRIEVANCES 156 (2012).

81 *Id.* at 153.

82 BHAGWAT, *supra* note 2, at 79.

83 *Id.*

84 The Guarantee Clause and the Third Amendment both provide useful examples of constitutional provisions that have fallen largely, if not completely, into a state of desuetude. *See* Baker v. Carr, 369 U.S. 186, 293-98 (1962) (Frankfurter, J. dissenting) (discussing the non-enforcement of the Guaranty Clause); Griswold v. Connecticut, 381 U.S. 479, 484 (1965) (providing a rare, and passing, reference to the Third Amendment as advancing a privacy interest in the home).

85 BHAGWAT, *supra* note 2, at 4.

provisions have become irrelevant to the scope and meaning of expressive freedom in today's United States.

Thus, federal judges routinely ignore the actual text of the First Amendment—and this behavior should be viewed as problematic for a judiciary staffed with self-proclaimed "textualists." After all, ignoring the text squarely "violates the notion that a court, when interpreting a legal text, should attempt to give legal effect to all provisions of the text."[86] The First Amendment specifies protection not only for "speech" but also for "the press," "assembly," and "petition."[87] And, the elephant in the room—which everyone seems to ignore—the directive that "Congress" shall "make no law."[88]

Chief Justice John Marshall made much of the Bill of Rights lacking the "[n]o state shall" language of Article I, Section 10 (which contains a variety of express limitations on state governments[89]) when holding that the provisions of the Bill of Rights, including the Takings Clause, do not apply to the states.[90] Marshall observed that "[t]he question thus presented is, we think, of great importance, but not of much difficulty."[91] If the *absence* of "no state shall" language in various provisions of the Bill of Rights provided a clear and conclusive answer to its scope of application vis á vis the states, shouldn't the *presence* of an express scope of application limitation – unique in the entire Bill of Rights—cnstrain the scope of the provision's application (namely, to the legislative branch, and not to the executive or judicial branches)? Despite the plain wording, today "Congress shall make" for all intents and purposes, on a de facto basis, actually means "no government entity shall make."[92]

For the record, I do not advocate for a general reduction in the First Amendment's institutional scope of application—as a normative matter, *any* and *all* government rules that seek to squelch speech based on content or viewpoint cannot be reconciled with a commitment to democratic self-government. Instead, we should probably ask ourselves whether the First Amendment can plausibly be invoked as the source of constitutional protection for particular and differentiated forms of expressive freedom.

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86 KROTOSZYNSKI, *supra* note 80, at 158.

87 U.S. CONST. amend. I.

88 *Id.*

89 *See* U.S. CONST. art. I, § 10.

90 Barron v. Baltimore, 32 U.S. (7 Pet.) 243, 247-51 (1833), *superseded by constitutional amendment,* U.S. CONST. amend XIV, *as recognized in* Dobbs v. Jackson Whole Women's Health Org., 141 S. Ct. 2228 (2022).

91 Barron, *supra* note 90, at 247.

92 *See generally* BARENDT, *supra* note 14, at 48-49 (discussing the limited relevance of the First Amendment's text to its contemporary legal meaning and significance).

What is more, if the constitutional protection of expressive freedom really is not a function of the First Amendment's actual text, we should probably be more honest about the First Amendment doctrine resting on judge-made constitutional common law rather than on the actual text of the amendment.[93]

It would be possible, of course, to pay more attention to the text and also enhance rather than degrade the scope of expressive freedom. A purposive, but more textualist, approach to interpreting and applying the First Amendment would involve giving all of its clauses meaningful work to do in facilitating the ongoing project of democratic self-government.[94] It would also involve what Professor Amar calls an "intratextual" reading of the clauses as creating a general rule against government censorship of the marketplace of political ideas.[95]

For the record, this is precisely how a reliable majority of the Supreme Court has approached the First Amendment since it undertook efforts to seriously enforce it.[96] Landmark cases such as *New York Times Co. v.*

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[93] *See* STRAUSS, *supra* note 14, at 9-12, 51-56, 104-11 (opposing crude forms of textualist originalism and positing that judges, lawyers, and legal academics alike should forthrightly acknowledge the common law nature of almost all important constitutional law adjudication). Professor Strauss argues that "[o]ur living constitution includes precedents and traditions that have developed over time" and that "[i]t is impossible to understand American constitutional law without recognizing as much." *Id.* at 99.

[94] *See* BHAGWAT, *supra* note 2, at 6-9 (arguing that each provision of the First Amendment has important work to do, at least potentially, in advancing the project of self-government). Professor Bhagwat is surely correct when he argues that "[i]t is now time to return to those 'other' provisions" in order to facilitate the process of democratic deliberation essential to a successful project of democratic self-government. *Id.* at 9.

[95] Akhil Reed Amar, *Intratextualism*, 112 HARV. L. REV. 747, 788-802 (1999) (arguing that persuasive constitutional interpretation requires reading particular clauses dynamically, purposively, and with careful consideration of the context that other words, phrases, and clauses located within the document provide). Amar explains that "[p]erhaps the greatest virtue of intratextualism is [that] it takes seriously the document as a whole rather than as a jumbled grab bag of assorted clauses." *Id.* at 795.

[96] *See* Terminiello v. Chicago, 337 U.S. 1, 4-6 (1949) (invalidating, on First Amendment grounds, a state court breach of peace conviction because to allow the conviction to stand would be to empower a so-called "heckler's veto" because the arrest and conviction stemmed from the audience's hostile reaction to the speech); Hague v. Committee for Industrial Organization, 307 U.S. 496, 512-19 (1939) (invalidating, on First Amendment grounds, a New Jersey city ordinance that prohibited labor organizations from meeting whether on public or private property); Near v. Minnesota *ex rel.* Olson, County Attorney, 283 U.S. 697, 721-723 (1931 (invalidating, on First Amendment grounds, a Minnesota statute that imposed liability for the publication of "lewd" or "scandalous" material).

Sullivan[97] and *Brandenburg v. Ohio*[98] are not exercises in close readings of the First Amendment's text, of the adoption and ratification debates in Congress or the state legislatures from June 8, 1789 to December 15, 1791, or the framing generation's understanding of what a commitment to the freedom of expression requires in a democratic republic. The judicially-reconstructed provision, instead, represents a more general rule against government efforts to engage in viewpoint- or content-based censorship of the marketplace of political ideas. And, in turn, this more general, purposive reading of the First Amendment gives rise to a broader scope of application than the amendment's Framers would likely have foreseen—for example, the protection of commercial speech[99] and graphic forms of pornography.[100]

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97 376 U.S. 254, 269, 270, 282-283,292 (1964) (restricting the scope of Alabama defamation law to facilitate public criticism of public officials even if such criticism happens to contain unintentional factual errors).

98 395 U.S. 444, 447-49 (1969) (per curiam) (holding that Ohio could not punish calls to unlawful action "except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action" and explaining that "[a] statute which fails to draw this distinction impermissibly intrudes upon the freedoms guaranteed by the First and Fourteenth Amendments").

99 *See* Cent. Hudson Gas & Elec. Co. v. Pub. Serv. Comm'n, 447 U.S. 557, 566, 571-572 (1980) (holding that the First Amendment's Free Speech Clause protects commercial advertising and applying a form of intermediate scrutiny to government regulations of commercial speech); *see also* Alex Kozinski & Stuart Banner, *Who's Afraid of Commercial Speech?*, 76 VA. L. REV. 627, 628 (1990) (advocating for the extension of First Amendment protection to commercial speech and arguing that constitutional protection of commercial speech should be no less rigorous and robust than the protection afforded to core political speech because the First Amendment exists to protect and facilitate both speaker and audience autonomy). Arguably, Professor Marty Redish should receive credit— or blame—for firing the opening shot in the effort to convince the federal courts to extend robust First Amendment protection to commercial advertising. *See* Martin H. Redish, *The First Amendment in the Marketplace: Commercial Speech and the Values of Free Expression*, 39 GEO. WASH. L. REV. 429 (1971). Redish's article set forth a holistic argument favoring the autonomy of readers, listeners, and viewers—rather than the government—to determine the value of particular kinds of expression. *See id.* at 433-34, 438-40 (arguing that because "advertising performs a significant function for its recipients, its values are better viewed with the consumer, rather than the seller, as the frame of reference" and proposing that a persuasive theory of the freedom of speech must empower individual citizens to pursue "rational self-fulfillment" that necessarily must encompass the right to "participate actively in decisions that significantly affect him") (quoting PETER BACHRACH, THE THEORY OF DEMOCRATIC ELITISM, A CRITIQUE 98 (1967)) (internal quotation marks omitted). Redish's audience-autonomy based theory of the freedom of speech ultimately carried the day and, accordingly, contemporary First Amendment doctrine affords broad and deep protection to commercial speech.

100 *See* United States v. Playboy Entm't Grp., Inc., 529 U.S. 803, 827 (2000) (invalidating, on First Amendment grounds, a federal statute that imposed special, burdensome rules on sexually-explicit cable programming because the regulation was content-based and did not meet the requirements of strict scrutiny review, meaning that it did not advance a compelling government interest in a sufficiently narrowly tailored way); *see also* Amy Adler, *The Perverse Law of Child Pornography*, 101 COLUM. L. REV. 209, 271-73 (2001) (arguing that First Amendment protection of sexually-

In sum, the First Amendment provides a poster child example of a constitutional provision whose literal text does little, if any, serious jurisprudential work and where judicially-crafted doctrines bear most, and arguably *all*, of the jurisprudential weight. Indeed, the First Amendment constitutes a text that is, in many important respects, effectively a *non-text*. That the First Amendment is a non-textual text should be a source of puzzlement—if not downright consternation. After all, textualism has been a growth stock in U.S. constitutional interpretation since at least the 1980s—and arguably even earlier, with Justice Hugo L. Black advancing strictly textualist arguments in both his judicial opinions[101] and in his academic writings while off the bench.[102] Following in the footsteps of Justice Black, Justice Scalia led a full frontal assault on constitutional doctrines that overtly and transparently rely on judicially-crafted legal rules and standards. His concurring opinion in *NASA v. Nelson*[103] provides an instructive example.

Nelson involved a challenge brought by government contractor employees at Caltech's Jet Propulsion Lab (JPL) to the federal government's employee background check program.[104] The JPL employees objected to background questions that the employees deemed unduly invasive and a violation of the

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explicit speech should encompass not only materials featuring adult actors but also some materials featuring minors); Andrew Koppelman, *Is Pornography "Speech"?*, 14 LEGAL THEORY 71, 72, 74, 77, 88-89 (2008) (arguing that viewer or reader autonomy adequately justifies First Amendment protection of sexually-explicit forms of communication in the absence of more convincing proofs that pornography causes material social harms).

101 *See In re* Winship, 397 U.S. 358, 377-78 (1970) (Black, J., dissenting) (noting that "nowhere in [the Constitution] is there any statement that conviction of crime requires proof of guilt beyond a reasonable doubt," positing that the "document itself should be our guide," and arguing that "the words of the written Constitution itself" should be preferred to "the shifting, day-to-day standards of fairness of individual judges"); Griswold v. Connecticut, 381 U.S. 479, 510 (1965) (Black, J., dissenting) ("I like my privacy as well as the next one, but I am nevertheless compelled to admit that government has a right to invade it unless prohibited by some specific constitutional provision."); *id.* at 527 (opining that because "Connecticut's law as applied here is not forbidden by any provision of the Federal Constitution as that Constitution was written" the federal courts have no power to invalidate it).

102 Hugo L. Black, *The Bill of Rights*, 35 N.Y.U. L. REV. 865, 867 (1960) ("It is my belief that there *are* 'absolutes' in our Bill of Rights, and that they were put there on purpose by men who knew what words meant, and meant their prohibitions to be 'absolutes.'"); *see* HUGO L. BLACK, A CONSTITUTIONAL FAITH (1968) (arguing that federal judges must strictly enforce the "absolute" commands set forth in the Bill of Rights and Fourteenth Amendment and positing that judges cannot legitimately either add or subtract from the rights expressly set forth in the Constitution itself).

103 562 U.S. 134, 159-61, 165 (2011), (Scalia J., concurring) ("Thirty-three years have passed since the Court first suggested that the right [to informational privacy] may or may not, exist. It is past time for the Court to abandon this Alfred Hitchcock line of our jurisprudence.").

104 *Id.* at 138-42.

right of informational privacy effectively recognized in 1977.[105] A 7-2 majority endorsed and reaffirmed the Supreme Court's assumption of a right of informational privacy as an aspect of the Due Process Clauses. Justice Samuel Alito explained that "[w]e assume, without deciding, that the Constitution protects [an informational] privacy right."[106] Nevertheless, the majority found that the federal government's background check program contained sufficient substantive and procedural safeguards and, accordingly, did not implicate the implied right of informational privacy. Given "the protection provided by the Privacy Act's nondisclosure requirement, and because the challenged portions of the forms consist of reasonable inquiries in an employment background check, we conclude that the Government's inquiries do not violate a constitutional right to informational privacy."[107]

The majority's approach rests comfortably within the common law tradition. *Griswold* recognized an unenumerated, yet fundamental, right of privacy derived from penumbras of more specific provisions of the Bill of Rights. In turn, *Whalen v. Roe*'s de facto recognition of a right of informational privacy[108] was a logical and entirely foreseeable extension and application of this more general right of privacy. As Justice Guido Calabresi

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105 *See* Whalen v. Roe, 429 U.S. 589, 598-600, 605 (1977) (rejecting a privacy-based constitutional challenge to a New York state law that imposed special record-keeping requirements for certain highly-addictive prescription medicines because the challenged law included constitutionally-adequate procedural and substantive safeguards on the collection, storage, and use of the sensitive personal medical data, cautioning that the Due Process Clauses of the Fifth and Fourteenth Amendments protect a right to informational privacy, and warning that the government must not collect or disclose sensitive personal information without a legitimate reason and adequate safeguards against unwarranted disclosures).

106 *Nelson*, 562 U.S. at 138; *see id.* at 147 ("As was our approach in *Whalen*, we will assume for present purposes that the Government's challenged inquiries implicate a privacy interest of constitutional significance.").

107 *Id.* at 159.

108 *Whalen*, 429 U.S. at 599, 605-06; *see* NASA v. Nelson, 562 U.S. 134, 138 (2011) ("We assume, without deciding, that the Constitution protects a privacy right of the sort mentioned in *Whalen* and *Nixon*."). For a general overview of how the lower federal courts have operationalized the important dicta in *Whalen*, see Mary D. Fan, *Constitutionalizing Informational Privacy by Assumption*, 14 U. PA. J. CONST. L. 953, 954, 956 (2012) and Scott Skinner-Thompson, *Outing Privacy*, 110 NW. U. L. REV. 159, 161 (2015). Professor Skinner-Thompson reports that most lower federal and state courts have recognized a constitutional right to informational privacy post-*Whalen*. *See* Skinner-Thompson, *supra*, at 184. Professor Fan concurs in this assessment. *See* Fan, *supra*, at 956-57; *see also* Larry J. Pittman, *The Elusive Constitutional Right to Informational Privacy*, 19 NEV. L.J. 135, 156-57, 160 (2018) (arguing that *Whalen* effectively established a constitutional right to informational privacy and reporting that, even post-*Nelson*, "substantially all of the federal circuit courts of appeals presently cite *Whalen* as definitively establishing a constitutional right to informational privacy").

argues, "the [*Griswold*] Court was, in retrospect, correct" because "[t]he law it struck down was an anachronism held in place solely by inertia."[109]

A fundamentally different approach is, of course, possible. Judges can pretend that they do not perform an updating function with respect to constitutional text. And this is precisely what Justice Scalia, joined by Justice Thomas, did in *Nelson*. Justice Scalia agreed that the government employees had failed to state a valid claim—but for a more basic reason. In Scalia's view, "[a] federal constitutional right to 'informational privacy' does not exist"[110] and, accordingly, "[l]ike many other desirable things not included in the Constitution, 'informational privacy' seems like a good idea—wherefore the People have enacted laws at the federal level and in the States restricting government collection and use of information."[111] If the Constitution, as amended, fails to specifically safeguard a particular interest, then the question is entirely up to Congress and the states to decide as they think best. Justice Scalia authored numerous opinions making this argument—most commonly in cases involving substantive due process.[112]

In cases involving provisions of the Bill of Rights, Justice Scalia usually parsed language in a very literal way. For example, the Sixth Amendment's Confrontation Clause means that a criminal defendant has the constitutional right to confront his/her/their accuser quite literally, "face-to-face."[113] In other

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[109] CALABRESI, *supra* note 10, at 11.

[110] *Nelson*, 562 U.S. at 160 (Scalia, J., concurring).

[111] *Id.* at 159-60.

[112] *See, e.g.*, Planned Parenthood of Southeastern Pennsylvania v. Casey, 505 U.S. 833, 980 (1992) (Scalia, J., concurring in part and dissenting in part) (opining that "[t]he issue is whether [abortion] is a liberty protected by the Constitution of the United States" and observing that "I am sure it is not" because "the Constitution says absolutely nothing about it"). Other members of the Supreme Court, notably including Justices Samuel Alito and Clarence Thomas, had adopted a similar approach that privileges text over common law constitutional precedents. *See, e.g.*, Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2243-45 (2022) (opining that "[t]he Constitution makes no express reference to a right to obtain an abortion, and therefore those who claim that it protects such a right must show that the right is somehow implicit in the constitutional text" and concluding that because abortion is neither expressly mentioned in the text nor supported by longstanding historical and legal tradition, *Roe* and *Casey* should be overruled); *id.* at 2304. (Thomas, J., concurring) (citing United States v. Carlton, 512 U.S. 26, 42 (1994)) (Scalia, J., concurring in judgement) (opining that "we should follow the text of the Constitution, which sets forth certain substantive rights that cannot be taken away, and adds, beyond that, a right to due process when life, liberty, or property is to be taken away") (internal quotations and citations omitted).

[113] Coy v. Iowa, 487 U.S. 1012, 1016-20 (1988); *see also* Maryland v. Craig, 497 U.S. 836, 860-61 (1990) (Scalia, J., dissenting) (objecting that "[s]eldom has this Court failed so conspicuously to sustain a categorical guarantee of the Constitution against the tide of prevailing current opinion," arguing that "[t]he Sixth Amendment provides, with unmistakable clarity, that '[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him,'" and categorically rejecting the "subordination of explicit constitutional text to currently favored public policy").

words, the federal judiciary has a duty to enforce strictly the literal words of the Sixth Amendment.

What, then, is one to make of Justice Scalia's failure to strictly enforce the precise language of the First Amendment? "Congress shall make no law" is an express limitation on the scope of the First Amendment—yet Justice Scalia had no objection to applying the Free Speech Clause broadly to executive and judicial officers. For example, Justice Scalia joined Chief Justice John Roberts's majority opinion in *Snyder v. Phelps*,[114] a case that involved judicial application of Maryland's law of tort to permit recovery for an offensive and outrageous targeted protest of Matthew Snyder's funeral and burial services. Snyder was a marine killed while on active duty in Iraq.[115] The legal rule at issue, which permitted Albert Snyder, Matthew Snyder's father, to recover for invasion of privacy, issued from the Maryland state courts—not from Congress or the Maryland state legislature. Moreover, the Maryland courts and a civil jury—not legislative officials—enforced and applied the rule in the case.

In fairness, the Supreme Court's initial consideration of whether the First Amendment's Free Speech and Free Press Clauses should apply against the state governments involved contempt proceedings in the Colorado state courts.[116] Writing for the majority, Justice Oliver Wendell Holmes, Jr. reserved the question of whether the First Amendment applies to the state governments via the Due Process Clause of the Fourteenth Amendment because, in the majority's view, the defendant in the contempt proceedings, a Denver newspaper publisher named Thomas M. Patterson, had failed to raise a valid First Amendment claim. Holmes explained that:

> [E]ven if we were to assume that freedom of speech and freedom of the press were protected from abridgment on the part not only of the United States but also of the States, still we should be far from the conclusion that the plaintiff in error would have us reach.[117]

This result obtained because, in Justice Holmes's view, the First Amendment only prohibited prior restraints—not subsequent punishment for published statements.[118] A more obvious objection—namely that the

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114 562 U.S. 443 (2011).

115 *Id.* at 447-50.

116 Patterson v. Colorado, 205 U.S. 454 (1907).

117 *Id.* at 462.

118 *Id.* (observing that "the main purpose of such constitutional provisions is 'to prevent all such *previous restraints* upon publications as had been practiced by other governments,' and they do not prevent the subsequent punishment of such as may be deemed contrary to the public welfare" and, accordingly, "subsequent punishment may extend as well to the true as to the false").

amendment has no application to judicial contempt proceedings at all—did not merit mention (or consideration). Patterson's newspapers had criticized the Colorado Supreme Court, in published editorials and editorial cartoons, regarding a case still technically before the bench; the Colorado Supreme Court's contempt sanctions, on these facts, did not constitute a prior restraint but rather punishment after the fact.[119]

Holmes simply ignored the relevant limiting language that, at least facially, appears to cabin the scope of the amendment's application—namely that "*Congress* shall make no law."[120] His interpretation essentially limited the meaning of the amendment to Blackstone's rules against prior restraints and press licensing schemes.[121] This approach, despite giving the amendment a remarkably narrow scope of potential application, nevertheless also failed to take its text seriously or read it carefully.

Justice John Marshall Harlan,[122] in dissent, took note of the First Amendment's application to "Congress," observing that the amendment prohibits "hostile legislation by Congress" but nevertheless concluded that "neither Congress nor any State since the adoption of the Fourteenth Amendment can, by legislative enactments *or by judicial action*, impair or abridge" the right to free speech and a free press.[123] Of course, modern First Amendment doctrine reflects Harlan's views in *Patterson*—not those of Justice Holmes.

It bears noting that Justice Harlan was an out and proud common law constitutionalist of the first order; he took the view that the Fourteenth Amendment's Privileges and Immunities Clause, Due Process Clause, or both

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119 *See* DAVID M. RABBAN, FREE SPEECH IN ITS FORGOTTEN YEARS, 1870-1920, at 130-34, 148-49, 164-65 (1997) (discussing *Patterson* and its legal reasoning in some detail and offering a generally critical analysis of Justice Holmes's majority opinion). Professor Rabban explains that "Holmes believed that Blackstone's reasoning, developed in the context of the common law of criminal libel, was particularly applicable to contempts of court." *Id.* at 134.

120 *See* BARENDT, *supra* note 14, at 49 (observing that "[t]he First Amendment literally only applies to the laws of Congress"). It is odd that Justice Holmes did not consider the amendment's facially limited scope in rejecting a claim challenging a judicial contempt proceeding.

121 *But cf.* RABBAN, *supra* note 119, at 132 ("A significant number of state court decisions, in contrast to Justice Holmes's opinion for the Supreme Court in *Patterson*, vigorously rejected Blackstone and the English common law as guides to American constitutional provisions on speech.").

122 The first Justice Harlan is perhaps most well-known for his dissenting opinion in *Plessy*, in which he opined "[o]ur Constitution is color-blind, and neither knows nor tolerates classes among citizens" and that "[i]n respect of civil rights, all citizens are equal before the law." *Plessy v. Ferguson*, 163 U.S. 537, 559 (1896) (Harlan, J., dissenting).

123 *Patterson*, 205 U.S. at 464-65 (Harlan, J., dissenting) (emphasis added).

secured fundamental rights against the state governments.[124] Thus, for Harlan, the First Amendment's text did not matter because the right Patterson had invoked arose directly from the Fourteenth Amendment—rather than through literal "incorporation" of the First Amendment against the state governments.[125] Harlan, unlike today's ersatz textualists, was an honest and transparent common law broker. His openness to embracing common law constitutionalism and common law constitutional rights rendered the precise text of the First Amendment entirely irrelevant in a case in which the plaintiff was asserting a free speech and free press claim against a state government. It also meant that even if the First Amendment's scope was limited solely to

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[124] *See* Chicago, B. & Q. Railroad Co. v. Chicago, 166 U.S. 226, 235-37, 241 (1897) (finding that due process imposes a rule against uncompensated takings by state governments). Justice Harlan's majority opinion expressly grounds the recognition of a substantive due process right against uncompensated takings on foundational common law principles. *See id.* at 236 ("The requirement that the property shall not be taken for public use without just compensation is but 'an affirmance of a great doctrine established by the common law for the protection of private property. It is founded in natural equity, and is laid down by jurists as a principle of universal law."). Of course, Harlan's view regarding the application of rights set forth in the Bill of Rights to the states did not carry the day. Instead, the doctrine of selective, but complete, incorporation ultimately prevailed. Under the doctrine of selective-but-complete incorporation, specific provisions of the Bill of Rights are either "in" or "out" as against the states and, if incorporated, will then apply identically against the state governments as they apply against the federal government. *See* Duncan v. Louisiana, 391 U.S. 145, 147-50, 149 n.14 (1968). It bears noting that the second Justice Harlan, John Marshall Harlan II, vigorously objected to this approach and was a steadfast proponent of the theory of independent, due process-based fundamental rights arising wholly separately from any specific provision of the Bill of Rights. *See* Williams v. Florida, 399 U.S. 78, 117-19, 130-33 (1970) (Harlan, J., dissenting). He consistently opposed both "total incorporation" and "selective incorporation" of particular provisions of the Bill of Rights in favor of recognizing free standing, and wholly independent, fundamental, unenumerated rights. *See id.* at 131 n.14 (listing Harlan's numerous opinions making this argument). The due process approach to protecting fundamental rights against the states, quite ably advocated by both the first and second Justice Harlan, is self-evidently an exercise in common law reasoning and adjudication; it draws directly on the traditions and customs of the people to ascertain the existence and scope of a fundamental right. *See* Poe v. Ullman, 367 U.S. 497, 541-42 (1961) (Harlan, J., dissenting).

[125] *See*, *e.g.*, O'Neil v. Vermont, 144 U.S. 323, 370-71 (1892) (Harlan, J., dissenting) (recognizing a substantive due process right to be free of cruel and unusual punishments inflicted by the state governments). The first Justice Harlan grounded all fundamental rights running against the states in the Due Process Clause of the Fourteenth Amendment and argued that most rights set forth in the Bill of Rights, as well as unenumerated yet fundamental rights, applied against the state governments as either "privileges and immunities" or aspects of "due process of law." *See* Maxwell v. Dow, 176 U.S. 581, 613-14 (1900) (Harlan, J., dissenting); Hurtado v. California, 110 U.S. 516, 540-43, 547-50 (1884); *see also* Maxwell, 176 U.S. at 614 ("The Fourteenth Amendment does not in terms refer to the taking of private property for public use, yet we have held that the requirement of 'due process of law' *in that Amendment* forbids the taking of private property for public use without making or securing just compensation.").

Congress, the Due Process liberty interest in expressive freedom under the Fifth Amendment's Due Process Clause was not.[126]

The important point, in both the Holmes and Harlan *Patterson* opinions, is that even in the Supreme Court's first consideration of the First Amendment's potential scope of application to the state governments, "Congress shall make no law" received virtually no consideration as creating a potential limit on the amendment's scope of application. In Holmes's case, the omission seems like a blown call, whereas in Harlan's case, it is simply the natural outgrowth of his overall approach to recognizing and protecting fundamental rights under the rubric of "due process of law" under the Due Process Clauses of both the Fifth and Fourteenth Amendments. Harlan, unlike Holmes, could disregard the specific wording of the First Amendment in favor of a common law approach that took the specific language of the Bill of Rights as reflecting deeply-seated human rights commitments, but which also did not construe the absence of specific constitutional language as foreclosing a right running against either the federal or a state government.[127]

The First Amendment's actual words have been irrelevant since before the Supreme Court clearly held that the amendment applied to the states via the Due Process Clause of the Fourteenth Amendment in 1931.[128] To be sure, the Supreme Court, from the 1930s to the 1970s, did make more regular efforts to give meaningful effect to the Press,[129] Assembly,[130] and Petition Clauses.[131] By the 1980s, however, the First Amendment had been reduced to the Free Speech Clause—as a kind of catch-all provision for any and all forms of expressive freedom.[132]

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126 *Hurtado*, 110 U.S. at 547-48 (Harlan, J., dissenting).

127 *Id.* at 542-58.

128 Stromberg v. California, 283 U.S. 359, 368-69 (1931); Near v. Minnesota, 283 U.S. 697, 723 (1931); *see* RABBAN, *supra* note 119, at 373-75 (discussing the incorporation of the First Amendment against the state governments under the Due Process Clause of the Fourteenth Amendment).

129 *See, e.g.*, Mills v. Alabama, 384 U.S. 214 (1966); Murdock v. Pennsylvania, 319 U.S. 105 (1943); Grosjean v. American Press Co., 297 U.S. 233 (1936).

130 *See, e.g.*, Edwards v. South Carolina, 372 U.S. 229 (1963); Thomas v. Collins, 323 U.S. 516 (1945).

131 *See, e.g.*, California Motor Transp. Co. v. Trucking Unlimited, 404 U.S. 508 (1972); Mine Workers v. Pennington, 381 U.S. 657 (1965); NAACP v. Button, 371 U.S. 415 (1963); Eastern R.R. Presidents Conference v. Noerr Motor Freight, Inc., 365 U.S. 127 (1961). For a helpful discussion and overview of the *Norerr-Pennington* Doctrine, which exempts petitioning of legislative or executive branch officials, even via mass media or billboard public campaigns, from serving as a basis for imposing antitrust liability on the speaker, as an incident of the First Amendment's Petition Clause, see Joseph B. Maher, Comment, *Survival of the Common Law Abuse of Process Tort in the Face of a* Noerr-Pennington *Defense*, 65 U. CHI. L. REV. 627, 630-33 (1998).

132 *See* BHAGWAT, *supra* note 2, at 3-6; INAZU, *supra* note 77, at 61-62.

In *Perry Education Association*,[133] decided in 1983, the Justices began using the Free Speech Clause as a synecdoche for the entire First Amendment. After *Perry*, the First Amendment's other clauses were largely judicially orphaned and ceased to generate important new protections for expressive freedom. As Professor John Inazu explains, "[w]ith *Perry*, even cases involving protests or demonstrations could now be resolved without reference to assembly."[134] Moreover, the Justices' abandonment of the Press, Assembly, and Petition Clauses went without mention, explanation, or justification. In First Amendment jurisprudence, the new normal became "All Free Speech Clause, all the time."

If one were writing a constitutional free speech guarantee today, it might have made sense to provide only for the protection of "speech." However, this is not what the Framers of the First Amendment actually did – or said. Nor was such a limited text ratified by the state legislatures between 1789 and 1791. The Supreme Court has essentially re-written the First Amendment and streamlined it; the text is now largely irrelevant to constitutional protection for expressive activities in the contemporary United States. What's more, the interpretation and application of the Free Speech Clause is not (at all) tethered to the Framers' original understanding of that clause's scope or meaning.[135]

Of course, if the text is simply a place holder for the body politic's sense of justice, we should expect the text to be merely a starting point, not the ending point, in the adjudication of constitutional rights.[136] With the passage of time, one would predict that if the plain meaning of the constitutional text departed from the community's values and attitudes regarding the appropriate scope of a particular fundamental right,[137] the text would come to play a less

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133 Perry Educ. Ass'n. v. Perry Local Educators' Ass'n, 460 U.S. 37, 45-47 (1983) (framing the expressive freedom claim at bar *solely* in terms of the Free Speech Clause and ignoring both the Assembly and Petition Clauses as a potential basis for decision); *see* INAZU, *supra* note 77, at 61 ("In 1983, the Court swept the remnants of assembly within the ambit of free speech law in *Perry Education Association v. Perry Local Educators' Association*.")

134 INAZU, *supra* note 77, at 62.

135 *See supra* text and accompanying notes 74 to 101.

136 Hurtado v. California, 110 U.S. 516, 547-50 (1884) (Harlan, J., dissenting) (positing that the express inclusion of a particular right in the Bill of Rights *does not* mean and *should not* mean that it is not constitutive of "due process" or the antecedent and synonymous clause in Magna Carta, the "law of the land").

137 For example, the British North America Act of 1867 (BNA), Canada's constitution, used exclusively male pronouns ("he") to describe both the qualifications for serving in the Senate and also the conditions that would justify removal of a sitting senator from office. BNA §§ 23 & 31. The question arose if the plain text of these provisions precluded women from serving in the federal Senate. Adopting a "living tree" approach, the Privy Council, Canada's highest appellate court at the time, departed from the BNA's plain text, original understanding, and consistent practice from 1867 to

and less important role in the judicial articulation and enforcement of that right. After a brief comparative law detour that demonstrates this jurisprudential phenomenon is not limited to the United States, the Article will provide a sustained argument in favor of the virtues of practicing common law constitutionalism, as opposed to originalist-textualist constitutionalism.[138]

IV. THE PRESENCE OR ABSENCE OF EXPRESS CONSTITUTIONAL FREE SPEECH GUARANTEES DOES NOT MATTER MUCH—IF AT ALL—IN OTHER CONSTITUTIONAL DEMOCRACIES

It probably would go too far to say that constitutional text is inevitably and invariably irrelevant—plainly government actors, including but not limited to judges, feel obliged to consider constitutional text. But the effect of text on the operationalization of human rights, including but not limited to expressive freedom, is non-linear, complex, and varies from legal system to legal system.[139] Thus, the problem with textual analysis merely begins with understanding the substance of rights. It extends to rules and procedures associated with the adjudication of such rights—and even whether any effective enforcement mechanisms exist for asserting constitutionally protected rights.[140]

1930, and held that the use of male pronouns *did not* preclude women from serving as senators. *See* Edwards v. Attorney General of Canada, [1930] AC 124, 136 (PC) (appeal taken from S.C.C.) (Lord Sankey) ("The British North America Act planted in Canada a living tree capable of growth and expansion within its natural limits. The object of the Act was to grant a Constitution to Canada."). In so doing, it overruled the contrary holding of the Supreme Court of Canada. It was highly likely, given the absence of female suffrage in both the United Kingdom and Canada in 1867, that the use of male pronouns in the BNA was not accidental but rather intentional. Even so, the Privy Council was quite right to "update" the BNA by reading the language inclusively rather than literally—and without regard to the original intent of the drafters of the BNA. *See id.* ("Their Lordships do not conceive it to be the duty of this Board—it is certainly not their desire—to cut down the provisions of the Act by a narrow and technical construction, but rather to give it a large and liberal interpretation so that the Dominion to a great extent, but within certain fixed limits, may be mistress in her own house, as the Provinces to a great extent, but within certain fixed limits, are mistresses in theirs."); *see also* CALABRESI, *supra* note 10, at 2-3, 163-71, 178-81 (arguing that courts should exercise an "updating" power over statutes "as if they were no more and no less than part of the common law").

138 *See infra* text and accompanying notes 174 to 230.

139 The *process* of constitutional adjudication also varies widely from place to place and clearly affects the effective scope of constitutional rights. *See* Vicki C. Jackson, *Constitutional Law in an Age of Proportionality*, 124 YALE L.J. 2680, 3094 (2015) (discussing the doctrine of proportionality, which many foreign constitutional courts use to provide methodological, structured, and transparent balancing of individual rights against government claims that abridge or deny a particular constitutional right on the facts presented, as both necessary and justified).

140 *See* Mark V. Tushnet, *Interpreting Constitutions Comparatively: Some Cautionary Notes, with Reference to Affirmative Action*, 36 CONN. L. REV. 649, 650-55 (2004) (arguing that the substance of constitutional rights, such as freedom of speech or equality, is often entwined with institutional

Nevertheless, in the United States, we reflexively assume that constitutional text matters—that it has a constraining force on legal actors, that its authors had some sort of discernable intent, and that the intent of the text's Framers should have some contemporary relevance when interpreting and applying the text.[141] Other legal cultures, however, take a radically different view on the relevance of both the constitutional text and original intent as a constraint on the scope and meaning of a constitutional provision.

For example, for almost 100 years, the Supreme Court of Canada has generally ignored textualist originalism and instead interpreted constitutional text in a dynamic and purposive fashion. Under the "living tree" model of constitutional interpretation, text serves merely as a starting point, not the ending point, in analyzing, defining, and applying constitutional rights.[142] What is more, the Supreme Court of Canada seems quite comfortable embracing common law constitutionalism.[143] Yet, in the United States, textualist

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constraints that delimit how courts go about protecting those rights). Professor Tushnet cautions that when engaging in comparative constitutional analysis, one "must be aware of the way in which institutional and doctrinal contexts limit the relevance of comparative information." *Id.* at 662. Moreover, "constitutional systems are *systems*, so that even if one has a good grasp on the way another constitutional system deals with a particular problem, one might not fully understand the way in which that solution fits together with other aspects of the constitutional system." *Id.* at 663. In sum, it is not enough to simply study substantive constitutional rights, even in a careful and contextual way, without also paying some attention to issues of the institutional design and operation of the polity's governing institutions (and particularly the domestic courts).

141 Bostock v. Clayton County, Ga., 140 S. Ct. 1731, 1737 (2020) ("When the express terms of a statute give us one answer and extratextual considerations suggest another, it's no contest. Only the written word is the law, and all persons are entitled to its benefit."). Justice Neil Gorsuch's approach to a textualist analysis of Title VII drew a stinging rebuke from Justice Alito. Alito objected that Gorsuch's approach "is like a pirate ship" because "[i]t sails under a textualist flag, but what it actually represents is a theory of statutory interpretation that Justice Scalia excoriated—the theory that courts should 'update' old statutes so that they better reflect the current values of society." *Id.* at 1755-56 (Alito, J., dissenting).

142 Edwards v. Attorney General of Canada, [1930] AC 124, 136, 143 (PC) (appeal taken from S.C.C.) (holding that the term "person" encompasses both men and women for purposes of federal Senate appointments and explaining that the framers of the British North America Act 1867 (BNA Act) "planted in Canada a living tree capable of growth and expansion within its natural limits"); *see also* PETER W. HOGG, 2 CONSTITUTIONAL LAW OF CANADA § 36.8(a) (5th ed. 2007) (discussing the Supreme Court of Canada's adoption of the "living tree" metaphor to describe its approach to interpreting the Canadian Charter of Rights and Freedoms and the BNA Act). The Supreme Court of Canada has taken pains to emphasize that the "living tree" approach flatly rejects originalism as an interpretative approach: "[t]he 'frozen concepts' reasoning [original intent] runs contrary to one of the most fundamental principles of Canadian constitutional interpretation: that our Constitution is a living tree, which, by way of progressive interpretation, accommodates and addresses the realities of modern life." Reference Re Same Sex Marriage, [2004] 3 S.C.R. 698, para. 22 (Can.).

143 *See* Carter v. Canada (Attorney General), [2015] 1 S.C.R. 331, paras. 70, 147 (Can.) (invoking s. 7 of the Canadian Charter of Rights and Freedoms, which expressly safeguards "life, liberty, and

originalism has retained an outsized role in constitutional interpretation—both in the federal courts and in popular commentary on the Constitution and Bill of Rights.[144]

A pattern of limited textual relevance to the scope and meaning of constitutional rights repeats in other jurisdictions. Australia provides a salient example. In Australia, the drafters of the federal constitution made a conscious and intentional decision not to include a written Bill of Rights.[145] Drawing on the British tradition of parliamentary sovereignty, they instead created a federal system and divided governing powers between the six states and the federal government. The Constitution does guarantee a democratic form of government and the right to vote—but it contains only two specifically enumerated rights-granting provisions. One guarantees the equal treatment of non-residents by the states[146]—essentially an analogue to the Privileges and Immunities Clause of Article IV, Section 2.[147] The other prohibits religious establishments, religious oaths for public office, and protects the free exercise of religion.[148] Australia's Commonwealth Constitution does not contain any provisions safeguarding the freedom of speech, press, assembly, or petition.

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security of the person" and invalidating a federal ban on physician assisted suicide as an unreasonable constraint on "security of the person").

144 *See* SCALIA, *supra* note 22, at 39-47 (arguing against dynamic or "living tree" interpretation of the Constitution and positing that it empowers judges to impose their own moral preferences over those of elected legislators who enjoy a democratic imprimatur to make social policies); *see also* ROBERT H. BORK, THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW 251-59 (1990) (positing that *only* textualist originalism can constrain judges from imposing their own moral preferences and therefore is the only legitimate approach to interpreting and applying constitutional text).

145 LUKE BECK, AUSTRALIAN CONSTITUTIONAL LAW: CONCEPTS AND CASES 18, 24-25 (2020); *see* Scott Stephenson, *Rights Protection in Australia*, in THE OXFORD HANDBOOK OF THE AUSTRALIAN CONSTITUTION 906-15 (Cheryl Saunders & Adrienne Stone eds., 2018) (discussing in some detail the conscious decision to omit a bill of rights from the Australian Constitution). Professor Stephenson explains that "[t]he initial decision not to include a bill of rights in the Constitution was grounded in a belief in the capacity of representative democracy to protect rights and a fear that a bill of rights would prevent the States from enacting racially discriminatory legislation." Stephenson, *supra*, at 906. Thus, although the Australian drafters borrowed many design elements from the U.S. Constitution, they declined to include a written bill of rights. *See* BECK, *supra*, at 18 ("While they rejected the presidential system of government and a comprehensive Bill of Rights, in other respects they found in the American system, what Sir Owen Dixon described as 'an incomparable model.'").

146 AUSTRALIAN CONST. § 117 ("A subject of the Queen, resident in any State, shall not be subject in any other State to any disability or discrimination which would not be equally applicable to him if he were a subject of the Queen resident in such other State.").

147 U.S. CONST. art. IV, § 2, cl. 1 ("The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States.").

148 AUSTRALIAN CONST. § 116 ("The Commonwealth shall not make any law for establishing any religion, or for imposing any religious observance, or for prohibiting the free exercise of any religion,

Nevertheless, the High Court of Australia (HCA), Australia's institutional equivalent of the Supreme Court of the United States, in the early 1990s discovered an "implied freedom" of political and governmental speech.[149] The argument—an entirely plausible one—posits that it is simply not possible to have free and fair elections without citizens enjoying the ability to engage in a process of democratic deliberation. As the Justices recently have explained, "[t]he constitutional basis for the implication in the *Constitution* of a freedom of communication on matters of politics and government is well settled."[150] Indeed, "[t]he freedom is of such importance to representative government that any effective statutory burden upon it must be justified."[151]

Thus, the (intentional) omission of an express free speech provision in Australia's Commonwealth Constitution of 1901 has not left freedom of expression to the whim of the federal and state legislatures. Even so, however, Australia's implied right is considerably weaker than the Free Speech Clause of the First Amendment.

First, the HCA consistently has held that the implied freedom does not constitute an individual constitutional "right" that exists to facilitate personal autonomy.[152] Instead, it "operates as constitutional restriction on legislative

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and no religious test shall be required as a qualification for any office or public trust under the Commonwealth.").

149 Australian Capital Television Pty. Ltd. v. Commonwealth (1992) 177 CLR 106 (Austl.); Nationwide News Pty. Ltd. v. Wills (1992) 177 CLR 1 (Austl.). The High Court has regularly heard and decided cases involving the implied freedom of political and governmental communication since recognizing the implied right in 1992. *See, e.g.*, LibertyWorks Inc. v. Commonwealth (2021) HCA 18 (Austl.); Comcare v. Banerji (2019) HCA 23 (Austl.). That said, however, at least one member of the High Court rejects the recognition of fundamental rights, including freedom of speech, through implications from other constitutional clauses. *See LibertyWorks* (2021) HCA 18, at para. 249 (Steward, J., concurring) (opining that "it is arguable that the implied freedom does not exist" and positing that the implied freedom "may not be sufficiently supported by the text, structure and context of the Constitution"). Justice Simon Steward argues that "because of the continued division within this Court about the application of the doctrine of structured proportionality, it is still not yet settled law." *Id.* At present, however, these views do not command a majority at the High Court. A clear and strong majority stands by the precedents recognizing the implied freedom of political and governmental communication; on the other hand, disagreement exists among the justices over the precise constitutional standard of review that should govern in free speech cases.

150 *LibertyWorks* (2021) HCA 18, at para. 44.

151 *Id.* at para. 45.

152 *Id.* at para. 44. *But cf.* MARTIN H. REDISH, THE ADVERSARY FIRST AMENDMENT: FREE EXPRESSION AND THE FOUNDATIONS OF AMERICAN DEMOCRACY 31-33, 71-74 (2013) (arguing that free expression can best be understood as empowering individuals to seek out information and ideas that enable them to be well-informed and engaged citizens). Professor Redish posits that "[t]he adversary theory of democracy emphasizes individual autonomy as theoretically and practically interwoven into the process of collective self-government." *Id.* at 4-5. Redish's theoretical framework

power."[153] These doctrinal features have important, and quite negative, implications for the scope of the implied freedom of political and governmental speech. It only applies to speech that is clearly related to politics and government (and not to speech that relates to the arts, literature, science, to commercial speech, or to sexually explicit speech).[154] In this respect, the Australian implied freedom has more in common with Judge Robert Bork's proposed approach to the First Amendment than to current free speech jurisprudence in the United States.[155]

Second, the burden on the government to justify restrictions on the implied freedom is relatively modest. To survive judicial scrutiny, a law that abridges free speech need merely have a "legitimate" purpose (meaning that it must be "compatible with the constitutionally prescribed system of government"), be "proportionate to the achievement of that purpose" (meaning the law constitutes "a rational response to a perceived mischief"), and be "necessary and adequate in its balance" (meaning that it possesses a reasonable fit between its objectives and the means used to achieve them).[156] Most federal and state laws that burden speech—if tailored at all—easily survive this relatively weak form of judicial scrutiny.

One might posit that the general weakness of Australia's constitutional protection of freedom of expression demonstrates the importance, rather than the irrelevance, of constitutional text. After all, if freedom of speech enjoyed express constitutional protection under the Commonwealth Constitution of 1901, perhaps the HCA would more vigorously safeguard it. On the other hand, Australia's Constitution *does contain* an express guarantee of the free exercise of religion—section 116.[157] This has not led to more vigorous judicial protection of the free exercise of religion. The HCA consistently has

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is essentially the mirror-image of the High Court's approach; he explains that "[a]dversary theory thus contrasts sharply with exclusively participatory versions of democratic theory because those theories systematically marginalize pure exercises of individual autonomy, considering individual autonomy to be relevant to democracy only to the extent it facilitates collective autonomy." *Id.* at 11.

153 *LibertyWorks* (2021) HCA 18, at para. 44.

154 *See* Stone, *supra* note 41, at 847-49 (discussing and explaining the limited scope of Australia's implied freedom of political and governmental communication); *see also* Adrienne Stone, *Rights, Personal Rights and Freedoms*, 25 MELB. U. L. REV. 374, 378–89 (2001) (analyzing and critiquing the High Court of Australia's failure to define protected speech clearly and explaining the limited, but ambiguous, scope of the implied freedom of political and governmental communication).

155 *See* Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1, 28 (1971) (arguing that "[t]he notion that all valuable types of speech must be protected by the first amendment confuses the constitutionality of laws with their wisdom" and positing that protection of non-political expression "rests, as does freedom for other valuable forms of behavior, upon the enlightenment of society and its elected representatives" which is "hardly a terrible fate").

156 *LibertyWorks* (2021) HCA 18, at paras. 45-46.

157 AUSTRALIAN CONST. § 116.

interpreted this express right quite narrowly and rejected most free exercise claims.[158]

Indeed, despite the existence of section 116, Australian legal academics have suggested that framing free exercise claims as more generic "speech" claims might be a more effective strategy for securing exemptions from neutral laws of general applicability that burden religiously-motivated conduct.[159] This would suggest that judicial enforcement of a particular right in Australia is not really a function of whether or not the right is expressly set forth in the Commonwealth Constitution. Thus, an express constitutional provision, which mirrors another provision of the First Amendment, has not been any more efficacious than the "implied freedom" that serves to protect political and governmental speech—and indeed is arguably *weaker* than the judicially-crafted implied freedom of political and governmental communication. In sum, the scope and vibrancy of a fundamental right in Australia does not seem to depend much, if at all, on whether or not it has been codified.

Whereas Australia has a written constitution, which came into force in 1901, Israel lacks a formal constitution as such. Instead, the Supreme Court of Israel has held that a number of statutory enactments, termed "Basic Laws," enjoy quasi-constitutional status.[160] In addition to making it procedurally more difficult to amend or abolish these statutes, by requiring an absolute majority in the Knesset (Israel's parliament), rather than a majority of a quorum to amend or repeal them, the Supreme Court of Israel also has found that freedom of speech and equality are "implied" fundamental rights that are essential corollaries of Israel's commitment to democratic self-government.[161]

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158 Section 116 has been limited in its scope to legislation (as opposed to executive and judicial actions) and, even with respect to legislation, provides very limited protection against neutral laws of general applicability. *See* Mitchell Landrigan, *Can the Implied Freedom of Political Discourse Apply to Speech By or About Religious Leaders?*, 34 ADELAIDE L. REV. 427, 433 (2014) ("The High Court has not given a broad interpretation to the free exercise provision or s 116 more generally.").

159 *See id.* at 432-35.

160 GIDEON SAPIR, THE ISRAELI CONSTITUTION: FROM EVOLUTION TO REVOLUTION 54-58, 69-71 (2018) (discussing the judicial recognition of Basic Laws and conveying limited entrenchment on these statutory enactments).

161 *See id.* at 58-66, 132, 144-46 (discussing these implied freedoms, including the freedom of speech and explaining that the Supreme Court of Israel embraced "[a]n expanded reading of the right to dignity as including such rights as equality, freedom of speech, and freedom of religion" and brought these rights into Israeli law "through the window" meaning by judicial fiat, rather than the "front door," meaning via legislative recognition); *id.* at 19-29, 63-64 (discussing the implied principle of equality in conjunction with several other dignity-based rights, including freedom of speech and religion); *see also* Amal Jamar, *The Hegemony of Neo-Zionism and the Nationalizing State in Israel – The Meaning and Implications of the Nation-State Law* in DEFINING ISRAEL: THE JEWISH STATE,

Professor Neta Ziv observes that "[b]asic rights and liberties such as freedom of assembly and speech, equality, and freedom of religious worship became part of Israel's unwritten constitutional properties."[162] Equality and speech rank among the most important of these implied human rights.[163] Rather than judicial usurpation of legislative powers, Israeli judges argue that the implication of fundamental rights is essential to the legitimacy of a democratic state. Thus, as former Chief Justice of the Supreme Court of Israel Aharon Barak posits, "[t]here is no (real) democracy without recognition of values" and these implied values are "based on human dignity, equality, and tolerance."[164]

Since recognizing an implied freedom of speech in *Kol Ha'Am,*[165] decided in 1953, as an implication of Israel's commitment to democratic self-government, the Supreme Court of Israel has issued numerous precedents over the years vindicating the implied freedom of speech.[166] Avi Weitzman, a U.S. commentator, observes that "[w]ithout a constitution to rely on, Israeli judges have had to ground free speech jurisprudence in Israel's democratic nature."[167] The Israeli courts have repeatedly invalidated government policies

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DEMOCRACY, AND THE LAW 153-71 (Simon Rabinovitch ed., 2018) (discussing the implied principle of equality and judicial enforcement of it). For a discussion of the Supreme Court of Israel's bold assertion of a power of judicial review to enforce implied constitutional rights, including speech and equality, see SAPIR, *supra* note 160, at 31-48, 109-51.

162 Neta Ziv, *Combining Professionalism, Nation Building and Public Service: The Professional Project of the Israeli Bar 1928-2002*, 71 FORDHAM L. REV. 1621, 1639 (2003).

163 Former Chief Justice Aharon Barak has explained that "[e]quality is one of the State of Israel's fundamental values." HCJ 6698/95 Ka'adan v. Israel Land Administration, 54(1) PD 258 (2000) (Isr.). However, freedom of speech is no less essential than equality in Israeli human rights jurisprudence. Aharon Barak, *Foreword: A Judge on Judging: The Role of a Supreme Court in a Democracy*, 116 HARV. L. REV. 19, 85-93 (2002) (discussing "fundamental principles" of a democracy, notably including equality of all persons and freedom of expression); Aharon Barak, *Human Rights in Israel*, 39 ISR. L. REV. 12 (2006) (discussing the normative basis for judicial protection of fundamental principles of justice in Israel, including freedom of speech and equality); Aharon Barak, *The Role of a Supreme Court in a Democracy, and the Fight Against Terrorism*, 58 U. MIA. L. REV. 125, 127 (2003) (explaining that "[r]eal democracy is not just the law of rules and legislative supremacy" but instead "is a multidimensional concept" that includes "the supremacy of values, principles and human rights").

164 Barak, *supra* note 163, at 127.

165 HCJ 73/53 Kol Ha'am v. The Minister of Interior, 7(2) PD 871, *translated in* SELECTED JUDGMENTS OF THE SUPREME COURT OF ISRAEL 90 (1953). Other relevant cases establishing an implied freedom of speech as a necessary element of democratic self-government include HCJ 14/86 Laor v. Theatre Review Board, 41(1) PD 421; and HCJ 680/88 Schnitzer v. Chief Military Censor, 42(4) PD 617. In 1962, the Supreme Court of Israel recognized an implied constitutional right to freedom of conscience. *See* HCJ 262/62 Peretz v. Local Council of Kfar Shmaryahu, 16(3) PD 2101.

166 Avi Weitzman, *A Tale of Two Cities: Yitzhak Rabin's Assassination, Free Speech, and Israel's Religious-Secular Kulturkampf*, 15 EMORY INT'L L. REV. 1, 25 n.98 (2001) (listing relevant cases).

167 *Id.* at 24.

that trench too deeply on freedom of expression: "A broad range of speech is protected for a variety of governmental, social, and personal functions."[168] Speech is integral to the maintenance of a functioning democracy; in consequence, the judiciary must protect it against government abridgments through the power of judicial review.[169]

To borrow the catch-phrase of the "Jurassic Park" movies, even in the absence of a constitutional text, speech, like nature, "finds a way," at least in some jurisdictions. Yet, we also see the opposite trend in some places. Otherwise democratic polities that feature a written constitution with an entrenched bill of rights, including a guarantee of freedom of expression, read the free speech clause in a limited or minimalist way that permits the government to censor even core political speech. Spain, for example, maintains and has regularly enforced statutory provisions that criminalize public criticism of the monarchy (including members of the royal family beyond the sovereign).[170] Lèse-majesté laws represent, quite literally, a form of seditious libel, a kind of criminal speech regulation long rejected in the United States as fundamentally incompatible with freedom of political speech.[171]

To be sure, there are places where the constitutional text seems to tell readers something useful about the scope and relative importance of the freedom of speech. Germany and South Africa provide relevant examples. Although, given that both nations feature relatively recent constitutions, it may simply be that these texts better correspond with prevailing social norms than constitutions of less recent vintage. In other words, the counter-examples of constitutions where the text does seem to prefigure the scope and vibrancy of

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168 *Id.* at 25.

169 Aharon Barak, *Freedom of Speech in Israel: The Impact of the American Constitution*, 8 TEL AVIV U. STUD. L. 241, 246-47 (1988).

170 CÓDIGO PENAL [C.P.][CRIMINAL CODE] §§ 490-491 (Spain); *see* Clarisse Loughrey, *Rapper Jailed for Three and Half Years After Criticising the Royal Family*, THE INDEPENDENT (London, UK) (Feb. 24, 2018), https://www.independent.co.uk/arts-entertainment/music/news/ rapper- jailed-lyrics-spanish-royal-family-valtonyc-josep-miquel-arenas-beltran-a8226421.html [https://perma.cc/SYU4-LRJS]; *see generally* OSAC, Lèse Majesté: Watching What You Say (and Type) Abroad, https://www.osac.gov/Content/Report/e48a9599-9258-483c-9cd4-169f9c8946f5 [https://perma.cc/WZU3-9JNJ] ("Several European monarchies, including Belgium, Denmark, Sweden, Spain, Netherlands, and Monaco still have *lèse majesté* laws on the books. The laws tend to carry harsher criminal penalties than other types of defamation and insult laws, though the charges are typically not as extreme as in other regions of the world.").

171 *See* Hustler Magazine, Inc. v. Falwell, 485 U.S. 46, 50-56 (1988) (observing that criticizing political figures is among the most important forms of speech protected by the First Amendment); New York Times Co. v. Sullivan, 376 U.S. 254, 268-86 (1964) (noting that the ability of citizens to openly criticize public officials constitutes a core purpose of the First Amendment and is fundamental to the process of democratic self-government).

expressive freedoms might simply better reflect prevailing social norms about how a commitment to freedom of speech should be operationalized in a democratic polity.[172]

It is not that the text better constrains the government and the courts—rather, the text itself is simply in stronger and better accord with the prevailing cultural norms that are widely shared within the citizenry, which relieves local judges from the felt necessity of "updating" constitutional text through the process of common law constitutionalism. When text aligns with socio-legal culture, text appears to do more meaningful work than when a constitutional text either dates back to a different time and place or when a new text attempts to establish a norm that does not fit very well with prevailing constitutional understandings within the body politic of what a meaningful commitment to expressive freedom requires a just society to tolerate.

In either case, however, it is shared human rights values within the community, and not the constitutional text, that is doing the real work. This explains why the First Amendment's text fails to define much, if at all, the metes and bounds of expressive freedom in the contemporary United States. It also explains why the constitutional courts in Australia and Israel have recognized an implied freedom of speech, derived from constitutional and statutory guarantees of free and fair elections, despite the utter and complete absence of constitutional text guaranteeing freedom of expression.

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[172] It bears noting, however, that South Africa's Constitutional Court has been more skeptical of hate speech regulations than the text of the 1996 Constitution might warrant, given the express elevation of dignity, equality, and human freedom as the nation's "foundational" constitutional values. **ERROR! MAIN DOCUMENT ONLY.**S. AFR. CONST., 1996, Act No. 108, § 1(a); *see id.* at § 7(1) (providing that "[t]his Bill of Rights is a cornerstone of democracy in South Africa" and "enshrines the rights of all people in our country and affirms the democratic values of *human dignity, equality and freedom*") (emphasis added). The free speech provision, Section 16, expressly excludes from protection "**Error! Main Document Only.**propaganda for war," "incitement of imminent violence," and "advocacy of hatred that is based on race, ethnicity, gender or religion, and that constitutes incitement to cause harm." *Id.* at § 16(2)(a) to (c). Moreover, the equality provision, Section 9, requires the government to advance and security the equality of all persons. *See id.* at § 9(4) ("National legislation must be enacted to prevent or prohibit unfair discrimination."). Finally, the provision on the abrogation of fundamental rights, Section 37, declares the substantive provisions safeguarding dignity, equality, and human freedom (as liberty of the person in Section 12) to be non-derogable; all other rights in the Bill of Rights, including the freedom of speech, are subject to legislative suspension in times of war or national emergency. *See id.* at § 37(1) & (5). Even so, the Constitutional Court has invalidated national legislation aimed at punishing and deterring hate speech. *See* S. Afr. Hum. Rts. Comm'n v. Masuku 2022 (5) SA 1 (CC) (S. Afr.); Qwelane v. S. Afr. Hum. Rts. Comm'n 2021 (6) SA 579 (CC) (S. Afr.). Thus, the Constitutional Court's approach to hate speech regulations appears to be in at least some tension with the express text of the Constitution—suggesting perhaps that South Africa *follows* the more general pattern of constitutional courts going their own way when deciding free speech cases, through a process of common law adjudication, rather than *departs from* this model.

Because ordinary citizens in Australia and Israel expect the government to respect the freedom of political speech, elected politicians have accepted, rather than contested, the judiciary's assertion of a power of judicial review in this context (despite the absence of a textual constitutional mandate). Indeed, were Australia or Israel to go about drafting new constitutions, these new constitutional texts would almost certainly include express free speech guarantees—precisely because the people of those polities *already* both expect and demand constitutional protection for freedom of speech (and get it).[173]

V. DEEPLY-SEATED SOCIO-LEGAL NORMS DEFINE THE SCOPE OF FREEDOM OF EXPRESSION MORE RELIABLY THAN CONSTITUTIONAL TEXT—AND THIS MIGHT APPLY TO OTHER SUBSTANTIVE RIGHTS TOO

The First Amendment provides a good starting point for framing the inherent limitations of constitutional text as a way of understanding either a human right or the prescriptive force of a constitutional provision. The federal courts have applied the First Amendment in a dynamic and purposive fashion—as a "living tree," to use the relevant language from the Supreme Court of Canada.[174] Judicial interpretation and application of the First Amendment is not tethered to the text in any meaningful way and, moreover, the Framers' understanding of "the" freedom of speech plays little, if any, meaningful role in contemporary First Amendment jurisprudence.

The relevance of constitutional text to the effective protection of constitutional rights in general, and First Amendment rights in particular, is both uncertain and seems to depend on factors wholly unrelated to a constitutional provision's literal text. Although it is commonplace in the United States to assume that constitutional text plays a critically import role in securing fundamental rights, this assumption simply does not bear up to close and considered scrutiny. Does text actually do much work in securing fundamental human rights in general—or the freedom of speech in particular? Or were Madison and Hamilton correct to posit that institutional structure,

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[173] The European Union, for example, included an express privacy protection for personal data – in addition to a more generic privacy guarantee—when writing and adopting the European Charter of Fundamental Rights. Charter of Fundamental Rights of the European Union, 2012/C 326/02, art. 8(1) ("Everyone has the right to the protection of personal data concerning him or her."). Data protection is a central concern among the citizens of the EU—as reflected by the GDPR. It was, accordingly, entirely foreseeable that the Charter would include an express guarantee of this particular aspect of privacy—in addition to a more general provision that tracks the privacy clause of the European Convention on Human Rights. *See id.* at art. 7 ("Everyone has the right to respect for his or her private and family life, home and communications.").

[174] Edwards v. Attorney General of Canada, [1930] AC 124, 136 (P.C.) (Can.).

design, and dynamics are far more important to safeguarding fundamental rights (including expressive freedom)?[175] In the case of expressive freedom, other factors, notably including a general legal culture that values expressive activities, appear to be doing the real work in securing judicial protection for democratic discourse.[176]

The question of whether constitutional text matters is hardly a new one. James Madison famously decried the utility of mere "parchment barriers" to preventing arbitrary government action.[177] In defending the necessity of a system of separation of powers, with a related system of checks and balances among the three branches of the federal government, Madison wrote that "a mere demarcation on parchment of the constitutional limits of the several departments is not a sufficient guard against those encroachments which lead to a tyrannical concentration of all the powers of government in the same hands."[178] Instead, each branch must both possess and be capable of exercising effective tools to check and thwart attempted incursions by the other branches of the federal government—and also have sufficient institutional incentives to protect its own constitutional turf against such encroachments.[179]

Like the separation of powers, the demarcation of fundamental human rights in a written constitution does not, perforce, mean that those words will have any meaningful constraining force on a government that would prefer to disregard constitutionally protected human rights. Indeed, Alexander Hamilton makes precisely this point, at length, in *Federalist No. 84*. Hamilton argues that the inclusion of a written bill of rights would be "not only unnecessary in the proposed Constitution but would even be dangerous."[180] The enumeration of certain rights, Hamilton posits, "would contain various exceptions to powers which are not granted; and, on this very account, would afford a colorable pretext to claim more than were granted."[181] After all, "why declare that things shall not be done which there is no power to do?"[182]

It should therefore be at least mildly surprising that, for most people, most of the time, written guarantees of fundamental rights are thought to be an effective, if not essential, means of securing the enumerated human rights.

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175 *See supra* text and accompanying notes 46-62.

176 *See supra* text and accompanying notes 74-101.

177 THE FEDERALIST NO. 48, at 308, 313 (James Madison) (Clinton Rossiter ed., 1961).

178 *Id.* at 313.

179 *See id.* at 308-13. (discussing how demarcating each branch of government's powers in writing is not enough to thwart abuse of their power and encroachment onto the powers of the other branches).

180 THE FEDERALIST NO. 84, *supra* note 46, at 513 (Alexander Hamilton).

181 *Id.*

182 *Id.*

This certainly proved true in the ratification debates over the U.S. Constitution, when arguments of the sort advanced by Hamilton in *Federalist No. 84* failed to quell potentially fatal objections that the federal government would not be bound to respect fundamental rights.[183] Thus, during the ratification debates over the Constitution, the absence of text designed to secure fundamental human rights mattered—and it mattered a great deal.

The adoption of a bill of rights, however, is not a sufficient condition to ensure that the government will, in practice, respect the enumerated rights. We also know, from the examples of Australia and Israel,[184] that the inclusion of a constitutional provision expressly safeguarding expressive freedom is not even a *necessary* condition for the exercise of the power of judicial review to invalidate laws that seek to censor or distort the marketplace of political ideas. This does not mean that a written provision is invariably irrelevant—but the force and effect of such a provision will depend critically on a nation's socio-legal culture, the salience of a particular human right within that socio-legal culture, and the institutional ability and willingness of the domestic courts to render binding judgments on the political branches enforcing the right.

Yet, despite these constitutional verities, which can be empirically tested and confirmed,[185] many U.S. legal academics, judges, and lawyers still claim that the text inevitably can and will constrain judicial discretion. The most prominent and influential theory of constitutional interpretation within the federal courts, including the Supreme Court, and advocated consistently and loudly by the Federalist Society, posits that legitimate judicial decisions must be rooted in constitutional text and in the Framers' original understanding of that text. Many—but not all—legal scholars heap scorn on this interpretative methodology as a kind of false faith that does little, if anything, to legitimate judicial decisions granting or withholding relief from particular litigants

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183 *See* MAGLIOCCA, *supra* note 64, at 32-34 (discussing the political necessity of promising to adopt written rights guarantees in order to secure ratification of the draft Constitution); *see also* KELLY, HARBISON & BELZ, *supra* note 52, at 121-22 (noting that proponents of the Constitution secured ratification in several states "by promising a series of constitutional amendments embodying a bill of rights").

184 *See supra* text and accompanying notes 144-173.

185 *See e.g.,* ADAM CHILTON & MILA VERSTEEG, HOW CONSTITUTIONAL RIGHTS MATTER (2020) (using empirical methods to deduce how constitutional rights in different countries define and delimit the rights of individuals practically); *see also* Mila Versteeg, Cosette Cramer & Kevin Cope, *Empirical Studies of Human Rights Law*, 15 ANN. REV. L. & SOC. SCI. 155 (2019) (discussing an empirical study on the effects of codified human rights and constitutional rights).

pressing constitutional claims.[186] Even so, the fact remains that within the Supreme Court and the lower federal courts, textualist originalism, warts and all, presently serves as the most prominent approach to reading and applying the Constitution's provisions.[187]

Moreover, at least some prominent legal academics advocate textualism and the importance of constitutional text to securing fundamental human rights. Akhil Amar is perhaps the most influential (non-Federalist Society) contemporary legal academic who argues that text matters.[188] Amar posits that constitutional text is not only important on its own terms, but also should be read dynamically to help lend credence to the idea that judges are enforcing the Constitution (rather than simply imposing their own legal and moral values in the name of the Constitution).[189] For Amar, text has objective meaning and reliance on this meaning helps to legitimate judicial decisions that enforce the rights set forth in the text.[190] Amar's principal concern relates to the legitimacy

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186 *See* Mitchell N. Berman, *Originalism is Bunk*, 84 N.Y.U. L. REV. 1, 8 (2009) (arguing that originalism "is not merely false but pernicious as well" and exists primarily as a means of "bolster[ing] the popular fable that constitutional adjudication can be practiced in some thing close to an objective and mechanical fashion" and warning that "originalism threatens to undermine the judiciary's unique and essential role in our system of government"); Mark Seidenfeld, *Textualism's Theoretical Bankruptcy and Its Implication for Statutory Interpretation*, 100 B.U. L. REV. 1817, 1819 (2020) (arguing that "while some might reasonably argue that textualism embodies attractive attributes for the practice of statutory interpretation, its theoretical footing is essentially bankrupt"). Although Seidenfeld's immediate focus is textualism in statutory interpretation, his theoretical critique is equally applicable to textualism in constitutional interpretation as well with respect to its potential efficacy in constraining and controlling judicial discretion. *See id.* at 1840-48.

187 *See* JOHN O. MCGINNIS & MICHAEL B. RAPPAPORT, ORIGINALISM AND THE GOOD CONSTITUTION 1 (2013) (observing that originalism "has been an important principle of constitutional interpretation since the early Republic," which still presently enjoys "prominent adherents on the Supreme Court," and emphasizing that "[l]egal academics across the political spectrum espouse some form of originalism"); *see also* BREYER, *supra* note 22, at 115-32 (offering a thoughtful discussion and critique of originalism as an interpretative approach to the constitutional text).

188 *See* AKHIL REED AMAR, THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION (1998) (providing a comprehensive, arguably epic, overall interpretation of the Bill of Rights); Akhil Reed Amar, *The Bill of Rights as a Constitution*, 100 YALE L.J. 1131 (1991) (providing a textual and structural overview of the Bill of Rights).

189 Amar, *supra* note 95, at 788-91.

190 *Id.* at 796 (arguing that "[e]mphasis on the Constitution's writtenness—its general textuality and its specific textual provisions—has certain democratic values" that notably include "constitut[ing] a democratic focal point" that serves to "structure the conversation of ordinary Americans as they ponder the most fundamental and sometimes divisive issues in our republic of equal citizens"); *see* SANFORD LEVINSON, CONSTITUTIONAL FAITH 9-15 (1988) (positing that a kind of generalized reverence for the Constitution, without much attention to its specifics, is a deeply embedded feature of U.S. political culture and observing that "'[v]eneration' of the Constitution has become a central, even if sometimes challenged, aspect of the American political tradition" and serves as a kind of "'civil religion'").

of the process of judicial review—and he suggests that text lends legitimacy to judicial decisions enforcing rights.[191] Of course, other prominent public law scholars reject this reasoning as nonsense, arguing that text does not meaningfully constrain judicial discretion and that judicial decision making is simply another form of ordinary politics.[192]

It is, of course, quite true that text can provide a basis for a judicial decision and can offer a possible answer to the problem of judicial discretion. After all, if "the text" compels a particular outcome, then an individual judge can attempt to disclaim any personal responsibility for it.[193] Thus, a textual constitutional provision enables a judge to claim (falsely, of course) that she lacked a free or meaningful choice—the text itself required, indeed compelled, the result.[194] Justice Hugo L. Black, deeply concerned about the legacy of

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[191] Amar, *supra* note 95, at 765 ("There are many arguments for judicial review, but perhaps the most elegant and forceful is the simple two-pronged notion that the Constitution is supreme law, and that judges must apply this law in cases within their jurisdiction."); *see id.* at 795-99 (arguing that intratextual constitutional interpretation renders judicial decision making less objectionable and helps to reduce the counter majoritarian difficulty by grounding judicial decisions in a document that itself possesses democratic legitimacy even if Article III judges do not). Oddly enough, Amar himself follows the modern practice of both ignoring the First Amendment's facially limited scope of application (it purports to restrict only Congress, not the executive or judicial branches) and failing to apply his intratextual interpretative methodology to the First Amendment's clauses that secure expressive freedom. *See id.* at 812-18. At least arguably, an intratextualist approach to the First Amendment itself would take the specific examples set forth (speech, press, assembly, petition) to stand for a larger, and more general, guarantee of expressive freedom. However, Amar does not propose this interpretative approach. I agree with Amar that "[g]ood interpreters need to know how to read between the lines" but they also need to be able to extrapolate larger meanings from those lines as well. *Id.* at 827.

[192] *See* Bruce Ackerman, *The New Separation of Powers*, 113 HARV. L. REV. 633, 667 (2000) (positing that "[p]art of the problem is cultural: Do lawyers and judges take the process of legal interpretation seriously?"); *see also* Bruce Ackerman & David Fontana, *Thomas Jefferson Counts Himself to the Presidency*, 90 VA. L. REV. 551, 630-31 (2004) (arguing that "even textualists should accord substantial weight to subsequent practice in resolving constitutional indeterminacies").

[193] *See, e.g.*, Texas v. Johnson, 491 U.S. 397, 420-21 (1989) (Kennedy, J., concurring). Justice Anthony Kennedy offered an apologia for his vote to apply the First Amendment to disallow a viewpoint-based state law that prohibited the burning of a U.S. flag to express disagreement with government policies—but permitted the retirement of a flag from use by burning it. "The hard fact is that sometimes we must make decisions we do not like. We make them because they are right, right in the sense that the law and the Constitution, as we see them, compel the result. And so great is our commitment to the process that, except in the rare case, we do not pause to express distaste for the result, perhaps for fear of undermining a valued principle that dictates the decision. This is one of those rare cases." *Id.*

[194] *See id.* at 421 ("I do not believe the Constitution gives us the right to rule as the dissenting Members of the Court urge, however painful this judgment is to announce . . . . It is poignant but fundamental that the flag protects those who hold it in contempt.").

Lochner,[195] famously adopted a strict form of textualism as a principal means of trying to limit and effectively constrain judicial discretion.[196] Thus, text and textualism present a way of answering Alexander Bickel's "[c]ounter-[m]ajoritarian [d]ifficulty"[197] by providing a popular mandate for the exercise of judicial review. From this vantage point, textualism responds to problems of discretion and legitimacy associated with judicial review by democratically unaccountable federal judges.

But, at least with respect to expressive freedom, in the contemporary United States, the text and textualism plainly constitute a "tin god"—meaning a kind of rhetorical makeweight that does no meaningful jurisprudential work.[198] To invoke text, while paying not the slightest attention whatsoever to the actual words of the text, is to embrace (literally) the jurisprudence of the non-sequitur. The First Amendment's interpretation and application provide a stark example of judges saying one thing while doing quite another; contemporary First Amendment jurisprudence depends critically on judge-made rules and constitutes clear examples of common law constitutionalism in action.[199]

At bottom, the problem is that textualism rests on a false premise—namely that text actually constrains judges bent on disregarding it. To be sure, text can and does provide political cover for judges.[200] But if we are seriously concerned with effectively securing a particular human right, simply codifying a human right in a constitution will not necessarily get the job done. The Eighteenth Amendment codified a national policy of prohibition, but the amendment did not change either the morality or drinking habits of the American people.

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195 *See* Lochner v. New York, 198 U.S. 45, 53-54, 58-60, 64 (1905) (invalidating, under the doctrine of substantive due process's protection of a right to "liberty of contract," a New York state law that limited the maximum hours per day and per week that a baker could lawfully work).

196 HUGO L. BLACK, A CONSTITUTIONAL FAITH (1969); Hugo L. Black, *The Bill of Rights*, 35 N.Y.U. L. REV. 865 (1960). For an illuminating discussion of the relationship between Justice Black's textualism and Justice Antonin Scalia's textualist originalism, along with a persuasive critique of both, see Michael J. Gerhardt, *A Tale of Two Textualists: A Critical Comparison of Justices Black and Scalia*, 74 B.U. L. REV. 25 (1994).

197 ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS 16 (1962).

198 Kisor v. Wilkie, 139 S. Ct. 2400, 2448 (2019) (Gorsuch, J., concurring) ("If today's opinion ends up reducing *Auer* to the role of a tin god—officious, but ultimately powerless—then a future Court should candidly admit as much and stop requiring litigants and lower courts to pay token homage to it.").

199 *See* STRAUSS, *supra* note 14, at 52-53 (observing that "[t]he First Amendment was part of the Constitution for a century and a half before the central principles of the American regime of free speech, as we now know it, became established in the law" and positing that "[w]e owe [these] principles . . . to the living, common law Constitution").

200 *See e.g.*, Texas v. Johnson, 491 U.S. 397, 420-21 (1989) (Kennedy, J., concurring); *see also supra* text and accompanying note 191.

Text can only do so much in the teeth of highly entrenched social customs and habits. Theories of constitutional interpretation need to take this reality into account—but the reigning theory of constitutional interpretation today within the federal courts casts a blind eye on the inability of text to constrain reliably judicial discretion.[201]

Simply making the point that text does not really constrain either governments generally or courts in particular might seem a self-evident observation to more sophisticated scholars of the legal system. But what is true of legal text in a general sort of way holds true of texts—or non-texts—related to the freedom of speech in an unusual, and particularized, kind of way.[202] In the United States, a conservative Supreme Court ostensibly staffed with "textualist-originalist" jurists has essentially ignored the text of the First Amendment in defining and protecting expressive freedom.

Originalism more generally tends to go out the window as well[203]—important precedents protecting commercial speech, for example, enjoy the strong support of the most conservative "textualist-originalist" judges, despite the fact that no evidence exists that the framing generation of the Bill of Rights would have understood commercial advertising to have any protection whatsoever as "speech."[204] Thus, the First Amendment receives a kind of

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[201] Indeed, Justice Elena Kagan argues that "we're all textualists now." Harvard Law School, *The 2015 Scalia Lecture: A Dialogue with Justice Kagan on the Reading of Statutes*, YOUTUBE, at 8:29 (Nov. 25, 2015), https://www.youtube.com/watch?v=dpEtszFT0Tg [https://perma.cc/EE2B-2MPD]. If this is truly so, then the vexing problem of judicial discretion constitutes a "buy" stock.

[202] For a cogent critique of the Supreme Court's failure to develop an independent jurisprudence of the right to assemble, and for some persuasive suggestions on what a reanimated Assembly Clause jurisprudence might look like, see INAZU, *supra* note 77. For a sustained and thoughtful argument that the Supreme Court should give independent force and effect to the Press Clause, see Sonja West, *Press Exceptionalism*, 127 HARV. L. REV. 2434 (2014) and Sonja West, *Awakening the Press Clause*, 58 UCLA L. REV. 1025 (2011). For the most part, the Rehnquist and Roberts Courts have rolled constitutional protection of all expressive freedoms in the Free Speech Clause—which is a very odd thing for ostensibly textualist-originalist judges to do.

[203] *See, e.g.*, Janus v. Am. Fed'n of State, Cnty., & Mun. Emps., Council 31, 138 S. Ct. 2448, 2469-71 (2018) (rejecting out of hand an originalist argument for sustaining mandatory union collective bargaining fees in favor of enforcing "decades of landmark precedent," dating to 1968 rather than 1791, instead).

[204] *See* Frederick Schauer, *Commercial Speech and the Architecture of the First Amendment*, 56 U. CIN. L. REV. 1181, 1182 (1988) (arguing that commercial speech, although "previously taken to be outside the coverage of the first amendment," has nonetheless been admitted into its coverage); *see also* Frederick Schauer, *The Politics and Incentives of First Amendment Coverage*, 56 WM. & MARY L. REV. 1613 (2015) [hereinafter Schauer, *First Amendment Coverage*] (arguing that the Supreme Court has defined the First Amendment's scope of coverage far too broadly to encompass a wide variety of commercial and non-commercial activities having little to do with core First Amendment values). Schauer posits that "[w]hat is most interesting about these various claims and arguments [for

dynamic, or "living tree," purposive interpretation and application, largely shorn of either concerns for giving full effect to the text of the provision or to the Framers' original understanding of the amendment as to its purpose and scope of application.

For the record, this is not necessarily a bad thing. But when we consider how best to secure and safeguard a fundamental right, like expressive freedom, blithely assuming that entrenching a right in a written constitution will get the job done rests on a series of false premises. Text works best when it is in full accord with the settled expectations of the people within a particular political community; common law constitutionalism is the rule, not the exception. Constitutional text will not safeguard a right if the citizenry is either hostile or merely indifferent to a particular freedom or liberty and omitting constitutional text will not prevent judges from exercising a power of judicial review to protect a right that We the People expect a just and well-ordered government to respect.

Text thus constitutes one input, and admittedly an important input, in a dynamic and ongoing dialectic within both the institutions of government and within the body politic on the legitimate scope of the government's coercive powers as measured against an individual citizen's claim to exercise autonomy and to be, in some material respects, self-regulating. Expressive freedom is not cabined by constitutional text in the United States, Australia, or Israel, and probably cannot be effectively defined within any particular linguistic formula. And, contrary to Justice Black's repeated claim that the First Amendment is an "absolute" that permits of no exceptions, the legal and constitutional reality is considerably more complex.

Discretion simply cannot be avoided because adjudicating expressive freedom claims will inevitably require courts to strike a balance between the legitimate regulatory aims of a community, as expressed through the institutions of government, and the ability of a lonely dissenter to speak her version of truth to power.[205] Expressive freedom will *always* involve striking

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very broad application of the First Amendment to various forms of often commercial conduct] is not merely that some of them have been taken seriously," but rather that "they have been advanced at all . . . ." *Id.* at 1616. He explains that "a generation ago . . . the suggestion that the First Amendment was even applicable to some of these activities would far more likely have produced judicial laughter or incredulity, if not Rule 11 sanctions." *Id.* at 1616.

[205] STEVEN F. SHIFFRIN, DISSENT, INJUSTICE, AND THE MEANINGS OF AMERICA 110-18, 124-30 (1999) (arguing that "protecting and supporting" dissenters and facilitating the public expression of dissenting viewpoints should be "at the center of the First Amendment tradition" and generally rejecting the marketplace of ideas metaphor because it overprotects speech that has at best a marginal

and holding a balance—and that balance will, of necessity, reflect the values and attitudes of the community more reliably and consistently than the precise text of a constitutional free speech guarantee (or, for that matter, the utter *absence* of such a written constitutional guarantee). It is inherently and intrinsically a common law jurisprudential enterprise.

VI. TURTLES ALL THE WAY DOWN: THE NECESSITY OF COMMON LAW EXEGESIS IN INTERPRETING AND APPLYING CONSTITUTIONAL TEXT

Departure from constitutional text is hardly limited to the First Amendment—or to liberal or progressive judges. Constitutional rights and rules constantly evolve and change, through a process of judicial explication, even though the text remains unchanged. All things considered, it would be better—far better—if federal judges were intellectually honest about this reality and acknowledge the common law nature of the interpretive game that's plainly afoot. Some judges have been open about this reality. Justice Oliver Wendell Holmes, Jr., for example, straightforwardly acknowledges that "[t]he life of the law has not been logic: it has been experience."[206] Common law constitutionalism reflects and incorporates an appreciation of the fact that legitimate judicial decisions must be informed by the lived experience of We the People. To both persuade and endure over time, constitutional decisions must reflect the values and sense of justice of the contemporary body politic.[207]

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relationship to the public expression of dissenting voices); *see* Robert C. Post, *The Constitutional Concept of Public Discourse: Outrageous Opinion, Democratic Deliberation, and* Hustler Magazine v. Falwell, 103 HARV. L. REV. 601, 624-32, 668-70 (1990) (arguing that just as government may not directly censor speech without undermining the process of democratic deliberation essential to a meaningful project of democratic self-government, the government must not be permitted to do so indirectly through the imposition of civil liability for offensive speech and emphasizing that "every issue that can potentially agitate the public is also potentially relevant to democratic self-governance").

[206] HOLMES, *supra* note 26, at 1; *see* Lum v. Fullaway, 42 Haw. 500, 502-03 (1958) (observing that "the genius of the common law, upon which our jurisprudence is based, is its capacity for orderly growth" through the "vehicle" of "judge-made law.").

[207] Professor Michael Klarman, a well-regarded legal historian, persuasively argues that most major constitutional decisions involving equal protection and racial justice were, and presumably still are, squarely within the metes and bounds of contemporary public opinion. *See* MICHAEL J. KLARMAN, FROM JIM CROW TO CIVIL RIGHTS: THE SUPREME COURT AND THE STRUGGLE FOR RACIAL EQUALITY (2004). My claim is that judges will work to keep their decisions within acceptable bounds more generally, even when doing so requires creative judicial interpretation of constitutional text or even outright departure from the text as written. *See generally* CALABRESI, *supra* note 10, at 199 n.18 (positing that judges should update a statute that "is out of phase" and explaining that this circumstance "neither entails nor requires that the statute be old, in terms of the number of years since its enactment" but instead means that the law "no longer fits in with the legal landscape, and it can become out of phase upon the advent of social, technological, or political changes.").

Chief Justice John Marshall powerfully argued for judges adopting a common law approach to interpreting constitutional text. Perhaps most famously, in *McCulloch v. Maryland*,[208] Marshall posited that federal judges "must never forget[] that it is a *constitution* we are expounding" with the ultimate goal being "a fair and just interpretation."[209] Any other approach would be untenable because "[a] constitution, to contain an accurate detail of all the subdivisions of which its great powers will admit, and of all the means by which they may be carried into execution, would partake of the prolixity of a legal code, and could scarcely be embraced by the human mind."[210] Such a document "would probably never be understood by the public."[211]

Marshall strongly implies that a constitution inaccessible to We the People would be both illegitimate and ineffectual.[212] Accordingly, a constitution's purpose and nature "require[ ], that only its great outlines should be marked, its important objects designated, and the minor ingredients which compose those objects be deduced from the nature of the objects themselves,"[213] with the precise details to be filled in by the federal courts (albeit with important roles for Congress and the President as well).[214]

When one marries up the interpretative approach Marshall advocates in *McCulloch* with the duty of the federal judiciary to enforce constitutional constraints against the political branches, the necessary conclusion is that the federal courts must, of necessity, perform an updating function that ensures the Constitution, as interpreted and applied, continues to enjoy popular legitimacy.[215] It also bears noting that this is the precisely the same argument that the Privy Council made in *Edwards* when disregarding the plain text of the BNA 1867, the original understanding of this text, and consistent practice regarding the constitutional ineligibility of women to serve in Canada's federal

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208 17 U.S. (4 Wheat.) 316 (1819).

209 *Id.* at 407.

210 *Id.*

211 *Id.*

212 *Id.*

213 *Id.*

214 *See* Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177-78 (1803) (holding that "[i]t is emphatically the province and duty of the judicial department to say what the law is" and this means that "if a law be in opposition to the constitution" then "the court must determine which of these conflicting rules governs the case"). Marshall characterizes the power of judicial review to enforce constitutional constraints as "the very essence of judicial duty." *Id.* at 178.

215 *See generally* CALABRESI, *supra* note 10, at 3-5, 19-21, 161-73 (arguing that courts must play an "updating" function to ensure that legal rules keep pace with the evolving sense of justice and fair play within the political community).

Senate—in favor of embracing a "living tree" approach that accommodates "growth and expansion within its natural limits."[216]

The truth is also that ostensible textualist judges have, at best, a mixed record of actually hewing to the text and original understanding—at least when they perceive the stakes to be sufficiently important. Justice Hugo Black, for example, wrote the majority opinion in *Younger v. Harris*,[217] a decision that celebrates "Our Federalism."[218] This decision prohibits a federal court from enjoining ongoing state criminal law proceedings—even if the state law proceedings rest on a clearly unconstitutional state law. Black explains that the basis for this rule is a general principle of respect for the co-sovereignty of the states: "This, perhaps for lack of a better and clearer way to describe it, is referred to by many as 'Our Federalism,' and one familiar with the profound debates that ushered our Federal Constitution into existence is bound to respect those who remain loyal to the ideals and dreams of 'Our Federalism.'"[219]

There's just one problem with Black's *Younger* opinion—it does not cite any provision of the U.S. Constitution for this rule, and it has the effect of delaying, if not denying outright, the ability of criminal defendants in ongoing state court proceedings to access an effective forum in which to vindicate their federal constitutional rights. The *Younger* abstention doctrine lacks any direct textual basis in the Constitution; it is a common law rule fashioned from whole cloth. Under Justice Black's strict textualism, it is a self-evidently illegitimate decision.

Other examples exist involving more recent members of the Supreme Court. For example, in *Seminole Tribe v. Florida*,[220] the Supreme Court held that Congress could not abrogate state sovereign immunity under the Eleventh Amendment using its powers under the Indian Commerce Clause.[221] Chief Justice Rehnquist explained that "our decisions since *Hans* ha[ve] been equally clear that the Eleventh Amendment reflects 'the fundamental principle

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216 Edwards v. Attorney General of Canada, [1930] AC 124, 136 (PC) (appeal taken from Canada); *see* BERNARD SCHWARTZ, THE SUPREME COURT: CONSTITUTIONAL REVOLUTION IN RETROSPECT 19 (1957) ("The Constitution must be capable of adaptation to needs that were wholly unforeseen by the Founding Fathers; else, it is less a document intended to endure through the ages than a governmental suicide-pact.").

217 401 U.S. 37 (1971)

218 *Id.* at 43-45.

219 *Id.* at 44.

220 517 U.S. 44 (1996).

221 *Id.* at 47, 63-65; *see* U.S. CONST. art. I, § 8, cl. 3 (providing that Congress has the power "[t]o regulate Commerce with foreign Nations, and among the several States, and *with the Indian Tribes*") (emphasis added).

of sovereign immunity [that] limits the grant of judicial authority in Art. III.'"[222] Justice Scalia joined the five-justice majority in *Seminole Tribe* and Chief Justice Rehnquist cites and quotes Justice Scalia's dissent in *Union Gas*,[223] a prior decision that *Seminole Tribe* squarely overrules.[224] *Seminole Tribe*, in turn, constitutes a significant expansion of *Hans v. Louisana*, an 1890 case that significantly departs from the clear text of the Eleventh Amendment.[225]

Hans radically expands the scope of the Eleventh Amendment by extending it to suits brought against a state government by a citizen of that state—the plain text of the amendment, however, only prohibits suits against state governments brought by citizens of *other* states or foreign countries.[226] The Eleventh Amendment constitutes a direct response to *Chisholm v. Georgia*, a case that permitted a state to be sued without its consent by the citizens of another state (namely, a citizen of South Carolina).[227] This result followed quite logically, and naturally, from the plain language of Article III, which expressly extended the jurisdiction of the federal courts to reach such actions.[228] The Eleventh Amendment removed specific language in Article III authorizing suits by non-citizens—it was (and remains) entirely silent regarding the ability of a citizen to sue her own state in order to vindicate a federal right. *Hans*, applying a spirit of the laws approach, greatly expanded the scope of the Eleventh Amendment—and *Seminole Tribe* greatly amplified and expanded the scope of *Hans.*

Staking out a normative position on the appropriate scope of state sovereign immunity lies beyond the scope of my present project. My point is this: Decisions like *Younger* and *Seminole Tribe* clearly show that conservative judges are no more faithful textualists than progressive jurists.

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222 *Seminole Tribe*, 517 U.S. at 64 (citing and quoting Pennhurst State Sch. & Hosp. v. Halderman, 465 U. S. 89, 97-98 (1984)).

223 Pennsylvania v. Union Gas Co., 491 U.S. 1, 38 (1989) (Scalia, J., dissenting) (opining that "'the entire judicial power granted by the Constitution does not embrace authority to entertain a suit brought by private parties against a State without consent given'") (citing *Ex Parte New York*, 256 U.S. 490, 497 (1921)).

224 *Seminole Tribe*, 517 U.S. at 65-73.

225 134 U.S. 1, 13-15 (1890).

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

227 Chisholm v. Georgia, 2 U.S. (2 Dall.) 419, 461 (1793) (Wilson, J.) (rejecting "the haughty notions of state independence, state sovereignty and state supremacy" because vindicating Georgia's claims would permit "the state [to] assum[e] a supercilious pre-eminence above the people who have formed it").

228 U.S. CONST. art. III, § 2, cl. 1 (providing that "[t]he judicial Power shall extend . . . to Controversies . . . between a State and Citizens of another State. . . and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects").

What is more, other salient examples of common law judging in the context of constitutional adjudication exist—for example, the regulatory takings doctrine under the Takings Clause (which Justice Scalia avidly and aggressively supported).[229]

Textualist judges, like Justices Scalia and Black, will cry out "bloody murder!" when progressive judges openly deploy common law reasoning and methodology to promote the expansion of individual rights, yet they clearly will embrace this modus operandi, and with real brio, when it suits their jurisprudential agenda.[230] In consequence, their attacks on constitutional common law to secure and protect fundamental rights ring hollow—as it turns out, it's turtles all the way down.

VII. CONCLUSION

Rather than being defined within the four corners of the First Amendment's text, the constitutional protection of expressive freedom in the contemporary United States, as defined and protected by the federal and state courts, involves a broad general presumption that information markets should be free and open and that government efforts to control or even actively regulate speech markets are inherently distortionary and, hence, constitutionally illegitimate.[231] Rather than a doctrine that hews carefully to

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[229] The Supreme Court created the regulatory takings doctrine during the *Lochner* era; its first appearance occurs in *Pennsylvania Coal v. Mahon*, 260 U.S. 393 (1922). In an opinion by Justice Holmes, the Supreme Court voids a Pennsylvania law that conditions the exploitation of mineral rights on the consent of the owner of surface rights, where mining operations could cause damage to surface structures. *See id.* at 415-16. Holmes writes that "The general rule at least is, that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking. It may be doubted how far exceptional cases, like the blowing up of a house to stop a conflagration, go—and if they go beyond the general rule, whether they do not stand as much upon tradition as upon principle." *Id.* This rule was cut from whole constitutional cloth; from 1791 to 1922, a Takings Clause claim required government expropriation and possession of a property interest. Even so, Justice Scalia was a strong proponent of the regulatory takings doctrine. *See* Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1027-31 (1992) (holding that a land use regulation that renders land valueless constitutes a "per se" regulatory taking).

[230] Bolling v. Sharpe, 347 U.S. 497 (1954) provides another example of Justice Black's selective approach to textualism. The Supreme Court, with Black's vote, "reverse incorporated" the Equal Protection Clause against the federal government. *See id.* at 500. The Fourteenth Amendment contains both a Due Process Clause and an Equal Protection Clause; a serious textualist would be very hard pressed to explain this redundancy if the concept of due process necessarily implies a right to equal protection of the law.

[231] *See* Jane Bambauer, *Is Data Speech?*, 66 STAN. L. REV. 57, 118 (2014) ("The First Amendment is, in many ways, an experiment that hinders the government from deciding what speech, and what thoughts, are good, even if most levelheaded people could agree on the matter. After all, a benevolent dictator is still a dictator.").

constitutional text and the original understanding of it, First Amendment jurisprudence today consists almost entirely of judge-made constitutional common law, mostly dating from the 1960s to the present, that establishes and enforces a rather general constitutional rule against any and all forms of government censorship (and reaches even some private censorship as well[232]).

The First Amendment that many judges, legal academics, lawyers, and ordinary citizens claim to know and cherish has little, if any, relationship to the actual text that the first Congress sent to the states for their consideration and which became part of the Constitution when Virginia ratified the First Amendment on December 15, 1791. This jurisprudential reality cries out for a great deal more notice and commentary than it has received to date. After all, with a Supreme Court bench now packed with purported textualist, originalist judges, it is exceedingly odd that the actual words of the First Amendment would matter so little in the pages of *U.S. Reports*.

At a broader level of analysis, the First Amendment's example should give a thoughtful person serious pause about the ability of text to define and constrain particular human rights. Rather than grounding the protection of expressive freedom in the text of the First Amendment and the practices of the generation that wrote and adopted it, the federal courts have essentially sought to ensure that citizens have the ability to participate freely in the process of democratic deliberation—a process integral to the use of elections as an effective means of conferring legitimacy on the institutions of government.[233]

To be sure, this common law approach to safeguarding expressive freedom has much to recommend it. Most judges and legal scholars would

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[232] *See* Marsh v. Alabama, 326 U.S. 501, 506 (1946) (holding that the First Amendment applies to a company-owned town because the operation of a municipal corporation constitutes an exclusive government function); *see also* Amalgamated Food Emp. Union Loc. 590 v. Logan Valley Plaza, Inc., 391 U.S. 308, 325 (1968) (holding that private ownership of a local shopping center does not preclude the imposition of First Amendment duties on the property's owners because the mall was the modern-day functional equivalent of a traditional town square and therefore an essential locus for democratic deliberation). Although the Supreme Court ultimately overruled the holding of *Logan Valley Plaza*, *see* Hudgens v. NLRB, 424 U.S. 507, 518 (1976), it has held that Congress, state legislatures, or the state courts can impose free speech duties on private property owners. *See* PruneYard Shopping Ctr. v. Robins, 447 U.S. 74, 85-88 (1980). In fact, the Supreme Court implicitly reaffirmed *PruneYard* in 2021. *See* Cedar Point Nursery v. Hassid, 141 S. Ct. 2063, 2076-77 (2021) (distinguishing the shopping center at issue in *PruneYard* from an agricultural work site and explaining that "the PruneYard was open to the public, welcoming some 25,000 patrons a day" unlike the nursery which was "closed to the public").

[233] *See* Citizens United v. Fed. Election Comm'n, 558 U.S. 310, 339 (2010) (opining that "[s]peech is an essential mechanism of democracy, for it is the means to hold officials accountable to the people" and positing that "[t]he right of citizens to inquire, to hear, to speak, and to use information to reach consensus is a precondition to enlightened self-government and a necessary means to protect it").

agree that it is very difficult to imagine a system of free and fair elections that does not provide some measure of protection for the process of public debate.[234] However, the First Amendment itself simply does not reference the process of democratic deliberation—even if the nexus between speech and democracy is a reasonably self-evident one.[235] The democratic self-government theory of the freedom of speech constitutes a common law "update" of the amendment's text.[236]

On the other hand, however, the fact that very strong normative reasons support the Supreme Court's purposive and dynamic interpretative approach should not—at least for a textualist and originalist judge—serve as a legitimate basis for simply disregarding the text and original understanding of the First Amendment's expressive freedom provisions. That such judges seem to have few, if any, compunctions about adopting a purposive and dynamic approach to the First Amendment should also raise serious doubts about the ability of text to constrain even jurists who claim particularly deep and abiding fealty to constitutional text as a central bulwark against unduly broad judicial discretion. Simply put, if judges who proclaim that they will enforce the text as written, nothing more and nothing less, do not actually do this, instead embracing a common law "updating" function,[237] is there any reason to believe that *any* judges will feel honor bound to hew closely and exclusively to constitutional text when deciding constitutional cases? And, if they could actually chart such a course, how long would they actually hold it before the pressure for constitutional revision, via either judicial action or amendment, became inexorable?[238]

At the end of the day, some constitutional rights cannot be effectively circumscribed by textual limitations. Like the Greek god Proteus, these rights can and will change their form and shape over time. The question for those drafting constitutional language then becomes identifying which rights can be more successfully codified—and which rights, because of their deeply-seated socio-legal salience, are relatively impervious to efforts to limit or constrain

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234 *See e.g.*, MEIKLEJOHN, *supra* note 1, at 25-27, 89-91 (arguing that freedom of speech is an essential and non-negotiable precondition for any society committed to a meaningful project of democratic self-government).

235 *See* BHAGWAT, *supra* note 2, at 9, 81-98, 160-63 (noting instances where democratic deliberation and democracy are interconnected and emphasizing the central importance of democratic deliberation to self-government under the U.S. Constitution).

236 *See supra* text and accompanying notes 93 to 99.

237 *See* CALABRESI, *supra* note 10, at 163-71.

238 *See* ACKERMAN, *supra* note 12, at 4-17, 87-88, 248, 408-20; *see also* BRUCE ACKERMAN, WE THE PEOPLE: FOUNDATIONS 266-67 (1991).

them through particular verbal formulae. Make no mistake, however: constitutional law is a species of common law, meaning that judges, not legislators, are its principal guardians.[239] As Justice Holmes observed in his iconic book, *The Common Law*, "[t]he felt necessities of the time, the prevalent moral and political theories, intuitions of public policy, avowed or unconscious, even the prejudices which judges share with their fellow-men, have had a good deal more to do than the syllogism in determining the rules by which men should be governed."[240]

In conclusion, efforts to cabin expressive freedom through text—through inclusion but also through exclusion—seem doomed to failure. The scope and meaning of expressive freedom within a particular legal system will, like Proteus, change shape and form, evolving over time, as the felt necessities of democratic self-government require. Federal judges will shape and reshape the doctrines associated with the protection of expressive freedom as necessary to enable them to craft judicial opinions that they believe will be credible—reasonably persuasive—to the general political community. This task is, and probably must be, an exercise in common law judging. The First Amendment is protean—and our understanding of how constitutions work would be significantly improved if we invested more time and energy in trying to understand precisely why this is so.

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[239] *See* CALABRESI, *supra* note 10, at 3-5.

[240] HOLMES, *supra* note 26, at 1.