

WHY THE DEMANDS OF FORMALISM WILL PREVENT NEW ORIGINALISM FROM
FURTHERING CONSERVATIVE POLITICAL GOALS

DANIEL HORNAL*

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* J.D., Georgetown University. Special thanks to Lee Otis, Alida Kass, and Gary Peller.
the crit, A Critical Legal Studies Journal

INTRODUCTION

Proponents of New Originalism propose that their modifications solve the indeterminacy and predictability problems inherent in early conceptions of originalism.¹ This article argues that excluding extrinsic evidence and relying only on the formal implications of the text merely switches one indeterminacy and predictability problem for another. Rules inherently carry implications unknown to rule writers. In the case of open-textured rules such as those in the Constitution, a broad reading can occupy whole fields of law, whereas a narrow reading can have almost no real-world effects. Because they must ignore extrinsic evidence, new originalists are almost unbound in their choice of interpretation. Thus, a new originalist critique cannot make meaningful claims about how a case should have come out. This casts serious doubt on the legitimacy of new originalism as a conservative theory of interpretation because rule writers now have no bulwark to protect against unthinkable progressive interpretations of their rules. If rule writers cannot even predict the effects of their rules under new originalism, let alone control those effects, new originalists cannot credibly claim the predictability or legitimacy-enhancing advantages claimed by proponents of early conceptions of originalism.

As used in this article, “originalism” is shorthand for “new originalism” or “original semantic meaning originalism” as used by Professor Randy Barnett² and Justice Antonin Scalia,³ and concisely described by Lawrence Solum.⁴ Solum differentiates between so-called “speakers meaning” and “sentence meaning.” He effectively demonstrates the limitations of speakers meaning for legal interpretation: Speakers meaning requires reciprocity, that is, that the speaker knows that the listener understands the speaker’s intentions. This is hard to demonstrate even in the case of interpretation of contemporary legislation, and is impossible in cases like the Constitution, where the framers met and discussed their intentions and interpretations in secret. Therefore, he argues that the better choice is to interpret the “clause meaning” or “conventional semantic meaning” of a rule.⁵ Throughout this article, I use the term “textiginalism” to refer to this style of analysis, as my critique applies equally to both new originalist and textualist analysis.

In this article, I argue that moving to an original conventional semantic meaning method of interpretation severely limits the critical and descriptive power of originalism. As the textiginalist refrain goes: “The rule of law is the law of rules.”⁶ Judges apply rules to facts. If judges must be blind to the intent of the rule-writers, the judge must then apply the full meaning of the rule regardless of the intent of the rule. However, the very nature of the judge’s job is to apply a rule to new facts. It could well be that the judge, in fairly applying the rule as written, applies the rule in a way not intended and never envisioned by the rulewriter, or the public. However, even though this

¹ See Lawrence Solum, *Semantic and Normative Originalism: Comments on Brian Leiter’s “Justifying Originalism.”* LEGAL THEORY BLOG (Oct. 30, 2007, 12:45 PM), <http://lsolum.typepad.com/legaltheory/2007/10/semantic-and-no.html> (“As developed by Brest, Dworkin and others the litany of problems included: (1) the nonexistence or radical ambiguity of intentions of a collective or group (i.e., the framers or ratifiers); (2) the existence of multiple intentional states (expectations, purposes, hopes, fears); [and] (3) the nonsatisfaction of the reflexivity conditions required for intentions to convey meaning (i.e. judges, lawyers, and citizens at the time of adoption lacked access to information about the intentions of the framers and ratifiers and the framers and ratifiers knew about the lack of information.”).

² See generally RANDY BARNETT, *RESTORING THE LOST CONSTITUTION* (2003).

³ See *District of Columbia v. Heller*, 554 U.S. 570, 605 (2008) (“[T]he examination of a variety of legal and other sources to determine the public understanding of a legal text in the period after its enactment or ratification . . . is a critical tool of constitutional interpretation.”).

⁴ See Solum, *supra* note 1.

⁵ *Id.*

⁶ See Antonin Scalia, *The Rule of Law as the Law of Rules*, 56 U. CHI. L. REV. 1175 (1989).

application is unforeseen, and perhaps even contrary to the desires of the rulewriter and the public, it may still be logically correct, and thus necessary under textiginalist analysis.

Rules inherently apply ideas through abstraction, and as applied are both over- and under-inclusive.⁷ The textiginalist critique of any individual application of rules to facts is that either the rule is not being applied in a way that would have been understood by the rulewriter or the public, or that the text is not being taken according to its original meaning. But these critiques are, in every interesting case, in tension with each other. The semantic meaning of “equal protection of the laws” is the same today as it was at the time of the ratification of the Fourteenth Amendment. It is likely that no one at the time predicted that homosexuals would use the text of the amendment to invalidate sodomy laws. However, a law targeted at, and enforced against, the private sexual behavior of one group and no other group is indeed a law that protects one group and not another.⁸ The logical result of the equal protection clause was to invalidate sodomy laws.⁹ That this understanding was outside the imagination of the rulewriters and the listening public has no bearing on the logic, meaning, or interpretation of the rule, if one takes Barnett’s and Scalia’s style of textualism or originalism seriously.

A test of the effectiveness of a mode of interpretation is if one can make predictions based upon it. Textiginalists have insisted that their “law of rules” increases predictability,¹⁰ but if neither the public nor the rulewriters can predict the effects of a law, it could be that a pragmatic “reasonability” standard taking into account policy, intent, and justice considerations is, in fact, more predictable than textiginalism.

In this article, I shall briefly review the current state of textiginalism. I will then show how a textiginalist critique cannot make any meaningful claims about how a constitutional case should come out because the original semantic meaning inherently carries with it unpredictable logical implications. I will finally show how other aspects of textiginalism conspire to compound the problem and render the doctrine of very limited use in modern debates, and of limited utility to the conservative social movement.

⁷ This is to say that they are most likely over and under-inclusive from an instrumentalist perspective. Assuming that rules have a function other than arbitrary imposition of a burden, it is likely that at least one rule violator in some case was harmless to the interest the rule protects, and at least one person innocent in the eyes of that rule harmed the interest protected by the rule. See H.L.A. Hart, *Positivism and the Separation of Law and Morals* *Law*, 71 HARV. L. REV. 593, 607 (1958) (introducing the now-famous “no vehicles in the park” hypothetical).

⁸ See *Lawrence v. Texas*, 539 U.S. 558, 579 (2003) (O’Connor, J., concurring). Justice Scalia urges us to define sodomy laws as prohibiting homosexual conduct and privileging heterosexual conduct. Because members of each sex have the same privileges (that is, to have sex with the opposite sex) there is no equal protection violation. *Id.* at 599-600 (Scalia, J., dissenting). Scalia’s objection to O’Connor’s opinion points to a larger problem in jurisprudence, outside the scope of this paper: it is impossible to codify a method for framing the facts of a case. If one defines the parties broadly enough and the interests narrowly enough, nothing violates equal protection. Define the parties narrowly enough and the interests broadly enough, and everything violates equal protection. The same problem applies when analyzing *Lawrence* under the majority’s due process analysis: if the Court frames the facts of the case as a state intruding on the fundamental right of private sexual conduct, then the Fourteenth Amendment appears to apply. If the Court frames the fundamental right as homosexual conduct, then it does not. Compare Kennedy, J., (majority opinion) *Id.* at 578 (“The State cannot demean their existence or control their destiny by making their private sexual conduct a crime”), with Scalia, J., (dissenting) *Id.* at 586 (“[N]owhere does the Court’s opinion declare that homosexual sodomy is a ‘fundamental right’ under the Due Process Clause.”).

⁹ *Id.*

¹⁰ Scalia *supra* note 6, at 1179.

I. DEFINITIONS AND SCOPE

It is the law that governs, not the intent of the lawgiver.
-Justice Scalia¹¹

Due to an intense and spirited debate, the meaning of the term “originalism” has evolved significantly from its meaning when Robert Bork and Edwin Meese first catapulted the term into the public spotlight in the 1980s.¹² The old meaning of originalism, so-called “original intention originalism,” is both unworkable and contrary to the original intent of the framers. It is unworkable because understanding the “intention” of a group of diverse legislators would be impossible, even if one had access to the private thoughts of each individual in the group.¹³ The task becomes more outlandish when one then tries to carry the rule-writer’s intent forward to unimagined situations in a then-unforeseeable future.¹⁴ H. Jefferson Powell further argued that original intention originalism is contrary to the intent of the framers at the time of ratification.¹⁵ While late 18th and early 19th century commentators used the magic words “original intent”, the words had a distinctly different meaning than that assigned by proponents of original intention originalism.¹⁶

This original ‘original intent’ was determined not by historical inquiry into the expectations of the individuals involved in framing and ratifying the Constitution, but by consideration of what rights and powers sovereign polities could delegate to a common agent without destroying their own essential autonomy. Thus, the original intentionalism was in fact a form of structural interpretation.¹⁷

Thus, even assuming each of the canons of original intention originalism were correct and workable, it would still not be proper to use it because original intent originalism lies outside the original intent of the founders, as best we can tell. Further, common law traditions of statutory interpretation varied widely depending on if the judge was interpreting a will, a statute or a contract.¹⁸ The Constitution was a novel form of document, and this made it particularly unclear what method to use to interpret the written constitution.¹⁹

Due to these objections, the most defensible, and the now predominant version of originalism is “original public meaning” originalism. Original public meaning originalism (more accurately called “original semantic meaning originalism”) requires the judge to interpret the Constitution according to the original meaning of the words of the text, as a sophisticated reader at the time would have interpreted them. This is the brand of originalism I shall deal with in this paper.²⁰

¹¹ ANTONIN SCALIA, *A MATTER OF INTERPRETATION* 17 (Amy Gutman ed., 1997).

¹² See RANDY BARNETT, *RESTORING THE LOST CONSTITUTION*, 89–91 (2004). This paragraph is drawn directly from his work, and I take no credit for the analysis herein.

¹³ See Paul Brest, *The Misconceived Quest for Original Understanding*, 60 BOSTON U. L. REV. 204, 215, 217 (1980).

¹⁴ *Id.* at 220, 221.

¹⁵ H. Jefferson Powell, *The Original Understanding of Original Intent*, 98 HARV. L. REV. 885, 887–88 (1985).

¹⁶ *Id.*

¹⁷ *Id.* at 888. “Structural interpretation” in this context refers to interpretation based on the interactions and power relationships of actors within a governmental structure.

¹⁸ *Id.* at 899.

¹⁹ *Id.* at 902.

²⁰ In his work *Abortion and Original Meaning*, 24 CONST. COMMENTARY 291, 292–93 (2007), Jack Balkin argues that originalism and the living constitution method are not fundamentally opposed, because the text of the Constitution can be combined with principles underlying the creation of the Constitution, and that those two understandings can be taken together to form constitutional doctrine not inconstant with the text but still adapted to modern times. His approach is

It is inescapable that originalism in its current form almost entirely collapses into textualism.²¹ I do not claim there is no material difference between the two doctrines, however, the critique in this paper deals equally with both for the most part, so I refer to the two doctrines collectively as “textiginalism.” Because the thrust of this paper applies similarly to statutes and the Constitution, I shall refer to both generally as “rules,” and refer to legislatures, executives and the founding fathers collectively as “rule-writers.”

Finally, I use the term “formalism” throughout this paper. It is never herein meant in a pejorative sense; rather, it takes the meaning suggested by Justice Scalia in his book *A Matter of Interpretation*.²² Formalism is, quite simply, taking rules and logic seriously. It is eschewing canons of construction that tip the scales away from including everything in the rule that the text of the rule, being read objectively, includes.²³

II. THE NECESSARY COMBINATION OF TEXTIGINALISM AND FORMALISM, AND FORMALISM’S LOGICAL ENDS.

The text is the law, and it is the text that must be observed.
-Justice Scalia, *A Matter of Interpretation*

When original intent originalism surrendered to original semantic meaning originalism, an important part of that change was the inevitable combination of originalism and formalism. If it is no longer possible to consider sources such as the records of the constitutional convention, the ratifying conventions, or contemporaneous commentary (except as evidence as to the definitions of the words and phrases in the rule), then it becomes difficult to answer questions such as “what problem was this legislation intended to solve?” Because textiginalists cannot credibly inquire into these questions (lacking the requisite information required to make a judgment), they must instead resort to formalism. The rules are looked at in a vacuum, and applied much as Justice Roberts suggested with his famous umpire analogy.²⁴ While formalism may simply be the preferred choice of judges in the modern conservative movement, it is a necessary part of textiginalism. Blind to the factors that might otherwise lead a non-formalist to a different result, an originalist must follow the logic of the text wherever it leads, regardless of result.

Formalism and textiginalism, then, require carrying the rule as written to its logical conclusion. This is not to say that a rule should be extended to reach an assumed-desirable result, rather, this

interesting, but removes most of the determinism that hard-line originalists such as Barnett claim as a benefit of originalism.

²¹ I take Justice Scalia’s approach in *Green v. Bock Laundry Machine Co.*, 490 U.S. 504, 528 (1989) to be emblematic of the textualist approach. He wrote:

The meaning of terms on the statute books ought to be determined, not on the basis of which meaning can be shown to have been understood by a larger handful of the Members of Congress; but rather on the basis of which meaning is (1) most in accord with context and ordinary usage, and thus most likely to have been understood by the whole Congress which voted on the words of the statute (not to mention the citizens subject to it), and (2) most compatible with the surrounding body of law into which the provision must be integrated—a compatibility which, by a benign fiction, we assume Congress always has in mind. I would not permit any of the historical and legislative material discussed by the Court, or all of it combined, to lead me to a result different from the one that these factors suggest.

²² SCALIA, *supra* note 11, at 25.

²³ See, e.g., *id.*

²⁴ *Confirmation Hearing on the Nomination of John G. Roberts, Jr. To Be Chief Justice of the United States: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 55 (2005) (Opening Statement of John G. Roberts, Jr.) (“Judges and Justices are servants of the law, not the other way around. Judges are like umpires.”).

simply means that a rule, once defined through textual analysis, must be fully applied within the understanding of that definition.

This is nothing new to a judge. Judging is, by its very nature, the application of already-existing rules to situations, including ones not anticipated by the rulewriter, regardless of whether that rulewriter is a legislature or was a common-law judge of yore. Law schools train their students to make logical conclusions by combining rules and then applying specific facts to the newly-synthesized rules. However, following a rule to its logical end may lead to a result unanticipated by the rulewriter. In fact, the result may even be outside the original rulewriter's imagination.²⁵ As I will demonstrate, the implications of following rules to their conclusion is that rules become unpredictable and it becomes nearly impossible to discredit any interpretation of rules as anti-textiginalist.

Example I: The Commerce Clause and Gonzales v. Raich

When the founders wrote the Interstate Commerce Clause,²⁶ the idea of a fully-integrated national economy was preposterous. *The Wealth of Nations* had just been published in 1776. That book described the mercantilist and feudal economic systems still prevalent in Europe, and advocated moves toward what is now considered capitalism.²⁷ While trade over long distances was common, trade did not have the almost all-encompassing role as does interstate and international trade in the lives of modern Americans. Still, trade was critically important to the country at its founding, and when states took actions to restrain competition and gain advantages over producers and merchants in other states it sometimes caused economic turmoil.

To prevent this turmoil, the Constitution gave the federal government the ability to regulate interstate commerce, and the ability to pass all laws necessary and proper to accomplish this power. It appears that the founders intended and the public understood the purpose and meaning of the Interstate Commerce Clause to be within the framework described above.²⁸

An "original purpose" (by this I mean "original public purpose," to thus foreclose any debate on the private intentions of the founders) reading of the Interstate Commerce Clause would foreclose laws such as the Federal Controlled Substance Act²⁹ (CSA) as applied in *Gonzales v. Raich*.³⁰ The respondents in *Gonzales* were two California residents who had a valid license from the State of California to grow cannabis, which they smoked to treat their medical conditions. They grew it in their own home, and the cannabis was never sold, traded or given away. After federal agents raided their home and destroyed their six cannabis plants, they sought injunctive and declarative relief, charging that the CSA as applied to their conduct violated, *inter alia*, the Interstate Commerce Clause.

Under an original intent analysis, this case is straightforward. The founders set up a federal government of limited powers. They did not intend for the federal government's power to reach into the private homes of citizens, against the wishes of their state. It is unlikely, then, that the founders

²⁵ See Frank H. Easterbrook, *Abstraction and Authority*, 59 U. CHI. L. REV. 349, 359 (1992) ("Rules may have surprising implications when applied to novel facts; often the implications of a rule elude its drafters. Thus Bork is consistent in concluding that the Fourteenth Amendment forbids segregation even though its authors might have accepted separate-but-equal, and that the First Amendment curtails libel actions even though defamation actions were common in 1791.").

²⁶ U.S. CONST. art I, § 8, cl. 3.

²⁷ See ADAM SMITH, AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS (Edwin Cannan, ed., 5th ed. 1904).

²⁸ See James Madison, *Vices of the Political System in the United States*, in 1 THE PAPERS OF JAMES MADISON ch. 5 document 16 (William T. Hutchinson et al. eds., 1962–77).

²⁹ 21 U.S.C. §§ 801–803 (2011).

³⁰ *Gonzales v. Raich*, 545 U.S. 1 (2005).

or the members of state ratifying conventions intended for the commerce clause to apply outside of direct regulation of trade or the channels of trade. This is consistent with the definition of “commerce” at the time of the founding.³¹

But what of a textiginalist approach? Then things are not so clear. It seems at first very difficult to argue that preventing private cultivation and use of marijuana is necessary or proper for the regulation of commerce among the several states. Commerce was not commonly understood to include things not sold, nor intended to be sold, nor legal to sell.³² And “interstate” was understood to include only goods that traveled through the organs of interstate commerce.³³ Yet, in *Gonzales*, Justice Scalia argued in his concurrence that the Commerce and Necessary and Proper clauses, taken together, made permissible a law that authorized federal agents to arrest and imprison cancer patients for growing and using medication that they themselves grew in their own home. This would have been out of the understanding and even the comprehension of those who ratified the Constitution.

It would be easy to argue that Justice Scalia’s concurrence was simply wrong, or that he had temporally abandoned his textiginalist principles to reach his preferred policy result. However, Scalia’s result is sensible under a textiginalist analysis.

Scalia’s result makes sense because although his reading of the Interstate Commerce Clause would be completely unrecognizable to the founders, his reading also logically follows from the text of the relevant constitutional phrases as understood at the founding. He writes “the commerce power permits Congress . . . to facilitate interstate commerce by eliminating potential obstructions, and to restrict it by eliminating potential stimulants.”³⁴ This is a reasonable interpretation of the words “regulate commerce.” Although at the time of the founding, the Commerce Clause was understood as a tool to prevent states from restricting commerce, the plain meaning of the term “regulate,” even at the time of the founding, included “restriction” as well as “facilitation.”³⁵

Scalia, along with the majority in *Gonzales*, credited the government’s argument that it is within the federal government’s power granted by the Necessary and Proper Clause³⁶ to absolutely ban all cultivation and possession of marijuana as a means to restrict the interstate trade of marijuana.³⁷ Scalia argued that Congress can interfere in matters not a part of interstate commerce if that interference is “an essential part of a larger regulation of economic activity, in which the regulatory

³¹ *Id.* at 58 (Thomas, J., dissenting) (“Throughout founding-era dictionaries, Madison’s notes from the Constitutional Convention, The Federalist Papers, and the ratification debates, the term “commerce” is consistently used to mean trade or exchange—not all economic or gainful activity that has some attenuated connection to trade or exchange.”); See generally Randy Barnett, *The Original Meaning of the Commerce Clause*, 68 U. CHI. L. REV. 101 (2001).

³² See Randy Barnett, *The Original Meaning of the Commerce Clause*, 68 U. CHI. L. REV. 101, 113–15 (2001). *But see* *Caminetti v. United States*, 242 U.S. 470 (1917) (Holding that Mann Act applied to transportation of women across state lines for non-economic, but immoral, purposes). Even in *Caminetti*, however, the word interstate is given its full meaning, and the holding rested on the belief that the federal government had the ability to regulate what comes across the interstate transport system, which was, in turn, used for commerce.

³³ *Id.* at 132–36.

³⁴ *Gonzales*, 545 U.S. at 35 (Scalia, J., concurring).

³⁵ NOAH WEBSTER, WEBSTER’S REVISED UNABRIDGED DICTIONARY (1828). I chose this dictionary rather than a 1787 dictionary because it was the first comprehensive modern American dictionary, and thus, what it loses due to being published 41 years too late it gains for being closer in geographic proximity to the founders and for reflecting the understanding of Americans, as opposed to the British. Webster was a business associate of Alexander Hamilton, and worked as an editor on a Federalist newspaper in New York in 1783. Webster began writing his dictionary in 1807, so the actual date of any particular definition may be much closer to the founding. I used this dictionary consistently throughout this paper.

³⁶ U.S. CONST. art. I, § 8, cl 18.

³⁷ A detailed analysis of this application of the Necessary and Proper Clause as applied to interstate commerce regulation is beyond the scope of this paper.

scheme could be undercut unless the intrastate activity were regulated.”³⁸ Because the federal government prohibits trade and possession of marijuana nationwide, allowing it to be legal in some cases could make enforcement of the ban more difficult. His interpretation of the necessary and proper clause is consistent with originalist scholarship³⁹ and founding-era precedent.⁴⁰

Therefore, Justice Scalia’s understanding of the meaning of the Constitution as applied in this case is fully within the logical meaning of the text as written and understood in 1787, and is a permissible originalist interpretation.

Justice Clarence Thomas takes a different view of the Commerce Clause:

As I explained at length in *United States v. Lopez*, the Commerce Clause empowers Congress to regulate the buying and selling of goods and services trafficked across state lines. The Clause’s text, structure, and history all indicate that, at the time of the founding, the term ‘commerce’ consisted of selling, buying, and bartering, as well as transporting for these purposes. Commerce, or trade, stood in contrast to productive activities like manufacturing and agriculture. Throughout founding-era dictionaries, Madison’s notes from the Constitutional Convention, The Federalist Papers, and the ratification debates, the term “commerce” is consistently used to mean trade or exchange—not all economic or gainful activity that has some attenuated connection to trade or exchange.⁴¹

Justice Thomas does not believe that the text of the Commerce Clause implies the power to regulate things that are not, looked at in a vacuum, actual commercial activities. *Expressio unius est exclusio alterius*.⁴² He also implicitly used the canon *expressio unius est exclusio alterius* (and the Tenth Amendment⁴³) when he wrote:

[T]he Framers understood what the majority does not appear to fully appreciate: There is a danger to concentrating too much, as well as too little, power in the Federal Government. This Court has carefully avoided stripping Congress of its ability to regulate interstate commerce, but it has casually allowed the Federal Government to strip States of their ability to regulate intrastate commerce—not to mention a host of

³⁸ *Gonzales*, 545 U.S. at 36 (Scalia, J., concurring) quoting *United States v. Lopez*, 514 U.S. 549, 561 (1995).

³⁹ See Randy Barnett, *The Original Meaning of the Necessary and Proper Clause*, 6 U. PENN. J. CONST. L. 183, 208 (2003) (“This evidence suggests that, while it is a mistake to equate “necessary” with “convenient,” neither was it as stringent a standard as connoted by the terms “indispensably” or “absolutely” necessary. Instead, the original meaning of necessity creates the requirement of a degree of means-end fit somewhere between these two extremes.”). This is not to argue that Barnett agrees with Scalia in this case; Barnett actually argued the case for Raich in front of the Court. However, Scalia’s interpretation of this part of the Necessary and Proper clause is not too distant from Barnett’s as expressed in his article.

⁴⁰ *McCulloch v. Maryland*, 17 U.S. 316, 413–14 (1819) (“Is it true, that this is the sense in which the word ‘necessary’ is always used? Does it always import an absolute physical necessity, so strong, that one thing to which another may be termed necessary, cannot exist without that other? We think it does not. If reference be had to its use, in the common affairs of the world, or in approved authors, we find that it frequently imports no more than that one thing is convenient, or useful, or essential to another. To employ the means necessary to an end, is generally understood as employing any means calculated to produce the end.”).

⁴¹ *Gonzales*, 545 U.S. at 58 (Thomas, J., dissenting) (citations omitted).

⁴² Literally, “The express mention of one thing excludes all others.”

⁴³ U.S. CONST. amend. X (“The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.”).

local activities, like mere drug possession, that are not commercial.⁴⁴

As to the Necessary and Proper Clause, Justice Thomas takes a harder line than Justice Scalia. He notes scholarship contemporary with the founding that stated that the Necessary and Proper Clause required a direct means-ends fit (as opposed to a “remote” means-end fit) between legislation and an enumerated power.⁴⁵ While under a textiginalist analysis, the opinions of founding-era commentators do not control, they provide evidence of the meaning of the phrases. Thomas uses a different passage of the same precedent cited by Scalia, which argues for a more conservative reading of the Necessary and Proper Clause.⁴⁶ Requiring a direct means-ends fit to apply the Necessary and Proper Clause to an enumerated power, as opposed to the more liberal “consistent with the Constitution” standard applied by Justice Scalia, Justice Thomas holds that the CSA as applied to the respondents is incompatible with the Constitution.

Justice Thomas takes a true textiginalist approach: he looks to the meanings of the text as understood in 1787, and the formal implications of that text. Justice Thomas’ result is thus perfectly permissible under textiginalism because it is fully within the logical meaning of the text and its logical implications as understood in 1787.⁴⁷ Justice Scalia takes a true textiginalist approach: he looks to the meaning of the text as understood in 1787, and the formal implications of that text. Justice Scalia’s contrary interpretation is also perfectly permissible.

So who is right? In this case, original intent analysis can provide an answer, but textiginalism cannot. This is a theme that, it will be shown, repeats endlessly.

Example II: A hard case: Griswold v. Connecticut.

The petitioner in *Griswold*⁴⁸ was convicted of aiding and abetting the violation of a statute which stated in relevant part: “Any person who uses any drug, medicinal article or instrument for the purpose of preventing conception shall be fined.”⁴⁹ He asked the court to declare the statute unconstitutional under, *inter alia*, the First Amendment⁵⁰ as incorporated through the Fourteenth.⁵¹

After declining to follow *Lochner v. New York*,⁵² the Court analyzed the statute and found that it violated the combined enumerated rights protecting speech,⁵³ protecting against peacetime quartering of soldiers,⁵⁴ banning unreasonable searches and seizures,⁵⁵ and prohibiting coerced self-

⁴⁴ *Gonzales*, 545 U.S. at 70 (Thomas, J., dissenting) (emphasis in original).

⁴⁵ *Id.* at 60.

⁴⁶ *McCulloch*, 17 U.S. at 421 (“Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are *plainly adapted to that end*, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional.”) (emphasis added).

⁴⁷ Randy Barnett, *The Original Meaning of the Commerce Clause*, 68 U. CHI. L. REV. 101, 101, 112–26 (2001) (Asserting that, upon examining every appearance of the word “commerce” in the records of the Constitutional Convention, the ratification debates and the Federalist Papers, there are no surviving examples of the word “commerce” meaning “any gainful activity;” rather, the word always referred to the trade and exchange of goods and transportation for this purpose); *Gonzalez*, 545 U.S. at 59 (Thomas, J., dissenting) (“in the early days of the Republic, it would have been unthinkable that Congress could prohibit the local cultivation, possession and consumption of marijuana.”).

⁴⁸ *Griswold v. Connecticut*, 381 U.S. 479 (1965).

⁴⁹ CONN. GEN. STAT. §§ 53-32 and 54-196 (1958) (As excerpted in *Griswald*, *supra* note 48).

⁵⁰ U.S. CONST. amend. I.

⁵¹ U.S. CONST. amend. XIV.

⁵² *Lochner v. New York*, 198 U.S. 45 (1905).

⁵³ U.S. CONST. amend. I.

⁵⁴ U.S. CONST. amend. III.

⁵⁵ U.S. CONST. amend. IV.

incrimination;⁵⁶ as well as the rights protected by the Ninth Amendment,⁵⁷ as incorporated by the Fourteenth Amendment.⁵⁸

I will trace the Court's reasoning, and buttress it as necessary with textiginalist arguments not available or common at the time of the decision.

Justice Douglas begins by noting that the freedom of association is not included in the plain text of the First Amendment,⁵⁹ which includes only "speech," "the press," "assembly," and "establishment of religion." And yet he noted that Amendment has been used to strike down laws that infringed on a parent's right to choose the path of her child's education,⁶⁰ and laws preventing the teaching of German in private school.⁶¹ Douglas says that those laws violated the "spirit" of the First Amendment—a classic intentionalist conclusion. A textiginalist might bristle at this logic, as it seems at first quite unbounded from the words in the Constitution.⁶² However, upon textiginalist analysis, the conclusion holds, though for different reasons. *Webster's Unabridged Dictionary* (1828)⁶³ defines speech as, *inter alia*, "The faculty of uttering articulate sounds or words" and "Any declaration of thoughts." It defines press as "The art or business of printing and publishing." If the Constitution protects (absolutely, as a right theoretically does) the declaration and utterance of thoughts, it cannot prevent someone from uttering their thoughts to children. If it protects the business of printing and publishing, it must protect that same person if they use printed material as a teaching aid. The First Amendment therefore protects the essential elements of teaching.⁶⁴

The right to speak and to teach, further, would be meaningless if there were no right to associate with others in order to speak and teach. As we assume the rights in the Constitution were intended to have meaning, a reading of the First Amendment must, as a matter of formalism, include the right of assembly. In *NAACP v. Alabama*,⁶⁵ the Court held that for the right to assemble to be meaningful, the government cannot unreasonably interfere with that right by forcing the NAACP to turn over its private membership list. Under some circumstances, the formal logical implications of the First Amendment protect privacy if that privacy is an important part of maintaining the right to expression, which is embedded in the rights of speech and the press.⁶⁶ As the *Griswold* court wrote, "Association . . . is a form of expression of opinion; and while it is not expressly included in the First Amendment its existence is necessary in making the express guarantees fully meaningful."⁶⁷

Thus, the First Amendment standing alone would certainly invalidate the Connecticut statute as applied to a doctor who merely gave information about birth control, as this is a form of teaching, which is simply speech and association. However, the First Amendment is insufficient to invalidate the giving away of actual birth control devices.

The Court next turned to the Third Amendment, stating that its prohibition of the quartering of

⁵⁶ U.S. CONST. amend. V.

⁵⁷ U.S. CONST. amend. IX.

⁵⁸ U.S. CONST. amend. XIV.

⁵⁹ *Griswold v. Connecticut*, 381 U.S. 479, 482 (1965).

⁶⁰ *Pierce v. Society of Sisters*, 268 U.S. 510 (1925).

⁶¹ *Meyer v. Nebraska*, 262 U.S. 390 (1923).

⁶² Douglas also writes "without these peripheral rights the specific rights would be less secure," which could be a textiginalist argument, in that it's giving full effect to the express terms. *Griswold*, 381 U.S. at 483.

⁶³ WEBSTER, *supra* note 35.

⁶⁴ A formal construction of "the press" might exclude handwritten notes between a teacher and a student. If this is so, then we can safely say that textiginalism has accomplished an *auto reductio ad absurdum*, and need not write more.

⁶⁵ *NAACP v. Alabama*, 357 U.S. 449, 462 (1958) (Holding that the NAACP need not turn over its membership list to the State of Alabama, as that would have a chilling effect on the speech of its members.).

⁶⁶ The same implications are, of course, attached to the freedom of religious expression expressed in the First Amendment.

⁶⁷ *Griswold*, 381 U.S. at 483.

soldiers “in any house” indicated that the home is a place deserving of protection from intrusion. This is further buttressed by the Fourth Amendment, which protects the “right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures,”⁶⁸ and the Fifth Amendment’s self-incrimination clause, which protects a person’s mind from coerced government intrusion.⁶⁹ The court argues that the real interest that each of these amendments is protecting is the right to privacy.

While inductive logic is still logic, a formalist may have a preference for deduction. It is true, perhaps, that each of those enumerated rights protects an unenumerated right known as privacy.⁷⁰ It is also true that the Ninth Amendment must protect *something*,⁷¹ and absent evidence of other unenumerated rights, privacy might be the best candidate. The textiginalist however, would prefer to find out if the formal implications of the Third, Fourth, and Fifth Amendments apply to the case at hand. Do these Amendments have anything to say about government regulation of the consensual sale of birth control devices that are not dangerous to the parties, and that have almost no negative externalities?⁷²

Webster’s Unabridged Dictionary (1828) defines “secure” as “Free from danger of being taken by an enemy.” It defines “seizure” as “The act of taking possession by force; as the *seizure* of lands or goods.” It defines unreasonable as “1. Not agreeable to reason. 2. Exceeding the bounds of reason; claiming or insisting on more than is fit; as an unreasonable demand. 3. Immoderate; exorbitant; as an unreasonable love of life or of money. 4. Irrational.”⁷³ Definition 1 is not of much use (*Webster’s* defines “reason” as “Right; justice; that which is dictated or supported by reason”) so we should instead look to definitions 2, 3, and 4 of “unreasonable.” On its own terms, the Fourth Amendment prohibits seizures of property that insists on more than is fit, that is immoderate, or irrational. It would then merely be a matter for the court to find that seizing⁷⁴ birth control from married couples is an irrational or immoderate action. This question was not decided by the court in *Griswold*, but it seems likely that the court would make such a finding.⁷⁵ While a tax, or safety regulations, or time, place, and manor restriction may be moderate and rational, it would be hard for the state to demonstrate the rationality of an outright ban on private and consensual activities that provide a significant benefit for the parties involved and no detriment to outsiders.⁷⁶ Therefore, the

⁶⁸ U.S. CONST. amend. IV.

⁶⁹ U.S. CONST. amend. V (“nor shall be compelled in any criminal case to be a witness against himself”).

⁷⁰ Justice Goldberg’s concurrence, *Griswold*, 381 U.S. at 486, deeply explores his belief that the Ninth Amendment does indeed protect the right to privacy.

⁷¹ “It cannot be presumed that any clause in the constitution is intended to be without effect; and therefore such a construction is inadmissible, unless the words require it.” *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 174 (1803).

⁷² Compare with the sale of addictive drugs.

⁷³ WEBSTER’S, *supra* note 35.

⁷⁴ One might argue that fining someone for possession is not a seizure. While reasonable people might disagree, I find this to be a strained reading. If generally applied, this interpretation would strip the Fourth Amendment of almost all meaning. If the government can simply fine someone who refuses to surrender property voluntarily, then the government would ultimately be able to gain the effect of seizure. The government could simply threaten to fine someone \$100,000 per day until the desired item was surrendered, and could jail someone for failing to pay the fine. Thus, a plenary power to fine is indistinguishable from a power to seize.

⁷⁵ The court wrote: “Would we allow the police to search the sacred precincts of marital bedrooms for telltale signs of the use of contraceptives? The very idea is repulsive to the notions of privacy surrounding the marriage relationship.” *Griswold v. Connecticut*, 381 U.S. 479, 485–86 (1965).

⁷⁶ Those who oppose abortion can make a credible argument from a liberty baseline that fetuses are agents worthy of moral consideration, and thus ought to be protected by the law. However, this argument cannot credibly carry forward to the sale of prophylactics, as there is no putative innocent third party. A general defense of defining “private” moral conduct as “public” for the purposes of the law can be found in Robert P. George, *Public Reason and Political Conflict: Abortion and Homosexuality*, 106 YALE L. J. 2475, 2496–502. George argues that there is something special about

much-maligned right to privacy—at least, as applied in *Griswold*—is consistent with textigianism as it is correct as a matter of deductive reasoning.⁷⁷

There is another, quite separate, method by which a textigianist might reach the same result in *Griswold*. Justice Goldberg writes in his concurring opinion (signed by three other members of the court):

[I]f upon a showing of a slender basis of rationality, a law outlawing voluntary birth control by married persons is valid, then, by the same reasoning, a law requiring compulsory birth control also would seem to be valid. In my view, however, both types of law would unjustifiably intrude upon rights of marital privacy, which are constitutionally protected.⁷⁸

What Justice Goldberg wrote is correct as a matter of formal logic: he is merely invoking the contrapositive.⁷⁹ If one believes that the Constitution, either through the Ninth Amendment or through penumbras of rights, would prevent the state from limiting the number of children a woman could have, then one must believe that *there is a right that protects a woman's right to control the number of children she has*. (If A then B.) If a woman has a right to control the number of children she has, then the state cannot regulate methods necessary for her to control the number of children she has. (If Not B then Not A).⁸⁰ If the sufficient condition (the content of the Constitution protects basic liberties) implies the necessary (a woman can control her number of children), then the negation of the necessary (a woman cannot control her number of children) implies the negation of the sufficient (the content of the Constitution does not protect basic liberties.) We know the negation of the sufficient is untrue; therefore the negation of the necessary must also be untrue.

This logic, of course, only follows from the original semantic meaning of the Constitution if one believes that the Ninth or Tenth Amendments made enforceable law, or if one were to believe the Constitution would prohibit a limit on the number of children one could produce.

If one does not believe in enforceable unenumerated rights, including the right to choose the number of children one bears, one could go to the original meaning of the American democratic government, which is broadly expressed in the preamble.⁸¹ Is it possible, as a matter of formal logic, to have established a government in a desire to “secure the Blessings of Liberty,” but have that same government have the power to regulate the number of children a woman is allowed to bear? To ask this question is to answer it.

heterosexual unions that cannot be replicated by homosexuals, and thus, equal protection does not demand equal treatment within the law. However, his argument cannot justify state intervention in private behavior within the Lockian tradition of private liberty, any more than it could justify state intervention into the hanging of tacky paintings in a private living room. See generally Jason Kuznicki, *Attack of the Utility Monsters: The New Threats to Free Speech*, 652 POLICY ANALYSIS 1 available at http://www.cato.org/pub_display.php?pub_id=10952.

⁷⁷ This is not to say that textigianism demands the court's result. An alternate textigianist analysis could likely produce a different result. However, this analysis simply shows that textigianism fails to provide a clear alternative vision even in a case widely criticized as activist and ungrounded.

⁷⁸ *Griswold*, 381 U.S. at 497.

⁷⁹ Defined, in short form: If A is sufficient to show B, then if B does not exist, A must not exist.

⁸⁰ The obvious retort to this is that birth control is not necessary, merely sufficient, to control reproduction. Abstinence is another option. However, this implies that the state can force its subjects into Scylla or Charybdis-type situations where those subjects must then choose between their rights. It would be as if the government passed a law allowing free speech only if someone first submitted to an unreasonable search. This cannot be allowed if the Constitution is to have any meaning. One could analogize a ban on contraception to time/place/manner restrictions on Constitutional rights, but then the state must meet the burden of showing that the restrictions further an important governmental interest and are narrowly tailored to meet that interest.

⁸¹ U.S. CONST. pmbl.

At the founding, the word “liberty” had much the same meaning as it does today:

Civil liberty, is the liberty of men in a state of society . . . so far only abridged and restrained, as is necessary and expedient for the safety and interest of the society, state or nation. A restraint of natural liberty, not necessary or expedient for the public, is tyranny or oppression. [C]ivil liberty is an exemption from the arbitrary will of others, which exemption is secured by established laws, which restrain every man from injuring or controlling another. Hence the restraints of law are essential to civil liberty.⁸²

Under this definition, laws “not necessary or expedient for the public” are unauthorized and therefore invalid. A ban on birth control does not enhance the public good, as it affects only private conduct.⁸³ The result in *Griswold*, then, follows logically from evidence contained within the text of the Constitution, and is a permissible textualist result.⁸⁴

III. WHAT’S REALLY GOING ON HERE? RULEMAKING AND INTERPRETATION, IN GENERAL.

When a rulewriter makes a rule, she is attempting to fix a problem in a then-understood or anticipated situation. Judges, then, face two hurdles: generalizing the rule from the inherently limited understanding of the rulewriter, and applying it to situations outside the rulewriter’s anticipation. A rule, particularly a constitutional rule, is necessarily imperfect. Rigid rules, like “drive 55,” are both under and over-inclusive. “Drive 55” is under-inclusive because it does not account for the person driving through a heavy fog in the rain at night. It’s over-inclusive because it doesn’t account for the person rushing someone to the hospital. Judges, then, who attempt to provide a consistent formal interpretation of a necessarily imperfect rule must let some of the culpable go free and send some of the innocent to jail. Flexible rules, like “drive safely,” are unpredictable, and may well be both under and over-inclusive as well, as the discretion of the judge is unlikely to be precisely what the rulewriter intended.

This problem is compounded⁸⁵ when rules are combined. There is also a rule that requires headlight use at night. Assume the fines for speeding and for driving with malfunctioning headlights are both \$50. There is something seemingly unjust and disproportional about fining someone \$50 if that person drives 75 miles per hour and commits no other crime, while the incredibly reckless person who drives 75 miles per hour at night without headlights only pays \$100. A system with that result argues for flexible rules like “drive safely,” but this rule causes the penalty to be dependent on the judge’s prejudices. A judge who grew up in New York City may think that driving 75 miles per hour is *per se* reckless and thus impose the maximum penalty. However, a judge who grew up driving the flat, straight roads of Eastern Montana may think that 75 miles per hour is entirely safe in the right circumstances, and impose no penalty at all.

Flexible rules, like “drive safely,” are endemic within the Constitution. Freedom of speech, narrowly interpreted, protects only utterances. There is no freedom to use an amplification system. Nor is there a written constitutional freedom to listen, so even if the right protects speech, the

⁸² WEBSTER’S, *supra* note 35.

⁸³ It should be noted that the public/private distinction may hold up for social regulation of private conduct, but does not for economic regulation. See generally Robert L. Hale, *Coercion and Distribution in a Supposedly Non-Coercive State*, 38 POL. SCI. Q. 470 (1923).

⁸⁴ This creates a Fourteenth Amendment integration problem not to be dealt with in this paper.

⁸⁵ That is, literally, multiplied.

government could theoretically force any crowd to all wear earplugs. On the other hand, the right to freedom of speech, broadly interpreted, includes the right to threaten, blackmail and slander. It includes the right to infringe copyrights and incite a riot. It includes the right to engage in public sexual expression, and to distribute child pornography.

The Fourth Amendment is equally if not more open-textured. The right is to be secure against unreasonable searches and seizures. But what does it mean to be secure? Does the right include searches by private parties? Is it reasonable to be searched at airports? Bus stations? Public gatherings? If it is reasonable to search, does reasonable also refer to the extent of the search? Is it reasonable to look through someone's bag? Pat them down? Is it reasonable to search under someone's clothing? Inside body cavities? Only for weapons? Or drugs? Does the amendment cover simple searches at all, or only searches that end in a seizure?

Judges must choose a path between the extremes for each rule. For constitutional rules especially, the range of possible meanings⁸⁶ can be almost limitless. Take the range of possible meanings for freedom of speech and assign a numerical value, with a 1 representing the most-restrictive meaning (that is, with a right that means almost nothing), and a 10 the least restrictive meaning (that is, a free speech right that covers every conceivable public and private method of expression). Similarly, take the least libertarian meaning of the Fourth Amendment as a 1, and the most libertarian as a 10. As every statistician and professional gambler knows, combining non-interdependent possibilities requires multiplication, not addition. Thus, the range of freedoms in a society with the First and Fourth amendments is between 1 and 100. Perhaps a citizen is at risk of having written material seized with minimal justification (1), or perhaps a citizen can distribute bomb making materials to children, and only assembled bombs with firing caps attached could be seized, and then, only upon a sworn statement that the bombs were about to be used in a crime (100).

The problem for a textiganlist is clear. In constitutional interpretation, the possible number of formal rule implications quickly becomes staggering. Every single constitutional question that reaches the Court implicates, at the very least, three independent constitutional rules,⁸⁷ plus a conceptualization or interpretation of whatever rule and behavior that is being tested against the Constitution. Each of these rules has, in the rule's semantic meaning, formal logical implications not anticipated by the rule writers being applied to cases which require rule generalization, and to a situation which (usually) must be generalized to fit within the text of the rule. The criticisms of original intention originalism, already thought to be fatal to that doctrine, seem like mere speed bumps compared to the herculean textiganlist task of finding the right answer among the innumerable possibilities of each of these formal logical possibilities, combined, and compounded.⁸⁸

⁸⁶ Judges and commentators may bristle at the suggestion of using a range of "possible" readings as opposed to a range of "reasonable" meanings. See SCALIA, *supra* note 11, at 23, 37–38 (critiquing strict constructionism and recommending a "reasonable" meaning within context). But one person's "unreasonable" is another person's "obvious." This is especially true for a textualist reading of the law: a textualist is unbound by most extrinsic evidence of the rule writer's intent, and thus the judge can freely pick between whatever textual interpretations that judge deems "reasonable."

⁸⁷ U.S. CONST. art. III (scope of judicial power); a power granting or denying section of the Constitution, such as U.S. CONST. art. I, § 8, cl. 18 (necessary and proper clause); and whatever substantive section of the Constitution is at stake.

⁸⁸ If one takes the Ninth Amendment seriously, rights questions become even more difficult by another order of multiplication. Justice Scalia has suggested that the Ninth Amendment protects real rights, but those rights are to be noted by other branches of government. *Troxel v. Granville*, 530 U.S. 57, 91–92 (2000) (Scalia, J., dissenting) ("I do not believe that the power which the Constitution confers upon me *as a judge* entitles me to deny legal effect to laws that (in my view) infringe upon what is (in my view) that unenumerated right."). His opinion here is contested. If one passes this threshold question of judicial enforceability, one must still decide if a particular right is an unenumerated right, and the process for doing that is up for grabs, as would be the particular enforcement of said right. Professor

IV. THE VALUE OF WRITTENNESS

Professor Barnett argues that the “writtenness”⁸⁹ of the Constitution explains why original semantic meaning should be the default interpretive mode.⁹⁰ To make this argument, he analogizes the function and advantages of a written constitution to what he sees as the function and advantages of written contracts. The advantages he discusses are the evidentiary function, the cautionary function, the channeling function,⁹¹ and the clarifying function.⁹²

The first advantage to written contracts is the “evidentiary function,” that is, that the contract provides evidence of an actual agreement and provides evidence as to the content of that agreement. Barnett explains that contract law developed the parole evidence rule to improve the evidentiary function and the cautionary function: if the parties know they will be bound tightly to the writing, they are likely to be careful in their drafting, as the court will not look to evidence contrary to the plain meaning of the text. Further, if the parties know they must be careful in drafting, the evidentiary function becomes more legitimate. Finally, contract writings and the associated rules of evidence clarify the intentions of the parties. The objective theory of contract and statute of frauds are both evidence of the power of writing: in law, writings are to be taken seriously, and are required for important transactions. Why else would contracts be written down? According to Barnett, the same advantages of written contracts over unwritten contracts apply to written constitutions over unwritten constitutions. That those advantages are greatest under an objective theory of contract with the parole evidence rule suggests that the analogous rule of original semantic meaning originalism should be applied to constitutions.

Barnett’s argument is convincing to the extent that the parole evidence rule prohibits the use of evidence contrary to the plain meaning of the text. But this is a solution in desperate search of a problem. No mainstream theory of constitutional interpretation accepts an interpretation clearly at odds with the semantic meaning of the written rule.⁹³

Barnett suggests that the courts should not attempt to identify unenumerated rights, and rather, the Ninth Amendment is a filter through which the Constitution should be read. It sets up a so-called “presumption of liberty.” See RANDY BARNETT, *RESTORING THE LOST CONSTITUTION* 260, 261 (2004). Unfortunately, this does very little to attack the problem of radical indeterminacy. There is little justification for a purely procedural definition of liberty: government and rights theories have little value if those theories do not produce substantive good for the governed. A serious problem with the “presumption of liberty” is that it ignores that laws that limit some people’s liberty substantively do so to enhance the liberty of others. In other words: every right creates a duty, every privilege creates a no-right, and both duties and no-rights are a restriction on liberty. See generally Wesley Newcomb Hohfeld, *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 23 *YALE L. J.* 28–45 (1913); Robert L. Hale, *Coercion and Distribution in a Supposedly Non-Coercive State*, 38 *POLITICAL SCI. QUARTERLY* 470 (1923).

⁸⁹ The document is put into a written form, as opposed to unwritten constitutions that formed the basis of previous governments.

⁹⁰ BARNETT, *supra* note 88, at 100–109. I’m only covering his very detailed and intricate argument very briefly, to provide a base for my argument that the complexity of interlocking rules and unanticipated formal implications of rules nullifies the claimed reasons that the “writtenness” of the Constitution implies a preference for the textiginalist mode of interpretation. This discussion will receive more exhaustive treatment in an upcoming article.

⁹¹ A discussion of the channeling function is outside the scope of this paper.

⁹² BARNETT, *supra* note 88 at 101.

⁹³ *But see* scrivener’s error and the absurd results test. A narrow absurd results test, however, has a very strong argument in its favor: if a rule results in a situation seemingly ripped from a Kafka novel, it seems inherently unjust to subject the unlucky victims of the absurd rule to suffer unless or until the political branches sort out the problem. It seems to undermine the legitimacy of the Constitution to require the government to act irrationally. It has been suggested that jurisprudence arguing that the death penalty is unconstitutional is clearly at odds with the mention of capital crimes elsewhere in the Constitution, and thus an interpretation that the death penalty is unconstitutional is clearly at odds with the text of the Constitution. It is correct to say that the Constitution’s mention of capital offenses is internally

The controversial aspects of constitutional law, such as *Miranda* warnings, tolerance of hate speech, affirmative action, reproductive freedom, gay rights, drug prohibition, and the separation of powers are controversial for the very reason that the constitutional text and the formal implications of that text, as evidenced by both deductions from the rules and the overall spirit of the text itself, provides support for both sides. Barnett argues that if there is ambiguity, a construction ought to be adopted that is consistent with what meaning can be derived from the text and which “enhances constitutional legitimacy.”⁹⁴ But no side of any significant constitutional debate endorses a reading inconsistent with what meaning can be derived, and what “enhances constitutional legitimacy”⁹⁵ is a political question and very much up for grabs. Again, this is a desperate plea for acceptance of a concept that has been widely accepted by the judiciary since well before the invention of textiginalism. New originalism brings nothing new.

V. POLITICS

In many conservative political discussions of modern constitutional interpretation, *Roe v. Wade*⁹⁶ is either the explicit topic or the elephant in the room. George W. Bush stated that he would appoint “strict constructionists” to the Court: this was a message to conservatives that his appointees would read rights narrowly in order to work to overturn *Roe*.⁹⁷ But strict constructionism, while it may overturn *Roe*, would leave the rest of U.S. law as a smoldering ruin⁹⁸ so it does not carry much weight, leaving textiginalism as the sole well-known conservative interpretive method that does not depend on subjective opinions of the spirit of the Constitution.

In a well-known conservative response to the excesses of textiginalist claims, Judge J. Harvie Wilkinson III argues that the *Heller*⁹⁹ decision on gun rights is an abandonment of a commitment to conservative principles, and criticizes the Court for using the same logic that lead to *Roe*.¹⁰⁰ He writes:

Whereas once legal conservatism demanded that judges justify decisions by reference to a number of restraining principles, *Heller* requires that they only make originalist arguments supporting their preferred view. Yet originalism cannot bear the weight that the *Heller* majority would place upon it. Originalism, though important, is not determinate enough to constrain judges’ discretion to decide cases based on outcomes they prefer. Some may see *Heller’s* originalism as the answer to the judicial legislation practiced in *Roe*, but . . . the two approaches lead to the same bad consequences.

inconsistent with that interpretation of the Eighth Amendment, but this does not imply that a prohibition on the death penalty is unconstitutional; it merely means there is a conflict of law. This conflict can be resolved multiple ways. That the framers didn’t realize that there was a conflict between those sections of the Constitution does not mean there is no conflict, nor does it determine how that conflict is to be solved.

⁹⁴ BARNETT, *supra* note 88, at 127.

⁹⁵ *Id.*

⁹⁶ *Roe v. Wade*, 410 U.S. 113 (1973).

⁹⁷ See e.g., Jeffrey Rosen, *Can Bush Deliver a Conservative Court?*, N.Y. TIMES (November 14, 2004), available at <http://www.nytimes.com/2004/11/14/weekinreview/14jeff.html>.

⁹⁸ See SCALIA, *supra* note 11, at 23 (calling strict constructionism a “degraded form of textualism that brings the whole philosophy into disrepute”); Section IV, *supra*, contrasting strict and loose constructions of the First and Fourth Amendments.

⁹⁹ *District of Columbia v. Heller*, 554 U.S. 570 (2008).

¹⁰⁰ J. Harvie Wilkinson, III, *Of Guns, Abortions and the Unraveling Rule of Law*, 95 VA. L. REV. 253, 257 (2009).

Wilkinson is correct that originalism cannot bear the weight put upon it by conservatives.¹⁰¹ But this prompts the question: if textiginalism cannot bear the weight of *Roe*,¹⁰² the most controversial and criticized decision since the Great Depression, what weight can it bear? Given the complexities of tracing the formal implications of rules, it seems unlikely that textiginalism can do much more than describe what judges have always done: apply complex rules to unanticipated facts. The extremely limited power of textiginalism should eliminate the political motivation behind the textiginalist movement, as when fairly applied it cannot attain the political result desired, nor even accomplish the admirable and politically neutral goal of predictability.

VI. CONCLUSION

The formalistic nature of textiginalism requires the deduction of the logical implications of each rule and then the deduction of the logical implication of each combination of rules. Unfortunately, this necessary component of textiginalism moves the law far from the original understanding of the text, and thus far outside the bounds of predictability. Because textiginalism is inherently unpredictable and thus by implication ungrounded in the original intent, any benefit of the evidentiary or cautionary function of “writteness” is lost. This is not to say textiginalism has no value at all, but its contribution to the creation of a defensible, consistent conservative jurisprudence has been vastly oversold.

¹⁰¹ See discussion of *Griswold v. Connecticut*, 381 U.S. 479 (1965) at section II, *supra*. It is arguable that, if *Griswold* is correctly decided, the only remaining step to *Roe* is to note that there is nothing in the constitution that indicates the unborn are legal persons, and thus they do not have rights to be balanced against the mother’s rights. This question neatly ties the court’s decision into the primary controversy about abortion within conservative political circles: at what point do a sperm and egg become a person? I cannot imagine a rule of decision to determine this.

¹⁰² I chose to discuss *Griswold* rather than *Roe* in this article because the court explained its logic far more clearly in the former decision. It should be clear that the arguments advanced in my discussion of the former apply with similar force to the latter. In particular, the logic of Justice Goldberg’s *Griswold* concurrence (not relied upon by the *Roe* court) provides compelling support for *Roe*.