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## When Originalism Failed: Lessons from Tort Law

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# WHEN ORIGINALISM FAILED: LESSONS FROM TORT LAW

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## ABSTRACT

*Two recent Supreme Court decisions upended American life. Opinions released on consecutive days in June 2022 overturned the right of reproductive choice nationwide and invalidated a statute regulating the carrying of concealed weapons in New York. The opinions were united by a common methodology. Pursuant to what one scholar terms “thick” originalism, history, as told by the majority, dictated the resolution of constitutional disputes.*

*This Article explores the use of thick originalism in several celebrated torts cases that raised constitutional issues. These cases illustrate two significant kinds of problems associated with a rigid historical approach to constitutional interpretation. The first is practical: the historical meaning and intended application of constitutional provisions often are elusive. In some instances, courts simply commit outright errors in constructing the historical narratives on which the decisions rest. In other cases, the use of thick originalism requires judges to exercise wide discretion to determine where to begin a historical inquiry and which sources to consult. This wide discretion, and the related problem of judicial bias associated with highly discretionary interpretive practices, are the very problems originalism is said to solve. The use of thick originalism may create the appearance of objectivity, but in fact considerable subjectivity of judgment is simply buried in the construction of the histories governing the outcome in these cases. The second problem associated with the use of thick originalism is normative. The use of a rigid form of originalism to define the contours of constitutional rights interrupts the ordinary operation of the common law and imposes on today’s society the values of the dominant white, male, and propertied power structure existing at the time of the adoptions of the Constitution and the Fourteenth Amendment. Society today is*

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*different than in the largely agrarian communities that composed the United States at the Founding. Solutions to Founding-era problems do not necessarily translate to the modern United States.*

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## INTRODUCTION

The majority opinions in two highly publicized cases decided by the Supreme Court on consecutive days in June 2022 were jarring. On June 23, the Court released its decision in *New York State Rifle & Pistol Ass’n v. Bruen*, striking down a New York state statute regulating the carrying of concealed weapons.<sup>1</sup> The very next day, the Court issued its opinion in *Dobbs v. Jackson Women’s Health Organization*, holding that there is no constitutional right for a woman to choose to terminate a pregnancy.<sup>2</sup> In both decisions, the Court’s conservative majority relied on a rigid form of originalism that “regards the discoverable meaning of the Constitution at the time of its initial adoption as authoritative for purposes of constitutional interpretation in the present.”<sup>3</sup>

Constitutional law scholars saw something different *and* more extreme in *Bruen* and *Dobbs* than in other recent Supreme Court

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1. 597 U.S. 1 (2022).

2. 597 U.S. 215 (2022).

3. Keith E. Whittington, *The New Originalism*, 2 GEO. J.L. & PUB. POL’Y 599, 599 (2004).

decisions that employ original history as part of their interpretive toolbox.<sup>4</sup> These two opinions adopted an extreme version of originalism, which one writer has termed “thick originalism,”<sup>5</sup> under which the impact of the Constitution on highly contested social issues is to be determined largely by the scope of regulation that governed the same issues during very different eras in which women possessed virtually no political rights and the firearms being regulated were muskets, not semiautomatic weapons.

At the same time, a largely distinct and separate scholarly community, tort historians, found the Court’s reasoning in *Bruen* and *Dobbs* oddly familiar but also deeply disquieting. More than a century ago, the Court of Appeals of New York in the infamous decision in *Ives v. South Buffalo Railway Co.* declared the state’s newly enacted workers’ compensation statute unconstitutional.<sup>6</sup> The court reasoned that the parties were entitled under the Due Process Clause to be judged by the same fundamental principles of law in place at the time of the adoption of the federal and state constitutions, in essence applying a strong version of thick originalism. The court wrongly concluded that it was a violation of due process for defendants to be held liable unless they had been at fault, which the court erroneously believed was the prevailing standard at the time of constitutional ratification. This early application of originalism in the tort arena proved to be an embarrassment and resulted in an avalanche of scholarly criticism, a state constitutional amendment overturning the decision, and a subsequent opinion from the United States Supreme Court rejecting the reasoning of *Ives*.<sup>7</sup> However, decades later, other state courts used thick originalism to declare workers’ compensation statutes and tort reform measures unconstitutional under various state constitutional law provisions, including remedy clauses and right-to-jury trial provisions.<sup>8</sup> Additionally, in *Browning-Ferris Industries of Vermont, Inc. v. Kelco Disposal, Inc.*, the majority of the United States Supreme Court and the

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4. See, e.g., Saul Cornell, *Cherry-Picked History and Ideology-Driven Outcomes: Bruen’s Originalist Distortions*, SCOTUSBLOG (June 27, 2022, 5:05 PM), <https://www.scotusblog.com/2022/06/cherry-picked-history-and-ideology-driven-outcomes-bruens-originalist-distortions/> [https://perma.cc/8C39-8DMD]; Angie Gou, *Cherry-Picked History: Reva Siegel on “Living Originalism” in Dobbs*, SCOTUSBLOG (Aug. 11, 2022, 4:57 PM), <https://www.scotusblog.com/2022/08/cherry-picked-history-reva-siegel-on-living-originalism-in-dobbs/> [https://perma.cc/ZJ3T-7TGP].

5. JACK M. BALKIN, MEMORY AND AUTHORITY: THE USES OF HISTORY IN CONSTITUTIONAL INTERPRETATION 86 (2024) (explaining that under thick originalism, “today’s judges must interpret the Constitution in the way that people at the time of its adoption would have interpreted it or that judges must give the provisions of the Constitution the same legal effect that lawyers at the time of adoption would have given them”).

6. 94 N.E. 431 (N.Y. 1911).

7. See N.Y. Cent. R.R. v. White, 243 U.S. 188 (1917); see also *infra* notes 116-17 and accompanying text.

8. See *infra* Section II.B.

dissenters engaged in a spirited debate, both relying on originalist arguments, about whether the Excessive Fines Clause of the Eighth Amendment applies to punitive damages.<sup>9</sup>

These early applications of originalism in the torts arena offer ominous warnings for courts seeking to decide a wider array of constitutional issues on the basis of what the law prohibited at the time of the constitutional Founding. In some cases, such as *Ives*, it later became clear that the court had totally misconstrued the history of the common law at the time of the Founding. Original meaning dramatically expands the scope of the historical records that a court must consider beyond the limited and finite renderings of those that originally drafted constitutional provisions. Evidence of original meaning is frequently uncertain and inconsistent. Courts examining the record centuries later often selectively choose the sources upon which to rely so that the history appears to support the justices' or judges' normative biases. Perhaps even more fundamental, twenty-first-century tort claims arising from accidents on a Los Angeles freeway or the ingestion of minute quantities of toxic chemicals that result in fatal diseases arguably cannot be handled under a liability system developed in an agrarian, pre-industrial society. We believe this tort history offers lessons to judges seeking to apply the original meaning of the Second Amendment, drafted in a time of muskets, to civilian use of semiautomatic weapons.

The early use of originalism in tort decisions also teaches that judging whether constitutional rights exist in the twenty-first century by whether conduct was regulated at the time of the Founding imposes the values of a legal order of a different era, one governed solely by straight white male property owners in a manner that few if any would deem acceptable in our own time.<sup>10</sup> When the *Ives* court struck down workers' compensation legislation in the early twentieth century, it believed, mistakenly, that it was operating under the principle that there could be no liability without fault that existed prior to the adoption of the Constitution. In doing so, it benefited property owners at the expense of injured workers. More than a century later, when the Supreme Court held that women do not have a right to terminate a pregnancy, Justice Breyer observed in his dissenting opinion that the "people" who ratified the Fourteenth Amendment, and earlier the Constitution, "did not understand women as full members of the community embraced by the phrase 'We the People.'"<sup>11</sup> In instances such as

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9. 492 U.S. 257 (1989).

10. See *Obergefell v. Hodges*, 576 U.S. 644, 690 (2015) (Roberts, C.J., dissenting) ("There is no dispute that every State at the founding—and every State throughout our history until a dozen years ago—defined marriage in the traditional, biologically rooted way.").

11. *Dobbs v. Jackson Women's Health Org.*, 597 U.S. 215, 372 (2022) (Breyer, J., dissenting); see also Mary Anne Case, *The Ladies? Forget About Them. A Feminist Perspective*

these, the courts do more than “freeze” the development of the law; they actually move it centuries backwards in a reactionary manner.

In Part I of this Article, “The Ghost of Thick Originalism Present: Abortions and Guns,”<sup>12</sup> we set out a brief overview of the intellectual history that resulted in the form of originalism adopted by the *Dobbs* and *Bruen* majorities. We further explore the Supreme Court’s acceptance of thick originalism as *the* preferred standard for determining the constitutionality of laws impacting everyday life in America and specifically its application in those decisions.

Part II, “The Ghost of Thick Originalism Past: *Ives*, State Constitutional Provisions, and Punitive Damages,” traces the use of thick originalism as the standard for constitutional interpretation in earlier times in the tort cases of *Ives*,<sup>13</sup> subsequent challenges to workers’ compensation statutes and other tort reform measures based on state constitutional provisions,<sup>14</sup> and finally, the contentious debate among the members of the Supreme Court in *Browning-Ferris* over the content of the original meaning of the Excessive Fines Clause and its possible application to punitive damages.<sup>15</sup>

Part III, “The Elusive Quest for Original Meaning,”<sup>16</sup> considers the first set of lessons that tort history offers today’s Supreme Court and other courts inclined to use thick originalism as a tool for constitutional interpretation: the difficulty or impossibility of twenty-first-century judges extracting an objective understanding of original meaning.

Part IV, “Looking Backward to Make Substantive Political Decisions,”<sup>17</sup> outlines a second set of lessons gleaned from tort history: how the use of thick originalism to define the contours of constitutional rights interrupts the ordinary operation of the common law and imposes the values of the dominant white male and propertied power structure existing at the time of the adoptions of the Constitution and the Fourteenth Amendment on today’s society.

We then briefly conclude.

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*on the Limits of Originalism*, 29 CONST. COMMENT. 431, 431-32 (2014) (“[T]he Framers of both the original Constitution and the post-Civil War Amendments were quite conscious of their interests in preserving their male prerogatives in law.”).

12. See *infra* notes 18-85 and accompanying text.

13. See *infra* notes 86-168 and accompanying text.

14. See *infra* notes 169-241 and accompanying text.

15. See *infra* notes 243-89 and accompanying text.

16. See *infra* notes 290-353 and accompanying text.

17. See *infra* notes 354-82 and accompanying text.

I. THE GHOST OF THICK ORIGINALISM PRESENT:  
ABORTION AND GUNS

In two highly controversial decisions from its 2022 term, the United States Supreme Court grounded significant new constitutional doctrine in heavily contested historical accounts. The majority opinions in these cases, *New York State Rifle & Pistol Ass'n v. Bruen*<sup>18</sup> and *Dobbs v. Jackson Women's Health Organization*,<sup>19</sup> represent the culmination of a trend toward an interpretive approach that gained traction in the 1980s and, through a process of refinement and reinterpretation in the intervening years,<sup>20</sup> has now captured the allegiance of a governing wing of the Court.

Writing for the majority in *Bruen*, Justice Thomas criticized the consensus “two-step test” that the Courts of Appeals had developed for evaluating Second Amendment challenges to state gun regulations. Under the first step of that test, state officials defending a gun regulation were required to “establish that the challenged law regulates activity falling outside the scope of the right as originally understood.”<sup>21</sup> Under the second step, courts evaluated “how close the law comes to the core of the Second Amendment right and the severity of the law’s burden on that right.”<sup>22</sup> Justice Thomas, perhaps surprisingly given the lower courts’ consensus, concluded that this test “is one step too many.”<sup>23</sup> Instead, he explained for the Court’s majority, the entire question of the operation of the Second Amendment as a restraint on gun regulation must turn on that constitutional provision’s “text, as informed by history.”<sup>24</sup> Much of the *Bruen* opinion, in turn, offers Justice Thomas’s version of the relevant history, treating that historical narrative as dispositive of the question confronting the Court.<sup>25</sup>

In *Dobbs*, history is deployed not to ground the extension of an individual constitutional right but to extinguish a different claim of right. Here again, the Court’s majority, in this instance in an opinion by Justice Alito, presents a highly contested history as the primary basis on which to interpret the relevant constitutional texts.<sup>26</sup> Previously, the Court had developed two lines of authority, arguably inconsistent with one other, for determining the scope of the substantive liberty interest protected by the Due Process Clauses of the Fifth and Fourteenth Amendments. In one line, running from *Griswold v.*

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18. 597 U.S. 1 (2022).

19. 597 U.S. 215 (2022).

20. See Whittington, *supra* note 3.

21. 597 U.S. at 18 (quoting *Kanter v. Barr*, 919 F.3d 437, 441 (7th Cir. 2019)).

22. *Id.* (quoting *Kanter*, 919 F.3d at 441).

23. *Id.* at 19.

24. *N.Y. State Rifle & Pistol Ass'n v. Bruen*, 597 U.S. 1, 19 (2022).

25. *Id.* at 32-70.

26. *Dobbs v. Jackson Women's Health Org.*, 597 U.S. 215 (2022).

*Connecticut*<sup>27</sup> to *Planned Parenthood of Southeastern Pennsylvania v. Casey*<sup>28</sup> to *Lawrence v. Texas*<sup>29</sup> and *Obergefell v. Hodges*,<sup>30</sup> the Court had clearly endorsed a substantive due process jurisprudence, grounded in what the justices termed “reasoned judgment,” that permits the recognition of liberty interests beyond those expressly set out in text or embedded in longstanding legal or societal traditions.<sup>31</sup> In the competing line, best represented by the Court’s “physician-assisted suicide” case, *Washington v. Glucksberg*,<sup>32</sup> the determinative test is whether the claimed individual right is expressly set out in the Bill of Rights or is “deeply rooted in this Nation’s history and tradition.”<sup>33</sup> In *Dobbs*, Justice Alito advanced the *Glucksberg* line as the sole basis for decision.<sup>34</sup> Like Thomas in *Bruen*, he then devoted much of the majority opinion to the telling of a particular historical account, although in this case the history functioned, under the “deeply rooted” criterion, to permit the Court to treat the right to reproductive choice as beyond the protections of the Fifth and Fourteenth Amendments.<sup>35</sup>

Constitutional lawyers, justices on the Supreme Court, and legal academics have been interested in evidence relating to the origins of individual provisions in the Constitution<sup>36</sup> (and relating to the broader structures and institutional arrangements created by constitutional text<sup>37</sup>) from the very beginning of our constitutional regime right through to the present moment. For most of the past two centuries, arguments based on original history, original intention, or original public meaning have been understood as relevant but not necessarily dispositive in academic debates and in the Supreme Court’s constitutional decisionmaking practices. In that sense, a theory of interpretation centered exclusively on history, or what some have termed a “foundational” approach to originalism, did not become current until

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27. 381 U.S. 479, 481-84 (1965).

28. 505 U.S. 833, 834 (1992), *overruled by Dobbs*, 597 U.S. 215.

29. 539 U.S. 558 (2003).

30. 576 U.S. 644 (2015).

31. *Casey*, 505 U.S. at 848-49 (“Neither the Bill of Rights nor the specific practices of States at the time of the adoption of the Fourteenth Amendment marks the outer limits of the substantive sphere of liberty which the Fourteenth Amendment protects.” (citing U.S. CONST. amend. IX)); *Obergefell*, 576 U.S. at 664 (“That process is guided by many of the same considerations relevant to analysis of other constitutional provisions that set forth broad principles rather than specific requirements. History and tradition guide and discipline this inquiry but do not set its outer boundaries.”).

32. 521 U.S. 702 (1997).

33. *Id.* at 721 (quoting *Moore v. City of E. Cleveland, Ohio*, 431 U.S. 494, 503 (1977)).

34. *Dobbs v. Jackson Women’s Health Org.*, 597 U.S. 215, 260 (2022).

35. *Id.*

36. A good early example is Chief Justice Marshall’s discussion in *Barron v. City of Baltimore* of the origins of the Bill of Rights in state ratification conventions. See 32 U.S. (7 Pet.) 243, 250 (1833).

37. See generally CHARLES L. BLACK, JR., *STRUCTURE AND RELATIONSHIP IN CONSTITUTIONAL LAW* (1969).



the late twentieth century.<sup>38</sup> There are important figures, however, who played a prominent role in the long course of constitutional interpretive practice, who did emphasize originalist history and who urged the Court to treat historical evidence as dispositive in the interpretation of constitutional text.<sup>39</sup> Justice Hugo Black, for example, in the incorporation cases, urged his colleagues to limit their analysis to text and history in determining the scope of the substantive liberty interest protected by the Fourteenth Amendment. Black asserted that “judges lose the way when they put glosses on the Constitution, that they are safe, and the people secure, only when they follow the mandates of the Framers in their full and natural meaning.”<sup>40</sup> He argued that the meaning of the Fourteenth Amendment should depend solely on the intention of its framers and ratifiers and presented historical evidence to support his theory of total incorporation.<sup>41</sup> Justice Black’s position was that the meaning of Section One of the Fourteenth Amendment “should be derived not from background principles or broad conceptions of ‘natural law,’ but rather from the clear intent of those associated with its formulation and adoption, most notably Congressman John Bingham of Ohio.”<sup>42</sup> Black’s total incorporation approach and the

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38. See DANIEL A. FARBER & SUZANNA SHERRY, *DESPERATELY SEEKING CERTAINTY: THE MISGUIDED QUEST FOR CONSTITUTIONAL FOUNDATIONS 1* (2002) (explaining that foundationalism “seeks to ground all of constitutional law on a single foundation”). The history of originalism in American constitutionalism has received significant academic attention and is contested. See, e.g., JOHNATHAN O’NEILL, *ORIGINALISM IN AMERICAN LAW AND POLITICS: A CONSTITUTIONAL HISTORY* (2005). See generally CHRISTOPHER WOLFE, *HOW TO READ THE CONSTITUTION: ORIGINALISM, CONSTITUTIONAL INTERPRETATION, AND JUDICIAL POWER* (1996). Some historians have identified strong originalist features in important nineteenth-century decisions, including the opinions of Chief Justice Taney and Justice Curtis in *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393 (1857). Throughout most of our constitutional history, however, the use of originalist history has been one of several interpretive methods deployed by the Supreme Court.

39. Lawrence Solum reports that “[t]he first use of the phrase ‘original meaning’ in the text (exclusive of citations) of an opinion by a Supreme Court Justice occurred in Justice Black’s dissent in *Harper v. Virginia State Bd. of Elections* in 1966.” Lawrence B. Solum, *What Is Originalism? The Evolution of Contemporary Originalist Theory*, in *THE CHALLENGE OF ORIGINALISM: THEORIES OF CONSTITUTIONAL INTERPRETATION* 12, 14 (Grant Huscroft & Bradley W. Miller eds., 2011) (footnote omitted).

40. Paul A. Freund, *Mr. Justice Black and the Judicial Function*, 14 *UCLA L. REV.* 467, 467 (1967).

41. See, e.g., *Duncan v. Louisiana*, 391 U.S. 145, 165, 171 (1968) (Black, J., concurring).

42. Richard C. Boldt & Dan Friedman, *Constitutional Incorporation: A Consideration of the Judicial Function in State and Federal Constitutional Interpretation*, 76 *MD. L. REV.* 309, 320 (2017). Justice Black’s historical argument is set out in his Appendix in *Adamson v. California*, 332 U.S. 46, 68-74 (1947) (Black, J., dissenting). He relies heavily on public statements about the intended purpose of the Fourteenth Amendment that were made by John Bingham and Roscoe Conkling, two of the principal drafters of the Fourteenth Amendment, and on historians who wrote about Bingham’s criticism of *Barron v. City of Baltimore*. See generally WILLIAM D. GUTHRIE, *LECTURES ON THE FOURTEENTH ARTICLE OF AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES* (1898); Louis B. Boudin, *Truth and Fiction About the Fourteenth Amendment*, 16 *N.Y.U. L.Q. REV.* 19, 22 n.5 (1938). Other historians disagreed with Black’s account and suggested that supporters of the Fourteenth Amendment

historical narrative that animated it ultimately did not prevail on the Court.<sup>43</sup> Instead, during the years of the Warren Court, the Burger Court, and the Rehnquist Court, originalist arguments were but one of several approaches to constitutional interpretation deployed by the justices in majority opinions.

In an article in the *Texas Law Review* in 1976, however, then-Associate Justice William Rehnquist set out a critique grounded in originalist argument of what he perceived to be the Court's overly expansive reading of the Fourteenth Amendment.<sup>44</sup> At about the same time, Professor Raoul Berger published his widely read book *Government by Judiciary*, which made a similar set of arguments.<sup>45</sup> Beginning in the 1980s, this nascent interest in deploying originalist history to push back against the Warren Court's "living constitutionalism" found expression in the political arena. In 1985 in a speech to the American Bar Association, Attorney General Edwin Meese urged the adoption of a foundationalist originalism that he explained would rein in the activist judges on the Court.<sup>46</sup> Meese would repeat these arguments in other venues,<sup>47</sup> and his arguments were amplified by Robert Bork and other prominent conservatives.<sup>48</sup>

Three key features characterized the originalism of the 1980s: an emphasis on the need for judicial restraint; a preference for

in Congress "were motivated primarily by a desire to constitutionalize human rights norms generally rather than to lock in specific protections enumerated in the Bill of Rights." Boldt & Friedman, *supra*, at 321 n.65 (citing Howard Graham, *The Early Antislavery Background of the Fourteenth Amendment*, 1950 WIS. L. REV. 479; JACOBUS TENBROEK, EQUAL UNDER LAW: THE ANTISLAVERY ORIGINS OF THE FOURTEENTH AMENDMENT (1951)).

43. Boldt & Friedman, *supra* note 42, at 320-21 ("This strategy of nailing down the interpretive scope of the amendment by linking it to a particular historical narrative . . . had several inherent weaknesses. First, as pointed out by Justice Frankfurter in his response to Justice Black in *Adamson*, the '[r]emarks of a particular proponent of the Amendment, no matter how influential, are not to be deemed part of the Amendment.' . . . More broadly, Justice Black's historical case for total incorporation turned on his willingness to generalize the intentions of one key actor and assign them to a diverse group of government officials and other supporters of the amendment whose purposes may not have aligned with Bingham's. Finally, there is considerable evidence from the historical record that even Congressman Bingham's intentions may have been more complex than Justice Black allowed." (second alteration in original) (footnote omitted)).

44. William H. Rehnquist, *The Notion of a Living Constitution*, 54 TEX. L. REV. 693 (1976).

45. RAOUL BERGER, *GOVERNMENT BY JUDICIARY* 158 (1977).

46. See Edwin Meese, III, Att'y Gen., Speech Before the American Bar Association (July 9, 1985), in *THE GREAT DEBATE: INTERPRETING OUR WRITTEN CONSTITUTION* (Paul G. Cassell ed., 1986).

47. See Edwin Meese, III, *The Supreme Court of the United States: Bulwark of a Limited Constitution*, 27 S. TEX. L. REV. 455, 464-65 (1986).

48. See ROBERT H. BORK, *THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW* 143-45 (1990) (arguing that "[a]ll that counts is how the words used in the Constitution would have been understood at the time"); see also Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CINN. L. REV. 849, 864 (1989). Indeed, Judge Bork's advocacy of originalism can be traced even earlier, to a piece he published in the early 1970s. See Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1 (1971).

majoritarian politics, as reflected in legislative majorities, as the primary means for resolving contested questions of public policy; and a focus on the subjective intentions of the “Founding Fathers” as the key historical evidence for interpreting the meaning of constitutional text.<sup>49</sup> This early version of originalism attracted fierce criticism, much of which was warranted.<sup>50</sup> First, critics pointed out the deep methodological problems attendant to original intention originalism. The Framers were a complex group of thinkers and activists who did not always agree on constitutional means or ends. Much of what was reduced to writing—in the specific proposals that were subject to their initial votes, in the drafting efforts of the Committee on Detail, and in the final text of the Constitution—reflected not a unitary intention but rather the expression of individual perspectives in the early documents and the compromise of inconsistent views in the final text.<sup>51</sup> In addition, the historical evidence itself is often opaque or unreliable.<sup>52</sup> Much reliance is placed, for example, on Madison’s Notes, even though recent scholarship has made clear that Madison revised his written account of the constitutional debates for some time after the constitution was ratified, perhaps to reflect subsequent developments and understandings.<sup>53</sup> Ultimately, the critics argued, judges, judicial law clerks, and constitutional advocates are neither trained nor disposed, for reasons of forensic pragmatism, to make historical credibility judgments that would stand up to close scrutiny by professional historians.<sup>54</sup>

An additional critique of the “first generation originalists”<sup>55</sup> that has persisted to the present, and that forms the basis for objections to more recent forms of originalism as well, is that the outcome of an originalist analysis often depends on the level of generality that the present-day interpreter ascribes to the original constitutional project.<sup>56</sup> In *Bruen*, for example, Justice Thomas is obligated to consider applications of the Second Amendment to facts and regulatory policies that neither the Framers nor the Founding generation could have

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49. See Whittington, *supra* note 3, at 602-03.

50. See, e.g., Paul Brest, *The Misconceived Quest for the Original Understanding*, 60 B.U.L. REV. 204, 205 (1980).

51. See Richard C. Boldt, *Constitutional Structure, Institutional Relationships and Text: Revisiting Charles Black’s White Lectures*, 54 LOY. L.A. L. REV. 675, 697-709 (2021) (examining the historical evidence surrounding the development of the Interstate Commerce Clause and other provisions governing the question of federalism).

52. See Daniel A. Farber, *The Originalism Debate: A Guide for the Perplexed*, 49 OHIO ST. L.J. 1085, 1085 (1989).

53. See MARY SARAH BILDER, *MADISON’S HAND: REVISING THE CONSTITUTIONAL CONVENTION* 49 (2015).

54. See William E. Nelson, *History and Neutrality in Constitutional Adjudication*, 72 VA. L. REV. 1237, 1250 (1986).

55. Whittington, *supra* note 3, at 607-08.

56. See Farber, *supra* note 52, at 1094-95.

anticipated. Thomas asserts that the “meaning” of the Amendment “is fixed according to the understandings of those who ratified it,” but that it “can, and must, apply to circumstances beyond those the Founders specifically anticipated.”<sup>57</sup> On this basis, he concludes, quoting the Court in *District of Columbia v. Heller*, that “the Second Amendment extends, *prima facie*, to all instruments that constitute bearable arms, even those that were not in existence at the time of the founding,”<sup>58</sup> including, presumably, semiautomatic handguns, but that the forms of legal regulation of those simpler weapons that were in place in the late eighteenth and mid-nineteenth centuries should provide the exclusive basis for the evaluation of current laws and regulations implemented to deal with a dramatically different species of weapons posing risks in a dramatically different social and cultural environment. Justice Thomas acknowledges this set of discretionary judgments shaping his historical narrative and its application to the legal question the Court confronted in *Bruen* by recurring to a familiar common law legal reasoning technique, “reasoning by analogy.” Thus, he explains:

Much like we use history to determine which modern “arms” are protected by the Second Amendment, so too does history guide our consideration of modern regulations that were unimaginable at the founding. When confronting such present-day firearm regulations, this historical inquiry that courts must conduct will often involve reasoning by analogy—a commonplace task for any lawyer or judge.<sup>59</sup>

A final critique is inherent in the very foundationalist nature of much originalist thinking. This is an interpretive technique that, by definition, resists the impulse to adopt a dynamic or changeable understanding of constitutional prescription in light of fundamental changes in the surrounding environment within which it must operate. In *Dobbs*, Justice Alito’s majority opinion grounds its determination that a right to an abortion is not a fundamental liberty interest protected by the Due Process Clause in its historical conclusion that such a right is not “deeply rooted in this Nation’s history and tradition.”<sup>60</sup> As the dissenting opinion points out, however, “those living in 1868 would not have recognized the claim [to reproductive choice]—because they would not have seen the person making it as a full-fledged member of the community.”<sup>61</sup> From this perspective, the meaning of liberty under the Due Process Clause should not be restricted to the understanding that pertained in the mid-nineteenth century. “Throughout our history,” the *Dobbs* dissenters explain, “the sphere of

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57. *N.Y. State Rifle & Pistol Ass’n v. Bruen*, 597 U.S. 1, 28 (2022) (quoting *District of Columbia v. Heller*, 554 U.S. 570, 582 (2008)).

58. *Id.* (quoting *Heller*, 554 U.S. at 582).

59. *Id.*

60. *Dobbs v. Jackson Women’s Health Org.*, 597 U.S. 215, 260 (2022) (quoting *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997)).

61. *Id.* at 380 (Breyer, J., dissenting).

protected liberty has expanded, bringing in individuals formerly excluded.”<sup>62</sup> Thus, because women at the time of the ratification of the Fourteenth Amendment were not understood as “full and equal citizens” and because they “had no legal existence separate from [their husbands],”<sup>63</sup> the original understanding of the relevant substantive liberty interest should not determine the scope of protection afforded by the Due Process Clause today.<sup>64</sup>

Some, but not all, of the weaknesses of the early forms of foundationalist originalism were addressed by advocates of the “new originalism” that began to appear in the academic literature in the early 1990s and in judicial opinions somewhat later.<sup>65</sup> This new originalism is focused not on the intention of the Framers but instead on the original public meaning of constitutional text at the time of its adoption.<sup>66</sup> This shift in focus, in turn, has generated a shift in the historical evidence that is most important for purposes of constitutional interpretation. The records of the Constitutional Convention and of state ratification conventions were of central interest in the originalism of the 1980s, while press accounts, period dictionaries, historical data with respect to contemporaneous legal practices, and the like are now the meat and potatoes of new originalism. Equally important, the new originalism is “less likely to emphasize a primary commitment to judicial restraint” and more likely to result in a new form of judicial activism.<sup>67</sup> In these terms, “originalism may often require the active exercise of the power of judicial review in order to keep faith with the principled commitments of the founding.”<sup>68</sup> Finally, the new originalism is much less concerned about protecting the policy outcomes of legislative

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62. *Id.*

63. *Id.* at 381 (quoting *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 897 (1992), overruled by *Dobbs*, 597 U.S. 215).

64. In addition to the methodological objections, a further criticism of original intention originalism was that, as H. Jefferson Powell explained, the original understanding of original intention was not originalist. Indeed, the overwhelming evidence is that the eighteenth-century common law tradition that informed the Framers’ understanding of their work did not contemplate that judges would rely heavily on the subjective intention of lawmakers. Madison’s view of the limited evidentiary value of contemporaneous expressions of intention is also well known. Professor Powell points out, for example, that Madison viewed the private opinions of individuals or groups who participated in the state ratification conventions as of “limited value.” See H. Jefferson Powell, *The Original Understanding of Original Intent*, 98 HARV. L. REV. 885, 937 (1985).

65. Whittington, *supra* note 3, at 607-09.

66. *Id.*

67. *Id.* at 608.

68. *Id.* at 609.

majorities than was the originalism of Meese, Bork, and Berger.<sup>69</sup> The goal of the new originalists has been to find and apply those principles that were “entrenched” in the Constitution.<sup>70</sup>

As Lawrence Solum has explained, all versions of originalism embrace what he terms “the fixation thesis” and “the contribution thesis.”<sup>71</sup> The former concept holds that the “semantic content” or “linguistic meaning” of the text of the constitution was fixed at the time the relevant provision was framed and ratified.<sup>72</sup> To the extent that we regard the constitution as a legal document, this thesis is reasonably uncontroversial.<sup>73</sup> The semantic content or meaning of a constitutional provision, however, is not the same thing as its “legal” content or meaning. “The legal content of the constitutional doctrine is simply the set of rules developed by courts (or other officials) for the application of the text to particular cases.”<sup>74</sup> Different versions of originalism take different views on the relationship between semantic content and legal content. All agree that the linguistic or semantic meaning of text fixed at its origination “contributes” to determining its legal content. This is “the contribution thesis.”<sup>75</sup> Where originalists disagree is over how constraining original semantic meaning is in the construction of legal rules to implement constitutional text. Originalists who fall on one end of this spectrum believe that original semantic content, determined through the examination of historical evidence, should drive the formulation of legal doctrine largely to the exclusion of other factors.<sup>76</sup> More moderate originalists, including Jack Balkin, believe that, while legal rules generally should not contradict clear constitutional text that is prescriptive in nature, legal content can include supplementary doctrinal formulations derived through other interpretive methods to implement or operationalize constitutional text in the form of standards or principles that are less than directly prescriptive.<sup>77</sup>

A foundationalist approach to originalism, because it views the fixed linguistic meaning of constitutional text as highly constraining of legal content, is essentially incompatible with sub-constitutional legal processes that contemplate a more dynamic disposition toward

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69. *Id.*

70. *Id.* at 610.

71. Solum, *supra* note 39, at 33-35.

72. *Id.* at 34.

73. Although Stephen Griffin points out that “[c]onstitutions are fundamentally different from other laws in that they are self-enforcing,” this means that “constitutional meaning [is] hammered out informally through political contestation.” Stephen M. Griffin, *Rebooting Originalism*, 2008 U. ILL. L. REV. 1185, 1204.

74. Solum, *supra* note 39, at 34.

75. *Id.* at 35.

76. *Id.* at 34.

77. Jack M. Balkin, *Nine Perspectives on Living Originalism*, 2012 U. ILL. L. REV. 815, 817.

determining applicable legal rules, including the common law method governing the development of much tort doctrine and the legislative processes by which common law rules are amended. When justices or other constitutional interpreters employ this rigid form of originalism to evaluate the constitutionality of legal rules that are the product of these dynamic sub-constitutional systems of common law or statutory development, they necessarily undermine the normal operation of those systems. This clash of methodologies may be warranted when the constitutional text is reasonably unambiguous and clearly prescriptive. Fidelity to the constitutional order may require that questions falling within the scope of clearly prescriptive rules be taken “off the table” for ordinary decisionmaking.<sup>78</sup> But when the text is less rule-like or prescriptive, when it is ambiguous or sets out a standard or a general governing principle, indeed “when . . . the text ‘runs out,’ ”<sup>79</sup> the decision to interrupt or unwind common law or statutory rules on the basis of their inconsistency with an originalist historical account may be less justified.

In his recent book *Memory and Authority: The Uses of History in Constitutional Interpretation*, Professor Balkin builds on existing scholarship and places originalist thought and practice into a broader examination of the ways in which history is deployed in constitutional law. Balkin’s analysis is organized around his distinction between “framework originalism,”<sup>80</sup> which he endorses, and “thick originalism,”<sup>81</sup> which he does not. Framework originalism asserts that the Constitution provides a “framework or plan for politics that is not complete at the outset but must be filled out and built on by later generations.”<sup>82</sup> This form of originalism, because it is dynamic, is compatible with “living constitutionalism.” Balkin’s work distinguishes between the practice of constitutional “interpretation” and constitutional “application.”<sup>83</sup> Framework originalism adopts a “thin” view of original constitutional meaning and a relatively more robust role for courts and other contemporary actors in our constitutional system in determining how the Constitution should apply to modern questions of law and policy. Thus, framework originalism is constrained by original constitutional meaning, to the extent it can be determined in a useful form, but it does not treat as dispositive “original expected applications.”<sup>84</sup>

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78. In *District of Columbia v. Heller*, Justice Scalia stated that “the enshrinement of constitutional rights necessarily takes certain policy choices off the table.” 554 U.S. 570, 636 (2008).

79. This is how Solum characterizes “constitutional underdeterminacy.” Solum, *supra* note 39, at 23-24 (emphasis omitted).

80. BALKIN, *supra* note 5, at 79.

81. *Id.* at 86-89.

82. *Id.* at 79.

83. Jack M. Balkin, *Abortion and Original Meaning*, 24 CONST. COMMENT. 291 (2007).

84. BALKIN, *supra* note 5, at 83-85.

Thick originalism of the kind reflected in the *Dobbs* majority opinion, by contrast, is committed to a thicker form of constitutional meaning and a correspondingly smaller role for constitutional “construction,” or the process by which embedded essential principles are applied to contemporary circumstances with less weight placed on historical evidence of the original expected application of the Founders or the Founding generation.<sup>85</sup> Importantly, thick originalism is foundationalist in that it crowds out other forms of constitutional reasoning. Thick originalists turn to historical data not only to determine the meaning of constitutional text, but also as evidence of the original expected application of that text.

## II. THE GHOST OF THICK ORIGINALISM PAST: *IVES*, STATE CONSTITUTIONAL PROVISIONS, AND PUNITIVE DAMAGES

For more than a century, courts have struck down alternative compensation systems, such as workers’ compensation systems, and other tort reform measures because they supposedly violated the original meanings of the federal and state constitutions, including the due process clauses in the United States Constitution and state constitutions. The constitutional phrase “due process” invites an argument that parties to tort litigation are entitled to be judged by the fundamental principles of the common law in place at the time of the adoption of the Constitution and its amendments. The Supreme Court has read the Due Process Clause against the English history of the Magna Carta to require that a deprivation of property be permitted only according to “the law of the land.”<sup>86</sup> One possible method for determining what “the law of the land” means for due process purposes is to examine what the governing principles of law were at the time of the adoption of the

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85. *Id.* at 87-88 (“[T]he ‘thick’ conception of original meaning favored by most conservative originalists has a correspondingly narrower zone for construction. In fact, some conservative original meaning originalists object to the very category of constitutional construction; for them, all constitutional issues are questions of interpretation, and the Constitution’s original meaning settles—or at least significantly bounds—the majority of constitutional questions.”). The originalism deployed by Justice Thomas in *Bruen* partakes, perhaps, both of thick and thin originalism. His approach to the constitutional status of modern weapons, for example, relies on assigning a comprehensive meaning to the term “arms” and a correspondingly activist role in determining the construction of that term that goes far beyond the original expected application of the text. As noted earlier, Justice Thomas asserts that the “meaning” of the Second Amendment “is fixed according to the understandings of those who ratified it,” but that it “can, and must, apply to circumstances beyond those the Founders specifically anticipated.” *N.Y. State Rifle & Pistol Ass’n v. Bruen*, 597 U.S. 1, 28 (2022) (quoting *District of Columbia v. Heller*, 554 U.S. 570, 582 (2008)). By contrast, the opinion’s treatment of the historical significance of regulatory practices at the Founding suggests that modern regulations must be brought with the original expected application of the Second Amendment. *Id.*

86. *Murray’s Lessee v. Hoboken Land & Improvement Co.*, 59 U.S. (18 How.) 272, 276 (1856) (“The words, ‘due process of law,’ were undoubtedly intended to convey the same meaning as the words, ‘by the law of the land,’ in *Magna Charta.*”).



Bill of Rights.<sup>87</sup> This method of originalism regards the meaning of constitutional provisions, and their application, as fixed in time at the moment of their enactment.<sup>88</sup> Inevitably, this creates tension with the common law of torts, which operates without any original text and constantly changes in response to technological, social, economic, political, and ideological developments.<sup>89</sup>

In this Part, we explore how early twentieth-century attempts to challenge the constitutionality of workers' compensation, and later challenges to other tort reform measures, ultimately rested on the assertion that parties in tort litigation were entitled under the Constitution to be judged by the fundamental principles of law in place at the time arguably applicable constitutional provisions were ratified. This form of analysis requires determining what the relevant common law provided at the time of the adoption of the Constitution. Unfortunately, the courts' understanding of what the law was at the time of the adoptions was often questionable at best and frequently downright wrong. As such, these decisions challenging the constitutionality of early attempts to change tort law provide examples, decades before originalism became prevalent in a wider variety of constitutional decisions, of how the judicial search for original meaning can be difficult or even impossible and lead to onerous constitutional conclusions.

87. In their recent article, Max Crema and Lawrence B. Solum convincingly argue that at the time of both the Magna Carta and the adoption of the Fifth Amendment to the United States Constitution, the "law of the land" and "due process of law" meant two entirely different things. Max Crema & Lawrence B. Solum, *The Original Meaning of "Due Process of Law" in the Fifth Amendment*, 108 VA. L. REV. 447 (2022). The "law of the land," according to Crema and Solum, was "a broad and ancient phrase meaning 'the Common Law, Statute Law, or Custom of England.'" *Id.* at 461 (quoting 2 EDWARD COKE, INSTITUTES OF THE LAWS OF ENGLAND 46 (London, W. Rawlins 6th ed. 1681) (1642)). In contrast, "'due process of law' . . . mean[t] . . . duly issued writs or precepts." *Id.* at 462.

88. BALKIN, *supra* note 5, at 82 (describing the "fixation thesis," which contends that the Constitution's meaning "is fixed at the time of adoption" as one of the two fundamental features of originalism).

89. *E.g.*, MARTHA CHAMALLAS & JENNIFER B. WRIGGINS, *THE MEASURE OF INJURY: RACE, GENDER, AND TORT LAW* 8 (2010) (describing, for example, how "two groups of torts cases . . . illustrate how gender and race ideology found their way into suits for personal injury, shaped evolving tort doctrine, and affected tort recoveries"); G. EDWARD WHITE, *TORT LAW IN AMERICA: AN INTELLECTUAL HISTORY*, at xi-xii (1980) ("Ideas that were sufficiently embedded as to have been thought beyond refutation have been abandoned; ideas that were once regarded as on the lunatic fringe have become commonplace."); Donald G. Gifford, *Technological Triggers to Tort Revolutions: Steam Locomotives, Autonomous Vehicles, and Accident Compensation*, 11 J. TORT L. 71, 73 (2018) [hereinafter Gifford, *Technological Triggers*] (focusing on how technological advancements changed tort law, but also alluding to other factors that change the law including politics and ideology and race, gender, and socioeconomic considerations); Donald G. Gifford & Brian Jones, *Keeping Cases from Black Juries: An Empirical Analysis of How Race, Income Inequality, and Regional History Affect Tort Law*, 73 WASH. & LEE L. REV. 557, 617-19 (2016) (confirming, empirically, the effect of race on changes in tort law and evaluating the possible effects of income inequality); Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193, 193-94 (1890) (explaining how the development of assault from battery demonstrates that "[p]olitical, social, and economic changes entail the recognition of new rights, and the common law, in its eternal youth, grows to meet the demands of society").

A. *Ives v. South Buffalo Railway Co.*

Perhaps the most famous decision successfully challenging the constitutionality of a tort reform statute occurred more than a century ago in *Ives v. South Buffalo Railway Co.*,<sup>90</sup> when the New York Court of Appeals declared the state's initial attempt to enact a workers' compensation statute unconstitutional on due process grounds.<sup>91</sup> Legal historian John Fabian Witt characterizes the opinion as "a centerpiece . . . in the greatest court controversy since *Dred Scott*"<sup>92</sup> and describes how the decision stood at the end of one era of American political, economic, and legal culture, before the vast changes that began with the acceptance of workers' compensation and later included the New Deal.<sup>93</sup> Perhaps more notoriously, for decades law students at Yale and many other law schools have begun their study of tort law with consideration of the opinion.<sup>94</sup>

Witt writes that "[i]n the second half of the nineteenth century, the United States experienced an accident crisis like none the world had ever seen."<sup>95</sup> As railroads crisscrossed the nation and mechanized factories dominated the nation for the first time,<sup>96</sup> the frequency and severity of workplace injuries skyrocketed.<sup>97</sup> When workers sued their employers, seeking compensation for their injuries, their paths were blocked by the negligence regime that governed tort liability at the time.<sup>98</sup> The injured worker was required to prove negligence or fault in order to recover.<sup>99</sup> Even more onerous, the plaintiff's claim was frequently blocked by any of the three "trinity of common law defenses," including contributory negligence, assumption of risk, and the fellow

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90. 94 N.E. 431 (N.Y. 1911).

91. *Id.* at 448.

92. JOHN FABIAN WITT, *THE ACCIDENTAL REPUBLIC: CRIPPLED WORKINGMEN, DESTITUTE WIDOWS, AND THE REMAKING OF AMERICAN LAW* 152 (2004).

93. *Id.* at 154, 186.

94. See Guido Calabresi, *Oscar Gray and the Yale Approach to Torts*, 79 MD. L. REV. 1156, 1156 (2020) (listing scholars who began teaching their first-semester Torts courses with *Ives*).

95. John Fabian Witt, *Toward a New History of American Accident Law: Classical Tort Law and the Cooperative First-Party Insurance Movement*, 114 HARV. L. REV. 690, 694 (2001).

96. See Gifford, *Technological Triggers*, *supra* note 89, at 87-88.

97. *Id.* at 88.

98. See LAWRENCE M. FRIEDMAN, *A HISTORY OF AMERICAN LAW* 444-49 (4th ed. 2019); MORTON J. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW, 1780-1860*, at 85, 95-101 (1977) (explaining that, after the Civil War, many personal injuries fell "under a 'negligence' heading, which had the effect of substantially reducing entrepreneurial liability"); WITT, *supra* note 92, at 43-48; Gifford, *Technological Triggers*, *supra* note 89, at 93-94 (noting that the law governing personal injuries became "less hospitable" to plaintiffs when the law switched from a strict liability standard in 1820 to a negligence regime by 1870); Charles O. Gregory, *Trespass to Negligence to Absolute Liability*, 37 VA. L. REV. 359, 383-84 (1951).

99. See HORWITZ, *supra* note 98, at 85.

servant rule.<sup>100</sup> While contributory negligence and assumption of the risk are familiar terms to those in the twenty-first century, the now-obscure fellow servant rule probably had the greatest effect in denying workers recovery.<sup>101</sup> Under the fellow servant rule, an injured worker could not recover from their employer when injured by the negligence of a co-worker, even though ordinarily the employer would be held vicariously liable for the torts committed by an employee.<sup>102</sup>

By the early twentieth century, the denial of compensation to injured workers under the negligence regime became untenable to workers, their unions, and social reformers.<sup>103</sup> At the same time, many employers, particularly large employers, were ready to move on from the negligence regime and support the adoption of workers' compensation systems because they feared that the often egregious outcomes under the fellow servant rule would soon result in its legislative abrogation and in greatly expanded corporate liability.<sup>104</sup>

In 1910, the New York General Assembly passed one of the nation's first workers' compensation bills.<sup>105</sup> The legislation provided that workers engaged in certain "especially dangerous" occupations could receive limited compensation from their employer, including loss of income within specified limits and payment of medical and rehabilitation expenses, without showing that the employer had been negligent.<sup>106</sup> Additionally, the statute eliminated the trinity of defenses—contributory negligence, assumption of risk, and the fellow servant rule<sup>107</sup>—that so often blocked a worker's recovery under the negligence regime.<sup>108</sup> The *Ives* opinion itself acknowledged that the legislation was

100. *Id.*

101. See JAMES W. ELY, JR., RAILROADS AND AMERICAN LAW 214-16 (2001); FRIEDMAN, *supra* note 98, at 448-49 ("The fellow-servant rule . . . meant in practice that a workman injured on the job had nowhere to turn. . . . Today, the fellow-servant rule seems callous: raw, naked capitalism at its worst; nothing for workers with broken bodies, nothing for families whose breadwinner was crushed to death in some factory; immunity and impunity for the railroads, mines, and mills.").

102. See *Farwell v. Bos. & Worcester R.R.*, 45 Mass. (4 Met.) 49 (Mass. 1842). Chief Justice Shaw justified the rule on the grounds that the injured plaintiff was in the better position to know of the risks caused by careless co-workers and could effectively guard against them. *Id.* at 57.

103. See PRICE V. FISHBACK & SHAWN EVERETT KANTOR, A PRELUDE TO THE WELFARE STATE: THE ORIGINS OF WORKERS' COMPENSATION 29 (2000) (describing the dissatisfaction of social reformers with the negligence liability system).

104. See WITT, *supra* note 92, at 67 (describing statutory and judicial abrogation of fellow servant doctrine in period preceding adoption of workers' compensation statutes).

105. Act of June 25, 1910, ch. 674, §§ 215-219-g, 1910 N.Y. Laws 1945 (repealed 1913).

106. *Id.* §§ 215-217.

107. See *id.* § 217 (stating an employer will be liable to pay compensation for injuries caused by "[a] necessary risk or danger of the employment or one inherent in the nature thereof," and by the "[f]ailure of the employer . . . or any of his . . . agents or employees to exercise due care, or to comply with any law affecting such employment").

108. *Id.*

modeled on the English Workmen's Compensation Act of 1897,<sup>109</sup> and the Report of the Wainwright Commission, which recommended the workers' compensation bill to the legislature, also noted the legislation's similarity to Germany's compensation system.<sup>110</sup> At approximately the same time that New York adopted its workers' compensation statute, a number of other states enacted similar legislation.<sup>111</sup>

The Court of Appeals described the New York workers' compensation statute as "plainly revolutionary"<sup>112</sup> and held that it was unconstitutional under the due process clauses of both the federal and state constitutions.<sup>113</sup> The *Ives* holding rests on two propositions, according to the court. For the decision to be correctly reasoned, both these propositions must be true and valid. First, due process requires "that every man's right to life, liberty, and property is to be disposed of in accordance with those ancient and fundamental principles which were in existence when our Constitutions were adopted."<sup>114</sup> In other words, the court expressly adopts an understanding of due process consistent with a form of originalism focused on original meaning. Specifically for our purposes, parties involved in tort litigation are entitled to be judged by the fundamental principles of the common law in place at the time of the adoption of the Due Process Clause. Within a few years, however, the United States Supreme Court explicitly rejected this description of due process of law. In *New York Central Railroad v. White*,<sup>115</sup> the United States Supreme Court upheld New York's second attempt to adopt a no-fault workers' compensation system after the state adopted a state constitutional amendment clearing any constitutional obstacles under state law.<sup>116</sup> In doing so, the Court shunned the rigid originalist understanding of due process adopted by Judge

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109. *Ives v. S. Buffalo Ry. Co.*, 94 N.E. 431, 436 (N.Y. 1911).

110. REPORT TO THE LEGISLATURE OF THE STATE OF NEW YORK BY THE COMMISSION APPOINTED UNDER CHAPTER 518 OF THE LAWS OF 1909 TO INQUIRE INTO THE QUESTION OF EMPLOYERS' LIABILITY AND OTHER MATTERS 166-81 (1910) (surveying systems in a number of European countries in a report recommending workers' compensation legislation).

111. See Eugene Wambaugh, *Workmen's Compensation Acts: Their Theory and Their Constitutionality*, 25 HARV. L. REV. 129, 132 n.4 (1911) (listing states that adopted compensation statutes in 1910 and 1911); see also Ernst Freund, *Constitutional Status of Workmen's Compensation*, 2 AM. LAB. LEGIS. REV. 43, 43-44 (1912) (contrasting the *Ives* opinion with the concurrent treatment of compensation statutes by courts in other jurisdictions).

112. *Ives*, 94 N.E. at 436.

113. *Id.* at 432 (holding that "[i]n so far" as the workers' compensation statute imposes liability without fault, "it is void under the fourteenth amendment to the Federal Constitution and under section 6 of article 1 of our State Constitution, which guarantees all persons against deprivation of life, liberty or property without due process of law").

114. *Id.* at 439.

115. 243 U.S. 188 (1917).

116. *Id.* at 195-96, 208.

Werner in *Ives*, stating “No person has a vested interest in any rule of law entitling him to insist that it shall remain unchanged for his benefit.”<sup>117</sup>

It is the second proposition underlying the *Ives* decision that is more relevant here. According to the court, one of the “fundamental principles [of law] . . . in existence” at the time of the adoption of the constitutions was “that no man who was without fault or negligence could be held liable in damages for injuries sustained by another.”<sup>118</sup> This bold proposition is historically inaccurate. The court’s erroneous interpretation of history illustrates how judicial attempts to determine original meaning can lead courts astray in their constitutional analysis.

At the time of the adoption of the federal and New York state constitutions, tort claims for personal injuries were exceedingly rare. The instrumentalities that would later inflict the bulk of serious injuries leading to tort claims lay in the future—steam locomotives, industrial and mining machinery, and, eventually, automobiles.<sup>119</sup> The late eighteenth and early nineteenth-century economy consisted largely of farms and handicraft economies.<sup>120</sup> The injuries that did occur were largely at the hands of the victims themselves, family members, or friends, not large corporations with the copious resources and insurance to pay personal injury claims.<sup>121</sup>

Lawyers and judges who encountered tort claims at the time of the adoption of the Constitution did not even think about the prevailing liability regime in terms of a negligence or strict liability standard. Civil litigation in both England and America was organized around a system of writs, each of which contained the procedural rules and substantive criteria for determining liability that governed the specific dispute to which the writ applied.<sup>122</sup> Advocates in cases involving accidental injury focused largely on the issue of whether their claims sounded in the writ of trespass *vi et armis* or the writ of trespass on the case. It was not until the mid-nineteenth century that decisions from U.S. courts, notably Chief Justice Lemuel Shaw’s historic

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117. *Id.* at 198.

118. *Ives v. S. Buffalo Ry. Co.*, 94 N.E. 431, 439 (N.Y. 1911).

119. See Gifford, *Technological Triggers*, *supra* note 89, at 86-88.

120. See CARROLL PURSELL, *THE MACHINE IN AMERICA: A SOCIAL HISTORY OF TECHNOLOGY* 11 (2d ed. 2007) (stating that the English colonists who settled in North America “attempted, as nearly as possible, in technological as well as social arrangement[]” to duplicate the “rural, agricultural, [and] handicraft society” of contemporary England).

121. See Kenneth S. Abraham, *The Common Law Prohibition on Party Testimony and the Development of Tort Liability*, 95 VA. L. REV. 489, 498 (2009) (claiming few accidents warranted bringing a tort action before the latter half of the nineteenth century because “[t]he parties involved in accidents on family farms would typically have been close relatives, against whom suit would either have been economically pointless or barred by intrafamily immunity rules”).

122. See generally EDMUND M. MORGAN & FRANCIS X. DWYER, *INTRODUCTION TO THE STUDY OF LAW* 79-81 (2d ed. 1948).

decision for the Supreme Judicial Court of Massachusetts in the 1850 case *Brown v. Kendall*, began to recognize a broad fault-based standard for tort liability that applied generally to accidental harms.<sup>123</sup> And even after Chief Justice Shaw's groundbreaking recognition of a cross-cutting fault-based liability regime, American and English law retained important pockets of common law strict liability that applied to abnormally dangerous activities,<sup>124</sup> private nuisance,<sup>125</sup> trespass to land,<sup>126</sup> and wild animals.<sup>127</sup>

Legal historian Lawrence Friedman concludes:

All in all, tort law was not highly developed in 1776, or for a good many years thereafter.

....

Existing tort law was simply not designed to deal with collision, derailments, exploding boilers, and similar calamities. . . . American law had to work out on its own schemes to distribute the burden of railroad and steamboat accidents . . . . Tort law was new law in the nineteenth century.<sup>128</sup>

Morton Horwitz goes so far as to assert that “[a]t the beginning of the nineteenth century there was a general private law presumption in favor of compensation, expressed by the oft-cited common law maxim *sic utere*.”<sup>129</sup> Prior to American Independence, it appears that the common law of England did follow a strict or no-fault liability standard<sup>130</sup> and that the American states continued to follow this

123. 60 Mass. (6 Cush.) 292 (Mass. 1850).

124. See, e.g., *Rylands v. Fletcher* (1868) 3 HL 330 (Eng.).

125. See, e.g., *Bohan v. Port Jervis Gas-Light Co.*, 25 N.E. 246 (N.Y. 1890).

126. See, e.g., *Fletcher v. Rylands* (1865) 159 All ER 737 (Eng.).

127. See, e.g., *Behrens v. Bertram Mills Circus, Ltd.* (1957) 2 QB 1 (Eng.).

128. See FRIEDMAN, *supra* note 98, at 222-23.

129. See HORWITZ, *supra* note 98, at 85; see also Gregory, *supra* note 98, at 370-72 (noting the presence of “liability for unintentionally caused harm” absent negligence). Gary Schwartz challenged Horwitz’s account of the development of negligence law, including his contention that during the mid-nineteenth century, American tort law moved from a predominantly no-fault or strict liability regime to one requiring negligence for liability. Gary T. Schwartz, *Tort Law and the Economy in Nineteenth-Century America: A Reinterpretation*, 90 YALE L.J. 1717, 1727-34 (1981) [hereinafter Schwartz, *Tort Law and the Economy*]. However, Schwartz later admitted that even his own historical account demonstrated that by the mid-nineteenth century, “the negligence term . . . shed its turn-of-the-century ambiguity and . . . acquired its status as a formal legal category.” Gary T. Schwartz, *The Character of Early American Tort Law*, 36 UCLA L. REV. 641, 644 (1989) [hereinafter Schwartz, *Early American Tort Law*].

130. *Hulle v. Orynge* (1466) 6 Edw. 4, fol. 7, pl. 18. J. Brian stated in dicta:

And so if a man makes an assault upon me and I cannot avoid him, and he wants to beat me, and I in defence of myself raise my stick and strike him and, in raising it, I hurt some man who is behind my back, this man will have an action against me. And yet it was lawful for me to raise my stick to defend myself, and it was against my will that I hurt him.

regime even following separation from the mother country. In any event, when the *Ives* court erroneously focused on a fault standard supposedly in place at the time of the adoption of the Constitution, it fixed its attention on an issue that was largely foreign from the manner in which courts of the earlier era approached liability.

Judge Werner's erroneous assertion that one of the fundamental principles in place at the time of the adoption of the Constitution was that there could be no liability without fault was based largely on the common law as it had existed during his lifetime. He apparently understood little about the no-fault liability that prevailed at that time of constitutional ratification. He had not explored cases like *Hulle v. Orynge* (The Case of the Thorns)<sup>131</sup> or other English common law cases that had followed a no-fault standard.

The law that Judge Werner did know was the negligence regime that had become dominant in the middle and late nineteenth century. This liability system required proof of negligence in order for a plaintiff to recover<sup>132</sup> as well as the absence of any of the three trinity of defenses<sup>133</sup> that frequently prevented injured plaintiffs from recovering even if their injurers had been at fault. Additionally, during the mid- and late nineteenth century, a defendant's proof that its conduct

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*Id.*, reprinted in COURTNEY STANHOPE KENNY, A SELECTION OF CASES ILLUSTRATIVE OF THE ENGLISH LAW OF TORT 379, 380-81 (1904) (footnote omitted); see also *Weaver v. Ward* (1616) 80 Eng. Rep. 284, 284 (concluding that tort liability "tends only to give damages according to hurt or loss . . . except that it may be judged utterly without . . . fault," further clarifying that this exception to liability applies only in narrow circumstances, e.g., "if a man by force take my hand and strike you, or . . . that the plaintiff ran across his piece when he was discharging, or had set forth . . . circumstances, so as it had appeared to the Court that it had been inevitable").

131. *Hulle v. Orynge* (1466) 6 Edw. 4, fol. 7, pl. 18.

132. See, e.g., *ELY*, *supra* note 101, at 211-24; *HORWITZ*, *supra* note 98, at 85, 91-101; *WITT*, *supra* note 92, at 43-48; *Gregory*, *supra* note 98, at 383-84.

133. In the nineteenth century, the most impactful of the three affirmative defenses was the fellow servant rule. See *supra* notes 101-02 and accompanying text; see also *Farwell v. Bos. & Worcester R.R.*, 45 Mass. (4 Met.) 49, 57 (Mass 1842) (holding that even though an employer was vicariously liable for the torts committed by his employees acting within the scope of employment in most instances, an injured employee could not recover from the employer for an injury caused by the tortious conduct of another employee). The second affirmative defense was "assumption of risk," which frequently precluded workers from recovering for injuries caused by their employer's negligence, either because "the employee, by accepting or continuing in the employment with 'notice' of such negligence," or the employer, in providing for the workplace, had exercised "reasonable care" despite the remaining risks it posed. *Tiller v. Atl. Coast Line R.R.*, 318 U.S. 54, 69 (1943) (Frankfurter, J., concurring); RESTATEMENT (THIRD) OF TORTS: APPOINTMENT LIAB. § 2 cmt. J (AM. L. INST. 2000) (describing the use of the label primary implied assumption of risk in the late nineteenth and early twentieth century). The third of the trinity of defenses was contributory negligence that totally precluded recovery during the late nineteenth century. See *Bazzell v. Atchison, Topeka & Santa Fe Ry. Co.*, 300 P. 1108 (Kan. 1931) (barring recovery for death of automobile driver struck by train that failed to sound bell and was obstructed by overgrown vegetation); *Farmer v. Mich. Cent. R.R.*, 58 N.W. 45, 46 (Mich. 1894) (barring recovery for the death of a railroad worker struck by a boxcar while waiting to board his train); *Summers v. Burdick*, 13 Cal. Rptr. 68 (Cal. Dist. Ct. App. 1961) (refusing to hold automobile driver liable for striking visually impaired plaintiff).

corresponded with the custom in the trade or business generally established a lack of negligence as a matter of law, at least in cases involving the claims of injured employees.<sup>134</sup> Horwitz describes the development of the negligence regime during the half-century in the middle of the nineteenth century as “a radical transformation . . . in the theory of legal liability.”<sup>135</sup>

The change in the law governing liability for accidental injuries from the time of the adoption of the Constitution until the time of *Ives* reflected the common law’s adaptation to the dramatically increased severity and frequency of such injuries caused by industrialization and the advent of mechanized forms of transportation.<sup>136</sup> Whether those changes in the law were directly caused by the technological transformation of the American economy has been extensively debated elsewhere. Briefly, one view, probably the prevailing view among legal historians including Horwitz, Friedman, and Charles O. Gregory, is that rapid industrialization did cause the ascendance of the negligence regime.<sup>137</sup> G. Edward White<sup>138</sup> and Witt proffer an alternative explanation for the rapid upheaval in American tort law during the nineteenth century that focuses on changes in intellectual thought during the mid-nineteenth century, particularly the importance of “nineteenth-

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134. *E.g.*, *Shadford v. Ann Arbor St. Ry. Co.*, 69 N.W. 661, 663 (Mich. 1897) (holding that there was no liability as a matter of law because the industrial tool “was one of a kind in general use throughout the country”); *Allison Mfg. Co. v. McCormick*, 12 A. 273, 275 (Pa. 1888) (“The general rule requires of the master that he provide materials and implements for the use of his servant, such as are ordinarily used by persons in the same business, but he is not required to secure the best known materials . . .”).

135. HORWITZ, *supra* note 98, at 85. At least two leading scholars strongly disagreed with Horwitz’s characterization of the change in the law as “a radical transformation,” as well as many other aspects of Horwitz’s thesis regarding the development of negligence. See Schwartz, *Tort Law and the Economy*, *supra* note 129, at 1722 (arguing that “the nineteenth-century American negligence rule developed in a basically evolutionary way”). *But cf.* Schwartz, *Early American Tort Law*, *supra* note 129, at 678 (stating, in a subsequent article, that “I am now inclined to avoid sweeping statements on the question of novelty versus evolution”); see Robert L. Rabin, *The Historical Development of the Fault Principle: A Reinterpretation*, 15 GA. L. REV. 925, 933 (1981) (arguing that the change in liability standards was less than radical because “the fault principle was far from dominant during the supposed heyday of fault”).

136. Witt, *supra* note 95, at 694.

137. FRIEDMAN, *supra* note 98, at 283-84 (“[I]n the nineteenth century, tort law (and negligence in particular) exploded. This can be laid at the door of the industrial revolution—the age of engines and machines.”); HORWITZ, *supra* note 98, at 99-100 (“One of the most striking aspects of legal change during the antebellum period is the extent to which common law doctrines were transformed to create immunities from legal liability and thereby to provide substantial subsidies for those who undertook schemes of economic development.”); Gregory, *supra* note 98, at 365 (“[M]any of our judges believed that the development of this young country under a system of private enterprise would be hindered and delayed as long as the element of chance exposed enterprisers to liability for the consequences of pure accident, without fault of some sort.”).

138. WHITE, *supra* note 89, at 3-19. See generally Gifford, *Technological Triggers*, *supra* note 89, at 101-04.



century political liberalism”<sup>139</sup> that focused on what was seen as an imposition on a tort defendant’s liberty when liability was imposed.<sup>140</sup> For our purposes, the cause of the dramatic change in the standards governing personal injury liability in the mid-nineteenth century does not matter. What does matter is that radical transformation of the common law did occur and led Judge Werner to err profoundly when he assumed that the original meaning of “due process” included a requirement that there could be no liability without fault.

In fact, Judge Werner and his colleagues did not need to be legal historians to understand that a requirement of no liability without fault was not one of the “fundamental principles which were in existence when our Constitutions were adopted.”<sup>141</sup> If liability without a showing of fault violated the due process clauses of the federal and state constitutions, it follows that there would have been no examples of no-fault liability at the time of constitutional drafting and ratification and during the more than a century that passed before *Ives*. Yet the opinion itself cites several examples of no-fault liability under English and American common law that the court fails to convincingly explain away.<sup>142</sup> One of the examples of no-fault liability under the common law that the court acknowledges is the admiralty doctrine that provides that a sailor who is sick or injured at sea is required to be cared for by the employer until the ship returns to port, even in the

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139. See WITT, *supra* note 92, at 45.

140. See *id.* at 46 (stating that “tort law marked the bounds of individuals’ liberty”); *cf.* Rabin, *supra* note 135, at 960 (arguing that instead of “a protective shield for ‘infant industry,’” the limitation of liability during the negligence regime “was a natural consequence of deeply conservative, preexisting sentiments toward loss allocation” (quoting FRIEDMAN, *supra* note 98, at 410-13)).

141. *Ives v. S. Buffalo Ry. Co.*, 94 N.E. 431, 439 (N.Y. 1911).

142. The examples cited by the court include the liability of the husband for torts committed by his wife before the enactment of the Married Woman’s Acts beginning in the 1890s, even when the husband was not personally at fault, and the liability of the “master” (employer) for the torts committed by the “servant” (employee) without any fault on the part of the employer. *Id.* at 446. The court unconvincingly tries to distinguish these cases on the grounds that someone, the wife or the employee, was at fault. Of course, in neither case was the party held liable, the husband or the employer, at fault. Additionally, the court acknowledges the ancient doctrine providing no-fault liability in the case of deodands. *Id.* An animal, such as an ox or bull, was forfeited to the Crown when it gored another citizen, even without a finding of fault on the part of the possessor of the animal. *Id.* The court tries to eliminate this as an example of no-fault liability under American common law, arguing that “the law of deodands” was never imported into this country. The court ignores later instances of no-fault civil forfeiture under American law. *E.g.*, Act of March 31, 1868, sec. 5, 15 Stat. 58, 59, (providing for the forfeiture of any distilling apparatus used in defrauding the federal government of taxes on alcoholic beverages); see *Dobbins’ Distillery v. United States*, 96 U.S. 395 (1877) (applying the statute against an innocent lessor where the apparatus was illegally used by its lessee, stating, “Nothing can be plainer . . . than . . . that the offence . . . is attached primarily to the distillery, . . . without any regard whatsoever to the personal misconduct or responsibility of the owner”).

absence of any fault on the part of the owner or operator of the ship.<sup>143</sup> Judge Werner attempts to distinguish this no-fault liability by arguing that “the contracts and services of seamen are exceptional in character,” identifying a variety of policy justifications for this exception.<sup>144</sup> Unfortunately for the integrity of his argument, early in the *Ives* opinion, Judge Werner had opined that similar “economic and sociological arguments” espoused in favor of the constitutionality of the workers’ compensation statute did not count.<sup>145</sup> Finally, the court attempted to distinguish an earlier decision by the United States Supreme Court rejecting a due process challenge to a Missouri state statute providing that a railroad corporation could be held liable to an adjoining landowner whose property was burned by sparks emitted from the defendant’s locomotive without any showing of fault on the part of the defendant.<sup>146</sup> The *Ives* court asserts that the no-fault statute did not violate due process because a provision of the Missouri state constitution provided that “the exercise of the police power of the state shall never be . . . so construed as to permit corporations to conduct their business in such manner as to infringe the equal rights of individuals, or the general well-being of the state.”<sup>147</sup> Obviously, under the Supremacy Clause, even a state statute purportedly authorized by a state constitution cannot violate the Due Process Clause of the Federal Constitution.

Perhaps more important, when the *Ives* court asserted that liability without fault violated a fundamental principle of the Constitution at the time when it was adopted, it entirely failed to acknowledge other areas of no-fault liability that existed at the time of constitutional ratification. On the heels of the *Ives* decision, the *Harvard Law Review* published an editorial noting numerous examples of no-fault liability

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143. *Ives*, 94 N.E. at 446; *see also* *The Osceola*, 189 U.S. 158, 175 (1903) (characterizing the entitlement of a seaman “to maintenance and cure, whether [his] injuries were received by negligence or accident,” as a settled proposition of law).

144. *Ives*, 94 N.E. at 446 (“A seaman engages for the voyage. He is subject to physical discipline, and exposed to hardships and dangers peculiar to the sea. He is, in effect, a coadventurer with the master . . . For these and many other obvious reasons the maritime law has wisely and benevolently built up peculiar rights and privileges for the protection of the seaman which are not cognizable in the common law.”).

145. *Id.* at 439 (“[W]e do not overlook the cogent economic and sociological arguments which are urged in support of the statute. . . . [B]ut we think it is an appeal which must be made to the people [in support of a constitutional amendment] and not to the courts.”).

146. *Id.* at 447; *see also* *St. Louis & S.F. Ry. v. Mathews*, 165 U.S. 1, 26 (1897) (holding constitutional a statute making railroad corporations strictly liable for property damage caused by sparks emitted by their cars because requiring railroads to use “the utmost care . . . against the escape of fire from their engines might not afford sufficient protection to the owners of property in the neighborhood of the railroads”).

147. *Ives v. S. Buffalo Ry. Co.*, 94 N.E. 431, 439 (N.Y. 1911) (quoting MO. CONST. of 1875, art. XII, § 5).

under the common law.<sup>148</sup> As previously noted,<sup>149</sup> English and early American common law provided for liability without a showing of fault existing in several important areas including liability for blasting,<sup>150</sup> private nuisance,<sup>151</sup> the liability of possessors of wild animals,<sup>152</sup> and the liability of those responsible for fires that harm others.<sup>153</sup> Additionally, only a year before the *Ives* decision, the Minnesota Supreme Court, without any mention of due process, held the owner of a boat who caused damage to the plaintiff's dock liable to the dock owner without any showing of fault on the part of the defendant.<sup>154</sup>

What led the *Ives* court to misconstrue the principles of tort law in place at the time of the adoption of the Constitution? Under the court's own proposition that parties were entitled to be judged by the same fundamental principles of liability in place at the time of the adoption, a version of originalism, this erroneous history resulted in an incorrect outcome. We have already discussed the rapid transformation of tort liability standards during the nineteenth century that may have obscured from the court the historically accurate principles governing liability at the time of constitutional ratification.<sup>155</sup> However, it does not seem unwarranted to also suggest that when Judge Werner wrote for

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148. Note, *The New York Workmen's Compensation Act as Due Process of Law*, 24 HARV. L. REV. 647 (1911).

149. See *supra* notes 124-27 and accompanying text.

150. See *Hay v. Cohoes Co.*, 2 N.Y. 159, 160 (N.Y. 1849) (holding defendant corporation liable for injuries to plaintiff's dwelling caused by defendant's blasting of rocks in order to dig a canal even though "no negligence or want of skill in executing the work was alleged or proved"); *Sullivan v. Dunham*, 55 N.E. 923, 924 (N.Y. 1900) (extending holding of *Hay* so that defendant was liable for injuries sustained by human being as result of blasting activity).

151. See HORWITZ, *supra* note 98, at 85 ("In 1800, . . . virtually all injuries were still conceived of as nuisances, thereby invoking a standard of strict liability . . .").

152. *E.g.*, *Muller v. McKesson*, 73 N.Y. 195, 199-200 (N.Y. 1878) (reasoning that the owner of "a vicious dog or other animal" cannot escape liability by demonstrating any amount of care in keeping the animal restrained); see also *N.Y. Cent. R.R. v. White*, 243 U.S. 188, 204 (1917) (acknowledging liability without fault for people who "harbored a mischievous animal" and stating "liability without fault is not a novelty in the law").

153. *E.g.*, *Hart v. W. R.R.*, 54 Mass. (13 Met.) 99, 104 (Mass. 1847) (holding defendant railroad liable for damage to plaintiff's dwelling caused by fire that "was transmitted, by ordinary and natural means," from shop of third party that was hit by sparks from defendant's engine); see also *White*, 243 U.S. at 204 (noting liability without fault for one "who employed fire"); *St. Louis & S.F. Ry. v. Mathews*, 165 U.S. 1, 5-9 (1897) (surveying regulation of liability for accidental fires in England and the United States).

154. *Vincent v. Lake Erie Transp. Co.*, 124 N.W. 221, 221-22 (Minn. 1910) (acknowledging that mooring a ship to a dock during a storm demonstrated "good judgment and prudent seamanship," but holding the ship owners liable for dock damage caused by the ship during the storm because, in mooring the ship to the dock, "those in charge of the vessel deliberately and by their direct efforts . . . preserved [it] at the expense of the dock").

155. See *supra* notes 132-34 and accompanying text.

the unanimous court in *Ives*,<sup>156</sup> his erroneous understanding of legal history may have been prompted by his need to justify a holding in tune with his own normative biases.<sup>157</sup>

Witt convincingly describes how Judge Werner's beliefs about the interactions between workers and employers led him to a strong bias against workers' compensation and similar social reform statutes.<sup>158</sup> Judge Werner spoke regularly of the role of the judge as the "heroic defender of the law's basic commitments against the encroachments of modern politics,"<sup>159</sup> of which workers' compensation was to him a paradigmatic example. He and some of his contemporaries saw workers' compensation statutes as the leading edge of wealth redistribution.<sup>160</sup> As Judge Werner wrote in the *Ives* opinion itself, if it were constitutional to impose upon the employer the costs of industrial accidents without proof of causation and/or fault, "it is equally competent to visit upon him a special tax for the support of hospitals and other charitable institutions, upon the theory that they are devoted largely to the alleviation of ills primarily due to his business."<sup>161</sup>

More importantly, Witt convincingly interprets Judge Werner's evaluation of workers' compensation statutes as reflecting hostility toward the "actuarial categories and probabilistic principles" inherent in these laws.<sup>162</sup> In Judge Werner's view, tortious liability was to be determined on the basis of the interactions of the autonomous worker and the autonomous employer. With his strong commitment to free labor among autonomous individuals, he found it difficult to accept the emergence of large corporations and unions representing workers collectively. The workers' compensation statutes left behind the world of torts that evaluated liability in terms of the two individual parties involved in a particular, individualized incident causing harm, a view of tort law reflecting corrective justice.<sup>163</sup> Instead, they justified the employer's obligation to pay on the basis of the instrumental values of

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156. *Ives v. S. Buffalo Ry. Co.*, 94 N.E. 431, 434 (N.Y. 1911). Chief Judge Cullen also filed a concurring opinion in which Judge Bartlett concurred. *Id.* at 449. Both judges joined Judge Werner's opinion for the court. *Id.* at 434.

157. As singer-songwriter Paul Simon wrote more than a half-century ago, "a man hears what he wants to hear and disregards the rest." THE BOXER, *on* BRIDGE OVER TROUBLED WATER (Columbia Recs. 1970).

158. See WITT, *supra* note 92, at 152-86. Witt appropriately titles the chapter of *The Accidental Republic* in which these beliefs are described as "The Passion of William Werner." *Id.*

159. *Id.* at 159.

160. *Id.* at 168, 171.

161. *Ives*, 94 N.E. at 440.

162. WITT, *supra* note 92, at 173-74.

163. See, e.g., Ernest J. Weinrib, *Corrective Justice*, 77 IOWA L. REV. 403, 409 (1992) (asserting that "a particular plaintiff su[ing] a particular defendant" is "the basic feature of private law").

loss minimization<sup>164</sup> and loss distribution.<sup>165</sup> Loss minimization could best be achieved, according to the proponents of workers' compensation, by looking at the liability issue in probabilistic and actuarial terms.<sup>166</sup> Judge Werner's perspective on these issues was rejected only six years later by a unanimous United States Supreme Court in *New York Central Railroad v. White*<sup>167</sup> when it explicitly accepted the arguments of those urging the enactment of workers' compensation legislation.<sup>168</sup>

This philosophy underlying workers' compensation violated Judge Werner's personal views premised on a free-labor economy and were seen by him as violating fundamental American principles. When he declared that the workers' compensation statute violated fundamental principles in place at the time of the adoption of the Constitution, he conjured an original meaning of the Due Process Clause that provided justification for the result he preferred. That legal history, however, was fictional.

### B. *Beyond Ives: State Tort Reforms*

Nearly a century after *Ives*, courts were still using originalism to evaluate state tort reforms. Oregon provides an excellent example, in which the state court relied on originalist history to interpret the state

164. See, e.g., GUIDO CALABRESI, THE COST OF ACCIDENTS: A LEGAL AND ECONOMIC ANALYSIS 26 (1970) ("[T]he principal function of accident law is to reduce the sum of the costs of accidents and the costs of avoiding accidents.").

165. See, e.g., *id.* at 27-28 (describing the importance of spreading accident losses and shifting them to "deep pocket[s]" as means of reducing "the real societal costs of accidents").

166. WITT, *supra* note 92, at 174 (explaining that compensation statutes sought to hold liable the party "responsible for the aggregate toll of casualties in a given industry," rather than the party who caused the accident in a particular case).

167. 243 U.S. 188, 195-96, 198, 208 (1917) (holding that the New York workers' compensation statute enacted following *Ives* and the subsequent adoption of state constitutional amendment allowing for such a system did not violate the Due Process Clause of the Fourteenth Amendment, explicitly stating that "[n]o person has a vested interest in any rule of law, entitling him to insist that it shall remain unchanged for his benefit").

168. The Court's acceptance of a more modern understanding of workplace injuries than the one espoused by Judge Werner was seen in its statements such as "it is evident that the consequences of a disabling or fatal injury are precisely the same to the parties immediately affected, and to the community, whether the proximate cause be culpable or innocent," *id.* at 205, and further stating that "[t]his is a loss arising out of the business, and . . . is an expense of the operation, as truly as the cost of repairing broken machinery or any other expense that ordinarily is paid by the employer." *Id.* at 203. The Court also acknowledges, similarly with approval, the arguments of proponents of workers' compensation:

[T]he whole common-law doctrine of employer's liability for negligence, with its defenses of contributory negligence, fellow servant's negligence, and assumption of risk, is based upon fictions, and is inapplicable to modern conditions of employment; that in the highly organized and hazardous industries of the present day the causes of accident are often so obscure and complex that in a material proportion of cases it is impossible by any method correctly to ascertain the facts necessary to form an accurate judgment . . . .

*Id.* at 197.

constitution's Remedy and Trial-by-Jury Clauses rather than its Due Process Clause.<sup>169</sup> In *Smothers v. Gresham Transfer, Inc.*,<sup>170</sup> the court invoked a thick form of originalism to hold unconstitutional a state workers' compensation statute, though only as applied. The court stated, "we conclude that the drafters of [the Remedy Clause], sought to give constitutional protection to absolute rights respecting person, property, and reputation *as those rights were understood in 1857 . . .*"<sup>171</sup> Fifteen years later, however, the court would discard the originalist analysis in *Smothers* in holding that a damages cap applied to a state employee was constitutional. In *Horton v. Oregon Health & Science University*,<sup>172</sup> the court determined the *Smothers* court had made a mistake regarding the history of the Remedy Clause. Unlike the factual mistake in *Ives*, this one was interpretive. The *Horton* court concluded that the framers of the Oregon Constitution did not intend to tie the meaning of the Remedy Clause to the common law as it stood at the time of its drafting. Moreover, the court noted that freezing the common law in place saddles future generations with its mistakes in perpetuity.

In *Smothers*, the plaintiff alleged a respiratory condition caused by exposure to sulfuric, hydrochloric, and hydrofluoric acid mist and fumes at work.<sup>173</sup> An administrative law judge of the Workers' Compensation Board upheld the insurer's denial of the claim because the plaintiff's exposure at work was not the "major contributing cause" of the injury; thus, the plaintiff did not have a "compensable injury" under the workers' compensation statutes.<sup>174</sup> The Oregon statutes made workers' compensation the exclusive remedy for all work-related injuries, regardless of whether the injury is compensable.<sup>175</sup> Therefore, when a plaintiff filed a tort claim against his employer, that claim was

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169. There are a sufficient number of state constitutional cases adopting originalism that scholars include those cases as a category. See, e.g., Dan Friedman, *Jackson v. Dackman Co.: The Legislative Modification of Common Law Tort Remedies Under Article 19 of the Maryland Declaration of Rights*, 77 MD. L. REV. 949, 979 & n.141 (2018) (referring to a "time capsule" analysis); David Schuman, *The Right to a Remedy*, 65 TEMPLE L. REV. 1197, 1208 (1992) ("One of the more common rules employed by courts declares that the remedy guarantee applies only to those causes of action in existence at the time the guarantee became part of the constitution. The remedy guarantee, in other words, freezes into permanence the law of the framers' time, but has no effect on subsequently created causes of action.").

170. 23 P.3d 333 (Or. 2001), *overruled by* *Horton v. Or. Health & Sci. Univ.*, 376 P.3d 998 (Or. 2016).

171. *Id.* at 351 (emphasis added). The Oregon Constitution was drafted in 1857.

172. 376 P.3d at 998.

173. 23 P.3d at 336.

174. *Id.*

175. *Id.* at 337.

dismissed.<sup>176</sup> The plaintiff then appealed to the Oregon Supreme Court, arguing he had been denied a remedy for injuries he suffered at work, contrary to the Remedy Clause of the Oregon Constitution.<sup>177</sup>

The court acknowledged that its Remedy Clause cases were inconsistent and determined it should attempt “to understand the wording in the light of the way that wording would have been understood and used by those who created the provision.”<sup>178</sup> After a lengthy discussion of text and historical circumstances, including Coke and Blackstone,<sup>179</sup> the court concluded that the Remedy Clause “sought to give constitutional protection to absolute rights respecting person, property and reputation as those rights were understood in 1857 . . . .”<sup>180</sup> After determining which of its Remedy Clause cases to overrule, the court announced a two-part test when analyzing a claim under that clause. First, “when the drafters wrote the Oregon Constitution in 1857, did the common law of Oregon recognize a cause of action for the alleged injury?”<sup>181</sup> If so, “the second question is whether [the legislature] has provided a constitutionally adequate substitute remedy for the common-law cause of action for that injury.”<sup>182</sup>

Turning to application, the court inquired whether, in 1857, the common law of Oregon would have recognized an action for negligence under the facts of the case.<sup>183</sup> No Oregon cases addressed the common law rights of employees to bring negligence actions against employers in the years immediately surrounding the adoption of the Oregon Constitution.<sup>184</sup> Thus, the court attempted to “divine[]” the content of the common law “from a wide range of sources.”<sup>185</sup> The court looked at an 1879 case from the United States Supreme Court,<sup>186</sup> an 1883 case from the Kansas Supreme Court,<sup>187</sup> and an 1888 Oregon Supreme Court case.<sup>188</sup> The court divined “that, in 1857, the common law of Oregon would have recognized that a worker had a cause of action for

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176. *Smothers v. Gresham Transfer, Inc.*, 23 P.3d 333, 336 (Or. 2001), *overruled by Horton v. Or. Health & Sci. Univ.*, 376 P.3d 998 (Or. 2016).

177. *Id.*

178. *Id.* at 338 (quoting *Vannatta v. Keisling*, 931 P.2d 770, 781 (Or. 1997)).

179. *Id.* at 338-51.

180. *Id.* at 351.

181. *Id.* at 356.

182. *Smothers v. Gresham Transfer, Inc.*, 23 P.3d 333, 356-57 (Or. 2001), *overruled by Horton v. Or. Health & Sci. Univ.*, 376 P.3d 998 (Or. 2016).

183. *Id.* at 358-59.

184. *Id.* at 359.

185. *Id.*

186. *Hough v. Ry. Co.*, 100 U.S. 213 (1879).

187. *Atchison, Topeka & Santa Fe R.R. v. Moore*, 29 Kan. 632 (1883).

188. *Anderson v. Bennett*, 19 P. 765 (Or. 1888).

negligence against his employer for failing to provide a safe workplace and failing to warn of the dangerous conditions to which the worker would be exposed at work.”<sup>189</sup>

Having determined that the Remedy Clause would have covered the plaintiff’s claim in 1857, the court moved to whether there was an adequate substitute remedy. To receive workers’ compensation, a plaintiff must prove the employer was not just a contributing cause, but the major contributing cause.<sup>190</sup> “The major contributing cause standard did not exist at common law.”<sup>191</sup> The plaintiff suffered an injury in which the employer might have been a contributing cause, but it was ruled not the major contributing cause.<sup>192</sup> Therefore, the plaintiff had no substitute remedy for the cause of action he would have had at common law; as such, it cannot be adequate. The court held that the workers’ compensation statutes, as applied to him, were unconstitutional.<sup>193</sup>

Fifteen years later, the court had seen enough and rejected originalism. In *Horton v. Oregon Health & Science University*,<sup>194</sup> the plaintiff’s six-month-old son developed a cancerous mass on his liver.<sup>195</sup> During an operation, the doctors inadvertently transected blood vessels to the liver, resulting in the need for a liver transplant, removal of the spleen, additional surgeries, and a lifetime of monitoring.<sup>196</sup> One of the surgeons and the Oregon Health and Science University (OHSU), a state entity, admitted liability and tried the case on damages.<sup>197</sup> The jury found that the plaintiff’s son had sustained and will sustain \$6,071,190.38 in economic damages and \$6,000,000 in noneconomic damages.<sup>198</sup> Both OHSU and the surgeon filed a motion to reduce the jury’s verdict to \$3,000,000 based on the Oregon Tort Claims Act.<sup>199</sup> The trial court granted the motion as to OHSU, holding that because sovereign immunity applied to OHSU, the legislature may constitutionally limit OHSU’s damages.<sup>200</sup> As to the surgeon, the court denied

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189. *Smothers v. Gresham Transfer, Inc.*, 23 P.3d 333, 360 (Or. 2001), *overruled by Horton v. Or. Health & Sci. Univ.*, 376 P.3d 998 (Or. 2016).

190. *Id.* at 361.

191. *Id.*

192. *Id.* at 362.

193. *Id.* at 336.

194. 376 P.3d at 998.

195. *Horton v. Or. Health & Sci. Univ.*, 376 P.3d 998, 1001 (Or. 2016).

196. *Id.*

197. *Id.*

198. *Id.* at 1001-02.

199. *Id.* at 1002.

200. *Id.*



the motion on the ground that, among other provisions, it violated the Remedy Clause.<sup>201</sup> The surgeon filed a direct appeal to the Oregon Supreme Court.<sup>202</sup>

The defendant surgeon argued that Oregon's Remedy Clause cases rest on a faulty understanding of history and should be overruled.<sup>203</sup> Interestingly, both the defendant and plaintiff agreed that the Remedy Clause should not be strictly tied to Oregon common law as it existed in 1857.<sup>204</sup> The court set out to determine if *Smothers* tied the meaning of the Remedy Clause to the 1857 common law and, if so, whether it should be overruled.<sup>205</sup> After reviewing *Smothers*, the court concluded that it tied the Remedy Clause to the 1857 common law in two ways. "First, if the common law of Oregon provided a cause of action for an injury to person, property, or reputation in 1857, then the law must continue to provide some remedy for that historically defined injury."<sup>206</sup> "Second, in determining whether the law provides a constitutionally adequate remedy, the court looked to the common law in 1857 as a model."<sup>207</sup>

In evaluating whether *Smothers* accurately interpreted the Remedy Clause, the court began with the following text: "The clause lacks words used elsewhere in the constitution that connect a constitutional guarantee to a single point in time."<sup>208</sup> Next, the court declared that context was "also at odds" with a historical limitation.<sup>209</sup> The court noted that the Remedy Clause was adopted as part of the original Oregon Constitution.<sup>210</sup> "Article XVII, section 7 provides that '[a]ll laws in force in the Territory of Oregon when this Constitution takes effect, and consistent therewith, shall continue in force until altered, or repealed.'"<sup>211</sup> In other words, the Oregon Constitution itself acknowledges that the common law evolves. The court noted that in adopting the common law, but modifying it to meet local conditions, Oregon continued a tradition dating to the colonizing of the country. It stated, "In modifying common-law rights to meet conditions unique to this state, Oregon continued a process that began when the original colonies first adopted and then modified English common law."<sup>212</sup> Thus: "Contrary to the premise that underlies *Smothers*, when the framers drafted the

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201. *Horton v. Or. Health & Sci. Univ.*, 376 P.3d 998, 1002 (Or. 2016).

202. *Id.*

203. *Id.*

204. *Id.* at 1003.

205. *Id.*

206. *Id.* at 1005.

207. *Horton v. Or. Health & Sci. Univ.*, 376 P.3d 998, 1005 (Or. 2016).

208. *Id.* at 1006.

209. *Id.*

210. *Id.*

211. *Id.* at 1007 (quoting OR. CONST. art. XVIII, § 7).

212. *Id.*

Oregon Constitution in 1857, they would have understood that the common law was not tied to a particular point in time but instead continued to evolve to meet changing needs.”<sup>213</sup>

The court did not stop at finding *Smother's* was based on an interpretive mistake. It presented the negative effects of freezing the common law in place. The common law “often turned on a patchwork of confusing and unworkable distinctions”<sup>214</sup> and the holding in *Smother's* “gives constitutional effect to those common-law anomalies.”<sup>215</sup> In an earlier Remedy Clause case, the court stated it wanted to avoid tying the legislature to a conception of the common law that would prevent it from amending the law to meet changed circumstances.<sup>216</sup> The court noted that, “to hold otherwise, would fix into place doctrines such as the fellow-servant doctrine, contributory negligence, and assumption of risk.”<sup>217</sup> Moreover, adhering to the *Smother's* standard “can result in the further anomaly of trying two claims to a jury—one under the current law and the other under the law as it existed in 1857.”<sup>218</sup> In the end, the court announced, “we overrule *Smother's*.”<sup>219</sup>

In addition to arguments over the Remedy Clause, *Horton* involved parallel arguments about the Trial-by-Jury Clause. In a 1999 case, *Lakin v. Senco Products, Inc.*,<sup>220</sup> the court held that damage caps were unconstitutional pursuant to the Trial-by-Jury Clause. Just as originalism was used to interpret the Remedy Clause in *Smother's*, so too was it used to interpret the Trial-by-Jury Clause in *Lakin*. The *Lakin* court reached its conclusion in three steps. First, the right to trial by jury guaranteed by the clause has the same meaning that it had in 1857.<sup>221</sup> Second, in 1857, “the extent of a party’s damages in an individual case was a question of fact for the jury and that the legislature could not interfere with the jury’s fact-finding function.”<sup>222</sup> Third, the legislature’s authority to limit a jury’s factual findings is no greater than a trial court’s.<sup>223</sup> The last step was important because trial courts

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213. *Horton v. Or. Health & Sci. Univ.*, 376 P.3d 998, 1007 (Or. 2016). The court referenced other sources making further arguments that the *Smother's* court erred historically. *Id.* at 1003 (citing Jonathan M. Hoffman, *Questions Before Answers: The Ongoing Search to Understand the Origins of the Open Courts Clause*, 32 RUTGERS L.J. 1005 (2001); Klutschkowsi v. PeaceHealth, 311 P.3d 461, 476-87 (Or. 2013) (Landau, J., concurring)).

214. *Id.* at 1005.

215. *Id.*

216. *Id.* at 1013 (citing Perozzi v. Ganiere, 40 P.2d 1009, 1016 (Or. 1935)).

217. *Id.*

218. *Id.*

219. *Horton v. Or. Health & Sci. Univ.*, 376 P.3d 998, 1010 (Or. 2016).

220. 987 P.2d 463, *modified*, 987 P.2d 476 (Or. 1999), and *overruled by Horton*, 376 P.3d 998.

221. *Horton*, 376 P.3d at 1040.

222. *Id.*

223. *Id.* at 1041.

did have the power to set aside a jury verdict in 1857 if it was against the weight of the evidence, but only if the party obtaining the verdict had an option of a new trial.<sup>224</sup> Neither a trial court nor the legislature could unilaterally limit a jury's award of noneconomic damages in civil cases in which a jury trial was customary in 1857. Thus, damage caps were unconstitutional.

In *Horton*, the defendant surgeon needed to overturn this holding to obtain the benefit of the cap. As with *Smothers*, he argued that *Lakin* was wrongly decided. The court worked through *Lakin*'s findings in reverse order. As to the third point, the court stated that simply because a judge cannot "reweigh the amount of damages that the jury awards in an individual case does not mean that the legislature cannot enact a statute that specifies, as a matter of law, the nature and extent of damages that are available in a class of cases."<sup>225</sup> As to the second point, the court said that although the amount of damages a party sustains is ordinarily a factual issue for the trier of fact, it does not follow that the trier of fact cannot be constrained by legal limits.<sup>226</sup> The court continued, stating that "common-law courts routinely have imposed legal limits on the type and amount of recoverable damages that a defendant's negligence, in fact, caused."<sup>227</sup> These limits include duty and proximate cause.

For our purposes, it is the *Lakin* court's first proposition, tying trial by jury to the law in 1857, that matters. The *Horton* court endorsed *Lakin*'s holding that the right to trial by jury was preserved as it was in 1857 by focusing on the state constitution's use of the word "inviolable" in the text.<sup>228</sup> Importantly, the court discussed what, exactly, such a restriction entails. One possibility was that *Lakin*'s holding was based "on the ground that only those legal limitations on damages that existed in 1857 are constitutionally valid."<sup>229</sup> The court rejected that standard: "[T]he limits on the extent of a defendant's damages that the common law recognized in 1857 bear little resemblance to those that we recognize today."<sup>230</sup> To emphasize how much has changed, the court quoted Justice Linde from a 1987 case:

At the time the Oregon Territory adopted the "common law of England," the common law had no broad theory of liability for unintended harm resulting from a failure to take due care toward members of the public

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224. *Id.*

225. *Horton v. Or. Health & Sci. Univ.*, 376 P.3d 998, 1041 (Or. 2016).

226. *Id.*

227. *Id.*

228. *Id.* at 1036.

229. *Id.* at 1042 (presaging the similar view later adopted in *Bruen*).

230. *Id.*

generally but only liability for harm resulting from negligent conduct in various callings and relationships. Men had particular duties but no general duty.<sup>231</sup>

In other words, a general theory of negligence was not fully formed when the Oregon Constitution was drafted. If the trial-by-jury provision “froze the legal limits on liability as they existed in 1857 and thus defined the extent of the damages that can be recovered against a negligent defendant, much of the later growth of the law of negligence would be at odds with [that provision].”<sup>232</sup> Consequently, “a defendant could invoke its right to a jury trial to argue against any expansion of damages beyond those for which it would have been liable when the Oregon Constitution was framed.”<sup>233</sup> Finding nothing in the text or history of the clause intended such “sweeping consequences,”<sup>234</sup> the court overruled *Lakin*.<sup>235</sup>

In emphasizing and supporting *Horton*'s repudiation of the rigid form of originalism embodied in the *Smother*s and *Lakin* decisions, we do not intend to lionize the case as a whole. *Horton* upholds a cap on compensatory damages, a policy position we do not endorse. Moreover, the case has been subjected to intense criticism for the flawed historical analysis of the Remedy and Trial-by-Jury Clauses in the Oregon Constitution it advances, which the court adopted in place of the *Smother*s and *Lakin* interpretations. *Horton* relied on less than compelling historical arguments to interpret these clauses as providing merely procedural, not substantive, guarantees.<sup>236</sup> Robert Peck and Erwin Chemerinsky have challenged *Horton*'s alternative history, arguing that the court's reading of Coke and Blackstone “fails to account for the distinctly American approach to incorporating their ideas into restrictions on government action.”<sup>237</sup> Peck and Chemerinsky continue: “The court then compounds its error by considering Coke's decision in *Dr. Bonham's Case* . . . .”<sup>238</sup> At another point, they bemoan the *Horton*

231. *Horton v. Or. Health & Sci. Univ.*, 376 P.3d 998, 1042 (Or. 2016) (quoting *Fazzolari v. Portland Sch. Dist. No. 1J*, 734 P.2d 1326, 1328 (Or. 1987)).

232. *Id.*

233. *Id.*

234. *Id.*

235. *Id.* at 1044.

236. The Remedy Clause is said to be “not a protection against the exercise of governmental power” but “one of those provisions of the constitution that prescribe how the functions of government shall be conducted.” *Horton*, 376 P.3d at 1005-06 (quoting *State ex rel. Oregonian Publ'g Co. v. Deiz*, 613 P.2d 23, 29 (Or. 1980) (Linde, J., concurring)). The Trial-by-Jury Clause is also “a procedural right; that is, it guarantees the right to a trial by a jury (as opposed to a trial by a judge) in civil actions for which the common law provided a jury trial.” *Id.* at 1040.

237. Robert S. Peck & Erwin Chemerinsky, *The Right to Trial by Jury as a Fundamental and Substantive Right and Other Civil-Trial Constitutional Protections*, 96 OR. L. REV. 489, 545 (2018).

238. *Id.*

court's selective use of history: "Even when the *Horton* court discovered a passage from Blackstone that may not have fit its thesis, the court engaged in a form of carpentry that downsized the troublesome text."<sup>239</sup> Robert Williams also criticized the use of history in *Horton*. The court "provided exhaustive analysis of the English origins of the right to remedy/access to court provisions, concluding that, despite evidence to the contrary, these clauses were only addressed to the judiciary and did not limit legislative modifications of the common law."<sup>240</sup> We view these critiques of *Horton* as well placed, providing further evidence that, regardless of one's view of the merits in specific litigation, the general practice of making history dispositive of constitutional outcomes is dangerous. Historical truth is too elusive to play that role.

In *Horton*, the Oregon Supreme Court overruled two precedents that had relied on a rigid form of originalist methodology. The immediate consequence was that the defendant surgeon was able to invoke the Oregon Tort Claims Act and reduce his damages payment to \$3 million.<sup>241</sup> More important, for our purposes, is what the reasoning reveals about the weaknesses of thick originalism. The Remedy Clause result was based, in part, on an interpretive mistake by the *Smothers* court. Unlike the factual error in *Ives*, the court supposedly erred in discerning the intended application of the clause. Such potential mistakes disclose the subjectivity inherent in originalism and will be highlighted in this Article's section on punitive damages. In analyzing both the Remedy Clause and the trial-by-jury provision, the court focused on the dangers of freezing the common law at a particular point in time. One of the strengths of the common law is its ability to gradually adapt to changing circumstances. A static common law would not recognize, for example, the development of negligence or the shedding of unfair defenses such as the fellow servant rule and contributory negligence. The Oregon Supreme Court rightly rejected giving constitutional effect to the anomalies of the common law and not allowing it to grow past them.

### C. Punitive Damages

*Ives* is a case in which a clear factual error dictated a flawed application of the Due Process Clause. Although striking, the Oregon Remedy Clause analysis and the Supreme Court's punitive damages jurisprudence raise a more pervasive concern. The appeal of originalism lies in its promise of objectivity. A court can banish the policy

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239. *Id.* at 547.

240. Robert F. Williams, *Can State Constitutions Block the Workers' Compensation Race to the Bottom?*, 69 RUTGERS U. L. REV. 1081, 1093 (2017).

241. The Oregon Supreme Court would later hold that Oregon's statutory cap on noneconomic damages that is not a part of the Oregon Tort Claims Act is unconstitutional pursuant to the Remedy Clause. *Busch v. McInnis Waste Sys., Inc.*, 468 P.3d 419, 433 (Or. 2020).

preferences of judges if it simply abides by the original meaning of a particular constitutional provision. Reality belies the promise. Justice Thomas has already admitted that courts must apply the original meaning of constitutional provisions “to circumstances beyond those the Founders specifically anticipated.”<sup>242</sup> The problem is exacerbated, moreover, because judges make choices when constructing the proper historical account and interpretation of a constitutional provision. Historical sources are varied and can be vague or ambiguous. How do judges, who are not trained historians, decide what counts as the “right” historical sources and how those sources should be interpreted? Policy preferences, supposedly neutralized by originalism, can influence both the construction and application of history.

In *Browning-Ferris Industries of Vermont, Inc. v. Kelco Disposal, Inc.*,<sup>243</sup> the Court held that the Eighth Amendment’s “Excessive Fines Clause does not apply to awards of punitive damages in cases between private parties.”<sup>244</sup> Analyzing the “original meaning”<sup>245</sup> of the Clause, the Court stated, “Then, as now, fines were assessed in criminal, rather than in private civil, actions.”<sup>246</sup> In a partial concurrence and partial dissent, Justice O’Connor, joined by Justice Stevens, declared, “the meaning of [fine] was much more ambiguous than the Court [was] willing to concede.”<sup>247</sup> As proof, O’Connor raised two points. First, O’Connor argued that the Excessive Fines Clause derived from limits on “ameracements” in the Magna Carta, and such ameracements were monetary penalties designed to deter misconduct in both criminal and civil cases.<sup>248</sup> Second, O’Connor cited to historical sources showing that “fines” were more broadly interpreted than criminal law alone.<sup>249</sup> O’Connor also focused on the “character of a sanction,”<sup>250</sup> stating “punitive damages serve the same purposes—punishment and deterrence—as the criminal law, and that excessive punitive damages present precisely the evil of exorbitant monetary penalties that the Clause was designed to prevent.”<sup>251</sup> Determining what to include in the

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242. *N.Y. State Rifle & Pistol Ass’n v. Bruen*, 597 U.S. 1, 28 (2022).

243. 492 U.S. 257 (1989).

244. *Id.* at 260.

245. *Id.* at 264 n.4 (citing *Ingraham v. Wright*, 430 U.S. 651, 670-71 n.39 (1977)).

246. *Id.* at 265.

247. *Id.* at 295 (O’Connor, J., concurring in part and dissenting in part).

248. *Id.* at 287-92.

249. *Browning-Ferris Indus. of Vt., Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257, 295-96 (1989).

250. *Id.* at 298; see Sheila B. Scheuerman, *The Road Not Taken: Would Application of the Excessive Fines Clause to Punitive Damages Have Made a Difference?*, 17 WIDENER L.J. 949, 956 (2008).

251. *Browning-Ferris*, 492 U.S. at 287 (O’Connor, J., concurring in part and dissenting in part); Scheuerman, *supra* note 250, at 956-57.

historical account of a constitutional provision necessarily requires discretion, as does whether to extend the application of a clause if the concern that originally inspired it is present.

The Court began its analysis by acknowledging there was an “absence of direct evidence of Congress’ intended meaning”<sup>252</sup> regarding the Excessive Fines Clause. The Court then traced the pedigree of the Eighth Amendment to the Virginia Declaration of Rights, which adopted, verbatim, the language of the English Bill of Rights of 1689.<sup>253</sup> The Court stated the English Bill of Rights was adopted in direct response to the King’s judges imposing excessive and partisan fines against the King’s enemies.<sup>254</sup> The Court provided contemporaneous definitions of “fines” from Coke and law dictionaries indicating that fines were for criminal matters.<sup>255</sup> The Court concluded:

This history, when coupled with the fact that the accepted English definition of “fine” in 1689 appears to be identical to that in use in colonial America at the time of our Bill of Rights, seems to us clear support for reading our Excessive Fines Clause as limiting the ability of the sovereign to use its prosecutorial power, including the power to collect fines, for improper ends.<sup>256</sup>

In short, the Clause was intended only to limit the sovereign’s power; punitive damages awarded for one private party against another was not the concern and thus is not covered. The Court ended its analysis with a note of flexibility, stating the history “does not necessarily complete our inquiry.”<sup>257</sup> The Court refused to look beyond history in the case of punitive damages, however, because they were in existence when the Constitution was written. Because the Framers were aware of punitive damages at the time the Constitution was written, they could have expressly included them within the scope of the Eighth Amendment but did not.<sup>258</sup>

In dissent, O’Connor challenged the Court’s history: “[A] chronological account of the Clause and its antecedents demonstrates that the Clause derives from limitations in English law on monetary penalties exacted in civil *and* criminal cases to punish and deter misconduct.”<sup>259</sup> She began by noting that four then-recent articles on the history of the Excessive Fines Clause all reached the conclusion that it is applicable

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252. *Browning-Ferris*, 492 U.S. at 265.

253. *Id.* at 266.

254. *Id.* at 267.

255. *Browning-Ferris Indus. of Vt., Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257, 265 n.6 (1989).

256. *Id.* at 267 (footnote omitted).

257. *Id.* at 273.

258. *Id.* at 274-75.

259. *Id.* at 287 (O’Connor, J., concurring in part and dissenting in part).

to punitive damages.<sup>260</sup> O'Connor's historical account focused on amercements. Whereas the Court's description of history began in the 1680s, O'Connor went all the way back to the Saxon legal system in pre-Norman England.<sup>261</sup> She noted that, at that time, crime and tort were not clearly distinct, and that victims of wrongs frequently sought retaliation instead of using the legal system.<sup>262</sup> As an alternative to retaliation, victims could accept financial compensation for the wrong from the wrongdoer; additional sums could be added to the payment because "every evil deed inflicts a wrong on society in general."<sup>263</sup>

"[A]fter the Norman Conquest in 1066, this method of settling disputes gave way to a system in which individuals who had engaged in conduct offensive to the Crown placed themselves 'in the King's mercy' so as not to have to satisfy all the monetary claims against them."<sup>264</sup> To receive clemency, the wrongdoer had to make a payment, called an amercement, to the Crown, its representative, or a feudal lord.<sup>265</sup> Some scholars believe that a portion of the amercement was paid to the victim or the victim's family.<sup>266</sup> Because amercements originated at a time when crime and tort were not distinct, they were not strictly criminal or civil.<sup>267</sup> Due to the frequency and sometimes abusive nature of amercements, Chapter 20 of the Magna Carta set limitations on them.<sup>268</sup>

According to O'Connor's history, "[f]ines originated in the 13th century as voluntary sums paid to the Crown to avoid an indefinite prison sentence for a common-law crime or to avoid royal displeasure."<sup>269</sup> Courts had no power to impose fines; they imposed prison sentences on wrongdoers, and the wrongdoer could "make fine" by voluntarily paying the Crown to end the matter.<sup>270</sup> Fines and amercements had very similar functions; the difference was the fine was voluntary, and

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260. *Id.* at 286-87 (citing Gerald W. Boston, *Punitive Damages and the Eighth Amendment: Application of the Excessive Fines Clause*, 5 COOLEY L. REV. 667 (1988); Calvin R. Massey, *The Excessive Fines Clause and Punitive Damages: Some Lessons from History*, 40 VAND. L. REV. 1233 (1987); John Calvin Jeffries, Jr., *A Comment on the Constitutionality of Punitive Damages*, 72 VA. L. REV. 139 (1986); Andrew M. Kenefick, Note, *The Constitutionality of Punitive Damages Under the Excessive Fines Clause of the Eighth Amendment*, 85 MICH. L. REV. 1699 (1987)).

261. *Browning-Ferris Indus. of Vt., Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257, 267, 287 (1989) (O'Connor, J., concurring in part and dissenting in part).

262. *Id.* at 287.

263. *Id.* (quoting W. MCKECHNIE, *MAGNA CARTA* 284-85 (1958)).

264. *Id.*

265. *Id.* at 287-88.

266. *Id.* at 288.

267. *Browning-Ferris Indus. of Vt., Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257, 288 (1989).

268. *Id.*

269. *Id.* at 289.

270. *Id.*



the amercement was not.<sup>271</sup> The Crown gradually eliminated the voluntary nature of the fine by imposing indefinite prison sentences, with the wrongdoer effectively being forced to pay the fine.<sup>272</sup> “By the 17th century, fines had lost their original character of bargain and had replaced amercements as the preferred penal sanction.”<sup>273</sup> The word “fine” took on its modern meaning and “amercement” dropped out of common usage.<sup>274</sup>

The Magna Carta prohibited abuse of amercements but not of fines, and the courts were free to abuse fines.<sup>275</sup> They did so, as chronicled in the Court’s opinion.<sup>276</sup> At this point, O’Connor’s account caught up with the Court’s. She agreed that the English Bill of Rights was drafted to stop the abuses the King’s courts were making of fines at this time. She quoted Blackstone that the English Bill of Rights was only declaratory of the old constitutional law.<sup>277</sup> The only prior limitation, however, was the Magna Carta’s limitation on amercements, which applied to civil, as well as criminal, payments. O’Connor stated, “Since it incorporated the earlier prohibition against excessive amercements—which could arise in civil settings—as well as other forms of punishment, [Article 10’s limitation on excessive fines] cannot be limited to strictly criminal cases but extends to monetary sanctions imposed in both criminal and civil contexts.”<sup>278</sup> O’Connor stated that because the word “amercement” was not commonly used in the late seventeenth century, “it appears that the word ‘fine’ in Article 10 was simply shorthand for all monetary penalties, ‘whether imposed by judge or jury, in both civil and criminal proceedings.’”<sup>279</sup>

In response to O’Connor’s amercements history, the Court responded that, while it was “somewhat intriguing,”<sup>280</sup> the Magna Carta “was aimed at putting limits on the power of the King”<sup>281</sup> and was “inapposite in a case where a private party receives exemplary damages from another party, and the government has no share in the recovery.”<sup>282</sup> Thus, the Court insisted “fines” were “understood to mean a payment to a sovereign as punishment for some offense.”<sup>283</sup> O’Connor,

271. *Id.*

272. *Id.*

273. *Browning-Ferris Indus. of Vt., Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257, 290 (1989).

274. *Id.*

275. *Id.*

276. *Id.* at 290-92.

277. *Id.* at 291 (citing 4 WILLIAM BLACKSTONE, COMMENTARIES \*372).

278. *Id.* (quoting Kenefick, *supra* note 260, at 1717) (alteration in original).

279. *Browning-Ferris Indus. of Vt., Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257, 291 (1989) (quoting Massey, *supra* note 260, at 1256).

280. *Id.* at 268 (majority opinion).

281. *Id.* at 271-72.

282. *Id.* at 272.

283. *Id.* at 265.

providing examples, responded “some 18th-century dictionaries did not mention to whom the money was paid.”<sup>284</sup> O’Connor closed by focusing on the purposes of the Excessive Fines Clause and punitive damages. “History aside,”<sup>285</sup> O’Connor stated, “[t]he character of a sanction imposed as punishment ‘is not changed by the mode in which it is inflicted, whether by a civil action or a criminal prosecution.’”<sup>286</sup> In short, “the identity of the recipient of a monetary penalty is irrelevant for purposes of determining the constitutional validity of the penalty. From the standpoint of the defendant who has been forced to pay an excessive monetary sanction, it hardly matters what disposition is made of the award.”<sup>287</sup>

Our point in a detailed recounting of the dispute in *Browning-Ferris* is not that Justice O’Connor got the history right and the Court got it wrong.<sup>288</sup> Instead, it is the more subtle, but ultimately more destabilizing, idea that the search for history is not mechanical. History does not provide an objective, neutral viewpoint from which to decide constitutional issues. The construction of a historical account requires discretion. In tracing the history of the Excessive Fines Clause, should the

284. *Id.* at 295 (O’Connor, J., concurring in part and dissenting in part).

285. *Browning-Ferris Indus. of Vt., Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257, 287 (1989).

286. *Id.* at 298 (quoting *United States v. Chouteau*, 102 U.S. 603, 611 (1881)).

287. *Id.* at 299. Despite relying on a historical analysis to hold that the Excessive Fines Clause does not apply to punitive damages between private parties, the Court soon held that the Due Process Clause regulates punitive damages. Two years later, the Court held that the Due Process Clause, in its procedural aspect, applies to punitive damages. *Pac. Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1 (1991). Shortly thereafter, the Court held that the Due Process Clause, in its substantive aspect, also applies to punitive damages. *TXO Prod. Corp. v. All. Res. Corp.*, 509 U.S. 443 (1993). In so doing, the Court denigrated the value of an “objective” criteria, such as history. *Id.* at 457. Thus, four years after using history to preclude regulation of punitive damages by the Excessive Fines Clause, the Court embraced regulation of punitive damages by the Due Process Clause, ignoring history. One scholar concluded which clause was used makes little or no difference. Scheuerman, *supra* note 250, at 971 (“At the end of the day, the Excessive Fines Clause leads to the same destination as the due process path that the Court chose to follow.”).

Two of the Court’s staunchest originalists, Justices Scalia and Thomas, dissented in the punitive damages cases primarily on the ground of opposition to unenumerated rights. *See, e.g.*, *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 598-99 (1996) (Scalia, J., dissenting). John Goldberg notes the tension between the Court striking down the right to reproductive choice while leaving in place the punitive damages jurisprudence:

BMW dissenter Justices Thomas and Scalia “were highly skeptical of *Roe*,” [John] Goldberg said, precisely because of the issue of unenumerated rights. “There’s more than a little irony here,” Goldberg said. If the high court is going to wade into precedent over enumerated versus unenumerated rights, the Supreme Court “really ought to revisit *Gore* if they’re going to have the chutzpah to revisit *Roe*.”

Cara Salvatore, *Why Spectrum’s Hard-to-Believe \$7B Jury Loss May Not Last*, LAW360 (Aug. 11, 2022, 6:02 PM), <https://www.law360.com/articles/1520274/why-spectrum-s-hard-to-believe-7b-jury-loss-may-not-last> [<https://perma.cc/D495-C8NA>].

288. However, that seems to be the scholarly consensus. In addition to the four articles listed in note 260, see also Beth A. Colgan, *Reviving the Excessive Fines Clause*, 102 CALIF. L. REV. 277, 310-19 (2014).

Court research back to the era immediately before its last-determined predecessor? Alternatively, should the Court research back to the Saxon days because of the similarities between fines and amercements? Which contemporaneous dictionaries should the Court consult? Only those that state “fines” are paid to the sovereign or also those that do not indicate to whom the amount is paid?

As one of the most dedicated originalists, Justice Thomas has conceded that discretion is necessary in applying the original meaning of a clause to a situation not specifically anticipated by the Founders.<sup>289</sup> There are, however, other application dilemmas, such as those Justice O'Connor raised in *Browning-Ferris*. What if a historical account reveals that the Founders were concerned about a specific problem and the issue confronting the Court raises that specific problem, though in a slightly different context? Should the Court extend the provision because it targets the historical concern of the Founders? Alternatively, should the Court refuse to extend the provision because the Founders did not expressly include it in the Constitution? In Jack Balkin's terminology, how thick is originalism? Answering these questions requires judges to exercise discretion. But with discretion comes the danger of judges enforcing their own policy preferences, the very problem originalism is supposed to eliminate.

### III. THE ELUSIVE QUEST FOR ORIGINAL MEANING

The Supreme Court's reliance on accounts about how the government did or did not regulate particular behavior at the time of the Founding to ground its constitutional analysis with respect to gun control or abortion at first appears to be a largely new phenomenon. The history of constitutional involvement in tort law proves otherwise. Words of the Constitution, notably “due process of law,” invited courts for more than a century to challenge developments in tort law. The record is not encouraging. While the New York Court of Appeals struck down the state's workers' compensation statute in 1911, subsequent judicial decisions and state constitutional amendments soon reversed this error.<sup>290</sup> Nevertheless, valuable lessons learned from the entanglements between constitutional provisions interpreted according to contested histories and tort law can be used to assess more recent decisions by the Supreme Court that seek to use particular histories of the

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289. *N.Y. State Rifle & Pistol Ass'n v. Bruen*, 597 U.S. 1, 28 (2022).

290. *See supra* notes 116-17 and accompanying text.

regulation of abortion, guns, and other aspects of conduct at the time of the Founding to determine the legitimacy of rights in the twenty-first century.<sup>291</sup>

In this Part, we distill the lessons—and the warnings—that a century’s worth of attempts to impose constitutional restraints derived from history on tort law offer for today’s more widespread application of thick originalism. Our focus is not on framework originalism. Nor is it on the theoretical justifications, or the lack thereof, for originalism as such. Instead, we argue that attempts to accurately determine the state of the law at the times of the adoption of the Constitution and the post-Civil War Amendments is fraught with peril. In some cases, such as *Ives*,<sup>292</sup> courts looking back more than a century to the state of the law at the time of the adoption of the Constitution reach a conclusion regarding the state of the law in place at that time that we now recognize was totally wrong and unquestionably historically inaccurate. In other cases, such as *Browning-Ferris*,<sup>293</sup> the historical record is ambiguous and indeterminate, allowing today’s Justices to pick-and-choose the strands of the historical record that support their preferred outcome, thus destroying any pretense that original meaning provides an objective meaning of constitutional provisions. Our objection to the use of thick originalism in this Part is a pragmatic one. The accurate history needed to justify any claim of objectivity is elusive.

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291. It is important to consider the distinct ways in which history is used in *Ives* as opposed to *Bruen* or *Dobbs*. In *Ives*, the question is the meaning of the Due Process Clause with respect to the rules governing liability for accidental harm. The Supreme Court has read the Due Process Clause against the history of the Magna Carta to require that a deprivation of property be permitted only according to “the law of the land.” *Murray’s Lessee v. Hoboken Land & Improvement Co.*, 59 U.S. (18 How.) 274 (1856). Adopting a thick form of originalism, the *Ives* court sought to determine what “the law of the land” meant at the time of the adoption of the Amendment to resolve its constitutional “interpretation” of the text. A framework originalist approach to the question, by contrast, would have taken the history of the Magna Carta as a starting point for engaging a process of constitutional “construction” under which the principle that deprivations of property must be governed by “the law of the law” would have recognized the evolving nature of common law tort doctrine and thus included the pressing concerns raised by the industrial revolution and captured in the recommendations of the Wainwright Commission. (There is, of course, a “level of generality” problem here concerning whether “principles” of law are the same as rules or governing doctrines. Common law doctrine evolves over time within a framework of persisting “principles.”)

The use of history in the Second Amendment cases is somewhat different. The issue is not framed as a problem of substantive due process, and therefore, the background rule of law norms in place at the time of the adoption of the Second Amendment are not the primary target of Justice Thomas’s historical analysis. Instead, he is seeking to answer a question concerning the legal status of gun possession and the legal regulation of guns. Finally, the question of history in *Dobbs* once again is not the general rule of law question, but a more specific question about whether reproductive choice and the decision to undergo an abortion is a protected liberty interest in the first instance. To answer that question, Justice Alito explores the legal status of abortion and whether abortion was restricted under criminal laws, and if so, under what terms at the time of the ratification of the Constitution or the Fourteenth Amendment.

292. *Ives v. S. Buffalo Ry. Co.*, 94 N.E. 431, 436 (N.Y. 1911); see also *supra* Section II.A.

293. 492 U.S. 257 (1989); see also *supra* Section II.C.

A. *The Difficulty of Applying the Original Understandings to Contemporary Legal Issues*

Thick originalism, in both tort law and in the broader arena, becomes problematic when contemporary circumstances present questions of application that could not have been anticipated by constitutional actors at the moment of constitutional adoption or ratification. Let us begin by considering the totally incorrect supposition in *Ives* that the imposition of tort liability at the time of the adoptions of the state and federal constitutions required the plaintiff to prove fault.<sup>294</sup> The court's worldview of accidental injuries at the time of the decision in 1911 was one based on the historical records of the preceding fifty years, with massive numbers of severe personal injuries inflicted by railroad locomotives and industrial machinery that resulted in a dramatically increased number of claims for compensation.<sup>295</sup> This more-recent history obscured an accurate accounting of accidental injuries and claims during the colonial era, when injuries were infrequent, less severe, and largely the fault of the victims themselves, family members, or close friends.<sup>296</sup> As a result, the court could not envision that at the time of the adoption of the due process clauses contained in the federal and state constitutions, liability without fault could have been the prevailing rule.

This same problem, first seen in earlier constitutional law decisions arising in the world of torts, now extends to the Supreme Court's recent decisions employing thick originalism in non-tort decisions. For example, in *Bruen*, Justice Breyer explicitly admonishes "that history will be an especially inadequate tool when it comes to modern cases presenting modern problems."<sup>297</sup> He continues:

Small founding-era towns are unlikely to have faced the same degrees and types of risks from gun violence as major metropolitan areas do today, so the types of regulations they adopted are unlikely to address modern needs. . . . How can we expect laws and cases that are over a century old to dictate the legality of regulations targeting "ghost guns" constructed with the aid of a three-dimensional printer? . . .

. . . .

. . . Laws addressing repeating crossbows, launcegays, dirks, dagges, skeines, stilladers, and other ancient weapons will be of little help to courts confronting modern problems. And as technological progress

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294. See *supra* notes 118, 129-31.

295. See *supra* notes 136-37 and accompanying text; see also Gifford, *Technological Triggers*, *supra* note 89, at 88-94.

296. See *supra* note 121 and accompanying text; see also Gifford, *Technological Triggers*, *supra* note 89, at 78-83.

297. *N.Y. State Rifle & Pistol Ass'n v. Bruen*, 597 U.S. 1, 113 (2022) (Breyer, J., dissenting).

pushes our society ever further beyond the bounds of the Framers' imaginations, attempts at "analogical reasoning" will become increasingly tortured.<sup>298</sup>

Framework originalism is one thing. Thick originalism, comparing the impact of regulations on everyday life during the eighteenth century and earlier times to the realities of the twenty-first century, is something far different. As Balkin puts it: "The generations that adopted the Constitution and its amendments were trying to grapple with their problems in their world, not our problems in our world. Their arguments about constitutional meaning and principle emerged in the context of assumptions that may be alien to our concerns."<sup>299</sup>

It is one thing to argue for fidelity to the original meaning of constitutional text. It is quite another to insist on adherence to the "original expected application" of that text, particularly when new circumstances arise that may have been unimaginable to the Founding generation.<sup>300</sup> Ronald Dworkin noted this distinction years ago, explaining that "semantic originalism" imposes an entirely distinct set of interpretive obligations as compared to "expectations originalism."<sup>301</sup> Under the former theory, the work of a constitutional interpreter is to discern what the authors of the text intended to say, while under the latter the task is to attend to the consequences they expected to produce.<sup>302</sup> Justice Antonin Scalia was a proponent of expectations originalism, arguing that courts should ask "how people living at the time the text was adopted would have expected it would be applied using language in its ordinary sense."<sup>303</sup> But even Scalia recognized that an unyielding adherence to this form of originalism was impractical, given the profound changes that have taken place since the Founding, and as a consequence he referred to himself as a "faint-hearted originalist."<sup>304</sup>

Concerns about the workability of thick originalism have occupied the thinking of constitutional scholars for some time. Richard Fallon, for example, has argued that a strict adherence to original expectations originalism would produce outcomes inconsistent with much settled constitutional doctrine and, indeed, with our constitutional traditions.<sup>305</sup> Professor Balkin, in an essay published in 2006, explained that "Scalia's originalism must be 'faint-hearted' precisely because he has chosen a[n] unrealistic and impractical principle of interpretation,

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298. *Id.* at 113-15.

299. BALKIN, *supra* note 5, at 113.

300. Balkin, *supra* note 83, at 298.

301. Ronald Dworkin, *Comment, in A MATTER OF INTERPRETATION* 116 (Amy Gutmann ed., 1997).

302. *See id.*

303. Balkin, *supra* note 83, at 296.

304. Scalia, *supra* note 48, at 861-64.

305. *See* RICHARD H. FALLON, JR., *IMPLEMENTING THE CONSTITUTION* 15 (2001).

which he must repeatedly leaven with respect for *stare decisis* and other prudential considerations.”<sup>306</sup> The difficulty, of course, with an approach to thick originalism that seeks to effectuate original expected applications while simultaneously adjusting to accommodate the practical limitations of the methodology is that these inevitable adjustments “undercut[] the claim . . . that decisions inconsistent with the original expected application are illegitimate.”<sup>307</sup> In addition, the inconsistent application of a thick originalist methodology, which is inevitable given the countervailing force of the reliance interests embedded in *stare decisis* doctrine, creates opportunities for judges to impose their personal normative positions. As Balkin explains: “Judges will inevitably pick and choose which decisions they will retain and which they will discard based on pragmatic judgments about when reliance is real, substantial, justified or otherwise appropriate.”<sup>308</sup> In the final analysis, the constraining effect of thick originalism hoped for by its supporters is unlikely to take hold, both because the task of applying constitutional text to unanticipated circumstances necessarily requires the exercise of significant subjective judgment and because, even if that subjectivity could be wrung out of the system, the Court would still be obligated to depart from original expected applications when the realities of contemporary politics make strict applications unpalatable or unrealistic.

## B. *The Subjective Rendering of the Historical Record*

### 1. *The Inconsistency of the Historical Record*

The illegitimacy of thick originalism is perhaps best revealed by the recognition that decisions applying this approach are frequently characterized by vigorous debates between the majority and dissenting opinions as to what the prevailing law was at the time of the adoption of the applicable amendment or other constitutional provision. If the purported objective of originalism is to establish an objective meaning of constitutional provisions,<sup>309</sup> this pervasive pattern of hotly contested debate between what the prevailing law was prior to and at the time of the Founding era strongly suggests that the objective has not been achieved.

In our analysis of a handful of cases applying thick originalism in both tort cases and constitutional decisions covering a broader range of issues, conflicting accounts of history are always present. As

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306. Balkin, *supra* note 83, at 297.

307. *Id.* at 298.

308. *Id.*

309. See Whittington, *supra* note 3, at 602 (describing originalism as a “mechanism to redirect judges from essentially subjective consideration of morality to objective consideration of legal meaning”).

previously noted,<sup>310</sup> Justice O'Connor in her dissent in *Browning-Ferris* vigorously attacks the majority's conclusion that the Excessive Fines Clause of the Eighth Amendment was not regarded as applying to awards of punitive damages at the time of its adoption.<sup>311</sup> She also notes that "[t]he history of the Excessive Fines Clause has been thoroughly canvassed in several recent articles, all of which conclude that the Clause is applicable to punitive damages."<sup>312</sup> O'Connor takes her search for original meaning all the way back to the Magna Carta and interprets the limitations on "amercements" in that charter to include all monetary penalties intended to deter misconduct, regardless of whether they arose in criminal or civil cases.<sup>313</sup> In contrast, the majority reached the opposite conclusion by focusing on the English Bill of Rights of 1689 and interpreting that document as aimed solely at monetary penalties assessed by the King.<sup>314</sup> The disagreement between the writers of the opinions is a principled one, but nevertheless they reach opposite conclusions by focusing on different historical sources.

Although there is no dissenting opinion in *Ives* criticizing the majority's rendition of the role that fault played in tort liability at the time of the adoption of the federal and state constitutions, the majority opinion itself chronicles multiple instances of no-fault liability existing at the time of the Founding.<sup>315</sup> Furthermore, the *Ives* history of the role of fault prior to the adoption of the constitutions has been heavily and nearly universally criticized by both scholars and subsequent courts.<sup>316</sup>

This same pattern of intensely debated history emerged when the Supreme Court began to more frequently use thick originalism to assess constitutionality in more varied decisions. As previously described, Justice Thomas, writing for the majority in *Bruen*, wrote that to sustain the constitutionality of New York State's statute requiring a permit to carry a concealed weapon, "[t]he government must . . . justify its regulation by demonstrating that it is consistent with the Nation's historical tradition of firearm regulation,"<sup>317</sup> a clear example of thick originalism. He described the majority's analysis striking down that statute as a "straightforward historical inquiry."<sup>318</sup> However,

310. See *supra* notes 259-79.

311. *Browning-Ferris Indus. of Vt., Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257, 287 (1989) (O'Connor, J., concurring in part and dissenting in part).

312. *Id.* at 286.

313. *Id.* at 288-90.

314. See *id.* at 266-70 (majority opinion).

315. See *supra* notes 147-52 and accompanying text.

316. See WITT, *supra* note 92, at 152, 175 ("As Columbia University economist Henry Seeger observed, *Ives* was 'criticized by able lawyers and teachers from the Atlantic to the Pacific' . . . I.M. Rubinow later reflected that *Ives* 'was severely criticized as, perhaps, no decision of a higher court has ever been criticized before' . . .); *id.* ("Today *Ives* is largely forgotten except as a curious outlier in a now-abandoned body of constitutional law.").

317. *N.Y. State Rifle & Pistol Ass'n v. Bruen*, 597 U.S. 1, 24 (2022).

318. *Id.* at 27.



along the way, he distinguishes and explains away multiple past enactments that prohibited or regulated the concealed carrying of firearms, including the English 1328 Statute of Northampton that he distinguished as “a product of . . . the acute disorder that still plagued England,”<sup>319</sup> which he asserted that “the dissent . . . misunderstand[s].”<sup>320</sup> Thomas characterized cases upholding the constitutionality of an 1871 Texas concealed-carry statute as “outliers.”<sup>321</sup> Statutes regulating firearms in the late nineteenth-century Wild West were ignored because of “the miniscule . . . populations” to whom they applied and “were irrelevant to more than 99% of the American population.”<sup>322</sup> In his dissenting opinion, Justice Breyer strongly contests the historical record, characterizing “[t]he Court’s near-exclusive reliance on history” as “deeply impractical.”<sup>323</sup> He notes that in an amicus brief filed in a previous gun control case, *McDonald v. Chicago*,<sup>324</sup> leading American historians told the Court that it “had gotten the history wrong.”<sup>325</sup> For our purposes, it is not necessary to conclude whether Justice Thomas or Justice Breyer is correct. The importance of the vigorous debate is merely to illustrate that thick originalism, often relying on dozens of examples of the law at the time of the founding, preceding centuries, or succeeding generations, invites the judiciary to pick and choose items of historical evidence. In the process, the goal of objectivity is destroyed.

## 2. *Subjectivity in the Decision to Employ Originalism*

As seen in the Oregon cases testing workers’ compensation under the state’s Right to Remedy Clause, sometimes a court elects to use originalism only to decline to do so in another case.<sup>326</sup> In its 2001 decision in *Smothers*, the Oregon Supreme Court used historical sources to show that the state’s constitutional Remedy Clause protected claims existing in 1857 at the time of the adoption of the Oregon Constitution.<sup>327</sup> Only fifteen years later in *Horton*, the same court rejected a challenge under the Remedy Clause to a cap on damages and explicitly rejected *Smothers*’ thick-originalist interpretation of the remedy that tied its interpretation to the common law at the time of its adoption.<sup>328</sup>

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319. *Id.* at 40 (alteration in original) (quoting Anthony Verduyn, *The Politics of Law and Order During the Early Years of Edward III*, 108 ENG. HIST. REV. 842, 850 (1993)).

320. *Id.* at 47.

321. *Id.* at 65.

322. *Id.* at 67.

323. *N.Y. State Rifle & Pistol Ass’n v. Bruen*, 597 U.S. 1, 107 (2022) (Breyer, J., dissenting).

324. 561 U.S. 742 (2010).

325. *Bruen*, 597 U.S. at 108 (Breyer, J., dissenting).

326. *See supra* Section II.B.

327. *See supra* notes 173-93 and accompanying text.

328. *See supra* notes 208-19 and accompanying text.

If the same court can apply thick originalism in one decision and repudiate it only a few years later in a similar context, original interpretation obviously does not fulfill its goal of objectivity.

The opinions in *Dobbs*<sup>329</sup> forecast similar selective application of thick originalism in the Supreme Court's future consideration of issues such as same-sex marriage, private consensual sexual activity, and even contraception. Based on the reasoning of the majority's opinion, Justice Thomas in his concurring opinion clearly, and arguably logically, calls for the Court to "reconsider all of this Court's substantive due process precedents, including *Griswold*, *Lawrence*, and *Obergefell*."<sup>330</sup> He continues that "[b]ecause any substantive due process decision is 'demonstrably erroneous,' we have a duty to 'correct the error' established in those precedents."<sup>331</sup> Even though the rights to contraception, private consensual sexual activity, and gay marriage were not "'deeply rooted in this Nation's history and tradition' and 'implicit in the concept of ordered liberty,'"<sup>332</sup> other Justices striking down the constitutional right to abortion found Thomas's invitation to be a bridge too far. Justice Kavanaugh, who most clearly and bluntly addresses the issue, states that "[o]verruling *Roe* does *not* mean the overruling" of *Griswold*, *Lawrence*, and *Obergefell*, "and does *not* threaten or cast doubt on those precedents."<sup>333</sup> In other words, thick originalism justifies a rejection of a constitutional right to abortion, but a similar analysis will not be employed if the political costs of a decision based on thick originalism are likely to be too high.

### 3. *Interpreting History to Justify Preferred Outcomes*

Legally educated professionals, particularly those employed as judges, are educated to justify their opinions about contemporary issues by citing sources from the past. It follows that it is a natural instinct for them to believe that their own normative views are supported by the history of the past. Thus, it is not surprising that they

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329. *Dobbs v. Jackson Women's Health Org.*, 597 U.S. 215 (2022); *see also supra* notes 26-35.

330. *Dobbs*, 597 U.S. at 332 (Thomas, J., concurring).

331. *Id.* (citations omitted).

332. *Id.* at 231 (majority opinion) (citation omitted).

333. *Id.* at 346 (Kavanaugh, J., concurring). Similarly, Justice Alito's opinion for the majority distinguishes the right to terminate a pregnancy from other "matters such as intimate sexual relations, contraception, and marriage" on the grounds that "abortion is fundamentally different . . . because it destroys . . . an 'unborn human being.'" *Id.* at 231 (majority opinion). Justice Thomas distinguishes the issue in a similar manner. *Id.* at 331 (Thomas, J., concurring). However, these attempts to distinguish these decisions are unconvincing because they fail to explain the constitutional justification for the recognition of these rights if a similar justification for recognizing a right to terminate a pregnancy is rejected. Justice Thomas suggests that once the Court overrules these other decisions, "the question would remain whether other constitutional provisions guarantee the myriad rights that our substantive due process cases have generated." *Id.* at 333.

exercise their discretion in selecting historical sources to justify “original meaning” to conform to their own normative views. In short, the inconsistencies described in the first section are not random; instead, they conform to the normative views of judges. In his dissenting opinion in *Bruen*, Justice Breyer provocatively suggests that “[t]he Court’s insistence that judges and lawyers rely nearly exclusively on history” would “permit judges to reach the outcomes they prefer and then cloak those outcomes in the language of history[.]”<sup>334</sup>

Balkin writes that thick originalism invites judges to “tell a story that massages the past so that it fits what the judge believes the tradition was and always should have been.”<sup>335</sup> Judges’ search for original meaning, as Balkin describes, is not, either consciously or subconsciously, the pursuit for historical objectivity: “The perpetual retrofitting of originalist theory to reach particular results leads to the sneaking suspicion that what really has constitutional authority in the United States is not the original meaning of the Constitution itself but rather contemporary social and political values, to which originalist theories must continually conform.”<sup>336</sup> He is accusing judges of something far more subtle than conscious dishonesty in their interpretation of historical records, but a bias that nevertheless undermines any claim of objectivity in thick originalism:

[P]eople’s normative judgments affect how they characterize the meaning of the past, what they select from the past, and what they find relevant in the past. Equally important, people’s normative judgments affect how they understand, apply, extend, or make analogies to legal doctrines and materials from the past. . . . Thick accounts of original meaning may disguise ideological predisposition behind a cloud of learned citations, but they will not eliminate the need for normative judgment.<sup>337</sup>

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334. *N.Y. State Rifle & Pistol Ass’n v. Bruen*, 597 U.S. 1, 107 (2022) (Breyer, J., dissenting).

335. BALKIN, *supra* note 5, at 171.

336. *Id.* at 94.

337. *Id.* at 136-37. This question regarding the inevitable subjectivity inherent in the interpretation of historical records was at the heart of a notable colloquy between Justices Stevens and Scalia in *McDonald v. City of Chicago*, 561 U.S. 742 (2010). In dissent, Justice Stevens argued for a judicial approach of “reasoned judgment” that

investigates both the intrinsic nature of the claimed interest and the practical significance of its judicial enforcement, that is transparent in its reasoning and sincere in its effort to incorporate constraints, that is guided by history but not beholden to it, and that . . . has the capacity to improve, rather than “[im]peril,” our democracy.

*Id.* at 911 (Stevens, J., dissenting) (second alteration in original) (citation omitted). In response, Justice Scalia argued:

[T]he question to be decided is not whether the historically focused method is a perfect means of restraining aristocratic judicial Constitution-writing; but whether it is the best means available in an imperfect world. Or indeed, even more narrowly than

Judge Werner's opinion in *Ives* is a paradigmatic example of a version of "a story that massages the past so that it fits what the judge believes the tradition was and always should have been."<sup>338</sup> A requirement of fault for liability was a pillar of the tort system that Werner and his contemporaries had always known and therefore something that must have existed at the time of the Founding.<sup>339</sup> It was coherent with his view of the relationship between workers and their employers, a perspective influenced by his high regard for President Lincoln and the abolitionist movement. Additionally, his belief in this history enabled him to perform the role of the "heroic defender of the law's basic commitments against the encroachments of modern politics,"<sup>340</sup> battling against the scourges of socialism and unionization.

That courts' interpretations of original meaning are often biased is an inherent outcome of the adversarial legal system. Judges are rarely trained as legal historians. As Justice Thomas, one of the greatest advocates of thick originalism, admits, in interpreting the historical record judges will rely upon briefs submitted by the parties and amici.<sup>341</sup> In his recently released and superb book, *Memory and Authority: The Uses of History in Constitutional Interpretation*,<sup>342</sup> Jack Balkin describes the ideas "that law uses history for its own ends" and "how

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that: whether it is demonstrably much better than what Justice Stevens proposes. I think beyond all serious dispute that it is much less subjective, and intrudes much less upon the democratic process. . . . [T]he methodological differences that divide historians, and the varying interpretive assumptions they bring to their work, are nothing compared to the differences among the American people . . . . And whether or not special expertise is needed to answer historical questions, judges most certainly have no 'comparative . . . advantage,' in resolving moral disputes.

*Id.* at 804-05 (Scalia, J., concurring) (fifth alteration in original) (emphases omitted) (citation omitted).

Justice Stevens's rejoinder to this argument was compelling and persuasive. He wrote:

Justice Scalia's defense of his method, which holds out objectivity and restraint as its cardinal—and, it seems, only—virtues, is unsatisfying on its own terms. For a limitless number of subjective judgments may be . . . *buried* in the analysis. At least with my approach, the judge's cards are laid on the table for all to see, and to critique.

*Id.* at 909 (Stevens, J., dissenting).

338. BALKIN, *supra* note 5, at 171.

339. *See supra* note 131 and accompanying text.

340. WITT, *supra* note 92, at 159; *see also supra* note 159 and accompanying text.

341. *United States v. Sineneng-Smith*, 590 U.S. 371, 375 (2020) ("In our adversarial system of adjudication, we follow the principle of party presentation."); *see also* BALKIN, *supra* note 5, at 171.

342. BALKIN, *supra* note 5.

lawyers think about history and employ history is refracted through standard forms of legal justification” as the “central claims of [his] book.”<sup>343</sup>

Balkin’s portrayal of the use of legal history, particularly thick originalism, is not a pretty one. He begins by asserting that lawyers, in their professional roles as advocates for clients, may “read history selectively.”<sup>344</sup> Their renditions of history lack ambiguity and subtlety because they seek to “turn complication into persuasive argument.”<sup>345</sup> Because judges generally possess neither personal training in historical research nor professional historians to assist them, they rely heavily on the briefs submitted by the parties.<sup>346</sup> Balkin argues that “[b]ecause judges can simply look to the briefs for historical information, they are also free to choose which parties and which amici they trust and write the history accordingly.”<sup>347</sup> As such, judges are in a position to adopt versions of the history of thick originalism “that buttresses their ideological and philosophical priors.”<sup>348</sup>

Comparing the briefs filed in *Browning-Ferris* with the majority opinion and O’Connor’s dissenting opinion confirms Balkin’s observation. For example, the majority’s understanding that the “amerce-ments clause” of the Magna Carta<sup>349</sup> does not apply to civil actions between private parties tracks the historical analysis provided in the respondents’ brief<sup>350</sup> and especially in the detailed historical analysis provided in an amicus brief filed by a group of consumer and public interest organizations and the Association of Trial Lawyers of

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343. *Id.* at 203. The distinctive ways in which lawyers and judges, on one hand, and historians, on the other, approach constitutional history, and the interplay between these different approaches, is the focus of Balkin’s book. *See generally id.* at 189-221.

344. *Id.* at 172.

345. *Id.* at 192.

346. *Id.* at 172-73.

347. *Id.* at 172.

348. *Id.* at 173.

349. *Browning-Ferris Indus. of Vt., Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257, 272 (1989); *see also supra* notes 280-84 and accompanying text.

350. Brief for Respondents, *Browning-Ferris Indus. of Vt., Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257 (1989) (No. 88-556), 1989 WL 1127732, at \*10 (finding that the historical record of punitive damages “provides no hint that they might be subject to any of the criminal-law protections afforded by our Constitution, the English Bill of Rights or Magna Carta”).

America.<sup>351</sup> At the same time, the historical analysis provided in Justice O'Connor's dissenting opinion<sup>352</sup> is based on the historical research contained in the petitioners' brief.<sup>353</sup>

#### IV. LOOKING BACKWARD TO MAKE SUBSTANTIVE POLITICAL DECISIONS

Although based on a flawed history, Judge Werner's *Ives* decision sought to embed the meaning and operation of the Constitution in an account of the prevailing law and practice in place at the Founding.<sup>354</sup> The majority opinions in *Bruen* and *Dobbs* similarly use highly contested "originalist" histories to fix the meaning and operation of the Constitution as applied to the regulation of guns and reproductive health care.<sup>355</sup> In addition to the practical problems associated with thick originalism rehearsed in Part III, the exclusive or foundationalist reliance on history to accomplish constitutional interpretation, which characterizes the *Ives* decision, *Smothers*, and the more recent *Bruen* and *Dobbs* opinions, is also problematic on normative grounds.<sup>356</sup>

As noted in Part I, a foundationalist approach to originalism that employs the fixed linguistic meaning of constitutional text to rigidly constrain the elaboration of legal content may be in significant tension with sub-constitutional legal processes characterized by a dynamic approach to developing legal doctrine, including the common law method and allied legislative processes that underlie much tort doctrine.<sup>357</sup> Constitutional provisions that are clearly prescriptive may require certain policy choices to be taken "off the table" for ordinary decisionmaking,<sup>358</sup> but when the text is less rule-like, the decision to strike common law or statutory rules on the basis of their inconsistency with an originalist historical narrative raises significant normative questions.

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351. Brief for Consumers Union of U.S. et al. as Amici Curiae Supporting Respondents, *Browning-Ferris Indus. of Vt., Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257 (1989) (No. 88-556), 1989 WL 1127730, at \*9 (finding, for example, that "[t]here is little question that amerements were fines payable to the King. They were not payable to private parties").

352. *Browning-Ferris*, 492 U.S. at 287, 295, 298-99 (O'Connor, J., concurring in part and dissenting in part); see also *supra* notes 285-87.

353. Brief for the Petitioners, *Browning-Ferris Indus. of Vt. v. Kelco Disposal, Inc.*, 492 U.S. 257 (1989) (No. 88-556), 1988 WL 1026228, at \*22 (finding that the "Magna Carta and the English Bill of Rights prohibited excessive monetary penalties in both civil and criminal proceedings").

354. *Ives v. S. Buffalo Ry. Co.*, 94 N.E. 431 (N.Y. 1911).

355. *N.Y. State Rifle & Pistol Ass'n v. Bruen*, 597 U.S. 1, 32-70 (2022); *Dobbs v. Jackson Women's Health Org.*, 597 U.S. 215 (2022).

356. The reference in text to "exclusive originalism" is drawn from Griffin, *supra* note 73, at 1187.

357. See *supra* text accompanying notes 78-79.

358. See *supra* text accompanying note 78.

This lack of normative justification is especially acute if one adopts what some have termed “original methods originalism,” which sensibly asserts “that the original meaning of the Constitution includes the methods of interpretation that the Framers, ratifiers, and/or public of the Founding era could, would, or should have expected to guide constitutional practice.”<sup>359</sup> Thus, if the original understanding of the Founding Generation was that accident law would be subject to common law rules developed in a system governed by precedent, *stare decisis*, and incremental refinement (and subject to amendment by occasional legislation), then the application of the federal or state due process clauses to fix tort liability rules once-and-for-all and exempt them from ongoing judicial and legislative development would constitute a methodological and normative constitutional mistake.

In *Ives*, the New York Court of Appeals prevented the legislature from enacting workers’ compensation statutes replacing an injured worker’s common law remedies under negligence.<sup>360</sup> In other words, the courts prohibited change from the status quo ante. Accident law, which changes in response to changes in society, was prevented from evolving. In reality, of course, this understates the extent to which the application of thick originalism confines tort law to the principles of an earlier era. Thick originalism does not solely prevent the law from moving from where it had been before the legislative enactment or judicial decision attacked as unconstitutional to the status quo ante; it assures that the law is consistent with that in place in a much earlier era, the eighteenth century or earlier in *Ives*, and the mid-nineteenth century in *Smothers*.

*Bruen* and *Dobbs* represent additional examples outside of the tort arena in which a heavy-handed form of originalism was deployed to erase decades of settled legal practice. Concealed-carry statutes operated in New York for more than a century before they were declared unconstitutional in *Bruen*, where the Supreme Court concluded that such statutes had not been in place at the time of the ratification of the Second Amendment and in previous centuries.<sup>361</sup> In overruling *Roe v. Wade*,<sup>362</sup> the Supreme Court in *Dobbs* functionally wiped out legal protection of a woman’s right to choose to terminate a pregnancy that had been in place for nearly fifty years, relying on the prevailing law not only at the time of the Founding, but going back as far as the thirteenth century.<sup>363</sup> Hence, it is inaccurate to characterize the impact of

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359. Solum, *supra* note 39, at 26 (discussing and citing John O. McGinnis & Michael B. Rappaport, *Original Interpretive Principles as the Core of Originalism*, 24 CONST. COMMENT. 371 (2007)).

360. 94 N.E. 431 (N.Y. 1911).

361. N.Y. State Rifle & Pistol Ass’n v. Bruen, 597 U.S. 1, 24 (2022).

362. 410 U.S. 113 (1973).

363. Dobbs v. Jackson Women’s Health Org., 597 U.S. 215, 238-41 (2022).

thick originalism as *freezing* the development of the law. Although the word “reactionary”<sup>364</sup> is often used loosely in political discourse, here the term is accurate and appropriate.

The use of thick originalism to evaluate the permissibility of tort reforms, gun regulations, or reproductive health-care policies presents a second, perhaps more concerning, problem of normative justification. This is the so-called “dead-hand problem,” which challenges the idea that foundational decisions made by an earlier generation should be binding on contemporary majorities. As Michael Klarman has put it: “Why would one think, presumptively, that Framers who lived two hundred years ago, inhabited a radically different world, and possessed radically different ideas would have anything useful to say about how we should govern ourselves today?”<sup>365</sup> One response to this objection is to “ascribe some special normativity to the Founding . . . that justifies privileging its values over those subscribed to by a contemporary popular majority.”<sup>366</sup> Some originalists adopt this strategy by emphasizing the Founders’ greater wisdom and virtue or by keying on the “unusual degree of popular mobilization” that was present at the Founding and at other “constitutional moments.”<sup>367</sup> Even conceding that Hamilton, Madison, Jay, and their colleagues were unusually wise, and their generation of constitutional activists unusually civic minded, does not resolve the dead-hand complaint. “No matter how smart the Framers were, they still held slaves and subordinated women; they could not dream of space travel, nuclear weapons, and computer technology; and they wrongly assumed basic demographic, political, and other facts about the world.”<sup>368</sup> Thus, declaring contemporary common or statutory law unconstitutional because it does not conform to the law in place at the time of the Founding imposes a legal order that reflects the values of an era where white and male owners

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364. See Samuel P. Huntington, *Conservatism as an Ideology*, 51 AM. POL. SCI. REV. 454, 460 (1957) (defining a reactionary as “a critic of existing society who wishes to recreate in the future an ideal which he assumes to have existed in the past”).

365. Michael J. Klarman, *Antifidelity*, 70 S. CAL. L. REV. 381 (1997). To a certain extent, all forms of originalism present this problem, but it becomes more pressing as we move up the spectrum from a modest form of the contribution thesis to a more strident form.

366. *Id.* at 388.

367. *Id.* On constitutional moments, see Bruce A. Ackerman, *The Storrs Lectures: Discovering the Constitution*, 93 YALE L.J. 1013 (1984).

368. Klarman, *supra* note 365, at 388-89 (“The ideological world of the Framers seems light years removed from our own. Most of them thought it acceptable to hold property in human beings (and those who didn’t were prepared to compromise the issue). Virtually all of them believed that married women should be treated, in essence, as the property of their husbands. The Founders generally assumed that people without property should not participate in politics, either because they lacked a sufficient stake in the community to justify their participation in its governance or because their poverty deprived them of the independence necessary for the exercise of responsible citizenship.” (footnotes omitted)).



of property totally dominated decisionmaking processes in a way that few, if any, in the contemporary legal and political systems would find remotely tolerable.<sup>369</sup>

As previously detailed,<sup>370</sup> Horwitz and other critical legal historians attributed the rise of a standard of tort liability during the mid-nineteenth century to the need to subsidize those seeking the proliferation of railway systems and emerging industries, the propertied classes of a later generation. Horwitz goes further than most legal historians in characterizing the rise of the negligence regime as an attempt to provide “substantial subsidies” to the industrialists and owners of railroads by “creat[ing] immunities from legal liabilit[ies].”<sup>371</sup> When the court in *Ives* declared New York’s workers’ compensation statute unconstitutional because it conferred benefits without proof of fault on the part of the employers, it echoed the interests of the propertied class during the Founding era, even if Judge Werner did get the history of tort law totally wrong.

Witt largely rejects this “materialist” account of the development of negligence.<sup>372</sup> Instead, his interpretation of *Ives* focuses on the incompatibility of workers’ compensation with a dominant ideology in place when the Fourteenth Amendment was ratified. According to Witt, Judge Werner’s strong belief in “free labor” and the relationships between employees and employers as autonomous beings originated with his commitment to abolition and the Union cause during the Civil War.<sup>373</sup> He argues that Judge Werner’s opinion in *Ives* echoed the perspectives of mid-nineteenth-century common law judges, notably Chief Justice Lemuel Shaw, that “wage earners were free agents.”<sup>374</sup> On this

369. More than a century ago, historian Charles Beard argued that the propertied classes at the time of the Founding, whom he catalogued as the “merchants, money lenders, security holders, manufacturers, shippers, capitalists, and financiers” drafted and ratified the Constitution in order to prevail over “debtors and farmers,” those of more limited means. CHARLES A. BEARD, AN ECONOMIC INTERPRETATION OF THE CONSTITUTION OF THE UNITED STATES, at xli-lxiii (Free Press 1986) (1913). At the time of American Independence, all the American colonies except one imposed property qualifications in order to vote. See Robert J. Steinfeld, *Property and Suffrage in the Early American Republic*, 41 STAN. L. REV. 335, 337 (1989).

370. See *supra* note 137 and accompanying text.

371. HORWITZ, *supra* note 98, at 100.

372. WITT, *supra* note 92, at 8-9 (distinguishing the “materialist” account of the development of negligence from “idealist accounts” that “tend to agree with materialist histories on the broad outlines of the story, but the idealists explain historical change by reference to developments in the history of ideas, the sociology of knowledge, or deeply rooted individualist traditions, rather than developments in the economy”).

373. *Id.* at 154.

374. *Id.* at 172 (citing *Farwell v. Bos. & Worcester R.R.*, 45 Mass. (4 Met.) 49 (Mass. 1842); see also *supra* note 102).

account, Judge Werner employed thick originalism to restore the law governing workplace injuries to the law in place at the time of the ratification of the Fourteenth Amendment.

Once again moving beyond tort history, Justices Breyer, Sotomayor, and Kagan, in their dissenting opinion in *Dobbs*, present the issue of male domination during the Founding era most starkly in their critical rendition of Judge Alito's opinion for the majority that led it to eliminate a woman's constitutional right to choose to terminate a pregnancy:

If the ratifiers did not understand something as central to freedom, then neither can we. Or said more particularly: If those people did not understand reproductive rights as part of the guarantee of liberty conferred in the Fourteenth Amendment, then those rights do not exist. . . . But, of course, "people" did not ratify the Fourteenth Amendment. Men did. So it is perhaps not so surprising that the ratifiers were not perfectly attuned to the importance of reproductive rights for women's liberty, or for their capacity to participate as equal members of our Nation. Indeed, the ratifiers—both in 1868 and when the original Constitution was approved in 1788—did not understand women as full members of the community embraced by the phrase "We the People."<sup>375</sup>

Commenting on the same issue, Balkin notes that Justice Alito's "construction of tradition" focused on "historical periods" when "regulations of abortion were part of more general features of law and social practices that kept women subservient, denied them equal opportunities, and regulated their sexuality and autonomy."<sup>376</sup>

The notion of a legal order in today's world protecting only the interests of white, male property owners is presumably unimaginable. Yet the application of thick originalism in both torts cases and in a broader array of constitutional decisions does exactly that. In past generations, when courts made egregious errors in declaring compensation systems unconstitutional, the net effect was to return the issue to the political processes. For example, as we previously noted,<sup>377</sup> after the *Ives* decision, the state of New York adopted a state constitutional amendment providing that a workers' compensation statute was allowed under that state's constitution. Today, however, political dysfunction generally,<sup>378</sup> and the mobilization of special interest

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375. *Dobbs v. Jackson Women's Health Org.*, 597 U.S. 215, 372 (2022) (Breyer, J., dissenting).

376. BALKIN, *supra* note 5, at 170 ("[T]he same tradition that denied women control over their reproductive lives was part of a larger tradition of male dominance. Alito's failure to reckon with the deep connections between the history of abortion regulation and the subordination of women generally is an example of how judges engage in historical erasure when they construct a constitutional tradition." (citation omitted)).

377. See *supra* notes 116-17 and accompanying text.

378. See Richard L. Hasen, *Political Dysfunction and Constitutional Change*, 61 *DRAKE L. REV.* 989 (2013). See generally MAXWELL STEARNS, *PARLIAMENTARY AMERICA: THE LEAST RADICAL MEANS OF RADICALLY REPAIRING OUR BROKEN DEMOCRACY* (2024).

opposition specifically, likely make the ratification of constitutional amendments allowing no-fault compensation systems virtually impossible.<sup>379</sup> If workers' compensation systems were being adopted for the first time today, it is likely that the politically well-mobilized plaintiffs' bar would be able to stop such a proposal because it would threaten their economic self-interest.<sup>380</sup> In the continuing debate over whether a woman has a right to terminate a pregnancy, despite the overwhelming popular majority in favor of such a right,<sup>381</sup> heightened political polarization makes the prospects for nationwide (federal) legislation protecting such a right extremely unlikely in the foreseeable future and a ratified constitutional amendment all but impossible.<sup>382</sup>

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379. More broadly, it is unlikely that the amendment process set out in Article V of the Constitution can ameliorate the dead-hand problem, as some adherents of originalism suggest. See, e.g., Griffin, *supra* note 73, at 1218. As Professor Klarman has explained: "On numerous occasions in American history, the will of national majorities has been frustrated by their inability to satisfy the supermajority requirements of Article V. . . . The dead-hand problem of constitutionalism is not solved by an amendment mechanism biased in favor of the status quo through supermajority requirements." Klarman, *supra* note 365, at 387.

380. In a 1990 article in the *Harvard Journal on Legislation*, Professor Jeffrey O'Connell asked: "What has brought such compromises that undermine no-fault laws? Why has no new state adopted a no-fault bill since 1975, and why have a few other states repealed or rolled back no-fault laws despite a wave of statistics supporting no-fault's advantages?" O'Connell's response: "One answer lies with the nation's trial lawyers who have banded together to oppose the passage or improvement of no-fault schemes. This group continually emphasizes that Americans must retain their 'right to sue.'" Jeffrey O'Connell, *A Draft Bill to Allow Choice Between No-Fault and Fault-Based Auto Insurance*, 27 HARV. J. ON LEGIS. 143, 145 (1990). O'Connell provided the following elaboration in a footnote:

Many in the insurance industry who believe in no-fault insurance (and there has been a variety of opinions in the industry) began to lose heart in the struggle for no-fault in the mid-70's when they saw how easily even well-crafted no-fault bills could be subverted or perverted during the legislative process by trial lawyers, among others. As one insurance industry lawyer explained: "It doesn't take too much to undo a reasonably good no-fault bill, just the cheerful cooperation of the friends and enemies of no-fault insurance, the friends in raising the benefits without much regard for the threshold [beyond which tort suits can also be brought]; the enemies in lowering the threshold while aiding and abetting the friends in raising the benefits. Then, add a little political grease in the form of a mandated rate reduction and a few other provisions . . . designed only to punish insurers for their support of the concept, and we [in the industry] begin to wonder if the battle is really worth fighting."

*Id.* at 145 n.12 (quoting Letter to Jeffrey O'Connell (Mar. 22, 1988) (alterations in original) (on file with the Harvard Journal on Legislation)).

381. See *Public Opinion on Abortion*, PEW RSCH. CTR. (May 17, 2022), <https://www.pewresearch.org/religion/fact-sheet/public-opinion-on-abortion/> [<https://perma.cc/9TTL-SM6V>] (reporting that "61% say abortion should be legal in all or most cases, while 37% say it should be illegal in all or most cases").

382. See Dave Levinthal, *Why a Constitutional Amendment Protecting Roe v. Wade and Enshrining Abortion Rights Is Next to Impossible*, BUS. INSIDER (June 24, 2022, 11:54 AM), <https://www.businessinsider.com/roe-v-wade-abortion-rights-constitution-2022-5> [<https://perma.cc/FUL3-NUXR>]. State action may be possible, as evidenced by recent referenda in Kansas and Ohio. Mitch Smith & Katie Glueck, *Kansas Votes to Preserve Abortion Rights Protection in Its Constitution*, N.Y. TIMES (Aug. 2, 2022), <https://www.nytimes.com/2022/08/02/us/kansas-abortion-rights-vote.html> [<https://perma.cc/588T-B5JA>];

In the current climate, thick originalism does more than return issues to the political process. Instead, it imposes the values of the eighteenth century's white, male, propertied classes on the far-different populace of the twenty-first century.

#### CONCLUSION

Recent Supreme Court opinions reveal a turn toward thick or foundational originalism, in which history, as told by the majority, dictates the outcome of cases. The common law subject we know best, torts, provides cautionary lessons for the Court about continuing to engage in thick originalism as a methodology. The first lesson is practical. The appeal of originalism lies in its claim to objectivity. Instead of allowing judges to impose their policy preferences, proponents of this approach claim that it is better to rely on history to determine legal outcomes. Unfortunately, the historical meaning, and intended application, of constitutional provisions is elusive. Judges, who are not trained historians, sometimes make clear errors of history, as in *Ives*. More profoundly, the search for history is not mechanical. As *Horton* and *Browning-Ferris* demonstrate, deciding where to begin a historical inquiry and which sources to consult requires discretion. Such discretion is vulnerable to judges' biases and policy preferences, whether conscious or not. Objectivity is illusory. The second problem is normative. The Constitution of the United States is a profound document that, for its time, expanded freedom and provided the framework for a better way to govern. To celebrate that, as we do, does not require us to ignore structural injustices that pervaded social, political, and economic life at the time of the Founding. Black people could be property, and, often, women were treated as property as well. Gay rights were not protected. Beyond these flaws, society today is simply different than in the largely agrarian communities that composed the United States at the time of the Founding. Solutions to Founding-era problems do not necessarily translate to the modern United States.

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Kate Zernike, *Ohio Vote Continues a Winning Streak for Abortion Rights*, N.Y. TIMES (Nov. 7, 2023), <https://www.nytimes.com/2023/11/07/us/politics/ohio-abortion-amendment.html> [<https://perma.cc/9K6V-GTBX>].

