
NEW YORK UNIVERSITY
JOURNAL OF LAW & LIBERTY

CONSTITUTIONAL INTERPRETATION AND THE BILL OF RIGHTS*

MINUTES FROM A CONVENTION OF THE FEDERALIST SOCIETY

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11-13-09
9:00–10:00 a.m.
Grand Ballroom

* Editors Note: This transcript has been slightly modified from its original format to correct obvious grammatical errors.

JUDGE O'SCANNLAIN: We have a special treat in store for you this morning, a serious discussion of constitutional interpretation and the Bill of Rights led by two distinguished constitutional law scholars. Burt Neuborne is the Inez Milholland professor of civil liberties at the NYU Law School, where he has taught for many years. Professor Neuborne also serves as the Legal Director of the Brennan Center for Justice, which is located at the law school.

An expert in constitutional law, Professor Neuborne is a member of the American Academy of Arts and Sciences. He received his undergraduate degree from Cornell, and did his law work at my alma mater, Harvard. Professor Neuborne's scholarship touches on such important topics as civil and political rights, the operation of democracy, the Bill of Rights, the separation of powers and judicial review.

One of his more recent and, may I say, provocative works, and I quote, "The house was quiet and the world was calm. The reader became the book, reading the Bill of Rights as a poem," is the subject of today's discussion.[1] I will introduce the article briefly in a moment. And incidentally, copies of Professor Neuborne's article are available in the back of the room.

Professor Randy Barnett is the Carmack Waterhouse Professor of Legal Theory at Georgetown Law Center. Prior to entering the Academy, Professor Barnett practiced law as a Chicago prosecutor and as an appellate advocate, most notably arguing *Gonzales v. Raich*[2] in the Supreme Court of the United States.

Also a prolific constitutional law scholar, Professor Barnett has published more than 80 articles. He received his undergraduate degree from Northwestern and also got his law degree at Harvard Law School.

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[1] Burt Neuborne, *"The House Was Quiet and the World Was Calm The Reader Became the Book": Reading the Bill of Rights as a Poem: An Essay in Honor of the Fiftieth Anniversary of Brown v. Board of Education*, 57 VAND. L. REV. 2007 (2004).

Professor Barnett's scholarship spans several areas of law. Most prominently, he has published several books on contract law and constitutional law. Most recently, he has explored topics in the philosophy of law, structural constitutional law, originalism, federalism and the presumption of liberty.

Now, the topic for today's panel is Professor Neuborne's article, in which he argues that the current jurisprudence and scholarship on the Bill of Rights suffers from a separationist flaw.[3] That is to say, the Bill of Rights is currently analyzed amendment by amendment, or even clause by clause, in splendid isolation. But Professor Neuborne argues that the Bill of Rights is better read as a structural whole.

Professor Neuborne finds that there is a coherent purpose to the Bill of Rights. It is both vertically and horizontally organized by theme, according to the Framers' conception of threats to freedom and the Republic. He marshals thorough historical evidence to support this thesis, and he then discusses its implications for 9th and 10th Amendment jurisprudence and the protections of the First Amendment.

Professor Barnett will respond by raising the question of what it means to follow the text. Sometimes judges do not follow the text when they should, and sometimes they say they are following text when in fact they're not. In particular, Professor Barnett will explore the connection between following a text and following a principle abstracted from a text.

But enough of introduction. Let these outstanding scholars speak for themselves. We will hear first from Professor Neuborne, who will speak for 10 to 15 minutes. Then Professor Barnett will offer his remarks for about 10 to 15 minutes. I will ask Professor Neuborne to respond very briefly if he wishes, and then the remaining time will be spent with discussion, with questions from the audience.

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[2] 545 U.S. 1 (2005). *Raich* was argued in 2004, while Professor Barnett was the Austin B. Fletcher Professor of Law at Boston University School of Law.

[3] Neuborne, *supra* note 1.

Professor Neuborne.

PROFESSOR NEUBORNE: Thank you, Judge O'Scannlain, and it's always a delight to be on a panel with Randy. I particularly want to thank Dean Reuter and Julie Nix for offering the invitation to speak.

I never turn down an invitation to speak at the Federalist Society either at NYU or at other venues. It's no secret that I usually am in profound disagreement with many of your policies, but I have to say that over my career as a law school teacher there's been no organization in American legal life that has been as committed to the free discussion of ideas and as intellectually open and stimulating as the Federalist Society. And so I salute you for that.

The derivation of the title that Judge O'Scannlain mentioned is a line from a Wallace Stevens poem. If you don't know Wallace Stevens and you're a lawyer, you should get to know him. Wallace Stevens is the lawyer's poet. He was an official of the Hartford insurance company. That was his day job. And at night, he wrote some of the greatest poetry in the English language.

Much of Stevens's poetry is about the act of reading, the mystery of reading. " The House Was Quiet and the World Was Calm" is Wallace Stevens great paean to the act of reading.[4] "And the reader becomes the book"—it's a merger of the reader and the text, and I take it as an inspiration for the work.

As the judge points out, current scholarship and current adjudication tends to view the Bill of Rights and the whole Constitution as a clause-bound document. We tend to tear words out of the document and look at them in isolation, sometimes clauses; sometimes just plain words torn from the document itself. And we do the best we can in terms of finding what the meaning of those words is, ranging from originalism to purposivism to all of the various "isms" that we talk about when we read the text.

And in some sense, it seems to me that we treat the Bill of Rights as though the Founders threw a pot of ink at the wall, and what we're doing is reading the random splatter. I want to suggest

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[4] WALLACE STEVENS, *The House Was Quiet and the World Was Calm*, *in* THE COLLECTED POEMS OF WALLACE STEVENS 358 (1954).

to you that reading it that way misses an extraordinary aspect of the Founders' genius because one of the extraordinary things about the Bill of Rights is the fact that it has, unlike any rights-bearing document in our intellectual history—you can go back to the Magna Carta and trace them down—it has within its four corners a remarkable structural coherence, both vertically and horizontally, that teaches us how to live in a tolerant and free democracy. And even if it didn't change the outcome of a case, it would change our understanding and our deep commitment to the document if we began to look at it that way. But I think it also helps us to decide cases, as well. So let me jump in.

First of all, I wonder, just think yourself, have you ever sat down and read the Bill of Rights all the way through? Have you ever read it as a single coherent document? Have you ever read the Constitution as a single coherent document? My experience has been that American law students graduate from law school without ever once reading the document in a coherent, single way so that you capture its ethos. And what I'm hoping to do is suggest to you that there's a great deal to be gained by reading it as you would read a great poem.

You would never read a great poem by tearing a word out or tearing a clause out, you would care about the order of the words. You would care about how the poet structured the thoughts because the ethos of the poem is captured in large part not just by the words but by their order and their context and their structure.

So let me suggest to you that the Bill of Rights looked at that way has this remarkable, I believe, coherence, let's say vertically. Have you ever asked yourself why the Fourth Amendment is after the Second but before the Eighth, and why the Ninth comes where it does and why the Bill of Rights ends with the Tenth and begins with the First? And I'm going to suggest to you that there is a story that not only is justified in history but in the text itself that helps you answer that question.

I believe that what the Founders did is that the First Amendment is first for a very important reason. The First Amendment unites six ideas, six luminous ideas in a single text for the first time

in the intellectual history of our culture and orders them in a particular way to describe the tolerant democratic commonwealth on the Hill that they hoped to found, the ideal commonwealth that they were hoping to found.

Then after the First Amendment, the next nine amendments list in both chronological and order of magnitude the risks and dangers to the ideal Commonwealth. The Second and Third deal with what they understood correctly to be the greatest threat to a tolerant democracy anywhere, and that's military overthrow. You can look anywhere in the world. If you look in Latin America, if you look in the Middle East, you look anywhere, and you realize that the greatest threat to a tolerant democracy is the military overthrow. And the Second and Third Amendments are designed to deal with military overthrow problems.

The Fourth through Eighth are a remarkably coherent chronological description of the next danger, which is the danger from civilian law enforcement. It is no coincidence, I suggest to you, that the Fourth deals with investigation, the Fifth deals with interrogation, the Sixth and Seventh deal with adjudication, and the Eighth deals with punishment.

You could not get a more careful and beautifully put together picture of the chronological development of a law enforcement situation than the Fourth through the Eighth. Maybe it's random that they happen that way, but no other rights bearing document in our cultural history has an order, whether you go to the English Bill of Rights, to any of the colonial charters, to any of the Revolutionary constitutions, to the Declaration of the Rights of Man, nothing has anything like that.

My suggestion to you is that Madison's genius was not necessarily substantive; it was structural. It was his capacity to see and the capacity of the other Founders to see a structural blueprint for how you create a tolerant democratic society and how you protect that tolerant democratic society from a series of dangers that are placed in chronological order of magnitude.

And then why close the Bill of Rights with the Ninth and Tenth Amendments? We are currently mired in a terrible dilemma

because the extreme readings of both amendments either give them too much power or no power. Either we read them out of the document entirely or we essentially read them as blank checks for judges. My suggestion is that the Founders did what you would expect brilliant people like that to do. The Ninth and Tenth amendments are meta-canons of construction. They tell us at the end of the document how to read it, and they tell us how to read it against the background of British hermeneutic tradition that went back to Henry VIII—that went back hundreds of years.

The Founders were well-trained British parliamentary lawyers. They all knew that there were two ways of looking at text. There was the *equity of the statute* way of looking at text, which expanded text analogically, and filled lacunae with known textual expansions, and then there was the *inclusio unius* way of looking at text, which said that if it was not in the text, you couldn't expand. And they did know, because you can see from the British division that the British lawyers and judges yawed back and forth between *equity of the statute* and *inclusio unius* in the way they read their parliamentary commands.

So, the Founders told us in the Bill of Rights itself, when rights are at stake, in the Ninth Amendment, equity of the statute is permissible. You can fill in gaps. You can use analogical reasoning to fill in gaps to make sure that the Bill of Rights didn't do what we were nervous about doing, which is to freeze rights before we had really understood the full need for them in a democratic society.

On the other hand, the Tenth Amendment adopts *inclusio unius* and says where powers are at stake, you cannot use analogical reasoning; you must stay directly inside the text. And I suggest to you, the interplay between a broad reading of rights and a narrow reading of powers is probably more important than the description of the rights themselves in the Bill of Rights or the Constitution and that much of our freedom flows from the fact that we have essentially a reciprocally opposite way of approaching the text. So that's my story about the vertical organization in the Bill of Rights, that if you look at it vertically, it tells a remarkably coherent story.

Let me just quickly give you an example of a horizontal reading. Take the First Amendment. The First Amendment has six ideas in it. The six ideas—establishment, free exercise, speech, press, assembly, petition—unfold six ways. If you think about that for a moment, that is a remarkably coherent story. That is a series of concentric circles that go from the inner-sanctum with the human conscience, our Establishment Clause being the deep conscience, that you don't want to support something you deeply disbelieve, with religion being the strongest kind of conscience that the Founders knew.

So you go from protection of conscience into a series of concentric circles with each concentric circle adding to the number of people and the nature of the communications. So you go, speech, which is individual discussions; press, institutional discussions designed to reach a mass audience; assembly, people getting together as a result of all of that information; and petition, people actually then interacting with their governments to bring the ideas into being.

I think it is not unfair to say that the First Amendment gives us the lifecycle of a democratic idea. It is the Founders' understanding that in a tolerant and free democracy, ideas begin within the protected nature of the human conscience and move in concentric circles toward final establishment or ratification into law, in a series of carefully modulated circles.

So I'll end by saying that Justice Harlan, in *NAACP v. Alabama*,[5] dropped a seventh non-textual idea into the First Amendment—freedom of association is not textual; it's not in the First Amendment—he was acting in perfect accord with the ethos of the Ninth Amendment which told him that he could use equity of the statute to look at that document and say "is there a lacunae? And using the techniques of British lawyers under equity of the statute, can I fill that lacunae with something that is compatible, analogical and necessary

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[5] *See NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 460 (1958) (recognizing that "freedom to engage in association . . . is an inseparable aspect of the 'liberty' assured by the Due Process Clause of the Fourteenth Amendment, which embraces freedom of speech.").

for the full enjoyment of the text?" Which was the British equity of the statute.

And it's why over time, even groups like the Federalist Society, who understandably are concerned with non-textual judging, tended to accept the Harlan formulation as appropriate, because the Harlan formulation is exactly what the Founders were thinking. You fill in a blank left in the First Amendment by reference to the power given you in the Ninth to construe it broadly and analogically but not completely openly. You must comply with the notions of equity of the statutes. So I think, read that way, it helps us understand the Ninth, it helps us understand the First, and it also gives us possibilities for understanding the Second and Third. It explains why the Second and Third are where they are: because they are so important because it was to protect against military overthrow.

So with that as my general thesis, I probably have stayed within my time limit—in my life I've never stayed within my time limit. I expect when the Grim Reaper comes for me, I'm going to ask for a couple more minutes.

So thank you very much.

JUDGE O'SCANNLAIN: Actually, Professor Neuborne did stay within the time limit, and now we will hear from Professor Barnett.

PROFESSOR BARNETT: Thank you, Judge. It is always a pleasure to appear on a public panel with Burt Neuborne, who is the epitome of a law professor who is both a gentleman and a scholar. And I am particularly pleased to comment on his very interesting article describing a holistic approach to the Bill of Rights.[6]

Now, there is much in the paper with which I agree, and you heard some of that in the summary. And even where I disagree, I found that I learned a great deal from it. And that is not always my experience with constitutional scholarship, I should say.

Now, Burt's meticulous organizational scheme by which he explains the order of the amendments as well as the order of the clauses within each amendment is ingenious, and maybe even

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[6] *See* Neuborne, *supra* note 1.

correct as a historical matter. And by the way, for those of you who are getting ready to run to the microphone to tell him that the First Amendment was really the Third Amendment because you think this is a great "gotcha" moment, he knows about that. He talks about that in his article. Save your comment for something else.

Now, in these brief comments, I want to question not the accuracy of his organizational structure but its relevance, which, to be clear, is not to claim that it is irrelevant. Instead, I want to evaluate its potential relevance by bringing to bear insights of original public meaning originalism,[7] the methodology that has come to prominence in recent years[8] but which Burt does not mention in his piece. So in particular, I want to examine his thesis in light of the recently rediscovered yet traditional distinction between constitutional interpretation on the one hand and constitutional construction on the other.

Now, according to this distinction, interpreting the text of the Constitution involves ascertaining its meaning. Put another way, interpretation attempts to identify the information that the text conveyed to a member of the general public at the time the measure was enacted. Interpretation attempts to identify the information that was included in this particular text.

Original public meaning interpretation, sometimes called the new originalism, seeks the information that the text conveyed to the member of the general public at the time it was enacted. Now, although this interpretive inquiry is complicated by the occasional use of legal terms of art—think about letters of mark and reprisal, for example—that may have had no general public meaning, I'm going to put that complication to one side. Originalists may disagree amongst themselves on exactly how this inquiry is supposed

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[7] *See* Randy E. Barnett, *An Originalism for Nonoriginalists*, 45 LOY. L. REV. 611 (1999); *see also* Randy E. Barnett, *The Original Meaning of the Commerce Clause*, 68 U. CHI. L. REV. 101 (2001); Randy E. Barnett, *The Original Meaning of the Necessary and Proper Clause*, 6 U. PA. J. CONST. L. 183 (2003).

[8] *See* Brian A. Lichter & David P. Baltmanis, *Foreword: Original Ideas on Originalism*, 103 NW. U. L. REV. 491 (2009) (stating that "originalism now represents a dominant—perhaps *the* dominant—method of constitutional interpretation.").

to be conducted and as well as on particular claims about original public meaning, but they all share a common quest, ascertaining the information that was conveyed by the text in context at the time it was enacted.

But originalists today acknowledge that the information conveyed by the text itself may be insufficient to resolve a particular case or controversy, in which case interpretation, strictly speaking, has come to an end, and what is called constitutional construction must begin. Constitutional construction is the activity of putting the information that the text does contain into action.

To give a noncontroversial example, while the Constitution forbids statutes that abridge the freedom of speech and assembly, it is necessary to tell whether any or every particular law that may restrict speech is, in fact, an abridgment. For example, regulations of the time, place and manner by which the rights of speech or assembly are exercised do not improperly abridge the freedom of speech, but instead coordinate the exercise of this right with the rightful liberty of others in society.[9] Similar doctrines have been developed to handle problems concerning, for example, the free exercise of religion.

Indeed, an elaborate doctrinal apparatus has evolved over the years to decide particular First Amendment cases.[10] None of these rules can be found, either expressly or by implication, in the text of the First Amendment itself. Yet all are necessary to put what is in

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[9] *See, e.g.*, Elizabeth Alden Longworthy, *Time, Place or Manner Restrictions on Commercial Speech*, 52 GEO. WASH. L. REV. 127, 128–29 (1983) (stating that "the Court has consistently upheld as constitutional reasonable time, place, or manner restrictions on noncommercial speech." and "the test for time, place or manner restrictions on noncommercial speech is designed to consider and balance the conflict liberty and property interests of speakers and listeners."); *see also* Hague v. Comm. Indus. Org., 307 U.S. 496, 516–17 (1939) (stating that the privilege to use the streets and parks for communicating views of national questions may be regulated in the interest of all but must not be abridged or denied); Renton v. Playtime Theaters, 475 U.S. 41, 48 (1986) (stating that "so-called content-neutral time, place and manner regulations are acceptable so long as they are designed to serve a substantial governmental interest and do not unreasonably limit alternative avenues of communication.").

[10] *See, e.g.*, David M. Rabban, *The Emergence of Modern First Amendment Doctrine*, 50 U. CHI. L. REV. 1207, 1213-17. (1983) (discussing evolution of the doctrine since 1917).

the text of the First Amendment into effect. This development of constitutional doctrine, to put the text into effect, is what we refer to as constitutional law, as opposed to the Constitution itself.

Insofar as it cannot be deduced from the text itself—sometimes it can, but most often it cannot—most of what the Supreme Court does when it develops this doctrine is actually construction rather than interpretation. So the commonly made objection, "Just where in the Constitution does it say that," falls flat when one is in what Professor Larry Solum has called "the construction zone",[11] where you only go when the information provided by the text has run out.

True, some contend that where the information contained in the text runs out, judges should remain silent and let the so-called representative branches make your choices. But this claim is itself a constitutional construction that appears nowhere in the text, which only goes to show that no matter how much information may be conveyed by particular text and discovered by interpretation, construction is needed at least some of the time to finish the job.

Now, how one is supposed to do constitutional construction is an interesting and controversial issue. In my experience, different people approach the enterprise of constitutional construction differently depending on their extra-textual theory of constitutional legitimacy. By this I mean what they believe makes a constitution binding. If you think the Constitution's legitimacy is based on its original or ongoing consent by the people, for example, you may adopt different rules of construction than if you think it is based on its procedural assurances that the laws imposed on people who have not consented do not violate their rights. But however they do constitutional construction, all originalists agree that constitutional construction can only be used to apply or supplement original meaning.[12] It cannot be used to contradict or trump original meaning.

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[11] *See* Lawrence B. Solum, *The Unity of Interpretation*, 90 B.U. L. REV. 551, 569 (2010) ("Hard cases are located in what I call 'the construction zone.'").

[12] *See* Randy E. Barnett, *It's a Bird, It's a Plane, No, It's Superprecedent: A Response to Farber and Gerhardt*, 90 MINN. L. REV. 1232, 1234 (2006) ("[O]nce it becomes appropri-

Now as many of you know, there's a lot more to say about this than I can say in these few minutes. My point in sketching the distinction between interpretation and construction is to highlight the following question with respect to Burt's holistic reading of the Bill of Rights. Is it an exercise in interpretation, or is it an exercise in construction? Now I think it could be either or both. A holistic reading of the Bill of Rights is interpretive if it reveals something about the original public meaning of the text. That is, it uncovers information that is actually in the text that is part of its public meaning. Now that is certainly possible. To give one example that he doesn't discuss in his paper, the fact that the Ninth Amendment refers to rights and the Tenth Amendment refers to powers is potentially significant, especially as the Constitution is scrupulous in reserving the term "rights" for persons and the term "powers" for state and federal governments.

A holistic approach is interpretive if it helps us resolve problems of ambiguity in which words have more than one meaning. Think of the words, for example, "arms" in the Second Amendment that could refer either to weapons or to the limbs of which our hands are attached. In his lengthy exposition I do not believe Burt offers any examples of textual ambiguity that are resolved by his holistic approach, though I could be wrong about this.

Now, holism could also be interpretive if it reduces the apparent vagueness of terms by rendering a seemingly general or abstract term more specific in context than it may first appear. For example, while the term "due process" may be vague, the phrase "due process of law" may be less so, and the additional information about its meaning may be supplied by its juxtaposition in the 14th Amend-

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ate for the Supreme Court to discard original meaning and the original meaning of the text is thereby reduced to a factor among many considerations by which the Constitution is 'interpreted,' the method being used is no longer originalism."); *see also* Robert N. Clinton, *Original Understanding, Legal Realism, and the Interpretation of "This Constitution,"* 72 IOWA L. REV. 1177, 1265 (1987) ("[A] construction that is inconsistent with the text as originally understood surely cannot be accepted."); Frederick Schauer, *Easy Cases*, 58 S. CAL. L. REV. 399, 429-30 (1985) (arguing that the text supplies boundaries around permissible interpretations).

ment with the Privileges or Immunities Clause and the Equal Protection Clause. Again, I don't think that Burt provides any examples of constitutional terms that were rendered more specific, or for that matter less specific, as a result of holistic analysis, but I think it's certainly a logical possibility.

So, although I would not rule out the value of holistic analysis to resolve interpretive issues of ambiguity or vagueness, I actually think that the thrust of Burt's thesis is really to provide a holistic approach to constitutional construction rather than interpretation. By this I mean that he is not using his method to identify the meaning of the text but rather to provide a way to decide cases where the meaning of the text is too vague to resolve a particular case or controversy.

Now, as I said, since constitutional construction is inevitable, perhaps holism provides a good approach. But I think Burt fails to provide any normative justification for why we should adopt his holistic approach when the meaning of the text has run out. Perhaps he can do this, and I don't wish to deny that such a justification is possible, but the burden is on him to do so before we should consider adopting his approach if it's an approach to constitutional construction. As it is, a holistic approach I think remains an intriguing, and yes, even poetic, way to look at the text, but I see no argument for why this is a way to decide cases when the meaning of the text has run out.

Now, unfortunately, however, I also see a danger in Burt's holistic approach, which will be the final point I make this morning. In various places it looks to me like he is using the approach neither to interpret the meaning of the text nor to construct constitutional doctrine by which its indeterminate meaning can be applied to a particular cases and controversies. Instead, he seems to be using his holistic approach to supersede or contradict the text.

For example, his holistic approach tells him that the Second Amendment does not protect an individual right to keep and bear

their own private arms,[13] which was the universally recognized condition of maintaining a well regulated militia. Instead, through a longer and elaborate analysis that I can't replicate here, he reads the amendment as protecting an individual right to serve in the Armed Forces or local police department that he thinks are analogous to the militia.[14]

Now I don't have time to enumerate all that might be wrong with this proposition, but the most obvious problem is that it is not at all what the text says, by any reasonable interpretation, and is a proposition that could easily have been expressed had that been its intended meaning. Moreover, I found his reasons for rejecting the individual rights interpretation of the Second Amendment to be wholly unpersuasive.

Burt's treatment of the Second Amendment suggests to me that his holistic approach may be simply another example of the standard approach by which courts and commentators evade rather than apply the meaning that the text does provide. Step one is to start with the words of the text, say, freedom of speech or the equal protection of the laws, to discern the principles that underlie its words. So underlying the freedom of speech may be the importance of expression, let's say, or a free exchange of ideas or freedom of thought, or lots of things. Underlying equal protection of the laws is often said to be of equality.

Having identified the underlying principle, which is always, by assumption, extra-textual, step two is to take the principles and start applying them directly to cases and controversies. In other words, those who appeal to underlying principles abandon or leave behind the particulars of the text and replace it with abstractions that are either more or less open-ended than the text itself.

As Justice Black observed in his dissenting opinion in Griswold v. Connecticut, "One of the most effective ways of diluting or expanding a

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[13] *See* Neuborne, *supra* note 1, at 2031 (arguing that the Second Amendment right "to keep and bear arms" is not an individual right, but a community right to engage in institutions of armed coercion).

[14] Neuborne, *supra* note 1, at 2025-27.

constitutionally guaranteed right is to substitute for the crucial word or words of a constitutional guarantee another word or words, more or less flexible and more or less restricted in meaning."[15] Now, while I disagree with Justice Black's opinion about the outcome in *Griswold*, I agree with this observation.

The history of the Supreme Court is replete with narrowing as well as broadening uses of underlying principles. For example, during Reconstruction, the Supreme Court appealed to allegedly underlying principles to evade the original meaning of the Reconstruction amendments, eventually leading to the results in *Plessy v. Ferguson*.[16] And in the New Deal, it appealed to broader underlying principles to evade the enumerated powers scheme that rendered an expressed appeal to constitutional rights much less necessary than it is today in the absence of an enumerated power scheme.

Now, my point is not that one need never recur to underlying principles to resolve issues of ambiguity or vagueness of a text. Rather, I maintain that when one plunges beneath the surface of the text to discern the principles that may lie beneath, then one must apply what one learns to the text itself. One should not take the principles and make them a substitute for the text, never to return to what the Constitution actually says.

So, Burt must not only tell us why we should use holism when engaged in constitutional construction. To be faithful to the elegant structure that is the Bill of Rights, he must continue to use the text as he finds it, not the lovely poem he may wish it to be.

Thanks.

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[15] Griswold v. Connecticut, 381 U.S. 479, 509 (1965) (Black, J., dissenting).

[16] *See* Plessy v. Ferguson, 163 U.S. 537(1896) (holding that separate but equal public facilities were not invalid under the Thirteenth Amendment), *overruled by* Brown v. Bd. of Educ., 347 U.S. 483 (1954); *see also* Slaughter-House Cases, 83 U.S. 36 (1873) (holding that the Fourteenth Amendment was meant to protect privileges and immunities associated with United States citizenship, and did not affect rights bestowed by state citizenship); Civil Rights Cases, 109 U.S. 3 (1883) (holding that the

JUDGE O'SCANNLAIN: I think the panel will function from this level from here on for the rest of the program. Before we take questions from the floor—I would encourage those of you who would like to participate in the discussion, simply to come to the nearest microphone, and in a moment or two we'll have a chance to invite you to participate—Professor Neuborne, perhaps you'd want to, in a very short manner, respond to Professor Barnett.

PROFESSOR NEUBORNE: First, let me say that there is no greater honor than to have your piece read carefully by someone who you respect, and so thank you, Randy.

Randy makes three points, and let me quickly responded to the three. The first is when he talks about using a holistic reading to provide more information about what an ordinary reader, an ordinary highly intelligent reader, in the Founders' time would take from the document. And that, I think, is the strongest argument for holistic reading.

We may have gotten into the habit of reading things textually, clause bound and word bound, but I suspect the people who were looking at the Constitution and deciding whether they liked it and wanted to ratify it in the various conventions, and the people themselves, they didn't look at one piece. They didn't look at one word. They didn't look at one clause. They looked at the entire document.

If what you want to do is recapture the psychology of a people who are adopting a foundational document, you do not recapture that psychology by reading it in clause-bound or word-bound ways. The best way to recapture that psychology is to read it as they read it, as a single coordinated whole, and to try to capture the ethos of the document that they were either accepting or rejecting.

Second, Randy is absolutely right that when that information runs out, my urging that you read the document holistically then provides, I think, the most accurate and the best way of going to construction because once the words do run out, there is a degree of discretion that is placed in a judge or in the people themselves

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Equal Protection Clause of the Fourteenth Amendment applies only to states and not to segregation by private entities).

when they're reading the document and trying to decide what it means to them.

Once the words run out and once using all of the information we can about the psychology and understanding of the original Founders, we have to make choices. And my suggestion to you is where better to found that choice than in an intense engagement with the text itself, with the holistic nature of the text itself. If you rank the various ways that judges make decisions in this area, I would have no hesitation, if there were time, to debate that holistic reading's really intense engagement with the order of the ideas and the structure is the best way to do that, the safest way to do that, and the way to do that that is most respectful of the text.

Now, Randy's third criticism, and this is a real one, what about if I use holistic reading to actually subvert the text? Or if not subvert the text, to do something that is beyond a construction of the text but is also as a substitution for the text. Now this would be the most controversial application of my work, and perhaps it is wrong. I mean, perhaps he's right to say it is wrong, but let me say that I deploy it only in one setting. I deploy it when respect for the text would mean that the text has either drifted into desuetude, and therefore, it's gone. Two hundred and 250 years have left the text without contemporary meaning. Or to give it meaning would be to give it an almost absurd meaning.

I know that this is an audience very committed to the individual rights reading of the Second Amendment, but let me suggest to you that what we're going to develop soon is a right to their muskets and a right to bear handguns. So you're going to have handguns, you're going to be able to have rifles, but you're not going to be able to have antitank weapons. You're not going to be able to have 105-millimeter Howitzers. You're not going to be able to have sawed-off shotguns. You're not going to be able to have exactly the weapons that you really need to protect you against tyranny.

What you have is symbolic weapons that you can wave and pretend that you are somehow protecting freedom from a standing army. There is no way to protect against a standing army with a handgun. So either the Second Amendment is kind of anachronism,

or it disappears into desuetude as saying that once upon a time the militia was the organized armed force in the society, and you had three different kinds: you had a militia, you had the standing army, and you had private law enforcement. And since the standing army and private law enforcement were profoundly unrepresentative, you needed a militia to check in to make sure that they didn't become tyrannical institutions.

Well, what happened in the 19th century is we invented two things. First, we invented law enforcement that is public and that is at least democratically controlled. There were no urban police forces at the time the Constitution was adopted. There was no formal police force. There was a *posse comitatus*, and there was the local people who could have their own private police forces. But we developed an urban police who were subject to democratic constraint.

We also perfected, and this is the citizen's army—Napoleon developed the citizen's army, thus, the Civil War tragically perfected it, an army of the people. And so what used to be the militia has morphed over time into the police and the citizen's army. And the question is, do you want to make sure that they remain microcosms of the people, or will the organs of armed coercion be made up once again of unrepresentative institutions?

I understand that is a very controversial reading of the Second Amendment, and I don't really assert it as more than an intellectual — especially given the way the courts are going, I don't expect that it's going to change the court's decisions. But I think if you're talking about it purely on the merits, looking at it holistically that way reinvigorates what was the second most important thing the Founders did, which was to protect us against unrepresentative bodies of armed coercion that would single out the people who were not in there and treat them poorly.

That's what we did to the Protestants and Catholics in the whole history of the English revolution. They weren't permitted to bear arms, and they, then, were singled out for discrimination against. It's what we did to blacks for most of the nation's history. And it seems to me that the Second Amendment is a deeply egalitarian assurance that the organs of armed coercion will never again be unrepresentative. That's it.

Thank you.

JUDGE O'SCANNLAIN: Professor Neuborne, the Second Amendment—

PROFESSOR NEUBORNE: I'm sorry. The Grim Reaper did come.

JUDGE O'SCANNLAIN: The Second Amendment is a very hot topic in the last few years with the Supreme Court,[17] and we're going to find out if it's incorporated against the states.[18] Do you want to make any predictions or suggest an analysis?

PROFESSOR NEUBORNE: Absolutely. Yes. I don't see how you can read it with its—No matter what you think it says, it's the second piece of the Bill of Rights. How could you not say it's incorporated against the states as well? It's too important.

JUDGE O'SCANNLAIN: Well, let's start with questions from the audience. Please introduce yourself and state your question.

MR. ANSELL [PHON.]: Hi. I'm Fred Ansell with the Department of Justice, but I don't speak for them.

JUDGE O'SCANNLAIN: Okay.

MR. ANSELL: My question to you is when I'm hearing your argument, while I think it's very interesting, I don't think of Wallace Stevens. I think of Learned Hand and his interpretation methods of statutory construction. And I'm wondering if that is implicitly or explicitly something that's going through your mind as a way of interpreting the Constitution, where every word takes meaning from every other word and the structure of the statute. It's not the way most judges interpret the statutes today, but certainly the way Hand did.

And my other question, I guess the reverse question is, is there anything about your theory of holistic interpretation in the Constitution that you think would affect the way judges would interpret statutes?

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[17] *See, e.g.*, District of Columbia v. Heller, 554 U.S. 570 (2008) (holding that individuals do not need to serve in a militia to possess and use a firearm for lawful purposes).

[18] The Supreme Court recently held that the Second Amendment is incorporated by the Fourteenth Amendment's Due Process Clause, and applies to states. McDonald v. Chicago, 130 S. Ct. 3020 (2010).

JUDGE O'SCANNLAIN: Professor Neuborne, and then we'll let Professor Barnett respond.

PROFESSOR NEUBORNE: You're very perceptive. I mean, if you hunt and peck—I can't find it in my piece now—if you hunt and peck through my piece, you'll see a citation to a wonderful Learned Hand quote in which he says that words are not alien pebbles in juxtaposition with one another.[19] And I did draw great inspiration from Hand's way of reading text.

I think, actually, Justice Souter's approach to reading statutes was very similar to that. He attempted to use the Hand formulation in reading statutes. One can agree or disagree with a particular application of it, but he was deeply involved in the contextual reading of statutes when he was on the bench. And so the short answer is you're absolutely right.

JUDGE O'SCANNLAIN: Professor Barnett, any thoughts?

PROFESSOR BARNETT: Not on this question. I did want to say one thing in response to Burt's response, and that is that it's really a separate issue. I think in the course of making his response, he illustrates the value of making a distinction between constitutional interpretation and constitutional construction, which is not a distinction everyone in this room is used to making.

I think one of the advantages of it is that it sorts out what we're really agreeing about and what we're really disagreeing about. And the way that he broke down the three—could it be used for interpretation, could it be used for construction, or could it be used beyond that?—illustrates why it's useful to make that distinction so you can identify the basis of agreement and also exactly what it is you're really disagreeing about so you're not just talking past each other.

JUDGE O'SCANNLAIN: Next question.

MR. BISHOP: I'm Brian Bishop from the Ocean State Policy Research Institute. At the risk of letting the criminals win, I don't know where the shells to my shotgun are, and I'm really almost

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[19] Neuborne, *supra* note 1, at 2007, 2012.

sorry in a way that what jumps out from what you said are some of the Second Amendment questions. But one very interesting relation of the formulation of Justice Harlan, you said, I would think—

JUDGE O'SCANNLAIN: Could you just step back just a little bit from the microphone.

MR. BISHOP: Sure.

JUDGE O'SCANNLAIN: Step away from the microphone. That's better.

MR. BISHOP: Lest my patron saint Edmund Burke roll over in his grave, I think the folks that went after the Bastille actually had pitchforks to start with, and then they got the Howitzers.

But what I'm wondering is might Justice Harlan have said that that reference, for instance, to the Second Amendment by reference to the Ninth, that the right of self-defense, which is not necessarily a right against tyranny, but I think animates some of our discussion and certainly discussion in state to state constitutions of Second Amendment-like privileges, wouldn't that have been a way for a holistic reading to also support the Second Amendment as an individual right?

PROFESSOR NEUBORNE: Sure, but I think you're doing something that if I were to do it, Randy would quite correctly call me out on it.

You are adopting a heresy for this body. You're adopting purposivism. You say you want to read the Second Amendment as a purposive document and figure out what its deep purpose was and read it to advance that. And to do that, you have to ignore the Preamble. The Preamble doesn't say a people cannot have self-defense without arms. It says that a well ordered militia is not possible without arms.

You're entitled to ask the question, but I hope that you don't judge my piece by its most controversial application, which is the Second Amendment. There's a great deal more than the Second Amendment in reading it holistically. But even at the Second Amendment, my piece, my construction attempts to give meaning to both halves of the amendment. It attempts to give meaning to the

Preamble and attempts to give meaning to the Individual Rights Clause.

Most of the opposite readings either privilege the Preamble or privilege the Individual Rights Clause. And they do it by saying, well, I know what the real purpose is, and so once I know what the real purpose is, I can excise the text that I think is inconsistent with the real purpose. I don't want to do that. I want to be faithful to both clauses of the text and find a meaning that is consistent with both.

JUDGE O'SCANNLAIN: Next question.

MR. SHAPIRO: Ilya Shapiro from the Cato Institute, and I'm wondering how the holistic approach applies, or whether it does, to the rest of the Constitution, that which wasn't ratified in 1789, or 1791.

PROFESSOR BARNETT: The 14th Amendment, for example.

MR. SHAPIRO: For example, whether that just merely says take this holistic approach, and now it applies to the states, or whether there's something else. Do you now read the whole Constitution holistically, or you know, just adding bits and pieces and saying, well, that previous holistic bit just drops out based on or something else gets added in. Can you elaborate on that?

PROFESSOR NEUBORNE: Well, I mean, you asked two wonderful questions. The first one is, would I try to do this with the text of the Constitution, the 1787 text of the Constitution? And there's an effort in my piece, there is a quick effort at doing it.[20] I think it can be done. These guys were brilliant. The people who drafted this were brilliant, and there was a structure to the text as well, if only we'll look for it. They weren't engaged in a kind of random exercise of, gee, I have a good idea today, I'm going to write it down. And it can help us. It helps us understand federalism, it helps us understand separation of powers if we will only look holistically. Now I haven't got time to develop it, but it's there.

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[20] *Id.* at 2065.

Your second point is I think even more interesting, and that is that I think that—this is something that the Supreme Court has done only with the 11th Amendment, but it seems to me they should do it more generally, and say that subsequent amendments altered the ethos of the prior amendments because we now have to read everything holistically. So I think you're right. I think you read the 13th, 14th and 15th Amendments and the Amendments generally as a package. And as the amendments grow and the package grows, the holistic reading of the document may change as well.

I mean, it's no coincidence that almost every amendment since the 10th Amendment—there are three or four that are not—are designed to perfect democracy. They're designed to fix something about a structural mistake in democracy. Obviously, the 13th and 14th don't do that, but so many of the rest of them do. And from that, I draw something about the importance of defending democracy in the document.

JUDGE O'SCANNLAIN: Professor Barnett, any response?

PROFESSOR BARNETT: No. The line is long.

JUDGE O'SCANNLAIN: Very good.

Next question.

MR. KLUKOWSKI: Professor, Ken Klukowski of the American Civil Rights Union, and I've also published a couple of law review articles on the Second Amendment. I'm curious as to how your theory would respond to the following: You reference people waving symbolic weapons in the air because they wouldn't be able to overthrow a government.

When Madison spoke in the Federalist about how, if a tyrannical regime would come to power, they would face a militia of half a million armed citizens, which in a nation of three million was roughly the able-bodied male population at the time. And when we see that those numbers hold true now, that in a nation of 300 million, we have 90 million gun owners, of which close to 30 million are former military or law enforcement with formal training in firearms, why would that overwhelming number of the citizens having firearms not have a deterrent effect on tyranny that

would still effectuate the individual right model that is articulated by Professor Barnett and others?

PROFESSOR NEUBORNE: Your deterrent effect on tyranny is the 90 million people standing strong. The fact that they have handguns facing the kind of weaponry—I mean, if you wanted to tell a terrible story about a military overthrow of this government, do you think that the military overthrow is going to be deterred by the fact that there's going to be 60,000 poor sons of bitches standing around with a handgun while they get mowed down by the kind of firepower that they could bring to bear on them?

You can't seriously think that the Second Amendment is a real protection against overthrow by a horrible tyrant. What it is, is an important symbol—symbolism, and I don't denigrate the symbolism. But my sense is that if 90 million of us would stand against an overthrow of this government, it isn't handguns that are going to protect us, it's a solidarity of the people that's going to protect us.

MR. KLUKOWSKI: Thank you, Professor. From my cold dead hands.

PROFESSOR BARNETT: Burt may be right about that, but it's a prudential matter that has to be made, given unforeseeable circumstances about what kind of threats people face. And I think—I mean, I don't want to go through a whole critique of his analysis of the Second Amendment. I don't think individual rights people disregard the first part of the amendment. I think that was a straw man in the article.

I think we have a theory that explains both parts, and we understand as well as the Founders did that the militia, which is the militia of the whole, not a select militia, serves a number of important purposes and they can be summarized as personal and collective self-defense, or what states constitutions refer to as the defense of themselves and the state, or the selves and the society, so that individual self-defense is part of what an armed population allows, and also collective self-defense is part of what an armed population allows.

The armed population is, another word for that is militia. The Government has the power under the Constitution to regulate it. There's no denying that. The fact that they choose not to regulate it is no indictment on the underlying requirement for there to be a general militia, and that is an individual right to keep and bear arms.

So the failure of the Government to have a well regulated militia or to call it into effect—by the way, it still statutorily exists under U.S. code—it is the government's fault, and they cannot undo a constitutional right because of their failure to use the militia the way it, they're allowed to if they want to.

JUDGE O'SCANNLAIN: Next question.

PROFESSOR SOMIN: This is a non-Second Amendment question.

PROFESSOR NEUBORNE: Oh, thank you. Thank you.

PROFESSOR SOMIN: Ilya Somin, George Mason Law School. I was interested in your theory of the Tenth Amendment as essentially creating a rule of construction under which powers are construed narrowly and additional powers cannot be added by implication.

I was wondering if you could expand on the implications of that for Congress's powers under Article I because I'm sure you recognize as well as I do, especially since the 1930s, Congress's powers in Article I have been vastly expanded, their interpretation by the Court almost entirely by implication. If you just look at interstate commerce or general welfare and the like, you would really have to have a lot of implications and penumbra and the like to get virtually unlimited congressional power as we have today. So does your theory imply that that should be cut back, and if so, how far?

PROFESSOR NEUBORNE: It's a good question. I argue in the piece that the Rube Goldberg causation notions that we've used for the Commerce Clause are probably in tension with the Tenth

Amendment. And that Justice Harlan, in *Wirtz*[21]—Harlan thought more about the Ninth and Tenth Amendments, I think, than almost any other justice.

Justice Harlan, in *Wirtz v. Maryland*, in his separate opinion,* urges us to rethink the notion that the Commerce Clause language is infinitely elastic, and he urges us to read it more narrowly, and I think he's right. I think he's right. I mean, in some sense, the Tenth Amendment jurisprudence grew up because the construction of the Commerce Clause essentially got out of control. And you wouldn't need a rigorous Tenth Amendment jurisprudence if you had a narrower and I think more sensible reading of the Commerce Clause itself.

JUDGE O'SCANNLAIN: Next question.

MR. SMITH: Yes, Brad Smith, a private litigator from Michigan. One thing that troubles me, Professor Neuborne, about your holistic approach is that it implies that the answers are self-contained in the Constitution, and maybe that's an unfair implication. But for generations, judges construed, or I should say interpreted, the Constitution. For generations, judges interpreted the Constitution in light of the Declaration of Independence and the Federalist papers. Would your theory rely more or less or the same on documents created at the time, like the Declaration and the Federalist papers?

PROFESSOR NEUBORNE: Short answer: It would rely much less. Much less. And in fact, I think when judges claim to be reading the text against the background of the Declaration of Independence or the Federalist Papers, what they're doing is simply creating a façade to explain why their reading is the reading—the reading they like is the reading that is going to be adopted.

MR. SMITH: If I could just follow up, moderator?

JUDGE O'SCANNLAIN: Go ahead.

MR. SMITH: I mean, that presumes that the drafting of the Constitution was done by a master, intelligent, cohesive thought, and all of the records that we have—and I'm not the scholar that the panel

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[21] Maryland v. Wirtz, 392 U.S. 183 (1968).

* Editors Note: Justice Harlan actually wrote for the majority in *Maryland v. Wirtz*.

is perhaps—but it was a contentious summer in Philadelphia, and a lot of people compromised, and there was a lot of debate. And so the idea that it's like the Bible, this is handed down, does not fit with history.

PROFESSOR NEUBORNE: Oh, I don't know. They didn't do a bad job. There's a cover of Nation magazine three or four years old, but it is a hilarious cover, and it's story of devolution, not evolution. It shows the Founders as these giants way back. And then at each generation, the next generation of political and international figures becomes a little less. And at the current time we're crawling into the slime in reverse order from the Founders. And you know, I think there's something to that. I don't apologize for clinging to that document and using it as the thing I steer by.

JUDGE O'SCANNLAIN: There's only time for one more question. Unfortunately, we have a deadline, so you may go ahead.

AUDIENCE PARTICIPANT: Thank you. I wanted to address the application of this to the Constitution of 1789. It seems to me we have an example that in *McCulloch v. Maryland*, where John Marshall looks at the word "necessary" and the Necessary and Proper Clause and reasons, given that we have the phrase "absolutely necessary" elsewhere in the Constitution, that "necessary" means something other than absolutely necessary.[22] And is that an application that you would accept?

PROFESSOR NEUBORNE: Well, I would have to think a little bit about it. I mean, if you want to really see, I think, the best discussion in our history about that—when Washington called his first cabinet together, the Cabinet would write opinions to him about important constitutional issues. Jefferson and Hamilton debate the meaning of the Necessary and Proper Clause in the context of whether the Government has the power to create the First Bank of the United States. And the exchange about the meaning of "necessary and proper" I think is just brilliant on

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[22] McCulloch v. Maryland, 17 U.S. 316, 387-88 (1819).

both of them. But I don't know enough about it to hazard a guess on a particular issue.

JUDGE O'SCANNLAIN: Any last words from Professor Barnett?

PROFESSOR BARNETT: I think that even McCulloch provides a good example of what I'm cautioning against. I think, by the way, juxtaposing "absolutely necessary" is useful and tells us something. I think it tells us, consistent with Madison's reading of the Necessary and Proper Clause, does not mean indispensably requisite, which is what was argued by Maryland.

But what Marshall does is he takes the word "necessary", he says it means "convenient" and then from now on in we're off and running with the word "convenient", and convenience actually had probably a slightly stronger connotation than it did by the New Deal period. But again, it's taking one word, substituting another word for it, and then taking that word and that becomes the Constitution, that's what I'm cautioning against.

JUDGE O'SCANNLAIN: What a great start to the day. Please join me in thanking our speakers.

(Panel concluded.)