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How To Talk About the Constitution

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INTRODUCTION

Since at least the early 1980s, the legal academy has been preoccupied with the question of constitutional interpretation. Not, mind you, the question of what the Constitution actually means. Rather, scholars have been consumed with the question of how the Constitution should be interpreted—what methodology should govern constitutional interpretation. In short, we have talked and talked about how to talk about the Constitution, rather than just talking about it.

The publication of Jack Balkin’s *Living Originalism* provides just the occasion to suggest it is time for academics to abandon their incestuous and exhausted conversations about interpretive methodology and focus instead on what the Constitution actually means. Balkin’s rich book makes strong statements about interpretive methodology and provides incisive readings of particular constitutional provisions. Of the two, by far the most successful is the latter. This is not to say we necessarily agree with Balkin’s particular interpretations, a question we sidestep here. It is rather to say Balkin’s substantive commitments are interesting and worth fighting about, while his discussion of interpretive methodology is unlikely to take us any place we have not been before.

In this piece, we urge a turn away from the longstanding debates over interpretive methodology and toward more actual interpretation. Despite such debates, judges and lawyers find commonality every day in how they interpret the Constitution in the cases they hear and resolve. Here, we advocate adopting this common and familiar method, what one might call “ordinary constitutional interpretation,” and show how in doing so one can come to important and perhaps surprising conclusions about what is part of our Constitution (and what is not).

Part I describes the interpretive debates that have preoccupied us since...
the 1970s, and Part II explains that those extensive debates have not taken us very far. Part III then suggests the alternative: we should all adopt the method of “ordinary constitutional interpretation” that takes place daily in the courtrooms and judicial chambers of America. Part IV provides some payoff; it shows how, by interpreting in this ordinary way, one can see a right to a minimally adequate education that previously has not been thought to exist in the Constitution. Part V concludes by suggesting other rights that seem more tangible than previously believed if one engages in this ordinary interpretive technique.

I. A BRIEF HISTORY OF INTERPRETIVE DEBATES

Why the legal academy fell down the rabbit hole of interpretive methodology is hardly a secret. It was driven by ideology and constitutional politics. In the late 1970s and early 1980s, conservatives looked for an interpretive methodology to roll back liberal constitutional decisions of the Warren Court.¹ They settled on originalism.² Liberals responded with their own counter-theory—“living constitutionalism”—to defend the precedents of the past twenty years and explain why the Warren Court was not only making the country a better place through its decisions but also faithfully interpreting the Constitution all the while.

Each theory, however, developed deep internal shortcomings. Take originalism. After many permutations, some documented by Balkin, originalism has abandoned a search for what real people thought about real problems, instead seeking to understand what people long dead would have thought about then-hypothetical or distant problems.³ More

¹ See, e.g., BARRY FRIEDMAN, THE WILL OF THE PEOPLE: HOW PUBLIC OPINION HAS INFLUENCED THE SUPREME COURT AND SHAPED THE MEANING OF THE CONSTITUTION 306-13 (2009) (describing the emergence of originalism as a strategic response by conservatives to certain Warren Court and early Burger Court decisions); Robert Post & Reva Siegel, Originalism as a Political Practice: The Right’s Living Constitution, 75 FORDHAM L. REV. 545, 547 (2006) (“Critics of the Warren Court began to argue that determining the original understanding of the Constitution’s framers was the only legitimate way of interpreting the Constitution.”).

² See JOHNATHAN O’NEILL, ORIGINALISM IN AMERICAN LAW AND POLITICS: A CONSTITUTIONAL HISTORY 9 (2005) (“The originalist idea stood as a fundamental and newly enlivened alternative to the reformist use and scholarly, legal liberal encouragement of modern judicial power.”); Dawn Johnsen, Lessons from the Right: Progressive Constitutionalism for the Twenty-first Century, 1 HARV. L. & POL’Y REV. 239, 244 (2007) (presenting the Reagan Administration’s policy goals “within the framework of [a new call for] originalism—the drive to limit constitutional meaning to the specific meaning the Framers had in mind at the time of drafting and ratification”); Office of Legal Policy, U.S. DEP’T OF JUSTICE, REPORT TO THE ATTORNEY GENERAL, ORIGINAL MEANING JURISPRUDENCE: A SOURCEBOOK 1-2 (1987) (characterizing originalism as the only legitimate method of interpretation and “the only approach that takes seriously the status of our Constitution as fundamental law, and that permits our society to remain self-governing”).

³ Vasan Kesavan & Michael Stokes Paulsen, The Interpretive Force of the Constitution’s Secret Drafting History, 91 GEO. L.J. 1113, 1129 n.52 (2003) (“What the Framers or Ratifiers intended, expected . . . [is less relevant to determining the meaning of constitutional text]. What is relevant is the hypothetical, objective original public meaning of the Constitution’s words and phrases themselves on this subject.”); see also Thomas B. Colby & Peter J. Smith, Living Originalism, 59 DUKE L.J. 239, 245 (2009) (describing the jurisprudential shift in focus from original intention, to original meaning, to
problematically, originalism has survived only by making a series of accommodations that profoundly undermine its integrity.\(^4\) Originalists have shown a marked willingness to depart from the conclusions their methodology would dictate when political palatability so required. “In its undiluted form, at least,” wrote Justice Scalia, one of the patron saints of originalism, it “is medicine that seems too strong to swallow.”\(^5\) Thus, like many originalists, he accepted stare decisis even when originalism would compel overturning key cases.\(^6\) And—also like many others—he conceded that he was a “faint-hearted originalist” unwilling or uncaring to challenge many aspects of today’s constitutionalism that would not have made any sense to the founding generation.\(^7\) As Jack Balkin’s laundry list of things originalists are faint-hearted about makes clear, when one is done making exceptions, the rule itself looks a bit hollow.\(^8\) To name but a few notable exceptions: the modern structure of the presidency, the legitimacy of the administrative state, a great shift in power from state governments to the center, and equality for all citizens, especially women, African-Americans, and gays.\(^9\) Subtract all this and one wonders what originalism is meant to accomplish exactly.

Meanwhile, on the Left, living constitutionalism has suffered its own intellectual and rhetorical collapse.\(^10\) Justice Scalia is unyielding in

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4. Most originalists concede that some nonoriginalist constitutional doctrines should be retained. See, e.g., Michael C. Dorf, Integrating Normative and Descriptive Constitutional Theory: The Case of Original Meaning, 85 GEO. L.J. 1765, 1808-10 (1997) (conceding that on issues like gender equality, “the reasoning of the Framers—viewed in modern perspective—will be so flawed or distasteful as to suggest that the Constitution means the opposite of what they assumed”); RONALD DWORKIN, LAW’S EMPIRE 362-63 (1986) (justifying desegregation decisions by arguing that judges must determine whether “the framers’ concrete opinion about segregation is consistent with their more abstract convictions about equality”); PHILIP BOBBIT, CONSTITUTIONAL INTERPRETATION 95-96 (1991) (quoting statements made by Judge Robert Bork during the 1987 Senate Hearings on his nomination to the Supreme Court, including statements that the nation’s growth and development preclude altering some Commerce Clause jurisprudence that violates the intentions of the Constitution’s drafters).


6. Id. (“[A]lmost every originalist would adulterate [originalism] with the doctrine of stare decisis’’); ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 140 (1997) (“As I have explained, stare decisis is not part of my originalist philosophy; it is a pragmatic exception to it.”).

7. Scalia, supra note 5, at 864 (“I hasten to confess that in a crunch I may prove a faint-hearted originalist.’’).


9. See Jack M. Balkin, Alive and Kicking: Why No One Truly Believes in a Dead Constitution, SLATE (Aug. 29, 2005, 5:15 PM), http://www.slate.com/articles/news_and_politics/jurisprudence/2005/08/alive_and_kicking.html (“A host of federal laws securing the environment, protecting workers and consumers—even central aspects of Social Security—go beyond the original understanding of federal power, not to mention most federal civil rights laws that protect women, racial and religious minorities, and the disabled from private discrimination . . . . [U]nder the original understanding of the Constitution . . . Presidential authority would be vastly curtailed [and independent federal agencies like the Federal Reserve Board and the FCC would all be unconstitutional].’’).

10. Since its inception, the originalist movement has attacked the legitimacy and coherence of living constitutionalism. See, e.g., William H. Rehnquist, The Notion of a Living Constitution, 54 TEX.
explaining why originalism is the more legitimate methodology: “If you somehow adopt a philosophy that the Constitution itself is not static, but rather it morphs from age to age to say whatever it ought to say—which is probably whatever the people would want it to say—you eliminate the whole purpose of a Constitution. And that is essentially what the so-called living Constitution leaves you with.”

Scalia’s criticism stings sufficiently that the Left has scrambled to come up with a response. It has been unable to offer a theory—or even a rhetorical device—that solves the twin problems of legitimacy and accounting for change over time. In 2006 James Ryan concluded that Cass Sunstein’s “book[... fall[s] a bit flat, at least in the eyes of this (sympathetic) reader,” because Sunstein neither offered nor justified a theory of constitutional interpretation. The volume The Constitution in 2020 was one critical effort. Although full of liberal ideals, nothing in it has yet caught on as the Left’s response to how the Constitution itself should be interpreted. Then, in the Summer 2011 issue of Democracy, the editors hosted a forum resting on the proposition that “[f]or too long progressives have wrestled with the question only to come short of the answer. They have complained about the Right’s step-by-step co-opting of the conversation about the Constitution, but they have not countered with their own narrative.”

And as the Left scraps around for an interpretive theory, it is being driven back—ironically—to text and intent. In their entry to the Democracy forum, Doug Kendall and Jim Ryan advocate for “New Textualism,” a mixture of text and intent reminiscent of some of the work of Akhil Amar. Jack Balkin’s book Living Originalism also makes a

L. REV. 693, 695-706 (1975) (describing living constitutionalism as the proposition that “nonelected members of the federal judiciary may address themselves to a social problem simply because other branches of government have failed or refused to do so,” and criticizing the theory as undemocratic and ignorant of its own “disastrous” history, including Dred Scott and Lochner); James E. Ryan, Does It Take a Theory? Originalism, Active Liberty, and Minimalism, 58 STAN. L. REV. 1623, 1631 (2006) (reviewing Stephen Breyer, Active Liberty: Interpreting Our Democratic Constitution (2005) and Cass R. Sunstein, Radicals in Robes: Why Extreme Right-Wing Courts Are Wrong for America (2005)) (arguing that early criticisms remain valid because “all [nonoriginalist approaches] suffer from a similar inability to answer the following question: If the original meaning of the Constitution is not to be the guide, what is?”).


12. See Dahlia Lithwick, Reasons To Go on Living: Does Anyone Believe in a ‘Living Constitution’ Anymore?, SLATE (Aug. 23 2005, 5:01 PM) (“Many prominent liberal thinkers have retreated from William Brennan’s soaring language about the need for a ‘living Constitution,’ because, I think, it embarrasses them. The idea [that it is arrogant to gauge the Framers’ intent with respect to contemporary issues] has been rebutted roundly with the notion that it’s even more arrogant for nine unelected officials to gauge anything at all.”).


15. First Principles: Debating the Constitution, 21 DEMOCRACY: IDEAS 59, 60 (Summer 2011).

powerful case for a left-based interpretive theory that has founding era roots.17

In a sense, we now see some convergence between the Left’s and the Right’s versions of constitutional interpretive theory, albeit one obscured by their rhetoric (and differing outcomes, of course).18 The Right stands staunch for original understandings, while basically ceding any turf as *fait accompli* that simply cannot win public acceptance. Which turns out to be much of the constitutional world that we inhabit today. And the Left, long the home of living constitutionalism, looks to plant deeper roots.

II. WHAT’S WRONG WITH INTERPRETIVE DEBATES

Enter Balkin.

In *Living Originalism*, Jack Balkin offers up a book-length discussion of interpretive methodology, peppered with substantive discussions of the Constitution. We agree with many things Balkin has to say. But the book runs up against some serious problems as well, and it is from those that we launch our critique of interpretive debates.

Balkin, the Book, has many wonderful qualities, some of which mirror those of Balkin, the Person. Jack Balkin is a person of provocative ideas, but also of great generosity. *Living Originalism* shares this; the text offers much to think about and consider, and both text and footnotes attest to Balkin’s generous participation in the mutual academic endeavor. Balkin is a fierce partisan, who nonetheless will happily step across the aisle seeking concord. *Living Originalism* does the same: it is, like Balkin, an essentially progressive project, but one that seeks union with conservatives on certain premises of sensible interpretation. Balkin is an expert in bricolage, the fashioning together of workable and elegant solutions from the tools at hand; *Living Originalism* is a pastiche of prominent interpretive theories, fashioned into one comprehensive and coherent whole.

As we make even clearer in another article, published roughly contemporaneously with this piece, we agree with a great deal of what

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17. BALKIN, supra note 8, at 101.
Balkin has to say.\textsuperscript{19} We agree that constitutional interpretation cannot begin without attention to the document’s text and the intentions, understandings, and meanings of those who authored it. We also join Balkin in believing interpretation cannot end there, especially with a constitution that is over two hundred years old. History provides important insight into constitutional meaning. We could not agree with Balkin more when he says: “A method of constitutional interpretation is not a decision procedure. It is more like a common language that allows people with very different views to reason together.”\textsuperscript{20}

So, what possibly could be the problem? We see two, neither of which are peculiar to Balkin, but are characteristic of many of the academy’s interpretive projects over the past twenty years. First, Balkin’s book fails to offer a digestible organizing principle or message to those members of the public who might seek to use it as a platform for constitutional dialogue. Theories of constitutional interpretation should be accessible to the public for the very reason that, as Balkin argues, constitutional meanings are forged through public action. The problem is that Balkin’s book is so loaded with jargon, it is unlikely to provide any members of the public—including progressives, Balkin’s intended audience—a slogan for recapturing the constitutional high ground. For example, Balkin speaks of “framework originalism” and “skyscraper originalism.” The former is good because it means that the authors of the Constitution created a framework for government but left it to their posterity to deliver on the Constitution’s promise, while the latter is bad because it would freeze meaning as original expected application. But the terms don’t resonate. Why are skyscrapers bad? They seem so very modern and necessary. (Suburban sprawl, now that is a problem!) There’s constitutional “construction,” a term the academy seems to have adopted because “interpretation” became a dirty word.\textsuperscript{21} There’s “interpretation-as-ascertainment” and “interpretation-as-construction.”\textsuperscript{22} There are the (at least) five different meanings of “original meaning.”\textsuperscript{23} There’s “redemptive constitutionalism.”\textsuperscript{24} There’s just a lot to keep in one’s head.

To be clear, we’re not just picking on Balkin here. Much of the legal academy is guilty as charged. Including, for good measure, at least one of us.\textsuperscript{25} This rabbit hole is deep and wide—and littered with some of the best


\textsuperscript{20}. BALKIN, supra note 8, at 136-37; accord. id. at 257 (“Framework originalism is not an algorithm for correct decision. It is a platform for ordinary legal argument about the Constitution.”).

\textsuperscript{21}. See id. at 4.

\textsuperscript{22}. Id.

\textsuperscript{23}. Id. at 12.

\textsuperscript{24}. Id. at 73.

work constitutional scholars have to offer. And that’s the shame of it.

The second problem with *Living Originalism* is that Balkin’s proposed theory, like so many of the others that have emerged from the academy in the past several decades, collapses on itself in an effort to accommodate everyone. In what can only be deemed an extended exercise in “if you can’t beat ’em, join ’em,” Balkin’s book adopts originalism as a methodology even as it trashes it. We agree with Balkin about the many shortcomings of originalism (just as we agree about the many shortcomings of “living constitutionalism”). But, even if we acknowledge that any serious constitutional interpretive methodology must take account of text and original meaning, understanding, or intention, was it really necessary for Balkin to adopt the very stance of the methodology he was rejecting? Many have been perplexed by Balkin’s intentions in doing so. But as if to put a point on it, in his chapters putting “living originalism” to work for actual constitutional provisions, he frequently slips away from his own unique version of originalism and into what reads as pure originalist reasoning—a fixation on original expected application.

The best defense in response to our complaints might be necessity—namely, that there’s no other way to read the Constitution. That is, the professoriate’s jargon-laden approach is the only way to get from 1787 to today. But that defense does not hold water because in truth there is an alternative. Balkin aptly reminds us that interpretation is a practice, not a prescription. In the world of real legal practice there is an alternative to all this theoretical debate, which has not really gotten us anywhere. It is to that world that we turn.

### III. HOW TO TALK ABOUT THE CONSTITUTION

Law professors talk about how to talk about the Constitution. Lawyers and judges talk about the Constitution. Law professors are mired in interpretive debates. Lawyers and judges just interpret. And how those lawyers and judges interpret is telling, especially in its contrast with academic debates.

Begin with the decision in *District of Columbia v. Heller*, which holds that the Constitution’s Second Amendment protects the right to own a gun for personal protection.26 The case is telling because it is written by a judge and scholar who is one of the founding fathers of originalism, Justice Scalia. But there is a difference between Scalia as a conservative theoretician and Scalia as a Justice writing for the Court.

Although *Heller* looks in some ways to be an originalist decision, it is—as Balkin himself has observed—anything but. Yes, the opinion leans...

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heavily on text and original meanings.27 But those things cannot get the Court where it was headed, a point made poignantly clear in McDonald v. City of Chicago.28 There the Court confronted the next question: whether the Second Amendment bound the states. Justice Alito’s opinion for the Court relied on an altogether different original meaning—that of Reconstruction, not the Founding—to support the extension of the Second Amendment right to the states.29 Justice Scalia’s own opinion, however, makes the point well enough, for ultimately he deals not only with text and original meaning, but with pre- and post-ratification practice, precedent, evolved understandings, normative justification, and consequentialist limitations on the right. It is by surveying this broad array of sources that Justice Scalia locates the ethos of self-defense purportedly at the center of the Second Amendment.30

Indeed, Heller looks just like constitutional interpretation as it gets taught in law school. Two excellent works of scholarship, somewhat outside the norm when it comes to interpretive methodology, remind us how constitutional interpreters usually interpret. Those works are Phillip Bobbitt’s twin volumes Constitutional Fate and Constitutional Interpretation, and Richard Fallon’s A Constructivist Coherence Theory of Constitutional Interpretation.31 Both authors seek to identify the “modalities” or types of arguments that are familiar among real-world constitutional interpreters, both within and outside the judiciary. Bobbit, for his part, identifies six “modalities” of constitutional argument that he contends animate and legitimate the practice of judicial review: historical, textual, structural, doctrinal, ethical, and prudential argument.32 Fallon, in a similar vein, finds that “most judges, lawyers, and commentators recognize the relevance of at least five kinds of constitutional argument”: text, intentions of framers, purposes of a clause or the whole document, etc.

27. Id. at 581-603; see also Mark Tushnet, Heller and the New Originalism, 69 OHIO ST. L.J. 609 (2008) (reporting that Heller has been accurately described as “the most originalist opinion in Supreme Court history”).
29. Id. at 3038 (“By the 1850’s, the perceived threat that had prompted the inclusion of the Second Amendment in the Bill of Rights—the fear that the National Government would disarm the universal militia—had largely faded as a popular concern, but the right to keep and bear arms was highly valued for purposes of self-defense.”).
30. Heller, 554 U.S. at 605-19 (offering a historical exegesis); id. at 619-26 (offering an analysis of Miller); id. at 629-36 (comparing the D.C. handgun ban to other historical gun regulations and concluding that “[f]ew laws in the history of our Nation have come close to the severe restriction of the District’s handgun ban” because “they do not remotely burden the right of self-defense as much as an absolute ban on handguns”).
31. See BOBBITT, supra note 4, at 95-96; PHILIP BOBBITT, CONSTITUTIONAL FATE: THEORY OF THE CONSTITUTION 234 (1982) [hereinafter BOBBITT, CONSTITUTIONAL FATE]; Richard H. Fallon, Jr., A Constructivist Coherence Theory of Constitutional Interpretation, 100 HARV. L. REV. 1189 (1987). See generally Richard H. Fallon, Jr., How to Choose a Constitutional Theory, 87 CALIF. L. REV. 535 (1999) (reviewing a variety of constitutional theories that have been developed by judges and scholars and proposing substantive criteria that should be used to evaluate these theories).
32. See BOBBITT, CONSTITUTIONAL FATE, supra note 31, at 1-119.
second, it would draw on its Eighth Amendment standards, as expressed in legislative enactments and state practice claims: first, the Court would consider spelled out a two-part methodology for assessing Eighth Amendment—

a full deployment of the Bobbitt modalities Review Tribunals did not provide an effective and adequate substitute. It came to this holding through cruel and unusual punishment as applied to juveniles. In interpretation to construe the meaning of the Eighth Amendment liberal colleagues, Justices O'Connor, Breyer, and Stevens. In Roper v. Simmons and Graham v. Florida, the Court used holistic constitutional interpretation to construe the meaning of the Eighth Amendment’s ban on cruel and unusual punishment as applied to juveniles. In Roper, the Court spelled out a two-part methodology for assessing Eighth Amendment claims: first, the Court would consider “objective indicia of society’s standards, as expressed in legislative enactments and state practice”; second, it would draw on its “own understanding and interpretation of the Eighth Amendment’s text, history, meaning, and purpose.” In Graham, the Court clarified that “objective indicia of society’s standards” include

34. 22 U.S. 1, 197 (1824) (holding the Commerce Clause grants the federal government power to regulate navigation that is “connected with ‘commerce . . . among the Several states’”).
36. 539 U.S. 558 (2003). In Boumediene, the Supreme Court held that the writ of habeas corpus extended to foreign nationals at Guantanamo Bay and the Department of Defense’s Combatant Status Review Tribunals did not provide an effective and adequate substitute. It came to this holding through a full deployment of the Bobbitt modalities—beginning with an “account of the history and origins of the writ” in England in the 1600s, and including an analysis of precedent, separation of powers principles, legislative enactments concerning habeas corpus throughout U.S. history, and “practical concerns” about what it would mean, geopolitically, to enable the writ to reach Guantanamo. Boumediene, 553 U.S. at 740-52. In Lawrence, the Court held that the Due Process Clause of the Fourteenth Amendment protected the right to consensual, homosexual relations through another extensive examination of United States social history—from the founding through the modern day—and a discussion of contemporary mores. Lawrence, 539 U.S. at 567-71.
37. Compare Glucksberg v. Washington, 521 U.S. 702, 710-16 (1997) (noting that “[w]e begin, as we do in all due process cases, by examining our Nation’s history, legal traditions, and practices” and subsequently examining the “States’ assisted-suicide bans” from recent years to bolster the holding), with id. at 736-37 (O’Connor, J., concurring) (emphasizing as a reason for her concurrence that there are at present “no [state] legal barriers” to effective medical alleviation of suffering for terminally ill patients and so Washington’s ban on assisted suicide did not undermine a constitutional right), id. at 792 (Breyer, J., concurring) (agreeing with Justice O’Connor that the challenged laws should be upheld because they do not prevent terminally ill patients from receiving treatment that controls severe pain), and id. at 738 (Stevens, J., concurring) (writing separately to “make it clear that there is also room for further debate about the limits that the Constitution places on the power of the States to punish the practice [of physician-assisted suicide]”).
40. Roper, 543 U.S. at 572.
not just legislative enactments but social practices as well—for instance, even though 38 states permitted sentences of life without parole for juvenile, nonhomicide offenders, the fact that “26 States, the District of Columbia, and the Federal Government do not impose them despite apparent statutory authorization” evidenced an emerging national consensus against the practice.\footnote{41} The foregoing cases cover a wide swath, but that’s the point: they are merely exemplars of a broad phenomenon. Numerous other cases could have been used to make the same point. While there is remarkably little that has been written on the actual interpretive methodologies of judges in constitutional cases,\footnote{42} or other interpreters in extra-judicial forums such as Congress,\footnote{43} what there is supports our assertion. Real judges aren’t originalists or living constitutionalists, or any other “ists” either.

So, that’s what we recommend—that scholars abandon the now-exhausted and exhausting debates over interpretive methodology and just start interpreting. The way judges do. We have wasted too much time, become too enamored of hearing ourselves talking about talking about the Constitution. And it has gotten us almost nowhere. Yet, in the real world, there is a way of interpreting the Constitution, a way very familiar to lawyers, that uses a well-known range of sources. Relying on all those sources, some the favorites of originalists, and some of living constitutionalists, we should get back to simply talking about the substance of the Constitution.

Maybe talking about the Constitution seems quotidian or less sexy than fashioning novel theories littered with jargon. But to us that seems backward. Ordinary interpretation matters to the actual nature of the Republic we constantly are fashioning. And besides, as we are about to demonstrate, ordinary interpretation can yield some pretty interesting results.

\textbf{IV. THE FEDERAL RIGHT TO A MINIMALLY ADEQUATE EDUCATION}

This is a summary of an argument made at greater length elsewhere.\footnote{44} It shows how, if one talks about the Constitution as judges and practicing

\begin{footnotesize}
\begin{enumerate}
\item \textit{Graham}, 130 S. Ct. at 2024.
\item \textit{See Bobbitt}, supra note 4, at 45 (contending that “we should change our focus from attempts to explain why men and women think and argue as they do in constitutional law, to a description of how they have thought and argued”); Barry Friedman, \textit{The Politics of Judicial Review}, 84 Tex. L. Rev. 257, 257 (2005) (“In the legal academy, scholarship about judicial review is predominantly normative. It is largely about how judges should decide cases and what posture they ought to take toward the work of other institutions.”).
\item \textit{See}, e.g., Michael J. Gerhardt, \textit{Constitutional Decision-Making Outside the Courts}, 19 Ga. St. U. L. Rev. 1123, 1124 (2003) (“Legal scholars are regretfully preoccupied with the work of the federal courts . . . . [N]o systematic analysis of the quality and significance of [constitutional reasoning by political actors] . . . has yet been undertaken.”).
\item \textit{See supra} note 19.
\end{enumerate}
\end{footnotesize}
lawyers do, it is possible to understand the Constitution as supporting rights that are not generally understood to exist there. One of the strongest of these rights is a federal right to a minimally adequate education. That right is grounded in the Due Process Clauses. Claiming that this right is “federal” does not necessarily mean the federal government has control over education, although the interpretive methodology does indicate that there has been an evolving federal role. Rather, the claim is that the states and local governments violate constitutional rights when they fail to provide a minimally adequate education.

A. Text

Begin with the Constitution’s text, as good interpreters should, and almost always do. The text says nothing about a federal right to education. (Still, as others have argued, there are rights and responsibilities in the text, like speech or political participation, that do depend on and perhaps infer an education adequate to act as a responsible citizen). But the absence of a clear textual basis is hardly determinative, as countless cases show. Indeed, in the seminal federal education precedent, San Antonio Independent School District v. Rodriguez, Justice Marshall had this to say:

I would like to know where the Constitution guarantees the right to procreate, Skinner v. Oklahoma, 316 U.S. 535, 541 (1942), or the right to vote in state elections, e.g., Reynolds v. Sims, 377 U.S. 533 (1964), or the right to an appeal from a criminal conviction, e.g., Griffin v. Illinois, 351 U.S. 12 (1956). These are instances in which, due to the importance of the interests at stake, the Court has displayed a strong concern with the existence of discriminatory state treatment. But the Court has never said or indicated that these are interests which independently enjoy full-blown constitutional protection.

Since the time of that statement, the central precedents finding broad acceptance but lacking a clear textual basis for their constitutional rights analyses have only multiplied, among them Lawrence v. Texas, Gideon v. Wainwright, and Griswold v. Connecticut. Even District of Columbia

45. As Eskridge and Frickey point out in the context of statutory interpretation, using the model of a “funnel of abstraction,” judges first turn to text—the most concrete inquiry—when trying to decipher meaning from statutes. William N. Eskridge, Jr. & Philip P. Frickey, Statutory Interpretation as Practical Reasoning, 42 STAN. L. REV. 321, 353 (1990); see also supra notes 27, 31-33 and accompanying text (explaining that ordinary constitutional interpretation begins with the Constitution’s text but also involves a comprehensive assessment of other sources).


v. Heller, finding a right to possess a weapon for self-defense, required substantial reading around a text long believed plain in a manner opposite to its outcome.

B. Framing Intentions

Framing-era intentions and understandings are another place interpreters typically turn. Here, they provide more support for the claim that the federal constitution recognizes a right to education, although the evidence is decidedly mixed.

On the one hand, public schooling, at least at the town level, was available at the time of the Framing and there were signs both of its important place in public discourse and even of its status as a constitutional right. Six of the original thirteen states had Education Clauses in their constitutions. Four of those included an obligation to establish schools, such as the Pennsylvania Constitution of 1776: “A school or schools shall be established in each county by the legislature, for the convenient instruction of youth, with such salaries to the masters paid by the public, as may enable them to instruct youth at low prices.”

Central political figures and thought leaders such as Noah Webster, Thomas Jefferson, Benjamin Rush, and John Adams argued that government had a duty to make education widely available.

Perhaps most important, two Land Ordinances of the Continental Congress planted deep roots for the contemporary American system of education—in which government is responsible for providing public education for its citizens. The Land Ordinance of 1785, dividing the

53. See Mass. Const. of 1790, ch. 5, § 2; N.H. Const. of 1784, art. 83; Vt. Const. of 1777, § XL; Ga. Const. of 1777, art. LIV; Pa. Const. of 1776, § 44; N.C. Const. of 1776, § XLI.
54. Pa. Const. of 1776, § 44. Similar clauses were inserted in the constitutions of Georgia, North Carolina, and Vermont. See Ga. Const. of 1777, art. LIV (“Schools shall be erected in each county, and supported at the general expense of the State, as the legislature shall hereafter point out.”); N.C. Const. of 1776, § XLI (“That a school or schools shall be established by the Legislature, for the convenient instruction of youth, with such salaries to the masters, paid by the public, as may enable them to instruct youth at low prices; and all useful learning shall be duly encouraged, and promoted, in one or more universities.”); Vt. Const. of 1777, § XL (“A school or schools shall be established in each town, by the legislature, for the convenient instruction of youth, with such salaries to the masters, paid by each town; making proper use of school lands in each town, thereby to enable them to instruct youth at low prices. One grammar school in each county, and one university in this State, ought to be established by direction of the General Assembly.”).
55. See, e.g., Lawrence A. Cremin, American Education: The National Experience: 1783-1876, at 107-10 (1980) (describing Thomas Jefferson’s support for education as a tool to exercise other personal rights); Kaestle, supra note 52, at 4-9 (discussing the Founders’ support for a right to education); Noah Webster, On the Education of Youth in America 3-22 (1790) (contending education is necessary for democratic order and advocating that states guarantee a right to education).
United States’ new territory into townships, reserved a lot in every township “for the maintenance of public schools, within the said township.” \footnote{An Ordinance for Ascertaining the Mode of Disposing of Lands in the Western Territory (May 20, 1785), 28 JOURNALS CONTINENTAL CONG. 375, 378 (1933).} The Northwest Ordinance of 1787, which set forth the parameters for how new territories could apply for statehood, provided: “Religion, morality, and knowledge, being necessary to good government and the happiness of mankind, schools and the means of education shall forever be encouraged.” \footnote{Northwest Ordinance of 1787, art. III, reprinted in 1 U.S.C., at LVII (2006).} Encouraging schools was implicitly a condition of statehood.

Still, it would be going too far to say the Framers intended a right to education. Education was a local affair, with “district schools” for those who could pay and “free schools” for those who could not. \footnote{See KAESTLE, supra note 52, at 13; REISNER, supra note 52, at 279-80.} But it also was a ramshackle affair at best in many places. Education was basic and religiously oriented. \footnote{See KAESTLE, supra note 52, at 14-17; REISNER, supra note 52, at 278-80; William A. Fischel, Neither “Creatures of the State” nor “Accidents of Geography”: The Creation of American Public School Districts in the Twentieth Century, 77 U. CHI. L. REV. 177, 177-78 (2010).} The pleas of those like Jefferson and Rush were often ignored. \footnote{Jefferson repeatedly sought without success to introduce a bill in the Virginia legislature for the establishment of public primary schools and a publicly controlled college without success (first in 1779, then later in 1817). KAESTLE, supra note 52, at 8-9 (1983). The reasons for the bill’s repeated failure are all too familiar: “[G]enerally, men of wealth, had little interest in being taxed for the education of the poor.” CREMIN, supra note 55, at 108; see also id. at 107-10 (providing a description of the bills, and Jefferson’s belief in education’s capacity to enable commerce, morality, civic duty, social relationships, and the exercise of basic personal rights).} The reality was that education cost money and people were reluctant to be taxed for a luxury good—especially one that often went to other people’s children. \footnote{Id.}

\textit{C. Post-Ratification State Practice I: The Common Schools Movement}

Within one hundred years, however, the situation had changed to the point that it was difficult to deny the existence of a right to education. The impetus for this was the “common schools” movement that took hold beginning in about 1830. That movement had two dramatic effects. First, it left the nation with systems of statewide, centrally-administered public schools. Second, virtually every state adopted a constitutional provision affirming the right to education.

In determining rights under the Due Process Clause, courts regularly look closely at the state and federal government practices that constitute us as a nation. Here is the explanation why, from one of our most conservative Justices:

\begin{quote} In an attempt to limit and guide interpretation of the Clause, we have insisted not merely that the interest denominated as a
“liberty” be “fundamental”, but also that it be an interest traditionally protected by our society. As we have put it, the Due Process Clause affords only those protections “so rooted in the traditions and conscience of our people as to be ranked as fundamental.”

As the state practices explored in this Section and the next show, the “traditions and conscience” of the nation strongly support a federal right to a minimally adequate education.

By 1830 a number of forces had coalesced to create widespread demand for public education. Increased trade, capitalism, and urbanization drove the desire for enhanced education, even in rural areas, and even for young girls. Part of the motivation was nativist. Waves of immigrants from Europe with new languages and religions (particularly Catholicism) led to concerns about preserving “American” values. But the desire also was egalitarian and progressive. Activists such as Calvin Stowe, Horace Mann, and John Pierce “rode circuit,” speechifying for public schools. The journal Common School Advocate declared: “It is the child’s right to be educated; and it is not only his right but it our indispensable duty to provide for the education of every child in the state.”

The common schools movement accomplished its objectives to a stunning degree. Its advocates sought to centralize the administration of schools, thus moving from a system of local funding and management to one overseen by the state government. They sought for the state to levy and disburse general taxes to help local districts finance public schools. They also believed that the centralization of school administration would provide for better management of schools and more competent teaching. By 1880 almost every state had a central administrator like a superintendent and a tax scheme in place for funding.

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63. KAESLE, supra note 52, at 23-25, 26-29, 65, 69.
65. DAVID TYACK & ELISABETH HANSOT, MANAGERS OF VIRTUE 47-48 (1986) (discussing public advocacy and speech giving in the service of promoting public schools); see also id. at 55-56 (discussing the driving personalities behind the movement); BINDER, supra note 64, at 91; KAESLE, supra note 52, at 103-105.
Most remarkable was the wave of state constitutional amendments guaranteeing education to residents. In 1834, eleven out of twenty-four state constitutions had language about education. By 1868, thirty-six out of thirty-seven did—and the language often obligated providing public education to all students. The Mississippi Constitution of 1868 was typical, providing: “[I]t shall be the duty of the legislature to encourage, by all suitable means, the promotion of intellectual, scientific, moral, and agricultural improvement, by establishing a uniform system of free public schools, by taxation or otherwise, for all children between the ages of five and twenty-one years, and shall, as soon as practicable, establish schools of higher grade.”

In an exhaustive survey of state constitutions at the time of the framing of the Fourteenth Amendment, Steven Calabresi and Sarah Agudo calculated that “[n]inety-two percent of all Americans in 1868 lived in states whose constitutions imposed this duty on state government,” leading them to conclude that the right to education was not only “deeply rooted in American history and tradition,” but that it arguably became federally canonized with the ratification of the Fourteenth Amendment.

D. Precedent

By 1918, education was compulsory in every state, but despite this fact and the promise of the late nineteenth century constitutions, reality for many students often fell shy of these ideals. Were this otherwise, Franklin Delano Roosevelt would not have had to include the “right to a good education” in his Second Bill of Rights. The years after 1880 were given over to significant administrative developments in state departments of education—standardizing curricula, licensing teachers, and appointing commissions to improve schools. But there was one glaring problem: funding. States typically relied on property taxes to fund local school

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69. Id.
70. MISS. CONST. of 1868, art. VIII, § 1 (emphasis added).
72. Id. at 108, 109-11.
districts with the result that richer neighborhoods had better schools, and poorer ones often had seriously substandard education. The Supreme Court’s seemingly unequivocal precedents with regard to a right to education were the result of litigations filed to fix the problem of disparate school funding. The seminal case was San Antonio School District v. Rodriguez, a challenge to Texas’s method of funding public schools. Justice Powell’s opinion for the Court brushed away the claim, relying in part on the fact that plaintiffs were seeking to enforce a positive constitutional right, not a negative one. “Education,” he wrote, “of course, is not among the rights afforded explicit protection under our Federal Constitution.” Of course.

And in subsequent cases, the Justices have continued to decline to find a federal right to education. In Plyler v. Doe, another challenge from Texas in which the state denied unlawful aliens access to public schools, the Court determined that there had been a violation of the Equal Protection Clause, but it stressed that “[p]ublic education is not a ‘right’ granted to individuals by the Constitution,” citing Rodriguez. In Kadramas v. Dickinson Public Schools, the Court rejected a challenge to a state law requiring parents to pay part of the cost of transporting their children to school. The Court stated, “the statute challenged in this case discriminates against no suspect class and interferes with no fundamental right.”

Still, despite these negative precedents, two significant facts remain. First, the constitutional education precedents were all Equal Protection cases, and—as we shall see—the right to a minimally adequate federal education is best located in the Due Process Clause. Second, try as they might, the justices could not quite close the door on the federal right they seemed to deny.

The latter point first: the Supreme Court’s cases constantly praised the importance of education and hedged on what it is the Court was actually resolving. In Rodriguez, the Court stressed that the state had “assure[d]” the trial court that it provided “‘every child in every school district an adequate education,’” and “[n]o proof was offered at trial persuasively discrediting or refuting the State’s assertion.” Then, Justice Powell—Rodriguez’s author—affirmed a district court injunction barring Texas officials from closing schools to undocumented children. The district

77. Id. at 100.
78. Id. at 35.
81. Id. at 465.
court believed it to be an open question whether there was “a constitutional right to a minimal level of a free public education,” and Justice Powell found the lower court’s decision was well-enough “reasoned.”\textsuperscript{84} \textit{Plyler} found the Texas law invalid under a very non-deferential “rational basis” review, stating: “By denying these children a basic education, we deny them the ability to live within the structure of our civic institutions, and foreclose any realistic possibility that they will contribute in even the smallest way to the progress of our Nation.”\textsuperscript{85} And, in \textit{Papasan v. Allain}, the Supreme Court described as open the question of whether there is a federal right to minimally adequate education.\textsuperscript{86}

Education, however, is hardly new to the Due Process Clause. Two of the seminal substantive Due Process cases, \textit{Meyer v. Nebraska}\textsuperscript{87} and \textit{Pierce v. Society of Sisters},\textsuperscript{88} struck down state laws regulating the sort of education parents could provide their children. This was reaffirmed in \textit{Troxel v. Granville}, in which the Court said: “[w]e have long recognized that a parent’s interests in the nurture, upbringing, companionship, care, and custody of children are generally protected by the Due Process Clause of the Fourteenth Amendment.”\textsuperscript{89} While these cases highlight how Due Process protects parents’ right to educate their children as they see fit, they also make clear that education is important enough to fall within the methodology of due process.

Then there is one of the seminal statements regarding education in all of American law. In an Equal Protection case, true, but still the promise is clear.

\textit{Today, education is perhaps the most important function of state and local governments}. Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society. It is required in the performance of our most basic public responsibilities, even service in the armed forces. It is the very foundation of good citizenship. Today it is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his surrounding community.

\textsuperscript{84} Id. at 1332 (“T]he court relied on a reservation in San Antonio Independent School District v. Rodriguez, supra, to find room for its holding that there is a constitutional right to a minimal level of free public education. Thus, while not finding direct support in our precedents, the court concluded that these holdings are consistent with established constitutional principles.”).


\textsuperscript{86} 478 U.S. 265, 285 (1986) (“As Rodriguez and Plyler indicate, this Court has not yet definitively settled the questions whether a minimally adequate education is a fundamental right, and whether a statute alleged to discriminatorily infringe that right should be accorded heightened equal protection review.”).

\textsuperscript{87} 262 U.S. 390 (1923) (striking down a state law forbidding the teaching of foreign languages prior to eighth grade).

\textsuperscript{88} 268 U.S. 510 (1925) (striking down a state law forbidding private education).

\textsuperscript{89} 530 U.S. 57, 77 (2000).
environment. In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education. Such an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms.\(^9\)

That was *Brown v. Board of Education*, of course. And though *Brown* focused on citizenship and opportunity, its sentiment regarding the central importance of education to ensuring that one “succeed in life” is even truer in the age of global super-competitiveness. In the years since *Brown* was handed down, the forces underscoring a federal right to a minimally adequate education have only accelerated.

**E. Post-Ratification State Practice II: Minimally Adequate Education**

The Supreme Court’s decision in *Rodriguez* triggered another wave of activity in the states, this one beginning in the courts but ultimately becoming a synergistic (sometimes antagonistic, sometimes cooperative) endeavor among the branches of state government. The funding inequality suits that led to *Rodriguez* are often called the “first wave” of educational reform.\(^9\) Following *Rodriguez*, there was a “second wave” seeking to use state law to equalize funding.\(^9\) But what really made a difference was the “third wave” of state constitutional litigation. This third wave sought not to equalize funding, but to assure every child an adequate education.\(^9\)

The state adequacy litigation has left a legacy of consequential state constitutional law. Every state constitution has a provision addressing education,\(^9\) and some thirty-one state courts—mostly high courts—have held those provisions to ensure minimally adequate education.\(^9\) Typical is

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93. For an overview of this shift, see William H. Clune, *The Shift from Equity to Adequacy in School Finance*, 8 EDUC. POL’Y 376, 376 (1994) (discussing the development of litigation strategy toward adequacy suits, the hallmark of “third wave” litigation). See also Enrich, supra note 92, at 166-83 (arguing that adequacy litigation has significant advantages for plaintiffs over funding equality litigation).
this language from the Washington Supreme Court:

[The State’s constitutional duty goes beyond mere reading, writing and arithmetic. It also embraces broad educational opportunities needed in the contemporary setting to equip our children for their role as citizens and as potential competitors in today’s market as well as in the market place of ideas. . . . The constitutional right to have the State “make ample provision for the education of all (resident) children” would be hollow indeed if the possessor of the right could not compete adequately in our open political system, in the labor market, or in the market place of ideas. In short . . . we hold that the[se constitutional concepts] constitute broad guidelines and that the effective teaching and opportunities for learning these essential skills make up the Minimum of the education that is constitutionally required.]

More important, these holdings have led to tangible change on the ground. Although school reform had been an issue in Massachusetts for years, it was the initiation of state litigation that made change a reality, galvanizing the legislature to pass the Education Reform Act and guarantee a “foundation budget” for every district in the state’s funding formula. A watershed decision of the Kentucky Supreme Court in 1989 led to that state’s Education Reform Act, increasing funding for pupils in low income districts and mandating new assessment tools. A North Carolina ruling led that state to create its “More at Four” preschool program. Similar stories can be told about many of the states, in which

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101. The judge in the North Carolina case, Judge Howard E. Manning, Jr., found North Carolina’s public education system failed to meet the state constitution’s mandate to provide children an equal
court decisions spurred significant changes in the funding and nature of education, especially for underprivileged children.

Although state reform efforts hardly moved in a single positive direction, at a minimum they served to establish a floor below which state funding and implementation could not fall. State litigation sometimes provoked a backlash from elected officials, as in Ohio where a court ruling led to efforts to discipline the courts and stalled education reform. In Ohio, after the Ohio Supreme Court removed itself from the fray, the legislature implemented sweeping reforms, as the court had ordered. But in states like California and New Jersey, where budgetary pressures precipitated a slashing of funding for education, court decisions halted those cuts and ensured that state funding remained adequate.

F. The Federal Story

In resolving Due Process claims, the Supreme Court often looks not only to state practices but to federal ones as well. The federal government’s involvement in education is a complicated story, driven in part by the longstanding belief that education is a state—and perhaps more properly a local—affair. Localist impulses themselves are mixed, running from an understandable interest in making decisions about one’s children close to home, to deeply racist and nativist fears. In reality, however, opportunity to receive a sound basic education in Hoke County v. State of North Carolina, an opinion issued in four parts beginning in 2000. The opinions are available at http://www.schoolfunding.info/states/nc/lit_nc_Hoke.php3. For a description of the More at Four program, see ELLEN S. PEISNER-FEINBERG & JENNIFER M. SCHAFF, FPG Child Dev. Inst., EVALUATION OF THE NORTH CAROLINA MORE AT FOUR PRE-KINDERGARTEN PROGRAM: PERFORMANCE AND PROGRESS IN THE SEVENTH YEAR (2007-2008) (2008), available at http://www.fpg.unc.edu/~mafeval/pages/publications.cfm (discussing the program’s success in aiding 29,978 low-income and at-risk students in the 2007-08 academic year).


105. The Court in Rodriguez considered localized control of education a highly significant principle of American schooling. San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 50 (1973) (“In an era that has witnessed a consistent trend toward centralization of the functions of government, local sharing of responsibility for public education has survived. The merit of local control was recognized last Term in both the majority and dissenting opinions in [Wright v. Council of the City of
the responsibility for assuring the quality of education in America’s schools has shifted up the governmental ladder. The centralizing trends toward state government began with the Common Schools movement and continued for the next century; the centralizing trends toward the federal government are more recent.107

Until the 1980s, the federal role in education was a limited one, and primarily encompassed providing aid to underfunded districts and underprivileged children. But even that took time to come about. Until World War II, the federal government’s role in education was largely limited to collecting statistics on education or making targeted investments such as in agricultural colleges.108 In 1917, Congress authorized federal grants to primary and secondary schools for agricultural, home economics, and industrial programs.109 After World War II, however, America’s expanding middle-class came to demand more in the way of higher education, increasing the federal role.110 The result was the Elementary and Secondary School Act (ESEA), which provided federal grants to every poor school district in America.111

Emporia, 407 U.S. 451 (1972)]. Mr. Justice Stewart stated there that “(d)irect control over decisions vitally affecting the education of one’s children is a need that is strongly felt in our society.”. 106. See BINDER, supra note 64, and accompanying text (discussing nativist impulses in early American education); Aaron J. Saiger, The School District Boundary Problem, 42 Urb. Law. 495, 504 (2010) (discussing use of school district zoning as an instrument of de facto segregation despite such segregation being de jure illegal).

107. For a discussion of centralizing trends during the Common Schools movement and in the decades after, see supra notes 64-76 and accompanying text. For an explanation of how, today, teacher certification standards, K-12 curriculum content, and achievement standards are set by state governmental bodies, see Derek Black, Unlocking the Power of State Constitutions with Equal Protection: the First Step Toward Education as a Federally Protected Right, 51 WM. & MARY L. REV. 1343, 1405 (“[T]he states, rather than the local school districts, set teacher qualification and certification standards, as well as control teacher preparation programs.”); and, for example, Va. Code Ann. § 22.1(B) (2006) (“The Board of Education shall establish educational objectives known as the Standards of Learning, which shall form the core of Virginia’s educational program . . . . At a minimum, the Board shall establish Standards of Learning for English, mathematics, science, and history and social science.”).


111. Elementary and Secondary Education Act of 1965, Pub. L. No. 89-10, 79 Stat. 27 (codified as amended at 20 U.S.C. ch. 70 (2006)). Wariness about the expansion of the federal government’s role in education was alive and well in both the Executive and Legislative branches even as they sought to pass ESEA. Even during the passage of this Act, both the President’s Commissioner of
Then, in the 1980s, the nation displayed a series of seemingly contradictory impulses about the federal role in education, first endorsing limits on it and then wholeheartedly supporting significant federal intervention. Ronald Reagan ran for President on a platform of reducing federal involvement in the nation’s schools, and achieved success in cutting federal education funding and in slicing back the Department of Education.\textsuperscript{112} In 1983, however, the National Commission on Excellence in Education published its stunning report, \textit{A Nation at Risk}, concluding: “[T]he educational foundations of our society are presently being eroded by a rising tide of mediocrity that threatens our very future as a Nation and a people.”\textsuperscript{113} Citing concerns from the quality of curricula, to the “expectations” for high-school graduates, to the “use that American schools and students make of time,” \textit{A Nation at Risk} warned that America was falling behind its foreign counterparts.\textsuperscript{114} By the time Reagan left office, the public’s views had shifted entirely. A poll in the late 1980s showed 71\% of Americans supporting a change in course from Reagan’s policies on schools.\textsuperscript{115} Reagan’s successor George H.W. Bush called himself the “education president” and used his office as a bully pulpit to spark state and local efforts.\textsuperscript{116}

Beginning in the late 1980s, a clear federal role was demarcated to ensure adequate education. In 1989, governors called together by President Bush declared: “[T]he time has come, for the first time in U.S history, to establish clear, national performance goals, goals that will make us internationally competitive.”\textsuperscript{117} Then, in 1991, President Bush rolled out an America 2000 education bill proposing federal standards in core curricular subjects.\textsuperscript{118} Although the bill failed, it set the stage for what was to follow. In 1994, President William Jefferson Clinton signed two significant education bills. First, Goals 2000: Educate America Act, set

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\item Education and lead sponsors of the bill in Congress were careful to reiterate that the goal was for “the Federal Government [to] participate—not seek domination, but to serve as a partner” in improving education. \textit{See} 111 Cong. Rec. 880 (1965) (statement of Francis Keppel, Comm’r of Ed.); \textit{see also} 111 Cong. Rec. 5734 (1965) (statement of Rep. Adam Clayton Powell).
\item \textit{Id.} at 2-3.
\item McGuinn, \textit{supra} note 112, 49.
\item \textit{MARI S A. VINOVSKIS, FROM A NATION AT RISK TO NO CHILD LEFT BEHIND: NATIONAL EDUCATION GOALS AND THE CREATION OF FEDERAL EDUCATION POLICY} 35 (2009).
\end{itemize}
voluntary national content and performance standards and devoted over $400 million to achieving those goals. As a House Report noted: “Never in our 200-year history as a Nation have we had national standards for what students should know. Such standards can serve as a focal point for education reform efforts and set voluntary goals toward which all students can strive.”\(^{120}\) Second, the Improving America’s School Act (IASA) conditioned what was then ten billion dollars of federal Title I money (created under the ESEA statute) on states developing “challenging” content and performance standards and mechanisms to assess and ensure progress.\(^ {121}\) Title I, a program designed in the 1960s to alleviate poverty, had become a hook for ensuring adequate education for all children.

In this century, the federal role has expanded with dramatic new legislation and increased funding, which serves only to underscore both the nation’s commitment to adequate education in elementary and secondary schools, and to a strong federal role within that project. The No Child Left Behind Act of 2001, a legislative priority of President George W. Bush, turned the federal government into the “umpire” of school quality.\(^ {122}\) Like IASA, it set performance standards and required implementation, but now federal law required annual assessments of all students in the state rather than just Title I students;\(^ {123}\) it required that schools develop specific plans to ensure “all students . . . meet or exceed” state proficiency levels; and it mandated that qualified teachers be in every classroom.\(^ {124}\) And in adopting NCLB, members of Congress made stunning statements about the role of the federal government and the right to education:

“This proposal before the Senate represents an important step in the right direction by recognizing the right of every child to receive a high quality education.”\(^ {125}\)

“Every child in America has a right to a world-class education. This bill enacts the reforms and provides the resources necessary to make this right a reality.”\(^ {126}\)

“[T]he right to a high quality public education goes to the very core


\(^ {120}\) H.R. REP. No. 103-168, at 38 (1993).


\(^ {123}\) Title I students refer to those who benefit from the Title I program—either because they live in Local Education Areas that receive Title I grants, or because they live in schools that do.

\(^ {124}\) Id. at §§ 1111(b)(2)(F), (G)(iii)-(iv) & 1119.


of the American values of fairness, opportunity, hard work, and democracy. Ensuring that all American children can get an adequate education, despite their family income, race, or accident of geography, will pull families out of poverty and make our country stronger.”

These developments have accelerated in important ways under President Barack Obama’s administration. The signature piece of legislation has been Race to the Top, a federal program devoting billions of dollars in federal reward money to states that buy into federal benchmarks and adopt workable means of achieving them. One requirement is a willingness to sign onto “common core standards.” Race to the Top funds have spurred alternative and innovative school programs across the country. Roughly forty-five states have signed on to the Common Core Standards, a set of standards defining the knowledge and skills that students should have from kindergarten to twelfth grade, developed by a collaboration of governors, state commissioners of education, teachers, and experts.

And, finally, the federal government is paying an increasing share of the national education budget. While the federal government’s increase vis-à-vis local governments is nowhere near as dramatic as the shift to state funding, it is still quite significant. In 1965 the federal share of education funding was under 5%; now it is over 10%. And this 10% is only direct expenditures. The deductibility of state and local taxes on federal returns provides indirect support, and some experts estimate this form of indirect support is roughly equal to the federal government’s direct contributions. Additionally, private schools are charitable

129. For Race to the Top Fund, see supra note 128, at 59,688-89, 59,691.
132. States today outspend local governments on education. In 2008-09, 47% of the average pupil’s education spending was born by the state government, and 44% by the local government. See U.S. CENSUS BUREAU, PUBLIC EDUCATION FINANCES: 2009, at 5 tbl. 5 (2011), available at http://www2.census.gov/govs/school/09f33pub.pdf. The federal share in 2008-2009 was 9.5%. Id.
institutions, so they do not pay direct taxes and contributions to them are deductible as well. All told, the federal government plainly provides well over 10% of the cost of educating a child in public school, and then subsidizes thousands of students who opt out of the public system altogether.

These significant shifts—the centralizing of responsibility for education, a greater federal role even in curricular definition—would not have come about without public support. In 1986, just as attitudes toward federal involvement in education were changing, 24% of all parents and 28% of public school parents chose the federal government as the “best way” to finance public education.137 Twelve years later, after Goals 2000 and IASA, those numbers stood at 37% and 41%.138 A poll following NCLB and Race to the Top legislation showed that 56% of parents of children in grades kindergarten through twelve believed the federal government should be more involved in education.139

Many negative rights with far less basis in the traditions of the American people than education have been recognized by the Supreme Court. Today, all states protect the right to education under state constitutions, and a supermajority of them has recognized the right to ensure some minimally adequate education. Schooling is compulsory in all states and a majority of the funding comes from state governments, with a significant portion from the federal government. Over time there has been a shift—gradual but important—toward performance-based standards that are unified to some extent throughout the nation. Indeed, looking to what Americans say and do, it would be extremely difficult, but for the text of our very old Constitution, to argue that education is not a fundamental right.

V. WHAT ELSE IS IN THE CONSTITUTION?

Is the right to education unique in being an affirmative right now sufficiently well-established by practice, that as a matter of ordinary constitutional interpretation it appears to be part of the Constitution? We don’t know. The work of ordinary interpretation is difficult, and we’ve not done that extensive work for other rights. Here, however, we offer tentative thoughts on other constitutional rights that arguably exist or are evolving in that direction.140

138. Id.
140. Other scholars have surely visited this topic. See Cass Sunstein, Why Does the American Constitution Lack Social and Economic Guarantees?, 56 SYRACUSE L. REV. 1, 20, 22-23 (2005)
First, consider the right to healthcare, or to a method of financing the consumption of healthcare, such as through health insurance. As with education, we begin with the lack of explicit constitutional text and with a glaring precedent purportedly rejecting the right—*Harris v. McRae.* In *Harris,* the Supreme Court held that states have no duty under the Due Process Clause to pay for abortions for women, even when necessary to save a woman’s life. “[A]lthough government may not place obstacles in the path of a woman’s exercise of her freedom of choice, it need not remove those not of its own creation. Indigency falls into the latter category.” But developments at the state and federal levels over the past half-century have arguably made *Harris* an inaccurate reflection of current constitutional understandings, especially if one looks beyond abortion to healthcare more broadly.

At least twelve state constitutions “address either the state’s role with regard to public health in general or healthcare for the poor specifically.” Most of these public health provisions were added in the twentieth century, with six dating to the 1970s. The New Jersey Supreme Court has recognized “preservation of health” as an implied constitutional right in recent years, even though there is no specific text referring to healthcare in the New Jersey constitution. There has not yet been the same amount of state court jurisprudence surrounding Public Health Clauses as there has been for Education Clauses, but that will likely change as states develop more and more comprehensive systems of...
oversight and management for healthcare.\textsuperscript{148}

Meanwhile, the federal government has become increasingly involved in the provision of healthcare since the 1950s, the capstone being the Affordable Care Act.\textsuperscript{149} In 1954, Congress amended the Internal Revenue Code to exclude from federal tax liability contributions of employers to group health insurance plans.\textsuperscript{150} The following decade, Congress created the Medicare and Medicaid programs, thereby subsidizing health insurance not only for the employed, but for the elderly and poor.\textsuperscript{151} Federal spending for these initiatives has swelled to enormous proportions; in 2009, the employer tax exclusion cost the government $242 billion,\textsuperscript{152} while Medicare cost $500 billion (22% of total healthcare consumption in the United States).\textsuperscript{153} During the 1970s, 1980s, and 1990s, Congress broadened access to healthcare by imposing regulations on employers, hospitals, and insurers. It passed a law in 1986 requiring that hospitals participating in Medicare provide emergency treatment without regard to ability to pay.\textsuperscript{154} It obligated insurance companies to ensure continuity and portability of coverage through sweeping reforms in 1974 and 1996.\textsuperscript{155}

Perhaps one of the strongest indicators of the public’s acceptance of an implicit right to healthcare in the United States is the undertone of the recent ACA litigation. In its Supreme Court briefs and oral argument, the federal government contended that an essential reason why Congress was justified in imposing an individual mandate was that, in this country, there is a deeply rooted “social norm” that one should not be turned away from a hospital or from necessary medical care.\textsuperscript{156} And because the sick are inevitably treated, costs are shifted to those who are insured. The

\textsuperscript{148} Massachusetts and Utah are the only states with state-wide health insurance programs, and both programs are relatively new. In areas where the state has long provided healthcare—for example, for the poor, for the insane, for criminal convicts, and in hospitals—state litigation has been more developed, and courts have read the constitutional language to impose an affirmative duty on the state. Leonard, supra note 145, at 1392.

\textsuperscript{149} Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119.


\textsuperscript{153} CONGRESSIONAL BUDGET OFFICE, 2011 LONG-TERM BUDGET OUTLOOK 37 (2010).

\textsuperscript{154} Emergency Medical Treatment and Labor Act, 42 S.C. § 1395dd.


government contended:

For decades, state and federal laws—reflecting deeply rooted societal values—have required emergency rooms to stabilize patients who arrive with an emergency condition, and common-law and ethical duties restrict a physician’s ability to terminate a patient-physician relationship. The uninsured thus participate actively in the market for health care services, even if they cannot pay in full [...]. It was clearly proper for Congress to take into account these legal norms, and the societal judgments they reflect, in determining that denying health care to persons without insurance, or otherwise attempting to penalize them at a time of medical need, was an inappropriate means of addressing uncompensated care.  

Notably, the challengers to ACA never refuted the existence of the underlying public norm on which the government hinged its argument. Their claim was instead that Congress lacks the authority to deal with the problem through imposing an individual mandate.

Five Justices of the Supreme Court agreed with the challengers’ claim that Congress lacks the authority to deal with the cost-shifting problems under the Commerce Clause, but they did not call into question the fact that all individuals in the United States will eventually participate in the healthcare market regardless of their ability to pay, given existing social norms. Throughout three days of oral argument, in fact, one Justice after another appeared to accept the premise that under federal statutes, state laws, common law, and public norms, the right to healthcare is an undeniable incident of United States residency.  

A second possibility for a constitutional right we might find through what we call ordinary constitutional interpretation is a right to basic subsistence—or welfare support. Twenty-three state constitutions have express welfare clauses, either authorizing or directing the state and local governments to care for the state’s indigent residents. In New York, the constitutional language is quite exacting: the legislature is affirmatively required to “aid, care, and support” the poor. Alabama, Kansas and

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157. Brief for Petitioners (Minimum Coverage Provision) at 7, 40, Dep’t of Health & Hum. Servs. v. Florida, 132 S. Ct. 2566 (2012); see also id. at 2 (“As a class, the uninsured shift tens of billions of dollars of costs for the uncompensated care they receive to other market participants annually. The cost-shifting drives up insurance premiums, which, in turn, makes insurance unaffordable to even more people. The Act breaks this cycle . . . .”); and id. at 39-40 (citing state court rulings and statutes that “have long imposed . . . a duty on doctors and hospitals to provide necessary emergency care”) (internal quotation marks omitted).


160. N.Y. CONST. art. XVII, § 1 (“The aid, care and support of the needy are public concerns and shall be provided by the state and by such of its subdivisions, and in such manner and by such means, as the legislature may from time to time determine.”).
Oklahoma impose an affirmative duty on state counties to provide for the indigent. In other states, the constitutional language is admittedly less precise. One scholar sums up the content of state Welfare Clauses as follows: “Exactly what the legislature must provide and for whom it must be provided is largely unspecified. Many of the provisions use a combination of mandatory and permissive language, making the scope of the command unclear.”

State courts have generally taken a more deferential posture toward acts of legislatures in suits brought under state constitutions’ Welfare Clauses as compared to suits brought under Education Clauses, but they have struck down limitations on welfare payments where the program could not be rationally defended. For instance, in *Fulton v. Krauskopf*, the New York Supreme Court held it was unreasonable for the City of New York to provide a flat grant of eighteen dollars to parents for travel allowances to take their children to school, because it forced families to “make the hard choice between eating and education.”

The federal government’s involvement in the field of welfare, as in the fields of education and healthcare, has deepened over the course of the twentieth century. The first modern piece of welfare legislation was the Social Security Act of 1935, which created Aid to Families with Dependent Children (AFDC), a joint federal-state program. Through AFDC, Congress gave grants to states to support their public benefit programs for children with deceased fathers. The primary beneficiaries were white widows, until Congress reformed AFDC in 1962 to broaden coverage to women who were unmarried, separated, or divorced. AFDC, which has since been replaced by the Temporary Assistance for Needy Families program, is only one example of the federal government’s role in providing for the poor. Means-tested “safety-net” programs run by the federal government have come to include the Earned Income Tax Credit, which provides refundable tax credits to the working poor;

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161. ALA. CONST. art. IV, § 88 ("It shall be the duty of the legislature to require the several counties of this state to make adequate provision for the maintenance of the poor."); KAN. CONST. art. VII, § 4 ("The respective counties of the state shall provide, as may be prescribed by law, for those inhabitants who, by reason of . . . other misfortune, may have claims upon the aid of society. . . . [Provided, however, t]he state may participate financially in such aid and supervise and control the administration thereof."); OKLA. CONST. art. XVII, § 3 ("The several counties of the State shall provide, as may be prescribed by law, for those inhabitants who, by reason of . . . misfortune, may have claims upon the sympathy and aid of the county.").

162. Rava, supra note 159, at 561.


166. *Id.*


Supplemental Security Income, which provides cash benefits to disabled adults and children of limited means; and Supplemental Nutritional Assistant Program (SNAP), the federal food stamp program.\(^{169}\) When food stamps were launched in 1964, they reached half a million people.\(^{170}\) Today, SNAP serves one in seven Americans, a population roughly equal to Spain’s, at an annual cost of $78 billion.\(^{171}\)

As in the cases of education or healthcare, the conventional wisdom is that the Supreme Court denied the existence of a constitutional right in *Dandridge v. Williams*, upholding a Maryland regulation setting a limit of $250 per month on the benefits available to families in AFDC.\(^{172}\) The Supreme Court determined that the regulation needed only to be rational because it dealt “with state regulation in the social and economic field, not affecting freedoms guaranteed by the Bill of Rights, and claimed to violate the Fourteenth Amendment only because the regulation results in some disparity in grants of welfare payments to the largest AFDC families.”\(^{173}\) But like *Rodriguez*, *Dandridge* was an Equal Protection Clause case—no arguments were made or adjudicated with respect to the Due Process Clause. To the extent that *Dandridge* has been read to carry due process ramifications, it may need to be revisited. Given the breadth of state constitutional protections regarding public benefits, and given the expansion of the federal government’s role in the provision of welfare over the twentieth century, it might be the case that access to basic subsistence has become entrenched, in the mindset of the country, as an unassailable constitutional guarantee.\(^{174}\)

Finally, recent enactments suggest the possibility of a right to environmental health. This right is of more recent vintage—its roots date back only fifty years ago, to the 1960s and 1970s, when Congress passed landmark statutes dealing with environmental regulation, and states amended their constitutions to insert environmental bills of rights. At the

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169. URBAN INSTITUTE, TEMPORARY ASSISTANCE FOR NEEDY FAMILIES PROGRAM—RESEARCH SYNTHESIS BRIEF SERIES 6 (2012).


173. Id. at 484.

174. For the view that “[b]asic welfare payments ought to be understood as constitutional entitlements” but that courts should only act on them “once other institutions of government have acted and created contexts in which the issue of rights surfaces,” see Lawrence G. Sager, *Justice in Plain Clothes: Reflections on the Thinness of Constitutional Law*, 88 NW. U. L. REV. 410, 429-33 (2010). For the view that a right to minimum economic independence—as provided through minimum subsistence and shelter—are part of our constitutional tradition and are formally guaranteed by Section Two of the Thirteenth Amendment, see Amar, *supra* note 140, at 37-39.
federal level, Congress passed the National Environmental Policy Act, the Clean Water Act, the Clean Air Act, the Endangered Species Act, the Safe Water Drinking Act, and the Resource Conservation and Recovery Act, to name a few. These statutes established the Council on Environmental Quality, they obligated federal agencies to study the environmental impacts of their projects and publish these findings in public reports, and they directed federal authorities not only to study methods for combating pollution and make recommendations to states, but also to promulgate binding regulations for air and water quality which private actors across the country would now have to follow. President Nixon deserves credit for driving the movement forward, as he announced a pollution control initiative in a State of the Union Address in 1969 and created the Environmental Protection Agency by executive order a year later.

At the state level, fourteen states inserted environmental provisions in their constitutions between 1960 and 1978, “not merely to require the responsible management of particular state-owned lands or resources, but also to mandate that legislatures combat problems of pollution and environmental degradation throughout their states.” Six states made

176. See Federal Water Pollution Control Act Amendments of 1972, Pub. L. No. 92-500, 86 Stat. 816 (codified as amended at 33 U.S.C. §§ 1251-1376 (2006)). Under the original Water Pollution Control Act, promulgated in 1948, Congress authorized the Surgeon General of the Public Health Service to undertake investigations, research, and surveys to encourage state and local bodies to impose water pollution controls. In 1972, Congress rewrote the statute to expand the federal government’s powers, now giving the EPA authority to “prepare or develop comprehensive programs for preventing, reducing, or eliminating the pollution of the navigable waters and underground waters.” Water Pollution Control Act Amendments of 1972, § 102(a).
181. NEPA, § 201.
182. Id. § 102(C).
185. Zackin, supra note 66, at 198; see also Mary Ellen Cusack, Judicial Interpretation of State Constitutional Rights to a Healthful Environment, 20 B.C. ENVTL. AFF. L. REV. 173, 181 & n.58 (1993) (aggregating provisions in state constitutions dealing with environmental protection and natural resources, and explaining that many of these provisions were added in the 1970s after a federal constitutional amendment failed).
environmental health either a citizen’s right or the state’s duty. For instance, the Illinois constitution declares: “Each person has the right to a healthful environment.”\textsuperscript{186} Nine states included language stating the legislature would take action to protect the environment. The New Mexico provision reads: “The legislature shall provide for control of pollution and control of despoilment of the air, water and other natural resources of this state.”\textsuperscript{187} The environmental movement that helped galvanize the state constitutional conventions during this period was similar to the common schools movement in the mid-1800s: a self-conscious group of activists and reformers organized and lobbied locally but coordinated across states to share information and ideas, and articulated their mission as a matter of inalienable rights—every citizen of the state should have a basic human right in the use and enjoyment of its natural resources.\textsuperscript{188} State constitutions’ environmental clauses have not yet produced the same sort of litigation successes as have education clauses,\textsuperscript{189} but it is early.\textsuperscript{190}

**CONCLUSION**

We began with a hope: that the legal academy stop talking about talking about the Constitution. It is time to put aside a tendentious debate about interpretation that has been going nowhere and begin to explore the substantive meaning of constitutional provisions. In doing so, we advocate using the process of ordinary constitutional interpretation, which is to say looking at the full range of sources that courts actually examine in constitutional litigation. Not everyone will agree with our substantive interpretations regarding education, health care, and other rights, but this is the turf on which contest should occur. It is time to start talking about the Constitution again, even if—or especially if—we disagree about its meaning.

\textsuperscript{186} Id. at 201 (quoting the Illinois Constitution).

\textsuperscript{187} Id. at 201 (quoting the Nevada Constitution).

\textsuperscript{188} Id. at 211-13, 216-17.

\textsuperscript{189} Id. at 256; Cusack, supra note 185, at 182-96.

\textsuperscript{190} Sylvia Ewald, State Court Adjudication of Environmental Rights: Lessons from the Adjudication of the Right to Education and the Right to Welfare, 36 Colum. J. Envtl. L. 413, 416-17, 457-58 (2011) (contending that state courts should look to their methods of constitutional rights enforcement in public education and welfare cases to more successfully enforce environmental rights in state constitutions).