Originalism and Presumptions of Generality in the Ninth and Tenth Amendments

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TABLE OF CONTENTS

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I. INTRODUCTION

Originalism has a problem. It grounds its legitimacy in being the method that most constrains judges from exercising arbitrary discretion. Yet, when faced with conflicting historical evidence favoring both broad and narrow readings of constitutional provisions, originalists have no principled way of choosing between the two. They must make an arbitrary decision. This undermines originalism's legitimacy.

An originalist set of rules for picking the proper level of generality ("Generality") by which to interpret constitutional provisions will improve originalism. Such rules will prevent judges from exercising arbitrary discretion when faced with conflicting historical evidence favoring competing Generalities. They will underscore originalism's claim of being the most constraining constitutional interpretive method.

This paper sets out to find that set of rules. Part II explores originalism's underlying principles. Any originalist rules for instructing one at what Generality to interpret the Constitution must ground themselves in these principles. Part III examines the prevailing originalist methodology for choosing a constitutional provision's Generality. It then illustrates why this methodology is problematic. Part IV argues for a new methodology: Originalists should look to the Ninth and Tenth Amendments to develop presumptions of Generality. Part V concludes.

II. PRINCIPLES OF ORIGINALISM: A GUIDE FOR FINDING A RULE

To find originalist Generality rules for interpreting the Constitution, it is first necessary to explore originalism's underlying principles. Any originalist rules will ground themselves in these principles. This section highlights two fundamental principles of originalism: (1) originalists interpret the Constitution according to the original public meaning of the document's text; and, (2) originalism is a constraining methodology seeking to prevent judges from engaging in results-oriented decision-making. Hence, originalist Generality rules must ground themselves in the Constitution's text and must be neutral principles.

A. *The Original Public Meaning of the Constitution's Text*

Originalists interpret the Constitution according to the original public meaning of the document's text. Although some originalists argue the Constitution must be interpreted according to the intentions of its drafters,[1] this is a minority viewpoint.[2] Most originalists "treat[] a constitution like a statute, and give[] it the meaning that its words were understood to bear at the time they were promulgated."[3] They do not care about drafters' intent.[4] Although originalists consult historical works within this framework, such as *The Federalist Papers* or comments from state ratification conventions, these works are not used for ascertaining drafters' intent. Originalists consult them to shed light on how the public originally understood the Constitution's text.[5]

This framework provides guidance for developing originalist Generality rules. Such rules must ground themselves in the Constitution's original meaning. They can allow for expectations that the Framers would not have anticipated, so long as they are consistent with the Constitution's text. And to develop these rules, we will need to consult historical works, but only to the extent that they clarify the Constitution's original meaning.

B. *Neutral Principles and Originalism*

Originalists also ground their decision-making in neutral principles.[6] They argue their method is a neutral approach that restrains judges.[7] It is upon this

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[1] *See, e.g.*, RAOUL BERGER, GOVERNMENT BY JUDICIARY: THE TRANSFORMATION OF THE FOURTEENTH AMENDMENT (2d ed. 1997) (arguing that the Fourteenth Amendment should be interpreted according to the drafter's original intent).

[2] Christopher Scalia, *Get Ready for a Flood of Falsehoods About Originalism*, WALL ST. J. (Oct. 11, 2020), https://www.wsj.com/articles/get-ready-for-a-flood-of-falsehoods-about-originalism-11602446778 (noting that interpreting the Constitution according to the original meaning of the document's text is "[t]he dominant form of originalism."); Thomas B. Colby, *The Sacrifice of the New Originalism*, 99 GEO. L.J., 713, 720–30 (2011) (discussing how originalists reject a search for subjective intent and instead seek objective meaning).

[3] Antonin Scalia, A Theory of Constitutional Interpretation, Remarks at The Catholic University of America (Oct. 18, 1996).

[4] *Id.*

[5] *Id.*

[6] The idea of neutral principles comes from Herbert Wechsler. *See* Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 19 (1959) (stating "[a] principled decision, in the sense that I have in mind, is one that rests on reasons with respect to all the issues in the case, reasons that in their generality and their neutrality transcend any immediate result that is involved.").

[7] Michael W. McConnell, *Active Liberty: A Progressive Alternative to Textualism and Originalism?*, 119 HARV. L. REV. 2387, 2415 (2006) (stating that originalism "supplies an objective basis for judgment that does not merely reflect the judge's own ideological stance" which is contrary to interpretive methodologies allowing for "constitutional interpretation

neutrality that originalists see their method as being the most legitimate.[8] Interpretive rules employed by originalists must, therefore, restrain judges against results-oriented decision-making. Otherwise, they risk undermining the basis of originalism's legitimacy.[9]

Neutral principles uphold originalism's adherence to constraining judges because they transcend the outcome of any case. For a principle to be neutral, it must be general enough to apply to multiple cases before a court.[10] If a principle cannot transcend application to a single case, it cannot be used to decide any case.[11] Neutral principles restrain judges from acting in an ad hoc manner and turning courts into "naked power organ[s]."[12] Originalists using neutral principles in their decision-making maintain the basis of their methodology's legitimacy—that it is an objective and neutral methodology. Of course, to be consistent with originalism, originalists need to ground their neutral principles in the original meaning of the Constitution's text.[13]

C. *An Originalist Formula*

An originalist rule for determining Generality must have the following elements to be consistent with the methodology's underlying principles: (1) it must be derived from the original meaning of the Constitution's text; and, (2) it must be a neutral principle. Any other approach risks undermining originalism's claim of being the most constraining methodology.

Originalism does not currently have such a set of rules. Consider the following criticism of the current originalist approach to Generality:

> [O]riginalists often seem to vary the level of generality at which they seek constitutional meaning in a way that cannot be explained simply by reference to the level of generality at which the constitutional text is expressed. Indeed, in practice the decision appears ad hoc, largely unconstrained, and thus susceptible to the same kind of results-oriented decision-making that originalists have long decried.[14]

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based on the judge's assessment of worthy purposes and propitious consequences that lacks objectivity.").

[8] *See* Lillian R. BeVier, *The Integrity and Impersonality of Originalism*, 19 HARV. J.L. & PUB. POL'Y 283, 286 (1996) ("Originalists tend to ground their arguments primarily on a foundation of legitimacy.").

[9] Justice Scalia recognized the importance of neutral principles to originalists, arguing that "judges have a duty to anchor their decisions in clear rules that can be applied broadly." ANTONIN SCALIA, THE ESSENTIAL SCALIA: ON THE CONSTITUTION, THE COURTS, AND THE RULE OF LAW 3 (2020).

[10] Wechsler, *supra* note 6.

[11] *Id.*

[12] *Id.* at 12.

[13] *See* Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L. J. 1, 8 (1971); *see supra* Part II.A.

[14] Peter J. Smith, *Originalism and Level of Generality*, 51 GA. L. REV. 1, 10 (2017).

This criticism highlights originalists' urgent need to develop Generality rules consistent with their underlying principles. Absent the development of such rules, originalism risks undermining its claim to being the most constraining method.

III. THE PREDOMINANT ORIGINALIST METHOD FOR DETERMINING APPROPRIATE LEVELS OF GENERALITY

Before we ascertain originalist Generality rules, we must better understand originalists' current method for selecting Generality. This section overviews that methodology, and then illustrates its shortcomings with an example.

A. *A Simple Look to a Constitutional Provision's Original Meaning*

Most originalists simply look to a constitutional provision's original public meaning to determine the appropriate Generality.[15] "[T]he degree of generality is itself an historical question."[16] In engaging in this historical inquiry, the originalist asks: "[H]ow general was a term or phrase at the time it was used?"[17] The answer to this question lies in the reasonably understood meaning of a constitutional provision at the time of its adoption.[18] Constitutional provisions must be applied at whatever Generality the original meaning of the text commands.

This methodology, however, is problematic because it does not necessarily constrain judges to construing a single Generality. If historical evidence supports reading a constitutional provision at high and low Generality, both readings are acceptable. This is where the rule fails within the originalist framework. As long as judges can support their preferred Generality with historical evidence, they are not constrained in their decision-making.[19]

B. *Originalism's Generality Problem: An Illustration*

Consider, for example, two competing arguments regarding the proper Generality at which to interpret the Equal Protection Clause. The first, using the current originalist framework, argues that one must interpret the Equal Protection Clause broadly. The second argument—using the same exact methodology—argues one must interpret the Equal Protection Clause narrowly.

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[15] *See, e.g.*, Randy E. Barnett, *An Originalism for Nonoriginalists*, 45 LOY. L. REV. 611, 644 (1999).

[16] *Id.*

[17] *Id.*

[18] *Id.*

[19] *See infra* Part III.B.

1. *An Originalist Argument for Reading the Equal Protection Clause Broadly*

Original meaning arguments support reading the Equal Protection Clause at a high Generality. One such reading gives us the following rule: "[A] principal purpose and consequence of the Equal Protection Clause's adoption was to deny states the power to pass 'caste' legislation creating classes of legally inferior persons based on arbitrary characteristics such as race, color, creed, or orientation."[20]

One can derive this rule from typical originalist sources of authority. A contrast of the Civil Rights Act of 1866 with the Equal Protection Clause suggests the latter forbids any legislation creating classes of legally inferior persons. The states ratified the Equal Protection Clause two years after Congress passed the Civil Rights Act of 1866. In this Act, Congress "sought to afford 'citizens of the United States . . . of every *race and color*' the same rights and benefits as enjoyed 'by white citizens.'"[21] Stated otherwise, Congress wanted to eliminate legally inferior *racial* classes. They generalized this principle when they embodied it in the Equal Protection Clause. Rather than forbidding legally inferior *racial* classes, Congress banned legally inferior classes of *all types.* The Equal Protection Clause extends protection of the laws to "any person."[22] Moreover, Congress rejected proposals to limit the Equal Protection Clause to race-based classifications.[23] Contemporary media also described the Equal Protection Clause at a high Generality. Take, for example, statements in the *Cincinnati Commercial* describing the Equal Protection Clause. These statements said the Equal Protection Clause "would place '[everybody] throughout the land upon the same footing of equality before the law, in order to prevent unequal legislation.' It predicted that once the amendment took effect, 'it [would] be impossible for any Legislature to enact special codes for one class of citizens.'" [24] An originalist—using the current originalist methodology for determining Generality—can reasonably argue for a broad reading of the Equal Protection Clause.

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[20] Brief for Amici Curiae Cato Institute, William Eskridge Jr., and Steven Calabresi in Support of Petitioners at 5, *Obergefell v. Hodges*, 576 U.S. 644 (2015) (No. 14-556) [hereinafter Cato Brief].

[21] *Id.* at 13 (citing the Civil Rights Act of 1866, Act of Apr. 9, 1866, ch. 31, 14 Stat. 27) (emphasis added).

[22] *Id.* (citing Robert J. Reinstein, *Completing the Constitution: The Declaration of Independence, Bill of Rights, and Fourteenth Amendment*, 66 TEMP. L. REV. 361, 383–92 (1993)).

[23] BENJAMIN B. KENDRICK, THE JOURNAL OF THE JOINT COMMITTEE OF FIFTEEN ON RECONSTRUCTION 46, 50, 83, 90–91, 97–100 (1914).

[24] Cato Brief, *supra* note 20, at 15. (citing *The Constitutional Amendment*, CIN. COMMERCIAL, Aug. 20, 1866 at 2, 4).

2. *An Originalist Argument for Reading the Equal Protection Clause Narrowly*

An original meaning argument can also support reading the Equal Protection Clause at a low Generality. Consider one such reading: Judges should understand The Equal Protection Clause to be a narrow response to slavery, only prohibiting legally inferior racial classes.[25] It does not protect against legislation making other classes legally inferior.[26]

This narrow reading of the Equal Protection Clause, like the broad reading, finds support in originalist sources of authority. The Supreme Court—staffed by justices alive when the states ratified the Fourteenth Amendment—held this position in 1872. Referencing the Equal Protection Clause, the Court held "it is not difficult to give meaning to this clause . . . [i]t is so clearly a provision for race and that emergency."[27] In light of this view, the Court found it unlikely the Equal Protection Clause was meant to apply to other legal classifications when it was ratified.[28] Additionally, other historical accounts of the Fourteenth Amendment argue Congress meant for it to constitutionalize the provisions of the Civil Rights Act of 1866—not add on to them.[29] Recall that the Civil Rights Act of 1866 explicitly limited its scope to race-based classifications.[30] Viewed in this context, the Equal Protection Clause's scope is no wider. An originalist—using the same methodology as above—can argue the Equal Protection Clause's drafters intended for it to read narrowly.

3. The Problem Illustrated

Both preceding arguments are rooted in the original meaning of the Constitution's text. Yet they reach different conclusions regarding the proper Generality for interpreting the Equal Protection Clause. This illustrates originalism's problem when construing Generality—its prevailing rule for doing so does not always constrain judges. The original meaning can convey ambiguous instructions for what Generality at which one must interpret a provision. And when the original meaning is ambiguous, judges can make arbitrary decisions. There is no neutral principle for choosing one Generality over another. If originalists want to improve upon the claim that their methodology is the most constraining, they must look for originalist sources to remove this discretion.

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[25] ANTONIN SCALIA & BRYAN GARDNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 88 (2012).

[26] *See id.*

[27] *The Slaughterhouse Cases*, 83 U.S. 36, 81 (1872).

[28] *See id.*

[29] *See* Michael W. McConnell, *Originalism and the Desegregation Decisions*, 81 VA. L. REV. 947, 958 (1995).

[30] *Id.* at 957–58.

IV. PRESUMPTIONS OF GENERALITY IN THE NINTH AND TENTH AMENDMENTS

The Ninth and Tenth Amendments, read according to their original meaning, give originalists neutral principles for construing Generality in the Constitution. Indeed, looking beyond the original meaning of just the constitutional provision in question—and including the Ninth and Tenth Amendments in interpretive questions—makes for more effective readings of the document.[31] The Ninth Amendment helps the originalist when reading the Constitution's rights recognition provisions. When the scope of such a provision is ambiguous, it instructs one to presume that reading it at a higher Generality is proper. Meanwhile, the Tenth Amendment helps the originalist when reading the Constitution's provisions allocating power to the federal government. It instructs one to presume that reading such a provision at a lower Generality is proper. By employing the Generality presumptions in the Ninth and Tenth Amendments, originalism can improve upon its claim that it is a constraining method.

A. *The Ninth Amendment: A Presumption of Generality for Rights Recognizing Provisions of the Constitution*

The Ninth Amendment creates a presumption favoring reading the Constitution's rights recognizing provisions at a high Generality. This presumption is evident after exploring the historical background of the amendment. Adding this presumption to the originalist toolkit—and eschewing competing originalist methods for reading rights—allows the method to choose Generalities effectively while adhering to its underlying principles.

1. *History and Original Public Meaning of the Ninth Amendment*

The Constitution's ratification, at one time, was not a sure thing. The Antifederalists had sharp criticisms of the document—criticisms that the Federalists needed to address to ensure the Constitution's ratification.[32] The Antifederalists expressed particular concern that the new Constitution did not contain an enumerated bill of rights.[33]

The Federalists countered that a bill of rights would be detrimental to the peoples' liberties.[34] Such an inclusion of an enumerated bill of rights, they

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[31] SCALIA & GARDNER, *supra* note 25, at 24 (arguing legal texts must be interpreted as a whole).

[32] *See generally*, THE COMPLETE ANTIFEDERALIST (Herbert J. Storing & Murray Dry eds., 1981).

[33] Randy E. Barnett, *A Ninth Amendment for Today's Constitution*, 26 VAL. U. L. REV. 419, 420 (1991).

[34] THE FEDERALIST NO. 84, at 420–21 (Alexander Hamilton) (Dover Thrift Ed., 2014).

argued, may be construed to mean the people retained no other rights.[35] And including *every* right retained by the people would be an impossible task.

Rights are unenumerable because rights define a private domain within which persons have a right to do as they wish, provided their conduct does not encroach upon the rightful domains of others. As long as their actions remain within this rightful domain, other persons—including the government—should not interfere. Because people have a right to do whatever they please within the boundaries defined by natural rights, this means that the rights retained by the people are limited only by their imagination and could never be completely specified or enumerated.[36]

Surely, no bill of rights could enumerate every liberty conceivable to the imagination. This left the Federalists in quandary: either risk derailing efforts to ratify the Constitution or include a bill of rights that, in their view, could disparage the people's unenumerated rights.

To address this challenge, James Madison developed a simple, yet elegant solution. If the Federalists did not want future generations to read an enumerated bill of rights as a disparagement of unenumerated rights, why not just leave instructions behind telling them *not to read the Constitution in such a manner?* [37] And that is exactly what the first Congress did. They sent a bill of rights to the states for ratification, assuaging the Antifederalists. But they included an amendment instructing progeny how to read this bill of rights: "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people."[38]

This background shows us the Ninth Amendment's original meaning—it is a rule of construction.[39] It tells us what we cannot do when reading the Constitution: imply that the enumeration of rights means the denial of unenumerated rights.[40] It also tells us what we must do when reading the Constitution: read enumerated rights broadly.[41]

The Framers viewed rights retained by the people as being plentiful—a body so vast, it could not be wholly contemplated.[42] This vision of plentiful rights retained by the people is what alarmed the Antifederalists about a bill of rights in the first place.[43] They worried they could not possibly enumerate every right retained by the people. By acknowledging this, they implicitly conceded

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[35] *Id.*

[36] Barnett, *supra* note 33, at 425.

[37] *Id.* at 456.

[38] U.S. Const. amend. IX.

[39] THOMAS HART BENTON, ABRIDGMENT OF THE DEBATES OF CONGRESS FROM 1789 TO 1856 278 (1857) (recording James Madison's argument that the Ninth Amendment [proposed as the Eleventh Amendment] should be read as a canon of construction against reading the Constitution's provision in a manner that would infringe upon citizens' rights).

[40] *See* U.S. Const. amend. IX.

[41] *Infra* Part IV.A.2.

[42] *See* Barnett, *supra* note 33, at 425.

[43] *See id.*

that the people retained rights they could not contemplate. Future generations would find rights the Framers would never have anticipated ending up in the Constitution. The Framers' vision of rights—expressed in the original meaning of the Ninth Amendment—was a vision of an ever-growing body of rights that could never be wholly defined. Any true originalist must follow the Ninth Amendment's command.

Scholars have argued for various methods to develop this vast body of rights.[44] A discussion of those various methods is beyond the scope of this paper. Yet, we need not discuss methods for determining rights under the Ninth Amendment to make a simple acknowledgement: The Framers left us with an incomplete list of enumerated rights in the Constitution from which to start our search. Any construction of the Bill of Rights, to be consistent with the Ninth Amendment, requires us to read these enumerated rights broadly. This broad reading helps us develop the vast body of unenumerated rights envisioned by the Framers. A contrary reading is inconsistent with the Framers' original understanding of the Ninth Amendment.

2. *The Ninth Amendment Presumption*

Applying the Ninth Amendment's command to read rights broadly leaves us with a rule of construction for determining Generality: The Ninth Amendment creates a presumption of higher Generality when reading the Constitution's rights recognizing provisions. Originalists should apply this presumption when a rights recognizing provision's original meaning reasonably supports multiple Generalities. Hence, this presumption will kick in when the original meaning of a provision's Generality is ambiguous. Under such circumstances, the Ninth Amendment presumption kicks in and instructs the reader to choose the higher Generality.

Adding this Ninth Amendment presumption to the originalist's toolkit gives the method a more effective manner for construing Generality.[45] For starters, this presumption is grounded in the Constitution's original meaning, so it is consistent with originalism. It also gives judges a neutral principle to abide by when faced with discretionary decisions. When a provision's Generality is ambiguous, the originalist judge can invoke the Ninth Amendment presumption and choose the higher Generality. Employing this presumption allows the originalist judge to eliminate discretion from their decision and support the notion that originalism is a constraining methodology.

The Ninth Amendment presumption is a neutral principle for originalists to apply that is both constraining and consistent with the Constitution's original meaning. However, to be evaluated effectively, it must be compared to

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[44] *See generally,* Randy E. Barnett, *The Ninth Amendment: It Means What It Says*, 85 TEX. L. REV. 1 (2006) (discussing the various originalist methods for developing the body of rights envisioned by the Ninth Amendment).

[45] *See supra* Part III.

originalism's leading Generality rule regarding constitutional rights: Justice Scalia's footnote 6.

3. *Contrasting the Ninth Amendment Presumption with Justice Scalia's Footnote 6*

Justice Scalia articulated the following rule for selecting the Generality of fundamental rights: Judges must "refer to the most specific level at which a relevant tradition protecting, or denying protection to, the asserted right can be identified."[46] This rule came to be known simply as "footnote 6."[47] Justice Scalia aimed to accomplish the same goal of this paper—constrain judges determining proper Generalities—when he crafted footnote 6. Hence, originalists reading this paper must ask themselves: Is footnote 6's framework better for selecting the proper Generality of rights than the Ninth Amendment presumption? To answer this question, we will analyze footnote 6 in the context of the Bill of Rights and fundamental rights.

a. *Footnote 6 and the Bill of Rights*

Although footnote 6 is a rule for reading fundamental rights, one can extend its underlying logic when seeking proper Generalities of rights enumerated in the Bill of Rights. Such an extension gives us the following rule: Judges should read the Bill of Rights at the "most specific level" to avoid exercising arbitrary discretionary power. When an originalist faces competing Generalities by which to read one of the first eight amendments, this rule instructs them to choose the narrowest reading of the right. It is a presumption of reading enumerated rights narrowly.

Yet Justice Scalia himself would have rejected extending footnote 6's logic to create such a presumption. His opinion in *District of Columbia v. Heller*[48] illustrates this. In *Heller*, the Supreme Court contemplated reading the Second Amendment at two competing Generalities. On the one hand, Justice Stevens argued in dissent for a specific reading of the Second Amendment—one that only protected the right to own a firearm in connection with the maintenance of "a well-regulated militia."[49] Conversely, Justice Scalia argued for a broader reading of the Second Amendment—one that "guarantee[s] the individual right to possess and carry weapons,"[50] regardless of whether an individual possessed the weapon for purposes of being in a militia.

Each of these readings had originalist support. Although not an originalist, Justice Stevens used originalist arguments to advance his position: "There is no

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[46] *Michael H. v. Gerald D.*, 491 U.S. 110, 127 (1989) n.6.

[47] *See, e.g.*, Gregory C. Cook, *Footnote 6: Justice Scalia's Attempt to Impose a Rule of Law on Substantive Due Process*, 14 HARV. J. L. & PUB. POL'Y 853, 853–54 (1991).

[48] 554 U.S. 570 (2008).

[49] *Id.* at 637 (Stevens, J., dissenting).

[50] *Id.* at 592.

indication that the Framers of the [Second Amendment understood it] to enshrine the common-law right of self-defense in the Constitution."[51] Meanwhile, Justice Scalia argued the Framers recognized an individual right to possess a firearm in the Second Amendment as a response to tyrants that banned militias by "taking away the people's arms."[52]

Faced with a narrow and broad reading of the Second Amendment, both of which had plausible support in the Constitution's original meaning, Justice Scalia chose the broader reading. He did not extend footnote 6's logic and adopt the narrower reading—that the Second Amendment only confers an individual right to own firearms for purposes of being in a militia. In fact, he did the exact opposite, starting his analysis by saying "[we] start . . . with a strong presumption that the Second Amendment right is exercised individually and belongs to all Americans."[53] Hence, he started with a presumption favoring the *broader* reading.

Justice Scalia started with this presumption of a broader reading after analyzing the Bill of Rights. He pointed out that the language "right of the people" is not only in the Second Amendment, but also the First Amendment and the Fourth Amendment.[54] Notably, he also found that "[t]he Ninth Amendment uses very similar terminology."[55] After analyzing these provisions, Justice Scalia found that each of them is meant to recognize "individual rights" broadly held by each citizen, not narrow "collective rights" that are only recognized only in connection with communal activities.[56]

Justice Scalia's analysis highlights a key feature of the language of the Constitution's rights recognizing provisions—the amendments' drafters often took pains to ensure future generations would not interpret rights too narrowly. Conversely, there is no language in the Constitution cautioning future generations from reading rights too broadly. With this dynamic in mind, it makes sense for there to be a presumption to read rights broadly.

And this is exactly what the Ninth Amendment presumption instructs judges to do. It embodies original concerns about reading rights too narrowly by giving a favorable presumption to broader readings. Justice Scalia used a similar rationale when concluding the Second Amendment confers a broad individual right to firearm ownership.[57] Meanwhile, a footnote 6 presumption would have led to the opposite conclusion—a conclusion not supported by themes of the Constitution's text. Indeed, the late Justice Scalia would likely agree that the Ninth Amendment presumption is a better canon of construction for originalists to use when interpreting enumerated rights in the Bill of Rights.

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[51] *Id.* at 637.
[52] *Id.* at 598.
[53] *Id.* at 581.
[54] *Heller*, 554 U.S. at 579.
[55] *Id.* at 579.
[56] *Id.*
[57] *See id.*

b. *Footnote 6 and Fundamental Rights*

Is footnote 6, however, a better canon of construction for interpreting fundamental rights not enumerated in the Bill of Rights? This was, after all, the type of right Justice Scalia had in mind when he crafted footnote 6. Analysis of footnote 6 shows that although it purports to be a neutral principle, it suffers from the same arbitrary features that it seeks to prevent. Alternatively, the Ninth Amendment presumption is rooted in neutral principles, making it a better principle to use for interpreting fundamental rights.

A neutral principle must not only give judges a constraining principle to apply when making decisions, but it must also itself be defined by a neutral methodology. Otherwise, it is not practically constraining. Judge Bork emphasized this requirement when discussing neutral principles, stating: "If judges are to avoid imposing their own values upon the rest of us . . . they must be neutral [not only in the *application* of principles, but] as well in the *definition* and the *derivation* of principles."[58]

Footnote 6 fails this test. Although it constrains judges when they apply it, Justice Scalia never explained *why* judges should constrain themselves by using this method. And constraining rules, absent principled explanations, do not advance originalism's goal of supporting the rule of law with neutral principles.[59] They allow courts to act as "naked power organ[s]."[60]

The Ninth Amendment presumption does not have this shortcoming. Like footnote 6, it is a constraining rule for originalist judges selecting Generalities. But it is a constraining rule rooted in a neutral source—the Ninth Amendment's original meaning.[61] It is not arbitrary. The Ninth Amendment presumption allows originalist judges to be neutral in both their definition and application of a principle. It is a better rule for interpreting fundamental rights.

4. *The Ninth Amendment Presumption: Originalism's Better Way Forward*

The Ninth Amendment's original meaning tells us the people hold a vast body of rights. The Ninth Amendment presumption operationalizes this original meaning by telling judges to favor broader readings of rights. Adding this presumption to the originalist toolkit gives originalism a constraining neutral principle that is consistent with the Constitution's original meaning—something

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[58] Bork, *supra* note 13, at 7.

[59] *See supra*, Part II.2. Consider a rule instructing judges to read even-numbered amendments at the highest possible Generality and odd-numbered amendments at the lowest possible Generality. Such a bright-line rule constrains judges. When faced with competing Generalities regarding an amendment, a judge could not choose their preferred outcome. Yet this rule would not support the rule of law. Originalists cannot adopt rules just because they are constraining—they must also be rooted in in neutral sources.

[60] Wechsler, *supra* note 6, at 12.

[61] *Supra* Part IV.A.1.

the method has been unable to find up to this point. It legitimizes originalism's claim that it is a constraining method.

The Ninth Amendment presumption, however, only tells originalists how to interpret the Constitution's rights recognizing provisions. It says nothing about what Generality we are to interpret the Constitution's delegated powers to the federal government. For guidance on this task, we must turn to the Tenth Amendment.

B. *The Tenth Amendment: A Presumption Against Generality for the Constitution's Federal Power Grants*

The Tenth Amendment creates a presumption for reading the Constitution's federal power grants narrowly. The Framers' motivations for adding the Tenth Amendment show the amendment's original meaning instructs us to construe the federal government's powers narrowly. This presumption supplements the originalist toolkit for effectively construing Generality while adhering to its underlying principles.

1. *Historical Background and Original Meaning of the Tenth Amendment*

Antifederalists also had concerns about the new Constitution's lack of an express limit on the federal government's powers. They viewed expansive provisions—such as the Necessary and Proper Clause—as allowing for wide interpretations of the powers delegated to the federal government.[62] Absent an express limitation on the powers the new Constitution vested in the federal government, Antifederalists feared a strong central government would swallow up states' powers.[63]

The Federalists attempted to assuage the concerns of the new Constitution's skeptics.[64] They assured states' ratifying conventions that the new federal government would be one of limited and enumerated powers.[65] Even Alexander

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[62] *See* THE FEDERALIST NO. 33 (Alexander Hamilton), *supra* note 34, at 149 (noting, with colorful language, that the Necessary and Proper clause had "been the source of much virulent invective and petulant declamation against the proposed Constitution."). Consider the following concern voiced in an Antifederalist publication: "[T]he omission of [an express limitation on the federal government's powers] when such great devolutions of power are proposed, manifests the design of reducing the several States to shadows." *Letters of the Centinel No.2*, Md. J. (Balt., Md.), Nov. 2, 1787, at 1, *reprinted* in 2 THE COMPLETE ANTIFEDERALIST, *supra* note 32, at 143, 146–47.

[63] *See* 2 THE COMPLETE ANTIFEDERALIST, *supra* note 32, at 143, 146–147.

[64] Kurt T. Lash, *The Original Meaning of an Omission: The Tenth Amendment, Popular Sovereignty, and Expressly Delegated Power*, 83 NOTRE DAME L. REV. 1889, 1906 (2008) (showing that "in the state ratifying conventions, the Federalists repeatedly insisted that the federal government would have only expressly delegated powers.").

[65] *See, e.g.*, The Debates of the Several State Conventions on the Adoption of the Federal Constitution 140-41 (Jonathan Elliot ed., Phila., J.B. Lippincott Co. 2d ed. 1891)

Hamilton—who later would argue for an expansive reading of the federal government's powers—argued the Constitution's limitations on federal power were self-evident.[66] The Federalists ultimately won the day, but not unconditionally. The Antifederalists wanted the assurances the Federalists brought to each state's ratifying convention put into the Constitution.

The Antifederalists wanted a guarantee that the new federal government would be one of limited and enumerated powers. This guarantee came in the form of an amendment. After ratifying the Constitution, several states submitted proposals for such an amendment.[67] The first Congress embodied these proposals in the Tenth Amendment, which reads as follows: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, *or to the people*."[68]

The final four words of the Tenth Amendment are critical to understanding its original meaning. The Framers, including those who drafted the Tenth Amendment, were influenced by the work of Emmerich de Vattel's *The Law of Nations*.[69] Vattel argued that because sovereigns are presumed to retain all powers not expressly delegated away, those delegated powers must be *construed narrowly*.[70] Vattel viewed the sovereign as being a monarch; the Framers, however, viewed the people as being sovereign.[71] This notion, that the people are the sovereign entity, is known as popular sovereignty.[72] The Framers embodied this concept in the Tenth Amendment's language when they added "or to the people" to the Tenth Amendment.[73] By doing so, they addressed Antifederalist concerns that the federal government's powers had no limit. The Tenth Amendment, by expressly putting the limits of popular sovereignty in the Constitution, ensured the federal government could claim no powers beyond those which the people delegated clearly.[74] The powers that they did delegate, moreover, had to be construed narrowly.[75]

(documenting comments of Federalist Archibald Maclaine at the North Carolina ratifying convention in support of the new Constitution).

[66] *Id.* at 362 (documenting the following statement by Alexander Hamilton: "[W]hatever is not expressly given to the federal head, is reserved to the members. The truth of this principle must strike every intelligent mind.").

[67] Lash, *supra* note 64, at 1916–17.

[68] U.S. Const. amend. X (emphasis added).

[69] Lash, *supra* note 64, at 1909; *see generally*, EMMERICH DE VATTEL, THE LAW OF NATIONS (Charles G. Fenwick trans., Carnegie Inst. Of Wash. 1916) (1758).

[70] *See* EMMERICH DE VATTEL, *supra* note 67 bk. 1, ch. 2 § 16.

[71] Lash, *supra* note 64, at 1910; *see, e.g.*, ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 37 (Henry Reeve trans., 2003) (finding that when "[t]he American Revolution broke out, and the doctrine of the sovereignty of the people came out of the townships, and took possession of the State . . . [e]very class was enlisted in its cause . . . . [I]t became the law of laws.").

[72] Lash, *supra* note 64, at 1910.

[73] *Id.* at 1924.

[74] *Id.* at 1923.

[75] *Id.* at 1924.

2. *The Tenth Amendment Presumption*

If the Tenth Amendment tells us to read the federal government's enumerated powers narrowly, then, like the Ninth Amendment, it gives us a rule of construction for construing Generality: The Tenth Amendment creates a presumption of reading the powers delegated to the federal government in the Constitution narrowly. This presumption, like the Ninth Amendment presumption, is useful to originalists interpreting delegated powers having multiple Generalities supported by the Constitution's original meaning. Under such circumstances, the originalist follows the Tenth Amendment presumption and chooses the lower Generality.

This Tenth Amendment presumption bolsters the originalist toolkit, giving the methodology an effective means for addressing Generality throughout the Constitution. This presumption is consistent with the original meaning of the Constitution's text. The Tenth Amendment, by including "or to the people," incorporated popular sovereignty into the Constitution, encouraging narrower constructions of delegated powers. Moreover, this presumption gives originalists faced with ambiguity a neutral rule to apply when determining the proper Generality at which to interpret the Constitution's delegated powers. By employing this methodology, the originalist judge avoids arbitrary decisions. They better adhere to originalism's principles of being a constraining method.

VI. CONCLUSION

The Ninth and Tenth Amendments give originalists presumptions to deploy when determining the Generality of constitutional provisions. These presumptions come into play when the original meaning of a constitutional provision's Generality is unclear. If dealing with a rights recognizing provision, the Ninth Amendment presumption instructs one to apply it at a higher Generality. If the provision is delegating power to the federal government, the Tenth Amendment presumption tells one to apply it at a lower Generality.

These presumptions ground themselves in originalism's underlying principles. They derive themselves from the Constitution's text, finding support in the original meaning of the Ninth and Tenth Amendments. And they give judges neutral principles to abide by. Unlike the prevailing originalist Generality rule, these two presumptions do not undermine originalism's legitimacy. They improve originalism and reinforce its claim to being the most constraining method.