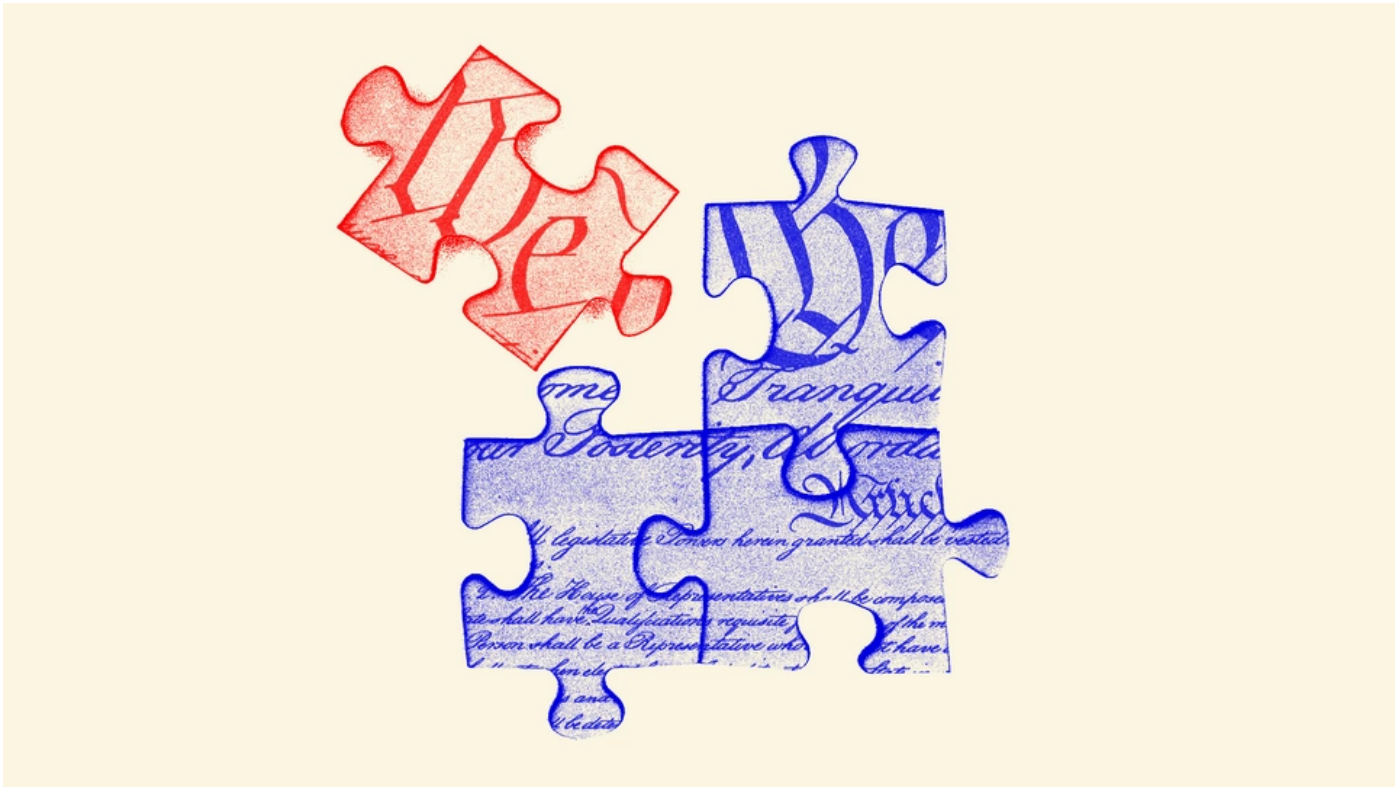
What the Constitution Doesn't Say

Unwritten ideas necessarily guide even the strictest readings of the text, despite what some originalist jurists like to believe.

By George Thomas February 3, 2022



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During oral argument at the Supreme Court in December over Mississippi's abortion ban, Justice Sonia Sotomayor laid bare a fundamental truth: "There's so much that's not in the Constitution."

Her point is a deep one, and salient to the abortion debate: The text of the Constitution does not explicitly affirm the right to abortion; no one disagrees with that. But the Constitution protects far more than what it literally

describes. Unwritten ideas necessarily guide even the strictest readings of the text, despite what some originalist jurists like to believe.

Adrian Vermeule: Beyond originalism

This can be seen in just about every major constitutional debate, as I explore in my new book, *The (Un)Written Constitution*. Take, for example, the recent decision by the Court's six conservatives to strike down the Biden administration's COVID-vaccine mandate. The ruling was based on the idea that Congress cannot delegate "major questions" to administrative agencies, in this case the Occupational Safety and Health Administration. The major-questions doctrine may be justified by a certain understanding of the separation of powers, as Justice Neil Gorsuch argued in his concurring opinion, but it is not found in constitutional text. Even the Court's power to strike down laws as unconstitutional is not specified by constitutional text. Indeed, the overhwelming majority of constitutional disputes that come before the Court—including abortion and free speech and the right to bear arms—depend on ideas and understandings that can't be found in the Constitution.

The arguments put forward in the Mississippi abortion case (*Dobbs v. Jackson Women's Health Organization*) are a perfect study in how unwritten ideas drive our readings of the text. The dispute over abortion revolves around the due-process clause of the Fourteenth Amendment, which stipulates that no state can "deprive any person of life, liberty, or property, without due process of law." While Mississippi insists that a woman's right to abortion "has no basis in the Constitution," Elizabeth Prelogar, the solicitor general for the United States, maintains that the right is contained in the word *liberty*. How do we determine whether *liberty* includes the right of a woman to terminate her pregnancy?

It requires, in short, going beyond the text. This is inescapable because the text alone doesn't specify the meaning of enumerated rights such as "the freedom of speech" and the "free exercise" of religion, let alone the meaning of abstract rights such as "liberty" and the "privileges or immunities of citizens." What's more, going beyond the text is practically demanded by the Ninth Amendment, which explicitly acknowledges that there are specific, inviolable rights not named in the Constitution: "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people." But how do we determine the scope of abstract rights or which unenumerated rights, if any, should be constitutionally protected?

An exchange between Justice Clarence Thomas and Solicitor General Prelogar highlights this difficulty. Justice Thomas wanted to know just what right Prelogar was rooting abortion in. Was it liberty? Autonomy? Privacy? And just where did she find this right in the Constitution? The problem, Thomas asserted, was that the right she was defending was too abstract. When we talk about the Second Amendment or the Fourth Amendment, he said, we know what we're talking about "because it's written. It's there."

But the "liberty" that Prelogar was referring to *is* written; it *is* there in the text. And the fact that "liberty" is more abstract than the rights found in the Second or Fourth Amendments doesn't obviate the Court's obligation to define its proper scope, just as the Court does with any other constitutional right.

Consider the First Amendment's prohibition against "abridging the freedom of speech, or of the press." What does that freedom entail, exactly? Does it prohibit Congress from preemptively blocking speech that it deems unprotected? What about punishing such speech after the fact? Does it allow an opposition party or private citizen to criticize the sitting

government? This last question was the subject of a heated debate in the 1790s, less than a decade after the First Amendment was ratified. While there was ready agreement that the text protected the freedom of speech and of the press, there was profound disagreement on the scope of these freedoms.

At the time, most sitting Supreme Court justices held that the First Amendment allowed the government to punish speech that brought public officials or the government into disrepute. Presiding over the trial of a critic of President John Adams, Justice Samuel Chase argued that any political minority must "surrender up their judgment" once a government was selected, and that "private opinion must give way to public judgment, or there must be the end of government." In contrast, James Madison argued that interpretations like Chase's prohibited the "right of freely examining public characters and measures, and of free communication among the people … which has ever been justly deemed the only effectual guardian of every other right." The disagreement between figures like Chase and Madison lay primarily in their disparate understanding of the logic of popular government, not in their literal reading of constitutional text. Their debate required using unwritten ideas to outline the substance and scope of "the freedom of speech, or of the press," just as we have to outline the scope of "liberty" in the Fourteenth Amendment.

Originalists insist that we can accomplish this only by reading the text as it was understood by those who framed and ratified it. They turn to history and linguistic conventions from the period under investigation to retrieve the "original public meaning" of the Constitution's words. What would they have meant to an ordinary reader at the time of the text's ratification? As Justice Amy Coney Barrett has argued, the original public meaning of the Constitution's text, "and it alone," is law. Yet this argument depends on unwritten ideas about the nature of the Constitution—on a disputed theory of

what the Constitution is—not on the text.

Harry Litman: Originalism, divided

Even if we follow the original public meaning, how do we know whether we should be governed by the expectations of those who ratified the Fourteenth Amendment or by the general principles they brought into being? The text doesn't tell us. Does the Fourteenth Amendment apply only to rights that were clearly protected when the amendment was ratified, or does it apply more generally? Does it apply to marriage only as it was understood in 1868? What about interracial marriage? Same-sex marriage? A right to make decisions about procreation? A woman's right to terminate her pregnancy? Even among originalists, debate persists on all of these issues.

Some originalists claim that we are bound by the concrete expectations of those who framed and ratified the Constitution. Justice Samuel Alito took something like this position during oral argument in *Dobbs*, when he asked whether "abortion was a right, liberty, or immunity in 1868, when the Fourteenth Amendment was adopted." If the people who ratified the amendment in 1868 did not expect "liberty" to include a woman's right to terminate her pregnancy, this logic goes, then that right is not protected.

If we follow the expected application of the amendment, it would almost certainly not protect interracial marriage—which wasn't federally legalized until a century after the amendment's ratification—let alone same-sex marriage. Similar questions come up with regard to gender. Should women be entitled to the privileges or immunities of citizenship, including the right to make choices about their occupation, despite the fact that many of those who framed and ratified the Fourteenth Amendment did not necessarily expect it to apply to women in this way? (A few years after the amendment was ratified, the Supreme Court suggested that the answer was no. It upheld

an Illinois law that denied the suffragist Myra Bradwell the right to practice law precisely because she was a woman: "The natural and proper timidity and delicacy which belongs to the female sex evidently unfits it for many of the occupations of civil life.")

If we follow the general principles that the text brought into being—as opposed to their original application—they may entail obligations that those who framed and ratified the amendment did not understand or even consider. Steven Calabresi, a leading originalist and former clerk to Justice Antonin Scalia, argues that this isn't our problem. We should not be concerned, he says, with how those who ratified the Fourteenth Amendment applied it in particular cases; nor should we be concerned with how they expected it to apply. We should be concerned instead with the *principle* or *concept* that they brought into being.

Scalia himself was skeptical of this approach. He contended that the word *liberty* in the Fourteenth Amendment protects only what is enumerated in the Bill of Rights, as well as rights that have historically been protected by American law. In *Dobbs*, the Mississippi solicitor general followed Scalia's reasoning, arguing that because the right to abortion is not specified in constitutional text, nor supported by history, it is not constitutionally protected. In doing so, he drew on Scalia's dissenting opinion in the 1992 case that reaffirmed the central logic of *Roe v. Wade*, where the justice asserted that abortion was not protected by the Constitution "because of two simple facts: (1) the Constitution says absolutely nothing about it, and (2) the longstanding traditions of American society have permitted it to be legally proscribed."

What looks like an indisputable claim firmly grounded in constitutional text is, in fact, a particular reading of the text driven by Scalia's desire to confine its more open-ended terms—such as *liberty* in the Fourteenth Amendment—to

specifically enumerated rights. Otherwise, Scalia feared, such terms would "become a boundless source of additional, unnamed, unhinted-at 'rights,' definable and enforceable by us, through 'reasoned judgment.'"

In his attempt to limit the Constitution's more abstract clauses, Scalia was following the New Deal jurist Hugo Black, who referred to himself as a constitutional literalist. Black famously argued that the Fourteenth Amendment "incorporates" the rights enumerated in the Bill of Rights, applying them—and no others—to the states. Accordingly, the "liberty" protected by the Fourteenth Amendment refers to rights articulated in the first eight amendments. Black pointed to his historical research to justify this argument, but even more important to his thinking was the belief that reading the text in this manner provided a salutary limit on judicial discretion. Like Scalia, Black worried that open-ended and abstract constitutional clauses invited judges to read their political preferences into the Constitution.

Yet the Fourteenth Amendment does not say that the "liberty" protected by due process refers only to what is articulated in the Bill of Rights. Those who framed the Fourteenth Amendment could have easily said as much, but they didn't. Some scholars have reasonably argued that this is the best reading of the amendment, but those arguments inescapably depend on unwritten ideas about how to interpret *liberty* in the Fourteenth Amendment.

How we determine the scope of "liberty"—whether we root it in particular historical understandings, limit it to rights enumerated elsewhere, or take it as a more general principle—is not dictated by constitutional text. This is just as true when we turn to supposedly concrete rights such as freedom of speech. It is true of numerous cases currently before the Court: Does religious liberty require states that fund nonsectarian private education to also fund religious education? Does the right to bear arms include a right to

concealed carry? These cases all turn on the justices' unwritten ideas.

My point is not to argue for or against any particular method of constitutional interpretation; it is, rather, to insist that a large majority of the issues faced by the Court cannot be resolved simply by appealing to constitutional text. There is no avoiding this. All approaches to constitutional interpretation rely on unwritten understandings. Going outside of the text is essential to reading the Constitution. This does not mean that anything goes; it means that we have the burden of giving our reasons for the constitutional judgments we must make.