

## INTELLECTUAL HISTORY AND CONSTITUTIONAL DECISION MAKING

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IN his article for this symposium issue of the *Virginia Law Review*<sup>1</sup> and in other places,<sup>2</sup> Professor Lawrence Solum has set forth an elaborate taxonomy for judges and commentators who want to privilege originalist methods of interpretation and construction in constitutional cases. Solum's taxonomy addresses several important issues in the philosophy of language that I will not take up in this Commentary. My concern is with the question with which Solum begins his article: What role, if any, should intellectual history play in constitutional theory? My approach to that question bypasses many of the issues to which Solum directs his attention and focuses instead on ones that I believe go to the heart of the question.

### I

Let me begin with a few straightforward propositions. Although Solum includes in his category "constitutional theory" methods of constitutional interpretation and construction, by which the "meanings" of provisions of the Constitution are determined, he is ultimately concerned with the decision of constitutional cases. His taxonomy is designed as a guide for those who decide those cases and those who comment on their decisions. Moreover, the taxonomy is not designed for all decision makers and commentators, but rather only those who believe that the central inquiry in constitutional decision making should consist of a search for the "original understanding" of contemporaries of the Framers of constitutional provisions as to the "meaning" of those provisions at the time of their framing. For judges and commentators who believe that the mean-

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<sup>1</sup> Lawrence B. Solum, *Intellectual History as Constitutional Theory*, 101 *Va. L. Rev.* 1111 (2015).

<sup>2</sup> See, e.g., Lawrence B. Solum, *Originalism and Constitutional Construction*, 82 *Fordham L. Rev.* 453, 456–57 (2013); Lawrence B. Solum, *Originalism and the Unwritten Constitution*, 2013 *U. Ill. L. Rev.* 1935, 1936; Lawrence B. Solum, *The Interpretation-Construction Distinction*, 27 *Const. Comment.* 95, 95–96 (2010); Lawrence B. Solum, *Semantic Originalism* 1–12 (Nov. 22, 2008) (unpublished manuscript, available at <http://ssrn.com/abstract=1120244>).

ing of constitutional provisions changes over time and that their current meaning should trump their original meaning when they are interpreted, Solum's taxonomy is not necessary. Solum's audiences are those who take originalism seriously.

Next, Solum's approach is designed to guide those originalists who are charged with applying constitutional provisions to contemporary disputes. He is not simply concerned with determining the "best possible interpretations" of provisions, using techniques premised on originalism. He also wants to provide guidelines for the construction of provisions. Notwithstanding the title of his article, he is writing far more for originalist judges and constitutional commentators than for intellectual historians.

Once one understands Solum's audiences, the question of what role intellectual history should play for constitutional theory becomes a narrower, more purposive one for him. He is not primarily concerned with whether the methods of intellectual history can illuminate a search for the original meaning of constitutional provisions. If that were his primary concern, he would have needed to write a different article, because the answer would obviously be "yes," for reasons I will subsequently discuss. Instead Solum is primarily concerned with whether the methods of intellectual history can help in the construction of constitutional provisions—that is, their application in contemporary cases.

But why should Solum be concerned with that question at all, given his focus on the contemporary application of constitutional provisions? At this point the purposive character of his inquiry becomes more obvious. To understand why that is, let us consider two distinctions that Solum makes at the outset of his article.

His first distinction is between the "communicative content" and "legal content" of provisions. The "communicative content" of a provision is the "meaning that the text communicated . . . to its anticipated or intended readers."<sup>3</sup> Here it is clear that Solum believes originalist methods are useful in determining communicative content, and here it would seem that the methods of intellectual history would also be useful. For example, when the First Amendment was enacted in 1791 it stated that "Congress shall make no law . . . abridging the freedom of speech."<sup>4</sup> A search for the "original understanding" of the term "freedom of speech,"

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<sup>3</sup> Solum, *supra* note 1, at 1117.

<sup>4</sup> U.S. Const. amend. I.

employing, among other techniques, the methods of intellectual history, would reveal that “freedom of speech” was not taken to include libelous, blasphemous, or obscene expressions, was possibly not intended to include true statements criticizing public officials, and may not have been intended to include any “abridgments” other than those where Congress engaged in advance censorship of publications.<sup>5</sup>

All those late eighteenth-century understandings of the phrase “freedom of speech” would help determine its communicative content. They would not, however, determine the “legal content” of “freedom of speech” for *Solum*. The “legal content” of a provision, he maintains, is “the meaning [given to that provision] when it is put into practice.”<sup>6</sup> That meaning would include “a rich and complex set of constitutional doctrines, including rules concerning prior restraints, the regulation of child pornography, and even limits on the regulation of billboards.”<sup>7</sup> It would also include the level of scrutiny afforded to various free speech cases, prior Supreme Court decisions defining categories of protected and unprotected speech, and the other doctrinal considerations in play when courts decide cases.

*Solum*’s distinction between communicative and legal content is connected to another distinction he makes, between constitutional interpretation and constitutional construction. Interpretation is an effort to discover the communicative content of a constitutional provision; construction is an effort to discover the provision’s legal content and thereby decide a case governed by the provision.<sup>8</sup> *Solum* treats interpretation as an “essentially factual inquiry” and construction as an “essentially normative” one.<sup>9</sup> He appears to believe that methodological techniques (including, surely, intellectual history) exist for converting the search for the meaning of a provision as “communicated . . . to its anticipated or intended readers” into something like a process of gathering facts.<sup>10</sup> He also appears to believe that once one moves from the communicative content to the legal content of a provision (and from the realm of constitutional interpretation to constitutional construction),

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<sup>5</sup> For more detail, see Leonard W. Levy, *Legacy of Suppression: Freedom of Speech and Press in Early American History* 1–6, 181–82, 233–43, 274–75, 289–90, 301–02 (1960).

<sup>6</sup> *Solum*, *supra* note 1, at 1117.

<sup>7</sup> *Id.* at 1117.

<sup>8</sup> *Id.* at 1118–20.

<sup>9</sup> *Id.* at 1123.

<sup>10</sup> *Id.* at 1117.

normative considerations, such as the choice of a “particular theory of construction,” based on “legal norms” or on “political or moral theory,” necessarily come into play.<sup>11</sup>

Once these distinctions are in place, one is in a position to see where Solum is heading. If discerning the communicative content of the constitutional text, which Solum equates with constitutional “interpretation,” can be reduced to a factual inquiry, then originalism is a methodology that can aid constitutional interpreters with one important task they need to perform: determining the “original understanding” of a provision. And if the other step in decision making—discerning a provision’s legal content or engaging in constitutional construction—necessarily takes in a number of other doctrinal and policy considerations, those can be weighed by originalist decision makers as well as any others. So the originalist would seem to be at an advantage over varieties of non-originalists in constitutional decision making, because the originalist will at least be giving serious attention to discerning the communicative content of constitutional provisions, and thus will be fashioning the best possible interpretation, whatever their contemporary legal effect might be after they are construed.

## II

In the process of suggesting that Solum’s article is primarily directed at persons committed to originalism as a methodological approach to constitutional interpretation, I noted that both of the distinctions Solum believes can help clarify our understanding of constitutional decision making—that between communicative and legal content and that between constitutional interpretation and construction—actually seem designed to privilege originalist over nonoriginalist approaches. Let me say a bit more about the distinctions.

Solum treats the “communicative content” of constitutional provisions as something capable of relatively easy discernment. He describes recovering communicative content as an essentially factual inquiry. He defines the communicative content of a provision as the “meaning that the [provision] communicated . . . to its anticipated or intended readers.”<sup>12</sup> Why should one think that discerning such a meaning would be an essentially factual inquiry?

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<sup>11</sup> Id. at 1122.

<sup>12</sup> Id. at 1117.

To be sure, there are some provisions in the Constitution (“neither shall any Person be eligible [for the Presidency of the United States] who shall not have attained to the Age of thirty five Years”) whose “communicative content” seems clear enough.<sup>13</sup> But as Solum notes, there are many provisions whose content, on its face, appears vague or ambiguous, and those provisions have generated the most attention and litigation.<sup>14</sup> It would seem that even an assiduous application of methods designed to recover the “original understanding” of such provisions would run into difficulties. Certainly it could not be reduced to a factual inquiry. So before the step of discerning the communicative content of constitutional provisions is folded into an approach to constitutional decision making, one would want to have some confidence in the capacity of that step to be taken. Where language such as “necessary and proper,” or “unreasonable,” or even “abridge” is contained in constitutional provisions, it would seem that the likely conclusion of a sustained historical inquiry into the way those provisions were “understood” would be that the drafters themselves were uncertain what they meant.

If recovering the “original understanding” of irreducibly vague or ambiguous provisions seems an elusive task whatever methods are employed, this problem is not the only one faced by methodologies that seek to extract the “original understanding” of constitutional provisions. Another difficulty is identifying and unearthing the relevant sources. Despite heroic efforts by “new” originalists to deal with this problem,<sup>15</sup> there is still no scholarly consensus about what counts or should count as a relevant historical source for the “original understanding” of a constitutional provision. Should sources be limited to public documents, or perhaps to the views of persons who formally participated in the drafting or ratification of constitutional provisions? If not, what weight should be attributed to private documents, such as letters in which contemporaries discuss the meaning of provisions? What should be the role of the “secret history” of the framing of the Constitution, or the discussions

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<sup>13</sup> U.S. Const. art. II, § 1, cl. 5. Although, one still might wonder why the Framers of that provision chose thirty-five years as the floor for eligibility, given the far lower life expectancy of the average citizen in the late eighteenth century. Did they think of thirty-five as the equivalent of fifty-five today, meaning they wanted only candidates in the later stages of their lives?

<sup>14</sup> Solum, *supra* note 1, at 1120–21.

<sup>15</sup> See, e.g., John O. McGinnis & Michael B. Rappaport, *Original Methods Originalism: A New Theory of Interpretation and the Case Against Construction*, 103 *Nw. U. L. Rev.* 751, 751–53, 786–93 (2009).

among delegates to the Philadelphia Constitutional Convention and states' ratifying conventions that have not found their way into print?<sup>16</sup> How far does a search for "original understanding" need to range?

More fundamentally, whose views on the meaning of constitutional provisions are to be canvassed? Late eighteenth- and early nineteenth-century America presents particular difficulties for prospective canvassers because of the large numbers of illiterate persons in the population, the limited number of persons who participated in the drafting and ratification of the Constitution, and the unevenness of the surviving record. And on what theory of the meaning of language are "original understandings" to be based? Are they to represent only the "understandings" of the drafters of a provision, or those who voted on it in Philadelphia, or those who ratified the Constitution? Or are they to represent some commonly held sense of the meaning of words in the general population,

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<sup>16</sup>On the "secret history" of the Constitution, see Vasani Kesavan & Michael Stokes Paulsen, *The Interpretive Force of the Constitution's Secret Drafting History*, 91 *Geo. L.J.* 1113 (2003).

Solum gives a hypothetical example of a conversation between Gouverneur Morris and James Madison about the meaning of the word "enumerated," in which Morris states that he employs "enumerated" as a synonym for "illustrative," so that the powers given to Congress in Article I, Section 8 of the Constitution should be understood as "examples of unlimited legislative powers." Solum, *supra* note 1, at 1135. Madison counters that this is not the "ordinary signification" of "enumerated," and Morris counters that his interpretation "will be best for the country," a conclusion Madison says he doubts. *Id.* Morris then suggests that if the Framers were to state plainly that they believed that Congress's enumerated powers were merely illustrative of its unlimited powers, "acceptance [of the Constitution] by the country would be in doubt." *Id.*

Suppose this conversation had actually taken place. It would suggest that at least one member of the Constitution's drafters intended that "enumerated" be taken as synonymous for "illustrative," but another member doubted that most Americans agreed with that conclusion. This might suggest that the meaning of "enumerated" to the drafters was uncertain, but if so, the language of the Ninth Amendment, which provides that "[t]he enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people," U.S. Const. amend. IX, and the Tenth Amendment, which provides that "[t]he 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," *id.* amend. X, would seem to resolve the ambiguity. Taken together, the Ninth and Tenth Amendments provide a rule of construction in which the enumeration of rights or powers in the Constitution does not preclude the existence of other reserved rights or powers, and is thus not merely illustrative of those powers, but rather is also a limited delegation of them to the unit of government identified in the delegation. So if Morris and Madison's exchange were taken as evidence that uncertainty about the meaning of "enumerated" existed, the Ninth and Tenth Amendments could be taken as evidence that the Framers had resolved to clear up that uncertainty.

even if large numbers of that population played no role in the drafting or ratification of the Constitution?

And what should those searching for the communicative content of constitutional provisions do with provisions whose very generality suggests that they were intended, as Chief Justice John Marshall put it in *McCulloch v. Maryland*, to be “adapted to the various crises of human affairs”?<sup>17</sup> What of provisions containing phrases such as “due process of law,”<sup>18</sup> “public use,”<sup>19</sup> “twice put in jeopardy of life or limb,”<sup>20</sup> “excessive fines,”<sup>21</sup> “cruel and unusual punishment,”<sup>22</sup> or “the press”?<sup>23</sup> Those phrases seem to invite construction over a range of cases and spans of time. How can one discern the “original understanding” of such phrases when they appear to be deliberately written in open-ended language?

A search for the communicative content of constitutional provisions thus encounters formidable difficulties, belying Solum’s conclusion that it can be reduced to an essentially factual inquiry. This is not to suggest that embarking on that search is a useless endeavor, but it is to suggest that if the communicative content of a provision is only, at best, part of its meaning, working very hard at trying to pin down that content is probably not going to be worthwhile for someone who is centrally interested in the provision as a constitutional theorist. For, as Solum concedes, even if one were to conclude unambiguously that the communicative content of the Free Speech Clause of the First Amendment did not mean that activities such as wearing T-shirts with political messages or making contributions to political action committees were regarded as “speech” by the Framers, there would still be the long history of the legal content of the Free Speech Clause, which over time has come to treat those activities as protected by the First Amendment.

So I do not think that ascertaining the communicative content of a constitutional provision would get most constitutional theorists very far in their effort to understand its legal content. It could be that that conclusion is what Solum wants his readers to reach, because then intellectual

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<sup>17</sup> 17 U.S. (4 Wheat.) 316, 415 (1819) (emphasis omitted).

<sup>18</sup> U.S. Const. amend. V.

<sup>19</sup> *Id.*

<sup>20</sup> *Id.*

<sup>21</sup> *Id.* amend. VIII.

<sup>22</sup> *Id.*

<sup>23</sup> *Id.* amend. I.

history, as he describes it, becomes quite a marginal tool in understanding constitutional decision making. This is because, according to Solum, techniques of intellectual history are not particularly good at helping to discern the communicative content of provisions, and are apparently not well suited at all to helping to discern their legal content, which is affected by legal doctrines and practices with which historians may lack familiarity.

But I do not think Solum's article is designed to undermine the stature of intellectual history as a methodology that can contribute to constitutional theory. I rather think it is designed to suggest that techniques of intellectual history may be useful to originalists in their search for the "communicative content" of provisions, defined by Solum as the meanings those provisions were intended to communicate to anticipated readers. Defined in that fashion, the communicative content of a provision provides a clue to its "original meaning," something originalists invariably look for. Although in Solum's view the techniques of intellectual history are not particularly useful for recovering the communicative content of provisions, he seems to believe that they are useful for recovering the "context" in which those provisions were promulgated, which might provide some clues to their original meaning.

But even if one concludes that Solum believes there is a role for intellectual history in helping to determine the communicative content of provisions, when one considers the full range of activities Solum associates with commenting on and theorizing about constitutional decision making—discerning the communicative and legal content of provisions, interpreting them, and construing them—intellectual history's role turns out to be quite limited. It can only afford some help in discerning communicative content, and thus is of limited utility in interpreting provisions, and it appears to be no help at all in discerning legal content or construing provisions: Those jobs are for lawyers. So in the end, "intellectual history as constitutional theory," as Solum conceives of those enterprises, does not amount to much more than a potential help to originalists in some self-defined originalist tasks.

### III

Solum's foil in writing his article is one by Professor Saul Cornell, in which, according to Solum, Cornell claims that the "interpretive methods drawn from intellectual history will do a better job of extracting the 'meaning' of constitutional text than the methods developed by judges,



2015]

*Commentary*

1173

lawyers, and legal scholars.”<sup>24</sup> Cornell does not have legal training, although he has written a good deal on legal sources, notably in the Framing Era.<sup>25</sup> It is possible that Cornell really means to claim what Solum says he claims, but if that is so, it seems to be the claim of a naïf, comparable to saying that intellectual historians of medicine will do a better job of diagnosing past diseases than doctors. I suspect Cornell is making a somewhat different claim. I suspect he is claiming that, with respect to constitutional provisions promulgated in past eras, the methods developed by members of the legal community for interpreting such provisions tend to be unduly presentist in their goals and aspirations, because judges, lawyers, and legal scholars are primarily concerned with the meaning of those provisions in the present. This invites anachronism, and may result in the meaning of the provisions being distorted.<sup>26</sup>

Put that way, I think Cornell’s claim is a fair one, and often accurate with respect to the interpretation of constitutional provisions by legal actors in generations far removed from the time of the provisions’ promulgations. But of course “distortion” of the meaning of a constitutional provision is very much in the eye of the beholder. If one’s goal is only to understand what Americans of the Framing Era thought were the limits of free speech, over two centuries of subsequent interpretations indicating that contemporary Americans believe the limits to be far different is not relevant. And Solum is surely right in noting that the “content” of a constitutional provision cannot be discerned only from what its drafters thought it might mean, since the provision also has been applied over time, and in the process taken on additional content. So if Cornell is claiming that all of those subsequent interpretations are somehow wrongheaded, and that one needs to revert back to the provision’s original meaning as discerned through the techniques of intellectual history, then he has become a particularly muddleheaded species of originalist. Not even someone deeply committed to the proposition that the “original understandings” of constitutional provisions should control their subse-

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<sup>24</sup> Solum, *supra* note 1, at 1114–15. I do not read Cornell as making precisely that claim, but rather a claim that the methods of originalists remain historically unsophisticated, and thus could profit from exposure to the methods of intellectual historians. See Saul Cornell, *Meaning and Understanding in the History of Constitutional Ideas: The Intellectual History Alternative to Originalism*, 82 *Fordham L. Rev.* 721, 755 (2013).

<sup>25</sup> See, e.g., Saul Cornell, *The Other Founders: Anti-Federalism and the Dissenting Tradition in America, 1788–1828*, at 128–34, 278–80 (1999).

<sup>26</sup> I take this conclusion to be consistent with Cornell, *supra* note 24, at 733–36.

quent interpretation would deny that in determining the “meaning” of a provision one cannot ignore its subsequent interpretations.

So it may be that Solum’s version of Cornell’s theory is a straw man, or it may be that Cornell simply does not understand how constitutional provisions evolve. But even if one believes that Cornell is a naïf (and most intellectual historians are comparably naïve about how constitutional decision making works) it does not follow, at least for me, that the limited role Solum prescribes for techniques of intellectual history in constitutional interpretation and construction is appropriate. In fact I think that most constitutional theorists, and particularly originalists, would profit from exposing themselves to the kind of work intellectual historians do.

Let us treat as accurate Solum’s description of constitutional adjudication as taking place in two stages, “interpretation” and “construction,” in which the decision maker searches for both the communicative and legal content of provisions relevant to the decision. Some constitutional theorists would reject the description on the ground that the original meaning of constitutional provisions, which Solum seems to equate with their communicative content, is not necessarily relevant in their interpretation because the meaning of the Constitution changes over time as the conditions under which it is interpreted change. But for present purposes we will take Solum’s description as a given, so that an originalist perspective is privileged in constitutional decision making.

We are thus, in the course of seeking to apply a constitutional provision to resolve a particular case, searching for the communicative and legal content of that provision. How might intellectual history techniques help us? Solum takes the position that they would not be much help, because, he asserts, “it is not obvious that the craft of intellectual history provides distinctive tools and methods appropriate to the interpretation of legal texts in general or the constitutional text in particular.”<sup>27</sup> He associates the ability to be an “expert reader[] of legal texts” with “legal skills,” such as “the ability to parse legal texts closely for precise meanings and fine distinctions.”<sup>28</sup> He also believes that when intellectual historians do read legal texts, “their aims are not primarily the recovery of communicative content.”<sup>29</sup>

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<sup>27</sup> Solum, *supra* note 1, at 1154.

<sup>28</sup> *Id.*

<sup>29</sup> *Id.*

I am unable to follow the reasoning process by which Solum reached these conclusions. First, if the methods of intellectual history are concerned with retrieving and understanding ideas in the past, why would they not be applicable to close readings of texts? Where else might intellectual historians find the sources of ideas? And why would they not be useful in reading *legal* texts, such as the Constitution? And where else would persons interested in discerning the communicative content of constitutional provisions look except to the language of those provisions and other evidence from the time the provisions were drafted indicating how the authors of the provisions might have understood the meaning of the words they used? And where would such evidence be *except in* the conventional sources employed by intellectual historians—letters, speeches, debates in Congress and ratifying conventions, pamphlets, the works of political and legal theorists writing at the time, changes in the language of provisions in successive drafts—to recover past ideas?

So it must be that Solum believes that, although the methods of intellectual history have conventionally been employed in close readings of all those sources, they somehow are not useful for close readings of legal sources. It appears that Solum thinks that without legal training, intellectual historians just are not able to accomplish that task. This strikes me as counterintuitive. Many of the sources that Professor Bernard Bailyn used to support his thesis that American colonists were influenced in their revolutionary aspirations by a strand of eighteenth-century Scottish republican ideology were pamphlets advancing legal arguments.<sup>30</sup> Despite his absence of legal training, Bailyn had no difficulty unpacking those arguments and tracing their sources.

I would be inclined to conclude, contrary to Solum, that if one is interested in recovering the communicative content of a constitutional provision enacted in a past epoch, the methods of intellectual history would be extremely useful. But Solum has another reason for concluding that those methods are “inappropriate” in construing constitutional provisions: Determining the “legal effect” of those provisions, he maintains, is crucial in their construction, and intellectual history techniques cannot recover that “legal effect.”

I am not sure why this should be the case. In fashioning the distinction between communicative and legal content, Solum says that “[t]he

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<sup>30</sup> Bernard Bailyn, *The Ideological Origins of the American Revolution*, at vi–xi, 1–4 (1967).

legal-content inquiry might involve questions like, ‘Does free speech doctrine impose strict scrutiny for content-based regulations of communication?’<sup>31</sup> Solum treats that inquiry as one peculiarly suited for persons with legal training because it presupposes a familiarity with the doctrinal corpus of free speech law, which includes distinctions between regulations that directly affect the content of speech and those that are content-neutral, as well as varying tiers of scrutiny for various regulations on speech challenged on constitutional grounds. His assumption is that, since the legal content of a constitutional provision will be affected by such doctrines and judicial practices, its determination is a matter for lawyers, not intellectual historians.

But does the legal content of a constitutional provision wholly lack historical dimensions? Consider Solum’s example of free speech. Between 1789 and 1938 there were no tiers of scrutiny employed by the Supreme Court in reviewing regulations challenged on constitutional grounds, whether they affected regulations on expressive activities or other activities.<sup>32</sup> Scrutiny was uniformly strict in free speech cases, unless the expressive activity being regulated, such as commercial speech, defamatory expressions, obscene expressions, or fighting words, was deemed altogether outside the ambit of constitutional protection.<sup>33</sup> Between the 1940s and the 1980s the Court began to narrow the category of unprotected expressions, treating some commercial speech and some defamatory speech as having a measure of constitutional protection and substantially limiting the class of expressions that qualified for the designation “obscene.”<sup>34</sup> By the 1960s the Court had recognized a distinction between content-based and content-neutral regulations affecting speech and had begun to formulate an intermediate tier of scrutiny for the latter regulations, requiring only that the governmental interest in restricting expression be “important” or “substantial,” rather than “compelling,” as in content-based regulations.<sup>35</sup> Beginning in the 1970s, the Court began to sweep certain expressive activities that did not literally involve speech, such as wearing clothing, burning flags, dancing, or giv-

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<sup>31</sup> Solum, *supra* note 1, at 1118.

<sup>32</sup> G. Edward White, *Historicizing Judicial Scrutiny*, 57 S.C. L. Rev. 1, 3 (2005).

<sup>33</sup> See *id.* at 3, 60; G. Edward White, *The First Amendment Comes of Age: The Emergence of Free Speech in Twentieth-Century America*, 95 Mich. L. Rev. 299, 310–11 (1996) [hereinafter White, *The First Amendment*].

<sup>34</sup> White, *The First Amendment*, *supra* note 33, at 351–52.

<sup>35</sup> *Id.* at 327–35.

2015]

*Commentary*

1177

ing money to organizations, into the ambit of the First and Fourteenth Amendments.<sup>36</sup>

Each of these doctrinal changes in free speech jurisprudence can be shown to have had its own history. These changes represented the Court's reaction to altered public attitudes about speech proposing commercial transactions, speech that offended some persons, speech that made false and damaging statements about others, and speech that communicated "unpopular" positions on public issues. They sometimes reflected the Court's awareness of arguments advanced in the scholarly literature on free speech. They were affected by the positions of some Justices that protection for free speech should be absolute rather than a balance of considerations, positions that forced the Court to consider what expressive activities were within the ambit of constitutional protection. All of these doctrinal changes, including the Court's decision to fashion and refine tiers of scrutiny in constitutional cases, were affected by ideas about the role of free speech in America as those ideas evolved in the mid- and late twentieth century. The evolution of free speech doctrine in those years can be shown to have been intimately connected to the evolution of those ideas.<sup>37</sup>

Why should the techniques of intellectual history not be useful in recovering and explaining those doctrinal changes in free speech jurisprudence? Why should they not be equally useful in explaining other twentieth-century changes in constitutional doctrine, such as the emergence of bifurcated review, in which some challenged regulations are given more heightened scrutiny than others, or the collapse of constitutional restrictions on the power of Congress to regulate the economy, or the heightened scrutiny afforded to certain invidious classifications under the Equal Protection Clause, or the selective incorporation of Bill of Rights provisions against the states under the Due Process Clause of the Fourteenth Amendment? Scholarly analyses seeking to associate those developments with changing ideas in twentieth-century American culture exist for all of these developments.<sup>38</sup> Far from being irrelevant in searches to ascertain the changing legal content of constitutional provi-

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<sup>36</sup> *Id.*

<sup>37</sup> For more detail, see *id.* at 342–58.

<sup>38</sup> See, e.g., Barry Cushman, *Rethinking the New Deal Court* 212–25 (1998); G. Edward White, *The Constitution and the New Deal* 159–63, 254–61 (2000); Michael Klarman, *An Interpretive History of Modern Equal Protection*, 90 *Mich. L. Rev.* 213 (1991).

sions, the techniques of intellectual history have helped illuminate that content.

So I am constrained to conclude that there seem few reasons to banish intellectual history from the arena of constitutional theory, and some good reasons to welcome it. I find it particularly ironic that a theorist committed to originalism would seek to do the banishing. This seems to be one of those instances in which the principle of keeping one's friends close and one's enemies closer seems to have been neglected. But of course that principle requires an understanding of who one's friends and enemies are.