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CONSIDERATIONS OF HISTORY AND PURPOSE IN CONSTITUTIONAL BORROWING

Robert L. Tsai*

The interaction between different bodies of constitutional thought isn't as well theorized as one might think. But it's getting there.[1] Those of us who devote a bit of our time to thinking about the relationships among the many legal ideas in our political tradition have reactions to borrowing that fall along a spectrum ranging from the deeply worried to the cheerfully sanguine. There isn't really even a consensus about the level of generality at which criticism should take place or even the terminology that we should employ to criticize the mixture of constitutional ideas that can take place. And we are divided as much by disciplinary approaches as by visions of what an ideal constitutional order might look like. Differences in orientation and commitment, too, shape how one sees the practice of constitutional borrowing from one legal system to another, or even between jurisdictions or bodies of thought within a single legal system.[2] And yet, the study of legal transplantation has never been as vibrant as it is now. Occasions like this Symposium, then, are valuable opportunities to get us to drill down deeper than we have in the past and also to broaden our individual projects by engaging with the work of others.

Into this fray steps Professor Tim Zick and his wonderful new book, *The Dynamic Free Speech Clause*.[3] The book sensibly accepts that borrowing is largely an

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[1] *See, e.g.*, Kerry Abrams & Brandon L. Garrett, *Cumulative Constitutional Rights*, 97 B.U. L. REV. 1309 (2017); Akhil Reed Amar, *Intratextualism*, 112 HARV. L. REV. 747 (1999); Joseph Blocher & Luke Morgan, *Doctrinal Dynamism, Borrowing, and the Relationship Between Rules and Rights*, 28 WM. & MARY BILL RTS. J. 319 (2019); Michael Coenen, *Combining Constitutional Clauses*, 164 U. PA. L. REV. 1067 (2016); Deborah Hellman, *The Epistemic Function of Fusing Equal Protection and Due Process*, 28 WM. & MARY BILL RTS. J. 383 (2019); Leslie Kendrick, *First Amendment Expansionism*, 56 WM. & MARY L. REV. 1199 (2015); Elizabeth Sepper, *Free Exercise Lochnerism*, 115 COLUM. L. REV. 1453 (2015).

[2] Some have even studied borrowing between bodies of government, say, from legislature to legislature. *See generally* COMPARATIVE LAW IN LEGISLATIVE DRAFTING: THE INCREASING IMPORTANCE OF DIALOGUE AMONGST PARLIAMENTS (Nicola Lupo & Lucia Scaffardi eds., 2014).

[3] TIMOTHY ZICK, THE DYNAMIC FREE SPEECH CLAUSE: FREE SPEECH AND ITS RELATION TO OTHER CONSTITUTIONAL RIGHTS (2018).

everyday occurrence while expressing a genuine concern that, at times, tying strategies can go too far.[4] The book is excellent in the sense that it is a serious study of constitutional law that investigates a phenomenon that others have long noticed but not always theorized; and it's useful in the sense that practicing lawyers and legal theorists alike will find the book helpful in thinking through how the various values enshrined in the First Amendment interact with one another, and with other constitutional values. Ideally, he envisions a holistic approach to interpreting the Constitution, even where provisions might clash, so that we "preserve a plural and diverse system of constitutional rights."[5]

Since the publication of Zick's book has brought us all together, I thought I'd spend some time with the arguments contained in it. What I'd like to do is inject a stronger sense of history and purposivism into the questions that the book raises. I'll do that by bringing Zick's book into conversation with my own book, *Practical Equality*,[6] which argues that all constitutional actors—regular citizens as well as judges—must make strategic decisions for the sake of equality (including sometimes by advancing the cause of equality through other means).[7] Sometimes that means explicitly appropriating ideas from one area of law to flesh out a concept from another area that is poorly conceived or has lost its utility through usage or neglect. Throughout, I draw on historical examples to illustrate how disputes over equality have led some committed egalitarians to ingeniously make use of alternative, often related concepts, to advance the banner of equality by other means.

My overarching goal will be to point out where our projects align nicely, as well as where they diverge. Some of our differences have to do with dissimilar writing objectives, but some of them arise from our distinctive vantage points.

I. HARMONY AMONG RIGHTS

An increased emphasis on historicism and purposivism should complicate how we think about constitutional borrowing—the taking of ideas or frameworks from one domain and using them in another domain for some persuasive end.[8] As Nelson Tebbe and I have argued,[9] it's certainly possible to take a systemic perspective to such matters and defend the general practice of intra-systemic borrowing for what it adds to democratic constitutionalism. More than ever, it's important to offer a general

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[4] *Id.* at 26–27, 35.

[5] *Id.* at 241.

[6] ROBERT L. TSAI, PRACTICAL EQUALITY: FORGING JUSTICE IN A DIVIDED NATION (2019).

[7] *Id.* at 10.

[8] Nelson Tebbe & Robert L. Tsai, *Constitutional Borrowing*, 108 MICH. L. REV. 459, 463 (2010).

[9] *See id.* at 459. As Lee Epstein and Jack Knight have observed, sometimes a conscious decision not to borrow can be as salient as a decision to overtly take and repurpose an idea from another domain. *See generally* Lee Epstein & Jack Knight, *Constitutional Borrowing and Nonborrowing*, 1 INT'L J. CONST. L. 196 (2003).

defense of interpretive practices against the strong challenges by illiberal ideologies,[10] strident forms of nationalism,[11] and even accounts of universalism[12] that threaten to upend American constitutionalism as we know it.

Like any social practice, though, people will have different motivations and ends as they try to act within a tradition, and even well-intentioned actions can be counterproductive. That means that we can and should criticize efforts at borrowing that are ill-advised or poorly executed—and we've offered one set of criteria to help guide how to think about such crossover work.[13] Needless to say, judges must respect certain institutional norms, including "role themes," that elected officials and activists need not heed.

But there are limits to how much we can say about an internal legal practice by assuming a perspective from outside the system itself. Call it the 35,000-foot problem. From that distance, people below seem like specks; they might not even look human at all, or perhaps are indistinguishable from other animals and things below. It's hard to discern why people are behaving the way they behave, it's nearly impossible to appreciate the actual problems they are trying to solve, and if we criticize their actions as legal theorists, it can only be according to the most abstract of values—a priori assumptions about the perfect legal system rather than inferences drawn from careful observation or experience.

Zick correctly takes to task critics of borrowing who say that mingling ideas about rights is "opportunistic,"[14] as if it's possible to engage in a form of "pristine" interpretation where judges can arrive at correct readings of text without engaging in any strategic considerations. Zick's foil is Fred Schauer,[15] who seems very worried at times that one idea could be masquerading as another.[16] With Zick, and against

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[10] *See, e.g.*, Michael C. Desch, *America's Liberal Illiberalism: The Ideological Origins of Overreaction in U.S. Foreign Policy*, 32 INT'L SECURITY 7 (2008).

[11] *See, e.g.*, Hawes Spencer, *A Far-Right Gathering Bursts into Brawls*, N.Y. TIMES (Aug. 13, 2017), https://www.nytimes.com/2017/08/13/us/charlottesville-protests-unite-the-right.html [https://nyti.ms/2uTxCDa].

[12] *See, e.g.*, James A. Gardner, *The Positivist Revolution That Wasn't: Constitutional Universalism in the States*, 4 ROGER WILLIAMS U. L. R. 109 (1998).

[13] Tebbe and I suggest that it may be fruitful to think of borrowing as defined by at least four different types: transplantation, hedging, displacement, and corruption. *See* Tebbe & Tsai, *supra* note 8, at 471–84. We also suggest that any instance of borrowing can be evaluated according to the following criteria: fit, transparency, completeness, and yield. *See id.* at 494–511. For a takedown of efforts to use the First Amendment to strengthen or expand a Second Amendment individual right to bear arms, see Gregory P. Magarian, *Speaking Truth to Firepower: How the First Amendment Destabilizes the Second*, 91 TEX. L. REV. 49, 61–72 (2012).

[14] ZICK, *supra* note 3, at 244.

[15] Frederick Schauer, *First Amendment Opportunism*, *in* ETERNALLY VIGILANT: FREE SPEECH IN THE MODERN ERA 174 (Lee C. Bollinger & Geoffrey Stone eds., 2003) [hereinafter Schauer, *First Amendment Opportunism*]; Fred Schauer, *The Boundaries of the First Amendment: A Preliminary Exploration of Constitutional Salience*, 117 HARV. L. REV. 1796 (2004).

[16] Schauer, *First Amendment Opportunism*, *supra* note 15, at 191.

Schauer, I agree that we can only truly understand the practice of borrowing from within a tradition, as constitutional actors acting within a particular legal system and political culture. We're not going to get very far if what we care about is how genuine a constitutional actor is when she reaches for a body of knowledge that hasn't yet been well developed in tandem with the one at hand. We certainly want people to act with civic virtue, but that's not going to be a difficult standard to overcome. We can also exclude those situations where someone purposefully tries to destroy the utility of a set of ideas by importing a foreign and ill-fitting set of ideas, which Nelson and I call "corruption."[17] Beyond this, there's not much to learn from being overly concerned with opportunism. After all, every chance to interpret a statute or constitutional provision gives rise to a host of possible strategic moves and counter-moves, many of which are entirely plausible.

Zick's right about something else: once we move beyond the courts, it's simply nonsensical to worry about the pollution of ideas, except in the most instrumental sense that an especially lousy mix of ideas might confuse the very people that activists or politicians wish to rally to some banner.[18] But any talk of degrading one set of ideas seems silly in the extreme. Ideas change, they travel, and occasionally they die out. We can try to police the meaning of ideas within particular domains, but the power to do so is circumscribed by the practices within those domains and the generally unruly mechanisms of cultural change.

After dispensing with the distracting concern some have for disingenuous forms of borrowing,[19] though, Zick pulls up short rather than immersing in the history and culture of borrowing. A number of Zick's criticisms still seem to be taken from the perspective of someone hovering at a distance, leading him to be troubled by certain practices that might actually turn out to be defensible upon closer inspection, but seemingly unbothered by others that actually could pose a serious problem. Zick identifies several places where free speech values can come into conflict with other values, such as equality.[20] At those times, his detached orientation leads him to suggest that his overriding concern is maintaining a harmonious relationship, which he defines as "diversity without dominance."[21] According to Zick's approach, any effort to "subordinate[ ]" or "supplant[ ]" one constitutional value with another violates the principle of "Rights Pluralism."[22]

It isn't always clear what this anti-domination baseline means. It might mean simply that no one value is entirely extinguished—that's something that *would* be a serious problem, for it can be immensely difficult to come back from the complete judicial exclusion of a constitutional value from a domain where it ought to have

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[17] Tebbe & Tsai, *supra* note 8, at 471, 482–84.
[18] *Cf.* ZICK, *supra* note 3.
[19] *See id.* at 244–50.
[20] *See, e.g.*, *id.* at 127.
[21] *Id.* at 245.
[22] *Id.*

some sway. It can be hard to see how a single decision or bad outcome can result in the lasting subordination of a right, though, so we'll need to get into the weeds a bit more to get a feel for how such damage would actually play out. But the pursuit of values-harmony could mean something thinner: the rule is satisfied so long as a decision maker gives due consideration to each value, even if one value is given decisive weight over another in a particular dispute.

This last possibility is something I'd like to explore further, since it opens up the possibility that in certain conflicts between values, we actually *want* one individual right or value to dominate another value—perhaps consistently so. As one example, let's take the possibility of a conflict between an individual right to bear arms and the right to protest. Here, Zick's preference for harmony among values leads him to be hesitant in how to sort out the various values of speech, bearing arms, equality, and democracy.[23] He starts out by saying that the First and Second Amendments aren't "inherently incompatible."[24] His preference is to try to keep First and Second Amendment ideas distinct and separate rather than to grapple with the values together.[25] In fact, Zick believes that most conflicts can actually be resolved by running scenarios through one rights-formula or the other, but not both.[26]

This seems easier said than done. It might not even be a good idea. Where someone wishes to bring weapons to a protest specifically to communicate a political message about guns, the two constitutional values would seem to point in the same direction: favoring the ability to do what the armed protestor wishes to do in a manner that will maximize his guns-related message. The gun in this situation is a prop that furthers his message. But where the expressive event is not obviously about guns at all, it seems to me that it's justifiable to say that the non-armed attendees of a protest ought to be able to express themselves completely free from risk of harm or intimidation. That can only happen if the would-be armed marcher is temporarily disarmed by statute, permit condition, or court order for the duration of a demonstration.

There's more. While Zick thinks "it does not seem fair to assess the incompatibility argument with reference to the most combustible and violent events,"[27] the obvious response would be: why not? Indeed, one might especially ask, "why not?," if history shows that a specific mix of virulent ideology, large gatherings, and loaded guns reasonably leads to social disorder and the threat of injury or worse.

On more than one occasion, Zick expresses skepticism that armed marchers could have a chilling effect on the exercise of other constitutional rights.[28] Yet proponents

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[23] *See id.* at 218.

[24] *Id.* Zick cites Eugene Volokh with approval for the proposition that carrying weapons might actually facilitate the expression of speakers, to the extent they fear violent reprisals. *Id.* at 219 (citing Eugene Volokh, *The First and Second Amendments*, 109 COLUM. L. REV. SIDEBAR 97, 102 (2009)).

[25] ZICK, *supra* note 3, at 213.

[26] *Id.* at 234.

[27] *Id.* at 218.

[28] Zick describes examples of armed protesters chilling speech as merely "anecdotal,"

of white sovereignty—a racialized vision of the polity—have historically gathered in large groups with guns in order to send a general message of black inferiority, depress turnout among black voters, or drive non-whites from a local community.[29] We might not be able to ban gun possession outright without a constitutional amendment or an about-face by the Supreme Court,[30] but we must take this history into account as we determine the best balance of rights in concrete disputes.

The history of white supremacy in America demonstrates over and over that racial supremacy and guns are a volatile mix, and not your ordinary form of political speech.[31] Given this historical fact, we might relax the rule against viewpoint discrimination and allow white supremacists to express their noxious views, but not in an organized and armed fashion, especially by marching with weapons through minority neighborhoods. America's experience with racial violence, including racial purges conducted by white citizens against freed persons and migrants,[32] is a key piece of the backdrop against which any of these values conflicts must be reconciled. In fact, in places where armed racial purges were conducted without anyone getting shot, local leaders defended their actions as peaceful, expressive events, because "[t]he crowd was not a riotous gathering; . . . no weapons were displayed, no threats made, no violence attempted."[33] In Tacoma, for instance, armed white citizens paraded through town and escorted all Chinese residents to the edge of town.[34] When the ringleaders were prosecuted, they later argued in court that what had taken place was "as orderly as a common procession."[35]

Even if a single shot isn't fired, the risk of an outbreak of violence is not merely theoretical, the terrifying message of racial intimidation that would be sent is certain to be understood, and the overall problems would not be posed by a different group that might wish to bear arms. This is because the cultural significance of their

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pleads that we need more data, and seemingly puts greater faith in the assertion that "in many places in the U.S., firearms have been carried at public protests for some time" and "seem[ ] not to have suppressed public speech." *Id.* at 218–19.

[29] *See generally* LYNCHING IN AMERICA: TARGETING BLACK VETERANS, https://eji.org/reports/online/lynching-in-america-targeting-black-veterans [https://perma.cc/UG53-23B9] [hereinafter LYNCHING IN AMERICA] (documenting "the history of racial violence targeting African American veterans in the United States in the late 19th and early 20th centuries").

[30] *See* McDonald v. City of Chicago, 561 U.S. 742, 750 (2010); District of Columbia v. Heller, 554 U.S. 570, 635–36 (2008) (Stevens, J., dissenting).

[31] *See* LYNCHING IN AMERICA, *supra* note 29.

[32] In a two-year period during the nineteenth century, 168 different communities expelled Chinese residents from their midst. *See* Robert L. Tsai, *Racial Purges*, 118 MICH. L. REV. (forthcoming 2019). *See generally* BETH LEW-WILLIAMS, THE CHINESE MUST GO: VIOLENCE, EXCLUSION, AND THE MAKING OF THE ALIEN IN AMERICA (2018) (discussing the history of Chinese exclusion in the late nineteenth century); LYNCHING IN AMERICA, *supra* note 29.

[33] George Dudley Lawson, *The Tacoma Method*, 7 OVERLAND MONTHLY 236 (Mar. 1886).

[34] *Id.*

[35] JEAN PFAELZER, DRIVEN OUT: THE FORGOTTEN WAR AGAINST CHINESE AMERICANS 228 (2007).

intended speech act can only be understood by reference to history—a history that might very well merit a different calibration of the constitutional values at stake. If we are to truly value the peaceable communication of political ideas, a different kind of harmony—a material one, where no one is shot or so afraid they don't show up or don't feel like they can speak freely when they do—will have to take precedence over a balanced outcome as to constitutional values in the abstract.

The Supreme Court has lent support to singling out certain kinds of racist expression closely associated with violence and inequality. In *Virginia v. Black*, the Justices upheld a law that singled out cross burning with intent to intimidate, and that law survived a viewpoint discrimination challenge.[36] What's more, Justice O'Connor's opinion drew deeply upon "cross burning's long and pernicious history as a signal of impending violence."[37] As she points out, cross burnings aren't like any other kind of expression, but instead are typically deployed in conjunction with other acts of inequality, including "beatings, shootings, stabbings, and mutilations."[38] Cross burnings "had special force given the long history of Klan violence."[39] They "communicate both threats of violence and messages of shared ideology"[40]—white supremacy and virulent resistance to this country's most fundamental values. Based on the logic of *Virginia v. Black*, armed gatherings of avowed white supremacists, conducted in a way that reasonably strikes fear in others and poses a risk of violence, arguably can be treated differently from other kinds of expression. As Justice Thomas, who would have gone further, explained, "That the First Amendment gives way to other interests is not a remarkable proposition."[41]

One of the most horrific events on the minds of the Reconstruction generation was the massacre of freed persons and their allies in New Orleans by armed ex-Confederates and white supremacists.[42] Pro-equality forces led by Republicans had called for a new constitutional convention to give emancipated slaves the vote.[43] Delegates gathered at the Mechanics Institute on July 30, 1866, but they weren't able to

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[36] 538 U.S. 343, 360–63 (2003). Justice Clarence Thomas would have gone further by treating cross burnings as pure conduct. He would not only have upheld the law, he would also uphold the provision that said that the fact of a cross burning was to be treated as prima facie evidence of intent to intimidate a person or group. This last provision split the justices, with a majority striking it down. *Id.* at 388 (Thomas, J., dissenting).

[37] *Id.* at 363 (majority opinion).

[38] *Id.* at 355. Justice Thomas added that cross burnings were "'a tool for the intimidation and harassment of racial minorities, Catholics, Jews, Communists, and any other groups hated by the Klan.' For those not easily frightened, cross burning has been followed by more extreme measures, such as beatings and murder." *Id.* at 389 (Thomas, J., dissenting) (internal citations omitted).

[39] *Id.* at 355 (majority opinion).

[40] *Id.* at 354.

[41] *Id.* at 399 (Thomas, J., dissenting).

[42] *See* Donald E. Reynolds, *The New Orleans Riot of 1866, Reconsidered*, 5 J. LA. HIST. ASS'N 5 (1964).

[43] *Id.* at 8.

complete their work.[44] Democrats who opposed black suffrage and considered this gathering illegitimate organized and turned out in a public show of force.[45] Led by the mayor, local police, firemen, and private citizens, these counterdemonstrators paraded down the street, surrounded the convention location, blocked a separate procession of black residents, and began shooting and beating both marchers and delegates already inside the building.[46] About 38 people were killed and 146 wounded.[47]

The New Orleans massacre came on the heels of an explosion of armed white violence against freed persons in Memphis on April 30, 1866.[48] There, simmering tensions between black Americans and the police force over police brutality led to an armed effort to purge the city of all black residents.[49] A report issued by the Freedmen's Bureau later pointed to "an especial hatred among the city police for the Colored Soldiers, who were stationed [t]here for a long time."[50] Things came to a head after officers who came upon black soldiers "forced them off [a] sidewalk" and ran into an officer.[51] All the black men were beaten savagely by the officers.[52] The next day, things escalated when police tried to break up a peaceful gathering of black soldiers who had been drinking.[53] During the altercation that day, one officer was wounded and another officer was killed when his own weapon discharged accidentally in his own hand.[54]

A giant crowd of white residents then gathered as police officers began attacking black residents in reprisal.[55] John Creighton, the City Recorder, gave a speech inciting the crowd to take revenge on freed persons and drive them from town.[56] He shouted that everyone "should get arms, organize and go through the Negro districts," and urged the crowd to resolve to "prepare and clean out every damned son of a bitch of a nigger out of town . . . Boys, I want you to go ahead and kill every damned one of the nigger race and burn up the cradle."[57] Roving bands of armed white citizens, interspersed with leading men and police officers, then "commenced an indiscriminate attack on the Negroes, they were shot down without mercy, women suffered alike with the men, and in several instances little children were killed."[58]

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[44] *Id.* at 5.
[45] *Id.* at 11.
[46] *Id.* at 11–12.
[47] *Id.* at 13.
[48] *See* T.W. Gilbreth, *The Freedmen's Bureau Report on the Memphis Race Riots of 1866*, TEACHING AM. HIST., https://teachingamericanhistory.org/library/document/the-freedmens-bureau-report-on-the-memphis-race-riots-of-1866/ [https://perma.cc/AU33-QYAG].
[49] *Id.*
[50] *Id.*
[51] *Id.*
[52] *Id.*
[53] *Id.*
[54] *Id.*
[55] *Id.*
[56] *Id.*
[57] *Id.*
[58] *Id.*

The Freedmen's Bureau report estimated that thirty black citizens were killed and another fifty wounded, while two white men were killed[59] (other reports put the black death toll at around forty-six).[60] The white rioters looted and burned down three black churches, eight school houses and fifty homes owned or inhabited by freed persons;[61] by contrast, "[n]o dwellings occupied by white men exclusively were destroyed and [there was] no evidence of any white men having been robbed."[62] The point here is that there is a long history of armed violence conducted by majorities and the explosive mix of racist speech and guns all has to be taken into account in how we weigh the constitutional values involved.

The New Orleans episode posed an obvious conflict between gun-toting protesters and freed persons who had assembled, with not only equality but also democracy at stake. The racial purge of Memphis wasn't keyed to an overt political event, but white supremacists exploited a series of racially explosive police encounters to rid the community of all black residents and restore white self-governance; that political strategy turned mobbing into a democracy-damaging event. Without blaming the black soldiers for asserting their right to bear arms, the fact that they were armed was nevertheless a factor in how quickly police responses escalated; the unrestrained arming of white citizens then facilitated the racial purge of Memphis.[63]

It is worth noting that whenever these massacres came up, there wasn't a laborious effort to balance rights—even though the victims who were seeking to meet or march didn't have advance permission from the city to do so.[64] Any failure to comply with permit rules or other local laws didn't extinguish their constitutional rights. Nor was there any concern shown for the right of antiblack protesters to march while armed to the teeth. Instead, those who supported the Thirteenth and

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[59] *Id.*

[60] H.R. REP. NO. 39-101, at 35 (1866).

[61] Gilbreth, *supra* note 48.

[62] *Id.*

[63] Though it occurred after the ratification of the Reconstruction Amendments, the Colfax Massacre of April 13, 1873, followed a similar pattern. *See* LEEANNA KEITH, THE COLFAX MASSACRE: THE UNTOLD STORY OF BLACK POWER, WHITE TERROR AND THE DEATH OF RECONSTRUCTION, at xi–xviii (2008). The bitterly contested Louisiana elections in 1972 that led to two sets of governors, two legislatures, and two sets of officials each proclaiming victory. *Id.* at 80–87. Republicans entered the courthouse in Colfax, Louisiana, and were protected by armed freed persons. *Id.* at 88–110. They were eventually set upon by hundreds of armed "Fusion" supporters, Klan members, and paramilitary group called the "White League" who retook control of the courthouse. *See id.* at 92, 146–52. Although the black men tried to surrender, the white forces shot and killed between 60 to 150 African Americans that day. *See id.* at 109. The full death toll remains uncertain because there were reports of bodies thrown into the river or buried in ditches. *See id.* For a recounting of the events, see generally ERIC FONER, RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION, 1863–1877, at 437 (1988); KEITH, *supra*; CHARLES LANE, THE DAY FREEDOM DIED (2008).

[64] MICHAEL KENT CURTIS, NO STATE SHALL ABRIDGE: THE FOURTEENTH AMENDMENT AND THE BILL OF RIGHTS 137 (1986).

Fourteenth Amendments consistently treated these incidents as gross violations of the victims' free speech rights, as well as proof of the need to codify the right of former slaves to vote.[65] The right to own firearms by freed persons was certainly seen by many pro-equality forces as crucial to self-defense,[66] but Republicans railed against laws that unfairly confiscated guns from black residents rather than demanded a right to armed self-expression.[67] In other words, any right to gather in armed fashion had to take a backseat to the demands of democracy, equality, and free speech.

I should add that even when the point of an expressive gathering *is* about gun rights, it still might be the case that the right to a peaceful protest is sufficiently disrupted by the potential that some people (let's say, pro-gun rights counterdemonstrators) will pose a danger to others if they are armed. In Charlottesville, for instance, some armed "alt-right" demonstrators began roving through the streets and menacing citizens far from the original location for their event.[68] It's actually surprising that the violence wasn't worse in Charlottesville than it turned out, given that armed white supremacists and anti-fascists both descended on the place,[69] and some militia figures were far better armed than the police.[70] One white supremacist asserted, "We're not non-violent. We'll fucking kill these people if we have to,"[71] while another demonstrator promised to "send at least 200 people with guns" to the statue of Confederate General Robert E. Lee.[72]

Now it's true that all sides will want proximity to some place for maximum communicative effect, perhaps even to one another (counterdemonstrators certainly

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[65] *Id.* at 50.

[66] *See id.* at 104, 138, 140–41. David Schenk suggests that mass disarmament of freed blacks by sheriffs as well as private parties raised concerns about self-defense as well as democracy, since these things happened not only to render black Americans vulnerable to white supremacist violence but also as part of efforts to suppress the black vote. David H. Schenk, *Freedmen with Firearms: White Terrorism and Black Disarmament During Reconstruction*, 4 GETTYSBURG C. J. CIV. WAR ERA 9, 36 (2014) (noting concern about "discriminatory regulations" by which blacks were forced to surrender their arms).

[67] *See* Schenk, *supra* note 66, at 30, 34.

[68] Emma Green, *Why the Charlottesville Marchers Were Obsessed with Jews*, ATLANTIC (Aug. 15, 2017), https://www.theatlantic.com/politics/archive/2017/08/nazis-racism-charlottesville/536928/ [https://perma.cc/9RVX-S8PT]; Jack Moore, *Charlottesville Police Refused to Protect Synagogue From Nazis, so Jewish Community Hired Armed Security for First Time*, NEWSWEEK (Aug. 16, 2017), https://www.newsweek.com/charlottesville-police-refused-protect-synagogue-nazis-so-it-hired-armed-651260 [https://perma.cc/R7A2-PUFG].

[69] Luke Morgan, Note, *Leave Your Guns at Home: The Constitutionality of a Prohibition on Carrying Firearms at Political Demonstrations*, 68 DUKE L.J. 175, 176 (2018).

[70] *Id.* at 179.

[71] *Id.* at 177.

[72] *Id.* Other right-wing "militia" organizations later flocked to the event, raising the risk of gun violence. *Id.* at 176; *see also* Presser v. Illinois, 116 U.S. 252, 254–55, 260, 267, 269 (1886) (rejecting First and Second Amendment challenge to arrest for conducting unlicensed and unauthorized armed march).

want to be near demonstrators). Those speech values can be honored where they are salient, but realistically, that can only be done by momentarily denying some or all speakers the right to bear arms during an expressive event. Even if we're uncomfortable with making a formal exemption for white supremacists who want to march with guns or any other asymmetrical rule that turns in part on ideology, surely it's possible to employ the time, place, and manner doctrine[73] in a way to ensure that all participants to a politically volatile speech event conduct themselves consistently with the values of peaceful speech and assembly.

II. DEMOCRACY AS A PURPOSE

Let me push the point in a slightly different direction by restating Zick's preference for balance. A harmonious relationship between intra-systemic legal values is valorized—*instead of what, exactly?* One possibility is justice: some thicker vision of what democratic relations and access to key social goods should look like when the constitutional order is reasonably healthy. For instance, if we believed that the most serious problem today is American democracy in decline, a rise in authoritarian tactics in the streets and within certain bureaucracies, and an oligarchy of interests bent on entrenching its own influence at the expense of the powerless, then we would be attracted to a stronger egalitarian, anti-corruption vision.[74] To realize that vision, or at least nudge us in the right direction, we would need a concerted effort at purposive reading of the Constitution to facilitate this transition.

But no coherent vision could possibly be realized by trying to preserve an ideal balance among institutional values in a purely internal sense, or even among the different people and bureaucracies that all might wish to invoke those values for their own ends. To those with a more dire diagnosis of our constitutional order, such a task would merely amount to rearranging deck chairs on a ship slowly disappearing into oblivion.

Instead, we would have to realize that—in the famous language of John Hart Ely—a "clause-bound" account—simply won't do.[75] We would have to look beyond the values specifically mentioned in particular clauses of the Constitution, and we must think hard about how a particular interpretive dispute might be resolved in light of a theory of justice or, at a minimum, how deciding a dispute one way or another bears on the condition of democracy at the very moment we are interpreting that document. Now Ely thinks you have to go beyond any particular provisions of the Constitution to fully grasp such a democratic theory[76] (let's momentarily put aside the fact that he errs in thinking that preserving the openness of the democratic

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[73] *See, e.g.*, Collin v. Smith, 578 F.2d 1197, 1201 (7th Cir. 1978).

[74] *See generally* Richard H. Pildes, *Romanticizing Democracy, Political Fragmentation, and the Decline of American Government*, 124 YALE L.J. 804 (2014).

[75] JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 11 (1980).

[76] *Id.* at 1, 13, 38.

process is a *procedural* value).[77] But he's right about two things. First, judges are necessarily impacting our democracy (or shaping our republican order, if you prefer)—one way or another.[78] It's true when they decide cases narrowly and when they decide cases based on robust grounds. It's also true when they fashion and enforce gatekeeping rules. The only question is whether they are doing the work well or doing it poorly.

Second, Ely is absolutely right that judicial interpretation must take place in accordance with some theory of democracy.[79] This, too, is inescapable, but we can go further still: A vision of democracy can either be latent or transparent; it can be paper-thin or extremely robust; and it can be politically inclusive or excessively partisan. But several of us think that it's wiser to lay our cards on the table than it is to pretend that judging is apolitical. And here's where it makes sense to modify Ely's own theory: when judges do the work of democracy by removing obstacles to the vote, or restrictions on political advocacy, or by lifting unequal burdens suffered by political minorities, they are reading and applying constitutional provisions according to a *substantive* account of democracy.

Notice that external critiques of this sort don't have to hinge on the motivations of judges. We don't have to find evidence that a judge is, in fact, an ethnonationalist, a racist, or a political hack. Rather, we can muster a democracy-based critique of a decision simply based on the relative congruence between a judicial ruling or a pattern of decisions—including any mixture of ideas—and an account of the political order.

All of this suggests that in elevating peaceful coexistence between norms over other priorities, Zick might have an overly narrow sense of what's at stake. Values-harmony might turn out to be a deeply conservatizing approach, laying down a superstructure of order-preserving values on top of a necessarily boisterous process for generating reform, and acting as a problematic brake on reform by privileging status quo norms. If so, a desire for harmony itself could become an obstacle to democratic renewal. This is because powerful political and economic forces can always employ outsized resources or connections to outflank the less powerful by exploiting the language of equilibrium.[80] Reformers acting on behalf of the marginalized are then cast as enemies of the legal order itself, disrupters of constitutional integrity, enemies of the rule of law.

Indeed, such a "wise struggle for human betterment" and "for the rights of man"—as Teddy Roosevelt put it—has taken place in every generation.[81] Each time, the most pressing issues of the age have played out with all sides acting opportunistically to harness cherished political ideals, along with the Constitution, in their efforts to win the day.[82] These labors are undertaken not only by would-be world

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[77] *Id.* at 15.

[78] *Id.* at 44–45.

[79] *Id.* at 45.

[80] *See, e.g.*, Michael S. Kang, *The End of Campaign Finance Law*, 98 VA. L. REV. 1 (2012).

[81] Theodore Roosevelt, The New Nationalism, Speech at John Brown Memorial Park, Osawatomie, Kansas (Aug. 31, 1910) (transcript available in the U.S. Archives).

[82] *See, e.g.*, Keith E. Whittington, *"Interpose Your Friendly Hand": Political Supports*

makers unafraid to overturn tables and chase out the villains, but also by reformers who might proceed at a slower clip and through less aggressive means. In past eras, the fight was taken by the people directly to over organized but misbehaving states or a pro-slavery oligarchy or rapacious corporations.[83] Today, our struggles seem to be over the proper role that the wealthiest class of citizens, forever wars, military-style weapons, and the fracturing nature of labor play in twenty-first century America.[84]

The purposivism that can be detected in Zick's account of adjudication seems indifferent to such broader societal conflicts, or at least proposes a form of judicial review that's non-judgmental as compared to the larger, warring conceptions of democratic life. The theoretical orientation driving the project is best exemplified by the fact that Zick's anti-domination principle is concerned with the relative balance of constitutional rights-values rather than people or perennially mistreated groups.[85] In other words, the theory seems best geared to ensure that certain fundamental rights not in vogue will not be overlooked or that one doctrine doesn't "collapse" into another. It may be less helpful in guarding against the domination of marginalized groups. In this important respect, the approach is primarily institutionalist and doctrinal rather than humanistic or visionary.

Furthermore, if—as both he and I seem to accept—the porousness of boundaries between ideas is a sociological fact, then it means that experts and institutions only have a limited capacity to prevent ideological exchange from occurring. And if the best that can be hoped for is infrequent juridic interventions in a social practice like borrowing to redirect that energy for the good of the legal order, then we ought to make those interventions count. Why spend all your time spitting in the wind? There are so many other problems we can do something about.

If I'm right about this, we would need something else to pair with Zick's superstructure of "rights pluralism"[86] or values harmony—a substantive vision of democratic justice both bold enough and coherent enough to translate abstractions into meaningful ideas and outcomes in the twenty-first century. Such a vision would be premised, too, on the historical insight that judges don't just juggle values in the abstract, but actually facilitate transitions from one politico-legal regime to another.[87] Once we have that vision in place, we could better evaluate whether an internal act of judicial borrowing is good or bad.

What would that something more look like?

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for the Exercise of Judicial Review by the United States Supreme Court, 99 AM. POL. SCI. REV. 583 (2005).

[83] *Id.* at 592.

[84] *See, e.g.*, JACQUES BUGHIN ET AL., SKILL SHIFT: AUTOMATION AND THE FUTURE OF THE WORKFORCE (2018), https://www.mckinsey.com/featured-insights/future-of-work/skill-shift-automation-and-the-future-of-the-workforce [https://perma.cc/VR3T-NZ6F].

[85] ZICK, *supra* note 3, at 31, 34, 74.

[86] *Id.* at 15.

[87] *Id.* at 30–31.

As I mentioned earlier, if one's diagnosis of America's democratic condition is decidedly negative, then one would probably favor an approach that doubles down on egalitarianism and anti-corruption as essential features of an improved regime.[88] That would also mean that, to the extent that rules would have to be modified or discarded, or practices like borrowing evaluated, we'd have to constantly keep a vision of democracy in mind. On this view, leaving a vision of democracy unarticulated—in the background—leads to far more idiosyncratic outcomes, some of which could help arrest democratic disrepair, and others that may very well quicken the pace of decline.

In a couple of places in the book Zick is critical of *Citizens United v. FEC*,[89] but his own voice is somewhat muted because he chooses to speak through Michael McConnell,[90] who has argued that the dispute should not have been decided by resorting to the Free Speech Clause, but instead treated as a Press Clause case.[91] This allows Zick to make an institutionalist point, which is that *Citizens United* is wrong as an instance of Free Speech "expansionism."[92] It's true that the Court has aggressively deployed free speech ideas and frameworks to protect the ability of corporations to engage in campaign speech, but how do we know that this is a bad case of expansionism, or even what out-of-kilter First Amendment values really look like?

It seems impossible to say this is a good or bad invocation of free speech without *some* concept of democracy here. After all, the five justices who prevailed believed they had the proper conception of democracy, a rough-and-tumble vision of politics that treats the individual who engages in door-to-door advocacy as presumptively the same as massive campaign expenditures by a corporation.[93]

To oppose this outcome effectively, it's not enough to insinuate that they might be insincere. We would need a competing vision of democracy. Otherwise, an expansionist ruling is just a kind of borrowing that doesn't go our way. On top of that, it's hard to say whether the next usage of free speech is a democratically unwise exercise or a beneficial one.

Others have worried about activists' tendency to weaponize free speech for some pet project,[94] but the truth is that this has been going on for some time and

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[88] For discussions of those who have advocated a revival of anti-corruption features of our Constitution, see ZEPHYR TEACHOUT, CORRUPTION IN AMERICA: FROM BENJAMIN FRANKLIN'S SNUFF BOX TO CITIZENS UNITED 298 (2014); Andrew Kent et al., *Faithful Execution and Article II*, 132 HARV. L. REV. 2111, 2116–18 (2019); Ethan J. Leib & Jed Handelsman Shugerman, *Fiduciary Constitutionalism: Two Legal Conclusions*, 16 GEO. J.L. & PUB. POL'Y (forthcoming 2019).

[89] 558 U.S. 310 (2010).

[90] ZICK, *supra* note 3, at 100–01, 249.

[91] Michael W. McConnell, *Reconsidering* Citizens United *as a Press Clause Case*, 123 YALE L.J. 412, 417 (2013).

[92] ZICK, *supra* note 3, at 249.

[93] *See Citizens United*, 558 U.S. at 318–19.

[94] *See, e.g.*, Janus v. Am. Fed'n of State, Cty. & Mun. Emps., 138 S. Ct. 2448, 2487 (2018) (Kagan, J., dissenting).

courts have at times gone along for the ride and at other times actively indulged this tendency.[95] As more commentators are warning, however, there are democratic-based justifications for judges to start putting their foot down.[96]

When Zick talks about balancing the various interests codified in the First Amendment itself, he is characteristically cautious, offering a sensible roadmap for the judge: first, treat each provision as representing "discrete, but synergistically related, provisions"; and second, recombine them as "cognate provisions" with "presumptively distinctive coverages and functions."[97] Even so, we are still left with no sure way of knowing whether, in actual usage, application of any of these concepts—alone or together—would benefit democracy writ large.

Interestingly, whereas Zick is generally more skeptical about combining First and Second Amendment concepts and frameworks for fear of creating confusion,[98] he is more enthusiastic about the marriage of ideas from the First Amendment with those associated with the Equal Protection Clause.[99] The main reason Zick breathes a sigh of relief is that so far, speech ideas haven't yet dwarfed equality ideas. But for some critics, this is an area where there could be far more interlacing of these seemingly disparate concepts. Kenji Yoshino and Tobias Barrington Wolff have separately argued, for instance, that expressive liberty should be developed in ways that promote egalitarian ideals.[100] Doing so could help sexual minorities in the military and other contexts where cultural conformity is backed by state power. Traditionally, strong deference to military authorities over their sphere of influence has frustrated juridic extensions of rights,[101] and so a certain amount of eclecticism and experimentation has seemed necessary to force a reconsideration of the rights of a modern citizen-soldier.

These accounts of what free speech can do to promote equality are grounded in a conception of what a fully autonomous citizen within a democracy can expect,

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[95] *See generally* ROBERT C. POST, CONSTITUTIONAL DOMAINS: DEMOCRACY, COMMUNITY, MANAGEMENT (1995); ROBERT L. TSAI, ELOQUENCE AND REASON: CREATING A FIRST AMENDMENT CULTURE (2008).

[96] Jeremy K. Kessler & David E. Pozen, *The Search for an Egalitarian First Amendment*, 118 COLUM. L. REV. 1953, 1987 (2018); Jedediah Purdy, *Beyond the Bosses' Constitution: The First Amendment and Class Entrenchment*, 118 COLUM. L. REV. 1953, 1987 (2018); Nelson Tebbe, *A Democratic Political Economy for the First Amendment*, 105 CORNELL L. REV. (forthcoming 2019); *cf.* Joseph Fishkin & William E. Forbath, *The Anti-Oligarchy Constitution*, 94 B.U. L. REV. 669, 694 (2014); William E. Forbath, *Caste, Class, and Equal Citizenship*, 98 MICH. L. REV. 1, 2 (1999). There are some who have serious doubts about how far the First Amendment can be turned in favor of an egalitarian agenda. *See, e.g.*, Louis Michael Seidman, *Can Free Speech Be Progressive*?, 118 COLUM. L. REV. 2219 (2018).

[97] ZICK, *supra* note 3, at 101.

[98] *Id.* at 11.

[99] *Id.* at 28.

[100] Tobias Barrington Wolff, *Compelled Affirmations, Free Speech, and the U.S. Military's Don't Ask, Don't Tell Policy*, 63 BROOK. L. REV. 1141, 1211 (1997); Kenji Yoshino, *Covering*, 111 YALE L.J. 769, 827–36 (2002).

[101] *See, e.g.*, Wolff, *supra* note 100, at 1187, 1193.

instead of a concern about values equilibrium. They are concerned not with the domination of one abstract value over another, but rather with ensuring that institutions don't dominate cultural minorities in ways that inhibit democratic participation.

One last observation along these lines. In developing a more robust account of democracy in the twenty-first century, one needn't fall all the way back to a Thayerian or Frankfurtian approach to judicial review.[102] Sam Moyn, for one, has turned the need for democratic revival into a clarion call against judicial review more broadly.[103] He blames *Marbury v. Madison*[104] for "transform[ing] popular rule into elite rule and democracy into juristocracy."[105] He then turns to those with a progressive vision of democracy and says, in light of the current composition of the Supreme Court, "the only option is for progressives to . . . disempower[ ] the courts."[106] Activists "need to abandon their routine temptation to collude with the higher judiciary opportunistically," he chides.[107]

Elsewhere, Moyn commends Thayer for his emphasis on "democratic learning" if judges would only step aside, and Frankfurter's concern with "the universal fallibility of all decision-making."[108] But Moyn solves his fear of juristocracy by indulging a romantic view of majoritarian politics.[109] There's no guarantee that getting courts completely out of the way of politics, or reducing the influence of judges across the board, will improve our democratic condition.[110] Moyn is expecting that an unmotivated populace will step in to protect its own rights, but there's no real evidence that judicial forbearance will activate political engagement. To the contrary: history shows that judicial involvement itself has often stimulated powerful citizen responses and ratified popular reforms.[111]

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[102] Thayer famously proposed the "clear mistake" rule for judicial review, embodying a powerful presumption of constitutionality. *See* James Bradley Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 HARV. L. REV. 129, 144 (1893). During the New Deal era, Frankfurter was the most consistent proponent of deference to legislatures, and he struggled mightily to reconcile judicial protection of racial and religious minorities with his embrace of the counter-majoritarian difficulty. *See* Daniel J. Solove, *The Darkest Domain: Deference, Judicial Review, and the Bill of Rights*, 84 IOWA L. REV. 941, 994–95 (1999).

[103] *See* Samuel Moyn, *Resisting the Juristocracy*, BOS. REV. (Oct. 5, 2018), http://bostonreview.net/law-justice/samuel-moyn-resisting-juristocracy [https://perma.cc/ABA2-Q7WE].

[104] 5 U.S. 137 (1803).

[105] Moyn, *supra* note 103.

[106] *Id.*

[107] *Id.*

[108] Samuel Moyn, *On Human Rights and Majority Politics: Felix Frankfurter's Democratic Theory*, 52 VAND. J. TRANSNAT'L L. (forthcoming 2019) (manuscript at 20–21, 28), http://papers.ssrn.com/so13/papers.cfm?abstract_id=3319515.

[109] *See id.* (manuscript at 23).

[110] *See id.*

[111] *See, e.g.*, Rachel Brody, *Views You Can Use: Love Wins*, U.S. NEWS (June 26, 2015), http://usnews.com/opinion/articles/2015/06/26/reactions-to-the-supreme-court-legalizing-gay-marriage [https://perma.cc/DBP4-RBVL] (discussing public response to the *Obergefell* decision).

It may simply be that without the unique institutional heft and discursive benefits that judicial participation can provide, reform-minded debates won't occur with the same sense of intensity and vibrancy. It's possible that any reforms may even be less durable without the opportunity for recognition and codification that judicial approval provides when politics itself breaks down. When gains would be so uncertain, why should progressives agree to fight with one arm tied behind their backs, in the hope that their opponents would not press the advantage?

Moreover, as Moyn acknowledges, the anti-judicial review position "presuppose[s] a democracy healthy enough . . . to fight for its rights."[112] Can that truly be said to describe our current condition, where populist movements are better at sweeping strongmen past institutional safeguards and into the Oval Office than they are at creating working majorities in Congress?[113] The pathologies of majoritarian politics in America today—with its hyper-partisanship, racially polarized party demographics, and bureaucratic inefficiencies[114]—should temper our enthusiasm for abandoning the judicial function.

III. DURABILITY AND REPLACEABILITY

One of the things that the study of democracy's slow, painful birth in America and its current precarious condition teaches us is just how deeply connected certain constitutional values truly are. Another lesson is that we'll need to draw upon a host of related ideas if we are going to dig ourselves out of our own mess. When we see these linkages repeatedly made, with great purpose and to surprising success, that should lead us to two other observations: (1) the durability of these connections as a normative condition, which means they shouldn't be lightly sundered or ignored; and (2) the possibility that one concept can, at times, serve as a substitute for another to serve the ends of justice.

This act of *principled substitution* can be distinguished from borrowing as such, though it does grow out of that practice, and both borrowing and substitution contribute to maintaining a vibrant legal culture. Instead, the substitution of one related concept for another is better understood as a purposive effort to exploit conceptual overlap for the ends of justice.[115] To talk about it this way is not to delegitimize the

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[112] Moyn, *supra* note 108 (manuscript at 28).

[113] *See* James Fallows, *If Trump Were an Airline Pilot*, ATLANTIC (Aug. 22, 2019), https://www.theatlantic.com/notes/2019/08/if-trump-were-airline-pilot/596575/ [https://perma.cc/7YMQ-YW3Z] (arguing that Trump would be removed from his position anywhere else).

[114] *See Trends in Party Affiliation Among Demographic Groups*, PEW RES. CTR. (Mar. 20, 2018), https://www.people-press.org/2018/03/20/1-trends-in-party-affiliation-among-demographic-groups/ [https://perma.cc/KXJ8-SRUP] (demonstrating racial divide in political parties); *Political Polarization in the American Public*, PEW RES. CTR. (June 12, 2014), https://www.people-press.org/2014/06/12/political-polarization-in-the-american-public/ [https://perma.cc/BS67-8RU2].

[115] As I explain it,

move; rather, it is merely to render more transparent how legal actors working within a tradition actually behave.

In *Practical Equality*, I pursue these lines of inquiry at some length.[116] As to the first proposition—the durability thesis—consulting history actually strengthens Zick's insight that a number of rights are "relational [in] nature."[117] But that insight might actually demand something more of institutions charged with preserving our constitutional culture. As he puts it, "these rights were discussed together, and influenced one another, even prior to formal adoption."[118] So, while it has become commonplace to ridicule Justice William O. Douglas's decision in *Griswold v. Connecticut* articulating the right to privacy,[119] his interpretive approach is more sound than many of his detractors would admit. Justice Douglas's writing style, with its emphasis on "penumbras" and "emanations" might be a bit florid or even awkward,[120] but he's absolutely right that there is not only conceptual overlap between particular rights, but that these relationships are historically grounded. Where he is justifiably criticized is in the way he deployed the relational-rights argument, especially the somewhat sloppy ways in which he talked about the different kinds of privacy and security interests.[121]

Why should we care, beyond what we already know from reading the text of the Constitution? Why might it matter to think of certain rights as not only closely related, but also that those connections are durable? The reason is that if our jurisprudence is not historically grounded in some important sense, then we can't fully appreciate why those synergies exist in the first place, why past generations of Americans have insisted that certain rights be discussed and protected together and what ends they pursued when they did so. If we don't consult that history with some care, we will more easily cast aside those relationships or fail to strike the right balance between those values and the needs of the present. By contrast, when we pursue a historically grounded jurisprudence, and commit ourselves to this approach, we satisfy an important condition for judicial review—paying homage to the thinking of past generations—without sacrificing the need for law that works in the here and now.

> [A] pragmatist focuses on the potential consequences of alternatives lying before her, and if there is no difference among the options, then a dispute . . . is "idle." We might find that the practical differences between two or more ways of handling a problem . . . are minor. Substituting one solution for another would then be principled.

TSAI, *supra* note 6, at 43 (adapting WILLIAM JAMES, PRAGMATISM: A NEW NAME FOR SOME OLD WAYS OF THINKING 36 (1921)).

[116] *See id.*

[117] ZICK, *supra* note 3, at 23.

[118] *Id.*

[119] 381 U.S. 479, 484 (1965).

[120] This sentence from the opinion is certainly grimace-worthy: "The Fifth Amendment in its Self-Incrimination Clause enables the citizen to create a zone of privacy which government may not force him to surrender to his detriment." *Id.*

[121] *See id.*

The recognition that the connective tissues between particular values are enduring must be reflected in more than just gesturing in their direction from time to time. In some instances, it might require not a presumption of distinctiveness and separation, but rather a presumption of mutual reinforcement. That would mean that we should always theorize certain concepts together rather than apart. There are two examples of mutual reinforcement that stand out, both of which have a strong textual claim to this kind of planned synergy as well as a compelling claim based upon historical usage. Joe Blocher and Luke Morgan call this "relevant similarity"[122]—some set of reasons why we ought to perceive different legal ideas as related. The first is obvious: the collection of varied but related ideas in the First Amendment sometimes collectively referred to as "expressive" or "deliberative" values.[123] Another prime example is the deep and lasting relationship between the principle of fairness and the principle of equality codified in the Fourteenth Amendment—which has been exploited at key moments for the sake of justice.[124]

Once we begin to truly wring significance from the durability of constitutional synergies, we should also notice something else: particular patterns in the ways that rights are mentioned together over time. For instance, as I mentioned earlier, we see that equality and voting rights for freed persons was believed to depend upon their ability to defend themselves.[125] This is not obvious from the text of the Bill of Rights, but instead arises strictly from usage over time.[126] And it presents a very different reason than we often hear in popular discourse about the need to bear arms to fend off a tyrannical government.[127] Instead, the threat of racist vigilantes in cahoots with nefarious local officials—be they lawmen or elected officials—lends some credence to an individual right to bear arms as counterweights to extreme forms of racial inequality.

Whether the militancy with which gun bearing, voting, and equal rights were entwined at a time of open racial conflict should be transplanted unmodified in a mature democracy is a separate question that would have to be confronted. We are now able to preserve the vote and reduce the possibility of racial harassment through more peaceful means than was possible in the latter half of the nineteenth century, and these measures significantly reduce the urgency for a militant judicial reading of these rights together. But this somewhat surprising linkage illustrates, at the very least, that ordinary people have looked at the original Bill of Rights and envisioned connections that are not obvious from the face of the text and not constrained by the assumptions,

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[122] Blocher & Morgan, *supra* note 1, at 330.

[123] *See* Jud Campbell, *Natural Rights and the First Amendment*, 127 YALE L.J. 246, 249 (2017).

[124] TSAI, *supra* note 6, at 92.

[125] *See supra* notes 64–67 and accompanying text.

[126] *See supra* notes 64–67 and accompanying text.

[127] *See supra* notes 64–67 and accompanying text. Indeed, this history lends credence to the view espoused by Justice Thomas that the right to bear arms was intended by the Framers of the Fourteenth Amendment to extend to freed persons. *See* McDonald v. Chicago, 561 U.S. 742, 845–47 (2010) (Thomas, J., concurring).

priorities, or methodologies favored by the Founding generation. Rather, those connections have been forged through instrumental use of foundational concepts.[128]

In *Practical Equality*, I document a few other linkages that we have not always recognized. For example, the generation that framed the Reconstruction Amendments also drew connections between the principle of equality that would come to be inscribed in the Fourteenth Amendment and the anti-cruelty promise of the Eighth Amendment.[129] It is especially illuminating that the subject came up both during debates over those transformative provisions[130] and that judges deployed the two rights-values in an interactive way in the years immediately after ratification—notably, in the "queue" case striking down a local sheriff's policy of cutting the hair off Chinese migrants who ran afoul of a housing ordinance.[131] Ho Ah Kow, the litigant, had prayed for relief, saying that having his hair shaved to within an inch of his scalp had "mutilated" him and caused him to be "disgraced" in his own eyes and "in the eyes of his friends and relatives,"[132] and "ostracized from" the respectable members of his transnational community (both in America and back in China).[133]

Justice Stephen Field, riding circuit in California, agreed. He declared the policy in violation of the Fourteenth Amendment's Equal Protection Clause because, despite its neutral wording, the law's "purpose [was] to reach the queues of the Chinese, and it [was] not enforced against any other persons."[134] Therefore, it was not just "special legislation" but also "hostile and spiteful legislation."[135] Justice Field went on to find that enforcement of the policy also amounted to "torture" proscribed by the Eighth Amendment, a punishment gratuitously added to detention in order to "aggravate the severity of his confinement."[136] This sanction, Field wrote, caused

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[128] For a sketch of the different forms of inequality, see Tsai, *supra* note 32 (manuscript at 18–19). There are many excellent studies of political mobilization through use of constitutional ideas that illustrate how the actual use of those ideas later change public meaning of those concepts, sometimes in durable ways. *See, e.g.*, MARY ZIEGLER, BEYOND ABORTION: *ROE V. WADE* AND THE BATTLE FOR PRIVACY 19 (2018) (discussing how mobilization shaped the right to abortion); Elizabeth Sepper & Deborah Dinner, *Sex in Public*, 129 YALE L.J. 78 (2019) (discussing the activism that led to recognition of sex equality in public accommodations laws); Reva B. Siegel, *How Conflict Entrenched the Right to Privacy*, 124 YALE L.J. F. 316, 319 (2015) (showing how the right to privacy was "shaped by conflict as well as consent"); Jack M. Balkin, *Constitutional Interpretation and Change in the United States: The Official and the Unofficial* 1 (Yale Law Sch. Pub. Law Research Paper, Paper No. 542, June 2015), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2594925 [https://ssrn.com/abstract=2594925] (analyzing how constitutional law changes in practice through social mechanisms).

[129] TSAI, *supra* note 6, at 147.

[130] *See id.*

[131] Ho Ah Kow v. Nunan, 12 F. Cas. 252, 257 (C.C.D. Cal. 1879).

[132] *Id.* at 253.

[133] *Id.*

[134] *Id.* at 255.

[135] *Id.* at 253, 256.

[136] *Id.* at 254–55.

"suffering altogether disproportionate to what would be endured by other prisoners if enforced against them."[137]

Notice this last formulation by Field when talking about the anti-cruelty principle, which explicitly incorporated an equality component to its purpose, asking whether others are punished similarly.[138] He concluded that the Chinese were made to suffer social harms that were disproportionate compared to how white prisoners were treated.[139] Now, look back upon Field's equality analysis, which explicitly emphasized the arbitrary, unnecessary, and deeply harmful ways in which an unequal policy harmed the Chinese.[140] It was essential, Field explained, that judges treat a broad law's "practical construction as a fact in its history."[141] Otherwise, closing one's eyes to the sophisticated plans of oppression and the harms they inflict would allow the Constitution's guarantees to "often be evaded and practically annulled."[142]

Field's integrated approach made perfect sense. Proponents of the Fourteenth Amendment were centrally focused on the rights of freed persons, but debates also encompassed gypsies, the children of Chinese migrants, and other marginalized groups in society.[143] Members of the Reconstruction generation were particularly incensed by the emergence of creatively oppressive local laws—many of them enacted through a state's police power to unequally punish, corral, or otherwise brand freed persons with second-class status.[144] They came up with a sophisticated remedial regime, with several moving parts, to deal with a broad of range of indignities, from large-scale oppression of former slaves to prejudice against foreigners.[145]

Drawing on this history, I have argued that even if the equality and anti-cruelty are treated as distinctive principles, they both protect individual dignity as well as maltreatment based on group membership. At times, each principle has been invoked to turn aside laws that are irrational, unfair, and outrageous.[146] The demand for equality, the ban on cruelty, and the duty of fairness collectively build a culture of equal dignity. Field grasped that, while the doctrinal fine points might be different for each concept, there would be some situations where more than one legal concept could do the job.[147] In such circumstances, one could do as Field did—which is to

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[137] *Id.* at 255.

[138] *See id.*

[139] *See id.*

[140] *See id.*

[141] *Id.*

[142] *Id.*

[143] *See* TSAI, *supra* note 6, at 62.

[144] *See id.* at 147–48.

[145] *See generally* CURTIS, *supra* note 64, at 6–7; TSAI, *supra* note 6, at 62–63, 147–48; *see also* JUDITH A. BAER, EQUALITY UNDER THE CONSTITUTION: RECLAIMING THE FOURTEENTH AMENDMENT 17–18 (1983); KURT T. LASH, THE FOURTEENTH AMENDMENT AND THE PRIVILEGES AND IMMUNITIES OF AMERICAN CITIZENSHIP 3–4 (2014).

[146] *See, e.g.*, TSAI, *supra* note 6, at 148.

[147] *See* Ho Ah Kow, 12 F. Cas. at 254–55.

find two violations for maximum effect[148]—or you could find a violation of one principle and ignore the other (in electing the second option, you would be engaging in principled substitution).

I should point out that insisting upon a historically grounded jurisprudence doesn't require that we adopt *originalism*—an interpretive approach that deploys a telescoped conception of history to narrow the meaning of a constitutional provision.[149] That interpretive method, which is of more recent vintage rather than anything that could be attributed to the Framers themselves, is driven by a particular ambition to prevail as the exclusive methodology when interpreting an open-textured provision. Despite its more sophisticated incarnations of late,[150] the approach as a whole remains committed to deciphering a fixed meaning at the moment of inscription. Its adherents deny that meaning can ever properly change through application.[151]

That brings us to the replaceability thesis: the extent to which ideas that are intimately connected can sometimes stand in place for each other, however imperfectly. This is something that I sense Zick is uncomfortable with, given that his approach employs a presumption of distinctiveness and demand for harmony among values that emphasize conceptual tidiness.[152] I won't spend time defending conceptual overlap other than to say that a robust constitutional culture will entail a fair amount of redundancy and that the very way in which we talk about values like fairness and equality have always demonstrated a high degree of congruence.

But I will note that principled substitution doesn't pose the same kind of threat to conceptual dilution that explicit efforts to amalgamate concepts might. It's not the same as trying to integrate disparate ideas and then making a hash out of both. Instead, it's choosing one idea over another when more than one concept can do some good. This choice is typically made in order to overcome a serious institutional objection or cultural obstacle of some kind. In that respect, substitution involves recharacterizing the stakes of a dispute in doctrinally different terms than how they have been originally framed. So long as a decision maker acts with integrity in shifting to an alternative formula, and the outcome is defensible within those terms, substitution should neither undermine long-term harmony nor exacerbate conceptual confusion.

In some settings, principled substitution will be all that's feasible. For instance, in schools, prisons, and government-run detention camps, you might be dealing with

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[148] *See id.*

[149] *See* John O. McGinnis & Michael B. Rappaport, *Unifying Original Intent and Original Public Meaning*, 113 NW. U. L. REV. 1371, 1373 (2019).

[150] *See, e.g.*, Jack M. Balkin, *The Construction of Original Public Meaning*, 31 CONST. COMM. 71, 78–79 (2016) (discussing different ways to apply the original public meaning theory); McGinnis & Rappaport, *supra* note 149, at 1371 (unifying two approaches to originalism, original intent and original public meaning, to create a singular approach); Lawrence B. Solum, *Originalist Theory and Precedent: A Public Meaning Approach*, 33 CONST. COMM. 451, 453 (2018) (discussing public meaning originalism).

[151] *See* McGinnis & Rappaport, *supra* note 149, at 1371.

[152] *See* ZICK, *supra* note 3, at 23.

non-citizens or citizens who press problematic equality claims (i.e., children, undocumented migrants, people convicted of a crime, individuals designated as "enemy combatants").[153] For people in those situations, a certain degree of different treatment is baked into the situation and presumed to be justified.[154] This means that, as a practical matter, certain rights like equality will have little potency, and some other concepts like anti-cruelty or fairness or reasonableness will have to carry the load. The good news is that so long as the egalitarian potential of these other ideas can be distilled and perhaps even maximized, the unequal burdens that such individuals must experience can be lessened. Not all, certainly, but at least the measures that can't be justified or inflict wanton pain and suffering. In these moments, substitution is akin to a strategy of the oppressed.

Think, too, of street encounters between the people and police. There's no doubt that formally, notions of fairness, reasonableness, equality, and anti-cruelty all overlap to protect a person's bodily integrity and their property interests. But realistically, we tend not to see fairness or anti-cruelty arguments because they are slightly harder to make, and because the rule of reason has largely displaced the other ways of regulating those encounters. This is not to say that these patterns are ideal. It is merely to point out that these patterns delimit future opportunities to borrow or substitute.[155]

There is another situation in which principled substitution can be the best way to do justice, and that's during a period of transition, from one political regime to another. At those moments, there may be a burgeoning, new vision of democratic justice, but defenders of the older regime try to hold fast to their old ways, and creative repurposing of those old ways remains the most effective strategy for easing the past into the present. It will take some time before conditions become congenial for those in charge to take up new ways. They cling to power by insisting upon applying their limited doctrinal frameworks, which are then stretched but not yet refined, and by entertaining tough questions but exhibiting an insufficient appetite to interrogate outmoded cultural or economic assumptions. Here I am thinking of not only the 1930s as the Court worked through the populist challenges inaugurated by the New Deal,[156] but also the 1940s and 1950s when the Justices struggled to reconcile the defense of individual liberties with majority rule in the face of totalitarianism at home and abroad,[157] and the 1960s, when civil rights mobilization forced a rethinking of protest in places not explicitly dedicated for such purposes, like businesses and inside libraries.[158]

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[153] *See* TSAI, *supra* note 6, at 154.

[154] *See id.*

[155] *See, e.g.*, Whren v. United States, 517 U.S. 806, 811–12 (1996).

[156] *See, e.g.*, Wickard v. Filburn, 317 U.S. 111, 132–33 (1942) (upholding fines under the Agricultural Adjustment Act).

[157] *See* Brown v. Bd. of Educ., 347 U.S. 483, 495 (1954); Korematsu v. United States, 323 U.S. 214, 223–24 (1944), *abrogated by* Trump v. Hawaii, 138 S. Ct. 2392 (2018).

[158] *See* Brown v. Louisiana, 383 U.S. 131, 142 (1966).

Sometimes, as with challenges to practices within the criminal justice system, notions of racial equality are poorly developed. Ideas that are articulated may be explicitly limited in context. Later, those limitations (public/private, speech/action) no longer make as much sense as they once did. And so we must reach for other ideas to either shore up, or stand in place, of the principle that now makes most sense. In the decades before the civil rights revolution, a significant amount of racial progress had to be made through other means, such as notions of procedural fairness. In *Brown v. Mississippi*, the Court held that the torture of black suspects cast doubt on the integrity of the judicial system if it relied upon evidence extracted through such horrific and unreliable methods.[159] A related procedural strategy focused on developing the right to counsel as a safeguard against excessive racism. In *Powell v. Alabama*, for instance, the justices stressed that lawyers were essential to protecting the black defendants who were "young, ignorant, illiterate, [and] surrounded by hostile sentiment."[160]

Most observers at the time saw such investigatory tactics and rushed trials without adequate representation as emblematic of a racially unequal justice system.[161] But major cultural and institutional obstacles stood in the way of a more robust accounting on equality grounds. Hence, activists and jurists both had to search creative for ways to do justice that were not ideal, even as they continued to work to build more congenial conditions for robust theories of equality.

Today, as we face the prospect of an extremely conservative Supreme Court that is hostile to many federal constitutional rights and willing to sideline the federal courts on major problems contributing to democracy's decline in America, principled substitution may have to take another form: state constitutional law. Some states have a rich tradition of protecting individual rights more actively then the U.S. Supreme Court on search and seizure issues, and in recent years state supreme courts have also done so to safeguard abortion rights, free speech, and the right to vote.[162] Inroads made in those contexts can later be leveraged during federal court litigation when social conditions are more amenable to the development of jurisprudence in that forum.

Its worth remembering that constitutional borrowing is shaped by the values of the past as well as by the needs of the present. And even more—if we care about justice as much as we care about fostering a truly heterogeneous political culture, we'll have to tolerate quite a bit of disharmony, repetition, and unruliness.

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[159] *See* 297 U.S. 278, 285–87 (1936).

[160] 287 U.S. 45, 57–58 (1932).

[161] *See* TSAI, *supra* note 6, at 53.

[162] *See, e.g.*, League of Women Voters of Pa. v. Pennsylvania, 181 A.3d 1083, 1084 (Pa. 2018) (holding that partisan gerrymandering violates state constitution's guarantee of "free and equal" elections); Common Cause v. Lewis, No. 18 CVS-014001, 2019 N.C. Super. LEXIS 56 at *413 (striking down maps gerrymandered against Democratic Party on three state constitutional grounds: free and equal elections, equality, and free speech and assembly); Robert L. Tsai, *Abortion Goes on Trial, Again*, BOS. GLOBE (Feb. 28, 2019). *See generally* JEFF SUTTON, 51 IMPERFECT SOLUTIONS: STATES AND THE MAKING OF AMERICAN CONSTITUTIONAL LAW (2018).