



ORIGINALISM ASCENDANT

The Constitution of the 2020s

What lies ahead for the
Constitution and the courts
after the overruling of *Roe v.
Wade*?

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I. Introduction

I am not an academic or a civil rights lawyer. I'm a Dallas-based specialist in civil appellate law, based at one of Texas' top commercial trial boutiques. This year marks the end of my third decade in law practice.

In recent years, I have been lucky to do interviews with dozens of TV, radio, and print journalists, as well as publish several op-eds, addressing a wide range of constitutional issues. I also publish two blogs and a podcast about commercial-law and constitutional topics of the day.

My experience—professionally, as a Texas appellate litigator, and in my “side gig” as a legal “explainer”—has given me substantial and practical insight into the transformative effect of President Trump on the nation's courts.

For example, he appointed three of the nine Justices on the Supreme Court, as well as six of the seventeen full-time judges on the U.S. Court of Appeals for the Fifth Circuit (the federal appeals court that covers Texas). The impact of those appointments was powerfully shown in mid-2022 when the Supreme Court overruled *Roe v. Wade* and all three Trump appointees joined the majority opinion.

Dobbs was based on originalism, a way of interpreting the Constitution based on what the framers thought when drafting it and its amendments. In this e-book, I examine how the Supreme Court and Fifth Circuit applied originalism in *Dobbs* and other significant constitutional opinions of 2022.

From there, I consider ways that those cases may shape dialogue about the Constitution—both in and out of court—for the rest of the 2020s. I hope that you enjoy my perspective on these matters and find my ideas informative and helpful.

II. Landmarks of 2022: Originalism and “UUPs”

I start by looking at how two significant 2022 cases applied originalism. In particular, I consider how originalism uses analogy to

bridge historical gaps between past and present. From there, I look at what I have somewhat jokingly called “UUPs,” for “Unexpectedly Unsettled Precedents,” and ask whether some seemingly established principles will stay viable with a more originalist judiciary.

A. Originalism

Originalism teaches that a focus on the framers’ intent leads to sound decisions based on objective evidence. The Constitution’s framers either intended something, or they didn’t. Two cases from 2022 show how the federal courts apply that general concept to specific, modern-day issues.

The first is *Jarkesy v. SEC*, decided by a Fifth Circuit panel in May 2022.¹ The majority held that the Seventh Amendment, which preserves the right to jury trial for “Suits at common law,” applies to an enforcement action by the Securities and Exchange Commission if the action seeks a monetary penalty.

The Seventh Amendment took effect with the ratification of the Bill of Rights in 1791. Of course, neither the SEC nor the federal securities-fraud statutes existed until 1933—142 years later. And the *Jarkesy* majority acknowledged that “some actions provided for by the securities statutes may be new and not rooted in any common-law corollary.”

Nevertheless, it held that “the enforcement action seeking penalties in this case was one for securities fraud, which is nothing new and nothing foreign to Article III tribunals and juries.” In other words, because the case involved a claim for money damages, it was enough like a traditional “Suit[] at common law” to receive Seventh Amendment protection.

The second case is *Dobbs v. Jackson Women’s Health Organization*,² which overruled *Roe v. Wade*. The majority warned that “[o]n occasion, when the Court has ignored the ‘appropriate limits’ imposed by ‘respect for the teachings of history,’ it has fallen into ... freewheeling judicial policymaking” Therefore, it continued, “guided by the history and tradition that map the essential components

of our Nation's concept of ordered liberty, we must ask what the *Fourteenth Amendment* means by the term ‘liberty.’”

From there, *Dobbs* exhaustively reviewed state laws about abortion as of 1868, when the Fourteenth Amendment took effect. After linking that review to a broad historical survey running back to the Middle Ages, the majority concluded that abortion-related rights were not part of the “ordered liberty” protected by the Constitution in 1868.

This analysis contrasts with what the Fifth Circuit did in *Jarkesy*. Just as the SEC did not exist in 1791, the vast majority of American women could neither own property nor vote in 1868. *Jarkesy* bridged that historical gap with an analogy between a modern-day SEC enforcement action and a 1791-era claim for money damages.

But in *Dobbs*, the majority did not draw a comparable analogy between a woman’s interest in bodily autonomy protected by *Roe*, and the broader protections of individual liberty and autonomy that the Constitution clearly guaranteed in 1868. Instead, *Dobbs* concluded that the extensive history of abortion restrictions established the relevant “order” for the Constitution’s protection of “ordered liberty,” and thus foreclosed constitutional protection for those rights.



The Supreme Court in mid-2022

The approach used by *Dobbs* does not entirely square with that of *Jarkesy*. The liberty interests protected by *Roe* were not recognized in 1868 because a woman’s right to participate in politics did not exist—just as an SEC enforcement action did not exist in 1791 because the SEC did not exist.

If an analogy works in the SEC context to bridge that kind of historical gap, it would seem relevant to at least consider a similar analogy, when faced with a comparable gap involving women’s health and reproductive rights.

The *Dobbs* dissent, for example, noted “the myriad ways bearing a child can alter the ‘life and future’ of a woman and other members of her family.” The Constitution in 1791 and 1868 plainly protected key aspects of citizens’ “life and future.” Even if that analogy is not ultimately accepted, the tool of analogy still appears intellectually relevant—especially when a similar sort of analogy was case-dispositive in *Jarquesy*.

When history provides no record, originalists must guess and extrapolate. Like anyone else, they have a natural bias toward outcomes that they prefer as a policy matter.

The contrast between *Jarquesy* and *Dobbs* shows that two conservative courts can be strongly committed to “originalism,” but then apply that commitment along different analytical paths. Those differences can leave those courts open to criticism as “results oriented,” notwithstanding their high-level general commitments to the idea of originalism.

B. Unexpectedly Unsettled Precedents (“UUPs”)

The focus on originalism has led to some rethinking of longstanding constitutional precedents, which I’ve sometimes called “UUPS” for “Unexpectedly Unsettled Precedents.” Those include constitutional protection for a right of interstate travel, and a well-known line of cases that rejects more than minimal protection for a “right to earn a living.”

1. Right of Interstate Travel

In July of 2022, shortly after *Dobbs*, a group of conservative Texas legislators announced their intent to pass new statutes to impose criminal and civil penalties for assisting with abortions involving a Texas resident, “regardless of where the abortion occurs, and regardless of the law in the jurisdiction where the abortion occurs.”³

Any constitutional challenge to such a law will likely involve the right of interstate travel. While the Supreme Court has assumed the existence of such a right for many years, not many cases have developed and applied it to specific situations. Study of those cases

reveals a surprisingly underdeveloped body of law for a concept that has been part of constitutional discussion for many years.

A good example appears in *The Slaughter-House Cases*,⁴ decided in 1872. Concerned about public health, the City of New Orleans consolidated all animal-slaughtering operations into one, government-owned facility. Private slaughterhouse owners sued, arguing that this law violated their “privileges or immunities” of citizenship, as protected by the newly enacted Fourteenth Amendment.

The Supreme Court rejected that challenge, holding that the “privilege or immunities” clause protected only rights of national citizenship. As an example of such a right, the court identified the right to travel between states, saying: “[A] citizen of the United States can, of his own volition, become a citizen of any State of the Union by a *bona fide* residence therein, with the same rights as other citizens of that State.”

Other right-to-travel cases are in this same vein—identifying the right as constitutionally protected, but not actually applying it to the case at hand. An example is *Bigelow v. Virginia*⁵ from the 1970s. Bigelow edited a newspaper in Virginia that ran an ad for a New York service that facilitated access to abortion. He was convicted under Virginia law at the time, and a majority of the Supreme Court vacated that conviction.

While *Bigelow* turned on the First Amendment's protection for commercial speech, the majority observed generally: “A State does not acquire power or supervision over the internal affairs of another State merely because the welfare of its own citizens may be affected when they travel to that State.”

That strong language must be taken with a grain of salt. *Bigelow*, decided soon after *Roe*, was written by Justice Harry Blackmun (*Roe*'s author), and a dissenter was Justice William Rehnquist—at the time, a young conservative firebrand, but today the philosophical inspiration for the Supreme Court's conservative majority.

The right of interstate travel made a brief appearance in *Dobbs* in Justice Brett Kavanaugh's concurrence, when he said: “For example, may a State bar a resident of that State from traveling to another State

to obtain an abortion. In my view, the answer is no, based on the constitutional right to interstate travel.”

That statement leaves unanswered questions, though. What if the law at issue isn’t an absolute bar, but a law allowing private lawsuits for civil penalties, such as Texas’ SB8? Or an advertising restriction similar to the one at issue in *Bigelow*? As with the general discussion in the Supreme Court’s right-to-travel opinions, this comment provides little guidance for specific situations.

In sum, while the law in this area is settled at a high level—the Constitution has long been assumed to protect a right to interstate travel—how that general principle may apply to new anti-abortion laws after *Dobbs* remains to be seen.

2. Right to Earn a Living

A recent Fifth Circuit concurrence argues for potential constitutional protection of a “right to earn a living,” based on how such economic matters were understood in 1791 when the Constitution was ratified.

Such a right sounds attractive at first. The United States has developed the world’s largest economy through its commitment to free-market principles and individual economic freedom. The “American Dream” of upward economic mobility has been a powerful motivational force throughout the country’s history.

But if that right is defined by the economic thinking of the late 1700s, without any benefit from modern economic analysis, it could arrogate substantial power to the courts with no empirically based guardrails to constrain it.

The case itself, *Golden Glow Tanning Salon v. City of Columbus*,⁶ decided November 8, 2022, is straightforward under today’s case law. A three-judge Fifth Circuit panel rejected a constitutional challenge by a tanning salon to a Mississippi town’s COVID-19 restrictions.

The panel applied “rational basis” review—the standard since the 1930s for constitutional challenges to economic regulation. Under that

standard, the panel held that the city had a plausible reason for the public-health law.

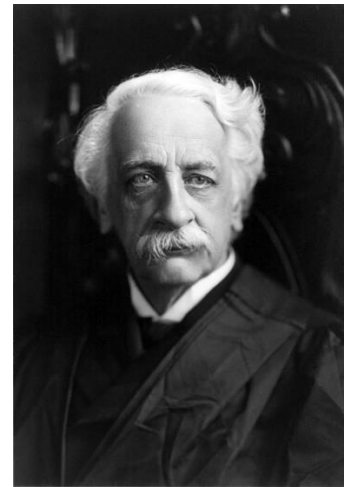
A concurrence acknowledged the current state of rational-basis precedent. But it also noted that recent Supreme Court opinions, such as *Dobbs*, focus on the historical understanding of constitutional text when written. Applying such a focus, argued the concurrence, the constitutional protection of “liberty” may be informed by thinking from the 1700s about the “right to earn a living,” and whether protection of such a right could justify invalidating an economic regulation.

Of course, that phrasing is just how the Supreme Court described the issue before it in *Lochner v. New York*,⁷ the long-discredited 1905 opinion that struck down a maximum-hour restriction in the baking industry. *Lochner* reasoned that “[s]tatutes of the nature of that under review, limiting the hours in which grown and intelligent men may labor to earn their living, are mere meddlesome interferences with the rights of the individual”

The return of *Lochner* in the name of originalism is an unexpected, but not illogical, result of *Dobbs*, and presents an intellectual challenge for originalists.

Many principles considered by the framers were wise and constructive. Others were not; for example, the original Constitution infamously protected the political power of slave states with the “Three-Fifths Compromise” by which a slave counted as a partial person in calculating Congressional seats and Electoral College votes.

Separating useful originalist ideas from the distracting ones—or even dangerous ones—presents an important challenge for the effective and credible use of that interpretive technique.



Hon. Rufus Peckham
Lochner Author

III. The 2020s: What May Lie Ahead

I now look forward from *Dobbs*, towards the balance of the 2020s. In particular, I consider how courts will address a constant challenge for originalism: how to analyze modern issues that involve matters beyond the experience—or even comprehension—of the Constitution’s framers.

I then examine the many voices that may be heard on constitutional issues in the 2020s. Those include the surprisingly wide range of “people’s elected representatives” who *Dobbs* invited to participate in abortion regulation. They also include members of Congress who may become interested in the considerable, albeit little-used, constitutional powers that the legislative branch has over judicial structure.

A. Constitutional Dialogue in the Courts

As illustrated above by *Jarkesy* and *Dobbs*, originalism has difficulty with issues that the Constitution’s drafters did not know about. In this section, I focus on two cases that involve social-science concepts that did not exist in 1791, and examine how the courts may try to apply originalist ideas in such settings. I also look at a recent gun-regulation case that brought the law of the Fifth and Third Circuits into conflict.

1. How Relevant is This Question: “What Would Hamilton Do?”

In *Community Financial Services Association of America v. Consumer Financial Protection Bureau*,⁸ business organizations challenged a payday-loan regulation issued by the CFPB. Among other points, they argued that the CFPB was structured unconstitutionally because its funding mechanism violated the Appropriations Clause of the Constitution.

A Fifth Circuit panel unanimously agreed. The opinion—unquestionably, bold and principled—leads to the question whether

“What Would Hamilton Do?” is a meaningful lodestar for constitutional interpretation about modern-day financial regulation.

The Appropriations Clause says: “No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law” It has been generally understood to mean that the U.S. Treasury cannot pay out money unless appropriated by an act of Congress.

The CFPB is funded by the Federal Reserve, which in turn, is funded outside the Congressional appropriations process by assessments on banks. The funds allocated to the CFPB are then maintained in an account that only it may access. The plaintiffs argued that this structure violated the Appropriations Clause because it “double insulated” the CFPB from Congress.

Seven federal courts have rejected that argument, including the U.S. Court of Appeals for the D.C. Circuit. Summarized generally, those opinions note that many federal financial regulators (such as the Federal Reserve, FDIC, and Comptroller of the Currency), to avoid the phenomenon of “agency capture,” are funded by assessments made outside the usual budgeting process. Because that funding is done pursuant to acts of Congress, those courts reasoned that an “Appropriation[] made by Law” had occurred and satisfied the Appropriations Clause.

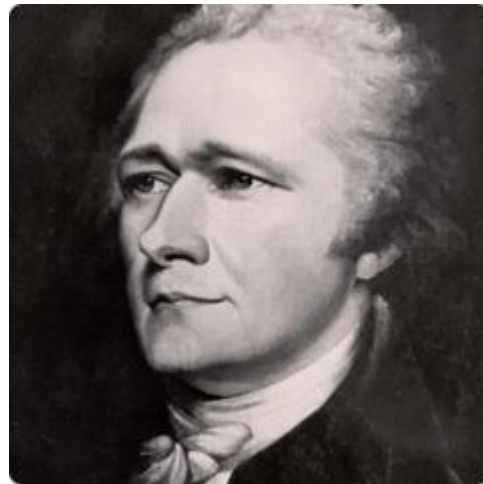
The Fifth Circuit saw matters otherwise. Citing several drafters of the Constitution, including the ubiquitous Alexander Hamilton, the court observed that the Appropriations Clause “embodies the Framers’ objectives of maintaining ‘the necessary partition among the several departments,’ ... and ensuring transparency and accountability between the people and their government.”

The court then held: “Wherever the line between a constitutionally and unconstitutionally funded agency may be, this unprecedented [double insulated] arrangement crosses it.” The opinion acknowledged the different results reached by other courts but “respectfully disagree[d]” with them in light of the CFPB’s particular structure, coupled with its considerable influence on the economy.

The court's observations as to the framers' general views about government structure are clearly correct. But the specific journey called for in this case—the path from “appropriations” today to “appropriations” as understood by Hamilton—is a long and bumpy one.

In the late 1700s, the federal government had no administrative agencies that issued financial regulations, much less a meaningful central bank that could handle such an agency's finances. The phenomenon of an agency's “capture” by the businesses it regulates was unknown. And since that time, the nation's financial markets have experienced many devastating “panics,” crashes, and crises, most recently in the Great Recession of 2008.

If Alexander Hamilton—a financially savvy advocate of strong federal government—were brought forward in time, it is very much an open question what he would actually think about the Appropriations Clause in the context of modern-day financial regulation. Absent a time-traveling appearance by him, the question “What Would Hamilton Think?” appears largely speculative when applied to organizations and activities that did not exist during his life.



Alexander Hamilton

Dobbs warned about overreliance on a single “capacious term” such as “liberty,” noting that “historians of ideas’ had cataloged more than 200 different senses in which the term had been used.” (Indeed, its warning specifically referred to the *Lochner* cases, discussed in the next section.)

To be sure, the word “appropriation” does not fire the imagination quite like the word “liberty.” But 200 years of crisis-filled economic history can also produce “different senses” of a word. Those differences pose challenges for an originalist inquiry about the meaning of a specific term such as “appropriation,” applied to a technical modern-day issue such as bank regulation.

2. Will Lochner Return?

Similar considerations emerge when considering recent reexamination of *Lochner*.

The Supreme Court abandoned *Lochner* in the 1930s when the Court faced backlash against its repeated invalidation of New Deal economic programs. Reasonable minds can certainly differ about the massive role that government plays in the modern economy, especially when much of that power lies with agencies led by unelected administrators.

But the terms of such debates are framed by insights from the field of economics. (The famed English economist Joan Robinson notably described her work as creating a “toolbox” for policymakers.) And that field simply did not exist in 1791 when the Constitution was ratified.

The concept of supply and demand curves, for example—the basic concept behind virtually all economic analysis—did not meaningfully exist until 1890, when Alfred Marshall published his landmark *Principles of Economics*.

From the left, the argument for strong fiscal policy was not fully developed until John Maynard Keynes published *The General Theory of Employment, Interest and Money* in 1936. From the right, Milton Friedman’s epic *Monetary History of the United States* was published in 1963. The Nobel Prize in Economic Sciences did not begin until 1969.

Vigorous debate about economic policy is a critical part of government. And the Supreme Court abandoned *Lochner* in the 1930s because it realized that most such debates are not for the courts. While a “right to earn a living” sounds attractive, it presents real risks when developed in the name of “originalism” without any benefit from modern economics.

3. Will Courts Get Along?

This next case is not strictly an example of originalism. But it illustrates the kind of difficulty that can arise when an energetic court,

addressing an issue of policy significance to many originalist thinkers, comes into tension with another court with a different point of view.

Some basic theory establishes the background. Scholars traditionally classify the statements in a judicial opinion as “holdings” (the reasons for a court’s decision) or “dicta” (additional discussion not necessary to the result, with varying precedential value depending on its thoroughness).

That distinction comes up short when applied to a recent concurrence in the Fifth Circuit case of *Defense Distributed v. Platkin*. The concurrence—a courteous (though unenforceable) request to a district court in another circuit—is an unusual jurisprudential addition to the mosaics of holding and dicta that ordinarily fill the *Federal Reporter*.

The concurring opinion arose from a contentious forum dispute in a firearm-regulation case. Gun ownership rights are a particular area of importance for originalist thinkers, as most recently shown by the Supreme Court’s 2022 invalidation of a New York gun-sales restriction.⁹

Defense Distributed provides data files from which a 3D printer can produce a rudimentary firearm. The company has been in litigation for years with federal and state gun regulators.

In the spring of 2022, a 2-1 Fifth Circuit panel opinion held that a Texas district judge erred by transferring a dispute between Defense Distributed and the New Jersey attorney general to the District of New Jersey.¹⁰ But the Fifth Circuit could not order the New Jersey court to return the case, because New Jersey is not in the Fifth Circuit.

Accordingly, the court ordered the Texas judge to ask the New Jersey judge to voluntarily transfer the case back to Texas. The District of New Jersey received that request, considered it after further briefing, and declined it on July 27. The Texas judge rejected further submissions on this point by Defense Distributed, and that led to further proceedings in the Fifth Circuit.

On September 16, 2022, the Fifth Circuit issued a routine order setting the new appeal for the earliest available argument date.¹¹ The order had an unusual concurring opinion, asking that the New Jersey

court reconsider return of the case to Texas in the interest of inter-circuit comity:

“We can think of no substantive reason—and none has been offered to us—why this case should nevertheless proceed in New Jersey rather than Texas, other than disagreement with our decision in *Defense Distributed*. The Attorney General of New Jersey confirmed as much during oral argument.

So we respectfully ask the District of New Jersey to honor our decision in *Defense Distributed* and grant the request to return the case back to the Western District of Texas—consistent with the judiciary’s longstanding tradition of comity, both within and across the circuits.”

In explaining how to write an appropriate letter of complaint, Amy Vanderbilt’s *Complete Book of Etiquette* advises: “If you write politely and make it clear that you expect some adjustment or correction to be made, you will usually get prompt results.”¹² The carefully drafted concurrence certainly follows her counsel for making a courteous request.



*Defense Distributed’s
single-shot Liberator*

But substantively, the concurrence is a jurisprudential unicorn. It is not a holding about the scheduling matter before the court (e.g., “The argument will be expedited”) or dicta about that issue (e.g., “I hope the expedited argument is in New Orleans because the courtroom is nice”). Nor is it holding or dicta about the issue that **was** previously before the court—the propriety of New Jersey venue—because that proceeding is over.

Does the jurisprudential novelty of the concurrence matter? Most likely, no. It will likely be remembered as an unusual feature of a hard-fought forum dispute. That said, it does sound some cautionary notes for the future.

The *Complete Book of Etiquette* offers a wide range of form letters that raise polite complaints and, by design, are adaptable to almost every conceivable slight or shortcoming.

In contrast, the Constitution limits federal judicial power to the resolution of a “case or controversy”—a well-developed term of art that constrains who and what may be affected by that power. The traditional concept of an opinion as a mix of holding and dicta is intertwined with that definition of a justiciable controversy.

While Amy Vanderbilt’s general advice to “write politely” is always well-taken, her specific advice about complaint letters is an uneasy fit with the “case or controversy” limitation on judicial power, and should be treated with appropriate caution. A case like *Defense Distributed*, where the substantive dispute (firearms regulation) has particular policy significance, seems uniquely risky as a breeding ground for jurisprudential unicorns.

Originalism faces a challenge when applied to topics that the framers knew nothing about. Recent cases about economic regulation provide instructive examples of situations where originalism may reach its useful limit.

B. Constitutional Dialogue Outside of Court

Constitutional conversation also takes place outside the courthouse. In this section, I consider the invitation by *Dobbs* for “the people’s elected representatives” to take up abortion regulation. In Texas, a surprising number of diverse “representatives” are emerging to answer that invitation.

I also look at the consequences—intended, and otherwise—of a recent Texas law about display of the national motto in public schools. I conclude by examining Congressional power to potentially change the structure of the federal courts, both as to subject matter and their makeup.

1. Who Are “the People’s Elected Representatives” after Dobbs?

Dobbs emphasized federalism—specifically, the question whether the legal framework for abortion should be set nationally (as in *Roe*), or by states (as in SB8 and the criminal statutes addressed in *Roe*). It concluded: “It is time to heed the Constitution and return the issue of abortion to the people’s elected representatives.”

In Texas, recent court battles have shown that “the people’s elected representatives” include far more than members of the Legislature. There are not just two levels to our government (state and federal) but also a third—local authorities.

Starting in 2020 as the COVID-19 pandemic began, intense litigation addressed the division of power between state and county government for conducting elections. The continuing pandemic led to further, extensive litigation about the role of state, county, and local government in public-health regulation. And finally, litigation about Texas’ SB8 law, which established a complex procedure for civil lawsuits about abortion services, examined when a state can claim to have removed itself from enforcement of a law.

Taken together, these lawsuits describe Texas government as more complex and nuanced than anyone had really appreciated before the COVID-19 pandemic. Three aspects of that complexity suggest ways that “the people’s elected representatives” may react to *Dobbs* by protecting, rather than attacking, access to abortion.

The first is prosecutorial discretion. In the mask litigation, the Attorney General consistently sought dismissal of cases because state government lacked authority to seek penalties for violating the Governor’s emergency orders. That power, argued the Attorney General, rested with district attorneys elected at the county level. (In Texas, oddly enough, prosecutors are considered part of the judicial branch of government.)¹³

The same holds true for laws criminalizing abortion services that took effect after *Dobbs*. District attorneys enforce those laws. As the

Attorney General noted in the mask cases, those county-level officials are free to set their own enforcement priorities.

The second is the concept of immunity from suit. Throughout the election, mask, and SB8 litigation, Texas argued that its sovereign immunity as a state meant that it could not be sued. Texas also invoked rules of state-court procedure that allow an immediate appeal of a ruling about immunity, accompanied by an automatic stay of all other court proceedings in the meantime.

Relatedly, the mask cases emphasized the strong protection that Texas law gives to religious and spiritual belief as to matters of personal autonomy. Claims that a mask or vaccination requirement violated personal conscience were taken seriously. That protection ties into the general concept in state law of “ecclesiastical immunity,” which insulates a church from claims that implicate its internal governance under its religious principles.

Of course, a local government or church may not disregard a Texas statute. But at the same time, if as a matter of public health, a local authority chose to facilitate its residents’ access to out-of-state abortion resources—or, as a matter of conscience, a faith-based organization did something similar, those entities could potentially assert immunity defenses, given the way immunity was litigated in the election, mask, and SB8 cases.

The third relevant source of authority is the power of local ordinance. Here again, a locality is not free to disregard a controlling state law. But the mask cases brought to light a surprising feature of Texas law.

While a county is fairly characterized as a subdivision of the State of Texas, a home-rule city is not. It has its own “sovereignty” that is at least somewhat independent of the state. Particularly in the context of public-health regulation, a city’s own lawmaking power could be the basis for regulation in the abortion area; for example, by clarifying unclear language in state law, or filling a gap in it.

Conceptually, the machinery of government is no different than the wiring of a car or the programming of a computer. It works no matter who operates it. Texas is a sprawling and highly diverse state,

with an equally intricate system of government. That system presents a diverse array of “people’s elected representatives” with authority and discretion to respond to the invitation presented by *Dobbs*.

2. Where Will People Sue?

The pre-*Dobbs* abortion cases made clear that constitutional litigation will go forward in both state and federal court. In particular, in late 2021 when the Supreme Court rejected a pre-enforcement challenge to SB8, it held that state courts may and should hear constitutional challenges to that kind of state law. They would proceed as appeals from a final judgment in a civil action brought pursuant to SB8.

Of course, the Supreme Court has the last word about constitutional questions. That said, the Supreme Court hears only a small fraction of the cases that seek its review. Lower appellate courts are often the last word on many important legal issues, and Texas state courts reviewing judgments in SB8-type cases would be no different.

The contrast between state and federal appellate courts is particularly strong for Texas. The Fifth Circuit is widely recognized as a conservative court on constitutional issues. In contrast, the Texas courts of appeal for large urban areas have become predominantly Democratic, and can be expected to have a more liberal view of abortion-related laws and other constitutional matters.

The Texas Supreme Court is a conservative, all-Republican court, but like the U.S. Supreme Court, can only hear a small percentage of the cases that seek review. While the state supreme court can reasonably be expected to view abortion-related laws in a similar way to the Fifth Circuit, it does not have to hear any such case if it decides not to.

As a result of the contrast between the state and federal appellate systems, seemingly arcane questions of appellate procedure may become outcome-determinative in abortion cases and other significant constitutional disputes. Those seeking to maintain access to abortion

will position their cases to go no further than the Democrat-dominated intermediate courts of appeal, while those seeking expansive state regulation will guide those cases into the federal system or actively seek Texas Supreme Court review of them.

Additionally, the broad reach of some proposed abortion laws suggests that we may see new voices and perspectives in this type of litigation.

Abortion cases have traditionally featured providers, such as Jackson Women's Health in *Dobbs*. But new laws reach more broadly, potentially including employers who pay for abortion services, Uber drivers and pilots who take someone to another state for an abortion, or even attorneys providing advice about the scope of a law.

These new voices will likely bring fresh perspective about where to sue and what specific issues to sue about.

3. Who Contributes to Constitutional Dialogue—and How?

Pursuant to a new statute, Texas school districts are receiving donations of posters with pictures of the U.S. and Texas flags, along with the national motto “In God We Trust.”

Section 1.004 of the Texas Education Code requires a public school to display, “in a conspicuous place,” “a durable poster or framed copy of the United States national motto, ‘In God We Trust,’” if the poster is given to the school by private donors and meets two requirements.

The poster also “must contain a representation of the United States flag centered under the national motto and a representation of the state flag,” and it “may not depict any words, images or other information other than the representations listed in the previous subsection about the motto and the two flags.”

At the start of this school year, the Carroll ISD, in Southlake, Texas—an affluent suburb of Dallas—received a set of such posters

from a local business. The school board accepted the posters at a public meeting and then placed them in the district's various campuses.

A father in the district then tried to donate six more posters. One had "In God We Trust" written in Arabic. The others were written in English but decorated in vibrant rainbow colors.

The school board turned him down, saying that the statute limits display to one poster or framed copy, so that schools are not overwhelmed with donations. The father argued that the law does not establish a one-poster limit, and requires a district to accept "a" poster so long as it satisfies the law.

Both sides have a point. It seems unreasonable to require a school district to put up dozens of posters in conspicuous places. But at the



*The national motto
on the \$20 bill*

same time, we accept statutes as the Legislature writes them. This statute does not set a numerical limit, and it is not irrational for a law that encourages display of the national motto to encourage extensive displays of that motto.

The Southlake controversy shows that even within the strict boundaries set by this law, there is substantial room for different expressions (and thus, a potential First Amendment lawsuit), if a district is found to have engaged in content discrimination by favoring the message expressed by one poster design over another poster's intended message.

A poster can make a statement about the motto, pro or con, by the way it is written. Imagine, for example, a poster that writes the motto in an attention-getting font. Some fonts are associated with certain political movements. Some are easy to read while some are more difficult.

Similarly, imagine a poster shaped in a Star of David, or the crescent shape associated with the beginning of Ramadan. Yes, the statute says that a poster may not contain "any other information" than

what is specified. But the motto still must be written in a font, and the poster must have a shape. Why is one font or shape better than another? Trying to answer that question could also lead to a claim of content discrimination in violation of the First Amendment.

Fortunately, there is another plausible reading of this statute, because it sets no requirement for how long the poster must remain in the “conspicuous place.” Surely, the Legislature did not mean for a poster to just be displayed for a few seconds. But in the absence of an express term, it would be fair for a district to assume that the Legislature intended a reasonable display time.

Then, the posters donated by the local business at the start of the year could be displayed for a week or two, followed by the rainbow-colored ones for a week or two. This approach to the law balances the interests of people that want a more traditional presentation of the motto as compared to others who, within the bounds of the law, want to expand that presentation.

Intentionally or not, the new Texas law has sparked a debate about the national motto, what it means, and how to display it. Hopefully, if the law is read reasonably, it can encourage a constructive and democratic dialogue across the state.

4. Could Congress Restrict Federal-Court Jurisdiction?

A conservative federal judiciary is openly skeptical about the reach of the “administrative state”—the sprawling agencies that make up most of today’s federal government. In response to opinions that limit agency power, Congress may be tempted to respond in kind with limits on judicial power. The Supreme Court’s recent *West Virginia v. EPA* opinion may have unintentionally shown Congress how to do so.

Two recent cases illustrate current conservative thinking about the administrative state. The first is *Jarkesy v. SEC*, discussed earlier. A Fifth Circuit panel held that the Seventh Amendment applies to an enforcement action by the SEC that seeks a monetary penalty. The court also held that Congress unconstitutionally delegated too much

power to the SEC by letting it choose between court or an internal tribunal when bringing an enforcement action.

One month later, in *West Virginia v. EPA*,¹⁴ the Supreme Court considered a challenge to the EPA's authority to regulate greenhouse gases. A 6-3 opinion concluded that regulation of fossil fuel use was a



The U.S. Capitol

“major question” because of its political and economic significance, and thus required a “clear statement” by Congress before courts would accept a delegation of authority to an administrative agency in that area.

These cases are a product of the power of judicial review. Courts have that power, in our constitutional order, so they may void a law that fails to comply with the Constitution.

But while courts have judicial review, Congress holds the power of the purse. And Article III of the Constitution expressly links Congress's spending power to the structure of the federal courts, stating: “The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish.”

In both of these cases, the agencies argued that a ruling against them would undermine such a “statutory scheme” created by Congress—in *Jarkesy*, the securities-fraud laws enacted in the early 1930s, and in *West Virginia*, the Clean Air Act. If Congress felt that an assertive federal judiciary was undermining such a comprehensive statutory scheme, it could well consider reconfiguring that “scheme” to reduce federal-court jurisdiction.

Such revisions could focus on procedure. For example, administrative-law appeals could be consolidated into one intermediate court, much as all patent appeals now go to the U.S. Court of Appeals for the Federal Circuit. Or, noting the overlapping jurisdiction of state courts, Congress could restrict removal to federal court of some cases.

More controversially, such a statute could focus on substance. A motivated Congress could consider elimination of circuit-court jurisdiction over some challenges to the structure of administrative agencies, requiring—for example—that any such appeal go directly to the Supreme Court. As that court is both busy and has the power of discretionary review, it would presumably decline most cases sent to it.

Opponents of such laws could make a legitimate point about the traditional roles and responsibilities of the courts. But as Justice Neil Gorsuch noted generally in the case about Texas’ SB8 law: “This Court has never recognized an unqualified right to pre-enforcement review of constitutional claims in federal court.”¹⁵ Neither is there an absolute right about any particular pathway to, or structure for, appeal.

In fact, the “major questions” concept developed in *West Virginia* may support a Congressional limitation on court jurisdiction. If Congress has so much strong lawmaking power in a particular area that its power is presumptively undelegable, it would follow that Congress has a corresponding power to limit the involvement of other government branches in that particularly significant area.

American citizens have rights to sue about the structure of their government. But Congress has the power to shape the forum where those rights are asserted. Aggressive judicial scrutiny of agencies created by Congress, based on the power of judicial review, may encourage Congress to aggressively explore its spending power and the relented ability to limit federal-court jurisdiction. If Congress does so, it may well start with the “major” areas and topics identified by the Supreme Court in *West Virginia v. EPA*.

5. Could Congress Add Federal Judges?

The Biden Administration formed a “blue-ribbon commission” to study the structure of the Supreme Court. The Commission’s final report summarized the available ways to potentially restructure that court, noted the pros and cons of those ideas, and ended without any specific proposal.¹⁶

But that lack of scholarly consensus does not mean that Congress lacks power in this area. As noted in the previous section, while the

Constitution gives the courts the power of judicial review, it gives Congress the power to control the structure and funding of the courts (other than judicial tenure and compensation, which are constitutionally protected).

Adding judicial positions is strong and potentially dangerous medicine. As the President's commission correctly noted, significant expansion of the courts invites an in-kind response when the opposing party holds power. That response could lead to a perpetual "see-saw" between political parties that whipsaws the judicial branch and undermines its legitimacy.

The question that Congress and a President may confront, though, is whether the judicial branch faces a present crisis of legitimacy, of sufficient magnitude to risk potential problems with stability. Approval-poll numbers for the Supreme Court have plunged since *Dobbs*, and awkward media appearances since *Dobbs* by individual Justices have not helped the Court's cause.

President Roosevelt knew about the "see-saw" problem when he sought to expand the Supreme Court in the 1930s. But he still concluded that expansion was needed to restart the economy, in the face of a Supreme Court mired in obsolete economic ideas. If approval numbers continue to fall and the Supreme Court issues more high-profile, unpopular opinions such as *Dobbs*, another "1930s moment" could arrive—or be perceived by Congress as having arrived.

IV. Conclusion

This e-book examined the role of originalism in today's federal courts. I started with the use of analogy in 2022's landmark *Dobbs* decision and a 2022 Fifth Circuit case about the SEC's power. I then asked whether, when applying originalism as conceptualized by these cases, certain longstanding lines of authority will continue to be viable.

In particular, I looked at the degree to which the Constitution may protect a right to travel freely between states, as well as the right to "earn a living" free of excessive economic regulation. From there, I considered ways that dialogue about the Constitution may develop during the balance of the 2020s.

In the courts, aggressive application of originalism may try to push that idea beyond its practical limits. That is particularly true as to modern economic concepts that are beyond anything the Constitution's framers could have reasonably comprehended.

Outside of court, the invitation by *Dobbs* to the "people's elected representatives" may have been heard by a surprisingly broad audience, suggesting that public discussion of the Constitution in the 2020s will be that much more diverse and nuanced. And while Congress has historically been reluctant to modify the structure of the federal courts, it has considerable constitutional power to do so if it perceives threats to comprehensive statutory schemes that it has established.

I make no claim to academic expertise about constitutional law or political science. I'm simply an interested observer, with a practical point of view, shaped by years of law practice and many explanations of legal issues in the media. I hope that you enjoyed my perspective, and that my ideas help you contribute to important conversations about the Constitution that lie ahead in the 2020s.

About the Author

Widely recognized as one of the top appellate lawyers in Texas, David Coale leads the appellate practice at the Dallas trial boutique, Lynn Pinker Hurst & Schwegmann LLP. His diverse experience ranges from sophisticated constitutional issues in the United States Supreme Court to defense of a payphone operator before a Tarrant County Justice of the Peace.



He is among the few lawyers to have handled a matter in all fourteen of the Texas intermediate courts of appeal, and is the only known Texas appellate lawyer who has been fictionalized in a romance-novel series as the lawyer for an outlaw motorcycle gang.¹⁷

A frequent commentator on legal issues, David publishes **600camp.com**, a popular blog about business cases in the U.S. Court of Appeals for the Fifth Circuit, and **600commerce.com**, a similar blog about the Dallas Court of Appeals and Texas Supreme Court. He also produces the **Coale Mind** podcast about constitutional issues of the day. (All opinions in this e-book are entirely his own, not those of his law firm or any client.)

Endnotes

¹ 34 F.4th 446 (5th Cir. 2022).

² 142 S. Ct. 2228 (2022).

³ The letter is available on the Texas Freedom Caucus website, <https://www.tinyurl.com/38skusps>.

⁴ 83 U.S. 36 (1872).

⁵ 421 U.S. 809 (1975).

⁶ 52 F.4th 974 (5th Cir. 2022).

⁷ 198 U.S. 45 (1905).

⁸ 51 F.4th 616 (5th Cir. 2022).

⁹ *New York State Rifle & Pistol Assoc., Inc. v. Bruen*, 142 S. Ct. 2111 (2022).

¹⁰ *Defense Distributed, Inc. v. Bruck*, 30 F. 4th 414 (5th Cir. 2022).

¹¹ *Defense Distributed, Inc. v. Platkin*, 48 F.4th 607 (5th Cir. 2022). A merits panel later affirmed. *Defense Distributed, Inc. v. Platkin*, __ F.4th __, No. 22-50669, 2022 WL 17689179 (5th Cir. Dec. 15, 2022).

¹² Amy Vanderbilt, *Amy Vanderbilt's New Complete Book of Etiquette: The Guide to Gracious Living* (1963).

¹³ *State v. Stephens*, __ S.W.3d __, No. PD-1032-20, 2021 WL 5917198 (Tex. Crim. App. Dec. 15, 2021).

¹⁴ 142 S. Ct. 2587 (2022).

¹⁵ *Whole Women's Health v. Jackson*, 142 S. Ct. 522 (2021).

¹⁶ Presidential Commission on the Supreme Court of the United States, *Final Report* (2021) (available at <https://www.whitehouse.gov/pscscotus>).

¹⁷ Joanna Wylde, *Reaper's Fire* 192 (2016) ("Dobie Coales ... sat facing me across a table, holding a file folder of papers I sincerely hoped included some strategy for saving my ass.").



ORIGINALISM ASCENDANT

The Constitution of the 2020s

David Coale