

ORIGINALISM AND THE PROBLEM OF GENERAL LAW

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In the early days of our Republic, federal judges explicitly relied on general law—an unwritten set of gap-filling principles—to drive their decisions. This practice ceased after Erie Railroad Co. v. Tompkins, in which the Supreme Court formally abandoned the concept of general law. But the current Supreme Court, with its emphasis on originalism, has revived general law by interpreting several constitutional provisions as codifying the general law of the Founders. To determine the content of the Founders' general law, it conducts an inchoate version of the general law analyses of the past: It surveys a large corpus of legal and historical sources from multiple jurisdictions, none of which are authoritative, and from them distills a general principle which provides the rule of decision in the case at hand. The Court's sub-silentio adoption of the general law analytic method is troubling for originalists and non-originalists alike.

This Note has three basic aims, all of which are novel contributions. First, it delineates the precise methodology used by seventeenth- and eighteenth-century judges to determine the content of the general law. Second, through careful study of Second Amendment and Confrontation Clause jurisprudence, it recognizes the deep similarities between the historical and modern originalist general law analytic processes. And third, it outlines the practical difficulties and internal tensions that arise from the Court's originalist revival of general law.

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INTRODUCTION

In a recent lecture at Harvard Law School, Professor William Baude¹ looked to his audience and asked: “Is textualism missing something important?”² He explained that often, “the text itself, even the text supplemented by something like the ‘original meaning’ of the text, is incomplete.”³ To remedy this deficiency, Baude argued that lawyers and courts should explicitly rely on “unwritten law” to “go beyond the text.”⁴ To illustrate his point, Baude provided some examples of extra-textual doctrines such as sovereign and qualified immunity and substantive canons of interpretation. He argued that lawyers and courts should not shy away from this amorphous body of law; instead, they should embrace it.⁵

But Professor Baude failed to mention one area in which such unwritten law has already taken root in the modern Supreme Court’s jurisprudence: originalist analyses of pre-existing constitutional rights. His oversight can be easily forgiven, however, because the Supreme Court itself marshals unwritten law in this way without ever explicitly saying so. This Note carefully analyzes some of the Supreme Court’s most distinctly originalist opinions to show that the Court employs a historical general law analysis when it determines the scope of pre-existing constitutional rights. That is, the Court determines the unwritten “general law” of the Founding generation and uses it to drive a seemingly textual analysis.

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² Harvard Law School, *2023 Scalia Lecture | William Baude: “Beyond Textualism?,”* YOUTUBE (Feb. 28, 2023) [hereinafter Harvard Law School], <https://youtu.be/RUseqPHoCII> [<https://perma.cc/JZK3-ZLJX>]; see also Rachel Reed, *Textualism Is ‘Missing Something,’* HARV. L. TODAY (Mar. 1, 2023), <https://hls.harvard.edu/today/textualism-is-missing-something> [<https://perma.cc/HD8M-VP9H>].

³ Harvard Law School, *supra* note 2.

⁴ *Id.*

⁵ *Id.*

The Court's sub-silentio adoption of this other-than-text analysis is troubling for originalists and non-originalists alike. It asks courts to conduct a form of reasoning that the Court has declared illegitimate in the contemporary context, and one that was criticized as enabling judges to "make" law.⁶ From a practical perspective, the difficulty is twofold: Not only is the Court conducting a general law analysis, but it is doing so while trying to put itself in the mindset of Founding-era lawyers—lawyers educated and trained under a fundamentally different view of the nature of the law.⁷ A more fundamental problem is that the Court's adoption of this analytic method results in internal tensions within originalist theory.⁸ Pointing out that certain constitutional provisions codified rights that existed as a matter of general law, while distinctively originalist, does relatively little to elucidate a text's meaning and raises more questions than it answers.

At the time of the Founding, jurists believed in the existence of "general law," an unwritten law common to all civilized nations and independent of any single positive source.⁹ The historic nature of general law may be difficult for modern lawyers to comprehend because it does not fit within the current understanding of "law," i.e., a binding sovereign command. Essentially, the general law was a set of background rules that courts applied in the absence of any positive sovereign mandate to the contrary. When local legislation or jurisdiction-specific precedent was silent on an issue, courts used the general law to fill the gaps. General law served this gap-filling function for a variety of subjects—from maritime law, to commercial law, to law governing state-state relations.¹⁰ Importantly, the Founding generation believed that certain fundamental rights existed as a matter of general law and that no positive enumeration was necessary to enforce them.¹¹ Some of these rights were subsequently codified in the Constitution, particularly in the Bill of Rights—that is, some constitutional provisions served as mere references to pre-existing general law rights and were not thought to be the source of the rights, but rather a confirmation of them.¹²

⁶ See *infra* Part III.

⁷ See *infra* Section III.A.

⁸ See *infra* Section III.B.

⁹ For a detailed discussion of general law, see *infra* Part I.

¹⁰ See *infra* notes 37–49 and accompanying text.

¹¹ See, e.g., *Nunn v. State*, 1 Ga. 243, 247–50 (1846) (relying on the general law right to keep and bear arms even though it was not enumerated in Georgia's Constitution); see also *infra* Section I.B.

¹² For a discussion of fundamental rights, bills of rights, and general law, see *infra* Section I.B. The Supreme Court has held that, as a matter of original meaning, certain Bill of Rights guarantees principally secure pre-existing rights. See, e.g., *District of Columbia v. Heller*, 554 U.S. 570, 592 (2008) ("[I]t has always been widely understood that the Second Amendment

The general law was typically rooted in widely followed customs and natural law or moral principles. Courts, however, often glossed over the question of *where* the general law came from, be it custom or natural law, as applying law without apparent authority did not pose an issue in a jurisprudential system that, before *Erie*, had not incorporated legal positivism.¹³ Courts unquestionably assumed that the general law was an objectively determinable set of legal principles and that their task was simply to “find” the applicable law. Courts found the general law by conducting the unique methodology of a general law analysis: They surveyed a large quantity of legal and historical sources from multiple jurisdictions, none of which were authoritative, and from them distilled a general principle which provided the rule of decision in the case at hand.¹⁴

The current Supreme Court is conducting an inchoate version of this general law analysis as a result of their emphasis on originalist constitutional interpretation.¹⁵ The Court is increasingly turning to originalist methods to interpret the Constitution, and a faithful application of originalism requires courts to treat certain constitutional provisions as codifying general law rights. Originalism, in its most basic form, requires courts to interpret the Constitution precisely as it was understood at the time of ratification.¹⁶ As mentioned, at the time of ratification, the Framers understood some Bill of Rights provisions as protecting *already existing* general law rights, not as creating *new* rights.¹⁷ Originalism thus fixes the meaning of these provisions as codifying and referencing the general law, and courts applying originalist methods are bound by this understanding of the pre-existing rights. Since these rights existed as a matter of general law and were understood through

. . . codified a *pre-existing* right.”); *Crawford v. Washington*, 541 U.S. 36, 54 (2004) (finding that the Confrontation Clause of the Sixth Amendment was a “reference to the right of confrontation at common law”).

¹³ See *infra* notes 38–44, 52–55 and accompanying text. Legal positivism, as adopted by the *Erie* Court, is a theory about the nature of the law that maintains that all law must be coercive orders of a sovereign. See Jack Goldsmith & Steven Walt, *Erie and the Irrelevance of Legal Positivism*, 84 VA. L. REV. 673, 677–78 (1998).

¹⁴ See *infra* Section I.D.

¹⁵ See *infra* Part II. This is *not* to say that the Court is applying a rule of decision that is not attached to a particular sovereign. All I argue is that the *analytical method* is the same—i.e., courts, both when finding the general law rule pre-*Erie* and when determining the scope of a pre-existing right at the time of enactment, engage in the same mode of analysis.

¹⁶ See Lawrence B. Solum, *Originalism Versus Living Constitutionalism: The Conceptual Structure of the Great Debate*, 113 NW. L. REV. 1243, 1265–66 (2019) (explaining that originalism as a theory rests on two principles: that the original meaning of the Constitution was fixed at the time each provision was ratified, and that constitutional practice should be constrained by this original meaning).

¹⁷ See *supra* notes 11–12 and accompanying text; *infra* Section I.B.

a general law analysis, courts must replicate this analytical method to understand the rights as they would have been at the time of ratification. Conducting general law analyses is therefore a necessary byproduct of the Supreme Court's originalism—it must be done if an originalist approach is used to interpret pre-existing rights.

As a result, the general law analysis—something the Supreme Court expressly rejected in the 1938 case *Erie Railroad Co. v. Tompkins*—is being reintegrated into the analytic process. This mode of analysis can be clearly seen in recent Supreme Court cases interpreting the Second Amendment¹⁸ and the Confrontation Clause,¹⁹ and is methodologically the same as that of pre-*Erie* courts seeking to determine the content of the applicable general law. If we still accept the rejection of general law, this should make us uncomfortable. As of now, modern general law analyses take place within the context of specific constitutional provisions that reference general law. But an undertheorized adoption of such analyses paves the way for *all* texts to be read in light of general law principles.²⁰ And, without a coherent underlying theory, these conceptions may be incorporated even into text-less areas of jurisprudence as generally applicable background principles.

This Note makes a few novel contributions. First, it delineates the precise methodology used by seventeenth- and eighteenth-century judges to determine the content of the general law.²¹ In Part I, I discuss general law in theory and in practice at the time of, and shortly following, the Founding. Section A defines general law and provides an overview of its historical underpinnings and subsequent rejection in the twentieth century. Section B shows how certain fundamental rights, codified in bills of rights, were conceived of as a species of general law. I detail several nineteenth-century examples of state and federal courts deciding questions of general law in Section C, before deriving the common characteristics of general law analyses in Section D.

¹⁸ See *District of Columbia v. Heller*, 554 U.S. 570 (2008); *N.Y. State Rifle & Pistol Ass'n v. Bruen*, 142 S. Ct. 2111 (2022).

¹⁹ See *Crawford v. Washington*, 541 U.S. 36 (2004).

²⁰ Cf. Harvard Law School, *supra* note 2 (Baude arguing that unwritten law, which includes the general law, governs “background principles against which interpretations take place”).

²¹ Many before me—and many on whom I explicitly rely—have explained the basic characteristics of general law. See, e.g., Anthony J. Bellia Jr. & Bradford R. Clark, *General Law in Federal Court*, 54 WM. & MARY L. REV. 655 (2013); William A. Fletcher, *The General Common Law and Section 34 of the Judiciary Act of 1789: The Example of Marine Insurance*, 97 HARV. L. REV. 1513 (1984); Danielle D'Onfro & Daniel Epps, *The Fourth Amendment and General Law*, 132 YALE L.J. 910 (2023). Section I.D attempts to distill all of the descriptions and examples of general law analyses into three fundamental, common features.

Second, this Note is also the first to recognize the deep similarities between current originalist and historical general law modes of analysis.²² I turn to the Supreme Court's originalist analysis of pre-existing rights in Part II. I begin with *Heller* and *Bruen*'s exposition of the Second Amendment in Section A, and Section B details how the Court has interpreted the Confrontation Clause. In both cases, I show how the Supreme Court—whether intentionally or not—is conducting a historical general law analysis: It situates itself in 1791 and assesses the rights claim under the Founders' conception of general law.

Third, in Part III, this Note is the first to recognize the internal tensions that arise from the Court's adoption of this analytic method as a byproduct of its emphasis on originalism. I address practical difficulties in Section A and more principled problems in Section B. I conclude by explaining how the adoption of a general law analysis, even though in some circumstances required by originalism, raises significant problems. If the Court proceeds down this path, it must grapple with these difficulties and provide solutions to lower court judges tasked with applying this methodology.

In the debates between originalism and more dynamic forms of interpretation, a careful analysis of precisely what is driving the Supreme Court's decisions and what sources of law are considered has been sidelined. The Court is not explicit about exactly what it is doing and what tools of analysis it uses. This Note more clearly identifies the unspoken reasoning behind some of the Court's jurisprudence, which will better enable us to understand what drives these decisions and to engage with them critically.

I

GENERAL LAW ANALYSES OF THE PAST

Most readers are undoubtedly familiar with the Supreme Court's famous proclamation in *Erie Railroad Co. v. Tompkins* that “[t]here is no federal general common law.”²³ In banishing general law from federal courts, the Supreme Court “overruled a particular way of looking

²² Some scholars implicitly or explicitly mention general law while advocating for or against modern reliance on principles of natural law. See, e.g., Diarmuid F. O'Scannlain, *The Natural Law in the American Tradition*, 79 *FORDHAM L. REV.* 1513, 1516–19 (2011) (“[T]he natural law is woven into the fabric of the Constitution, and, therefore, is relevant to originalist constitutional interpretation.”). Others critique or defend the whole of the Court's “history and tradition” tests. See, e.g., Sherif Girgis, *Living Traditionalism*, 198 *N.Y.U. L. REV.* 1477 (2023). This Note sits somewhat at the unexplored intersection of those two strands: It recognizes that the Court's emphasis on history and tradition is sometimes a masked reliance on general law, which can include natural law.

²³ 304 U.S. 64, 78 (1938).

at law.”²⁴ In Section A, I briefly describe this historic legal philosophy and the reasons for its abandonment in *Erie*. In Section B, I show how certain rights were thought to exist as a matter of general law. This background serves to contextualize the following two Sections, in which I first describe various examples of courts deciding cases under general law, and then use those examples to synthesize the common mode of reasoning employed by judges to find the general law.

A. Overview of General Law

The term “general law” can be confusing. It is a remnant of the pre-*Erie* conception of the law, largely not invoked in the modern context except in a derogatory fashion.²⁵ And *Erie*’s rejection of “federal general common law”²⁶ only added to the confusion, because it “conflated two distinct categories of law: general law and local common law.”²⁷ At the time of the Founding, and at least through 1842 when *Swift v. Tyson*²⁸ was decided, the common law included both “general law” and “local law.”²⁹ Both general law and local law were forms of common law, but they governed different subject matters and stemmed from different sources.³⁰ General law was so prominent, in fact, that “common law” in the early nineteenth century usually meant the *general* common law.³¹ Local common law was simply called “local law,” and general common law was referred to as “general law,” or “common law.”³² To most practitioners today, however, since the existence of general law has largely been rejected, “common law” refers to only local common law. In this Note, I use “common law” in its historic sense, as referring to both general law and local law.

²⁴ *Guar. Tr. Co. of N.Y. v. York*, 326 U.S. 99, 101 (1945); see also Stephen E. Sachs, *Finding Law*, 107 CALIF. L. REV. 527, 570–71 (2019) (“No other decision has [been] regarded as ‘a sea change in how judges view law,’ or even ‘a change in the nature of law itself.’ Before *Erie*, judges were said to be ‘the living oracles of a preexisting natural law’; afterward, they apparently became ‘lawmakers in a relativistic legal world,’ in which ‘the common law was nothing more than [their] decisions.’” (second alteration in original) (citations omitted)).

²⁵ See William P. LaPiana, *Swift v. Tyson and the Brooding Omnipresence in the Sky: An Investigation of the Idea of Law in Antebellum America*, 20 SUFFOLK U. L. REV. 771, 774 (1986) (“[G]eneral law . . . has been an object of derision.”).

²⁶ *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 78 (1938).

²⁷ *Bellia & Clark*, *supra* note 21, at 662.

²⁸ 41 U.S. 1 (1842).

²⁹ See *Bellia & Clark*, *supra* note 21, at 658–59.

³⁰ See *infra* notes 33–41 and accompanying text.

³¹ See, e.g., *infra* notes 58–59 and accompanying text (Justice Story and New York’s Justice Greene referring to general law as “common law”); see also Fletcher, *supra* note 21, at 1515 n.9.

³² See Fletcher, *supra* note 21, at 1514–15.

Following independence, the states adopted England's common law, both general law and local law.³³ Local law "concerned matters specific to a particular state or a nation,"³⁴ such as "realty, probate, and procedure."³⁵ It was attributed to a positive source and thus applied only within the sovereignty that passed the particular statute or developed the relevant rule. General law, on the other hand, was not seen as stemming from any particular sovereign. It was a body of rules "not under the control of any single jurisdiction," but rather a collection of "principles or practices common to many different jurisdictions."³⁶ When local law was silent on an issue, courts would fill the gap by applying general law.³⁷ General law concerned matters of common interest to multiple states or countries,³⁸ and the governing "rules and customs" were "developed and refined by a variety of nations over hundreds and, in some cases, thousands of years."³⁹ It was "an unwritten body of law based on custom and the laws of nature"⁴⁰ that was "capable of being understood through the exercise of reason."⁴¹ Courts often left out the source of general law, be it custom⁴² or natural law,⁴³ as applying law in the absence of a sovereign command

³³ See *supra* note 29; see also I JAMES KENT, COMMENTARIES ON AMERICAN LAW 472–73 (6th ed. N.Y.C., William Kent 1832) ("[T]he common law, so as far as it is applicable to our situation and government, has been recognised and adopted, as one entire system, by the constitutions of Massachusetts, New-York, New-Jersey, and Maryland. It has been assumed . . . or declared by statute . . . as the law of the land in every state.").

³⁴ Bellia & Clark, *supra* note 21, at 664.

³⁵ Anthony J. Bellia Jr., *State Courts and the Making of Federal Common Law*, 153 U. PA. L. REV. 825, 890 (2005).

³⁶ Caleb Nelson, *The Persistence of General Law*, 106 COLUM. L. REV. 503, 505 (2006).

³⁷ PETER S. DU PONCEAU, A DISSERTATION ON THE NATURE AND EXTENT OF THE JURISDICTION OF THE COURTS OF THE UNITED STATES 87–88 (Phila., Abraham Small 1824) ("The common law . . . was a general system of jurisprudence, constantly hovering over the local legislation and filling up its interstices. . . . Like the sun under a cloud, it was overshadowed, not extinguished, by the local laws.").

³⁸ See Bellia & Clark, *supra* note 21, at 664.

³⁹ *Id.* at 658; see also *id.* at 681 ("[G]eneral law was understood to reflect reason and practices common to many nations.").

⁴⁰ *Id.* at 666.

⁴¹ Stewart Jay, *The Origins of Federal Common Law: Part Two*, 133 U. PA. L. REV. 1231, 1267–71 (1985); see also O'Scannlain, *supra* note 22, at 1516 (describing the Founders' writings as "replete with references to a higher, unwritten law, *accessible to human reason*" (emphasis added)).

⁴² See Jordan J. Paust, *In Their Own Words: Affirmations of the Founders, Framers, and Early Judiciary Concerning the Binding Nature of the Customary Law of Nations*, 14 U.C. DAVIS J. INT'L L. & POL'Y 205, 231–40 (2007) (providing evidence that Founding-era American jurists believed customary law, or the law of nations, to be part of the general law); see also Fletcher, *supra* note 21 (describing the law merchant, a branch of the law of nations, as the principal example of general law).

⁴³ See O'Scannlain, *supra* note 22, at 1516–19 (detailing how the Founding Fathers viewed the natural law as a source for some Constitutional provisions); see also Frederick Mark Gedicks, *An Originalist Defense of Substantive Due Process: Magna Carta, Higher-Law Constitutionalism, and the Fifth Amendment*, 58 EMORY L.J. 585, 622 (2009) (describing "the

did not pose an issue in a jurisprudential system that had not yet incorporated the principles of legal positivism. In other words, to them, the actual source of general law was irrelevant—all that mattered was that it existed. When a case was to be decided under general law, the judge’s task was to “find” the law, not to “make” it.⁴⁴

Although *Swift* has become the primary example of general law, both federal and state courts frequently employed general law long before *Swift* was decided.⁴⁵ A broad range of disputes were governed by principles of general law. To supply the rule of decision, the *Swift* Court relied on general commercial law, or, as it was called, the law merchant⁴⁶—the most commonly used category of general law in American courts.⁴⁷ But courts also viewed general law as governing matters that would be categorized today as “admiralty and maritime law, conflict of laws, and private international law.”⁴⁸ What is now considered to be customary international law was thought of, at the time of the Founding, to be a species of general law.⁴⁹ Importantly, as detailed in the next Section, Founding-era Americans also conceived of some fundamental rights as residing in general law.

After *Swift*, the distinction between local law and general law became increasingly blurry.⁵⁰ State courts sought to localize matters previously governed by general law, while federal courts expanded the definition of general law to include historically local subjects.⁵¹ The rise of legal realism

colonial belief that the common law captured and reflected natural rights and the natural law”).

⁴⁴ See Sachs, *supra* note 24, at 527, 570–71.

⁴⁵ See Fletcher, *supra* note 21, at 1515.

⁴⁶ *Swift v. Tyson*, 41 U.S. 1, 18–20 (1842).

⁴⁷ See 4 WILLIAM BLACKSTONE, COMMENTARIES *67 (referring to law merchant as a “great universal law,” “regularly and constantly adhered to”); see also *infra* Section I.C (detailing a number of nineteenth-century law merchant cases); Fletcher, *supra* note 21, at 1518 (“[C]ourts often used the general law to supply the rule of decision. It was applied in a wide variety of cases, but most frequently and consistently in commercial cases.”).

⁴⁸ Bellia, *supra* note 35, at 889–90.

⁴⁹ See Carlos M. Vazquez, *Customary International Law as U.S. Law: A Critique of the Revisionist and Intermediate Positions and a Defense of the Modern Position*, 86 NOTRE DAME L. REV. 1495, 1498 (2011) (describing how scholars believe that “customary international law was [historically] regarded as ‘general common law’” (citing Curtis A. Bradley & Jack L. Goldsmith, *Customary International Law as Federal Common Law: A Critique of the Modern Position*, 110 HARV. L. REV. 815, 850 (1997))).

⁵⁰ See Bellia, *supra* note 35, at 891.

⁵¹ For example, the development of uniform commercial statutes replaced general commercial law. See NAT’L CONF. OF COMM’RS ON UNIF. STATE LAWS, SIXTH ANNUAL CONFERENCE OF COMMISSIONS FOR THE PROMOTION OF UNIFORMITY OF LEGISLATION IN THE UNITED STATES 8 (1896); see also Lyman D. Brewster, *The Promotion of Uniform Legislation*, 6 YALE L.J. 132, 140 (1897) (arguing for “statutory unity rather than diversity, in matters of common interest . . .”). And in *Erie*, the Court condemned the “broad province” that federal courts had “accorded to the so-called ‘general law’ as to which federal courts exercised an

led jurists to view what was once “finding” law instead as “making” law, and the actions of judges articulated in this way increasingly appeared political.⁵² Ultimately, this combined with the rise of legal positivism led courts to believe that all law “must be attributable to a sovereign source.”⁵³ In the words of Justice Holmes, there was no “transcendental body of law outside of any particular State but obligatory within it.”⁵⁴ The 1938 Supreme Court in *Erie* agreed that “law . . . does not exist without some definite authority behind it” and renounced the idea of general law.⁵⁵ The fundamental general law rights that were thought to have pre-existed constitutions were reconceived as “created” by the various bills of rights.⁵⁶

The shift in American legal philosophy may make it difficult for some modern lawyers to wrap their heads around the concept of general law as it existed in the beginning of our Republic. While the following Sections will hopefully provide some clarification, general law—or just “the common law” as it was then referred to⁵⁷—is perhaps best described through the words of prominent legal figures of the time. In 1836, Justice Joseph Story described it thus: “[T]he common law . . . is rather a system of elementary principles and of general juridical truths, which are continually expanding with the progress of society, and adapting themselves to the gradual changes of trade, and commerce, and the mechanic arts, and the exigencies and usages of the country.”⁵⁸ And some years later, in similarly sweeping language, Justice Greene Bronson of New York State’s highest court said:

The common law consists of those principles and maxims, usages and rules of action which observation and experience of the nature of man, the constitution of society and the affairs of life have commended to enlightened reason, as best calculated for the government and security

independent judgment.” *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 75 (1938); see also *Bellia & Clark*, *supra* note 21, at 693–701 (describing the “state efforts to localize general law” and the “federal judicial efforts to generalize local law”).

⁵² See Bradford R. Clark, *Ascertaining the Laws of the Several States: Positivism and Judicial Federalism after Erie*, 145 U. PA. L. REV. 1459, 1476 n.89 (1997) (quoting Lawrence Lessig).

⁵³ See *Bellia*, *supra* note 35, at 891.

⁵⁴ *Black & White Taxicab & Transfer Co. v. Brown & Yellow Taxicab & Transfer Co.*, 276 U.S. 518, 533–34 (1928) (Holmes, J., dissenting).

⁵⁵ *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 79 (1938) (quoting *Black & White Taxicab*, 276 U.S. at 533 (Holmes, J., dissenting)).

⁵⁶ *Compare, e.g.*, *Maxwell v. Dow*, 176 U.S. 581, 587 (1900) (describing the Bill of Rights as “secur[ing] and recogniz[ing] the fundamental rights of the individual as against the exercise of Federal power”), *with, e.g.*, *Palko v. Connecticut*, 302 U.S. 319, 322 (1973) (describing the Fifth Amendment as “creat[ing]” rights). See also *infra* Section I.B.

⁵⁷ See *supra* notes 25–32 and accompanying text.

⁵⁸ Joseph Story, *Codification of the Common Law*, in *THE MISCELLANEOUS WRITINGS OF JOSEPH STORY* 702 (William W. Story ed., C.C. Little & J. Brown, 1852).

of persons and property. Its principles are developed by judicial decisions as necessities arise from time to time demanding the application of those principles to particular cases in the administration of justice.⁵⁹

Story's "elementary principles" and "general juridical truths," and Bronson's "principles and maxims" already existed within the amorphous body of general law. The judge's task was simply to discover their existence through "enlightened reason."

B. General Law Rights

At the time of the Founding, Americans viewed certain fundamental rights as a species of general law.⁶⁰ To them, the Constitution was a product of a social contract between all people that formed the body politic.⁶¹ According to Thomas Jefferson, the idea that certain fundamental rights were naturally "unceded" by the social contract was a "universal and almost uncontroverted position."⁶² Popular belief held that the theoretical social contract guaranteed certain fundamental rights such as the "freedom of religion,"⁶³ and any codification of these principles was not the actual source of the rights.⁶⁴ The source of these fundamental rights was instead often thought to be the natural law.⁶⁵

⁵⁹ *People v. Randolph*, 2 Parker's Crim. Rptr. 174, 176–77 (N.Y. 1855).

⁶⁰ For more background than the ensuing discussion, see generally Jud Campbell, *Constitutional Rights Before Realism*, 2020 U. ILL. L. REV. 1433 (2020). As mentioned, the actual source of the fundamental rights—e.g., custom versus natural law—was often glossed over, as the insistence on positivism had not yet taken root. See *supra* notes 40–44 and accompanying text.

⁶¹ See, e.g., Pennsylvania Ratification Convention Debates, Remarks of William Findley (Dec. 1, 1787) ("In the [Constitution's] Preamble, it is said, 'We the People,' and not 'We the States,' which therefore is a compact between individuals entering into society . . ." (emphasis added)), in 2 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 448 (Merrill Jensen ed., 1976). Cf. MASS. CONST. of 1780, pmb. (describing the polity's formation as "a social compact"); N.H. CONST. of 1784, art. 1 (emphasizing the government "originates from the people [and] is founded in consent").

⁶² Letter from Thomas Jefferson to Noah Webster, Jr. (Dec. 4, 1790), in 18 THE PAPERS OF THOMAS JEFFERSON 131, 132 (Julian P. Boyd ed., 1971).

⁶³ *Id.*

⁶⁴ See, e.g., JOSEPH GALLOWAY, A LETTER TO THE PEOPLE OF PENNSYLVANIA; OCCASIONED BY THE ASSEMBLY'S PASSING THAT IMPORTANT ACT, FOR CONSTITUTING THE JUDGES OF THE SUPREAM COURTS AND COMMON-PLEAS, DURING GOOD BEHAVIOUR 25–28 (1760) (arguing that the Bill of Rights had no authority "to change, but only to restore the antient Laws and Customs of the Realm"; and, because the right to independent judges is "Inherent," granting judicial commissions only "during Pleasure" was "an arbitrary and illegal Violation of the Peoples antient Liberties"), reprinted in CHARLES EVANS ET AL., I EARLY AMERICAN IMPRINTS, SERIES 1: EVANS, 1639–800, No. 8636; John Q. Adams, *To the Printers*, BOS. GAZETTE, Jan. 25, 1773, at 2 (similar argument), reprinted in 3 THE WORKS OF JOHN ADAMS: SECOND PRESIDENT OF THE UNITED STATES 531, 531–36 (Charles F. Adams ed., Boston, Little, Brown and Co., 1851).

⁶⁵ See O'Scannlain, *supra* note 22, at 1516–19.

Because certain individual rights were already protected by the social contract, the Founding generation thought it unnecessary to enumerate those rights in a constitution or declaration of rights.⁶⁶ Any enumeration of existing fundamental rights was therefore a declaratory and not a constitutive exercise⁶⁷—not creating new rights, but recognizing pre-political and pre-constitutional rights.⁶⁸ This is not to say that enumeration was pointless, however. Most obviously, enumeration cemented rights, protecting them from change without constitutional amendment. And further still, it could have provided a hook for judicial review or a method for recognizing the importance of rights that were not supported by general law.⁶⁹

This belief is reflected in the debates around the Framers' decision to omit a bill of rights from the federal Constitution. During the Philadelphia Convention of 1787, two delegates moved to insert a clause prohibiting bills of attainder and ex post facto laws.⁷⁰ Every delegate agreed to include the prohibition against bills of attainder, but some rejected the need to prohibit ex post facto laws.⁷¹ Oliver Ellsworth argued that prohibition was unnecessary because “there was no lawyer, no civilian, who would not say that ex post facto laws were void of themselves.”⁷² James Wilson agreed, saying that inserting such a ban would proclaim that the Founders were “ignorant of the first principles of Legislation.”⁷³

⁶⁶ See, e.g., THE FEDERALIST No. 84 ¶ 8 (Alexander Hamilton) (“[I]n strictness, the people surrender nothing; and as they retain everything they have no need of particular reservations.”); see also Gedicks, *supra* note 43, at 667 (noting that “the Federalists had expressly argued that the entire Bill of Rights was redundant” because “natural and customary rights [existed] independent of any textual enumeration”).

⁶⁷ See 1 ANNALS OF CONG. 715 (1789) (Joseph Gales ed., 1834) (“The amendments reported are a declaration of rights, the people are secure in them, whether we declare them or not.” (remarks of Rep. Roger Sherman)); see also *Lindsay v. E. Bay St. Comm’rs*, 2 S.C.L. (2 Bay) 38, 57 (S.C. Ct. App. 1796) (explaining that South Carolina’s constitutional provisions protecting property were “not declaratory of any new law, but confirmed all the ancient rights and principles”).

⁶⁸ See Samuel Hopkins, *The Rights of the Colonies Examined* (Nov. 1764) (“[Americans] do not hold [their] rights as a privilege granted them, nor enjoy them as a grace and favor bestowed, but possess them as an inherent, indefeasible right . . .”), reprinted in 6 RECORDS OF THE COLONY OF RHODE ISLAND AND PROVIDENCE PLANTATIONS IN NEW ENGLAND, 1757–69, at 419 (Joseph R. Bartlett ed., 1861); see also O’Scannlain, *supra* note 22, at 1517 (“[W]hen our founders codified fundamental rights in the Constitution, they did not believe that they were ‘creating’ those rights, any more than a mathematician ‘creates’ mathematical principles when he writes the axioms of a formal system.”).

⁶⁹ See, e.g., 2 RECORDS OF THE FEDERAL CONVENTION OF 1787, at 376 (Max Farrand ed., Yale Univ. Press rev. ed. 1966) (1911) (Williamson arguing that a ban of ex post facto laws, though not necessary to secure the right, could be useful because “Judges can take hold of it”).

⁷⁰ See *id.* at 375 (remarks of Gerry and McHenry).

⁷¹ *Id.* at 376.

⁷² *Id.*

⁷³ *Id.*

Even those who were in favor of the clause did not suggest that ex post facto laws could be passed without a constitutional ban. Instead, they argued that enumeration would be practically beneficial by enabling judges to “take hold of it” when state legislatures passed ex post facto laws.⁷⁴ During the subsequent ratification debates, the exclusion of a bill of rights was again defended on the ground that certain rights were already protected by their fundamental nature.⁷⁵

State court decisions from the early nineteenth century also exemplify the belief that bills of rights were largely declaratory and that some rights existed as a matter of general law. Two New York decisions dealt with the taking of private property without any compensation. At the time the first was decided, there was no state law—statutory or constitutional—that prohibited takings without compensation.⁷⁶ Despite the lack of written law, in the 1816 case *Gardner v. Village of Newburgh*, the New York court held that compensation was required when the government took private property.⁷⁷ In support, the court cited the foreign jurists Grotius, Puffendorf, and Bynkershoeck, as well as the fact such a principle was “adopted by all temperate and civilized governments.”⁷⁸ The lack of a written prohibition did not matter, for the fundamental right was a “clear principle of natural equity” and stemmed from a “deep and universal sense of . . . justice.”⁷⁹ In 1822, New York’s highest court again considered the question, this time one year after a prohibition on takings without compensation was included in the New York Constitution.⁸⁰ However, in *Bradshaw v. Rogers*, the court expressly disclaimed reliance on either the U.S. Constitution or New York’s in declaring a compensationless taking unlawful.⁸¹ Instead, the court cited them in the insistence for compensation because “they are both declaratory of a great and fundamental principle of government; and any law violating that principle must be deemed a nullity, as it is against natural right and justice.”⁸² A prohibition of takings without

⁷⁴ See *id.* (remarks of Hugh Williamson).

⁷⁵ For example, in Virginia, George Nicholas explained that a “Bill of Rights is only an acknowledgement of the pre-existing claim to rights in the people. They belong to us as much as if they had been inserted in the Constitution.” Virginia Ratification Convention Debates (June 16, 1788), in 10 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 1334 (John P. Kaminski et al. eds., 1993).

⁷⁶ See *Gardner v. Vill. of Newburgh*, 2 Johns. Ch. 162, 166 (N.Y. Ch. 1816).

⁷⁷ *Id.*

⁷⁸ *Id.*

⁷⁹ *Id.*

⁸⁰ *Bradshaw v. Rogers*, 20 Johns. 103 (N.Y. Sup. Ct. 1822).

⁸¹ *Id.* at 106.

⁸² *Id.*

compensation existed as a species of general law, regardless of whether it was written down.

The nineteenth-century Georgia Supreme Court also explicitly embraced the view that the state and federal bills of rights were largely declaratory of pre-existing rights. In *Nunn v. State*, a defendant challenged Georgia's concealed-carry restrictions based on a right to keep and bear arms that was not written in the state constitution.⁸³ The court, in an opinion by Chief Justice Joseph Lumpkin, ultimately struck down the restrictions as unlawful. Lumpkin began by noting the right to keep and bear arms present in the constitutions of the United States and in several of the states.⁸⁴ Even though the provisions did not apply to Georgia, he relied on them nonetheless because they “confer[red] no new rights on the people which did not belong to them before.”⁸⁵ All of the declarations of rights “only reiterated a truth” and showed that the right to keep and bear arms “is one of the fundamental principles, upon which rests the great fabric of civil liberty.”⁸⁶ The “unalienable right which lies at the bottom of every free government” existed as a matter of general law, and the lack of a declaration in the state constitution was inconsequential.⁸⁷

The prevalent understanding in the eighteenth and nineteenth centuries was that bills of rights were for the most part declaratory of rights that existed across all jurisdictions. The listed rights were not meant to vary across jurisdictions but were a kind of general law. In other words, these bills of rights—including some of the U.S. Constitution's first ten amendments—were not intended to *create* law, but were meant to reflect a *pre-existing* body of rules and principles common to all civilized nations. With this background in mind, I now turn to examples of judges finding and applying general law,⁸⁸ before synthesizing the general methodology used.⁸⁹

C. *General Law in Practice*

Even before *Swift v. Tyson* was decided in 1842, American state and federal courts looked to principles of general law to decide cases. In this Section, I provide some examples of that practice, first in state courts and then in federal courts. These cases are just a snapshot of some of

⁸³ 1 Ga. 243 (1846).

⁸⁴ Specifically, he noted the scope of the right in the Kentucky, Georgia, and Indiana Constitutions. *Id.* at 247–49.

⁸⁵ *Id.* at 249.

⁸⁶ *See id.*

⁸⁷ *See id.* at 250.

⁸⁸ *See infra* Section I.C.

⁸⁹ *See infra* Section I.D.

the clearer decisions from among the hundreds, if not thousands, of general law cases from early American history.⁹⁰ In the following summaries, I focus less on the courts' authority for applying the general law, and more on the methods used to determine its content. The cases mostly relate to commercial or maritime disputes—as opposed to rights claims—simply because the former categories provide a more fruitful body of general law decisions. The mode of analysis in cases relying on general law, however, is the same regardless of the category of law, and so the decisions detailed in this Section are illustrative also of how nineteenth-century judges might attempt to find general law rights.

In the 1820 Indiana case *Piatt v. Eads*, the drawer of a bill of exchange did not demand payment until four days after payment was due.⁹¹ The drawee claimed that the grace period for demanding payment only lasted three days, and as such he was no longer obligated to remit payment.⁹² The Indiana Supreme Court, after noting that the law merchant “is a law of a general nature,” sought to determine whether payment was due “on the last day of grace, or on the following day.”⁹³ The Indiana court cited to a United States Supreme Court opinion holding that “a demand of payment should be made upon the last day of grace,”⁹⁴ but that did not end (or even begin) the analysis. Instead, the court considered English treatises and case law, other U.S. Supreme Court cases, and decisions from the courts of New York, Massachusetts, and Connecticut.⁹⁵ No single source was authoritative, but the unanimity of the rules in the various jurisdictions “settled” the question: Payment must have been demanded within the three-day grace period, not one day later.⁹⁶

In the early nineteenth century, New York's highest court routinely settled legal disputes through recourse to the general law. For example, in *Walden v. Le Roy*, Chief Justice James Kent considered the question of whether the owner of a cargo ship—who took a necessary detour to stop at a port and repair sea damage—could recover the incurred cost of additional wages and provisions *pro rata* against the proprietors

⁹⁰ Determining even a rough number of decisions that relied on general law would be an insurmountable task. Between 1803 and 1840, the Supreme Court alone (one court among hundreds) decided fifty-three cases concerning maritime insurance law (a subset of maritime law, itself a subset of general law). See Fletcher, *supra* note 21, at 1538–39 n.122 (listing all fifty-three cases). Given the number of different jurisdictions and subject matters, one can imagine the huge quantity of general law decisions to choose from.

⁹¹ 1 Blackf. 81, 81–82 (Ind. 1820).

⁹² See *id.* at 82.

⁹³ *Id.*

⁹⁴ *Lenox v. Roberts*, 15 U.S. 373, 377 (1817).

⁹⁵ *Piatt*, 1 Blackf. at 82–83, 83 n.3.

⁹⁶ *Id.*

of the cargo.⁹⁷ Justice Kent first noted a “sufficiently analogous” case of his same court,⁹⁸ but since the law merchant is “the general law of commercial nations . . . it is to be expounded by having recourse to the usages of other nations.”⁹⁹ One New York case was not enough. In finding for the ship owners, Justice Kent considered English cases and treatises, the jurisprudence of France and Italy, as well as “the reason of the case” and “the spirit of the rule for contributions.”¹⁰⁰ The foreign law was not binding on the New York court, but rather evidence of the content of the general law. The New York court considered another matter of general commercial law in the 1816 case *N.Y. Fireman Insurance Co. v. Lawrence*, an insurance dispute over a cargo ship that had been captured by French pirates.¹⁰¹ Though the court thought that “plain elementary rules in the law of insurance” were “sufficient to decide the case,”¹⁰² it proceeded to consider a number of English and other state cases as additional evidence of “the true exposition of the law.”¹⁰³

Reliance on the general law was not limited to state courts; U.S. federal courts of all levels decided cases by finding applicable principles in the general law. In *The Rebecca*, decided in 1831, a district court in Maine was confronted with the question of whether, by general commercial law, a lien exists against a ship for the captain’s non-performance of a contract.¹⁰⁴ One party argued that it was “a general principle of maritime law,”¹⁰⁵ while the other party argued that such a rule, if it existed, was a product “not [of] the general customs of the sea, but [of] local usages, or special acts of legislation.”¹⁰⁶ In other words, the court needed to decide whether such a rule was a principle of general law or local law.

In order to determine the “principles of the general maritime law,”¹⁰⁷ the court proceeded to extensively detail the law’s development through European history.¹⁰⁸ The court began its historical analysis with “[t]he revival of commerce in the Middle Ages” and the accompanying

⁹⁷ 2 Cai. 263 (N.Y. Sup. Ct. 1805).

⁹⁸ *Id.* at 263–64.

⁹⁹ *Id.* at 265.

¹⁰⁰ *Id.* at 264–66.

¹⁰¹ 14 Johns. 46, 46–48 (N.Y. 1816).

¹⁰² *Id.* at 57–58.

¹⁰³ *Id.* at 58–62.

¹⁰⁴ 20 F. Cas. 373, 374 (D. Me. 1831) (No. 11,619).

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*

¹⁰⁷ *Id.* at 376.

¹⁰⁸ *See id.* at 376 (noting that resolution of the case may depend on “a critical examination of the origin and history of the maritime law”).

civil laws.¹⁰⁹ It noted the origins of the principle in the twelfth-century French Rolls of Oléron,¹¹⁰ and the fact that it was codified in an ordinance of Peter III of Aragon—the King of Valencia beginning in 1276.¹¹¹ It traced the general rule through the statutes of Holland, Sweden, Germany, and France.¹¹² Notably, no English case nor American case was directly on point.¹¹³ This did not matter for the court, however, because the general law “does not consist of cases, but of principles.”¹¹⁴ In this case, the general law did indeed consist of the claimed principle.

In 1822, Justice Story, riding circuit in Massachusetts, decided an admiralty case by reference to the general commercial law.¹¹⁵ *Peele v. Merchants’ Insurance Co.* concerned a dispute between the owners of a ship called the *Argonaut* and its insurers, after the ship crashed and the owners abandoned it as a total loss.¹¹⁶ Justice Story set out to determine the general law with respect to the right to abandon ship and damages calculations.¹¹⁷ He sought to “extract” “general principles . . . from the current of authorities.”¹¹⁸ So, through the lens of both judicial opinions and legal treatises, he extensively surveyed the development of the common law in both England¹¹⁹ and the United States.¹²⁰ The cases were not “easily reconcilable,” but Story “review[ed] them for the purpose of ascertaining what at least is the leading principle.”¹²¹ The general principle he extracted—which ultimately favored the insured—was justified by its origins in French law and the fact that it was found in “one of the earliest treatises on Insurance.”¹²²

The United States Supreme Court also conducted its fair share of general law analyses. In the years leading up to *Swift v. Tyson*, the Court routinely applied general commercial law to resolve disputes, which of course required “finding” the content of the general law to begin with. In 1807, the Supreme Court decided *French’s Executrix v. Bank of*

¹⁰⁹ *Id.* at 376.

¹¹⁰ *Id.* at 374; *see also id.* at 375 (“But this principle does not rest solely on [the Rolls’s] authority.”).

¹¹¹ *Id.* at 376.

¹¹² *Id.* at 374–77.

¹¹³ *Id.* at 375 (English); *id.* at 378 (American).

¹¹⁴ *Id.*

¹¹⁵ *Peele v. Merchants’ Ins. Co.*, 19 F. Cas. 98 (C.C.D. Mass. 1822) (No. 10,905).

¹¹⁶ 19 F. Cas. at 99–101.

¹¹⁷ *Id.* at 102.

¹¹⁸ *Id.* at 111.

¹¹⁹ *Id.* at 104–09.

¹²⁰ *Id.* at 109–11. Justice Story looked at both state and federal cases. *Id.*

¹²¹ *Id.* at 104.

¹²² *Id.* at 113.

Columbia.¹²³ The Court considered a question similar to that in *Piatt*,¹²⁴ namely, whether the endorser of a promissory note is still obligated to pay the note's holder absent timely notice and demand.¹²⁵ Chief Justice John Marshall began by noting the "general rule of law" that an endorser faces no liability when the holder fails to demand payment and to give notice of nonpayment to the endorser.¹²⁶ In deciding whether an exception existed, he considered a number of English cases, and from these cases determined the "reason for the rule," i.e., the general "principle" common to all authorities.¹²⁷ Ultimately, "[i]n point of reason, justice, and the nature of the undertaking," the endorser prevailed because he was entitled to demand strict notice.¹²⁸

Another general commercial law from the Supreme Court was the 1833 case of *Nichols v. Fearson*,¹²⁹ in which the Court considered whether a promissory note for \$101 in exchange for \$97 cash was usurious and thus unenforceable.¹³⁰ Because the question was one "of such general mercantile interest," Justice Johnson "dispose[d] of the question according to [the Court's] own best judgment of the law."¹³¹ No Supreme Court precedent existed, so the Court decided the issue based on "what appear[ed] . . . to be the weight of authority."¹³² Johnson surveyed decisions from Connecticut, Virginia, Kentucky, South Carolina, and Maryland,¹³³ and concluded that the promissory note was enforceable.¹³⁴

Finally, a brief survey of general law in practice would not be complete without a discussion of the Supreme Court's 1842 decision in *Swift v. Tyson*, authored by Justice Story.¹³⁵ The background of the case is relatively convoluted, and a rendition of the facts is unnecessary for the purposes of this Note. Ultimately, the resolution of the case depended on whether pre-existing debt was adequate consideration in exchange for a negotiable instrument.¹³⁶ Justice Story first concluded that New York law did not govern the dispute.¹³⁷ As such, he was free "to ascertain upon general reasoning and legal analogies, . . . what is the just rule furnished by the principles of

¹²³ 8 U.S. (4 Cranch) 141 (1807).

¹²⁴ See *supra* notes 91–93 and accompanying text.

¹²⁵ *French's Ex'x*, 8 U.S. (4 Cranch) at 153.

¹²⁶ *Id.*

¹²⁷ *Id.* at 155–64.

¹²⁸ *Id.* at 164.

¹²⁹ 32 U.S. (7 Pet.) 103 (1833).

¹³⁰ *Id.* at 103–05.

¹³¹ *Id.* at 108.

¹³² *Id.* at 109.

¹³³ *Id.* at 109–11.

¹³⁴ *Id.* at 112.

¹³⁵ 41 U.S. (16 Pet.) 1 (1842).

¹³⁶ *Id.* at 14–15.

¹³⁷ *Id.* at 18–19.

commercial law to govern the case.”¹³⁸ Decisions from any one jurisdiction, although deserving of “the most deliberate attention and respect,” could not serve as “conclusive authority.”¹³⁹ At best, they were evidence of “the general principles and doctrines of commercial jurisprudence.”¹⁴⁰ Beginning with a baseline principle set forth by Cicero,¹⁴¹ Justice Story went on to consider its adoption in past Supreme Court cases,¹⁴² English cases and treatises,¹⁴³ and state court decisions,¹⁴⁴ ultimately concluding that pre-existing debt could serve as valuable consideration because that principle “seem[ed] generally but not universally to prevail.”¹⁴⁵

D. General Law Analyses

Based on the examples provided in the preceding Section, one can make a few high-level observations about general law analyses. First, each jurisdiction decided the content of the general law for itself. The general law concerned matters that interested many different jurisdictions,¹⁴⁶ and as such, no one jurisdiction could prescribe general law that bound all others.¹⁴⁷ General law was not a product of sovereign commands, and so no sovereign could bind another as to its content. While courts routinely looked to decisions from multiple jurisdictions, the final decision as to the content of the general law was a matter of independent judgment.¹⁴⁸

This held true even across jurisdictions within the United States.¹⁴⁹ Federal courts were not bound by state expositions of general law,¹⁵⁰

¹³⁸ *Id.* at 19.

¹³⁹ *Id.*

¹⁴⁰ *Id.*

¹⁴¹ *Id.*

¹⁴² *Id.* at 20.

¹⁴³ *Id.* at 20–22.

¹⁴⁴ *Id.* at 22.

¹⁴⁵ *Id.*

¹⁴⁶ See *supra* notes 33–39 and accompanying text.

¹⁴⁷ See *Thurston v. Koch*, 4 U.S. (4 Dall.) 348 (1800) (opinion of Peters, J.) (explaining how, when a question of general law is still unsettled, a U.S. court can “at least, commence the means of final decision,” not settle the matter for other courts); see also *Bellia & Clark*, *supra* note 21, at 660; *Fletcher*, *supra* note 21, at 1539.

¹⁴⁸ See, e.g., *Baring v. Reeder*, 11 Va. (1 Hen. & M.) 154 (1806) (explaining how, in matters of general law, the court would “consult[] [the opinions of] eminent jurists and merchants [in Europe],” but that those sources were “clothed with no authority whatsoever.”); *Bourke v. Granberry*, 21 Va. (Gilmer) 16, 25 (1820) (“It is not new for this court to differ from the courts of England, on questions of general law.”); see also *Bellia & Clark*, *supra* note 21, at 678.

¹⁴⁹ See *Bellia & Clark*, *supra* note 21, at 672 (“States did not have the power to ‘settle’ questions of general law.”).

¹⁵⁰ See, e.g., *Nichols v. Fearson*, 32 U.S. (7 Pet.) 103, 108–12 (1833) (consulting state expositions of general law but ultimately resolving the case “according to [the Court’s] own best judgment of the law”); see also *Bellia & Clark*, *supra* note 21, at 669, 672.

and the courts of one state were neither bound by federal courts¹⁵¹ nor by the courts of any other state¹⁵² when it came to matters of general law. As shown by *Piatt*, the Indiana Supreme Court did not consider itself bound by the U.S. Supreme Court on matters of general commercial law.¹⁵³ And the reverse can be seen in *Swift*, where the U.S. Supreme Court did not consider any one jurisdiction (state or otherwise) to be the authoritative expositor on matters governed by general law.¹⁵⁴

Second, to resolve questions of general law, courts often considered a vast quantity of different sources. Consistent with the first observation, courts did not treat any one source as an authoritative statement of the general law. Rather, each source was but one piece of evidence pointing to the correct interpretation of the general law. In discerning principles of general law, courts routinely consulted legal treatises and judicial opinions from England, other states, and federal courts as evidence of the law.¹⁵⁵ And courts did not limit their consideration to only legal sources; they often looked to “more general ‘practice,’ or ‘custom,’ or ‘reason,’ which might be ascertained from ‘external sources’ beyond judicial decisions.”¹⁵⁶ As St. George Tucker wrote in an appendix to his 1803 edition of Blackstone’s Commentaries:

[T]he matters cognizable in the federal courts, belong . . . partly to the law of nations, partly to the common law of England; partly to the civil law; partly to the maritime law . . . ; and partly to the general law and custom of merchants; and partly to the municipal laws of any foreign nation, or of any state in the union, where the cause of action may happen to arise, or where the suit may be instituted; so, [all these sources] must in their turn be resorted to as the rule of decision¹⁵⁷

¹⁵¹ See, e.g., *Thompson v. Cumming*, 29 Va. (2 Leigh) 321, 325 (1830) (stating that the U.S. Supreme Court’s pronouncement of the law merchant “does not bind us”); *Waln v. Thompson*, 9 Serg. & Rawle 115, 122 (Pa. 1822) (“The decisions of the Supreme Court of the United States [on questions of general commercial law] have no obligatory authority over this court”); see also *Bellia & Clark*, *supra* note 21, at 686.

¹⁵² See, e.g., *Southard v. Steele*, 19 Ky. (3 T.B. Mon.) 435, 438 (1826) (describing Pennsylvania general law precedent as “not obligatory upon us, yet . . . entitled to respect”); *Hixon v. Reed*, 12 Ky. (2 Litt.) 174, 177 (1822) (describing New York general law decisions as “not obligatory on this court, [but] entitled to high respect”); *Houston v. New England Ins. Co.*, 22 Mass. (22 Pick.) 89, 92 (1827) (refusing to “adopt the [general law] decision in Virginia” because the law was “otherwise settled in England and New York”); see also *Bellia & Clark*, *supra* note 21, at 678.

¹⁵³ See *supra* notes 91–96 and accompanying text.

¹⁵⁴ See *supra* notes 135–45 and accompanying text.

¹⁵⁵ See *Bellia & Clark*, *supra* note 21, at 678.

¹⁵⁶ Adam N. Steinman, *Case Law*, 97 B.U. L. REV. 1947, 1956 (2017) (citations omitted).

¹⁵⁷ St. George Tucker, Appendix to 1 WILLIAM BLACKSTONE, COMMENTARIES at 430 (S. Tucker ed. & comm. 1803).

The list of potential sources of law that Tucker had in mind would astound a modern-day judge. Beyond just state and federal law, the notion of general law subsumed broad categories of law.

The example cases in the previous Section demonstrate just how broad the corpus of sources could be. At a minimum, the typical general law analysis included a consideration of English common law and the decisions of other states.¹⁵⁸ At perhaps its broadest, judges considered the civil law of other countries¹⁵⁹ and the history of laws as they developed over the course of many centuries.¹⁶⁰

Third, the logical chain from the body of sources to the general law principle was necessarily inductive in nature—a judge could have come to a number of different conclusions about the nature of the underlying principle. Reasoning can be either deductive or inductive. It is deductive if “the truth of the input propositions (the premises) logically guarantees the truth of the output proposition (the conclusion)”¹⁶¹ Inductive reasoning, on the other hand, involves “mak[ing] inferences that may not be deductively valid.”¹⁶² In other words, “the truth of the premises need not guarantee the truth of the conclusion [They only] provide evidential support for the conclusion.”¹⁶³

In general law analyses, judges distilled a general principle (the “law”) from the applicable corpus of sources. The prevailing view at the time was that a judge, by carefully studying precedent, could reveal its true, underlying principles through the process of induction.¹⁶⁴ Given

¹⁵⁸ For example, consider the New York cases, *supra* notes 97–103, and Story’s decisions in *Peele*, *supra* notes 115–22, and *Nichols*, *supra* notes 129–34.

¹⁵⁹ See *supra* text accompanying notes 97–102.

¹⁶⁰ See *supra* text accompanying notes 104–14.

¹⁶¹ 1 ENCYCLOPEDIA OF THE MIND 226 (Harold Pashler ed., 2013); see also Usha Goswami, *Inductive and Deductive Reasoning*, in THE WILEY-BLACKWELL HANDBOOK OF CHILDHOOD COGNITIVE DEVELOPMENT 399, 399 (Usha Goswami ed., 2d ed. 2011) (“Deductive reasoning includes conditional reasoning (‘if A, then B’), counterfactual reasoning, and transitive reasoning (linear syllogisms).”).

¹⁶² Goswami, *supra* note 161, at 399; see also *id.* (“[I]nductive reasoning include[s] generalizing on the basis of a known example, making an inductive inference from a particular premise, and drawing an analogy.”).

¹⁶³ ENCYCLOPEDIA OF THE MIND, *supra* note 161, at 226.

¹⁶⁴ See, e.g., William Curtis Noyes, *Legal Rules Governing the Enjoyment and Use of Light*, 23 AM. JURIST & L. MAG. 46, 58–59 (1840) (“Let your minds be well stored with legal principles, and there is little danger of being lost or long led astray among the mass of cases Scrutinize every case with rigor, take no man’s mere opinion for law, apply to it the infallible test of principle, and if it will not stand this trial, it may safely be disregarded”); DANIEL MAYES, AN ADDRESS TO THE STUDENTS OF LAW IN TRANSYLVANIA UNIVERSITY: DELIVERED AT THE BEGINNING OF THE SESSION FOR 1835, at 6–7 (J. Clarke & Co. 1835) (calling legal study a “science,” and explaining that “in truth, it ha[s] elementary principles, founded in reason and in the fixed nature of things,” which can be “examined, investigated, and understood”); see also LaPiana, *supra* note 25, at 774–82 (describing how Lord Bacon’s

the nature of inductive reasoning, a judge could have come to a number of equally valid conclusions about the underlying principle. Once the relevant principles were found, they became “the premises for the additional procedure of deductive analysis,”¹⁶⁵ i.e., a deductive application of the principles to the facts of the case. This method of reasoning reflected the common beliefs about the nature of the law pre-*Erie*: “Law was a system of principles which could be discovered through the investigation of the cases which reflected the principles. Judges had the responsibility of correctly elucidating principles through the investigation of precedents and of applying them to the cases before them.”¹⁶⁶ While general law analyses may seem to be a remnant of the past, each of these three principles can be clearly seen when the Supreme Court uses an originalist approach to interpreting constitutional provisions that codified pre-existing rights.

II

ORIGINALIST ANALYSIS OF PRE-EXISTING RIGHTS

“The law is perfectly well settled that the first ten amendments to the Constitution, commonly known as the Bill of Rights, were not intended to lay down any novel principles of government, but simply to embody certain guaranties and immunities which we had inherited from our English ancestors. . . .”¹⁶⁷ While this 1897 understanding of all ten amendments may no longer be reflected in the law, the Supreme Court still interprets certain provisions of the Bill of Rights as references to “pre-existing”¹⁶⁸ rights—rights that existed at general law at the time of enactment. The Supreme Court has applied an originalist framework to pre-existing rights in at least the context of the Second Amendment’s right to bear arms¹⁶⁹ and the Sixth Amendment’s right

scientific method—inducing principles from carefully studied facts—influenced antebellum American jurists’ view of the law as a science of principles).

¹⁶⁵ THEODORE DWIGHT BOZEMAN, *PROTESTANTS IN AN AGE OF SCIENCE: THE BACONIAN IDEAL AND ANTEBELLUM AMERICAN RELIGIOUS THOUGHT* 67 (1977).

¹⁶⁶ LaPiana, *supra* note 25, at 830; *see also* JOSEPH STORY, *Characteristics of the Age, in THE MISCELLANEOUS WRITINGS OF JOSEPH STORY* 340, 350–60 (William W. Story ed., C.C. Little & J. Brown, 1852) (describing how influential “Lord Bacon’s method of induction” was on a number of subjects, including the law); *supra* note 164 and accompanying text.

¹⁶⁷ *Robertson v. Baldwin*, 165 U.S. 275, 281 (1897); *see also* *Pac. Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 34–35 (1991) (Scalia, J., concurring) (“[M]ost of the procedural protections of the Federal Bill of Rights simply codified traditional common-law privileges . . .”).

¹⁶⁸ This term is taken from *District of Columbia v. Heller*, and I will use it to refer generally to rights that existed at the time of the Founding and were subsequently codified in the Constitution. *See* 554 U.S. 570, 588 (2008).

¹⁶⁹ U.S. CONST. amend. II.

to confrontation.¹⁷⁰ I discuss the former in Section A and the latter in Section B. In both situations, the Supreme Court looked to a similar array of sources to determine the scope of the right and to find a general principle to apply to the case at hand. In other words, in both situations, the Court engaged in a general law analysis. While the opinions rooted some of the analysis in the relevant constitutional text, the following Sections will show that general law drove the Court's analysis. After all, the words "confrontation" and "keep and bear arms" only get you so far.¹⁷¹

A. *The Second Amendment*

The Supreme Court's application of general law analyses to the Second Amendment can be seen both in *Heller* (the initial exposition of the originalist standard governing firearm regulations)¹⁷² and in *Bruen* (the subsequent application of the *Heller* standard to a New York firearm restriction).¹⁷³ While I address each case in turn, I focus more on the former because it provides a clearer example of the mode of reasoning. However, the subsequent discussion of *Bruen* demonstrates that general law analyses continue to have a place in originalist jurisprudence even after the initial delineation of the scope of a pre-existing constitutional right.

1. *District of Columbia v. Heller*

In *District of Columbia v. Heller*, the Supreme Court held that the Second Amendment confers an "individual right to possess and carry weapons in case of confrontation,"¹⁷⁴ and that D.C.'s restrictive gun registration scheme violated the Second Amendment.¹⁷⁵ While the result of *Heller* is notable, the way in which Justice Scalia reached these conclusions is more important for the purposes of this Note. Justice Scalia rooted his opinion in the original understanding of the Second Amendment,¹⁷⁶ and supplemented the plain text with a detailed historical analysis. Critical to his analysis was the premise that "it has always

¹⁷⁰ U.S. CONST. amend. VI.

¹⁷¹ *Cf.* *Crawford v. Washington*, 541 U.S. 36, 42 (2004) (noting that the "Constitution's text alone does not resolve th[e] case").

¹⁷² *District of Columbia v. Heller*, 554 U.S. 570 (2008).

¹⁷³ *N.Y. State Rifle & Pistol Ass'n v. Bruen*, 142 S. Ct. 2111 (2022).

¹⁷⁴ *Heller*, 554 U.S. at 592.

¹⁷⁵ *Id.* at 628–29.

¹⁷⁶ *See id.* at 634–35 ("Constitutional rights are enshrined with the scope they were understood to have when the people adopted them."); *see also* Lawrence Solum, *Heller and Originalism, Part I: An Introduction to the Series*, LEGAL THEORY BLOG (June 28, 2008), <https://lsolum.typepad.com/legaltheory/2008/06/heller-and-the.html> [<https://perma.cc/N4TE-RQ7F>]

been widely understood that the Second Amendment . . . codified a *pre-existing* right”;¹⁷⁷ it did not “fashion a new one.”¹⁷⁸ Justice Scalia, while not precisely explaining the implications of this premise, used it as a justification for his wide-ranging historical analysis.

As noted above, when the Bill of Rights was passed, the “rights [it] mentioned . . . were often conceptualized as a species of general law.”¹⁷⁹ Justice Scalia, by saying that the Amendment codified a pre-existing right, meant that the Amendment’s original meaning is coextensive with the pre-existing right, fixed in 1791. Because the right existed in the general law, the original meaning of the Amendment was the same as the Founders’ conception of the right under the rubric of general law. Justice Scalia, to find the original meaning, thus needed to determine what the 1791 general law right would have protected. And the only way to determine the content of general law rights is through a general law analysis.

Justice Scalia never once pointed this out in his opinion, but his analysis is consistent with this understanding. At every step of the analysis, Scalia used history not just to defend his textual analysis but also to go well beyond the Amendment’s plain text. For example, Justice Scalia initially concluded that the words “the right of the people” refer to an individual right.¹⁸⁰ He first defended this textual conclusion with a “review of founding-era sources,”¹⁸¹ but he did not stop there. Instead, he turned more broadly to “the historical background of the Second Amendment” in order to glean insights.¹⁸² Scalia traced the development of the right to keep and bear arms over the course of a century’s worth of English history.¹⁸³ In the course of this survey, he looked to a wide variety of sources, including accounts of monarchs disarming their

(“[*Heller*] provides the clearest expression of public meaning originalism to be found in a Supreme Court decision.”).

¹⁷⁷ *Heller*, 544 U.S. at 592; *see also id.* at 599 (“[T]he Second Amendment was not intended to lay down a ‘novel principl[e]’ but rather codified a right ‘inherited from our English Ancestors’” (second alteration in original) (quoting *Robertson v. Baldwin*, 165 U.S. 275, 281 (1897))).

¹⁷⁸ *Id.* at 603.

¹⁷⁹ Campbell, *supra* note 60, at 1455; *see also supra* Section I.C.

¹⁸⁰ *Heller*, 544 U.S. at 581.

¹⁸¹ *Id.* at 584.

¹⁸² *Id.* at 592.

¹⁸³ *Id.* at 592–95. Scalia began with the “Restoration,” *id.* at 592, which began in 1660. *See Restoration*, ENCYCLOPAEDIA BRITANNICA, <https://www.britannica.com/topic/Restoration-English-history-1660> [<https://perma.cc/CQZ9-8Y7G>] (explaining that the “Restoration” in English history refers to the return of Charles II as king in 1660). He ended his survey of English history with “the tumultuous decades of the 1760’s and 1770’s.” *Heller*, 544 U.S. at 594.

subjects,¹⁸⁴ the English Bill of Rights,¹⁸⁵ treatises on English law,¹⁸⁶ and early American popular press¹⁸⁷ and legal treatises.¹⁸⁸ He determined that all of these extra-textual sources showed that the Founders understood the right to bear arms as an individual right. None of the sources directly dealt with the Second Amendment, or the words “the right of the people,” and yet Justice Scalia made extensive use of them. He used historical sources relating to *other* rights to keep and bear arms because they were evidence of the general law right as it existed in 1791, which is referenced by the Second Amendment.

The implicit presence of general law in Justice Scalia’s opinion explains his method of reasoning. Determining the scope of the general law requires one to look beyond the semantic meaning of the text, to consider a wide variety of historical and legal sources—none of which provide a binding interpretation of the law—and to distill from them a general principle that can be applied to the case at hand.¹⁸⁹ The clearest example of this method of reasoning is Justice Scalia’s analysis leading to his conclusion that “the inherent right of self-defense [is] central to the Second Amendment right.”¹⁹⁰ This was necessary to his determination that the D.C. gun laws were unconstitutional; the regulations “ma[de] it impossible for citizens to use [handguns] for the core lawful purpose of self-defense and [were] hence unconstitutional.”¹⁹¹ But self-defense is nowhere mentioned in the text of the Second Amendment. Justice Scalia only came to this conclusion after examining in detail a vast number of sources and from them distilling a general principle: The “core” of the 1791 general law right to keep and bear arms was self-defense.

In the course of this analysis, Justice Scalia considered English history;¹⁹² the 1788 ratification debates;¹⁹³ “analogous arms-bearing rights in state constitutions that preceded and immediately followed adoption

¹⁸⁴ *See id.* at 592–93 (mentioning the practices of Kings Charles II and James II).

¹⁸⁵ *See id.* at 593.

¹⁸⁶ *See id.* at 593–94 (relying on the works of Blackstone and “[o]ther contemporary authorities”).

¹⁸⁷ *See id.* at 594 (using articles published in the New York Journal and the Boston Gazette in the year 1769).

¹⁸⁸ *See id.* at 594–95 (relying on the understanding of the right as evidenced in the “early American edition of Blackstone’s Commentaries (by the law professor and former Anti-federalist St. George Tucker”).

¹⁸⁹ *See supra* Section I.D.

¹⁹⁰ *Heller*, 544 U.S. at 628; *see also id.* at 599 (“[S]elf-defense . . . was the *central component* of the [Second Amendment] right itself.”).

¹⁹¹ *Id.* at 630.

¹⁹² *See id.* at 598.

¹⁹³ *See id.* at 598–99.

of the Second Amendment;¹⁹⁴ and post-ratification interpretation of the Amendment by legal scholars, U.S. federal and state courts, and legislatures.¹⁹⁵ He determined that the individual right to self-defense was the single thread running through all of those sources,¹⁹⁶ and concluded that the Founding generation must have referenced this individual right in the Second Amendment.

Reframing this in language familiar to this Note, Justice Scalia concluded that the Founding generation conceived of the general law right to keep and bear arms as protecting the individual right to self-defense. This individual right was also protected by the Second Amendment since its sparse text codified the broader general law right. Justice Scalia never explicitly said he was setting out to determine the scope of the general law. Instead, an implicit reference to the general law can be found in his repeated assertions that the Second Amendment “codified a pre-existing right.”¹⁹⁷ More importantly, however, the mode of analysis used throughout the opinion demonstrates that Scalia was in fact determining the scope of the general law at the time of enactment, whether he did so explicitly or not.

2. New York State Rifle & Pistol Association v. Bruen

In *New York State Rifle & Pistol Association v. Bruen*, the Supreme Court, in an opinion authored by Justice Clarence Thomas, struck down New York’s “may issue” firearm regime as unconstitutional under the Second Amendment.¹⁹⁸ In doing so, Justice Thomas elaborated on *Heller*’s constitutional standard: Judges first must determine if the Second Amendment’s plain text governs the regulated conduct. If it does, the challenged restriction is constitutional only if it is “consistent with the Nation’s historical tradition of firearm regulation.”¹⁹⁹

The second part of *Bruen*’s test is in fact a general law analysis styled as a “history and tradition” inquiry. Without making it clear, Justice Thomas uses most of the majority opinion to determine whether New York’s licensing regime would have been accepted as a matter of

¹⁹⁴ See *id.* at 600–03 (examining interpretations of arms-bearing rights in the state constitutions of Pennsylvania, Vermont, North Carolina, Massachusetts, Kentucky, Ohio, Indiana, Missouri, Mississippi, Connecticut, and Alabama).

¹⁹⁵ See *id.* at 605–10, 616–19 (scholars); *id.* at 610–14 (courts); *id.* at 614–16 (legislatures).

¹⁹⁶ See *id.* at 628 (“As the quotations earlier in this opinion demonstrate, the inherent right of self-defense has been central to the Second Amendment right.”).

¹⁹⁷ *Id.* at 592 (emphasis omitted).

¹⁹⁸ 142 S. Ct. 2111, 2122–26 (2022).

¹⁹⁹ *Id.* at 2129–30 (“When the Second Amendment’s plain text covers an individual’s conduct, the Constitution presumptively protects that conduct. The government must then justify its regulation by demonstrating that it is consistent with the Nation’s historical tradition of firearm regulation.”); see also *id.* at 2126 (similar).

general law as it existed at the time of the Founding. He considered innumerable legal and historical sources—spanning about 700 years and originating from multiple jurisdictions²⁰⁰—in the quest to determine whether the general law right to keep and bear arms at the time of the Founding would have “permitted *broad prohibitions* on all forms of public carry,”²⁰¹ as he characterized New York’s law. At the outset, Justice Thomas explained that “not all history is created equal”; historical evidence that long predates or postdates ratification is treated as less weighty.²⁰² He then categorized the historical evidence by time period and jurisdiction and considered each in turn.²⁰³ A brief overview of some of this part of the opinion will clearly demonstrate the implicit presence of general law and general law analyses in Thomas’s reasoning.

Justice Thomas first considered almost 500 years of “English history and custom before the founding,” surveying various statutes, cases, and treatises from the time.²⁰⁴ He then turned to “the history of the Colonies and early Republic,” detailing various colonial and early state statutes and treatises.²⁰⁵ Ultimately, he concluded that a single “thread” ran through the legal and historical sources from “the century leading up to the Second Amendment and in the first decade after its adoption”: Bearing arms was only prohibited when it was done “in a way that spread[] ‘fear’ or ‘terror’ among the people.”²⁰⁶ Therefore, “the pre-existing right enshrined in the Second Amendment [did not] permit[] broad prohibitions on all forms of public carry.”²⁰⁷

The way that Justice Thomas marshalled the historical evidence is perfectly consistent with general law analyses. He surveyed innumerable historical sources from multiple jurisdictions (England, the colonies,

²⁰⁰ See *id.* at 2135–36 (“Respondents appeal to a variety of historical sources from the late 1200s to the early 1900s. We categorize these periods as follows: (1) medieval to early modern England; (2) the American Colonies and the early Republic; (3) antebellum America; (4) Reconstruction; and (5) the late-nineteenth and early-twentieth centuries.”).

²⁰¹ *Id.* at 2145 (emphasis added).

²⁰² *Id.* at 2136 (“Historical evidence that long predates [the ratification] date may not illuminate the scope of the right if linguistic or legal conventions changed in the intervening years.”); see also *id.* (“[Courts must] guard against giving postenactment history more weight than it can rightly bear.”). This is perfectly consistent with general law analyses, as the weightiest general law principles were those which had been accepted for the longest time. Cf. *supra* notes 104–14 and accompanying text (discussion of *The Rebecca*).

²⁰³ *Bruen*, 142 S. Ct. at 2135–56.

²⁰⁴ *Id.* at 2138. He considered English statutes from as early as 1285 to treatises as late as 1745. *Id.* at 2138–42.

²⁰⁵ *Id.* at 2142–45.

²⁰⁶ *Id.* at 2145; see *id.* at 2140–43 (discussion of English law as supporting this principle); *id.* at 2143–45 (discussion of colonial and state law as supporting this principle).

²⁰⁷ *Id.* at 2145.

and various states), noted that no single interpretation was binding,²⁰⁸ and determined that the general law at the time of ratification included a right to bear arms in public, only subject to “certain reasonable, well-defined restrictions.”²⁰⁹ Thomas “found” the restrictions by distilling the principles underlying the corpus of historical evidence—for example, the principle that “the intent for which one could carry arms” was limited.²¹⁰ And throughout his analysis, Justice Thomas relied more on long-standing principles at the time of the Founding than on modern developments.²¹¹

B. *The Sixth Amendment’s Confrontation Clause and Crawford*

The Supreme Court’s opinion in *Crawford v. Washington*²¹² is another example of a general law analysis present in the Court’s current originalist jurisprudence. *Crawford* was the Supreme Court’s first time interpreting the Confrontation Clause of the Sixth Amendment²¹³ through an originalist lens. In *Crawford*, the Supreme Court set out to determine whether one suspect’s police interview could be admitted in court against another suspect despite the lack of cross-examination.²¹⁴

The Supreme Court, in an opinion authored by Justice Scalia, held that the use of the police interview violated the Confrontation Clause.²¹⁵ At the outset, Justice Scalia noted that the “Constitution’s text alone does not resolve th[e] case.”²¹⁶ He thus “turn[ed] to the historical background of the Clause.”²¹⁷ To justify the use of history in such a fashion, Scalia noted that the “founding generation’s immediate source of the

²⁰⁸ See *id.* at 2153 (“[W]hile we recognize the support that postbellum Texas provides for respondents’ view, we will not give disproportionate weight to a single state statute and a pair of state-court decisions. As in *Heller*, we will not ‘stake our interpretation of the Second Amendment upon a single law, in effect in a single [state], that contradicts the overwhelming weight of other evidence regarding the right to keep and bear arms for defense’ in public.” (alteration in original) (quoting *District of Columbia v. Heller*, 554 U.S. 570, 632 (2008))).

²⁰⁹ *Id.* at 2156.

²¹⁰ *Id.*; see *supra* note 206 and accompanying text.

²¹¹ Cf. *The Rebecca*, 20 F. Cas. 373, 375, 378 (D. Me. 1831) (rejecting one interpretation of the general law because the principle relied upon was “entirely due to modern invention,” whereas the other interpretation was “ancient custom” and “so deeply rooted . . . in the living spirit of maritime law”); see also *supra* notes 104–14 and accompanying text (more detailed discussion of *The Rebecca*).

²¹² 541 U.S. 36 (2004).

²¹³ U.S. CONST. amend. VI (“In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him.”).

²¹⁴ *Crawford*, 541 U.S. at 38.

²¹⁵ *Id.* at 68–69. The majority opinion was joined by Justices Stevens, Kennedy, Souter, Thomas, Ginsburg, and Breyer.

²¹⁶ *Id.* at 42.

²¹⁷ *Id.* at 43.

concept . . . was the common law,”²¹⁸ and that the right to confrontation “is most naturally read as a reference to the right of confrontation at common law.”²¹⁹ Just as with the Second Amendment in *Heller*, Scalia here held that the Sixth Amendment codified a *pre-existing* right.²²⁰ Accordingly, the use of history to interpret the scope of the Confrontation Clause is completely justified by originalist theory: Since the Constitution is to be interpreted consistently with its original public meaning, and the original meaning of the Confrontation Clause was as a reference to the general law, the Confrontation Clause must be interpreted consistently with the general law understanding of the right at the time of enactment.

The majority opinion proceeded in roughly four parts. First, Justice Scalia thoroughly detailed the historical understandings and practices of the right to confrontation both in England and in the several states.²²¹ Second, from this historical record, he deduced “two inferences about the meaning of the Sixth Amendment,”²²² the content of which will be elaborated upon later in this Note. Third, he considered Supreme Court precedent, noting that the results of the cases could be largely squared with the two principles, but that the same could not be said about their rationales.²²³ Finally, in a brief conclusion, Justice Scalia applied these principles to the situation at hand and determined that the defendant’s Sixth Amendment rights were violated.²²⁴

This high-level method of reasoning is reminiscent of general law analyses²²⁵—a methodological resemblance that is accentuated in analyzing the opinion’s first and second parts in more depth. In the first part of the opinion, Justice Scalia surveyed a wide variety of sources from a time period spanning over 300 years.²²⁶ He considered English historical criminal law including treatises, specific statutes, certain trials, and

²¹⁸ *Id.*

²¹⁹ *Id.* at 54.

²²⁰ See *supra* notes 177–78 and accompanying text.

²²¹ See *Crawford*, 541 U.S. at 43–50 (exploring the historical evolution of the right to confront one’s accusers from Roman times to its subsequent interpretation in English common law for testimony at criminal trials and in the Colonies’ declarations of rights and state decisions).

²²² See *id.* at 50–56.

²²³ See *id.* at 57–68.

²²⁴ See *id.* at 68–69.

²²⁵ See *supra* Part I.

²²⁶ See *Crawford*, 541 U.S. at 43–50. The earliest source cited is an English trial from the year 1554, *id.* at 43 (citing *Throckmorton’s Case*, 1 HOWELL’S STATE TRIALS 869, 875–76 (1554)), although Scalia does say that the “right to confront one’s accusers is a concept that dates back to Roman times.” *Id.* The most recent source cited is a treatise of American law from 1872. See *id.* at 50 (citing 1 J. BISHOP, CRIMINAL PROCEDURE § 1093, at 689 (2d ed. 1872)).

court cases,²²⁷ practice in the Colonies including declarations of rights from before the American Revolution,²²⁸ Constitutional ratification debates,²²⁹ and early state and federal court decisions from before and after the Sixth Amendment was adopted.²³⁰

In the second part, Justice Scalia synthesized the entire body of sources into two “inferences” about the scope of the pre-existing right to confrontation²³¹: (1) that “the principal evil at which the Confrontation Clause was directed was the civil-law mode of criminal procedure, and particularly its use of *ex parte* examinations as evidence against the accused,”²³² i.e., “testimonial hearsay”;²³³ and (2) that “the Framers would not have allowed admission of testimonial statements of a witness who did not appear at trial unless he was unavailable to testify, and the defendant had had a prior opportunity for cross-examination.”²³⁴

A closer look at how Justice Scalia arrived at the second proposition clearly shows the presence of general law, and thus a general law analysis, in his reasoning. His basic argument begins with the inferential conclusion, based on his prior historical survey, that English common law in 1791 limited the use of testimonial hearsay of absent witnesses to only certain situations.²³⁵ He then notes that the Sixth Amendment, because it is a “reference to the right of confrontation at common law, . . . incorporates those limitations.”²³⁶ And the early state court decisions confirm that these limitations “were received as part of the common law of this country.”²³⁷ This last proposition correctly implies that state courts treated the right of confrontation as one that existed in general law.²³⁸ In the late eighteenth and early nineteenth century, when these

²²⁷ See *id.* at 47 (treatises); *id.* at 43–46 (statutes); *id.* at 44–45 (trials); *id.* at 44–47, 54–55 n.5 (cases).

²²⁸ See *id.* at 47–49.

²²⁹ See *id.* at 48–49.

²³⁰ See *id.* at 49–50 (referring to *State v. Webb*, 2 N.C. 103, 104 (Super. L. & Eq. 1794) (per curiam) (“[I]t is a rule of the common law, founded on natural justice, that no man shall be prejudiced by evidence which he had not the liberty to cross examine.”) and *State v. Campbell*, 30 S.C.L. 124 (S.C. Ct. App. 1844) (finding the ability of the accused to confront and subject witnesses to their personal examination to be an “indispensable condition” implicitly guaranteed by the State Constitution)).

²³¹ See *id.* at 50–56.

²³² *Id.* at 50.

²³³ *Id.* at 53.

²³⁴ *Id.* at 53–54.

²³⁵ See *id.*

²³⁶ *Id.* at 54.

²³⁷ *Id.*

²³⁸ For example, in *State v. Webb*, 2 N.C. 103, 104 (Super. L. & Eq. 1794) (per curiam) (emphasis added), the North Carolina Superior Court of Law and Equity held that the right of confrontation “is a *rule of the common law*, founded on natural justice.” In another case, *Commonwealth v. Richards*, 35 Mass. 434 (1 Pick. 1836), the Supreme Judicial Court of

state court cases were decided, the “common law” was the “*general* common law shared by the American states rather than a local common law of a particular state.”²³⁹ Justice Scalia just as easily could have written that the state court decisions show that the limitations on the use of testimonial hearsay were received “as a part of the *general* law” of this country.

In sum, after determining that the Sixth Amendment references a pre-existing right, the *Crawford* Court set out to determine the scope of the general law right of confrontation at the time of enactment. To do so, it surveyed a vast array of legal and historical sources, from a number of different jurisdictions, over a period of more than 300 years. And from this body of sources, it distilled two “inferences,” which it subsequently applied to decide the case at hand. In other words, Justice Scalia employed a typical general law analysis to determine the content of the general law.

III

IMPLICATIONS OF THE COURT’S CURRENT MODE OF ANALYSIS

Practically speaking, the mode of analysis prevalent in general law cases is the same as the one employed by the Supreme Court in *Heller*, *Bruen*, and *Crawford*. The Court, as a product of originalist theory, must sometimes engage in a general law analysis to determine the scope of a pre-existing right as it existed in the general law of 1791. As described in Section I.D, general law analyses share three common characteristics: (1) No single source is an authoritative statement of the general law; (2) because of this, judges are required to look at a vast number of different kinds of sources; and (3) from these sources, judges must distill general principles and apply them to the case at hand. The Supreme Court did just this in *Heller*, *Bruen*, and *Crawford*. In *Heller*, Justice Scalia found the principle of individual self-defense as undergirding all the historical and legal sources he considered. In *Bruen*, Justice Thomas surveyed mountains of historical evidence to determine the single “thread” running through all sources. Finally, in *Crawford*, Scalia catalogued a vast array of authorities and inferred from them that the right of confrontation generally prevented the use of testimonial hearsay without a prior opportunity to cross examine the witness.

Massachusetts decided an issue of the right to confrontation by looking to analogous cases from the states of New York and Pennsylvania as well as English decisions and treatises, all because those sources were evidence of the general law.

²³⁹ Fletcher, *supra* note 21, at 1515 n.9 (emphasis added).

Broadly speaking, there are two categories of problems presented by the Supreme Court adopting this general law analysis—one practical and one principled. It requires courts to conduct an alien mode of analysis that has been rejected in the modern context, and it results in internal tensions within originalism. I address these problems in turn and describe how they are further compounded by the effect of stare decisis.

A. *Practical Problems*

The Supreme Court has famously denounced the existence of general law.²⁴⁰ But while the idea of general law no longer has a place in American jurisprudence, the mode of analysis that federal courts are required to undertake within the originalist framework is the same as the historical approach courts took to find the general law. Thus, an originalist understanding of certain constitutional provisions asks courts to conduct a form of reasoning that the Court has said is illegitimate in the contemporary context, and one that was criticized as enabling judges to “make” law. The difficulty is twofold—not only is the Court conducting a general law analysis, but it is doing so while trying to put itself in the mindset of eighteenth-century lawyers. To faithfully understand the original meaning of certain constitutional provisions, a judge must put herself in the frame of mind of people who understood the nature of the law in fundamentally different terms. Any current judge or Justice approaching a question similar to those in *Heller*, *Bruen*, or *Crawford* attended law school in a post-*Erie* environment—one in which general law was a remnant of history. How to properly determine the content of general law, even as it existed in the past, is becoming a lost body of knowledge.²⁴¹ The Court’s jurisprudence requires judges to apply an analytic framework which has been dead arguably since *Erie* was issued in 1938.²⁴² This task is especially daunting when one considers that, of the current Justices, the eldest was not even born until ten years after *Erie*.²⁴³

²⁴⁰ See *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 78 (1938) (“There is no federal general common law.”); *Wheaton v. Peters*, 33 U.S. (8 Pet.) 591, 658 (1834) (“It is clear, there can be no common law of the United States. . . . There is no principle which pervades the union and has the authority of law, that is not embodied in the constitution or laws of the union.”).

²⁴¹ See *supra* note 24 and accompanying text (describing how *Erie* changed the very nature of the law).

²⁴² But see *Bellia & Clark*, *supra* note 21, at 663, 705–10 (arguing that general law still has a place in federal courts such as when courts “uphold basic features of the constitutional structure that preempt state law”).

²⁴³ See *Current Members*, SUP. CT. U.S., <https://www.supremecourt.gov/about/biographies.aspx> [<https://perma.cc/592N-8C6W>].

An additional complicating factor is that conducting general law analyses in the modern era is significantly more difficult than it was in the early nineteenth century. Back when general law was commonly accepted, court decisions were not reported consistently, especially state court decisions.²⁴⁴ For example, the Federal District Court of Maine in *The Rebecca* noted that it did not know whether the question presented was one of first impression.²⁴⁵ The reason was because a “very small portion only of the decisions of [the] courts of admiralty [was] in print,” and so the court could not infer the fact that the question had not been decided just from a lack of reported decisions.²⁴⁶ Now, modern day judges have access to vast electronic databases that can be queried with extreme specificity. On the one hand, this is beneficial because judges can find relevant sources more easily. But on the other, judges now might be required to consider hundreds of sources, whereas before they might have identified and considered only a handful. It is much more difficult to determine a general principle inductively from one hundred sources than it is to do the same from ten.

B. Principled Problems

A more fundamental problem with the Court employing this mode of analysis—one which goes to the core of the Supreme Court’s jurisprudence—is the fact that it results in internal tensions within originalism. Although recently declining in popularity, one of the more common justifications for originalism is that it constrains judicial discretion,²⁴⁷ at least better than any alternative.²⁴⁸ A more modern defense of originalism might rest on alternative arguments,²⁴⁹ but no matter how the argu-

²⁴⁴ See generally Erwin C. Surrency, *Law Reports in the United States*, 25 AM. J. LEGAL HIST. 48 (1981) (detailing the history of legal reporting and noting how, in the early nineteenth century, not all—and sometimes none at all—state court decisions were published).

²⁴⁵ 20 F. Cas. 373, 378 (D. Me. 1831) (“Whether it be, or be not, of the first impression in this country, I am unable to say.”).

²⁴⁶ *Id.*

²⁴⁷ See William Baude, *Originalism as a Constraint on Judges*, 84 U. CHI. L. REV. 2213, 2217 (2017) (“One of the most important modern theorists of originalism, Professor Lawrence Solum, . . . [makes] the normative argument that original meaning *ought* to constrain constitutional practice, for reasons derived from legitimacy and the rule of law.”); *id.* at 2213–14 (showing how a central feature of Justice Scalia’s defense of originalism was that it “constrains judges from simply following popular pressures”). *But see id.* at 2215 (noting that “many modern originalists have tended to deemphasize the importance of constraining judges”).

²⁴⁸ See Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849, 863–64 (1989) (“[T]he practical defects of originalism are defects more appropriate for the task at hand . . . and more likely to produce results acceptable to all.”).

²⁴⁹ See, e.g., Gary Lawson, *Reflections of an Empirical Reader (Or: Could Fleming Be Right This Time?)*, 96 B.U. L. REV. 1457, 1460–61 (2016) (defending originalism as a theory of interpretation inherent to the nature of communication).

ment is framed, the originalist ideal includes affirming textual clarity and having a written document that determines and constrains. The implicit presence of unwritten general law in the Supreme Court's jurisprudence is in tension with these ideals: it adds ambiguity to the text and provides few (if any) constraining principles.

As shown in this Note, general law still has a firm and necessary place in the modern Court's constitutional originalist analysis. In certain scenarios, the popular understanding of the general law was codified in the Constitution, cementing its place in American law forever (or at least as long as the relevant Amendments last). The concurrent rise of legal positivism and legal realism led the Court to abandon the general law model in the past. And while they may not translate perfectly to this context, the principles behind legal positivism and realism still hold some force and show that this may be an area in which originalism, even according to arguments offered by its proponents, provides little benefit over other interpretive theories.

The rise of legal positivism led to the abandonment of general law because the latter was not attached to a particular sovereign.²⁵⁰ In the oft-repeated words of Justice Holmes: "The common law is not a brooding omnipresence in the sky but the articulate voice of some sovereign or quasi-sovereign that can be identified."²⁵¹ Positivist principles dictated that the authority behind any rule of law must originate from a distinct entity. When the Supreme Court interprets the Second Amendment or the Confrontation Clause as embodying pre-existing general law rights, it is not necessarily succumbing to the same problems as it would if it were relying on general law to supply the rule of decision—it is not enforcing a rule of law detached from any sovereign authority. The Federal Government, through the Constitution, acts as the positive authority behind both of these rights. But this reconciliation holds true only to the extent that the Constitution actually references and reflects principles of general law. If the Court were to rely on general law when the relevant positive law does not direct it to do so, it would be enforcing a rule of law disconnected from the sovereign authority of the United States. Any expansion of general law's place in modern jurisprudence would need to be reconciled with the principles behind legal positivism.

The concurrent rise of legal realism led to the rejection of the idea that judges could "find" law—a necessary assumption of the general law theory. When determining the content of the general law, judges

²⁵⁰ See *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 78–80 (1938); *supra* notes 50–56 and accompanying text.

²⁵¹ *S. Pac. Co. v. Jensen*, 244 U.S. 205, 222 (1917).

were no longer thought of as “finding” law, rather, they were “making” it.²⁵² The Supreme Court’s emphasis on originalism can be squared with the ideals of the modern legal realist America, but it may be more difficult to do so with the Court’s originalist approach to pre-existing rights. According to originalism, in what could theoretically be (and sometimes may be) an empirical inquiry with a definite answer—in other words, a deductive analysis—the Court seeks to find the original public meaning of the Constitution. The Justices are not “making” unbounded constitutional law; they are bound to find and follow the Constitution’s determinable original meaning.

When the original meaning of a constitutionally guaranteed right is the same as the 1791 understanding of a general law right, however, this distinction is blurred. Even though the Court is seeking to determine what *the founding generation understood* the general law to be, in practice, as shown above, the inquiry is no different than it would be were the Justices seeking to determine what *the general law actually was* in 1791. Principles of general law were not necessarily written down for courts to find generations later; the Founding generation understood its content to be determinable only through a general law analysis. And as shown in this Note, judges are employing an inductive method of reasoning—one which does not necessarily end in a correct conclusion, just a probable one.²⁵³ The very nature of general law ensures that the Court must employ the same mode of reasoning to discover others’ opinions of the general law as it would to find the general law for itself.

Pointing out the fact that certain constitutional provisions codified rights that existed as a matter of general law, while distinctively originalist, does relatively little to constrain a text’s meaning and raises more questions than it answers. What sources should be considered? From which jurisdictions? What is the common principle shown by historical customs, practices, and laws? The list goes on. Turning to the general law for reference almost by definition results in the possibility of multiple, equally probable conclusions.²⁵⁴ After all, the general law was “far from

²⁵² See Sachs, *supra* note 24, at 529–30 (second alteration in original) (“*Erie* left no room for a common law . . . to be found instead of made. As one scholar put it, ‘*Erie*’s real significance is that it represents the Supreme Court’s formal declaration that this view of the common law . . . is dead, a victim to positivism and realism.” (quoting Larry Kramer, *The Lawmaking Power of the Federal Courts*, 12 PACE L. REV. 263, 283 (1992))); see also *supra* note 52 and accompanying text.

²⁵³ See *supra* notes 164–66 and accompanying text.

²⁵⁴ Cf. Jake Charles Bruen, *Analogies, and the Quest for Goldilocks History*, DUKE SECOND THOUGHTS BLOG (June 28, 2022), <https://firearmslaw.duke.edu/2022/06/bruen-analogies-and-the-quest-for-goldilocks-history> [<https://perma.cc/BR9Q-KC2S>] (arguing that the *Bruen* decision would enable either the constant modification of the Second

a unified field at the time of the Founding, nor was it so conceived, as both the writings of the Founders themselves and contemporaneous legal commentary demonstrate.”²⁵⁵

The mode of reasoning characteristic of a general law analysis—identifying principles from a wide body of differing sources, the scope of which is not pre-determined—does not limit judicial discretion as much as an originalist might hope. Each of the three characteristics of general law analyses points to relatively unbounded discretion, and judicial discretion is a concept inextricably entwined with questions of democratic legitimacy.²⁵⁶ First, since each jurisdiction determines the content of the law for itself, judges are not bound by other interpretations. Second, there are few (if any) principles constraining a judge’s selection of sources to consider. And third, inductive logic, by definition, can result in multiple different-yet-still-valid conclusions.

All of the aforementioned problems, practical and principled, are compounded by the strong precedential effect of a single Supreme Court opinion. The alien and open-ended nature of the Court’s originalism-framed general law analysis leads to a significant probability that a single court will misunderstand the historical record. If the Supreme Court misunderstands the general law as known to the Framers, the misunderstanding will be codified as a matter of constitutional law and binding on all lower courts. This phenomenon gives too much power to a potentially idiosyncratic interpretation of the general law—lower court judges would be required to follow an incorrect assessment of the general law. Originalists—and the Court itself—must grapple with these problems to present a cohesive theory of constitutional interpretation.

CONCLUSION

According to originalism’s dictates, if the founding generation understood certain pre-existing rights—like the right to bear arms or the

Amendment right upon the unearthing of new historical evidence or the calcification of a particular version of history); Saul Cornell, *Cherry-Picked History and Ideology-Driven Outcomes: Bruen’s Originalist Distortions*, SCOTUSBLOG (June 27, 2022, 5:05 PM), <https://www.scotusblog.com/2022/06/cherry-picked-history-and-ideology-driven-outcomes-bruens-originalist-distortions> [<https://perma.cc/FR2Y-C8YN>] (referring to Breyer’s characterization of the Supreme Court’s “tendentious, error-filled, and highly selective culling of evidence to vindicate their gun-rights agenda” and the “egregious distortion of historical record”).

²⁵⁵ Bernadette Meyler, *Towards a Common Law Originalism*, 59 STAN. L. REV. 551, 556 (2006).

²⁵⁶ See Karen M. Gebbia-Pinetti, *Statutory Interpretation, Democratic Legitimacy and Legal-System Values*, 21 SETON HALL LEGIS. J. 233, 268–69 n.96 (1997) (cataloging how “conflicting visions of the democratically legitimate relationship between the legislature that enacts a statute and the courts that must apply it” lie at the heart of the debate between different models of statutory interpretation).

right of confrontation—in terms of general law, then adhering to the Constitution’s original meaning requires conducting a general law analysis. So long as originalism continues to be a dominant theory of interpretation with the Supreme Court, general law analyses—and all the accompanying practical difficulties and principled problems of indeterminacy and discretion—will persist. The merits of originalism have been much debated, and I will not attempt to resolve the debate here. It is enough to say that, with several self-proclaimed originalist Justices on the Court,²⁵⁷ and with originalism only rising in popularity,²⁵⁸ it appears that the implicit reliance on unwritten general law, problems and all, is here to stay.

If we still accept the reasons behind the abandonment of general law, the Supreme Court’s sub silentio adoption of general law analyses is worrisome. The legal realist and positivist critiques of general law *as a concept* also apply (albeit perhaps with less force) to general law *analyses*. As of now, general law analyses are confined to interpreting a limited number of constitutional provisions that reference general law. But the number of qualifying provisions could easily increase. As the Supreme Court continues to expand its originalist jurisprudence, historical general law analyses might be used to interpret other Bill of Rights provisions that the Court determines to have pre-existed the Constitution. For example, scholars have argued that the First Amendment’s protections of speech and press as well as the Eighth Amendment’s ban on cruel or unusual punishments may be references to already existing rights.²⁵⁹ The Supreme Court, to be consistent in its originalist philosophy,

²⁵⁷ See Ilan Wurman, *What is Originalism? Did it Underpin the Supreme Court’s Ruling on Abortion and Guns? Debunking the Myths*, CONVERSATION (July 8, 2022, 2:17 PM), <https://theconversation.com/what-is-originalism-did-it-underpin-the-supreme-courts-ruling-on-abortion-and-guns-debunking-the-myths-186440> [<https://perma.cc/8HP9-NVMR>] (describing the Justices’ interpretive theories).

²⁵⁸ See John O. McGinnis, *The Rise of the Culture of Originalism*, L. & LIBERTY (Mar. 30, 2018), <https://lawliberty.org/the-rise-of-the-culture-of-originalism> [<https://perma.cc/VV2V-VSW6>] (tracing originalism from its status as a marginal theory to influencing recently appointed appellate judges); James R. Rogers, *Originalism’s Expanding Popularity*, L. & LIBERTY (Oct. 15, 2019), <https://lawliberty.org/originalisms-expanding-popularity> [<https://perma.cc/BVF6-Q28W>] (referring to the “increasingly sympathetic attention from a broader set of legal scholars”).

²⁵⁹ See, e.g., Philip A. Hamburger, *Natural Rights, Natural Law, and American Constitutions*, 102 YALE L.J. 907, 908 (1993) (asserting that the freedoms of speech and press were natural rights as they could be exercised in the absence of government); Jud Campbell, *Natural Rights and the First Amendment*, 127 YALE L.J. 246 (2017) (arguing that the expressive freedoms of speech and press, amongst elites during the Founding Era, were based upon understandings of natural rights); Laurence Claus, *The Antidiscrimination Eighth Amendment*, 28 HARV. J.L. & PUB. POL’Y 119 (2004) (arguing that the Eighth Amendment made general common law an objective referent for which punishments were cruel or unusual).

may begin to apply a general law analysis to these provisions as well—something it currently does not do.

As Professor Baude’s speech mentioned at the beginning of this Note indicates, there is also some hunger among certain scholars to expand the role of unwritten (general) law.²⁶⁰ Baude argues that it should be used to “go beyond” the relevant text—whether or not the text references general law principles.²⁶¹ And how else is unwritten law determined but through a general law analysis? Baude’s proposed approach would import general law analyses into nearly every area of the law. Any undertheorized expansion of general law analyses threatens the cohesiveness of originalism—the Court must be exceedingly rigorous in avoiding the pitfalls identified in this Note.

This Note is the first to realize the unspoken reasoning behind some of the Supreme Court’s most originalist opinions—an analytic method, before now ignored or well-hidden, which should trouble originalists and non-originalists alike. It explains what is driving the Court’s opinions and why certain sources of law are considered.²⁶² With this perspective, scholars can better engage critically with the Supreme Court’s opinions and better participate in broader debates about methods of interpretation. Furthermore, should the Supreme Court begin to expand the role of unwritten general law in its jurisprudence, such expansion would be recognizable and susceptible to critiques along the same lines as those in this Note.

²⁶⁰ Harvard Law School, *supra* note 2.

²⁶¹ *Id.*

²⁶² To be sure, not all questions are answered in these pages; many are beyond the scope of this Note. But the methodology it identifies can provide some guidance for resolving questions that often accompany general law analyses. *See, e.g.*, *N.Y. State Rifle & Pistol Ass’n v. Bruen*, 142 S. Ct. 2111, 2162–63 (2022) (Barrett, J., concurring) (highlighting two unresolved methodological points: (1) “the manner and circumstances in which postratification practice may bear on the original meaning of the Constitution”; and (2) whether courts should rely on the understanding of individual rights in 1868 or 1791).