Semantic Change in Supreme Context: Semantics in the Privacy Line and Originalist Interpretation

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SEMANTIC CHANGE IN SUPREME CONTEXT: SEMANTICS IN THE PRIVACY LINE AND ORIGINALIST INTERPRETATION

by Adam Prestidge*

I. INTRODUCTION

Whether as characters on a page or as uttered syllables, language can carve nations. The meaning of a word gives it power and application in society and conveys the intended communication of the writer or speaker. Semantics is the study of these meanings.

The Constitution is the foundation of all law in the United States, and all legal decisions must be in line with that foundation. It is the “democratic task of the Supreme Court . . . to interpret the Constitution of the United States.”¹ The judges of the Court fulfill this task by determining the meaning of the words of the Constitution and the Bill of Rights, as well as the words of subsequent legislation and court decisions. Those who interpret the meaning of the Constitution are sometimes divided into two seemingly conflicting categories: those who view the Constitution as a “living” document, evolving in meaning over time, and those who view the Constitution as a static document, written with definite meanings that hold true to their semantic origin and are justly applicable today. Those who subscribe to the latter approach, called “originalists,” rely on “old dictionaries

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and other evidence of how the words in the Constitution were used at the time of the founding”\(^2\) and apply that foundation as a factor of modern legal decisions.

Two words that carry great semantic weight in the United States legal tradition are *privacy* and *liberty*.\(^3\) These words are cornerstones of the founding documents and modern decisions alike, and Supreme Court Justices are frequently confronted with deciding what those words have meant in the past and what they mean today. With the significant and complex notions the words carry, *privacy* and *liberty* shape American culture. What are those semantic implications, and how are they to be interpreted and applied in American law?

While every word in language implies certain notions of meaning, these meanings can change. Semantic change is a function of all language, with words gathering new notions that expand meaning, narrowing to exclude previous notions, or shifting to entirely new meanings. But when the meaning of a word in a law changes, the meaning of that law also changes, which “raises an obvious issue for the interpretation of our written constitutions.”\(^4\) As judges and legislators redefine a word through judicial decisions and laws, the cultural understanding of that word (i.e., its meaning) will gradually shift and conform, perpetuating semantic change.

This paper will discuss how semantic change poses fundamental problems for the theory and practice of judicial originalism. Relying on the presented evidence of semantic change and its impact in the Privacy Line, I will discuss how semantic change affects the theory of Originalism. I will make the argument that semantic change, occurring as shown, creates an inconsistent foundation of meaning on which to base originalist interpretation. In this case with the meaning of *liberty* and *privacy* constantly in motion, it becomes unclear from where and when original notions should be extrapolated. How-

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3 In this paper, the words *liberty* and *privacy* will be italicized when they are referred to specifically as words themselves. They will not be italicized when referring to the political ideas or rights they entail.

4 Nelson, supra note 4, at 519.
ever, I will argue that in spite of semantic change, the legal system actually does need some form of original semantic notions in law. As a solution, I will present a linguistics-based approach to interpretation that accounts for semantic change, original law, and the needs of an ever-evolving society.

A. Cases Referenced and Semantic Methods

In addition to referencing the Bill of Rights and the Fourteenth Amendment, this study makes significant reference to the so-called “Privacy Line” of Supreme Court cases. This paper focuses on four of the most influential and debated cases in the Privacy Line: Griswold v. Connecticut,5 Roe v. Wade,6 Planned Parenthood of Southeastern PA v. Casey,7 and Lawrence v. Texas.8 In each of these groundbreaking cases, arguments on the meanings of liberty and privacy have been central themes, and the changing semantics of those words have played a pivotal role in their outcome.

In order to understand how the changing meanings of these words have impacted American law and culture, we must turn to an examination of semantic meaning and change. As the meanings of liberty and privacy change, their effects in legal texts change; hence, an argument based on liberty made in 2003 will have different connotations from an argument made in 1803, even though they are based on the same literation.

II. The Semantics of Liberty and Privacy

A. Semantic Change Explained

“English words have been changing their meanings for centuries, and words are still changing their meanings today.”9 While linguists have identified many common types of semantic change that words undergo, there are a few general principles that underlie these changes. One of the principal tendencies of semantic change is for the meaning of a word to often shift to what the speaker believes it to mean. This may be influenced by individual circumstances and schema, and by broader social and cultural forces. What the tendencies of semantic change have in common is a propensity for words to shift from literal to figurative meaning.

Consider these simple examples: The word wave originally referred only to a “movement in the sea,” yet in the mid 1800s, it broadened to include the figurative notions of any “swelling, onward movement,”10 such as a wave of emotion or a crime wave. A similar shift can be seen in the word mountain, which could now be used as a mountain of trouble, or of debt.

The evidence presented in this paper shows that the words liberty and privacy have also been affected by this “pervasive force in semantic change,”11 shifting in meaning from the literal to the figurative. This shift will be demonstrated by using dictionaries pub-

10 http://dictionary.oed.com/cgi/entry/50281715
11 Arnold supra note 4, at 54.
lished from 1755-2003. Because dictionaries are written with both prescriptive and descriptive elements, they offer the clearest reflection of what words mean and how they are used.

**B. Semantic Progression of Liberty**

*Liberty* has evolved through a long and steady progression, adopting new notions that have changed the meaning of the word significantly. The word has shifted from a freedom from literal oppression to a figurative freedom to act as one pleases.

In 1755, *liberty* was a notion of freedom from something, namely slavery, tyranny, or oppression, with little or no consideration to individual liberty in terms of choice or action. In 1853, the idea of *liberty* expands to include notions of individual liberty of the will and mind, retaining, however, the defining notion that liberty was something granted within just restraints of formal government. The 1895 definition includes for the first time notions of autonomy, “self-government,” and “freedom of action.”

This is the first instance in which the *liberty* of the individual seems to operate somewhat independently of restraints of government.

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12 Highlighting change through a series of progressing dictionaries shows how some notions of *liberty* and *privacy*, which may have been peripheral to the meaning in the past, have shifted to the core meaning in modern times. While this does not verify every element of diachronic change in the most empirical manner, it is representative of certain change that has been occurring over the last two centuries. It should be noted that in the field of historical linguistics, there is not an established convention for the empirical verification of semantic change that is suitable for this study. In the absence of such an empirical method, the lexicographical data cited in this study seems to be a reasonable and valid approach. This method begins with Johnson’s *Dictionary of the English Language*, the first of its kind.

13 Dictionaries not only prescribe what words should mean, they also describe how they are used and comprehended in a contemporary language by its speakers.

14 Samuel Johnson, *A Dictionary of the English Language* 672 (1755).

15 Noah Webster, *An American Dictionary of the English Language* 417 (1853).

16 A *Standard Dictionary of the English Language* 696 (Funk et al. eds., 1895).
In 1937, the term *liberty* seemed to be contrary to any notion of restraint, whether just or unjust. The phrases “exemption from compulsion or restraint in willing or volition” and “freedom beyond the ordinary bounds” eliminated limits of liberty. With this elimination of restriction, in 1969, *liberty* became drastically different than it had been at the drafting of the Bill of Rights, coming to imply unrestricted choice based completely on individual desire: “The state or condition of one who is free; exemption from restraint; power of acting as one pleases; freedom.” In this instance, this definition is completely void of any notion of restriction.

This modern idea of *liberty* without restraint is obviously contrary to the meaning of *liberty* in 1853, when Noah Webster wrote: “The restraints of law are essential to civil liberty.”

C. Semantic Progression of Privacy

The word *private* originated with the same foundation as the word *privacy*—that of secrecy, seclusion, and solitude—but it also carried certain notions that *privacy* did not, namely notions of particularity and peculiarity. These notions took on a sense of individual independence, and in the 1895 definition there developed a sense of freedom associated with the word *private*, as in “characterized by freedom from observation.”

That sense of individuality became central to the meaning of *privacy*. In 1937, the notion of independence and particularity became the primary entry of the definition, and the word continued to develop, implying not only individuality, but a lack of formal-

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18 Webster, supra note 15, at 417.
19 Often, the definition of *privacy* includes the idea of being in a private state. Because the term *private* is the primary semantic foundation of *privacy*, I will discuss the debate concerning privacy not in terms of *privacy* itself, but in terms of the complex and shifting definition of the word *private*.
20 Funk, supra note 16, at 467.
ized restrictions upon that individuality. 21 In 1979, private was “not open to, intended for, or controlled by the public.” 22 By 2003, the idea of something being private completely separated it from not only observation or scrutiny, but from outside influence or restriction of any kind, “carried on by the individual independent of the usual institutions.” 23

This shows a clear shift from literal meaning to figurative. Semantically speaking, the word private, and its resultant state of privacy, has evolved from a simple secluded state to one of unrestricted independence.

D. Semantic Fusion of Liberty and Privacy

The result of the progressions of liberty and privacy is a semantic connection, a point where the meanings of the two words coincide. As liberty and privacy have evolved, they have shed notions of restrictions on individual behavior while expanding the scope of what is considered acceptable.

The 1979 definition of private was something that is “not open to, intended for, or controlled by the public.” 24 In 2003, when something is private, 25 it was “carried on by the individual independent of the usual institutions.” The idea of privacy became a protection of unrestricted individuality.

Similar restrictions are dropped from the term liberty; in 1969, liberty became the “power of acting as one pleases,” 26 a concept seemingly void of restraint. In 2003, liberty included the right to “the

24 McKechnie, supra note 22, at 13432.
25 Merriam-Webster, supra note 23, at 601.
26 Thatcher, supra note 17, at 490.
positive enjoyment of various social, political, or economic rights and privileges.” What happens when the right to liberty without restraint guarantees us a right to privacy without outside constraint? Is anything then permissible behind closed doors?

III. SEMANTIC CHANGE IN SUPREME CONTEXT

The semantic shifts of privacy and liberty have had a drastic impact on the Privacy Line, and it is easy to see how the words have been used with their developed meanings. This section highlights those changing uses and discusses how they affect the argument of the specific opinions, demonstrating the reality of semantic change in law.

A. The Fifth Amendment (1791)

No person... shall be . . . deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation. 28

Knowing that the country had recently declared independence from England, and that slavery was a common practice, gives useful context for considering the use of liberty in the Fifth Amendment. Fittingly, the 1755 definition, “freedom, as opposed to slavery,”29 is focused on freedom from the unjust restrictions of tyranny or inordinate government, and is a more literal definition because it has not semantically gathered the notions of individuality and reduced restrictions, as it does in later uses.

Likewise, we can assume based on the 1755 definition, that private, in reference to property, does not carry the notions of individual behavior and freedom that it does in later uses. With these

27 Merriam-Webster, supra note 23, at 412.
28 U.S. Const. amend. Z.
29 Johnson, supra note 14, at 672.
notions, the Fifth Amendment is the foundation from which law and semantics of the Privacy Line have shifted.30

**B. The Fourteenth Amendment—Section 1. (1866)**

*Nor shall any State deprive any person of life, liberty, or property, without due process of law.* 31

Nearly a hundred years after the Bill of Rights was drafted, the use of *liberty* is very different in the Fourteenth Amendment, at least based on evidence from period dictionaries. Because these documents are worded so similarly, it would be natural to assume that these amendments are guaranteeing the same rights, but examination of semantic shift reveals otherwise.

In Noah Webster’s 1853 dictionary, liberty is “freedom from restraint, in a general sense, and applicable to the body, or to the will or mind.” 32 The Fourteenth Amendment declares that no state shall “deprive a person of liberty [i.e. freedom from restraint].” Thus, by saying that the state will not deprive a person of the freedom from restraint, it could be argued that the Amendment is saying that without due process, the state will impose no restrictions on any person. This argument undoubtedly favors those who would seek a removal of government restriction on social behavior such as abortion or homosexuality a century later.

**C. Griswold v. Connecticut (1965)**

Ninety-nine years after the Fourteenth Amendment was written, the case of *Griswold v. Connecticut* came before the Supreme Court, examining liberty and privacy within a marriage in regards

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30 The Fifth Amendment is not the sole foundation of the arguments in the Privacy Line; several other amendments of the Bill of Rights are often cited in these Supreme Court opinions, including the Ninth and the Fourteenth. It is however, the only amendment where both liberty and privacy appear, and for this study is considered the semantic foundation of these words as they appear in the Privacy Line.

31 U.S. CONST. amend. XIV, § 1.

32 Webster, *supra* note 15, at 412.
to the prescription and use of contraceptives. In his concurring statement, Justice Byron White declares that the “Connecticut law as applied to married couples deprives them of ‘liberty’ without due process of law.”

Around the time of the 1965 case, the 1969 definition of liberty is “exemption from restraint; power of acting as one pleases.” Assuming that Justice White intended this use of liberty, his logic is understandable: telling a married couple that the use of contraceptives is illegal is a restriction of their power to act as they please.

In *Griswold v. Connecticut*, the court intentionally “has not attempted to define with exactness the liberty thus guaranteed,” but does declare that the “concept of liberty protects those personal rights that are fundamental.” While it is unclear which “fundamental” rights the Court is referring to, the opinion does include discussion of the Ninth Amendment, which contains a provision to protect more rights than simply those that are explicitly stated in the Bill of Rights. But does liberty protect implied rights that evolve out of semantic change, such as the liberty to act “as one pleases”? According to the majority of the Supreme Court in 1965, it does.

But *Griswold v. Connecticut* was not only a debate about liberty. It was also about privacy. In writing the majority opinion, Justice Douglas states: “The present case, then, concerns a relationship lying within the zone of privacy created by several fundamental constitutional guarantees.”

But what is acceptable within that zone of privacy? In the late 18th century, when the Bill of Rights “guaranteed” a right to privacy, private meant “not open or secret.” However, in the 1960s, those guarantees expanded through the semantic expansion of private, guaranteeing a protection of things that are “peculiar to one’s self;

33 See *Griswold*, 381 U.S. at 502.
34 Thatcher, supra note 17, at 490.
35 See id. at 486.
36 The Ninth Amendment states: “The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.”
37 See *Griswold*, 381 U.S. at 485.
belonging to or concerning an individual only; personal.” 38 It appears that the ruling of Griswold, allowing a married couple to use contraceptives, is not a defense of secret behavior: it is a defense of personal behavior.

As a result of adjudicating based on modern semantics in Griswold, the original notions of liberty and privacy were left in a state of archaism. Based on the newly ratified modern notions, the rights afforded by the Privacy Line continued to expand.

D. Roe v. Wade (1973)

In Griswold v. Connecticut, the modern legal meanings of liberty and privacy were established: the right to liberty protected a right to privacy. With that decision as precedent, modern semantics became ratified and a similar approach would be taken in Roe v. Wade. While the cultural debate surrounding Roe centers on the morality of abortion, the Supreme Court case itself centered on whether the right of a woman to have an abortion was a right protected by a guarantee to liberty and privacy, and whether states had the right to abridge that liberty:

The principal thrust of appellant’s attack on the Texas statutes is that they improperly invade a right, said to be possessed by the pregnant woman, to choose to terminate her pregnancy. Appellant would discover this right in the concept of personal “liberty” embodied in the Fourteenth Amendment’s Due Process Clause; or in personal, marital, familial, and sexual privacy said to be protected by the Bill of Rights or its penumbras, see Griswold v. Connecticut… 39 (emphasis added).

With Griswold having set the precedent, the decision in Roe makes perfect sense in terms of semantics. Writing in a concurring opinion, Justice Stewart wrote: “Several decisions of this Court make clear that freedom of personal choice in matters of marriage and family

38 Thatcher, supra note 17, at 661.
39 See Roe, 410 U.S. at 129.
life is one of the liberties protected by the Due Process Clause of the Fourteenth Amendment.\textsuperscript{40} \textit{Griswold v. Connecticut} is one of those previous decisions that established the semantic standard.

\textit{Roe v. Wade}, with all of its emotion and hotly-debated issues aside, was not the creation of a newer, more evolved meaning, but a decision that was based on the meaning which developed and were seen in \textit{Griswold}, which had been ratified only seven years prior, establishing a newer legal foundation.

\textbf{E. Planned Parenthood of Southeastern PA. v. Casey (1992)}

Twenty years after \textit{Roe}, the issue of abortion was revisited in the Supreme Court; not coincidentally, the semantic issue of \textit{liberty} was also revisited. The opinion written in \textit{Casey} is longer than \textit{Griswold}, \textit{Roe}, and \textit{Lawrence v. Texas} combined, and it mentions \textit{liberty} more than 120 times.

\textit{Casey} does not merely mention \textit{liberty} repeatedly, but it actually redefines it yet again: “At the heart of liberty is the right to define one’s own concept of existence, of meaning, of the universe, and of the mystery of human life.”\textsuperscript{41} While unpopular to some, the argument in \textit{Casey} was built around this modern notion of \textit{liberty}, that is, “defining one’s own concept of existence.”\textsuperscript{42}

The opinion builds on the modern semantics of \textit{privacy} as well, stating, “Our precedents ‘have respected the private realm of family life which the state cannot enter.”\textsuperscript{43} This statement presents the idea that there is a private realm where individual liberties cannot be restricted by the state. With this notion of \textit{privacy}, it is not surprising how subsequent cases in the Privacy Line have been decided.

This adoption of \textit{liberty} and \textit{privacy} as freedom from restrictions creates a predicament for the Court, which is charged with the

\begin{itemize}
  \item \textsuperscript{40} See id. at 168.
  \item \textsuperscript{41} See \textit{Casey}, 505 U.S. at 851.
  \item \textsuperscript{42} Justice Scalia later derided this statement, calling it the “famed sweet-mystery-of-life passage” in his dissenting opinion in \textit{Lawrence v. Texas}; See \textit{Lawrence}.
  \item \textsuperscript{43} See \textit{Casey}, 505 U.S. at 851.
\end{itemize}
contradictory burden of placing restrictions on *liberty*, which is itself a (semantically evolved) freedom from restriction. Acknowledging this task, the Justices jointly write:

Neither the Bill of Rights nor the specific practices of States at the time of the Fourteenth Amendment’s adoption marks the outer limits of the substantive sphere of such ‘liberty.’ Rather, the adjudication of substantive due process claims may require this Court to exercise its reasoned judgment in determining the boundaries between the individual’s liberty and the demands of organized society.44

Yet in the same decision, having taken on the task of determining the boundaries of liberty, the Court affirms that there is an area—a private realm—where the state cannot enter, and therefore cannot set boundaries. The result is not surprising: having built upon evolved semantics, the right to semantically-modern liberty and privacy (in this case, the right to abortion) is upheld as one that is not only protected, but “sacred.”45

*F. Lawrence v. Texas (2003)*

*Liberty* and *privacy* both appear more frequently in *Lawrence* than in any of the cases discussed, though it is the shortest, which indicates the centrality of these words in this decision. However, the discussion surrounding these words is very different. In the previously discussed cases, the opinions addressed the question: “What do *liberty* and *privacy* mean?”

*Lawrence v. Texas* is unlike those opinions because it clearly defines the entitlements of *liberty* and *privacy*. In *Lawrence*, “the court explicitly and unequivocally”46 declares that the action committed,

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44 See id. at 924.
45 See id. at 926 (“No right is held more sacred, or is more carefully guarded by the common law, than the right of every individual to the possession and control of his own person.”).
homosexual sodomy, is within the protection of liberty and privacy. There is no question of what notions are implied, no mention of the Ninth Amendment, only a strict application of the modern semantics of liberty. Not surprisingly, in 2003 the definition of liberty reached its furthest point from its origin in the Bill of Rights. Based on this definition, the decision in Lawrence is automatic. If all people are guaranteed a right to the “positive enjoyment of social, political, or economic rights and privileges” as well as the right to “do as one pleases,” two consenting individuals should absolutely be permitted to engage in any sexual activity they desire. This is especially true in the privacy of their own home, where, according to the 2003 definition of privacy, actions are “carried on by the individual independent of the usual institutions.”

In the following excerpts, there is little doubt what semantic notions Justice Kennedy applied as he defined what was legal within the rights of liberty and privacy [italics added for emphasis]:

“The liberty protected by the Constitution allows homosexual persons the right to choose to enter upon relationships in the confines of their homes and their own private lives...”

“The Nation’s laws and traditions... show an emerging awareness that liberty gives substantial protection to adult persons in deciding how to conduct their private lives in matters pertaining to sex... Petitioners’ right to liberty under the Due Process Clause gives them the full right to engage in private conduct without government intervention.”

Liberty and privacy are cited hand-in-hand as seemingly complementary rights, a product of the semantic fusion discussed in the previous section. While the previous cases defined what these words

47 Merriam-Webster, supra note 23, at 412.
48 Id.
49 Id. at 601.
50 See Lawrence, U.S. at 558.
51 See id. at 559.
52 See id. at 560.
meant and ratified their modern semantics, *Lawrence v. Texas* definitively continued to define what is acceptable under the umbrella of these modern notions. The case provided a final verdict on the modern semantics of *liberty* and *privacy*—they had been defined, ratified through use in judicial decision, and now stood as the standard by which laws would be measured.

Without mentioning the cultural consequences of this decision, one thing is clear: semantic change did occur, and it had an indelible role in the outcome of landmark Supreme Court cases.

**G. Semantic Fusion and Constitutional Confusion**

As is evident from Justice Kennedy’s intertwined usage of *liberty* and *privacy*, the two words became complementary guarantors of the same right: the freedom to act as one desires behind closed doors. As a result, the defense of *liberty* in *Lawrence* cannot be made without a defense of *privacy*, and vice versa. Because of the semantic overlap of *liberty* and *privacy*, any modern social issue regarding *privacy* “is now concerned less with institutions like marriage and the home and more with personal independence.” This shows a clear difference from semantics prevalent at the writing of the Bill of Rights.

Due to semantic shift in the Privacy Line, previous Court rulings and laws have been overturned and certain actions previously prohibited have been legally accepted into society (contraception, abortion, sodomy, et al.). What is left in the wake is a country divided on moral issues, with opposite sides claiming the Constitution as the infallible source that proves their views correct. And depending on interpretation, the Constitution can prove either side correct. An examination of the Fifth Amendment with shifting semantic notions illustrates what a confusing situation semantic change creates.

53 In *Lawrence v. Texas*, *liberty* occurs 63 times, *privacy/private* 62.
54 Franke, *supra* note 33, at 1404.
55 Especially *Bowers v. Harwick*, 478 U.S. 186
With an originalist interpretation, employing the 1785 definition of *liberty*, the Fifth Amendment states: “No person...shall be deprived of [freedom from slavery or tyranny].”

With a modern interpretation, employing the 2003 definition, the Fifth Amendment states: “No person...shall be deprived of [the power to do as one pleases, or, the positive enjoyment of social, political, or economic rights and privileges].”

As opposed as these theories may be, however, the law has been declared based on modern semantics, and those modern notions have a permanent place in American society.

IV. SEMANTIC CHANGE AND ORIGINALISM

A. Impact of Semantic Change

Semantic change presents linguistic inconsistencies in the theory of constitutional originalism. Originalism relies on a belief “that the original understanding provides the authoritative source of constitutional meaning” and that “there is something normatively special about the role, status, or institutions of the origination.”56 Judicial opinion is based on a thorough understanding and reverence for that original, with strict application of its meaning.

Yet semantic change makes it difficult for originalism to function as a reliable and consistent basis of interpretation. Shifting meanings create a shifting interpretation of the original, and as that interpretation becomes ratified through legal and judicial action, it becomes more difficult to identify the original foundation, its meaning, and its role in modern interpretation.

B. Where Is the Foundation of Originalism?

One of the major flaws of originalism is that its basis is constructed on words that have an unclear and shifting foundation.

While the Constitution is the primary source for original interpretation, “[t]he applicable conventions were not fully settled at the time of ratification, and the Constitution’s ‘meaning’ was correspondingly open.”57 Yet originalism is interpretation based on the adherence to original meaning that even the Framers themselves “did not consider...to be fully settled.”58

For example, the Fifth Amendment and the Fourteenth Amendment are of equal standing in the Constitution; the wording is similar in both, and both are cited in cases in the Privacy Line. But it is impossible to equally apply the same strict originalist standard of interpretation to these amendments as they pertain to modern law.

While both amendments mention that “liberty shall not be deprived,” it is not clear whether the original meaning of liberty should be drawn from the Fifth Amendment of 1791, or the Fourteenth Amendment of 1866. If originalism holds true to the first-written documents, and the meaning is interpreted to reflect the 1791 semantics, such an interpretation does not account for the semantic change that might have altered the way that liberty was used in 1866. In short, a strict interpretation based on late-1700s semantics disregards that later use, applying outdated semantic notions to a word that had already shifted from those notions. Perhaps the writers of the Fourteenth Amendment were well aware of the changed semantics of liberty, and their original intent was to have those notions included. Shouldn’t their original intentions be honored?

However, it is no better to base original meaning off of the later-drafted Fourteenth Amendment. As has been discussed extensively, liberty of 1866 was different from liberty of 1780, and to base interpretation off of the Fourteenth Amendment simply dismisses the older meaning of liberty in favor of the newer meaning. Despite this problematic contradiction, a word’s newer meaning typically dominates its preceding meaning. Modern understanding becomes the rule, taking prevalence over previous interpretations. Likewise, an equal con-

57 Nelson, supra note 2, at 522.
58 Id.
sideration of both meanings is prohibitively flawed, because a finite original meaning cannot be based off of two divergent foundations.

If a foundation of originalist interpretation is not easily identified within the Constitution, perhaps it can be identified elsewhere. This paper is written under the premise that original meanings cited by originalist interpretations are based off of the Constitution, but the words of the Constitution were used prior to the 1700s, and semantic change had been altering words for centuries. According to strict originalist theory, should liberty be interpreted with consideration of its oldest English meaning? Or should liberty be interpreted with consideration of the semantics of its Latin root?

Originalist interpretation is fundamentally based on the meaning of the “original,” but it is rendered seriously flawed when there is no definite original.

C. Originalism and Legal Change

The lack of a clear textual original is not the only problem in establishing the foundation of semantics in originalism, as judicial interpretation is bound “not only by the text of code or Constitution, but also by the prior decisions of superior courts.” Though a judge may interpret the meaning of liberty in the Bill of Rights under very strict originalist terms, he or she cannot ignore that a much broader view of liberty was applied in Casey in 1992. “[W]hen the Supreme Court . . . decides a case . . . the mode of analysis that it applies will thereafter be followed by the lower courts within that system, and even by that supreme court itself.” This creates a confusing obstacle when the notions of words used in a modern law “differ markedly from the ‘original meaning’ of the identical words” as they appear in the Constitution. The incongruence becomes even more divergent when the majority of the Court continues to adjudicate in line with semantic change. This makes it more difficult for originalist judges


60 Id.

61 Nelson, supra note 2, at 522.
to adjudicate based on originalist interpretations because often “the original understanding appears at odds with modern broad constitutional protection of civil rights.”

V. POSSIBLE APPROACH

A. Why Originalism Is Still Necessary

In spite of the presented flaws, originalism is still part of the solution. American law needs originalism. Without originalism, the “dichotomy between ‘general rule of law’ and ‘personal discretion to do justice’” becomes more extreme, with “personal discretion” becoming the dominating factor in law. Left primarily up to personal discretion, “individuals’ own interpretations of law provide the ‘push,’ shaping the new versions of legality.

Respect for original meaning is what enables laws to be developed based on a system more consistent than individual interpretation: “Just as that manner of textual exegesis facilitates the formulation of general rules, so does, in the constitutional field, adherence to a more or less originalist theory of construction.” While originalism may be linguistically flawed, it “best promotes the virtues of certainty, predictability, and administrative efficiency.”

63 Scalia, supra note 45, at 1176.
65 Scalia, supra note 45, at 1184.
66 Simon, supra note 42, at 1485.
B. The Linguistic Approach

As necessary as originalism is, this paper has established that the originalist theory does have linguistic flaws because of semantic change. So emerges a seemingly paradoxical question: How can law retain original notions in a culture that both legally and linguistically evolves beyond those notions?

Rather than suggesting a new theory of Constitutional interpretation, I will suggest a linguistic approach that may answer these questions. The solution to this paradox may lie in combining original semantics with flexible pragmatics. This means that the original meanings of words would be retained from when they were written, but their application in a modern cultural sense would be more flexible in order to adapt to cultural needs.

While semantics deals with the meaning of a word and all of the notions that it implies, pragmatics deals with understanding in cultural context. For example, depending on context, a simple phrase such as “I’m going to take you out” has very different pragmatic application. It could be a suggestion for a night out, a threat, a promise of rescue, or something else entirely, depending on the circumstances of its use.

Using this linguistic approach, a judge could have a very different view of the phrase “no person shall be deprived of liberty.” With the method here proposed, liberty could retain its original semantic meaning—freedom from bondage—but its pragmatic application in modern culture could be flexible and left to the determination of the judge.

For example, in interpreting a case in the Privacy Line with original notions, a judge might have asked, “What did the ‘right to liberty [i.e. freedom from bondage]’ mean at the time of the Constitution, and how can that be applied now?” This question takes original semantics and original pragmatics, and then attempts to fit them to modern culture. Presumably, at the time of the Constitution, the right to freedom from bondage meant not being bound in shackles and forced to labor under a master or tyrant. But does that pragmatic application still have the same effect today? Probably not.

However, using the linguistic approach here suggested, a judge could instead ask, “What does ‘right to [freedom from bondage]’
mean today?” Or, more specifically, “What does ‘right to [freedom from bondage]’ mean in the case of a woman who desires an abortion, or in the case of a homosexual couple?”

This approach maintains a connection to the original anchor of our country, the Constitution, the foundation of American rule of law. While keeping this foundation, however, it would also allow the interpretation of laws in question to be flexible, with their application adaptable as necessary to govern a constantly evolving nation. Whether they are liberal or conservative, judges could cite the Constitution and its original meaning in their decisions. The pragmatic application of certain phrases in the Constitution could be addressed in modern context and changed as decided, without disregarding original meaning or instigating further semantic change.

With this approach, perhaps the inconsistencies caused by semantic change in originalism might be resolved. Instead of continually redefining the meaning of the words of the Constitution, judges could decide how those words apply in modern society. In essence, judges could decide what the phrase “liberty for all” actually is, rather than simply “define the liberty of all.”

67 See Casey, 505 U.S. at 851.