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THE FEDERALIST SOCIETY



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IMMIGRATION, FREEDOM, AND THE CONSTITUTION

ILYA SOMIN*

In recent years, many conservatives have come to favor a highly restrictionist approach to immigration policy. But that position is in conflict with their own professed commitment to principles such as free markets, liberty, colorblindness, and enforcing constitutional limits on the power of the federal government. These values ultimately all support a strong presumption in favor of free migration.

I. IMMIGRATION AND FREEDOM

Let us focus on free markets first. Immigration restrictions are among the the biggest government interventions in the economy. They prevent millions of people from taking jobs, renting homes, and pursuing a wide range of opportunities that they could otherwise have. Economists estimate that if we had free migration throughout the world, we could double world GNP.¹ That is not a gaffe or a mispring; it is a real estimate. Perhaps doubling GNP is overly optimistic. Still, increasing it by, say, 50 percent is a greater effect than virtually any other realistically feasible change in economic policy.²

* Professor of Law, George Mason University. This essay is based on a speech delivered at the Federalist Society Student Symposium in February 2016, as part of a debate with Professor John C. Eastman. For his contribution, see John C. Eastman, *The Power to Control Immigration is a Core Aspect of Sovereignty*, 40 HARV. J.L. & PUB. POL'Y 9 (2017).

1. Michael A. Clemens, *Economics and Emigration: Trillion-Dollar Bills on the Sidewalk?*, J. ECON. PERSP. 83 (2011), <http://pubs.aeaweb.org/doi/pdfplus/10.1257/jep.25.3.83> [<https://perma.cc/JD93-7VWR>]; Bob Hamilton & John Whalley, *Efficiency and Distributional Implications of Global Restrictions on Labor Mobility: Calculations and Policy Implications*, 14 J. DEV. ECON. 61, 70 (1984); John Kennan, *Open Borders*, 16 REV. ECON. DYNAMICS 1, 10–11 (2013), <http://www.ssc.wisc.edu/~jkennan/research/OpenBorders.pdf> [<https://perma.cc/4W66-F2M7>].

2. Clemens, *supra* note 1, at 101.

The reason why immigration restrictions have such an enormous effect is pretty simple. People become much more productive when they move from countries where they have little or no opportunity to use their talents, to those where they can be more productive. Just crossing from Mexico to the United States makes a person three or four more times more productive than they otherwise would be, even without improving their skills in any way.³ And the opportunities to improve skills are, for most immigrants, far greater in the U.S. than where they initially came from. There is an enormous amount of wealth that can be created just by cutting back on our immigration restrictions.

But it would be a mistake to say that the issue here is primarily economic. It is also, and even more fundamentally, about freedom. When people come to the United States from poor and oppressive societies, they increase their freedom in many ways. Think of refugees fleeing religious or ethnic persecution, women escaping patriarchal societies, or people fleeing massacres such as those perpetrated by ISIS. The ancestors of most modern Americans escaped such oppression during the period when we wisely did not have the kinds of immigration restrictions that we do today. If we had today's immigration policies back then, the ancestors of most of the current US population would never have been allowed to come.

Immigration restrictions undermine the freedom of native-born Americans as well as immigrants. Because of our immigration laws, millions of native-born Americans cannot hire the workers they want, associate with the businesses that they choose, nor benefit from the entrepreneurship of immigrants; on average, they tend to be more entrepreneurial than native-born citizens.⁴

3. Ernesto Aguayo-Téllez & Christian I. Rivera-Mendoza, *Migration from Mexico to the United States: Wage Benefits of Crossing the Border and Going to the U.S. Interior*, 39 POL. & POL'Y 119, 132 (2011).

4. See, e.g., ROBERT W. FAIRLIE, SMALL BUS. ADMIN., IMMIGRANT ENTREPRENEURS AND SMALL BUSINESS OWNERS, AND THEIR ACCESS TO FINANCIAL CAPITAL 1 (2012), <https://www.sba.gov/sites/default/files/rs396tot.pdf> [<https://perma.cc/7VHB-ERVE>]; Dan Viederman, *What We're Talking About: The Negative Business Impact of Anti-Immigration Laws*, DIGITALCOMMONS@ILR (Nov. 2011), <http://digitalcommons.ilr.cornell.edu/cgi/viewcontent.cgi?article=2151&context=globaldocs> [<https://perma.cc/6EV2-J4FT>]; Catherine Rampell, *Immigration and Entrepreneurship*, N.Y. TIMES (July 1, 2013), http://economix.blogs.nytimes.com/2013/07/01/immigration-and-entrepreneurship/?_r=0 [<https://perma.cc/Q87K-K2UD>].

II. IMMIGRATION AND DISCRIMINATION

Current immigration policy is also inimical to the principle of color-blindness in government. In December 2014 President Obama's Department of Homeland Security concluded that it cannot enforce immigration restrictions unless it continues to engage in massive racial profiling. This is the one area where the Obama administration believes that racial profiling is a good thing.⁵

Such profiling affects not just immigrants but millions of native-born citizens whose sole crime is that they happen to be of the same race or ethnicity as many undocumented immigrants.⁶ If you believe in ending racial discrimination in government policy, this would be a great place to start. I am aware of no other area where federal law enforcement openly resorts to racial discrimination on such a large scale, even under a liberal administration that is, in general, hostile to racial profiling.

Most conservatives and libertarians support the principle of colorblindness in public policy, or at least a strong presumption in favor of it. We do not believe that the government should discriminate on the basis of race or ethnicity. Why? Because these are morally irrelevant characteristics. Your race or ethnicity says nothing about the kinds of rights you should have. It is not a morally relevant characteristic, and not something you have any control over.

The same is true of the place where you happen to be born. In and of itself, being born on one side of a line on a map or another is a morally irrelevant characteristic. It says nothing about the kinds of rights or the amount of freedom that you should have. Ultimately, we support colorblindness because we do not believe in restricting people's freedom based on their choice of parents. The same principle should apply to immigration policy.

5. Ilya Somin, *Obama Administration Decides to Continue the Use of Racial Profiling in Immigration Law Enforcement*, VOLOKH CONSPIRACY (Dec. 7, 2014), https://www.washingtonpost.com/news/volokh-conspiracy/wp/2014/12/07/obama-administration-decides-to-continue-racial-profiling-in-immigration-law-enforcement/?utm_term=.1f1d12b5c959 [<https://perma.cc/JWC7-ZD9U>].

6. *See id.*; Ilya Somin, *Immigrants are Not the Only Victims of Immigration Restrictions*, VOLOKH CONSPIRACY (Oct. 2, 2015), <https://www.washingtonpost.com/news/volokh-conspiracy/wp/2015/10/02/immigrants-are-not-the-only-victims-of-immigration-restrictions/> [<https://perma.cc/DU6D-RFTJ>].

III. HOW TO DEAL WITH POSSIBLE DOWNSIDES OF IMMIGRATION

A presumption in favor of open borders immigration does not mean we can never have any restrictions on free movement of any kind. We can restrict the movement of terrorists, violent criminals, people with contagious diseases, and so forth.⁷ But the key point here is that we can and sometimes should restrict such movement regardless of whether the person in question is a native-born citizen or not, and regardless of where they happened to be born. I am not arguing there should never be restrictions of any kind, merely that those restrictions should not be based on who you chose for your parents and on what side of a line on the map you happen to be born.

Immigration like everything else, does have its downsides. Nothing is a free lunch. However, virtually all the standard objections are either overblown or addressable by means less draconian than forcibly consigning people to lives of poverty and oppression in the Third World. Here, I will just mention one such issue. But similar points apply to others.

Many fear that increasing immigration might lead to increased welfare spending. The social science research actually suggests that in the long run, this is not true.⁸ Controlling for other variables, states with more immigrants do not have higher per capita welfare spending than other states.⁹ In Western Europe, nations with more immigrants actually have lower per capita welfare spending than their counterparts because natives tend to be more opposed welfare spending when they think that the funds might go to immigrant groups.¹⁰

7. See S. COMM. ON HOMELAND SEC. & GOVERNMENTAL AFFS., 114TH CONG., THE STATE OF AMERICA'S BORDER SECURITY 83–93 (2015) (providing for a variety of methods for controlling the border).

8. See Ilya Somin, *Increased Immigration is Unlikely to Increase the Size of the Welfare State*, VOLOKH CONSPIRACY (Feb. 18, 2014), https://www.washingtonpost.com/news/volokh-conspiracy/wp/2014/02/18/increased-immigration-is-unlikely-to-increase-the-size-of-the-welfare-state/?utm_term=.3b2ea75c7536 [<http://perma.cc/C9FD-S76T>] (reviewing recent research on the subject).

9. See Zachary Gochenour & Alex Nowrastch, *The Political Externalities of Immigration: Evidence from the United States* (Cato Inst. Working Paper No. 14, 2014), <https://www.cato.org/publications/working-paper/political-externalities-immigration-evidence-united-states> [<https://perma.cc/XH6Y-XXP3>].

10. See, e.g., ALBERT ALESINA & EDWARD GLAESER, FIGHTING POVERTY IN THE US AND EUROPE (2004); Nate Breznau, *Immigrant Presence, Group Boundaries, and Sup-*

But let's say you are still concerned about this problem. There is an obvious solution: Simply deny welfare benefits to this group of immigrants, or limit them to whatever level you consider appropriate. The 1996 Welfare Reform Act already does this for many welfare programs.¹¹ That can be extended if necessary. If conservatives devoted their efforts to such measures rather than to promoting immigration restrictions, that would be enormously beneficial for both immigrants and natives. Other common complaints against immigration have similar "keyhole" solutions that are far preferable to immigration restrictions.¹²

IV. WHY THERE IS NO GENERAL FEDERAL POWER TO RESTRICT IMMIGRATION UNDER THE CONSTITUTION

I will end by focusing on Congress's supposed power over immigration.¹³ If you read Article I of the Constitution,¹⁴ you rapidly come to a very simple conclusion: there is no general power to restrict immigration there. It just is not listed anywhere in the Constitution. There is a power over naturalization, to grant or withhold citizenship.¹⁵ But naturalization is not the same thing as immigration. People can live in a country without being citizens. Similarly, their movement can sometimes be restricted, even if they are citizens. The Founders knew that no less than we do.

Today, many would argue that Congress has broad authority over immigration because of the Foreign Commerce Clause—the power to regulate commerce with foreign nations.¹⁶ Such an approach is consistent with the broad modern interpretation of

port for the Welfare State in Western European Societies, 59 *ACTA SOCIOLOGICA* 195 (2016); Gary P. Freeman, *Migration and the Political Economy of the Welfare State*, 485 *ANNALS AM. ACAD. POL. & SOC. SCI.* 51, 57–58 (1986).

11. Pub. L. No. 104-193, 110 Stat. 2105.

12. For a good overview, see Bryan D. Caplan, *Why Should We Restrict Immigration*, 32 *CATO J.* 1 (2012). On the general concept of "keyhole solutions," see *Keyhole Solutions*, OPEN BORDERS, <http://www.openborders.info/keyhole-solutions/> [<http://perma.cc/2KT6-PEFK>].

13. The argument of this Part is a brief summary of a much more detailed article I am writing on this subject.

14. U.S. CONST. art. I, §§ 1–10.

15. *Id.* art. I, § 8.

16. U.S. CONST. art. I, § 8 cl. 3.

the Congress power over interstate commerce.¹⁷ But at least as a matter of original meaning, simple movement from place to place was not considered commerce. The very same clause that gives Congress the power to regulate foreign commerce also gives it authority over interstate commerce.¹⁸ Nobody at the time of the founding or for decades thereafter thought it gave Congress the ability to ban people from moving from one state to another.¹⁹ If the Interstate Commerce Clause as an original matter does not include that power, then the Foreign Commerce Clause, which is in fact the very same clause, does not grant the power to restrict international migration

Many conservatives, including John Eastman, have argued for a similarly narrow interpretation of the commerce power in other contexts.²⁰ The same reasoning applies here. For the first hundred years of American history, this was actually the dominant interpretation of the Constitution: that Congress did not have a general power to restrict immigration.

It was not until the 1870s and 80s that Congress, with the passage of the Page Act and the Chinese Exclusion Act, enacted systematic immigration restrictions, as a result of an upsurge in anti-Chinese racism.²¹ In 1889, the Supreme Court upheld the Chinese Exclusion Act.²² The Court recognized that this power is not actually listed in Article I of the Constitution, but held that it was an inherent attribute of sovereignty—something that all governments must have.²³

There are two problems with that claim. First, the federal government got along for 100 years without having this power, so it is far clear that they must have it. Second, if we assume that seemingly essential powers are present without needing to

17. See, e.g., *Gonzales v. Raich*, 545 U.S. 1 (2005).

18. U.S. CONST. art. I, § 8, cl. 3.

19. See generally Randy E. Barnett, *The Original Meaning of the Commerce Clause*, 68 U. CHI. L. REV. 101 (2001).

20. See, e.g., John C. Eastman, *Minutes from a Convention of the Federalist Society: The Roberts Court and Federalism*, 4 N.Y.U. J.L. & LIBERTY 330, 337 (2009).

21. See Kerry Abrams, *Polygamy, Prostitution, and the Federalization of Immigration Law*, 105 COLUM. L. REV. 641 (2005); Sarah H. Cleveland, "Powers Inherent in Sovereignty": *Indians, Aliens, Territories, and the Nineteenth Century Origins of the Plenary Power over Foreign Affairs*, 81 TEX. L. REV. 1 (2002).

22. *The Chinese Exclusion Case*, 130 U.S. 581 (1889).

23. *Id.* at 609.

be enumerated, then why do we enumerate things that are even more inherent, such as the power to declare war,²⁴ raise armies,²⁵ and so forth? These powers are far more essential than the power to restrict immigration. Yet they had to be enumerated. The whole point of enumeration is to ensure that Congress's powers, and those of the federal government generally, are limited.²⁶ As Chief Justice John Marshall put it, "enumeration presupposes something not enumerated."²⁷ The powers that are not enumerated are not included. That is the basic principle that originalists usually apply to assertions of federal power. And it should apply here, as well..

CONCLUSION

At our best, we should be the nation of the Statue of Liberty, not the nation of walls and deportations. Freedom for both immigrants and natives alike: That is what will truly make America great again.

24. U.S. CONST. art. I, § 8, cl. 11.

25. *Id.* art. I, § 8, cl. 12.

26. *See, e.g.*, THE FEDERALIST NO. 45 (James Madison) ("The powers delegated by the proposed Constitution to the federal government are few and defined. Those which are to remain in the State governments are numerous and indefinite."); 2 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 369 (1833).

27. *Gibbons v. Ogden*, 22 U.S. (1 Wheat.) 1, 195 (1824).

THE POWER TO CONTROL IMMIGRATION IS A CORE ASPECT OF SOVEREIGNTY

JOHN C. EASTMAN*

Where in our constitutional system is the power to regulate immigration assigned? Professor Ilya Somin argues that the power to regulate immigration is not a power given to Congress because it is not enumerated.¹ But I think it is so clearly a power given to Congress and that such was so well understood at the time of our founding that the Constitution did not even need to specify it. Even so, I think the Constitution does specify it.² The notion that the power to regulate immigration is not contained within the power of naturalization³ is an anachronistic view of the latter power⁴ that understands naturalization merely to confer citizenship and not as having anything to do with who can immigrate into this country in order to obtain citizenship.

Of course, in 1787 when that clause was written, immigration and naturalization were largely synonymous because of a couple of facts that are no longer true. First, one did not cross the Atlantic in a number of hours; it was a three-month-long journey. Most people made the trip only once in a lifetime (though if you were a diplomat, you might have to make it several times). However, making that trip meant that you were

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1. See Ilya Somin, *Immigration, Freedom, and the Constitution*, 40 HARV. J.L. & PUB. POL'Y 1, 5–6 (2017).

2. U.S. CONST. art. 1, § 8, cl. 4 (“Congress shall have the Power To . . . establish an uniform Rule of Naturalization . . .”).

3. *Id.*

4. See James E. Pfander & Theresa R. Wardon, *Reclaiming the Immigration Constitution of the Early Republic: Prospectivity, Uniformity, and Transparency*, 96 VA. L. REV. 359, 393 (2010) (“Equally revealing, [the Framers] regarded the formation of naturalization rules as tantamount to the construction of an immigration policy for the new nation.”).

relocating and taking on a new allegiance and becoming a member of a new body politic.

The second thing was property law. If you were not a naturalized citizen, you could not inherit property—and in many cases you could not even own property.⁵ And so, before you made the decision to immigrate, you had to know what the naturalization rules were. Giving Congress the power to naturalize—to determine who can become citizens and members of our body politic—necessarily encompassed the power to decide who could come here in order to put themselves up for that naturalization.

Proof that this was the understanding of the naturalization power is found in the negative implication of the text of Article I, Section 9 of the United States Constitution, which specifically states: “The Migration or Importation of such Persons as any of the States now existing shall think proper to admit, shall not be prohibited by the Congress prior to the Year [1808]”⁶ What is the negative implication to be drawn from that restriction on Congress’s power? The negative implication is that Congress does have the power to restrict migration and importation, although it cannot exercise that power until 1808. This provision was aimed at slavery, but it says migration *and* importation, not just importation, and that additional word meant that the prohibition (and hence the implied power) applied more broadly than just in the slavery context. In other words, the Supreme Court was correct when, in the Chinese Exclusion Cases, it recognized that Congress has inherent power over immigration, a power that is essential to and an incident of sovereignty.⁷

However, this notion of sovereignty did not begin in the Chinese Exclusion Cases. Rather, it began forty years earlier in *The Passenger Cases*.⁸ Those cases confronted the fact that New York and Massachusetts each imposed a head tax on every

5. See 2 JAMES KENT, COMMENTARIES ON AMERICAN LAW 70 (1832) (characterizing rights of property ownership as “civil privileges, conferred upon aliens, by state authority”).

6. U.S. CONST. art. I, § 9, cl. 1.

7. See, e.g., *Fong Yue Ting v. United States*, 149 U.S. 698, 705–06 (1893); *Chae Chan Ping v. United States*, 130 U.S. 581, 603–04 (1889).

8. 48 U.S. (7 How.) 283 (1849).

passenger arriving from overseas into their ports.⁹ The Court held that the power to grant ingress and egress to and from its territory belongs to every sovereign, and cited Vattel, among others, for that proposition.¹⁰ I think this notion of an inherent foreign affairs power is correct. It is a power that the Court has recognized in many areas.

But that inherent power distinguishes between the states and the federal government. In *Federalist No. 32*, For example, James Madison explained that the Constitution left to the states issues that are of local concern but assigned to the national government all of the powers that are inherent in the definition or understanding of a national sovereignty.¹¹ It would have been bizarre not to have recognized the power to regulate immigration as a power of the national government because control of one's borders was such a critical and core aspect of sovereignty.

The flip side of *The Passenger Cases* is that the states could not impose that tax because it was an intrusion on foreign commerce. Congress, therefore, could impose a tax because it was an exercise of the Foreign Commerce power.¹² The Court held that Congress could use the tax as an imposition—as a way to regulate or control immigration.

What about immigration that does not involve commerce? The Court uses language in *The Passenger Cases* to say that engaging in the business of bringing passengers is an aspect of foreign commerce. The notion that passenger travel is “commerce” was decided in *Gibbons v. Ogden*,¹³ so that case, too, would have to be overruled to sustain the argument that Congress has no power to regulate the transportation of people into the United States. But what about those who are not coming on a ship? What about those who are not coming on a train or a caravan across a land

9. *Id.* at 284, 287.

10. *Id.* at 525 (citing 2 EMMERICH DE VATTEL, THE LAW OF NATIONS § 104 (1758) (“The sovereign ought not to grant an entrance into his state for the purpose of drawing foreigners into a snare; as soon as he admits them, he engages to protect them as his own subjects, and to afford them perfect security, as far as depends on him. Accordingly, we see that every sovereign who has given an asylum to a foreigner, considers himself no less offended by an injury done to the latter, than he would be by an act of violence committed on his own subject.”)).

11. THE FEDERALIST NO. 32 (James Madison).

12. See U.S. CONST. art. I, § 8, cl. 3.

13. 22 U.S. (9 Wheat.) 1 (1824).

border? What about those who are just walking here? There is nobody engaged in the commerce of transporting those passengers other than the people themselves.

Of course, we would have to interpret the word “commerce” more narrowly than modern precedent does in order to accept the proposition that the transportation of migrants would not be included. I advocate an understanding of the Interstate Commerce Clause that is probably as strict as anyone in the country because I think the Founders had a much more restricted view of “commerce” than our modern cases allow, but even for the Founders, I believe the commerce power included the power to regulate immigration. In their view, the Foreign Commerce Clause encompassed not only the trade of goods but also intercourse between the two nations more broadly—and that would necessarily include the movement of peoples.¹⁴ People coming here to take up residence and engage in the economy would have been an intercourse between the two nations, fully within the power of Congress to “regulate Commerce with foreign Nations”¹⁵

Taken together, the Naturalization power and the Foreign Commerce power provide a textual basis for an immigration policy. More broadly, the power to regulate migration is inherent in the very notion of sovereignty.¹⁶ What does it mean

14. See Jack M. Balkin, *Commerce*, 109 MICH. L. REV. 1, 1 (2010) (“Understanding ‘commerce’ in its original sense of ‘intercourse’ is consistent with all of the evidence offered by rival theories of commerce as trade or economic activity; but it better explains the source of Congress’s powers over immigration and foreign affairs. It also better explains Congress’s broad powers over transportation and communications networks, whether or not these networks are used for purposes of business or trade.”); see also Randy E. Barnett, *The Original Meaning of the Commerce Clause*, 68 U. CHI. L. REV. 101, 113 (2001) (“Commerce is defined in the 1785 edition of Samuel Johnson’s *Dictionary of the English Language* as ‘1. Intercourse; exchange of one thing for another; interchange of any thing; trade; traffick.’”).

15. See Balkin, *supra* note 14, at 26 (“The eighteenth-century definition of commerce as ‘intercourse’ or ‘exchange’ among different peoples easily encompasses immigration and emigration of populations for any purpose, whether economic or noneconomic.”); see also *Gibbons*, 22 U.S. (9 Wheat.) at 65–66 (“Considering it then, as a regulation of trade among the States, it becomes necessary to inquire into the foundation of the right of intercourse among the States, either for the purposes of commerce, or residence and travelling.”).

16. See *Chae Chan Ping v. United States*, 130 U.S. 581, 603–04 (1889) (“The jurisdiction of the nation within its own territory is necessarily exclusive and

to have sovereignty? The Declaration of Independence gives us some guidance on that question. It begins: “When in the Course of human events it becomes necessary for *one people* to dissolve the political bands which have connected them with another.”¹⁷ After that opening statement, the drafters set out the propositions that legitimized their claim of right to renounce their former allegiance.

The Declaration’s “one people” language recognizes that even though all of humanity has fundamental, inalienable human rights, in order to secure those rights, we form discrete societies of people. These groups are most often defined geographically, and they each decide how to best institute a government to protect their inalienable rights. That process requires recognition of a group of people that stands distinct from other groups. All such groups have the same natural right to create their government and to defend their inalienable rights as we have. But a right to preserve geographic borders is inherent in the understanding of how we protect rights. Boundaries serve to protect and secure the blessings of liberty and posterity for a nation’s people.

If we are going to accept that proposition at all, then we have to recognize that we must make a policy determination on how large our welcome mat should be for immigration. The only way to avoid that determination is to claim that there ought to be no distinction between citizen and noncitizen, no ability to control the volume of people that come at any given time. The Founders clearly did not have that open-borders mentality.¹⁸

For the first century of America’s history, virtually no cases dealt with immigration restrictions,¹⁹ because the country needed to populate its vast territory. In fact, the policy judgment at the time of the founding was to encourage as many

absolute. It is susceptible of no limitation not imposed by itself.” (quoting *The Schooner Exchange v. McFadden*, 11 U.S. (7 Cranch) 116, 136 (1812))).

17. THE DECLARATION OF INDEPENDENCE para. 1 (U.S. 1776) (emphasis added).

18. See Pfander & Wardon, *supra* note 4, at 385.

19. See generally Matthew J. Lindsay, *Immigration, Sovereignty, and the Constitution of Foreignness*, 45 CONN. L. REV. 743 (2013) (arguing that, throughout the nation’s first century, the Supreme Court found nothing constitutionally exceptional about a statute that governed foreigners engaged in the process of immigration).

individuals as possible “to people the Western lands.”²⁰ Immigration was necessary for the successful expansion of American society but also for defense purposes. If we had not shored up our western lands and other borders, the country would not have survived its early years. It is thus not surprising that we do not see cases dealing with restrictions on immigration in the early years of the new republic. The lack of case law, however, does not suggest that the Founders and early lawmakers did not recognize that there was such a power.²¹

In fact, the Founders recognized that when considering restrictions on immigration, it is important to focus on what is necessary to protect the people here.²² That means we can make distinctions between different parts of the world from which we accept immigrants. Quite simply, immigrants from parts of the world where despotism was the rule were more problematic because such individuals, habituated to un-republican forms of government, would tend to bring their despotic tendencies and habits to the United States.²³ These were the kinds of concerns that were expressed, for example, briefly at the Federal Convention and in the early Naturalization Acts in Congress.²⁴ Accordingly, we must recognize that Congress had the power to make restrictions when, in its policy judgment, such restrictions were necessary.

That is why, when it confronted these issues a century after America’s founding, the Supreme Court concluded that immigration restrictions are inherent in sovereignty.²⁵ Moreover, this kind of policy judgment is best crafted by the political

20. See ARISTIDE R. ZOLBERG, *A NATION BY DESIGN* 6 (2008) (arguing that foreign immigration “made a much greater contribution to [U.S.] population than had ever occurred” in Europe).

21. See *id.* at 3 (“A reexamination of the record with this in mind reveals that the absence of federal legislation does not reflect a lack of interest in regulating entry, but was attributable to the overriding of immigration policy by what was then the central issue of national politics, the matter of states’ rights in relation to slavery.”).

22. See Pfander & Wardon, *supra* note 4, at 385 (outlining extensive immigration regulations in the late eighteenth century).

23. See ZOLBERG, *supra* note 20, at 55–56 (referencing Franklin’s and Tocqueville’s discussions of an influx of immigrants who may not be accustomed to liberty).

24. See Pfander & Wardon, *supra* note 4, at 385–403.

25. See *Chae Chan Ping v. United States*, 130 U.S. 581, 609 (1889).

branches, not by judicial interposition. The Court thus developed a doctrine granting Congress almost unfettered plenary authority to make such judgments. The kinds of arguments that Professor Ilya Somin makes,²⁶ therefore, are more properly submitted to Congress, not to the courts. If you think lawmakers got the policy judgment wrong, then argue for a change in the law, because what the proper immigration policy should be is inherently a political decision that the legislative branch is entitled to make.

That is where I think the fight has to be. I do not think Congress has the mix right at the moment, and certainly, much of the existing impediments and red tape to get through the process are unnecessary. But it is Congress that has to make the decision on where to draw the line. Otherwise, we will destroy not only the notion of boundaries but also the notion of sovereignty itself, and that seems counter to the very principles of the Declaration of Independence that we ought not to break.

26. See Somin, *supra* note 1.

JUMP-STARTING K–12 EDUCATION REFORM

HON. CLINT BOLICK*

Our K–12 educational system is a national catastrophe. Many, if not most, of the public schools we think of as good or excellent are in fact, by international comparisons, average or poor.¹ When we compare ourselves to the other Organization for Economic Cooperation and Development (OECD) countries that are competitors in the world, we are either at the midpoint or the bottom half of educational performance in every area of education.²

The country closest to us in terms of academic performance is Slovakia.³ I have nothing against Slovakia, but it's Slovakia, and we've got to aspire to be better than Slovakia. The thing about Slovakia is that it spends half as much money on K-12 education per student as the United States, so we pay twice as much to get the same outcome.⁴

Of course, this situation is especially dire for low-income kids. Nearly half of black and Hispanic kids drop out of school

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1. See ORG. FOR ECON. CO-OPERATION & DEV., PROGRAMME FOR INTERNATIONAL STUDENT ASSESSMENT (PISA): RESULTS FROM PISA 2012: UNITED STATES 1–2, 7 (2012), <http://www.oecd.org/pisa/keyfindings/PISA-2012-results-US.pdf> [<https://perma.cc/R95E-HB9Q>] (reporting that fifteen-year-old American students performed below average in mathematics and near average in reading and science in a ranking of thirty-four participating countries).

2. *Id.* at 1–2.

3. See *id.* at 1, 4 (reporting that Slovakia “performs at the same level as the United States”); *id.* at 6, 7 (reporting almost identical mean scores for American and Slovakian students in mathematics).

4. *Id.* at 1, 4.

before they graduate.⁵ Think about that: If you don't even have high school graduation, what are your prospects in life? Even kids from affluent suburban public schools go to college, and the first thing they are required to do there is take remedial English because they are barely literate.⁶ And we think that we can take care of these problems with programs like Affirmative Action? As a cab driver once told me, the problem is not in college; the problem is in kindergarten.

All of this is especially perverse, given the fact that we have the capacity in this country right now to deliver a high-quality education, customized to every individual child at a fraction of the cost of which we are providing it. And yet we're not doing that. Many of you are probably familiar with the Khan Academy,⁷ the school, so to speak, that takes place entirely over the Internet.⁸ It offers free classes in mathematics and sciences and so forth.⁹ Thousands if not millions of kids, and for that matter, adults, have learned through the Khan Academy.¹⁰ We have charter schools that are absolutely eye-popping in their

5. See JAY P. GREENE & GREG FORSTER, MANHATTAN INSTITUTE, PUBLIC HIGH SCHOOL GRADUATION AND COLLEGE READINESS RATES IN THE UNITED STATES 2 (2003), <http://www.oecd.org/pisa/keyfindings/PISA-2012-results-US.pdf> [<http://perma.cc/A5UP-6HN3>].

6. See MARY NGUYEN BARRY & MICHAEL DANNENBERG, OUT OF POCKET: THE HIGH COST OF INADEQUATE HIGH SCHOOLS AND HIGH SCHOOL STUDENT ACHIEVEMENT ON COLLEGE AFFORDABILITY 2, 4–5 (2016), <https://edreformnow.org/app/uploads/2016/04/EdReformNow-O-O-P-Embargoed-Final.pdf> [<https://perma.cc/F5HX-W67Z>] (reporting that “nearly half” of first-year college students enrolled in remedial coursework came from middle- to upper-income families); *id.* at 10 (“In 2015, 72 percent of high school graduates taking the ACT failed to meet college readiness benchmarks across English, Reading, Mathematics, and Science.”); Editorial, *Guess Who’s Taking Remedial Classes*, N.Y. TIMES (May 10, 2016), http://www.nytimes.com/2016/05/10/opinion/guess-whos-taking-remedial-classes.html?_r=1 [<https://perma.cc/W9D4-FTXG>] (noting that “the income data [cited in Barry & Dannenberg, *supra*] suggest that many [students enrolled in remedial college courses] come from suburban communities whose schools did not prepare them for college-level work”).

7. See KHAN ACADEMY, <https://www.khanacademy.org/> [<https://perma.cc/MP4N-B7H6>] (last visited Mar. 7, 2017).

8. See *Our Mission*, KHAN ACADEMY, <https://www.khanacademy.org/about> [<https://perma.cc/RYR5-YZEV>] (last visited Mar. 7, 2017).

9. See *Subjects*, KHAN ACADEMY, <https://www.khanacademy.org/library> [<https://perma.cc/XJE8-M354>] (last visited Mar. 7, 2017).

10. See *Donate*, KHAN ACADEMY, <https://www.khanacademy.org/donate?gclid=COjbmDrJ180CFVFZhgodKEAJJg> [<https://perma.cc/TW7E-DLCZ>] (last visited Mar. 7, 2017).

success, not just for high-performing students but for low-income kids as well.¹¹

A lot of times good-intentioned people say we just need to lower class sizes.¹² We need to send more money to the classroom to facilitate that.¹³ Well, when you think about it, what is the ideal student-teacher ratio? Is it 12:1? 15:1? 18:1? What if you have a teacher like Jaime Escalante, possibly the most gifted math teacher in American history?¹⁴ Should he have 18 kids a class? Twenty kids a class? We have the capacity today to deliver that type of education to millions of kids, and yet we're not doing that. The reason we're not doing that is because our education system is a nineteenth-century education system.¹⁵ If Abraham Lincoln were alive today, he would recognize almost nothing about our country. The one thing he would recognize instantly is our schools because they are structured largely the same way they were in the late 1800s, with rows of kids being talked to by their teachers in school districts where they attend school because of their ZIP Code and so forth.¹⁶

Given the breadth of our education crisis, we have to start asking not whether a particular reform program is too radical, but rather whether it is radical enough. We need a fundamental reconstruction of our K-12 school system, including a devolution of power and resources to the schools and to the families. For instance, why in the twenty-first century do we have school districts? Some of them are so large that they are impermeable bureaucracies.¹⁷ Some are so small that they could

11. See Adam Ozimek, *The Unappreciated Success of Charter Schools*, FORBES (Jan. 11, 2015, 7:31 P.M.), <http://www.forbes.com/sites/modeledbehavior/2015/01/11/charter-success/#3f43d29070f4> [<https://perma.cc/HK8T-DRVW>].

12. See, e.g., NAT'L EDUC. ASS'N, CLASS SIZE REDUCTION: A PROVEN REFORM STRATEGY 1–3 (2008), http://www.nea.org/assets/docs/PB08_ClassSize08.pdf [<https://perma.cc/5DMY-YS25>].

13. See *id.*

14. See generally Claudio Sanchez, *Jaime Escalante's Legacy: Teaching Hope*, NPR (Mar. 31, 2010, 3:05 P.M.), <http://www.npr.org/templates/story/story.php?storyId=125398451> [<https://perma.cc/6JAR-RZYZ>].

15. See ENCYCLOPEDIA OF EDUCATIONAL REFORM AND DISSENT 279 (Thomas C. Hunt et al. eds., 2010).

16. See *id.*

17. New York City, the largest school district in the United States, was home to 989,012 students as of 2013. See INST. OF EDUC. SCIS., NATIONAL CENTER FOR

not possibly capture economies of scale.¹⁸ They siphon off massive amounts of money without delivering a commensurate educational productivity,¹⁹ they are prone to capture by special interest groups,²⁰ and they perpetuate funding inequity through property taxes.²¹

We need to think about bold systemic reforms like changing the school district system. One reform in particular has large potential to transform American education: education savings accounts.²² It is an idea I am proud to say was born in my former organization, the Goldwater Institute,²³ and it was born of necessity.²⁴ Goldwater pushed school vouchers and helped get a program passed for disabled kids²⁵ and foster kids in Arizona.²⁶ The school voucher program was struck down by the Arizona Supreme Court under the so-called Blaine

EDUCATION STATISTICS: TABLE 215.10 (2013), https://nces.ed.gov/programs/digest/d15/tables/dt15_215.10.asp [<https://perma.cc/3KVW-GKPR>].

18. See Marvin E. Dodson, III & Thomas A. Garrett, *Inefficient Education Spending in Public School Districts: A Case for Consolidation* 13–14 (Fed. Reserve Bank of St. Louis, Working Paper No. 2002-010C) (demonstrating that consolidation of small school districts results in efficiency gains).

19. See, e.g., Terrance F. Ross, *Where School Dollars Go to Waste*, ATLANTIC (Jan. 30, 2015), <http://www.theatlantic.com/education/archive/2015/01/where-school-dollars-go-to-waste/384949/> [<https://perma.cc/9BC9-UDMC>].

20. See Neal McCluskey, *Corruption in the Public Schools: The Market is the Answer*, CATO INST. POL'Y ANALYSIS NO. 542, at 2–3 (Apr. 20, 2005) (providing examples of special interest corruption in the Miami-Dade public school system).

21. See Laurie Reynolds, *Full State Funding of Education as a State Constitutional Imperative*, 60 HASTINGS L.J. 749, 751–52 (2009).

22. See Clint Bolick, *Nevada Places a Bet on School Choice*, WALL ST. J., (June 14, 2015, 6:06 P.M.), <http://www.wsj.com/articles/nevada-places-a-bet-on-school-choice-1434319588> [<https://perma.cc/HUG4-HAW6>]; Fernanda Santos & Motoko Rich, *With Vouchers, States Shift Aid for Schools to Families*, N.Y. TIMES (Mar. 27, 2013), <http://nyti.ms/16iODpa>, [<https://perma.cc/K6JF-RE9C>].

23. See DAN LIPS, GOLDWATER INST., EDUCATION SAVINGS ACCOUNTS: A VEHICLE FOR SCHOOL CHOICE 2, 4 (2005), https://www.heartland.org/sites/all/modules/custom/heartland_migration/files/pdfs/19148.pdf [<https://perma.cc/L7P8-CB34>]; JONATHAN BUTCHER & LINDSEY M. BURKE, THE HERITAGE FOUND., EXPANDING EDUCATION CHOICES: FROM VOUCHERS AND TAX CREDITS TO SAVINGS ACCOUNTS 1, 4 (2013), <http://report.heritage.org/sr136> [<https://perma.cc/5U3M-TPKE>].

24. See LIPS, *supra* note 23, at 4.

25. See Ariz. Rev. Stat. Ann. §§ 15-891 to -.06 (Supp. 2008) (amended 2014).

26. See *id.* §§ 15-817 to -.07 (repealed 2011).

Amendment.²⁷ A number of states have these types of amendments.²⁸ The court concluded that because the money and vouchers could only go to private schools, it violated this super-protection of the separation of church and state.²⁹

The school voucher program got us thinking at the Goldwater Institute: What if we had a program of school choice that did not just allow you to choose private schools?³⁰ And the idea of education savings accounts was born.³¹ This is how they work: If you are an eligible student, the state will take 90 percent of what it would have spent on your education and instead put it into an education savings account that you own and control.³² You can then use it for any educational expense, from private school tuition to distance learning to technology to tutoring to purchasing discrete services or classes in your local public school to community college classes to transportation.³³ And if you do not use all of the money, you can save it for college.³⁴

This idea started in Arizona.³⁵ It was adopted for the same two groups of students that had the vouchers—the foster kids and disabled kids.³⁶ It was upheld under the Blaine Amendment by the same courts that had struck down the

27. *Cain v. Horne*, 202 P.3d 1178, 1185 (Ariz. 2009) (en banc); *see also* *Mitchell v. Helms*, 530 U.S. 793, 828 (2000) (describing the Blaine Amendment as a constitutional amendment “which would have . . . bar[red] any aid to sectarian institutions”).

28. *See, e.g.*, ALASKA CONST. art. VII, § 1; ARIZ. CONST. art. II, § 12; CAL. CONST. art. IX, § 8; COLO. CONST. art. IX, § 7; DEL. CONST. art. X, § 3; FLA. CONST. art. I, § 3; HAW. CONST. art. X, § 1; IDAHO CONST. art. IX, § 5; ILL. CONST. art. X, § 3; KY. CONST. § 189; MINN. CONST. art. XIII, § 2; MO. CONST. art. IX, § 8; MONT. CONST. art. X, § 6(1); N.Y. CONST. art. XI, § 3; PA. CONST. art. III, § 29; S.C. CONST. art. XI, § 4; S.D. CONST. art. VI, § 3; TEX. CONST. art. I, § 7; WASH. CONST. art. I, § 11; WYO. CONST. art. I, § 19.

29. *See Horne*, 202 P.3d at 1184.

30. *See LIPS, supra* note 23, at 4–5.

31. *See id.* at 4–6.

32. *Id.* at 6.

33. *See id.*

34. *Id.*

35. *See generally* Ariz. Rev. Stat. Ann. §§ 15-2401 to -2404 (2015), amended by S.B. 1457, 52d Leg., 2d Reg. Sess. (Ariz. 2016).

36. *See id.* §§ 15-2401(6)(a)(i)–(iii), (viii), (ix), amended by S.B. 1457, 52d Leg., 2d Reg. Sess. (Ariz. 2016).

school vouchers³⁷ and it was soon on the move, first to Florida, which also had struck down vouchers³⁸ but not education savings accounts,³⁹ and then to Tennessee⁴⁰ and Mississippi.⁴¹ Nevada recently became the first state to adopt nearly universal education savings accounts.⁴² Practically every student in Nevada is eligible for an education savings account if they choose to have it.⁴³

The benefits of this program are potentially enormous.⁴⁴ First of all, educational savings accounts cut out the middle man in education.⁴⁵ They cut out the educational bureaucracy.⁴⁶ It is just like so many other things in our society, where you can directly purchase the types of educational services that you want for your child.⁴⁷ You can customize them because not every child needs the exact same things. They are especially good for kids with special needs, like kids with disabilities that often require special education.⁴⁸ They facilitate the purchase and delivery of technology, they eliminate the power of self-

37. See *Niehaus v. Huppenthal*, 310 P.3d 983, 987 (Ariz. Ct. App. 2013), *appeal denied*, 2014 Ariz. LEXIS 59 (Ariz. Mar. 21, 2014).

38. See *Bush v. Holmes*, 919 So. 2d 392, 398 (Fla. 2006).

39. See Fla. Stat. § 1002.385 (2016), *amended by* S.B. 672, 24th Leg., 2d Reg. Sess. (Fla. 2016); *Faasse v. Scott*, No. 2014-CA-1859 (Fla. Cir. Ct. Dec. 30, 2014) (dismissing the plaintiff's challenge of Florida's Education Savings Account with prejudice).

40. See S.B. 27, 2015 Gen. Assemb. (Tenn. 2015).

41. See S.B. 2695, 2015 Reg. Sess. (Miss. 2015).

42. See S.B. 302, 2015 Sess. (Nev. 2015); Jason Bedrick, *Nevada Enacts First Nearly Universal Education Savings Account*, CATO INST. (June 3, 2015, 7:42 A.M.), <http://www.cato.org/blog/nevada-enacts-first-nearly-universal-education-savings-account>, [https://perma.cc/G4J5-K4ML].

43. See S.B. 302, 2015 Sess. (Nev. 2015).

44. See Thomas W. Stewart & Jenn Odell, *2015 Legislative Recap: Important Bills From Nevada's 78th Legislative Session*, 16 NEV. L. J. 419, 430–31 (2015); FOUND. FOR EXCELLENCE IN EDUC., *ESA'S: THE NEXT GENERATION OF SCHOOL CHOICE 2–4*, 17 (2015), <http://www.excelined.org/wp-content/uploads/ESAs-the-NextGen-of-School-Choice-FINAL.pdf> [https://perma.cc/P8UL-RUZA]; Josh Cunningham, *The Next Generation of School Vouchers: Education Savings Account*, NCSL (2016), <http://www.ncsl.org/research/education/the-next-generation-of-school-vouchers-education-savings-accounts.aspx> [https://perma.cc/D2UK-NKLB].

45. See Stewart & Odell, *supra* note 44, at 430–31; Cunningham, *supra* note 44.

46. See Stewart & Odell, *supra* note 44, at 430–31; FOUND. FOR EXCELLENCE IN EDUC., *supra* note 44, at 17.

47. See Stewart & Odell, *supra* note 44, at 430–31; Cunningham, *supra* note 44.

48. Stewart & Odell, *supra* note 44, at 430–31; Cunningham, *supra* note 44.

interested special interests in the educational arena, and they are a way of saving for college.⁴⁹ They also are ultimately equitable because every child gets the same amount of money unless they have special needs, in which they get more.⁵⁰

The program is under legal challenge in Nevada.⁵¹ It will be very interesting to see what happens there. I am predicting that if the program is upheld, it will continue to move to other states. And I think that this will be the first truly twenty-first-century system of K-12 education that really exists from a public policy standpoint.

A final comment, and a very important one. The realm of the possible in terms of education reform is bound ultimately by the United States Supreme Court. When my colleagues and I argued the *Zelman v. Simmons-Harris*⁵² case in 2002, which upheld school vouchers by a 5-4 majority, the dissent warned that if the voucher program was upheld, we would see religious strife—the likes of which we had not seen since Bosnia and Northern Ireland.⁵³ Well, we have come to see that has not happened, and I hope that if the issues of school choice go to the U.S. Supreme Court, a more contemporary perspective will apply.⁵⁴ But this is an area where you, as lawyers, can make an enormous difference, whether you serve on a school board or as a lawyer for schools or education reform groups. Our nation's future depends upon the engagement of each and every one of us.

I want to finish with a very quick tribute to Justice Antonin Scalia in the *Zelman* case. A very good lawyer named Bob

49. See Stewart & Odell, *supra* note 44, at 430–31; FOUND. FOR EXCELLENCE IN EDUC., *supra* note 44, at 17.

50. Stewart & Odell, *supra* note 44, at 430–31; Cunningham, *supra* note 44.

51. See Note, David Wilhelmsen, *Orphans, Baby Blaines and the Brave New World of State-Funded Education: Why Nevada's New Voucher Program Should Be Upheld Under Both State and Federal Law*, 42 J. LEGIS. 257, 257–58 (2016); Michelle Rindels, *Judge Puts Sweeping Nevada School Choice Program on Hold*, LAS VEGAS SUN (Jan. 11, 2016), <http://lasvegassun.com/news/2016/jan/11/judge-puts-sweeping-nevada-school-choice-program-o/> [<https://perma.cc/T8XY-UFXD>].

52. 536 U.S. 639 (2002).

53. *Id.* at 685–86 (Stevens, J., dissenting).

54. See John Schoenig, *Parental Choice, Catholic Schools, and Educational Pluralism at the Dawn of a New Era in K-12 Education Reform*, 27 NOTRE DAME J.L. ETHICS & PUB. POL'Y. 513, 529 (2013) (discussing the benefits of educational choice programs and their spread following *Zelman*).

Chanin from the National Education Association was arguing against the voucher program in its constitutionality. He said that if only the school districts had more money, this problem would die; we would not even need to talk about vouchers.⁵⁵ Justice Scalia, in the way that only he could get to the absolute heart of the problem, leaned back and said, "It isn't a money problem It's a monopoly problem."⁵⁶ I think that truer words have not been spoken. We will miss him enormously. But it falls to the rest of us to carry the standard to improve our nation's schools and educational opportunities.

55. See Transcript of Oral Argument 59, *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002), http://www.supremecourt.gov/oral_arguments/argument_transcripts/00-1751.pdf [<https://perma.cc/N5A5-MT2Z>].

56. *Id.*

ECONOMIC EQUALITY IS AN IMMORAL IDEAL

YARON BROOK*

Capitalism (political and economic freedom) causes economic inequality.¹ Indeed, in most pre-capitalist countries in the world today, there is less inequality than there is in the United States,² despite the United States's ranking among the "most-free" countries in terms of economic freedom.³ But all of these pre-capitalist countries are dirt-poor.⁴ 350 years ago, the pre-capitalist West was also dirt-poor.⁵ There was equality—equality of poverty.⁶ One of capitalism's great virtues is the fact that it has created inequality.⁷

What does that mean? It means that capitalism has allowed the creators of wealth to keep it. Capitalism has rewarded individuals

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1. See, e.g., Trina Jones, *Race, Economic Class, and Employment Opportunity*, 72 LAW & CONTEMP. PROBS. 57, 57–58 (2009) (describing inequality in the U.S.).

2. See *Adam Smith & The Case for Inclusive Capitalism*, 9 NO. 6 SEC. LITIG. REP. 15 (2012).

3. JAMES GWARTNEY, ROBERT LAWSON & JOSHUA HALL, REPORT, ECONOMIC FREEDOM OF THE WORLD: 2016 ANNUAL REPORT 8–9 (2016), <http://www.freetheworld.com/2016/economic-freedom-of-the-world-2016.pdf> (defining "most-free" as countries in the top quartile of economic freedom for 2014, the most recent year of data). The United States ranked 16th of 159 countries, ahead of many other major countries including Germany (30th), Japan (tied-40th), France (tied-57th), Italy (69th), Russia (tied-102nd), India (112th), China (tied-113th) and Brazil (124th). *Id.*

4. CENT. INTELLIGENCE AGENCY, WORLD FACT BOOK, POPULATION BELOW POVERTY LINE (2015) [hereinafter CIA FACT BOOK] (using percentage of population below the poverty line as a proxy for measuring a country's wealth).

5. Max Roser, *GDP Growth Over the Last Centuries*, OUR WORLD IN DATA (2016), <https://ourworldindata.org/gdp-growth-over-the-last-centuries/> [<https://perma.cc/7SYD-33T9>].

6. See *id.* (displaying all countries or regions as nearly equally impoverished).

7. See generally DON WATKINS & YARON BROOK, EQUAL IS UNFAIR: AMERICA'S MISGUIDED FIGHT AGAINST INCOME INEQUALITY (2016).

based on their level of productivity.⁸ The more productive you are, the more you make; the less productive you are, the less you make. This is supply and demand and market forces at work. Capitalism in its pure form, in a free market—setting cronyism aside—is a system of earned inequality.

When we look across the world both historically and geographically, countries that adopt capitalism and free markets are more likely to flourish economically and socially.⁹ The rich get fabulously rich, and the poor just get rich—rich relative to where they were before.¹⁰ Just ask any middle-class Chinese person or Indian person or Taiwanese person. They are rich, relative to the previous generation or relative to where they themselves were just a few years earlier. And given the speed at which this economic transformation is happening on a global scale, projections for continued wealth creation and accumulation continue to be positive.¹¹

So, yes, capitalism creates inequality.¹² But inequality is good. Members of society have different skills, roles, and outcomes, and that's okay. The fact that there are people who are much smarter than I am, who have the ability to create beautiful things like the iPhone and sell them to billions of people, is wonderful. All of us benefit from that. And if these people make billions of dollars, that's a good thing, because that's part of the incentive to make and market the product.

Every time you buy a product like the iPhone, are you better or worse off? Consider J.K. Rowling. She is one of those individuals responsible for inequality in the last 20 years. Every time you bought one of the Harry Potter books, you added to inequality. Scholastic took twenty-five dollars from you for the

8. See WATKINS & BROOK, *supra* note 7, at 59-66, 145-48.

9. TERRY MILLER & ANTHONY B. KIM, *ECONOMIC FREEDOM: THE PROVEN PATH TO PROSPERITY IN INDEX OF ECONOMIC FREEDOM* (2016), available at <http://www.heritage.org/index/book/chapter-1> [<https://perma.cc/7XAJ-FAG8>].

10. See, e.g., CIA FACT BOOK, *supra* note 4.

11. See generally John D. Giorciari, *India's approach to great-power status*, FLETCHER F. WORLD AFF., Winter 2011, at 61; Frank Holmes, *How China went from communist to capitalist*, BUS. INSIDER (Oct. 10, 2015 10:06 AM), <http://www.businessinsider.com/how-china-went-from-communist-to-capitalist-2015-10> [<https://perma.cc/XRK9-E8MX>].

12. See Adam Smith, *supra* note 2.

book, giving a fifth of your payment to J.K. Rowling. She became a billionaire. You became twenty-five dollars poorer.

But why is there any problem with this scenario? You are better off because you get the spiritual value of reading Harry Potter—at the very least you expect you will—and Rowling got monetary compensation. As a result, she became a billionaire, and that’s a good thing, not a bad thing. After all, you are both better off. That is the beauty of markets. That is the beauty of capitalism. Yes, capitalism creates wealth inequality, but so what? If the transactions are win-win, as voluntary trade is, we are all better off.

Now, there are real problems in the world today which, in my view, the whole inequality debate is hiding and trying to disguise. These problems include poverty, cronyism, and low economic growth.¹³ None of these problems has anything to do with the inequality gap between rich and poor. We have a justified sense of outrage and injustice when we see the difficulties in economic mobility for the poor.¹⁴ We see the injustice that arises from cronyism.¹⁵ We resent the fact that some rich people are rich because they are cronies; we rightfully feel that it is a problem.¹⁶ And we are legitimately concerned by the lack of economic growth over the last eight years—a cause of real frustration among many in the middle class. But the inequality gap, the number, the Gini coefficient—however you want to call it—is irrelevant to these legitimate issues. The inequality itself is not an issue; it is a bogus issue. There is no problem of inequality.

If we seriously consider the problem of the poor not being able to rise up from poverty, we see that this is often caused by politicians instituting policies in order to reduce inequality.¹⁷

13. See WATKINS & BROOK, *supra* note 7, at 14–17, 117–75.

14. See, e.g., Cody Branham, *Stuck In The Middle: Curbing Income Inequality With The Better Bargain Plan*, 25 KAN. J.L. & PUB. POL’Y 187 (2016); see also Eric M. Zolt, *Inequality in America: Challenges for Tax and Spending Policies*, 66 TAX L. REV. 641 (2013).

15. Jonathan R. Macey, *Crony Capitalism: Right Here, Right Now*, 37 HARV. J.L. & PUB. POL’Y 5 (2014).

16. *Id.*

17. See *id.*; see also LAWRENCE ABER ET AL., REPORT, OPPORTUNITY, RESPONSIBILITY, AND SECURITY: A CONSENSUS PLAN FOR REDUCING POVERTY AND RESTORING THE AMERICAN DREAM 8 (2015) (reporting findings that social mobility

Common examples include restrictions on credit, minimum wages, and licensing laws.¹⁸ If you really look at it, these policies all make poverty worse and more intractable—all in the name of reducing inequality.

Of course, low economic growth is another factor that doesn't help when it comes to the inability of poor people to rise up from poverty.¹⁹ The question is: what causes low growth? Low growth is easy to understand. It is caused by the federal government overtaxing and dramatically overregulating this economy.²⁰ And when you overregulate the economy, you get low growth.²¹ That shouldn't come as a surprise.

Of course, there are people at the top who make money they do not deserve or rightfully earn. There is massive cronyism in America today.²² But the cronyism problem is not so much that businesses are corrupting politics; rather, the problem begins when power-hungry politicians impose themselves onto businesses.²³ And businesses, in an attempt to defend themselves,

in the United States lags behind other advanced economies), <https://www.brookings.edu/wp-content/uploads/2016/07/Full-Report.pdf> [<https://perma.cc/98PF-TBD4>].

18. See, e.g., Andrew Soergel, *Pay Wars: Would a higher minimum wage help or hurt workers?*, U.S. NEWS & WORLD REPORT (Mar. 28, 2016), <http://www.usnews.com/news/the-report/articles/2016-03-28/ask-an-economist-will-a-minimum-wage-hike-help-or-hurt-workers> [<https://perma.cc/T7GA-R4HC>]; WATKINS & BROOK, *supra* note 7, at 123–38.

19. See Anthony D. Taibi, *Banking, Finance, and Community Economic Empowerment: Structural Economic Theory, Procedural Civil Rights, and Substantive Racial Justice*, 107 HARV. L. REV. 1463, 1520 (1994) (suggesting that local economies must be strengthened to effectuate “real” economic and community empowerment).

20. See, e.g., Ralph Robey et al., *Government Regulation of Business and Its Impact on The Growth of The Economy—Panel Discussion*, 17 BUS. LAW. 24, 35 (1961). Ralph Robey argues that “[e]conomic growth is achieved where people are able to work and are provided an incentive to do so and where Government Regulation is kept to a minimum” *Id.*

21. *Id.*

22. See, e.g., Macey, *supra* note 15 (“Crony capitalism . . . seems as though today it is on the rise.”).

23. See WATKINS & BROOK, *supra* note 7, at 148–53; cf. LAWRENCE G. BAXTER, *Understanding Regulatory Capture: An Academic Perspective from the United States*, in THE MAKING OF GOOD FINANCIAL REGULATION: TOWARDS A POLICY RESPONSE TO REGULATORY CAPTURE 53, 53–54 (Stefano Pagliari ed., 2012), http://www.stefanopagliari.net/making_good_financial_regul.pdf [<http://perma.cc/M9YR-GQVW>] (describing the concept of “regulatory capture,” which occurs when businessmen and regulators switch places; in other words,

ultimately capture the politicians.²⁴ The beginning point is the power we grant politicians and our political institutions.

To reduce and ultimately eliminate cronyism, we must insulate businesses from government rather than government from businesses. My favorite example here is the *United States v. Microsoft*²⁵ case—the famous hearing where Microsoft was brought in front of Congress in the early 1990s and told to increase its lobbying functions in Washington, D.C.²⁶ Microsoft told politicians in Washington to leave it alone, and Microsoft largely resisted resorting to lobbying efforts.²⁷ Indeed, in the past Microsoft had spent very little on lobbying.²⁸ In fact, in 1997, its political donations to federal candidates amounted to less than \$100,000.²⁹ What happened a year or two later? The Justice Department began to investigate, and Microsoft suddenly realized that the government was not going to leave it alone.³⁰ Today, Microsoft spends tens of millions of dollars a year on lobbying.³¹ They even have a beautiful building in Washington, D.C., right behind the Cato building.

businesses become “the umpires” when regulatory capture occurs and therefore have control of how the market is regulated).

24. *Id.*

25. 97 F. Supp. 2d 59 (D.D.C. 2000).

26. John M. Broder & Joel Brinkley, *U.S. Versus Microsoft: The Strategy; How Microsoft Sought Friends in Washington*, N.Y. TIMES (Nov. 7, 1999), <http://www.nytimes.com/1999/11/07/us/us-versus-microsoft-the-strategy-how-microsoft-sought-friends-in-washington.html?pagewanted=all> [<https://perma.cc/J9CF-KSUV>].

27. Michael Kinsley, *The Washington lobbying dance*, L.A. TIMES (APR. 5, 2011), <http://articles.latimes.com/2011/apr/05/opinion/la-oe-kinsley-column-microsoft-20110405> [<https://perma.cc/SM9C-BHCN>].

28. John M. Broder, *Microsoft Spending Millions on Ads and Lobbying Efforts*, N.Y. TIMES, (June 12, 2000), <http://www.nytimes.com/2000/06/12/technology/12lobby.html?pagewanted=all> [<https://perma.cc/RPW6-3BMK>] (claiming that Microsoft had a practice of making “virtually no political donations” until just a few years earlier).

29. Joel Brinkley, *U.S. vs. Microsoft: The Lobbying; A Huge 4-Year Crusade Gets Credit for a Coup*, N.Y. TIMES (Sept. 7, 2001), <http://www.nytimes.com/2001/09/07/business/us-vs-microsoft-the-lobbying-a-huge-4-year-crusade-gets-credit-for-a-coup.html> [<https://perma.cc/YE63-W82K>].

30. *See id.*

31. According to its website, Microsoft’s lobbying efforts in 2013 amounted to roughly \$10 million at the federal level and roughly \$8 million at the state level. These figures decreased slightly for 2014–16. MICROSOFT PUBLIC POLICY ENGAGEMENT, <https://www.microsoft.com/en-us/about/corporate-responsibility/>

We think of inequality as a problem because we have set up a Platonic ideal that economic equality is a good thing when it is not. There is nothing good about equality. Few actually explicitly advocate for total equality of outcome because they know how unacceptable that view is. We have tried it (multiple variants of communism and socialism), and the outcomes are horrible.³²

So whenever I debate somebody who wants more economic equality, I ask, “How much is just right? What Gini coefficient and what redistribution is just right?” There are no rational answers to these questions, because there is no right level of inequality. The ideal that we have all implicitly accepted is that equality is good but it’s just not practical. I reject that. Economic equality is more than just impractical; it is an evil ideal. And equality of opportunity is just another form of equality of outcome and just as impossible and bring into reality.³³

The only legitimate concept of equality is equality of individual rights—the fact that the founders recognized (inconsistently, unfortunately) that each individual has an unalienable right to act to achieve the values necessary for his own life, for his own happiness, free of coercion. This entails equality of liberties and equality before the law. Every attempt to create equality of outcome or equality of opportunity violates the idea of equality of rights and equality of liberty. Somebody’s liberties are restricted in order to supposedly increase the opportunities and the outcome of somebody else. This is immoral and wrong.

public-policy-engagement [https://perma.cc/F8QP-NUEF] (last visited Mar. 7, 2017).

32. See, e.g., Damien Cave, *The Cuban Evolution*, N.Y. TIMES (Mar. 1, 2014), http://www.nytimes.com/2014/03/02/sunday-review/the-cuban-evolution.html?_r=0 [https://perma.cc/Q2QM-HHRZ]; see also Georgi Boorman, *Enforcing Outcome Equality Makes Everyone Miserable*, FEDERALIST, (July 28, 2015), <http://thefederalist.com/2015/07/28/enforcing-outcome-equality-makes-everyone-miserable/> [https://perma.cc/H943-CQMM] (discussing the situations in Venezuela and Cuba); WATKINS & BROOK, *supra* note 7, at 51–56, 207–10.

33. See Paul Krugman, *Liberty, Equality, Efficiency*, N.Y. TIMES (Mar. 9, 2014), <http://www.nytimes.com/2014/03/10/opinion/krugman-liberty-equality-efficiency.html> [https://perma.cc/D9Z3-BE7W]; Paul Krugman, *More Thoughts on Equality of Opportunity*, N.Y. TIMES (Jan. 11, 2011), <http://krugman.blogs.nytimes.com/2011/01/11/more-thoughts-on-equality-of-opportunity/> [https://perma.cc/ZRT8-KN8J].

We must get rid of the moral ideal of equality of outcome. It contradicts our very nature as distinct, unique individuals who, when free, produce unequal results. Inequality is a feature of freedom. The ideal of equality is the negation of human nature and of the value of political freedom. Economic equality, therefore, is a wrong ideal, and it distorts our politics and our policy thoroughly.

AMERICA'S EXCEPTIONAL SAFETY NET

JULIA D. MAHONEY*

Two notions have achieved conventional wisdom status in many quarters. First, that the United States is a safety net laggard when compared with other highly developed nations;¹ and second, that the obvious thing to do to improve our safety net is to become more like those other nations.² In my judgment, both claims are wrong. Far from being a “welfare state laggard,”³ the United States has a rich tradition of a strong, unique safety net,⁴ one that has over the course of the nation’s history reflected a distinct American identity. At its best, America’s safety net is bouncy⁵ and a key component of

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1. See, e.g., Elise Gould & Hilary Wething, *U.S. Poverty Rates Higher, Safety Net Weaker Than in Peer Countries*, ECON. POL’Y INST. (July 24, 2012), <http://www.epi.org/publication/ib339-us-poverty-higher-safety-net-weaker/> [https://perma.cc/9564-2NXD].

2. See, e.g., Neil Irwin, *A Big Safety Net and Strong Job Market Can Coexist. Just Ask Scandinavia.*, N.Y. TIMES (Dec. 17, 2014), <http://www.nytimes.com/2014/12/18/upshot/nordic-nations-show-that-big-safety-net-can-allow-for-leap-in-employment-rate.html> [https://perma.cc/QL5C-9KR6].

3. IRWIN GARFINKEL ET AL., *WEALTH AND WELFARE STATES: IS AMERICA A LAGGARD OR LEADER?* 5 (2010)

4. *Id.* at 5–9 (concluding that the United States is not a “welfare state laggard” when full account is taken of employer-provided benefits, public expenditures on education, in-kind government benefits, and other factors); see also JACOB HACKER, *THE DIVIDED WELFARE STATE: THE BATTLE OVER PUBLIC AND PRIVATE SOCIAL BENEFITS IN THE UNITED STATES* 7 (2002) (“What is most distinctive about American social welfare policies is not the level of spending but the source.”).

5. See Ron Haskins, *Welfare Reform, Success or Failure? It Worked*, BROOKINGS INST. (Mar. 15, 2006), <http://www.brookings.edu/research/articles/2006/03/15welfare-haskins> [https://perma.cc/55GV-R7WE] (“[E]xperience with welfare reform since 1996 shows conclusively that most low-income families are capable of finding and holding jobs while, with government support, increasing the financial well-being of their children. Welfare reform has been a triumph for the federal government and the states . . .”).

what, at least until fairly recently, has been an extraordinarily entrepreneurial and dynamic society.⁶

That said, right now our safety net is not as bouncy as it once was, and not as bouncy as it has the potential to be.⁷ In what follows, I detail some of the reasons why what should be a springy safety net—catching those in distress and then propelling them back up—is looking downright frayed these days. After describing the challenges we face, I offer some “outside the box” suggestions⁸ that aim to draw on the United States’ exceptional institutions to help reweave our social fabric.

So, first, why do I not see America as a safety net laggard? The answer is that unlike many policy experts and academics have had a way-too-cramped definition, in defining “safety net” I take into account the full panoply of United States institutions. When we carefully consider programs such as government-provided or government-subsidized health care and health insurance; Social Security, private pensions, tax-advantaged retirement accounts, and public expenditures on education,⁹ the United States does not trail peer nations.¹⁰

6. See generally ROBERT J. GORDON, *THE RISE AND FALL OF AMERICAN GROWTH: THE U.S. STANDARD OF LIVING SINCE THE CIVIL WAR* (2016).

7. See, e.g., RICHARD V. BURKHAUSER & MARY C. DALY, *THE DECLINING WORK AND WELFARE OF PEOPLE WITH DISABILITIES: WHAT WENT WRONG AND A STRATEGY FOR CHANGE* 7 (2011) (“[E]ncouraging work rather than benefit receipt following the onset of a disability will slow the process that eventually leads to an inability to work and can solve a range of problems currently burdening the disability system.”).

8. Cf. Julia D. Mahoney, *The Struggle for America’s “Fiscal Soul”*, NEW RAMBLER (Jan. 4, 2016), <http://www.newramblerreview.com/book-reviews/political-science/the-struggle-for-america-s-fiscal-soul> [http://perma.cc/9DAR-AGUK] (reviewing EDWARD D. KLEINBARD, *WE ARE BETTER THAN THIS: HOW GOVERNMENT SHOULD SPEND OUR MONEY* (2015) and MICHAEL D. TANNER, *GOING FOR BROKE: DEFICITS, DEBT, AND THE ENTITLEMENT CRISIS* (2015)) (urging the consideration of “outside the box measures” to address the United States government’s financial predicament).

9. See Julia Ryan, *American Schools vs. the World: Expensive, Unequal, Bad at Math*, ATLANTIC (Dec. 3, 2013), <http://www.theatlantic.com/education/archive/2013/12/american-schools-vs-the-world-expensive-unequal-bad-at-math/281983/> [https://perma.cc/2PDZ-FRC6].

10. See generally JACOB FUNK KIRKEGAARD, PETERSON INST. FOR INT’L ECON., *THE TRUE LEVELS OF GOVERNMENT AND SOCIAL EXPENDITURES IN ADVANCED ECONOMIES* (March 2015), <https://piie.com/publications/pb/pb15-4.pdf> [https://perma.cc/E9JK-2E6S].

It is true that many of these institutions differ from the means-tested government programs for the poor and near-poor like the Supplemental Nutrition Assistance Program (SNAP)¹¹ that are often the first thing to leap to mind at the phrase “safety net.”¹² But when we ponder what prevents and ameliorates poverty, we have to view matters with a far wider lens. The fact is that as U.S. society has evolved, programs with benefits that flow substantially—even primarily—to those other than the poor and near-poor are essential for preventing or allaying poverty.¹³

Perhaps most striking, when comparing the United States with other rich nations many neglect to account for the so-called “third sector” of nonprofit firms that undergirds civil society. One of the courses I teach at the University of Virginia School of Law is Nonprofit Organizations, and each time I teach it I am struck anew by the beneficence of individual and institutional donors in the United States. This tradition of benevolence, which predates U.S. independence,¹⁴ remains strong today, as Americans of all political stripes give time, money, and expertise to a wide range of worthy causes in a way and to a degree that citizens of other highly prosperous nations simply do not.¹⁵ These institutions of civil society often substitute for government, providing services similar to those provided by

11. See, e.g., Robert Rector, *Uncovering the Hidden Welfare State: 69 Means-tested Programs and \$940 Billion in Annual Spending* (June 19, 2012), <http://www.heritage.org/research/testimony/2012/06/welfare-state-69-means-tested-programs-and-940-billion-in-annual-spending> [https://perma.cc/W4DM-83TY].

12. See KAREN LONG JUSKO, THE STAN. CTR. ON POVERTY AND INEQUALITY, *SAFETY NET* (2015), http://inequality.stanford.edu/sotu/SOTU_2015_safety-net.pdf [https://perma.cc/G8KB-8J2W].

13. See Binyamin Appelbaum & Robert Gebeloff, *Even Critics of Safety Net Increasingly Depend Upon It*, N.Y. TIMES (Feb. 11, 2012), <http://www.nytimes.com/2012/02/12/us/even-critics-of-safety-net-increasingly-depend-on-it.html?pagewanted=all> [https://perma.cc/MBY4-SVF3].

14. See KATHLEEN D. MCCARTHY, *AMERICAN CREED: PHILANTHROPY AND THE RISE OF CIVIL SOCIETY 1700-1865* (2003); THOMAS G. WEST, *POVERTY AND WELFARE IN THE AMERICAN FOUNDING* (2015), <http://www.heritage.org/research/reports/2015/05/poverty-and-welfare-in-the-american-founding> [https://perma.cc/RD6C-38XW].

15. See Elisabeth Eaves, *Who Gives the Most?*, FORBES (Dec. 18, 2008), http://www.forbes.com/2008/12/24/america-philanthropy-income-oped-cx_ee_1226eaves.html [https://perma.cc/6BUG-PCMG].

governmental institutions, but a number do even more.¹⁶ They provide important goods and services, including religious instruction and support, that the government cannot.¹⁷

Even in areas where the United States provides safety net services that have direct analogues in other developed nations, we are exceptional. Examining Medicare and Medicaid, we see that there is far more respect for individual needs and preferences than is the case in most other societies.¹⁸ It is interesting to me that the Independent Payment Advisory Board (IPAB) contained in the Affordable Care Act has incited so much opposition,¹⁹ because it was modeled on institutions in other nations that command acceptance.²⁰ But the sort of rationing the IPAB was charged with, where a panel of experts deliberately insulated from the political process makes life-and-death decisions,²¹ does not map well on to American institutions and political commitments.

So what has gone wrong? Why do I and many others fear that America's safety net is less effective than it once was at providing a "hand up"? There are several reasons. The first is the omnipresence of "cliffs," whereby benefits plunge or even disappear altogether if beneficiaries earn more money. These "cliffs" include subsidies for health insurance premiums under the Affordable Care Act,²² rights to live in public housing

16. See RYAN MESSMORE, DOES ADVOCATING LIMITED GOVERNMENT MEAN ABANDONING THE POOR? (2011), <http://www.heritage.org/research/reports/2011/05/does-advocating-limited-government-mean-abandoning-the-poor> [<https://perma.cc/6Y6D-NEC3>].

17. *Id.*

18. Compare 42 Fed. Reg. § 483.15(a)–(b) (Feb. 2, 1989), with Lisa L. Dahm, *Healthcare Systems and Quality of Care: Do International Measurement Standards Exist?*, TEMP. INT'L & COMP. L.J. 395, 405 (2006).

19. See Robert Pear, *Obama Panel to Curb Medicare Finds Foes in Both Parties*, N.Y. TIMES, (April 19, 2011), http://www.nytimes.com/2011/04/20/us/politics/20health.html?_r=0 [<https://perma.cc/TK6F-4VY3>].

20. Scott W. Atlas, *IPAB: President Obama's Nice Way to Ration Care to Seniors*, FORBES (Oct. 21, 2012, 10:53 A.M.), <http://www.forbes.com/sites/scottatlas/2012/10/21/ipab-president-obamas-nice-way-to-ration-care-to-seniors/#1fecbed074f3> [<https://perma.cc/C6RW-Y8LW>].

21. George P. Smith & Richard P. Galena, *Re-Negotiating a Theory of Social Contract for Universal Health Care in America or, Securing the Regulatory State?*, CATH. U. L. REV. 423, 445 (2014).

22. See Manoj Viswanathan, *The Hidden Costs of Cliff Effects in the Internal Revenue Service Code*, U. PA. L. REV. 931, 961 (2016).

projects,²³ and student loan forgiveness programs.²⁴ It is a long, long list, and, disturbingly, it is growing.²⁵ Second is the rise of occupational licensing requirements. In the last generation or two, the percentage of jobs that require some form of occupational license has soared.²⁶ That makes it tougher for those in financial difficulty to redeploy their human capital to new jobs.²⁷ Third is tightened credit as the result of the Dodd-Frank Act and various other regulatory “reform” measures. Frequently justified as necessary to protect people from making bad choices,²⁸ these measures discourage the formation of new businesses and thus reduce the ability of those living on the edge to prosper.²⁹

And that is not all. We have also made mistakes extremely costly for many citizens. Civil forfeiture is rampant.³⁰ If you

23. See *id.* at 944–45.

24. See SANDY BAUM & MARTHA C. ROBINSON, URBAN INST., STRENGTHENING FEDERAL STUDENT AID: REFORMING THE STUDENT LOAN REPAYMENT SYSTEM, (2016), <http://www.urban.org/research/publication/strengthening-federal-student-aid-reforming-student-loan-repayment-system> [<https://perma.cc/Q6L9-J2A3>].

25. See CONG. BUDGET OFFICE, GROWTH IN MEANS-TESTED PROGRAMS AND TAX CREDITS FOR LOW-INCOME HOUSEHOLDS (2013), <http://www.cbo.gov/sites/default/files/cbofiles/attachments/43934-Means-TestedPrograms.pdf> [<https://perma.cc/U3G6-P7S8>].

26. See Michelle Minton, *Professional Licensing: A Risk to the Free Markets and Freedom of Speech*, COMPETITIVE ENTER. INST. (2014), <https://cei.org/blog/professional-licensing-risk-free-markets-and-freedom-speech> [<https://perma.cc/NK7V-RMRY>]; Austin Raynor, *Economic Liberty and the Second-Order Rational Basis Test*, 99 VA. L. REV. 1065, 1084–88 (2013).

27. See Steven Menashi & Douglas H. Ginsburg, *Rational Basis With Economic Bite*, N.Y.U.J.L. & LIBERTY 1055, 1088 (2014).

28. See Jason Scott Johnston, *Do Product Bans Help Consumers? Questioning the Economic Foundations of Dodd-Frank Mortgage Regulation*, 23 GEO. MASON L. REV. 617, 652 (2016) (noting that Dodd-Frank “aims at restricting consumer choice by ridding the market of certain types of loans”).

29. See Karen Gordon Mills & Brayden McCathy, *The State of Small Business Lending: Credit Access during the Recovery and How Technology May Change the Game* 4–5 (Harv. Bus. Sch. Working Paper No. 15-004, 2014) (suggesting that “regulatory overhang” may be contributing to a “small business credit gap”).

30. See Michael van den Berg, Comment, *Proposing A Transactional Approach to Civil Forfeiture Reform*, 163 U. PA. L. REV. 867, 875–76 (2015) (outlining the expansion of civil forfeiture since the 1980s); Rachel L. Stuteville, Comment, *Reverse Robin Hood: The Tale of How Texas Law Enforcement Has Used Civil Asset Forfeiture to Take from Property Owners and Pad the Pockets of Local Government—the Righteous Hunt for Reform Is On*, 46 TEX. TECH L. REV. 1169, 1187 (2014) (“While civil forfeiture’s benefits can be great to society as a whole, they are currently overshadowed by rampant over-policing and law enforcement abuse.”); see also Christopher Ingram, *Law Enforcement Took More Stuff From People Than Burglars*

have saved any money, it is possible to lose it if you get mixed up with the wrong people, even tangentially.³¹ Excessive fines are imposed by many jurisdictions.³² Over-criminalization saddles many with criminal records that make it hard to get hired.³³ Finally, perhaps the greatest strain on America's safety net is the precarious financial condition of the United States government. With total U.S. government debt projected to exceed \$20 trillion in 2017,³⁴ America's capacity to fulfill all its obligations looks increasingly in doubt.³⁵

So what should we do? In thinking about where to go next, we should start with what we have. That is, we should not aim to copy a fantasy paradise across the Atlantic, for those nations are for the most part under even greater financial pressure than we are.³⁶ The better course is to focus on what the United States does well and build on it. In the spirit of extending our panel discussion beyond the usual anti-poverty prescriptions,³⁷ I offer two suggestions. The first is think seriously about how better to

Did Last Year, WASH. POST (Nov. 23, 2015), <https://www.washingtonpost.com/news/wonk/wp/2015/11/23/cops-took-more-stuff-from-people-than-burglars-did-last-year/> [<https://perma.cc/Q3GZ-QL4E>].

31. See John R. Emshwiller & Gary Fields, *Federal Asset Seizures Rise, Netting Innocent With Guilty*, WALL ST. J. (Aug. 22, 2011), <http://www.wsj.com/news/articles/SB10001424053111903480904576512253265073870> [<https://perma.cc/6F2H-Y5TT>].

32. See Carey Gillam, *Lawsuits Claim Missouri Towns Jail Poor People For Profit*, REUTERS (Feb. 9, 2015), <http://www.reuters.com/article/usa-missouri-lawsuits-idUSL1N0VJ1CW20150209> [<https://perma.cc/6PPS-TM2V>]; Terrence McCoy, *Ferguson Shows How a Police Force Can Turn Into a Plundering "Collection Agency"*, WASH. POST (Mar. 5, 2015), <https://www.washingtonpost.com/news/morning-mix/wp/2015/03/05/ferguson-shows-how-a-police-force-can-turn-into-a-plundering-collection-agency/> [<https://perma.cc/W2BU-HCWQ>].

33. See Erik Luna, *The Overcriminalization Phenomenon*, 54 AM. U. L. REV. 703, 712–15 (2005).

34. See CONG. BUDGET OFFICE, AN UPDATE TO THE BUDGET AND ECONOMIC OUTLOOK: 2016 TO 2026 (2016).

35. See Edmund W. Kitch & Julia D. Mahoney, *Living with the Risk of United States Financial Failure* (2016) (unpublished manuscript on file with the *Harvard Law & Policy Review*).

36. See, e.g., Bill Gardener, *NHS may be forced to abandon free healthcare, Britain's top doctor says*, TELEGRAPH (Jan. 19, 2015), <http://www.telegraph.co.uk/news/health/news/11356389/NHS-may-be-forced-to-abandon-free-healthcare-Britains-top-doctor-says.html> [<https://perma.cc/AB8P-ZGL2>].

37. See, e.g., AM. ENTER. INST./BROOKINGS INST. WORKING GRP. ON POVERTY AND OPPORTUNITY, OPPORTUNITY, RESPONSIBILITY, AND SECURITY: A CONSENSUS PLAN FOR REDUCING POVERTY AND RESTORING THE AMERICAN DREAM (2015).

harness the capabilities of our civil societal institutions, particularly in the area of healthcare. The Affordable Care Act focused on insuring people or enrolling them in Medicaid—in short, on “covering” them—but “coverage” is not access.³⁸ We blundered into a system whereby “nonprofit” hospitals only have to offer nebulous “community benefit,” not demonstrable charitable payoffs, in order to enjoy valuable tax benefits.³⁹ We should reconsider that approach in order to boost access to needed health care. In addition, we should encourage the many “grass roots” health care innovations we are seeing, especially free clinics and low-cost clinics. My second suggestion is that we think very seriously about a major restructuring of the finances of the United States government. Such a restructuring could include selling off some of the nation’s plentiful assets, including its carbon energy assets.

38. See Scott W. Atlas, *How Obamacare Fails the Poor and Middle Class*, CNN (Mar. 4, 2015), <http://www.cnn.com/2015/03/04/opinion/atlas-obamacare-poor-middle-class/> [<http://perma.cc/Z426-JXZ4>].

39. See Jessica Berg, *Putting the Community Back into the “Community Benefit” Standard*, 44 GA. L. REV. 375, 384–86 (2010) (discussing the “community benefit” requirement for tax exempt status); see generally Zachary J. Buxton, Comment, *Community Benefit 501(R)edux: An Analysis of the Patient Protection and Affordable Care Act’s Limitations Under Community Benefit Reform*, 7 ST. LOUIS U.J. HEALTH L. & POL’Y, 449 (2014) (discussing the impact of the Affordable Care Act on the tax exempt status of health care institutions).

THE FREEDOM TO FAIL: MARKET ACCESS AS THE PATH TO OVERCOMING POVERTY AND INEQUALITY

JASON SCOTT JOHNSTON*

There are two views of markets. In one view of markets, held perhaps most famously by my former colleague Senator Warren, markets are a place where people are trapped, manipulated, and made worse off.¹ If they borrow money, they'll probably borrow too much that they won't be able to repay, and then they'll be out on the street. If they were allowed to choose their own school in a market system, they'd make the wrong choice, and so we have to make that choice for them. The other view of markets is that markets offer a chance. All real market choices involve risks. Sometimes people will fail, but sometimes they will win. They build businesses, their kids get better educations, and they escape poverty and move up the ladder economically.

I am an economist, a lawyer, and a law professor, so I'll address both law and economics. Economics has taught us that the ability to access credit markets is an absolute prerequisite to the formation of new businesses.² Most new jobs come from new small businesses.³ For example, from 1980 to 2012—over a

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1. Paul Glastris, *Elizabeth Warren's Consolidation Speech Could Change the Election*, WASH. MONTHLY (June 30, 2016), <http://washingtonmonthly.com/2016/06/30/elizabeth-warrens-consolidation-speech-could-change-the-election/> [<https://perma.cc/PC7F-WMBP>] (detailing Sen. Warren's view on markets and the United States economy in particular).

2. NAT'L FED. OF INDEP. BUS., RECOMMENDATIONS FOR IMPROVING SMALL BUSINESS CREDIT ACCESS AND FINANCIAL REFORM 2 (2009) ("Bank credit plays an important role in small business success. Without access to bank lending, small business owners would have trouble raising the funds they need to operate and grow their business.").

3. OFFICE OF ADVOCACY, SMALL BUS. ASSOC., FREQUENTLY ASKED QUESTIONS, 1 (Sept. 2009) (finding small businesses comprise 64% of net new private-sector jobs).

30-year period—average net employment growth in big businesses hovered around zero.⁴ Net employment growth was entirely in smaller and newer businesses.⁵

The bad news is that employment in firms that are newer (less than five years old) fell from 18 percent of private-sector employment in 1981, and even 16 percent in 1988, down to twelve percent in 2012.⁶ Why was that? There are a lot of factors, but certainly one factor has to be that we have not created conditions in credit markets, especially since the passage of the Dodd-Frank Act in 2010, that are favorable to creation of new businesses. Credit markets have tightened up and it has become much more difficult for new businesses to get outside capital.⁷

Most new businesses are not created by raising equity from friends and family. Outside capital is absolutely crucial to the creation of new businesses.⁸ New businesses mean more jobs, and new businesses also mean new

4. BUREAU OF LABOR STATISTICS, BUSINESS EMPLOYMENT DYNAMICS BY AGE AND SIZE OF FIRM (2016) <http://www.bls.gov/bdm/business-employment-dynamics-data-by-age-and-size.htm> [<https://perma.cc/Z7J3-P9L2>]. Table 2-A-F shows firms ten years or older with fifty or more employees, and net growth around zero since 1994. *Id.*

5. See BUREAU OF LABOR STATISTICS, MONTHLY LABOR REVIEW, HIGH-EMPLOYMENT-GROWTH FIRMS: DEFINING AND COUNTING THEM Tbl. 3 (June 2013), <http://www.bls.gov/opub/mlr/2013/article/clayton.htm> [<https://perma.cc/V2U4-Y29J>].

6. BUREAU OF LABOR STATISTICS, BUSINESS EMPLOYMENT DYNAMICS BY AGE AND SIZE OF FIRM (2016) <http://www.bls.gov/bdm/bdmage.htm> [<https://perma.cc/KH4M-YZZJ>]. Table 6 shows firms younger than five years with approximately 12% of private sector employment in 2012. *Id.*

7. Peter J. Wallison, *Is the Dodd-Frank Act Responsible for the Economy's Slow Recovery from the Financial Crisis and the Ensuing Recession?* 7 (Am. Enter. Inst., Working Paper, 2015), <https://www.hillsdale.edu/wp-content/uploads/2016/02/FMF-2015-Dodd-Frank.pdf> [<http://perma.cc/H3FM-JZ9E>] (“Because of their unique role in local economies, increases in the costs of community banks and tightening credit standards after Dodd-Frank are particularly bad news for small business start-ups.”).

8. Bill Fay, *Sources of Financing for Small Business*, DEBT.ORG, <https://www.debt.org/small-business/sources-financing/> [<https://perma.cc/2ZEZ-QVRA>] (“Approximately 80 percent of the estimated 27.5 million U.S. small businesses . . . use some form of credit to help finance their operations.”).

entrepreneurs. And entrepreneurship is a major way that people move up the economic ladder.⁹

So where do people get the capital? How do you get outside capital to start a new business? You need collateral and you have to be able to borrow.¹⁰ What are two ways that economists know small businesses get going? The first important way businesses are started is by using collateral in homes: people take out home equity lines of credit.¹¹

The second way is credit card debt.¹² A huge fraction—54 percent—of new businesses are using personal credit cards to finance the business.¹³ Not business credit cards, but personal credit cards. Senator Warren looks at credit cards, and she sees people in bankruptcy who have made a lot of bad financial decisions including in how they use their credit cards. In response, the CARD Act¹⁴ was passed. The CARD Act mandates certain terms in credit card contracts and forbids others. The net effect of these restrictions on contractual choice has been that it is more difficult for people to get credit cards. As a result, it is surely true that some consumers are paternalistically prevented from running up credit card debts that they can't pay. But another consequence, forgotten by

9. Jon Thurber, *Inequality is not the issue – growth is*, UCLA NEWSROOM (Dec. 3, 2015), <http://newsroom.ucla.edu/stories/inequality-is-not-the-issue-growth-is> [https://perma.cc/SR3X-KYWA].

10. Justin Pritchard, *Collateral Loans*, ABOUT MONEY (Mar. 15, 2016), <http://banking.about.com/od/businessbanking/a/personalguarantee.htm> [https://perma.cc/8EG7-PKWX].

11. See generally FED. TRADE COMM'N, USING YOUR HOME AS COLLATERAL (2012).

12. Marco Carbajo, *Which Unsecured Business Lines of Credit are Best for your Business?*, SMALL BUS. ASS'N INDUS. WORLD BLOG (May 21, 2014), <https://www.sba.gov/blogs/which-unsecured-business-lines-credit-are-best-your-business> [https://perma.cc/B3WQ-25D8].

13. See Tamara E. Holmes, *Used wisely, small-business cards can keep business afloat*, CREDIT CARD NEWS, <http://www.creditcards.com/credit-card-news/small-business-credit-cards-1269.php> [https://perma.cc/K26J-YWUA] (finding that 31% of small businesses used credit cards for financing needs in the past twelve months).

14. Credit Card Accountability Responsibility and Disclosure Act of 2009 (CARD Act), Pub. L. No. 111-24, 123 Stat. 1734 (codified at various sections of titles 15 and 16 of the U.S. Code).

parernalists, is that it is more difficult for people to get credit cards that can be used for starting new businesses.¹⁵

What about home equity? How do you get home equity? Well, you get a loan, a mortgage. What have we done with the Dodd-Frank Act?¹⁶ As interpreted by the Consumer Financial Protection Bureau (CFPB), that law's requirement that lenders make loans only to people with a reasonable ability to repay has wiped out the market for mortgages for young people, for minorities, and for anybody who doesn't have an established credit history. We have eliminated the subprime mortgage market. Is that a bad thing for income and wealth mobility and for the creation of new businesses? Yes, it is.¹⁷

A couple of very recent studies have reinforced this conclusion. During the 2000s, the rate of new business formation was the greatest in places where home prices were increasing.¹⁸ Another study found that every ten percent increase in home equity increased the probability that a household would become entrepreneurial by fourteen

15. See Ralph F. McDonald III et al., *The Credit Card Act of 2009 – Changes will Affect Consumers, Card Issuers, Retailers, Colleges, and Investors*, JONES DAY PUBL'NS (June 2009), <http://www.jonesday.com/the-credit-card-act-of-2009—changes-will-affect-consumers-card-issuers-retailers-colleges-and-investors-06-10-2009/> [<https://perma.cc/3XYV-NDNQ>] (finding that card issuers would “[r]educ[e] credit availability except to the most credit-worthy customers . . .”).

16. Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. 111-203, 124 Stat. 1376 (2010) (codified in sections of titles 7, 12, 15, and 22 of the U.S. Code).

17. See Karen Gordon Mills & Brayden McCathy, *The State of Small Business Lending: Credit Access during the Recovery and How Technology May Change the Game* 4–5 (Harv. Bus. Sch., Working Paper No. 15-004, 2014) (suggesting that “regulatory overhang” may be contributing to a “small business credit gap”); see also Janet L. Yellen, Chair, Bd. Of Governors of the Fed. Reserve Sys., *Transcript of Chair Yellen’s FOMC Press Conference* 22 (Dec. 17, 2014) <https://www.federalreserve.gov/mediacenter/files/FOMCpresconf20141217.pdf> [<https://perma.cc/DVF7-2RCG>] (attributing anemic housing growth to “very tight credit—continuing tight credit conditions for any borrower that doesn’t have pristine credit”).

18. See Manuel Adelino et al., *Housing Prices, Collateral and Self-Employment*, 117 J. FIN. ECON. 288, 289 (2015) (finding that “during the housing price boom of 2002-2007, areas with rising house prices (and increased leverage) experienced a significantly bigger increase in small business starts and a rise in the number of people who were employed”).

percent.¹⁹ When you restrict mortgages, you restrict the ability of people to acquire capital in their homes.²⁰ If people cannot acquire capital, a very important source of collateral for getting a loan to start a new business has disappeared.²¹

Why did Congress enact the Dodd-Frank Act? Because people looked around after the fact and saw that a large number of people defaulted on their mortgages at the end of the early twenty-first century housing boom.²² But the major increase in mortgage delinquencies was not among lower income borrowers, but among higher income borrowers who were speculating on rising housing prices.²³ Was there fraud in the subprime mortgage market? Yes, there was fraud in the

19. See Stefano Corradin & Alexander Popov, *Home Prices, Home Equity, and Entrepreneurships* 5 (European Cent. Bank, Working Paper No. 1544, 2013) <https://www.ecb.europa.eu/pub/pdf/scpwps/ecbwp1544.pdf?fa04c22695e5cb3ff81e7195452402d5> [<https://perma.cc/F4PJ-HXTT>] (“A 10% increase in home equity increases the probability that a non-business owning household will switch to entrepreneurship in the future by up to 14%.”).

20. See Alan Kronovet, Note, *An Overview of Commercial Mortgage Backed Securitization: The Devil Is in the Details*, 1 N.C. BANKING INST. 288, 288 (1997) (explaining how securitization structures like home mortgage allow individuals “to gain access to the capital markets”). One way the Dodd-Frank Act restricts mortgage availability is by consolidating the banking system. See HESTER PEIRCE & STEPHEN MATTEO MILLER, MERCATUS CTR., *SMALL BANKS BY THE NUMBERS, 2000-2014* (2015), <http://mercatus.org/publication/small-banks-numbers-2000-2014> [<https://perma.cc/J9H5-BAWU>] (“Since 2Q 2010—immediately before the July passage of Dodd-Frank—to 3Q 2014 . . . , the United States lost 14 percent of its small banks.”).

21. See Corradin & Popov, *supra* note 19, at 33 (finding an a strong positive correlation between “the increase in (particularly mortgage) debt” and new business formation, suggesting “that once agents switch from a fixed-income job to entrepreneurship, they draw down their home equity to finance their business investment, confirming that real estate is indeed efficient collateral”).

22. Charles W. Murdock, *The Dodd-Frank Wall-Street Reform and Consumer Protection Act: What Caused the Financial Crisis and Will Dodd-Frank Succeed in Preventing Future Crises?*, 64 S.M.U.L. REV. 1243, 1244 (2011) (observing that Dodd-Frank was passed in response to the “cascade of mortgage defaults” that occurred in the Great Recession).

23. See Jason Scott Johnston, *Do Product Bans Help Consumers? Questioning the Economic Foundations of Dodd-Frank Mortgage Regulation*, 23 GEO. MASON L. REV. 617, 692 (2016) (citing Manuel Adelino et al., *Loan Originations and Defaults in the Mortgage Crisis: The Role of the Middle Class* 13 (Nat’l Bureau of Econ. Research, Working Paper No. 20848, Jan. 2015), <http://nber.org/papers/w21320.pdf> [<http://perma.cc/XVA2-LCHC>]).

subprime mortgage market.²⁴ But, under the common law, fraud is a defense to contract enforcement,²⁵ and fraud is a tort.²⁶ We didn't need the Dodd-Frank Act to deal with fraud; we've always known that active fraud is going to hurt people. Dodd-Frank was premised on a much different model of human behavior: a view that people are not smart enough to make the right choices; therefore, they should not be allowed to choose at all.²⁷ Just like with credit cards, Dodd Frank is based

24. See FIN. CRISIS INQUIRY COMM'N, FINANCIAL CRISIS INQUIRY REPORT: FINAL REPORT OF THE NATIONAL COMMISSION ON THE CAUSES OF THE FINANCIAL AND ECONOMIC CRISIS IN THE UNITED STATES 161 (2011) <https://www.gpo.gov/fdsys/pkg/GPO-FCIC/pdf/GPO-FCIC.pdf> [<https://perma.cc/BT5A-7KXB>] (“Ed Parker, the head of mortgage fraud investigation at Ameriquest, the largest subprime lender in 2003, 2004, and 2005, told the FCIC that fraudulent loans were very common at the company. ‘No one was watching. The volume was up and now you see the fallout behind the loan origination process.’”); see also JOHN MAULDIN & JONATHAN TEPPER, *ENDGAME: THE END OF THE DEBT SUPERCYCLE AND HOW IT CHANGES EVERYTHING* 23 (2011) (attributing part of the subprime mortgage crisis to “ratings agencies, who should have been the cops but were handing out fake IDs to issuers”).

25. See RESTATEMENT (SECOND) OF CONTRACTS § 166 (1981) (“If a party’s manifestation of assent is induced by the other party’s fraudulent misrepresentation as to the contents or effect of a writing evidencing or embodying in whole or in part an agreement, the court at the request of the recipient may reform the writing to express the terms of the agreement as asserted . . .”).

26. See RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR ECONOMIC HARM § 9 (Tentative Draft No. 2, 2014) (“One who fraudulently makes a material misrepresentation of fact, opinion, intention, or law, for the purpose of inducing another to act or refrain from acting, is subject to liability for economic loss caused by the other’s justifiable reliance on the misrepresentation.”).

27. Senator Dodd illustrated his view that the 2008 financial crisis was the result of predatory lending, not just informational asymmetries, with the story of an elderly librarian named Delores King:

Delores King was given a mortgage [that the bank] kn[ew] she could not pay, she was on a fixed income, they knew it would balloon to the point that it would consume 70 percent of her income—don’t tell me they did not know what that was. And expecting that 80-year-old woman to read and understand all she was going to be subjected to in the fine print of the mortgage contract is ridiculous. Yet that is how this daisy chain worked and why we ended up in the mess we did.

156 CONG. REC. S3002 (Apr. 30, 2010) (statement of Sen. Dodd); see also Johnston, *supra* note 23, at 637 (characterizing the Dodd-Frank mortgage regime as one of complex, “de-facto restriction[s] on the types of mortgage products offered to consumers”); *id.* at 652 (stating that Dodd-Frank “aims at restricting consumer choice by ridding the market of certain types of loans”).

on the view that consumers should not be allowed to take certain types of market risks.²⁸

So, in these two areas, we have done exactly the wrong thing. Instead of harnessing market forces and making credit more available to people who are going use it to start new businesses and create jobs that benefit not just themselves but all the people they employ, we have done the opposite. We have been moving in the wrong direction at a rapid pace, though it has slowed in recent years as the political constellations have changed.²⁹ These laws prevent people from accessing the market in a way that can help overcome both poverty and inequality.³⁰

In addition to accumulating financial wealth through the creation of new businesses, another way that people overcome poverty is through the accumulation of human capital: education. Here too we have restricted choice in a way that perpetuates poverty. Centralized policies have denied to poor parents a market choice of which schools their children may attend. We know such a choice has not been made widely available; we also know that it is what parents want and that it should happen.³¹ Eighty percent of the African-American families in Philadelphia want their kids to have to have a

28. See, e.g., 15 U.S.C. § 1639c (2012) (banning certain loans to consumers that lack “a reasonable ability to repay”); see also 12 U.S.C. § 5481 (2012) (establishing the Bureau of Consumer Financial Protection with rulemaking authority over credit cards); 12 C.F.R. § 1026.15 (2013) (prohibiting issuance of certain credit cards “unless the card issuer considers the consumer’s ability to make the required minimum periodic payments”).

29. See, e.g., Elise Gould, *Even the Most Educated Workers Have Declining Wages*, ECON. POL’Y INST. (Feb. 20, 2015) <http://www.epi.org/publication/even-the-most-educated-workers-have-declining-wages/> [<https://perma.cc/7JCA-VKAN>] (finding that “among education categories, the greatest real wage losses between 2013 and 2014 were among those with a college or advanced degree”).

30. See *Over-regulated America*, ECONOMIST, (Feb. 18, 2012) <http://www.economist.com/node/21547789> [<https://perma.cc/P7TG-2NLD>] (questioning why “the jobless rate isn’t even higher” after enactment of “partly unintelligible and partly unknowable” legislation like Dodd-Frank).

31. John E. Chub & Terry M. More, *Politics, Markets, and the Organization of Schools*, 82 AM. POL. SCI. REV. 1065, 1085 (1988) (determining that a “voucher system, combining . . . decentralization of resources and choice, is at least a reasonable alternative to direct control—one that might transform the public schools into different, more effective organizations, while still leaving them truly public”).

choice in what school to attend.³² But they are not given that opportunity because the teacher's unions have invested enormous amounts to erect legal obstacles to such parental choice.³³ Those obstacles have to be removed. Now more than ever, investing in human capital is the surest path to intergenerational movement up the income and wealth ladder. Obstacles to market choice in education have to be removed.³⁴

Instead of opening up markets and making them accessible to people so that they can be an engine for overcoming poverty and inequality, we have done exactly the opposite.³⁵ And why? There is a tendency of both lawyers and politicians to consider selected stories—sad stories sometimes—of people who've failed.³⁶ They look at stories of failed choices and jump to the conclusion that the solution is to prevent people from making choices in the first place.

32. Kelsey Hamilton, *What are parents thinking about charter schools?* AEIDEAS (April 28, 2016, 4:55 PM), <http://www.aei.org/publication/what-are-parents-thinking-about-charter-schools/> [https://perma.cc/GJ5W-U3BG]; see also BLACK ALL. FOR EDUC. OPTIONS, *New Survey Shows Black Voters Strongly Support Parental Choice for Educational Options in Their Communities*, (August 2015), http://www.baeo.org/?ns_ref=11&id=7335 [https://perma.cc/4TPB-L64P] (surveying “2,400 Black voters in four states” with the result being “7 out of 10 say they support . . . more educational choices” and “6 in 10” favoring school vouchers).

33. See, e.g., *Cain v. Horne*, 202 P.3d 1178, 1185 (Ariz. 2009) (en banc); *Bush v. Holmes*, 919 So.2d 392, 396, 398 (Fla. 2006) (siding with the American Federation of Teachers that a Florida school voucher program violated the state constitution); see also Joel Klein, *The Failure of American Schools*, ATLANTIC (June 2011), <http://www.theatlantic.com/magazine/archive/2011/06/the-failure-of-american-schools/308497/> [https://perma.cc/AFY4-MV72] (“As Albert Shanker, the late, iconic head of the [United Federation of Teachers], once pointedly put it, ‘When schoolchildren start paying union dues, that’s when I’ll start representing the interests of schoolchildren.’”).

34. See Michael Greensone et al., *Thirteen Economic Facts about Social Mobility and the Role of Education*, HAMILTON PROJECT (2013) http://www.brookings.edu/~media/research/files/reports/2013/06/13-facts-higher-education/thp_13econfacts_final.pdf [https://perma.cc/5T37-2CN6] (discussing the importance of education in climbing out of poverty).

35. See Amendments to the 2013 Mortgage Rules Under the Real Estate Settlement Procedures Act (Regulation X) and the Truth in Lending Act (Regulation Z), 78 Fed. Reg. 44,686, 44,711 (Jul. 24, 2013) (to be codified at 12 C.F.R. parts 1024, 1026) (agreeing that “the expense associated with obtaining [business credit] reports . . . could increase the cost of credit or restrict access to credit for self-employed consumers”); see also *supra* notes 27–28 and accompanying text.

36. See, e.g., *supra* note 27 and accompanying text.

You have to look at the situation in a different way and take a different perspective. You have to look at the people who took chances and succeeded. How often do you hear those stories? Taking chances and succeeding is the engine of growth. It is the engine for overcoming inequality and poverty.³⁷ And it is where we have to focus.

37. See Martin Zwillig, *How to Balance Risk Versus Opportunity*, FORBES (Jan. 14, 2014, 10:06 P.M.), <http://www.forbes.com/sites/martinzwilling/2014/01/16/how-to-balance-business-risk-versus-opportunity/#f92a4e736f75> [https://perma.cc/9UFH-7X8X] (“There is no real business opportunity without risk.”).

LESSONS FROM THE LEAST OF THESE

ROBERT WOODSON*

I approach the topic of poverty from the perspective of a radical pragmatist. Eighty percent of my closest friends are ex-something, because I have worked most of my professional life in the Center for Neighborhood Enterprise, an organization I founded 34 years ago. Prior to that, I was involved in the Civil Rights Movement. Then in the 1960s, I was mugged by reality and joined the American Enterprise Institute (AEI). I went there to work with Peter Berger and Bob Nesbitt, who were studying the role of “mediating structures” or intermediary institutions like families, churches, and other voluntary associations.¹ They asked me to go in-residence at AEI to write about these subjects from the perspective of a practitioner, someone on the front lines in low-income neighborhoods finding solutions.

I left the Civil Rights Movement in the late 1960s when I realized that a lot of poor blacks were the victims of a bait-and-switch game, in which we generalize about all the conditions of blacks and, as a result, the remedies help only those at the top who are well-educated. I find the same problem as we look at the issue of poverty as a whole.

We cannot generalize about poor people. I have identified four categories of poor people. There are those in Category One whose characters are intact but have who have no money because they have lost a job or a breadwinner has passed away. There are others in Category Two whose whose characters are intact but, as a result of our welfare system’s perverse incentives to stay single and unemployed, conclude that achieving is not worth it. In Category Three, there are people who are disabled and need help, though even in the disabled population, you have people who are discouraging their children to read because they will lose a \$600 Supplemental Security Income (SSI) check. Finally, there are those

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1. Brad Lowell Stone, *Mediating Structures*, FIRST PRINCIPLES (Apr. 9, 2012), [http://www.firstprinciplesjournal.com/articles.aspx?article=348&\[https://perma.cc/CRA6-239W\]](http://www.firstprinciplesjournal.com/articles.aspx?article=348&[https://perma.cc/CRA6-239W]).

in Category Four, individuals with character deficits who are poor because of the chances they take and the choices they make.² Category Four concerns most of us. Those are the people that, given money and services, are injured by a helping hand.

When we generalize about the poor, we have problems finding solutions for poverty. People on the Left tend to look at all poor people as if they fall into Category One, while people on the Right tend to look at all poor people as if they fall into category Four. Therefore, we miss each other when considering remedies. The people in Categories One and Two use the system in the way it was intended, as an ambulance service, not a transportation system. They receive help, but then they move off. Applying the same remedies to Category Four, however, is disabling to those people.

It is also true that we did not associate poverty and pathology until the 1960s.³ The black community is often a moral barometer of the health of the nation. Yet, in ten years of the Depression, when the United States had a negative GNP and a nearly 25 percent unemployment rate⁴ and the unemployment rate in the black community was over 40 percent,⁵ the marriage rate in the black community was higher than it was in the white community despite times of economic deprivation and racism.⁶ In 1925 in New York City, 85 percent of black families had a man and

2. Robert L. Woodson Sr., *The 4 Types of Poverty, and How to Cure Them*, DAILY SIGNAL (Sept. 20, 2015), <http://dailysignal.com/2015/09/20/the-4-types-of-poverty-and-how-to-cure-them/> [<https://perma.cc/283D-GDGC>].

3. Stephen Suh & Kia Heise, *Re-evaluating the "Culture of Poverty"*, SOC'Y PAGES (Oct. 14, 2014), <https://thesocietypages.org/roundtables/culture-of-poverty/> [<https://perma.cc/P7BK-NAZN>] ("It wasn't until Daniel Patrick Moynihan's infamous 1965 study on the black American family (often dubbed 'The Moynihan Report') that the 'culture of poverty' idea set off a firestorm. Moynihan described the problems of inner-city black families as stemming from a 'tangle of pathology,' characterized by single-mother families and unemployment.").

4. Robert F. Margo, *Employment and Unemployment in the 1930s*, 7 J. ECON. PERSP. 41, 43 (1993).

5. William A. Sundstrom, *Last Hired, First Fired? Unemployment and Urban Black Workers During the Great Depression*, 52 J. ECON. HIST. 415, 417 (1992).

6. James H. S. Bossard, *Depression and Pre-Depression Marriage Rates: A Philadelphia Study*, 2 AM. SOC. REV. 686, 693-94 (1937) ("Black majority census tracts showed a 52.4% depression marriage rate whereas native-born-White majority census tracts and Irish majority tracts showed 28.2% and 26.3%, respectively. The Russian majority tracts showed a 45.4% depression marriage rate and the Italian majority tracts a 34.1% rate.").

woman raising children.⁷ In stark contrast, in 2015, the black illegitimacy rate was close to 75 percent.⁸

Fred Siegel's book *The Future Once Happened Here*,⁹ from the Manhattan Institute, is very telling. He explained that radical liberal social activists in the 1960s concluded that one of the ways to reveal the moral shortcomings of capitalism was to flood the system with welfare recipients.¹⁰ In detaching work from income, and thereby diminishing men and the role they played as fathers,¹¹ welfare dependency, drug addiction, and school dropouts would increase, ultimately "opening [the nation up] to radical change."¹² These policies, espoused by Carl Piven and others, were followed by government action to actually recruit people into the welfare system.¹³ These efforts lifted the stigma of welfare as social insurance and replaced it with the idea of "welfare rights," and in the case of blacks, replaced it with the idea of reparations.¹⁴ Thus the black family and other families began to decline, followed by out-of-wedlock births and poverty.¹⁵

The question that I want to address, but to which I do not often hear a satisfying answer, is: "What are the solutions?" When I read Robert Putnam, Charles Murray, Lawrence Mead, and other scholars, they are long on the analysis of the problem but short on the solutions.¹⁶ Thus, I would like to offer what I

7. Walter E. Williams, *The True Black Tragedy: Illegitimacy Rate of Nearly 75%*, CNSNEWS.COM (May 19, 2015), <http://www.cnsnews.com/commentary/walter-e-williams/true-black-tragedy-illegitimacy-rate-nearly-75> [https://perma.cc/D93F-ABPX].

8. *Id.*

9. FRED SIEGEL, *THE FUTURE ONCE HAPPENED HERE* (1997).

10. *See id.* at 60–61.

11. *See id.* at 67–68.

12. *Id.* at 60–61.

13. *Id.* at 62.

14. *Id.* at 59.

15. *Id.* at 68.

16. Those who reviewed Putnam's work have noticed that his solutions were incomplete. *See* Jason DeParle, 'OurKids,' by Robert D. Putnam, N.Y. TIMES (Mar. 4, 2015), http://www.nytimes.com/2015/03/08/books/review/our-kids-by-robert-d-putnam.html?_r=0 [https://perma.cc/5RWE-JWL2] (reviewing ROBERT D. PUTNAM, *OUR KIDS* (2015)) ("What he omits, however—sometimes maddeningly—is a discussion of the political or economic forces driving the changes he laments."). Murray's work faces similar criticism. *See* Nicholas Confessore, *Tramps Like Them: Charles Murray Examines the White Working Class in 'Coming Apart'*, N.Y. TIMES (Feb. 10, 2012), <http://www.nytimes.com/2012/02/12/books/review/charles->

believe are solutions. We have the word “enterprise” in our name because we believe that the principles that operate in our market economy should operate in our social economy, and that our market economy is driven by entrepreneurship.

We recognize that the percentage of the people in our market economy are entrepreneurs is in the single digits,¹⁷ yet they generate 70 percent of the jobs.¹⁸ This is where all the imagination occurs. The iPhone, which accounts for around 60 percent of Apple’s income,¹⁹ did not exist nine years ago.²⁰ Imagination and innovation drive our market economy.²¹ In our social economy,

murray-examines-the-white-working-class-in-coming-apart.html [https://perma.cc/KY88-VTW4] (reviewing CHARES MURRAY, *COMING APART: THE STATE OF WHITE AMERICA, 1960–2010* (2012)) (“You will learn about working-class laziness, but you will find little discussion of the decline of trade unions or the rise of a service economy built on part-time work without benefits.”). Mead’s work does not escape criticism, either. See Laurence E. Lynn, Jr., *Book Reviews*, 6 J. POL’Y ANALYSIS & MGMT. 451, 456 (1987) (reviewing LAWRENCE M. MEAD, *BEYOND ENTITLEMENT: THE SOCIAL OBLIGATIONS OF CITIZENSHIP* (1986)) (“[W]hen Mead urges that ‘somehow the rhetoric of equal rights that dominates federal politics must be turned around to justify equal obligations as well,’ the word ‘somehow’ reverberates like a knell. How?”).

17. Although the estimates of the percentage of the U.S. population who are entrepreneurs vary from study to study, the percentage is generally low. The Kauffman Foundation conducted a study regarding “the Rate of New Entrepreneurs,” defined as “the percentage of the adult, non-business-owner population that start a business each month,” which concluded that “[i]n 2014, an average of 0.31 percent of the adult population, or 310 out of 100,000 adults, created new business each month.” ROBERT W. FAIRLIE ET AL., EWING MARION KAUFFMAN FOUND., *THE KAUFFMAN INDEX: 2015 STARTUP ACTIVITY NATIONAL TRENDS 10* (June 2015) (emphasis added). Another study estimates that around 9 percent of the U.S. population are entrepreneurs. See LOUIS E. BOONE & DAVID L. KURTZ, *CONTEMPORARY BUSINESS* 189 (2010).

18. Michael Mazerov, *Startups Fuel Job Growth, Animated*, CTR. ON BUDGET & POL’Y PRIORITIES (Feb. 5, 2016), <http://www.cbpp.org/blog/startups-fuel-job-growth-animated> [https://perma.cc/3SSX-H24H] (“[S]tartups and high-growth firms—which are likely to be young—accounted for about 70 percent of all new jobs in the U.S. economy.”).

19. Sam Thielman et al., *Decline in iPhone Sales Leads to First Revenue Decline in 13 Years for Apple*, *GUARDIAN* (Apr. 27, 2016), <https://www.theguardian.com/technology/2016/apr/26/apple-iphone-first-revenue-decline-13-years> [https://perma.cc/G8YP-YY9C] (stating that the iPhone accounts for nearly two-thirds of Apple’s revenue).

20. *8 Years of the iPhone: An Interactive Timeline*, *TIME* (June 27, 2014), <http://time.com/2934526/apple-iphone-timeline/> [https://perma.cc/9L4B-ZUZR] (“[T]he very first iPhone was sold on June 29, 2007.”).

21. Jay S. Walker, *The Power of Imagination*, *WALL ST. J.* (Feb. 25, 2013), <http://www.wsj.com/articles/SB10001424127887323549204578315882921881920> [https://perma.cc/BXG2-XN9N] (“People talk about wanting more innovation. But

however, it is just the inverse. In our social economy, we can waste millions of dollars, even if it is well-managed by well-credentialed people, because we assume that certification is synonymous with qualification.²² And so our experts are those who study people and not those who produce outcomes.²³

In our market economy, almost 70 percent of all our pharmaceutical discoveries comes from untutored sources like the rainforests of Brazil, or the monks in Tibet who are seemingly inactive, yet produce results.²⁴ Then smart people come along and see what these “unsmart” people do. We take their inventions, bring them here and market them. Consider the drug Reserpine. In the 1950s, researchers from Summit, New Jersey, went to Tibet and saw that the monks were using certain herbs to calm people after they went into religious frenzies. That was the foundation of sedatives.²⁵ Thus, it is a common practice in our market economy to use untutored sources as a source of new knowledge.²⁶

innovation is a process result. Imagination is the fuel. You’re not going to get innovation if you don’t have imagination.”).

22. See Peter Cappelli, *Skill Gaps, Skill Shortages and Skill Mismatches: Evidence for the US* 51, (Nat’l. Bureau of Econ. Research, Working Paper No. 20382, 2014), <http://www.nber.org/papers/w20382.pdf> [<https://perma.cc/MKN5-6HRD>]. There are many important reasons for being concerned about education, but seeing it as the equivalent of skill is certainly a mistake. One of the unfortunate consequences of using education as the proxy for skill has been to see schools, the providers of education, as the mechanism for dealing with skill problems and leaving training and on-the-job experiences out of the story. *Id.*

23. See Glenn E. Hoover, *The Failure of the Social Sciences*, 3 AM. J. ECON. & SOC. 89, 89 (1943) (“For some years the prestige of the social scientists has been falling while the problems they were expected to solve have become more complex and more urgent . . . The fundamental cause of our disrepute is that we have contributed so little which the world finds useful.”).

24. Gordon M. Cragg & David J. Newman, *Natural Products: A Continuing Source of Novel Drug Leads*, (June 1, 2014) (author manuscript) (available at <http://www.ncbi.nlm.nih.gov/pmc/articles/PMC3672862/pdf/nihms468935.pdf> [<https://perma.cc/5HGU-GPV8>]) (pointing to a study showing that “only 36% of 1073 [new chemical entities discovered between 1981 and 2010] can be classified as truly synthetic (i.e., devoid of natural inspiration) in origin”).

25. Ciba Pharmaceuticals, which is incorporated in Summit, New Jersey, successfully extracted reserpine. See U.S. Patent No. 2,788,309 (filed Apr. 9, 1957); Nathan S. Kline, *The Challenge of the Psychopharmaceuticals*, 103 PROC. AM. PHIL. SOC’Y 455, 455 (1959).

26. Inventors quite often receive inspiration from nature. For example, George de Mestral invented Velcro after he noticed the burrs sticking to his dog’s fur, and August Kekule noticed benzene’s ring structure after observing a snake chasing

At the Center for Neighborhood Enterprise, we recognize, as we do in a commercial economy, that most of the entrepreneurs in our commercial economy are “C” students, not “A” students.²⁷ As the adage goes, the “A” students come back to the universities to teach, and the “C” students endow the universities with the money they have made.²⁸ Generally, the “A” students like to have all the answers to all of their questions before they act, and when they are finally ready to act, an opportunity may be gone. “C” students, on the other hand, are able to act in the presence of doubts and uncertainties, and are willing to fail and try again.

This applies to what we do at the Center for Neighborhood Enterprise. We go into low-income neighborhoods.²⁹ We do not do failure studies. We learn nothing by studying the failures of people, except how to create failure. If 70 percent of the families in these low-income neighborhoods are raising children that are dropping out of school, are in jail, or are on drugs, it means 30 percent are not. We go into those 30 percent of the functioning

its tail. See S. Rena Smith & Sandra K. Abell, *Using Analogies in Elementary Science*, 46 *SCI. & CHILD.* 50, 50–51 (2008).

27. That “A students work for C students” is an old, but popular, adage that seems to be gaining attention from entrepreneurs and parents concerned about their children’s education. See Sally Herigstad, *Q&A: Why Robert Kiyosaki Thinks our Education System is a Bust*, *YAHOO! FIN.* (Apr. 10, 2013), <http://finance.yahoo.com/news/q-why-robert-kiyosaki-thinks-120000985.html> [<https://perma.cc/3YGG-BPZJ>].

28. See, e.g., Gerard Baker, *Larry Summers vs. the Tiger Mom: A Live Debate with Amy Chua: Why A Students Become Academics and C Students Become Billionaire Donors*, *WALL ST. J.* (Jan. 29, 2011), <http://www.wsj.com/articles/SB10001424052748703956604576109962171060504> [<https://perma.cc/997H-KXUT>] (noting, albeit anecdotally, that among Harvard alumni, “A students became academics, . . . and the C students—the ones who had made the money—sat on the fund-raising committee.”).

29. The website for the Center for Neighborhood Enterprise lists the following “Founding Principles”:

- 1) Low-income individuals and neighborhood-based organizations should play a central role in the design and implementation of programs to address the problems of their communities;
- 2) An effective approach to societal problems must be driven by the same principles that function in the market economy, recognizing the importance of competition, entrepreneurship, cost efficiency, and an expectation of return on investment; and
- 3) Value-generating and faith-based initiatives are uniquely qualified to address problems of poverty that are related to behavior and life choices.

CTR. FOR NEIGHBORHOOD ENTER., <http://www.cneonline.org/about-cne/> [<https://perma.cc/B6QG-U8BF>] (last visited Jan. 24, 2017).

households and locate the source of the knowledge and experience that is causing people to succeed and achieve in the midst of these toxic communities. Then we try to apply “Miracle-Gro” in terms of training and technical assistance, acting as venture capitalists. By going in and applying resources and information that enables them to take what works among the 30 percent, we can apply it to the 70 percent of those dysfunctional households, and work to improve them.

In 1973, in Washington, D.C., we worked with a group of residents in public housing in Kenilworth Park. Kimi Gray, a 19 year-old woman abandoned by her husband and left with five children, got off welfare in three years and sent all five of her children to college.³⁰ Then she used her energy to take over the resident management of that property, helping to organize the residents.³¹ They formed the Resident Management Corporation, where they applied these principles.³² In the course of 12 years, 500 children from there went to college, welfare dependency went down, and these people found their strengths.³³

We studied that success, and then with former Congressman and Secretary of Housing and Urban Development Jack Kemp’s help, we held hearings to highlight these things that were working.³⁴ Additionally, we had the housing rules changed so the residents could receive the money that the housing authority was receiving, so they could hire other residents.³⁵ We saw drops in welfare dependency as well as dramatically reduced teen pregnancies because the residents’ indigenous leadership inspired people.³⁶

30. See Louie Estrada, *Public Housing Advocate Kimi Gray Dies*, WASH. POST (Mar. 4, 2000), <https://www.washingtonpost.com/archive/local/2000/03/04/public-housing-advocate-kimi-gray-dies/5a9cc90c-c993-4c33-a129-14bb9fc90089/> [https://perma.cc/9HQQ-56QA].

31. *Id.*

32. *Id.*

33. *Id.*; see also ROBERT L. WOODSON, NAT’L CTR. FOR POL’Y ANALYSIS, PRIVATE SECTOR ALTERNATIVES TO THE WELFARE STATE: A NEW AGENDA FOR BLACK AMERICANS 10–11 (1987).

34. See Robert L. Woodson, *What Jack Kemp Taught*, WASH. TIMES (May 8, 2009), <http://www.washingtontimes.com/news/2009/may/8/what-jack-kemp-taught/> [https://perma.cc/BR5Q-JUPB].

35. WOODSON, *supra* note 33, at 11.

36. *Id.*

The same thing happened in the Cochran Gardens public housing in St. Louis.³⁷ For three months, *60 Minutes* worked with us and did a 26-minute show on resident-managed public housing, reporting these successes.³⁸ Like Kenilworth Park and Cochran Gardens, there have been dramatic islands of excellence that defy the norm. It is interesting, however, that not a single researcher on the left or the right of center has ever taken the time to find out why or how those places were succeeding or the implications for public policy. *60 Minutes* could do it; PBS did a special on it,³⁹ but not a single researcher has done it.

Therefore I am suggesting that if we want to know what works to reduce poverty in America, we must go into these islands of excellence that have been created by the people living there, try to find out what they have done that defies conventional wisdom, and then host conferences and conduct studies regarding the people who are successful. We should fill our conferences, not with people who have failed but people who have succeeded, and we should put microphones and research in front of them to try to tell us what works. Rather than always studying failure, we should ask, "What lessons can be learned from people suffering from the problem?"

George Bernard Shaw asked the rhetorical question, "Must then a Christ die in torment in every age to save those that have no imagination?"⁴⁰ And Einstein said, "imagination is more important than knowledge."⁴¹ What we are lacking in our search for solutions is not just tinkering with the economic incentives by providing work requirements and drug testing for people. We must understand that we need cultural change.

Charles Murray, in his book, says he believes that the upper classes have a moral obligation to offer examples and instruction of success in order to lead the working classes and the poor out of the wasteland of failure.⁴² All is not well,

37. *Id.* at 12.

38. See ROBERT L. WOODSON, *THE TRIUMPHS OF JOSEPH: HOW TODAY'S COMMUNITY HEALERS ARE REVIVING OUR STREETS AND NEIGHBORHOODS* 46 (1998).

39. See *The New Urban Renewal: Reclaiming Our Neighborhoods*, PBS (1997).

40. See JOHN A. BERTOLINI, *THE PLAYWRIGHTING SELF OF BERNARD SHAW* 130 (1991).

41. Gregory N. Mandel, *To Promote the Creative Process: Intellectual Property Law and the Psychology of Creativity*, 86 *NOTRE DAME L. REV.* 1999, 2006 (2011).

42. See CHARLES MURRAY, *COMING APART: THE STATE OF WHITE AMERICA, 1960-2010*, at 285, 306 (2012).

however, among the upper classes. Among the families living in Silicon Valley, the suicide rate among teenagers is five times the national average,⁴³ and the median income is nearly \$95,000 as of 2014.⁴⁴ Eighty-seven percent of those families have two parents,⁴⁵ yet their children are jumping in front of freight trains and jumping off bridges in record numbers.⁴⁶ The same thing is happening in Plano, Texas.⁴⁷ Heroin addiction deaths are occurring in New Hampshire and in Northern Virginia.⁴⁸ So all is not well among the upper classes, and problems in all communities stem from more than monetary poverty. If some of the remedies to isolation and loneliness are similar to solutions that occurred in the low-income, toxic neighborhoods, perhaps low-income people can offer solutions to people in the upper classes as well. Perhaps we need to look for some new sources for a solution. And I contend, look among the broken if you want to be healed.

43. Yanan Wang, *CDC Investigates Why So Many Students in Wealthy Palo Alto, California Commit Suicide*, WASH. POST (Feb. 16, 2016), <https://www.washingtonpost.com/news/morning-mix/wp/2016/02/16/cdc-investigates-why-so-many-high-school-students-in-wealthy-palo-alto-have-committed-suicide/> [<https://perma.cc/KSH8-DRGW>].

44. Lauren Helper, *Silicon Valley Median Income Now \$94,572—43% Higher than the Typical U.S. Household*, SILICON VALLEY BUS. J. (Sept. 24, 2014), <http://www.bizjournals.com/sanjose/news/2014/09/24/silicon-valley-median-income-now-94-572-43-higher.html> [<https://perma.cc/B3CN-QWH5>].

45. See SILICON VALLEY CMTY. FOUND. CTR. FOR EARLY LEARNING, PARENT STORY PROJECT: PERSPECTIVES ON RAISING CHILDREN IN SILICON VALLEY (2014).

46. See Hanna Rosin, *The Silicon Valley Suicides: Why Are So Many Kids with Bright Prospects Killing Themselves in Palo Alto*, ATLANTIC (Dec. 2015), <http://www.theatlantic.com/magazine/archive/2015/12/the-silicon-valley-suicides/413140/> [<https://perma.cc/6AEH-77R3>].

47. Christina Corbin, *Grim Headlines, Hard Data Show Suicides on Rise Among Teens Nationally*, FOXNEWS.COM (Feb. 4, 2016), <http://www.foxnews.com/health/2016/02/04/grim-headlines-hard-data-show-suicides-on-rise-among-teens-nationally.html> [<https://perma.cc/MH96-LQFN>].

48. Haeyoun Park & Matthew Bloch, *How the Epidemic of Drug Overdose Deaths Ripples Across America*, N.Y. TIMES (Jan. 19, 2016), <http://www.nytimes.com/interactive/2016/01/07/us/drug-overdose-deaths-in-the-us.html> [<https://perma.cc/56CU-UMQ9>]; Jamie Forzato, *Dealing Death: The Heroin Epidemic*, WTOP (Mar. 16, 2015), <http://wtop.com/local/2015/03/dealing-death-heroin-epidemic/slide/1/> [<https://perma.cc/X96H-XPGM>].

DEFYING CONVENTIONAL WISDOM: THE CONSTITUTION WAS NOT THE PRODUCT OF A RUNAWAY CONVENTION

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INTRODUCTION

The Constitution stands at the pinnacle of our legal and political system as the “supreme Law of the Land,”¹ but it is far more important than just a set of rules. We do not take oaths to defend our nation, our government, or our leaders. Our ultimate oath of loyalty affirms that we “will to the best of [our] Ability, preserve, protect and defend the Constitution of the United States.”² Each president, every member of the Supreme Court, legislators in both houses of Congress, all members of the military, countless state and federal officials, all new citizens, and all members of the legal profession pledge our honor and duty to defend this document.

Despite this formal and symbolic profession of devotion, many leaders, lawyers, and citizens repeat the apparently inconsistent claim that the Constitution was illegally adopted by a runaway convention. In the words of former Chief Justice Warren Burger, the Constitution’s Framers “didn’t pay much attention to any limitations on their mandate.”³ The oft-repeated claim is that the Constitutional Convention was called by the Confederation Congress “for the sole and express purpose of revising the Articles of Confederation.”⁴ However, “the Convention departed from the mission that Congress had given it. The Convention did not simply draft ‘alterations’ for the Articles of Confederation as amendments. Instead, it proposed an entirely new Constitution to replace the Articles of Confederation.”⁵

Critics also assert that the Founders’ illegal behavior extended into the ratification process. “The Convention did not ask Congress or the state legislatures to approve the proposed Constitution. Instead, perhaps fearing delay and possible de-

1. U.S. CONST. art. VI, cl. 2.

2. *Id.* art. II, § 1, cl. 8; *see also id.* art. VI, cl. 3.

3. Warren Burger, Remarks at the Fifth Annual Judicial Conference of the United States Court of Appeals for the Fifth Circuit (May 8, 1987), in 119 F.R.D. 45, 79.

4. Resolution of Confederation Congress (February 21, 1787), *reprinted in* 1 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 185, 187 (John P. Kaminski et al. eds., 2009) [hereinafter DHRC].

5. Gregory E. Maggs, *A Concise Guide to the Records of the Federal Constitutional Convention of 1787 As A Source of the Original Meaning of the U.S. Constitution*, 80 GEO. WASH. L. REV. 1707, 1711 (2012).

feat, the Convention called for separate ratifying conventions to be held in each state.”⁶

These criticisms are not new. Many of the Anti-Federalist opponents of the Constitution unleashed a string of vile invectives aimed at the architects of this “outrageous violation.”⁷ The Framers employed “all the arts of insinuation, and influence, to betray the people of the United States.”⁸ “[T]hat vile conspirator, *the author of Publius*: I think he might be impeached for high treason.”⁹ The Constitution itself was treated to similar opprobrium:

Upon the whole I look upon the new system as a most ridiculous piece of business—something (*entre nous*) like the legs of Nebuchadnezar’s image: It seems to have been formed by jumbling or compressing a number of ideas together, something like the manner in which poems were made in Swift’s flying Island.¹⁰

Modern legal writers level critiques that are equally harsh, albeit with less colorful language. One author contends that James Madison led the delegates “[i]n what might be termed a bloodless coup.”¹¹ Another suggests that the intentional violation of their limited mandate “could likely have led to the participants being found guilty of treason in the event that their proceedings were publicized or unsuccessful.”¹² Ironically, Chief Justice Burger’s critique of the legality of the Constitution was delivered in his capacity as Chairman of the National Commission on the Bicentennial of the Constitution of the United States.¹³ This is a classic ex-

6. *Id.*

7. Sydney, N.Y.J., June 13–14, 1788, reprinted in 20 DHRC, *supra* note 4, at 1153, 1157.

8. A COLUMBIAN PATRIOT: OBSERVATIONS ON THE CONSTITUTION (1788), reprinted in 16 DHRC, *supra* note 4, at 272, 277.

9. Curtiopolis, N.Y. DAILY ADVERTISER, Jan. 18, 1788, reprinted in 15 DHRC, *supra* note 4, at 399, 402.

10. Letter from William Grayson to William Short (Nov. 10, 1787), reprinted in 1 DHRC, *supra* note 4, at 150, 151.

11. Paul Finkelman, *The First American Constitutions: State and Federal*, 59 TEXAS L. REV. 1141, 1162 n.43 (1981) (reviewing WILLI PAUL ADAMS, *THE FIRST AMERICAN CONSTITUTIONS: REPUBLICAN IDEOLOGY AND THE MAKING OF THE STATE CONSTITUTIONS IN THE REVOLUTIONARY ERA* (1980) and WILLIAM WINSLOW CROSSKEY & WILLIAM JEFFREY, *POLITICS AND THE CONSTITUTION IN THE HISTORY OF THE UNITED STATES* (1980)).

12. Brian Kane, *Idaho’s Open Meetings Act: Government’s Guarantee of Openness or the Toothless Promise?*, 44 IDAHO L. REV. 135, 137 (2007).

13. Burger, Remarks, *supra* note 3, at 77.

ample of Orwellian “double-think.” Our belief that the Constitution is Supreme Law deserving respect and oaths of allegiance is utterly inconsistent with the notion that it was crafted by an illegal convention and ratified by an unsanctioned process that bordered on treason.

As we will see, the scholarship on this issue is inadequate. Only two articles have been dedicated to developing the argument that the Constitution was illegally adopted by revolutionary action.¹⁴ Nearly all other scholarly references to the illegality of the adoption of the Constitution consist of either brief discussions or naked assertions.¹⁵ Professors Bruce Ackerman and Neal Katyal argue that the illegality of the Constitution justifies the constitutional “revolutions” of Reconstruction and twentieth-century judicial activism.¹⁶

Despite the widespread belief that the Constitutional Convention delegates viewed their instructions as mere suggestions which could be ignored with impunity, the historical record paints a different picture. In *Federalist No. 78*, Alexander Hamilton underlined the importance of acting within one’s authority: “There is no position which depends on clearer principles, than that every act of a delegated authority, contrary to the tenor of the commission under which it is exercised, is void.”¹⁷ And in *Federalist No. 40*, James Madison had already answered the charge that the Convention delegates had exceeded their commissions.¹⁸

Understanding the lawfulness of the adoption of the Constitution is not merely of historical interest. State appellate courts have cited the allegedly unauthorized acts of the delegates as

14. Bruce Ackerman & Neal Katyal, *Our Unconventional Founding*, 62 U. CHI. L. REV. 475 (1995); Richard S. Kay, *The Illegality of the Constitution*, 4 CONST. COMMENT. 57 (1987).

15. See, e.g., John C. Godbold, “Lawyer” — A Title of Honor, 29 CUMB. L. REV. 301, 314 (1999); Kurt T. Lash, *The Constitutional Convention of 1787: The Original Meaning of the New Jurisprudential Deal*, 70 FORDHAM L. REV. 459, 523 (2001); L. Scott Smith, *From Promised Land to Tower of Babel: Religious Pluralism and the Future of the Liberal Experiment in America*, 45 BRANDEIS L.J. 527, 539–40 (2007); Lindsay K. Jonker, Note, *Learning from the Past: How the Events That Shaped the Constitutions of the United States and Germany Play Out in the Abortion Controversy*, 23 REGENT U. L. REV. 447, 453–54 (2011).

16. Ackerman & Katyal, *supra* note 14, at 476.

17. THE FEDERALIST NO. 78, at 467 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

18. THE FEDERALIST NO. 40 (James Madison).

legal precedent in lawsuits challenging the legitimacy of the process for the adoption of state constitutions.¹⁹ When critics claim that the Supreme Court's judicial activism is tantamount to an improper revision of the Constitution's text, some scholars defend the Court by comparison to the "unauthorized acts" of the delegates to the Constitutional Convention.²⁰ And as noted by Professor Robert Natelson, the specter of the "runaway convention" of 1787 is a common argument employed by political opponents of modern calls for an Article V Convention of States.²¹ If the Philadelphia Convention violated its mandate, a new convention will do so today, critics assert. Even without such pragmatic implications, this article respectfully suggests that in a nation that treats allegiance to the Constitution as the ultimate standard of national fidelity, it is a self-evident truth that we ought to be satisfied, if at all possible, that the Constitution was lawfully and properly adopted. Yet, while this is obviously the preferred outcome, we must test this premise with fair-minded and thorough scholarship.

To this end, this Article separately examines the two claims of illegal action by the Founders. First, it reviews the question of whether the delegates violated their commissions by proposing "a whole new" Constitution rather than merely amending the Articles of Confederation. Second, it explores the legality of the ratification process that permitted the Constitution to become operational upon approval of nine state conventions rather than awaiting the unanimous approval of the thirteen state legislatures.

Each issue will be developed in the following sequence:

- Review of the timing and text of the official documents that are claimed to control the process.
- Review of the discussion of the issue at the Constitutional Convention.
- Review of the debates on the issue during the ratification process.

19. See *Smith v. Cenarrusa*, 475 P.2d 11, 14 (Idaho 1970); *Wheeler v. Bd. of Trs. of Fargo Consol. Sch. Dist.*, 37 S.E.2d 322, 328–29 (Ga. 1946).

20. See, e.g., Lash, *supra* note 15, at 523.

21. Robert G. Natelson, *Proposing Constitutional Amendments by Convention: Rules Governing the Process*, 78 TENN. L. REV. 693, 719–23 (2011).

Finally, after developing the legal issues surrounding the Framers' allegedly illegal acts, this article examines modern scholarly literature to assess whether the critics have correctly analyzed each of these two related but distinct legal issues.

I. DID THE CONVENTION DELEGATES EXCEED THEIR
AUTHORITY?

A. *The Call of the Convention*

The idea of "calling" the convention actually raises several distinct questions: (1) Who had the authority to convene the meeting? (2) When and where was it to be held? (3) Who actually invited the states to appoint delegates and attend the meeting? (4) Who chose the delegates? (5) Who gave the delegates their authority and instructions? (6) What were those instructions? (7) Who had the authority to determine the rules for the Convention?

It might be thought that the place to begin our analysis of these questions would be Article XIII of the Articles of Confederation, which laid out the process for amending that document.²² However, this Article contains no provision whatsoever for holding a convention. Accordingly, the Convention had to originate from other sources that are easily discovered by a sequential examination of the relevant events. We start with the Annapolis Convention.

On November 30, 1785, the Virginia House of Delegates approved James Madison's motion requesting Virginia's congressional delegates to seek an expansion of congressional authority to regulate commerce. However, on the following day the House reconsidered because "it does not, from a mistake, contain the sense of the majority of this house that voted for the said resolutions."²³ On January 21, 1786, a similar effort was initiated. Rather than a solution in Congress, the Virginia

22. ARTICLES OF CONFEDERATION OF 1781, art. XIII. ("[N]or shall any alteration at any time hereafter be made in any of them; unless such alteration be agreed to in a Congress of the United States, and be afterwards confirmed by the legislatures of every State.").

23. 1 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION, AS RECOMMENDED BY THE GENERAL CONVENTION AT PHILADELPHIA IN 1787, at 115 (Jonathan Elliot ed., 2nd ed. 1891) [hereinafter ELIOT'S DEBATES].

House proposed a convention of states—a meeting that would become known as the Annapolis Convention. Its purpose was:

[T]o take into consideration the trade of the United States; to examine the relative situation and trade of the said states; to consider how far a uniform system in their commercial regulations may be necessary to their common interest and their permanent harmony; and to report to the several states such an act relative to this great object as, when unanimously ratified by them, will enable the United States in Congress assembled effectually to provide for the same²⁴

It is clear that the Annapolis Convention was intended to propose a change to the Articles of Confederation using the power of the states and without involving Congress. Patrick Henry, who became an Anti-Federalist leader of the first rank, signed the resolution calling this Convention as Governor of Virginia and it was communicated with the requisite formalities to the other states.²⁵ The minutes of the Annapolis Convention reflect that only five states (New York, New Jersey, Pennsylvania, Delaware, and Virginia) were in attendance.²⁶ Four additional states appointed commissioners, but they did not arrive in a timely fashion and as such were not part of the proceedings.²⁷ The credentials of the delegates were read and then the Convention turned to the issue of “what would be proper to be done by the commissioners now assembled.”²⁸

The final Report of the Commissioners concluded that they “did not conceive it advisable to proceed on the business of their mission under the circumstance of so partial and defective a representation.”²⁹ They then expressed a desire “that speedy measures may be taken to effect a general meeting of the states, in a future convention, for the same and such other purposes as the situation of public affairs may be found to require.”³⁰ The commissioners repeatedly mentioned the limits of their authority and even worried that by making a mere recommendation for

24. *Id.* at 115–16.

25. *Id.* at 116.

26. *Id.*

27. 1 DHRC, *supra* note 4, at 177.

28. 1 ELLIOT'S DEBATES, *supra* note 23, at 116.

29. *Id.* at 117.

30. *Id.*

a future meeting it might “seem to exceed the strict bounds of their appointment.”³¹ Nonetheless, they passed a recommendation for a new convention “with more enlarged powers” necessitated by a situation “so serious” as “to render the situation of the United States delicate and critical, calling for an exertion of the united virtue and wisdom of all the members of the confederacy.”³² It was apparent to all that the act of these delegates was a mere political recommendation.

The Annapolis report suggested the framework for the next convention of states in four specific ways. First, it set the date and place—Philadelphia, on the second Monday of May, 1787.³³ Second, it recommended a “convention of deputies from the different states” who would gather “for the special and sole purpose of entering into [an] investigation [of the national government’s ills], and digesting a plan for supplying such defects as may be discovered to exist”³⁴ Third, it looked to the state legislatures to name the delegates and to give them their authorization. The Annapolis commissioners “beg[ged] leave to suggest” that “the states, by whom [we] have been respectively delegated,” “concur” in this plan and send delegates “with more enlarged powers.”³⁵ Moreover, the commissioners recommended that the states “use their endeavors to procure the concurrence of the other states, in the appointment of commissioners.”³⁶ The purpose of the next convention would be to “devise such further provisions as shall appear to them necessary to render the constitution of the federal government adequate to the exigencies of the Union”³⁷ The next convention’s proposals would be adopted by a familiar process. It would “report such an act for that purpose to the United States in Congress assembled, as, when agreed to by them, and afterwards confirmed by the legislatures of every State, will effectually provide for the same.”³⁸

There was no request to Congress to authorize the Philadelphia Convention. But the Annapolis commissioners “neverthe-

31. *Id.*

32. *Id.* at 118.

33. *Id.*

34. *Id.*

35. *Id.*

36. *Id.*

37. *Id.*

38. *Id.*

less concluded, from motives of respect, to transmit copies of this report to the United States in Congress assembled, and to the executive of the other states."³⁹ Importantly, the term "Articles of Confederation" is totally absent from their report. Instead, the Annapolis report asked the states to appoint and authorize delegates "to render the constitution of the federal government adequate to the exigencies of the Union."⁴⁰

1. *The States Begin the Official Process*

The plan for the second convention was launched on November 23rd, 1786, once again by the Virginia General Assembly.⁴¹ The measure recited that the Annapolis commissioners "have recommended" the proposed Philadelphia Convention.⁴² Virginia gave its two-fold rationale for not pursuing this matter in Congress: (1) Congress "might be too much interrupted by the ordinary business before them;" (2) discussions in Congress might be "deprived of the valuable counsels of sundry individuals, who are disqualified [from Congress]" because of state laws or the circumstances of the individuals.⁴³ George Washington was undoubtedly the best known example of the latter class of persons.⁴⁴ Having Washington at such a convention would be invaluable to convey a sense of dignity and seriousness, but he was not willing to serve in Congress.⁴⁵

Seven commissioners were to be appointed "to meet such Deputies as may be appointed and authorised by other States" at the time and place specified "to join with them in devising and discussing all such alterations and further provisions, as may be necessary to render the Federal Constitution adequate to the exigencies of the Union."⁴⁶ There was no mention of seeking the permission of Congress to hold the convention, nor does the phrase "Articles of Confederation" appear in the doc-

39. *Id.*

40. *Id.*

41. Virginia's Appointment of Delegates to the Constitutional Convention (Nov. 23, 1786), reprinted in 8 DHRC, *supra* note 4, at 540, 540.

42. *Id.*

43. *Id.*

44. See Whit Ridgeway, *George Washington and the Constitution, in A COMPANION TO GEORGE WASHINGTON* 413, 421–24 (Edward G. Lengel ed., 2012).

45. *Id.*

46. 8 DHRC, *supra* note 4, at 541.

ument. On December 4th, Virginia elected seven delegates to the Philadelphia Convention.⁴⁷ The act provided that “the Governor is requested to transmit forthwith a copy of this Act to the United States in Congress, and to the Executives of each of the States in the Union.”⁴⁸ Edmund Randolph, who became governor just four days earlier, complied with the request.⁴⁹

New Jersey voted on November 24th, 1786 to send authorized delegates “for the purpose of taking into consideration the state of the Union as to trade and other important objects, and of devising such further provisions as shall appear necessary to render the Constitution of the federal government adequate to the exigencies thereof.”⁵⁰ Pennsylvania acted next, voting on December 30th to send delegates to the Philadelphia Convention. The legislature recited that it was “fully convinced of the necessity of revising the Foederal Constitution, for the purpose of making such alterations and amendments as the exigencies of our public affairs require.”⁵¹ Pennsylvania instructed their delegates “to join with [delegates from other states] in devising, deliberating on, and discussing all such alterations and further provisions as may be necessary to render the foederal constitution fully adequate to the exigencies of the Union.”⁵²

North Carolina’s legislature passed a measure on January 6th, 1787 bearing the title “for the purpose of revising the foederal constitution.”⁵³ This state’s delegates were empowered “to discuss and decide upon the most effectual means to remove the defects of our foederal union, and to procure the enlarged purposes which it was intended to effect.”⁵⁴ North Carolina refers to the Articles of Confederation in the preamble of its resolution but not in the delegates’ instructions.⁵⁵

47. *Id.*

48. *Id.*

49. 1 DHRC, *supra* note 4, at 192 (Randolph circulated the Virginia resolution).

50. Resolution Authorizing and Empowering the Delegates (Nov. 24, 1786), *reprinted in* 1 DHRC, *supra* note 4, at 196, 196.

51. Act Electing and Empowering Delegates (Dec. 30, 1786), *reprinted in* 1 DHRC, *supra* note 4, at 199, 199.

52. *Id.*

53. Act Authorizing the Election of Delegates (Jan. 6, 1787), *reprinted in* 1 DHRC, *supra* note 4, at 200, 200.

54. *Id.* at 201.

55. *Id.* at 200–201.

On February 3rd, Delaware became the fifth state to authorize the Philadelphia Convention with an act entitled “for the purpose of revising the federal Constitution.”⁵⁶ The preamble recites that the legislature was “fully convinced of the Necessity of revising the Foederal Constitution, and adding thereto such further Provisions as may render the same more adequate to the Exigencies of the Union.”⁵⁷

Delaware employed the familiar language of international diplomacy in granting “powers” to its delegates.⁵⁸ They were “hereby constituted and appointed Deputies from this State, with Powers to meet such Deputies as may be appointed and authorized by the other States . . . and to join with them in devising, deliberating on, and discussing, such Alterations and further Provisions, as may be necessary to render the Foederal Constitution adequate to the Exigencies of the Union.”⁵⁹ Delaware added one extremely important limitation to their delegates’ authority. Their powers did “not extend to that Part of the Fifth Article of the Confederation . . . which declares that . . . each State shall have one Vote.”⁶⁰

On February 10th, Georgia enacted a measure “for the Purpose of revising the Federal Constitution.”⁶¹ Its delegates were empowered “to join with [delegates from other states] in devising and discussing all such alterations and farther [sic] provisions, as may be necessary to render the federal constitution adequate to the exigencies of the union.”⁶²

In addition to Delaware’s specific instruction on preserving the equality of the states, all six of the initial states issued formal instruction to their delegates regarding voting. For example, each state established its own rule for a minimum number of delegates authorized to cast a vote for the state. Virginia, New Jersey, North Carolina, and Delaware required a minimum of three delegates to be present to cast the state’s single

56. Act Electing and Empowering Delegates (Feb. 3, 1787), reprinted in 1 DHRC, *supra* note 4, at 203, 203.

57. *Id.*

58. *Id.*

59. *Id.*

60. *Id.*

61. Act Electing and Empowering Delegates (Feb. 10, 1787), reprinted in 1 DHRC, *supra* note 4, at 204, 204.

62. *Id.*

vote.⁶³ Pennsylvania required a four-delegate quorum.⁶⁴ Georgia set the number at two delegates.⁶⁵

In chronological order, the next event was a February 21st resolution passed by the Confederation Congress that is widely proclaimed as the measure that “called” the Constitutional Convention. But, to understand the origins of this controversial and important measure, we need to turn our attention to the legislature of New York.

2. *Machinations in New York*

Congress’s inability to pay the debts from the War for American Independence was one of the key reasons that the states were looking to revise the federal system.⁶⁶ Congress proposed a new system in April 1783 containing two important changes to the Articles of Confederation.⁶⁷ First, apportionment of debt would be based on population rather than the value of land.⁶⁸ Second, the Impost of 1783 requested that the states permit Congress to impose a five-percent tariff on imports for twenty-five years with the funds dedicated to paying off war debt.⁶⁹

The Impost of 1783 reveals the formalities the Confederation Congress employed when it requested that the states take official action. Congress proclaimed that their measure was “recommended to the several states.”⁷⁰ Moreover, “the several states are advised to authorize their respective delegates to subscribe and ratify the same as part of said instrument of union.”⁷¹ This was followed by a formal printed, six-page “Ad-

63. Act Authorizing the Election of Delegates (Nov. 23, 1786), *reprinted in* 1 DHRC, *supra* note 4, at 196, 196; Act Authorizing the Election of Delegates (Jan. 6, 1787), *reprinted in* 1 DHRC, *supra* note 4, at 200, 200; Act Electing and Empowering Delegates (Feb. 3, 1787) *reprinted in* 1 DHRC, *supra* note 4, at 203, 203.

64. Act Electing and Empowering Delegates (Dec. 30, 1786), *reprinted in* 1 DHRC, *supra* note 4, at 199, 199.

65. Act Electing and Empowering Delegates (Feb. 10, 1787), *reprinted in* 1 DHRC, *supra* note 4, at 204, 204.

66. *See e.g.*, THE FEDERALIST NO. 15, at 69 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

67. 19 DHRC, *supra* note 4, at xxxvi.

68. *Id.*

69. *Id.*

70. 24 JOURNALS OF THE CONTINENTAL CONGRESS, 1774–1789, at 258 (Worthington C. Ford et al. eds., 1904–37) [hereinafter JOURNALS OF CONGRESS].

71. *Id.* at 260.

dress to the States, by the United States in Congress Assembled to accompany the act of April 18, 1783."⁷²

The Impost measure was eventually adopted by twelve states.⁷³ However, New York's Senate defeated the Impost by a vote of 11-7 on April 14th, 1785.⁷⁴ With no other solutions on the horizon, on February 15th, 1786, Congress urged the New York legislature to reconsider.⁷⁵ Repeated requests from Congress and rebuffs from New York left the dangerously divisive matter unsettled when the state's legislature convened in January 1787.⁷⁶ On February 15th, the legislature rejected an impassioned plea by Alexander Hamilton to approve the Impost, voting 38 to 19 to send yet another deliberately unacceptable proposal back to Congress.⁷⁷

Rather than complying with the request of Congress to approve the Impost, the New York House voted on February 17th to instruct the state's delegates in Congress to make a motion to call for a convention of states under very specific terms.⁷⁸ After an acrimonious attack from Senator Abraham Yates, Jr., the Senate approved the measure by a vote of 10-9 on February 20th.⁷⁹ The context strongly suggests that the New York legislature believed that this motion was an effort to not only respond to the ongoing dispute about the Impost, but to attempt to control the upcoming convention of states to be held in Philadelphia on terms acceptable to this most recalcitrant state.

3. Congress Responds to the Annapolis Convention Report

While the conflict with New York remained in a hostile stalemate, on February 19th, a committee in Congress voted by a one-vote margin to approve a resolution responding to

72. 1 ELLIOT'S DEBATES, *supra* note 23, at 96–100. Scholars of the era understood the importance of this document in the process of adopting the Constitution. The Impost of 1783 is cited in *Elliot's Debates* in the chapter entitled: "Proceedings which led to the Adoption of the Constitution of the United States." *Id.* at 92.

73. CALVIN H. JOHNSON, RIGHTEOUS ANGER AT THE WICKED STATES: THE MEANING OF THE FOUNDERS' CONSTITUTION 224 (2005).

74. 19 DHRC, *supra* note 4, at xxxvi.

75. *Id.*

76. *Id.* at xxxvi–xxxix.

77. *Id.* at xl.

78. 31 JOURNALS OF CONGRESS, *supra* note 70, at 72.

79. 19 DHRC, *supra* note 4, at 507.

the Annapolis report.⁸⁰ It expressed the view that Congress “entirely coincide[ed]” with the report as “the inefficiency of the federal government and the necessity of devising such farther [sic] provisions as shall render the same adequate to the exigencies of the Union” and “strongly recommend[ed] to the different state legislatures to send forward delegates to meet the proposed convention”⁸¹

However, before the resolution could be voted on by Congress, New York’s delegates introduced a competing resolution as instructed by their state legislature.⁸² New York’s motion was limited to “revising the Articles of Confederation.”⁸³ In light of the underlying acrimony, New York’s alternative measure was doomed. The final vote was five votes no, three votes yes, and two states divided.⁸⁴ Neither Rhode Island nor New Hampshire was present or voting.⁸⁵

Massachusetts’ delegates—one of the three states voting to approve the New York measure—followed immediately with an alternative viewed as a compromise.⁸⁶ Congress approved these fateful words:

Resolved that in the opinion of Congress it is expedient that on the second Monday in May next a convention of delegates who shall have been appointed by the several states be held at Philadelphia for the sole and express purpose of revising the Articles of Confederation and reporting to Congress and the several legislatures such alterations and provisions therein as shall when agreed to in Congress and confirmed by the states render the federal constitution adequate to the exigencies of government and the preservation of the Union.⁸⁷

While the language of this resolution has been oft-quoted, scholars have generally failed to look at the resolution and its context to determine whether this was in fact the formal call for the Phila-

80. Commentaries on the Constitution, *reprinted in* 13 DHRC, *supra* note 4, at 36–37.

81. 32 JOURNALS OF CONGRESS, *supra* note 70, at 71–72.

82. *Id.* at 72.

83. *Id.*

84. *Id.* at 73.

85. *Id.*

86. *Id.* at 73–74.

87. Confederation Congress Calls the Constitutional Convention (Feb. 21, 1787), *reprinted in* 1 DHRC, *supra* note 4, at 185, 187.

delphia Convention. There are two attributes that would be found in a formal call that are completely absent here. First, the language of the resolution would be addressed to the states. Second, Congress would follow its normal formal protocol for submitting measures for the consideration of the states. For example, when Congress asked the states to ratify the amendment to the Articles in the Impost of 1783, the language was directed to the states and there was formal communication to the chief executives of each state.⁸⁸ There is no such language of invitation contained in the February 21st resolution of Congress and there is no record of any formal instruments of communication to the states inviting them to send delegates to Philadelphia. When Virginia called the Philadelphia Convention, it had sent such communications.⁸⁹ Congress never did in this instance.

The absence of the formalities is strong evidence that Congress was merely issuing its blessing on the convention planning already in progress at the initiative of Virginia and five other states. Congress expressed its "opinion" that "it is expedient" that a convention of delegates "be held." On its face, it reads more like an endorsement than a formal request to the states to send delegates. Moreover, the question of the power of Congress to issue such a formal call cannot be overlooked. There is nothing in the text of the Articles of Confederation (particularly Article XIII) that suggests that Congress had any power to actually call a convention of states.⁹⁰

However, the historical record demonstrates that the states clearly believed that they could call conventions of states to discuss common problems. Natelson has catalogued ten such conventions after the Declaration of Independence but prior to the Annapolis Convention.⁹¹ Congress was basically a bystander in this process. Virginia did not seek the approval of Congress when it invited the other states to the conventions held in Annapolis and Philadelphia. It is clear that the states believed, as the text of the Annapolis report makes plain, that notifying Congress arose

88. 24 JOURNALS OF CONGRESS, *supra* note 70, at 258.

89. Virginia's Appointment of Delegates to the Constitutional Convention (Nov. 23, 1786), reprinted in 8 DHRC, *supra* note 4, at 540, 540.

90. See *supra* note 22 and accompanying text.

91. Robert G. Natelson, *Founding-Era Conventions and the Meaning of the Constitution's "Convention for Proposing Amendments"*, 65 FLA. L. REV. 615 (2013).

“from motives of respect”⁹² rather than from any sense that it was necessary to seek congressional approval.

Calling a convention is a formal invitation to participate in an official gathering. A call to the states to take action at the request of Congress would have said so directly and would have been sent to the states with appropriate formalities. All such indicia of a formal call are missing from the February 21st resolution but are clearly present in the measure enacted the previous fall by the Virginia legislature.

4. *The Six Remaining States Appoint Delegates*

A February 22nd resolution by the Massachusetts legislature was enacted without knowledge that Congress had acted the prior day.⁹³ It was repealed and replaced with another enactment on March 7th.⁹⁴ This resolution adopted the operative paragraph from the congressional resolution.⁹⁵ Thus, Massachusetts delegates were instructed to “solely” amend the Articles of Confederation to “render the federal constitution adequate to the exigencies of government and the preservation of the union.”⁹⁶ Without specifically citing the Congressional resolution, on March 6th, New York’s legislature appointed delegates with the verbatim language used in the resolution.⁹⁷ Consequently, the Empire State’s delegates were under the same instructions as those from Massachusetts.

South Carolina’s legislature ignored the language proffered by Congress. It essentially returned to the Virginia model with an enactment entitled “for the purpose of revising the foederal constitution.”⁹⁸ On March 8th, its delegates were given the authority “to join” with other delegates “in devising and discussing all such alterations, clauses, articles and provisions as may

92. 1 ELLIOT’S DEBATES, *supra* note 23, at 118.

93. Resolution Authorizing the Appointment of Delegates and Providing Instructions for Them (Feb. 22, 1787), *reprinted in* 1 DHRC, *supra* note 4, at 205, 205.

94. House Substitute of 7 March for the Resolution of 22 February (Mar. 7, 1787), *reprinted in* 1 DHRC, *supra* note 4, at 207, 207.

95. *Id.*

96. *Id.*

97. Assembly and Senate Authorize Election of Delegates (Feb. 26, 1787), *reprinted in* 1 DHRC, *supra* note 4, at 209, 209.

98. Act Authorizing the Election of Delegates (Mar. 8, 1787), *reprinted in* 1 DHRC, *supra* note 4, at 213, 214.

be thought necessary to render the foederal constitution entirely adequate to the actual situation and future good government of the confederated states.”⁹⁹

Connecticut was the second state to formally acknowledge the Congressional measure in its appointment of delegates. Its enactment recited that the act of Congress was a recommendation.¹⁰⁰ The measure specified that the delegates were “authorized and impowered . . . to confer with [other delegates] for the Purposes mentioned in the sd [sic] Act of Congress.”¹⁰¹ However, it granted further authority under a different formula. Its delegates were “duly empowered” to discuss and report “such Alterations and Provisions, agreeable to the general Principles of Republican Government, as they shall think proper, to render the foederal Constitution adequate to the Exigencies of Government, and the Preservation of the Union.”¹⁰² Thus, the final phrasing is essentially the same as the Virginia formula. Connecticut appears to have been covering both alternatives when it finally acted on May 17th—two days after the scheduled start of the Convention.

After prolonged discord between the House and Senate, on May 26th, Maryland appointed delegates authorized to meet and negotiate “for the purpose of revising the federal system.”¹⁰³ Working with other states, the delegates were sanctioned to join in “considering such alterations, and further provisions, as may be necessary to render the federal constitution adequate for the exigencies of the union.”¹⁰⁴ Following the Virginia model, New Hampshire was the twelfth and final state to authorize delegates on June 27th—a month after the Convention was in full operation.¹⁰⁵ Its delegates were to join with other states “in devising and discussing all such alterations and further provi-

99. *Id.*

100. Act Electing and Empowering Delegates (May 17, 1787), reprinted in 1 DHRC, *supra* note 4, at 215, 215.

101. *Id.* at 216.

102. *Id.*

103. Act Electing and Empowering Delegates (May 26, 1787), reprinted in 1 DHRC, *supra* note 4, at 222, 222.

104. *Id.*

105. Act Electing and Empowering Delegates (June 27, 1787), reprinted in 1 DHRC, *supra* note 4, at 223, 223.

sions as to render the federal constitution adequate to the exigencies of the Union.”¹⁰⁶

Like the first six states, each of the final six states imposed an internal quorum rule that was strictly observed by the Convention. Massachusetts and South Carolina required the presence of at least three delegates.¹⁰⁷ New Hampshire permitted two delegates to represent the state.¹⁰⁸ Connecticut and Maryland allowed one delegate to suffice.¹⁰⁹ New York, in its ongoing obstinate approach, appointed three delegates but made no provision for any lesser number to suffice to cast the state’s vote.¹¹⁰ Every other state appointed more delegates than the minimum number required by that state’s quorum rule.

Only two states, Massachusetts and Connecticut, actually cited the Congressional resolution in their formal appointment of delegates.¹¹¹ Connecticut described the Congressional resolution as a “recommend[ation]” but did not limit its delegates to the merely amending the Articles of Confederation.¹¹² New York and Massachusetts appointed delegates employing the verbatim language of the Congressional resolution.¹¹³ From the context, however, it was clear to all that these delegates were to “solely amend the Articles” as specified by their states—not because of the language from Congress.

On the other hand, both Pennsylvania and Delaware specifically cite the Virginia resolution as the impetus for their

106. Resolution Electing and Empowering Delegates (Jan. 17, 1787), *reprinted in* 1 DHRC, *supra* note 4, at 223, 223.

107. 3 RECORDS OF THE CONSTITUTIONAL CONVENTION OF 1787, 584 (Max Farrand ed., 1st ed. 1911) [hereinafter FARRAND’S RECORDS].

108. *Id.* at 572–73.

109. *Id.* at 585–86.

110. *Id.* at 579–81.

111. House Substitute of 7 March for the Resolution of 22 February (Mar. 7, 1787), *reprinted in* 1 DHRC, *supra* note 4, at 207, 207; Act Electing and Empowering Delegates (May 17, 1787), *reprinted in* 1 DHRC, *supra* note 4, at 215, 215.

112. Act Electing and Empowering Delegates (May 17, 1787), *reprinted in* 1 DHRC, *supra* note 4, at 215, 215.

113. House Substitute of 7 March for the Resolution of 22 February (Mar. 7, 1787), *reprinted in* 1 DHRC, *supra* note 4, at 207, 207; Assembly and Senate Authorize Election of Delegates (Feb. 26, 1787), *reprinted in* 1 DHRC, *supra* note 4, at 209, 209.

action.¹¹⁴ Moreover, in the official communications between the Maryland House and Senate, the Senate cited the Virginia resolution as the basis for action by the Maryland legislature.¹¹⁵ Nine states essentially followed the Virginia language in the grant of authority to their delegates. Connecticut adopted broad language of its own creation. One thing is clear about all twelve states: every legislature acted on the premise that it was the body that would decide what authority it would give its own delegates.

B. Arguments about Delegates' Authority at the Constitutional Convention

On the second Monday in May, in the eleventh year of the independence of the United States of America, "in virtue of appointments from their respective States, sundry Deputies to the foederal-Convention appeared."¹¹⁶ No quorum of states materialized until May 25th.¹¹⁷ On that day, the first order of business was the election of George Washington as President of the Convention followed by the election of a secretary.¹¹⁸ The next order of business was for each state to produce its credentials.¹¹⁹ The credentials of the seven states in attendance were read.¹²⁰ We know this from the following entry:

On reading the Credentials of the deputies it was noticed that those from Delaware were prohibited from changing the Article in the Confederation establishing an equality of votes among the states.¹²¹

Through the remainder of the Convention, upon the arrival of a new state, or a new delegate, the record repeatedly reflects that the credentials were produced and read.¹²² The Delaware

114. Act Electing and Empowering Delegates (Dec. 30, 1787), *reprinted in* 1 DHRC, *supra* note 4, 199, 199; Act Electing and Empowering Delegates (Feb. 3, 1787), *reprinted in* 1 DHRC, *supra* note 4, at 203, 203.

115. Senate Message to House Objecting to Adjournment (Jan. 20, 1787), *reprinted in* 1 DHRC, *supra* note 4, at 217, 217–18.

116. 1 FARRAND'S RECORDS, *supra* note 107, at 1.

117. *Id.*

118. *Id.* at 2.

119. *Id.*

120. *Id.*

121. *Id.* at 4.

122. *See id.* at 7, 45, 62, 76, 115, 334, 353.

example indicates clearly that the Convention understood that these deputies were agents of their state and subject to the instructions contained in their credentials.

On May 29th, 1789, Edmund Randolph introduced his plan for a truly national government.¹²³ It was met with immediate resistance on various grounds. General Charles Cotesworth Pinckney, a delegate from South Carolina, “expressed a doubt whether the act of Congs. recommending the Convention, or the Commissions of the deputies to it, could authorize a discussion of a System founded on different principles from the federal Constitution.”¹²⁴ Elbridge Gerry, from Massachusetts, expressed the same doubt. “The commission from Massachusetts empowers the deputies to proceed agreeably to the recommendation of Congress. This [sic] the foundation of the convention. If we have a right to pass this resolution we have a right to annihilate the confederation.”¹²⁵ Both objectors—who became leading Anti-Federalists after the Convention—described the act of Congress as a “recommendation.”¹²⁶ Both cited their state commissions as the formal source of their authority.¹²⁷ There was no motion made and no vote taken in response to these arguments. On June 7th, George Mason, who ultimately refused to sign the Constitution and became a leading Anti-Federalist,¹²⁸ described the authority of the convention somewhat more broadly. The delegates were “appointed for the special purpose of revising and amending the federal constitution, so as to obtain and preserve the important objects for which it was instituted.”¹²⁹

William Paterson rose on June 9th in opposition to the proposal to adopt a system of proportional representation for the legislative chamber. He contended that the Convention “was formed in pursuance of an Act of Congs. that this act was recited in several of the Commissions, particularly that of Massts.

123. *Id.* at 20.

124. *Id.* at 34.

125. *Id.* at 43.

126. *Id.* at 41, 43.

127. *Id.* at 34, 43.

128. Virginia Convention Debates (June 10, 1788), reprinted in 9 DHRC, *supra* note 4, at 811–813.

129. 1 FARRAND’S RECORDS, *supra* note 107, at 160–61.

which he required to be read."¹³⁰ Of course, the formula created by Congress was only followed precisely by New York and Massachusetts. Paterson cleverly avoided asking for a reading of his own New Jersey credentials, which contained a much broader statement of authority.¹³¹ He was attempting to defeat proportional representation, and he carefully selected the credentials he thought would bolster his political argument. Paterson elaborated on his view of the delegates' authority:

Our powers do not extend to the abolition of the State Governments, and the Erection of a national Govt. —They only authorise amendments in the present System, and have for yr. Basis the present Confederation which establishes the principle that each State has an equal vote in Congress¹³²

Six days later, Paterson introduced his well-known New Jersey plan which contained nine points: (1) federal powers were to be enlarged; (2) Congress should be given the power to tax; (3) enforcement powers should be given to collect delinquencies from the states; (4) Congress would appoint an executive; (5) a federal judiciary would be created; (6) a supremacy clause was included; (7) a process was created for admission of new states; (8) a uniform rule of naturalization should be adopted in each state; and (9) full faith and credit observed between the states with regard to criminal convictions.¹³³

The New Jersey Plan was no minor revision of the Articles of Confederation. It contained a radical expansion of power compared with the existing system. Paterson did not include any change in the system of voting in Congress. However, Congress would remain one-state, one-vote. And, he did not propose the direct election of any branch of government by the people. If the New Jersey Plan had formed the ultimate framework from the Convention, it would have almost certainly required a comprehensive rewrite of the Articles of Confederation—a “whole new document”—rather than discrete amendments. Paterson and the other Anti-Federalists did not object to massive changes or a new document; rather they contended that the delegates were unau-

130. *Id.* at 177.

131. See Resolution Authorizing and Empowering the Delegates (Nov. 24, 1786), reprinted in 1 DHRC, *supra* note 4, at 196, 196.

132. 1 FARRAND'S RECORDS, *supra* note 107, at 184.

133. *Id.* at 242–45.

thorized to adopt a different theory of government. When the advocates of the New Jersey Plan raised arguments about the scope of the delegates' authority, they were not making technical legal arguments. Their contention was one of political philosophy. Any plan that they deemed insufficiently "federalist" in character was beyond the scope of their view of the delegates' authority.

This is clearly shown by debates on the following day, Saturday, June 16th. John Lansing, Jr., an ardent Anti-Federalist from New York, asked for a reading of the first resolutions of both Paterson's plan and Randolph's Virginia Plan.¹³⁴ Lansing contended that Paterson's plan sustained the sovereignty of the states, while Randolph's destroyed state sovereignty.¹³⁵ He picked up Paterson's earlier contention that the Convention had the authority to adopt the New Jersey Plan but not the Virginia Plan.¹³⁶ "He was decidedly of opinion that the power of the Convention was restrained to amendments of a federal nature, and having for their basis the Confederacy in being."¹³⁷ Then he asserted, "The Act of Congress[, t]he tenor of the Acts of the States, the commissions produced by the several deputations all proved this."¹³⁸

While Lansing's own New York credentials followed the limited formula of Congress, he was playing fast and loose with the facts to assert that this was a fair description of the authority of any other state except Massachusetts. However, one component of his argument was more than disingenuous political spin. He emphasized the concept that the Convention must propose a federal, not national government.¹³⁹ Every state's credentials had explicit language embracing the view that the revised government should be federal in character since they were to deliver an adequate "federal constitution." Like Randolph's plan, the Anti-Federalists' plan would have required a substantial rewrite of the Articles of Confederation. Their continued objection was not to the writing of a "whole new document" but to a form of government that they personally deemed to be insufficiently "federal" in character. James Wilson took the floor immediately follow-

134. *Id.* at 249.

135. *Id.*

136. *Id.*

137. *Id.*

138. *Id.*

139. *Id.* at 246.

ing Lansing and Paterson on this Saturday session. He began with a side-by-side comparison of the two comprehensive plans. He contended that his powers allowed him to “agree to either plan or none.”¹⁴⁰

On the following Monday, June 18th, Madison picked up the argument. He contended that the New Jersey Plan itself varied from some delegates’ views of a federal system “since it is to operate eventually on individuals.”¹⁴¹ Madison contended that the States “sent us here to provide for the exigences [sic] of the Union. To rely on & propose any plan not adequate to these exigences [sic], merely because it was not clearly within our powers, would be to sacrifice the means to the end.”¹⁴² Here, and in other speeches and writings, Madison embraced the notion that the delegates would be justified in exceeding their strict instructions if necessary. But his moral argument was not a concession by him that, in fact, their proposed actions were a legal violation of their credentials. His argument was clearly in the alternative. He bolstered his argument based on the language adopted by ten states. This recitation makes it clear that he believed that their actions were justified under the language of their credentials.

Hamilton followed Madison in defense of the delegates’ authority to consider the Virginia Plan. They had been “appointed for the *sole* and *express* purpose of revising the confederation, and to *alter* or *amend* it, so as to render it effectual for the purposes of a good government.”¹⁴³ He concluded with a reminder that the Convention could only “propose and recommend.”¹⁴⁴ The power of ratifying or rejecting lay solely with the states.¹⁴⁵

On the following day, June 19th, Madison again defended the Virginia Plan against the charge that it was not sufficiently “federal” in character.¹⁴⁶ Madison focused on the claimed differences between a federal system and a national system to demonstrate that the Virginia Plan was indeed federal in char-

140. *Id.* at 261.

141. *Id.* at 283.

142. *Id.*

143. *Id.* at 294.

144. *Id.* at 295.

145. *Id.*

146. *Id.* at 313–22.

acter.¹⁴⁷ The Anti-Federalists claimed that a federal government could not operate directly on individuals.¹⁴⁸ Madison demonstrated that in certain instances both the existing Articles and the New Jersey Plan would permit direct governance of individuals.¹⁴⁹ Second, it was contended that to qualify as a federal plan the delegates to Congress had to be chosen by the state legislatures.¹⁵⁰ But, as Madison pointed out, Connecticut and Rhode Island currently selected their members in the Confederation Congress by a vote of the people rather than by the legislature.¹⁵¹ Thus, Madison convincingly argued that if the New Jersey Plan was “federal” in character and fell within the delegates’ credentials, the Virginia Plan was likewise a federal proposal and could be properly considered.

About two weeks later, when the contentious issue of the method of voting in the two houses of Congress hit a stalemate, on July 2nd, Robert Yates, an Anti-Federalist from New York, was appointed to the committee to discuss a proposal from Oliver Ellsworth that has come to be known as the Connecticut Compromise.¹⁵² That committee, headed by Elbridge Gerry, reported its recommendations on July 5th. Two days later, Gerry explained that the “new Govern[ment] would be partly national, partly federal.”¹⁵³

The Convention approved equal representation for each state in the Senate on July 7th.¹⁵⁴ And on July 10th, as they were hammering out the details for popular representation in the House of Representatives, Lansing and Yates left the Convention for good.¹⁵⁵ This left New York without a vote from that point on in the Convention. Hamilton remained and participated in the debates, but New York never cast another vote.

During the Convention, every allegation that delegates were exceeding their credentials was directed at the Virginia Plan and not the final product. Thus, it is simply not true to suggest

147. *Id.* at 314.

148. *Id.*

149. *Id.*

150. *Id.*

151. *Id.*

152. *Id.* at 509.

153. *Id.* at 551 (statement of Gouverneur Morris quoting Gerry).

154. *Id.* at 548–49.

155. *Id.* at 536.

that the Convention believed it was intentionally violating its credentials when voting to adopt the Constitution. Even during the earlier stages of the Convention, the Federalists defended the Virginia Plan as being within the scope of their authority. The final product—the actual Constitution—was more balanced toward true federalism than the Virginia Plan. Thus, at no stage of the Convention was there a consensus that the delegates were acting in an *ultra vires* manner.

C. *Debates in the Confederation Congress*

The Constitution was carried by William Jackson, secretary of the Convention, to New York where he delivered it to Congress on September 19th.¹⁵⁶ The debates over the Constitution began the following week on September 26th.¹⁵⁷

On the first day of debate, Nathan Dane made a motion contending that it was beyond the power of Congress to recommend approval of the new Constitution.¹⁵⁸ Congress was limited to proposing amendments to the Articles of Confederation rather than recommending a new system of government.¹⁵⁹ Dane's motion acknowledges that the delegates' powers were found in their state credentials.¹⁶⁰ Dane referred to the February 21st action of Congress as having "resolved that it was expedient that a Convention of the States should be held for the Sole and express purpose of revising the articles of Confederation."¹⁶¹ A fair reading of Dane's motion suggests that he was surprised by the outcome. Nothing he said implied that the delegates had violated their credentials from the states. Dane contended that Congress should simply forward the Constitution to the state legislatures for their consideration.¹⁶² He argued that this was neutral toward the Constitution, though he clearly opposed the document.¹⁶³

Richard Henry Lee vigorously contended that the Constitution could be amended by the Confederation Congress before it

156. 13 DHRC, *supra* note 4, at 229.

157. *Id.* at 231.

158. *Id.*

159. *Id.*

160. *Id.*

161. *Id.*

162. *Id.* at 232.

163. *Id.*

was sent to the states.¹⁶⁴ He ultimately proposed a series of amendments outlining many provisions in the nature of a bill of rights and various changes in the structure of government.¹⁶⁵ He also sought to establish the Senate on the basis of proportional representation rather than the equality of the states.¹⁶⁶ Rufus King of Massachusetts argued that Congress could not “constitutionally make alterations” and that “[t]he idea of [the] Convention originated in the states.”¹⁶⁷ Madison followed this argument almost immediately contending that “[t]he Convention was not appointed by Congress, but by the people from whom Congress derive their power.”¹⁶⁸

It must be noted there were substantial conflicts in Congress over the mode of ratification (which will be considered in section II) and it is fair to conclude that some members of Congress were surprised with the outcome of the Convention. Nonetheless, there was no serious contention that the delegates had violated their instructions from the states. Notably absent from the record is any claim that Congress had called the Convention and given the delegates their instructions and authority. This silence is powerful evidence that Congress did not believe that it had called the Convention or had issued binding instructions.

Every attempt to propose amendments or to express a substantive opinion on the merits of the Constitution was unsuccessful. On September 28th, Congress (voting by states) unanimously approved the following resolution:

Resolved unanimously, That the said report with the resolutions and letter accompanying the same be transmitted to the several legislatures in order to be submitted to a convention of delegates chosen in each state by the people thereof in conformity to the resolves of the Convention made and provided in that case.¹⁶⁹

The only recommendation coming from Congress was that the state legislatures should send the matter to state conventions. This

164. *Id.* at 237–38.

165. *Id.* at 238–240.

166. *Id.* at 240.

167. Melancton Smith’s Notes (Sept. 27, 1787), reprinted in 1 DHRC, *supra* note 4, at 335, 335–36.

168. *Id.* at 336.

169. Journals of Congress (Sept. 28, 1787), reprinted in 1 DHRC, *supra* note 4, at 340, 340.

was an approval of the new ratification process only, and not an approval of the merits of the Constitution.

D. Debates in the State Ratification Convention Process

Many people—even some scholars—contend that the Constitution was sent straight from the Constitutional Convention in Philadelphia to the ratification conventions in the several states.¹⁷⁰ Such “history” obviously misses two important steps. First, Congress dealt with the issue as we have just seen. Second, Congress sent the Constitution together with its recommendation for following the new process to the state legislatures—not the state ratification conventions. Each legislature had to decide whether it would follow this new process by calling a ratification convention within the state. Some of the most important discussions of the propriety of the actions of the Constitutional Convention are found in these state legislative debates. In some states, the issue spilled over into the ratification conventions and public debates as well. We consider the evidence from all such sources below.

1. *There was a General Consensus that the States, Not Congress Called the Convention*

While modern scholars generally assert that the Philadelphia Convention was called by Congress on February 21st, 1787, the contemporary view was decidedly different.¹⁷¹ As we shall see, the friends and opponents of the Constitution widely agreed that the origins and authority for the Convention came from the States.

During the Pennsylvania legislative debates over calling the state ratification convention, an important Federalist, Hugh Breckenridge, explained the origins of the Convention:

How did this business first originate? Did Virginia wait the recommendation of Congress? Did Pennsylvania, who followed her in the appointment of delegates, wait the recommendation of Congress? The Assembly of New York, when they found they had not the honor of being foremost in the measure, revived the idea of its being necessary to have it

170. See, e.g., Brian C. Murchison, *The Concept of Independence in Public Law*, 41 EMORY L.J. 961, 976 (1992) (“Moreover, the Convention did not present the proposed Constitution to Congress for approval, or to the legislatures of the states, but called for ratification by ‘specially elected conventions’ in the states.”).

171. See *supra* notes 88–92 and accompanying text.

recommended by Congress, as an excuse for their tardiness (being the seat of the federal government), and Congress, to humor them, complied with their suggestions But we never heard, that it was supposed necessary to wait [for Congress's] recommendations.¹⁷²

George Washington described the origins of the Convention in similar terms in a letter to Marquis de Lafayette on March 25th, 1787:

[M]ost of the Legislatures have appointed, & the rest it is said will appoint, delegates to meet at Philadelphia the second monday [sic] in may [sic] next in general Convention of the States to revise, and correct the defects of the federal System. Congress have also recognized, & recommended the measure.¹⁷³

Madison echoed this theme in a letter to Washington sent on September 30th, 1787. “[E]very circumstance indicated that the introduction of Congress as a party to the reform was intended by the states merely as a matter of form and respect,” he wrote.¹⁷⁴ Federalists, as may be expected, consistently adhered to the view that the Convention had been called by the states and the action of Congress was a mere endorsement.

Even in the midst of their assertions that the Convention had violated its instructions, leading Anti-Federalists repeatedly admitted that the Convention was called by the states and not by Congress. In the Pennsylvania legislature, an Anti-Federalist leader read the credentials granted to that state’s delegates to the Constitutional Convention, followed by the contention that “no other power was given to the delegates from this state (and I believe the power given by the other states was of the same nature and extent).”¹⁷⁵ An Anti-Federalist writer—who took the unpopular tack of attacking George Washington—admitted this point as well. “[T]he motion made by Virginia for a General Convention, was so readily

172. Assembly Debates, A.M. (Sept. 28, 1787), reprinted in 2 DHRC, *supra* note 4, at XX, 79–80.

173. Letter from George Washington to Marquis de Lafayette (Mar. 25, 1787), reprinted in THE PAPERS OF GEORGE WASHINGTON DIGITAL EDITION 106 (Theodore J. Crackel ed., 2008).

174. Letter from James Madison to George Washington, New York (Sept. 30, 1787), reprinted in 1 DHRC, *supra* note 4, at 343, 343–44.

175. Convention Debates (Nov. 28, 1787), reprinted in 2 DHRC, *supra* note 4, at 382, 394.

agreed to by all the States; and that as the people were so very zealous for a good Federal Government”¹⁷⁶ A series of Anti-Federalist articles appeared in the Massachusetts Centinel from December 29th, 1787 through February 6th, 1788.¹⁷⁷ In the first installment, this writer admitted that the Constitutional Convention originated in the Virginia legislature:

The Federal Convention was first proposed by the legislature of Virginia, to whom America is much indebted for having taken the lead on the most important occasions.— She first sounded the alarm respecting the intended usurpation and tyranny of Great-Britain, and has now proclaimed the necessity of more *power* and *energy* in our federal government

In consequence of the measures of Virginia respecting the calling a federal Convention, the legislature of this State on the 21st of February last, *Resolved*, “That five Commissioners be appointed by the General Court, who, or any three of whom, are hereby empowered to meet such commissioners as are or may be appointed by the legislatures of the other States”¹⁷⁸

Even in a state that formally adopted Congressional language, a major Anti-Federalist advocate admitted that its legislature was prompted to act “in consequence” of the call from Virginia.

2. *Who gave the delegates their instructions?*

An article in the New York Daily Advertiser on May 24, 1787, may provide us the most objective view on the source of the delegates’ authority since it was published the day before the Convention began its work. No one yet had a reason to claim that the delegates had violated their instructions.

[W]e are informed, that the authority granted to their delegates, by some states, are very extensive; by others even general, and by all much enlarged. Upon the whole we may

176. *An American*, AM. HERALD, Jan. 28, 1788, reprinted in 5 DHRC, *supra* note 4, at 792, 792.

177. See 5 DHRC, *supra* note 4, at 549, 589, 661, 698, 833, 843, 869.

178. *The Republican Federalist I*, MASS. CENTINEL, Dec. 29, 1787, reprinted in 5 DHRC, *supra* note 4, at 549, 551–52.

conclude that they will find their authority equal to the important work that will lay before them¹⁷⁹

This writer—opining before sides were formed—agreed with both the Federalists and the Anti-Federalists after the Convention that the relevant instructions to the delegates were issued by their respective states.

a. Anti-Federalist Views

Perhaps the most famous Anti-Federalist was Virginia's Patrick Henry. He led a nearly successful effort to defeat the ratification of the Constitution in that state's convention.¹⁸⁰ But, early in the process, as a superb trial lawyer, Henry sought to lay the documentary record before the Virginia convention to prove that the delegates had violated their instructions.

Mr. *Henry* moved, That the Act of Assembly appointing Deputies to meet at Annapolis, to consult with those from some other States, on the situation of the commerce of the United States—The Act of Assembly for appointing Deputies to meet at Philadelphia, to revise the Articles of Confederation—and other public papers relative thereto—should be read.¹⁸¹

Henry's maneuver demonstrates that he believed that the controlling instructions were to be found, not in a congressional measure, but in the two Virginia acts which appointed delegates to Annapolis and Philadelphia.

One of the most widely circulated Anti-Federalist attacks against the legitimacy of the Convention was a letter from Robert Yates and John Lansing, Jr. explaining their early exit from the Convention.¹⁸² The core of their argument was that the Convention had violated its restricted purpose. After reciting the familiar language that the convention had been confined to the "*sole and express purpose of revising the articles of Confederation*,"¹⁸³ their letter identifies what they believed to be the controlling source of those

179. *To the Political Freethinkers of America*, N.Y. DAILY ADVERTISER, May 24, 1787, reprinted in 13 DHRC, *supra* note 4, at 113, 114.

180. Virginia Convention Debates (June 10, 1788), reprinted in 9 DHRC, *supra* note 4, at 897–900.

181. Virginia Convention Debates (June 4, 1788), reprinted in 9 DHRC, *supra* note 4, at 915, 917.

182. *The Report of New York's Delegates to the Constitutional Convention*, N.Y. DAILY ADVERTISER, Jan. 14, 1788, reprinted in 15 DHRC, *supra* note 4, at 366.

183. *Id.* at 369.

instructions: "From these expressions, we were led to believe that a system of consolidated Government, could not, in the remotest degree, have been in contemplation of the Legislature of this State."¹⁸⁴ Their admission should lay to rest any suggestion that the Anti-Federalists believed that Congress gave the Convention its authority and instructions.

The New York Journal published a series of Anti-Federalist articles penned by Hugh Hughes under the pen name of "A Countryman."¹⁸⁵ He decries what seemed to be "a Predetermination of a Majority of the Members to reject their Instructions, and all authority under which they acted."¹⁸⁶ But earlier in the same paragraph he recites "the Resolutions of several of the States, for calling a Convention to *amend* the Confederation"¹⁸⁷ as the source of the delegates' instructions. His argument strongly suggests that all of the delegates violated their instructions. However, he recites only a paraphrase of the New York instructions in support of his contention. Again, he assumes that the state legislatures, not Congress, were the source for the delegates' instructions.

An Anti-Federalist writer from Georgia admitted the correct legal standard even in the midst of an assertion that played fast and loose with the facts:

[I]t is to be observed, delegates from all the states, except Rhode Island, were appointed by the legislatures, with this power only, "to meet in Convention, to join in devising and discussing all such ALTERATIONS and farther [sic] provisions as may be necessary to render the articles of the confederation adequate to the exigencies of the Union."¹⁸⁸

Not a single state appointed delegates with the exact language set out in this writer's alleged quotation. His own state's resolution does not even mention the Articles of Confederation.¹⁸⁹ He begins

184. *Id.*

185. See 19 DHRC, *supra* note 4, at 271, 291, 347, 424.

186. Hugh Hughes, *A Countryman I*, N.Y.J., Nov. 21, 1787, reprinted in 19 DHRC, *supra* note 4, at 271, 273.

187. *Id.*

188. *A Georgian*, GAZETTE ST. GA., Nov. 15, 1787, reprinted in 3 DHRC, *supra* note 4, at 236, 237.

189. The operative language from the Georgia legislature instructed the delegates: "to join with [other delegates] in devising and discussing all such alterations and farther [sic] provisions, as may be necessary to render the federal constitution adequate to the exigencies of the union." Act Electing and Empowering Delegates (Feb. 10, 1787), reprinted in 1 DHRC, *supra* note 4, at 204, 204.

by accurately citing the states as the source of the instructions and then, as was commonly the case, went from fact to fantasy when he purported to quote the delegates' instructions.

Letters from a Federal Farmer, which are widely recognized as the pinnacle of Anti-Federalist writing, contains the same admission—even in the midst of attacking the legitimacy of the convention. The Farmer accuses the Annapolis Convention of launching a plan aimed at “destroying the old constitution, and making a new one.”¹⁹⁰ The states were duped and fell in line. “The states still unsuspecting, and not aware that, they were passing the Rubicon, appointed members to the new convention, for the sole and express purpose of revising and amending the confederation.”¹⁹¹ The Farmer's political purpose was served by selectively quoting the language used only by two states. But his argument about the states being unaware they were passing the Rubicon applied to all twelve states—including the six that named their delegates and gave them their instructions before this phrase was ever drafted in the Confederation Congress. Again, the Farmer blames the states for being duped when they gave instructions to their delegates.

The Anti-Federalist Cato also contended that the process employed was improper. However, in a classic straw man argument, he decried a process that never happened. According to Cato, “a short history of the rise and progress of the Convention” starts with Congress determining that there were problems in the Articles of Confederation that could be fixed in a convention of states.¹⁹² He contends that Congress was the initiator and that the states were in the role of responders.¹⁹³ All citizens were entitled to their own opinions, but several Anti-Federalists seemed to believe they were also entitled to their own facts.

As we can see, while Anti-Federalists had serious doubts about the propriety of the actions of the Convention's delegates, there was an overriding acknowledgement within their ranks of one key legal issue: the sources of the authority for the delegates were the enactments of each of the several state legislatures.

190. Federal Farmer, *Letters to the Republican*, Nov. 8, 1787, reprinted in 19 DHRC, *supra* note 4, at 203, 211.

191. *Id.*

192. *Cato II*, N.Y.J., Oct. 11, 1787, reprinted in 19 DHRC, *supra* note 4, at 79, 81.

193. *Id.* at 79–82.

b. Federalist Views

In *Federalist No. 40*, Madison posed the question “whether the convention [was] authorized to frame and propose this mixed Constitution[?]”¹⁹⁴ His response was to the point: “The powers of the convention ought, in strictness, to be determined by an inspection of the commissions given to the members by their respective constituents.”¹⁹⁵ Even though Madison discusses the language from the Annapolis Report and the Congressional Resolution of February 21st, he establishes that his examination of those two documents is predicated on the idea that all the states essentially followed one formula or the other. Publius was clear: the states gave the delegates their instructions.¹⁹⁶

During the debate in the Massachusetts legislature over calling a state ratification convention, one Federalist member proclaimed, “Twelve States have appointed Deputies for the sole purpose of forming a system of federal government, adequate to the purposes of the union.”¹⁹⁷ The states gave the instructions, and the language he cites is the most common element of all state appointments.¹⁹⁸ John Marshall gave the ultimate answer to Henry’s claim that the delegates had exceeded their powers:

The Convention did not in fact assume any power. They have proposed to our consideration a scheme of Government which they thought advisable. We are not bound to adopt it, if we disapprove of it. Had not every individual in this community a right to tender that scheme which he thought most conducive to the welfare of his country? Have

194. THE FEDERALIST NO. 40, at 247 (James Madison) (Clinton Rossiter ed., 1961).

195. *Id.*

196. *Id.* at 254.

197. *House Proceedings and Debates of 24 October*, MASS. CENTINEL, Oct. 27, 1787, reprinted in 4 DHRC, *supra* note 4, at 135, 136.

198. See *A Friend to Good Government*, POUGHKEEPSIE COUNTRY J., Apr. 8, 1788, reprinted in 20 DHRC, *supra* note 4, at 902, 905 (“[T]he Convention that framed the Constitution, in question; they were appointed by the State Legislatures, and empowered by the letter of the authority under which they acted”); Oliver Ellsworth and William Samuel Johnson, *Speeches in the Connecticut Convention* (Jan. 4, 1788), reprinted in 15 DHRC, *supra* note 4, at 243, 249, (“As to the old system, we can go no further with it; experience has shewn [sic] it to be utterly inefficient. The States were sensible of this, to remedy the evil they appointed the convention.”) (statement of William Samuel Johnson).

not several Gentlemen already demonstrated, that the Convention did not exceed their powers?¹⁹⁹

Federalist authors defended the charge that the delegates exceeded their authority in several publications. Curtius II mocked Cato for making the allegation.²⁰⁰ “One of the People,” writing in the *Pennsylvania Gazette*, recited that the delegates had been authorized by their states to make alterations—an inherent right of the people.²⁰¹ “A Friend to Good Government,” in the *Poughkeepsie Country Journal*, defended the legitimacy of the convention with an accurate review of the events and documents.²⁰²

The most stinging defenses of the legitimacy of the actions of the Convention were aimed at New York’s Robert Yates and John Lansing, who had left the convention early and had widely attacked the Constitution as the result of unauthorized action. “A Dutchess County Farmer” argued that the Convention was:

[I]mpowered to make such alterations and provisions therein, as will render the federal Government (not Confederation) adequate to the exigencies of the Government and the preservation of the Union[.] In the discharge of this important trust, I am bold to say, that the Convention have not

199. Virginia Convention Debates (June 10, 1788) reprinted in 9 DHRC, *supra* note 4, at 1092, 1118.

200. Curtius II, N.Y. DAILY ADVERTISER, Oct. 18, 1787, reprinted in 19 DHRC, *supra* note 4, at 97, 97–102.

201. See *One of the People*, PENN. GAZETTE, Oct. 17, 1787, reprinted in 2 DHRC, *supra* note 4, at 186, 189–190 (“The deputies from this state were empowered, they had power to make such alterations and further provisions as may be necessary to render the federal government fully adequate to the exigencies of the Union. Had objections such as these prevailed, America never would have had a Congress, nor had America been independent. Alterations in government are always made by the people.”).

202. See *A Friend to Good Government*, POUGHKEEPSIE COUNTRY J., Apr. 8, 1788, reprinted in 20 DHRC, *supra* note 4, at 902, 902 (“[T]hey were appointed by the State Legislatures, and empowered by the letter of the authority under which they acted to report such alterations and amendments in the Confederation as would render the federal government adequate to the exigencies of government and the preservation of the Union—you will here perceive that the latitude given in the instruction, were amply large enough to justify the measures the Convention have taken. The objects in view were the welfare and preservation of the Union, and their business so far to new model our government as to encompass those objects.”).

gone beyond the spirit and letter of the authority under which they acted²⁰³

But it was the critique of Lansing and Yates that was the most contentious charge. They had justified their early exit on the basis that it was impractical to establish a general government. The Farmer asked:

[I]f you were convinced of the impracticability of establishing a general Government, what lead you to a Convention appointed for the sole and express purpose of establishing one; could you suppose it was the intention of the Legislature to send you to Philadelphia, to stalk down through Water street, cross over by the way of Chesnut, into Second street, and so return to Albany? [T]he public are well acquainted with what you have not done. Now good Sirs, in the name of humanity, tell us what you have done, or do you suppose that the *limited and well defined powers under which you acted*, made your business only *negative*?²⁰⁴

Lansing and Yates were also strongly criticized by “A Citizen” writing in the Lansingburg Northern Centinel:

The powers given to the Convention were for the purpose of proposing amendments to an old Constitution; and I conceive, with powers so defined, if this body saw the necessity of amending the whole, as well as any of its parts, which they undoubtedly had an equal right to do, thence it follows, that an amendment of every article from the first to the last, inclusive, is such a one as is comprehended within the powers of the Convention, and differs only from an entire new Constitution in this, that the one is an old one made new, the other new originally.²⁰⁵

“The Citizen” turned out to be a lawyer from Albany named George Metcalf.²⁰⁶ Lansing and Yates were so incensed at his effective attacks on their actions and character that they commenced a legal action against him.²⁰⁷ They also sought,

203. *A Dutchess County Farmer*, POUGHKEEPSIE COUNTRY J., Feb. 26, 1788, reprinted in 20 DHRC, *supra* note 4, at 815, 816.

204. *Id.* at 817.

205. *A Citizen*, LANSINGBURGH NORTHERN CENTINEL, Jan. 29, 1788, reprinted in 20 DHRC, *supra* note 4, at 674, 676–77.

206. *See id.* at 674.

207. *George Metcalf Defends Himself*, ALBANY J., Mar. 1, 1788, reprinted in 20 DHRC, *supra* note 4, at 832, 832–33.

apparently unsuccessfully, to determine the identity of the Dutchess County Farmer.²⁰⁸

The charge that the Convention exceeded its authority was leveled in state legislatures, ratification conventions, and in the public debates in the papers. In every one of those venues, the Federalists responded to the charges with timely and effective arguments. The overwhelming evidence is that the Federalists believed that they had repeatedly and successfully defeated these claims. As John Marshall said: "Have not several Gentlemen already demonstrated, that the Convention did not exceed their powers?"²⁰⁹

3. *Was the Convention unlawful from the beginning?*

The most extreme Anti-Federalist argument was proffered by Abraham Yates, Jr., of New York. He argued that every stage of the process was illegal. The New York legislature violated the state constitution, when on February 19th, 1787, it voted to instruct the state's delegates in Congress to recommend a convention to propose amendments to the articles.²¹⁰ Congress violated Article XIII of the Articles of Confederation when it voted on February 21st "to recommend a convention to the several legislatures."²¹¹ The New York Senate and Assembly violated the state constitution yet again, he contended, by voting on March 27th to appoint delegates to the convention in Philadelphia.²¹²

Yates continued the list of alleged violations to include the September 17th vote of the Convention to approve the Constitution, the refusal of Congress to defeat the Constitution on September 28th, and the action of the New York legislature in February 1788 to call the ratification convention.²¹³ Yates' argument was not based on the parsing of the language of state instructions and congressional resolutions. He contended that "to attempt a consolidation of the union and utterly destroy the confederation, and

208. See Letter from Abraham G. Lansing to Abraham Yates, Jr. (Mar. 2, 1788), reprinted in 20 DHRC, *supra* note 4, at 835.

209. Virginia Convention Debates (June 10, 1788) reprinted in 9 DHRC, *supra* note 4, at 1092, 1118.

210. *Sydney*, N.Y.J., June 13–14, 1788, reprinted in 20 DHRC, *supra* note 4, at 1153, 1156.

211. *Id.*

212. *Id.* at 1156–57.

213. *Id.* at 1157.

the sovereignty of particular states” was beyond the authority granted to any state legislature in their respective constitutions and beyond the power of Congress in the Articles of Confederation.²¹⁴ To justify the kind of government created by the Constitution, Yates apparently believed that the people of every state would first need to amend their state constitutions to give their legislatures the power to enter into such a government. Then the states would be authorized to direct their delegates in Congress to propose amendments to the Articles of Confederation in accord with the new state constitutional provisions. Finally, Congress would be required to approve the new measure followed by the unanimous consent of the legislatures of every state. This position was echoed in delegate instructions drafted by the town of Great Barrington, Massachusetts²¹⁵—a community that was at the center of Shay’s Rebellion.²¹⁶

Yates does help us understand the true nature of the Anti-Federalist argument. They were not contending that they expected a series of discrete amendments to the Articles of Confederation. The New Jersey Plan would have also required a wholesale revision of that document. Anti-Federalists contended that no one was authorized at any point to adopt a government that was national rather than federal in character.²¹⁷ The Convention was condemned not for creating a whole new document, but for creating a government with a new nature. Anti-Federalists conceded the key procedural points—the states called the convention and the states gave their delegates their instructions. To have contended otherwise would have turned Anti-Federalist doctrine on its head. Advocates for state supremacy simply could not argue that Congress had an implied power to call a convention and that the states’ delegates were bound to follow the will of Congress. Contemporary practice was exactly the opposite. State legislatures routinely instructed their delegations in Congress.²¹⁸ No one would have the audac-

214. *Id.*

215. Draft Instructions (Nov. 26, 1787), reprinted in 5 DHRC, *supra* note 4, at 959.

216. Stephen T. Riley, *Dr. William Whiting and Shays’ Rebellion*, 66 PROC. OF THE AM. ANTIQUARIAN SOC’Y 119, 120 (1957).

217. See, e.g., 1 FARRAND’S RECORDS, *supra* note 107, at 34, 42–43.

218. See, e.g., 5 THE PAPERS OF JAMES MADISON 231–34 (William T. Hutchinson et al. eds., 1962).

ity to contend the reverse was true—especially not a self-respecting Anti-Federalist.

4. *The “Runaway Convention” theory was tested and rejected*

The Anti-Federalists’ claim that the delegates to the Convention exceeded their authority was put to a vote in New York and Massachusetts—the only two states that tracked the congressional language in their delegates’ instructions.

The New York legislature was decidedly anti-reform—it systematically rejected amendments to the Articles of Confederation and had done its best to derail the Philadelphia Convention by proposing a limited alternative in Congress.²¹⁹ It is unsurprising, therefore, that there was a motion in the New York legislature to condemn the work of the Constitutional Convention as an *ultra vires* proposal. On January 31st, 1788, Cornelius C. Schoonmaker and Samuel Jones proposed a resolution which recited that “the Senate and Assembly of this State” had “appointed Delegates” to the Philadelphia convention “for the sole and express purpose of revising the articles of confederation.”²²⁰ To this point, the resolution was correct since it focused solely on the language employed by the New York legislature. However, the resolution then claimed that the “Delegates from several of the States” met in Philadelphia “for the purpose aforesaid.”²²¹ Based on this inaccurate recitation of the credentials from the other states, the resolution claimed that “instead of revising and reporting alterations and provisions in the Articles of Confederation” the delegates “have reported a new Constitution for the United States” which “will materially alter the Constitution and Government of this State.”²²² A contentious debate ensued, but ultimately the legislature of this Anti-Federalist-leaning state defeated the motion by a vote of 27 to 25.²²³

219. See *supra* notes 81–84 and accompanying text; 32 JOURNALS OF CONGRESS, *supra* note 70, at 72–73.

220. Assembly Proceedings (Jan. 31 1788), reprinted in 20 DHRC, *supra* note 4, at 703, 703.

221. *Id.*

222. *Id.* at 704.

223. *Id.*

A similar debate arose in the Massachusetts legislature. Dr. Kilham argued that the Convention had “assum[ed] powers not delegated to them by their commission.”²²⁴ Immediately thereafter the Massachusetts House voted to call the ratification convention by a vote of 129 to 32.²²⁵ A more specific resolution was made in the Massachusetts ratification convention. “Mr. Bishop” from Rehoboth, moved to “strike out all that related to the Constitution” and to “insert a clause” in which “the General Convention was charged with exceeding their powers & recommending measures which might involve the Country in blood.”²²⁶ The motion was defeated by a vote of “90 & od to 50 & od.”²²⁷ The final ratification by Massachusetts recites that the people of the United States had the opportunity to enter into “an explicit & solemn Compact” “without fraud or surprise.”²²⁸

In addition to these formal defeats in the very states that had relied on the restrictive language from Congress, an Anti-Federalist critic penned an article in the New York Daily Advertiser that demonstrated that the general public in that city rejected these claims. “Curtiopolis” claimed that the “Convention were delegated to *amend* our political Constitution, instead of which they *altered it*.”²²⁹ He accused the delegates of “detestable *hypocrisy*” and claimed that “their deeds were *evil*.”²³⁰ Focusing in on Alexander Hamilton, Curtiopolis urged the readers “to take good notice of that vile conspirator, *the author of Publius*: I think he might be impeached for high treason: he continues to do infinite mischief *among readers*: this whole city, except about forty [or] fifty of us, are all bewitched with him, and he is a playing the very devil elsewhere.”²³¹ This Anti-Federalist writer openly admitted that only forty or fifty people in New York City agreed with his strident position—the rest of the population were “bewitched.”

224. MASS. CENTINEL, Oct. 27, 1787, reprinted in 4 DHRC, *supra* note 4, at 135, 135.

225. *Id.* at 138.

226. Letter from Nathaniel Gorham to Henry Knox (Mar. 9, 1788), reprinted in 7 DHRC, *supra* note 4, at 1673, 1674.

227. *Id.*

228. 16 DHRC, *supra* note 4, at 68.

229. Curtiopolis, N.Y. DAILY ADVERTISER, Jan. 18, 1788, reprinted in 20 DHRC, *supra* note 4, at 625, 625.

230. *Id.* at 625–26.

231. *Id.* at 628.

While it is clear that the allegation of *ultra vires* action was widely asserted, this view was decisively rejected in the two states that had the only plausible basis for raising the contention. It was a minority view, often accompanied by inflammatory charges against the delegates to the Convention.

II. WAS THE CONSTITUTION PROPERLY RATIFIED?

The most common modern attack against the legitimacy of the Constitution has been addressed—the delegates did not exceed the authority granted to them by their states. Neither Federalists nor Anti-Federalists contended that the calling of the Convention was premised on the language of Article XIII of the Articles of Confederation. But, when critics of the Constitution's adoption turn to the ratification process, they suddenly shift gears. They claim the Constitution was not properly ratified when it was adopted because the process found in Article XIII was not followed. This Article specified that amendments had to be ratified by all thirteen states—rather than being approved by specially called conventions in just nine states.

Logically, if the Convention was not called under the authority of the Articles to begin with, as most concede, it makes little sense to argue that the Convention needed to follow the ratification process contained therein. This confusion is understandable because, prior to the Convention, the clear expectation was that the work product from Philadelphia would be first sent to Congress and then would be adopted only when ratified by all thirteen legislatures. But, as we see below, the source of this rule was not Article XIII, but the resolutions from the states, which had called the Convention and given instructions to their delegates.

However, we will also discover that most critics have overlooked two important steps taken in the process of adopting the Constitution. The Convention enacted two formal measures. One was the Constitution itself. The second was a formal proposal concerning a change in the ratification process. Congress and all thirteen state legislatures approved this change in process. The expected process was used to approve a process designed to obtain the consent of the governed. This two-stage endeavor was aimed to satisfy both the legal requirements from the old system and the moral claim that the Constitution should be approved by the people themselves.

A. *The Source of Law for Ratification Authority*

Although not formally binding, both the Annapolis Convention and the February 21st Congressional endorsement look to the same method for ratification of the Constitutional Convention's work. The Annapolis report suggests that the Convention should send its proposal "to the United States in Congress Assembled, as when agreed to, by them, and afterwards confirmed by the Legislatures of every State, will effectually provide for the same."²³² The controlling documents—the delegates' appointments by their respective legislatures—were in general agreement as to the mode of ratification. Virginia's legislature specified the following: "reporting such an Act for that purpose, to the United States in Congress, as, when agreed to by them, and duly confirmed by the several States, will effectually provide for the same."²³³ Georgia,²³⁴ South Carolina,²³⁵ Maryland,²³⁶ and New Hampshire²³⁷ employed the exact same phrasing. Pennsylvania made only a minor change allowing for the submission of "such act or acts."²³⁸ This two-word variance was repeated precisely by Delaware.²³⁹ Thus seven states were in near unison on the point. New Jersey and North Carolina were silent on the issue of the method of ratification. Massachusetts quoted the ratification language of the February 21st endorsement by Congress.²⁴⁰ New York copied the Congressional language precisely in the formal directives to their dele-

232. Proceedings and Report of the Commissioners at Annapolis, Maryland (Sept. 11–14, 1786), *reprinted in* 1 DHRC, *supra* note 4, at 181, 184–185. The language of the Congressional endorsement was nearly identical. *See supra* note 89 and accompanying text.

233. Act Authorizing the Election of Delegates (Nov. 23, 1786), *reprinted in* 1 DHRC, *supra* note 4, at 196, 197.

234. Act Electing and Empowering Delegates (Feb. 10, 1787), *reprinted in* 1 DHRC, *supra* note 4, at 204, 204.

235. Act Authorizing the Election of Delegates, (Mar. 8, 1787), *reprinted in* 1 DHRC, *supra* note 4, at 213, 214.

236. Act Electing and Empowering Delegates (May 26, 1787), *reprinted in* 1 DHRC, *supra* note 4, at 222, 223.

237. Resolution Electing and Empowering Delegates (Jan. 17, 1787), *reprinted in* 1 DHRC, *supra* note 4, at 223, 223.

238. Act Electing and Empowering Delegates (Dec. 30, 1786), *reprinted in* 1 DHRC, *supra* note 4, at 199, 199–200.

239. Act Electing and Empowering Delegates (Feb. 3, 1787), *reprinted in* 1 DHRC, *supra* note 4, at 203, 203.

240. House Substitute of 7 March for the Resolution of 22 February (Mar. 7, 1787), *reprinted in* 1 DHRC, *supra* note 4, at 207.

gates.²⁴¹ Connecticut used similar, but somewhat distinct language: “[r]eport such Alterations and Provisions . . . to the Congress of the United States, and to the General Assembly of this State.”²⁴² The variances are legally insignificant. Every state that addressed the method of ratification contemplated that the Convention would send its report first for approval by Congress and then for final adoption by the legislatures of the several states.

B. The Constitutional Convention’s Development of the Plan for Ratification

The very first mention of the plan for ratification was on May 29th in a speech by Edmund Randolph during the first substantive discussion in the Convention. Randolph laid out a fifteen-point outline that became known as the Virginia Plan.²⁴³ The final item dealt with ratification:

15. Resd. that the amendments which shall be offered to the Confederation, by the Convention ought at a proper time, or times, after the approbation of Congress, to be submitted to an assembly or assemblies of Representatives, recommended by the several Legislatures to be expressly chosen by the people, to consider & decide thereon.²⁴⁴

This obviously differed from the language of the delegates’ instructions. Randolph’s proposal, like the instructions from the states, called for approval by Congress. But rather than approval by the legislatures themselves, Randolph called for ratification conventions of specially elected delegates upon the recommendation of each legislature.

What is clear, both from this language and from the ensuing debates, is that there were two competing ideas concerning ratification of the Constitution. The first theory, driven by traditional, institutional, and legal concerns, was that Congress and all thirteen state legislatures should be the agencies that consent on behalf of the people. Alternatively, others contended that the people themselves should consent to the Constitution. Randolph’s ratification method took elements of both. Congress—which had rep-

241. Assembly and Senate Elect Delegates (Mar. 6, 1787), *reprinted in* 1 DHRC, *supra* note 4, at 211, 211.

242. Act Electing and Empowering Delegates (May 17, 1787), *reprinted in* 1 DHRC, *supra* note 4, at 215, 216.

243. 1 FARRAND’S RECORDS, *supra* note 107, at 18–22.

244. *Id.* at 22.

representatives from every state and which voted as states—would approve first to satisfy the institutional and legal interest. The second step of state ratification conventions was offered as the best method to obtain the direct consent of the people. It was believed that the consent of the governed was best obtained not by a vote by state legislators, who were chosen for multiple purposes, but by convention delegates elected solely for the purpose of ratifying or rejecting the Constitution.

The first debate on Randolph's fifteenth resolution was recorded on June 5th. Madison's notes list six delegates who spoke to the issue—Sherman, Madison, Gerry, King, Wilson, and Pinkney.²⁴⁵ Yates' notes only mention comments by Madison, King, and Wilson.²⁴⁶ Roger Sherman thought popular ratification was unnecessary.²⁴⁷ He referred to the provision in the Articles of Confederation for changes and alterations.²⁴⁸ It is not clear from the context whether Sherman believed that such measures were legally binding or merely provided an appropriate example that should be followed.²⁴⁹ Madison argued that the new Constitution should be ratified in the "most unexceptionable form, and by the supreme authority of the people themselves."²⁵⁰ He also suggested that the Confederation had been defective in the method of ratification since it lacked any direct approbation by the people.²⁵¹ Elbridge Gerry contended that the Articles had been sanctioned by the people in the eastern states.²⁵² He also warned that the people of this quarter were too wild to be trusted with a vote on the issue.²⁵³ His fears undoubtedly arose from concerns about Shay's Rebellion and associated populist movements, particularly in Rhode Island.²⁵⁴

Rufus King argued that Article XIII legitimized the idea that legislatures were competent to ratify constitutional changes

245. *Id.* at 122–123.

246. *Id.* at 126–27.

247. *Id.* at 122.

248. *Id.*

249. *See id.*

250. *Id.* at 123.

251. *Id.* at 122–23, 126–127.

252. *Id.* at 123.

253. *Id.*

254. MASS. CENTINEL, Oct. 27, 1787, reprinted in 4 DHRC, *supra* note 4, at xliii.

and that the people had impliedly consented.²⁵⁵ But, he continued, it might make good policy sense to change the mode.²⁵⁶ In the end, the people wouldn't care which method of consent was employed so long as the substantive document was appropriate.²⁵⁷ In Madison's notes, James Wilson of Pennsylvania argued that whatever process was adopted, it should not end with the result that a few inconsiderate or selfish states should be able to prevent the others from "confederat[ing] anew on better principles" while allowing the others to accede later.²⁵⁸ Yates's notes focus on Wilson's contention that "the people by a convention are the only power that can ratify the proposed system of the new government."²⁵⁹ Charles Pinckney of South Carolina agreed with the essence of Wilson's first point arguing that if nine states could agree on a new government, it should suffice.²⁶⁰ After these speakers, it became obvious that more work would be needed to reach consensus on the topic. And it was quickly agreed that the issue should be postponed.²⁶¹

The fifteenth resolution regarding the ratification process was raised for a vote in the Committee of the Whole on June 12th. Yates records that no debate arose and that it passed five in favor, three opposed, and two states divided.²⁶² Madison records the vote as six in favor, New York, New Jersey, and Connecticut opposed, while Delaware and New Jersey were divided.²⁶³ On July 23rd, the issue was again addressed. The provision was now numbered as the nineteenth resolution of the amended Virginia Plan. Ellsworth moved to refer the Constitution to the legislatures of the States for ratification.²⁶⁴ Although New Jersey temporarily lacked a quorum for voting purposes, Paterson seconded the motion.²⁶⁵

255. 1 FARRAND'S RECORDS, *supra* note 107, at 123.

256. *Id.*

257. *Id.* at 123, 127.

258. *Id.* at 123.

259. *Id.* at 127.

260. *Id.* at 123.

261. *Id.* at 123, 127.

262. *Id.* at 220.

263. *Id.* at 214.

264. 2 FARRAND'S RECORDS, *supra* note 107, at 88.

265. *Id.*

Mason, Randolph, Nathaniel Gorham of Massachusetts, Hugh Williamson of North Carolina, Morris, King, and Madison spoke against the motion. It was supported only by Ellsworth and Gerry.²⁶⁶ The vast majority of the debate was centered on the contention that the Constitution would be placed on the best footing if arising from the direct approval by the people. Though no one disputed this moral proposition, Gerry contended that the people had acquiesced in the ratification of the Articles of Confederation which was a sufficient expression of the consent of the governed.²⁶⁷ Moreover, he argued, the contention that the direct consent of the governed was necessary proved too much since the argument would delegitimize the Articles of Confederation and many state constitutions.²⁶⁸ Neither Gerry nor Ellsworth expressly argued that the text of Article XIII was legally controlling. But, Ellsworth came close to implying this idea. This prompted the following response from Morris:

The amendmt. moved by Mr. Elseworth [sic] erroneously supposes that we are proceeding on the basis of the Confederation. This Convention is unknown to the Confederation.²⁶⁹

No refutation of Morris was forthcoming from any of the proponents of legislative ratification.

Ellsworth's motion was defeated 7 to 3, with Connecticut, Delaware, and Maryland supporting the motion.²⁷⁰ Morris then moved for a new national ratification convention chosen and authorized by the people.²⁷¹ This idea was truly unpopular and died for the lack of a second.²⁷² Thus, as of July 23rd, the plan was to submit the new Constitution to Congress and then on to state ratification conventions.²⁷³ But, this was not the end of the matter.

The Convention adjourned on July 26th until August 6th to allow a Committee of Detail to transform all of the resolutions into a single working draft.²⁷⁴ On the 6th, the Convention re-

266. *Id.* at 88–94.

267. *Id.* at 89–90.

268. *Id.*

269. *Id.* at 92.

270. *Id.* at 93.

271. *Id.*

272. *Id.*

273. *Id.* at 93–94.

274. *Id.* at 128.

convened, distributed the draft document and adjourned until the next day to allow the delegates a chance to read the whole document.²⁷⁵ There were now three provisions concerning ratification and transition to the new government, Articles XXI, XXII and XXIII:

ARTICLE XXI.

The ratification of the conventions of __ States shall be sufficient for organizing this Constitution.

ARTICLE XXII.

This Constitution shall be laid before the United States in Congress assembled, for their approbation; and it is the opinion of this Convention, that it should be afterwards submitted to a Convention chosen [in each State], under the recommendation of its legislature, in order to receive the ratification of such Convention.

ARTICLE XXIII.

To introduce this government, it is the opinion of this Convention, that each assenting convention should notify its assent and ratification to the United States in Congress assembled; that Congress, after receiving the assent and ratification of the Conventions of __ States, should appoint and publish a day, as early as may be, and appoint a place, for commencing proceedings under this Constitution; that after such publication, the Legislatures of the several States should elect members of the Senate, and direct the election of members of the House of Representatives; and that the members of the Legislature should meet at the time and place assigned by Congress, and should, as soon as may be, after their meeting, choose the President of the United States, and proceed to execute this Constitution.²⁷⁶

Debate on these three articles began on August 30th.²⁷⁷ The initial focus was the matter of filling in the blank left in the draft—how many states would be required to ratify. Wilson proposed seven—a majority.²⁷⁸ Morris argued for two different numbers, a lower number if the ratifying states were contigu-

275. *Id.* at 176.

276. *Id.* at 189.

277. *Id.* at 468.

278. *Id.*

ous, and a higher number if not.²⁷⁹ Sherman argued that since the present system required unanimous approval, ten seemed like the right number.²⁸⁰ Randolph argued for nine because it was a “respectable majority of the whole” and was a familiar number under the Articles.²⁸¹ Wilson suggested eight.²⁸² Carroll argued that the number should be thirteen since unanimity should be required to dissolve the existing confederation.²⁸³

Madison, Wilson, and King debated the issue of whether non-consenting states could be bound by the action of a majority or super-majority.²⁸⁴ The whole debate spilled over to the next day.²⁸⁵ King immediately moved to add the words “between the said States” to “confine the operation of the Govt. to the States ratifying it.”²⁸⁶ Nine states voted favorably.²⁸⁷ Maryland was the lone dissent.²⁸⁸ Delaware was temporarily without a quorum. The moral principle of treaty law prevailed—no state could be bound by a treaty without its consent.

During the debates, various formulas were proposed and rejected. Madison offered seven states.²⁸⁹ Morris moved to allow each state to choose its own method for ratification.²⁹⁰ Sherman, who argued for ten states on the prior day, now argued that all thirteen should be required.²⁹¹ A motion to fill in the blank with 10 states was rejected 7 to 4.²⁹² Nine states (which was apparently moved by Mason) was approved by a vote of 8 to 3.²⁹³ Virginia

279. *Id.*

280. *Id.* at 468–69.

281. *Id.* at 469. Nine states could declare war and take other military actions, for example. See ARTICLES OF CONFEDERATION OF 1781, art. IX, para. 6.

282. 2 FARRAND’S RECORDS, *supra* note 107, at 469.

283. *Id.*

284. *Id.*

285. *Id.*

286. *Id.* at 475.

287. *Id.*

288. *Id.*

289. *Id.*

290. *Id.*

291. *Id.*

292. *Id.* at 477.

293. *Id.*

and both Carolinas voted no.²⁹⁴ Then final passage of the Article as amended was approved by all states save for Maryland.²⁹⁵

The debate then turned to Article XXII which required the approbation of Congress and then submission to the ratification conventions, with the state legislatures being responsible for the calling and associated rules.²⁹⁶ Morris moved to strike the phrase requiring the “approbation” of Congress.²⁹⁷ His motion passed eight states to three—with Massachusetts, Maryland, and Georgia voting no.²⁹⁸ Other skirmishes ensued, the most important of which was the suggestion of Randolph to allow the state ratification conventions to be at liberty to propose amendments which would then be submitted to a second general convention.²⁹⁹ He generated no support for his idea.³⁰⁰ Final passage on Article XXII as drafted was 10 to 1, with Maryland again being the lone dissent.³⁰¹ Article XXIII, which provided a transition plan for moving from the Articles to the Constitution, was then approved with a minor amendment without dissent.³⁰²

On September 5th, Gerry gave notice that he intended to move for reconsideration of Articles XIX, XX, XXI, and XXII.³⁰³ His motions regarding Articles XXI and XXII were heard on September 10th.³⁰⁴ Gerry argued that failing to require the approbation of Congress would give umbrage to that body.³⁰⁵ Hamilton spoke strongly in support of Gerry’s motion:

Mr. Hamilton concurred with Mr. Gerry as to the indecorum of not requiring the approbation of Congress. He considered this as a necessary ingredient in the transaction. He thought it wrong also to allow nine States as provided by art. XXI. to institute a new Government on the ruins of the existing one. He [would] propose as a better modification of the two articles (XXI & XXII) that the plan should be sent

294. *Id.*

295. *Id.*

296. *Id.* at 478.

297. *Id.*

298. *Id.*

299. *Id.* at 479.

300. *Id.*

301. *Id.*

302. *Id.* at 479–80.

303. *Id.* at 511.

304. *Id.* at 559.

305. *Id.* at 559–60.

to Congress in order that the same if approved by them, may be communicated to the State Legislatures, to the end that they may refer it to State Conventions; each Legislature declaring that if the convention of the State should think the plan ought to take effect among nine ratifying States, the same [should] take effect accordingly.³⁰⁶

In other words, Hamilton argued that the plan for nine states to approve the new Constitution would in fact be appropriate if the new plan for ratification was first approved by the Congress and then by the thirteen state legislatures. Hamilton's proposal would thread the needle, achieving both of the competing interests—the desire to follow the recognized procedures to achieve legal validity (approval of the new process both by Congress and the state legislatures) as well as the desire to ground the Constitution in the moral authority that flows from the approval of the people. Sherman made a second important suggestion in accord with Hamilton. Rather than embodying the Hamilton plan in the text of the proposed Constitution, Sherman proposed that these ratification requirements should be made a “separate Act”—a formal proposal having legal weight but distinct from the ultimate document itself.³⁰⁷ The motion to reconsider was passed seven to three with New Hampshire divided. Massachusetts, Pennsylvania, and South Carolina were the dissenting states.³⁰⁸

A motion to take up Hamilton's idea was defeated, on a procedural vote, 10 to 1.³⁰⁹ Article XXI as submitted was then approved unanimously.³¹⁰ Hamilton withdrew his motion regarding Article XXII since it was certain to meet with the same defeat.³¹¹ Hamilton's motion would have provided a very clear argument for both legal and moral validity—but at this stage it was rejected.³¹² Immediately after this vote, the Constitution was committed to the final committee of style to prepare the final draft of the Constitution.³¹³

306. *Id.* at 560.

307. *Id.* at 561.

308. *Id.*

309. *Id.* at 563.

310. *Id.*

311. *Id.*

312. *Id.*

313. *Id.* at 564.

Surprisingly, on September 10th, the Committee of Style returned with final language that essentially tracked the suggestions of Hamilton and Sherman.³¹⁴ The final version of Article VII regarding ratification followed the previously approved text of the draft Article XXI: “The ratification of the Conventions of nine States shall be sufficient for the establishment of this Constitution between the States so ratifying the same.”³¹⁵

The contents of draft Articles XXII and XXIII were placed into a separate formal act adopted unanimously as an official act of the Convention.³¹⁶ The controlling paragraph of this second official enactment read as following:

Resolved, That the preceding Constitution be laid before the United States in Congress assembled, and that it is the Opinion of this Convention, that it should afterwards be submitted to a Convention of Delegates, chosen in each State by the People thereof, under the Recommendation of its Legislature, for their Assent and Ratification; and that each Convention assenting to, and ratifying the Same, should give Notice thereof to the United States in Congress assembled.³¹⁷

This Act also contained the transition plan for elections for the new government that had been previously drafted as Article XXIII.³¹⁸ In addition to the Constitution and the “Ratification and Transition” Resolution, a formal letter of transmission was also sent from the Convention to Congress.³¹⁹ The letter was adopted by the “Unanimous Order of the Convention” and formally signed by George Washington, President of the Convention.³²⁰

In the end, the Convention followed Hamilton’s suggestion as to content and Sherman’s suggestion as to bifurcation. They would lay the matter before Congress with the request that Congress send the matter to the state legislatures.³²¹ The legislatures were, in turn, requested to approve the new methodology for ratification.³²² It is this final product that must be considered

314. *Id.* at 579.

315. *Id.* at 603.

316. *Id.* at 604–05, 665–66.

317. *Id.* at 665.

318. *Id.* at 665–66.

319. *Id.* at 666–67.

320. *Id.* at 667.

321. *Id.* at 665.

322. *Id.*

in assessing the legality of the process employed for ratification—not any of the prior suggestions or drafts that were considered by the Convention.

There appears to be no scholarly work that assesses the validity of the ratification process taking into account the full process sanctioned by the Convention, followed by Congress, and approved by the thirteen state legislatures. No one would doubt the need to consider the legal ramifications of this language had it remained in the text of the Constitution. The decision of the Convention to separate the transitional articles into a separate act was not done so as to deny their efficacy. It was an apparent decision to not clutter the Constitution of the United States with language that was temporary in nature. This language was just as formal as the Constitution itself and actually was employed by the sanction of Congress and the state legislatures for both the ratification process and in planning for an orderly transition.

C. *Debates in the Confederation Congress*

On September 19th, the Secretary of the Constitutional Convention, William Jackson, delivered the Constitution, the “Ratification and Transition” Resolution, and the letter to the Secretary of the Confederation Congress, Charles Thompson.³²³ It was read to Congress on September 20th and the date of September 26th was assigned for its consideration.³²⁴ The debate lasted for two days.³²⁵

Every speaker in Congress ultimately argued that the Constitution should be laid before the people via the convention process outlined in Article VII and the “Ratification and Transition” Resolution.³²⁶ However, there was a strong clash over the approach in so doing. Nathan Dane wanted Congress to adopt language that explained that since the “constitution appears to be intended as an entire system in itself, and not as any part of, or alteration in the Articles of Confederation” Congress—which was a creature of the Articles—was powerless to take

323. 13 DHRC, *supra* note 4, at 229.

324. *Id.*

325. *Id.*

326. See 1 DHRC, *supra* note 4, at 327–340.

any action thereon.³²⁷ Richard Henry Lee proposed a resolution stating that the Articles of Confederation did not authorize Congress to create a new confederacy of nine states, but, out of respect, sending the Convention's plan to the states anyway.³²⁸ He further recommended that Congress amend the Constitution.³²⁹ Madison wanted Congress to formally approve the Constitution.³³⁰ He agreed with Lee that Congress had the power to amend the document, but if it did so, then it would be subject to the procedural requirements of Article XIII which would require the assent of thirteen legislatures rather than nine state conventions.³³¹ Dane and R.H. Lee repeatedly pointed out that approving the new process "brings into view so materially [the] question of 9 States *should be adopted*."³³²

Those arguing against the Constitution wanted Congress to review it article by article. Those arguing for the Constitution sought to avoid a repetition of the work of the Convention. In the end, Congress adopted essentially the same approach as was advocated by Hamilton at the end of the Constitutional Convention:

Congress having received the report of the Convention lately assembled in Philadelphia.

Resolved unanimously, That the said report with the resolutions and letter accompanying the same be transmitted to the several legislatures in order to be submitted to a convention of delegates chosen in each state by the people thereof in conformity to the resolves of the Convention made and provided in that case.³³³

Specifically referencing the accompanying resolutions ("Ratification and Transition"), Congress limited its approval to the process itself, rather than the Constitution on its substance.³³⁴ The editors of the encyclopedic *Documentary History of the*

327. Nathan Dane's Motion (Sept. 26, 1787), *reprinted in* 1 DHRC, *supra* note 4, at 327, 328.

328. Richard Henry Lee's Motion (Sept. 27, 1787), *reprinted in* 1 DHRC, *supra* note 4, at 329, 329.

329. Melancton Smith's Notes (Sept. 27, 1787), *reprinted in* 1 DHRC, *supra* note 4, at 335, 336.

330. *See id.* at 335.

331. *Id.* at 336.

332. Debates (Sept. 27, 1787), *reprinted in* 13 DHRC, *supra* note 4, at 234, 234–35.

333. Journals of Congress (Sept. 28, 1787), *reprinted in* 1 DHRC, *supra* note 4, at 340, 340.

334. *See id.*

Ratification of the Constitution summarize the approach taken by Congress thusly:

On 28 September Congress reached a compromise. It resolved “unanimously” that the Constitution and the resolutions and the letter of the Convention be sent to the states with only a suggestion that the states call conventions to consider the Constitution. This compromise followed the recommendation of the Convention.³³⁵

Congress only approved the new process and sent the matter to the state legislatures with recommendation that they do the same.

D. Thirteen Legislatures Approve the New Process

Given the fact that the Convention had been held in Philadelphia, the first state legislature to receive the new Constitution and the accompanying resolutions was Pennsylvania.³³⁶ There was an effort to call a ratification convention very quickly with the goal of making the Keystone state the first to ratify the Constitution.³³⁷ However, this desire was thwarted by the quorum rules for the legislature found in the state constitution.³³⁸ Rather than the typical majority requirement, two-thirds of the members of the Assembly were necessary to constitute a quorum.³³⁹ And even though there was a clear pro-Constitution majority in the legislature, slightly more than a third of the members deliberately absented themselves from the chambers to defeat the ability of the legislature to transact any business—not only the calling of the ratification convention, but the ability to complete the state’s legislative calendar before the end of the session on September 29th.³⁴⁰ The Anti-Federalists hoped that the forthcoming elections after the end of session would result in a greater number of anti-Constitution representatives.³⁴¹

Apparently, this was not the first time that members went missing for such purposes.³⁴² The Assembly directed the Sergeant-at-Arms to find the missing members and to direct them

335. 13 DHRC, *supra* note 4, at 230.

336. *See* 2 DHRC, *supra* note 4, at 54.

337. *See id.*

338. *Id.* at 55.

339. *Id.*

340. *Id.*

341. *See id.* at 54.

342. *Id.* at 55.

back to their seats—which was their duty under law.³⁴³ Finally, two members were located and were escorted by the Assembly’s messengers—with the enthusiastic support of a threatening mob—back to their seats.³⁴⁴ These two members were a sufficient addition to constitute a quorum.³⁴⁵ On September 29th, the Pennsylvania legislature was the first to approve the new process by calling a convention.³⁴⁶

In October, five state legislatures followed suit: Connecticut on October 16th,³⁴⁷ Massachusetts on October 25th,³⁴⁸ Georgia October 26th,³⁴⁹ New Jersey on October 29th,³⁵⁰ and Virginia on October 31st.³⁵¹ Georgia is noteworthy because its delegates were permitted to “adopt or reject any part of the whole.”³⁵² On November 9th and 10th, Delaware’s legislature approved the new process by calling a convention.³⁵³ Maryland’s Assembly approved the call of the ratification convention on November 27th and the Senate followed on December 1st.³⁵⁴ In December, two more state legislatures sanctioned the use of the new process: North Carolina on December 6th³⁵⁵ and New Hampshire on December 14th.³⁵⁶

North Carolina is worthy of special mention. Pauline Maier notes that despite the fact that “critics of the Constitution con-

343. *Id.*

344. *Id.*

345. *Id.*

346. Assembly Proceedings (Sept. 28, 1787), reprinted in 2 DHRC, *supra* note 4, at 99, 99–103.

347. House Proceedings, A.M. (Oct. 16, 1787), reprinted in 3 DHRC, *supra* note 4, at 364, 364–66.

348. Report of the Joint Committee with Senate and House Amendments (Oct. 19–25, 1787), reprinted in 4 DHRC, *supra* note 4, at 130, 130–33.

349. Assembly Proceedings (Oct. 26, 1787), reprinted in 3 DHRC, *supra* note 4, at 227, 227–28.

350. Resolutions Calling the State Convention (Oct. 29, 1787), reprinted in 3 DHRC, *supra* note 4, at 167, 167–68.

351. Resolutions Calling the State Convention (Oct. 31, 1787), reprinted in 8 DHRC, *supra* note 4, at 118, 118.

352. Assembly Proceedings (Oct. 26, 1787), reprinted in 3 DHRC, *supra* note 4, at 227, 228.

353. Resolutions Calling the State Convention (Nov. 9–10, 1787), reprinted in 3 DHRC, *supra* note 4, at 90, 90.

354. JOHN FRANKLIN JAMESON, STUDIES IN THE HISTORY OF THE FEDERAL CONVENTION OF 1787, at 163 (1903).

355. *Id.*

356. *Id.* at 161.

trolled both houses,” “[t]hey had . . . no intention of departing from the prescribed way of considering the Constitution.”³⁵⁷ Like the others, the North Carolina legislature approved the new method of ratification and held a ratification convention for the Constitution.³⁵⁸

On January 19th, 1788, South Carolina approved the new methodology,³⁵⁹ followed by New York on February 1st.³⁶⁰ Finally, on March 1st the Rhode Island legislature took action.³⁶¹ Rhode Island was by far the most antagonistic state toward the Constitution. Many different approaches were considered. Rhode Island had previously explained that its failure to participate in the Constitutional Convention was based on the fact that the legislature had never been authorized by the people to send delegates to a convention for such a purpose.³⁶² Many critics of Rhode Island, including the representatives from the more populous cities in the state, contended that this argument was specious and was nothing more than a tactic to express opposition to any move toward a stronger central government.³⁶³

In the end, the language adopted by the Rhode Island legislature was remarkably neutral in submitting the matter to the people. After reciting the procedural history of the Constitutional Convention, the legislature approved the following:

And whereas this Legislative Body, in General Assembly convened, conceiving themselves Representatives of the great Body of People at large, and that they cannot make any Innovations in a Constitution which has been agreed upon, and the Compact settled between the Governors and Governed, without the express Consent of the Freemen at large, by their own Voices individually taken in Town-Meetings assembled: Wherefore, for the Purpose aforesaid, and for

357. PAULINE MAIER, *RATIFICATION: THE PEOPLE DEBATE THE CONSTITUTION, 1787–1788*, at 403 (2010).

358. JAMESON, *supra* note 354, at 163.

359. *Id.* at 164.

360. Assembly Proceedings (Jan. 31, 1788), *reprinted in* 20 DHRC, *supra* note 4, at 703, 703–07.

361. Rhode Island Act Calling a Referendum on the Constitution (Mar. 1, 1788), *reprinted in* 24 DHRC, *supra* note 4, at 133, 133–35.

362. Letter from the Rhode Island General Assembly to the President of Congress, Newport (Sept. 15, 1787), *reprinted in* 24 DHRC, *supra* note 4, at 19, 19–21.

363. Newport and Providence’s Protest of Rhode Island General Assembly’s Letter to Congress (Sept. 17, 1787), *reprinted in* 24 DHRC, *supra* note 4, at 21, 21–23.

submitting the said Constitution for the United States to the Consideration of the Freemen of this State.³⁶⁴

The Freemen were tasked with the duty to “deliberate upon, and determine . . . whether the said Constitution shall be adopted or negatived.”³⁶⁵ In effect, the Rhode Island legislature made every voter a delegate to a dispersed ratification convention and handed them the authority to determine whether the Constitution should be adopted or rejected.

As predicted, the Rhode Island voters overwhelmingly rejected the Constitution by a vote of 238 to 2,714.³⁶⁶ But the rejection by the people of Rhode Island was procedurally no different from the rejection by North Carolina’s delegates in its 1788 convention. The ratification may have failed, but in each state the legislature sanctioned the use of the new methodology designed to obtain the consent of the people. Not one state refused to participate in the new process on the premise that the methodology set forth in Article XIII of the Articles of Confederation should be employed.

It is beyond legitimate debate that Congress approved and the state legislatures voted to implement the process outlined in Article VII and the “Ratification and Transition” Resolution. All thirteen state legislatures approved the implementation of the new process by March 1st, 1788. The legal argument that all thirteen legislatures approved the new process could not have been raised until after this step had been approved by the thirteenth state. Before this date, arguments bolstered by political philosophy and practical necessity were raised—and were all that could be raised.

The chief example of such an argument is *Federalist No. 40*, which was published on January 18th, 1788.³⁶⁷ As of this date, only ten legislatures had approved the use of the new ratification process. South Carolina approved the following day.³⁶⁸ But

364. Rhode Island Act Calling a Referendum on the Constitution (Mar. 1, 1788), reprinted in 24 DHRC, *supra* note 4, at 133, 133–34.

365. *Id.* at 133–34.

366. Report of Committee Counting Yeas and Nays Upon the New Constitution (Apr. 3, 1788), reprinted in 24 DHRC, *supra* note 4, at 232, 233.

367. See Publius, *On the Powers of the Convention to Form a Mixed Government Examined and Sustained*, N.Y. PACKET, Jan. 18, 1788, reprinted in 20 DHRC, *supra* note 4, at 629, 629 (THE FEDERALIST NO. 40 (James Madison)).

368. JAMESON, *supra* note 354, at 164.

the big prize was New York, where it was far from certain as to whether the legislature would approve the process and call a convention. On February 1st, by a vote of 27 to 25, the New York legislature rejected a motion to condemn the Convention for violating its instructions.³⁶⁹ Immediately thereafter, the New York legislature approved the new process and called for the convening of its ratification convention.³⁷⁰

Madison made the defense that was available to him as of January 18th—a political and moral justification for ratifying the Constitution by the authority of the people.³⁷¹ The legal argument based on the approval of the new process by all thirteen legislatures was simply not available to Madison because he wrote in the midst of the fray before all steps were completed. But in hindsight we have the benefit of knowing how events unfolded and are entitled to reconsider the legal questions in light of the totality of the record. Forty-one days after Madison published *Federalist No. 40*, all thirteen state legislatures had approved the new process.

Well prior to the date when the Constitution came into force (June 21st, 1788, upon New Hampshire's ratification), Congress and all thirteen state legislatures had approved the methodology for ratification of the new form of government. Whatever legal questions would have arisen if only twelve legislatures had approved or if the approval was subsequent to Constitution entering into force are speculative and moot. It did not happen that way. It is probable that the Founders would have adopted the Constitution even if the legal processes had not fallen neatly into place. But we do not judge the legality of the process on the basis of what might have happened, but on the basis of the complete record of what actually transpired.

369. Assembly Proceedings (Jan. 31, 1788), reprinted in 20 DHRC, *supra* note 4, at 703, 704.

370. *Id.* at 704–07.

371. See THE FEDERALIST NO. 40 (James Madison).

III. MOST MODERN SCHOLARSHIP FAILS TO CONSIDER THE
ACTUAL PROCESS EMPLOYED IN ADOPTING THE
CONSTITUTION

A. *Most Scholarly References to the Legality of the Adoption of the
Constitution are Superficial and Conclusory*

No legal scholar should conclude that the Constitution was drafted by an illegal runaway convention without at least asking themselves a few questions: What is the evidence for this conclusion? Did the Framers of the Constitution defend the propriety of their action? What is revealed by the relevant documents?

If one simply asks the second question, any reasonable scholar should think to consider the *Federalist Papers* to see if there is any defense of the legitimacy of the Constitutional Convention. *Federalist No. 40*'s first sentence alerts the reader to its central subject: "THE *second* point to be examined is, whether the convention were authorized to frame and propose this mixed Constitution."³⁷² Madison clearly defended the legitimacy of the delegates' actions. This defense puts every scholar on notice that one cannot simply assume that the delegates knowingly violated their instructions without some examination of the historical evidence.

There are dozens of "scholarly" references to the origins and legitimacy of the Constitutional Convention that fail even this rudimentary "standard of care" for scholarship. Law review authors and editors alike bear responsibility for the naked assertions and plain errors that have marked numerous references to the Philadelphia Convention. Even if a scholar ultimately determines that the Anti-Federalist attacks on the legitimacy of the Convention were accurate, there is a clear duty to point to the fact that James Madison, John Marshall, and many others, who are normally considered authorities with substantial credibility, took the opposite view. Academic integrity demands at least this much.

Law reviews are littered with the naked assertion that Congress called the Convention for the "sole and express purpose of amending the Articles of Confederation" and that the Convention went beyond its authority by creating a whole new docu-

372. *Id.* at 247 (Clinton Rossiter ed., 1961).

ment.³⁷³ Scholarly writers have not been satisfied with merely repeating this perfunctory canard and many have made assertions concerning the Constitutional Convention that are objectively false by any measure.³⁷⁴ Two articles state that the Annap-

373. See, e.g., Warren E. Burger, *Foreword*, 56 GEO. WASH. L. REV. 1 (1987); Robert C. Byrd, *Remarks by U.S. Senator Robert C. Byrd: The Constitution in Peril*, 101 W. VA. L. REV. 385, 388 (1998) (reciting that “the Framers went beyond the purposes for which Congress had called the convention”); Stewart Dalzell & Eric J. Beste, *Is the Twenty-Seventh Amendment 200 Years Too Late?*, 62 GEO. WASH. L. REV. 501, 545 (1994); Charles Fried, *Foreword: Revolutions?*, 109 HARV. L. REV. 13, 20–25, n.45 (1995) (“The Continental Congress’s charge to the Convention was far narrower than the work the Convention undertook from the beginning”); Richard S. Kay, *Constituent Authority*, 59 AM. J. COMP. L. 715, 728 (2011) (claiming that the Convention “grossly exceeded” the charge given to it by the “Continental Congress”); Lash, *supra* note 15, at 523 (“The Philadelphia Convention ignored that mandate and drafted an entirely new Constitution.”); Misha Tseytlin, Note, *The United States Senate and the Problem of Equal State Suffrage*, 94 GEO. L.J. 859, 869–70 (2006) (“[T]he delegates decided to deviate from these instructions”); Benjamin A. Geslison, *What Were They Thinking? Examining the Intellectual Inspirations of the Framers and Opponents of the United States Constitution*, 17 TEX. REV. L. & POL. 185, 193 (2012) (reviewing FORREST McDONALD, *NOVUS ORDO SECLORUM: THE INTELLECTUAL ORIGINS OF THE CONSTITUTION* (1985) and HERBERT J. STORING, *WHAT THE ANTI-FEDERALISTS WERE FOR: THE POLITICAL THOUGHT OF THE OPPONENTS OF THE CONSTITUTION* (1981)) (The Anti-Federalists “argued persuasively that the Constitution was an illegal act completely unauthorized by the Convention”); see also Robert F. Blomquist, *Response to Geoffrey R. Stone and Seth Barrett Tillman, Beyond Historical Blushing: A Plea for Constitutional Intelligence*, 2009 CARDOZO L. REV. DE NOVO 244, 245; Jason A. Crook, *Toward A More “Perfect” Union: The Untimely Decline of Federalism and the Rise of the Homogenous Political Culture*, 34 U. DAYTON L. REV. 47, 50 (2008); Godbold, *supra* note 15, at 314; Kane, *supra* note 12, at 160; Maggs, *supra* note 5, at 1710–12; Denys P. Myers, *History of the Printed Archetype of the Constitution of the United States of America*, 11 GREEN BAG 2d 217, 219–20 (2008); Smith, *supra* note 15, at 539–41; Edward C. Walterscheid, *The Nature of the Intellectual Property Clause: A Study in Historical Perspective (Part 1)*, 83 J. PAT. & TRADE-MARK OFF. SOC’Y 763, 790 (2001); Susan Henderson-Utis, Comment, *What Would the Founding Fathers Do? The Rise of Religious Programs in the United States Prison System*, 52 HOW. L.J. 459, 506 (2009); Jonker, *supra* note 15, at 453–54; David Kowalski, Comment, *Red State, Blue State, No State?: Examining the Existence of A Congressional Power to Remove A State*, 84 U. DET. MERCY L. REV. 335, 343–45 (2007).

374. See, e.g., Dennis M. Cariello, *Federalism for the New Millennium: Accounting for the Values of Federalism*, 26 FORDHAM URB. L.J. 1493, 1528 (1999); John Cornyn, *The Roots of the Texas Constitution: Settlement to Statehood*, 26 TEX. TECH L. REV. 1089, 1094–95 (1995); Robert L. Jones, *Lessons from a Lost Constitution: The Council of Revision, the Bill of Rights, and the Role of the Judiciary in Democratic Governance*, 27 J.L. & POL. 459, 555 (2012); James Leonard, *Ubi Remedium Ibi Jus, or, Where There’s a Remedy, There’s a Right: A Skeptic’s Critique of Ex Parte Young*, 54 SYRACUSE L. REV. 215, 367 (2004); Michael B. Rappaport, *The Constitutionality of a Limited Convention: An Originalist Analysis*, 28 CONST. COMMENT. 53, 67–68 (2012); Richard D. Rosen, *Funding “Non-Traditional” Military Operations: The Alluring Myth of A Presidential Power of the Purse*, 155 MIL. L. REV. 1, 152 (1998); Louis Michael Seidman, *The Secret*

olis Convention “asked Congress to call a convention.”³⁷⁵ The Annapolis delegates did no such thing. A copy was submitted to Congress out of mere respect with no request for action.³⁷⁶ The Maine article reproduced a speech by a federal judge that claimed that the five-month gap between the “request” from Annapolis and the “call” from Congress arose because Congress could not convene a quorum³⁷⁷—a claim that is belied by hundreds of pages of congressional records in this time frame.³⁷⁸

Another writer, a bankruptcy judge, claimed: “The Federalists did not really refute the charge that the delegates to the Convention had exceeded the authority given them by their states.”³⁷⁹ His only citation for this proposition is the text of Article VII of the Constitution.³⁸⁰ Ironically, this author’s next paragraph cites John Marshall on the legitimacy of the ratification process.³⁸¹ However, he ignores Marshall’s statement in defense of the Convention that “the Convention did not exceed their powers.”³⁸²

Colonel Richard D. Rosen claims that “[t]he Convention also did not bother, as the Continental Congress had directed, to return to Congress for its approval upon completing its work.”³⁸³ We have already reviewed in detail the debates in the Confederation Congress after it received the Constitution from Philadelphia. Even Chief Justice Burger, who asserted that the

History of American Constitutional Skepticism: A Recovery and Preliminary Evaluation, 17 U. PA. J. CONST. L. 1, 12–14 (2014); Lynn D. Wardle, *The Proposed Federal Marriage Amendment and the Risks to Federalism in Family Law*, 2 U. ST. THOMAS L.J. 137, 198 (2004); Lynn D. Wardle, “Time Enough”: *Webster v. Reproductive Health Services and the Prudent Pace of Justice*, 41 FLA. L. REV. 881, 938 n.308 (1989); Bruce Stein, Note, *The Framers’ Intent and the Early Years of the Republic*, 11 HOFSTRA L. REV. 413, 428–29 (1982).

375. George Anastaplo, *The Constitution at Two Hundred: Explorations*, 22 TEX. TECH L. REV. 967, 969–70 (1991); Daniel Wathen & Barbara Riegelhaupt, *The Speeches of Frank M. Coffin: A Sideline to Judging*, 63 ME. L. REV. 467, 472 (2011) (quoting speech of Judge Frank M. Coffin).

376. 1 ELLIOT’S DEBATES, *supra* note 23, at 118.

377. Wathen & Riegelhaupt, *supra* note 375, at 472 (quoting speech of Judge Frank M. Coffin).

378. 24 JOURNALS OF CONGRESS, *supra* note 70, at 261–62.

379. Randolph J. Haines, *The Uniformity Power: Why Bankruptcy Is Different*, 77 AM. BANKR. L.J. 129, 147 (2003).

380. *Id.*

381. *Id.*

382. Virginia Convention Debates (June 10, 1788) reprinted in 9 DHRC, *supra* note 4, at 1092, 1118.

383. Rosen, *supra* note 374, at 66 n.367.

Constitution was illegally adopted, recognized that “the Constitution was sent back to the Continental Congress.”³⁸⁴

A few scholars have chronicled a more complete version of the events surrounding the call of the Philadelphia Convention.³⁸⁵ However, completeness does not always equate with historical accuracy. Shawn Gunnarson makes the forgivable error of saying that only four states “responded” to Virginia’s call for the Annapolis Convention.³⁸⁶ Nine states (counting Virginia) appointed delegates, but only four others joined Virginia in a timely manner. However, Gunnarson makes the far more egregious error of claiming that Virginia’s subsequent call for the Philadelphia Convention “languished until New York presented a motion in Congress.”³⁸⁷ This assertion ignores the fact that five other states joined the Virginia call for the Philadelphia Convention before New York’s motion was ever presented in Congress. Moreover, New York’s motion did not even launch the discussion of the Annapolis Convention in Congress. A congressional committee had already recommended that Congress endorse the Philadelphia Convention prior to New York’s motion.³⁸⁸

Gunnarson follows with the standard, but inaccurate, claim that Congress authorized the Convention, which he follows with the utterly unsupportable assertion that “the delegates decided to exceed the express terms of their congressional mandate.”³⁸⁹ He offers no evidence to support the notion that the Convention believed that it had been called pursuant to a mandate by Congress or that the delegates agreed that they had violated their actual mandates from their respective states. As we have seen, the record of the Convention shows that all sides of the debate appealed to the authority of their state appointments as the issue of the scope of their authority; moreover, the Federalists vigorously defended the legitimacy of their actions.

Other scholars who have written more extensive critiques of the legitimacy of the Convention generally base their core arguments and conclusions on the faulty premise that Congress

384. Burger, Remarks, *supra* note 3, at 79.

385. See, e.g., Shawn Gunnarson, *Using History to Reshape the Discussion of Judicial Review*, 1994 B.Y.U. L. REV. 151, 160–62 (1994).

386. *Id.*

387. *Id.* at 161.

388. See *supra* notes 80–82 and accompanying text.

389. Gunnarson, *supra* note 385, at 162.

called the Convention for the sole purpose for amending the Articles of Confederation.³⁹⁰ Such conclusions would be far more academically palatable if there was some level of acknowledgement that this premise of infidelity is disputed.³⁹¹

Brian C. Murchison's article bears mentioning because of his selective editing of the historical record. He casts doubt on fidelity of the actions of the delegates at the Convention by first suggesting that the Convention "arguably went beyond 'revising' the Articles" and that it "proposed an entirely new government."³⁹² He ends by proclaiming that the "Convention's product was 'bold and radical' not only for its extraordinary content but for the independent character of its creation."³⁹³ Murchison posits the view the Convention acted without legal authority. His central thesis is that Madison justified this knowingly revolutionary action with language that paralleled Jefferson's Declaration of Independence.³⁹⁴

Murchison's entire argument is premised on the contention that the delegates' formal authority came from a combination of the Annapolis Convention report and the February 21st resolution of Congress. As we have seen earlier, the overwhelming evidence from the historical record supports Madison's contention in *Federalist No. 40* that "[t]he powers of the convention ought, in strictness, to be determined by an inspection of the commissions given to the members by their respective constituents."³⁹⁵ Murchison actually quotes the first part of this sentence—putting a period after the word "determined."³⁹⁶ By

390. See e.g., Finkelman, *supra* note 11, at 1174.

391. Compare *id.*, with Eric M. Freedman, *Why Constitutional Lawyers and Historians Should Take A Fresh Look at the Emergence of the Constitution from the Confederation Period: The Case of the Drafting of the Articles of Confederation*, 60 TENN. L. REV. 783, 839 (1993) (noting, in passing, that Bruce Ackerman contends that the delegates were unfaithful to their call while James Madison in *Federalist No. 40* takes the opposite position) (citing Bruce Ackerman, *Constitutional Politics/Constitutional Law*, 99 YALE L.J. 453, 456 (1989)).

392. Brian C. Murchison, *The Concept of Independence in Public Law*, 41 EMORY L.J. 961, 976 (1992).

393. *Id.*

394. *Id.* at 975–81.

395. THE FEDERALIST NO. 40, at 247 (James Madison) (Clinton Rossiter ed., 1961).

396. *Id.* at 975 ("He devotes *Federalist No. 40* to answering this objection, posing the question as 'whether the convention were authorized to frame and propose this mixed Constitution,' and conceding, 'The powers of the convention ought, in strictness, to be determined.'").

omitting the second half of the sentence, Murchison turns Madison's defense of the Convention's action into a concession of questionable behavior. Murchison's pedantic analysis seeks to fit Madison's arguments into a Procrustean Bed—lopping off key words on the one hand, while stretching superficial comparisons with the Declaration of Independence into a full-blown claim that *Federalist No. 40* was a clever ruse attempting to justify a revolutionary convention. The superstructure of his theory is built on the discredited foundation that the delegates knowingly exceeded the limits flowing from their congressional appointment—facts he asserts without discussion or proof.

Two scholars have looked at the question of the call of the Convention and reached the conclusion that it did not come from Congress.³⁹⁷ Unsurprisingly, both of these scholars reach this conclusion by an actual examination of the relevant documents.

Julius Goebel, Jr., recites the history that “some of the states . . . had authorized the appointment of delegates to a convention long before Congress was stirred to action”³⁹⁸ Moreover, “Congress when it finally did recommend a convention” did so “by resolve, a form to which no statutory force may be attributed.”³⁹⁹ “Congress on February 21, 1787, had endorsed the holding of a convention.”⁴⁰⁰

Robert Natelson devotes six pages of a 2013 law review article to the defense of the fidelity of the delegates to their commissions.⁴⁰¹ By examining the texts of the credentials from each state, he concludes that “the delegates all were empowered through commissions issued by their respective states, and were subject to additional state instructions. All but a handful of delegates remained within the scope of their authority or, if that was no longer possible, returned home.”⁴⁰² However, he concludes that it is reasonable to question the fidelity of New York's Alexander Hamilton and Massachusetts' Rufus King and Nathaniel Gorham—all of whom signed the Constitution.⁴⁰³

397. See Julius Goebel, Jr., *Melancton Smith's Minutes of Debates on the New Constitution*, 64 COLUM. L. REV. 26, 30 (1964); Natelson, *supra* note 91, at 674–79.

398. Goebel, *supra* note 397, at 30.

399. *Id.*

400. *Id.*

401. Natelson, *supra* note 91, at 674–79.

402. *Id.* at 679.

403. See *id.* at 678.

While Natelson correctly analyzes the historical facts and the legal conclusions on the whole, I take issue with his use of the signing of the Constitution as the test for fidelity of these delegates. Signing was largely symbolic and was, at most, a personal pledge of support. This was at the end of a convention where every vote was made by states as states. The vote to approve the Constitution at the very end was counted by states, not by delegates. No delegate ever took official action as an individual. The Massachusetts delegates were either faithful or unfaithful to their commissions by casting dozens of votes in the process—especially the ultimate vote to approve the Constitution. As acknowledged by Natelson,⁴⁰⁴ the charge is less credible against Hamilton because he never voted after Lansing and Yates left in July.⁴⁰⁵ Hamilton's personal endorsement of the Constitution by signing it was not an act for the state of New York. Moreover, both the legislature of New York and the ratification convention in Massachusetts rejected the contention that the Convention had violated the directions given by the states.⁴⁰⁶ Despite these relatively minor disputes with Natelson regarding these specific delegates, his article is singularly noteworthy for looking at the correct documents and reasoning to sound conclusions therefrom.

B. *Answering Ackerman and Katyal*

Professors Bruce Ackerman and Neal Katyal⁴⁰⁷ stand nearly alone⁴⁰⁸ among legal scholars for having undertaken a

404. See *id.* at 678 n.414.

405. Natelson, however, questions whether Hamilton should have continued as a commissioner after the departure of his two New York colleagues. *Id.* at 722.

406. See Assembly Proceedings (Jan. 31 1788), reprinted in 20 DHRC, *supra* note 4, at 703, 704; 16 DHRC, *supra* note 4, at 68.

407. Katyal was a third-year student at Yale Law School at the time of publication. He is now a professor at Georgetown University Law Center.

408. Professor Akhil Amar has responded twice to the arguments of Ackerman and Katyal. See Akhil Reed Amar, *The Consent of the Governed: Constitutional Amendment Outside Article V*, 94 COLUM. L. REV. 457 (1994) [hereinafter *Consent*]; Akhil Reed Amar, *Philadelphia Revisited: Amending the Constitution Outside Article V*, 55 U. CHI. L. REV. 1043, 1047–60 (1988) [hereinafter *Philadelphia*]. As the titles of both articles suggest, his discussions of the legality of the adoption of the Constitution are made in service of his argument that there are paths to amend the Constitution that are outside of Article V. See Amar, *Consent*, *supra*, at 494–508; Amar, *Philadelphia*, *supra*, at 1072–76. Moreover, his defense of the legality of the Constitution is much more like an affirmative defense in a criminal case than a true de-

comprehensive review of the legality of the adoption of the Constitution.⁴⁰⁹ An earlier article, not cited by Ackerman and Katyal, makes very similar arguments.⁴¹⁰ Ackerman and Katyal's premises and conclusions are concisely described in their fourth paragraph:

Our main task, however, is to confront the problem raised by the *Federalists'* *flagrant illegalities*. Movements that *indulge in systematic contempt for the law* risk a violent backlash. Rather than establish a new and stable regime, *revolutionary acts of illegality* can catalyze an escalating cycle of incivility, violence, and civil war. How did the Federalists avoid this dismal cycle? More positively: How did the Founders manage to win acceptance of their claim to speak for the People at the same moment that *they were breaking the rules of the game?*⁴¹¹

This excerpt is typical of the highly charged language that pervades their work. The illegality of the adoption of the Constitution is not treated as a close question—the process of adopting

fense. He essentially argues that while there is a facial inconsistency with Article XIII of the Articles of Confederation, the Constitution was lawfully adopted because the Articles were a treaty that had been breached by the states. Amar, *Consent*, *supra*, at 465–69. Thus, having been breached, the states were at liberty to write a new document that would otherwise be illegal. While we certainly find elements of international law parallels in the arguments of the Federalists, his concession that there is a facial violation is a much different defense than is argued here. His thesis that there is an extra-constitutional method of amending the Constitution takes the contention outside of anything that would amount to an originalist or textualist defense of the Constitution. It is a creative argument, but Ackerman and Katyal's critiques of it are powerful. See Ackerman & Katyal, *supra* note 14, at 476–487. This article is the first comprehensive direct defense (as opposed to Amar's affirmative defense) of the legality of the Constitution.

409. See Ackerman & Katyal, *supra* note 14.

410. Kay, *supra* note 14. Kay bases his argument on the familiar and erroneous assertion that the Annapolis Convention “proposed that Congress call another convention to be held in Philadelphia.” *Id.* at 63. He fails to cite or quote the actual language of the report from the Annapolis Convention which clearly addressed its recommendations to the state legislatures to call a convention. The convention's stated reasons for sending a copy to Congress was to demonstrate courtesy. He then asserts the common claim that Congress called the Convention and limited their authority to the revision of the Articles. *Id.* at 63–64. Kay embellishes on this claim by stating “the Congressional resolution calling the convention, as well as the instructions to a number of state delegations, restricted the convention's mission to ‘revising the Articles . . .’” *Id.* at 64. He fails to examine the actual language of any state's delegation, nor does he consider the argument made by Madison in *Federalist No. 40* that the actual call of the Convention came from the states.

411. See Ackerman & Katyal, *supra* note 14, at 476–77 (emphasis added).

the Constitution was “flagrant[ly]” illegal.⁴¹² The Founders demonstrated “systematic contempt for the law.”⁴¹³ They committed “revolutionary acts of illegality.”⁴¹⁴ They were not merely “breaking the rules of the game”—Madison, Hamilton, and Washington were doing so with deliberate disdain.⁴¹⁵

Ackerman and Katyal purport to paraphrase the Founders’ justification for this unscrupulous maneuvering:

Granted, we did not play by the old rules. But we did something just as good. We have beaten our opponents time after time in an arduous series of electoral struggles within a large number of familiar lawmaking institutions. True, our repeated victories don’t add up to a formal constitutional amendment under the existing rules. But we never would have emerged victorious in election after election without the considered support of a mobilized majority of the American People. Moreover, the premises underlying the old rules for constitutional amendment are deeply defective, inconsistent with a better understanding of the nature of democratic popular rule. We therefore claim that our repeated legislative and electoral victories have already provided us with a legitimate *mandate from the People* to make new constitutional law. Forcing us to play by the old rules would only allow a minority to stifle the living voice of the People by manipulating legalisms that have lost their underlying functions.⁴¹⁶

This paraphrase was unsupported by any citation to the actual words of the Federalists. Statements can be found from Madison and other Federalists that support the claim that they believed their actions were morally justified,⁴¹⁷ but nothing at all can be found to support the overall tone and thesis of this effort at historical ventriloquism. The Federalists defended both the legal and moral basis of their actions. They would at times argue these defenses in the alternative. But absolutely nothing can be found from the Framers that demonstrates that they believed their actions were clearly illegal and revolutionary and were nonetheless justified.

412. *Id.* at 476.

413. *Id.*

414. *Id.*

415. *See id.* at 476–77.

416. *Id.* at 478.

417. *See, e.g.,* THE FEDERALIST NO. 40, at 252–54 (James Madison) (Clinton Rossiter ed., 1961).

Ackerman and Katyal allege “three legal obstacles” that purportedly demonstrate the illegality of the Founders’ conduct:

- Problems with the Articles of Confederation
- Problems with the Convention
- Problems with State Constitutions⁴¹⁸

The professors allege ten distinct violations under these three categories.⁴¹⁹ However, their “three legal obstacles” and ten specific allegations are not well-organized. A more logical organization of the professors’ legal arguments would be:

- The process was illegal from beginning to end because Article XIII provided the exclusive method for amending the form of governance of the United States.
- The delegates went beyond the call of the convention containing their controlling instructions.
- The method of ratification chosen violated both Article XIII and several state constitutions.⁴²⁰

418. Ackerman & Katyal, *supra* note 14, at 475–487.

419. *See id.* at 478–486. The violations are as follows: (1) the Constitution invited secession; (2) the Constitutional Convention ignored the role the Articles “expressly assigned to the Continental Congress” for approving subsequent amendments; (3) the Founders cut the state legislatures out of the ratifying process; (4) the entire process was done “in the face of the Articles’ express claim to specify the exclusive means for its revision;” (5) the Convention was a secessionist body; (6) Delaware’s delegation “recognized that it was acting in contempt of its commission;” (7) the delegates had been “charged” by the “Continental Congress” to meet “for the sole and express purpose of revising the Articles” and the delegates went “beyond their legal authority when they ripped up the Articles and proposed an entirely new text;” (8) the delegations from New York, Connecticut, and Massachusetts clearly violated their commissions; (9) all states that gave instructions as to the mode of ratification specified approval by Congress followed by approval of the state legislatures—which was not followed; and (10) the Supremacy Clause of the Constitution created an implied conflict with and *de facto* change in several state constitutional amendments. Thus, the process for obtaining amendments to state constitutions was applicable and was not followed. *Id.*

420. One of their arguments does not fit this outline but can be easily dismissed. The contention that the Convention was secessionist is nothing more than a political criticism and does not rise to the level of a serious legal argument. Moreover, it is a stretch to contend that it is a secessionist act to invite all states to a convention to discuss possible changes to the form of government. The fact that one state chose not to attend does not alter the nature of the Convention. If Rhode Island had been excluded by the others from the drafting convention it would plausibly raise the specter of secessionism. Describing Rhode Island’s refusal to attend the Convention as an act of secession by the other twelve states is facially without merit.

1. *The Contention that the Whole Process Was Illegal under the Articles of Confederation May Be Summarily Dismissed*

Although the professors' argument that the entire process was done "in the face of the Articles' express claim to specify the *exclusive* means for its revision"⁴²¹ made the list of their ten specific illegalities, a reader must hunt diligently through the remainder of their article for any supporting argumentation. Random statements in support of this argument are sprinkled throughout the article, but if this theory is to be considered seriously, it demands robust development and careful consideration rather than scattered and disjointed assertions.⁴²²

The longest single presentation of this theory is a mere two sentences that refer to the Annapolis Convention:

The commissioners had taken upon themselves the right to propose a fundamental change in constitutional law. While Article XIII had confided exclusive authority in Congress to propose amendments, Annapolis was making an end run around the existing institution by calling for a second body, the convention, unknown to the Confederacy's higher lawmaking system.⁴²³

Ackerman and Katyal critique their rival Akhil Amar for making claims unsupported by evidence from the contemporaneous debates.⁴²⁴ Amar's theory (alleging a breach of treaty obligations) should be rejected, they say, because there wasn't "any evidence that Americans took Amar's argument seriously."⁴²⁵ However, in their own article, despite their self-described exhaustive research,⁴²⁶ they cite very slender evidence that anyone at the time

421. Ackerman & Katyal, *supra* note 14, at 480.

422. If this theory was advanced in this manner in an appellate brief, it is clear that it would be dismissed under the familiar standard for undeveloped claims. See *Citizens Awareness Network, Inc. v. U.S. Nuclear Regulatory Comm'n*, 59 F.3d 284, 293–94 (1st Cir. 1995) ("[I]ssues adverted to in a perfunctory manner, unaccompanied by some effort at developed argumentation, are deemed waived. It is not sufficient for a party to mention a possible argument in the most skeletal way, leaving the court to . . . put flesh on its bones."); *United States v. Hayter Oil Co.*, 51 F.3d 1265, 1269 (6th Cir. 1995) (finding that defendants waived issue by making conclusory statements and failing to develop their theory).

423. Ackerman & Katyal, *supra* note 14, at 497.

424. See, e.g., *id.* at 488 n.35.

425. *Id.* at 539–540.

426. *Id.* at 540 ("[W]e have amassed an enormous body of evidence expressing legalistic objections to the Federalists' unconventional activities.").

even raised the argument that the entire Convention was illegal from the beginning. And they offer no evidence at all that Americans at the time took the argument seriously.

The professors' meager suggestion of contemporary support comes from a statement on the floor of the Massachusetts legislature by Rufus King:

The Confederation was the act of the people. No part could be altered but by consent of Congress and confirmation of the several Legislatures. Congress therefore ought to make the examination first, because, if it was done by a convention, no Legislature could have a right to confirm it . . . Besides, if Congress should not agree upon a report of a convention, the most fatal consequences might follow. Congress therefore were the proper body to propose alterations . . .⁴²⁷

But King stopped well short of the argument advanced by Ackerman and Katyal. He did not say that it was illegal to call a convention of states to draft amendments. Rather he began with the premise that nothing could be finally altered except by the consent of Congress and all of the states. In light of the legal requirement for ratification, King makes a political argument that it is wiser to have Congress make the proposed alterations in the first place.

This explanation of King's argument makes much more sense in light of the fact that he was the co-author the successful motion in Congress to endorse the Constitutional Convention on February 21st, 1787.⁴²⁸ The professors acknowledge King's role in the congressional resolution⁴²⁹ but shrug it off without explanation—as if King had somehow been swept into the vortex of Madison and Hamilton's grand revolutionary conspiracy. If King believed it was illegal for a convention to be called, he was a hypocrite of the first order by making the motion. But a wise politician can change his views on the practicality of a particular approach without duplicity. The better reading of King's words and actions leads to the conclusion that he believed it was illegal to adopt changes without approval of Congress and the states.

427. *Id.* at 501 (quoting *Proceedings of Government, Boston, October 12*, WORCESTER MAGAZINE, 3rd week of Oct. 1786, at 353).

428. Ackerman & Katyal, *supra* note 14, at 503.

429. *See id.* at 501.

Moreover, in the footnote citing the original source of King's speech in the Massachusetts legislature, the professors quote Nathan Dane on this topic.⁴³⁰ Dane, also speaking in the state legislature, said:

[A] question arises as to the best mode of obtaining these alterations, whether by the means of a convention, or by the constitutional mode pointed out in the 13th article of the confederation. In favour of a convention, it is said, that the States will probably place more confidence in their doings, and that the alterations there may be better adjusted, than in Congress.⁴³¹

Far from arguing that Article XIII was the exclusive path for changes, Dane clearly posits a convention as a legitimate alternative. The criteria for choosing one or the other, Dane suggests, is simply political expediency.

I have found two contemporary critics of the Constitution who did in fact make the argument advanced by Ackerman and Katyal. In the New York ratification convention, Abraham Yates unleashed a scattershot attack on the legality of the entire process. He argued that on February 19th, 1787, the New York legislature violated the state constitution when it instructed its delegates in Congress to move an act recommending the convention.⁴³² Moreover, Congress violated Article XIII when it passed its resolution of approval on February 21st.⁴³³ Congress again violated Article XIII, on September 28th, when it sent the Constitution to the state legislatures.⁴³⁴ And the New York legislature violated its Constitution when it approved the calling of the ratification convention in February 1788.⁴³⁵ The best reading of Yates is that he was an ardent Anti-Federalist and that he was willing to make shotgun attacks that were a mix of political and legal rhetoric designed to serve his political viewpoint. Treating Yates as a legal purist—or even as someone who merits consideration as a serious legal critic—overstates both his arguments and his importance.

430. *See id.* at 501 n.72.

431. *Id.* (quoting Nathan Dane, Speech to Massachusetts House of Representatives, in *Proceedings of Government*, NEWPORT MERCURY, Nov. 17, 1786).

432. *Sydney*, N.Y.J., June 13–14, 1788, reprinted in 20 DHRC, *supra* note 4, at 1153, 1156.

433. *Id.*

434. *Id.* at 1157.

435. *Id.*

Moreover, the standard that Ackerman and Katyal raise against Amar is truly appropriate: did Americans at the time pay any serious attention to these arguments? Yates' position was never confirmed by the vote of any convention or legislative body. Not Congress, not the Constitutional Convention, not any ratification convention, and not any state legislature. New York, Massachusetts, Rhode Island, and North Carolina all had problems with the adoption of the Constitution at one time or another. Not even in any of these states was there ever a successful resolution that condemned the very calling of a Convention from its inception.

The void-from-the-beginning position did have one other contemporary source of support not mentioned by the professors. The Town Meeting of Great Barrington, Massachusetts approved the following resolution as an instruction to their delegate to the state ratification convention:

First as the Constitution of this Commonwealth Invests the Legislature [sic] with no such Power as sending Delligates [sic] To a Convention for the purpose of framing a New System of Fedderal [sic] Government—we conceive that the Constitution now offered us is Destituce [sic] of any Constituenal [sic] authority either states or fodderal [sic].⁴³⁶

The small town in Massachusetts, relying primarily on its state constitution, took the position that the legislature had no power to appoint delegates to the Constitutional Convention. The additional contention that the proposed Constitution was "Destituce" of any federal "Constituenal" authority was summarily made. This paragraph represents the pinnacle of contemporary acceptance of the Ackerman/Katyal theory. Such scant evidence fails to meet their own standard requiring evidence that "Americans took [their] argument seriously."⁴³⁷

There was nearly universal acceptance of the idea that a Convention was a proper alternative to Congress for drafting proposed changes, as Dane's state legislative speech demonstrates. Moreover, no one believed that the Convention had any power to make law. They merely had the power to make a recommendation. As James Wilson said:

436. Draft Instructions (Nov. 26, 1787), reprinted in 5 DHRC, *supra* note 4, at 959.

437. Ackerman & Katyal, *supra* note 14, at 539.

I think the late Convention have done nothing beyond their powers. The fact is, they have exercised no power at all. And in point of validity, this Constitution, proposed by them for the government of the United States, claims no more than a production of the same nature would claim, flowing from a private pen.⁴³⁸

Second, the overwhelming understanding was that the states—which were clearly in possession of ultimate political power—had the power to convene a convention if they wished. In fact, the clear supremacy of the states was the very reason a new Constitution was needed. The States created the Union. The States created the Articles of Confederation. The States appointed the members of Congress. The state legislatures could and did issue binding directions to their members in Congress. Indeed, the February 21st, 1787, resolution by Congress approving the Convention was the result of a process started by the New York congressional delegation who were acting in obedience to directions received from their legislature.⁴³⁹

The States called the Convention. The States appointed delegates to the convention and gave them instructions on the scope of their authority and quorum rules for casting the single vote of their state. Natelson records that from “1774 until 1787, there were at least a dozen inter-colonial or interstate conventions.”⁴⁴⁰ Convening conventions of the states to recommend solutions for problems was common political practice. The argument that it was a violation of Article XIII for the states to convene a convention to propose changes in the Constitution was made by a scant few at the time and accepted only by the single town of Great Barrington. Ackerman and Katyal’s contention that the convention was *void ab initio* cannot bear up under focused scrutiny.

438. Convention Debates, A.M. (Dec. 4, 1787), reprinted in 2 DHRC, *supra* note 4, at 483.

439. See 19 DHRC, *supra* note 4, at xl; 32 JOURNALS OF CONGRESS, *supra* note 70, at 72.

440. Robert Natelson, *James Madison and the Constitution’s “Convention for Proposing Amendments”*, 45 AKRON L. REV. 431, 434 (2012).

2. *Conspiracy Theories and Character Attacks: Exploring the Legality of the Delegates' Conduct*

Ackerman and Katyal paint a picture of the Federalists as “dangerous revolutionaries”⁴⁴¹ who “lacked the legal authority . . . to make such an end run”⁴⁴² around the existing legal requirements. Yet, here again, the professors make a scattershot attack, failing to ever engage in a focused analysis of the questions of: (a) who called the convention; and (b) what were the instructions given to the delegates. Some of their analytical difficulty seems to arise from the professors’ failure to make any distinction between informal measures that suggest, support, or endorse a convention and formal “calls” for a convention.⁴⁴³

a. *The Call*

The professors claim that in “calling for the Philadelphia Convention, the Continental Congress had charged the delegates to meet ‘for the *sole and express* purpose of revising the Articles.’”⁴⁴⁴ Later, they say that the Continental Congress “join[ed] the call for the convention.”⁴⁴⁵ In other places, they say that the “commercial commissioners” at the Annapolis Convention called the Convention.⁴⁴⁶ Then later, they describe the Annapolis Convention with a bit more nuance: “[T]he commissioners did not take decisive action unilaterally. They merely called upon Congress and the thirteen state legislatures to issue such calls.”⁴⁴⁷ The report language from Annapolis clearly contradicts even this version of their assertion. The Annapolis delegates asked their state legislatures to appoint commissioners with broader powers and to use their good offices to get other states to do the same.⁴⁴⁸ They sent copies of

441. Ackerman & Katyal, *supra* note 14, at 495.

442. *Id.* at 487.

443. *See, e.g., id.* at 486 (describing the Federalists’ general plan for ratification as the “Federalists’ call for ratifying conventions”); *id.* at 498 (describing Hamilton’s recommendation at Annapolis as a “dramatic call”).

444. *Id.* at 481; *see also id.* at 501 (“[King and Dane] would be the authors of the congressional resolution calling upon the states to send delegates to Philadelphia.”).

445. *Id.* at 483.

446. *Id.* at 496.

447. *Id.* at 497.

448. 1 ELLIOT’S DEBATES, *supra* note 23, at 118.

their report both to Congress and to the Governors “from motives of respect.”⁴⁴⁹ By Ackerman and Katyal’s logic, it would be equally valid to suggest that the Annapolis delegates asked the thirteen governors to call a convention.

The professors review the historical sequence leading up to the Convention without ever trying to conclusively answer the question: Who formally called the convention? In their sequential narrative, Ackerman and Katyal begin with efforts to amend the Articles in 1781, move on to the Mount Vernon Conference between Virginia and Maryland, then to the Annapolis Convention, then to a discussion of the impact of Shay’s Rebellion, onto the February, 1787 resolution by Congress, a protest from Rhode Island, and finally to the Constitutional Convention itself.⁴⁵⁰

There is a significant gap in this sequence. Ackerman and Katyal do not give any consideration to the actions of the legislatures in actually calling for the Philadelphia Convention. This failure is no mere oversight, since *Federalist No. 40* expressly contended that the delegates’ authority did not come from either the Annapolis Convention or the resolution from the Confederation Congress—but from the several states.⁴⁵¹ Moreover, the professors themselves noted that the Annapolis Convention had “called upon” both Congress and the thirteen state legislatures to call the Convention.⁴⁵² They duly discuss the role of Congress but inexplicably fail to discuss the role of the state legislatures. Avoiding this inconvenient set of facts relieves them of the difficulty of explaining how Congress could issue the official call for a convention when in fact, before Congress acted, six states had already named the time and place, chosen delegates, set the agenda, and had issued instructions to control their delegates’ actions in Philadelphia.

While this is the professors’ principal failure in describing the sequence of events, their reference to “Rhode Island’s Protest” is

449. *Id.*

450. Ackerman & Katyal, *supra* note 14, at 489–514.

451. See THE FEDERALIST NO. 40, at 247 (James Madison) (Clinton Rossiter ed., 1961) (“[B]y the assent . . . of the legislatures of the several states . . . a convention of delegates, who shall have been appointed by the several states”); see also *id.* at 249 (“The States would never have appointed a convention with so much solemnity, nor described its objects with so much latitude, if some *substantial* reform had not been in contemplation.”).

452. Ackerman & Katyal, *supra* note 14, at 497.

simply odd. It is the only state action that is reviewed in this sequence of events. And this discussion is placed prior to the discussion of the Convention itself. Rhode Island's "protest" was issued September 15th, 1787, just two days before the conclusion of the Convention.⁴⁵³ Moreover, Ackerman and Katyal fail to note that Rhode Island's protest was itself protested by the towns of Newport and Providence.⁴⁵⁴ Yet, in their discussion of Rhode Island's protest, the professors give yet another explanation for the call of the Convention. They note that "the Philadelphia Convention was a creature of state legislatures."⁴⁵⁵ However, three pages later Ackerman and Katyal return to their claim that Congress called the convention and gave the delegates their instructions—a claim repeated at least twice thereafter.⁴⁵⁶

The best explanation for this shifting cloud of confusion is that the professors simply did not think through the difference between a formal call and various informal suggestions, endorsements, and encouragements. The full historical record and documents give us the correct answer: Virginia called the Convention and this formal call was joined by eleven other states.

b. The Delegates' Authority

Ackerman and Katyal continue their inconsistent analysis with respect to the source of the delegates' instructions and authority. At times they argue that "Congress had charged the delegates" to only amend the Articles.⁴⁵⁷ They favorably recite Anti-Federalist claims that the federalist proposals "were simply beyond the convention's authority."⁴⁵⁸ And yet, they be-

453. Nearly every mention of Rhode Island in the debates of the Philadelphia Convention and the subsequent ratification conventions was pejorative in nature. See, e.g., The Virginia Convention Debates (Jun. 25, 1788), reprinted in 10 DHRC, *supra* note 4, at 1515, 1516 (Benjamin Harrison V stated that "Rhode-Island is not worthy of the attention of this House—She is of no weight or importance to influence any general subject of consequence." Harrison was a signer of the Declaration of Independence and former Governor of Virginia).

454. Newport and Providence's Protest of Rhode Island General Assembly's Letter to Congress, (Sept. 17, 1787), reprinted in 24 DHRC, *supra* note 4, at 21, 21–23.

455. Ackerman & Katyal, *supra* note 14, at 505.

456. *Id.* at 508–509, 514.

457. *Id.* at 481.

458. *Id.* at 508.

grudgingly admit, often in footnotes, that the instructions from the states actually mattered.⁴⁵⁹ The following passage is crucial:

In calling for the Philadelphia Convention, the Continental Congress had charged the delegates to meet “for the *sole and express* purpose of revising the Articles.” Given this explicit language, did the delegates go beyond their legal authority when they ripped the Articles up and proposed an entirely new text?

This charge was raised repeatedly—and justifiably in the cases of Massachusetts [sic], New York, and Connecticut, where legislatures had expressly incorporated Congress’s restrictive language in their own instructions to delegates. Other state delegations, however, came with a broader mandate, allowing them to make any constitutional proposal they thought appropriate. Thus, while some key delegates may well have acted beyond their commission, this was not true of all.⁴⁶⁰

While the strong inference is raised that all delegates were bound by the “explicit language” from Congress, Ackerman and Katyal make the curious claim that the delegates from Massachusetts, New York, and Connecticut were justifiably accused of violating their instructions *from their own state legislatures*. The professors do not explain how New York’s delegation could be accused of violating their instructions by voting for the Constitution since New York cast no vote one way or the other. Yet, they inexplicably contend that New York’s delegates are “justifiably” charged of going “beyond their commission” when they “ripped the Articles up and proposed an entirely new text.”⁴⁶¹

As to Connecticut, the professors fail to quote or consider the actual legislative language appointing the delegates. As we have already seen, while the Connecticut resolution refers to the congressional resolution, its delegates were ultimately given much broader authority.⁴⁶² Connecticut more properly belongs in the category of states essentially following the Virginia model, granting broad authority to their

459. See, e.g., *id.* at 482 n.18, 483 n.20.

460. *Id.* at 481–83 (footnotes omitted).

461. *Id.* at 482–83.

462. Act Electing and Empowering Delegates (May 17, 1787), reprinted in 1 DHRC, *supra* note 4, at 215, 216.

delegates. The charge against the Massachusetts delegation is facially more plausible. However, there are two significant factors, previously reviewed, that place this claim in a different light.⁴⁶³ The professors fail to mention that the Massachusetts legislature debated the question of whether the Convention had “assum[ed] powers not delegated to them by their commissions.”⁴⁶⁴ Despite this contention, that legislature agreed to call the state ratification convention by a vote of 129 to 32.⁴⁶⁵ Moreover, the Massachusetts convention, by a vote of “90 & od to 50 & od,” expressly rejected the argument that their delegates had violated their instructions.⁴⁶⁶ Moreover, James Madison strongly defended the legality of the actions of the delegates from those states that adopted the congressional language in their instructions.⁴⁶⁷ In their review of *Federalist No. 40*, the professors summarily pronounce Madison’s legal analysis of the instructions as “strained” without the benefit of further discussion.⁴⁶⁸ Thus, we are left with the choice of accepting the conclusions of the Massachusetts legislature, ratifying convention, and James Madison or the undeveloped assertions of two leading modern scholars in pursuit of a grand theory that the Federalists were unconventional revolutionaries.

But we should not lose sight of the fact that Ackerman and Katyal make an important admission regarding the other nine states. As to the charge that the delegates from these states violated their commissions, the professors pronounce judgment: “this was not true.”⁴⁶⁹ Notwithstanding this begrudging exoneration of the actions of delegates from nine states, the balance of the article proceeds on the basis of a cloud of assumed impropriety by all delegates. “Illegality was a leitmotif at the convention from its

463. See *supra* notes 229–33 and accompanying text.

464. *Speech of Dr. Kilham*, MASS. CENTINEL, Oct. 27, 1787, in 4 DHRC, *supra* note 4, at 135.

465. MASS. CENTINEL (Oct. 27, 1787) reprinted in 4 DHRC, *supra* note 4, at 135, 138.

466. Letter from Nathaniel Gorham to Henry Knox (Mar. 9, 1788), reprinted in 7 DHRC, *supra* note 4, at 1673, 1674.

467. See THE FEDERALIST NO. 40, at 248–55 (James Madison) (Clinton Rossiter ed., 1961).

468. Ackerman & Katyal, *supra* note 14, at 544.

469. *Id.* at 483.

first days to its last.”⁴⁷⁰ Musical imagery is no substitute for actual evidence nor does it resolve the professors’ numerous internal inconsistencies on this issue. We have previously reviewed the full historical record on this subject. The claim that recognized and deliberate illegality was the overriding theme of the Convention is without merit.

c. The Delaware Claim

The professors make the particular claim that Delaware’s delegation “recognized that it was acting in contempt of its commission.”⁴⁷¹ This assertion is supported by a footnote with a variety of citations—not one of which supports the claim that the Delaware delegates recognized that they were violating their commissions.⁴⁷² The first citation is nothing more than Merrill Jensen’s reproduction of the commission by the Delaware legislature.⁴⁷³ Ackerman and Katyal then say that the “Delaware problem was broadly recognized by the delegates to Philadelphia.”⁴⁷⁴ For this assertion, they cite the minutes of Convention when the Delaware credentials were first read.⁴⁷⁵ This was a mere notation that Delaware’s delegates had been directed by their legislature to not support a form of voting in Congress that failed to recognize the equality of states. They offer no explanation of the specific actions taken by the Delaware delegates that were in violation of their commissions. The professors do not quote a single statement by any source from Delaware. Such a citation should be the bare minimum when asserting that the Delaware delegates “recognized” their “contempt” for their instructions. The final citation in this footnote is a comment by Luther Martin, an Anti-Federalist who claimed in his own Maryland ratifying convention that Delaware’s delegates had violated their instructions.⁴⁷⁶ Not one piece of evidence is offered which demonstrates that the Delaware delegates themselves knew or believed they were violating their instructions.

470. *Id.* at 506.

471. *Id.* at 481.

472. *See id.* at 481 n.16.

473. *Id.*

474. *Id.*

475. *Id.*

476. *Id.*

The preservation of the equality of the states was indeed a major topic at the Constitutional Convention. Delaware's delegates supported the Great Compromise which created our bicameral system with the House based on equality of population and the Senate based on the equality of States.⁴⁷⁷ This compromise was consistent with the tenor of Delaware's instructions to preserve the equality of the states in Congress. The opinion of a single Anti-Federalist from Maryland does not prove Ackerman and Katyal's assertion that Delaware's delegates knowingly violated their instructions. And the ultimate proof of the delegates' fidelity is found in the fact that Delaware was the first state to ratify the Constitution.⁴⁷⁸ Its vote was unanimous.⁴⁷⁹

3. *The Legality of the Ratification Process*

a. *Article XIII*

Ackerman and Katyal's principal attack on the legality of the adoption of the Constitution rests on the alleged improprieties of the ratification process. This is logical given that, at least occasionally, they admit that the vast majority of delegates were faithful to their instructions. Thus, they focus the majority of their article on the more complex and plausible issue that the ratification process was improper.

The professors make a straightforward legal argument.⁴⁸⁰ Article XIII required all amendments to be first proposed by Congress and then ratified by all thirteen state legislatures. The new Constitution itself was not approved by Congress, nor by the state legislatures—thus the ratification process was illegal.

Ackerman and Katyal make three fundamental errors in their ratification argument. First, they fail to identify the correct source for the rule that ratification was to proceed first to Congress and then to the state legislatures. Second, they fail to consider the legal implications arising from the "Ratification and Transition" Resolution of the Philadelphia Convention.⁴⁸¹

477. See 1 FARRAND'S RECORDS, *supra* note 107, at 664.

478. 3 DHRC, *supra* note 4, at 41.

479. *Id.*

480. Kay's arguments on this point are essentially parallel to those of Ackerman and Katyal. See Kay, *supra* note 14, at 67–70.

481. Kay does reference this second act of the Convention in his arguments on ratification. However, he inaccurately classifies this act as a letter. See *id.* at 68. Kay

Third, they fail to acknowledge that the new process itself was, in fact, approved by Congress unanimously and then by all thirteen state legislatures.

It is only by ignoring the full documentary and historical record that Ackerman and Katyal so easily reach their conclusion that the change in the ratification process was unsanctioned. But the plain facts are that the states set the expectation for the ratification process in their appointments of delegates, and the states were free to lawfully change this process provided that Congress and all thirteen legislatures agreed. And this is what actually happened.⁴⁸²

The professors make much ado about the political and moral arguments raised by Madison to justify for the new process. From such statements by Madison, they contend that he argued that the end of obtaining the Constitution was so important that it justified illegal and revolutionary means to achieve this end.⁴⁸³ Two things are abundantly clear from the historical record about these contentions. First, the supporters of the Constitution genuinely believed that a government based on the consent of the governed was morally superior to a government assented to only by elected legislators. All political legitimacy rested on this standard. Second, it is beyond legitimate debate that the Founders would have proceeded with the new process and entered into the government under the new Constitution even if one or more state legislatures refused to endorse the new process for ratification. The Framers clearly believed that the nation was on the verge of collapse and that moral and political legitimacy, based on the direct consent of the governed, was more important than legalistic correctness.⁴⁸⁴ However, proof that the Founders were willing, if it had become necessary, to take such steps is not proof that they acted illegally. We judge the legality of their

gives no consideration to the legal effects of the approval of the process set forth in these resolutions by both the Confederation Congress and all thirteen state legislatures.

482. See Journals of Congress (Sept. 28, 1787), reprinted in 1 DHRC, *supra* note 4, at 340, 340.

483. Ackerman & Katyal, *supra* note 14, at 488.

484. See THE FEDERALIST NO. 40, at 252–55 (James Madison) (Clinton Rossiter ed., 1961).

actual actions, not what they probably (or even certainly) would have done if the legally proper method failed.

Thus, Ackerman and Katyal's recitation of the Federalists' moral arguments and appeals to popular sovereignty are historically interesting and demonstrate that our country came very close to making a quasi-revolutionary decision in the ratification process. But, in the end they found a path that was not revolutionary. They asked Congress and all thirteen state legislatures to approve the new ratification process and they did. Thus, there is no need for either an apology or a moral justification from the Framers nor forgiveness from their political descendants. Congress and all thirteen legislatures gave legal sanction to the new process.

b. State Constitutions

Ackerman and Katyal make a second argument as to the illegality of the ratification process. They contend that several state constitutions contained a required process for amendments thereto.⁴⁸⁵ And since the Supremacy Clause in Article VI represented a *de facto* amendment to these state constitutions, these states were required to follow that process first.⁴⁸⁶ Each state constitution would have to be amended to authorize the legislature to call a ratification convention for a Constitution that proclaimed itself to be supreme over the states in matters delegated to the new central government.⁴⁸⁷

This argument borders on frivolousness, ignoring, as it does, the text of Article XIII. The first sentence of that Article contained a supremacy clause: "Every State shall abide by the determination of the United States in Congress assembled, on all questions which by this confederation are submitted to them."⁴⁸⁸ Nothing in Article VI of the Constitution says anything materially different.⁴⁸⁹ The Constitution and all laws made in furtherance of the Constitution are supreme over inconsistent state laws and state constitutions. The provisions of the Articles of Confederation and the Constitution on the ques-

485. Ackerman & Katyal, *supra* note 14, at 484.

486. *See id.*

487. *See id.* at 484–87.

488. ARTICLES OF CONFEDERATION OF 1781, art. XIII.

489. *See* U.S. CONST. art. VI, cl. 1.

tion of supremacy are functionally identical. Moreover, if the state constitutions of these select states required the use of the state amending process to adopt a supremacy clause, then that requirement was equally applicable to the adoption of the Articles of Confederation. No state did this, of course, which underscores the absurdity of this argument.

Although Ackerman and Katyal never mention it, this argument was made and answered during the ratification debates. The Republican Federalist argued that the Massachusetts constitution would be effectively amended by the new federal constitution.⁴⁹⁰ Accordingly, prior to ratification, permission would have to be obtained by first following the provisions of the Massachusetts state constitution.⁴⁹¹ This suggestion was never given serious consideration in either the Massachusetts legislature or its ratification convention.

This theory was also argued by the town of Great Barrington, Massachusetts in proposed instructions to their original delegate to the state ratification convention, William Whiting.⁴⁹² He was one of the Common Pleas judges from Great Barrington, Massachusetts who was convicted of sedition for his role in Shay's Rebellion.⁴⁹³ A Federalist writer answered such arguments by pointing out that, if true, they would equally demonstrate that the Articles of Confederation had been illegally adopted:

[I]f we put the credentials of our rulers in 1781 to the test; if we dare to try the extent of their authority by the criterion of *first principles*; if in our researches after truth on this point we follow *these* whithersoever they will guide us, may it not be safely and fairly asserted that the States of South Carolina Virginia, New Jersey, Connecticut, Rhode-Island and New Hampshire even from the date of Independence to that of the confederation to which we are objecting, never invested their respective Legislatures with sufficient powers permanently to form and ratify such a compact.⁴⁹⁴

490. *The Republican Federalist III*, MASS. CENTINEL, Jan. 9, 1787, reprinted in 5 DHRC, *supra* note 4, at 661–65.

491. *See id.*

492. *See* Draft Instructions (Nov. 26, 1787), reprinted in 5 DHRC, *supra* note 4, at 959.

493. *See id.* at 958.

494. Letter from John Brown Cutting to William Short London (Jan. 9, 1788), reprinted in 14 DHRC, *supra* note 4, at 493–94.

As Ackerman and Katyal suggest, we must ask if there is evidence that there was broad agreement as to the validity of the argument among Americans at the time. The answer is clearly no. The professors cite no contemporary evidence in support of their interpretation of the interplay between state constitutions and Article VI's Supremacy Clause. And the supporting evidence this article has discovered and cited above hardly rises to the level of general contemporary agreement.

Moreover, we cannot escape the parallel between the supremacy clause in Article XIII of the Articles of Confederation and the one in Article VI of the Constitution. No serious contention was ever made that state constitutions had to be revised before either of these provisions should be adopted. Ackerman and Katyal's argument in this regard is much like the contention by the plaintiffs in *Leser v. Garnett*.⁴⁹⁵ There, the plaintiffs sought to strike the names of women voters from the list of eligible voters on the ground that the 19th Amendment was improperly adopted.⁴⁹⁶ One of their arguments was that the state legislatures were without power to approve a constitutional amendment allowing women to vote if the state constitution prohibited such voting.⁴⁹⁷ The plaintiffs contended that legislators who voted for the 19th Amendment in states where suffrage was limited to males "ignored their official oaths [and] violated the express provisions" of their state constitutions.⁴⁹⁸ The Court quickly and unanimously rejected this contention.⁴⁹⁹ State constitutions do not have to be first amended to allow the legislature to vote to ratify amendments that impliedly contravene provisions thereof.

4. *The Professors' Real Agenda*

The reason that Ackerman and Katyal advance their theory that the Constitution was adopted by a revolutionary and illegal process is revealed in their article's final section. They contend that such revolutionary actions—changes in the governing structure without adherence to the proper processes—are appropriate whenever the need is sufficiently great to justify ille-

495. 258 U.S. 130 (1922).

496. *Id.* at 135.

497. Brief for Petitioner at 100, *Leser v. Garnett*, 258 U.S. 130 (1922) (No. 553).

498. *Id.* at 110.

499. See *Leser*, 258 U.S. at 137.

gal means.⁵⁰⁰ They contend that the constitutional revolutions of Reconstruction and those of the era of judicial activism are just as valid as the Constitution itself:

In justifying their end run around state-centered ratification rules, nineteenth-century Republicans and twentieth-century Democrats not only resembled eighteenth-century Federalists in asserting more nationalistic conceptions of We the People than their opponents. They also sought to give new meaning to the idea of popular sovereignty by making it far more inclusionary than anything contemplated by the eighteenth century.⁵⁰¹

They contend that there has been a tacit approval of all of these revolutionary changes by the votes of the people in subsequent national elections.⁵⁰² However, this attempt at equivalency fails on at least two levels. First, the Constitution was approved by ratification conventions directly elected by the people.⁵⁰³ These elections provide the moral justification for the claim that the Constitution was adopted by the consent of the governed. Moreover, no state was bound by the new Constitution until the people of that state actually consented. The actual consent of the governed was obtained.

The judicial revolution praised by Ackerman and Katyal has no such parallel reflecting the consent of the governed. In fact, just the opposite is true. The direct votes of the people are often overturned by judicial rulings as was the case in *Lucas v. Forty-Fourth General Assembly of Colorado*.⁵⁰⁴ Judges cannot consent for the people. Subsequent elections for Congress or the White House and the passage of time do not constitute the consent of the governed for judicial revisionist rulings. Thomas Paine, who understood a few things about revolutions and moral consent said:

All power exercised over a nation must have some beginning. It must either be delegated or assumed. There are no other sources. All delegated power is trust, and all assumed

500. See Ackerman & Katyal, *supra* note 14, at 568–73.

501. *Id.* at 570–71.

502. See *id.* at 571–72.

503. See Journals of Congress (Sept. 28, 1787), reprinted in 1 DHRC, *supra* note 4, at 340, 340.

504. 377 U.S. 713 (1964).

power is usurpation. Time does not alter the nature and quality of either.⁵⁰⁵

The parallel fails. First, the Constitution was lawfully adopted. Second, the Constitution was approved by the direct vote of the people before anyone was obligated by it. Nothing in this history provides a parallel to establish an aura of legal or moral legitimacy for judges who wish to exercise the self-created prerogative to regularly rewrite the Constitution starting the first Monday of every October.

IV. CONCLUSION

When we raise our hands to swear allegiance to the Constitution and promise to defend it against all enemies foreign or domestic, we can do so with a clean conscience. The Constitutional Convention was called by the states. The delegates obeyed the instructions from their respective legislatures as to the scope of their authority. The new method for ratification was a separate act of the Constitutional Convention that was approved by a unanimous Congress and all thirteen legislatures. The consent of the governed was obtained by having special elections for delegates to every state ratifying convention. No state was bound to obey the Constitution until its people gave their consent. Moral legitimacy and legal propriety were in competition at times. But in the end, the Framers found a way to satisfy both interests.

The Constitution of the United States was validly and legally adopted.

505. THOMAS PAINE, *THE RIGHTS OF MAN*, reprinted in 2 *THE WRITINGS OF THOMAS PAINE*, at 265, 428 (Moncure Daniel Conway ed., 1894).

DELEGATION RECONSIDERED: A DELEGATION DOCTRINE FOR THE MODERN ADMINISTRATIVE STATE

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INTRODUCTION

The American Constitution designed structures intended to limit discretionary government power, checking assignments of discretionary power necessary for effective government (something the new Constitution was supposed to improve) by dividing them among different entities and different officials.¹ The national government was granted limited powers;² the states retained plenary powers not at odds with national powers;³ and the “vesting clauses” of Articles I, II, and III grant the entirety of the legislative, executive, and judicial powers of the national government to specific bodies and officers.⁴ That set of assignments long has been understood to preclude reassignment of those powers to others. Congress cannot, for example, claim for itself part of the President’s power to appoint officers

1. *See, e.g.*, THE FEDERALIST Nos. 76–78 (Alexander Hamilton), Nos. 10, 41, 42, 47–51 (James Madison).

2. *See, e.g.*, U.S. CONST., art. I, §§ 8, 10.

3. *See* U.S. CONST., amend. X.

4. *See* U.S. CONST., art. I, § 1, cl. 1; *id.* art. II, § 1, cl. 1; *id.* art. III, § 1, cl. 1.

of the United States⁵ or to execute the laws,⁶ nor can it assign to non-Article III officers the judicial power of the United States.⁷

This allocation of power does not only bar rearrangement of authority by invasion; it also prevents rearrangement via what might appear to be a voluntary surrender of authority. For example, the Constitution's structure cannot be squared with Congress giving its own peculiar authority—the legislative powers granted in the Constitution—to any other body.⁸ This conclusion follows from both the language of the document and the understanding of the people framing it that the reasons against altering the allocation of powers are the same regardless of the form of that change.

The delegation doctrine (or nondelegation doctrine), first clearly articulated in *Field v. Clark*,⁹ has been accepted as a common-sense statement of this proposition for more than a century. Nonetheless, judicial application of the doctrine has been sufficiently rare—there are merely two cases in which

5. See *Buckley v. Valeo*, 424 U.S. 1 (1976).

6. See *Immigration & Naturalization Serv. v. Chadha*, 462 U.S. 919 (1983).

7. See, e.g., *Stern v. Marshall*, 564 U.S. 462 (2011); *N. Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50 (1982). But see *Commodities Futures Trading Comm'n v. Schor*, 478 U.S. 833 (1986) (holding that an administrative agency is permitted under certain conditions to hear and decide matters that could have been committed to Article III courts, including common-law counterclaims to regulatory-statutory claims, subject to availability of subsequent review by an Article III court); *Crowell v. Benson*, 285 U.S. 22, 51–54 (1932) (holding that administrative determinations of fact in maritime workers' compensation cases are permitted, so long as final decision on matters of law is reserved to Article III courts). It is open to question how much of *Schor* and *Crowell* remain good law following *Northern Pipeline* and *Stern*. It also is not clear whether the assignments approved in *Schor* and *Crowell* should be considered part of the judicial power of Article III or, given the limitations on what is being finally determined, merely administrative power to resolve some issues through adjudication. See, e.g., *Mistretta v. United States*, 488 U.S. 361, 417 (1989) (Scalia, J., dissenting).

8. See, e.g., *Clinton v. New York*, 524 U.S. 417 (1998); *Loving v. United States*, 517 U.S. 748, 757–58 (1996); *Wayman v. Southard*, 23 U.S. (10 Wheat.) 1, 42–43 (1825). This proposition, though often repeated by the courts and seemingly self-evident at some level, is not universally accepted. See, e.g., Cynthia R. Farina, *Deconstructing Nondelegation*, 33 HARV. J.L. & PUB. POL'Y 87 (2010). Although this article will refer to the reassignment of powers given to Congress, reference to delegation of power that must be exercised through formal legislation also should be understood as affecting the related power of the President who participates in lawmaking through the requirement of presentment.

9. 143 U.S. 649, 692 (1892).

the Supreme Court has overturned laws on that ground¹⁰—that many scholars have opined that the doctrine exists as no more than a tautology¹¹ or that it is simply unenforceable as a practical matter.¹² In other words, despite its broad acceptance as a doctrine that is consistent with the structure and text of the Constitution, it effectively is treated as simply a notional, not a realistic, constraint.

Recent opinions from two Justices, however, may signal new openness to reconsideration of the Court's apparent reluctance to reject laws that effectively cede legislative authority to executive—or non-executive administrative—officers. Both Justice Samuel Alito and Justice Clarence Thomas, writing in *Department of Transportation v. Association of American Railroads*,¹³ expressed concern about legislated grants of expansive authority to make rules regulating private conduct.¹⁴ Whether or not these opinions presage a change in the Court's posture respecting delegation, they provide an occasion for reexamining how much the Constitution's division of and limitations on power traditionally assumed to be "legislative" can and should be judicially enforceable.

This article traces the concerns that informed constitutional decisions separating powers along with early laws and judicial decisions respecting the assignment of authority to the executive and judicial branches. Although the difficulty of drawing clear lines among classes of government power has been acknowledged repeatedly, the framers of the Constitution thought divided power was critical to the defense of liberty, and courts found approaches that enforced constitutionally separated powers.¹⁵ The alteration of the delegation doctrine in

10. See *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 474 (2001) (citing *Panama Refining Co. v. Ryan*, 293 U.S. 388 (1935)); *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935).

11. See, e.g., Eric A. Posner & Adrian Vermeule, *Interring the Nondelegation Doctrine*, 69 U. CHI. L. REV. 1721 (2002).

12. See, e.g., Peter H. Schuck, *Delegation and Democracy: Comments on David Schoenbrod*, 20 CARDOZO L. REV. 775, 790–91 (1999); Cass R. Sunstein, *Nondelegation Canons*, 67 U. CHI. L. REV. 315, 326–28 (2000).

13. 135 S. Ct. 1225 (2015).

14. See *id.* at 1237 (Alito, J., concurring); *id.* at 1240–41, 1253–55 (Thomas, J., concurring in judgment).

15. See, e.g., *Wayman v. Southard*, 23 U.S. (10 Wheat.) 1, 43, 46 (1825); discussion *infra*, at Parts II.A., II.B., & II.D.

the late 19th and early 20th Century, however, set the law on a different path, one that gave a binary choice essentially requiring either detailed lawmaking by Congress on all points or judicial acquiescence to extraordinary commitments of discretionary authority for other branches of government to adopt rules governing conduct that should be regulated by legislation, if at all. That choice resolved into periodic statements of fealty to a delegation doctrine coupled with routine acquiescence to authorizations that effectively delegated Congress' legislative power to others.

If the constitutional structure is to be preserved, the delegation doctrine needs realignment. The doctrine should return to its historic roots. It should focus first and foremost on the nature of the authority granted—on whether discretionary authority assigned to another branch is of such importance that it should only be decided by Congress and on whether the authority fits within the set of functions constitutionally committed to that branch. A law that fails this test constitutes an attempted delegation of legislative power instead of a legal authorization for specific exercises of executive or judicial power. Changing the focus from the *scope* to the *nature* of the authority legally assigned can provide a path to reinvigorating separation of powers protections.

I. SEPARATION VERSUS DELEGATION

A. *Separation of Functions*

The most basic proposition about the U.S. Constitution in the eyes of its framers was its ability to enable effective national government without putting liberty at risk by separating power in different hands. James Madison put the point starkly:

No political truth is certainly of greater intrinsic value, or is stamped with the authority of more enlightened patrons of liberty, than that . . . [t]he accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, . . . may justly be pronounced the very definition of tyranny.¹⁶

16. THE FEDERALIST No. 47, at 235 (James Madison) (Mary Carolyn Waldrep ed., 2014).

The importance of separated powers as a safeguard of liberty was not simply part of a set of considerations that the Constitution's best-known advocates acknowledged. The framers, Madison most of all, repeatedly stressed its place in the constitutional scheme and its centrality to a proper foundation for the nation in other statements made during the national debate over ratification of the Constitution.¹⁷ Madison's Federalist No. 51 is justly renowned for its soaring rhetoric about how different a task constitution-making would be "[i]f men were angels," the role of the people as critical to checking power, and the constitutional design that enabled "[a]mbition . . . to counteract ambition."¹⁸ More prosaically, but equally important, Federalist No. 51 declares that the "separate and distinct exercise of the different powers of government . . . is admitted on all hands to be essential to the preservation of liberty" and that the "division of the government into separate and distinct departments," together with the division of power between state and national governments, provides a critical protection against usurpation of the rights of the people.¹⁹

In Federalist 48, Madison went on to add that while separation of the legislative, executive, and judicial powers—placing them in different bodies and different officials' hands—is necessary to protect liberty, it is not sufficient:

. . . [P]ower is of an encroaching nature, and . . . it ought to be effectually restrained from passing the limits assigned to it. After discriminating, therefore, in theory, the several classes of power, as they may in their nature be legislative, executive, or judiciary, the next and most difficult task is to

17. The insistence of the framers on separation of powers, and the criticism of some state constitutions for failing to do this effectively, *see, e.g.*, THE FEDERALIST No. 47 (James Madison), or for failing to balance powers against one another effectively, *see, e.g.*, THE FEDERALIST No. 48 (James Madison), does not mean that only one constitutional arrangement would satisfy the framers' concerns, *see, e.g.*, Gerhard Casper, *An Essay in Separation of Powers: Some Early Versions and Practices*, 30 WM. & MARY L. REV. 211 (1989); William B. Gwyn, *The Indeterminacy of the Separation of Powers in the Age of the Framers*, 30 WM. & MARY L. REV. 263 (1989); M. Elizabeth Magill, *The Real Separation in Separation of Powers Law*, 86 VA. L. REV. 1127 (2000). Madison and others, however, strongly urged those considering ratification to appreciate the virtues of the particular arrangement adopted in the Constitution. *See, e.g.*, THE FEDERALIST Nos. 47–51 (James Madison), Nos. 67–73, 78–80 (Alexander Hamilton).

18. THE FEDERALIST No. 51, at 254 (James Madison) (Mary Carolyn Waldrep ed., 2014).

19. *Id.* at 253.

provide some practical security for each, against the invasion of the others.²⁰

This separation of functions plainly does not contemplate that one branch of government would take over functions assigned to a different branch. Warnings about encroachment of one branch on the powers of another were directed at this end, along with a particular caution about the legislature. In Madison's memorable words, "[t]he legislative department is everywhere extending the sphere of its activity, and drawing all power into its impetuous vortex."²¹

B. Delegation: Encroachment's Other Side

Equally important, the understanding of separated powers did not permit one branch to assign its functions to another branch. That prospect was not so evident a concern as the intrusion of one branch into the affairs of another over the other's objection. But the framers of the Constitution were well aware of John Locke's warning against delegation of legislative power:

The power of the Legislative being derived from the People by a positive voluntary Grant and Institution, can be no other, than what the positive Grant conveyed, which being only to make Laws, and not to make Legislators, the Legislative can have no power to transfer their Authority of making laws, and place it in other hands.²²

The critical point, however, goes beyond Locke's declaration that the people have not consented to a grant of legislative power to others. It also must be understood that the incentives that so obviously made the framers concerned with encroachment apply equally to delegation. The bottom line is that *the grant of power from one entity to another is never an act of pure generosity; the grantor invariably gains something from the grant.*²³

20. THE FEDERALIST No. 48, at 242 (James Madison) (Mary Carolyn Waldrep ed., 2014).

21. *Id.*

22. JOHN LOCKE, *Second Treatise of Government* § 141, in JOHN LOCKE, TWO TREATISES OF GOVERNMENT 363 (Peter Laslett ed., Cambridge Univ. Press 1988) (1690) (emphasis omitted).

23. Anyone who has had direct experience with delegation should understand this point. Delegation within an organization creates increased freedom, increased opportunity to claim successful outcomes, and increased insulation against blame for bad outcomes. See, e.g., Peter H. Aranson, Ernest Gellhorn & Glen O. Robinson, *A Theory of Legislative Delegation*, 68 CORNELL L. REV. 1 (1982); John F. Man-

In the case of a delegation of authority from the legislature, the returns to legislators could be in the form of reducing the degree to which they will be held accountable for unpopular actions, or the returns could flow from enabling a less costly mechanism for taking some steps that legislators are persuaded provide public benefits.²⁴ Despite the common caricature of government as a sinkhole for wasteful spending—reflecting the fact that politicians often benefit from spending that is difficult to divorce from rent-seeking²⁵—there are competing pressures to use scarce funds in ways that provide the greatest returns.²⁶ Efficiency in government, however, is not measured in the same way as in private enterprise; the benefits come in returns to those who hold office, which are not strictly correlated with the sorts of inputs and outputs associated with standard concepts of economic efficiency.²⁷

Whatever the nature of the political and personal benefits—which exist even where the “outplacement” is associated with

ning, *The Nondelegation Doctrine as a Canon of Avoidance*, 2000 SUP. CT. REV. 223; Neomi Rao, *Administrative Collusion: How Delegation Diminishes the Collective Congress*, 90 N.Y.U. L. REV. 1463 (2015). Arguments about the limitations on such benefits—on the degree to which Congress, for instance, can insulate itself from criticism for unpopular results—raise legitimate points. See, e.g., Posner & Vermeule, *supra* note 11, at 1746–50. But these arguments are ultimately only quibbles over the *degree*, not the *existence*, of these effects.

24. See, e.g., David Epstein & Sharyn O'Halloran, *The Nondelegation Doctrine and the Separation of Powers: A Political Science Approach*, 20 CARDOZO L. REV. 947 (1999); Jerry L. Mashaw, *Prodelegation: Why Administrators Should Make Political Decisions*, 1 J.L. ECON. & ORG. 81 (1985); Mathew D. McCubbins, Roger G. Noll & Barry R. Weingast, *Structure and Process, Politics and Policies: Administrative Arrangements and the Political Control of Agencies*, 75 VA. L. REV. 431 (1989); Kenneth A. Shepsle, *The Strategy of Ambiguity: Uncertainty and Electoral Competition*, 66 AM. POL. SCI. REV. 555 (1972).

25. The literature on rational-choice politics and rent-seeking is voluminous. Among the classic expositions of core concepts, see, e.g., JAMES M. BUCHANAN & GORDON TULLOCK, *THE CALCULUS OF CONSENT* (Univ. Michigan Press 1962); MANCUR OLSON, JR., *THE LOGIC OF COLLECTIVE ACTION: PUBLIC GOODS AND THE THEORY OF GROUPS* (Harvard Univ. Press 1965); Anne O. Krueger, *The Political Economy of the Rent-Seeking Society*, 64 AM. ECON. REV. 291 (1974).

26. This is a general axiom of economics, though in the context of government, it is arguable what the maximand is that is advanced by a particular spending level or by particular efficiencies within the set budget level. See, e.g., WILLIAM A. NISKANEN, JR., *BUREAUCRACY AND REPRESENTATIVE GOVERNMENT* 24–38 (Aldine-Atherton 1971); KENNETH A. SHEPSLE & MARK S. BONCHEK, *ANALYZING POLITICS: RATIONALITY, BEHAVIOR, AND INSTITUTIONS* 348–77 (W.W. Norton & Co. 1997).

27. See, e.g., George J. Stigler, *Economic Competition and Political Competition*, 13 PUB. CHOICE 91 (1972).

public benefits (at least from some vantage)—assigning some part of an official's or entity's functions to others invariably has some return for the delegating officials.²⁸ Acknowledgement of official self-interest in delegation of power as much as in the acquisition of power should be enough in itself to raise questions about the practice. The practical and policy considerations associated with these observations are addressed further below.

From the standpoint of constitutional design, the critical point is that redistribution of authority from one entity to another—whether by encroachment or delegation—is at odds with the inclusion of specific procedures for each branch's and officer's functions. The division of legislative authority between houses of Congress having different geographic bases and different balances among the members, along with the requirement of presentment to the President and potentially a veto requiring a supermajority to supersede, serve important roles as checks on specific decisions. A delegation of authority that elides those checks should be viewed with suspicion.²⁹

C. *Early Experiences*

1. *Laws*

The early Congresses, which included a substantial number of drafters and ratifiers of the Constitution, adopted laws that granted administrative officials power to make a variety of discretionary decisions.³⁰ The grants of authority almost inevitably permitted executive officials (or, in at least one case, judges) to make decisions that might otherwise have been made directly by Congress. Yet in each case that nature

28. See, e.g., Aranson et al., *supra* note 23; Epstein & O'Halloran, *supra* note 24. In this sense, however, it is worth noting that *both* legislating and delegating (and *not* legislating or *not* delegating) can confer benefits. A similar concept is found in Fred S. McChesney, *Rent Extraction and Rent Creation in the Economic Theory of Regulation*, 16 J. LEGAL STUD. 101 (1987), which observes that not regulating, despite the acknowledged possibility of imposing regulatory constraints, can serve the same rent-extracting function as regulating. The same "two sides of the same coin" corollary applies to delegation as another means for expanding power.

29. See, e.g., *Clinton v. New York*, 524 U.S. 417 (1998).

30. See Kenneth Culp Davis, *A New Approach to Delegation*, 36 U. CHI. L. REV. 713, 719–20 (1969); Posner & Vermeule, *supra* note 11, at 1735–36; Harold J. Krent, *Delegation and Its Discontents*, 94 COLUM. L. REV. 710, 738–39 (1994) (reviewing DAVID SCHOENBROD, *POWER WITHOUT RESPONSIBILITY* (1993)).

of the assignment of authority was accepted as consistent with the Constitution's division of powers. The existence of alternative mechanisms that would have allowed direct exercise of more decisional power by Congress and less by others did not, in the view of those who were present at the constitutional creation, make any of these assignments an improper grant of *legislative* power.

For example, the Second Congress passed the Residence Act,³¹ which authorized presidentially appointed commissioners to purchase or accept land (of no more than ten square miles located within certain bounds along the Potomac) that the President deemed sufficient to create a federal district—now the District of Columbia—to house the national government and to “provide suitable buildings for the accommodation of Congress, and of the President, and for the public offices of the government of the United States” on terms deemed appropriate by the President.³² Congress certainly could have set the precise metes and bounds of the District itself and also could have approved details of each building itself, but the legislators found it unnecessary to specify further details.

Similarly, the Judiciary Act of 1789,³³ passed by the First Congress—in addition to setting the number of Supreme Court Justices, creating specified lower courts in particular jurisdictions, and laying out a series of detailed requirements for the operation of the judiciary—empowered the federal courts to adopt “all necessary rules for the orderly conducting [of] business” in those courts.³⁴ Again, the Congress presumably could have legislated the details of the procedural requirements for filings, briefs, arguments, execution of judgments, and so on.

Another example concerns procedures for paying pensions for military veterans. Part of the law adopted by the First Congress authorizing the formation of the army authorized continued payment from the federal government of pensions initially obligated by the states; these payments would be made under regulations prescribed by the President.³⁵ In the same vein, the Third Congress extended the government's pension payments to disa-

31. 1 Stat. 130 (1790).

32. *Id.*

33. 1 Stat. 73.

34. *Id.* at 83.

35. Act of Sept. 29, 1789, 1 Stat. 95.

bled veterans for another year, again allowing the President to fill in the procedural details for making the payments.³⁶ The Third Congress also passed the Embargo Act of 1794,³⁷ which authorized the President, if Congress was not in session, “whenever, in his opinion, the public safety shall so require, to lay an embargo on all ships and vessels in the ports of the United States, or upon the ships and vessels of the United States, or the ships and vessels of any foreign nation, under such regulations as the circumstances of the case may require, and to continue or revoke the same, whenever he shall think proper.”³⁸ Among other limitations, any embargo instituted under this authority was to expire within 15 days of the next session of Congress.

What is striking about the list of delegations of authority in the early Congresses is the *nature* of the delegations. Although Congress could have legislated all of the details that it deputized other officials to direct, the Congress committed to the other branches decisions that were consistent with the functions of those branches. Outside the realm of foreign affairs (where the President enjoys substantial independent authority, as over the use of embargoes³⁹), it did not authorize the President or the courts or other governmental officers to adopt rules that broadly regulated behavior of private individuals or entities or that controlled the conduct of other officials outside the branch carrying out the legislated mandate.

Instead, the early laws deputized other officers to make decisions on matters of housekeeping, of management of national property, of licensing, of procedures for performing duties aligned with the assignee’s other powers. So, for instance, laws such as the Judiciary Act only gave judges authority over procedures that were traditionally within judges’ discretion, that is, issues of *judicial* process generally thought to be adjuncts to the decision of cases and controversies.⁴⁰ And in the foreign affairs and national security domain, where Congress gave the broadest authority to the President, the authorization under the

36. Act of Mar. 3, 1791, 1 Stat. 218.

37. 1 Stat. 372.

38. *Id.*

39. *See, e.g.,* The Prize Cases, 67 U.S. 635 (1863).

40. The matters of process committed to the judiciary in early law, hence, stand in sharp contrast to the laws at issue in *Morrison v. Olson*, 487 U.S. 654 (1988), and *Mistretta v. United States*, 488 U.S. 361 (1989).

Embargo Act was limited both in the time for which it applied (when Congress was not in session) and its potential duration (expiring shortly after Congress' return).

While the early laws do provide examples of legislative commitment of discretionary authority to the President, the courts, or specific executive officers, the authorizations are almost entirely consistent with the exercise of *administrative* power, not of *coercive* power over private activity that is separate from access to government benefits or permits (at least outside the special realm of national security and foreign affairs powers) or of *obligatory* power that would enable the delegate to alter the nation's financial commitments. Those powers remained squarely in the legislature's domain.

2. Wayman v. Southard

Although not the first case to uphold legislative commitment of authority to the President,⁴¹ the most significant early decision of the Supreme Court delineating the contours of congressional entitlement to authorize other federal entities to exercise power that might have been exercised by Congress came in the 1825 case of *Wayman v. Southard*.⁴² Chief Justice John Marshall's opinion for the Court tracked the same line as the early laws, recognizing the propriety of delegations of discretionary authority over matters associated with powers constitutionally committed to the other branches.⁴³

Wayman presented a challenge to a particular rule of executing judgment, based on a provision in the Process and Compensation Act of 1792 that adopted for federal courts the same "forms of writs, executions, and other process" used in the applicable state courts.⁴⁴ The provisions respecting reliance on state law were "subject however to such alterations and additions as the said courts respectively shall in their discretion deem expedient, or to such regulations as the [S]upreme [C]ourt of the United States shall think proper

41. See, for example, *Cargo of the Brig Aurora v. United States*, 11 U.S. (7 Cranch) 382 (1813), addressing the constitutionality of delegations of authority to respond in specified ways to particular post-enactment events. This decision is discussed *infra* at Part III.

42. 23 U.S. (10 Wheat.) 1 (1825).

43. See *id.* at 46.

44. Act of May 8, 1792, 1 Stat. 275.

from time to time by rule to prescribe to any circuit or district court concerning the same."⁴⁵ The defendants, resisting execution of judgment under the federal rule (which differed from Kentucky's), asserted that the "subject . . . to" provision, "if extended beyond the mere regulation of practice in the Court, would be a delegation of legislative authority which Congress can never be supposed to intend, and has not the power to make."⁴⁶

Chief Justice Marshall, writing for the Court, stated what he took to be an obvious rule:

It will not be contended that Congress can delegate to the Courts, or to any other tribunals, powers which are strictly and exclusively legislative. But Congress may certainly delegate to others, powers which the legislature may rightfully exercise itself.⁴⁷

Powers that fall into the first category are rules for decisions on matters of such importance that they "must be entirely regulated by the legislature itself."⁴⁸ The second category is comprised of subjects "of less interest," where Congress properly may make "general provisions" and leave it to others to "fill up the details."⁴⁹

While admitting that the line between these two classes of power is not "exactly drawn," Marshall made plain his view that regulation of matters having to do with judicial forms and proceedings fell cleanly into the second class and were appropriate subjects for the discretion of the federal courts. He invoked the provisions of the Judiciary Act of 1789 and other laws granting authority over judicial processes to the courts as

45. *Id.* at 276; see *Wayman*, 23 U.S. at 41.

46. *Wayman*, 23 U.S. at 42.

47. *Id.* at 42–43.

48. *Id.* at 43.

49. *Id.* Some scholarly commentaries on the English law with respect to royal prerogative of proclamations view the Crown's power as similarly limited to elaborating details within the scope of existing law. See, e.g., 1 WILLIAM BLACKSTONE, COMMENTARIES *303; ALBERT VENN DICEY, AN INTRODUCTION TO THE STUDY OF THE LAW OF THE CONSTITUTION 53–54 (MacMillan Press 1979) (1885). Framers of the American Constitution were familiar with Blackstone's views on the limits of the executive—in the person of the King—to exercise power that rightly belonged to the legislature, as well as with Blackstone's observations on times when the King's authority intruded into the realm properly reserved to Parliament. See, e.g., 4 WILLIAM BLACKSTONE, COMMENTARIES *424.

evidence of the contemporaneous understanding that such delegations were unproblematic.⁵⁰

Marshall's *Wayman* opinion added two thoughts that help clarify his approach to delegated authority. He wrote that "[t]he difference between the departments undoubtedly is, that the legislature makes, the executive executes, and the judiciary construes the law; but the maker of the law may commit something to the discretion of the other departments . . ."⁵¹ Further, Marshall seemed to have this description of the general division of powers in mind when he observed that "[a] general superintendence over" the execution of judgments "seems to be properly within the judicial province, and has been always so considered."⁵² In other words, the Justices in *Wayman* were looking at the nature of the delegation in the context of the separation of powers, considering both what was being authorized by Congress and how it connected with the nature of the power constitutionally exercised by the recipient of that authority.

Wayman did not provide entirely clear guidance for what would be permissible delegations. Marshall acknowledged that "the precise boundary of this power [to commit discretionary authority to another branch] is a subject of delicate and difficult inquiry."⁵³ The decision, however, did suggest the general contours of the constitutional rule respecting delegation as Marshall and his colleagues then saw it. Under *Wayman*, delegation of authority that could have been exercised by Congress directly through legislation is allowed if it satisfies two conditions. First, it must consist of discretion on a matter of sufficiently slight importance not to require resolution by Congress. Second, it must convey a discretionary authority that is of the sort reasonably associated with the activity of the body exercising that discretion. Together these conditions render the delegated authority not a devolution of

50. *Wayman*, 23 U.S. at 42–47. Although the decision became known, rightly, for its statements on delegation of power, much of the opinion dealt with details of the Process and Compensation Act, evaluating what the Act comprehended relative to the execution of judgments.

51. *Id.* at 46.

52. *Id.* at 45.

53. *Id.* at 46.

legislative power but instead part of the power constitutionally vested in the other branch.⁵⁴

II. THE “INTELLIGIBLE PRINCIPLE” TEST: DELEGATION AS SCOPE

Unfortunately, after a century of holding to the understanding evidenced in *Wayman* (albeit not always in as clear and cogent a fashion), delegation cases shifted their focus to a different question than Marshall thought compelling for distinguishing between permissible and impermissible delegations. The difference can be seen by comparing two decisions often treated as similar, *Field v. Clark*⁵⁵ and *J.W. Hampton, Jr., & Co. v. United States*.⁵⁶

A. Field Test for Delegation

Field v. Clark is best known for its clear statement that the Constitution prevents delegation of legislative authority. Justice John Marshall Harlan’s majority opinion asserts “[t]hat Congress cannot delegate legislative power to the President is a principle universally recognized as vital to the integrity and maintenance of the system of government ordained by the Constitution.”⁵⁷ Similarly, Justice Lucius Lamar’s opinion for himself and Chief Justice Melville Fuller declared “[t]hat no part of this legislative power can be delegated by Congress to any other department of the government, executive or judicial, is . . . universally recognized as a principle essential to the integrity and maintenance of the system of government ordained by the Constitution.”⁵⁸

While both *Field* opinions clearly condemned delegation of legislative power, analysis of whether that had occurred in the

54. This conception differs from the “naïve view” championed by Professor Posner and Professor Vermeule. They favor a tautology that any legislative delegation of authority satisfies the Constitutional requirement that the legislative power be exercised by the Congress; having legislated, Congress has exercised that power and any other power given to others, no matter its breadth or nature, is not to be objected to on that ground. See Posner & Vermeule, *supra* note 11, at 1736. Differences between this and the approach suggested by *Wayman* are further discussed *infra* at Part V.

55. 143 U.S. 649 (1892).

56. 276 U.S. 394 (1928).

57. *Field*, 143 U.S. at 692.

58. *Id.* at 697 (Lamar, J., dissenting from the opinion but concurring in judgment).

law at issue—the Tariff Act of 1890,⁵⁹ generally known as the McKinley Tariff Act—was muddled.⁶⁰ The McKinley Tariff Act raised tariff rates on most dutiable products while simultaneously eliminating tariffs on a set of products, including sugar, molasses, coffee, tea, and hides. The law also directed the President to revoke the duty exemption of those products and to impose other, specified duties on each product, whenever the President:

shall be satisfied that the Government of any country producing and exporting sugars, molasses, coffee, tea, and hides . . . imposes duties or other exactions upon the agricultural or other products of the United States, which in view of the free introduction of such sugar, molasses, coffee, tea, and hides into the United States he may deem to be reciprocally unequal and unreasonable . . .⁶¹

The *Field* majority found that the law did not work an unconstitutional delegation—that it “[did] not, in any real sense, invest the President with the power of legislation”⁶²—because the law specified the action that had to occur if the President found a certain fact to exist.⁶³ That is, the law did not leave it to the President to determine the appropriate course, which was suspension of the specific exemption of a set of goods from tariff duties, and did not leave it to the President to decide the amount of the tariffs that would then be imposed.⁶⁴ For that reason, the majority declared, when the President found the fact Congress had decided would trigger the prescribed action and then took that action, this was executive, not legislative, action:

59. 26 Stat. 567.

60. See, e.g., Oona Hathaway, *Presidential Power over International Law: Restoring the Balance*, 119 YALE L.J. 140, 173 (2009).

61. 26 Stat. at 612; see, e.g., C. Stuart Patterson, *The Constitutionality of the Reciprocity Clause of the McKinley Tariff Act*, 40 AM. L. REGISTER & REV. 65, 66 (1892).

62. *Field*, 143 U.S. at 692.

63. *Id.* at 692–93.

64. Note, however, that the goods at issue in the case for which duties were challenged—certain woolen, silk, and cotton products and cloths—were not those identified in the law as subject to the exemption as an initial matter or to the suspension of that exemption under particular conditions. See *id.* at 662–64. The case, thus, must be deemed a facial challenge to the law’s constitutionality, a challenge to the imposition of any duties under the Act rather than a challenge to its application in a narrower sense. See *id.* at 694–97 (discussing the severability of challenged provisions from the application of the Act as a whole).

Legislative power was exercised when Congress declared that the suspension should take effect upon a named contingency. What the President was required to do was simply in execution of the act of Congress. It was not the making of law. He was the mere agent of the law-making department to ascertain and declare the event upon which its expressed will was to take effect.⁶⁵

The majority relied on a series of earlier decisions, reaching back to Court's 1813 decision in *The Brig Aurora*,⁶⁶ to support the conclusion that "contingent" legislation—legislation that provides for actions to take place on the finding of a particular fact or set of facts—does not work a delegation of lawmaking authority but consists of deputizing another officer to make inquiries over matters that do not require the sort of policy discretion associated with legislation.⁶⁷ Lacking that sort of discretion, the authorized actions, the Court said, are quintessentially executive in nature. The test laid down by the Court, thus, looks very much like the test used in *Wayman v. Southard*. In fact, it may have represented an even narrower test for (at least a subset of) delegations of authority.

The problem with *Field* is not so much the test used as uncertainty about its application. As Justice Lamar noted, the concept of what is "reciprocally unequal and unreasonable" tariff treatment—not just for duties laid on the class of goods for which tariffs were suspended but for any "duties or other exactions" on *any* goods exported from the United States—is not a matter of simple fact-finding.⁶⁸ Further, the duration of the President's action is by law "for such time as he shall deem just," a provision that Justice Lamar found conveyed policy-making discretion.⁶⁹

The assertion that all that was at issue in *Field* was simple fact-finding and non-discretionary action is misleading. A case like *Brig Aurora* shows the difference between the provisions of the McKinley Tariff at issue in *Field* and contingent legislation as traditionally understood (and approved). *Brig Aurora* addressed a provision that directed the President to revoke or

65. *Id.* at 693.

66. 11 U.S. (7 Cranch) 382 (1813).

67. See *Field*, 143 U.S. at 682–94.

68. See *id.* at 696–700 (Lamar, J., dissenting from the opinion but concurring in judgment).

69. See *id.* at 699.

modify parts of the Non-Intercourse Act⁷⁰ if he determined that France or Britain had revoked measures that violated U.S. neutrality.⁷¹ That is a far more limited, and far more fact-based commitment of authority.

The division between the two opinions in *Field* reveals a softness in the Justices' efforts to determine whether the McKinley Tariff in fact granted discretion—as it surely did in some measure—and if so, whether that discretion violated the Constitution's assignment of separate powers to the various branches. The narrow focus on fact-finding versus discretion does not as clearly direct analysis to the real separation of powers issue as the considerations identified in *Wayman*: the importance of the matter on which the decision by the President was authorized and the relation of the decision to the authority constitutionally committed to the President. But at least the Justices were still asking—although not as directly as Chief Justice Marshall—whether the *nature* of the decision committed to the President fit with executive rather than legislative decision-making, whether it was an exercise of general policy-making discretion (a legislative prerogative) or of fact-finding and implementation (an executive function).

B. Hampton's Road to Delegation: An Intelligible Principle?

If *Field* represented a somewhat less clearly articulated—and probably misapplied—continuation of the approach taken in *Wayman* and other cases, the language employed by Chief Justice William Howard Taft in the next major delegation case to come before the Court, *J.W. Hampton, Jr., & Co. v. United States*,⁷² pointed delegation analysis in a different direction. Not surprisingly, given the long-running debate over tariffs and the obvious need for mechanisms to set and collect them,⁷³ *Hampton* concerned another trade law provision, Section 315 of the Tariff Act of 1922,⁷⁴ known at the time as the Fordney-McCumber Tariff.

70. 2 Stat. 528 (1809).

71. See *The Brig Aurora*, 11 U.S. (7 Cranch) at 382–83 (1813).

72. 276 U.S. 394 (1928).

73. Debate over the tariff dates back to the First Congress, which passed the contentious Hamilton Tariff, Act of July 4, 1789, 1 Stat. 24, as the nation's first substantive law, and the Collection Act, Act of July 31, 1789, 1 Stat. 29, as one of the first handful of laws.

74. Pub. L. No. 67-318, 42 Stat. 858; see also STEPHEN W. STATHIS, LANDMARK LEGISLATION 1774–2012: MAJOR U.S. ACTS AND TREATIES 221 (2d ed. 2014).

That section gave the President authority to raise or lower tariffs by up to 50 percent in order to equalize the costs of production between the United States and the principal competing country for imports into the United States.⁷⁵ The President depended on—but was not bound to implement the findings of—an investigation by the U.S. Tariff Commission (a formally independent agency of six presidentially-appointed and senatorially-confirmed officials), setting out the relative differences in costs of production for the affected products.⁷⁶ President Calvin Coolidge’s decision to increase by 50 percent the duty applied to barium dioxide from Germany was challenged as an unconstitutional exercise of legislative power which Congress could not delegate.⁷⁷

Chief Justice Taft’s opinion in *Hampton* saw advantages from extending power to the President and deferred to the political process that produced grants of authority such as in the Tariff Act. After observing that Congress’ legislative purview encompasses “all and many varieties of legislative action,” Taft declared that:

Congress has found it frequently necessary to use officers of the executive branch within defined limits, to secure the exact effect intended by its acts of legislation, by vesting discretion in such officers to make public regulations interpreting a statute and directing the details of its execution, even to the extent of providing for penalizing a breach of such regulations.⁷⁸

In the specific case of finding what differences existed in the production costs of particular products in the U.S. and elsewhere and calculating how much tariffs needed to be adjusted to make those costs the same—in pursuit of fair competition—Congress needed to find a more efficient mechanism than the cumbersome and unscientific process of legislation, as Taft saw the matter. To that end:

Congress adopted in section 315 the method of describing with clearness what its policy and plan was and then authorizing a member of the executive branch to carry out its policy and plan and to find the changing difference from time to time and to make the adjustments necessary to con-

75. 42 Stat. at 858–59.

76. *Id.* at 941.

77. *Hampton*, 276 U.S. at 404.

78. *Id.* at 406 (citation omitted).

form the duties to the standard underlying that policy and plan. As it was a matter of great importance, it concluded to give by statute to the President, the chief of the executive branch, the function of determining the difference as it might vary. He was provided with a body of investigators who were to assist him in obtaining needed data and ascertaining the facts justifying readjustments.⁷⁹

The opinion acknowledged that the President was not required to follow the determination of the Tariff Commission, and in fact the law's text did not require the President to follow any particular method of deciding what to do or when to do it.⁸⁰ Despite that, the Court decided that Congress had sufficiently prescribed its plan for tariffs, and that the President was merely exercising discretion in implementing that plan rather than creating it. Thus, there was no delegation of legislative power.⁸¹

The capstone to the Chief Justice's opinion, and the test for which *Hampton* became known, came after comparing presidential adjustment of tariff rates (to make U.S. sales prices of imports more equivalent to those for domestically produced goods) under the Fordney-McCumber Act to the exercise of rate-making authority by an administrative agency. Taft's opinion announced that: "[i]f Congress shall lay down by legislative act an intelligible principle to which the person or body authorized to fix such rates is directed to conform, such legislative action is not a forbidden delegation of legislative power."⁸²

While the *Hampton* decision did not offer much to clarify what "an intelligible principle" meant, it did invoke the *Field* case as an example. Taft quoted *Field's* conclusion that the President there did not exercise legislative power because the instructions he was given were sufficiently directive that he "was the mere agent of the lawmaking department to ascertain and declare the event upon which its expressed will was to take effect."⁸³ But unlike *Field*, which cast the legislated instructions as granting only a ministerial power to take actions prescribed for a particular contingency, *Hampton* asked whether there was

79. *Id.* at 405.

80. *Id.*

81. *Id.* at 406–10.

82. *Id.* at 409.

83. *Id.* at 410–11.

sufficient legislative guidance to an exercise of far broader discretionary power.

Hampton also marked a clear departure from *Wayman* and its progeny in another dimension. Where Chief Justice Marshall in *Wayman* emphasized that important decisions on matters of public policy must be made by Congress and cannot be assigned to others, Chief Justice (and former President) Taft justified the delegation upheld in *Hampton* in part because the matter was of such “great importance” that the decision *should* be given to the President. As with various advocates for administrative policy-making as more thoughtful, informed, efficient, or even scientific,⁸⁴ Taft’s vision of good government encompassed a broader role for discretionary executive decisions—especially presidential decisions—than Marshall, Madison, and other founders and contemporaries had envisioned.⁸⁵ On this view, discretionary executive power did not have to be justified as part of a narrow set of constitutionally committed responsibilities but instead could be the product of a political preference for placing certain decisions in administrators’ hands.

After *Hampton*, what mattered was not so much the *nature* of the delegated authority or its fit with core executive powers but the *scope* of the delegation. The new question was not whether the commitment of authority to the executive was on matters of a sort that was appropriate for executive action but rather whether it could be said to be guided by an instruction that could be understood. If so, the administering official was exercising authority that was not so open-ended as to be deemed “legislative” power.

C. *The Intelligible Principle Test’s (Almost) Open Door*

In the nearly 90 years that have followed *Hampton*, it has become clear that even the vaguest, most incoherent set of mutually incompatible goals can satisfy the “intelligible principle”

84. See, e.g., Colin S. Diver, *Statutory Interpretation in the Administrative State*, 133 U. PA. L. REV. 549 (1985); Epstein & O’Halloran, *supra* note 24; Jody Freeman & Adrian Vermeule, *Massachusetts v. EPA: From Politics to Expertise*, 2007 SUP. CT. REV. 51; Hathaway, *supra* note 60; Mashaw, *supra* note 24; Richard J. Pierce, Jr., *Political Accountability and Delegated Power: A Response to Professor Lowi*, 36 AM. U. L. REV. 391 (1987).

85. See, e.g., Gary Lawson, *Delegation and Original Meaning*, 88 VA. L. REV. 327, 335–53 (2002) [hereinafter *Delegation*].

test. Although the Supreme Court rejected broad, unstructured delegations of regulatory authority in the *Panama Refining* and *Schechter Poultry* decisions,⁸⁶ since 1935 it has been unable to find a delegation that was not sufficiently intelligible to satisfy the majority of Justices.

So, for example, in *National Broadcasting Co., Inc. v. United States*,⁸⁷ the Court found a sufficiently intelligent principle in the law authorizing the Federal Communications Commission (FCC) to allocate broadcast licenses in a fair and efficient manner and to grant licenses that serve “the ‘public interest, convenience, and necessity.’”⁸⁸ Rebuffing a challenge to the legitimacy of this charge, Justice Frankfurter quoted his own language from a prior case raising a different issue respecting this standard⁸⁹ in which he said: “While this criterion is as concrete as the complicated factors for judgment in such a field of delegated authority permit, it serves as a supple instrument for the exercise of discretion by the expert body which Congress has charged to carry out its legislative policy.”⁹⁰

After finding that the FCC was authorized essentially to take any action it deemed served “the public interest,” including comprehensively regulating relationships between broadcast stations and networks, Frankfurter declared—without any meaningful explanation—that the context of the use of that term in the law provided enough guidance that it was not too “vague and indefinite” to pass constitutional muster.⁹¹ The statement was particularly unsatisfying because the Court’s opinion rendered the law’s instruction more vacuous than it needed to be. After all, Frankfurter’s opinion essentially stripped the phrase of all limiting language that could have given it meaning in the context of the law, a point forcefully made by Justice Murphy in dissent.⁹² It extracted the instruction from the narrow context of radio spectrum licensing—which, rightly or wrongly, has been viewed as bestowing a

86. See *Panama Refining Co. v. Ryan*, 293 U.S. 388 (1935); *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935).

87. 319 U.S. 190 (1943).

88. *Id.* at 225–226.

89. *Id.* at 216.

90. *FCC v. Pottsville Broad. Co.*, 309 U.S. 134, 138 (1940).

91. *National Broadcasting*, 319 U.S. at 214–18, 225–226.

92. *Id.* at 227, 230–32 (Murphy, J., dissenting).

privilege or government benefit on licensees—and applied it to the sort of regulation of private business relationships that traditionally has been seen as requiring more particularized legislative direction.⁹³ If broad authority to regulate in the public interest constitutes an intelligible principle that adequately constrains the scope of the discretionary power being given to government officials, then *National Broadcasting* must be taken as abandoning the effort to control legislative delegations of policy-making authority.

The appearance of judicial surrender on the question of delegation was further cemented by the Court's decision the following year in *Yakus v. United States*.⁹⁴ The Emergency Price Control Act of 1942⁹⁵ created the Office of Price Administration in order "to stabilize prices and to prevent speculative, unwarranted, and abnormal increases in prices" and to guard against a variety of ill effects flowing from "excessive prices."⁹⁶ The act instructed that the Administrator should set prices that "in his judgment will be generally fair and equitable and will effectuate the purposes of this Act."⁹⁷ The law also directed the Administrator "[s]o far as practicable" to take account of the prices prevailing in October 1941, and to "make adjustments for such relevant factors as he may determine and deem to be of general applicability, including . . . [s]peculative fluctuations, general increases or decreases in costs of production, distribution, and transportation, and general increases or decreases in profits earned by sellers of the commodity or commodities, during and subsequent to the year ended October 1, 1941."⁹⁸

The Court found that these instructions gave the Administrator standards to guide his price-fixing and concluded that the law sufficiently narrowed the scope of his discretion to satisfy constitutional requirements that it make the law rather than

93. For description of the historical treatment of such delegations, see, e.g., PHILIP HAMBURGER, *IS ADMINISTRATIVE LAW UNLAWFUL?* 4–8 (Univ. of Chicago Press 2014); David Schoenbrod, *The Delegation Doctrine: Could the Court Give It Substance?*, 83 MICH. L. REV. 1223 (1985) [hereinafter *Substance*]; David Schoenbrod, *Separation of Powers and the Powers That Be: The Constitutional Purposes of the Delegation Doctrine*, 36 AM. U. L. REV. 355 (1987) [hereinafter *Purposes*].

94. 321 U.S. 414 (1944).

95. Pub. L. No. 77-421, 56 Stat. 23.

96. *Id.* at 23-24; *Yakus*, 321 U.S. at 420.

97. 56 Stat. at 24; *Yakus*, 321 U.S. at 420.

98. 56 Stat. at 24–25; *Yakus*, 321 U.S. at 421.

deputizing another to perform that function.⁹⁹ Justice Owen Roberts's devastating dissent demonstrates that the flaccid and contradictory instructions leave to the Administrator virtually unfettered discretion to decide whether, when, how, and how much to regulate prices of an extraordinarily broad array of products.¹⁰⁰

If instructions to take actions that are "in the public interest" or to set prices that are "fair and equitable" provide enough guidance to permit administrative officials to impose coercive requirements on private citizens and enterprises, it is hard to imagine congressional directives that cannot be said sufficiently clear to constitute lawmaking rather than delegation of legislative authority. That is consistent with the reasoning that has led some commentators to opine that the Constitution is satisfied by any legislation that does not formally state that some other body may act in Congress' stead.¹⁰¹

Part of the problem surely is the difficulty of crafting a test based on the scope of authority given to an administrator by the Congress that does not become a vehicle for the exercise of uncabined judicial discretion, itself a constitutional problem. That is the reason that Justice Antonin Scalia, a fervent advocate of adherence to constitutionally prescribed limits on discretionary government power—while dissenting on other grounds from the Court's decision in *Mistretta v. United States*,¹⁰² which declined to strike down a congressional delegation to an independent commission of authority to fix the terms of criminal sentences for federal crimes—observed:

[W]hile the doctrine of unconstitutional delegation is unquestionably a fundamental element of our constitutional system, it is not an element readily enforceable by the courts. Once it is conceded, as it must be, that no statute can be entirely precise, and that some judgments, even some judgments involving policy considerations, must be left to the officers executing the law and to the judges applying it, the debate over unconstitutional delegation becomes a debate not over a point of principle, but over a question of degree.¹⁰³

99. See *Yakus*, 321 U.S. at 423.

100. See *Yakus*, 321 U.S. at 448–51 (Roberts, J., dissenting).

101. See, e.g., Posner & Vermeule, *supra* note 11, at 1726.

102. 488 U.S. 361 (1989).

103. *Id.* at 415 (Scalia, J., dissenting).

Justice Scalia added that, given the difficulty of fixing a matter of degree together with recognition that Congress is better suited than the courts to decide what is necessary for effective governance, “it is small wonder that we have almost never felt qualified to second-guess Congress regarding the permissible degree of policy judgment that can be left to those executing or applying the law.”¹⁰⁴

D. American Trucking: *Nondelegation’s End or Wayman’s Return?*

Just over a decade after *Mistretta*, the question whether the Court would ever again overturn a congressional authorization of action by other officials as constituting an unlawful delegation of legislative authority was seemingly put to rest in *Whitman v. American Trucking Associations, Inc.*¹⁰⁵ The U.S. Court of Appeals for the D.C. Circuit, breaking with the pattern for court decisions of the prior six decades, had invalidated on delegation grounds a decision of the Environmental Protection Agency (EPA) that it declared lacked any guiding intelligible principle.¹⁰⁶

The Clean Air Act, as amended, authorized the EPA to promulgate air quality standards for each regulated air pollutant, instructing the agency to craft a standard that is “requisite to protect the public health” while assuring that there is “an adequate margin of safety.”¹⁰⁷ The D.C. Circuit concluded that these instructions were incoherent to the point of abandoning Congress’ duty to actually make law. Reversing the court of appeals, the Supreme Court found this assignment “well within the outer limits of our nondelegation precedents”¹⁰⁸—a conclusion that critics of the Supreme Court’s decisions in this

104. *Id.* at 416. Although concurring with the Court’s resistance to use of the nondelegation doctrine in its received form, Justice Scalia condemned the authorization for a commission to set criminal sentences as assigning authority unconnected to either the constitutionally assigned work of the executive in implementing the law or of the judiciary in deciding cases and controversies. *See id.* at 417–22.

105. 531 U.S. 457 (2001).

106. *Am. Trucking Ass’ns, Inc. v. EPA*, 175 F.3d 1027 (D.C. Cir. 1999); *see also Am. Trucking Ass’ns, Inc. v. EPA*, 195 F.3d 4 (D.C. Cir. 1999). The court of appeals did not, however, conclude that there was no possible interpretation of the law that could pass constitutional muster, instead remanding the matter to the agency.

107. Clean Air Act Amendments of 1970, Pub. L. No. 91-604, 84 Stat. 1679.

108. *American Trucking*, 531 U.S. at 474.

arena might find consistent with *both* the precedents and the D.C. Circuit's condemnation of the law.

The Court's decision, by Justice Scalia, did step slightly away from post-*Schechter* precedents in one respect. Displaying unease about relying on a test as soft as the intelligible principle standard for protection of constitutional structure, the opinion seemed to hark back to Chief Justice Marshall's understanding of the delegation problem in *Wayman* by noting that the degree of precision required to survive a delegation challenge depends on "the scope of the power congressionally conferred."¹⁰⁹ Thus, less clarity is needed for smaller, less significant commitments of authority to other officials than for commitments of authority to impose substantial burdens on large numbers of individuals and enterprises.

This aspect of *American Trucking* looks a great deal like the question of *importance* that figured prominently in Marshall's *Wayman* analysis.¹¹⁰ It is an idea that fits well with the approach taken by the Court at times in applying judicial review standards, where clearer statements of deference to administrative decisions are demanded for important issues or "major questions" than for run-of-the-mill determinations.¹¹¹ It also is a notion that seems to be in tension with Justice Scalia's expression of skepticism about judicial tests that turn on matters of degree, visible in cases such as *Mistretta*.¹¹² Still, however intriguing the observation about differentiating the delegation standard according to the importance of the issue may be, the *American Trucking* decision did not elaborate on this observation or create a framework for more determinate analysis.

109. *Id.* at 475 (citation omitted).

110. See discussion of *Wayman* decision *supra* at Part II.D.

111. See, e.g., *King v. Burwell*, 135 S. Ct. 2480, 2489 (2015); *American Trucking*, 531 U.S. at 468 (pinning the increased clarity requirement to a change in the law, but one important enough to be deemed an "elephant"); *Food & Drug Admin. v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 159 (2000); RONALD A. CASS, COLIN S. DIVER, JACK M. BEERMANN & JODY FREEMAN, *ADMINISTRATIVE LAW: CASES & MATERIALS* 173–77 (Wolters-Kluwer, 7th ed. 2016); Ronald A. Cass, *Is Chevron's Game Worth the Candle? Burning Interpretation at Both Ends*, in *LIBERTY'S NEMESIS: THE UNCHECKED EXPANSION OF THE STATE* 57, 60–63 (Dean Reuter & John Yoo eds., 2016); Abigail R. Montcrieff, *Reincarnating the "Major Questions" Exception to Chevron Deference as a Doctrine of Noninterference (Or Why Massachusetts v. EPA Got It Wrong)*, 60 ADMIN. L. REV. 593 (2008).

112. See, e.g., *Mistretta*, 488 U.S. at 415–16 (Scalia, J., dissenting).

Moreover, Justice Stevens, in a partial concurrence joined by Justice Souter urged straightforward recognition that no matter what the Court said, it would no longer take the notion of non-delegation seriously, and in their view should not.¹¹³ In fact, Stevens wrote that it would be best for the Court to “frankly acknowledg[el] that the power delegated to the EPA is ‘legislative’ but nevertheless conclude that the delegation is constitutional because adequately limited by the terms of the authorizing statute.”¹¹⁴ The Stevens approach would have had the benefit of clarity, boldly renouncing any effort to constrain administrative power apart from exercising judicial review for some form of fidelity to the contours of legislative commands. That is, judges still could say that some exercises of administrative discretion exceed statutory authorization even if no delegation of power would violate their view of the Constitution. Such an approach would have marked a dramatic change in the Court’s reading of the vesting clause of Article I and of the Constitution’s approach to separated powers more generally.¹¹⁵

At the end of the day, *American Trucking* seemed to signal that the Court simply did not believe it had the wherewithal to craft a delegation test that did more than substitute judicial for legislative discretion.¹¹⁶ There was no consensus on a way to give the delegation doctrine vitality, but there also was no inclination (apart from Justices Stevens and Souter) to throw the constitutional baby out with the bathwater.

113. *American Trucking*, 531 U.S. at 487–90 (Stevens, J., concurring in part and concurring in judgment).

114. *American Trucking*, 531 U.S. at 488 (Stevens, J., concurring in part and concurring in judgment).

115. See, e.g., *Wayman*, 23 U.S. at 48; *Field*, 143 U.S. 649, 692–93; *id.* at 697 (Lamar, J., dissenting from the opinion but concurring in judgment); *Hampton*, 276 U.S. at 407–09; *Panama Refining Co. v. Ryan*, 293 U.S. 388, 421 (1935); *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 529 (1935). But see Jack M. Beermann, *An Inductive Understanding of Separation of Powers*, 63 ADMIN. L. REV. 467, 469–73, 491–94 (2011) (arguing that the cases are consistent with a reading of the vesting clauses as not constraining assignments of authority to the same extent as some other, more specific provisions).

116. Gary Lawson observes that “the combined vote in the Supreme Court on nondelegation issues from *Mistretta* through *American Trucking* was 53-0.” Lawson, *Delegation*, *supra* note 85, at 330.

III. AMERICAN RAILROADS: FROM SCOPE TO SEPARATION

While academic debates about whether the delegation doctrine was dead for all practical purposes, never really had any legitimate constitutional basis, or had morphed into canons of statutory construction did not end with *American Trucking*, betting odds were against the doctrine rising again as an effective constraint on congressional authorization of broad, unstructured exercises of policy-making power by administrative bodies following that decision.¹¹⁷ Against that background, the Supreme Court's decision more than a decade after *American Trucking* to grant certiorari to review a D.C. Circuit decision holding that Congress unconstitutionally had granted power to a private entity (the National Railroad Passenger Corporation, commonly known as "Amtrak") to exercise regulatory power over other private parties (other railroads)¹¹⁸ did not seem a likely vehicle for broader reconsideration of the delegation doctrine.

The court of appeals decision pointedly directed its attention to the special circumstance of a private party acting as a regulator.¹¹⁹ The case seemed at first blush to turn on peculiarities of the authorizing statute that raised questions about whether Amtrak was truly private, whether it was private for purposes of delegation analysis, and whether it was exercising regulatory authority. The governing law formally declared Amtrak to be a private, for-profit corporation and not to be an instrumentality of the federal government.¹²⁰ Yet, Amtrak receives government subsidies, operates under extensive government regulation, and has a board of directors that is (almost entirely) presidentially appointed and removable by the President.¹²¹ It also was given some authority over measures and goals for the operation of other railroads, which to a certain degree can be

117. See, e.g., Farina, *supra* note 8; Manning, *supra* note 23; Thomas W. Merrill, *Rethinking Article 1, Section 1: From Nondelegation to Exclusive Delegation*, 104 COLUM. L. REV. 2097 (2004); Posner & Vermeule, *supra* note 11; see also Sunstein, *supra* note 12, at 318.

118. *Ass'n of Am. R.Rs. v. Dep't of Transportation*, 721 F.3d 666 (D.C. Cir. 2013)

119. *Id.* at 670–77.

120. See Rail Passenger Service Act of 1970, Pub. L. No. 91-518, 84 Stat. 1328.

121. See *id.*; *American Railroads*, 721 F.3d at 674.

seen as competitors to Amtrak.¹²² Amtrak did not have unilateral control over these matters; it had to arrive at agreement with the Federal Railroad Authority or, if the two entities did not agree, refer the matters to arbitration (under less than clear terms for who the arbitrator would be and how the arbitration would work).¹²³

Given the peculiar combination of legislative provisions and facts pointing in different directions on Amtrak's status as public or private and the complicated alignment of authorizations under the law, it is not surprising that the Supreme Court's decision in *Department of Transportation v. Association of American Railroads*¹²⁴ spent its time sorting through questions of whether Amtrak was indeed private or public and whether it was exercising regulatory authority.¹²⁵ The Court did not reach the issue that seemed to have prompted a grant of certiorari in the case: whether the authority given to Amtrak by law violated the Constitution. The plain inference was that the majority was in no hurry to grapple with a delegation challenge, sending the delegation issue back to the court of appeals to address in light of the conclusion that Amtrak is governmental.

Two separate opinions, however, by Justice Samuel Alito and Justice Clarence Thomas, suggested that at least two members of the Court were prepared to consider constitutional problems attending delegation of policy-making authority.¹²⁶ Both clearly signaled their concern that the majority's reluctance to strike down delegations on the basis of a test that depends on matters of degree threatens to undermine important constitutional values.

Justice Alito made two critical points. First, he underscored that delegation of authority is a way of evading accountability, an evasion that imperils liberty. In his words, "[l]iberty requires accountability."¹²⁷ He observed that delegation allows officials to hide the real source of decision-making from ordinary citizens.¹²⁸

122. See Passenger Rail Investment and Improvement Act of 2008, Pub. L. No. 110-432, 122 Stat. 4907; *American Railroads*, 721 F.3d at 668–69.

123. See *American Railroads*, 721 F.3d at 673.

124. 135 S. Ct. 1225 (2015).

125. See *id.* at 1128–34.

126. Compare *American Railroads*, 135 S. Ct. at 1234–40 (Alito, J., concurring), with *id.* at 1240–55 (Thomas, J., concurring in judgment).

127. *Id.* at 1234 (Alito, J., concurring).

128. *Id.* at 1234–35.

Second, Alito pointed out that unconstrained delegation also elides purposefully constructed procedural constraints on important exercises of power that were designed to safeguard against government overreach.¹²⁹ His opinion states:

The principle that Congress cannot delegate away its vested powers exists to protect liberty. Our Constitution by careful design, prescribes a process for making law, and within that process there are many accountability checkpoints. . . . It would dash the whole scheme if Congress could give its power away to an entity that is not constrained by those checkpoints.¹³⁰

Justice Thomas spent almost the entirety of his 27-page opinion laying out even more starkly the importance of judicially administered rules against delegations of legislative power and his commitment to a reinvigorated delegation doctrine that can effectively police attempts at such delegations.¹³¹ Like Justice Alito, Justice Thomas anchored his concern in the need to preserve the constitutionally mandated—and philosophically attractive—separation of powers.¹³² He tied the constitutional commitment to separation of powers to historical roots in English law stretching back to Magna Carta, defined the special power vested in Congress to make “generally applicable rules of private conduct,”¹³³ and (as Justice Alito did) stressed that the exercise of this power has to be done expressly by the Congress through the processes embedded in the Constitution, including bicameralism and presentment.¹³⁴

Thomas’ opinion also explored the transition from a test that adhered to historic understandings of legislative power’s non-delegability to a test that permitted it so long as it adhered to an “intelligible principle,” and urged his colleagues to return to older notions of separated power generally and of legislative power specifically.¹³⁵ Justice Thomas invoked Locke, Madison,

129. *See id.* at 1239–40.

130. *Id.* at 1237.

131. *See id.* at 1240–55 (Thomas, J., concurring in judgment).

132. *See id.* at 1240–49.

133. *See id.* at 1245. Similar phrasing occurs at various points in Justice Thomas’s opinion, and he also connects this notion to the protection against deprivation of life, liberty, or property without due process.

134. *See id.* at 1240–52.

135. *See id.* at 1246–52.

and Hamilton for the philosophical importance of structural constraints on government, recognized that adherence to separated powers and cumbersome procedures can inhibit efficient solutions to public problems—and pointedly accepted that as a suitable trade-off for preventing too frequent or too intrusive regulations of private conduct.¹³⁶

Justice Thomas' opinion in *American Railroads* is a bold declaration that the Court veered off track in *Hampton* and its progeny and needs to recall the fundamental meaning of separated power and of the constitutional structure that embraces that concept as a fundamental protection of liberty. It is not an opinion that suggests amenability to concurring in decisions based on the intelligible principle doctrine, to a narrow focus on the scope of legislatively-conferred discretionary power, or to any form of business-as-usual in this arena. Together with Justice Alito's concurrence, it also should provide impetus for asking what a Constitution-based delegation doctrine should look like.

IV. A DELEGATION DOCTRINE FOR THE MODERN ADMINISTRATIVE STATE

There are a few, critical requirements to creating a basis for resolving delegation contests. The first requirement is recognition that delegation of power violates the Constitution; even if the Court has difficulty figuring out the right test, it must begin by acknowledging that there is a constitutional commitment of power that is incompatible with the sort of delegations that are now routinely accepted. Second, identifying an improper delegation of power requires understanding the power's *nature* rather than its scope. With this in mind, a broad authorization for exercise of a relatively minor power that *is* properly associated with the work of another branch does not fail simply because it is broad. By the same token, a narrow authorization for the exercise of a power of great importance that is *not* properly associated with the work of another branch does not become constitutional simply because it is narrow. Last, despite the fact that the nature of the power assigned to a particular official or entity is the critical question, the *locus* of the re-assignment (who receives the power) and the *scope* of the power conferred

136. See *id.* at 1244–45, 1252.

may help identify instances where that assignment is especially problematic.

A. *No Delegation of Vested Power*

First, it is imperative that the starting point for delegation analysis moving forward should be acceptance that the Constitution *does* bar delegation of the powers vested in particular branches. That is far from common ground today. Consider the argument by Professor Farina, one of the most articulate opponents of the anti-delegation-doctrine position:

[I]f the Article I vesting clause prevents delegation, so, it would seem, must the Article II and III vesting clauses. Yet the President's ability to delegate executive power is well established.¹³⁷

Professor Farina roots her analysis in the laws of contract and, even more, of agency, understanding that government officers exercise power as agents of the people, that is, as the people's delegates.¹³⁸ Looking to agency law, Farina finds that it is normal to permit subdelegations of power from an agent when that is necessary to effectuate the purposes behind the agent's charge.¹³⁹ She reasons that the President's authority to delegate is both recognized and consistent with the broader body of (nonconstitutional) law. Completing her argument, Farina asks if the President, who lacks a textual authorization to take actions that are "necessary and proper" to carry out his assigned duties, can delegate, why not the Congress, which is expressly given the power to make laws that are "necessary and proper" for doing its job?¹⁴⁰ The syllogism at the heart of this argument—all branches have vested power; other branches, especially the President, may delegate that power; therefore, Congress may delegate its power—errs in both premise and conclusion.

Let's start with the notion that other branches may delegate power. To be sure, it long has been recognized that vesting executive power in the President to "take care that the Laws be faithfully executed" does not bar having others help implement

137. Farina, *supra* note 8, at 90 n.13.

138. *Id.* at 91.

139. *Id.* at 91–93.

140. *Id.* at 92.

the laws.¹⁴¹ But note that the instruction is that the President “take care” that the laws are executed, not that the President personally perform all of the actions necessary to carry the laws into effect. It was not an accident of drafting that the instruction was to see that the laws are implemented rather than to implement the laws.

The President does not need to execute the tasks required to prosecute cases in the courts or to get the mail delivered or to see that the armed forces drill in proper fashion because that is not constitutionally required. Beyond the common sense of this, the Constitution refers to parts of the executive branch—the departments, officers of the United States, and inferior officers—that must be understood to be doing the work that the President does not do directly.¹⁴² Without the ability to assign work to those who assist in execution of the laws, these references would be anomalous. Further, the constitutional reference to appointment of inferior officers suggests an understanding that governance would require lower-level officials who would perform tasks with less discretionary authority than higher-level officials. All of this is consistent with the President’s exercise of his constitutional power and responsibility to see that the laws are faithfully executed.

On the other hand, the President cannot depute others to perform the tasks that *are* constitutionally assigned to him. So, for example, he could not turn over his power to appoint federal judges to the Attorney General, sending a note to the Senate saying that the Attorney General will be making those decisions and appointments—in short, “leave me out of this; just deal with her.” Nor could the Congress insist that the President turn over that power to the Attorney General, even if the insistence was by way of legislation duly presented to and signed by the President.¹⁴³ The President’s ability to perform

141. See, e.g., Peter L. Strauss, *Overseer or “The Decider”?* *The President in Administrative Law*, 75 GEO. WASH. L. REV. 696 (2007) [hereinafter *Overseer*]. Although Professor Strauss takes one side in the debate over the extent to which the President is constitutionally directed to be the sole decider on all matters within the executive domain, he also presents the range of divergent views on the issue as well as much of the background information respecting this debate.

142. See, e.g., U.S. CONST. art. II, § 2, cl. 1–2. A similar inference is strongly suggested by the Incompatibility Clause. See U.S. CONST. art. I, § 6, cl. 1.

143. For a both thoughtful and entertaining explanation of the bar to congressional direction of delegations, including within other branches, see Larry Alexan-

his constitutional duties was challenged in a related manner, through constraints on the power to remove senatorially confirmed officers, in the Tenure of Office Act of 1867.¹⁴⁴ These provisions were held to violate the Constitution's commitment of executive power to the President.¹⁴⁵

Of course, the President may use assistants—including high-level assistants whose judgment the president generally relies upon—just as Article III judges may give some tasks of fact-finding to special masters and may treat the recommendations of those masters as presumptively valid. But in neither case does that constitute a delegation of final authority to those who assist.¹⁴⁶ That is true in the realm of administrative decision-making that consumes so much attention. And it is equally true for the military, which is populated by “Officers” who hold commissions from the President, by inferior officers, and by those who exercise no significant discretionary authority (at least not beyond a confined and modest realm) but whose work is essential to the execution of our military missions.¹⁴⁷

Just as the first part of the syllogism respecting delegations within the other branches fails, so too does the conclusion respecting delegations of legislative power. Concern over the exercise of legislative power was greater than over the exercise of either executive or judicial power.¹⁴⁸ The exercise of

der & Saikrishna Prakash, *Delegation Really Running Riot*, 93 VA. L. REV. 1035 (2007).

144. 14 Stat. 430 (1867).

145. See *Myers v. United States*, 272 U.S. 52, 176 (1926). The Court in *Myers* declared the Tenure of Office Act unconstitutional despite the fact that it had been repealed some four decades earlier, emphasizing the sense that this sort of legislated interference with presidential power sorely deserved formal condemnation. *Id.*

146. That conclusion is in line with Supreme Court decisions holding unconstitutional laws that purported to commit final authority over decisions within the judicial power of Article III to bankruptcy judges. See, e.g., *Stern v. Marshall*, 564 U.S. 462 (2011); *N. Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50 (1982). See also *Morgan v. United States*, 304 U.S. 1 (1938) (Cabinet officer may not rely on recommendation of hearing officer without personally conducting hearing).

147. On the division among different federal officials, including between principal officers and inferior officers and different levels of military appointment, see, e.g., *Edmond v. United States*, 520 U.S. 651 (1997); *Weiss v. United States*, 510 U.S. 163 (1994); United States Army, *Army Regulation 601-100: Appointment of Commissioned and Warrant Officers in the Regular Army*, Nov. 21, 2006, http://www.apd.army.mil/pdf/AR601_100.pdf [<http://perma.cc/TYV4-DWRL>].

148. See, e.g., THE FEDERALIST No. 48 (James Madison).

legislative power was thought by the framers of the Constitution to be so central and so critical that it was bound up in constitutionally mandated procedures—the most notable being bicameralism and presentment—and the selection processes for those who participate directly in lawmaking were designed to divide legislative power among officials chosen by different constituencies and serving for different terms of office.¹⁴⁹ Given the obvious heightened attention to imposing constraints on legislation, even if the Constitution were thought to permit subdelegation within the executive branch or the judicial branch, that premise would be far from establishing an equivalence for the legislative power.

B. *Discerning Delegation's Place: Between Naïve Formalism and Denying Discretion*

The harder question is the line-drawing question: how do courts distinguish impermissible delegations of legislative power from permitted assignments of legal authority? Some possibilities should be rejected at the outset. One is the contention that Congress properly (and completely) exercises the legislative power whenever it enacts a law in the constitutionally required manner.¹⁵⁰ On that view, sometimes called the “naïve” or “formalist” approach, anything that the law does—including assigning incredibly broad power over important decisions to others under vague, even meaningless, directives—must be addressed on other grounds.¹⁵¹ For adherents to this view, or some of its closer relatives, once Congress has formally enacted law it must be challenged, if at all, on grounds other than delegation.¹⁵²

Like the “delegation is fine” thesis, the naïve position must be rejected. Professors Larry Alexander and Sai Prakash demonstrate this by asking readers to consider a series of imaginary delegations that would plainly be rebuffed as assigning to others powers that were vested by the Constitution in particular hands—purposefully and exclusively. Simple legislation could not, for

149. See, e.g., Lawson, *Delegation*, *supra* note 85, at 336.

150. See, e.g., Posner & Vermeule, *supra* note 11, at 1721.

151. See, *id.* (articulating and defending the “naïve” approach). Professors Alexander & Prakash have labeled this the “formalist” approach. See Alexander & Prakash, *supra* note 143, at 1041.

152. See, e.g., Merrill, *supra* note 117, at 2115; Posner & Vermeule, *supra* note 11, at 1724.

instance, authorize a Federal Amendment Agency to exercise the power assigned to Congress to propose constitutional amendments or authorize a Federal Appointment Agency to exercise the Senate's power of advice and consent to presidential appointments.¹⁵³ Nor could a duly ratified treaty authorize the President to enter into other treaties without the consent of the Senate.¹⁵⁴

Each of these hypotheticals conforms to the requirements of bicameral passage and presentment with the concurrence of the President (or, in the limit case, with supermajorities of both houses following a veto) yet fails any sensible view of what is constitutionally permitted—simply put, treating these initiatives as lawful would permit amendment of important structural features of the Constitution without engaging the amendment process.¹⁵⁵ And, as Alexander and Prakash argue, each of the hypotheticals is indistinguishable from the exercise of core legislative power so far as the delegation questions they present.¹⁵⁶

At the opposite extreme, a delegation doctrine based in the text of the Constitution and the contemporaneous or nearly contemporaneous understanding of its meaning would not bar every commitment of discretionary authority to officials in the executive branch of the federal government.¹⁵⁷ While the early assignments of authority to the executive by law were mainly modest commitments of fact-finding or similarly circumscribed authority, they were not assignments of purely ministerial authority. Consider the law that granted presidentially appointed commissioners authority to fix the contours of the District of Columbia and to determine the needs for (and make provision for) accommodations for the new government.¹⁵⁸ The authorization was not discretion-free and could not have been if it was to have any usefulness. But the major policy questions—primarily where to locate the new capital city and how big it should be—were answered in the legislation.

This is consistent with the understanding of how other policy directives get put into effect, then and now. Ordinary operation of

153. See Alexander & Prakash, *supra* note 143, at 1038, 1054–55.

154. See *id.* at 1052.

155. See U.S. CONST. art. V.

156. See Alexander & Prakash, *supra* note 143, at 1038–39.

157. See, e.g., *Wayman*, 23 U.S. at 42–47; Strauss, *Overseer*, *supra* note 141, at 759.

158. See Residence Act, 1 Stat. 130 (1790).

executive authority—such as deciding which criminal cases to pursue, how much to invest in each prosecution, what steps to take in making a case, how to train troops for potential combat, how to organize available naval forces for effective operation, and a myriad of other determinations—necessarily is associated with the exercise of discretion.¹⁵⁹ The discretion associated with such core executive decisions also necessarily encompasses an element of policy judgment. Resource expenditures within prosecutors' offices, on any rational view, must be made on grounds such as the importance of particular types of prosecution as well as the likelihood of success and of influencing potential criminal conduct, judgments that must count as matters of policy as much as of fact.¹⁶⁰ Yet these decisions, just as the decisions on the number and nature of buildings needed to house the government and the way in which various departments of the new government would be accommodated, routinely are associated with executive, rather than legislative, authority.

C. *Testing Delegation's Limits: Back to Nature*

As the prior sections explain, three positions respecting delegation—first, acceptance of delegations of legislative, executive and judicial authority as constitutionally permitted; second, the naïve formalist position, allowing authorizations of discretionary power so long as they are enacted by proper process; and, third, the notion that no discretionary authority can be granted—must be rejected. Each is relatively simple, straight-forward, and wrong. This leaves the problem that has stymied efforts to resurrect a meaningful delegation doctrine: how to find the limits on legal authorization of discretionary authority.

The test cannot be whether there are “intelligible standards” for the exercise of discretionary authority. That test has utterly failed to provide meaningful constraint on assignment of broad, uncabined power to others to make the sort of basic policy choices that traditionally have been understood—including by those who framed the Constitution—as being exercises of

159. See, e.g., Sarah J. Cox, *Prosecutorial Discretion: An Overview*, 13 AM. CRIM. L. REV. 383, 393 (1976); Diver, *supra* note 84, at 568; Freeman & Vermeule, *supra* note 84, at 80; Mashaw, *supra* note 24, at 96; Robert Misner, *Recasting Prosecutorial Discretion*, 86 J. CRIM. L. & CRIMINOLOGY 717, 720 (1996); Pierce, *supra* note 84, at 417; Strauss, *Overseer*, *supra* note 141, at 700.

160. See, e.g., Cox, *supra* note 159, at 402; Misner, *supra* note 159, at 776.

the legislative power.¹⁶¹ Instead, the *nature* of the power conferred, rather than the *scope* of the power, must be the linchpin for limiting delegations. After all, the point of the separation of power in the Constitution is that powers of different *kinds*—legislative, executive, and judicial—must be placed in different hands and exercised under different processes in order to protect liberty.¹⁶²

Policing that framework must depend on the ability to separate the three sorts of power, to divide the powers by their nature and to assure that legal assignments of powers do not place powers in the wrong hands. As with the earliest commitments of discretionary authority to the executive, laws assigning executive officers power over particular decisions must be consistent with *executive* not *legislative* power as fundamentally understood.¹⁶³ The separation is not between the existence of discretionary power and ministerial power. As already noted, both the executive power and the judicial power necessarily comprehend a degree of discretionary authority.

Justice Scalia's *Mistretta* dissent joined that observation to the equally important reflection that the question in each case where a "delegation" is asserted to have been made is whether the power assigned fits within the powers rightly committed to the officer or body enabled to exercise it:

The whole theory of *lawful* congressional "delegation" is not that Congress is sometimes too busy or too divided and can therefore assign its responsibility of making law to someone else; but rather that a certain degree of discretion, and thus of lawmaking, *inheres* in most executive or judicial action, and it is up to Congress, by the relative specificity or generality of its statutory commands, to determine—up to a point—how small or how large that degree shall be. Thus, the courts could be given the power to say precisely what constitutes a "restraint of trade," . . . or to prescribe by rule the manner in which their officers shall execute their judg-

161. See discussion *supra* Part III. See also Gary Lawson, *The Rise and Rise of the Administrative State*, 107 HARV. L. REV. 1231, 1241 (1994) [hereinafter *Rise and Rise*]. On the understanding of legislative power, see, e.g., THE FEDERALIST No. 75 (Alexander Hamilton); HAMBURGER, *supra* note 93, at 4–8; Schoenbrod, *Substance*, *supra* note 93, at 1226; Schoenbrod, *Purposes*, *supra* note 93, at 356.

162. See, e.g., THE FEDERALIST Nos. 37, 48, 51 (James Madison), Nos. 75, 78 (Alexander Hamilton).

163. See, e.g., *Mistretta*, 488 U.S. at 417–22 (Scalia, J., dissenting) (explaining the necessary connection of legislatively assigned discretionary authority to the power constitutionally committed to the branch receiving that assignment).

ments, . . . because that “lawmaking” was ancillary to their exercise of judicial powers. And the Executive could be given the power to adopt policies and rules specifying in detail what radio and television licenses will be in the “public interest, convenience or necessity,” because that was ancillary to the exercise of its executive powers in granting and policing licenses and making a “fair and equitable allocation” of the electromagnetic spectrum.¹⁶⁴

Scalia’s insistence on the connection of an assignment of discretionary authority to the work of the branch receiving it is central to any judicial constraint on delegation.

D. *Delegation’s Limits: Defining Nature*

It is not, however, enough to recognize that the Constitution bars naked assignments of power that looks similar to lawmaking. As Justice Scalia recognized, the power to make a policy decision covering a class of determinations is not automatically *legislative* power. It can be executive or judicial if it falls within the proper scope of what other branches do. A policy decision can be announced in an adjudication as a rule for decision; it can be embraced in advance as a rule that covers a class of future determinations; or it can be articulated by an executive officer to guide implementation of a set of tasks. The connection to core tasks of executive power or judicial power is an essential step in assuring that the authority exercised is appropriately classified as executive or judicial.

1. *Beyond Connection: Defining Legislative Power*

Attaching the policy decision to the exercise of other tasks within the constitutionally prescribed missions of the other branches—deciding a case or managing governmental resources—limits the likelihood that it will be an exercise of legislative power. If the constitutional separation of powers is to be sustained against efforts to outpace lawmaking authority to others, however, there must be an additional protection rooted in the understanding of what is essentially “legislative” power that, even if attached to some other assignment, cannot be given to others.

164. *Id.* at 417 (citations and footnote omitted).

The Constitution's framers understood that the conceptual lines separating the different powers were not easily articulated. So, for example, James Madison wrote that:

Experience has instructed us that no skill in the science of government has yet been able to discriminate and define, with sufficient certainty, its three great provinces the legislative, executive, and judiciary; or even the privileges and powers of the different legislative branches.¹⁶⁵

Madison added that the conceptual problems were compounded, in the process of framing a Constitution, by difficulties in finding appropriate language to convey the separations of power that are dictated by their conceived distinct spheres, and also by the practical difficulties in gaining assent to appropriate divisions of power.¹⁶⁶ But Madison also emphasized the critical importance of actual agreement on the division of power and the success enjoyed by the Constitutional Convention in surmounting the various obstacles to that end.¹⁶⁷

2. Rules for Regulation of Society

What, then, is the dividing line between legislative and executive power? Again, the *Federalist* essays offer a starting point that is appropriate both because of its connection to the governing text and because of its common-sense approach to the question: "The essence of the legislative authority is to enact laws, or, in other words, to prescribe *rules for the regulation of the society*."¹⁶⁸

The difference between a general rule for the "regulation of the society" (on the one hand) and a rule that applies to a more circumscribed group and setting (on the other hand) seems an appropriate place to begin drawing the line between determinations that must be exercised *only* by the legislative branch (in concert with the President) through constitutionally prescribed procedures for lawmaking and those that may be assigned to others. Rules that apply to settings in which the government traditionally has given responsibility to executive or judicial officers—such as

165. THE FEDERALIST No. 37, at 172 (James Madison) (Mary Carolyn Waldrep ed., 2014).

166. *Id.* at 173.

167. See, e.g., *id.* at 174; THE FEDERALIST No. 51 (James Madison); see also Lawson, *Delegation*, *supra* note 80, at 341–42.

168. THE FEDERALIST No. 75, at 366 (Alexander Hamilton) (Mary Carolyn Waldrep ed., 2014) (emphasis added).

determinations respecting the management of resources already in the government's domain, decisions on licenses for others to use those resources, judgments on how to deploy our military assets in pursuit of the common defense, or rulings governing concrete disputes on legal claims—look less like general “rules for the regulation of the society.”

This point effectively is the argument Justice Scalia made in *Mistretta*, that the creation of general rules for sentencing is a legislative act different in kind from the pronouncement of individual sentences or from the announcement of considerations that guide decision of legal claims in individual cases.¹⁶⁹ Even if the rule of a case is relied on in future cases—even if judges understand that it will be and self-consciously frame their opinions so that the rules for decision can be relied on in a broader class of cases—the application in the instant case coupled with the opportunity for later decisions to tailor it to the particulars of future cases make the judges' announcements quite different from a binding rule for society.

Recognizing the difference between such settings in which determinations given to officials are tethered to circumstances that limit and frame decisions for executive or judicial officers and less cabined settings does not give Congress carte blanche for all actions that can be described in terms similar to activity that is within the core of discretionary executive (or judicial) conduct. Congress cannot, for instance, commandeer resources and authorize officials to construct regulatory programs merely by using the label of resource management. Regulation of power plant emissions is not the same as management of government-owned buildings and land, as the former inevitably requires rules regulating a far broader spectrum of private conduct and implicating judgments about values and behavior that are less subject to decision-making divorced from contentious political considerations.¹⁷⁰ Both pro- and anti-regulatory forces may ar-

169. See *Mistretta*, 488 U.S. at 417–22 (Scalia, J., dissenting).

170. This explains courts' (occasional) reluctance to approve expansive interpretations of such regulatory authority, even if couched primarily in terms of statutory construction and “deference” analysis. See, e.g., *Util. Air Regulatory Grp. v. EPA*, 134 S. Ct. 2427, 2242–46 (2014); *id.* at 2455–58 (Alito, J., concurring and dissenting); *Am. Trucking Ass'n, Inc. v. EPA*, 531 U.S. 457, 468–75 (2001). Political support for such regulation (whether as a matter of public health or as simply a matter of personal preference), however, doubtless has contributed to approval of considerable degrees of government control not explicable as part-and-parcel of

gue over the scope of constitutionally permitted bases for treating property as common and regulable by the government, in the nature of navigable waters, or for programs to promote other constitutionally-sanctioned ends for which resource constraints are necessary and proper, but the authorization for broad, discretionary, administrative authority cannot rest on historical precedent for resource management.

3. Policy Choices of Major Importance

This limitation on the categorical separation of decisions, which is the basis for the distinction above, shows that categorization of activities alone is not enough. It is necessary also to ask whether the rule at issue asks an entity other than Congress to make policy choices of major importance, policy choices sufficiently basic and far-reaching to constitute decisions that are *exclusively* legislative in nature.

The authority given to the commissioners fixing the boundaries for the District of Columbia, for example, was executive, not because it was guided by an intelligible principle but because the Congress already decided the important questions of the capital's location (along the Potomac river, between the Eastern Branch and Connogochegue) and overall size (not more than ten miles square, consistent with the maximum set in the Constitution).¹⁷¹ Those were contentious issues with serious political implications at the time;¹⁷² the details granted to executive action by the Residency Act were not. While a list of considerations could have been provided to guide the commissioners in making the critical, contentious decisions as well as in filling out the details of siting and building the new capital, this course would not have rendered the larger decisions appropriate for executive action.

ordinary resource management. See, e.g., Ronald A. Cass, *Massachusetts v. EPA: The Inconvenient Truth About Precedent*, 93 VA. L. REV. 75 (2007).

171. See U.S. CONST. art. I, § 8, cl. 17; Residence Act, 1 Stat. 130 (1790).

172. See, e.g., JOSEPH J. ELLIS, *FOUNDING BROTHERS: THE REVOLUTIONARY GENERATION* 50–52, 69–78 (2000) (explaining the intense argument over the location of the nation's capital, the relation of that debate to other issues of regional conflict, and some of the maneuvering that led to compromise). Notably the Residency Act passed narrowly, by a vote of 32-29 in the House of Representatives and 14-12 in the Senate. See ANNALS OF CONGRESS, Sen., 1st Cong., 2d Sess., at 1039–40 (Jul. 2, 1790); ANNALS OF CONGRESS, H.R., 1st Cong., 2d Sess., at 1735–37 (Jul. 13, 1790).

Decisions of the significance that attached to the location of the nation's capital must be made by the legislature—and only by the legislature.¹⁷³ Picking a site for the capital did not regulate private conduct directly, but it was effectively a “regulation of society” because of its import for who would have easiest access to the national government's officers and, consequently, who would have greatest opportunity to exercise influence over them and profit from them. The concerns were not of a narrow effect on a matter of importance to a small set of people or interests but a broad effect on the full range of matters that potentially fall within the federal government's domain.¹⁷⁴ Those considerations underlay the intense controversy respecting the siting determination.¹⁷⁵

The same governing principle applies to assignments of authority to regulate behavior more directly. Consider, for example, three alternative assignments to the FCC, saying (i) “allocate radio station assignments in your discretion;” (ii) “allocate the radio spectrum in your discretion;” or (iii) “regulate *electronic communica-*

173. Another example is the decision on what expenditures would be cut to comply with the Gramm-Rudman-Hollings Act (formally, the Balanced Budget and Deficit Control Act of 1985, Pub. L. No. 99-177, 99 Stat. 1038) (“Gramm-Rudman Act”). Details of the reductions were to be finally determined by, and implementation directed by, the Comptroller General (through a report from the Comptroller to the President, who was not given discretion to deviate from that document). Because of the Comptroller's decisions' direct effect on federal spending authority, his acts were held to be “executive” and impermissible for someone who was removable by Congress rather than the President. *See* *Bowsher v. Synar*, 478 U.S. 714 (1986). Paradoxically, the fallback provision in case that arrangement was held unconstitutional was to have Congress effectively pass a law melding recommendations of the Congressional Budget Office and Office of Management and the Budget. *See* Gramm-Rudman Act § 274(f). Although the law failed for conferring *executive* authority on the Comptroller General, his mandate was essentially *legislative* in its importance and its impact.

174. *See* ELLIS, *supra* note 172, at 69–80. Joseph Ellis also explains the link between the decision on siting the capital and the debate over national assumption of responsibility for debts previously incurred by the states, another deeply contentious matter at the start of the republic. *See id.* at 48–72.

175. Interestingly, there was discussion (at least among advocates of locating the capital along the Potomac) of preventing direct legislative determination of the issue. *See id.* at 74–75. The problem of capital location was not merely contentious but also multifaceted, making it terribly difficult to secure majorities in both houses. *See id.* at 69–75. Jefferson himself had at one point urged assignment of the entire problem to George Washington to avoid the difficulty of majoritarian decision—or, perhaps, to secure his favored solution. *See* “Jefferson's Report to Washington on Meeting Held at Georgetown,” Sep. 14, 1790, in 17 PAPERS OF THOMAS JEFFERSON 461–62 (Julian P. Boyd ed., 1965) (cited in ELLIS, *supra* note 172, at 75).

tions in your discretion.” The first of these alternative assignments is different than the other two. It is the grant of policy discretion in the disposition of licenses that Congress has determined should be used to allocate a portion of the radio spectrum among a defined class of potential users.¹⁷⁶

The use of regulatory discretion in a setting where the government already has claimed a resource and is now providing rules for its use is not cleanly differentiated from prescribing rules for the regulation of society insofar as both exert a degree of coercive government power. But the distinction between allocation of a defined resource already within the government’s control and the regulation of what is presently private activity reinforces the considerations that divide the alternative assignments set out above.¹⁷⁷ The first alternative, which is set *within* a licensing regime, falls within the executive authority because it confers discretion over issues of modest importance that are directly connected to the performance of an executive function and also because it is *not* a grant of regulatory power over a general audience. The second and third potential assignments above, in contrast, are grants of legislative power, differing from the first assignment in importance, breadth of regulatory power, and the range of competing considerations relevant to reaching the necessary policy conclusions.¹⁷⁸

176. Saying that a basic policy decision has been made to use licensure for regulating some area of economic activity is not the same as saying that the decision is the best or even a rationally defensible one. On licensure for radio spectrum, see, for example, Ronald H. Coase, *The Federal Communications Commission*, 2 J.L. & ECON. 1 (1959) and Thomas W. Hazlett, *The Rationality of U.S. Regulation of the Broadcast Spectrum*, 33 J.L. & ECON. 133 (1990).

177. As the qualifications noted here should make clear, observing the differences among categories of activity provides a basis for inclining in one or another direction; it does not provide a guarantee that any congressional decision couched in terms of an activity more appropriate for administrative authority should or will be upheld as proper.

178. Whatever one thinks of the economic or political sense of the initial commitment of authority to the Federal Radio Commission in 1927 (carried forward as Title III of the Communications Act of 1934, Pub. L. No. 73-416, 48 Stat. 1064, 1081), the instruction respecting radio station allocation was a far narrower one in the context of the limited uses of wireless communications at the time than it might appear to be looking backward from today’s vantage. See, e.g., ERIK BARNOUW, *A TOWER IN BABEL: A HISTORY OF BROADCASTING TO 1933*, VOL. 1 (Oxford Univ. Press 1966); Coase, *supra* note 176; Hazlett, *supra* note 176; Kevin Werbach & Gregory Staples, *The End of Spectrum Scarcity*, 41 IEEE SPECTRUM 48 (Mar. 2004).

In the same vein, saying to the EPA, “determine the level of particulate matter of a given sort that seriously threatens human health” is different from saying “figure out what to do to respond to any environmental or health threat” or even asking the agency to exercise that level of broad rulemaking authority over a class of environmental or health threats. This difference is a closer matter; both of these instructions are aimed at producing regulatory imperatives for elements of society that are not laying claim to particular benefits or resources within the government’s control. Both indeed can be characterized as “prescribing rules for the regulation of society.” Yet, if the first directive is not “figure out what level of this identified particulate matter threatens human health and then figure out what to do about it” but rather is to *identify* the level that corresponds to a particular instruction and then *implement* the rules that have been written by Congress, the difference between that instruction and the second instruction is not simply one of degree. Instead, it is the difference between a grant of discretion in making assessments within a legislatively prescribed regulatory framework and deciding far more basic propositions on the regulation of society.¹⁷⁹

Basic judgments on regulation of society can produce the sort of coercive rules for the citizenry that were the subject of greatest concerns at the founding—concerns that were the basis for constitutional structures dividing and limiting legislative power. These judgments are not appropriate for administrative decision-making, even when attached to some regulatory structure that invokes executive powers such as prosecution.¹⁸⁰

While this article was in process, a thoughtful scholar on constitutional law opined that those who would reinvigorate the delegation doctrine simply refuse to acknowledge “the reality of the

179. For this reason, the proper rule is the division between *basic* rules for the regulation of society—rules of great importance—and more modest rules that, even if regulating others’ conduct, are of low importance *and* are tied to effectuation of other, plainly executive functions. *But see* Schoenbrod, *Substance*, *supra* note 93, at 1252–55 (no delegation of authority to make *rules* regulating private conduct); Schoenbrod, *Purposes*, *supra* note 93, at 359 (same). The test advocated here allows a category of properly constrained policy-making that carries out core executive functions even where it constitutes in some fashion the regulation of society.

180. *See, e.g.*, Ronald A. Cass, *Overcriminalization: Administrative Regulation, Prosecutorial Discretion, and the Rule of Law*, 15 ENGAGE: J. FEDERALIST SOC’Y PRAC. GROUPS 11 (2014).

[modern] administrative state.”¹⁸¹ Restraints on delegation, in other words, seem to some observers incompatible with our current, large-scale, powerful administrative operations, and (in the more jaundiced view of this) efforts to revive a doctrine that would work to constrain delegations are explicable as based primarily in hostility to the modern administrative state.¹⁸²

As the examples above show, however, many assignments of authority to administrative officials can pass muster under this test, including assignments of “legislative rulemaking” authority.¹⁸³ More fundamentally, preserving the status quo cannot be the ultimate goal of constitutional law.¹⁸⁴ That some current assignments of authority to administrators may fail a more serious delegation screen should not be enough to condemn the effort to create a workable doctrine. As Chief Justice Marshall appreciated in *Wayman*, issues of *great importance* are the province of Congress, to be decided by procedures that give the greatest prospect of engaging broad democratic support, of minimizing prospects for narrow self-interest, of protecting in-

181. See Private e-mail to Ronald A. Cass (May 6, 2016) (on file with Author).

182. While this paraphrases the point made in correspondence, it encapsulates both the sentiment expressed in an unguarded way and, surely, sentiments shared by other delegation proponents. See *id.*; see also Catherine Sharkey, In the Wake of *Chevron's* Retreat 8–10 (unpublished manuscript) (March 2016) (on file with Author) (describing margins along which skeptics of administrative authority respond by tailoring legal doctrines, including revising rules for judicial review of agency action and noting that “Chief Justice Roberts [seized] the opportunity in *King* to further a broader project of resisting the administrative state by cutting back on *Chevron*”); Cass R. Sunstein & Adrian Vermeule, *The Unbearable Rightness of Auer* 2 (Harv. Pub. L. Working Paper No. 16-02, 2016) http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2716737, [<https://perma.cc/H5UG-D66Q>] (“The argument in favor of independent judicial judgment reflects an emerging large-scale distrust of the administrative state.”).

183. It also is worth noting that even changes in doctrine seen as potentially reducing the scope of administrative discretion often work to provide avenues for supporting it. See, e.g., Sharkey, *supra* note 182, at 11–19 (describing the relationship between demands for a “hard look” at agency action and its encouragement of improved decision-making by virtue of increased reliance on the administrative record).

184. Certainly, the Supreme Court has plainly rejected this argument in other contexts involving unconstitutional delegations of authority. See, e.g., *Stern v. Marshall*, 564 U.S. 2 (2011); *N. Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50 (1982).

dividual liberty, and of reflecting longer-term, not shorter, perspectives on society's interests.¹⁸⁵

4. *Conceptual Tests and Judicial Discretion*

The test advocated here is faithful to the constitutional design, but it is open to criticism for failing adequately to confine judicial discretion. After all, while the test endeavors to implement a formal, textual constraint in the Constitution, it requires analysis of what constitutes the "legislative power" conferred by the Constitution by reference to concepts that inhere in the division of power. Although there is no magic lexicon of analytical labels, this is best described as a *conceptual* test, not a *functional* test; it is based on text understood in the context of constitutional structure rather than being based in assessing outcomes on measures divorced from formal text.¹⁸⁶

Conceptual tests, however, often appear less determinate—and thus less constraining on those who apply them—than formalist tests.¹⁸⁷ The absence of presentment and bicameralism in the line-item veto,¹⁸⁸ for example, were more easily identified than is the characterization of a matter as of sufficient importance to require congressional resolution. Concern over the degrees of freedom allowed to judges in administering a test is certainly a valid consideration, at times a dispositive one,¹⁸⁹

185. See *Wayman v. Southard*, 23 U.S. (10 Wheat.) 1, 43 (1825); see also THE FEDERALIST Nos. 44, 47, 51 (James Madison); Lawson, *Rise and Rise*, *supra* note 161, at 1239.

186. Compare Erwin Chemerinsky, *Formalism and Functionalism in Federalism Analysis*, 13 GA. ST. U. L. REV. 959 (1997), with Frank H. Easterbrook, *Formalism, Functionalism, Ignorance, Judges*, 22 HARV. J.L. & PUB. POL'Y 13 (1998) [hereinafter *Formalism*].

187. A number of scholars have made similar points in connection with the divide between formalist and "functional" analysis. They also have observed the common practice of judges mixing functional and formal analysis as well as the blurred line between the two forms of reasoning. See, e.g., William N. Eskridge, Jr., *Relationships between Formalism and Functionalism in Separation of Powers Cases*, 22 HARV. J.L. & PUB. POL'Y 21 (1998); Frederick Schauer, *Formalism*, 97 YALE L.J. 509 (1988); Peter L. Strauss, *Formal and Functional Approaches to Separation-of-Powers Questions—A Foolish Inconsistency?*, 72 CORNELL L. REV. 488 (1987).

188. See *Clinton v. New York*, 524 U.S. 417 (1998).

189. See, e.g., RONALD A. CASS, THE RULE OF LAW IN AMERICA 4–19, 28–29 (2001); Michael Dorf, *Prediction and the Rule of Law*, 42 UCLA L. REV. 651, 680–89 (1995); Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175, 1178–81, 1185 (1989); see also Easterbrook, *Formalism*, *supra* note 186, at 16–18.

and it was quite clearly a reason for Justice Scalia's reluctance to embrace the "intelligible principle" test.

This concern, however, has not prevented enforcement of other constitutional provisions that require conceptual analysis. In *Free Enterprise Fund v. Public Company Accounting Oversight Board*¹⁹⁰ ("PCAOB"), for instance, the Court reviewed a challenge to having two levels of insulation against presidential at-will removal power. Under the Sarbanes-Oxley Act,¹⁹¹ which created the PCAOB, members of the Oversight Board are appointed by the Securities and Exchange Commission ("SEC") and are removable by the SEC only for good cause. The members of the SEC, in turn, are appointed by the President and by law are removable by the President only for good cause. Although the Constitution does not speak directly to the question of the removal of Officers of the United States,¹⁹² a majority of the Court found the implications of Article II's vesting clause (vesting executive power in the President), supported the inference that the President must have effective control over those who execute the laws.¹⁹³ Even accepting that limits could be placed on the removal of some officers, the Court found that the imposition of two levels of insulation against presidential control exceeded constitutional limits on interference with the President's ability to see that the laws are faithfully executed.¹⁹⁴

The conceptual test in *PCAOB* was based on the text and structure of the Constitution; it was an effort to understand and apply the instruction in the vesting clause of Article II. The particular distinction set forth in *PCAOB* (the difference between a one-level and a two-level constraint on at-will removal of executive officers) will not be compelling to everyone—indeed, probably not to very many—but the analytical approach to the issue presented nonetheless should be credited as a valid one. It avoids pitfalls of an excessively narrow reading of the text (as, for instance, containing no implication respecting presidential control of removal because it was not expressly mentioned in the Constitution). At the same

190. 561 U.S. 477 (2010).

191. Pub. L. No. 107-204, 116 Stat. 745 (2002).

192. The sole mechanism for removal of "civil Officers of the United States" mentioned in the Constitution is through impeachment by the House of Representatives and conviction by the Senate. See U.S. CONST. art. II, § 4.

193. See *PCAOB*, 561 U.S. at 496–97.

194. *Id.*

time, the *PCAOB* test does not admit the degree of freedom for judges that more free-ranging inquiries into motivation behind the text almost certainly would confer.¹⁹⁵

The same sort of analysis underlies the test advanced here. When the constitutional text and structures strongly suggest the need for judicial support to preserve a feature of government, even without the capacity to fashion a fitting formalist test, the Court rightly has found a way to do that. The same imperative should support the modest-importance-plus-connection test, especially for regulation of conduct. This does not give judges a tool for second-guessing legislative determinations of the best means of accomplishing tasks within their power to assign;¹⁹⁶ but it does provide a tool for preventing legislative authorization for other officials to exercise the core responsibility constitutionally committed to Congress.¹⁹⁷

Of course, a test that is both effective at safeguarding constitutional separation of powers and less dependent on conceptual analysis might be preferable. In this vein, a broader delegation doctrine that invalidates all assignments of authority to adopt rules for private conduct—even if associated with circumscribed grants of power to take steps in furtherance of clearly executive or judicial functions—might be defended on prudential grounds. It might be a better means of protecting against unconstitutional reassignments of power because it so plainly prohibits a defined class of authorizations.¹⁹⁸ But it also would invalidate commitment of common law judging that has been routine under laws such as the Sherman Act and that has

195. For critical discussion of the less constraining approaches of motive-based or similar purposive analysis, see, e.g., Easterbrook, *Formalism*, *supra* note 186, at 16–18; Scalia, *supra* note 189, at 1178–81, 1185; see also Ronald A. Cass, *The Perils of Positive Thinking: Constitutional Interpretation and Negative First Amendment Theory*, 34 *UCLA L. REV.* 1405 (1987).

196. Most important, the test advanced here does not ask, as many functional arguments do, what would work best to protect a set of extra-constitutional values. For advocacy of functional analysis in support of external values, see, e.g., Chemerinsky, *supra* note 186.

197. This comports with concerns express in Easterbrook, *Formalism*, *supra* note 175.

198. See, e.g., Schoenbrod, *Substance*, *supra* note 93; Schoenbrod, *Purposes*, *supra* note 93.

been a characteristic of at least some branches of federal adjudication from the republic's earliest days.¹⁹⁹

In the end, the advantage of such a strong delegation doctrine in sweeping away marginally questionable authorizations along with the central cases of unconstitutional delegations—creating a sort of “safety zone” to assure that the core is not breached²⁰⁰—would very likely make its continued application improbable. On balance, the test suggested in *Wayman* and renewed here is better likely to accomplish constitutional ends, avoid excessive intrusion into political decisions, and be sustainable over time.

5. Further Margins: Locus and Scope

While the test for when assignment of power crosses the line to improper delegation of legislative authority should look to the distinction between grants of power to write rules for the regulation of society and grants of power to use discretion in carrying out other functions, like resource management, licensure, or benefit distribution, there plainly will be difficult cases. In close cases, two other considerations may be looked to in order to assess the consistency of the assignment with the Constitution's division of power. These are not part of the test for consistency with the constitutional division of powers—not considerations to be balanced against indications that a power has been reassigned against constitutional command—but instead are considerations that may help in difficult cases to identify more and less problematic assignments of authority.

One is the *locus* of the assignment. If the law assigns discretionary authority to the President directly, there is less likelihood that the allocation of power is intended to undermine constitutional divisions than if the power is assigned to officials who are insulated from presidential control and, therefore,

199. On the nature and history of federal common law adjudication, see, e.g., Bradford R. Clark, *Federal Common Law: A Structural Reinterpretation*, 144 U. PA. L. REV. 1245 (1996); Martha Field, *Sources of Law: The Scope of the Federal Common Law*, 99 HARV. L. REV. 881 (1986); see also *Mistretta*, 488 U.S. at 417 (Scalia, J., dissenting) (discussing the propriety of judicial discretion under the Sherman Act); Frank H. Easterbrook, *Statutes' Domains*, 50 U. CHI. L. REV. 533, 544 (1983) (same).

200. For an explanation of a similar strategy in First Amendment jurisprudence, see, e.g., Frederick Schauer, *Fear, Risk and the First Amendment: Unravelling the "Chilling Effect"*, 58 B.U. L. REV. 685 (1978).

more amenable to congressional influence.²⁰¹ So, for example, the commitment of power to the President reviewed in a case such as *Field* or even *Hampton* (where the President could rely on, but was not bound by, determinations from the Tariff Commission) differed from the commitment of authority to the Sentencing Commission reviewed in *Mistretta* or the devolution of authority to the EPA reviewed in *American Trucking*.

In one sense, the notion of granting power to an agency that is more independent of the President, and hence more likely to be responsive to Congress, seems to be a vehicle for retaining greater supervisory authority in Congress.²⁰² From that vantage, it might be regarded as more consistent with the exercise of power over policy-making by the institution supposed to exercise “all legislative powers.” But the power that is retained is not power checked by the processes the Constitution provided to guard against threats to liberty.²⁰³ Members of Congress can expand their influence without having to be directly accountable by giving authority to officers who are far more apt to be susceptible to fears of public criticism or implicit promises of future reward than a President.²⁰⁴ The point is not that Congressional oversight is generally problematic, only that when a grant of discretionary authority is at the margin of arguable constitutionality, greater leeway should be allowed where the authority runs directly to the President.

The other consideration that should have effect at the margin is the *scope* of the delegation. Grants of broad discretionary authority directly tied to core executive functions do not become unconstitutional merely because of their breadth. Similarly, narrow grants of discretionary authority divorced from the constitutionally committed power of the branch to which it is directed do not become constitutional merely because they are

201. See, e.g., Douglas H. Ginsburg & Steven Menashi, *Nondelegation and the Unitary Executive*, 12 J. CONST'L L. 251 (2010).

202. See, e.g., DAVID R. MAYHEW, CONGRESS: THE ELECTORAL CONNECTION 134–35 (1974); Peter L. Strauss, *The Place of Agencies in Government: Separation of Powers and the Fourth Branch*, 84 COLUM. L. REV. 573, 589–91, 592–95 (1984). But see Neal Devins & David Lewis, *Not-So-Independent Agencies: Party Polarization and the Limits of Institutional Design*, 88 B.U. L. REV. 459 (2008).

203. See, e.g., *Ass'n of Am. R.Rs. v. Dep't of Transportation*, 135 S. Ct. 1225, 1237 (2015) (Alito, J., concurring).

204. See, e.g., MAYHEW, *supra* note 202.

limited.²⁰⁵ Yet, as with the consideration of locus, the breadth of the power granted can be a useful consideration when constitutionality is otherwise unclear. Other things equal, more open-ended authority over a wider range of decisions ought to count against a finding of constitutionality, but the critical concern remains whether the authority constitutes a commitment of discretion to make general rules for others or to direct activity within the recipient's constitutionally assigned realm.

V. CONCLUSION

The central feature of the U.S. Constitution—what the Constitution's framers thought provided the most important bulwark of liberty—is the division of power among different branches (and between the federal government and the states). Although federal courts, including the Supreme Court, have been zealous in policing some aspects of constitutional separation of power, they have been notoriously reluctant to enforce the limitation of the legislative power to Congress. The delegation doctrine has been invoked rarely and largely reduced to a superficial search for the inevitably discovered “intelligible principle” to guide commitments of discretionary authority to executive (or judicial) officers. Recent indications that at least two Supreme Court Justices are open to revisiting and revitalizing the delegation doctrine, however, suggest a possible change.

That is a development to be hoped for. If it does transpire, the Justices should reject the test of the past century, refocusing the delegation doctrine on the nature of the responsibility granted and its connection to the constitutional competence of the officials or bodies authorized to exercise discretionary power. Such a transformation would return delegation analysis to the considerations that animated constitutional separation of powers and that were central to early laws and decisions. It would provide a path to protect liberty without giving judges an elastic authority over lawmakers' choices. It would knit together the concerns that informed Chief Justice Marshall and his colleagues in the early years of the nation and those animating Justice Scalia (resisting

205. So, for example, the cases striking down commitments of authority to non-Article III judges, for example, do not rely on the breadth of the commitment. *See, e.g., Stern v. Marshall*, 564 U.S. 2 (2011); *N. Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50 (1982).

the doctrine in its present form) and Justices Alito and Thomas (urging the doctrine's recasting and revival) almost two centuries later. Not least, by insisting that the basic rules governing society be made as our founding document provides, it would promote the rule of law as well.

“AN ARTIFICIAL BEING”: JOHN MARSHALL AND CORPORATE PERSONHOOD

CHRISTOPHER J. WOLFE*

Two of the Supreme Court’s most controversial decisions in recent history—*Citizens United v. FEC*¹ and *Burwell v. Hobby Lobby*²—both relied on a legal concept that was little-discussed in the majority opinions: corporate personhood. Justice Kennedy’s opinion for the Court in *Citizens United* and Justice Alito’s opinion for the Court in *Hobby Lobby* focused on the rights of free speech and the free exercise of religion, more or less accepting that those rights can inhere in corporate persons. Some of the strongest public reactions to these opinions have to do precisely with the fact that they are defenses of the rights of corporate persons and not rights of natural human beings.³

Dissenting opinions in *Citizens United* and *Hobby Lobby* dealt with the issue of corporate personhood at much greater length than the majority opinions. Justice Stevens, in his dissent in *Citizens United*, discussed the original understanding of the First Amendment’s application to corporations. He concluded that the Founders did not believe that the protections afforded to natural persons, like freedom of speech, would extend to corporations.⁴ Justice Ginsburg, in her *Hobby Lobby* dissent, approvingly cited Justice Stevens’s opinion in *Citizens United* as part of her argument that Chief Justice John Marshall and the

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1. 558 U.S. 310 (2009).

2. 134 S. Ct. 2751 (2014).

3. See, e.g., 162 CONG. REC. S152 (2016) (statement of Sen. Elizabeth Warren).

4. *Citizens United*, 558 U.S. at 429 (Stevens, J., dissenting).

Framers did not intend for corporate persons to have the protection of free exercise of religion. Ginsburg wrote:

[T]he exercise of religion is characteristic of natural persons, not artificial legal entities. As Chief Justice Marshall observed nearly two centuries ago, a corporation is “an artificial being, invisible, intangible, and existing only in contemplation of the law.”⁵

Justices Ginsburg and Stevens are not the only ones who have interpreted Chief Justice Marshall’s *Dartmouth College* opinion in this way. Chief Justice Rehnquist in his *First National Bank of Boston v. Bellotti*⁶ dissent made much the same claim about Marshall’s line from *Dartmouth College*.⁷ Whether or not Justice Ginsburg’s quote from *Dartmouth College* actually demonstrates that Marshall was against corporate persons having constitutional rights is an important question. Marshall made restrictive statements about corporate personhood similar to those made in *Dartmouth College* in at least four other opinions he wrote in his tenure on the Supreme Court: *Bank of the United States v. Deveaux*,⁸ *Osborn v. Bank of the United States*,⁹ *Bank of the United States v. Dandridge*,¹⁰ and *Providence Bank v. Billings*.¹¹ The main question of this Article is whether Marshall’s view of corporate personhood necessarily entails a restrictive interpretation of the rights of corporate persons. This Article will argue that Marshall’s statements suggesting a restrictive interpretation of corporate personhood do not entail a restrictive interpretation of their rights, given the context in which those statements were made.

This Article examines the Constitution’s original understanding of corporate personhood by paying special attention to the issues raised by Justices Stevens and Ginsburg.¹² Chief Justice

5. *Hobby Lobby*, 134 S. Ct. at 2794 (Ginsburg, J., dissenting) (quoting *Trs. of Dartmouth Coll. v. Woodward*, 17 U.S. (4 Wheat.) 518 (1819)).

6. 435 U.S. 765 (1978).

7. *See id.* at 823–24 (Rehnquist, J., dissenting).

8. 9 U.S. (5 Cranch) 61 (1809).

9. 22 U.S. (9 Wheat.) 738 (1824).

10. 25 U.S. (12 Wheat.) 64 (1827).

11. 29 U.S. (4 Pet.) 514 (1830).

12. Writing in 2012, Ian Speir claimed that:

[T]o date, while a number of scholars have explored the role and conception of the corporation in early American history, few have

Marshall's early precedents, which helped enshrine corporate personhood in Supreme Court case law, will be the main focus of this discussion. Since Marshall's time on the Court, the law has undoubtedly undergone major changes; however, Marshall's opinions serve as a good foundation for such an analysis. Some of these changes concern corporations themselves, such as the addition of state general incorporation laws, which facilitated the tremendous growth of commercial corporations during the remainder of the 19th century,¹³ while others have to do with the ratification and incorporation of the 14th Amendment, such as the extension of equal protection to corporations against state interference found in *Santa Clara County v. Southern Pacific Railroad*.¹⁴

Section One briefly evaluates the original intent of the constitutional clauses concerning corporate personhood from the era of the Articles of Confederation through ratification to better assess Marshall's view of those clauses. Section Two discusses influences on Marshall's view of corporate personhood, including Founders such as Alexander Hamilton and jurists from the English common law tradition. Section Three discusses Marshall's thoughts on corporate personhood, paying special attention to the restrictive statements he made about corporations. And lastly, Section Four analyzes the accuracy of recent inter-

undertaken to articulate the 'original understanding' of the corporation—American views about the corporation and its role in society at and around the time the Constitution and Bill of Rights went into effect. Furthermore, none has attempted to tie this understanding to the 'original meaning' of the Constitution—that is, the understood meaning of the Constitution's text at ratification.

Ian Speir, *Corporations, the Original Understanding, and the Problem of Power*, 10 GEO. J.L. & PUB. POL'Y 115, 117–18 (2012) (footnotes omitted).

13. Discussing the effect of the *Dartmouth College* case, Elizabeth Pollman also argues that "[r]ecognizing the corporate charter as covered by the Contract Clause and the corporation's property as protected by the Due Process Clause stabilized the corporate form as a viable organization for long-term private investment." Elizabeth Pollman, *Reconceiving Corporate Personhood*, 2011 UTAH L. REV. 1629, 1639.

14. 118 U.S. 394 (1886). However, Morton Horwitz writes that *Santa Clara County* largely takes Marshall's opinion in *Dartmouth College* as the foundation for its understanding of corporate personhood. MORTON J. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW: 1870–1960*, at 67 (1992) ("The *Santa Clara* decision was not thought of as an innovation but instead was regarded as following a line of cases going back almost seventy years to the *Dartmouth College Case*").

pretations of Marshall's view of corporate personhood, such as those found in Justice Stevens's dissent in *Citizens United* and Justice Ginsburg's dissent in *Hobby Lobby*.

I. AN IMPLIED POWER TO CREATE CORPORATE PERSONS AND DUTY TO PROTECT THEM ONCE CREATED

The bare text of the Constitution itself neither allows Congress to create corporate persons nor makes it a duty to protect corporate persons' constitutional rights. Rather, Chief Justice Marshall and his contemporaries inferred the existence of such congressional power. They considered the power of the federal government to create corporations an implied power derived from the Necessary and Proper Clause. They understood the Contract Clause of Article I, Section 10, to imply the duty of the federal government to protect the rights of corporations, whether those corporations were created at the federal or state level.¹⁵ Marshall also considered whether corporate persons have standing to bring cases in federal court, raising questions about the interpretation of Article III, Section 2.

A. *Corporate Personhood Under The Articles of Confederation*

States were the main governments granting franchises to corporations in early America, and they generally considered corporations to have some of the qualities of legal personhood. Corporations differed from joint-stock associations (also present during the Colonial and Articles periods) in that those groups were not considered legal persons.¹⁶ The power to create corporate persons was considered a sovereign power. Initially, colonial governments were granted this power by the King's agents; after the colonies broke away and created new state governments, the power to create corporate persons was considered part of the sovereign power of the state govern-

15. William Crosskey also suggests that the Commerce Clause may have been understood as the source of congressional power concerning corporations. See WILLIAM W. CROSSKEY, *POLITICS AND THE CONSTITUTION IN THE HISTORY OF THE UNITED STATES* 43 (1953).

16. See Simeon E. Baldwin, *American Business Corporations Before 1789*, 8 AM. HIST. REV. 449, 450 (1903).

ments. The Articles of Confederation gave scant assurance that a state corporate charter from one state would be honored in another state.¹⁷ The Articles' only mention of this issue is an oblique reference to interstate commerce for the "people" of a state in Article IV:

[T]he people of each state shall have free ingress and regress to and from any other state, and shall enjoy therein all the privileges of trade and commerce, subject to the same duties, impositions and restrictions as the inhabitants thereof respectively, provided that such restrictions shall not extend so far as to prevent the removal of property imported into any state, to any other State of which the Owner is an inhabitant¹⁸

More assurance for corporate charters across state borders was desired when it came time to create a new constitution in 1787.

Whether or not the Continental Congress itself had the power to create corporations was a question debated during this period. In 1781, Alexander Hamilton began his first efforts to create a national bank by encouraging Robert Morris (then Superintendent of Finance) to create the Bank of North America. Some at the time (such as Thomas Fitzsimmons) protested the chartering of the Bank, while others (such as Thomas Paine) supported it.¹⁹ James Wilson delved into the difficult problem of constitutional justification for that 1781 Act.²⁰ The problem was that the Articles of Confederation only allowed the Continental Congress to legislate according to expressly delegated powers,²¹ and the power to create a corporation such as the Bank of North America was not expressly enumerated. Wilson was forced to resort to an argument outside the Articles, claiming that the power to incorporate for national goals flowed from the Union mentioned in the Declaration of Independence,

17. *See id.* at 464.

18. ARTICLES OF CONFEDERATION OF 1781, art. IV, para. 1.

19. *See Speir, supra* note 12, at 138.

20. James Wilson, *Considerations on the Bank of North America 1785*, reprinted in 1 COLLECTED WORKS OF JAMES WILSON 64 (Kermit Hall & Mark Hall eds., 2007) [hereinafter WILSON].

21. ARTICLES OF CONFEDERATION of 1781, art. II ("Each state retains its sovereignty, freedom, and independence, and every Power, Jurisdiction and right, which is not by this confederation expressly delegated to the United States, in Congress assembled.").

which preexisted the Articles.²² Wilson pointed to examples of similar powers the Continental Congress had already exercised, such as the administration of national territory and the incorporation of new states.²³

Wilson's resources for arguing that the creation of a corporation was permissible under the Articles' government were few, but he had even fewer resources for arguing that there was a duty to defend the rights of that corporation. In the Bank of North America's charter, the Continental Congress explicitly recommended that states create laws "making it a felony without benefit of clergy, for any person to counterfeit bank notes, or to pass such notes, knowing them to be counterfeit."²⁴ Many states, including Wilson's Pennsylvania, did, in fact, pass laws protecting the Bank of North America Corporation, but the key point is that the Bank was dependent on the states to provide that protection.²⁵ Several states also passed their own charters of incorporation for the Bank of North America that overlapped the Continental Congress's charter. Wilson considered those state charters to be superfluous.

Wilson's arguments concerning the constitutionality of the Bank of North America would turn out to be highly significant for the future of corporate personhood and implied powers.²⁶

22. James Wilson, *Considerations on the Bank of North America 1785*, reprinted in 1 WILSON, *supra* note 20, at 65.

23. *Id.* at 66.

24. 1 DOCUMENTARY HISTORY OF BANKING AND CURRENCY IN THE UNITED STATES 141 (Herman Krooss ed., 1983) [hereinafter DHBC].

25. James Madison makes note of this issue of the charter of the Bank of North America in his speech in Congress opposing the National Bank on February 2, 1791:

The case of the bank, established by the former Congress . . . never could be justified by the regular powers of the articles of confederation. Congress betrayed consciousness of this, in recommending to the States to incorporate the bank also. They did not attempt to protect the bank notes, by penalties against counterfeiters. These were reserved wholly to the authority of the States.

JAMES MADISON: WRITINGS 1772–1836, at 484 (Jack Rakove ed., 1999) [hereinafter MADISON'S WRITINGS].

26. Ian Speir notes several other significant (though perhaps less influential) discussions of corporate rights during the Articles of Confederation period besides the bank charter debate; these include the revision of the University of Pennsylvania's corporate charter, the vetoing of a New York trade union charter, criticism of the New Jersey Society for Useful Manufactures corporation, and de-

With a new Constitution and the removal of the expressly delegated powers requirement, Alexander Hamilton was able to argue that the charter incorporating the Bank of the United States was constitutional based on reasons similar to Wilson's regarding implied sovereign power.²⁷ Hamilton's arguments would in turn influence Marshall's opinions in *McCulloch v. Maryland* and *Dartmouth College v. Woodward*.

B. *Corporate Personhood at the Philadelphia Convention*

There was less discussion of corporate personhood or corporations at the Philadelphia Convention and the state ratification debates than one might expect. A few sparse mentions of corporations indicate that the Framers either did not purposefully intend for Congress to be able to create corporations or, if they did intend to give Congress this power, thought it could be done by an implied power under the Necessary and Proper Clause.

At the Convention on September 14, 1787, James Madison proposed adding an express power of Congress to create corporations.²⁸ This proposal was rejected.²⁹ In the context of the delegates' discussion of national powers (what would become Article I, Section 8), Benjamin Franklin argued that "a power to provide for the cutting of canals where deemed necessary"³⁰ should be added. Madison then suggested, "an enlargement of the motion into a power 'to grant charters of incorporation where the interest of the U.S. might require & the legislative provision of individual states may be incompetent.'" ³¹ This clause would have given Congress express permission to create corporations for various purposes, such as cutting canals. Rufus King objected to Madison's motion, arguing that "[i]t will be referred to the establishment of a Bank,"³² and that

bates over whether municipalities ought to incorporate. See Speir, *supra* note 12, at 130–35.

27. See 1 WILSON, *supra* note 20, at lxix.

28. 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 615 (Max Farrand ed., 1911) [hereinafter FARRAND].

29. *Id.*

30. *Id.*

31. *Id.*

32. *Id.* at 616. Ironically, King was also a key proponent of the addition of the Contract Clause to Article I, Section 10 through his role on the Committee of Style, and was later a supporter of Congress' charter of the first Bank of the United

those banks would establish monopolies. James Wilson's counter to King's objection was that "mercantile monopolies . . . are already included in the power to regulate trade,"³³ and the creation of a bank added nothing beyond what was already legal. In the end, Franklin's motion for Congress' canal cutting power was not modified to include the right to create corporations generally, and the canal cutting power itself was outvoted eight to three.³⁴

In 1791, after the Constitution was ratified, opponents of the Bank of the United States reminded those in favor of it that a clause for the creation of corporations by Congress had been explicitly rejected at the Constitutional Convention. Then-Secretary of State Thomas Jefferson wrote:

[I]t is known that the very power now proposed as a *means* was rejected as an *end* by the Convention which formed the Constitution. A proposition was made to them to authorize Congress to open canals, and an amendatory one to empower them to incorporate. But the whole was rejected, and one of the reasons for rejection urged in debate was, that then they would have a power to erect a bank, which would render the great cities, where there were prejudices and jealousies on the subject, adverse to the reception of the Constitution.³⁵

Madison too, when admonishing Congress not to charter the bank, "well recollected that a power to grant charters of incorporation had been proposed in the general convention and rejected;"³⁶ this is unsurprising considering that he was the one who proposed it.

None of these arguments about the legislative history of the Constitution would persuade Treasury Secretary Hamilton, however, who argued that although an express power was rejected, the words of the Necessary and Proper Clause implied

States in 1791. See ROBERT ERNST, RUFUS KING: AMERICAN FEDERALIST 112 n.77 (1968).

33. 1 FARRAND, *supra* note 28, at 616.

34. See ALAN CRAIG HOUSTON, BENJAMIN FRANKLIN AND THE POLITICS OF IMPROVEMENT 150 (2008).

35. 1 DHBC, *supra* note 24, at 149.

36. MADISON'S WRITINGS, *supra* note 25, at 482.

that Congress could create corporations.³⁷ This argument persuaded John Marshall.

On September 17, 1787 (the last day of the Convention), Elbridge Gerry complained that he could not vote for ratification due to his view that “under the power of commerce, monopolies may be established.”³⁸ It is likely that Gerry had monopolies established for corporations (such as a bank) in mind when he made this comment.³⁹ In fairness, this cannot be taken as strong evidence for the conclusion that the power to create corporations was implied in the Constitution, but it is some evidence.⁴⁰

To summarize: there is little evidence in the record to prove that the Constitution was intended by its framers to delegate the power to create corporations to Congress, that the Federal government had a duty to protect corporations’ rights by contract, or that corporate bodies had any sort of standing in federal court. However, Marshall did not need very much evidence, given what he was trying to say. Marshall argued in *Dartmouth College* that:

It is more than possible, that the preservation of [contract rights involved in corporate charters] was not particularly in view of the framers of the constitution, when the clause under consideration was introduced into that instrument. . . . But although a particular, and a rare case may not, in itself, be of sufficient magnitude to induce a rule, yet it must be governed by that rule, when established, unless some plain and strong reason for excluding it can be given. It is not enough to say, that this particular case was not in the mind of the convention, when the article was framed, nor the American people, when it was adopted.⁴¹

37. See CARSON HOLLOWAY, *HAMILTON VERSUS JEFFERSON IN THE WASHINGTON ADMINISTRATION* 99–100 (2016).

38. See Elbridge Gerry, Speech in the Constitutional Convention, Monday September 17, in 4 *THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION* 15 (John Kaminski & Gaspare Saladino eds., 1987) [hereinafter DHRC].

39. See *id.* at 15 n.2.

40. The records of the state ratifying conventions do not indicate that a federal power to create corporations was a topic of discussion. See generally 2–26 DHRC, *supra* note 38.

41. *Trs. of Dartmouth Coll. v. Woodward*, 17 U.S. (4 Wheat.) 518, 644 (1819).

In other words, it did not matter to Marshall whether the contract rights involved in corporate charters were ever mentioned at the Constitutional Convention, as long as they used the word “contract” in a general sense that could be appropriately applied to corporate charters. Marshall’s argument about corporate persons does not rely on history or the Framers’ intent, but rather on the full applications of the words of the Constitution based on their original meaning.

II. MARSHALL’S INFLUENCES

When attempting to understand Chief Justice Marshall’s jurisprudence on corporate personhood, the importance of his training as a lawyer in the British common law tradition should not be underestimated. His common law-influenced views on corporate personhood can be seen illustrated in one of his experiences working as a lawyer in Virginia in the case of *Bracken v. Visitors of William and Mary College*.⁴² Additionally, the arguments Alexander Hamilton employed in his 1791 defense of the constitutionality of the Bank of the United States would shape Marshall’s understanding of corporate personhood in the context of the American Constitution.

A. *Blackstone, Coke, and British Common Law*

Marshall’s views on corporations were fundamentally informed by the precedents and writings of the British common law tradition, though he rarely explicitly quoted them in his major opinions on corporations delivered while on the Supreme Court.⁴³ Marshall himself wrote in *Deveaux* that “our ideas of a corporation, its privileges and its disabilities, are derived entirely from the English books, we resort to them for aid, in ascertaining its character.”⁴⁴

The core notions Marshall learned about corporations from the common law tradition were the general definition of a “corporation” and the reasons why government ought to create them. The famous legal commentator William Blackstone had

42. 7 Va. (3 Call) 573 (1790).

43. See WARREN HUNTING, *THE OBLIGATION OF THE CONTRACTS CLAUSE OF THE U.S. CONSTITUTION* 70 (1919).

44. *Bank of the United States v. Deveaux*, 9 U.S. (5 Cranch) 61, 88 (1809).

defined corporations as “artificial persons, who may maintain a perpetual succession, and enjoy a kind of legal immortality,” and stated that they were created “for the advantage of the public to have any particular rights kept on foot and continued.”⁴⁵ This is very similar to Marshall’s definition found in *Dartmouth College*.⁴⁶ Later commentators have called this the “concession” theory of corporate personhood.⁴⁷ Corporations are required to be created for public purposes, which Blackstone acknowledged could include the facilitation of a variety of public benefits, such as “the advancement of religion, of learning, and of commerce.”⁴⁸ These public purposes, whether achieved in some way by private corporations, government corporations, or eleemosynary corporations, are the ultimate reasons why the government ought to protect their rights once created, including granting corporations standing in court.

The reality that corporate persons are different than natural persons convinced the British common law commentators, and Marshall, that certain conditions must be met for a corporation to have standing to defend itself. Sir Edward Coke, another famous legal commentator whom both Blackstone and Marshall cite, pointed out that unlike a natural person, a corporate person must be defended by an attorney.⁴⁹ A natural person could presumably defend himself in court, but an entire corporation cannot—especially considering that all officers in the organization’s history are considered parts of the corporation’s life. In a statement very similar to Marshall’s comment in *Devaux*, Coke wrote in the *Sutton’s Hospital* case that:

[A] Corporation aggregate of many is invisible, immortal, & resteth only in intendment and consideration of the law. . . . They may not commit treason, nor be outlawed, nor excommunicate, for they have no souls, neither can they appear in person, but by Attorney.⁵⁰

45. 1 WILLIAM BLACKSTONE, COMMENTARIES *467.

46. See 17 U.S. (4 Wheat.) at 636.

47. See MIKE O’CONNOR, A COMMERCIAL REPUBLIC 90 (2014).

48. 1 BLACKSTONE, *supra* note 45, at *467.

49. See Case of Sutton’s Hospital (1612) 77 Eng. Rep. 960, 971–73; 10 Co. Rep. 23 a, 30 b–32 b.

50. *Id.*

Coke and Marshall's acknowledgement that corporations are not natural persons was not intended to diminish or dismiss the legitimate role corporate persons played, or the rights they had. They were statements describing how and when it was appropriate for corporate persons to defend themselves in court, and were neither restrictive nor expansive of their rights. This is perhaps the main difference between Marshall's discussion of corporate persons and the recent use of his quotations in Justice Rehnquist's *Bellotti* dissent,⁵¹ Justice Stevens's *Citizens United* dissent,⁵² and Justice Ginsburg's *Hobby Lobby* dissent.⁵³

B. *Bracken v. Visitors of William and Mary College*

One case John Marshall was involved in as a young lawyer in Virginia demonstrates the stance he would later take toward corporations when he became Chief Justice and includes more explicit citation of British common law precedents than can be found in his Supreme Court opinions.⁵⁴ In the Virginia Court of Appeals, Marshall represented the College of William and Mary against a professor, Reverend Bracken, who complained that the board of visitors of the college was not the proper authority to make changes to the curriculum of the school. In *Bracken v. Visitors of William and Mary College*,⁵⁵ Marshall argued before the court that the corporate charter of the school had clearly put the board in charge of such decisions.⁵⁶

What is interesting with regard to corporate personhood about this case is where Marshall places the public purpose requirement that all corporations must ultimately serve. The Virginia Assembly had granted the college a charter for a private corporation to serve the public purpose of educating students;

51. See *First Nat'l Bank v. Bellotti*, 435 U.S. 765, 822–28 (1978) (Rehnquist, J., dissenting).

52. See *Citizens United v. FEC*, 558 U.S. 310, 393–485 (Stevens, J., dissenting).

53. See *Hobby Lobby v. Burwell*, 134 S. Ct. 2757, 2787–806 (Ginsburg, J., dissenting).

54. Florian Bartosic claimed that "it seems that the Chief Justice's reasoning in 1819 was in certain respects grounded upon premises only one step removed from the reasoning of Marshall, the lawyer, in 1790." See Florian Bartosic, *With John Marshall from William and Mary to Dartmouth College*, 7 WM. & MARY L. REV. 259, 266 (1966).

55. 7 Va. (3 Call) 573 (1790).

56. *Id.* at 580.

once the corporation was created, Marshall contended that the court could not question or look into how well (and with what curriculum) the corporation was fulfilling its public purpose of education. All that mattered was that the board continued to meet the terms of the charter. The public purpose itself did not mean that the private corporation was under the public's control once created as a legal person.⁵⁷

Marshall's thoughts about the public purpose requirement in creating corporations in the American constitutional context would also be profoundly influenced by a real life political debate that contained lessons which could not be learned by reading the British common law books.

C. *Hamilton's Defense of the Bank of the United States Corporation*

In 1791, Secretary of the Treasury Alexander Hamilton successfully lobbied Congress to pass a bill to charter the Bank of the United States corporation.⁵⁸ However, President George Washington did not immediately sign the bill given the questions that had been raised in Congress by Madison about whether chartering such a corporation was a constitutional power of Congress since it was not explicitly stated in Article I, Section 8.⁵⁹ Washington took seriously his oath to "preserve, protect and defend the Constitution," so he asked Attorney General Edmund Randolph, Secretary of State Thomas Jefferson, and Secretary of the Treasury Hamilton for advisory opinions on whether they thought the bill was constitutional.⁶⁰

Hamilton's advisory opinion argued that the power to create corporations is implied by the Necessary and Proper Clause since the enumerated powers in Article I, Section 8 are aligned with the public purposes served by corporations. Hamilton's argument had some similarities to James Wilson's

57. *Id.* at 581 ("If, then, the Vistors have only legislated on a subject upon which they had a right to legislate, it is not for this Court to enquire, whether they have legislated wisely, or not, and if the change should even be considered as not being for the better, still it is a change . . .").

58. See *House of Representatives Vote to Charter the Bank of the United States (Feb. 8, 1791)*, in *DHBC*, *supra* note 24, at 145.

59. GORDON WOOD, *EMPIRE OF LIBERTY* 144 (2009) [hereinafter WOOD]; see also *MADISON'S WRITINGS*, *supra* note 25, at 484.

60. WOOD, *supra* note 59, at 144.

earlier defense of the Bank of North America corporation, but the inclusion of the Necessary and Proper Clause in the new U.S. Constitution provided Hamilton with a much stronger argument. The way Hamilton framed this question included the question of corporate personhood:

Now it appears to the Secretary of the Treasury, that *this general principle is inherent* in the very *definition of Government* and essential to every step of the progress to be made by the United States, namely—that every power vested in a Government is in its nature *sovereign* and includes by *force of the term*, a right to employ all the *means* requisite, and fairly applicable to the attainment of the ends of such power . . . This general and indisputable principle puts at once an end to the abstract question. Whether the United States have the power to *erect a corporation?* that is to say, to give a *legal or artificial capacity* to one or more persons, distinct from the natural. For it is unquestionably incident to *sovereign power* to erect corporations, and consequently to *that* of the United States, in *relation to the objects* intrusted to the management of government.⁶¹

In other words, the act of Congress to create a corporation such as the bank was a means to ends specified in Article I, Section 8, such as coining money and regulating its value.⁶² The public purposes of corporations, the key reasons for their creation going back to the earliest days of common law, were found by Hamilton in the enumerated powers of Congress.

While Hamilton's discussion of the constitutional power to create corporations is lengthy, he did not have as much to say about the constitutional duty to defend corporate rights. The most he had to say about it is this:

61. Hamilton's *Opinion as to the Constitutionality of the Bank of the United States*, 1791, in DHBC, *supra* note 24, at 153–54 (emphasis in original).

62. With regard to Hamilton's means-ends argument, Madison had a subtle rejoinder. In his speech against the Bank before Congress, Madison:

[A]dverted to a distinction, which he said had not been sufficiently kept in view, between a power necessary and proper *for the government or union*, and a power necessary and proper *for executing the enumerated powers*. In the latter case, the powers included in each of the enumerated powers were not expressed, but to be drawn from the nature of each. In the former, the powers composing the government were expressly enumerated . . . But the proposed bank could not even be called necessary to the government; at most it could be called convenient.

MADISON'S WRITINGS, *supra* note 25, at 488 (emphasis added).

To erect a corporation, is to substitute a legal or artificial for a natural person, and where a number are concerned, to give them individuality. To that legal or artificial person, once created, the common law of every State, of itself, annexes all those incidents and attributes which are represented as a prostration of the main pillars of their jurisprudence . . . the general rule of those laws assign a different regimen. The laws of alienage cannot apply to an artificial person, because it can have no country; those of descent cannot apply to it, because it can have no heirs; those of escheat are foreign from it, for the same reason; those of forfeiture, because it cannot commit a crime; those of distribution, because, though it may be dissolved, it cannot die.⁶³

Hamilton, like Coke, allowed that certain laws, rights, and duties simply cannot apply to corporations based on what they are. Once again, this acknowledgement by Hamilton that corporations do not have precisely the same privileges and immunities as natural persons was not intended to diminish or dismiss the legitimate role that Hamilton wanted corporate persons such as the Bank of the United States to play. Perhaps Hamilton simply took it for granted that the Bank of the United States would require constitutional protections from state legislators seeking to tax it in order to kill it. Marshall, of course, provided exactly that protection in *McCulloch*. Regardless, Hamilton did anticipate some of the criticisms of corporate rights that would come later. As he put it:

A strange fallacy seems to have crept into the manner of thinking and reasoning upon this subject. Imagination appears to have been unusually busy concerning it. An incorporation seems to have been regarded as some great, independent, substantive thing—as a political end of peculiar magnitude and moment; whereas it is truly to be considered as a *quality, capacity, or means* to an end.⁶⁴

Certainly Jefferson, the Secretary of State at the time, was willing to argue against corporate rights in that manner. He famously wrote that he wished to “crush in its birth the aristocracy of our moneyed corporations which dare already to challenge our government to a trial of strength and bid defiance to

63. DHBC, *supra* note 24, at 161.

64. *Id.* at 156 (emphasis in original).

the laws of our country.”⁶⁵ However, most of the judges or legal authorities at the time did not share Jefferson’s animosity toward corporations. Judges and lawyers, such as Marshall, were largely in agreement with Hamilton in wishing to ensure that corporate rights were defended.

Hamilton’s “Opinion on the Constitutionality of the Bank” is perhaps the main influence which led Marshall to defend corporations based on the Constitution. Marshall was fully aware of Hamilton’s arguments. In his five-volume edition of *The Life of Washington*, Marshall included an extensive multipage quote from Hamilton’s speech. Regarding Hamilton’s opinion, Marshall wrote: “A perusal of the arguments used on the occasion would certainly afford much gratification to the curious.”⁶⁶ Historian Charles Hobson goes so far as to say that: “[s]carcely a passage in the first part of *McCulloch* could not be traced to Hamilton’s advisory opinion or to some earlier writing, speech, or legal document.”⁶⁷ What is true of Marshall’s great case on the implied power of Congress to create a corporation is also true of his case defending corporate rights during the same 1819 term. Hardly a single premise of *Dartmouth College* cannot be traced back to Hamilton’s advisory opinion or to the earlier British common law commentators.

It is important to consider these historical events and earlier authors because most of Marshall’s arguments about the Constitution and corporations were purposefully not original. Corporations had been defended in courts for a long time before Marshall came to their defense in the American constitutional context.

65. Letter from Thomas Jefferson to George Logan (Nov. 12, 1816), in 12 THE WORKS OF THOMAS JEFFERSON 44 (Paul Leicester Ford ed., 1905).

66. JOHN MARSHALL, 5 THE LIFE OF GEORGE WASHINGTON 254 (AMS Press 1969) (1804–07).

67. CHARLES HOBSON, THE GREAT CHIEF JUSTICE: JOHN MARSHALL AND THE RULE OF LAW 122 (1996). Another commentator, Wallace Mendelson, wrote that: “[*Brown v. Maryland* and *McCulloch v. Maryland*] are constitutional glosses to Hamilton’s *Report on Manufactures*, *Report on Public Credit*, and related state papers—the classic expressions of Federalist mercantile policy. Indeed, the *McCulloch* opinion is largely a repetition of Hamilton’s earlier defense of the bank.” WALLACE MENDELSON, CAPITALISM, DEMOCRACY, AND THE SUPREME COURT 23 (1960).

III. MARSHALL CREATES THE PRECEDENT

For Marshall, the question of whether the court had a duty to defend a corporate person's constitutional rights depended fundamentally on how the corporation in question was created. The restrictive statements Marshall occasionally made concerning corporate personhood did not have to do with whether the court had a duty to protect corporate persons' constitutional rights. Rather, those statements were made regarding either jurisdiction or the additional express powers given to a corporation by its charter. When Marshall did grant a corporation standing in court as an artificial person, there is no question that he considered it a duty to protect its rights.

A. *Marshall on the chartering of corporations*

Most of the cases Marshall heard concerning corporations during his time on the Supreme Court involved banking corporations, particularly the Bank of the United States. This bank, with its congressional charter, was repeatedly challenged in court when states attempted to impose taxes upon it. Some of those court challenges involved arguments against the Bank based on the mere fact that it was a corporation.

In *McCulloch v. Maryland*,⁶⁸ Marshall held that Congress had the power to create corporate persons. This power to create persons was one of the "necessary and proper" powers which Congress possessed to exercise the enumerated powers also found in Article I, Section 8 of the Constitution. The public purpose requirement that all corporations had according to the common law tradition was placed by Marshall as the end served by congressional creation of corporations. As he put it in *McCulloch*: "The power of creating a corporation is never used for its own sake, but for the purpose of effecting something else."⁶⁹ Marshall went on to argue:

If we look to the origin of corporations, to the manner in which they have been framed in that government from which we have derived most of our legal principles and ideas, or to the uses to which they have been applied, we find

68. 17 U.S. (4 Wheat.) 316 (1819).

69. *Id.* at 411.

no reason to suppose, that a constitution, omitting, and wisely omitting, to enumerate all the means for carrying into execution the great powers vested in government, ought to have specified this.⁷⁰

In English law, the King possessed the sovereign power to create corporations for public purposes; in the new American context, the Framers implied a sovereign power to create corporations for public purposes in Article I, Section 8. The public purpose served by the Bank of the United States was summed up nicely by Marshall in a later court challenge, *Osborn v. Bank of the United States*, where he wrote that the Bank “is an instrument which is ‘necessary and proper’ for carrying on the fiscal operations of government.”⁷¹ The fiscal operations of government included the collection of taxes, the coining and regulation of currency, and other enumerated powers.

Even though the Bank of the United States conducted private business as well as public, Marshall held that this did not negate its status as a corporate person created for a public purpose.⁷² Corporations are defined as serving the public based on their stated objects found in their charter, not their individual corporate acts after they are created.⁷³ They are also not absorbed into the state’s control by their public purposes.⁷⁴ This argument is the context in which Marshall made his famous statement in *Dartmouth College* about corporate persons, as can be seen by reading the sentences immediately following the quote:

A corporation is an artificial being, invisible, intangible, and existing only in contemplation of law. Being the mere creature of the law, it possesses only those properties which the charter of its creation confers upon it, either expressly, or as incidental to its very existence. These are such as are supposed best calculated to the object, for which it was created. . . . But this being does not share in the civil government of the country, unless that be for the purpose for which it was created. Its immortality no more confers on it political

70. *Id.* at 421. Historically speaking, this argument from Marshall that a power to create corporations was intentionally left out of Article I, Section 8 is of course questionable given what happened at the convention. See *supra* Section I.B.

71. 22 U.S. (9 Wheat.) 738, 861 (1824).

72. See *id.* at 860.

73. See *id.*

74. See *id.* at 866–67.

power, or a political character, than immortality would confer such power or character on a natural person. It is no more a state instrument, than a natural person exercising the same powers would be. . . .

The objects for which a corporation is created are universally such as the government wishes to promote. They are deemed beneficial to the country; and this benefit constitutes consideration, and in most cases, the sole consideration of the grant.⁷⁵

Corporations are somewhere in between the public and the private spheres. They cannot be politically controlled by the government in the way a government agency would be, but they also must have some public purpose as their object. Those public objects are the ultimate reason for creating corporations, and are also the reason why government has a duty to protect legitimate corporate rights.

B. Marshall on the duty to defend corporate persons' rights

Marshall also believed there was an implied constitutional duty under the Contract Clause of Article 1, Section 10 to defend the rights of corporate persons. For Marshall, once a corporation was created, a duty to protect its rights against statutory violations kicked in, since the charters of incorporation were constitutionally protected contracts.

Corporate persons had to meet several qualifications in order to be defended by the court, but in general Marshall considered it a matter of justice to defend their rights. In *Dartmouth College*, Marshall defended the property rights of an eleemosynary corporation. The young lawyer Daniel Webster made an impassioned defense on behalf of the College against the New Hampshire legislature at oral argument, one which a witness (Dr. Chauncey Goodrich) claimed moved Chief Justice Marshall to tears.⁷⁶ The contract violated in the case was between the state of New Hampshire and the donors of the money establishing the College (and their descendants). Marshall claimed that this was "a contract, on the faith of which, real and personal estate has been con-

75. *Trs. of Dartmouth Coll. v. Woodward*, 17 U.S. (4 Wheat.) 518, 636–37 (1819).

76. *THE DANIEL WEBSTER READER* 163 (Bertha Rothe ed., 1956).

veyed to the corporation. It is then a contract within the letter of the constitution”⁷⁷ The Chief Justice also gave examples of other contracts that deserved the Court’s protection besides charters of incorporation, namely copyrights for the advancement of scientific discovery.⁷⁸ The United States had a public object worth defending in both instances, Marshall argued. It almost seemed “unnecessary” to him to argue that “in these private eleemosynary institutions, the body corporate, as possessing the whole legal and equitable interest, and completely representing the donors, for the purpose of executing the trust, has rights which are protected by the constitution.”⁷⁹

Not all contracts that corporations engage in, however, demanded the court’s protection under the Constitution. In his Rhode Island circuit court opinion *Head & Amory v. Providence Insurance Company*,⁸⁰ Marshall argued that given the type of beings they are, the subsequent contracts that corporations make after their creation must be done in a specific way.⁸¹ Natural persons have more freedom in the types of contracts they make which will be defended by courts; not so with corporate persons:

An individual has an original capacity to contract and bind himself in such manner as he pleases. . . . [B]ut with these bodies which have only a legal existence, it is otherwise. The act of incorporation to them is an enabling act; it gives them all the power they possess; it enables them to contract, and when it prescribes to them a mode of contracting, they must observe that mode, or the instrument no more creates a contract than if the body had never been incorporated.⁸²

The fact that corporations make contracts is one of their essential properties, but they must adhere to the specific mode of making contracts stated in their charter in order for the court to defend them.

The duty of the court to defend corporate persons’ rights is generally founded on a “conservative principle” of the Court to

77. *Dartmouth College*, 17 U.S. (4 Wheat.) at 644.

78. *Id.* at 646.

79. *Id.* at 654.

80. 6 U.S. (2 Cranch) 127 (Marshall, Circuit Justice, C.C.R.I. 1804).

81. *Id.* at 168.

82. *Id.* at 168–69.

prevent corporations from being destroyed once created.⁸³ This follows from corporations' essential property of "immortality."⁸⁴ Marshall argued that the state of Ohio had no right to destroy the corporation of the Bank of the United States by a tax in the *Osborn* case, claiming:

The same conservative principle, which induces the Court to interpose its authority for the protection of exclusive privileges, to prevent the commission of waste, even in some cases of trespass, and in many cases of destruction, will, we think, apply to this.⁸⁵

However, the conservative principle was limited by the court's jurisdiction to hear a case involving a corporation in the first place. In *Providence Bank v. Billings*, Marshall drew a limit on how far the conservative principle applied by not defending a state corporation against a state tax. The reason for this was that the Rhode Island legislature granted Providence Bank's charter in the first place, and could choose to destroy the corporation, its creature, if it wished. Marshall admitted:

A power therefore which may in effect destroy the charter, is inconsistent with it; and is impliedly renounced by granting it. Such a power cannot be exercised without impairing the obligation of the contract. When pushed to its extreme point, or exercised in moderation, it is the same power, and is hostile to the rights granted by the charter.⁸⁶

Be this as it may, to deny the state its power to tax its own citizens (artificial or natural) was an absurd consequence that Marshall was unwilling to affirm. The power of the state to tax was in conflict with the duty of the state to defend corporate rights; what decided this case for Marshall was that exemption from such a tax was not explicitly stated in the corporation's charter.⁸⁷

83. *Osborn v. Bank of the United States*, 22 U.S. (9 Wheat.) 738, 842 (1824).

84. *Id.* at 861.

85. *Id.* at 842.

86. 29 U.S. (4 Pet.) at 560–61.

87. *Id.* at 560 ("This question is to be answered by the charter itself. It contains no stipulation promising exemption from taxation. The state, then, has made no express contract which has been impaired by the act of which the plaintiffs complain.").

C. *Marshall on standing for corporate persons in federal court*

For Marshall, the fact that a corporation had been incorporated and made a legal person by the state or national government did not automatically grant it standing in federal court. This was partially because they were artificial creatures of the law, which limited what types of court they could appear in.

The strictest requirement that Marshall imposed on corporations was that their access to federal court was limited by the terms of their charters. In the case of *Bank of the United States v. Deveaux*, Marshall was unwilling to grant standing even to a corporation created by the U.S. Congress, in part because the corporation was not a state “citizen” within the meaning of the Judiciary Act:

The jurisdiction of this court being limited, so far as respects the character of the parties in this particular case, ‘to controversies between citizens of different states,’ both parties must be citizens, to come within the description.

That invisible, intangible, and artificial being, that mere legal entity, a corporation aggregate, is certainly not a citizen; and, consequently, cannot sue or be sued in the courts of the United States, unless the rights of the members, in this respect, can be exercised in their corporate name. If the corporation be considered as a mere faculty, and not as a company of individuals, who, in transacting their joint concerns, may use a legal name, they must be excluded from the courts of the union.⁸⁸

Furthermore, the charter granted by Congress for the first Bank of the United States only used general language about the bank’s standing: to “sue or be sued . . . in courts of record.”⁸⁹ Marshall was unwilling to construe this as authorization to sue in *federal* court.

However, if access to federal court was expressly mentioned in a congressionally-chartered corporation’s charter, Marshall was willing to grant it. When the Second Bank of the United States was chartered, Congress made sure to expressly mention a right “to sue and be sued . . . in every circuit court of the

88. *Bank of the United States v. Deveaux*, 9 U.S. (5 Cranch) 61, 86–87 (1809).

89. *Acts to Charter the Bank of the United States*, February 25 (Mar. 2, 1791), in DHBC, *supra* note 24, at 182.

United States.”⁹⁰ Marshall then confirmed that the court had jurisdiction to hear the corporation’s case in *Osborn*:

The charter of incorporation not only creates it, but gives it every faculty which it possesses. The power to acquire rights of any description, to transact business of any description, to make contracts of any description, to sue on those contracts, is given and measured by its charter, and that charter is a law of the United States. This being can acquire no right, make no contract, bring no suit, which is not authorized by a law of the United States. It is not only itself the mere creature of a law, but all its actions and all its rights are dependent on the same law.⁹¹

The corporation’s access to federal court under “arising under” jurisdiction was therefore derived from its charter. In *Osborn*, Marshall also makes an interesting comparison and contrast of corporate citizens with naturalized citizens. Like corporations, persons born in another country who become naturalized citizens are “the mere creature of a law.”⁹² But unlike corporations, naturalized citizens automatically are granted the rights to standing in specific courts under a “uniform rule of naturalization.”⁹³

In spite of his strict requirements regarding access to federal court, Marshall maintained that a corporation derives its citizenship from the citizenships of the individuals who work for and lead it. This principle was stated most clearly by Marshall’s dissent in the case of *Bank of the United States v. Dandridge*.⁹⁴ There Marshall contended that the agents of a corporation are themselves the corporate person. To deny this would be to deny the basis for all of corporate law. Marshall wrote, “[i]f this proposition can be successfully maintained, it becomes a talisman, by whose magic the whole fabric which the law has erected respecting corporations, is at once dissolved.”⁹⁵ Corporate acts are done by natural persons, since that is the only way

90. *Act to Charter the Second Bank of the United States* (Apr. 10, 1816), in DHBC, *supra* note 24, at 226.

91. *Osborn v. Bank of the United States*, 22 U.S. (9 Wheat.) 738, 823 (1824).

92. *Id.*

93. *Id.* at 827.

94. 25 U.S. (12 Wheat.) 64, 90 (1827) (Marshall, C.J., dissenting).

95. *Id.* at 113.

they can act given the entities that they are. To separate the legal entity of the corporation from the association of natural persons who run it is to flash the magic talisman to which Marshall referred. In *Deveaux*, Marshall admits that a corporation made of natural persons who are citizens is itself a citizen:

[T]he term citizen ought to be understood as it is used in the constitution, and as it is used in other laws. That is, to describe the real persons who come to court, in this case, under their corporate name. That corporations composed of citizens are considered by the legislature as citizens, under certain circumstances, is to be strongly inferred from the registering act.⁹⁶

The problem for the first Bank of the United States in *Deveaux* was merely that the individuals comprising the bank lacked complete diversity of citizenship with the opposing party.⁹⁷

Marshall wanted to maintain the fabric of corporate law in American life for the public purposes that were served through it. He therefore upheld corporate personhood, even though certain courts were off limits to corporate persons due to the way their charters were written.

D. *Marshall on the "express" and essential rights of corporations*

In *Dartmouth College* and many other cases, Marshall claimed that the powers of a corporation were "express" powers and powers "incidental to its very existence."⁹⁸ Marshall considered several powers to be essential to corporations' very existence as corporations. These implied powers included: immortality (the corporation continuing after its founders passed away or quit the corporation), individuality (including a unique corporate name and seal), the right to manage its own internal affairs, the right to own property, the right to make binding contracts in some mode, the right to assistance of counsel, and the right to sue and be sued in some kind of court.⁹⁹ Marshall wrote in *Deveaux*:

96. *Bank of the United States v. Deveaux*, 9 U.S. (5 Cranch) 61, 91 (1809).

97. *Id.* at 77.

98. *Trs. of Dartmouth Coll. v. Woodward*, 17 U.S. (4 Wheat.) 518, 636 (1819). For a helpful discussion of Marshall's stance on the express powers of corporations, see FRANCIS STITES, *PRIVATE INTEREST AND PUBLIC GAIN: THE DARTMOUTH COLLEGE CASE, 1819*, at 105 (1972) ("Corporate rights were not to be extended beyond the obvious meaning of their charters.").

99. 17 U.S. (4 Wheat.) at 636.

This power [to sue and be sued in some kind of court,] if not incident to a corporation, is conferred by every incorporating act, and is not understood to enlarge the jurisdiction of any particular court, but to give a capacity to the corporation to appear, as a corporation, in any court which would, by law, have cognisance of the cause, if brought by individuals.¹⁰⁰

Marshall defended this essential right of corporate persons and several others in his rulings.

Marshall also considered some rights of corporations to be non-essential to their existence. The charter thus had to express such rights in order for the corporation to legally possess them. He wrote in *Dartmouth College*: "There can be no reason for implying in a charter, given for valuable consideration, a power, which is not only not expressed, but is in direct contradiction to its express stipulations."¹⁰¹ Marshall adhered to a strict construction rule when interpreting corporations' non-essential powers.¹⁰² Those non-essential, "express" powers included: the exemption from a tax, the right to sue and be sued in a specific court, the right to make contracts in a specific mode, and the power to issue auctioneer licenses. The last mentioned, the power to issue an auctioneer license, is a particularly clear example of a power that would need to be expressed in a charter. Marshall discussed this power in *Fowle v. The Common Council of Alexandria*;¹⁰³ Marshall wrote:

The power to license auctioneers, and to take bonds for their good behavior in office, not being one of the incidents to a corporation, must be conferred by an act of the legislature; and in executing it, the corporate body must conform to the act.¹⁰⁴

Marshall applied this theory of express powers in other cases as well. In *Providence Bank v. Billings*, a state bank was not exempt from a state tax, since that exemption was not expressed in the

100. 9 U.S. (5 Cranch) at 85–86.

101. 17 U.S. (4 Wheat.) at 638.

102. Marshall was by no means alone in holding the doctrine of express rights. For example, Justice McLean wrote in *Beaty v. Lessee of Knowler* that "a corporation is strictly limited to the exercise of those powers, which are specifically conferred on it, will not be denied. The exercise of the corporate franchise, being restrictive of individual rights, cannot be extended beyond the letter and spirit of the act of incorporation." 29 U.S. (4 Pet.) 152, 164 (1830).

103. 28 U.S. (3 Pet.) 398 (1830)

104. *Id.* at 407.

corporation's charter.¹⁰⁵ "Any privileges which may exempt it from the burthens common to individuals, do not flow necessarily from the charter, but must be expressed in it," wrote Marshall.¹⁰⁶ After all, natural persons have to pay taxes, so an artificial person would also have to pay taxes ordinarily.¹⁰⁷

Marshall's doctrine of express rights strongly reinforced the importance of a corporation's charter. In his anonymous defense of the *McCulloch* decision, *A Friend to the Constitution No. V*, Marshall wrote that the chartering of a corporation is:

[T]he mere annexation of a quality to a measure, to the doing which, if the measure itself be proper, the constitution creates no objection. In illustration of this argument, reference is made to the territorial governments which are corporations.¹⁰⁸

Many different corporate bodies have charters; Marshall's concept of "corporation" was therefore a broad one. For Marshall, chartered corporations included not only private commercial corporations and eleemosynary corporations, but also cities and the United States government itself.¹⁰⁹ The Constitution itself is a form of corporate charter, based on Marshall's reasoning.¹¹⁰

E. *Marshall on the internal rules of corporations*

Marshall recognized the right to manage a corporation's own internal affairs, without outside interference, as one of the essential powers of a corporation. Marshall's involvement in a line of cases regarding corporations' official written documents reflects his respect for corporations' internal rules. He wrote in his *Dandridge* dissent that the principle of a corporation officially acting, speaking, and contracting through writing is "an essential ingredient of its very being . . ."¹¹¹ Marshall used these cases as another opportunity to emphasize the nature of corporations as artificial beings.

105. 29 U.S. (4 Pet.) 514, 563 (1830).

106. *Id.* at 562.

107. *See id.* at 564.

108. JOHN MARSHALL: WRITINGS 498 (Charles Hobson ed., 2010).

109. *See* *Dixon v. United States*, 7 F. Cas. 761, 763 (C.C.D. Va. 1811) (No. 3,934) ("The United States of America will be admitted to be a corporation.").

110. *See id.*

111. *Bank of the United States v. Dandridge*, 25 U.S. (12 Wheat.) 64, 103 (Marshall, C.J., dissenting).

Marshall favored accepting written documents from corporations as legally binding evidence in court, even when those documents did not bear an official corporate seal. Marshall wrote in the *Dandridge* dissent that corporations can—and can only—speak through their writing:

Can such a being speak, or act otherwise than in writing? Being destitute of the organs of man, being distinct from all its members, can it communicate its resolutions, or declare its will, without the aid of some adequate substitute for those organs? . . . I can imagine no other than writing.¹¹²

Following Blackstone, Marshall's use of the term "speech" here concerns the corporation manifesting its intentions on a given matter. Some had argued that the manifestation of intentions had to be done under corporate seal in order for the court to recognize it, but Marshall allowed more leeway.¹¹³ His statement about corporations having no way to communicate except by writing was not intended to limit corporations' legally recognized speech, but to expand it. Marshall justified expansion of recognized speech for corporations as an update to the law in support of the corporations of his time.¹¹⁴ In earlier centuries, corporate seals were commonplace. But Marshall wrote that in 1827 that this practice had changed:

As writing has become more common, and seals are less distinguishable from each other, the good sense of mankind gradually receives the writing without the seal, in all the less formal and less important transactions of the corporate body.¹¹⁵

In *Dandridge*, Marshall approved of Justice Story's opinion in *Bank of Columbia v. Patterson's Administrators*,¹¹⁶ which stated that the "ancient rule" about corporate seals had to be relaxed.¹¹⁷ For Marshall, corporations themselves are "not novel-

112. *Id.* at 92. Marshall's discussion of corporations' lack of physical organs in his *Dandridge* dissent harks back to the arguments of Coke, whom Marshall explicitly cites. *Id.*

113. *Id.* at 100.

114. *Id.* at 97.

115. *Id.*

116. 11 U.S. (7 Cranch) 299 (1813).

117. *Dandridge*, 25 U.S. (12 Wheat.) at 100.

ties," but institutions of a "very ancient" date, to be protected by the court of the current day.¹¹⁸

F. Summary

Marshall discussed corporate personhood in a variety of different cases. Certain principles repeat themselves in all of his cases, regardless of factual variances. Marshall generally believed that corporations were created by the sovereign power of the government, which invests certain powers in associations to give them corporate form. In the American context, he thought responsibility fell to Congress and the state legislatures to charter corporations, for objects that would serve the public good of the American people. He also believed that the contract involved in creating the charter between the association and the legislature was not to be violated, and that therefore courts had a duty to protect corporations after their creation. Charters of corporations would contain certain implied powers incidental to all corporations, as well as expressed powers. All non-essential powers that are not expressed in a corporation's charter need not be defended by the courts. And lastly, Marshall embraced a certain amount of adaptation of the law to the changing circumstances of corporations in the current time, in order to defend them more vigorously.

My interpretation of Marshall's precedents and opinions about corporate personhood is that he followed closely the earlier common law defenses of corporations, applying them to the American context. In that application of common law to the American context, Marshall owed a great deal to Hamilton's arguments about the constitutionality of the Bank of the United States. Marshall's restrictive statements about corporate personhood did not amount to new restrictions on their rights, and were made either in contexts where he was ruling on their access to federal court or defending prerogatives they had long held, under a new Constitution.

G. The Immediate Aftermath

Immediately after Marshall's tenure on the court, several important developments occurred with regard to corporate per-

118. *Id.* at 92.

sonhood. These events inform an examination of Marshall's jurisprudence on this subject, especially given that he was tangentially involved in some of them.

In 1832, President Andrew Jackson famously vetoed the third charter of the Bank of the United States. The corporation was allowed to be privatized, and its assets were eventually liquidated. Although Marshall's Whig friends lost that political battle, his jurisprudence supporting the Bank of the United States corporation would live on as a support to other commercial corporations, and was even strengthened. A massive expansion in the number of commercial corporations occurred in the Jacksonian era as it was realized that that corporate rights would be legally protected. As Marshall scholar Francis Stites put it, the *Dartmouth College* decision in particular "rendered the corporation serviceable to the needs of a developing national economy."¹¹⁹

The Taney Court provided even stronger support for corporate rights, loosening Marshall's restrictions on corporate persons' standing in federal court. In *Louisville, Cincinnati, & Charleston Railroad Company v. Letson*,¹²⁰ Justice Wayne held that corporate persons were state citizens for purposes of establishing diversity jurisdiction, explicitly overturning Marshall's early rulings in *Bank of the United States v. Deveaux* and *Strawbridge v. Curtiss*.¹²¹ Interestingly, Justice Wayne claimed in his *Letson* opinion that in private conversations Chief Justice Marshall himself had changed his mind about the *Deveaux* restrictions on standing for corporations in federal court.¹²² Justice Wayne wrote in *Letson*:

We remark too that the cases of *Strawbridge* and *Curtiss* and *Bank* and *Deveaux* have never been satisfactory to the bar, and that they were not, especially the last, entirely satisfactory to the Court that made them. They have been followed always most reluctantly and with dissatisfaction. By no one was the correctness of them more questioned than by the late chief justice who gave them. It is within the knowledge of several of us, that he repeatedly expressed regret that those decisions had been made, adding, whenever the sub-

119. STITES, *supra* note 98, at 99.

120. 43 U.S. (2 How.) 497 (1844).

121. 7 U.S. (3 Cranch) 267 (1806).

122. *See id.* at 555.

ject was mentioned, that if the point of jurisdiction was an original one, the conclusion would be different.¹²³

Wayne's assertion about Marshall's ideas on this matter in *Letson* are confirmed by a private letter from Justice Story to James Kent, celebrating the 1844 decision. Justice Story wrote:

I equally rejoice, that the Supreme Court has at last come to the conclusion, that a corporation is a citizen, an artificial citizen, I agree, but still a citizen. It gets rid of a great anomaly in our jurisprudence. This was always [Justice Bushrod] Washington's opinion. I have held the same opinion for many years, and Mr. Chief Justice Marshall had, before his death, arrived at the conclusion, that our early decisions were very wrong.¹²⁴

Marshall may have considered his early opinions on the standing of corporations in federal court such as *Deveaux* to be wrong, but on the whole his jurisprudence consistently defended corporate persons' rights. His statement about corporations not being citizens in *Deveaux* was qualified by a proviso, and was followed ten years later by a strong assertion that corporations were persons in *Dartmouth College*. Marshall was a great supporter, at the end of the day, of corporate persons and their rights.

IV. CONCLUSIONS

Recent Supreme Court opinions (such as Justice Rehnquist's dissent in *Bellotti*, Justice Breyer's dissent in *Citizens United*, and Justice Ginsburg's dissent in *Hobby Lobby*) cite Marshall's restrictive statements about the nature of corporate personhood to suggest that Marshall did not intend for the Court to defend a robust set of rights for corporate persons.¹²⁵ However that interpretation is wrong, an error stemming largely from taking Marshall's restrictive statements out of context.

In his *Bellotti* dissent, Justice Rehnquist argued that corporations' political activities that had no connection to their com-

123. *Id.*

124. Letter from Joseph Story to James Kent (Aug. 31, 1844), reprinted in 2 LIFE AND LETTERS OF JOSEPH STORY 469 (William Story ed., 1851).

125. See *Burwell v. Hobby Lobby*, 134 S. Ct. 2751, 2787 (2014); *Citizens United v. FEC*, 558 U.S. 310, 394 (2009); *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 823 (1978).

mercial interests were not covered by First Amendment free speech protections.¹²⁶ Rehnquist cites the restrictive statement in *Dartmouth College*, that a corporation is merely an “artificial being,” as evidence to show that there is a distinction between the express and essential powers of corporations.¹²⁷ That much Chief Justice Marshall would agree with, although he would dispute Justice Rehnquist’s particular view of express powers. Justice Rehnquist wrote:

I can see no basis for concluding that the liberty of a corporation to engage in political activity with regard to matters having no material effect on its business is necessarily incidental to the purposes for which the Commonwealth [of Massachusetts] permitted these corporations to be organized or admitted within its boundaries.¹²⁸

Justice Rehnquist considered the activities in which the First National Bank of Boston was involved to be unprotected, since they were “incidental to the purpose” of their charters as banks.¹²⁹ For Chief Justice Marshall, the public purpose of a charter was the ultimate object a legislature had in mind during the charter’s initial creation; but that public purpose was not the sole determinant of which express powers the corporation was granted.¹³⁰ Some express powers could be granted by the legislature based on factors besides the ultimate purpose. Marshall would not have judged that a corporation had failed to live up to its ultimate public purpose based on a given activity in which it engages, so long as the provisions of the corporation’s charter were being followed. Justice Rehnquist’s use of Marshall got a lot right, especially in Justice Rehnquist’s willingness to admit that several other powers are incidental to corporations’ existence.¹³¹ Justice Rehnquist’s use of Marshall, however, went

126. 435 U.S. at 823.

127. See *Bellotti*, 435 U.S. at 823 (citing *Trs. of Dartmouth Coll. v. Woodward*, 17 U.S. (4 Wheat.) 518, 636 (1819))

128. *Id.* at 828.

129. *Id.*

130. See *Dartmouth College*, 17 U.S. (4 Wheat.) at 637–38.

131. Justice Rehnquist mentioned all of the following as essential powers of corporations: due process protection for their property, freedom of the press (if the corporation was a media corporation), the right to immortality, the right to

astray by enlisting the restrictive statement in *Dartmouth College* to suggest a limiting principle upon corporate powers that Chief Justice Marshall would not have recognized.

In his *Citizens United* dissent, Justice Stevens argued that corporations in general were not intended by Chief Justice Marshall or the Framers to be covered by First Amendment free speech protections.¹³² Justice Stevens cited the restrictive statement in *Dartmouth College*, that a corporation is merely an “artificial being,” to support the argument of law professor David Shelledy that “the legitimacy of every corporate activity was thought to rest entirely in a concession of the sovereign.”¹³³ Justice Stevens failed to mention that the concession of the sovereign occurs only at the time of chartering the corporation, and that legislatures were restricted from abridging the specific rights of corporate persons once created.

Generally, Justice Stevens painted an overly negative picture of Chief Justice Marshall and the Framers’ views of corporations. Citing the *Cyclopedia of the Law of Corporations*, Justice Stevens claimed there was a “cloud of disfavor under which corporations labored’ in the early years of this Nation.”¹³⁴ Justice Stevens pointed to the animus against corporations found in Jefferson’s 1816 “Letter to Tom Logan” as typical of the founding generation.¹³⁵ Contra Stevens, Jefferson’s animus was extremely atypical, and would have faced criticism from most of the legal community of that generation, including Marshall. Support for corporate rights, including business corporate rights, was much more common; as law professor Bruce Campbell put it:

After about 1810, there was a broad popular consensus concerning the status of business corporations. As a general rule, legislatures scrupulously respected chartered rights . . . [a]nd where there was a public outcry against an

limited liability, and freedom to engage in commercial speech in the form of advertising. See *Bellotti*, 435 U.S. at 822, 825–26.

132. See *Citizens United*, 558 U.S. at 425–32 (Stevens, J., dissenting).

133. *Id.* at 428–29 (quoting David Shelledy, *Autonomy, Debate, and Corporate Speech*, 18 HASTINGS CONST. L. Q. 541, 578 (1990–91)).

134. See *Citizens United*, 558 U.S. at 427 (Stevens, J., dissenting).

135. See *id.*

existing business corporation, the defense, predictably, was stated in terms of respect for chartered rights.¹³⁶

Chief Justice Marshall and the Framers' respect for corporate rights was completely lost on Justice Stevens in *Citizens United*. Justice Scalia's rejoinder to Justice Stevens was perhaps unsatisfying ("how came there to be so many" corporations in the early 1800s, if they were so hated?¹³⁷), but Justice Scalia's overall point on that score was correct.

In her *Hobby Lobby* dissent, Justice Ginsburg argued that a for-profit corporation which contained an explicitly religious mission statement in its charter was not covered by the free exercise of religion protections of the Religious Freedom Restoration Act.¹³⁸ Justice Ginsburg cited the restrictive statement in *Dartmouth College*, that a corporation is merely an "artificial being," as evidence that the artificial being of a corporation itself has no conscience.¹³⁹ This much Chief Justice Marshall would agree with, since he was in full agreement with Coke's view that since corporations have no souls, they could not appear in ecclesiastical courts or be excommunicated. However, Justice Ginsburg's citation of Chief Justice Marshall did nothing to show that a corporation that explicitly acknowledges a religious mission in its corporate charter should not have that religious aspect respected by the law.¹⁴⁰ Justice Ginsburg cited *Dartmouth College* an additional time to argue that Chief Justice Marshall was in favor of different types of corporations: some "for-profit," others religious, and still others eleemosynary.¹⁴¹ This sort of distinction between types of corporations is something that Chief Justice Marshall and all common law judges acknowledged, although Justice Ginsburg was wrong when she treated for-profit corporations as necessarily secular.¹⁴² Given his respect for express powers stated in charters, it seems

136. Bruce Campbell, *Dartmouth College as a Civil Liberties Case: The Formation of Constitutional Policy*, 70 KY. L. J. 697, 699–700 (1982).

137. See *Citizens United*, 558 U.S. at 386 (Scalia, J., concurring).

138. *Burwell v. Hobby Lobby*, 134 S. Ct. 2751, 2794–95 (Ginsburg, J., dissenting).

139. *Id.* at 2794.

140. See *id.*

141. See *id.* at 2795–96.

142. *Id.* One of the essential attributes of almost all charters, including charters incorporating a church, is the right to acquire property. See generally Paul Kauper & Stephen Ellis, *Religious Corporations and the Law*, 71 MICH. L. REV. 1499 (1973).

likely that Justice Marshall would have considered a for-profit corporation a religious corporation, if it had religion written into its charter.

Chief Justice Marshall's principles on corporate personhood require some imaginative reapplication in the present circumstances, because he never ruled in any cases in which for-profit corporations made pleas based on rights to political speech or the free exercise of religion. In his *Citizens United* dissent, Justice Stevens complained that Justice Scalia provided no quotations in his opinion to prove that the Framers would have granted corporate persons free speech protections.¹⁴³ Justice Stevens could not provide quotations on that specific topic either, because Chief Justice Marshall and the Framers were not presented with today's specific questions about corporations; it was a different "political universe" as Justice Stevens himself said.¹⁴⁴ In his *Dandridge* dissent, Chief Justice Marshall seemed comfortable adjusting the law to fit the changing historical circumstances in a way that supported corporations.¹⁴⁵

Some of the new historical circumstances of corporate personhood in the 21st century involve corporations explicitly created for the purpose of political speech, and religiously influenced business practices. These corporations complicate the question of whether Marshall would have considered the constitutional rights to political speech and the free exercise of religion to be implied powers of corporations or express powers of corporations. Marshall never heard a case involving congressional interference with a corporation during his tenure, so the application of the federal Bill of Rights to corporate persons never came up.¹⁴⁶ What would Marshall have said about today's corporate entities, with their new tax statuses? It is difficult to get a certain answer, but some flatly incorrect answers

143. See *Citizens United v. FEC*, 558 U.S. 310, 430–31 (2009) (Stevens, J., dissenting).

144. *Id.* at 432.

145. *Bank of the United States v. Dandridge*, 25 U.S. (12 Wheat.) 64, 96–97 (1827) (Marshall, C.J., dissenting).

146. Douglas Smith has argued that the Bill of Rights was nonetheless designed with corporate charters in mind. Smith interprets the Establishment Clause of the First Amendment as a restriction on the chartering of a church by the United States Congress. See Douglas Smith, *The Establishment Clause: Corollary of Eighteenth-Century Corporate Law?*, 98 NW. U.L. REV. 239 (2003).

can at least be rejected. One can rule out arguments similar to that of Justice Stevens in *Citizens United* that Marshall would have been opposed to corporate persons possessing constitutional rights simply because they were corporations.¹⁴⁷ Marshall's overall stance of support for corporations throughout his tenure simply rules this possibility out. Marshall would also probably not be so quick to dismiss the religious character of some for-profit corporations, as Justice Ginsberg did in her *Hobby Lobby* dissent. Simply because a corporate person engages in a given form of activity allowed by its charter, such as making money, does not determine that it is solely devoted to making money. Following the common law tradition, Marshall considered the promotion of religion to be one of the main public purposes served by corporations. In that tradition, the ultimate reason that the law considers all corporations to be legal persons is for the promotion of the public good.

Legislatures may propose restrictions on political influence or provisions requiring birth control in health insurance plans for reasons of promoting the public good. But whenever such measures are proposed, it should be expected that the judiciary will defend the rights vested in corporate persons, given its long history of doing so going back to Chief Justice Marshall. No "magic talisman" can be found in Marshall's words that would change that history.

147. A brief submitted by a group of historians and legal scholars as *amici curiae* in *Hobby Lobby* misused Marshall's restrictive statements in a similar way. See Brief of Historians and Legal Scholars as Amici Curiae Supporting Neither Party, *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (No. 13-354). They wrote: "This Court's earliest decisions addressing the status of corporations reveal little protection of corporations *qua* corporations." *Id.* at 8. The example from Marshall the historians cite, *Deveaux*, does not prove their point however, since it dealt only with jurisdictional matters and not the rights of corporations recognized by the court. That would have required an interpretation of *Dartmouth College* and the express powers doctrine.

ESSAY: A PROPOSAL TO RESTRUCTURE THE CLEMENCY PROCESS—THE VICE PRESIDENT AS HEAD OF A WHITE HOUSE CLEMENCY OFFICE

PAUL J. LARKIN, JR.*

In the midst of the recent presidential campaign, the president's clemency power was a low priority issue. Neither candidate mentioned the subject during the debates or on the stump. The candidates' economic programs, foreign policy vision, and personal credibility outranked the importance of clemency by a country mile.

That is unfortunate for two reasons. Clemency is a prerogative that the president can exercise for any reason he or she deems appropriate without review, neither by Congress nor the courts.¹ How a president exercises that power therefore tells us a great deal about his or her view of the criminal justice system, as well as his or her character.² In addition, executive clemency, as the saying goes, "ain't what it used to be." With the exception of President Barack Obama, who granted a large number of commutations to drug offenders,³ over the past few

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1. See, e.g., *United States v. Klein*, 80 U.S. (13 Wall.) 128, 148 (1872); *Ex parte Garland*, 71 U.S. (4 Wall.) 333, 380 (1866).

2. See, e.g., Albert W. Alschuler, *Bill Clinton's Parting Pardon Party*, 100 J. CRIM. L. & CRIMINOLOGY 1131 (2010).

3. President Barack Obama commuted the sentences of 1,175 offenders. OFF. OF PARDON ATT'Y, U.S. DEP'T OF JUSTICE, CLEMENCY INITIATIVE, <https://www.justice.gov/pardon/clemency-initiative> [<https://perma.cc/NZ8F-YOH3>] (last visited Mar. 14, 2017); Barack Obama, *The President's Role in Advancing Criminal Justice Reform*, 130 HARV. L. REV. 811, 837 (2017); Devlin Barrett & Carol E. Lee, *President Obama Commutes Chelsea Manning's Sentence*, WALL. ST. J. (Jan. 17, 2017), <http://www.wsj.com/articles/president-obama-commutes-chelsea-mannings-sentence-1484688697>. The reason is that he believes the drug laws carry unduly severe punishments. The Anti-Drug Abuse Act of 1986, Pub. L. No. 99-

decades chief executives have granted clemency far less frequently than in years past. Various explanations have been offered for that decline: the increased accuracy of the trial process, the widespread use of plea-bargains, the institution of parole as an early release mechanism, the use of sentencing guidelines to prevent unduly harsh sentences, and fear by chief executives that an offender granted clemency will reoffend, causing them embarrassment and voter retribution.⁴ In addition, some chief executives have likely been reluctant to sign clemency warrants because some warrants signed by predecessors have poisoned the well by resting on political or other ignoble considerations.⁵ The bottom line is that clemency no longer plays the historic role that it did for most of our history and thus desperately needs to be fixed.

Two scholars—Professor and U.S. Sentencing Commissioner Rachel Barkow and Professor Mark Osler—have recently argued that the best solution is to create a formal clemency board along the lines of the Sentencing Commission, consisting of judges, former prosecutors, defense counsel, penologists, religious authorities, and the like.⁶ Aside from providing the president with a broad range of views, a bipartisan, diverse clemency board would give the president any “cover” he may need to reform the clemency process. Only such a board, the argument goes, can function as a political shield.

570, 100 Stat. 3207 (1986) (codified at 21 U.S.C. § 841 (2006)) (amended 2010), became law during a panic over the emergence of “crack” cocaine in the nation’s inner cities. The statute imposed a stiff mandatory minimum penalty on the distribution of crack, and the amount that triggered that penalty was 100 times less than the predicate amount of powdered cocaine. Congress reduced the 100:1 ratio to 18:1 in the Fair Sentencing Act of 2010, Pub. L. No. 111-220, 124 Stat. 2372, but that statute does not apply retroactively. Paul J. Larkin, Jr., *Crack Cocaine, Congressional Inaction, and Equal Protection*, 37 HARV. J.L. & PUB. POL’Y 241, 241–43 & n.3 (2014) [hereinafter Larkin, *Crack Cocaine*]. President Obama has decided to use his clemency power to reduce the sentences of offenders left stranded by the prospective-only 2010 law. Paul J. Larkin, Jr., *Revitalizing the Clemency Process*, 39 HARV. J.L. & PUB. POL’Y, 886–87 (2016) [hereinafter Larkin, *Revitalizing Clemency*].

4. See, e.g., Larkin, *Revitalizing Clemency*, *supra* note 3, at 856–82.

5. See, e.g., STEPHANOS BIBAS, *THE MACHINERY OF CRIMINAL JUSTICE* 24 (2012) (“Presidential clemency is criticized as a perk for the rich and powerful, ranging from vice-presidential aide I. Lewis Libby to fugitive commodities trader Marc Rich.”).

6. See Rachel E. Barkow & Mark Osler, *Restructuring Clemency: The Cost of Ignoring Clemency and a Plan for Renewal*, 82 U. CHI. L. REV. 1 (2015).

That is a reasonable argument, although I find it ultimately unpersuasive because it would raise more problems than it solves. In my opinion, rather than create a formal clemency board the president should appoint one person to head a White House Clemency Office and serve as his principal clemency advisor. The vice president is the right person for that job.

I. THE PROBLEM: AN INSTITUTIONAL CONFLICT OF INTEREST

The willingness to mitigate punishment or forgive wrongdoing has been a revered feature of Western Civilization.⁷ In America, executive clemency was an accepted feature of colonial and early state criminal justice systems.⁸ It was written into the text of the Constitution as the Pardon Clause of Article II,⁹ and both the presidents and governors have granted clemency throughout our history.¹⁰ The extraordinary power to grant clemency allows a chief executive to play God on this side of the River Styx by forgiving an offender's sins or remitting his punishment.

Numerous commentators have recognized that the federal clemency process, however, is no longer fulfilling its noble purposes.¹¹ There is a consensus that the chief problem is the placement of the Office of the Pardon Attorney in the U.S. Department of Justice. That office came into being in the nineteenth century to assist the Attorney General in managing the clemency application process for the president, and it worked well for most of its history.¹² Recently, however, two factors

7. See, e.g., Larkin, *Revitalizing Clemency*, *supra* note 3, at 842–45; Leslie Sebba, *The Pardoning Power—A World Survey*, 68 J. CRIM. L. & CRIMINOLOGY 83 (1977).

8. See Paul J. Larkin, Jr., *The Demise of Capital Clemency*, 73 WASH. & LEE L. REV. 1295, 1300 & n.15 (2016) (collecting authorities) [hereinafter *Capital Clemency*].

9. U.S. CONST. art. II, § 2, cl. 1 (“The President . . . shall have Power to grant Reprieves and Pardons for Offences against the United States, except in Cases of Impeachment.”).

10. See, e.g., JEFFREY R. CROUCH, *THE PRESIDENTIAL PARDON POWER* (2009); CHRISTEN JENSEN, *THE PARDONING POWER IN THE AMERICAN STATES* (1922).

11. See, e.g., Daniel T. Kobil, *The Quality of Mercy Strained: Wrestling the Pardoning Power from the King*, 69 TEX. L. REV. 569, 573–74 (1991); Jonathan T. Menitove, *The Problematic Presidential Pardon: A Proposal for Reforming Federal Clemency*, 3 HARV. L. & POL'Y REV. 447, 453–54 (2009); Kathleen M. Ridolfi, *Not Just an Act of Mercy: The Demise of Post-Conviction Relief and a Rightful Claim to Clemency*, 24 N.Y.U. REV. L. & SOC. CHANGE 43, 46 (1998); Paul Rosenzweig, *Reflections on the Atrophying Pardon Power*, 102 J. CRIM. L. & CRIMINOLOGY 593, 594–95 (2012).

12. Beginning in 1789, the secretary of state was technically responsible for all pardon documents, but presidents generally relied on the attorneys general for

have effectively torpedoed the effectiveness of that office: (1) the decision by Attorney General Griffin Bell to have the Pardon Attorney report to him through the Deputy Attorney General and (2) the post-1980 politicization of federal criminal justice. The combination weakens the role of the Pardon Attorney and creates either an actual or apparent conflict of interest, because the Deputy Attorney General is the Justice Department official principally responsible for supervising criminal prosecutions. Few officials in that position, critics argue, would be willing to recommend that the president exonerate or grant leniency to someone whom a colleague has sent to prison.¹³

Critics of the process have suggested revisions of one kind or another.¹⁴ Some have argued that the Office of the Pardon Attorney should be transferred from the department that prosecuted a clemency applicant to a new position in the Executive Office of the President. Others have suggested that the president or Congress should create an independent agency, similar to the U.S. Sentencing Commission, to review every clemency petition and independently forward its recommendations to the White House. Everyone, however, recommends that the president or Congress end the door-keeping role that the Justice Department currently plays.

Yet, no one (myself included) has focused on the narrow question of *who* should head that office or chair that commission. That question is an important one for, at least, two reasons. In all likelihood, the person sitting in that chair will be responsible for setting the office's agenda, managing the flow of clemency petitions, choosing the supporting staff, and, in an ideal setting, meeting directly with the president to present his recommendations. Traditionally, the Office of the Pardon Attorney has been housed in the Department of Justice, and the

their advice regarding clemency. The State Department continued to process pardon applications until 1858, when Secretary of State Daniel Webster and Attorney General John Crittenden agreed that it should become the attorney general's responsibility. Seven years later, Congress authorized the hiring of a pardon clerk to assist the attorney general. See Margaret C. Love, *The Twilight of the Pardon Power*, 100 J. CRIM. L. & CRIMINOLOGY 1169, 1172–82 & n.25 (2010) (citing Act of March 8, 1865, ch. 98, 38th Cong., 2d Sess. 516).

13. See, e.g., Margaret C. Love, *Justice Department Administration of the President's Pardon Power: A Case Study in Institutional Conflict of Interest*, 47 U. TOL. L. REV. 89 (2015).

14. See, e.g., Larkin, *Revitalizing Clemency*, *supra* note 3, at 899–900, 903, 914 (collecting alternatives).

Pardon Attorney has been a career lawyer, not a political appointee, certainly not someone subject to the “advice and consent” process contemplated by the Article II Appointments Clause.¹⁵ Perhaps someone the president appoints should hold that position. So, whom should the president select as pardon attorney? In my opinion, the best person would be the Vice President of the United States.

II. A SOLUTION: THE VICE PRESIDENT AS CLEMENCY ADVISOR

To say that the vice president occupies a humble position in the government is an understatement.¹⁶ Daniel Webster declined the office, saying that “I do not propose to be buried until I am really dead.”¹⁷ “The chief embarrassment in discussing the office,” wrote then-professor (and later President) Woodrow Wilson, “is that in explaining how little there is to be said about it one has evidently said all that there is to say.”¹⁸ John Adams, the nation’s first vice president, described it as “the most insignificant office that ever the invention of man contrived.”¹⁹

15. See U.S. CONST. art. II, § 2, cl. 2 (“[The President] shall have Power . . . [to] nominate, and by and with the Advice and Consent of the Senate, [to] appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law . . .”).

16. See JODY C. BAUMGARTNER & THOMAS F. CRUMBLIN, *THE AMERICAN VICE-PRESIDENCY: FROM THE SHADOW TO THE SPOTLIGHT 2* (2015) (“[A] list of vice presidents and vice presidential candidates reads like a virtual *Who’s Who* of political mediocrities.”); *id.* at 4 (“[T]he office was in many respects an afterthought[.]”).

17. *Id.* at 33. Webster likely ate his words two years later when Milliard Fillmore became president upon the death of Zachary Taylor. JOEL K. GOLDSTEIN, *THE WHITE HOUSE VICE PRESIDENCY: THE PATH TO SIGNIFICANCE, MONDALE TO BIDEN 1* (2016).

18. WOODROW WILSON, *CONGRESSIONAL GOVERNMENT* 241 (1901).

19. Letter from John Adams to Abigail Adams (Dec. 19, 1793) (quoted in BAUMGARTNER & CRUMBLIN, *supra* note 16, at 3). Contemporaries such as George Clinton, Elbridge Gerry, Richard Henry Lee, George Mason, James Monroe, Hugh Williamson, and Robert Yates shared his opinion or feared that the vice president would hamper the Senate by colluding with the president. See, e.g., *id.* at 29 (“As one vice presidential scholar put it, ‘nineteenth-century vice presidents make up a rogues’ gallery of personal and political failures.’” (footnote omitted)); Andrew N. Shindi, Note, *Concocting the Most Insignificant Office Ever Contrived: The Vice Presidency During the Early Republic*, 104 *GEO. L.J.* 1029, 1031–32 (2016). Vice-President John Nance Gardner is often reported as having said that the position “isn’t worth a pitcher of warm spit.” Daniel L. May, *We the People The Third Vice President of the United States of Earth*, 73 *A.B.A. J.* 76, 76 (1987). Rumor has it, though, that his real last word was a tad less genteel. See, e.g., BAUMGARTNER & CRUMBLIN, *supra* note

The Constitution hardly proves them wrong, assigning the vice president only limited functions. As President of the Senate, he casts a vote in the event of a tie. When a joint session of Congress counts the Electoral College votes, he presides over the proceedings and certifies the results, and as “president-in-waiting,” he succeeds the president upon the latter’s death, resignation, removal, or (now) temporary disability.²⁰ Otherwise, he performs whatever tasks the president (or sometimes Congress²¹) assigns him.²² Some assignments are substantial; others, far less so.²³ The last three vice presidents, Al Gore, Dick Cheney, and Joe Biden, have been valued advisors to the presidents

16, at 3; see also MICHAEL NELSON, A HEARTBEAT AWAY: REPORT OF THE TWENTIETH CENTURY FUND TASK FORCE ON THE VICE-PRESIDENCY 27 (1988).

20. See U.S. CONST. art. I, § 3, cl. 4 (“The Vice President of the United States shall be President of the Senate, but shall have no Vote, unless they be equally divided.”); *id.* art. II, § 1, cls. 1–2 (creating the vice presidency as an independently elected office and establishing the Electoral College); *id.* art. II, § 1, cl. 6 (declaring that “the Powers and Duties of the [President’s] Office . . . shall devolve on the Vice President” in the event of the president’s removal, death, resignation, or incapacity); *id.* amend. XII (providing for the separate election of president and vice president); *id.* amend. XX, §§ 1, 3–4 (providing for the succession of the vice president in the event of the death or removal of the president); *id.* amend. XXV, §§ 1–4 (same, disability of the president). Originally, there was a question whether the vice president would become president or merely act as president were the latter to leave office. John Tyler resolved the issue as a practical matter in 1841 by taking the presidential oath of office, see U.S. CONST. art. II, § 1, cl. 6, after the death of President William Henry Harrison. The Twenty-Fifth Amendment resolved the issue as a matter of law in 1967 by directing that the vice president becomes president in the event of the death, removal, resignation, or disability of the president. BAUMGARTNER & CRUMBLIN, *supra* note 16, at 14–16.

21. By statute, the vice president is a member of the National Security Council and the board of Directors of the Smithsonian Institute. 50 U.S.C. § 402 (2012); 20 U.S.C. § 42 (2012); see also 3 U.S.C. § 15 (2012).

22. See U.S. CONST. art. II, § 1, cl. 1 (“The executive Power shall be vested in a President of the United States of America.”); Glenn Harlan Reynolds, *Is Dick Cheney Unconstitutional?*, 102 NW. U.L. REV. COLLOQUY 1539, 1541 (2007) (“The Vesting Clause of Article II vests all the executive power in the President, with no residuum left over for anyone else. Constitutionally speaking, the Vice President is not a junior or co-President, but merely a President-in-waiting, notwithstanding recent political trends otherwise.” (footnote omitted)). The vice president had no separate budget until late in the 1960s when Spiro Agnew received one.

23. See, e.g., Richard D. Friedman, *Some Modest Proposals on the Vice-Presidency*, 86 MICH. L. REV. 1703, 1717 (1988) (noting that FDR appointed VP Henry Wallace to head the Economic Defense Board on the eve of World War II); Reynolds, *supra* note 22, at 1541 (“Jimmy Carter gave Fritz Mondale an unusual degree of responsibility, a move replicated in subsequent administrations, particularly under Clinton/Gore and Bush/Cheney.” (footnotes omitted)); BAUMGARTNER & CRUMBLIN, *supra* note 16.

they served,²⁴ but historically speaking the vice president's principal responsibilities (asides from having a pulse) were to serve as the nation's representative at state funerals, to undertake diplomatic missions for the president, to handle troubleshooting assignments, and to work on behalf of their party.²⁵ Accordingly, it is not surprising that the scholarly publications discussing the achievements of the nation's vice presidents are about as numerous as the pages that sportswriters devote to the exploits of benchwarmers.²⁶

Yet, the vice president may be the perfect choice as the president's principal clemency advisor. To start with, the vice president has the desired impartiality. The vice president has no law enforcement responsibility; that belongs to the president, the attorney general, and officials such as the Director of the Federal Bureau of Investigation.²⁷ The vice president therefore lacks the institutional conflict-of-interest that plagues the federal clemency process today.

Aside from lacking a conflict of interest, several factors affirmatively militate in the vice president's favor. The vice president is a constitutional officer. He is elected to the same four-year term the president serves, he holds the second highest position in the executive branch, and he is removable only by im-

24. See BAUMGARTNER & CRUMBLIN, *supra* note 16, at 139–99.

25. See *id.* at 201–02 (“Gore, Cheney, and Biden . . . took the job seriously. This alone sets the modern era apart from previous times, when the vice presidency was seen as little more than a joke.”); *id.* at 119–29 (discussing the vice president's ceremonial, diplomatic, political, and advisory roles).

26. Most of the literature deals with specific vice presidents, the separate-state residency requirement of the Twelfth Amendment, or the accession provisions of the Twenty-Fifth Amendment. See, e.g., JON MEACHAM, *DESTINY AND POWER: THE AMERICAN ODYSSEY OF GEORGE HERBERT WALKER BUSH* (2015); Joel K. Goldstein, *The New Constitutional Vice Presidency*, 30 WAKE FOREST L. REV. 505 (1995); Reynolds, *supra* note 22. The number of general treatments of the vice presidency has increased significantly of late, but it still is far closer to one than one hundred. In addition to the literature cited elsewhere in this essay, see, for example, PAUL C. LIGHT, *VICE-PRESIDENTIAL POWER: ADVICE AND INFLUENCE IN THE WHITE HOUSE* (1984); JULES WITCOVER, *THE AMERICAN VICE PRESIDENCY: FROM IRRELEVANCE TO POWER* (2014); Richard Albert, *The Evolving Vice Presidency*, 78 TEMP. L. REV. 811 (2005); Paul T. David, *The Vice Presidency: Its Institutional Evolution and Contemporary Status*, 29 J. POL. 721 (1967).

27. See, e.g., U.S. CONST. art. II, § 3 (“[The President] shall take care that the laws be faithfully executed”); 28 U.S.C. §§ 503, 506, 509 (2012) (authority of the Attorney General); *id.* §§ 532–33 (same, FBI Director); *id.* § 541 (same, U.S. Attorneys); *id.* §§ 561–69 (same, U.S. Marshals and Deputy U.S. Marshals).

peachment.²⁸ The vice president therefore has the political independence, stature, and authority to mediate among the often-competing views of the Justice Department and the applicant, along with any general entreaties from the American Bar Association, the defense bar, or other organizations with an interest in clemency. Lodging the advisory authority in one official also improves the efficiency of the process and perhaps enhances the accuracy of the recommendations the president receives.²⁹ Finally, the vice president gives the president some political cover by sharing in any potential blame should the president's decisions prove unpopular.

The next important factor is access. For most of our history, vice presidents did not have immediate access to the president. In fact, Walter Mondale was the first with a permanent office in the West Wing.³⁰ But every vice president since him has an office there, and every vice president since Nelson Rockefeller has had weekly meetings with the president.³¹ That access gives the vice president a leg up on every other potential clemency advisor because he can literally walk to the Oval Office from his nearby quarters in the same building.

Another factor is judgment. The president will need confidence in the wisdom of the vice president's counsel. Except for the rarest of cases, the president will not have the time to read a clemency applicant's file and must rely on the judgment of someone who has. The vice president will have the necessary time because his schedule is largely under the president's control, and a president who believes that clemency is important will not burden the vice president with duties that exhaust his days. Moreover, by having his own budget, the vice president can hire staff to focus exclusively on clemency.³² Given his regular access to the president, the vice president will be familiar with the president's correctional philosophy and privy to his reasons for granting and denying clemency requests, so the

28. See U.S. CONST. art. I, § 3, cls. 6–7; *id.* art. II, §§ 1, 4; *id.* amend. XII; *id.* amend. XX, §§ 1, 3; Friedman, *supra* note 23, at 1721.

29. See THE FEDERALIST No. 70, at 426 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (“[P]lurality in the executive . . . tends to conceal faults and destroy responsibility.”).

30. BAUMGARTNER & CRUMBLIN, *supra* note 16, at 92.

31. *Id.* Vice President Cheney met with President George W. Bush several times each day. *Id.* at 127.

32. *Id.* at 92.

vice president should be able to anticipate the president's likely decisions far better than any other person or group.

Closely related to judgment is experience. Some presidents (for example, Jimmy Carter, Ronald Reagan, Bill Clinton, and George W. Bush) have been former governors, but not all (for example, Richard Nixon, Gerald Ford, and George H.W. Bush). If the vice president were a former governor, he would have had experience with making clemency decisions. The November 2016 election illustrates the value of that experience. Neither Donald Trump nor Hillary Clinton had any hands-on experience in making clemency judgments, but each vice presidential candidate did: Mike Pence was the governor of Indiana, and Tim Kaine, a senator, is a former governor of Virginia.³³ President Trump would benefit from the advice offered by someone who has made those decisions.³⁴

The last factor is trust. The president must have faith that the vice president will serve the president's interests rather than his own as a future presidential candidate. Nowadays, each presidential nominee selects his running mate, so, in theory, whoever the president chooses will be judicious, reliable, and trustworthy.³⁵ Of course, some presidential nominees may choose a defeated rival to unify the party.³⁶ Others may select someone who would benefit him politically either with powerful interest groups or in a part of the nation he does not call

33. See Associated Press, *Pence pardons three people*, WANE.COM, (Jan. 13, 2015), <http://wane.com/2015/01/13/pence-pardons-three-people/> [https://perma.cc/46AR-XSNF]; Sheryl Gay Stolberg & Thomas Kaplan, *On Death Penalty Cases, Tim Kaine Revealed Inner Conflict*, N.Y. TIMES, (July 23, 2016), <http://www.nytimes.com/2016/07/24/us/politics/tim-kaine-death-penalty.html> [https://perma.cc/B92E-KVQ9].

34. See Goldstein, *supra* note 26, at 547 ("Although compatibility must exist for the Vice President to have a chance to become the President's close working partner, this alone does not guarantee that the Vice President will achieve that status. Vice presidential influence has also been a function of competence. Presidents look for help to those who they believe have something to offer. They are unlikely to allot much time to someone with nothing to say or little to add. Vice Presidents have been most successful if they bring strength to the administration in an area where such strength is needed." (footnote omitted)).

35. That was not always the case, certainly not when, prior to the adoption of the Twelfth Amendment, vice presidents could be selected from the opposing party. There also was no guarantee of loyalty when senior party officials made the choice in the nineteenth century. BAUMGARTNER & CRUMBLIN, *supra* note 16, at 32–36, 56–59, 88–91.

36. For example, President Reagan chose George H.W. Bush.

home.³⁷ In those instances, the president may pick a different consigliere. Attorney General Bobby Kennedy was the brother of President John Kennedy, so the latter had no doubts about the trustworthiness of the former. Griffin Bell, the nation's 72nd Attorney General, was a personal friend of President Jimmy Carter, while William French Smith and Edwin Meese were confidants of President Ronald Reagan before they became the 74th and 75th Attorneys General, respectively. In cases like those, the president may believe that, given a longstanding, prior personal relationship with the lawyers whom he appointed as his attorneys general, he has greater confidence in their sound judgment, honesty, impartiality, and loyalty than the vice president enjoys. But those are unusual cases. They explain why the president may decide to use someone other than the vice president in some cases, but they are not a reason to forego using the vice president as the president's principal clemency advisor everywhere else.

Common jokes about the position aside, the vice president occupies a powerful position in government. Former Vice President (and former President) George H.W. Bush and current Vice President Biden made that point, explaining that the vice president enjoys a position of strength when he enjoys the president's firm support.³⁸ Article II vests the "executive Power" in the president, but he can make it clear to his administration

37. For example, President Kennedy chose Texas Senator Lyndon Baines Johnson for geographic diversity and political support in the South. See BAUMGARTNER & CRUMBLIN, *supra* note 16, at 62–63; Friedman, *supra* note 23, at 1705–06 ("Often, perhaps most often, the vice-presidential candidate is chosen primarily not because she would be a good president but because she would help make a good ticket, balanced in ideology, geography, experience, and now, perhaps, sex and ethnicity as well." (footnote omitted)).

38. See BAUMGARTNER & CRUMBLIN, *supra* note 16, at 207–08 (quoting George H.W. Bush: "'Vice presidential power is still largely a function of the president's willingness to confer it.'" (footnote omitted)); THE LATE SHOW WITH STEPHEN COLBERT, *Vice President Joe Biden Interview, Part 2*, YOUTUBE (Sept. 11, 2015), <https://www.youtube.com/watch?v=XwmMPytjrK4> [<https://perma.cc/92W7-P2V8>] ("[S]ure, [they make jokes] . . . [and] they really should. There is no inherent power in the vice presidency But here's the deal. It is directly a reflection of your relationship with the president. If you have a relationship with the president, . . . and everyone knows if they do, if it's real, that you have his . . . back and you also have his confidence, then you can really do something worthwhile."). Of course, the vice president's position is powerful even when he is not the president's counselor. He is first in line to succeed the president, and more than one-third of all presidents between 1841 and 1975 died in office or quit. BAUMGARTNER & CRUMBLIN, *supra* note 16, at 2.

that the vice president is a trusted advisor and that he has the power of the presidency behind him in whatever responsibilities he is assigned. President Carter did so by telling his staff, "If you get a request from Fritz [Walter Mondale's nickname], treat it as if from me."³⁹ Were the president to make the vice president his principal clemency advisor, there is no doubt that the vice president would have whatever authority he needs to accomplish that task.

The principal objection to making the vice president the principal clemency advisor is that the duties of that office would subtract from the time that he needs to remain conversant with all of the issues that would be on his plate were the president no longer able to remain in office. The national security issues alone are too complex for anyone to learn on the fly, the argument goes, so nothing should be assigned to the vice president that could in any way keep him from becoming a knowledgeable and competent replacement for the president at a moment's notice. Vice President Harry Truman was unaware of the existence of an atomic bomb when he succeeded to the presidency upon the death of Franklin Roosevelt in 1945.⁴⁰ That scenario is unthinkable today given that more than a half dozen foreign nations have nuclear weapons, and terrorists groups are trying to acquire them.

Moreover, there is a good reason why Henry Wallace was the first—and last—vice president to head a cabinet-level agency. Appointed to head the new Economic Defense Board in July 1941 (renamed the Board of Economic Warfare after Pearl Harbor), Wallace's responsibilities conflicted with the jurisdiction of other cabinet-level departments, notably State and Commerce, leading President Roosevelt to abolish the warfare board.⁴¹ Such "line assignments," as they are called, invariably place the vice president on the horns of a dilemma. Either they are important, which means that the vice president will butt heads with cabinet officials like the Attorney General or the Secretaries of State, Defense, or Treasury, or the assignments are trivial, which demeans the vice president and his office.⁴²

39. BAUMGARTNER & CRUMBLIN, *supra* note 16, at 94 (footnote omitted).

40. JODY C. BAUMGARTNER, *THE AMERICAN VICE PRESIDENCY RECONSIDERED* 5 (2006).

41. NELSON, *supra* note 19, at 65.

42. *Id.* at 64–67.

For reasons such as those, commentators have recommended against tasking vice presidents with formal line assignments, and several vice presidents have recently spurned them.⁴³ Making the vice president head of a White House Clemency Office would dilute his ability to advise the president on the full range of his responsibilities.

Those concerns, however, are manageable. The president cannot add to the number of hours the vice president has each day, but he can reduce the number of hours that the vice president must spend on political assignments, such as making speeches and raising funds.⁴⁴ Of course, that would cut against the grain for some presidents, but the ones who take their clemency role seriously might find the tradeoff positive. Being head of the White House Clemency Office is also not the equivalent of being the secretary of a cabinet department. Evaluating clemency petitions is a relatively small-scale assignment. The number of petitions to review, the issues that they may raise, the number of people to be consulted and staff assistants to be managed—all of them are far smaller and more easily addressed than what the Secretaries of State, Defense, or the Treasury must handle. To be sure, the Vice President will be at odds with the Attorney General on occasion, but clemency occupies such a small amount of the Attorney General's jurisdiction that the number of conflicts should be bearable. The result is that the role will not mire the Vice President in "bureaucratic struggles" or "waste" his or others' time and resources.⁴⁵ Nor would clemency advisor be a "trivial assignment" that would undermine the Vice President's reputation.⁴⁶ A president who cared little about clemency could leave the status quo in place, so using the vice president as clemency advisor would signify its importance.

43. See, e.g., *id.* at 11; BAUMGARTNER & CRUMBLIN, *supra* note 16, at 65–70, 115–19, 141–43, 161–64, 181–82, 208. Vice President Walter Mondale began that trend after discussing the matter with former Vice Presidents Nelson Rockefeller and Hubert Humphrey. Mondale concluded that line assignments would be a waste of his time and avoided them, which freed him to play a general advisory role for President Carter. BAUMGARTNER & CRUMBLIN, *supra* note 16, at 119.

44. BAUMGARTNER & CRUMBLIN, *supra* note 16, at 122–25 (describing the political roles played by the vice president).

45. *Id.* at 208.

46. *Id.*

III. A POSSIBLE ALTERNATIVE: A CLEMENCY BOARD

Some commentators have argued that the president or Congress should formally establish a clemency board along the lines of the U.S. Sentencing Commission.⁴⁷ Of course, an *informal* clemency board could be combined with the recommendation presented in this Essay. The president or vice president can seek advice from whomever he chooses.⁴⁸ Gathering opinions from trusted parties would not keep the vice president from being the president's principal clemency advisor—the “last guy in the room after meetings,” as Vice President Biden once put it.⁴⁹ By contrast, a *formal* clemency board creates several serious problems.

A formal clemency board would be immediately labeled as a new-fangled version of a parole board. Congress repealed the statutes establishing parole in the Sentencing Reform Act of 1984 and substituted a mandatory sentencing guidelines system in their place.⁵⁰ Resurrecting parole would likely be attacked from several directions. As I have argued elsewhere, liberal and conservative criminal justice commentators “landed numerous, crippling blows to the original, romantic theory and practice of parole,”⁵¹ so returning it to a focal place in release

47. See, e.g., Barlow & Osler, *supra* note 6, at 1.

48. The president has the prerogative to seek advice on clemency from whomever he selects. See *Pub. Citizen v. U.S. Dep't of Justice*, 491 U.S. 440, 482–89 (1989) (Kennedy, J., concurring in the judgment) (separation of powers principles prevent Congress from regulating the president's ability to obtain advice); *In re Cheney*, 406 F.3d 723, 728 (D.C. Cir. 2005) (en banc) (“In making decisions on personnel and policy, and in formulating legislative proposals, the President must be free to seek confidential information from many sources, both inside the government and outside.”). The same policy arguments support recognizing that right in the vice president too.

49. BAUMGARTNER & CRUMBLIN, *supra* note 16, at 128, 190 (footnote omitted).

50. Sentencing Reform Act, Pub. L. No. 98-473, ch. 2, 98 Stat. 2031 (1984) (codified as amended at 18 U.S.C. § 3551 (2012) and 28 U.S.C. §§ 991–98 (2012)); *Mistretta v. United States*, 488 U.S. 361 (1989). Not everyone agrees that, like Generalissimo Francisco Franco, (“*Saturday Night Live*,” *Franco is still dead...but he's feeling better each day....*, YOUTUBE (Jun. 28, 2012), <https://www.youtube.com/watch?v=butZyxI-PRs> [<https://perma.cc/4P3M-P2ZS>]), parole is still dead. For the argument that the Supreme Court's decision in *United States v. Booker*, 543 U.S. 220 (2005), which held unconstitutional mandatory sentencing guidelines, also effectively raised parole from the tomb like Lazarus, see Paul J. Larkin, Jr., *Parole: Corpse or Phoenix?*, 50 AM. CRIM. L. REV. 303 (2013).

51. Paul J. Larkin, Jr., *Clemency, Parole, Good-Time Credits, and Crowded Prisons: Reconsidering Early Release*, 11 GEO. J.L. & PUB. POL'Y 1, 36 (2013); *id.* (“Parole was

decisions would require members of Congress “to admit that they made a mistake in abandoning parole or to confess that they are rebirthing a policy previously thrown away.”⁵² Moreover, it is unclear why the president would want to take the heat for a disguised version of parole. One of the rationales for adoption of parole was to shift responsibility, and the potential blame, from the chief executive to a parole board. “Parole release decisions took the heat off the governor and dropped it into the parole board’s lap.”⁵³ A formal clemency board would transfer that heat back to the president.

Outsourcing clemency evaluations could also create more problems than it solves. Principal among these is the political brouhaha that would occur were members of such a committee to publicly assail the president’s clemency decisions and use the very platform that he created for them as the basis for their political legitimacy. That is not a hypothetical scenario. Criminal justice issues have become highly politicized. One of the most prominent debates today stems from the vast increase in federal imprisonment America has witnessed over the last thirty years due largely, the argument goes, to a focus on drug prosecutions and the stiff mandatory sentences of imprisonment demanded by a statute enacted two years after the Sentencing Reform Act: the Anti-Drug Abuse Act of 1986.⁵⁴ Various parties have been extremely critical of that law and the vast increase in federal imprisonment it has

too lenient for offenders and too discriminatory. Parole was ineffective at stemming crime and at rehabilitating prisoners. Parole placed trial judges and parole boards at odds, as each one tried to outguess the other regarding when a prisoner should be considered for release. Parole asked the impossible of correctional officials, because no one could satisfactorily predict when (if at all) an inmate had been rehabilitated, and of prisoners, because maintaining stable relationships in the community was an impossible task for someone hundreds (or more) miles from home. Parole was dishonest because it encouraged prisoners and parole boards to follow a script at release hearings and because it was used to ease prison overcrowding, not to further rehabilitation. And parole was illegitimate because it allowed only a narrow class of offenders—i.e., ones with community ties and good acting skills—to obtain release.”).

52. *Id.*

53. *Id.* at 35. To be sure, several penologists have recommended resurrecting parole. See, e.g., MICHAEL JACOBSON, DOWNSIZING PRISONS 158–72 (2005); Joan Petersilia, *Community Corrections*, in CRIME: PUBLIC POLICIES FOR CRIME CONTROL 483, 497–507 (James Q. Wilson & Joan Petersilia eds., 2002).

54. Pub. L. No. 99-570, 100 Stat. 3207 (codified at 21 U.S.C. § 841 (2012)) (amended 2010).

generated, with some critics attributing it to lingering racism.⁵⁵ It would be far easier for a clemency board to level criticisms against one person (the president) than against a collegial body (Congress) since each member of the latter can pawn off the blame on someone else. Incendiary criticisms of the president's clemency decisions would serve neither the president's, the applicant's, nor the public's interests.

A board created by statute would only aggravate the problem. As different interest groups jostled to establish their separate influence in the revised clemency process, the president would be under pressure to grant petitions based on irrelevant factors rather than by asking himself whether an applicant has reformed, whether his conduct was an aberration in an otherwise law-abiding life, and whether the legitimate purposes of the criminal law would be advanced or retarded by showing him leniency. By turning a penological or philosophical issue into a political one, the result would inject even more inappropriate political influence into clemency decisions than we see today.⁵⁶

No president who believes that clemency decisions are all cost and no benefit will want to get into a political catfight with an independent clemency agency and its powerful political allies. Instead, he will go along with the board's recommendations and save his political capital for use elsewhere.⁵⁷ That acquiescence, however, would besmirch clemency. What is worse, in the wrong hands that system would produce the equivalent of a "spoils system" as presidents used their pardon

55. See Larkin, *Crack Cocaine*, *supra* note 3, at 241–42, n.9 (collecting authorities). The racial disparity in imprisonment rates between blacks and white is undeniable, *id.* at 279, but the argument that it is due to racism is equally mistaken, *id.* at 249–78, as is the assumption that what may discriminate against the class of black offenders also discriminates against the class of blacks as a whole, *id.* at 278–94.

56. See Larkin, *Capital Clemency*, *supra* note 8, at 1296–97 & nn.2–4, 1308 & nn.53–55. Ironically, that result would also flip Alexis de Tocqueville's keen observation on its head. ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 257 (Harvey C. Mansfield & Delba Winthrop eds. & trans., 2000) (1835 & 1840) (noting that in America every political dispute ultimately becomes a legal one).

57. See Larkin, *Revitalizing Clemency*, *supra* note 3, at 905. Of course, there is no guarantee that a person who is just "a heartbeat away" from becoming president will not let his ambition cloud his judgment. High school chemistry teachers are not the only ones who sometimes break bad. But no one gets elected president without knowing how to protect himself against a potential fifth columnist or insider who goes rogue, even when he is the vice president.

power to repay old friends or make new ones. That outcome would delegitimize clemency.

Society wants the president to take his clemency power seriously and to make clemency decisions on a case-by-case basis according to the merits of each one. No society with that conviction wants to see clemency become a form of patronage. Relying on the informal recommendations of the vice president keeps the process “in house,” so to speak, and avoids those problems. Society is better off with that system than with the current one or the proposed alternative.⁵⁸

The U.S. Sentencing Commission did not succumb to this problem because it was under an external constraint, viz., the federal criminal code, that would not apply to a clemency board. All Sentencing Guidelines, commentary, and policy statements must comply with acts of Congress,⁵⁹ and a district court may not vary from those laws at sentencing.⁶⁰ By contrast, a clemency board would only serve in an advisory capacity, and the president is under no restraint when making clemency decisions; in fact, the Supreme Court has made it clear that Congress cannot hamper the president’s exercise of this prerogative.⁶¹ The upshot is that a clemency board is under no constraint as to how often, or for whom, it can recommend mercy. A board would have public relations power without criminal justice responsibility.

Finally, while the president could define and rearrange the membership and structure of any informal group of advisors that he chose, a board created by Congress would deny him

58. A formal clemency board would also add to the existing bureaucracy, which has already been criticized for moving at a sluggish pace. Slowing that process further makes little sense.

59. See 28 U.S.C. § 994(a)–(b) (2012) (Sentencing Guidelines must be consistent with acts of Congress); 28 U.S.C. § 994(k) (2012) (the U.S. Sentencing Commission may not consider rehabilitation when promulgating guidelines); *Mistretta v. United States*, 488 U.S. 361, 368 (1989) (“[E]ach [guidelines] sentence is to be within the limit provided by existing law.”) (citing 28 U.S.C. § 994(a), (b)(2) (2012)).

60. See 18 U.S.C. § 3582(a) (2012) (a district court may not consider the possibility of rehabilitation when deciding whether to imprison an offender or for how long to incarcerate him); *Tapia v. United States*, 564 U.S. 319 (2011) (applying 18 U.S.C. § 3582(a)); *Neal v. United States*, 516 U.S. 284 (1996) (ruling that the Sentencing Commission is bound by Supreme Court interpretations of a federal statute); see also *Mistretta*, 488 U.S. at 367.

61. See *United States v. Klein*, 80 U.S. (13 Wall.) 128, 148 (1872); *Ex parte Garland*, 71 U.S. (4 Wall.) 333, 380 (1866).

that flexibility. There is no need for any such restriction, or for Congress to become involved in regulating the president's clemency decision-making process. Doing so even raises separation of powers issues. Clemency is a presidential prerogative. One consequence is that the president alone can and should decide how to make those decisions, which includes selecting the people from whom he seeks advice. A formal clemency board would interfere with the president's freedom to structure the clemency process as he sees fit. For example, if the president loses confidence in the vice president's judgment, he could select someone else as principal clemency advisor. A statute would deny the president that flexibility. He would be forced to disregard it or argue that it violated the Article II Pardon Clause. Either choice would provide considerable entertainment for the media, but neither one would help him make decisions. A statutory directive therefore cannot help the president; it can only hurt him. For that reason, just as Congress is entitled to decide whether to use a committee system to evaluate and recommend passage of legislation, so too the president should be entitled to decide whether to use one person or a select group of them for advice on clemency decisions.

IV. CONCLUSION

The need for reconsideration of the federal clemency process is a real one, and there is a consensus that the Justice Department should no longer play its traditional doorkeeper role. Using the vice president as a new clemency advisor offers the president several unique benefits that no other individual can supply without having enjoyed a prior close personal relationship with the chief executive. Donald Trump should seriously consider using Vice President Pence as his principal clemency advisor. Presidents, clemency applicants, and the public might just benefit from that new arrangement.