HARVARD JOURNAL
of
LAW & PUBLIC POLICY

VOLUME 46, NUMBER 1 WINTER 2023

THE FEDERALISTS VS. THE ANTI-FEDERALISTS: REVISITING THE FOUNDING DEBATES

THE FORTY-FIRST ANNUAL FEDERALIST SOCIETY NATIONAL STUDENT SYMPOSIUM ON LAW AND PUBLIC POLICY – 2022

SPEECHES

ARTICLES

NOTES

HARVARD JOURNAL
of
LAW & PUBLIC POLICY

Founded by E. Spencer Abraham & Steven J. Eberhard

THE *HARVARD JOURNAL OF LAW & PUBLIC POLICY* RECEIVES NO FINANCIAL SUPPORT FROM HARVARD LAW SCHOOL OR HARVARD UNIVERSITY. IT IS FUNDED EXCLUSIVELY BY SUBSCRIPTION REVENUES AND PRIVATE CHARITABLE CONTRIBUTIONS.

The *Harvard Journal of Law & Public Policy* is published three times annually by the Harvard Society for Law & Public Policy, Inc., Harvard Law School, Cambridge, Massachusetts 02138. ISSN 0193-4872. Nonprofit postage prepaid at Lincoln, Nebraska and at additional mailing offices. POSTMASTER: Send address changes to the Harvard Journal of Law & Public Policy, Harvard Law School, Cambridge, Massachusetts 02138.

Yearly subscription rates: United States, $55.00; foreign, $75.00. Subscriptions are renewed automatically unless a request for discontinuance is received.

The *Journal* welcomes the submission of articles and book reviews. Each manuscript should be typed double-spaced, preferably in Times New Roman 12-point typeface. Authors submit manuscripts electronically to harvardjlpp@gmail.com, preferably prepared using Microsoft Word. Views expressed are those of the authors and do not necessarily reflect the views of the Society or of its officers, directors, editors, members, or staff. Unless otherwise indicated, all editors are students at the Harvard Law School.

PREFACE

The *Harvard Journal of Law & Public Policy* has the unique blessing of standing on the shoulders of generations of some of the brightest and hardest-working student editors to attend Harvard Law School. Volume 46 is a testament to their work.

This Volume welcomed a return to normal. Harvard's campus is once again alive with in-person classes and events and the work of recovering institutional memory has begun.

JLPP hosted its first (and second) in-person symposium in living memory. In October, we had the extraordinary privilege of hosting a symposium on common good constitutionalism. With 19 speakers, 4 moderators, and over 100 attendees from at least four countries, it was an extraordinary logistical lift that could not have been accomplished without the help of our amazing staff and my co-coordinator Prof. Lee J. Strang of the University of Toledo College of Law. I will have the opportunity to speak more about this later as the symposium will be published as its own print Issue later in the year.

In January, we were proud to host a symposium on administrative law in the states. Thanks are due to Adam J. White of the C. Boyden Gray Center for the Study of the Administrative State and Deputy Managing Editor Benjamin R. Pontz for their coordination efforts. The symposium will be published in Issue 2.

JLPP: Per Curiam marked its first birthday. *Per Curiam* was the product of last Volume's Editor-in-Chief Eli Nachmany and Director of *Per Curiam* Alexander Khan's imagination and hard work. It has sought to be *the* place for short-form serious legal scholarship. Much credit is due to its current Director, Ari Spitzer, whose vision for *Per Curiam* has driven so much of its growth. This Volume saw two major developments. First, *Per Curiam* was able to release

timely coverage from leading scholars on several of the Supreme Court's opinions as they came down last term. We are excited to expand that coverage throughout the term this upcoming year. Second, we launched our *Obiter Dicta* series, which seeks to publish judge's speeches.

* * *

As with every year, Issue 1 begins with the presentation of the previous year's Federalist Society National Student Symposium. This year we have the honor of publishing the 41st Annual Symposium hosted on March 4–5, 2022 at the University of Virginia School of Law entitled "The Federalists vs. The Anti-Federalists: Revisiting the Founding Debates." We have the distinct pleasure of getting to work with some of the best student editors from all over the country to put this together. Thank you for all your hard work.

This Issue will present symposium pieces from Professors John O. McGinnis, Michelle M. Kundmueller, and Chief Judge Jeffrey S. Sutton. It will also feature a debate from the symposium between Professors Michael W. McConnell and John Mikhail on the resolution: "The Federalists Designed a Constitution of Plenary Federal Power."

Following the presentation of the symposium pieces, the Issue continues with two speeches. First, we will present a speech by Judge Douglas H. Ginsburg delivered to the Capitol Hill Chapter of the Federalist Society on the subject of antitrust law's consumer welfare standard. Then, we will present Judge Neomi Rao's Thomas M. Cooley Judicial Lecture about the "province of law."

At the center of the Issue are two articles diving into the legal history of two major contemporary debates. First, Judge Andrew S. Oldham writes on the issue of qualified immunity at the Founding. Second, Michael Weingartner writes about Professor William Baude's theory of liquidation as it applies to the independent state legislature theory.

We close out the issue with two excellent contributions from our student editors. Thomas A. Koenig and Benjamin R. Pontz discuss what they term "the Roberts Court's functionalist turn in administrative law." Finally, Frances Williamson explores the concept of public meaning in the wake of *Mahanoy Area School District v. B. L.*

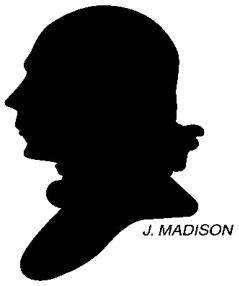
* * *

A few additional thanks are in order. First, thank you to our amazing Deputy Editor-in-Chief, Zach Winn, for taking on an incredible amount of substantive editing while somehow managing to ensure that *JLPP* stays on schedule. Thanks also to our Articles Chair, Kyle Eiswald, for his invaluable input on article selection and constant communication with our authors; Notes Chair, Joel Malkin for handling both the selection and editing of our student writing; Managing Editors, Anastasia Pyrinis and Sandy Smith, for their work editing this Volume; Managing Editor, Cole Timmerwilke, for serving as the National Editor for the student symposium; Director of *Per Curiam*, Ari Spitzer, for his efforts to advance *Per Curiam*; and CFO, Matthew Steiner, for handling all the business affairs of the *Journal*.

Finally, thank you to our 1L and 2L staff who really bear the brunt of the editing work. It is no small feat to check every footnote and every line of a several hundred page publication and without it JLPP would cease to be able to carry out its work.

Mario Fiandeiro
Editor-in-Chief

THE FEDERALIST SOCIETY



presents

The Forty-First Annual National Student Symposium
on Law and Public Policy

The Federalists vs. The Anti-Federalists: Revisiting the Founding Debates

March 4–5, 2022
The University of Virginia School of Law

The staff acknowledges the assistance of the following members of the Federalist Society in preparing this Symposium for publication:

National Editor

Cole Timmerwilke
Harvard Law School

Executive Editors

Dominic Bayer
Northwestern University
Pritzker School of Law

Nitin Nainani
Cornell Law School

Seth Lucas
George Mason University
Antonin Scalia Law School

Paige Scobee
University of Texas School of Law

General Editors

Johnathan Baur
George Mason University
Antonin Scalia Law School

Leighton Berridge
University of Iowa College of Law

Nathan Downey
University of Oklahoma College of Law

Nathan Drum
Wake Forest University School of Law

Justin Folk
University of California at Berkeley
School of Law

Kelly Gorman
University of Wisconsin Law School

Creigh Greensmith
Georgetown University Law Center

Stephen Greenway
Mercer University School of Law

Steven E. Grotch
Emory University School of Law

Jeff Gurley
University of Michigan Law School

William Harren
Arizona State University
Sandra Day O'Connor College of Law

Lilly Harris
Arizona State University
Sandra Day O'Connor College of Law

Phillip Hawkyard
University of California College of Law,
San Francisco

Anita Kinney
Northwestern University
Pritzker School of Law

Joshua Lacoste
Notre Dame Law School

Andrew Lang-Reyes
Northwestern University
Pritzker School of Law

Anthony Leonardi
University of South Dakota
Knudson School of Law

Robert McCutcheon
University of Chicago Law School

James Meslener
Stetson University College of Law

Tyler Primm Miller
William & Mary Law School

Kyle Nazareth
Ohio Northern University
Pettit College of Law

Megan Schneider
Georgetown University Law Center

Eric Walker
University of Michigan Law School

Elias Wunderlich
University of Iowa College of Law

WERE THE FOUNDERS THEMSELVES ORIGINALISTS?

JOHN O. MCGINNIS*

The founding generation was broadly originalist in constitutional interpretation. As Judge Pryor has suggested, the Founders believed the meaning of the Constitution was fixed at the time of enactment and was not subject to updating by interpretation. Any updating was to be left to the amendment process. Thus, originalism energizes the amendment process by allowing subsequent generations to be framers of the Constitution.

What is harder to assess is exactly what kind of originalists the Founders were. Ultimately, a review of the history indicates that the Founders were legal contextual textual originalists, rather than living constitutionalists. Calling the Founders "legal contextual textual originalists" seems like quite a mouthful. What it means is that, first, the Founders focused on the text rather than directly on intent.[1] And second, the Founders were contextualists, not word- or even clause-bound textualists. The Founders ascertained the meaning and often made it more precise by consulting the entire document. Third, they permitted the meaning of the text to be made more precise by understanding it as law and that meant consulting the legal and historical background of its terms.[2]

---

* George C. Dix Professor in Constitutional Law, Northwestern Pritzker School of Law. This is a lightly edited version of the speech I gave at the student convention. The ideas are emphatically not mine alone, but reflect a quarter century of collaboration with my friend and colleague, Michael Rappaport of the University of San Diego School of Law. They are based on our jointly authored articles.

1. John O. McGinnis & Michael B. Rappaport, *Unifying Original Intent and Original Public Meaning*, 113 NW. U. L. REV. 1371, 1409–12 (2019).

2. *See* John O. McGinnis & Michael B. Rappaport, *The Constitution and the Language of the Law*, 59 WM. & MARY L. REV. 1321, 1392–94 (2018).

The Constitution was not created *ex nihilo* but rather was set against a rich background of Anglo-American history and Anglo-American interpretive methods. This background was to the advantage of the officials who had to implement the Constitution and those who lived under it because the Constitution's Anglo-American legal heritage can make meaning more exact than might otherwise be expressed solely within the four corners of a short document.

In this brief time, I will show how various elements of the founding indicate that the Founders were originalists: first, the document itself; second, debates between the Federalists and the Anti-Federalists; and third, the post-enactment practice of the founding generation.

First, a review of the document itself provides valuable insights into the nature of the originalism of the founding generation. The Constitution the Founders created is itself an essential context for its method of interpretation.

Second, the debate between the Anti-Federalists and the Federalists, those supporting the Constitution, demonstrates the Founders' embrace of legal contextual textual originalism in how the Constitution would be interpreted. The Federalists emphasized that the judges would be constrained by strict rules of interpretation so that they could not create a consolidated government. Some of the Anti-Federalists, to be sure, opposed these methods of interpretation in favor of more populist—rather than legal—methods. But that does not mean that the Anti-Federalists expected populism to guide constitutional interpretation. To the contrary, the Anti-Federalists' opposition to originalist methods often stemmed from their recognition that originalism was likely to guide constitutional interpretation—for the Anti-Federalists, a reason to reject the Constitution.[3]

3. *See* H. Jefferson Powell, *The Original Understanding of Original Intent*, 98 HARV. L. REV. 885, 907–12 (1985) (laying out the debate between the pseudonymous Anti-Federalist Brutus and the Federalist Alexander Hamilton over interpretive methods).

Third, the founding generation put originalist interpretation of the Constitution into practice. Obviously, in a short talk, I cannot do justice to the huge variety of constitutional argument and debate in the early republic. However, the debate over the constitutionality of the Bank of the United States illustrates how all the main participants in the founding generation's political debates were originalists and even largely agreed on the methods of interpretation, even as they disagreed on the question of whether chartering a national bank was constitutional.[4] Indeed, the better and more experienced the lawyers were, the more they tended to agree on interpretive principles, if not the result.[5]

First, let us begin with the Constitution, which itself provides some clues about how it is to be interpreted. For instance, as Professors Chris Green and Evan Bernick have argued in some interesting new work, the Oath Clause[6] is an oath to "this Constitution." Some internal references in the Constitution, like "the powers granted herein" and their careful enumeration, suggest that this Constitution is listing things.[7] That is the kind of thing texts do. Moreover, Washington's transmittal letter talks of delivering the Constitution for ratification to the States.[8] And what was the Constitution? It was a text written on parchment.

Another indication of the salience of text is the great care the Framers took in perfecting it. The Committee of Detail and the Committee of Style of the Constitutional Convention made many

4. McGinnis & Rappaport, *supra* note 1, at 1401–18.

5. *Id*. at 1403.

6. U.S. CONST. art. VI, cl. 3. *See* Evan D. Bernick & Christopher R. Green, *What is the Object of the Constitutional Oath?* (August 22, 2019). Available at SSRN: https://ssrn.com/abstract=3441234 or http://dx.doi.org/10.2139/ssrn.3441234 [https://perma.cc/SZS2-XQTQ].

7. *See* Christopher R. Green, *"This Constitution": Constitutional Indexicals as a Basis for Textualist Semi-Originalism*, 84 NOTRE DAME L. REV. 1607, 1651–53 (2009).

8. Letter from George Washington to the President of Congress (Sept. 17, 1787), *in Founders Online*, NAT'L ARCHIVES, https://founders.archives.gov/documents/Washington/04-05-02-0306 [https://perma.cc/4ACL-AF7N] ("We have now the Honor to submit to the Consideration of the United States in Congress assembled that Constitution which has appeared to us the most advisable.").

changes to bring clarity to the Constitution. Everyone was watching the nuances, down to its punctuation. For instance, Gouverneur Morris, the most influential member of the Committee of Style, rendered Article I, Section 8, Clause 1 as providing three separate powers: (1) to lay and collect taxes, duties, and imposts; (2) to pay debts of the United States; and (3) to provide for the common defense and general welfare of the United States. Their separation was indicated by a semicolon.[9] But Roger Sherman saw that breaking up the phrases with a semicolon would give greater powers than he thought had been the sense of the Convention, and thus eliminated the last semicolon, making sure that the requirement to provide for the common defense and general welfare provided a limitation on the first two powers and not an expansion.[10] Such careful rearticulation suggests that the text was the essential matter for interpretation—they took a lot of time over it—and that the text was designed both to limit and empower the federal government. When a judge updates the Constitution through interpretation, he destroys the delicate compromise that was forged in that text.

The text itself indicates the relevance of the entire Constitution to interpreting particular clauses, as suggested by the interlocking nature of many provisions, such as the Necessary and Proper Clause, as well as the repetition of words and concepts. Thus, it provides support for contextual textualism. Examples of words that are repeated throughout the text include the words "officer" and "necessary." Intra-textualism flows directly from the way the document is written. In short, as Justice Paterson noted in the 1790s, what differentiated the United States Constitution from previous national

9. *See* William Michael Treanor, *The Case of the Dishonest Scrivener: Gouverneur Morris and the Creation of the Federalist Constitution*, 120 MICH. L. REV. 1, 21–22 (2021) (comparing the Committee of Style's version to the version in the final Constitution).

10. *See id*. at 23–24. *See also* Albert Gallatin In The House Of Representatives (June 19, 1798), *in* 3 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 379 (Max Farrand ed., 1911) (describing how Sherman, "a member from Connecticut", discovered the construction by Morris, "one of the members who represented the State of Pennsylvania", that would have created a distinct power and the clause was restored to the final version as a limitation).

constitutions like the British constitution that preceded it was its "written exactitude."[11]

But the relevant, perhaps most important, context of the Constitution also comes from the fact that it is a legal document. As philosophers of language remind us, much of what is asserted in a proposition is contextual, and one important part of the general context of the Constitution is its legal context.[12] That comes from the fact that the Constitution was clearly understood as law.[13] As a result, the Constitution's words must be understood against the common law and other aspects of legal background, and they must be interpreted according to the rules of interpretation generally applicable to legal documents, with the caveat that some of the rules need to be changed or modified to apply to the Constitution.

The Constitution itself makes clear it is a legal document. First, the Constitution defines itself as "the supreme Law of the Land" through the Supremacy Clause.[14] Second, the Constitution is full of legal terms. It is extremely difficult to account for the plethora of legal terms without understanding that the Constitution is a legal document to be interpreted, at least when it is relevant, against the background of the law at the time. Mike Rappaport and I have counted the number of these terms.[15] Some terms like "Letters of Marque and Reprisal"[16] are unambiguously legal. No one would understand them in ordinary language. Others have a legal meaning, although perhaps also an ordinary meaning as well: something

11. *See Vanhorne's Lessee v. Dorrance*, 2 U.S. (2 Dall.) 304, 308 (1795).

12. *See* Scott Soames, *Toward a Theory of Legal Interpretation*, 6 N.Y.U. J.L. & LIBERTY 231, 236–37 (2011) (describing how linguistics distinguishes the meaning of a sentence from its content relative to context, and distinguishes both the meaning and contextual content from what is asserted).

13. *See* John O. McGinnis, *The Constitution's Creation Is Compatible with Reading It as a Legal Document*, L. & LIBERTY (Apr. 3, 2017), https://lawliberty.org/the-constitutions-creation-is-compatible-with-reading-it-as-a-legal-document/ [https://perma.cc/U9JF-B2B8] (discussing the legal context of the constitution).

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

15. *See* McGinnis & Rappaport, *supra* note 2, at 1370–71, 1373–75 (counting the terms in the Constitution that have at least some legal meaning).

16. U.S. CONST. art. I, § 8, cl. 11.

like "Privileges and Immunities of Citizens in the several States."[17] Altogether, such terms appear 103 times in the short document of the Constitution.[18] More appear in the Bill of Rights, like the term "due process."[19] The first Congress's decision to write down the people's rights in the language of the law confirms that the founding generation understood the Constitution is written in that language. It is to be interpreted, when relevant, according to the legal conventions of the time. To be sure, that does not mean every word or clause of the Constitution needs a legal context to unpack. Legal rules themselves recognize many contexts in which ordinary meanings predominate.

Another indication the Constitution was interpreted against the background of legal rules is that it contained specific clauses that block the application of legal interpretive rules that would otherwise apply. For instance, after stating that the Constitution and other federal laws are the "supreme Law of the Land," the clause provides this phrase: "any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."[20] Professor Caleb Nelson explained the reason for the appearance of what might seem a curious phrase; it actually had a well understood meaning in the law at the time. It is called a *non obstante* clause.[21] It was to block the application of another legal interpretive rule that would require judges to harmonize state and federal laws, even if the best reading of the state law was that it should be blocked under the Supremacy Clause.[22] The provision showed the Constitution was understood against a set of relevant legal backdrops, again, when those are relevant.

And early observers of the Constitution recognized that it was a document that needed to be interpreted as such. For instance, St.

17. U.S. CONST. art. IV, § 2, cl. 1.
18. McGinnis & Rappaport, *supra* note 2, at 1374.
19. U.S. CONST. amend. V.
20. U.S. CONST. art. VI, cl. 2.
21. Caleb Nelson, *Preemption*, 86 VA. L. REV. 225, 232 (2000).
22. *Id*.

George Tucker wrote that "science [meaning almost certainly legal science], only, is equal to the task" of making sense of the complexity of our constitutional system of government.[23] And one way the Federalists assured the Anti-Federalists they would not twist the Constitution to create a stronger federal government than was contemplated by the Constitution was to point out that the Constitution would be applied according to textual interpretation done according to legal rules. That was the response of Alexander Hamilton to the Anti-Federalist Brutus. According to *Federalist NO. 78*, judges would just compare the statutes to the Constitution, voiding them only if they conflicted.[24] In doing so, they would be bound down by "strict rules and precedent,"[25] in Hamilton's words. Hamilton relies on the contextual nature of the Constitution, particularly in its legal context, as a protection against updating by judges—the kind of practice favored by living constitutionalists.

Now, let me move to show how the founding generation employed originalism.

The debate over whether the federal government had the power to charter a bank,[26] of course, happened immediately after the Constitution was enacted, and it is one of the best sources for how the founding generation regarded interpretation. This debate engaged a huge spectrum of political opinion. It pitted nationalists—who saw the Bank as essential to sustaining a flourishing Republic[27]—

23. ST. GEORGE TUCKER, 1 BLACKSTONE'S COMMENTARIES: WITH NOTES OF REFERENCE, TO THE CONSTITUTION AND LAWS, OF THE FEDERAL GOVERNMENT OF THE UNITED STATES; AND OF THE COMMONWEALTH OF VIRGINIA xv (1803).

24. THE FEDERALIST NO. 78, at 466 (1788) (Alexander Hamilton) (Clinton Rossiter ed., 2003) ("If there should happen to be an irreconcilable variance between [the Constitution and a statute]…the Constitution ought to be preferred to the statute, the intention of the people to the intention of their agents".).

25. *Id*. at 470.

26. *See* McCulloch v. Maryland, 17 U.S. 316 (1819) (holding that the Constitution gives Congress the power to incorporate a bank).

27. *See* Alexander Hamilton, *Final Version of the Second Report on Further Provision Necessary for Establishing Public Credit (Report on a National Bank, 13 December 1790, in Founders Online*, NAT'L ARCHIVES, https://founders.archives.gov/documents/Hamilton/01-07-

against those more interested in preserving state power, which they saw as closer to the people and less liable to corruption than national institutions like the Bank. The nationalists argued that the Bank was necessary and proper to a variety of enumerated powers, such as the taxing power, and was clearly sustained by the text of the Constitution.[28] Those who were in favor of more rights for the States were concerned that Necessary and Proper Clause should be interpreted narrowly and that the nationalists were interpreting it too broadly, were understanding it to mean "conducive."[29] They had a stricter meaning of what necessary meant—but again, a meaning rooted in the text.[30]

They also argued that such a large power should have been expressly enumerated, which is a kind of textual argument about expectations; what kind of powers would be enumerated depend on how large they are.[31] This debate sustained the attention of the most important political and legal thinkers of the time: James Madison,[32]

02-0229-0003 [https://perma.cc/AE6V-SMQM] (arguing the advantages of the Bank to the new nation).

28. *See* Alexander Hamilton, *Final Version of an Opinion on the Constitutionality of an Act to Establish a Bank*, [23 February 1791], *in Founders Online*, NAT'L ARCHIVES, https://founders.archives.gov/documents/Hamilton/01-08-02-0060-0003 [https://perma.cc/MEP6-TKU3] (arguing that Congress has the power to incorporate a Bank in relation to its power of collecting taxes, among other powers).

29. *See id*. (noting that according to grammatical and popular senses of the term "necessary," the word "often means no more than *needful, requisite, incidental, useful*, or *conducive to*") (emphasis in original).

30. *See The Bank Bill,* [2 February] *1791*, *in Founders Online*, NAT'L ARCHIVES, https://founders.archives.gov/documents/Madison/01-13-02-0282 [https://perma.cc/MU3G-T95J] (James Madison speech in Congress on the constitutionality of the Bank, arguing the Bank is not "necessary" to the government but merely convenient).

31. *See id*. (arguing that the enumeration of powers in the Constitution "condemn any exercise of any power, particularly a great and important power, which is not evidently and necessarily involved in an express power").

32. *See id*.

Thomas Jefferson,[33] Alexander Hamilton,[34] and Edmund Randolph.[35]

So, what comes out of that debate for the idea of, "Are the Framers originalists?" First, I think it follows that they were textualists who did not focus directly on intent. Second, in interpreting the text, they said, "We should follow the conventional rules of interpreting a text." Third, those involved in the debate largely incorporated the text according to rules that one would apply to documents analogous to the federal Constitution, like a statute or state constitution.

Famously, the Bank was first debated in the cabinet. Secretary of Treasury Hamilton's opinion was the most explicit on the obligation to follow the text under established legal rules. He stated that the " intention is to be sought for in the instrument itself," of course, by which he meant the text, "according to the usual and established rules of construction."[36] Others in the debate also called for following the text under conventional rules. Elbridge Gerry, a Bank proponent like Hamilton, but importantly, for our discussion, an Anti-Federalist unlike Hamilton, argued the rules of Blackstone should be followed.[37] Attorney General Edmund Randolph, an opponent of the Bank, also discussed how conventional statutory rules of interpretation should apply to the text of the Constitution.[38] None of them argued for anti-originalist rules or for judicial updating. Their

33. *See* Thomas Jefferson, *Opinion on the Constitutionality of the Bill for Establishing a National Bank, 15 February 1791*, *in Founders Online*, NAT'L ARCHIVES, https://founders.archives.gov/documents/Jefferson/01-19-02-0051 [https://perma.cc/EV8W-EJPZ].

34. *See supra* notes 29–31.

35. *See* Edmund Randolph, *Enclosure: Opinion on the Constitutionality of the Bank, 12 February 1791*, *in Founders Online*, NAT'L ARCHIVES, https://founders.archives.gov/documents/Washington/05-07-02-0200-0002 [https://perma.cc/L9Q5-LLGZ].

36. *See supra* notes 30–31.

37. 1 ANNALS OF CONG. 1998 (1791). *See also* Charles J. Reid, *America's First Great Constitutional Controversy: Alexander Hamilton's Bank of the United States*, 14 U. ST. THOMAS L.J. 105, 161 (2018) (describing Gerry's proposal for interpretation).

38. Edmund Randolph, Opinion of Edmund Randolph, *in* LEGISLATIVE AND DOCUMENTARY HISTORY OF THE BANK OF THE UNITED STATES: INCLUDING THE ORIGINAL BANK OF NORTH AMERICA 86 (M. St. Clair Clarke & D.A. Hall comp., 1832).

views should be given great weight, because they emanate from very able, practicing lawyers. But even those who did not make a living practicing law used conventional rules. Thomas Jefferson's opinion against the Bank largely turned on the conventional anti-surplusage rule, as he argued that the large power of the Bank would have to have been enumerated.[39]

James Madison set out a series of interpretive rules that would lead to making a constitutional judgment against the Bank.[40] Again, the rules concerned interpretation of the text of the Constitution. There is one way I think in which his proposed rules were not quite like the others embraced. He appeared to think the Constitution should be interpreted like a treaty, but that view did not seem to be widely shared, even by those who agreed with his opinion that the Bank was unconstitutional.[41] Importantly, there appeared to be a consensus against the direct use of the substantive intent of the Philadelphia Convention, against the idea of the originalism of original intent. While Hamilton and Randolph, the two best practicing lawyers among the disputants, disagreed on whether the Bank of the United States was constitutional, they agreed that the intent of the framers was not relevant. Madison mentioned his memory of what happened at the convention in his speech on the Bank, but even he did not include it in his reference to the five relevant legal interpretive rules of the tax for his legal analysis.[42]

Jefferson did argue the Framers had implicitly rejected a Bank based on what they intended at the Convention, but the anti-surplusage rule was more important even to his legal analysis. To be sure, the intent of the Framers was sought indirectly by interpreting the text, but not independently. And I think that is very consistent

39. Thomas Jefferson, Opinion of Thomas Jefferson, Secretary of State, on the Same Subject, *in* LEGISLATIVE AND DOCUMENTARY HISTORY OF THE BANK OF THE UNITED STATES: INCLUDING THE ORIGINAL BANK OF NORTH AMERICA 93 (M. St. Clair Clarke & D.A. Hall comp., 1832).

40. 1 ANNALS OF CONG. 1945–46 (1791).

41. McGinnis & Rappaport, *supra* note 1, at 1398 (discussing Madison's treaty-like approach to interpretation).

42. 1 ANNALS OF CONG. 1945–46 (1791).

with much of the rest of what we see in the founding era. Chief Justice Marshall famously argues that the intent of the Constitution is chiefly collected from its words—it is the text that is paramount.[43] The debate over the Bank also does not support the notion that it was a conventional rule to directly consider the substantive intent of the participants at the state conventions as constitutive of the meaning of the Constitution any more than the Framers' intent.

But it is quite interesting how some of the disputants use that intent. Instead, they suggested the material from the ratifying conventions may have had an interpretive role, but a limited role. Thus, they did not look at them as a matter of intent; they used the state conventions as a form of evidence about the interpretation of a text laid down by others.[44] In other words, the convention was the first interpreter of the text, and they only looked at the formal actions of an entire convention, like the passage of proposed amendments, as to what it thought the Constitution meant, not individual comments of the ratifiers. This too was an application of a conventional legal rule. Contemporary expositions of statutes by officials had long been given weight in Anglo-American law,[45] but note that the rule was applied in a new context. They were giving weight to contemporary expositions, in this case, by the ratifiers of a document that had already been laid down.

The most important lesson to take away from the Bank debate among opponents and advocates is how originalist they were. When they debated the meaning of a text, they debated as if the meaning were already fixed and something to be clarified through resort to conventional rules of interpretation. They were thus acting self-consciously as interpreters of a written legal text.

---

43. Sturges v. Crowninshield, 17 U.S. (4 Wheat.) 122, 202–03 (1819).

44. McGinnis & Rappaport, *supra* note 1, at 1412–17.

45. Hans W. Baade, *"Original Intent" in Historical Perspective: Some Critical Glosses*, 69 TEX. L. REV. 1001, 1043 (1991) (citing Cohens v. Virginia, 19 U.S. (6 Wheat.) 264, 416 (1821)) (noting that contemporaneous exposition was a "consideration[] to which Courts have always allowed great weight in the exposition of laws").

The famous opinion in *McCulloch v. Maryland* upholding the Bank is very familiar to many of you.[46] The decision follows a contextual textualism, which considers the meaning of clauses and the context of the whole document, looking at words and connecting to other words. It begins by expressing and relying on the arguments of the cabinet members and the members of Congress in favor of the Bank.[47] But it is important to rebut one argument from the opinion that has been used to justify living constitutionalism. The argument comes from the opinion's language that the Constitution is "intended to endure" and "to be adapted to the various *crises* of human affairs."[48] And, according to many, that language suggests that the Constitution is a living document.[49]

I want to end by giving what I think is a full repudiation of that argument because I think it is the single most common argument that the Founders were living constitutionalists. Consider a fuller context of Chief Justice Marshall's discussion. In *McCulloch*, Chief Justice Marshall wrote:

> The subject is the execution of those great powers on which the welfare of a nation essentially depends. . . . This could not be done by confiding the choice of means to such narrow limits as not to leave it in the power of Congress to adopt any which might be appropriate, and which were conducive to the end. This provision is made in a constitution intended to endure for ages to come, and, consequently, to be adapted to the various *crises* of human affairs. To have prescribed the means by which government should, in all future time, execute its powers, would have been to change,

46. McCulloch v. Maryland, 17 U.S. (4 Wheat) 316 (1819).

47. *Id*. at 401–02.

48. *Id*. at 415.

49. *See, e.g.*, Erwin Chemerinsky, *The Price of Asking the Wrong Question: An Essay on Constitutional Scholarship and Judicial Review*, 62 TEX. L. REV. 1207, 1256–57 (1984) (interpreting Chief Justice Marshall's words as supporting a "generally accepted" theory of living constitutionalism); Thomas C. Grey, *Do We Have an Unwritten Constitution?*, 27 STAN. L. REV. 703, 710 (1975) (arguing that Chief Justice Marshall's words support living constitutionalism).

> entirely, the character of the instrument, and give it properties of a legal code.[50]

While Chief Justice Marshall certainly recognized the problems of allowing future decisionmakers to respond to new circumstances, his argument was not that the Constitution should be adapted to mean whatever those future decisionmakers believed it should mean. Instead, Marshall argued that the problem of anticipating future circumstances required the Congress to be given broad authority so it could choose among the means. Moreover, even if one were to interpret the language as allowing Congress to adapt the Constitution to future circumstances, it does so only in a relatively narrow way. Congress might have the power to adapt the means to future circumstances, but it clearly does not have the power to change the ends. While Congress can select new means to regulate commerce among the States, for instance, it cannot change the meaning of the term "regulate Commerce . . . among the several States."[51]

Also, the view that *McCulloch* endorsed living constitutionalism was not adopted by courts for centuries. During the 19th century, the quote was never cited to support the view that the meaning of the Constitution would change over time.

Interpreting Chief Justice Marshall's *McCulloch* opinion as embracing a broad but originally defined meaning of Congress's powers also has the advantage of rendering the opinion consistent with his other opinions. For example, Chief Justice Marshall's discussion of both constitutional and statutory interpretation in *Sturges v. Crowninshield*[52] reads like textual originalism. There, Marshall said that the meaning of the text should be rejected only if it reached absurd results.[53] And that absurdity must "be so monstrous, that all

50. *McCulloch*, 17 U.S. (4 Wheat) at 415.
51. U.S. CONST. art. I, § 8, cl. 3.
52. 17 U.S. (4 Wheat.) 122 (1819).
53. *Id*. at 202–03.

mankind would, without hesitation, unite in rejecting the application."[54] And even this absurdity rule is just another example of a legal rule that is applied at the time. So it is incongruous to think of *McCulloch* as voicing a different view than the contextual textualism that he practices in the *Sturges* opinion.

Moreover, the originalist interpretation that those in the early era practiced was so powerful that it continued to dominate constitutional law for decades, even if on occasion, it was misapplied.[55] It began to fray later in the nineteenth century.[56] In the progressive era, an alternate vision of the living Constitution came to the fore. But today, the Supreme Court appears to be moving back towards an expressly originalist interpretation of the Constitution.[57] In doing so, the Court is reviving the interpretive practices of the founding generation and applying them anew. The Roberts Court thus does not represent a radical break with the past, but a return to the origins of our constitutional order.

54. *Id*. at 203.

55.*See* Howard Gillman, *The Collapse of Constitutional Originalism and the Rise of the Notion of the "Living Constitution" in the Course of American State-Building*, 11 STUD. AM. POL. DEV. 191, 205 (1997).

56. *See* Barry Friedman & Scott B. Smith, *The Sedimentary Constitution*, 147 U. PA. L. REV. 1, 13–14 (1998) (describing how originalism frayed after the Civil War as temporal distance from the Founding widened).

57. *See, e.g.*, Kennedy v. Bremerton Sch. Dist., No. 21–418, slip op. 24 (U.S. 2022) (holding that the "original meaning and history" control in Establishment Clause cases); N.Y. State Rifle & Pistol Ass'n, Inc. v. Bruen, No. 20–843, slip op. 17 (U.S. 2022) (requiring gun regulations to be "consistent with the Second Amendment's text and historical understanding").

THE ANTI-FEDERALISTS: PLANTING THE SEEDS OF AMERICAN POPULISM?

MICHELLE M. KUNDMUELLER*

I am very happy and honored to be here. I am particularly humbled to be flanked by scholars of such eminence. And I'm really looking forward to today's talks, because today is one more instance of the grand American tradition of talking about what it means for the people to engage in good self-government. This tradition, if I may call it that, is not the exclusive province of lawyers. But as law students, as lawyers, and as judges we have a special place in this conversation. Insofar as law has a role to play in any government (and within a republican government especially), I think that we have both the opportunity and the duty to apply our intellectual capacity to the relationship between law and good self-government.

I wouldn't normally start a talk this way, with an affirmation of the importance of the event that we are all attending. But such an affirmation seemed more than normally relevant in light of this week's news about the war in Ukraine.[1] Earlier this week, as I was writing about Anti-Federalists and populists, I kept stopping my work to check BBC News. Alternating between American political

* Assistant Professor of Political Science, Old Dominion University. This Essay is a lightly edited version of Professor Kundmueller's remarks at the Federalist Society's 41st annual National Student Symposium, "The Federalists vs. the Anti-Federalists," held at the University of Virginia Law School on March 5, 2022.

1.. *See* BBC World Serv., *Russian Forces Continue Attacks on Ukraine,* BBC NEWS (Mar. 5, 2022), https://www.bbc.co.uk/programmes/w172xytptnbf8b1 [https://perma.cc/N9ZT-TB5R].

thought, on the one hand, and Ukraine's struggle to maintain independence, on the other, I was repeatedly forced to confront the fact that that there are aspects of self-government that I typically take for granted. Watching current events unfold alongside preparing these remarks reinvigorated my commitment to my scholarship and to trying to understand and speak to others about the role of law in democratic government. The news reminded me, in a most visceral way, that self-rule is a precious thing.

Today's topic is the relationship between the thought of the Anti-Federalists and populism. I propose to answer two questions. First, can we identify common ground between Anti-Federalists and populists? Second, does their common ground justify characterizing the Anti-Federalists as the philosophical ancestors of populists? I conclude that there is significant common ground: both favor a more direct form of democracy controlled by the common citizen and therefore both harbor deep suspicions of elites and complex institutions. Yet we cannot fairly categorize the Anti-Federalists as proto-populists: their advocacy for more direct government and the prominence of the will of the people was premised on beliefs about the function of a political community's size that populists do not share. Indeed, I suspect that the Anti-Federalists, who rejected outright the idea of one national government for even the original thirteen states, might have been more critical of populism than they were of the Federalists themselves.

By and large, both Anti-Federalists and populists favor a more direct form of democracy.[2] They don't necessarily favor direct democracy in the sense that it requires that all citizens get together

2. *See* W.B. Allen et al., *Interpretative Essay*, *in* THE ESSENTIAL ANTIFEDERALIST, at vii (W.B. Allen et al., eds., 2d ed. 2002) [hereinafter THE ESSENTIAL ANTIFEDERALIST] ("The Antifederalists warned that 'delegated republicanism' bestowed unrestrained powers on the representatives and, when coupled with long terms in office, invited public officials to substitute their own independent will for the consent of the governed."). *Compare* Jennifer Nedelsky, *Confining Democratic Politics: Anti-Federalists, Federalists, and the Constitution*, 96 HARV. L. REV. 340, 343 (1982) (reviewing HERBERT J. STORING, THE COMPLETE ANTI-FEDERALIST (1981) and noting the Anti-Federalists' emphasis on "a close

and vote directly on all laws, but they favor a more direct form of democracy than is set forth in the Constitution (or, in the case of today's populists, in the Constitution as it is currently implemented).[3]

Both Anti-Federalists and contemporary populists want a more direct role for the common citizen and for the middle class; they harbor deep suspicions of elites, who they understand as experts—or those who might be seen (by some, not by Anti-Federalists or populists) as having a better capacity to rule.[4] It's not necessarily just about preventing the rule of wealthy elites; it's also—perhaps even more strongly—about preventing the rule of those who claim to have either a special expertise or heightened moral capacity for rule.[5]

---

and active relation between the citizen and his government"), *with* Sherman J. Clark, *A Populist Critique of Direct Democracy*, 112 HARV. L. REV. 434, 437 (1998) ("The populist case for direct democracy is straightforward and appealing: direct democratic processes are at some level more democratic, more legitimate, than representative institutions, because they are more directly responsive to the people.").

3. *See* THE FEDERALIST NOS. 10, 47, 51 (James Madison).

4. Brutus I (Oct. 18, 1787), *reprinted in* THE ANTI-FEDERALIST: AN ABRIDGMENT BY MURRAY DRY, OF THE COMPLETE ANTI-FEDERALIST EDITED, WITH COMMENTARY AND NOTES, BY HERBERT J. STORING 116 (Herbert J. Storing ed., 1981) [hereinafter THE ANTI-FEDERALIST: AN ABRIDGMENT] ("In so extensive a republic, the great officers of government would soon become above the controul of the people, and abuse their power to the purpose of aggrandizing themselves, and oppressing them."); *see also* Ignatius Donnelly, *People's Party Platform*, OMAHA MORNING WORLD-HERALD (July 5, 1892), https://wwnorton.com/college/history/eamerica/media/ch22/resources/documents/populist.htm [https://perma.cc/AQF3-FGFK] ("The fruits of the toil of millions are badly stolen to build up colossal fortunes for a few, unprecedented in the history of mankind; and the possessors of these, in turn, despise the Republic and endanger liberty.").

5. Kenneth P. Miller, *Constraining Populism: The Real Challenge of Initiative Reform*, 41 SANTA CLARA L. REV. 1037, 1039–43 (2001) (comparing the anti-elitist tendencies of American populists to the elitist and moralistic tendencies of American progressives); Nedelsky, *supra* note 2, at 342, 345–46, 348–50 (stating Anti-Federalists were critical of the belief that the elite would pursue the public good).

They also are both suspicious of complex institutions.[6] I think something that oftentimes gets overlooked in discussions about institutional complexity is the role of complex laws. Anti-Federalists and populists embrace the idea that laws—as well as institutions—ought to be simple and understandable by everybody.[7] I'm guessing that, whatever stage you're at in law school right now, you're beginning to see that simplicity might not be one of the advantages of our system.

Nonetheless, I don't think that we can fairly categorize the Anti-Federalists as a variety of proto-populist. Their advocacy for simple institutions, direct government, and the preeminence of the will of the common citizen was premised on beliefs about the function of a political community's size that populism doesn't share.[8] So at the end of the day, I suspect that the Anti-Federalists might actually be more critical of populism than they were of the Federalists. And by the end of my talk, I hope I will have explained why.

Of course, American populism varies over time, and it varies around the globe.[9] So, before proceeding to distinguish the Anti-Federalists from the populists, I'll take just a moment to clarify the facets of populism that I am focusing on and mean to refer to when I say "populist" or "populism." I thought that for today's purpose the best thing to do was to try to sketch populism as broadly as I

---

6. Miller, *supra* note 5, at 1051 (describing the populist use of the ballot initiative as a means to cut through the "slow, careful, iterative, and compromise-oriented nature of legislative action"); HERBERT J. STORING, WHAT THE ANTI-FEDERALISTS WERE *FOR* 53–63 (1981).

7. Miller, *supra* note 5, at 1051; STORING, *supra* note 6, at 53–63.

8. STORING, *supra* note 6, at 15–23. "It was thought to have been demonstrated, historically and theoretically, that free, republican governments could extend only over a relatively small territory with a homogenous population." *Id.* at 15. In contrast, the Populists entered the political arena as the United States was expanding into a nation far exceeding the size of the fledgling Union that the Anti-Federalists thought too large.

9. *See* Mark Tushnet & Bojan Bugarič, *Populism and Constitutionalism: An Essay on Definitions and Their Implications*, 42 CARDOZO L. REV. 2345, 2348 (2020) ("[P]opulisms may share a family resemblance, but the family is an extended one whose dispersal around the world has produced members who could have little to say to each other at a family reunion.").

can, so that we can focus on some of its aspects that are relevant to today's political movements. So what's my extremely simplified version of populism? Well, it has two elements or, if you will, a two-prong test: (1) direct rule (2) by the citizenry.[10]

Let me first start with the simpler of these two prongs: "by the citizenry." The key quality of "the citizenry" in this test is that those who legislate and execute the government cannot be limited to the subset of the people who are either experts or any other kind of elites.[11] There are two reasons for this. First, populists believe that those individuals who aren't of the people are more corruptible, perhaps because they're more morally suspect because of their elite status or because of some intrinsic worth of the common citizen.[12] The second reason, I believe, is less controversial: they believe that elites—like the common citizen—will rule in their own interests.[13] According to this logic, common-citizen rule is better because it is in the interest of the common citizen, and elite rule is worse because it will favor the elites and not the common citizen and hence not the common good.[14]

Then, there is the direct rule prong of the populism test that I have devised for today. I will use the federal constitution's avoidance of direct rule by way of comparison. I think we all know that our national government is designed, in a sense, to check the will of the people, because sometimes 51% of the people can be incredibly imprudent or even horrifically unjust. The complexity of our government structure is designed to maintain the will of the citizenry—

10. *See* Donnelly, *supra* note 4 ("Assembled on the anniversary of the birthday of the nation, and filled with the spirit of the grand general and chief who established our independence, we seek to restore the government of the Republic to the hands of the 'plain people,' with which class it originated.").

11. *See* Donnelly, *supra* note 4.

12. *See* Miller, *supra* note 5, at 1043.

13. *See* Miller, *supra* note 5, at 1043*; see also* Donnelly, *supra* note 4.

14. *See, e.g.*, Miller, *supra* note 5, at 1043; Donnelly, *supra* note 4 (decrying political parties for struggling for power to the detriment of the people and declaring that "[c]orruption dominates the ballot-box, the Legislatures, the Congress, and touches even the ermine of the bench.").

but only ultimately. Along the way to implementation—or to complete and final implementation—the will of the citizenry is moderated through institutions that delay, that require negotiation among factions, and that bolster the rule of law when it is in tension with the will of the citizenry. By contrast, populism does not seek to delay or moderate implementation of the popular will, and to the extent that it may sometimes bolster the rule of law it does so less vigorously than the Federalists wished to see this done. The emphasis of populism is on weeding out corruption—which it defines as anything contrary to the will of the common citizen—and getting things done thoroughly and quickly. You might say that populism's methods employ simplification, speed, and—if need be—overcoming or eradicating procedural and legal barriers (such as the Constitution) to government action.

So do the Anti-Federalists agree with this platform of a more direct rule, a rule by the common citizen? I think they do, at least by and large. Their fears and warnings about the Constitution include warnings of elite rule—whether the claim to elite rule is based on wealth, expertise, or claims about the inadequacy of the common citizen.[15] The Anti-Federalists warned about the potential for corrupt rule[16] that they associated with both rule by elites and with complex government. And they insist that the government must follow the will of the majority—the will of that 51%—which they think requires clear lines of division between the major branches of government and short terms.[17] Clear lines of division between the

15. *See* Brutus I, *supra* note 4, at 109 ("tyrannic aristocracy").

16. *See* Melancton Smith, Address in the Course of Debate by the Convention of the State of New York on the Adoption of the Federal Constitution (June 25, 1788), *reprinted in* THE ANTI-FEDERALIST: AN ABRIDGMENT, *supra* note 4, at 351 ("Certainly, the congress will be as liable to corruption as other bodies of men. Have they not the same frailties, and the same temptations?").

17. *See* Letters from The Federal Farmer: Letter III (Oct. 10, 1787), *reprinted in* THE ANTI-FEDERALIST: AN ABRIDGMENT, *supra* note 4, at 47 (critiquing the mixing of branch functions under the Constitution); Allen et al., *supra* note 2, at xxi ("Because the Anti-federalists were dubious about being both democratic and national, they urged less

separate branches of the government are required, because you need to know who is responsible for a government action,[18] and short terms are required so that once you understand who is responsible for something that is not the will of the people, you can get those folks out of office.[19] They wanted, as Michael Zuckert calls it, a short-leash republic.[20] So, yes, the Anti-Federalists have quite a bit in common with populists: they do want more direct rule by the common citizen. But this, I believe, does not indicate that they qualify as proto-populists. I'll spend the rest of my time articulating why.

The Anti-Federalists' insistence on a simple government dominated by the will of the citizens is premised on a belief in a necessary connection between free self-government and local or regional government. I am going to call it "small government" today, but I do not necessarily mean this a government that is not doing a lot. What I mean is that the size of the territory or the number of people being governed is small. The Anti-Federalists' theories are premised on the idea that a republic must be small in this sense. This is

---

independence for the elected representatives. . . . For the Antifederalists, a responsible representative—the essential characteristic of republicanism—was one who was constitutionally obliged to be responsive to the sovereign people.").

18. *See* Centinel I (Oct. 5, 1787), *reprinted in* THE ANTI-FEDERALIST: AN ABRIDGMENT, *supra* note 4, at 16 (arguing that government should be kept simple so that the people know which representatives to hold responsible).

19. Cato V (Nov. 22, 1787), *reprinted in* THE ESSENTIAL ANTIFEDERALIST, *supra* note 2, at 202–03.

20. *See generally* Michael P. Zuckert, *The Political Science of James Madison*, *in* HISTORY OF AMERICAN POLITICAL THOUGHT 149–66 (Bryan-Paul Frost & Jeffrey Sikkenga eds., 2003) (contrasting the Anti-Federalist vision of "short-leash" republicanism with the "long-leash" proposals of Madison and the Federalists). According to Zuckert, the central idea in short-leash republicanism was "not to have gaps, either within the society (i.e., all were to have the same interests so far as possible) or between government and society," because "the development of an identity and interest separate from the people—that is, gaps—appeared to be the source of all political evil." *Id.* at 156.

why they so vehemently respond, not only to the form of the Constitution, but to the fact of a national constitution.[21] At the end of the day, if they have to accept the fact of a national Constitution, they want to debate that form. But they are also objecting to becoming one national government over a large expanse of land and a large population.[22] I do not think we can understand their critique of the Constitution's form without understanding their critique of the size and population of the nation.

Why do they have this issue about the size of the government? Brutus I-IV is probably the best source for an encapsulated, one-stop-shopping, primary-source answer to this question.[23] But you can also find a defense of the small republic (albeit in less concentrated form) in Centinel,[24] Federal Farmer,[25] Agrippa,[26] Melancton Smith,[27] Cato,[28] and in other Anti-Federalist writers as well.

To return to answering this question: there are three main reasons why the Anti-Federalists believe that a small republic is the only free republic. First, the Anti-Federalists think that a free government must be a government where people assent to the rule. That was their definition of free government: A free government is a

21. STORING, *supra* note 6, at 24–28 (arguing that, as a group, the Anti-Federalists objected to the total amount of power granted to the federal government under the Constitution).

22. STORING, *supra* note 6, at 15–23.

23. *See* Brutus I-IV, *reprinted in* THE ANTI-FEDERALIST: AN ABRIDGMENT, *supra* note 4, at 108-133; *see also* Michael P. Zuckert & Derek A. Webb, *Introduction* to THE ANTI-FEDERALIST WRITINGS OF THE MELANCTON SMITH CIRCLE, at xiii (Michel P. Zuckert & Derek A. Webb eds., 2009) (noting Brutus's prominence among Anti-Federalist writers).

24. Centinel I, *supra* note 18, at 7-22.

25. *See* Letters from The Federal Farmer, I-VII & XVI-XVII, *reprinted in* THE ANTI-FEDERALIST: AN ABRIDGMENT, *supra* note 4, at 23–101.

26. *See* Letters of Agrippa, I-XI, *reprinted in* THE ANTI-FEDERALIST: AN ABRIDGMENT, *supra* note 4, at 227-53.

27. *See* Speeches of Melancton Smith, *reprinted in* THE ANTI-FEDERALIST: AN ABRIDGMENT, *supra* note 4, at 329–59; *see also* Zucker & Webb, *supra* note 23, *passim*.

28. *See* Cato III (Oct. 25, 1787), *reprinted in* THE ESSENTIAL ANTIFEDERALIST, *supra* note 2, at 26-29.

government where people assent to the rule.[29] And the Anti-Federalists fundamentally thought this was impossible over a large population, spread out over a large piece of land, because—as they said—there will simply be too many different interests.[30] You might think of this as too many types of people. But I think that phrasing it this way tends to make us focus disproportionately on specific kinds of difference, like race and ethnicity, that we focus on more than they did. Additionally, they're worried about the fact that in a larger nation, there are more different types of industrial and economic interests; similarly, the more expansive the nation, the more types of different geographic needs.[31] Historical interests enter the picture too: there are cultural differences that spring from the different histories of Alaska relative to Virginia, relative to Manhattan.[32] Even the histories of, say, Houston, Jacksonville, and the Keys—while they share a lot relative to the nation as a whole—are

29. Brutus I, *supra* note 4, at 114 ("In every free government, the people must give their assent to the laws by which they are governed. This is the true criterion between a free government and an arbitrary one. The former are ruled by the will of the whole, expressed in any manner they may agree upon; the latter by the will of one, or a few.").

30. Brutus I, *supra* note 4, at 114 ("In a republic, the manners, sentiments, and interests of the people should be similar. If this be not the case, there will be a constant clashing of opinions; and the representatives of one part will be continually striving against those of one another. This will retard the operations of government, and prevent such conclusions as will promote the public good. If we apply this remark to the condition of the United States, we shall be convinced that it forbids that we should be one government."); *see generally* Cato III, *supra* note 28, at 26-29.

31. Brutus I, *supra* note 4, at 114 ("The United States includes a variety of climates. The productions of the different parts of the union are very variant, and their interests, of consequence, diverse. Their manners and habits differ as much as their climates and productions; and their sentiments are by no means coincident. The laws and customs of the several states are, in many respects, very diverse, and in some opposite; each would be in favor of its own interests and customs, and, of consequence, a legislature, formed of representatives from the respective parts, would not only be too numerous to act with any care or decision, but would be composed of such heterogenous and discordant principles, as would constantly be contending with each other.").

32. Allen et al., *supra* note 2, at xxiii ("Making general laws that would apply to the needs of Maine and Georgia would neither address the important local needs of either state nor attract the support of the local inhabitants.").

diverse and create a diverse set of history-related differences among the desires and needs of the peoples of those cities.

What the Anti-Federalists have noticed and focus on is that laws written for a broader set of differences and interests will naturally be more complex. Laws that apply to a broader set of interests—which is to say to a more diverse set of individuals and their interests—will have to be more complex because they must apply to more different scenarios. The complexity, of course, is a problem from the perspective of desiring a simpler, short-leash republic, but ultimately the Anti-Federalists simply think that—even at the cost of complex laws—it isn't possible to get a free government if you have to govern over citizens with a very broad set of interests.[33]

They argue that citizens so different from one another simply would not consent to one set of rules. Their definition of free government requires consent to the law, so they therefore argue that a free government isn't possible over a nation that holds too many different types of citizens. Instead, they argue that a large nation is going to become one of two things: either it's going to be a giant homogenization machine,[34] or it's going to be despotic and ruled by force.[35] It has to be either homogenization or despotism because there's simply no set of rules that everyone can agree on. And I leave it to you to think about how those two factors (homogenization and despotism) may have been at work over the course of

33. Brutus I, *supra* note 4, at 113 ("[W]e shall be constrained to conclude, that a free republic cannot succeed over a country of such immense extent, containing such a number of inhabitants, and these increasing in such rapid progression as that of the whole United States."); *see generally* Cato III, *supra* note 28, at 26-29.

34. Allen et al., *supra* note 2, at vii (characterizing the Antifederalists as believing that the Constitution would promote "political homogeneity over a vast territory").

35. Brutus I, *supra* note 4, at 115–16 ("In despotic governments . . . standing armies are kept up to execute the commands of the prince or the magistrate, and are employed for this purpose when occasion requires: But they have always proved the destruction of liberty, and [are] abhorrent to the spirit of a free republic . . . In so extensive a republic, the great officers of government would soon become above the controul of the people, and abuse their power to the purpose of aggrandizing themselves, and oppressing them.").

American history. But to the Anti-Federalists a small nation is necessary because fewer interests are the only way to escape those two potential fates. Fewer total interests, they argue, are essential to free government and to the continuation of difference across political communities.

Fewer total interests in the country also turn out to be key to the second benefit of a small nation—the capacity for a "mirror legislature." A mirror legislature is a legislature that actually resembles the people, and it is easiest to explain in contrast to the Federalists' goal for Congress. In large part, the Federalists want a legislature that was better than the people. Not necessarily morally better, but more competent at least.[36] They thought of picking legislators almost the way you might think of picking players for a national basketball team: the bigger the country, the more likely that your large pool will contain more amazing talent.[37] The Anti-Federalists reject this. In contrast to the Federalists, the Anti-Federalists don't want the best potential legislators. Instead, they want a legislature that "mirrors" the citizenry.[38] Thus, for example, they want all of the

36. THE FEDERALIST NO. 10, at 47 (James Madison) (George W. Carey & James McClellan eds., Liberty Fund Gideon ed. 2001) ("In the next place, as each representative will be chosen by a greater number of citizens in the large than in the small republic, it will be more difficult for unworthy candidates to practise with success the vicious arts, by which elections are too often carried; and the suffrages of the people being more free, will be more likely to centre on men who possess the most attractive merit, and the most diffusive and established characters.").

37. *Id.* ("In the first place, it is to be remarked, that however small the republic may be, the representatives must be raised to a certain number, in order to guard against the cabals of a few; and that however large it may be, they must be limited to a certain number, in order to guard against the confusion of a multitude. Hence the number of representatives in the two cases not being in proportion to that of the constituents, and being proportionally greatest in the small republic, it follows, that if proportion of fit characters be not less in the large than in the small republic, the former will present a greater option, and consequently a greater probability of a fit choice.").

38. Brutus I, *supra* note 4, at 115–16 ("If the people are to give their assent to the laws, by persons chosen and appointed by them, the manner of the choice and the number chosen, must be such, as to possess, be disposed, and consequently qualified to declare the sentiments of the people; for if they do not know, or are not disposed to speak the

trades represented—all of the different kinds of professions represented—at least down to what we would define as lower middle class.[39]

The Anti-Federalists want a small nation that can be mirrored in its legislature for a few reasons. This mirror legislature plan is motivated by a belief that the legislators, even if neither more virtuous nor more capable as politicians, will actually perform their functions with more expertise and more faithfulness than those in a large nation. Because they come from more walks of life and represent a smaller variety of individuals, the Anti-Federalists think that the mirror legislature has a more thorough knowledge of the people it represents and is thus going to be able to write laws better adapted to those individuals. Because the representatives in a mirror legislature can be friends and neighbors to the whole, small community, they will have warmer feelings towards constituents

---

sentiments of the people, the people do not govern, but the sovereignty is in a few. Now, in a large extended country, it is impossible to have a representation, possessing the sentiments, and of integrity, to declare the minds of the people, without having it so numerous and unwieldly, as to be subject in great measure to the inconveniency of a democratic government.").

39. Brutus III, *supra* note 23, at 124–25 ("The very term, representative, implies, that the person or body chosen for this purpose, should resemble those who appoint them—a representation of the people of America, if it be a true one, must be like the people. It ought to be so constituted, that a person, who is a stranger to the country, might be able to form a just idea of their character, by knowing that of their representatives. They are the sign—the people are the thing signified. . . . This extensive continent is made up of a number of different classes of people; and to have a proper representation of them, each class ought to have an opportunity of choosing their best informed men for the purpose. . . . In this assembly, the farmer, merchant, mecanick, and other various orders of people, ought to be represented according to their respective weight and numbers. . . . The great body of the yeomen of the country cannot expect any of their order in this assembly [the proposed Congress]. . . ."); Allen et al., *supra* note 2, at xxiv (arguing that the Antifederalists were critical of the Constitution because there "were no places in the government for the yeomen middle class, and no checks upon those who were unlikely to rule in the interests of the middle class.").

who are literally their neighbors: they will have less desire to oppress the people living in the house next door than they would strangers living across the country.[40]

The desires of the members of a mirror legislature will also be more in line with the will of the citizens, not just because of the love of one's neighbor and the legislators' superior knowledge of the issues, but perhaps most of all because of self-interest.[41] By virtue of its size, the small republic simply has fewer total interests.[42] Therefore, the mirror legislature in a small republic—if it has short term limits and simple government—will always act in the interests of the people as understood by the people.[43] It's not going to oppress the people, the Anti-Federalists argue, because it *is* the people. That was really the line of their argument.

---

40. *See* Brutus I, *supra* note 4, at 113–16; Brutus III, *supra* note 23, at 124–26; Cato III, *supra* note 28, at 26-29. *See also* Brutus IV, *supra* note 23, at 127–28.

41. *See* Allen et al., *supra* note 2, at xxv (noting that the "the proposed scheme of representation also excluded the power of recall, frequent elections, and rotation of office, the local interests of the yeoman citizen, or owner of small business enterprises – the middling interests of the country who genuinely have the national interest in mind – would not be constantly present to the representatives in Congress."). *See also* Michael Zuckert, *The Virtuous Polity, the Accountable Polity: Liberty and Responsibility in "The Federalist," in* PUBLIUS: THE JOURNAL OF FEDERALISM 22, 132–37 (1992) (explaining the mirror-image theory of representation and comparing the Federalist theory of representation to the Anti-Federalist insistence on the identity of ruler and ruled).

42. *See* Brutus I, *supra* note 4, at 113 (quoting MONTESQUIEU, THE SPIRIT OF THE LAWS 124 (Cohler et al. eds., Cambridge Univ. Press 1989) (1748) ("It is natural to a republic to have only a small territory, otherwise it cannot long subsist. In a large republic there are men of large fortunes, and consequently of less moderation; there are trusts too great to be placed in any single subject; he has interest of his own; he soon begins to think that he may be happy, great and glorious, by oppressing his fellow citizens; and that he may raise himself to grandeur on the ruins of his country. In a large republic, the public good is sacrificed to a thousand views; it is subordinate to exceptions, and depends on accidents. In a small one, the interest of the public is easier perceived, better understood, and more within the reach of every citizen; abuses are of less extent, and of course are less protected.")

43. Brutus III, *supra* note 23, at 124-25. *See also* Brutus III, *supra* note 23, at 126 (referring to "[t]he well born, and highest orders in life, as they term themselves, will be ignorant of the sentiments of the midling class of citizens, strangers to their ability, wants, and difficulties, and void of sympathy, and fellow feeling.").

Finally, the Anti-Federalists argue that national size impacts national virtue.[44] I think this is one of the more overlooked—but most intriguing—ideas about small republics. So populists tend to have a rhetoric that says elite bad, ordinary person good.[45] They indicate that there's a moral difference between an elite and an everyday person. You can also find that rhetoric in the Anti-Federalists, but I think that their more profound point, and a point that they do make over and over again, is that there is something corrupting about power itself.[46] This more profound point, when applied to nation size, is the one that the populists miss: if power corrupts, then to avoid corruption, it is imperative to avoid becoming a powerful nation.

Fundamentally, the Anti-Federalists want a smaller nation so that it will have less power. They want their nations to have less power, so that their nation's citizens and its leaders will be less corrupted by power.[47] In other words, they think that life in a large nation—which will necessarily be led and culturally shaped by its more powerful officers—will fan ambition and love of glory in the human heart.[48] If you create a great nation, they argue, great leaders will come forward to lead it away from its true common good.[49]

---

44. *See generally* Brutus I, *supra* note 4, at 113; Brutus III, *supra* note 23.

45. *See* Donnelly, *supra* footnote 4 ("The fruits of the toil of millions are badly stolen to build up colossal fortunes for a few, unprecedented in the history of mankind; and the possessors of these, in turn, despise the Republic and endanger liberty.").

46. *See* Brutus I, *supra* note 4, at 113 ("Besides, it is a truth confirmed by the unerring experience of ages, that every man, and every body of men, invested with power, are ever disposed to increase it, and to acquire a superiority over every thing that stands in their way. This disposition, which is implanted in human nature, will operate in the federal legislature. . . .").

47. Brutus I, *supra* note 4, at 113 (quoting BARON DE MONTESQUIEU, THE SPIRIT OF THE LAWS); Cato III, *supra* note 28, at 26-29.

48. Brutus I, *supra* note 4, at 116 ("When [great offices] are attended with great honor and emolument, as they always will be in large states, so as greatly to interest men to pursue them, and to be proper objects for ambitious and designing men, such men will be ever restless in their pursuit of them."); *see also* Brutus II, *supra* note 23, at 119.

49. Brutus I, *supra* note 4, at 116 ("In so extensive a republic, the great officers of government would soon become above the control of the people, and abuse their power to the purpose of aggrandizing themselves . . . .").

You will create a culture in which people are rewarded and praised for being powerful and therefore aspire to power.[50] In such a nation, both the quality of the leaders and the quality of the people they lead will be lower because of the capacity of the presidency (especially) to attract those susceptible to the love of glory.[51] The human heart craves glory, and this is not a love that should be tempted, they thought.[52]

I don't think that today's populists take any of these concerns about large republics seriously. To the best of my knowledge, populists are not concerned that a large nation with many interests cannot be ruled freely; I doubt very much if they are concerned with the possibility that it must be ruled either by despotism or homogenization. I don't think the relationship between nation size and inability to have a mirror legislature is among their concerns. But more troubling yet, I think, is their lack of concern about combining the large republic created by the Federalists with the short-leash republic ideas that they—the populists—share with the Anti-Federalists. As either the Anti-Federalists or the Federalists could have told them, this is a dangerous combination: it's the most important reason why the Anti-Federalists should not be thought of as proto-populists.

Heading to D.C. to clean up the government in the fashion that today's populists desire to do might have some effects that the populists don't foresee. The danger is that, in taking back the nation, they clear the way for a power-loving tyrant that a large, powerful, and efficient nation has nurtured. Ancient history teaches, and the Anti-Federalists therefore well knew, that after a mob takes over, a tyrant steps forward to rule that mass movement. In other words, populists step into—or worse yet, create—positions of power to tear down the rights protecting devices necessary for a large nation (those very devices put in place by our friends the Federalists). To

50. *See* Brutus I, *supra* note 4, at 116. *See also* Brutus IV, *supra* note 23, at 127–28.

51. Brutus III, *supra* note 23, at 125–26; Cato V, *supra* note 19, at 201–03.

52. Cato V, *supra* note 19, at 201–03; *see also* Brutus II, *supra* note 23, at 119; *see generally* Brutus I, *supra* note 4, at 113–17.

simplify the government and make it more responsive to the people, the populists wish to tear down the devices designed by the Federalists to prevent their new invention from falling into the hands of a tyrant.

In the imagination of the Anti-Federalists, a tyrant is far more likely to be raised in the glory-loving culture of a large nation. And when a tyrant steps forward to direct and dominate the people, the tyrant's will is far less likely to be checked if the populists have first cleared the path for him by flattening the obstacles to tyranny erected by the Federalists.

A large nation is not just dangerous because of the difficulty of governing it well, the Anti-Federalists would argue; it is dangerous because, insofar as it is governed well, it creates an enormous temptation to those who love power in a culture that (because of its long-term exposure to the love of power) loves power.[53] Thus, I think the Anti-Federalists and the Federalists could agree that the populists might just clear the way for the next Caesar.

Thank you.

53. Cato V, *supra* note 19, at 202 ("Americans are like other men in similar situations, when the manners and opinions of the community are changed . . . and your political compact inexplicit, your posterity will find that great power connected with ambition, luxury, and flattery will as readily produce a Caesar, Caligula, Nero, and Domitian in American as the same causes did in the Roman empire.").

21ST CENTURY FEDERALISM: A VIEW FROM THE STATES

HON. JEFFREY S. SUTTON*

March 5, 2022

Thank you, Judge Rao, for the introduction, and thank you to UVA for hosting. My son graduated from the University of Virginia School of Law last year and was a member of the Federalist Society, so it's great to be back with you all. Thank you for inviting me.

It's hard to find a tasteful COVID story, but let me see if this one counts. In the Fall of 2020, I was teaching at Ohio State. And if you remember, that was not an easy time to teach or to manage a law school. Ohio State was trying to accommodate live learning, hybrid, and a little of everything.

On the first day of class, we are in an auditorium about this size at Ohio State, and we have the folks that are online projected on the screen. And then I have students suitably spaced in front of me, everyone with masks. And if you've taught with a mask or spoken for a long time with a mask, you know it's not easy. Your mouth gets dry, and it's just not great, but of course necessary, certainly back then.

And just as class was about to begin, I thought to myself, "Ah, I should have brought a bottle of water. One, my mouth's going to get dry. And two, it's a great explanation for keeping your mask down for a little while." But then I remembered that Ohio State, to its credit, put together a COVID-precaution goody bag. It had instructions, Ohio State masks, wipes, and at the bottom, a bottle of

* Chief Judge, United States Court of Appeals for the Sixth Circuit.

water. So just as we're about to start, I grab it, take a big sip, and then pause, "What is that?" *Sanitizer*.

To my credit, I did not spit it out on the people in front of me. And then I'm thinking to myself, seventh grade science, "Is this one of those poisons you extract, or do you dilute it? This must be a dilution situation." I don't tell the students what's going on. It's the first day of class, and it's still within the add-drop period. Who takes a class from somebody who drinks sanitizer?

So I calmly walk out of the class. Amazingly, for all its precautions, Ohio State left the water fountains going. And so I was able to drink a lot of water, get back in, and never tell my students what happened. And let me just alert you here: I don't think you need this alert, but the sanitizer taste does not go away quickly.

Some of you are thinking, "Well, there was a silver lining, right? You just had this big shot of alcohol, and what's not to like about that?" Well, I'm not a scientist, but there must be at least two types of alcohol. Hand sanitizer has none of the properties you might be thinking of. It just tastes really bad. So congrats to UVA for getting a really smart speaker to start things off.

I want to open by thinking about state courts, state constitutions, and federalism through a few lenses. The first is that of careers. I was not able to hear Governor Glenn Youngkin's remarks yesterday, but I was thrilled to hear that he recommended careers in state government, because I do too.

My biggest break as a lawyer was becoming the Solicitor General of Ohio in the mid-1990s. It may be true, as one of the professors said in the last panel, that going to Columbus is not as prestigious as going to D.C. I'm not so sure. I guess it depends on how you define prestige. If you define prestige as getting something done, I would say going to Columbus or Richmond is more prestigious.

But put prestige aside. The real point is that the states are nimbler and are a great place to go as a young lawyer if you want responsibility. Serving as Ohio's Solicitor General was the key break in my career. Maybe more importantly, it was my favorite job. I love my

current job, but I never had a better job than being Solicitor General of Ohio. So, that's from the perspective of careers.

I'll turn now to the perspective of the rule of law. It's the rare law student that doesn't have some idealism. There can be practical reasons for going to law school, but I'd like to think most law students go to law school with some idealism in mind. They care about things like justice, rule of law, or fairness.

In this country, if you care about the rule of law, you must care about the state courts and the state constitutions that go with them.[1] In the last year for which we have numbers, 83,000,000 civil and criminal cases were filed in state courts.[2] The counterpart number in the federal courts is 400,000.[3] Eighty-three million to 400,000. If you drill down to just the criminal cases, it is 17,000,000 to 70,000.[4] With over 200 state criminal cases for every one federal criminal case, the states are where most liberties are lost or preserved and where the rule of law exists or does not.

So, I don't know how you can care about the rule of law and not care about what's going on in state courts. That is where so much of the action is. Every one of those cases, of course, is a case where state constitutions could make a difference. I can't resist saying that this probably explains why we have only one state court judge on the panel and two federal judges—because federal judges don't have as much to do. And the state court judges are so busy. They

1. *See* JEFFREY S. SUTTON, 51 IMPERFECT SOLUTIONS: STATES AND THE MAKING OF AMERICAN CONSTITUTIONAL LAW 1–2 (2018).

2. CT. STATS. PROJECT, NAT'L CTR. FOR STATE CTS., STATE COURT CASELOAD DIGEST: 2018 DATA 7 (2020), https://www.courtstatistics.org/data/assets/pdf_file/0014/40820/2018-Digest.pdf [https://perma.cc/27VE-R97L].

3. Admin. Off. of U.S. Cts., *Federal Judicial Caseload Statistics 2018* [hereinafter Admin. Off., *Statistics 2018*], U.S. CTS., https://www.uscourts.gov/statistics-reports/federal-judicial-caseload-statistics-2018 [https://perma.cc/A5EF-7TJ6] (last visited Aug. 14, 2022) (358,563 cases filed); Admin. Off. of U.S. Cts., *Federal Judicial Caseload Statistics 2020* [hereinafter Admin. Off., *Statistics 2020*], U.S. CTS., https://www.uscourts.gov/statistics-reports/federal-judicial-caseload-statistics-2020 [https://perma.cc/MU46-Z9MB] (last visited Aug. 14, 2022) (425,945 cases filed).

4. CT. STATS. PROJECT, *supra* note 2, at 7; Admin. Off., *Statistics 2018*, *supra* note 3. *But see* Admin. Off., *Statistics 2020*, *supra* note 3 (93,213 federal criminal cases filed).

couldn't possibly come to UVA for a panel, unless they are very smart—see Justice Goodwin Liu of the California Supreme Court.

You should care about state courts and state constitutions for another reason. From time to time, the United States Supreme Court puts up a big red stop sign. They just say, "We're not open for business in this particular area."[5] And that can happen with respect to so-called blue rights, red rights, progressive rights, conservative rights—keeping in mind the danger of labels. The point is, it's completely neutral.

Once the stop sign goes up, you have two options. Option A is to embrace unhappiness. But pity only works for a little while. Eventually, you're going to grow tired of not being able to act on your impulse or conviction in a given area.

Option B is to go to the states. That sometimes means state legislators, sometimes state supreme courts, and sometimes state constitutional amendments. If you think of the current era—the cases decided by the United States Supreme Court in the last decade or two, and the ones winding their way through the courts now—there are a lot of areas where there is already a red stop sign. Option B in state court is the only one available.

Examples come readily to mind. Redistricting, for instance. The *Rucho v. Common Cause*[6] decision in 2019 says the First and Fourteenth Amendments do not speak to the issue.[7] If, like me, you have a problem with extreme partisan gerrymandering, you're going to have to go to state legislatures, adopt state constitutional amendments, form commissions, and file lawsuits in state courts. This is an area where it's dangerous to believe in labels and easy categories, and state courts often don't do what you might expect. Ohio is

5. SUTTON, *supra* note 1, at 2–3.
6. 139 S. Ct. 2484 (2019).
7. *See id.* at 2499, 2505.

a good example: it's a fairly conservative state where the state supreme court has now invalidated the last two Republican redistricting lines after the most recent census.[8]

Consider a few more examples where state courts are the only available option. The Takings Clause and the *Kelo v. City of New London*[9] decision offer a similar story. Professor Mahoney has mentioned the difficulty of winning relief under the federal Takings Clause.[10] Abortion regulation is another example. Whether pre-*Dobbs* or post-*Dobbs*,[11] there is some room for state regulation of abortion. And conceivably, after-*Dobbs*, there'll be room for regulation at the state court level. School funding is also a good example.[12] Anyone who cares deeply about property rights, even outside of the Takings context, including impairment of contract, licensing, and economic liberties cases, should care about state courts. Economic liberties cases since *Williamson v. Lee Optical*[13] have been a tough hill to climb in federal court. It has been climbed some, but not a lot.[14] The same is not necessarily true in state courts under

8. Adams v. DeWine, Nos. 21-1428 & 21-1449, 2022 WL 129092, at *2 (Ohio Jan. 14, 2022); League of Women Voters of Ohio v. Ohio Redistricting Comm'n, Nos. 21-1193, 21-1198, & 21-1210, 2022 WL 1665325, at *2 (Ohio May 25, 2022). As of May 2022, the court had struck down five proposed redistricting plans. *League of Women Voters*, 2022 WL 1665325, at *1.

9. 545 U.S. 469 (2005).

10. *See generally* Ann Woolhandler & Julia D. Mahoney, *Federal Courts and Takings Litigation*, 97 NOTRE DAME L. REV. 679 (2022).

11. *Dobbs*, Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228 (2022), was ultimately decided June 24, 2022.

12. *See* San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 55 (1973) (refusing to recognize a constitutional right to equal funding between and among public school districts).

13. Williamson v. Lee Optical Co., 348 U.S. 483 (1955).

14. *See, e.g.*, Brantley v. Kuntz, 98 F. Supp. 3d 884, 894 (W.D. Tex. 2015); *see also* Golden Glow Tanning Salon, Inc. v. City of Columbus, 52 F.4th 974, 981–84 (5th Cir. 2022) (Ho, J., concurring) (suggesting there is more historical support for a federal right to earn a living than many substantive due process rights that the federal courts recognize).

state constitutions. Judge Willett wrote a great concurrence in a recent case that illustrates that.[15]

My next point concerns what we might call the scholarly or theoretical perspective: how is it, or why is it, that a state court could take a different path from the United States Supreme Court? The United States Supreme Court puts up a stop sign, "We are not open for business in that area." Reasons abound for interpreting counterpart state guarantees differently.

Some reasons are obvious from the state constitutions themselves. I do not have the authority to impose a homework assignment, but I think as a matter of conscience you should do what I am about to ask, and it takes only five minutes. Pull out Article One of your state's constitution or the constitution of the state you are planning to practice in. You will learn a lot by reading Article One.

Article One in almost every state constitution is where the drafters put rights.[16] Professor Amar has pointed out that many states at the founding had a Declaration of Rights.[17] Today, they all have a Declaration of Rights.[18] They are sometimes called a Bill of Rights.[19] You will see they are not just the familiar provisions from the federal Bill of Rights and Fourteenth Amendment. You will see a lot of unique provisions, and then you will see a lot of similar provisions but with more specific language. For example, a state provision

15. *See* Patel v. Tex. Dep't of Licensing & Regul., 469 S.W.3d 69, 92–123 (Tex. 2015) (Willett, J., concurring). "Today's case arises under the *Texas* Constitution, over which we have final interpretive authority . . . [and] nothing in its 60,000-plus words requires judges to turn a blind eye to transparent rent-seeking that bends government power to private gain, thus robbing people of their innate right—antecedent to government—to earn an honest living." *Id.* at 98; *see also* Ladd v. Real Est. Comm'n, 230 A.3d 1096, 1109, 1116 (Pa. 2020) (concluding that a licensing regime violated the Pennsylvania Constitution's right to pursue a chosen occupation).

16. *See, e.g.*, NEV. CONST. art. I; IDAHO CONST. art. I; TEX. CONST. art. I; ME. CONST. art. I; TENN. CONST. art. I; GA. CONST. art. I; FLA. CONST. art. I; VA. CONST. art. I; S.C. CONST. art. I; CAL. CONST. art. I; WASH. CONST. art. I.

17. AKHIL REED AMAR, THE WORDS THAT MADE US: AMERICA'S CONSTITUTIONAL CONVERSATION, 1760–1840, at 312 (2021).

18. Clint Bolick, *State Constitutions: Freedom's Frontier*, 16 CATO SUP. CT. REV. 15, 16 (2016).

19. *See, e.g.*, VA. CONST. art. I.

may protect free exercise, but also include a right to conscience.[20] They often have different words with a different meaning or more words, often with more meaning. That's a good reason to interpret those provisions differently from a parallel federal provision.

Local history and culture offer another explanation as to why a state court may choose to chart a different path. Think of states like Utah, Rhode Island, Maryland, and Pennsylvania; all were founded by religious dissenters.[21] It would be strange for them not to think of that history in construing their free exercise clause, potentially construing it in a more muscular way than, say, the United States Supreme Court did in *Smith*.[22] State courts have a free hand to customize constitutional guarantees to account for regional circumstances, while the United States Supreme Court may not.

The biggest areas of fundamental disagreement between state courts and the United States Supreme Court often have legitimate explanations. One explanation is that some constitutional provisions are written in the most general terms. What process is "due"? When is a search "unreasonable"? What speech is "free"? Those kinds of general terms frequently demand disagreement. It would be odd, it seems to me, to have them all mean the same thing for the whole country in fifty-one constitutions.

Here's an even better explanation for disagreement—one that applies in half the cases. Judges, appellate judges, in particular, take methods of interpretation seriously. We're not perfect, we don't always follow them consistently, but we do our best, and we do care about them.

---

20. *See, e.g.*, WASH. CONST. art. I, § 11.

21. *Path to Utah Statehood*, PBS, https://www.pbs.org/wgbh/americanexperience/features/mormons-utah/ [https://perma.cc/5Q25-J325] (last visited Aug. 7, 2022); *Religion and the Founding of the American Republic: America as a Religious Refuge*, LIBR. OF CONG., https://www.loc.gov/exhibits/religion/rel01-2.html [https://perma.cc/3AVY-8NWA] (last visited Aug. 7, 2022).

22. *See* Emp. Div., Dep't of Hum. Res. of Or. v. Smith, 494 U.S. 872, 890 (1990).

For all the labels out there about constitutional interpretation, federal constitutional law cases break down into two rough categories.[23] On one side, you've got formalism, fixed meaning, textualism, and originalist public meaning. On the other side, a more fluid, more evolving, more informal, more purposivist interpretive methodology. That is basically all of federal constitutional law.

Why is it worth identifying that dichotomy? Well, if the precedent at the federal level happens to be a more formal, originalist precedent, and you happen to be arguing in an informal court, a court that embraces living constitutionalism, a court that is less textual, you've just established that the federal precedent is presumptively wrong. If they take methods of interpretation seriously, they should think it's presumptively wrong. That means roughly half of the time state courts should find the relevant federal precedents not helpful.

The last reason for disagreement is that time has not been kind to all areas of federal constitutional law. Let me give you an illustration of one doctrine that you ought to be skeptical of. Think of the "tiers of review" that federal courts apply to some rights. That doctrine has grown and evolved. It started as two tiers of review and then became three with intermediate scrutiny, then we added rational basis plus.[24] By now, some say we have seven tiers of review.[25]

In a way, it looks legitimate—it's almost biblical, right? On the first day, God gave us rational basis, and the second day He gave

---

23. *See* JEFFREY S. SUTTON, WHO DECIDES? STATES AS LABORATORIES OF CONSTITUTIONAL EXPERIMENTATION 126 (2021); *see also* Gerard Clark, *An Introduction to Constitutional Interpretation*, 34 SUFFOLK U. L. REV. 485, 486 (2001) (breaking down the modes of constitutional interpretation into two categories).

24. *See* Joel Alicea & John D. Ohlendorf, *Against the Tiers of Constitutional Scrutiny*, 41 NAT'L AFFS. 72, 73–76 (2019) (tracing the history of the tiers of scrutiny); *see* Maxwell Stearns, Obergefell, Fisher, *and the Inversion of Tiers*, 19 U. PA. J. CONST. L. 1043, 1046–47 (2017) (arguing that there are five tiers of scrutiny, including rational basis plus).

25. R. Randall Kelso, *Standards of Review Under the Equal Protection Clause and Related Constitutional Doctrines Protecting Individual Rights: The "Base Plus Six" Model and Modern Supreme Court Practice*, 4 U. PA. J. CONST. L. 225, 226 (2002) (arguing that the U.S. Supreme Court has used as many as seven different standards of review).

us strict scrutiny, and so on. But at some point, we ought to acknowledge that the tiers of review are not inevitable; they don't stem from a clause in the Constitution.[26] Something else might deserve a try. There's balancing, as Justice Stevens long advocated.[27] There's class legislation, which was the model in the nineteenth century.[28] There are other options out there. And I doubt that "tiers of review" is the only federal constitutional doctrine that has not aged well. So it seems to me that there are often good explanations for state courts to chart a different course.

One last point. How is all of this good for federal constitutional law? First of all, if you're an originalist, it would be strange not to pay attention to state constitutions. In fact, I don't know how you can do originalism without paying attention, particularly to the development of state constitutions between 1776 and 1786.[29]

All of the key guarantees in the federal document come from one and often several state documents.[30] Cases like *Heller*, where the United States Supreme Court looked to state guarantees to interpret the Second Amendment right to bear arms, confirm that point.[31]

---

26. *See* Alicea & Ohlendorf, *supra* note 24, at 73.

27. *See, e.g.*, Craig v. Boren, 429 U.S. 190, 211–13 (1976) (Stevens, J., concurring).

28. *See* SUTTON, *supra* note 1, at 92–108, 115 (describing the class litigation model prior to *Buck v. Bell*, 274 U.S. 200 (1927)); *see also* Melissa L. Saunders, *Equal Protection, Class Legislation, and Colorblindeness*, 96 MICH. L. REV. 245, 252–53 n.29 (1997) (tracing the historical use of "class legislation" in the law from the mid- to late-nineteenth century).

29. *See* Gregory E. Maggs, *A Guide and Index for Finding Evidence of Original Meaning of the U.S. Constitution in Early State Constitutions and Declarations of Rights*, 98 N.C. L. REV 779, 811 (2020) (addressing the value of state constitutions when attempting to discern the ordinary meaning of words in the U.S. Constitution at the time of its adoption).

30. *See id.* at 781 ("James Madison relied heavily on the various state declaration of rights when he drafted the Bill of Rights in 1789."); SUTTON, *supra* note 23, at 122.

31. *See* District of Columbia v. Heller, 554 U.S. 570, 584–85, 591, 600–03 (2008); *see* Maggs, *supra* note 29, at 781–82 ("The Supreme Court, for instance, has cited early state constitutions and declarations of rights in more than one hundred cases [to make claims about the U.S. Constitution's original meaning]. One example is *District of Columbia v. Heller*, where the Court held that the Second Amendment protects an individual's right to keep and bear arms. In reaching this conclusion, the Court relied, in part, on provisions in four early state constitutions that were similar to the Second Amendment." (footnotes omitted)).

The second point turns on the Brandeis model of states as innovative laboratories.[32] This is a benefit of federalism that we can all embrace. Think of it this way. If you have a difficult problem, why experiment all at once with one country, three-hundred and thirty million people, fifty-one sovereigns, and God knows how many local governments?[33] It's better to let a smaller territorial government do the experimentation. If it works, the idea can spread.[34]

Brandeis's insight applies equally to federal constitutional law and rights innovation. Do we really want a top-down model where we race to D.C. and the winner takes all? Sure, it's great when you are the winner and you constitutionalize something you love, but it leads to a lot of resentment when the opposite happens.

Why don't we let states go first? With legislation, we often start with states and then nationalize proven solutions. The same ground-up approach works for courts and the development of constitutional interpretation of general terms or the innovation of new rights. Letting states be the primary agents of change is going to improve the United States Supreme Court's decisions. It's going to lower the resentment from counter-majoritarian decisions at the federal level, because states will be leading the way. And the odds are a little higher that you're going to get to a good outcome.[35]

The Brandeis model leaves us with a broader insight: Uniformity isn't everything. And that's a point I wish we would embrace more in America circa 2022. There are many areas of public policy where there are legitimate reasons for taking a different path. And one virtue of federalism is that it allows local governments, whether states

---

32. *See* New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) ("It is one of the happy incidents of the federal system that a single courageous state may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.").

33. *See United States Population 2022 (Live)*, WORLD POPULATION REVIEW, https://worldpopulationreview.com/countries/united-states-population [https://perma.cc/KE62-6DP4] (last visited Oct. 10, 2022) (stating that the United States population is currently over 338 million).

34. *See* SUTTON, *supra* note 23, at 373.

35. *See* SUTTON, *supra* note 1, at 2, 60–62.

or cities, to embrace one approach without imposing it on their neighbors.[36]

Thank you for inviting me.

36. *See* Kaytlin Roholt Lane, *Federalism, Now More than Ever*, 56 PENN. L.J. 4, 4 (2021) ("Federalism, [the Framers] believed, was the best way to ensure a harmonious union between separate states with distinct cultures and political preferences.").

"PARTLY FEDERAL, PARTLY NATIONAL": THE FOUNDERS' MIDDLE COURSE

MICHAEL MCCONNELL*

INTRODUCTION

I'd like to begin with a comment on Professor John Mikhail being here, because I think many of you in the room probably don't know him. He's not one of us—I think that's fair to say—but he is one of the five or six scholars around the country with the most comprehensive knowledge of the Founding. I've attended conferences with Professor Mikhail, especially the originalism conference in San Diego, for several years now. I invariably learned enormous amounts from him, even when I didn't necessarily agree with the conclusions that he reached. I open this way for two reasons that I think are actually important.

The first is that this says something about originalism: that originalism is a method for determining truths about the Constitution. It is not an ideology, and it is not merely a tool for lawyers to get to the results that they want. That Professor Mikhail can be as erudite and thoughtful a scholar in the originalist mode as he is, and be as far from many of us in the room as he is, is evidence of that, and I think that's a wonderful thing. The second, which might be more important, is that we live in a time when people are not talking to each other. There are significant scholars in law schools who ought to be ashamed of themselves, because they would not come to this room, and they have given up on the idea that one

* Richard and Frances Mallery Professor and Director of the Constitutional Law Center, Stanford Law School; Senior Fellow, Hoover Institution; Judge, United States Court of Appeals for the Tenth Circuit, 2002–2009.

should engage those with whom one disagrees on a scholarly plain. So, I am very happy to be able to be here on a platform with Professor Mikhail, who exemplifies an older spirit of scholarship.

I. THE FEDERALISTS AND THEIR OPPONENTS

Now, a slight criticism about the panel: I actually think we need to have three people up here because there really were three positions at the time of the Framing. There were the consolidationists, perhaps including James Wilson and Gouverneur Morris, with whom Professor Mikhail associates himself.[1] There were also the confederationists: those who wanted almost all serious power to be in the state level and for the national government not to be national in character really at all. Their ideal was to have some kind of souped-up version of the Articles of Confederation.[2] The federalists, though, rejected both of those extreme alternatives.

We would need a confederationist here to have the full range of alternatives, because I'm not going to defend that position. There are people today who believe that the confederationists prevailed

---

1. *See* Robert G. Natelson, *The General Welfare Clause and the Public Trust: An Essay in Original Understanding*, 52 U. KAN. L. REV. 1, 23–24 (2003) ("The perils of extreme decentralization, coupled with the understandable influence of British precedents, help explain why the first instinct of convention leaders was to propose a 'consolidated' rather than a 'federal' union."); 2 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION, at 424 (Jonathan Elliot ed., 1836) (consolidationist remarks of Rep. James Wilson); *see also* Kurt T. Lash, *Resolution VI: The Virginia Plan and Authority to Resolve Collective Action Problems under Article I, Section 8*, 87 NOTRE DAME L. REV. 2123, 2154 n.148 (2013) (citing JACK M. BALKIN, LIVING ORIGINALISM 146 n.27 (2011)); 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 26 (Max Farrand ed., 1911) [hereinafter FARRAND'S RECORDS] (consolidationist remarks of Gouverneur Morris).

2. *See* 1 FARRAND'S RECORDS, *supra* note 1, at 245 (James Madison recording the New Jersey Plan); *id.* at 27 (William Paterson on enlarging the Articles of Confederation); 3 FARRAND'S RECORDS, *supra* note 1, at 337 (letter of John Lansing Jr. on the goal of the convention); *id.* at 244 (letter of Robert Yates on the goal of revising the Articles of Confederation); *id.* at 179–80. (Luther Martin speech to the Maryland House of Representatives on his understanding of the purpose of the convention).

in their pursuit of a very strong states' rights position.[3] The confederationist argument is heard infrequently in law schools, but it certainly is something that one hears around the country. It's a real, serious position, but it is no more true than the consolidationist position that the federalists also rejected.

The truth, according to Madison, is that our Founders charted a middle course, creating a constitution that was partly national and partly federal.[4] Now, it wasn't just a silly, compromised, mushy-middle thing. They had a coherent theory of government, which did create a very powerful national government, but it was not one of—to quote the debate topic today—plenary power. The Constitution did not impart to the new national government what Professor Mikhail persistently refers to as a general welfare power. That was specifically rejected,[5] and the fact that the supporters and ratifiers of the Constitution went to the people and defended it on this ground–which Professor Mikhail concedes—is not something that we should dismiss. The Constitution gets its authority not from the men who designed it in Philadelphia, but from the people who ratified it in the thirteen states.[6]

Therefore, it really matters what the people thought and what they were told. Consequently, I believe that the Constitution creates

---

3. *See, e.g.*, RAOUL BERGER, FEDERALISM: THE FOUNDERS' DESIGN (1987).

4. THE FEDERALIST NO. 39, at 242–43 (James Madison) (Clinton Rossiter ed., 2003) ("The proposed Constitution" is "neither a national nor a federal Constitution, but a composition of both. In its foundation it is federal, not national; in the sources from which the ordinary powers of the government are drawn, it is partly federal and partly national; in the operation of these powers, it is national, not federal; in the extent of them, again, it is federal, not national.").

5. THE FEDERALIST NO. 45, at 289 (James Madison) (Clinton Rossiter ed., 2003).

6. *See* ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 38 (Amy Gutmann ed., 1997) ("I will consult the writings of some men who happened to be delegates to the Constitutional Convention—Hamilton's and Madison's writings in *The Federalist*, for example. I do so, however, not because they were Framers and therefore their intent is authoritative and must be the law; but rather because their writings, like those of other intelligent and informed people of the time, display how the text of the Constitution was originally understood….What I look for in the Constitution is precisely what I look for in a statute: the original meaning of the text, not what the original draftsmen intended.").

a partially federal, partially national government. The way Madison described it was, "the powers delegated by the proposed Constitution to the federal government are few and defined," and those left to the state governments are "numerous and indefinite."[7] Professor Mikhail takes a position along with the consolidationists: that the powers delegated to the federal government are unlimited and undefined,[8] and those left to the states are whatever pittance is left when the federal government exercises its unlimited plenary authority.

To be more specific, again quoting from Madison, the federal powers "will be exercised principally on external objects, as war, peace, negotiation," foreign commerce and taxation.[9] Madison then says, "[t]he powers reserved to the several States will extend to all the objects which, in the ordinary course of affairs, concern the lives, liberties, and properties of the people, and the internal order, improvement, and prosperity of the State."[10] That means ordinary administration of justice, criminal law, property and contract law, tort, family law, and the basic infrastructure of ordinary life.

Most Americans in the early years of the republic would never have occasion to encounter an officer of the federal government outside the port cities, where international commerce was taking place. The federal courts were the only institution of the national government that truly penetrated the interior.[11] Now, that is not how it eventually turned out. Look around; that is not the republic

7. THE FEDERALIST NO. 45, at 289 (James Madison) (Clinton Rossiter ed., 2003).

8. *See generally* John Mikhail, *The Constitution and the Philosophy of Language: Entailment, Implicature, and Implied Powers*, 101 VA. L. REV. 1063 (2015) (arguing that the Constitution, especially the Necessary and Proper Clause, gives the national government implied powers to fulfill its purpose); John Mikhail, *The Necessary and Proper Clauses*, 102 GEO. L.J. 1045, 1055 (2014).

9. THE FEDERALIST NO. 45, at 289 (James Madison) (Clinton Rossiter ed., 2003).

10. *Id.*

11. *See* Erwin C. Surrency, *A History of Federal Courts*, 28 MO. L. REV. 214, 215–16 (1963) (outlining the structure and location of Federal Courts during the early years of the United States).

that we have today. Today, the United States resembles the consolidated union that the Anti-Federalists warned about, although I don't think we're all the way there.

When you look at what States do today, their continuing importance to the political dynamic of the United States is apparent—our national structure continues to have substantial federal, nonnational elements.[12] Still, we're a lot closer to a consolidated republic than we were at the beginning. Now, why has that happened? I think a fair summary of Professor Mikhail's position is that plenary federal authority was intentionally baked into the cake from the beginning and then sold to the American people with false advertising. But I don't think that's how it happened. I think it happened because of a series of changes between the Founding and today.

II. CAUSES OF THE MOVE TOWARD A CONSOLIDATIONIST CONSTITUTION

Most importantly, the people made a deliberate decision to eliminate the key protection of State interests in the original Constitution: the Seventeenth Amendment.[13] The original idea was that each branch, including the States, had a check on all the others. The State's check on the federal government was the Senate because the State legislatures chose the Senators.[14] The federal government could not enact any law without the agreement of a majority vote of the Representatives of the State legislatures.[15]

---

12. Michael W. McConnell, *Federalism: Evaluating the Founders' Design*, 54 U. CHI. L. REV. 1484, 1509 (1987).

13. U.S. CONST. amend. XVII. *See also* Jay S. Bybee, *Ulysses at the Mast: Democracy, Federalism, and the Sirens' Song of the Seventeenth Amendment of the Seventeenth Amendment*, 91 NW. U. L. REV. 500 (1997).

14. THE FEDERALIST NO. 62 (James Madison). *See* 2 FARRAND'S RECORDS, *supra* note 1, at 150–56.

15. Todd J. Zywicki, *Beyond the Shell and Husk of History: The History of the Seventeenth Amendment and Its Implications for Current Reform Proposals*, 45 CLEV. ST. L. REV. 165, 180–81 (1997) (explaining the Senate's original role as an anti-democratic institution). *See* THE FEDERALIST NO. 62, at 375 (James Madison) (Clinton Rossiter ed., 2003)

It's difficult to think of a more effective way to protect the interests of the States against a consolidated national government. But we, the people, in our wisdom, eliminated that check. Consequently, our Constitution is without a mechanism or enforcement device to prevent the accretion of power at the national level. I'm much more of a constitutionalist than an Anti-Federalist or Federalist; regardless of whether we like these changes or not, we have to live with them because that's what the people decided, and that is our Constitution today.

Today, the only protection States have against the usurpations of the federal government are the federal courts.[16] And last time I looked, federal judges are employees of the federal government. They're part of the apparatus. That is not a sensible way to maintain a federal and state balance. That wasn't what the founders did;[17] that's what we, the people, did with the Seventeenth Amendment.

And that's not the only thing. The people also amended the Constitution in other ways which augmented federal power at the expense of the States. The Sixteenth Amendment authorized the federal government to collect an income tax.[18] Prior to that, the federal government had to rely upon tariffs, which today are just a tiny proportion of its revenue.[19] But the income tax is not just about

16. Michael W. McConnell, *What Are the Judiciary's Politics?*, 45 PEPP. L. REV. 455, 469, 471
(2018).

17. *See generally* THE FEDERALIST NO. 62 (James Madison).

18. U.S. CONST. amend. XVI.

19. CHRISTOPHER A. CASEY, CONG. RSCH. SERV., IF11030, U.S. TARIFF POLICY: OVERVIEW 2 (2022) ("Over the past 70 years, tariffs have never accounted for much more than 2% of total federal revenue."); OFF. OF MGMT. & BUDGET, EXEC. OFF OF THE PRESIDENT, HISTORICAL TABLES, TABLE 2.2—PERCENTAGE COMPOSITION OF RECEIPTS BY SOURCE: 1934–2027, https://www.whitehouse.gov/omb/budget/historical-tables/ [https://perma.cc/CL9J-E3PN].

money coming out of our pocketbooks. It gave the national government a claim on the entire wealth of the United States.[20] And he who has the money has the power.

Now the federal government has all the money and the states come begging to the federal government for assistance.[21] Because the federal government can attach conditions to outlays of money,[22] the stage is set for a powerful national government. Don't blame that on the Founders if you don't like it: blame it on the people for adopting the Sixteenth Amendment. My point is not that these amendments are good or bad, but simply that they exist, and a constitutionalist must embrace them. They are part of the Constitution, just as much as the original Constitution of 1787 is. And a constitution with the Sixteenth and Seventeenth Amendments is far closer to being a consolidationist constitution than the one that the Framers created.[23]

---

20. *See* MOLLY F. SHERLOCK & DONALD J. MARPLES, CONG. RSCH. SERV., R45145, OVERVIEW OF THE FEDERAL TAX SYSTEM IN 2022 2 (2022) ("For FY2021, $2.0 trillion, or 50.5% of the federal government's revenue, was collected from the individual income tax."); Douglas Laycock, *Notes on the Role of Judicial Review, the Expansion of Federal Power, and the Structure of Constitutional Rights*, 99 YALE L.J. 1711, 1736-37 (1990) (reviewing ROBERT F. NAGEL, CONSTITUTIONAL CULTURES: THE MENTALITY AND CONSEQUENCES OF JUDICIAL REVIEW (1989)).

21. *See* U.S. CENSUS BUREAU, 2020 ANNUAL SURVEY OF STATE GOVERNMENT FINANCES (2020), STATE GOVERNMENT FINANCE TABLE: 2020, https://www.census.gov/data/tables/2020/econ/state/historical-tables.html [https://perma.cc/CRS6-8ATZ].

22. *See South Dakota v. Dole*, 483 U.S. 203, 206 (1987) (quoting *Fullilove v. Klutznick*, 448 U.S. 448, 474 (1980) (opinion of Burger, C.J.)) ("Congress may attach conditions on the receipt of federal funds, and has repeatedly employed the power 'to further broad policy objectives by conditioning receipt of federal moneys upon compliance by the recipient with federal statutory and administrative directives.'").

23. *See* George Mason, Speech to the Virginia Ratification Convention (June 4, 1788) *in* 3 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 29 (Jonathan Elliot ed., 1836) ("The assumption of this power of laying direct taxes does, of itself, entirely change the confederation of the states into one consolidated government. This power, being at discretion, unconfined, and without any kind of control, must carry every thing before it. The very idea of converting what was formerly a confederation to a consolidated government, is totally subversive of every principle which has hitherto governed us. This power is calculated to annihilate totally the state governments.").

The original idea of the Framers—not Madison, but a majority of them—was that the States were the safest repository of our liberties.[24] State governments were closer to the people and therefore less likely to become tyrannical and disregard the will of the people.[25] The national government was scary because the people's representatives would go off to the distant federal city where they might lose touch and become part of something like a deep state.[26] That's the danger the Framers worried about.

The Framers thought liberty would be protected at the State level. That's why the Bill of Rights only applied to the national government.[27] That belief turned out to be wrong, and I agree with almost everything Professor Mikhail said about the importance of slavery to interpreting the shifting allocation of power between States and the federal government.

An important part of it is that in the States where slavery existed, the slaveocracy was not just about the enslaved peoples. It was an entire totalitarian system designed to prop up the institution of slavery.[28] Freedom of speech, freedom of religion, freedom of movement, freedom of the press, freedom of petition especially: the

---

24. *See Amendments to the Constiution, [8 June] 1789, in* 12 THE PAPERS OF JAMES MADISON 196–210 (Charles F. Hobson and Robert A. Rutland eds., 1979) (Madison proposing an amendment to the Constitution that read "No state shall violate the equal rights of conscience, or the freedom of the press, or the trial by jury in criminal cases."

25. McConnell, *supra* note 12, at 1500, 1506.

26. *Cf.* Brutus, No. 1 (1787), *reprinted in* 1 THE FOUNDERS' CONSTITUTION 124 (Philip B. Kurland & Ralph Lerner eds., 1986) (voicing concern that ambitious and designing men would entrench themselves in the great, executive offices of the nation to "gratify their own interest and ambition" without being called to account for their abuses of power).

27. *See* McDonald v. City of Chicago, 561 U.S. 742, 754 (2010).

28. *Id.* at 843–44 (Thomas, J., concurring in part and dissenting in part) ("In the contentious years leading up to the Civil War, those who sought to retain the institution of slavery found that to do so, it was necessary to eliminate more and more of the basic liberties of slaves, free blacks, and white abolitionists. . . . The measures they used were ruthless [and] repressed virtually every right recognized in the Constitution."); *see also* KERI LEIGH MERRITT, MASTERLESS MEN: POOR WHITES AND SLAVERY IN THE ANTEBELLUM SOUTH 2–5 (2017); Garrett Epps, *The Antebellum Political Background of the Fourteenth Amendment*, 67 L. & CONTEMP. PROBS. 175, 192 (2004).

States trampled on all of these freedoms.[29] It turned out that the States, far from being the safest repositories of our freedoms, became tyrannical slave regimes.[30] It took a civil war to end that, and the Fourteenth Amendment is the constitutional embodiment of the end of that war. And what does the Fourteenth Amendment do? It nationalizes individual rights and gives Congress the power to enforce that nationalization of individual rights.[31] This was another huge step away from the Founders' conception of the balance between States and the national government and toward a consolidated national government.

Even the Eighteenth Amendment, which enacted Prohibition,[32] was not just about booze. For the first time, the United States government directly exercised a police power that affected individual people and individual businesses in the heartland.[33] We needed, for

29. *See* MERRITT, *supra* note 28, at 2 (discussing the banning of a book critical of the slaveholding class); Nicholas May, *Holy Rebellion: Religious Assembly Laws in Antebellum South Carolina and Virginia*, 49 AM. J. OF LEGAL HIST. 237, 237, 245 (2007) (stating that southern states restricted the religious liberty of slave); Epps, *supra* note 28, at 192 (discussing limitations or attempted limitations placed upon the freedoms of petition and speech of people in the northern states by slaveholders).

30. The Slaughterhouse Cases, 83 U.S. (16 Wall.) 36, 128 (1872) (Swayne, J., dissenting) ("These amendments are all consequences of the late civil war. . . . The public mind became satisfied that there was less danger of tyranny in the head than of anarchy and tyranny in the members.").

31. U.S. CONST. amend. XIV, § 5; *Ex parte* Virginia, 100 U.S. 339, 345–46, (1879) ("[The Thirteenth and Fourteenth Amendments] were intended to be what they really are—limitations of the power of the States and enlargements of the power of Congress . . . Whatever legislation is appropriate, that is, adapted to carry out the objects the amendments have in view, whatever tends to enforce submission to the prohibitions they contain, and to secure to all persons the enjoyment of perfect equality of civil rights and the equal protection of the laws against State denial or invasion, if not prohibited, is brought within the domain of congressional power.").

32. *See* U.S. CONST. amend. XVIII, § 1.

33. *See* Kathleen F. Brickey, *Criminal Mischief: The Federalization of American Criminal Law*, 46 HASTINGS L.J. 1135, 1161–62 (1995); WESLEY M. OLIVER, THE PROHIBITION ERA AND POLICING: A LEGACY OF MISREGULATION 15 (2018).

the first time, a national police force to enforce a national criminal prohibition.[34]

This is why the Fourth Amendment first becomes contested—it applied only to the national government.[35] Before Prohibition, the national government wasn't running around breaking into people's houses (other than those of merchants on the coast, to enforce tariffs).[36] With Prohibition, you had Eliot Ness and The Untouchables running around, violating . . . well, not necessarily violating the Fourth Amendment, but often coming close.[37] It's the first time that a national police force penetrated into the interior of the country.[38]

The Civil War itself also encouraged a step in the direction of a consolidated national government. The Civil War not only changed the Constitution with the Thirteenth, Fourteenth, and Fifteenth Amendments, but also changed the way people thought about nationhood.[39] That's an important matter too. Prior to the Civil War, most of the time the phrase "the United States" was treated as a

---

34. Paul Aaron & David Musto, *Temperance and Prohibition in America: A Historical Overview*, *in* ALCOHOL AND PUBLIC POLICY: BEYOND THE SHADOW OF PROHIBITION 127, 158 (Mark H. Moore & Dean R. Gerstein eds., 1981).

35. Orin S. Kerr, *Cross-Enforcement of the Fourth Amendment*, 132 HARV. L. REV. 471, 496 (2018) ("[T]he Fourth Amendment was understood to regulate only the federal government.").

36. *See* Orin S. Kerr, *An Equilibrium-Adjustment Theory of the Fourth Amendment*, 125 HARV. L. REV. 476, 504 (2011) ("Before the Prohibition era, federal law enforcement was in its infancy.").

37. *See* OLIVER, *supra* note 33, at 39*; see also Nathanson v. United States*, 290 U.S. 41, 44–46 (1933) (holding that officers violated a defendant's Fourth Amendment rights while enforcing Prohibition).

38. Orin S. Kerr, *The Fourth Amendment and New Technologies: Constitutional Myths and the Case for Caution*, 102 MICH. L. REV. 801, 841–42 (2004) ("[T]he Federal government brought only a few thousand criminal cases nationwide per year" before Prohibition."). "Prohibition created a then-unprecedented federal role for law enforcement in chasing after bootleggers. The federal Prohibition Office was created, and federal agents began trying to uncover illegal alcohol that was being transported in violation of the Volstead Act." *Id.* at 504; *see also id.* at 842–44 (detailing federal law enforcement's Prohibition-enforcement activities across the country).

39. *See* MORTON KELLER, AFFAIRS OF STATE: PUBLIC LIFE IN LATE NINETEENTH CENTURY AMERICA 4–5, 39–40 (1977).

plural noun: "the United States *are*".[40] After the Civil War, people generally treated the United States as a singular noun: "the United States *is*".[41] And if that's true—it's maybe too good to check—but assuming that it's true, as a matter of language, as a matter of the actual mores and sensibilities of the people, the United States becomes something more like a nation. It is no longer a group of states, but a singular entity, and that makes a difference as well.[42]

Another important factor is the rise of an integrated national economy. This isn't something that was done to us by courts, or legislatures, or anything else—it's just a fact of economic life. This is the main reason the Commerce Clause looks different today than it did at the Founding.[43] It is true the Supreme Court has gone a

---

40. *See* GEOFFREY C. WARD WITH RIC BURNS AND KEN BURNS, THE CIVIL WAR: AN ILLUSTRATED HISTORY 273 (1990) (quoting Shelby Foote as saying, "Before the war, it was said, "The United States are . . . "); William Michael Treanor, *Taking Text Too Seriously: Modern Textualism, Original Meaning, and the Case of Amar's Bill of Rights*, 106 MICH. L. REV. 487, 489 (2007) ("'United States' was often matched with a plural verb in 1787 and consistently matched with a singular verb after the Civil War.").

41. GEOFFREY C. WARD WITH RIC BURNS AND KEN BURNS, *supra* note 40 ("Before the war, it was said, 'The United States are . . . ' Grammatically it was spoken that way and thought of as a collection of independent states. After the war, it was always 'the United States *is*…'—as we say today without being self-conscious at all. And that sums up what the war accomplished. It made us an 'is.'"). *But see* Minor Myers, *Supreme Court Usage & the Making of an 'Is'*, 11 GREEN BAG 2D 457, 458, 460 (2009) (surveying usage of "United States are" and "United States is" in Supreme Court opinions from 1790 to 1919 and finding that "the plural usage was the predominant usage" several decades after the Civil War).

42. *See* Susan A. Ehrlich, *The Increasing Federalization of Crime*, 32 ARIZ. ST. L.J. 825, 831 (2000) ("However, the Civil War decisively transformed the political geography of the nation. For the first time since its independence from Great Britain, the union was greater than the sum of the individual states, and the federal government became the point of convergence of power."). *But see* Treanor, *supra* note 40, at 489–90 ("[O]ne cannot conclude simply from this change in grammatical practice that the dominant political theory changed—the same verb shift occurred for the word news, and there was no reconceptualization of news.").

43. *See* Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528, 584 (1985) (O'Connor, J., dissenting) ("Incidental to this expansion of the commerce power, Congress has been given an ability it lacked prior to the emergence of an integrated national econ-

little far with it—I don't disagree with that, and I would criticize some of its decisions.[44] Still, the main reason the Commerce Clause looks different is because the world has changed. When you ask the same question—about the federal power to regulate commerce among the States—in the context of an economy that is national in character, where major companies operate in all fifty states, and even around the world, you get a different answer. It's the same Constitution, the same principle. But as applied to the modern, national, integrated economy, the results look mightily different. The same point can be made with respect to globalization; the world now being on our doorstep creates the need for an enormous national army. We have border problems.[45] World affairs is a big thing now.

It was these changes, I submit—not any notion of "plenary power" in the original Constitution of 1787—that accounts for the degree of centralization of government in the United States of today.

III. CONTRA PROFESSOR MIKHAIL ON THE HISTORICAL EVIDENCE

I also want to say that I respectfully disagree with many of Professor Mikhail's specific points about what happened in 1787. I'm going to mention only one, because I think it is quite important. He says that Resolution 6 from the Virginia Plan, as amended and made even more nationalistic via an amendment by Gunning Bedford of Delaware, was adopted by the Convention.[46] Resolution 6 basically provided that the national government will have a general

---

omy. Because virtually every *state* activity, like virtually every activity of a private individual, arguably "affects" interstate commerce, Congress can now supplant the States from the significant sphere of activities envisioned for them by the Framers.")

44. *See* McConnell, *supra* note 12, at 1487–88, 1490.

45. *See* Priscilla Alvarez, *Record-Breaking Surge of Migrants Anticipated at the US-Mexico Border, Border Patrol Chief Says*, CNN (last updated Mar. 25, 2022), https://edition.cnn.com/2022/03/25/politics/border-surge-immigration/index.html [https://perma.cc/M2GH-F42D].

46. *See* Kurt T. Lash, *"Resolution VI": The Virginia Plan and Authority to Resolve Collective Action Problems under Article I, Section 8*, 87 NOTRE DAME L. REV. 2123, 2138 (2012).

welfare power.[47] Many people have said that it was adopted, but I think it is just not so.[48]

Immediately after Bedford's motion was provisionally adopted, John Rutledge of South Carolina, the leading critic of a general welfare power, proposed an alternative, that the powers of the federal government be specifically enumerated.[49] That motion was voted down by an equal vote of 5–5,[50] but as chair of the Committee of Detail, Rutledge went ahead and enumerated powers in what is now our Article I, Section 8, scrapping the language of Bedford's motion.[51]

A lot of people say, "Well, no, actually the enumeration of powers is just an elaboration of what was meant by Resolution 6 as amended by Bedford. There's really no change, and these are just two ways of saying the same thing."[52] But when you look at the votes, every single state (with the exception of Maryland) that voted for Rutledge's motion to enumerate voted against Bedford's motion, and every state that voted in favor of Bedford's motion voted against Rutledge's motion to enumerate.[53] Again, with the exception of the Maryland delegation, which was deeply divided among themselves and often inconsistent. I think it is quite clear from the record that the enumeration of powers was presented as an alternative to the general welfare provision. The Committee of Detail simply disregarded the equally-divided vote against enumeration and acted as if Rutledge's motion had been adopted.

Also, contrary to Professor Mikhail's contention, James Wilson the consolidationist did not dominate the Committee of Detail. He

---

47. 2 FARRAND'S RECORDS, *supra* note 1, at 131–32 .

48. *See, e.g.*, Lash, *supra* note 46, at 2138–39, 2141 (stating that the convention approved Bedford's motion before it was subsequently overlooked).

49. *See* 2 FARRAND'S RECORDS, *supra* note 1, at 17 (Madison's notes); *see also* Lash, *supra* note 46, at 2136.

50. 2 FARRAND'S RECORDS, *supra* note 1, at 17.

51. U.S. CONST. art. I, § 8; *see* 2 FARRAND'S RECORDS, *supra* note 1, at 177, 181–85.

52. *See, e.g.*, Jack M. Balkin, *Commerce*, 109 MICH. L. REV. 1, 12 (2010).

53. *Compare* 2 FARRAND'S RECORDS, *supra* note 1, at 17 (Madison's notes), *with id*. at 27.

was on the Committee of Detail and worked on it, but Rutledge was the chair.[54] Wilson may have been cancelled out by Ellsworth, who was a leading confederationist, or he may have been persuaded by Rutledge of the advantages of enumerating powers.[55] The other two members, Randolph and Gorham, were moderate nationalists, who would naturally be supportive of the Rutledge position as long as the enumeration included sufficient power to carry out national objectives.[56]

The Committee of Detail produced exactly what Rutledge wanted: an enumeration of powers as an alternative to a general welfare provision. This choice was specifically made to ensure that this would not be one confederated national government. And although it conflicted with the prior vote of the Convention, it was well received by the delegates and adopted with minor changes, by overwhelming votes.[57]

54. 1 FARRAND'S RECORDS, *supra* note 1, at xxii (Committee of Detail).

55. *See* John Patrick Coby, *The Proportional Representation Debate at the Constitutional Convention: Why the Nationalists Lost*, 7 AM. POL. THOUGHT 216, 226 n.14 (2018).

56. *See id.* at 218 n.4. (identifying Randolph as a moderate nationalist).

57. *See generally* 2 FARRAND'S RECORDS, *supra* note 1.

THE ORIGINAL FEDERALIST THEORY OF IMPLIED POWERS

JOHN MIKHAIL*

Thank you, Judge McFadden, for your kind introduction. Let me start by thanking the University of Virginia for hosting this event and the organizers for inviting me, and by noting what a privilege it is for me to participate in this debate with Professor Michael McConnell. He is one of the great constitutional scholars of our time, and it's an honor for me to appear on this stage with him.

I'd like to begin my remarks by drawing some distinctions, in order to sharpen our topic. At the outset, I'll simply note these distinctions without much explanation. I'll then draw on them to state a general thesis I'd like to defend today. Finally, I'll say a few words on behalf of the thesis, before turning things over to Michael.

Here are the distinctions I have in mind. The first is the distinction between how the framers designed the Constitution and how they and other Federalists defended it, once Anti-Federalists began attacking it. The second is the distinction between the powers

* Carroll Professor of Jurisprudence, Georgetown University Law Center. This Essay is a slightly revised version of my opening remarks in a debate with Professor Michael McConnell on the topic, "Resolved: The Federalists Designed a Constitution of Plenary Federal Power," at The Federalist Society's 2022 National Student Symposium hosted by the University of Virginia School of Law on March 5, 2022. I wish to thank Barrett Anderson and the other organizers for inviting me to participate in this event, along with my fellow panelists, Judge Trevor McFadden and Professor McConnell, for their dialogue and critical engagement on this topic. Thanks also to Cole Timmerwilke and the other editors of the Harvard Journal of Law & Public Policy for helping to turn my remarks into this Essay.

vested or delegated by the Constitution, on the one hand, and its enumerated powers, on the other. These three terms are often used interchangeably, but that's a mistake, for the simple reason that powers can be vested or delegated without being enumerated. In our Constitution, enumerated powers are a subset of delegated powers, because some delegated powers are implied. Put differently, there is a critical difference between "delegated" powers and "expressly delegated" powers—a point that was squarely raised, extensively debated, and decisively resolved when the Tenth Amendment was proposed and ratified.[1] Since this is a key theme in the account of federal power I'll defend today, it's important to clarify at the outset.

The third distinction is the difference between powers vested by the Constitution in the Government of the United States and those powers vested in Congress, the President, or other Departments or Officers of the United States. The text of the Necessary and Proper Clause requires us to draw this distinction, which is crucial to understanding how the Constitution was designed and ratified.[2] Nevertheless, a vast amount of scholarship and case law conflates these concepts, causing a great deal of confusion.

Finally, the fourth distinction is more methodological. Simply put, it's the difference between historical studies that honestly and squarely confront the role of slavery in the formation of the Constitution and scholarship that ignores or distorts that issue.

With this background in mind, let me now state my thesis. It doesn't fit easily into a single sentence, but I'll try to give a fairly concise statement of it nonetheless. In a nutshell, the thesis is that

---

1. *See, e.g.*, 1 ANNALS OF CONG. 767-68 (1789) (Joseph Gales ed., 1834). *See generally* John Mikhail, *Fixing Implied Constitutional Powers in the Founding Era*, 34 CONST. COMMENT. 507 (2019).

2. *See* U.S. CONST. art. I, § 8, cl. 18 (distinguishing the powers vested by the Constitution in the Government of the United States from the powers vested by the Constitution in Congress or other Departments or Officers of the United States). *See generally* John Mikhail, *The Necessary and Proper Clauses*, 102 GEO. L. J. 1045 (2014).

the framers designed the Constitution to vest implied as well as enumerated powers in the Government of the United States. Those implied powers include, but are not limited to:

1. All the powers to which any nation would be entitled under the law of nations, such as foreign affairs, Indian affairs, immigration, and other incidents of national sovereignty;[3]
2. All the powers that Blackstone and other writers had explained were tacitly possessed by any legal corporation, including the power to own property, make contracts, sue and be sued, operate under a seal, and enact by-laws, along with other corporate powers, such as the power to remove officers for good cause;[4]
3. The power to legislate on all issues that affect the general interests or harmony of the United States, or that lay beyond the competence of the states—in other words, the authorities implicated by Resolution 6 of the Virginia Plan,[5] later modified by the so-called Bedford motion;[6]
4. Finally, the power to fulfill all the purposes for which the Government of the United States was formed, including, but

---

3. *See, e.g.*, 1 COLLECTED WORKS OF JAMES WILSON 66 (Kermit L. Hall and Mark David Hall eds., 2007); 2 ANNALS OF CONG. 1955 (Statement of John Vining, Feb. 8, 1791); Pennhallow v. Doane's Admr's, 3 U.S. (3 Dall.) 54 (1795). *See generally* GEORGE SUTHERLAND, CONSTITUTIONAL POWER AND WORLD AFFAIRS (1919).

4. *See, e.g.*, 1 WILLIAM BLACKSTONE, COMMENTARIES *455-473, 303-315 (David Lemmings ed., 2016); 2 COLLECTED WORKS OF JAMES WILSON 1035-37 (Kermit L. Hall and Mark David Hall eds., 2007). *See generally* John Mikhail, *Is the Constitution a Power of Attorney or a Corporate Charter? A Commentary on "'A Great Power of Attorney': Understanding the Fiduciary Constitution" by Gary Lawson & Guy Seidman*, 17 GEO. J. L. & PUB. POL'Y 407 (2019).

5. *See* 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 20–21 (Max Farrand ed., 1911) [hereinafter FARRAND'S RECORDS]. Resolution 6 empowered the National Legislature "to legislate in all cases to which the separate States are incompetent, or in which the harmony of the United States may be interrupted by the exercise of individual Legislation." *Id*.

6. *See* 2 FARRAND'S RECORDS, *supra* note 5, at 26–27. Bedford's motion added to Resolution 6 the power of Congress "to legislate in all cases for the general interests of the Union." *Id*. at 26. It was ultimately adopted by the Convention by a vote of 8-2, with only South Carolina and Georgia dissenting. *Id*. at 27.

not limited to, those ends enumerated in the Preamble and General Welfare Clause.[7]

That's a lot of implied power. Among other things, it suggests that Congress is constitutionally authorized to legislate directly for the common defense and general welfare of the United States. That may seem shocking to some of you, but after many years of studying this issue, I'm reasonably confident that it is historically accurate, at least with respect to the principal framers of the Constitution. While I don't expect to persuade you of this robust account of federal power in the short time we have today, let me at least try to make the thesis more plausible by offering some clarifications and replies to objections.

First, it's natural to object that the Constitution I've just described is not the one defended by Madison and Hamilton in their *Federalist* essays or at their state ratifying conventions.[8] That's correct—but this is where my first distinction comes into play. If one asks how the Constitution was *designed* by the framers, then that question must be distinguished from what happened during the campaign to ratify the Constitution, once critics began attacking it.

In this context, it's worth noting that a common mistake is to assume that James Madison played the leading role in framing the Constitution. The primary author of the Constitution was not Madison, but two anti-slavery Northerners—James Wilson and Gouverneur Morris—who did most of the actual drafting of the

---

7. *See* U.S. CONST. pmbl. ("We the People of the United States, in Order to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defence, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity, do ordain and establish this Constitution for the United States of America."); U.S. CONST. art. I, § 8, cl. 1 ("The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States; but all Duties, Imposts, and Excises shall be uniform throughout the United States.").

8. *See, e.g.*, THE FEDERALIST NO. 33 (Alexander Hamilton) (explaining why the Necessary and Proper Clause was harmless, and concerns about it were overblown); THE FEDERALIST NO. 44 (James Madison) (same).

Constitution for the Committees of Detail and Style, respectively.[9] Wilson and Morris were two of the strongest nationalists at the federal convention. They also were among the biggest champions of implied national powers in the period *before* the convention. Unlike Madison, they believed that, even under the Articles of Confederation, the United States had the implied power to create a national bank, regulate public finance, govern western territories, provide for the general interests of the United States, and do "all other Acts and Things that Independent States may of right do."[10] For them, the Constitution was less a radical break with the past than an opportunity to place what the national government was already legally competent to do on a sounder footing.

Another likely objection to my thesis is that, on its face, the Preamble is obviously not a grant of power. That's also correct, but it misses the point. The Preamble is not a grant of power itself. Rather, it is a statement of the purposes for which the Constitution was created. But the Necessary and Proper Clause authorizes Congress to make necessary and proper laws to execute all of the powers vested by the Constitution in the Government of the United States, or in any Department or Officer thereof. And one of the powers vested by the Constitution in the Government of the United States is the power to fulfill the purposes for which that government was formed.

---

9. *See generally* David S. Schwartz & John Mikhail, *The Other Madison Problem*, 89 FORDHAM L. REV. 2033 (2021). *See also, e.g.*, William Ewald, *James Wilson and the Drafting of the Constitution*, 10 U. PA. J. CONST. L. 901 (2008); Jonathan Gienapp, *In Search of Nationhood at the Founding*, 89 FORDHAM L. REV. 89 (2021); John Mikhail, *The Constitution and the Philosophy of Language: Entailment, Implicature, and Implied Powers*, 101 VA. L. REV. 1063 (2015); William Michael Treanor, *The Case of the Dishonest Scrivener: Gouverneur Morris and the Creation of the Federalist Constitution*, 120 MICH. L. REV. 1 (2021); David S. Schwartz, *The Committee of Style and the Federalist Constitution*, 70 BUFF. L. REV. 781 (2022).

10. THE DECLARATION OF INDEPENDENCE para. 32 (U.S. 1776). *See generally* John Mikhail, *A Tale of Two Sweeping Clauses*, 42 HARV. J. L. & PUB. POL'Y 29 (2019).

That is the original Preamble-based theory of implied powers, as I understand it. It's a simple and sturdy argument, far more intuitive and coherent than many things one finds in the Supreme Court's contorted commerce clause jurisprudence, which is often used to achieve the same ends. In the eighteenth century, this theory was not radical, but mainstream, and it reflected some of the highest ideals of the Enlightenment. Its core premise is that legitimate governments are vested with the power to fulfill their purposes, which include protecting the natural rights and providing for the common defense and general welfare of the governed. This would be true of the Government of the United States even if its ends were not clearly stated in the Constitution. The fact that these ends and the Necessary and Proper Clause are clearly expressed in our fundamental charter simply makes more explicit what would otherwise be true tacitly and as a matter of course.

Turning to original public meaning, it's appropriate to want solid evidence that the founders embraced this robust theory of implied powers. Here my reply is that, if one looks, one can find this evidence all over founding-era sources. The core ideas come in different varieties and are not always formulated as crisply as I have stated them here. Partly due to their implications for slavery, they were often invoked guardedly, or with a fair bit of obfuscation. In many contexts, they were ignored or suppressed, to avoid saying the quiet part out loud. But the evidence that these beliefs were widely held is clear and convincing, if one takes time to look for it.

For example, the original Federalist theory of implied powers was a main reason why three framers—Edmund Randolph, George Mason, and Elbridge Gerry—refused to sign the document in Philadelphia.[11] More broadly, this original theory of implied powers is the same theory that Brutus, Federal Farmer, and

11. *See, e.g.*, 2 FARRAND'S RECORDS, *supra* note 5, at 563-64, 631 (Randolph); *id.* at 632-33 (Gerry); SUPPLEMENT TO MAX FARRAND'S RECORDS OF THE FEDERAL CONVENTION OF 1787, at 249, 251 (James H. Hutson ed., Supp., 1987) (Mason).

other Anti-Federalists warned of during ratification;[12] that Benjamin Franklin relied upon when he called on Congress to abolish slavery;[13] that many members of Congress used to defend the First Bank of the United States;[14] and that John Marshall described in *McCulloch v. Maryland*, *U.S. v. Fisher*, and other landmark cases.[15] Finally, this theory is also the same basic argument that Madison invoked when he proposed his amendments to the Constitution in 1789. To clarify why he wanted to add the Ninth Amendment to the Constitution, Madison pointed to the implied powers implicated by the Necessary and Proper Clause. In light of that clause, he explained, Congress was vested with broad discretionary powers that enabled it "to fulfill every purpose for which the Government was established."[16]

Let me expand on the notion of original public meaning and how it should be understood in this context. As I have indicated,

---

12. *See, e.g.*, Brutus, No. 5 (Dec. 13, 1787), in 1 THE DEBATE ON THE CONSTITUTION 499, 500 (Bernard Bailyn ed., 1993) (arguing that the Preamble, read together with the Necessary and Proper Clause, gives Congress power to make laws at discretion); Federal Farmer, No. 4, (Oct. 12, 1787), in 3 THE FOUNDERS' CONSTITUTION 240 (Philip B. Kurland & Ralph Lerner eds., 1987) (arguing that "it is almost impossible to have a just conception of [the] powers" implicated by the Necessary and Proper Clause); An Old Whig, No. 2 (Fall, 1787), *id.* at 239 (arguing that the Necessary and Proper Clause vests Congress with sweeping implied powers); Centinel, no. 5 (Fall 1787), *id*. at 239 (arguing that the Necessary and Proper Clause enables Congress to justify "every possible law" as constitutional).

13. *See, e.g.*, 2 ANNALS OF CONG. 1197-98 (Joseph Gales ed., 1834). *See generally* John Mikhail, *McCulloch v. Maryland, Slavery, the Preamble, and the Sweeping Clause*, 36 Const. Comment. 131 (2021).

14. *See, e.g.*, 14 DOCUMENTARY HISTORY OF THE FIRST FED. CONG. 390, 393 (William Charles diGiacomantonio et al. eds., 1995) (Statement of Fisher Ames, Feb. 3, 1791); *id.* at 413 (Statement of John Laurence, Feb. 4, 1791); *id.* at 454 (Statement of Elbridge Gerry, Feb. 7, 1791). *See generally* Joseph M. Lynch, NEGOTIATING THE CONSTITUTION: THE EARLIEST DEBATES OVER ORIGINAL INTENT 83-92 (1999); Richard Primus, *The Essential Characteristic: Enumerated Powers and the Bank of the United States*, 117 MICH. L. REV. 415 (2018).

15. *See* McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 421 (1819); United States v. Fisher, 6 U.S. (2 Cranch) 358, 396 (1805).

16. *See* CREATING THE BILL OF RIGHTS 82 (Helen E. Veit et al. eds., 1991) (statement of James Madison, June 8, 1789).

some of the best evidence of the original understanding of implied powers are speeches in Congress during debates over the First Bank of the United States. These speeches are not well known because most casebooks pass right by them to focus attention on the "stars" of the bank debate: Madison, Randolph, Jefferson, and Hamilton.[17] Yet one can learn a lot about the original meaning of the Constitution from these debates, arguably more so than from the opinions of the first cabinet. Randolph, Jefferson, and Hamilton were writing for an audience of one, and the contents of their opinions were not publicly known until 1805, when John Marshall summarized them in his biography of George Washington.[18] By contrast, House members who defended the bank did so in public, knowing their statements would be published and circulated in newspapers throughout the nation. By 1791, watching Congress had become a popular social activity in Philadelphia, and the galleries were full of onlookers.[19] If one wants to know how the Constitution was originally construed, then one should focus on these public speeches. When one does, it becomes clear that many of the founders embraced sweeping implied powers, rooted mainly in the Preamble and Necessary and Proper Clause.[20]

If implied powers were so widely embraced, why weren't they discussed during ratification? The answer is that they *were* discussed—by Anti-Federalists, who repeatedly warned that these powers, along with the Supremacy Clause, were dangerous and

17. *See, e.g.*, RANDY E. BARNETT, CONSTITUTIONAL LAW: CASES IN CONTEXT 44-59 (1st ed. 2008); PAUL BREST ET AL., PROCESSES OF CONSTITUTIONAL DECISIONMAKING: CASES AND MATERIALS 30-39 (6th ed. 2015); MICHAEL STOKES PAULSEN ET AL., THE CONSTITUTION OF THE UNITED STATES 53-73 (2d ed. 2013).

18. *See generally* John Marshall, 4 THE LIFE OF GEORGE WASHINGTON 264-403 (Philadelphia, C.P. Wayne 1805).

19. *See, e.g.*, "Introduction," 14 DOCUMENTARY HISTORY OF THE FIRST FED. CONG. OF THE UNITED STATES OF AMERICA xi-xv (William Charles diGiacomantonio et al. eds., 1995).

20. *See supra* note 14 and accompanying text.

would likely produce a consolidated government.[21] Many commentators have assumed that these Anti-Federalist objections were exaggerations, made to cast the Constitution in an unduly negative light.[22] But the fact is they probably were accurate interpretations of what men like Wilson and Morris set out to achieve with the Constitution. They *wanted* a strong national government with power to provide for the common defense and general welfare in unforeseeable circumstances, and they drafted the Constitution accordingly. The fact that Federalists were unwilling to put the Constitution in jeopardy by spelling this out during ratification should not surprise us, let alone lead us to draw false inferences about how the government they designed was meant to operate.

A more revealing question is how federal powers were conceived *after* ratification, when it was time to put the new machine into motion. At that point, "government by implication" quickly

---

21. *See supra* note 12 and accompanying text. *See also, e.g.*, 10 DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 1321-22 (John P. Kaminski and Gaspar J. Saladino eds., 1993) (Patrick Henry in the Virginia Ratifying Convention); 22 DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 2146 (John P. Kaminski et al. eds., 2008) (George Clinton in the New York Ratifying Convention).

22. *See, e.g.*, JACK N. RAKOVE, ORIGINAL MEANINGS: POLITICS AND IDEAS IN THE MAKING OF THE CONSTITUTION 16 (noting that many Anti-Federalist objections to the Constitution "distorted the plain text or rested on predictions so fantastic as to defy common sense and the limits of plausible speculation"); Paul Finkelman, "Slavery and the Constitutional Convention: Making a Covenant with Death," *in* BEYOND CONFEDERATION: ORIGINS OF THE CONSTITUTION AND AMERICAN NATIONAL IDENTITY 193, n. 13 (Richard Beeman, Stephen Botein. & Edward Carter III, eds., 1987) (suggesting that Patrick Henry "used any argument he could find to oppose the Constitution"); Cecilia Kenyon, "Men of Little Faith: The Anti-Federalists on the Nature of Representative Government," in MEN OF LITTLE FAITH: SELECTED WRITINGS OF CECILIA KENYON 39 (Stanley Elkins, Eric McKitrick, & Leo Weinstein, eds., 2002) (discussing the "very black picture indeed of what the national representatives might and probably would do with the unchecked power conferred upon them under the provisions of the new Constitution" and observing that "[t]he 'parade of imaginary horribles' has become an honorable and dependable technique of political debate, but the marvelous inventiveness of the Anti-Federalists has rarely been matched"). *Cf.* John F. Manning, *Textualism and the Equity of the Statute*, 101 COLUM. L. REV. 1, 81 (2001) ("[I]t is at least plausible that the Anti-Federalists shaded or exaggerated their views for reasons of political strategy").

became how the First Congress did business, in the words of one historian.[23] On issue after issue—the oath, removal, assumption, the bank—the United States largely ran on implied powers.[24] Strict construction, states' rights, the enumerated powers doctrine, and similar theories were visible competitors, but this was still the Age of Federalism, when the original Constitution held sway.[25]

Let me conclude these remarks by noting two corollaries of my thesis, one which concerns gaps in the written Constitution, and the second, slavery. Famously, the Constitution seems to be missing certain enumerated powers that one might expect the framers to have noticed and supplied. For example, there is no general foreign affairs power. Nor are there express powers over removal, neutrality, immigration, Indian affairs, federal eminent domain, or recognition of foreign governments, among other subjects. If the federal government is one of only enumerated powers, along with incidental powers to carry into effect the enumerated ones, then omissions like these seem puzzling. What were the framers thinking? The mystery disappears and the Constitution becomes more rational and coherent once one realizes that all of these powers can be understood as among the "other powers" vested by the Constitution in the Government of the United States to which the Necessary and Proper Clause refers. Perhaps the framers knew what they were doing, in other words, when they decided to enumerate some powers, but left others implicit.

---

23. *See* LYNCH, *supra* note 14, at 51.

24. *See, e.g.*, 1 ANNALS OF CONG. 266-71 (1789) (Joseph Gales ed., 1834) (House debate on whether Congress had the power to require state legislators to take the oath of office); *id*. at 455-591 (House debate on which branch has the authority to remove officers); 2 ANNALS OF CONG. 1205-1364 (Joseph Gales ed., 1834) (House debate on assumption of public debt); *id*. at 1891-1960 (House debate on the Bank of the United States).

25. LYNCH, *supra* note 14, at 50-92. *See also, e.g.*, STANLEY ELKINS & ERIC MCKITRICK, THE AGE OF FEDERALISM: THE EARLY AMERICAN REPUBLIC, 1788-1800 (1993); JONATHAN GIENAPP, THE SECOND CREATION: FIXING THE AMERICAN CONSTITUTION IN THE FOUNDING ERA (2018); Mikhail, *supra* note 1; Farah Peterson, *Expounding the Constitution*, 130 YALE L.J. 2 (2020); David S. Schwartz, Jonathan Gienapp, John Mikhail, & Richard Primus, *The Federalist Constitution: Forward*, 89 FORDHAM L. REV. 1669 (2021).

Finally, let me say a word about slavery. The conventional wisdom among contemporary historians is that the Constitution was a thoroughly pro-slavery document, which gave slaveholders practically everything they wanted, including protecting slavery from interference by Congress in perpetuity. The term that historians use to describe this doctrine is the "federal consensus."[26] On this view, Congress was incapable of abolishing slavery before the Civil War by ordinary legislation, because the Constitution gave no power to the federal government to interfere with domestic slavery. Regulation of domestic slavery, in other words, was a power reserved to the States by the Tenth Amendment.

In light of the theory of implied powers I've defended here, it's natural to ask if the federal consensus was correct. Is it true that the United States could not end slavery? Or were Anti-Federalists like George Mason and Patrick Henry right when they said that this was nonsense—that whether by means of its taxing authority, its war powers, or even just its implied power to promote the general welfare, Congress could liberate all those who were enslaved?[27] This question, of course, dominated American history

---

26. For the origin of this term, which has become common among historians, see WILLIAM M. WIECEK, THE SOURCES OF ANTISLAVERY CONSTITUTIONALISM IN AMERICA, 1760-1848, at 16 (1977). For more recent discussions and elaborations of the federal consensus, see, for example, JAMES OAKES, THE CROOKED PATH TO ABOLITION: ABRAHAM LINCOLN AND THE ANTISLAVERY CONSTITUTION (2021); SEAN WILENTZ, NO PROPERTY IN MAN: SLAVERY AND ANTISLAVERY AT THE NATION'S FOUNDING (2018). For an alternative account, which holds that the original Constitution was more neutral with respect to powers over domestic slavery, see DON E. FEHRENBACHER, THE SLAVEHOLDING REPUBLIC: AN ACCOUNT OF THE UNITED STATES GOVERNMENT'S RELATIONS TO SLAVERY 15-47 (2001).

27. *See, e.g.*, 9 DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 1161 (John P. Kaminski and Gaspar J. Saladino eds., 1990) (Mason); 10 DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 1338 (John P. Kaminski and Gaspar J. Saladino eds., 1993) (Mason); *id.* at 1341-42 (Henry); *id.* at 1477, 1504 (Henry). *See generally* Robin L. Einhorn, *Patrick Henry's Case Against the Constitution: The Structural Problem with Slavery*, 22 JOURNAL OF THE EARLY REPUBLIC 549 (2002); Mikhail, *supra* note 13.

for the next seventy-five years, and it can be reframed with reference to later abolitionists. For example, who was correct, William Lloyd Garrison or Frederick Douglass?[28]

I won't try to answer that question here. Let me just conclude these remarks by saying that, in my view, there may be few topics as important as this one. In part this is because slavery is so divisive, its legacies are so profound, and so many of our fellow citizens are justly demanding a reckoning with its role in American history and society. They want to know if America's founding documents can still be admired, and if so, why. My hope is that some of my reflections today might contribute modestly to that endeavor. Thank you.

28. Garrison and his allies famously repudiated the Constitution as a "proslavery compact"—a "covenant with death" and "agreement with Hell." *See, e.g.*, WIECEK, *supra* note 26, at 228. By contrast, Douglass eventually adopted the position that the Constitution was a "glorious liberty document" and that attributing pro-slavery intentions to its framers was "a slander upon their memory." Frederick Douglass, The Meaning of July Fourth for the Negro (speech at Rochester, New York, July 5, 1852), *in* 2 THE LIFE AND WRITINGS OF FREDERICK DOUGLASS 181-204, 201-202 (Philip S. Foner ed., 1950).

WITHER THE CONSUMER WELFARE STANDARD?

HON. DOUGLAS H. GINSBURG*

INTRODUCTION

President Biden issued Executive Order 14036[1] to widespread media acclaim[2] in July of last year. The order sweeps broadly and suggests the administration will make antitrust a major priority.[3] In particular, the President's Executive Order highlights greater enforcement of antitrust laws against technology platforms, in labor markets, in transportation markets such as air travel, and in health care.[4] What the order does not say is what previous administrations were missing in their enforcement agendas that overlooked competition problems in such varied industries.

The President's choice of advisers and leadership for the antitrust agencies fills in much of that gap.[5] President Biden selected leaders who have consistently taken aim at the economic foundations of modern antitrust and sought to replace those foundations with political goals in order to accomplish through antitrust law what they

* Senior Judge, United States Court of Appeals for the District of Columbia Circuit. These remarks were delivered to the Capitol Hill Chapter of the Federalist Society, on March 2, 2022.

1. Promoting Competition in the American Economy, Exec. Order 14036, 86 Fed. Reg. 36987 (July 9, 2021).

2. *See, e.g.*, David Leonhardt, *Biden's New Push*, N.Y. TIMES (Sept. 16, 2021), https://www.nytimes.com/2021/07/09/briefing/us-economy-biden-competition-order.html [https://perma.cc/4LJW-7U5J] (parroting misleading economic trend data).

3. *See id*.

4. *See id*.; *see also* Executive Order 14036, *supra* note 1.

5. *See* Editorial, *An Antitrust Bait and Switch*, WALL ST. J. (June 16, 2021, 6:39 PM), https://www.wsj.com/articles/an-antitrust-bait-and-switch-11623883196 [https://perma.cc/3HCZ-B77P] (discussing the appointment of FTC Chair Lina Kahn as a bellwether of Biden's antitrust agenda).

have thus far not been able to accomplish through legislation.[6] Whether their efforts will prove successful at reshaping antitrust law remains to be seen.[7]

In my limited time here today, I want to take up an issue that was being discussed when I came to the Antitrust Division in 1983—indeed, even when I had started teaching antitrust law in the late 1970s.[8] After a long hiatus, it is being discussed again.[9] I am referring to the idea that antitrust enforcement should have as its goal something other than, or in addition to, consumer welfare—meaning efficient markets that deliver lower prices and better products to consumers.

I. THE RISE OF THE CONSUMER WELFARE STANDARD

Getting consumer welfare accepted as the sole purpose of the antitrust laws was a hard-won victory for economic rationality and for the rule of law.[10] Before then, courts viewed antitrust as serving various, conflicting societal goals.[11] The intellectual foundation for the consumer-welfare approach was laid in the 1960s by some of the people whose work everyone here knows—or should know—economists Aaron Director and Harold Demsetz, and law professors Richard Posner, Robert Bork, William Baxter, and Phil

6. *See* Holman W. Jenkins, Jr., *Let a Biden Reappraisal Include Antitrust*, WALL ST. J. (Aug. 27, 2021, 6:08 PM), https://www.wsj.com/articles/biden-antitrust-lina-khan-tim-wu-jonathan-kanter-google-microsoft-amazon-facebook-brandeis-11630094525 [https://perma.cc/78US-D7WH]; *see also, e.g.*, Consolidation Prevention and Competition Promotion Act of 2017, S. 1812, 115th Cong. (2017); *Crack Down on Corporate Monopolies & the Abuse of Economic and Political Power*, A BETTER DEAL, [https://perma.cc/J8CL-XJQL] (last visited Sept. 12, 2022).

7. *See* Joshua D. Wright, *Lina Kahn Is Icarus at the FTC*, WALL ST. J. (July 13, 2021, 1:25 PM), https://www.wsj.com/articles/lina-khan-ftc-monopoly-big-tech-11626108008 [https://perma.cc/H3YZ-5DT3] (describing the strong possibility that courts will reject Kahn's antitrust agenda).

8. *See* Joshua D. Wright et al., *Requiem for a Paradox: The Dubious Rise and Inevitable Fall of Hipster Antitrust*, 51 ARIZ. ST. L.J. 293, 302–303, 360 (2019).

9. *See, e.g.*, *An Antitrust Bait and Switch*, *supra* note 5.

10. *See* Wright et al., *supra* note 8, at 293 – 94, 298–313.

11. *Id.* at 300.

Areeda.[12] It was in 1979, after only about a dozen years of intensive academic work on this subject, when the Supreme Court adopted the consumer welfare standard, saying simply, "Congress designed the Sherman Act as a 'consumer welfare prescription.'"[13] The Court has adhered to that insight ever since, even though it meant overruling about half a dozen of its own precedents over the years.[14] These included all the precedents that made vertical restraints per se unlawful.[15] One after another, territorial restraints, maximum price restraints, and eventually minimum resale price restraints were all re-examined and made subject to the rule of reason, requiring a case-by-case assessment of the potential anticompetitive effects of the relevant business conduct.[16]

All of this was done through economic analysis.[17] Per se condemnations were seen often to be contrary to the welfare of consumers

12. *See, e.g.*, Aaron Director & Edward H. Levi, *Law and the Future: Trade Regulation*, 51 NW. U. L. REV. 281 (1956); Armen A. Alchian & Harold Demsetz, *Production, Information Costs, and Economic Organization*, 62 AM. ECON. REV. 777 (1972); Richard A. Posner, *The Federal Trade Commission*, 37 U. CHI. L. REV. 47 (1969); ROBERT H. BORK, THE ANTITRUST PARADOX: A POLICY AT WAR WITH ITSELF (1978); William F. Baxter, *Legal Restrictions on Exploitation of the Patent Monopoly: An Economic Analysis*, 76 YALE L.J. 267 (1966); PHILLIP E. AREEDA, ANTITRUST ANALYSIS: PROBLEMS, TEXT, CASES (1st ed. 1967).

13. Reiter v. Sonotone Corp., 442 U.S. 330, 343 (1979) (quoting BORK, *supra* note 12 at 66); *see also* Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 486 n.10 (1977) ("The discussions of [the treble damages provision of the Sherman Act] on the floor of the Senate indicate that it was conceived of primarily as a remedy for '[t]he people of the United States as individuals,' especially consumers.").

14. *See, e.g.*, Continental T.V., Inc. v. GTE Sylvania Inc., 433 U.S. 36, 57–59 (1977) (abandoning per se rule against territorial restraints); Copperweld Corp. v. Indep. Tube Corp., 467 U.S. 752, 771–74 (1984) (abandoning the "intra-enterprise conspiracy" doctrine); Brooke Group Ltd. v. Brown & Williamson Tobacco Corp., 509 U.S. 209, 219–27 (1993) (raising the required showing for predatory pricing); State Oil Co. v. Khan, 522 U.S. 3, 22 (1997) (lifting per se rule against maximum resale price maintenance); Ill. Tool Works Inc. v. Indep. Ink, Inc., 547 U.S. 28, 31 (2006) (eliminating the presumption that a patent confers market power); Leegin Creative Leather Prods., Inc. v. PSKS, Inc., 551 U.S. 877, 907 (2007) (lifting per se rule against minimum resale price maintenance).

15. *GTE Sylvania*, 433 U.S. at 57 – 59; *Cooperweld*, 467 U.S. at 771 – 74; *State Oil*, 522 U.S. at 22; *PSKS*, 551 U.S. at 907.

16. *GTE Sylvania*, 433 U.S. at 57 – 59; *State Oil*, 522 U.S. at 22; *PSKS*, 551 U.S. at 907.

17. *See* Wright et al., *supra* note 8 at 306–07.

and to prevent efficient arrangements in the chain of distribution.[18] Likewise, the application of economics and the consumer welfare standard altered the Supreme Court's understanding and application of Section 2 of the Sherman Act with respect to monopolization and attempted monopolization, particularly when considering intellectual property rights.[19]

When Bill Baxter came to the Division in 1981, he discarded the so-called "Nine No-Nos," the Division's list of nine practices previously thought to be anticompetitive in the licensing of intellectual property rights.[20] It was a good deal later before we saw the Supreme Court making the basic point that the possession of an intellectual property right does not ordinarily entail a monopoly or even meaningful market power.[21] I have a lawful monopoly over my backyard, but that does not give me any market power. It is rare, indeed, that the possession of a lawfully acquired patent provides market power that should be viewed with concern, instead of being viewed as a reward for investment in innovation.[22]

II. ANTITRUST AND CORPORATE POLITICAL INFLUENCE

All of that came into question and was starting to be debated, as I said, before I came to the Division in 1983.[23] The debate had been

18. *See GTE Sylvania*, 433 U.S. at 54–56.

19. *See Indep. Ink*, 547 U.S. at 33–46; *see also* Aspen Skiing Co. v. Aspen Highlands Skiing Corp., 472 U.S. 585, 608–611 (1985) (recognizing a monopolist may have an antitrust duty to deal with competitors in narrowly limited circumstances); Verizon Commc'ns Inc. v. L. Offs. of Curtis V. Trinko, LLP, 540 U.S. 398, 409 (2004) (further narrowing *Aspen Skiing* and clarifying it is the outer bound of Section 2 liability); Pac. Bell Tel. Co. v. linkLine Commc'ns, Inc., 555 U.S. 438, 449–51 (2009) (further narrowing *Aspen Skiing* and all but eliminating "price squeeze" claims).

20. *See* Abbott B. Lipsky, Jr., *Current Antitrust Division Views on Patent Licensing Practices*, 50 ANTITRUST L.J. 515 (1981).

21. *Indep. Ink*, 547 U.S. at 44–45.

22. *See* Daniel F. Spulber, *How Patents Provide the Foundation of the Market for Inventions*, 11 J. COMP. L. & ECON. 271, 273–75 (2015) (explaining how patents operate to increase innovation).

23. *See* Wright et al., *supra* note 8 at 302–03

originated by FTC Chairman Robert Pitofsky.[24] He was concerned with the political influence that a large firm might acquire by virtue of its size, and could use to advantage itself or to disadvantage its rivals via the political branches of government.[25]

Corporate political influence, which is usually used for "rent-seeking,"[26] is a legitimate cause for concern. The result is too often a crony capitalism that distorts resource allocation, unjustly rewards some and harms others, and is antithetical to the market competition that benefits consumers and the economy.[27]

The Brandeisians may overstate the issue, however, as they often confuse lobbying dollars spent with political capital acquired.[28] Although the quantity of lobbying effort is an input in the congressional budget process, simply totaling the number of dollars spent without considering offsetting expenditures from opposing lobbying groups overstates the role lobbying plays in directing congressional priorities. In some cases, lobbying may be a zero-sum game, with each group's expenditures merely offsetting those of an opposing group.[29]

---

24. *See* Robert Pitofsky, *The Political Content of Antitrust*, 127 U. PENN. L. REV. 1051 (1979).

25. *See id.* at 1052 – 55.

26. "People are said to seek rents when they try to obtain benefits for themselves through the political arena. They typically do so by getting a subsidy for a good they produce or for being in a particular class of people, by getting a tariff on a good they produce, or by getting a special regulation that hampers their competitors." David R. Henderson, *Rent Seeking*, ECONLIB, https://www.econlib.org/library/Enc/RentSeeking.html [https://perma.cc/NTM3-UEGJ] (last visited Sept. 12, 2022).

27. *See, e.g.*, Hettinga v. United States, 677 F.3d 471, 481–82 (D.C. Cir. 2012) (Brown, J., concurring) (noting that at the request of dairy producers two senators pushed legislation to block a more competitive entrepreneur).

28. Reed Showalter, *Democracy for Sale: Examining the Effects of Concentration on Lobbying in the United States*, AMERICAN ECONOMIC LIBERTIES PROJECT at 29–31 (August 2021), http://www.economicliberties.us/wp-content/uploads/2021/08/Working-Paper-Series-on-Corporate-Power_10_Final.pdf [https://perma.cc/VC3N-WDME].

29. Karam Kang, *Lobbying Can Have a Small Effect on Policy Enactment but Very Valuable Returns*, LSE: BLOG ADMIN (September 14, 2015), https://blogs.lse.ac.uk/usappblog/2015/09/14/lobbying-can-have-a-small-effect-on-policy-enactment-but-very-valuable-returns/ [https://perma.cc/GRA9-4V7T].

In any event, it does not necessarily follow that antitrust enforcement is an appropriate preventative measure for corporate political influence. If not the only, certainly the primary tool with which an antitrust agency can inhibit corporate political influence by large firms is merger control, that is, by blocking mergers not because they are thought to be anticompetitive but solely in order to prevent the merged firm from obtaining a size that is thought to be conducive to political influence.

There are a number of problems with using merger control to that end. First, and most obviously, it precludes realizing whatever efficiencies are motivating the merger, to the detriment of consumers.[30] Second, size is a rather poor proxy for political influence. Many small firms and, particularly, associations of small firms, have substantial political clout, often besting large firms on the other side of an issue. Consider insurance agents versus insurance companies;[31] automobile dealers versus automobile manufacturers;[32] and gasoline retailers versus petroleum companies.[33] These "small dealers and worthy men," as Justice Peckham called them in 1897,[34] prevail consistently, both in the state and the federal legislatures.

30. *See* Wright et al., *supra* note 8 at 343–45 (reviewing the empirical evidence and concluding that "the consistency of results across these literature surveys is clear: vertical integration, in general, benefits consumers").

31. *See generally Industry Profile: Insurance*, OPEN SECRETS https://www.opensecrets.org/federal-lobbying/industries/summary?id=F09 [https://perma.cc/PXA9-RULA] (last visited Oct. 25, 2022) (over $150 million spent on lobbying between the two groups each year).

32. *See generally* Daniel A. Crane, *Tesla, Dealer Franchise Laws, and the Politics of Crony Capitalism*, 101 IOWA L. REV. 573 (2016) (showing automobile dealers political lobbying power).

33. *See generally* Exxon Corp. v. Governor of Md., 437 U.S. 117 (1978) (involving legislation favoring independent retailers against vertically integrated petroleum companies).

34. United States v. Trans-Missouri Freight Ass'n, 166 U.S. 290, 323 (1897).

Finally, some firms attain size—and perhaps also political influence—simply because they are successful in satisfying consumers.[35] A merger control program aimed at preventing firms from becoming large would leave those firms unaffected. It would essentially be an arbitrary and haphazard application of the antitrust laws.

Even the more "targeted" reform efforts in the proposed American Innovation and Choice Online Act, which would apply only to firms that had an estimated market valuation in excess of $550 billion over the previous year,[36] would have arbitrary results. For example, Meta would have qualified as a "covered platform"—and therefore been subject to special rules about which firms it could refuse to deal with—in 2020 and 2021, but not after its stock price declined in 2022.[37] With this regime in place, it is not hard to imagine a firm saving bad news to release whenever the specter of antitrust enforcement appears.

The same problems attend a fixed limit on firm size; indeed, that would be so arbitrary that it has not been proposed by any thoughtful proponent of curbing corporate political influence.[38] This is not to deny it was proposed by Senator Edward Kennedy in 1979 and endorsed by Zephyr Teachout as recently as 2014.[39]

---

35. *See* Verizon Commc'ns Inc. v. Law Offices of Curtis v. Trinko, 540 U.S. 398, 407 (2004) ("The mere possession of monopoly power, and the concomitant charging of monopoly prices, is not only not unlawful; it is an important element of the free-market system. The opportunity to charge monopoly prices—at least for a short period—is what attracts 'business acumen' in the first place; it induces risk taking that produces innovation and economic growth.").

36. S. 2992, 117th Cong. (as reported by S. Comm. On the Judiciary, March 2, 2022).

37. Sofia Pitt, *Meta Shares Plunge 24% to the Lowest Price Since* 2016, CNBC (Oct. 27, 2022 8:19 AM), https://www.cnbc.com/2022/10/27/meta-stock-falls-23percent-on-earnings-miss-analyst-downgrades.html [https://perma.cc/ZGW8-QBGH].

39. *See* Zephyr Teachout, *Corporate Rules and Political Rules: Antitrust as Campaign Finance Reform* (Fordham Law Legal Studies Research Paper No. 2384182, 2014), papers.ssrn.com/sol3/papers.cfm?abstract_id=2384182 [https://perma.cc/D2EG-XPPQ] (suggesting Senator Ted Kennedy's 1979 proposal to limit mergers of companies with assets over $2 billion is the type of solution needed to prevent market concentration).

III. ALTERNATIVE GOALS FOR ANTITRUST

More recently, other voices have championed different goals for antitrust. All are arguably worthy goals, but ask yourself whether they are best, or even reasonably, achieved by reforming antitrust law or enforcement policy. They include the preservation of jobs that would be rendered redundant if a merger were approved; countering income inequality; preserving small, locally owned businesses, as Brandeis suggested;[40] protecting the privacy of consumers' personal data;[41] and safeguarding the environment.[42]

Here are some specifics. For example, Lina Khan, now the Chair of the Federal Trade Commission, and Sandeep Vaheesan, of the Open Markets Institute: "[A]ntitrust laws must be reoriented away from the current efficiency focus toward a broader understanding that aims to protect consumers and small suppliers from the market power of large sellers and buyers, maintain the openness of markets, and disperse economic and political power."[43]

Also, professors Jonathan Baker and Steven Salop[44]: "[A]ntitrust law and regulatory agencies could address inequality more broadly by treating the reduction of inequality as an explicit antitrust goal."

---

40. *Mr. Justice Brandeis, Competition and Smallness: A Dilemma Re-Examined*, 66 YALE L. J. 69, 69 (1956).

41. *See* Michael Scarborough, David Garcia, & Kevin Costello, *Privacy Now Looms Large In Antitrust Enforcement*, LAW360 (Sept. 17, 2021), https://www.sheppardmullin.com/media/publication/1951_Privacy%20Now%20Looms%20Large%20In%20Antitrust%20Enforcement.pdf [https://perma.cc/KG6Q-3ZNB] (discussing evolving view of privacy as an element of market structure, rather than product quality).

42. Nicole Kar et al., *92 percent of businesses call for changes to competition rules to boost climate change collaboration*, LINKLATERS (Apr. 30, 2020), linklaters.com/en/about-us/news-and-deals/news/2020/april/92-percent-of-businesses-call-for-changes-to-competition-rules-to-boost-climate-change-collaboration [https://perma.cc/5TL3-FYCA] (discussing growing consensus among business leaders that economic goals should give way to sustainability in competition law).

43. Lina Khan & Sandeep Vaheesan, *Market Power and Inequality: The Antitrust Counterrevolution and Its Discontents*, 11 HARV. L. & POL'Y REV. 235, 237 (2017).

44. Jonathan B. Baker & Steven C. Salop, *Antitrust, Competition Policy, and Inequality*, 104 GEO. L. J. 1, 24 (2015).

And in testimony before the Senate in 2017, Barry Lynn, also from the Open Markets Institute, argued that the consumer welfare standard "warps" antitrust law by preventing its use for "specific policy outcomes—such as reducing inequality or raising the earnings of workers or fighting concentrated political power."[45]

More ambitious still is Professor Maurice Stucke,[46] who notes:

If antitrust's ultimate goal is to promote well-being, we must then address what constitutes 'well-being.' . . . Promoting well-being entails promoting (1) material well-being (income and wealth, housing, and jobs and earnings) and (2) quality of life (health status, work and life balance, education and skills, social connections, civic engagement and governance, environmental quality, personal security, and subjective well-being).[47]

But, he continues, "the greater issue is fairness, namely how well the resources are distributed."[48]

"To maximize well-being," Professor Stucke goes on, "any competition policy must balance the promotion of material well-being with quality-of-life factors, such as freedom and self-determination, while not deterring the exercise of compassion and interpersonal relationships."[49]

As you could not help but realize from this litany, none of the suggestions for broadening the goal of antitrust from consumer welfare to incorporate additional objectives seems in the least bit practical.

Let's take inequality. What could an antitrust agency do about inequality, whether inequality of wealth or of income? I have not found a single proponent of the idea who has laid out what the antitrust agencies could do to reduce inequality. I suppose they could

---

45. *The Consumer Welfare Standard in Antitrust: Outdated or a Harbor in a Sea of Doubt?: Hearing Before the Senate Comm. On the Judiciary*, 115th Cong. 13 (2017) (testimony of Barry Lynn, Executive Director, Open Markets Institute).

46. Maurice E. Stucke, *Reconsidering Antitrust's Goals*, 53 B.C. L. REV. 551, 599-600 (2011).

47. *Id.*

48. *Id.* at 601.

49. *Id.* at 602.

try to inhibit business success, or to hinder transactions that would make an entrepreneur rich, but those efforts are too absurd to attribute to serious scholars such as Jonathan Baker and Steven Salop.[50] Indeed, they seem to think using antitrust to reduce income inequality is more a theoretical than a practical idea,[51] at least as of now, for they conclude that "[t]he range of competition policy options set out here can be a useful starting point for a policy debate."[52]

Use antitrust to raise the earnings of workers, says Barry Lynn.[53] How? By making a raise for employees a condition for approving a transaction?

Perhaps the people hawking these generalities have so different a conception of antitrust that they also conceive of a different type of enforcement agency, one empowered to order wages raised, quite apart from any transaction contemplated by the Sherman Act. One that breaks up large companies not because of any anticompetitive conduct, but because they have too much political influence or have centralized their management instead of treating smaller units as autonomous in the Brandeisian interest of localism.

According to Professor Stucke, it seems, "deterring the exercise of compassion and interpersonal relationships" would also be an antitrust offense—or perhaps just a factor to be considered against a firm in the dock for some other conduct.[54] Even if one were inclined to adopt such an approach, how could enforcers identify activity that increases compassion and strengthens interpersonal relationships? How would enforcers measure compassion? Such a scheme risks reducing human complexity to a cynical token in a bid to punish companies that do not share the enforcers' economic ideology.

---

50. Baker & Salop, *supra* note 44, at 27.

51. Not surprisingly, because Baker and Salop are serious scholars, their statement quoted above is followed by recognition of the several "issues" and "challenges" that would be presented by making the reduction of inequality an antitrust goal. *Id.*

52. *Id.*

53. Lynn, *supra* note 45.

54. Stucke, *supra* note 46, at 602.

What kind of decision making would be required if all—or any—of these proposals were adopted as criteria to be applied in addition to or in lieu of consumer welfare? At the very least, they would require antitrust enforcers (if they should still be called that) to impose losses on consumers for gains in, let us say, employment; or for some contribution to income equality; or to prevent the loss of local ownership of a company that wants nothing more than to sell itself to a national firm. These are all incommensurable values. To let the government decide how much consumers pay in the form of higher prices, poorer quality, or foregone innovation in order to reduce inequality or the like is to invite economic totalitarianism. Worse still, the bureaucrats reordering the economy would lack a nonarbitrary way to make these tradeoffs, notwithstanding any pretense to the contrary. Sound familiar? It would be socialism writ small, pure and simple.

Arbitrary decision making is systemically costly even beyond the loss of welfare it entails. Arbitrary decision making invites political manipulation. A call from a congressman cannot turn an anticompetitive transaction into a boon for consumers any more than can a call from the Chinese Communist Party to the courts of China. If the agency's analysis is readily manipulable by throwing in some effect on wages or localism or what-have-you, then any outcome can be jiggered. Even if no call ever comes, there is little reason for the public to think the agency's decisions are, in fact, made on some objective or at least defensible basis. Indeed, insofar as the decisions are explained in an agency release or in a brief in court, the agency will be hard-pressed to dispel the implication that it has acted in an arbitrary way; one doesn't have to be a judge to recognize doubletalk. Further still, the pall of political influence will hang over every boardroom and will chill much productive activity. Even if antitrust enforcers could remain as pure as triple-distilled water, the prospect of additional, highly complex regulation creates a barrier to entry, which is inherently anticompetitive and harmful to consumers.

Antitrust law does not efficiently serve its deterrent function when companies cannot determine with some confidence when their actions will incur potential liability.[55] If a company's counsel cannot reliably predict when an acquisition or strategy might run afoul of antitrust law, firms will be left with only two options.[56] First, a rationally risk-averse firm—which is to say most firms—could shy away from any possible liability to avoid incurring the economic and reputational cost of a government lawsuit.[57] Alternatively, a risk-preferring firm could attempt to profit from the indeterminacy of a multi-factor competition law by acquiring market, or even monopoly, power and counting on political influence to protect it from the antitrust agencies. In the first case, chilling productive activity that does not result in harm to competitors is a deadweight loss because the activity would have yielded both consumer and producer gains. In the alternative case, allowing conduct that results in the accumulation of market power and higher prices also results in a deadweight loss. But add to this the inevitable uncertainty about how courts across the country would review decisions made under a multifactor standard, and the potential for error seems striking.[58]

I suggest that, at bottom, the assault on the consumer welfare standard is an assault on the antitrust enterprise and on the societal

---

55. *See* Louis Kaplow, *An Economic Approach to Price Fixing*, 77 ANTITRUST L.J. 343, 362-63 (2011) (discussing the decision-making framework for determining welfare consequences of deterrence success or failure in the context of antitrust).

56. If the firms routinely cannot predict when conduct runs afoul of the Sherman Act, then there is also a risk that any new set of standards will run afoul of the constitutional prohibition against vagueness. *See* Matthew G. Sipe, *The Sherman Act and Avoiding Void-For-Vagueness*, 45 FLA. ST. UNIV. L. REV. 709, 734-35 (2018) (discussing the intersection of antitrust law, due process, and the void-for-vagueness doctrine).

57. *See* Kaplow, *supra* note 57, at 367–68 (discussing potential for false positives to chill productive activity in the context of price fixing cases).

58. *See* Barton Beebe, *An Empirical Study of the Multifactor Tests for Trademark Infringement*, 94 CAL. L. REV. 1581, 1648-49 (2006) ("an approach that calls on the district judge to throw a heap of factors on a table and then slice and dice to taste" is one judges have expressed reluctance towards) (quoting Reinsurance Co. of Am., Inc. v. Administratia Asigurarilor de Stat, 902 F.2d 1275, 1283 (7th Cir. 1990) (Easterbrook, J., concurring)).

commitment to a competitive economy that underlies it. If inequality, or wages, or political influence should be regulated, let the job be done respectively by the Internal Revenue Service, a wage control board, and those who enforce the codes of ethics that apply to the political branches.

IV. THE CASE OF EUROPE

This is not a plea to preserve the status quo for its own sake. It is a plea to preserve the rule of law, by having a transparent and objective criterion, the application of which can be evaluated *ex ante* by potentially affected parties and reviewed in a court of law. Only then can decisions be accepted by the public as legitimate.[59] There are, of course, going to be two sides in every case and expert economists arguing for each side. But that is a very different proceeding than one would see in a court if the agency has made its decision based upon distributive or environmental or any of the other criteria being proposed without a moment's thought about arbitrariness and transparency versus the rule of law. A variation on this threat to the rule of law may already be coming our way. As of now it is being talked about more in Europe than here. Indeed, the European Commission has made a proposal it calls the Green Deal "to transform the EU into a modern, resource-efficient and competitive economy,"[60] the central point of which is to reduce effects on the environment.

The Green Deal is very much what you would imagine, having to do primarily with energy and climate change—and the talk there is

59. *See* Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175, 1179 (1989).

60. Eur. Comm'n, *A European Green Deal* (2019), https://ec.europa.eu/info/strategy/priorities-2019-2024/european-green-deal_en [https://perma.cc/N28K-424D].

about making European competition policy hospitable to firms collaborating to accomplish the EU's environmental goals.[61] Commissioner Vestager has suggested the European Commission may allow mergers based upon a number of environmental benefits, saying "[m]any sustainability agreements . . . like some agreements on open standards for green products, for instance . . . can be legal, even though they do restrict competition, so long as the benefits they bring for consumers outweigh those restrictions."[62] Those benefits are, of course, environmental. The Commission may even adopt new block exemption regulations related to reducing carbon dioxide emissions or improving "sustainable working conditions."[63] Of course, cooler heads may prevail, such as Andreas Mundt, Germany's head of the Federal Cartel Office. He recently remarked: "we must take utmost care that the debate that we currently have on cooperation does not get bigger and catch the area of mergers" in the effort to incorporate sustainability into antitrust.[64]

This is going to be a rallying point for a great deal of agitation by firms seeking permission to collaborate. Perhaps some of them actually will be trying to do something to advance their governments' views on the environment without any significant diminution in

61. *See* Margrethe Vestager, *The Green Deal and Competition Policy* (Sept. 22, 2020), https://ec.europa.eu/commission/commissioners/2019-2024/vestager/announcements/green-deal-and-competition-policy_en [https://perma.cc/XN6C-GHQN] (asking for input into whether the EU should "make it easier for companies to agree to produce greener products, without breaking the competition rules").

62. Margrethe Vestager, *Competition policy in support of the Green Deal* (Sept. 10, 2021), https://ec.europa.eu/commission/commissioners/2019-2024/vestager/announcements/competition-policy-support-green-deal_en [https://perma.cc/8R7C-ACKL] (reviewing options for implementing Green Deal without eliminating antitrust scrutiny).

63. Benjamin Geisel, *The impact of the Green Deal on EU Competition law: How Sustainability Aspects are shaping the Rules and what it means for Businesses*, ALLEN & OVERY (Oct. 5, 2021), https://www.allenovery.com/en-gb/global/news-and-insights/publications/sustainability-belgium-the-impact-of-the-green-deal-on-eu-competition-law [https://perma.cc/KAS9-4LPY].

64. Tom Madge-Wyld, *Sustainability concerns must not steer merger challenges, Mundt says*, GLOBAL COMP. REV. (Feb. 23, 2022), https://tinyurl.com/2p8tfrv5 [https://perma.cc/9VPR-EKWX].

competition, but surely others will be seeking a way to get together and do things they would like to do for their bottom lines but are inhibited from doing now by the antitrust laws.[65] Rent seeking, that is, will be a growth industry on a scale not seen since Louis XVI dispensed favors at Versailles.

The European Commission lapsed once more than 20 years ago when it approved an agreement among makers of household appliances (clothes washers, in particular) to allow them to collaborate to achieve a standard that would conserve water.[66] To my knowledge, it is the only time the Commission has done anything of this sort, but it is quite clear that similar proposals will now be coming its way.[67] Surely something similar can be expected on this side of the Atlantic, considering the parallel interest in slowing climate change.[68] Indeed, in the U.S. there is already an emerging literature on the pursuit of environmental goals as the predicate—or perhaps pretext—for firms seeking relief from the antitrust laws.[69] Expect similar pleas based upon so-called "social" goals, and we will have two-thirds of the ESG movement in play. Thus, the anti-

65. Alexander Raskovich et al., *Colluding to Go Green: Global Antitrust Institute Comments on the Austrian Federal Competition Authority's Draft Guidelines to Exempt "Sustainability Agreements"* (Geo. Mason U. L. & Econ. Research Paper Series No. 22-29, June 2022), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4143814 [https://perma.cc/HQ9R-TUMV].

66. Commission Decision of 24 January 1999 (Case IV.F.1/36.718–CECED), OJ [2000] L 187/47.

67. *See, e.g.*, Pierre Zelenko and Nicole Kar, *Sustainability goals: Is competition law cooperating?*, LEXOLOGY (Jan. 21, 2020), https://www.lexology.com/library/detail.aspx?g=7fc53217-3b30-4144-92ed-ee508a91efb2 [https://perma.cc/8Q3P-HM5U].

68. *See generally* H.R. Res. 109, 116th Cong. (2019) (outlining a "Green New Deal").

69. *See, e.g.*, Paul Balmer, *Colluding to Save the World: How Antitrust Laws Discourage Corporations from Taking Action on Climate Change*, 47 ECOLOGY L.Q. 219 (2020), https://www.ecologylawquarterly.org/currents/colluding-to-save-the-world-how-antitrust-laws-discourage-corporations-from-taking-action-on-climate-change/ [https://perma.cc/5UGS-R2F4]; *see also*, Sean O'Kane, *DOJ drops antitrust probe into automakers that want cleaner cars*, THE VERGE (Feb. 7 2020), https://www.theverge.com/2020/2/7/21128684/doj-antitrust-investigation-closed-trump-ford-vw [https://perma.cc/HV75-25FS].

trust enterprise as we know it now is under assault from two directions. On one side are people agitating for non-consumer welfare criteria as a general matter and, on the other side, are firms interested in collaborating on ESG in the hope of relaxing the competition laws, and hence the competition, that now constrains them.

Europe's Digital Markets Act (DMA) and the United Kingdom's related Digital Markets Unit (DMU) signal a similar shift towards valorizing social goals, such as privacy, that may prove difficult in practice to define, let alone protect.[70] More worrisome still, the DMA will allow the European Commission to micromanage the business practices of so-called "digital gatekeepers" through *ex ante* prohibitions.[71] Unlike existing competition rules in Europe, the DMA would not require the Commission to prove the prohibited conduct resulted in economic harm to anyone.[72] In effect, Europe is experimenting with discarding antitrust law as we know it; in its place will be central government regulation of platforms.[73]

CONCLUSION

Whether the United States will follow the trend in Europe, as one might reasonably fear,[74] of course, remains to be seen.

Even if we do not go that far, however, antitrust law is heading into an existential struggle. Will the agencies that enforce it become

---

70. *See* Alden Abbott, *Consumer Welfare-Based Antitrust Enforcement is the Superior Means to Deal with Large Digital-Platform Competition Issues*, TRUTH ON THE MARKET (Nov. 2, 2021), https://truthonthemarket.com/2021/11/02/consumer-welfare-based-antitrust-enforcement-is-the-superior-means-to-dealing-with-large-digital-platform-competition-issues/ [https://perma.cc/WH7D-SHCD].

71. *See* Aurelien Portuese, *The Digital Markets Act: European Precautionary Antitrust*, INFO. TECH. & INNOVATION FOUND. (May 24, 2021), https://itif.org/publications/2021/05/24/digital-markets-act-european-precautionary-antitrust [https://perma.cc/Y49R-8YKT].

72. *Id.*

73. *Id.*

74. *See* Arthur Sidney, *Senators Should Avoid Making the Digital Economy More European*, DISRUPTIVE COMP. PROJECT, (Jan. 17, 2022), https://www.project-disco.org/competition/011722-senators-should-avoid-making-the-digital-economy-more-european/ [https://perma.cc/8VYY-MX7R].

the vehicles for arbitrary, bureaucratic management of firms? Or vendors of indulgences to politically influential firms and their handmaidens elsewhere in government? Both? Or, dare we hope, neither?

THE PROVINCE OF THE LAW

HON. NEOMI RAO*

My topic for tonight's speech is the "province of the law." I aim to mark out the boundaries of this province and to consider what lies within the substance of its soil. The province of the law matters because, as Alexander Hamilton said, "[t]he interpretation of the laws is the proper and peculiar province of the courts."[1] To take the metes and bounds of law's province should reveal something about the judicial province and judicial duty.

My starting point is that law *has* a province. To make such an assertion is already to stand on one side of many important jurisprudential debates. It assumes that within our constitutional system law has a distinct domain, and that legal interpretation is a distinct enterprise, not to be confused with abstract moral philosophy, economics, or political theory. This separation was once taken for granted, but today it is often supplanted by legal theories that both deny the boundaries of the law and corrupt its substance.

We have followed the fabled "path of the law"[2] further and further away from our constitutional origins. Rather than go any further, we should turn back to the idea that law has a province. It is a place, not a journey.

My lecture proceeds as follows. I begin by explaining the concept of law's province. Thinking about the law as a province suggests

---

* Judge, United States Court of Appeals for the District of Columbia Circuit. These remarks were delivered as part of the Thomas M. Cooley Judicial Lecture hosted by the Georgetown Center for the Constitution and the Federalist Society, on April 8, 2022, at the National Archives in Washington, D.C.

1. THE FEDERALIST NO. 78, at 404 (Alexander Hamilton) (Gideon ed., 2001).

2. *Cf.* Oliver Wendell Holmes, Jr., *The Path of the Law*, 10 HARV. L. REV. 457 (1897).

not only that law has limits, but also that it has substance, the soil that makes up our legal traditions. The limits of this province and its distinct content shape the judicial duty. I will then turn to exploring these two aspects of the province of the law, its limits and its substance.

First, the boundaries of law's province have come under siege from many different directions—including living constitutionalism and an unbounded administrative state. In response, originalists and textualists have sought to defend law's boundaries. Legal interpretation requires determining the original meaning of the Constitution and what Justice Scalia called the "fair reading" of statutes.[3] Much of the conservative legal movement's efforts have been to rebuild the proper borders around the province of the law. And this has been essential work, to understand the nature of law, to consider the proper role of judges, and to expound the distinct powers vested in the political branches.

Second, the province of the law is more than just its boundaries. The terrain of our law includes the foundational political theory animating the Constitution, not to mention roots resting in the common law and natural law. To interpret and apply our laws correctly, we must unearth and examine our distinctly Anglo-American legal principles and constitutional commitments. The proper and peculiar province of the courts is to interpret the law, staying within law's province and drawing from its rich history and traditions.

For those who believe law has a province, we must focus on the task of understanding what belongs in it. Appreciating our laws with humility and respect for preceding generations will promote, as Lincoln said, "the perpetuation of our political institutions."[4]

---

3. ANTONIN SCALIA & BRYAN A. GARNER, READING LAW 33–41 (2012).

4. Abraham Lincoln, *The Perpetuation of Our Political Institutions: Address Before the Young Men's Lyceum of Springfield, Illinois* (Jan. 27, 1838), *reprinted in* THE ESSENTIAL LINCOLN: SPEECHES AND CORRESPONDENCE 6 (Orville V. Burton ed. 2009).

This lecture serves as a kind of response against those who would deny the boundaries of law's province, leaving only a wilderness of evolving norms, abstract justice, or something like the common good. It is an affirmative case for the province of the law.

I. LAW'S PROVINCE

To understand the province of the law and the province of the courts, the best place to start is with the Constitution. We are, after all, at an event hosted by the Georgetown Center for the Constitution and here at the National Archives, just a few feet away from an original copy of our great charter.

The Constitution establishes what counts as law and how it must be enacted.[5] The Constitution also establishes and limits the powers of the three branches of government, powers that, importantly, are *vested* in particular actors. The legislative power is vested in Congress; the executive power is vested in a single President; and the judicial power is vested in courts.[6]

Vesting power in a particular actor grants authority that includes a bundle of duties, many of them exclusive to the particular office.[7] This echoes a fundamental principle of property law, namely that when title to land *vests*, its owner possesses a specific and exclusive bundle of rights that attach to a particular place. As Madison said in explaining the separation of powers, "[t]he interest of the man, must be connected with the constitutional rights of *the place*."[8]

---

5. *See* U.S. CONST. art. I, §§ 1, 7; *id.* art. VI, cl. 2.

6. *See id.* art. I, § 1; *id.* art. II, § 1; *id.* art. III, § 1.

7. Steven Calabresi, along with others, has examined the original meaning of the vesting clauses and the importance of vesting for understanding the Constitution's separation of powers. *See, e.g.*, Steven G. Calabresi, *The Vesting Clauses as Power Grants*, 88 NW. U. L. REV. 1377, 1380–82 (1994).

8. THE FEDERALIST NO. 51, *supra* note 1, at 268 (James Madison) (emphasis added).

My particular concern is with the federal courts, which are vested with the Article III "judicial Power."[9] This includes particular duties and obligations that flow from the original understanding of this power. Chief Justice Marshall, echoing Hamilton, famously said, "[i]t is emphatically the *province* and *duty* of the judicial department to say what the law is."[10]

Understanding what is within the province and duty of the judiciary requires understanding what is within the province of the law. Hamilton and Marshall's reference to "province" indicates a framework for thinking about law and judicial duty. First, law's province has limits and boundaries. Second, our legal province is made up of the peculiar soil and substance of American legal traditions.

Both the limits of the law and its substance are essential for understanding law's province and therefore the province and duty of the courts.

II. BOUNDARIES OF LAW'S PROVINCE

Let me next explore what it means for law to have a province, a fixed place with firm boundaries. In our society, the boundaries of law's province are marked out by the Constitution. The Constitution limits the powers of the federal government and establishes what counts as law. One way to appreciate these boundaries is to consider some ways in which they have been eroded. I cannot possibly detail them all in a dinner lecture but let me note just a few.

The early twentieth century progressives waged the first modern assault on the Constitution's exclusive vesting of government power in specific and distinct actors. Give them credit; they were honest about what they were doing. Woodrow Wilson and others

---

9. *See* U.S. CONST. art. III, § 1 ("The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish.").

10. Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803) (emphasis added).

openly stated that the Constitution's protections for individual liberty and rights had to yield to social efficiency and progressive policies geared toward the common good.[11] The progressives maintained that the legislature is too slow, the courts too traditional, and the need for progress too urgent to leave political reform to the constitutional process.[12] Instead, the progressives borrowed from then-popular German social thought in the belief that the collective good required government by experts.[13]

The Progressive Era ushered in what I will, for the sake of simplicity, call the wilderness theory of law. A wilderness approach promotes an unbounded understanding of government power in pursuit of particular substantive ends. Instead of keeping law within its well-defined province, the progressives tore down the fences that separated the legal enterprise from a free-wheeling social science inquiry.

It no longer mattered that the Constitution vested limited legislative power in Congress.[14] Executive agencies would now be able to exercise what amounted to the lawmaking power in the name of

---

11. WOODROW WILSON, CONGRESSIONAL GOVERNMENT: A STUDY IN AMERICAN POLITICS 284–85 (1885) ("The 'literary theory' of checks and balances is simply a consistent account of what our constitution-makers tried to do; and those checks and balances have proved mischievous just to the extent to which they have succeeded in establishing themselves as realities."); *cf.* PHILIP HAMBURGER, IS ADMINISTRATIVE LAW UNLAWFUL? 458 (2014) (describing Wilson's project of severing constitutional law from administrative function).

12. *See, e.g.*, FRANK JOHNSON GOODNOW, THE AMERICAN CONCEPTION OF LIBERTY AND GOVERNMENT 21 (1916) (celebrating the fact that "the sphere of governmental action is continually widening and the actual content of individual private rights is being increasingly narrowed"); JAMES M. LANDIS, THE ADMINISTRATIVE PROCESS 96 (1938) (complaining that, unlike adjudication by administrative bodies, judicial interpretation "suffer[s] not only from inexpertness but more from the slowness of that process to attune itself to the demands of the day").

13. *See* HAMBURGER, *supra* note 11, at 370–71, 458–66 (citing Woodrow Wilson, *The Study of Administration*, 2 POL. SCI. Q. 197 (1887)); *see also* West Virginia v. EPA, 142 S. Ct. 2587, 2617 n.1 (2022) (Gorsuch, J., concurring) (discussing Woodrow Wilson's disdain for democracy).

14. *See* Neomi Rao, *Why Congress Matters: The Collective Congress in the Structural Constitution*, 70 FLA. L. REV. 1 (2018).

efficiency.[15] The administrative state allows for the creation of law outside constitutional channels and the imposition of nationwide directives controlling the health, safety, and government-defined moral well-being of the people.

Many of these agencies combine the exercise of legislative, executive, and judicial functions—effectively making laws, enforcing them, and adjudicating public and private rights.[16] Despite the Constitution's vesting of all executive power in a single President, we have numerous independent agencies, such as the National Labor Relations Board and the Federal Election Commission.[17] Congress may of course create administrative agencies, so long as it acts within its limited and enumerated powers. But nowhere does the Constitution allow for the *delegation* of legislative power, the *comingling* of government powers, and execution of the laws *independent* of the Chief Executive.

In the original progressive approach, the power vested in the courts would also have to be diminished—the judiciary could not scrutinize these innovations and state the obvious: that many were unconstitutional. Rather, the courts had to adjust to the progressive project and the sweeping reforms of the New Deal. The courts largely stood aside as the fences around law's province were breached, and in some places torn down entirely.[18]

---

15. *See* Neomi Rao, *Administrative Collusion: How Delegation Diminishes the Collective Congress*, 90 N.Y.U. L. REV. 1463, 1465 (2015) ("Delegation undermines separation of powers, not only by expanding the power of executive agencies, but also by unraveling the institutional interests of Congress.").

16. *See* Gary Lawson, *The Rise and Rise of the Administrative State*, 107 HARV. L. REV. 1231, 1233–49 (1994).

17. *See* Neomi Rao, *Removal: Necessary and Sufficient for Presidential Control*, 65 ALA. L. REV. 1205, 1207–25 (2014).

18. *See* Wickard v. Filburn, 317 U.S. 111 (1942) (endorsing an expansive interpretation of the Commerce Clause); Home Bldg. & Loan Ass'n v. Blaisdell, 290 U.S. 398 (1934) (adopting a narrow view of the Contracts Clause); Humphrey's Executor v. United States, 295 U.S. 602 (1935) (upholding removal restrictions that limit presidential control of so-called independent agencies); Whitman v. Am. Trucking Ass'ns, 531 U.S. 457, 474 (2001) (cataloguing the broad delegations of legislative power that have been found permissible since the New Deal).

While the courts retreated from enforcing the Constitution's actual boundaries, some judges also ventured out on new paths, far from law's province. Courts had long recognized the duty to say what the law is: to say what was within the province of the law.[19] But the Supreme Court gradually decided it would say and enforce what the law *should* be. That it would impose judge-made rules based on new concepts of liberty and reliance on the social good. Wholly apart from the Constitution's amendment process, jurists such as Justice Marshall and Justice Brennan emphasized that an enlightened Supreme Court should further hazy values like human dignity and develop new variants of liberty and equality, grown not from our legal soil but from select contemporary values.[20]

Spinning rights from the emanations and penumbras of the Constitution,[21] the courts further pushed law into the wilderness, far from its origins and roots.

Against these attacks, many people have sought to restore the province of the law—to fix, as it were, the fences that surround it.

---

19. *See, e.g.*, Marbury v. Madison, 5 U.S. 137 (1 Cranch), 177 (1803).

20. *See, e.g.*, Furman v. Georgia, 408 U.S. 238, 271 (1972) (Brennan, J., concurring) ("The primary principle [for interpreting the Eighth Amendment] is that a punishment must not be so severe as to be degrading to the dignity of human beings."); Milliken v. Bradley, 418 U.S. 717, 782 (1974) (Marshall, J., dissenting) ("[H]owever imbedded old ways, however ingrained old prejudices, this Court has not been diverted from its appointed task of making a living truth of our constitutional ideal of equal justice under law." (internal quotation marks omitted)); San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 71 (1973) (Marshall, J., dissenting) (stating that the "right of every American to an equal start in life . . . is far too vital" to rely on "the vagaries of the political process" to determine how public education is financed); *cf.* Neomi Rao, *Three Concepts of Dignity in Constitutional Law*, 86 NOTRE DAME L. REV. 183, 269–71 (2011) (discussing how certain appeals to dignity in constitutional decisionmaking undermine the protection of individual rights).

21. *See* Griswold v. Connecticut, 381 U.S. 479, 484 (1965) ("The foregoing cases suggest that specific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance.").

Judges and scholars have articulated theories of textualism and originalism, which depend on the claim that the law has a determinate meaning.[22] These approaches to interpretation restored the old fences and returned to the traditional American way of thinking about law as possessing specific content and specific limits. Proponents of textualism and originalism pushed back against the skepticism about law's meaning from progressives, legal realists, and living constitutionalists.

Marking the boundaries of law also helped to mark the boundaries of judicial power, its "proper and peculiar" province.[23] Most judges now at least claim to follow a text-first approach to statutory interpretation and to recognize the importance of the original meaning of the Constitution. "We're all textualists now," said Justice Kagan.[24] This recognition makes it harder, perhaps impossible, to justify the wilderness theory of law, harder to justify the judicial creation of entirely new rights.

Importantly, following the original meaning of the Constitution or the text of a statute is the best way to respect the moral and political choice of the American people to ratify the Constitution and its particular structure of lawful government.[25] The people did not

---

22. *See, e.g.*, Clarence Thomas, *Judging*, 45 U. KAN. L. REV. 1, 5 (1996) ("My vision of the process of judging is unabashedly based on the proposition that there are right and wrong answers to legal questions."); Stephen E. Sachs, *Originalism as a Theory of Legal Change*, 38 HARV. J.L. & PUB. POL'Y 817, 819 (2015) ("Whatever rules of law we had at the Founding, we still have today, unless something legally relevant happened to change them. *Our* law happens to consist of *their* law, the Founders' law, including lawful changes made along the way.").

23. THE FEDERALIST NO. 78, *supra* note 1, at 404 (Alexander Hamilton).

24. Harvard Law School, *The 2015 Scalia Lecture: A Dialogue with Justice Elena Kagan on the Reading of Statutes*, YOUTUBE (Nov. 25, 2015), https://www.youtube.com/watch?v=dpEtszFT0Tg [https://www.perma.cc/VVT4-L37L].

25. *See generally* Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1 (1971); Frank H. Easterbrook, *Text, History, and Structure in Statutory Interpretation*, 17 HARV. J.L. & PUB. POL'Y 61 (1994); Steven G. Calabresi & Saikrishna B. Prakash, *The President's Power to Execute the Laws*, 104 YALE L.J. 541 (1994); ANTONIN

agree to a legal wilderness, nor did they choose an unbounded government. Rather, the people chose a government with separated and limited powers. This was the structure they believed would best prevent arbitrary rule and preserve their individual liberties—social, religious, and economic.

These efforts to explain the reasons for law's boundaries are now familiar. And the at least partial success of textualism and originalism is undeniable.

In our constitutional system, what counts as law is limited, as are the powers of the legislative, executive, and judicial departments. Text-based and originalist interpretation respects the boundaries of law's province and the fundamental moral choice of the people to live under "a government of laws, and not of men."[26]

III. WHAT IS INSIDE THE PROVINCE OF THE LAW?

This brings me to the heart of this lecture, to a consideration of what is *inside* our legal province. Fixing the fences around the province of the law has had a tremendous impact on our legal culture and on the courts.

Understanding the province of the law, however, requires more than marking out its boundaries. It also requires understanding what properly exists within the province, within the soil and foundations of our law.

In light of contemporary debates about legal interpretation, it seems increasingly obvious that it is not sufficient for judges merely

---

SCALIA, A MATTER OF INTERPRETATION (1997); JOHN O. MCGINNIS & MICHAEL B. RAPPAPORT, ORIGINALISM AND THE GOOD CONSTITUTION (2013); Sachs, *supra* note 22; J. Joel Alicea, *The Moral Authority of Original Meaning*, 98 NOTRE DAME L. REV. 1 (2022) (offering a defense of originalism based in the framework of natural law); *cf.* PHILIP HAMBURGER, LAW AND JUDICIAL DUTY 606–09 (2008).

26. 4 THE WORKS OF JOHN ADAMS 106 (Charles Francis Adams ed. 1851) (emphasis omitted).

to stay nominally within law's province.[27] Rather, we must also endeavor to understand what is properly within it.

Critics of textualism and originalism often equate formal methods of interpretation with literalism, as utterly empty and indifferent to truth.[28] But textualism and originalism are far from empty procedural methodologies. To be a practicing textualist or originalist requires understanding the substantive content of law's province.

Last month, in a different lecture, I discussed what I call the political morality of textualism—by which I mean the deep moral foundations of textualism's claim that statutes must be interpreted by their terms and in light of longstanding background principles and legal reasoning.[29]

Constitutional interpretation and the search for original meaning similarly occur within the context of our Anglo-American legal history. Originalism and all its variants are part of a robust dialogue in the academy, and it seems, even on Twitter. I will not delve into those particulars tonight.

Rather, I wish simply to recognize that originalism incorporates a substantive legal background that matters when judges are faced with difficult constitutional questions. Breaking new constitutional

---

27. *Compare* ADRIAN VERMEULE, COMMON GOOD CONSTITUTIONALISM (2022) (arguing courts should abandon originalism and instead import principles of natural law into constitutional interpretation), *with* William H. Pryor Jr., *Against Living Common Goodism*, 23 FEDERALIST SOC. REV. 24, 26 (2022) (calling this approach "indistinguishable in everything but name from Justice Brennan's living constitutionalism"), *and* William Baude & Stephen E. Sachs, *The "Common-Good" Manifesto*, 136 HARV. L. REV. 861, 861 (2023) (book review) (arguing Vermeule's treatise "fails to support its hostility toward originalism, to motivate its surprising claims about outcomes, or even to offer an account of constitutionalism at all").

28. William N. Eskridge, Jr., *Textualism, the Unknown Ideal?*, 96 MICH. L. REV. 1509, 1548 (1998) (voicing the concern that textualism means "[m]ajority-based choices . . . would more often be trumped by dictionary-toting, grammar-minded judges holding Congress to the letter of what it writes"); VERMEULE, *supra* note 27, at 105 (criticizing textualism as creating "law without mind").

29. *See* Neomi Rao, *Sumner Canary Memorial Lecture at Case Western Law School: Textualism's Political Morality* (Mar. 3, 2022), 73 CASE W. L. REV. (forthcoming).

ground is a task primarily for the Supreme Court. On the D.C. Circuit, however, I have had to decide unsettled constitutional questions, which has required ascertaining the original meaning of constitutional provisions considered within the structure of our government.[30]

In doing so, I have come to appreciate the many layers of reasoning that are required. At one level there is the meaning of specific words or phrases: this includes analyzing how the words were used and understood at the time of the ratification, how they were defined in Founding-era dictionaries,[31] and how they appeared in debates such as those between the Federalists and the Anti-Federalists.[32]

At another level, and in addition to the linguistic inquiry, the province of the law also includes deeper roots. For example, the meaning of the Constitution reflects the political theory that influenced the Framers.

---

30. *See, e.g.*, Maloney v. Carnahan, 45 F.4th 215, 221 (D.C. Cir. 2022) (Rao, J., dissenting from the denial of rehearing en banc) ("[T]he text and structure of the Constitution, historical practice, and the Supreme Court's decisions all establish that individual members of Congress cannot bring suit to assert injuries to the legislative power."); Larrabee v. Del Toro, 45 F.4th 81, 91 (D.C. Cir. 2022) ("The rule suggested by the [Supreme] Court's caselaw is consistent with our understanding of the original meaning of the [Constitution's] Make Rules Clause."); Trump v. Mazars USA, LLP, 940 F.3d 710, 749 (D.C. Cir. 2019) (Rao, J., dissenting) ("The text and structure of the Constitution, its original meaning, and longstanding practice demonstrate that Congress's legislative and judicial powers are distinct and exercised through separate processes, for different purposes, and with entirely different protections for individuals targeted for investigation.").

31. *See, e.g.*, SAMUEL JOHNSON, A DICTIONARY OF THE ENGLISH LANGUAGE (9th ed. 1790) (unpaginated).

32. *See, e.g.*, Perez v. Mortg. Bankers Ass'n, 575 U.S. 92, 119–24 (2015) (Thomas, J., concurring) (using one such debate to help interpret the meaning of the "judicial power").

The Framers drew from thinkers such as Locke, Hutcheson, Vattel, Montesquieu, Blackstone, and others.[33] When the people ratified the Constitution, they made a moral and political decision to establish a governmental authority with certain limited lawmaking powers for the good of society. That decision reflected prior *natural law reasons* for creating and living within a defined province of law.[34] The Anglo-American legal tradition also draws from Roman law, civil law, and natural law, but it has incorporated those in a unique way.[35] Any reference to these sources must be bounded by *our* constitutional system of government.

Justice Thomas, for whom I was so fortunate to clerk, frequently pulls together these sources when interpreting the Constitution, particularly in his masterful concurrences and dissents. He interprets the Constitution in light of foundational and theoretical principles undergirding our great document.[36] For example, when explaining why Congress cannot delegate legislative power, he rightly relies on "principles about the relationship between private rights and governmental power [that] profoundly influenced the men who crafted, debated, and ratified the Constitution."[37] Justice

---

33. *See, e.g.*, Gundy v. United States, 139 S. Ct. 2116, 2133 (2019) (Gorsuch, J., dissenting) (citing Locke as "one of the thinkers who most influenced the framers' understanding of the separation of powers"); Robert Curry, *Getting to 1776*, CLAREMONT R. OF BOOKS, Apr. 10, 2017 (discussing the role of Francis Hutcheson), https://claremontreviewofbooks.com/digital/getting-to-1776/ [https://perma.cc/GLN9-Q5K7]; Franchise Tax Bd. of Cal. v. Hyatt, 139 S. Ct. 1485, 1493–94 (2019) (citing Vattel as "the founding era's foremost expert on the law of nations"); THE FEDERALIST NO. 9, *supra* note 1, at 38–40 (Alexander Hamilton) (discussing Montesquieu); *id.* NO. 47, 250–52 (James Madison) (same).

34. *See* HAMBURGER, *supra* note 25, at 606–09; Alicea, *supra* note 25, at 16–33.

35. Professor Richard Helmholz has examined this issue at length. *See, e.g.*, R.H. HELMHOLZ, NATURAL LAW IN COURT 94–126 (2015). *See generally* R.H. Helmholz, *Magna Carta and the Ius Commune*, 66 U. CHI. L. REV. 297 (1999) (discussing the role of Roman and canon law in Magna Carta); R.H. Helmholz, *Natural Law and Human Rights in English Law: From Bracton to Blackstone*, 3 AVE MARIA L. REV. 1 (2005).

36. *See* Neomi Rao, *Saying What the Law Is, Justice Thomas Style*, 2021 HARV. J.L. & PUB. POL'Y PER CURIAM 6, at *1 (2021).

37. Dep't of Transp. v. Ass'n of Am. Railroads, 575 U.S. 43, 74 (2015) (Thomas, J., concurring).

Thomas's understanding of separation of powers draws on what he calls the "ancient roots" that are part of our law.[38] And he recognizes that the scope of individual constitutional rights, such as the Second Amendment right to bear arms, cannot be fleshed out with reference to the text alone. Instead, he has looked to Magna Carta and the English Bill of Rights.[39]

In analyzing the meaning of the Constitution and understanding its legal background, we must be mindful of the animating spirit and the institutional structure of *our* law. We must draw on our distinctly Anglo-American legal reasons and principles.[40] All of this is to say that we cannot look to any source that pleases us in the present, digging around the province of someone else's law to chart our own.

Our province reflects the exceptionalism of the American legal context, which locates the sovereignty of government in the people.[41] Our constitutional government emphasizes a certain kind of civil liberty that encourages hard work, entrepreneurship, and strong communities.

As George Washington recognized in a letter addressed to the Hebrew Congregation of Newport, Rhode Island, "[t]he citizens of the United States . . . have a right to applaud themselves for having given to mankind examples of an enlarged and liberal policy: a policy worthy of imitation." The policy required industrious and "*good* citizens." With such a policy and such citizens in mind, President Washington cited the Book of Micah and expressed the hope that

---

38. *Id.* at 70.

39. *See* McDonald v. City of Chicago, 561 U.S. 742, 815–16 (2010) (Thomas, J., concurring in part and concurring in the judgment).

40. *See* James E. Pfander & Daniel D. Birk, *Article III and the Scottish Judiciary*, 124 HARV. L. REV. 1613, 1631–42 (2011) (tracing the influence of the Scottish Enlightenment's leading political theorists—Hume, Reid, Smith, and Millar, among others—on the Founding generation).

41. U.S. CONST. pmbl.

"every one shall sit in safety under his own vine and figtree, and there shall be none to make him afraid."[42]

* * *

In exploring the province of our law, we might not always agree about what is there. The political philosophy behind our Constitution may at times be contested, but it is something more determinate than abstract ideals of a good or favored moral philosophy. Finding the correct interpretation within our province may sometimes be difficult and judges may make good-faith mistakes. Disputes will arise as in many other legal inquiries,[43] but that is no reason to duck hard questions about what is necessarily and properly within our legal terrain.

This ongoing deliberation is essential because the province of the law is not static. Far from it. The scope of the law regularly changes based on legislation enacted by Congress. The Constitution may be amended, creating a more fundamental shift in the boundaries of law's province. Courts continue to decide cases and further articulate the meaning of the laws.

But new statutes, amendments, and precedents cannot be understood except by reference to what already exists within law's province. This perspective can help us to identify what is not properly within the province of our law. We must learn to recognize the concepts or doctrines that are simply weeds and to explain why they are foreign invaders that have taken root in our soil.

It is the proper and peculiar province of the courts to interpret the laws—to keep the garden cultivated and free of such weeds.

---

42. Letter from George Washington to the Hebrew Congregation in Newport, Rhode Island (Aug. 18, 1790), *reprinted in* 6 THE PAPERS OF GEORGE WASHINGTON SERIES 284, 285 (Dorothy Twohig et al. eds., 1996).

43. *Compare* McIntyre v. Ohio Elections Comm'n, 514 U.S. 334, 361 (1995) (Thomas, J., concurring) ("[T]he historical evidence indicates that Founding-era Americans opposed attempts to require that anonymous authors reveal their identities on the ground that forced disclosure violated the 'freedom of the press.'"), *with id.* at 371–85 (Scalia, J., dissenting) (employing an originalist methodology but reaching the opposite conclusion).

In keeping with this analogy, Chief Justice Marshall and other early jurists often referred to improper and outlandish interpretations as "wild."[44] Wild was defined at the Founding to mean "not tame," "not cultivated," and "uncivilized."[45] In contrast to *wild* interpretations, the orderly province of the law includes principles drawn from the text and structure of the Constitution.

Early justices had no difficulty discarding the arguments they deemed "wild" and inconsistent with our cultivated law. Faithfully exercising the judicial duty requires stating what the law is, and what is simply too wild and too foreign to be considered part of our law. And by pointing to the outlandish and the wild, the judiciary keeps the other departments in check as well—setting down markers for what types of legislation and execution are within the province of the law and what will be deemed outside of it, in the wilderness. The political branches also have an obligation to maintain the province of the law, but within their particular spheres.

When tending to law's province, judicial precedents can raise difficult questions. Judges conventionally follow stare decisis, standing by what has already been decided. But sometimes things are decided incorrectly and at odds with the Constitution and our legal foundations—they are, in a sense, an invasive species within law's province.

Judges are often cautioned to stand by even these decisions, to simply settle the dust around these strange plants, perhaps to prune here and there, and hope the weeds stay within their little plots.[46]

---

44. *See, e.g.*, McCulloch v. Maryland, 17 U.S. (1 Wheat.) 316, 403 (1819) (Marshall, C.J.) ("No political dreamer was ever wild enough to think of breaking down the lines which separate the States, and of compounding the American people into one common mass."); Anderson v. Dunn, 19 U.S. (6 Wheat.) 204, 228–29 (1821) (Johnson, J.) (rejecting as "a supposition too wild to be suggested" that the House lacks a contempt power).

45. 2 SAMUEL A. JOHNSON, *Wild*, A DICTIONARY OF THE ENGLISH LANGUAGE (4th ed. 1773).

46. *See, e.g.*, June Med. Servs. L.L.C. v. Russo, 140 S. Ct. 2103, 2133–42 (2020) (Roberts, C.J., concurring in the judgment), *abrogated by* Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228 (2022).

Yet part of the judge's duty is to say what the law is within our peculiar and proper province. In so doing, judges must point out the precedents that do not fit.[47] And this takes some work, because human beings are adaptable and quickly grow accustomed to new landscapes. Part of the judicial power requires identifying and uncovering what has been grown over, to help people to see the broader context, not just the latest and brightest foliage.

It should go without saying that in our constitutional republic, judges cannot introduce new laws or impose new values. But sometimes judges introduce the weeds, and it may fall on later judges to pull them up.[48]

Judges must tend to the new and the old, saying what the law is and how it fits together. Of course, this is a task that must be undertaken with good judgment and learning and a fair measure of humility, because law's province is extensive and complex. Yet the difficulty of the task does not erase the duty of the judges.

CONCLUSION

Let me bring this lecture to a close with a few final thoughts.

There is at present an understandable and rising frustration with literalism and shallow linguistic positivism. The solution, however,

---

47. *See, e.g.*, Gamble v. United States, 139 S. Ct. 1960, 1984 (2019) (Thomas, J., concurring) ("[I]f the Court encounters a decision that is demonstrably erroneous—*i.e.*, one that is not a permissible interpretation of the text—the Court should correct the error . . . ."); Caleb Nelson, Stare Decisis *and Demonstrably Erroneous Precedents*, 87 VA. L. REV. 1 (2001). Most jurists recognize that there comes a point when mistaken precedents must be discarded. Conventional analysis about when to overturn a precedent sometimes focuses on the distortions that the weeds create on other areas of the law, requiring not just error, but egregious error. *See, e.g.*, Ramos v. Louisiana, 140 S. Ct. 1390, 1414 (2020) (Kavanaugh, J., concurring in part) ("A garden-variety error or disagreement does not suffice to overrule. In the view of the Court that is considering whether to overrule, the precedent must be egregiously wrong as a matter of law in order for the Court to overrule it."); William Baude, *Precedent and Discretion*, 2019 SUP. CT. REV. 313, 319–29 (2020) (comparing the different approaches to precedent articulated by Justice Thomas and Justice Alito).

48. *Compare* Roe v. Wade, 410 U.S. 113 (1973), *with Dobbs*, 142 S. Ct. 2228.

is not to tear down the boundaries of the law or to import new, abstract ideals. Rather we must focus on understanding the particular substance of our laws. Law's province has both limits and substance. The judicial duty requires both staying within law's limits and accounting for the law's deep and rich legal foundations.

And by insisting on a province for the law, I must admit to an institutional ambition for the courts. Often the lack of legal boundaries is associated with judicial supremacy and the expansion of the judicial power. I think this is a mistake, certainly in the long run. If there are no boundaries to the law and no limits on the judge's province, then the importance of judgment dissipates. Without law, there remain only will and politics, and judges, as we know, "have neither force nor will, but merely judgment."[49] Judges have no law to interpret if their province is a legal wilderness governed by abstract reasoning about justice, efficiency, the common good, or whatever philosophy is most in vogue.

If it is the peculiar and proper province of the judiciary to say what the law is, in the absence of any defined province, the judiciary will eventually become irrelevant.

Invoking judicial "legitimacy" by sitting on the bench and letting the weeds take over will preserve neither the courts nor the law. Law is not a path, moving farther and farther from its origins. It is a province, in which new things may be built by the people, but only within constitutional limits and with firm roots in our distinct legal soil.

---

49. THE FEDERALIST NO. 78, *supra* note 1, at 402 (Alexander Hamilton) (formatting modified).

OFFICIAL IMMUNITY AT THE FOUNDING

HON. ANDREW S. OLDHAM*

INTRODUCTION

It is unclear to me that originalists' qualified immunity debate is framed in the correct terms. Or that it is framed in the correct time period. The current debate turns on whether officers enjoyed common-law tort immunities in 1871, when Congress passed the Enforcement Act that today appears in 42 U.S.C. § 1983.[1] But the constitutional claims underlying qualified immunity cases often come from the Bill of Rights—not Reconstruction.[2] So the originalist inquiry should focus (at least in the first instance) on whether officers enjoyed constitutional immunities in 1791. And the historical pleading practices embraced in English common law and by our first Congresses suggest the answer is "yes."[3]

This Article challenges the premises of the current debate by considering the archetypal qualified immunity case: a Fourth Amendment plaintiff's claim against an officer who allegedly executed an "*unreasonable*" search or seizure. In 1791, the word "unreasonable" meant "against the reason of the common law."[4] That common law brought with it a host of immunities for officers charged with

* Judge, United States Court of Appeals for the Fifth Circuit.

1. *See infra* notes 10–20 and accompanying text.

2. *See* discussion *infra* Section V.

3. *See* discussion *infra* Sections III and IV.

4. Laura K. Donohue, *The Original Fourth Amendment*, 83 U. CHI. L. REV. 1181, 1270 (2016).

searching and seizing.[5] Thus, it is possible that a Fourth Amendment claim at the Founding required plaintiffs to show that an officer's search or seizure was not only wrongful, but *so* wrongful that the plaintiff could overcome the officer's common-law immunities. If that is correct, then today's originalist critics of qualified immunity must broaden their focus and shift their debate in both time (from 1871 to 1791) and focus (from torts to the Constitution).

I. THE CURRENT DEBATE

Qualified immunity is a hot topic. It is the rare legal doctrine that has captured the attention of mainstream news and everyday Americans.[6] It has stimulated debates and prompted Congress to consider whether to amend § 1983[7]—the material provisions of which have remained unaltered since its enactment in 1871. Qualified immunity generates *a ton* of federal court litigation[8] and has created a serious divide amongst courts and legal scholars.[9]

5. *See* discussion *infra* Section III and IV; Malley v. Briggs, 475 U.S. 335, 340 (1986) (explaining that common law is generally referenced for guidance in recognizing official immunity).

6. *See, e.g.*, Editorial, *End the Court Doctrine that Enables Police Brutality: A Series on George Floyd and America*, N.Y. TIMES (May 22, 2021), https://www.nytimes.com/2021/05/22/opinion/qualified-immunity-police-brutality-misconduct.html [https://perma.cc/U2CK-EVPL].

7. *See* George Floyd Justice in Policing Act of 2021, H.R. 1280, 117th Cong. § 102 (2021).

8. *See* Joanna C. Schwartz, *How Qualified Immunity Fails*, 127 YALE L.J. 2, 9 (2017). In just five out of the 94 federal judicial districts there were 1,183 cases filed under § 1983 over two years by individuals against law enforcement officers. *Id.*

9. *See* Aaron L. Nielson & Christopher J. Walker, *Qualified Immunity and Federalism*, 109 GEO. L.J. 229, 231–33 (2020) (describing these debates).

The part of the present debate that I find most interesting is whether originalists must abjure qualified immunity. Some—Professor William Baude chief among them—have argued yes.[10] Others—most recently Scott Keller—have argued no.[11] The fault line between them is whether some form of immunity had some form of common-law provenance in 1871.[12] If so, Congress might have silently enacted that immunity when expressly making state officials liable for deprivations of constitutional rights under § 1983.[13]

But this focus on 1871 obscures the way that § 1983 interacts with the underlying constitutional rights it protects. Take the archetypal § 1983 case: A suspect sues a police officer for using excessive force during his arrest. The suspect—let's call him Adam—files suit under § 1983 against the arresting officer—let's call her Amanda. Section 1983 gives Adam a cause of action for money damages against Amanda when she:

> under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects [Adam], or causes [Adam] to be subjected, . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution.[14]

What is the right, privilege, or immunity secured by the Constitution of which Amanda allegedly deprived Adam? It is the right against "unreasonable . . . seizures" protected by the Fourth Amendment.[15]

But in the current qualified immunity debate, the Federal Constitution (specifically, the Fourth Amendment) and its original public meaning (in 1791) are irrelevant. The debate instead centers on state law (namely, torts) at some point between the present day and 1871,

---

10. William Baude, *Is Qualified Immunity Unlawful?*, 106 CALIF. L. REV. 45, 88 (2018).

11. Scott A. Keller, *Qualified and Absolute Immunity at Common Law*, 73 STAN. L. REV. 1337, 1399–1400 (2021).

12. *See id.* at 1344.

13. *See id.* at 1341.

14. 42 U.S.C. § 1983.

15. U.S. CONST. amend. IV.

the year of § 1983's enactment. The Supreme Court's canonical qualified immunity decision, *Pierson v. Ray*,[16] looked to Mississippi tort law for the source of that immunity.[17] Professor Baude likewise frames his argument around "constitutional torts" and argues that *Pierson* misread state law.[18] Scott Keller's impressive historical analysis starts from the same premise—namely, that immunity doctrine relates closely to tort law—and disputes Professor Baude's interpretation of the nineteenth-century common law.[19] And similarly, some judges construe the Fourth Amendment as a judicial license to promulgate an ever-evolving and ever-expanding corpus of federal tort law that is not rooted in anything beyond other twenty-first century qualified immunity cases.[20]

On the one hand, this makes some sense. After all, Amanda committed a *tort* in the sense that she allegedly battered (or falsely arrested) Adam, and that tort became *unconstitutional* because Amanda did so under color of state law. Moreover, as Professor Baude points out, early cases adjudicating the scope of Fourth Amendment rights arose in the context of state law tort suits.[21] For example, Adam would sue under state law for battery or false arrest; Amanda would then defend by invoking her power to arrest with or without a warrant; and hence the meaning of Adam's

16. 386 U.S. 547 (1967).

17. *Id.* at 555–57. The officers accused of wrongdoing in *Pierson* argued successfully that they "should not be liable if they acted in good faith and with probable cause in making an arrest under a statute that they believed to be valid." *Id.* at 555. The Court, relying in part on a torts treatise and the Restatement (Second), agreed that "that the defense of good faith and probable cause" was available to the officers. *Id.* at 555–57 (first citing RESTATEMENT (SECOND) OF TORTS § 121 (AM. L. INST. 1965); and then citing 1 FOWLER V. HARPER & FLEMING JAMES, JR., THE LAW OF TORTS § 3.18, at 277–78 (1956)).

18. *See* Baude, *supra* note 10, at 52–55.

19. *See* Keller, *supra* note 11, at 1344, 1375.

20. *See, e.g.*, Joseph *ex rel.* Est. of Joseph v. Bartlett, 981 F.3d 319, 331 n.40 (5th Cir. 2020) (finding "value in addressing the constitutional merits" of § 1983 cases "to develop robust case law on the scope of constitutional rights"); Roque v. Harvel, 993 F.3d 325, 332, 329 (5th Cir. 2021) (reiterating that "value" and holding federal courts have power under the Fourth Amendment to promulgate standards to measure where "the reasonableness rope ends")

21. *See* Baude, *supra* note 10, at 51–52.

Fourth Amendment rights against Amanda would be liquidated in the context of a state law tort dispute.

On the other hand, this fixation on state law obscures an important point. As Chief Justice Marshall famously put it, "we must never forget, that it is *a constitution* we are expounding."[22] And it seems to me that a central question in *Adam v. Amanda*—as in *Pierson v. Ray*—is whether the original public understanding of the Fourth Amendment included some form of immunity for the arresting officer. There is at least some evidence that it did.

II. ORIGINALIST PRINCIPLES

Before considering the original public meaning of the Fourth Amendment and whatever immunities it did or did not include in 1791, I put forward two introductory propositions that I hope will be relatively uncontroversial.

The first is that English common law matters to the originalist enterprise.[23] The American public obviously understood the common law at the Founding—which is why some provisions of the Constitution are lifted directly from the law of our mother country.[24] That

22. McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 407 (1819).

23. By "common law," I simply mean the laws of England leading up to the Founding. *See* Atwater v. City of Lago Vista, 532 U.S. 318, 327 (2001) (recognizing that "common law" can be "understood strictly as law judicially derived or, instead, as the whole body of law extant at the time of the framing"); *id.* at 333 ("Quite apart from Hale and Blackstone, the legal background of any conception of reasonableness the Fourth Amendment's Framers might have entertained would have included English statutes, some centuries old . . . .").

24. To take just one example of our English constitutional parentage, England's 1689 Bill of Rights gave us all or some of the Take Care Clause, the Speech and Debate Clause, the First Amendment, the Second Amendment, and the Eighth Amendment. Other parts of the Constitution expressly disclaim the preexisting common law. For example, the Sixth Amendment guarantee of an "impartial jury," U.S. CONST. amend. VI, expressly disclaims the common-law rule that jurors could give evidence against defendants, *see, e.g.*, 3 WILLIAM BLACKSTONE, COMMENTARIES *375 (stating the rule, which "universally obtains," that a juror may "give his evidence publicly in court"). The important point for present purposes is that the common law formed the backdrop for the Constitution—no matter whether a given provision of constitutional text adopted or rejected that backdrop.

is also why, in cases too numerous to count or cite, the Supreme Court interprets the Constitution generally, and our Bill of Rights specifically, against the backdrop of English common law.[25] And that is why the Supreme Court so often invokes William Blackstone, whose *Commentaries* were widely read and "accepted [by the public at the Founding] as the most satisfactory exposition of the common law of England."[26]

My second (hopefully uncontroversial) introductory proposition is that the practices of the first Congresses matter. Those Congresses were obviously closer in time to the Founding. The first Congresses understood the original public meaning of the Constitution because they represented members of the relevant original public. And they were tasked with filling the great many holes left by the Constitution to democratic interpretation and implementation. As Professor David Currie put it in his masterwork, *The Constitution in Congress*, "the Constitution, as Chief Justice Marshall would later remind us, laid down only the 'great outlines' of the governmental structure."[27] The Framers left the details to Congress, which they thought was better situated to "translat[e] the generalities of this noble instrument into concrete and functioning institutions."[28] Congress's task "was one partly of interpretation and partly of interstitial creation."[29] In this way, "the First Congress was

25. *See, e.g.*, Ramos v. Louisiana, 140 S. Ct. 1390, 1397 (2020) (Sixth Amendment); Gamble v. United States, 139 S. Ct. 1960, 1969–78 (2019) (Double Jeopardy Clause); District of Columbia v. Heller, 554 U.S. 570, 582 (2008) (Second Amendment); Eldred v. Ashcroft, 537 U.S. 186, 200 n.5 (2003) (Copyright Clause); Harmelin v. Michigan, 501 U.S. 957, 966–75 (1991) (Eighth Amendment); Dimick v. Schiedt, 293 U.S. 474, 480–85 (1935) (Seventh Amendment); *Ex parte* Wells, 59 U.S. (18 How.) 307, 310–15 (1855) (Pardon Clause).

26. Schick v. United States, 195 U.S. 65, 69 (1904).

27. David P. Currie, The Constitution in Congress, 1789–1801, at 3 (1997) (quoting *McCulloch*, 17 U.S. at 407).

28. *Id.*

29. *Id.*

a sort of continuing constitutional convention, and not simply because . . . many of its members . . . helped to compose or to ratify the Constitution."[30]

The first Congresses' active role in translating, interpreting, and creating the Constitution is why the Court so often turns to the first Congresses to understand the Constitution's meaning, again in cases too numerous to count or cite. When it comes to interpreting Article III, no early statute is more influential than the Judiciary Act of 1789.[31] As noted by the greatest legal treatise of our time, "the first Judiciary Act is widely viewed as an indicator of the original understanding of Article III and, in particular, of Congress' constitutional obligations concerning the vesting of federal jurisdiction."[32] But the Court's reliance on early congressional practice is by no means limited to the First Judiciary Act. Other examples abound.[33]

Most importantly for present purposes, the Court has repeatedly used both of these originalist sources—English common law and

30. *Id.* at 3–4.

31. *See, e.g.*, Wisconsin v. Pelican Ins. Co., 127 U.S. 265, 297 (1888) (stating that the Judiciary Act of 1789 "was passed by the first congress assembled under the constitution, many of whose members had taken part in framing that instrument, and is contemporaneous and weighty evidence of its true meaning"), *overruled on other grounds by* Milwaukee Cnty. v. M.E. White Co., 296 U.S. 268 (1935).

32. Richard H. Fallon, Jr. et al., Hart and Wechsler's The Federal Courts and The Federal System 21 (7th ed. 2015).

33. *See, e.g.*, Seila Law LLC v. CFPB, 140 S. Ct. 2183, 2197–98 (2020) (Appointments Clause); Fin. Oversight & Mgmt. Bd. for P.R. v. Aurelius Inv., LLC, 140 S. Ct. 1649, 1657–58 (2020) (Article IV); Eldred v. Ashcroft, 537 U.S. 186, 200 (2003) (Copyright Clause); *Harmelin*, 501 U.S. at 980(Eighth Amendment); Marsh v. Chambers, 463 U.S. 783, 787–90 (1983) (Establishment Clause).

early congressional practice—to understand the Fourth Amendment.[34] That makes sense because the Amendment prohibits "*unreasonable* searches and seizures."[35] And in 1791, "'unreasonable' conveyed a particular meaning: namely, against reason, or against the reason of the common law."[36] As Professor Laura Donohue explains: "That which was consistent with the common law was reasonable and, therefore, legal. That which was inconsistent was unreasonable and illegal. General warrants, being against the reason of the common law, were thus unlawful, or void."[37] This understanding of the word "unreasonable" was shared by John Locke, William Blackstone, the Founders, and the public more generally.[38]

III. OFFICIAL IMMUNITY AT ENGLISH COMMON LAW

With these principles in place, we can now consider official immunity at common law in England. As explained below, officer immunities were robust.[39] But to fully understand the content and operation of those immunities, it is first necessary to know something about common-law pleading. So that is where I begin, with Joseph Chitty's authoritative *Treatise on Pleading* as a guide.[40]

---

34. *See, e.g.*, Collins v. Virginia, 138 S. Ct. 1663, 1675–76 (2018) (Thomas, J., concurring) (discussing common-law warrantless curtilage searches); Birchfield v. North Dakota, 136 S. Ct. 2160, 2174–75 (2016) (discussing common-law search-incident-to-arrest doctrine); Atwater v. City of Lago Vista, 532 U.S. 318, 327–35 (2001) (discussing common-law origins of officers' warrantless misdemeanor arrest power); Wilson v. Arkansas, 514 U.S. 927, 931–36 (1995) (discussing the common-law knock-and-announce rule); United States v. Verdugo-Urquidez, 494 U.S. 259, 267–68 (1990) (discussing early congressional practice).

35. U.S. CONST. amend. IV (emphasis added).

36. Donohue, *supra* note 4, at 1270.

37. *Id.* at 1270–71.

38. *See id.* at 1271–76 (collecting sources).

39. *See infra* text accompanying notes 55–118.

40. *See* 1 Joseph Chitty, A Practical Treatise on Pleading (New York, Robert M'Dermut 1809).

Plaintiffs at common law filed a "declaration" much like today's complaint.[41] Defendants could then file a "plea in bar" explaining why the plaintiff could not maintain a cause of action.[42] Pleas in bar fell into three categories: "1st. The general issue. 2dly. A denial of a particular allegation in the declaration. And 3dly. A special plea of new matter not apparent on the face of the declaration."[43] Pleading the "general issue" operated as a general denial that allowed a defendant to "question the truth of every material allegation in the plaintiff's pleading."[44] Thus, the general issue and the particular denial both provided ways for a defendant to attack the plaintiff's prima facie case. The special plea, on the other hand, functioned more like an affirmative defense. It permitted a defendant to "admit[] the facts alleged in the declaration" and still "avoid[] the action by matter which the plaintiff would not be bound to prove or dispute in the first instance."[45]

So far, those pleading rules look a lot like today's rules of civil procedure.[46] The catch is that defendants at common law had to choose one plea and stick with it; disputing the plaintiff's prima facie case while also pleading an affirmative defense simply was not an option.[47] And the rule barring multiple pleas was strictly enforced. An illustrative case involved a plaintiff who sued for battery

41. *See id.* at *248 ("The declaration is a specification, in a methodical and legal form, of the circumstances which constitute the plaintiff's cause of action.").

42. *See id.* at *434–35.

43. *Id.* at *465 (emphases omitted).

44. BRYAN A. GARNER, A DICTIONARY OF MODERN LEGAL USAGE 382 (2d ed. 1995); *see also* CHITTY, *supra* note 40, at *465.

45. CHITTY, *supra* note 40, at *497.

46. *See* FED. R. CIV. P. 8(b)(3), (c) (providing for "General and Specific Denials" along with "Affirmative Defenses").

47. *See* CHITTY, *supra* note 40, at *511–12 ("Every plea must in general be single, and if it contain two matters, either of which would bar the action, and require several answers, it will in general be subject to a special demurrer for duplicity . . . ." (emphases omitted)); *id.* at *540 ("We have already seen . . . that the defendant could not plead several defences to the same part of a declaration . . . .").

after the defendant lost control of the horse he was riding and trampled the plaintiff.[48] The defendant attempted a special plea of justification—"that his horse, being frightened, ran . . . upon the plaintiff, against the defendant's will."[49] Unfortunately, the defendant failed to admit to the plaintiff's factual allegations as part of his special plea.[51] That meant he had pleaded both a "special matter" and the "general issue."[50] A sympathetic court recognized that the defendant might have been acquitted had he made a single plea.[51] But it held for the plaintiff nonetheless.[52]

These technical rules and the rigidity with which they were enforced did not last forever. Eventually, a statute of Queen Anne made it "lawful for any defendant . . . to plead as many several matters thereto[] as he shall think necessary for his defence."[53] But as we will see, officers of the Crown got that pleading privilege nearly a century early, in addition to other protections.[54] And they got much more too.[55] Indeed, what they got looks a lot like the "defense to liability" and "limited 'entitlement not to . . . face the . . . burdens of litigation'" that today we call qualified immunity.[56]

Consider for example a 1609 English statute aptly named "An act for ease in pleading troublesome and contentious suits prosecuted against justices of the peace, mayors, constables, and certain other

48. *See id.* at *511 (citing Gibbons v. Pepper (1695) 91 Eng. Rep. 922; 1 Ld. Raym. 38 (KB)).

49. *Id.* at *511.

[51] *Id.*

50. See *id*.

51. See *id*.

52. *Id.*

53. *Id.* at *540–41 (quoting An Act for the Amendment of the Law, and the Better Advancement of Justice 1705, 4 Ann. c. 16, § 4, *reprinted in* 4 THE STATUTES AT LARGE 205 (Owen Ruffhead ed., London, Woodfall & Strahan 1763)).

54. *See infra* notes 57–61

55. *See infra* notes 74–80.

56. Ashcroft v. Iqbal, 556 U.S. 662, 672 (2009) (quoting Mitchell v. Forsyth, 472 U.S. 511, 526 (1985)).

[royal] officers, for the lawful execution of their office."[57] The statute began by reciting the "many causeless and contentious suits which . . . daily are commenced and prosecuted" against these officers "to their great . . . discouragement in doing of their offices."[58] Then it offered a solution. When officers faced "any action, bill, plaint or suit, upon the case, trespass, battery or false imprisonment" due to "any matter, cause or thing . . . done by virtue or reason of their . . . offices," they had options.[59] An officer could "plead the general issue [] that he is not guilty."[60] And he could "give such special matter in evidence to the jury which shall try the same, which special matter being pleaded had been a good and sufficient matter in law to have discharged the said . . . defendants of the . . . matter laid to . . . their charge."[61] While the rest of England had to choose between pleading the general issue and pleading special matter, executive officers could do both.

That unique entitlement shares some interesting similarities with qualified immunity. The entitlement increases plaintiffs' burden of proof by forcing them to prove a prima facie case and then go a step further.[62] It gives officers a defense that ordinary defendants lack.[63] And it predicates that defense on concerns about officers being unable to perform their duties.[64]

57. 7 Jac. 1 c. 5, *reprinted in* 7 THE STATUTES AT LARGE 226–27 (Danby Pickering ed., Cambridge, Joseph Bentham 1763).

58. *Id.*

59. *Id.*

60. *Id.*

61. *Id.*

62. *Cf.* District of Columbia v. Wesby, 138 S. Ct. 577, 589 (2018) ("Under our precedents, officers are entitled to qualified immunity under § 1983 unless (1) they violated a federal statutory or constitutional right, and (2) the unlawfulness of their conduct was clearly established at the time." (internal quotation marks omitted)).

63. *Cf.* Harlow v. Fitzgerald, 457 U.S. 800, 807 (1982) (limiting qualified immunity to certain "executive officials").

64. *Cf. id.* at 816 (noting "the general costs of subjecting officials to the risks of trial," including "distraction of officials from their governmental duties").

Parliament later clarified that the same protections it afforded officers in the 1609 immunity statute also applied in the specific context of searches and seizures. Take the Fraud Act of 1662,[65] for example. The Fraud Act required captains of incoming and outgoing ships to formally declare the contents on board with customs officials.[66] It also authorized customs officers to "enter aboard any ship or vessel" and search for undeclared goods "in any private or secret place, in or out of the hold of the ship or vessel."[67] And upon discovery of any such goods, the Act permitted the searching officer to "bring [them] on shore into his Majesty's store-house."[68] Then came the immunity from suit. The statute provided that "in every action, suit, indictment, information or prosecution, wherein . . . the officers of his majesty's customs . . . have been . . . sued, indicted, prosecuted or molested," officers could "plead the general issue."[69] They also could plead an affirmative defense by "giv[ing] this . . . act[] of parliament . . . in evidence, in any of his majesty's courts of justice, or other courts where the said matter shall be depending."[70] As a result, judges were "strictly enjoyned and required to admit the same, and to acquit and indemnify [officers] . . . from all such [actions], for or concerning any matter or thing acted or done in the due and necessary performance and execution of their respective trusts and imployments therein."[71] So once again, officers received statutory authorization to "plead the general issue" and also plead an affirmative defense.

Only this time Parliament went further. Instead of permitting officers to plead and prove *preexisting* "special matters" as an affirmative defense (as it did in the 1609 statute),[72] Parliament created an

65. An Act for Preventing Frauds and Regulating Abuses in His Majesties Customes 1662, 14 Car. 2 c. 11, *reprinted in* 8 THE STATUTES AT LARGE, *supra* note 57, at 78–94.

66. *See id.* §§ 2–3.

67. *Id.* § 4.

68. *Id.*

69. *Id.* § 16.

70. *Id.*

71. *Id.*

72. *See supra* notes 60–61 and accompanying text.

entirely new defense. And that defense was incredibly powerful. Once an official demonstrated he had been sued for anything "done in the due and necessary performance" of his office, he could submit the Fraud Act in evidence and automatically avoid liability.[73]

The immunities did not stop there. Parliament also imposed substantial financial penalties to discourage plaintiffs from suing officers or otherwise interfering with their duties.[74] As the towering historian and Fourth Amendment expert William Cuddihy explains: "As early as 1512, anyone obstructing the efforts of the curriers, one of the companies that could only search its members, incurred a forty shilling fine."[75] But these fines increased: "The excises of 1696 and 1723 escalated some penalties to thirty and one hundred pounds."[76] Given that the average family income in 1688 was "thirty-two pounds, with an individual margin of survival of only nine shillings, the intent of the measure was self-evident."[77]

To further disincentivize officer suits, Parliament added to its 1609 immunity statute that "if the verdict shall pass with the said defendant . . . , or the plaintiff . . . therein become nonsuit[ed] or suffer any discontinuance thereof, . . . the justices . . . shall . . . allow unto the defendant . . . double costs, which he . . . shall have sustained by reason of the[] wrongful vexation in defence of the said action."[78] Given these and other provisions,[79] it's little wonder

73. 14 Car. 2 c. 11, § 16.

74. *See* William J. Cuddihy, The Fourth Amendment: Origins and Original Meaning 602–1791, at 431 (2009).

75. *Id.*

76. *Id.*

77. *Id.*

78. Constable Protection Act 1662, 7 Jac. 1 c. 5, *reprinted in* 7 THE STATUTES AT LARGE, *supra* note 57, at 226–27.

79. For additional examples of similar officer immunity statutes, see Further Relief for Poor Prisoners, (1650) II ACTS & ORDS. INTERREGNUM 378; Habeas Corpus Act 1679, 31 Car. 2 c. 2, § 20, *reprinted in* 8 THE STATUTES AT LARGE, *supra* note 57, at 432–39; Constable Protection Act 1751, 24 Geo. 2 c. 44, *reprinted in* 20 THE STATUTES AT LARGE 279–80 (Danby Pickering ed., Cambridge, Joseph Bentham 1765).

that English historian Henry Hallam once complained that Parliament had "shield[ed] the officers of the crown[] as far as possible[] from their responsibility for illegal actions."[80]

Officer immunities are also evident in the two English cases that were more influential than any other to the framing of our Fourth Amendment.

The first case was *Wilkes v. Wood*.[81] It began with the anonymous publication of the forty-fifth issue of an opposition periodical called *The North Briton*.[82] This particular issue spared no punches; it lambasted England's secretaries of state as "wretched" puppets of a "corrupt[] and despot[ic]" prime minister, and it even criticized the king.[83] Unamused, Secretary of State Lord Halifax signed a general warrant demanding a "strict and diligent search" for the authors and printers of the "seditious" publication.[84]

Chaos followed. Halifax and his messengers received a second-hand tip that John Wilkes, a suspected author of *The North Briton*, had spent some time at one Dryden Leach's printing shop.[85] The search party raided Leach's house later that night, removed him from his bed next to his wife, and combed through his belongings for six hours.[86] The messengers similarly searched suspected publisher George Kearsley and did the same to suspected printer Richard Balfe.[87] Finally, they arrived at Wilkes's residence.[88] Wilkes protested, so some officers whisked him away.[89] Those who remained searched the residence and another of his houses for eighteen hours.[90] Wilkes returned to find dozens of damaged doors, scores

80. 3 Henry Hallam, The Constitutional History of England from the Accession of Henry VII to the Death of George II, at 384 (Boston, Wells & Lily 1829).

81. (1793) 98 Eng. Rep. 489; Lofft 1 (CP).

82. *See* CUDDIHY, *supra* note 74, at 440.

83. *Id.* (quoting 2 N. BRITON, Apr. 23, 1760, at 227, 235).

84. *Id.*

85. *Id.* at 441.

86. *Id.*

87. *Id.*

88. *Id.*

89. *Id.* at 442.

90. *Id.*

of rummaged trunks, hundreds of broken locks, and thousands of papers dumped "promiscuously" on the floor.[91]

As expected, Wilkes and others sued in trespass.[92] The success of that litigation is well-documented and incredibly important.[93] But the Crown's litigation strategy is just as interesting. As Cuddihy explains, "the Crown's lawyers moved to bar the actions . . . on grounds that the Vagrancy Act of 1744 immunized constables against suits for enforcing certain kinds of general warrants from justices of the peace."[94] Under this reasoning, "state secretaries, as the kingdom's paramount officials, necessarily assumed all powers of its most basic magistrates, the justices of peace."[95] And messengers, as "deputies of the secretaries," then "implicitly qualified as constables."[96] In other words, officer immunity remained a central part of search-and-seizure litigation well into the eighteenth century. And while the Crown's immunity argument didn't persuade Chief Justice Pratt, that was more a feature of the Vagrancy Act than anything else.[97]

The second foundational case was *Entick v. Carrington*.[98] Officer immunity played a prominent role there too. Much like John Wilkes, John Entick contributed to an opposition periodical called *The Monitor or British Freeholder*.[99] He too was the victim of a general warrant signed by Lord Halifax and an invasive search performed

91. *Id.*

92. *Wilkes*, 98 Eng. Rep. at 489.

93. *See, e.g.*, Griffin B. Bell & Perry E. Pearce, *Punitive Damages and the Tort System*, 22 U. RICH. L. REV. 1, 2–3 (1987).

94. CUDDIHY, *supra* note 74, at 444.

95. *Id.*

96. *Id.*

97. *See id.* (describing Pratt's reluctance to extend the Act to "protect secretaries and messengers that it nowhere mentioned").

98. (1765) 19 How. St. Tr. 1029 (CP).

99. *Id.* at 1031.

by messengers of the Crown.[100] So he too sued the messengers in trespass.[101]

The messengers' litigation strategy largely mirrored that in *Wilkes*. This time they invoked a 1751 statute regulating actions "brought against any constable . . . or other officer . . . acting by his order and in his aid, for any thing done in obedience to any warrant under the hand or seal of any justice of the peace."[102] The statute directed that if a defendant constable produced the authorizing warrant at trial, "the jury shall give their verdict for the defendant."[103] It also prescribed a method for service of process that the messengers contended Entick had disregarded.[104]

Chief Justice Pratt (now serving as Lord Camden) rejected the immunity argument and ruled for Entick.[105] But the way he did so highlights the prevalence of officer immunities in the years leading up to our Founding.

Mere pages before his celebrated defense of "sacred and incommunicable" property rights,[106] Camden conducted an extended discussion of officer immunity and officer pleas.[107] He began that discussion by quoting at length from the 1751 immunity statute invoked by the *Entick* defendants. Its title, he said, was "An Act for the rendering justices of the peace more safe in the execution of their offices, and for indemnifying constables and others acting in

100. *See id.* at 1030–31 (describing a four-hour, nonconsensual search in which officers of the Crown "broke open the boxes, chests, drawers, &c. of the plaintiff in his house . . . and read over, pryed into and examined all the private papers, books, &c. of the plaintiff there found").

101. *See id.* at 1030.

102. Constable Protection Act 1751, 24 Geo. 2 c. 44, § 6, *reprinted in* 20 THE STATUTES AT LARGE, *supra* note 79, at 279–81; *see Entick*, 19 How. St. Tr. at 1036–37 (quoting "the statute of the 24th of Geo. 2, c. 44").

103. 24 Geo. 2 c. 44, § 6.

104. *See id.*; *Entick*, 19 How. St. Tr. at 1036–37.

105. *See Entick*, 19 How. St. Tr. at 1060–62.

106. *Id.* at 1066.

107. *See id.* at 1060–62.

obedience to their warrants."[108] And its preamble found it "necessary that [these officers] should be, as far as is consistent with justice and the safety and liberty of the subjects over whom their authority extends, rendered safe in the execution of the said office and trust."[109]

Camden went on to note that those sentiments were part of a broader trend of English statutes "being made to change the course of the common law" to better protect and immunize officers.[110] Citing the same 1609 immunity statute I've already mentioned above,[111] Camden observed: The 1609 statute "is an act of like kind to relieve justices of the peace, mayors, constables, and certain other officers, in troublesome actions brought against them for the legal execution of their offices; who are enabled by that act to plead the general issue."[112] Camden continued: "If then that privilege of giving the special matter in evidence upon the general issue is contrary to the common law, how much more substantially is this [1751] act an innovation of the common law . . . ?"[113] That is because the 1751 Act "indemnifies the officer upon the production of the warrant and deprives the subject of his right of action."[114] He determined that for both general and special pleading, the "objects . . . are the same, and the remedies are similar in both, each of them changing the common law for the benefit of the [officers] concerned."[115] But they were there to supplement each other: "The first not being an adequate remedy in case of the several persons therein mentioned, the second is added to complete the work, and to make them as secure as they ought to be made from the nature of the case."[116]

---

108. *Id.* at 1059.

109. *Id.*

110. *Id.* at 1062.

111. *See supra* text accompanying notes 57–61 (discussing "[a]n act for ease in pleading troublesome and contentious suits").

112. *Entick*, 19 How. St. Tr. at 1062.

113. *Id.*

114. *Id.*

115. *Id.*

116. *Id.*

Granted, Camden wound up concluding that neither immunity statute applied in the case—Lord Halifax was not a "justice of the peace," and the defendant messengers were not "constables."[117] But Camden's analysis reveals just how much official immunities mattered to English search-and-seizure litigation in the late eighteenth century. And at the heart of it all was "the privilege of pleading the general issue[] and . . . the special matter."[118]

IV. FOURTH AMENDMENT IMMUNITY AT THE FOUNDING

The same principles emerged on our side of the Atlantic. But before the Framers could decide questions about immunities, they first had to settle the scope of the relevant right. Thus, Mercy Otis Warren lamented "the insecurity in which we are left with regard to warrants unsupported by evidence."[119] Patrick Henry protested that general warrants arbitrarily permitted "any man [to] be seized[,] any property [to] be taken, [and] . . . [e]very thing the most sacred [to] be searched and ransacked by the strong hand of power."[120] And other Anti-Federalists circulated a draft constitution declaring that general warrants were "grievous and oppressive and ought not to be granted."[121]

The Federalists eventually jumped on board too. Drawing heavily on a provision in the Massachusetts Constitution that had been

117. *See id.* at 1059–62.

118. *Id.* at 1062.

119. Mercy Otis Warren, *Observations on the Constitution* (1788), *reprinted in* 2 BIRTH OF THE BILL OF RIGHTS 143 (Jon L. Wakelyn ed., 2004).

120. Patrick Henry, Debates, *The Virginia Convention* (June 24, 1788), *in* 10 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 1473, 1474 (John P. Kaminski & Gaspare J. Saladino eds., 1993).

121. Society of Western Gentleman, *A Declaration of Rights*, VA. INDEP. CHRON., Apr. 30, 1788, *reprinted in* 9 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION, *supra* note 120, at 773.

written by John Adams and hearkened all the way back to the famous *Writs of Assistance Case*,[122] James Madison penned the following:

> The rights of the people to be secured in their persons[,] their houses, their papers, and their other property, from all *unreasonable* searches and seizures, shall not be violated by warrants issued without probable cause, supported by oath or affirmation, or not particularly describing the places to be searched, or the persons or things to be seized.[123]

As noted above, Madison did not choose the word "unreasonable" by accident. It had a distinct legal meaning at the time of the Founding—namely, against the reason of the common law.[124] For example, "[a]ccording to Samuel Johnson's *A Dictionary of the English Language*, 'reasonable' was understood at the time as 'agreeable to reason,' a formulation that reflected the meaning *consistent with the reason of the common law*."[125]

The Framers subsequently modified the text of the Fourth Amendment before asking the People to ratify it.[126] Crucially for present purposes, however, the Framers kept the word "unreasonable" at the center of its text:

---

122. *See* CUDDIHY, *supra* note 74, at 605–06 (describing the connection between the Massachusetts Constitution, John Adams, and the *Paxton* case). There is no formal report of the case, which is also known as *Paxton v. Gray*. Larry D. Kramer, *The Supreme Court 2000 Term Foreword: We the Court*, 115 HARV. L. REV. 4, 30 n.105 (2001).

123. 1 ANNALS OF CONG. 452 (1789) (emphasis added).

124. *See supra* notes 35–37 and accompanying text.

125. Donohue, *supra* note 4, at 1274 (quoting *Reasonable*, SAMUEL JOHNSON, A DICTIONARY OF THE ENGLISH LANGUAGE (3d ed. 1768)).

126. The import of these modifications is widely debated, especially when it comes to the relationship between reasonableness and warrants. *Compare, e.g.*, CUDDIHY, *supra* note 74, at 263–406 (describing the "evolution of the specific warrant as the orthodox method of search and seizure"), *with* William J. Stuntz, *The Substantive Origins of Criminal Procedure*, 105 YALE L.J. 393, 409 n.62 (1995) (rejecting the idea that "a broad modern-style warrant requirement [was] part of the Founders' picture of search and seizure law"). But that's a debate I leave for another day.

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.[127]

As explained above, the common law that existed at the Founding brought with it a series of protections for officers who were charged with executing searches and seizures.[128] It was only when the officers' searches and seizures transgressed the reason of the common law—including the common-law immunities discussed above—that those searches became *unreasonable*.[129] Thus, the plaintiff would have to show that the officer behaved so badly that he lost the various protections afforded to him by the common law.[130] Or put differently, the officer was not just wrong—he was *so* wrong that he lost the qualified immunity afforded to him by the common law.[131]

Early congressional practice supports this understanding, as three early statutes indicate. The first is the Collection Act of 1789.[132] As its name implies, the Act concerned "the due collection of . . . duties imposed by law."[133] And as its date implies, the Act was a product of the very same Congress that drafted the Fourth Amendment. To prevent merchants from concealing taxable goods,

---

127. U.S. CONST. amend. IV.

128. *See supra* notes 92–97 and accompanying text (discussing *Wilkes*).

129. *See* Donohue, *supra* note 4, at 1274 (citing *Reasonable*, SAMUEL JOHNSON, A DICTIONARY OF THE ENGLISH LANGUAGE (3d ed. 1768)).

130. *See supra* notes 98–118 and accompanying text (discussing *Entick*).

131. That bears an eerie resemblance to modern doctrine. *See* Ashcroft v. al-Kidd, 563 U.S. 731, 743 (2011) (holding qualified immunity "protects 'all but the plainly incompetent or those who knowingly violate the law'" (quoting Malley v. Briggs, 475 U.S. 335, 341 (1986))).

132. Act of July 31, 1789, ch. 5, 1 Stat. 29 [hereinafter Collection Act of 1789].

133. *Id.* § 1.

the statute provided warrants for daytime searches on land and further authorized warrantless searches on ships.[134] It also granted searching officers a qualified immunity from suit. Specifically, any officer sued "for any thing done in virtue of the powers given by th[e] act" could "plead the general issue" and "give th[e] act in evidence" as a defense at trial.[135] Not only that, but the statute automatically placed the burden of proof upon the plaintiff and entitled prevailing defendants to "recover double cost[s]."[136]

The second statute is "[a]n Act to prohibit intercourse with the enemy."[137] Like the Collection Act, this statute authorized collectors and naval officers to perform warrant-based searches on land and warrantless searches on ships for taxable goods.[138] It also permitted searches and seizures upon probable cause that a suspect was transporting weapons and other supplies to hostile nations.[139] More importantly, it continued the pattern of recognizing the searchers' immunity. Defendant officers retained the right to "plead the general issue," "give th[e] act . . . in evidence," and "recover double costs."[140] But this time the officers got more. Even in cases where "judgment [was] given against the defendant," Congress directed the judge to absolve the officer of all liability "if it shall appear to the court . . . that there was probable cause" for the officer to do what he did.[141]

The third statute is largely a reiteration of the first two.[142] Like its predecessors, the statute authorized collectors to perform warrant-based searches of "any particular dwelling-house, store, building,

134. *See id.* § 24.
135. *Id.* § 27.
136. *Id.*
137. Act of Feb. 4, 1815, ch. 31, 3 Stat. 195 [hereinafter Collection Act of February 1815].
138. *Id.* §§ 1–2.
139. *Id.* §§ 3–4.
140. *Id.* § 8.
141. *Id.* § 9.
142. *See* Act of Mar. 3, 1815, ch. 100, 3 Stat. 239 [hereinafter Collection Act of March 1815].

or place" upon "cause to suspect a concealment of any goods, wares, or merchandise."[143] Also like its predecessors, the statute granted collectors a qualified immunity. It specified that "any officer or other person, executing or aiding or assisting in the seizure of goods, wares, or merchandise" who was "sued or molested for any thing done in virtue of the powers given by this act . . . or by virtue of a warrant granted by any judge or justice" had options.[144] That officer could "plead the general issue."[145] He could also "give this act and the special matter in evidence."[146] And then he could "recover double costs" in suits where "the plaintiff is non-suited, or judgment pass[es] against him."[147]

These three statutes bear remarkable similarities to the English immunity statutes I discussed earlier.[148] In each statute Congress addressed places—like dwelling-houses—where the Fourth Amendment applied.[149] Congress recognized the officers' rights to search those places.[150] And Congress recognized the officers' immunities against suits arising from those searches.[151] On both sides of the Atlantic, officers could "plead the general issue."[152] Officers had equal right to "give the [immunity] act in evidence" as a "special matter."[153] And prevailing officers were entitled to "recover double costs."[154]

---

143. *Id.* § 10.

144. *Id.* § 13.

145. *Id.*

146. *Id.*

147. *Id.*

148. *See supra* notes 53–77 and accompanying text.

149. *Compare* Collection Act of 1789, *supra* note 132, § 1, *with* Collection Act of February 1815, *supra* note 137, § 2, *and* Collection Act of March 1815, *supra* note 142, § 10.

150. *Compare* Collection Act of 1789, *supra* note 132, § 24, *with* Collection Act of February 1815, *supra* note 137, § 1–4, *and* Collection Act of March 1815, *supra* note 142, § 10.

151. *Compare* Collection Act of 1789, *supra* note 132, § 1, *with* Collection Act of February 1815, *supra* note 137, § 9, *and* Collection Act of March 1815, *supra* note 142, §13.

152. Collection Act of March 1815, *supra* note 142, § 13. *Compare id.*, *with* 14 Car. 2 c. 11, § 16.

153. Collection Act of 1789, *supra* note 132, § 27. *Compare id.*, *with* 14 Car. 2 c. 11, § 16.

154. Collection Act of March 1815, *supra* note 142, § 13. *Compare id.*, *with* 7 Jac. 1 c. 5.

Indeed, a side-by-side comparison shows that two of the statutes are materially identical. Here again is a slightly abbreviated version of the immunity provision in Parliament's 1609 "act for ease in pleading" troublesome suits:

> [B]e it therefore enacted . . . [t]hat if any action . . . shall be brought . . . against [certain officers] . . . for or concerning any . . . thing . . . done by virtue or reason of their . . . offices, [t]hat it shall be lawful to and for every such [officer] . . . to plead the general issue[] that he [is] not guilty, . . . and to give such special matter in evidence to the jury which shall try the same, . . . and that if the verdict shall pass with the said defendant[s] . . . , or the plaintiff[s] . . . therein become nonsuit[ed], or suffer any discontinuance thereof, [t]hat in every such case the justices or justice . . . shall by force and virtue of this act allow unto the defendant[s] . . . their double costs.[155]

And here is the immunity provision from the first Congress's Collection Act of 1789:

> [B]e it further enacted, [t]hat if any officer . . . aiding and assisting in the seizure of goods[] shall be sued or molested for any thing done in virtue of the powers given by this act . . . , such officer . . . may plead the general issue, and give this act in evidence; and if in such suit the plaintiff be nonsuited, or judgment pass against him, the defendant shall recover double cost[s].[156]

It seems that the first Congress—which drafted both the Collection Act and the Fourth Amendment—understood the official immunities that searching officers enjoyed at the Founding. Those immunities were part of the common law. And hence it appears the Fourth Amendment prohibited searches and seizures that ran

155. 7 Jac. 1 c. 5, *reprinted in* 7 THE STATUTES AT LARGE, *supra* note 57, at 226–27.
156. Collection Act of 1789, *supra* note 132, § 27.

against that common law—taking account of the officers' preexisting immunities.

V. RESPONSES

That's all quite interesting, you might say, but it's irrelevant to § 1983. In fact, it arguably proves that qualified immunity has no legal basis. After all, the 1871 Congress chose not to include anything in § 1983 about pleading the general issue or any official immunities—unlike the pre-Founding statutes in England, the Collection Act, &c. Mustn't we presume that Congress's omission was intentional, you might ask?

Maybe not. As an initial matter, the presumption of intentional omission arises where Congress includes some language in one section of a statute and omits it from another section of the same statute.[157] It's not obvious that any presumption applies when Congress writes different statutes on different topics at different times in different ways. As Justice Scalia put it, "the presumption of consistent usage"—and its corollary, the presumption of intentional omission—"can hardly be said to apply across the whole *corpus juris*."[158] And the presumptions are particularly inapposite when statutes are not "enacted at the same time" and do not "deal[] with the same subject."[159]

But more to the point, I am not suggesting that *§ 1983* implicitly carries with it any immunity generally or qualified immunity specifically. Section 1983 provides the cause of action, but in our archetypal case, the *Fourth Amendment* provides the substantive right.[160] The substantive right protected by the Fourth Amendment runs against "unreasonable" searches and seizures—and hence imports

157. *See, e.g.*, Dean v. United States, 556 U.S. 568, 573 (2009); Russello v. United States, 464 U.S. 16, 23 (1983).

158. ANTONIN SCALIA & BRYAN GARNER, READING LAW 172 (2012).

159. *Id.* at 173.

160. *See* Albright v. Oliver, 510 U.S. 266, 271 (1994) ("Section 1983 'is not itself a source of substantive rights,' but merely provides 'a method for vindicating federal rights elsewhere conferred.'" (quoting Baker v. McCollan, 443 U.S. 137, 144 n.3 (1979))).

the reason of the common law into the constitutional right. The common law that predates the Founding—and the statutory law that postdates it—makes me wonder whether the concept of unreasonableness could bring with it official immunities.

Let me provide an example that's near and dear to my heart: habeas corpus. The Great Writ is mentioned exactly one time in the Constitution. It appears in Article I, § 9, which specifies certain powers that are expressly denied Congress. In clause 2 of that section, the Constitution says: "The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it."[161] Thus the Constitution prohibits Congress from "suspend[ing]" the privilege—but it says nothing at all about the scope of the privilege, where it comes from, which courts can vindicate it under what circumstances, &c.[162] So if you only read Article I, § 9, you might wonder whether the Constitution guarantees *any* habeas corpus rights at all.

It gets worse. The Supreme Court has said that state courts cannot issue habeas writs to federal officers.[163] So if an individual is detained without cause or charge by the United States Army, for example, his only recourse lies in a habeas writ from a federal court.[164] But we know from the Madisonian Compromise that the Constitution does not guarantee the existence of inferior federal courts—only the Supreme Court.[165] We also know that the Supreme Court has no power to grant habeas corpus unless it does so through its appellate jurisdiction.[166] So if Congress could abolish the inferior courts (which thus could not trigger the Supreme Court's appellate jurisdiction) and if state courts cannot issue writs to federal officers (and thus not trigger the Supreme Court's appellate jurisdiction),

161. U.S. CONST. art. I, § 9, cl. 2.
162. *Id.*
163. *See* Tarble's Case, 80 U.S. (13 Wall.) 397, 411–12 (1871).
164. *See id.* at 409–10.
165. *See* U.S. CONST. art. III, § 1.
166. *See Ex parte* Bollman, 8 U.S. (4 Cranch) 75 (1807).

does that mean that the Constitution does not guarantee *any* habeas corpus rights at all for our hypothetical Army detainee?

A potential answer to this troubling line of questions lies in the First Judiciary Act.[167] In that Act, Congress gave all federal courts the power to issue writs of habeas corpus.[168] It's possible that was pure statutory grace on Congress's part. But it's also possible that the first Congress—which was closer in time and understanding to the Founding than we are—understood that the habeas power is part of "[t]he judicial power" vested by Article III.[169] In that sense, the grant of habeas power in the First Judiciary Act is as much an interpretation about how Article III works as it is anything else.

By analogy, think again about the Collection Act.[170] It's possible that it's just a statute. But it's also possible that the first Congress was explaining how the Fourth Amendment works. The Fourth Amendment contemplates searches. The statute authorized them. The Fourth Amendment contemplates limits on searches. The statute provided them. And the Fourth Amendment contemplates a remedy for a right that "shall not be violated." Couldn't the statute be part of that remedy? Isn't it possible that the same enforcement mechanism widely embraced by English statutes and prominently featured in *Wilkes* and *Entick* was also the mechanism that the People ratified? Isn't it possible that when the People prohibited "unreasonable searches and seizures," they meant searches and seizures that ran contrary to the reason of the common law—including the protections of the 1609 Act and their materially identical twins in the Collection Act?

But suppose you take the contrary position—that the Collection Act is just another statute and tells us nothing about the Fourth Amendment. That creates its own problems. For example, if the Collection Act is just an exercise of legislative grace, then presumably we should infer meaning from Congress's failure to enact

167. Judiciary Act of 1789, ch. 20, 1 Stat. 73.
168. *Id.* § 14.
169. U.S. CONST. art. III, § 1.
170. Collection Act of 1789, *supra* note 132, § 1.

modern statutes like it. That is, Congress's failure to provide for pleading the general issue in modern statutes means that Congress implicitly prohibited it. But of course, the Collection Act did more than that. It also authorized searches and specified the parameters for reasonable searches. And we would never argue that Congress's failures to authorize searches and specify the parameters for reasonable ones means that Congress prohibited them too.

Take for example the Controlled Substances Act.[171] It prohibits certain kinds of possession of certain kinds of drugs.[172] It says nothing about searches, the places or times where searches can be conducted, or immunity. But we would never say that officers cannot search for drugs prohibited by the Controlled Substances Act; rather, we'd say that the Fourth Amendment—regardless of the statute—allows such searches so long as they're reasonable. That is, the Fourth Amendment authorizes a reasonable search–just as the Collection Act did—even when Congress fails to say so in post-Collection Act statutes. My question is whether the Fourth Amendment also authorizes official immunity—just as the Collection Act did—even when Congress fails to say so in post-Collection Act statutes.

Well hold on, you might say, didn't Lord Camden say that the 1609 Act was an "innovation" to the common law? Indeed, he did.[173] But it's unclear if that makes the 1609 Act and its progeny any less of the common law, against the reason of which the Fourth Amendment prohibited searches and seizures. The Framers rejected several search-and-seizure practices they didn't like.[174] But they didn't object to officer immunities. To the contrary, they positively enacted them.[175] It seems at least possible that the Collection Act—like the pre-Founding English laws on which the Framers

171. Controlled Substances Act, Pub. L. No. 91-513, 84 Stat. 1242 (1970) (codified as amended at 21 U.S.C. §§ 801–971).

172. See 21 U.S.C. §§ 841–843.

173. *See supra* note 113 and accompanying text (discussing *Entick*).

174. The most obvious was the general warrant. *See supra* notes 37–38.

175. *See, e.g.*, Collection Act of 1789, *supra* note 132, § 27.

modeled it—is part of the common law that the Fourth Amendment embraced.

Another potential response to all of this is: That is a narrow theory. Because it turns on the original public meaning of the Fourth Amendment, it will tell us nothing at all about official immunity (or the lack thereof) for, say, First Amendment or Eighth Amendment claims.

But that might be a virtue rather than a vice. We regularly apply different standards of review to different constitutional claims.[176] And even for those who think history and tradition should replace the traditional tiers of scrutiny, the history and tradition of the Religion Clauses is different from the history and tradition of the Second Amendment.[177] So of course the analysis is different for different constitutional rights. The real question in my view is why we would think the same qualified immunity inquiry applies regardless of the constitutional right at issue.

Finally, you might wonder whether we have gone a long way only to go nowhere. I started this Article by asking whether we should focus on 1791 and the original public meaning of the Fourth Amendment instead of 1871 and the enactment of § 1983. But what about the Fourteenth Amendment, ratified by the People in 1868?[178] Isn't *that* the relevant source of law and the relevant time period given that it is the Fourteenth Amendment that incorporates the Fourth against the States and state officers like Amanda?[179]

---

176. *See* United States v. Virginia, 518 U.S. 515, 532–33 (1996) (applying intermediate scrutiny to claim of gender discrimination); Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 227 (1995) (applying strict scrutiny to claim of racial discrimination); Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989) (applying specialized scrutiny to free speech claim).

177. *Compare* Town of Greece v. Galloway, 572 U.S. 565, 576–79 (2014) (Establishment Clause), *with* McDonald v. City of Chicago, 561 U.S. 742, 767–78 (2010) (Second Amendment).

178. *See McDonald*, 561 U.S. at 777.

179. *See* Jamal Greene, *Fourteenth Amendment Originalism*, 71 MD. L. REV. 978, 979 (2012) ("An originalist who believes that the Fourteenth Amendment incorporated against state governments some or all of . . . the Bill of Rights should . . . be concerned

It is unclear to me how far that moves the ball. As an initial matter, even for Fourteenth Amendment Originalists, isn't it the substantive prohibition ratified in the *Fourth* Amendment that's doing the work to protect the People against unreasonable searches and seizures? Isn't the Fourteenth Amendment just providing the mechanism for making those substantive Fourth Amendment prohibitions applicable to the States, much as § 1983 provides the cause of action for vindicating constitutional rights without altering the content of those rights? If so, then the question remains what the Fourth Amendment means. Moreover, even if you think the Fourth Amendment meant something different in 1868 (when the People made it applicable to the States) than it did in 1791 (when the People ratified it), I would think the burden remains on the official-immunity critic to show how the People changed the reason of the common law in the intervening century between the two Amendments.

CONCLUSION

My project here is not to legitimize official immunity or suggest any particular answer to the current debate. I only hope to refocus that debate on the proper questions.

A proper understanding of this area of law must be rooted in the *constitutional* right at issue. For too long, originalist critics have focused on tort law to the exclusion of constitutional law. And worse, in Fourth Amendment qualified immunity cases, too many have read the word "unreasonable" as a judicial license to promulgate an ever-evolving body of twenty-first century federal tort law. Whatever the right answer might be, it should start and end with the meaning of the Constitution when the People ratified it.

---

primarily (if not exclusively) with determining how the generation that ratified that amendment understood the scope and substance of the rights at issue.").

LIQUIDATING THE INDEPENDENT STATE LEGISLATURE THEORY

MICHAEL WEINGARTNER*

Following the 2020 presidential election, an obscure and potentially revolutionary constitutional theory reemerged. The so-called "independent state legislature" theory posits that the Constitution vests state legislatures with plenary power to craft rules for congressional elections and to direct the appointment of presidential electors, unbound by state constitutions and free from review by state courts. Though the Supreme Court rejected this theory in the past, four Justices signaled their seeming approval in 2020, and, in 2022, the Court granted certiorari to resolve the question in Moore v. Harper, *to be decided this term.*

The debate over the independent state legislature theory pits textual arguments against the longstanding practice of states throughout our history. Every state constitution dictates the procedure by which state legislatures may enact election laws, and state constitutions are full of provisions which regulate nearly every aspect of federal elections from voter registration to congressional redistricting to absentee voting. Nearly all of these provisions were enacted with the affirmative participation of state legislatures, and since the Founding they have, through state court review, constrained the authority of state legislatures when enacting election laws.

---

* Law Clerk to Judge Gene E.K. Pratter, United States District Court for the Eastern District of Pennsylvania. J.D. 2021, University of Pennsylvania Law School. The author would like to thank Carolyn Shapiro, Rick Hasen, Guy-Uriel Charles, Vikram Amar, Mitchell Berman, Hayward Smith, Joshua Douglas, and Rebecca Green for comments, Maggie Blackhawk for invaluable guidance, and the editors of the Harvard Journal of Law and Public Policy for patient and thorough editing.

This Article operationalizes this history by applying James Madison's analytical framework of "constitutional liquidation," recently endorsed by the Supreme Court in Chiafalo v. Washington *to resolve whether states could control the votes of presidential electors. This framework posits that the meaning of indeterminate constitutional text may be liquidated—that is, settled—by longstanding and broadly accepted historical practice. Applying that framework here reveals that, while the Constitution's text may be unclear as to the role of state constitutions in regulating federal elections, subsequent practice and the acquiescence of state legislatures, Congress, and the public has settled the Constitution's meaning and rejected the independent state legislature theory.*

INTRODUCTION

Following the 2020 presidential election, an obscure and potentially revolutionary constitutional theory reemerged. According to the so-called "independent state legislature" (ISL) theory, the Constitution, through Article I, Section 4 (the Elections Clause) and Article II, Section 2 (the Electors Clause), vests state legislatures with plenary power to craft rules for Congressional and Presidential elections unbound by state constitutions and free from review by state courts.[1] This theory, repeatedly rejected by the Supreme Court,[2] was roused from its slumber by a wave of litigation that pitted state legislatures against their constitutions. In the months before the election, the COVID-19 pandemic and concerns over in-person voting prompted numerous challenges to state election laws

1. *See* Michael T. Morley, *The Independent State Legislature Doctrine, Federal Elections, and State Constitutions*, 55 GA. L. REV. 1, 16 (2020).

2. *See infra* Part I.B.

that limited absentee and early voting or imposed onerous signature match or witness requirements.[3] Roughly half of these challenges were brought in state courts under state constitutions,[4] many of which include election and voting rights provisions that go far beyond those found in the U.S. Constitution.[5] The Pennsylvania Supreme Court, for example, extended the absentee ballot deadline based on the state constitution's guarantee that elections shall be free and equal.[6] Meanwhile, changes to election rules made by governors, secretaries of state, and elections boards were challenged as usurping the exclusive power of state legislatures.[7] After election day, the theory took on a troubling new dimension as supporters of former President Trump called for Republican-controlled legislatures in states won by Joe Biden to reject the electors chosen by voters and instead appoint their own slates of pro-Trump electors.[8] While no alternate electors were appointed and efforts to invoke the ISL theory in court were unsuccessful, four Justices signaled their willingness to consider at least some version of the theory,[9] including Justice Alito, who suggested the Pennsylvania

3. *See* Richard L. Hasen, *Three Pathologies of American Voting Rights Illuminated by the COVID-19 Pandemic, and How to Treat and Cure Them*, 19 ELECTION L.J. 263, 273 (2020) (collecting cases); Eugene D. Mazo, *Voting During a Pandemic*, 100 BOSTON L. REV. ONLINE 233, 294–96 (2020) (same).

4. *See COVID-Related Election Litigation Tracker*, STAN.-MIT HEALTHY ELECTIONS PROJECT, https://healthyelections-case-tracker.stanford.edu [https://perma.cc/JF8D-R5E8].

5. *See* Joshua A. Douglas, *The Right to Vote Under State Constitutions*, 67 VAND. L. REV. 89, 104 (2014).

6. *See* Pennsylvania Democratic Party v. Boockvar, 238 A.3d 345, 371 (Pa. 2020).

7. *See* Mark S. Krass, *Debunking the Non-Delegation Doctrine for State Regulation of Federal Elections*, 108 VA. L. REV. 101, 118–19 (forthcoming 2022) (listing four categories of Elections Clause challenges and collecting cases).

8. *See* Lawrence Lessig & Jason Harrow, *State Legislatures Can't Ignore the Popular Vote in Appointing Electors*, LAWFARE (Nov. 6, 2020), *https://www.lawfareblog.com/state-legislatures-cant-ignore-popular-vote-appointing-electors* [https://perma.cc/TL78-9P72].

9. *See* Democratic National Committee v. Wisconsin State Legislature, 141 S. Ct. 28, 34 n.1 (2020) (Kavanaugh, J., concurring) (arguing that under the Electors Clause state courts may not "rewrite state election laws."); Moore v. Circosta, 141 S. Ct. 46, 47 (2020) (Gorsuch, J., dissenting) (noting that "under the Federal Constitution, only the state 'Legislature'" may enact election laws).

Supreme Court's extended absentee ballot deadline may have violated the Elections Clause.[10] The Court will address the ISL theory directly during October Term 2022 in *Moore v. Harper*, a case in which the North Carolina Supreme Court struck down the congressional district map passed by the state legislature based on a number of state constitutional provisions.[11]

Proponents of the ISL theory rely primarily on the textual argument that when the Elections and Electors Clauses grant authority to "the Legislature" of each state, they refer solely and exclusively to institutional representative legislative bodies.[12] This novel reading, however, conflicts with over two hundred years of historical practice. Since the Founding, state constitutions have regulated nearly every aspect of federal elections, from voter registration and balloting to congressional redistricting and election administration.[13] Most of these election-related provisions were presented by state legislatures and approved by voters. For centuries, these provisions have constrained both the process and the substance of state election laws.

This Article contends that this longstanding practice, spanning all fifty states and with only scattered exceptions throughout history, has settled the meaning of the Elections and Electors Clauses and foreclosed the ISL theory. It draws on James Madison's analytical framework of "constitutional liquidation," under which the meaning of unclear or ambiguous constitutional text may be liquidated—i.e., settled—by a "regular course of practice."[14] The Supreme Court

10. *See* Republican Party of Pennsylvania v. Boockvar, 141 S. Ct. 1, 1 (2020) (statement of Alito, J.).

11. Docket No. 21-1271; *see also* Harper v. Hall, 868 S.E.2d 499, 535–47 (N.C. 2022).

12. *See* Michael T. Morley, *The Intratextual Independent "Legislature" and the Elections Clause*, 109 NW. U. L. REV. 847, 855–59 (2015).

13. *See infra* Part III.B.

14. Letter from James Madison to Spencer Roane (Sept. 2, 1819), *in* 1 THE PAPERS OF JAMES MADISON: RETIREMENT SERIES 500, 502 (David B. Mattern et al, eds. 2009).

has increasingly looked to historical practice to resolve constitutional ambiguities,[15] including in election law.[16] Most recently, the Court explicitly adopted a liquidation framework in *Chiafalo v. Washington* to settle whether states may control the votes of members of the Electoral College.[17]

Following the Court's lead, this Article examines the debate over the ISL theory through the liquidation framework. Part I provides background on the Clauses, the Supreme Court's doctrine, and the theory's 2020 reemergence. Part II explores how settled historical practice informs the Court's interpretation of the Constitution and how the Court has applied liquidation in election cases, including *Chiafalo*. Part III then applies the liquidation framework to the ISL theory and concludes that, while the Constitution's text is not dispositive, the subsequent history is. Since the Founding, there has been a consistent, deliberate practice of state constitutions regulating federal elections and constraining state legislatures. This longstanding practice enjoys the acceptance of courts, Congress, the public, and even state legislatures themselves. This strongly suggests the meaning of the Elections and Electors Clauses has been settled in favor of state constitutional constraints and that the ISL theory should, once again, be rejected.

I. BACKGROUND

A. The Clauses

The Constitution empowers states to regulate federal elections in two places. First, the Elections Clause of Article I provides that "[t]he Times, Places and Manner" for congressional elections "shall be prescribed in each State by the Legislature thereof . . . ."[18] Second, the Electors Clause of Article II empowers states to "appoint, in such Manner as the Legislature thereof may direct, a Number of

15. *See infra* Part II.A.
16. *See infra* Part II.B.
17. Chiafalo v. Washington, 140 S. Ct. 2316, 2326 (2020).
18. U.S. CONST. art. I, § 4.

Electors"[19] to cast votes for president and vice president.[20] Both Clauses refer to state legislatures using identical language, suggesting each confers authority in the same manner and with the same effect—if any—on the power of state constitutions to constrain state legislatures.[21]

1. The Elections Clause

The Elections Clause empowers states to regulate the "Times, Places and Manner" of congressional elections, with the caveat that "Congress may at any time by Law make or alter such Regulations . . . ."[22] Congress's power under the Elections Clause is thus coextensive with that of the states. The Constitution does not define the terms "Times," "Places," or "Manner," but the Supreme Court has held that their "substantive scope is broad"[23] and that they "embrace authority to provide a complete code for congressional elections," including "notices, registration, supervision of voting, protection of voters, prevention of fraud and corrupt practices, counting of votes, duties of inspectors and canvassers, and making and publication of election returns . . . ."[24] This authority overlaps with several state constitutional provisions.[25]

A thornier question is whether the Elections Clause confers the power to regulate voter qualifications, which nearly all state constitutions do.[26] On the one hand, Article I's Qualifications Clause states that voters in House elections "shall have the Qualifications

19. U.S. CONST. art. II, § 1, cl. 2.

20. *See* U.S. CONST. amend. XII.

21. *See* Justin Levitt, *Failed Elections and the Legislative Selection of Presidential Electors*, 96 N.Y.U. L. REV. 1052, 1062 (2021) ("What is true of the delegation to the 'Legislature' for determining the manner of congressional elections should also be true of the similar delegation for determining the manner of appointing presidential electors.").

22. U.S. CONST. art. I, § 4, cl. 1.

23. Arizona v. Inter Tribal Council of Arizona, Inc., 570 U.S. 1, 8 (2013).

24. Smiley v. Holm, 285 U.S. 355, 366 (1932).

25. *See infra* Part III.B.

26. *See* Douglas, *supra* note 5, at 101–02.

requisite" for state legislative elections.[27] In light of this specific language, the Supreme Court has stated in dicta that the more general Elections Clause does not extend to voter qualifications.[28] On the other hand, in *Oregon v. Mitchell*, the Court upheld amendments to the Voting Rights Act that lowered the minimum voting age from twenty-one to eighteen for congressional elections.[29] Four Justices would have upheld the amendments under the Fourteenth Amendment,[30] but Justice Black's controlling opinion upheld it under the Elections Clause, writing that "the powers of Congress to regulate congressional elections[] includ[e] the age and other qualifications of the voters . . . ."[31] Despite the Court's more recent statements,[32] *Mitchell* has not been overturned and remains good law.[33] Congress has also imposed a citizenship requirement for presidential and congressional elections and required states to allow military and overseas citizens to vote for Congress.[34] The line between a voter

27. U.S. CONST. art I, § 2, cl 1. The Seventeenth Amendment applies the same requirement to U.S. Senate elections. *See id.* amend. XVII, cl. 1.

28. *See Inter Tribal Council*, 570 U.S. at 16 ("One cannot read the Elections Clause as treating implicitly what these other constitutional provisions regulate explicitly."); *see also* Oregon v. Mitchell, 400 U.S. 112, 210 (1970) (Harlan, J., concurring in part and dissenting in part) ("It is difficult to see how words could be clearer in stating what Congress can control and what it cannot control.").

29. Oregon v. Mitchell, 400 U.S. 112, 118 (1970).

30. *See id.* at 117-118 (Opinion of Black, J.).

31. *Id.* at 122. *See also id.* at 124 ("Congress has ultimate supervisory power over congressional elections.").

32. In dicta, a majority of the Supreme Court in *Inter Tribal Council* suggested that "the Elections Clause empowers Congress to regulate *how* federal elections are held but not *who* may vote in them." *Inter Tribal Council*, 570 U.S. at 16.

33. Richard L. Hasen, *"Too Plain for Argument?": The Uncertain Congressional Power to Require Parties to Choose Presidential Nominees Through Direct and Equal Primaries*, 102 NW. U. L. REV. 253, 262 (2008) (noting that *Mitchell* "remains good law unless overruled by the Court").

34. *See* 18 U.S.C. § 611 (2018) (citizenship requirement); 52 U.S.C. § 20302(a) (2018) (overseas requirement). While neither provision has been challenged in court, some commentators have criticized them. *See* Brian C. Kalt, *Unconstitutional but Entrenched: Putting UOCAVA and Voting Rights for Permanent Expatriates on a Sound Constitutional Footing*, 81 BROOK. L. REV. 441, 441–44 (2016) (unconstitutionality of overseas voting

qualification and a "Manner" regulation may also be blurry.[35] Requiring voters to register or pay a poll tax may be a qualification, but laws laying out specific payment or registration procedures go further and regulate the "Manner" of elections.[36] Given that the Elections Clause confers the same substantive power on states and Congress, these same considerations arguably govern a state's power to regulate voter qualifications for federal elections.

2. The Electors Clause

While the Elections Clause empowers states and Congress to regulate the time, place, and manner of congressional elections,[37] the Electors Clause addresses only the "Manner" of appointing presidential electors.[38] Though this text may appear to confer a narrower authority,[39] the Supreme Court has construed the power conferred

requirement); Stephen E. Mortellaro, *The Unconstitutionality of the Federal Ban on Noncitizen Voting and Congressionally-Imposed Voter Qualifications*, 63 LOY. L. REV. 447, 447–48 (2017) (unconstitutionality of citizenship requirement).

35. Franita Tolson, *The Spectrum of Congressional Authority Over Elections*, BOSTON U. L. REV. 317, 318 (2019).

36. *See infra* note 309 and accompanying text.

37. U.S. CONST. art. I, § 4, cl. 1.

38. U.S. CONST. art. II, § 1, cl. 2.

39. *See* Nicholas O. Stephanopoulos, *The Sweep of the Electoral Power*, 36 CONST. COMMENT. 1, 54 (2021) ("As a textual matter, the Electors Clause is plainly narrower than the Elections Clause.").

by the Electors Clause as coextensive with that granted by the Elections Clause,[40] holding that the Clause grants states "plenary authority to direct the manner of appointment."[41] The use of the word "Manner" in both clauses suggests as much with respect to manner regulations.[42] The fact that the Electors Clause does not refer to regulations of the "Times" and "Places" of appointment has never been understood to limit a state's ability to regulate these aspects of presidential elections; rather, the omission of "Times" and "Places" is likely just a reflection of the fact that a state may choose to appoint electors through a manner other than an election.[43]

Likewise, while Article II's text only allows Congress to set the time for choosing electors,[44] the Supreme Court has interpreted Congress's power as coextensive with states.[45] In *Ex parte Yarbrough*, the Court upheld a portion of the Ku Klux Klan Act crimi-

40. *See* Oregon v. Mitchell, 400 U.S. 112, 124 & n.7 (1970) (plurality opinion) (holding that "[i]t cannot be seriously contended that Congress has less power over the conduct of presidential elections than it has over congressional elections," and explaining that "inherent in the very concept of a supreme national government with national officers is a residual power in Congress to insure that those officers represent their national constituency as responsively as possible," one that "arises from the nature of our constitutional system of government and from the Necessary and Proper Clause"). *See also* Dan T. Coenen & Edward J. Larson, *Congressional Power Over Presidential Elections: Lessons from the Past and Reforms for the Future*, 43 WM. & MARY L. REV. 851, 891 (2002) ("[T]he [Electors Clause] power is fully coextensive with Congress's sweeping authority to regulate *in any way* the 'Manner' of House and Senate elections.").

41. McPherson v. Blacker, 146 U.S. 1, 25 (1892).

42. *See* Vasan Kesavan, *Is the Electoral Count Act Unconstitutional?*, 80 N.C. L. REV. 1653, 1750–51 (2002) ("There is little reason to suppose that the word "Manner" in [the Elections Clause] has a substantially different meaning from the word "Manner" in [The Electors Clause].").

43. *See* Bush v. Gore, 531 U.S. 98, 104 (2000) (per curiam) (noting that a State may choose to "select the electors itself" rather than hold an election and may at any time "take back the power to appoint electors").

44. U.S. CONST. art. II, § 1, cl. 5.

45. *See* U.S. Term Limits, Inc. v. Thornton, 514 U.S. 779, 895 (1995) (Thomas, J., dissenting) ("[T]he treatment of congressional elections in Article I parallels the treatment of Presidential elections in Article II.").

nalizing conspiracies to intimidate voters from supporting congressional candidates or presidential electors.[46] In *Burroughs v. United States*, the Court upheld the financial disclosure and reporting requirements of the Federal Corrupt Practices Act, holding that Congress "undoubtedly" possesses the power "to safeguard [a presidential] election from the improper use of money to influence the result."[47] And when the *Mitchell* Court upheld Congress's lowering of the voting age to eighteen, it did so for both congressional and presidential elections, explaining that "it cannot be seriously contended that Congress has less power over the conduct of presidential elections than it has over congressional elections."[48]

There is a stronger case that voter qualifications fall within the Electors Clause's scope.[49] While the Qualifications Clause addresses qualifications for voters in congressional elections, it makes no reference to—and thus does not limit—qualifications to vote for presidential electors.[50] This suggests the "Manner" of appointing

46. *Ex parte* Yarbrough, 110 U.S. 651, 658, 660–62 (1884); (noting that the Elections Clause grants Congress the "power to protect the elections on which its existence depends from violence and corruption," and extending this same authority to presidential elections). This same statute also includes a private right of action, codified today at 42 U.S.C. § 1985(3), to which *Yarbrough*'s holding also likely applies. *See* Michael Weingartner, *Remedying Intimidating Voter Disinformation Through § 1985(3)'s Support-or-Advocacy Clauses*, 110 GEO. L.J. ONLINE 83, 99–100 & n.109 (2021) (citing Richard Primus & Cameron O. Kistler, *The Support-or-Advocacy Clauses*, 89 FORDHAM L. REV. 145, 153–54 (2020)).

47. Burroughs v. United States, 290 U.S. 534, 544–45 (1934) (expressly rejecting the argument that Congress's authority under the Electors Clause is "limited to determining 'the time of choosing the electors'" as overly narrow and explaining that the power to regulate presidential elections to protect the integrity thereof "in no sense invades any exclusive state power").

48. Oregon v. Mitchell, 400 U.S. 112, 124 (1970).

49. *See* Derek T. Muller, *Weaponizing the Ballot*, 48 FLA. ST. U. L. REV. 61, 89 (2021) (explaining that the Electors Clause "includes the power to define the body of voters that chooses presidential electors").

50. U.S. CONST. art. I, § 5, cl. 1. *See also* Robert G. Natelson, *The Original Scope of the Congressional Power to Regulate Elections*, 13 U. PA. J. OF CONST. L. 1, 21 (2010) (arguing that the Electors Clause is "the counterpart to the provision in Article I authorizing the states to set the qualifications of persons choosing the House of Representatives").

electors under the Electors Clause includes the power to decide voter qualifications.[51]

***

Despite their textual differences, the Elections and Electors Clauses share two important features. First, each confers the same substantive power on States and Congress. Second, each delegates that power to States in an identical manner. To the extent either disrupts the status quo of state legislatures as constrained by state constitutions, they do so in the same way and to the same degree.

B. The Doctrine

Current Supreme Court doctrine rejects the ISL theory's literalist reading of the Elections and Electors Clauses and has consistently held that a state legislature's power to craft rules for federal elections is constrained by state constitutions. In *Ohio ex rel. Davis v. Hildebrant*, the Court considered a provision of the Ohio Constitution allowing citizens to nullify acts of the legislature by popular referendum.[52] Such a referendum was used to overturn Ohio's redistricting plan, and a group of voters sued claiming the Elections Clause granted the state legislature exclusive authority over redistricting.[53] The Supreme Court rejected this argument and upheld

---

51. If the Electors Clause grants Congress the power to set voter qualifications in presidential elections, two structural arguments suggest it should have the same authority over congressional elections despite the Qualifications Clause. First, following *Mitchell*, it makes little sense for Congress to have greater power over presidential elections than over congressional elections. Second, congressional and presidential elections are conducted simultaneously, and the Supreme Court has already held that the Congress may make laws affecting state elections held concurrently with federal elections. *See Ex parte Yarbrough*, 110 U.S. at 662; Pamela S. Karlan, *Section 5 Squared: Congressional Power to Extend and Amend the Voting Rights Act*, 44 HOUS. L. REV. 1, 17 (2007) ("[T]he Elections Clause has long been interpreted to give Congress power over so-called 'mixed elections'—that is, to permit Congress to regulate all aspects of an election (or an electoral process) used even in part to select members of Congress."). It thus follows that Congress may regulate "mixed" congressional and presidential elections, including as to setting voter qualifications.

52. Ohio *ex rel.* Davis v. Hildebrant, 241 U.S. 565, 566 (1916).

53. *Id.* at 566–67.

the referendum.[54] Four years later, in *Hawke v. Smith*, the Court held this same Ohio referendum could not be used to block ratification of the Eighteenth Amendment[55] and stated that ratification was "entirely different" from States' Elections Clause authority.[56]

That difference was clarified in *Smiley v. Holm*, which asked whether the Minnesota legislature's congressional redistricting plan was subject to a gubernatorial veto per the state constitution.[57] The Supreme Court held that it was, and explained that the Constitution confers upon state legislatures a variety of different functions, including an "electoral" function when selecting Senators (prior to the adoption of the Seventeenth Amendment), a "ratifying" function for proposed Constitutional Amendments, and a "consenting" function with respect to lands acquired by the United States.[58] Because these functions go beyond ordinary lawmaking, they are not subject to state constitutional limits.[59] But, the Court explained, when a state legislature enacts laws under the Elections Clause it is engaged in ordinary lawmaking and therefore subject to the usual constraints.[60] Thus, while a state constitution may not restrict a state legislature's ratification function,[61] a state's redistricting plan—an act of ordinary lawmaking—remains subject to a governor's veto.[62]

The Court reaffirmed the power of state constitutions to constrain state legislatures in *Arizona State Legislature v. Arizona Independent Redistricting Commission (AIRC)*.[63] There, the people of Arizona had

54. *Id.* at 569.

55. Hawke v. Smith, 253 U.S. 221, 225 (1920).

56. *Id.* at 231.

57. Smiley v. Holm, 285 U.S. 355, 363 (1932).

58. *See id.* 365–66.

59. *Id.* at 369.

60. *Id.* at 367–68 (holding the Elections Clause did not "endow the legislature of the State with power to enact laws in any manner other than that in which the constitution of the state has provided").

61. *See* Hawke v. Smith, 253 U.S. 221, 231 (1920).

62. *See Smiley*, 285 U.S. 372–73.

63. Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n (AIRC), 576 U.S. 787, 793 (2015).

adopted a state constitutional amendment via ballot initiative establishing an independent redistricting commission.[64] The Arizona legislature challenged the Commission's map, arguing that the Elections Clause precluded any entity other than it from redistricting.[65] The Court rejected this argument, holding that the term "Legislature" under the Elections Clause included the initiative process as established by the Arizona Constitution.[66] Thus, state constitutions could both constrain and remove the authority of state legislatures. *AIRC* generated significant scholarly debate and a strong dissent by Chief Justice Roberts.[67] But four years later in *Rucho v. Common Cause*, all nine Justices embraced state constitutions, state courts, and independent redistricting commissions as valid means of curbing excessive partisan gerrymandering.[68]

Proponents of the ISL theory, however, claim to find support in a different set of Supreme Court decisions. The first of these, *McPherson v. Blacker*, is frequently cited as controlling precedent for its discussion—in dicta—of the role of state constitutions under the Electors Clause.[69] Decided in 1892, *McPherson* involved a challenge to the Michigan legislature's decision to elect presidential electors by district, rather than on a winner-take-all basis.[70] The claim was that this scheme violated the Electors Clause, which required "[e]ach state" to appoint presidential electors, rather than subdivisions of a state.[71] The Supreme Court disagreed, explaining that the Electors Clause "leaves it to the legislature exclusively to define the method" of appointing electors.[72] *McPherson*'s holding thus does

64. *Id.* at 792.

65. *Id.*

66. *Id.* at 793.

67. *See id.* at 824–50 (Roberts, C.J., dissenting).

68. *See* Rucho v. Common Cause, 139 S. Ct. 2484, 2507 (2019) (opinion of Roberts, C.J.); *id.* at 2524 (Kagan, J., dissenting).

69. *See* Michael T. Morley, *The Independent State Legislature Doctrine*, 90 FORDHAM L. REV. 501, 516 (2021).

70. McPherson v. Blacker, 146 U.S. 1, 4–5 (1892).

71. *Id.* at 9.

72. *Id.* at 36.

not address state constitutions at all. In dicta, however, the Court wrote that, while state legislatures ordinarily must exercise "legislative power under state constitutions as they exist," the express delegation of authority under the Electors Clause "operat[es] as a limitation upon the State in respect of any attempt to circumscribe the legislative power."[73] But the Court did not elaborate on the nature of such a limitation, and the surrounding context does not suggest that the Court embraced the ISL theory; a few pages later, the Court cited with approval federal statutes that required states in special circumstances to appoint electors "by law;" that is, via the ordinary lawmaking process laid out in state constitutions.[74]

Proponents of the ISL theory also point to *Bush v. Palm Beach County Canvassing Board* (*Bush I*), decided after the 2000 presidential election.[75] The Court vacated the Florida Supreme Court's decision requiring election officials to include votes from recounts requested by Al Gore.[76] The Florida Supreme Court had construed the state's election code based in part on the Florida Constitution's right to vote.[77] The Supreme Court explained, though, that when a state enacts laws governing the selection of presidential electors it is "not acting solely under the authority given it by the people of the State, but by virtue of a direct grant of authority" from the Presidential Electors Clause.[78] The Court cited *McPherson*'s "limitation" on how much a state constitution could "circumscribe" the state legislature, but declined to rule on the matter, instead remanding the case so the Florida Supreme Court could clarify the extent to which it had relied on the state constitution.[79]

Before this could be resolved, the Florida Supreme Court issued another opinion ordering a manual recount in certain counties, this

73. *Id.* at 25.

74. *Id.* at 40–41. *See also* Levitt, *supra* note 21, at 1064.

75. Bush v. Palm Beach Cnty. Canvassing Board, 531 U.S. 70 (2000).

76. *See* Palm Beach Cnty. Canvassing Bd. v. Harris, 772 So. 2d 1220, 1240 (Fla. 2000).

77. *See Bush I*, 531 U.S. at 77 (quoting *Palm Beach Cnty. Canvassing Bd.*, 772 So. 2d at 1236-37).

78. *Id.* at 76.

79. *Id.* at 76 (quoting *McPherson*, 146 U.S. at 25).

time based on state law with no reference to the state constitution.[80] In *Bush v. Gore* (*Bush II*), a divided Supreme Court stayed the recounts based on the Fourteenth Amendment and thus never reached the Electors Clause issue.[81] Chief Justice Rehnquist, however, wrote a concurring opinion that embraced a form of the ISL theory under which the Electors Clause not only precluded state constitutional limits on state legislatures but also prohibited state courts from departing too far from the plain text of state election laws.[82] The rest of the Court, however, did not embrace this view, which drew sharp dissents from four Justices.[83]

In sum, the Court has consistently held that state legislatures remain constrained by state constitutions when they exercise authority under the Elections and Electors Clauses, and neither *McPherson* nor *Bush I* demonstrate a departure from that doctrine or an embrace of the ISL theory.

C. The Debate

Although a majority of the Supreme Court rejected the ISL theory in *AIRC*, and all nine Justices endorsed state constitutions as a check on state legislatures in *Rucho*, this does not appear to have resolved the matter. The 2020 election breathed new life into the debate, with four Justices signaling their willingness to consider some version of the theory. In an appeal from the Pennsylvania Supreme Court's decision to extend the absentee ballot deadline, Justice Alito—joined by Justices Thomas and Gorsuch—wrote that the Elections and Electors Clauses confer authority "on state legislatures, not state courts," and that they "would be meaningless if a state court could override the rules adopted by the legislature simply by claiming that a state constitutional provision gave the courts the authority to make whatever rules it thought appropriate for the conduct

80. *See* Gore v. Harris, 772 So. 2d 1243, 1248 (Fla. 2000).

81. Bush v. Gore, 531 U.S. 98, 110–11 (2000).

82. *See id.* at 111, 113 (Rehnquist, C.J., concurring).

83. *Id.* at 123 (Stevens, J., dissenting); *id.* at 130–31 (Souter, J., dissenting); *id.* at 141 (Ginsburg, J., dissenting); *id.* at 148 (Breyer, J., dissenting).

of a fair election."[84] Likewise, in an appeal from the Fourth Circuit's decision to leave in place a consent agreement with the North Carolina Board of Elections to extend the state's absentee ballot receipt deadline, Justice Gorsuch wrote that a state elections board had no authority to "(re)writ[e] election laws" enacted by the state legislature, and that doing so "offend[s] the Elections Clause's textual commitment of responsibility for election lawmaking to state and federal legislators."[85] And in an appeal from a federal district court's decision to change Wisconsin's absentee ballot deadline, Justice Kavanaugh cited Chief Justice Rehnquist's *Bush II* concurrence for the proposition that "state courts do not have a blank check to rewrite state election laws for federal elections" and argued that "a state court may not depart from the state election code enacted by the legislature."[86]

These Justices were not alone. The Eighth Circuit held in *Carson v. Simon* that "the Electors Clause vests the power to determine the manner of selecting electors exclusively in the 'Legislature' of each state," and that "this vested authority is not just the typical legislative power exercised pursuant to a state constitution."[87] Likewise, three Fourth Circuit judges wrote in dissent that the Elections and Electors Clauses grant power "to a specific entity within each State: the 'Legislature thereof,'" and that the only check on this power lies with Congress, not state courts.[88] Litigants in other cases attempted to invoke the theory with less success.[89] And while most scholars

84. Republican Party of Pa. v. Boockvar, 141 S. Ct. 1, 2 (2020) (mem.) (statement of Alito, J.).

85. Moore v. Circosta, 141 S. Ct. 46, 47-48 (2020) (mem.) (Gorsuch, J., dissenting).

86. Democratic Nat'l Comm. v. Wis. State Legislature, 141 S. Ct. 28, 34 (2020) (mem.) (Kavanaugh, J., concurring).

87. Carson v. Simon, 978 F.3d 1051, 1059–60 (8th Cir. 2020).

88. Wise v. Circosta, 978 F.3d 93, 111–12 (4th Cir. 2020) (en banc) (Wilkinson, Agee, and Neimeyer, J.J., dissenting).

89. *See, e.g.*, Complaint for Emergency Injunctive Relief, Hotze v. Hollins, No. 4:20-cv-03709, 2020 WL 6437668 (S.D. Tex. Nov. 2, 2020) (alleging a violation of the Elections Clause in a challenge to a county allowing drive-in voting); Verified Complaint for Emergency Injunctive and Declaratory Relief, Trump v. Kemp, No. 1:20-cv-05310, 2020

rejected the theory following *Bush II*,[90] some commentators have recently come to defend it.[91]

The Supreme Court will have the opportunity to address the debate over the ISL theory during October Term 2022 when it decides *Moore v. Harper*.

II. CONSTITUTIONAL INTERPRETATION AND SETTLED PRACTICE

Proponents of the ISL theory commonly rely on textual arguments.[92] Opponents largely point to precedent and Founding-era history[93] while noting how adopting the theory would disrupt our electoral system.[94] Missing from this discussion, however, is what should be most obvious: state legislatures already *are* constrained

---

WL 7872546 (N.D. Ga. Dec. 31, 2020) (alleging Georgia's Governor and Secretary of state violated the Electors Clause by certifying the state's presidential election results).

90. *See* Vikram David Amar, *The People Made Me Do It: Can the People of the States Instruct and Coerce Their State Legislatures in the Article V Constitutional Amendment Process?*, 41 WM. & MARY L. REV. 1037, 1045 (2000); Robert A. Schapiro, *Conceptions and Misconceptions of State Constitutional Law in* Bush v. Gore, 29 FLA. ST. U. L. REV. 661, 672 (2002).

91. *See* Morley, *supra* note 69. *But see* Richard Epstein, *"In such Manner as the Legislature Thereof May Direct": The Outcome in Bush v. Gore Defended*, 68 U. CHI. L. REV. 613 (2001).

92. *See* Arizona State Legislature v. Arizona Indep. Redistricting Comm'n (AIRC), 576 U.S. 787, 824–850 (2015) (Roberts, C.J., dissenting); Morley, *supra* note 12.

93. *See* Larry D. Kramer, *The Supreme Court in Politics*, *in* THE UNFINISHED ELECTION OF 2000, at 105, 122 (Jack N. Rakove ed., 2001) (noting a lack of historical evidence supporting the ISL theory); Schapiro, *supra* note 90, at 672 (arguing the ISL theory "does not rest on firm foundations of text, precedent, or history"); Saul Zipkin, Note, *Judicial Redistricting and the Article I State Legislature*, 103 COLUM. L. REV. 350, 354 (2003); Richard H. Pildes, *Judging "New Law" in Election Disputes*, 29 FLA. ST. U. L. REV. 691, 727–28 (2001) ("as a matter of historical practice, state legislatures were not understood at the [Founding] to be more 'independent' by virtue of Article II . . . than they were when acting pursuant to any other source of authority."); Marcia L. McCormick, *When Worlds Collide: Federal Construction of State Institutional Competence*, 9 U. PA. J. CONST. L. 1167, 1194 n. 135 (2007) ("there is not historical support for the significance of the language in [the Electors Clause].").

94. *See* Nathaniel Persily, Samuel Byker, William Evans & Alon Sachar, *When is a Legislature Not a Legislature? When Voters Regulate Elections by Initiative*, 77 OHIO ST. L.J. 689, 690 (2016) (arguing the "consequences would be both bizarre and disastrous" if the Court were to adopt the ISL theory).

by state constitutions when they enact election laws and have been since the Founding. Every state constitution dictates the procedure by which election laws must be enacted, and state constitutions are full of provisions relating to nearly every aspect of federal elections, from voter qualifications and registration to congressional redistricting and the minutiae of election administration.[95] These provisions—nearly all of which were enacted with the active and affirmative involvement of state legislatures[96]—have not only regulated federal elections directly but have also, through state court review, constrained state legislatures' exercise of their authority under the Elections and Electors Clauses for centuries.

What to make of this tension? Where practice conflicts with clear constitutional text, we would expect the text to prevail.[97] But where the text is unclear, the Supreme Court has long relied on historical practice to settle constitutional meaning.[98] Some scholars have termed this practice "historical gloss,"[99] after Justice Frankfurter's concurrence in *Youngstown Sheet & Tube Co. v. Sawyer* and his contention that "a systematic, unbroken, executive practice, long pursued to the knowledge of the Congress and never before questioned, . . . may be treated as a gloss on 'executive power' vested in the President."[100] Others ground the practice in James Madison's concept of "constitutional liquidation,"[101] which posits that indeter-

95. *See infra* Part III.B.

96. *See infra* Part III.C.

97. *See* New York State Rifle & Pistol Ass'n, Inc. v. Bruen, 142 S. Ct. 2111, 2137 (2022) ("[T]o the extent later history contradicts what the text says, the text controls."); Keith E. Whittington, *The New Originalism*, 2 GEO. J.L. & PUB. POL'Y 599, 610 (2004).

98. *See* United States v. Midwest Oil Co., 236 U.S. 459, 469 (1915); *Ex parte* Grossman, 267 U.S. 87, 118-19 (1925); The Pocket Veto Case, 279 U.S. 655, 689 (1929); Dames & Moore v. Regan, 453 U.S. 654, 686 (1981).

99. *See* Curtis A. Bradley & Trevor W. Morrison, *Historical Gloss and the Separation of Powers*, 126 HARV. L. REV. 411, 417 (2012).

100. Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 610–11 (1952) (Frankfurter, J., concurring).

101. *See* William Baude, *Constitutional Liquidation*, 71 STAN. L. REV. 1 (2019).

minate constitutional text "might require a regular course of practice to liquidate and settle [its] meaning."[102] Because gloss and liquidation look to the practice of government actors, they have been most commonly employed to resolve separation-of-powers disputes.[103] But the Court has also looked to historical practice to resolve constitutional ambiguities related to elections. Most recently in *Chiafalo v. Washington*, the Court explicitly invoked Madisonian liquidation to settle whether states could cabin the discretion of presidential electors.[104] This Part discusses the Supreme Court's recent embrace of Madisonian liquidation and what that analysis entails before focusing on how the Court has applied liquidation to interpret the Constitution's various election-related provisions.

A. Settled Practice and the Liquidation Framework

The Supreme Court has often relied on historical practice to guide its interpretation of unclear constitutional text. Recently, the Court has embraced Madisonian liquidation as a specific framework for doing so.[105] In 2014, the Court in *National Labor Relations Board v. Noel Canning* interpreted the Recess Appointments Clause, which

---

102. Letter from James Madison to Spencer Roane (Sept. 2, 1819), *in* 1 THE PAPERS OF JAMES MADISON: RETIREMENT SERIES 500, 502 (David B. Mattern et al. eds., 2009).

103. *See* Joseph Blocher & Margaret Lemos, *Practice and Precedent in Historical Gloss Games*, 106 GEO. L.J. ONLINE 1 (2017); Curtis A. Bradley & Neil S. Siegel, *Historical Gloss, Madisonian Liquidation, and the Originalism Debate*, 106 VA. L. REV. 1, 3 (2020).

104. Chiafalo v. Washington, 140 S. Ct. 2316, 2326 (2020).

105. The degree to which Madisonian liquidation differs from related frameworks, such as historical gloss, is the subject of some debate. *See* Bradley & Siegel, *supra* note 103 at 39–59; Richard H. Fallon, Jr., *The Many and Varied Roles of History in Constitutional Adjudication*, 90 NOTRE DAME L. REV. 1753, 1775 (2015). Professor Baude identifies at least two ways in which liquidation may be distinct from other forms of historical analysis. First, he observes that liquidation, unlike some forms of historical gloss, requires a threshold finding of textual indeterminacy. Second, he notes that under a liquidation analysis the relevant historical practice must be the result of constitutional deliberation, rather than mere action. *See Baude*, supra note 101, at 64. Theoretical differences aside, the Court's most recent pronouncements on the use of history to resolve ambiguous constitutional text have largely embraced liquidation over other methods. *See, e.g.*, New York State Rifle & Pistol Ass'n, Inc. v. Bruen, 142 S. Ct. 2111, 2137 (2022).

provides that "[t]he President shall have Power to fill up all Vacancies that may happen during the Recess of the Senate."[106] Justice Breyer, writing for the majority, invoked Madisonian liquidation and characterized the Court's past reliance on historical practice as "continually confirm[ing] Madison's view."[107] After determining that the text was ambiguous as to whether it referred to inter- or intrasession recesses,[108] the Court looked to the history of intrasession recess appointments and the Senate's lack of opposition to conclude that the Clause addressed both types of vacancies.[109] This focus on text, historical practice, and acceptance by institutional actors laid out a basic framework for Madisonian liquidation.

Since then, the Court has applied the same framework to the President's recognition power,[110] the Appointments Clause,[111] and Congress's subpoena power.[112] Of the many scholars who have explored constitutional liquidation,[113] Professor William Baude provides the most thorough treatment of its requirements and application.[114] Examining the writings of James Madison, he identifies three elements of a liquidation analysis: (1) a discrete textual indeterminacy, (2) a deliberate course of practice reflecting constitutional reasoning, and (3) acquiescence by institutional actors and the public.[115]

106.. NLRB v. Noel Canning, 573 U.S. 513, 520 (2014); *see also* U.S. CONST. art. II, § 2, cl. 3.

107.. *Noel Canning*, 573 U.S. at 525 (collecting cases).

108. *See id.* at 528.

109. *Id.* The Court invalidated the specific appointments at issue because it held a three-day recess was too short to trigger the Clause, again relying on historical practice. *See id.*

110. *See* Zivotofsky v. Kerry, 135 S. Ct. 2076, 2091 (2015).

111. *See* Financial Oversight and Management Board for P.R. v. Aurelius Inv., LLC, 140 S. Ct. 1649, 1659.

112. *See* Trump v. Mazars USA, LLP, 140 S. Ct. 2019, 2031 (2020).

113. *See* Fallon, *supra* note 105; Michael W. McConnell, *Time, Institutions, and Interpretation*, 95 B.U. L. REV. 1745 (2015); Daphna Renan, *Presidential Norms and Article II*, 131 HARV. L. REV. 2187 (2018); Paul G. Ream, Note, *Liquidation of Constitutional Meaning Through Use*, 66 DUKE L.J. 1645 (2017).

114. *See* Baude, *supra* note 101.

115. *See id.* at 13–21.

B. Liquidation and Election Law

Much of the discussion around liquidation has focused on separation-of-powers disputes, where historical practice and acquiescence by government actors are front and center.[116] Recently, some commentators have explored whether other areas of constitutional law, such as individual rights, might also be amenable to a liquidation analysis.[117] And since the Supreme Court's decision in *Chiafalo*, scholars such as Professors Guy-Uriel Charles and Luis Fuentes-Rohwer have begun to examine liquidation's role in election law.[118] This Section helps build on this progress by providing an account of how election-related constitutional provisions can be liquidated, one informed by the Supreme Court's own practice.

There are several reasons why liquidation is an appropriate framework to resolve election-related constitutional ambiguities. First, because elections occur regularly, there is an ample historical record from which to ascertain whether a given practice is longstanding and consistent. Second, because elections are open and contested, there is strong incentive to challenge any perceived constitutional infirmities, so we may be confident that a settled course of practice is the result of deliberation and acceptance. Third, because elections depend on widespread public involvement, popular acquiescence is also ascertainable.

---

116. *See* Blocher & Lemos, *supra* note 103; Curtis A. Bradley & Neil S. Siegel, *Historical Gloss, Constitutional Conventions, and the Judicial Separation of Powers*, 105 GEO. L.J. 255 (2016); Curtis A. Bradley & Neil S. Siegel, *After Recess: Historical Practice, Textual Ambiguity, and Constitutional Adverse Possession*, 2014 SUP. CT. REV. 1 (2015); Bradley & Siegel, *supra* note 103.

117. *See* Aziz Z. Huq, *Fourth Amendment Gloss*, 113 NW. U.L. REV. 701 (2019); Robert Leider, *Constitutional Liquidation, Surety Laws, and the Right to Bear Arms*, GEORGE MASON UNIVERSITY LEGAL STUDIES RESEARCH PAPERS SERIES, LS 21-06 (2021).

118. *See* Guy-Uriel E. Charles & Luis E. Fuentes-Rohwer, Chiafalo, *Constitutionalizing Historical Gloss in Law & Democratic Politics*, DUKE LAW SCHOOL PUBLIC LAW & LEGAL THEORY SERIES No. 2020-68 (2020). Rebecca Green provides another example, also inspired by the *Chiafalo* decision. *See* Rebecca Green, *Liquidating Elector Discretion*, 15 HARV. L. &. POL'Y REV. 53 (2020).

Cases that considered state constitutions under the Elections and Electors Clauses have emphasized historical practice. *McPherson* dedicated several pages to reviewing the various ways in which states had historically appointed presidential electors to hold Michigan's scheme constitutional.[119] The Court emphasized that "no question has ever arisen as to the constitutionality of either" a statewide or a district-based scheme[120] and thus construed the Electors Clause based on settled historical practice—i.e., liquidation.[121] The *Smiley* Court also endorsed a form of liquidation, holding that where the Constitution is ambiguous, "long and continuous interpretation in the course of official action under the law may aid in removing doubts as to its meaning"[122] and describing the settled and "uniform" practice of state election laws being subject to a governor's veto.[123] Likewise, the *AIRC* court looked to historical practice to hold that the term "Legislature" under the Elections Clause can include a ballot initiative.[124] The Court emphasized that, while "[d]irect lawmaking by the people was 'virtually unknown when the Constitution of 1787 was drafted,'" the practice "gained a foothold" by the early twentieth century.[125] While *AIRC* did not rely solely on historical practice, the weight it gave to the history of direct lawmaking illustrates how a novel or still-emerging practice may be sufficiently settled for liquidation purposes.

---

119. *See* McPherson v. Blacker, 146 U.S. 1, 28–35 (1892) (discussing appointment scheme dating back to the late 18th Century).

120. *Id.* at 33 (quoting 1 JOSEPH L. STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1466 (1833)).

121. *See* NLRB v. Noel Canning, 573 U.S. 513, 525 (2014) (citing *McPherson* as an early example of Madisonian liquidation).

122. *See* Smiley v. Holm, 285 U.S. 355, 369 (1932).

123. *Id.* at 369–371.

124. *See* Arizona State Legislature v. Arizona Indep. Redistricting Comm'n (AIRC), 576 U.S. 787, 793–96 (2015).

125. *Id.* at 793–94 (quoting DONOVAN & BOWLER, AN OVERVIEW OF DIRECT DEMOCRACY IN THE AMERICAN STATES, IN CITIZENS AS LEGISLATORS 1 (S. Bowler, T. Donovan, & C. Tolbert eds. 1998).

The Supreme Court has also looked to settled practice to interpret other ambiguous constitutional provisions as they relate to elections. In *Burson v. Freeman*, the Court considered a First Amendment challenge to a Tennessee law prohibiting campaign speech within 100 feet of a polling place on election day.[126] After designating the area around polling places a public forum, a plurality looked to historical practice to determine whether the state had a compelling interest in protecting voters and "the necessity of restricted areas in or around polling places."[127] The history revealed the vulnerability of voters to intimidation and undue influence.[128] In response, states adopted secret ballots and regulated election speech near polling places.[129] This practice persisted throughout the twentieth century, and the plurality noted that "all 50 States . . . settled on the same solution: a secret ballot secured in part by a restricted zone around the voting compartments."[130] This "widespread and time-tested consensus" demonstrated that such laws satisfied strict scrutiny.[131]

The *Burson* plurality relied on historical practice as part of its strict scrutiny analysis, but Justice Scalia, who provided the crucial fifth vote, went further. In his view, the history cited by the plurality didn't just demonstrate the necessity of such laws; it also reflected a shared understanding that "the streets and sidewalks around polling places have traditionally *not* been devoted to assembly and debate," and that content-based restrictions there need only be "reasonable and viewpoint neutral."[132] In other words, historical practice had settled the meaning of the First Amendment with respect to polling places.

126. Burson v. Freeman, 504 U.S. 191 (1992).
127. *Id.* at 199–200.
128. *Id.* at 200–02.
129. *See id.* at 202–04.
130. *Id.* at 205–06.
131. *Id.* at 206.
132. *Id.* at 215, 216 (Scalia, J., concurring).

In 2016's *Evenwel v. Abbott*, a group of voters challenged Texas's legislative districting plan, arguing that the Fourteenth Amendment's equal protection clause required apportionment based on voter-eligible population, rather than total population.[133] The Supreme Court rejected this argument based not only on history and precedent, but also the "settled practice" of using total population, which "all 50 States and countless local jurisdictions have followed for decades, even centuries."[134] While *Evenwel* did not hold that the Constitution *required* apportionment based on total population, it may still be read as liquidating what the Constitution does *not* require—that is, apportionment based on eligible voter population.[135]

Most recently, the Supreme Court adopted a liquidation framework in *Chiafalo v. Washington*, which concerned whether, under the Electors Clause and the Twelfth Amendment,[136] States could subject presidential electors to fines or removal if they did not vote for their party's preferred candidate.[137] This question pitted the Constitution's text—which many argued envisioned electors exercising discretion[138]—against the longstanding practice of electors adhering to the will of the political parties and the voters who select them.[139] Justice Kagan, writing for the Court, resolved the issue by invoking Madisonian Liquidation.[140]

Justice Kagan began with the text of the Electors Clause, which "gives the States far-reaching authority over presidential electors,

133. Evenwel v. Abbott, 136 S. Ct. 1120 (2016).

134. *Id.* at 1132.

135. *See id.* at 1132–33 ("Because history, precedent, and practice suffice to reveal the infirmity of appellants' claims, we need not and do not resolve whether, as Texas now argues, States may draw districts to equalize voter-eligible population rather than total population.").

136. U.S. CONST. amend. XII.

137. Chiafalo v. Washington, 140 S. Ct. 2316, 2326 (2020).

138. *See* Charles & Fuentes-Rohwer, *supra* note 118, at 5; THE FEDERALIST NO. 68, at 410–14 (Alexander Hamilton) (Clinton Rossiter ed., 2003); Stephen M. Sheppard, *A Case for the Electoral College and for Its Faithless Elector*, 2015 WIS. L. REV. ONLINE 1, 7–8 (2015).

139. *See Chiafalo*, 140 S. Ct. at 2328 (noting only 180 faithless votes out of over 23,000).

140. *Id.* at 2326.

absent some other constitutional constraint."[141] This authority, she continued, included placing conditions on appointment, such as a residency requirement or a pledge to vote for their party's nominee.[142] Absent any contrary constitutional provision, states are free to enforce such pledges.[143] The faithless electors, however, argued that three pieces of text provided for elector discretion. First, they argued the use of the term "Electors"—which the Constitution also uses to describe individual voters—connotes choice.[144] Second, they argued that the Twelfth Amendment's requirement that electors shall "vote . . . for President and Vice President," likewise connotes discretion.[145] Third, they argued that the Twelfth Amendment's directive that electors vote "by Ballot" suggests both secrecy and discretion, both of which "conflict[] with any notion of state control over the vote of an elector."[146] In short, if states could control the votes of presidential electors, then "the electors would not be 'Electors,' and their 'vote by Ballot' would not be a 'vote.'"[147]

But where the faithless electors saw the constitutional text as clear, Justice Kagan saw indeterminacy. As she explained, the terms "elector," "vote," and "ballot" "need not always connote independent choice."[148] She offered hypothetical examples of "electors" who lack meaningful choice but whose "ballots" might nonetheless be considered "votes," such as "a person [who] always votes in the way his spouse, or pastor, or union tells him to," a person casting a proxy ballot for another, or a person who votes in an election in which they have "no real choice because there is only one name on

141. *Id.* at 2324.
142. *Id.*
143. *Id.*
144. *See* Consolidated Opening Brief for Presidential Electors at 23–26, Chiafalo v. Washington, 140 S. Ct. 2316 (2020) (Nos. 19-465, 19-518).
145. *See id.* at 26–29.
146. *Id.* at 29–31.
147. *Id.* at 31.
148. *Chiafalo*, 140 S. Ct. at 2325.

a ballot."[149] To Justice Kagan, these examples illustrated that "although voting and discretion are usually combined, voting is still voting when discretion departs."[150] She concluded that "the Framers did not reduce their thoughts about electors' discretion to the printed page," and the Constitution's "sparse instructions [take] no position on how independent from—or how faithful to—party and popular preferences the electors' votes should be."[151]

In light of this indeterminacy, Justice Kagan turned to history and Madison's belief that "a regular course of practice can liquidate & settle the meaning of disputed or indeterminate terms & phrases."[152] She recounted the practice of electors voting in accordance with a state's wishes, starting with the first contested presidential election, in which would-be electors declared their support for specific candidates and "all but one elector did what everyone expected, faithfully representing their selectors' choice of presidential candidate."[153] She then explained how the Twelfth Amendment "embraced this new reality [by] both acknowledging and facilitating the Electoral College's emergence as a mechanism not for deliberation but for party-line voting."[154] She noted that "courts and commentators . . . recognized the electors as merely acting on other people's preferences" and that state legislatures "dropped out of the picture" by allowing voters to choose presidential electors and by "enact[ing] statutes requiring electors to pledge that they would squelch any urge to break ranks with voters."[155] To the extent that there have been faithless electors, Justice Kagan argued, these have been "anomalies only," representing "just one-half of one percent of the total" number of Electoral College votes.[156] In light of this

149. *Id.*
150. *Id.*
151. *Id.* at 2326.
152. *Id.* (citing Letter to S. Roane (Sept. 2, 1819), *in* 8 WRITINGS OF JAMES MADISON 450 (Gaillard Hunt ed., 1908)) (internal quotation marks omitted).
153. *Id.*
154. *Id.* at 2327.
155. *Id.* at 2327–28.
156. *Id.* at 2328.

longstanding practice, Justice Kagan concluded that a state may "instruct[] its electors that they have no ground for reversing the vote of millions of its citizens."[157]

Chiafalo presents the Court's clearest endorsement of liquidation to interpret election-related constitutional provisions. As Professors Charles and Fuentes-Rohwer have acutely observed, however, it does more than that.[158] Consider what Justice Kagan's textual analysis tells us about liquidation in practice. Though Justice Kagan twice claims that both "[t]he Constitution's text and the Nation's history . . . support allowing a State to enforce an elector's pledge,"[159] her textual analysis at best finds the text to be indeterminate.[160] It is history, not text, that is doing the real work in this opinion.[161] *Chiafalo* is thus instructive on how indeterminate text must be before liquidation is appropriate.[162] Justice Kagan's responses to the textual arguments put forth by the faithless electors—strained hypotheticals about coerced votes, proxy voting, and Soviet sham elections—are hardly irrefutable.[163] *Chiafalo* illustrates that liquidation's textual indeterminacy requirement may pose a lower hurdle and that historical practice can settle constitutional meaning even where the text may tilt the other way.

Consider also Justice Kagan's historical analysis. One question raised by the liquidation framework is how consistent a practice must be to liquidate constitutional meaning.[164] As Justice Kagan notes, faithless electors, though rare, are not unheard of: there have

157. *Id.*

158. *See generally* Charles & Fuentes-Rohwer, *supra* note 118.

159. *Chiafalo*, 140 S. Ct. at 2323–24; *see also id.* at 2328 ("The Electors' constitutional claim has neither text nor history on its side.").

160. *See id.* at 2326.

161. *See* Charles & Fuentes-Rohwer, *supra* note 118, at 14.

162. *See* Baude, *supra* note 101, at 66 ("A theory dependent on constitutional indeterminacy naturally prompts the question: What makes a constitutional provision indeterminate?").

163. *See* Charles & Fuentes-Rohwer, *supra* note 118, at 14. ("*Chiafalo* cannot be justified on textualist grounds and quite frankly *Chiafalo* is not a textualist case.").

164. *See* Baude, *supra* note 101, at 16–17 (noting Madison's use of various terms, from "regular" and "continued" to the more restrictive "uniform").

been 180 faithless votes cast since the Founding.[165] One commentator has argued these votes pose a serious obstacle to *Chiafalo*'s analysis.[166] But the Court was clear that occasional "anomalies" do not defeat an otherwise consistent pattern.[167] This is most obvious where such anomalies go unchallenged,[168] but remains true even where a court or a body such as Congress acquiesces in the anomaly.[169] *Chiafalo* thus endorses a functionalist approach to liquidation that does not require perfect adherence.

Finally, consider what *Chiafalo* tells us about liquidation's third requirement, acceptance, and which actors must acquiesce in a practice to give it legitimacy. The Court looked to electors themselves, of course, but also to courts, contemporary commentators, Congress, and state legislatures.[170] The Court also credited the beliefs of individual voters, including one voter in the 1796 election who declared that "'[W]hen I voted for the [Federalist] ticket, I voted for John Adams . . . do I chuse [sic] [a presidential elector] to determine for me whether John Adams or Thomas Jefferson is the fittest man for President of the United States? No—I chuse [sic] him to *act*, not to *think*.'"[171] This analysis comports with Professor Baude's view that liquidation requires that a settled practice be accepted by both government actors and the public.[172]

In short, *Chiafalo* not only confirms that Madisonian liquidation is an appropriate framework for interpreting election-related constitutional provisions, but also provides important insights into

165. *See Chiafalo*, 140 S. Ct. at 2328.

166. *See* Green, *supra* note 118.

167. *Chiafalo*, 140 S. Ct. at 2328.

168. *See id.* (stressing that, while Congress has counted every faithless elector's vote, "only one has ever been challenged").

169. *See id.* (emphasizing that "the Electors cannot rest a claim of historical tradition on one counted vote in over 200 years" and that "Congress's deference to a state decision to tolerate a faithless vote is no ground for rejecting a state decision to penalize one").

170. *See id.* at 2327–28.

171. *Chiafalo*, 140 S. Ct. at 2326 n.7 (citing Gazette of the United States, Dec. 15, 1796, p.3. col. 1 (emphasis in the original)).

172. *See* Baude, *supra* note 101 at 18–20.

how a liquidation analysis should be carried out in the context of election law.

III. LIQUIDATING THE ROLE OF STATE CONSTITUTIONS

Professor Baude identifies three elements of the liquidation framework: (1) a discrete textual indeterminacy; (2) a course of deliberate practice by institutional actors reflecting constitutional reasoning; and (3) settlement of the textual indeterminacy through institutional and popular acquiescence to the practice.[173] The Supreme Court in *Chiafalo* examined each of these elements with respect to the Electors Clause and the Twelfth Amendment.[174] This Part follows the Court's lead and applies the same liquidation framework to the Elections and Electors Clauses and concludes that their practical meaning has been settled in favor of state legislatures remaining constrained by state constitutions.

A. Textual Indeterminacy

The first step in discerning the role of state constitutions under the Elections and Electors Clauses is to determine, to the extent possible, the text's original meaning.[175] ISL theory proponents argue that the text permits state legislatures to regulate federal elections free from state constitutional constraints.[176] This Section, however, demonstrates that the Clauses are indeterminate as to the role of state constitutions and that, while an "independent state legislature" interpretation is plausible, the text, history, and purpose of the Clauses also support an interpretation under which state legislatures remain constrained by state constitutions.

The Elections Clause provides that "[t]he Times, Places and Manner of holding Elections for Senators and Representatives, shall be

---

173. *See id.* at 13–18.

174. *See supra* notes 137–172 and accompanying text.

175. *See* Baude, *supra* note 101 at 13–16; Whittington, *supra* note 97, at 608–10 (2004); Lawrence B. Solum, *the Fixation Thesis: The Role of Historical Fact in Original Meaning*, 91 NOTRE DAME L. REV. 1, 306 (2015).

176. Morley, *supra* note 1, at 18.

prescribed in each State by the *Legislature* thereof."[177] Similarly, the Electors Clause provides that "[e]ach State shall appoint [presidential electors] in such Manner as the *Legislature* thereof may direct."[178] Neither clause references state constitutions nor state courts. Two question thus arise: first, what is the meaning of the term "Legislature," and second, are these "Legislatures" subject to state constitutional constraints?

1. Defining "Legislature"

To what, exactly, does the term "Legislature" refer to under the Elections and Electors Clauses? One interpretation is that the term refers exclusively to elected multi-member bodies that exercise general lawmaking authority.[179] This definition would exclude other state entities such as governors and courts along with ballot initiatives and independent redistricting commissions.[180] An alternative interpretation is that the term refers to a state's general lawmaking authority as established and constrained by state constitutions. This interpretation has been embraced by the Supreme Court throughout the twentieth century.[181]

Plausible arguments can be made that the text of the Clauses supports either interpretation. Most eighteenth-century dictionaries defined the word "legislature" simply as "the power that makes

177. U.S. CONST. art. I, § 4, cl. 1 (emphasis added).

178. U.S. CONST. art. II, § 1, cl. 2.

179. *See* Morley, *supra* note 12 at 863 (arguing the term "legislature" refers to "a particular institution within each state that contains members, is presumptively comprised of multiple branches, periodically convenes and meets for limited periods of time, and then enters into recess").

180. *See id.* (arguing the Elections Clause precludes regulation by any "state-level entity or process" that does not meet the definition of legislature).

181. *See supra* Part II.B.

laws."[182] Some, however, recognized that "legislature" often referred to an institutional lawmaking body.[183] This ambiguity is mirrored in Founding-era debates over the Elections Clause, where the term "legislature" was often used interchangeably with the terms "state" or "state government."[184] In Virginia, for instance, one delegate noted how the "State Legislature" might fail to select a place for holding elections, but later discussed how Congress might alter election rules "established by the *States*."[185] Likewise, James Madison discussed the dangers associated with placing authority to regulate federal elections "exclusively under the control [sic] of the State Governments," while elsewhere referring to the "State Legislatures."[186] In other states, debates contemplated institutional legislatures.[187] Original meaning thus does not foreclose either a broad or a narrow interpretation.

But the Clauses are not the only places where state legislatures appear in the Constitution; they also appear seventeen times in various contexts.[188] Most other mentions refer specifically to institutional legislatures,[189] including provisions empowering state legislatures to select Senators[190] and ratify Constitutional

182. *See, e.g.*, *Legislature*, 2 *A Dictionary of the English Language* (1st ed. 1755) ("The power that makes laws").

183. *Id.* (offering as an example: "Without the concurrent consent of all three parts of the legislature, no law is or can be made").

184. *See* Brief of the Brennan Center for Justice as Amicus Curiae in Support of Appellees at 6–7, Arizona State Legislature v. Arizona Indep. Redistricting Comm'n (AIRC), 576 U.S. 787 (2015) (No. 13-1314) (discussing a survey of founding era documents in which "the terms 'state' and 'state government' were used roughly half the time in reference to the first part of the Elections Clause").

185. *See* IX THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION DIGITAL EDITION 920 (John P. Kaminski et al. eds., 2009) [hereinafter DOCUMENTARY HISTORY] (emphasis added).

186. *See* X *id.* 1260.

187. *See* Natelson, *supra* note 50 at 31.

188. *See AIRC*, 576 U.S. at 829 (Roberts, C.J., dissenting).

189. *See* Morley, *supra* note 12, at 855-59.

190. U.S. CONST. art. I, § 3, cl. 1 (providing that Senators from each state shall be "chosen by the Legislature thereof").

Amendments.[191] Several Founding-era documents discussing these provisions interpreted the term "legislature" as referring to institutional bodies.[192] Some commentators have advanced an intratextualist[193] argument that the term "Legislature" should be given the same meaning in the Elections and Electors Clause.[194]

Others, however, caution against intratextualism on the grounds that different provisions of the Constitution were "enacted at different times, in different circumstances, and for different reasons," and even the original unamended Constitution is the product of various "tradeoffs, political battles won and lost, and compromised ideals."[195] Regulating federal elections is different than selecting Senators; debates over the former focused on Congress's authority to supersede state laws,[196] while debates over the latter focused on the need for different forms of federal representation.[197] So while references to institutional legislatures may provide some useful

191. U.S. CONST. art. V (providing that amendments shall be valid "when ratified by the Legislatures of three fourths of the several States").

192. *See* Federal Farmer, *Letter XII* (Jan. 12, 1788) (describing legislatures as bodies comprised of "two branches"). *See also* 1 CHANCELLOR JAMES KENT, COMMENTARIES ON AMERICAN LAW 261–62 (John M. Gould ed., 14th ed. 1896) (describing state legislatures "in the true technical sense, being the two houses acting in their separate and organized capacities"). Several of the Federalist Papers similarly use the term "legislature" in reference to the institutional bodies. *See* THE FEDERALIST NO. 27, at 174–75 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (describing "State legislatures" as "select bodies of men"); *id.* NO. 60, at 368 (Alexander Hamilton) (contrasting "State legislatures" with "the people").

193. *See* Akhil Reed Amar, *Intratextualism*, 112 HARV. L. REV. 747, 748 (1999) (arguing in favor of interpreting "a contested word or phrase that appears in the Constitution" by looking to that word's meaning elsewhere in the document).

194. *See* Morley, *supra* note 12 (making this argument in detail); *AIRC*, 576 U.S. at 829 (Roberts, C.J., dissenting) ("The unambiguous meaning of 'the Legislature' in the Elections Clause as a representative body is confirmed by other provisions of the Constitution that use the same term in the same way.").

195. *See* Adrian Vermeule & Ernest A. Young, *Hercules, Herbert, and Amar: The Trouble with Intratextualism*, 113 HARV. L. REV. 730, 731, 742 (2000).

196. *See* Jamal Greene, Note, *Judging Partisan Gerrymanders Under the Elections Clause*, 114 YALE L.J. 1021, 1030–40 (2005).

197. *See* David Schleicher, *The Seventeenth Amendment and Federalism in an Age of National Political Parties*, 65 HASTINGS L.J. 1043, 1050–52 (2014).

context, a one-size-fits-all definition of "legislature" may not reflect how the term was understood in different contexts. At a minimum, the historical record casts sufficient doubt on the intratextualist reading of the term "legislature" to warrant a turn to history.[198]

2. Legislatures: Independent or Constrained?

Even if we assume that the Elections and Electors Clauses refer specifically to institutional legislatures, the question remains whether those legislatures are subject to state constitutional constraints when they regulate federal elections. One interpretation is that the Clauses grant state legislatures exclusive and plenary power, free from state constitutional constraints. A less dramatic interpretation is that the Clauses simply delegate power to state legislatures to regulate federal elections via their ordinary lawmaking authority.

Again, plausible arguments can be made in support of either interpretation. If, as discussed above, the term "legislature" refers to a state's general lawmaking authority, then the Clauses empower state governments, rather than institutional legislatures. This comports with the drafting history. An early draft of the Elections Clause provided that "[e]ach state shall prescribe the time and manner of holding elections" for the federal legislature,[199] and the record provides no explanation for the insertion of the term "legislature" into the final version.[200] This insertion may not have been significant, as the text of the Elections Clause provides that election rules "shall be prescribed in each *State* by the Legislature *thereof*,"[201] suggesting that the Clause treats legislatures as creations *of*, and

198. This is especially so in light of the relatively low bar for textual indeterminacy in cases like *Chiafalo*. *See* supra notes 148–151 and accompanying text.

199. *See* 1 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 146 (Jonathan Elliot ed. 1836) [hereinafter ELLIOT'S DEBATES].

200. Greene, *supra* note 196, at 1031 (noting "no recorded debate over the Clause until after it emerged from the Committee of Detail").

201. U.S. CONST. art. I, § 4 (alteration in original).

thus constrained *by*, the states.[202] This understanding aligns with the Framers' experience. The Constitution was drafted and ratified against a backdrop of state constitutions that empowered and constrained state legislatures,[203] and there is no indication the Framers sought to upset the balance of power within states.

One argument in favor of the "independent" interpretation is that, because federal offices derive their power from the Constitution, states lack inherent power to regulate federal elections. Any such power must therefore come from the Constitution, the text of which appears to grant this power exclusively to institutional legislatures.[204] But even if the text of the Clauses singles out institutional legislatures, it is not clear that the Clauses were understood as a grant of power to states. Many saw the Elections Clause, with its built-in Congressional veto, as taking power *away* from the states.[205] Viewed this way, the Elections Clause, like the Qualifications Clause,[206] limits states' sovereign authority.[207] Justice Thomas has argued that states do have inherent power to regulate federal elections and that the Elections Clause "does not delegate any authority to the States," but "simply imposes a duty upon them" to

202. *See* Bush v. Gore, 531 U.S. 98, 142 (2000) (Ginsburg, J., dissenting) (emphasizing the words "State" and "thereof" in the Presidential Electors Clause and suggesting the Clause requires "solicitude . . . to the legislature's sovereign").

203. *See* Vikram Amar & Alan Brownstein, *Bush v. Gore and Article II: Pressured Judgment Makes Dubious Law*, 48 FED. LAW. 27, 31 (2001).

204. *See* Morley, *supra* note 1 at 6.

205. *See* Franita Tolson, *Reinventing Sovereignty: Federalism as a Constraint on the Voting Rights Act*, 65 VAND. L. REV. 1195, 1220 (2012) ("the founding generation, and in particular the Anti-Federalists, recognized that the Elections Clause deprived the states of their sovereign authority over elections.").

206. U.S. CONST. art. I, § 2, cl. 2.

207. *See* U.S. Term Limits v. Thornton, 514 U.S. 779, 806 (1994) ("Even if we believed that States possessed as part of their original powers some control over congressional qualifications . . . the Qualifications Clauses were intended to preclude the States from exercising any such power and to fix as exclusive the qualifications in the Constitution.").

hold congressional elections.[208] While this argument has not yet persuaded a majority of the Court,[209] it nonetheless offers a plausible alternative reading of the Clauses.

But even if the Clauses are affirmative grants of power, it does not necessarily follow that this power is unconstrained by state constitutions. Proponents of the ISL theory again make an intratextualist argument: the Constitution assigns state legislatures various functions in the federal system, including the selection of Senators[210] and the ratification of constitutional amendments,[211] most of which are not subject to state constitutional constraints.[212] As the argument goes, the use of similar language in the Elections and Electors Clauses suggests that state legislatures' power to regulate federal elections is similarly unconstrained.

This intratextualist approach, however, conflicts with the Constitution's treatment of Congress. As with state legislatures, the Constitution assigns various functions to Congress, some of which, like the impeachment power or the power to judge the qualifications of its members, are subject neither to a Presidential veto nor judicial review.[213] For the most part, however, the functions assigned to Congress must be exercised according to the usual constitutional

208. *Id.* at 862 (Thomas, J., dissenting). *See also* Chiafalo v. Washington, 140 S. Ct. 2316, 2329 (2020) (Thomas, J., concurring) (arguing the use of the term "shall" in the Presidential Electors Clause "expressly requires action by the States" and that "[t]his obligation to provide the manner of appointing electors does not expressly delegate power to States").

209. *See Chiafalo*, 140 S. Ct. at 2324 (holding the Presidential Electors Clause "gives the States far-reaching authority over presidential electors, absent some other constitutional constraint"); Cook v. Gralike, 531 U.S. 510, 523 (2001) ("[T]he States may regulate the incidents of [congressional] elections . . . only within the exclusive delegation of power under the Elections Clause."); U.S. Term Limits v. Thornton, 514 U.S. at 805 ("[I]n certain limited contexts, the power to regulate the incidents of the federal system is not a reserved power of the States, but rather is delegated by the Constitution.").

210. U.S. CONST. art. I, § 3.

211. U.S. CONST. art. V.

212. *See* Hawke v. Smith, 253 U.S. 221 (1920).

213. *See* U.S. CONST. art. 1, §§ 2, 3, and 5.

constraints. If the term "Congress" is used throughout the Constitution to signal both independent and constrained functions, we should presume the same is true of references to state legislatures.

This is particularly so of the Elections and Electors Clauses, which confer power on Congress and state legislatures simultaneously. It would be anomalous, without some explicit textual cue, for the Clauses to confer a constrained power on one but not the other.

The Elections and Electors Clauses grant authority to Congress as well as state legislatures, but Congress's power under the Clauses is clearly subject to the usual constitutional constraints.[214] The Elections Clause provides that Congress may "make or alter" rules governing congressional elections, but that it must do so "by law."[215] Compare this with other congressional functions, such as impeachment or the power to judge the qualifications of members, which are not subject to constitutional constraint nor judicial review.[216] The respondents in *Smiley* seized upon the fact that the term "by law" seemingly applies only to Congress to argue that state legislatures were not so constrained, but the Supreme Court explained that "the inference is strongly to the contrary," and that, because the lawmaking power is "the same whether it is performed by [the] state or national legislature . . . the use of the phrase ["by law"] places the intent of the whole provision in a strong light."[217] This inference is even stronger in light of Article II, which provides that "Congress may determine the Time of chusing the Electors, and the Day on which they shall give their Votes."[218] Article II does not require Congress to do so "by law," but there is no indication that

214. *Cf.* Nathaniel F. Rubin, *The Electors Clause and the Governor's Veto*, 106 CORNELL L. REV. ONLINE 57, 66-67 (2021), https://perma.cc/5JB2-4KFP; Levitt, *supra* note 21 at 1063 n.39.

215. U.S. CONST. art. I, § 4.

216. *See* Reed v. County Comm'rs, 277 U.S. 376, 388 (1928) (noting that under Article I, Section 5, each house of Congress "is fully empowered, and may determine such matters without the aid of the [other house] or the Executive or Judicial Department").

217. Smiley v. Holm, 285 U.S. 355, 367 (1932).

218. U.S. CONST. art. II, § 1, cl. 5.

Congress may regulate the appointment of Electors free from federal constitutional constraints. As another example, the Twenty-Third Amendment provides that the District of Columbia "shall appoint [presidential electors] in such manner as Congress may direct" without using the term "by law,"[219] but this power is also exercised through the ordinary lawmaking process.[220] It is thus reasonable to read the Elections Clause as requiring state legislatures to also enact election laws through the ordinary lawmaking process, constrained by state constitutions.

The Electors Clause may also be read as constraining state legislatures. Unlike the original Article I, Section 3, which gave state legislatures the unconstrained power to "chuse" Senators, Article II gives state legislatures only the power to "direct" the manner of their appointment.[221] This language mirrors Article V of the Articles of Confederation, which provided that Congressional delegates "shall be annually appointed in such manner as the legislature of each State shall direct."[222] This language, in effect when the Constitution was drafted and ratified, was not understood to confer independence on state legislatures; when the Articles took effect, eight out of ten state constitutions regulated the selection of congressional delegates, as did three of the four state constitutions adopted after the Articles were proposed.[223] The use of similar language in Article II suggests a similar understanding. Moreover, unlike Article V, the Electors Clause provides that "[e]ach State shall appoint [electors] in such Manner as the Legislature thereof *may* direct."[224]

---

219. *See* U.S. CONST. amend. XXIII.

220. *See* Pub. L. 87-389, 75 Stat. 817 (1961) (providing that the District of Columbia's electors be provided by popular vote).

221. *Compare* U.S. CONST. art. I, § 3, cl. 1, *with* U.S. CONST. art. II., § 1, cl. 2.

222. *Compare* ARTICLES OF CONFEDERATION of 1781, art. V, *with* U.S. CONST. art. II, § 1.

223. *See* Hayward H. Smith, *History of the Article II Independent State Legislature Doctrine*, 29 FLA. U. L. REV. 731, 755 nn. 157–58 (2001) (collecting relevant provisions of state constitutions before and after the Articles of Confederation were enacted).

224. U.S. CONST. art. II, § 1, cl. 2 (emphasis added).

The use of the permissive "may"—particularly when read alongside the mandatory "shall" in the same clause—strongly implies that the state legislature's role is neither exclusive nor independent of other state organs.

In sum, while intratextualism presents a plausible basis for the ISL theory when focusing solely on references to state legislatures, a closer reading provides a strong textual basis to conclude that both the Elections and Electors Clauses in fact provide for constrained state legislatures. Under the Elections Clause, state legislatures, like Congress, must enact "regulations" and do so "by law"—that is, subject to the ordinary substantive and procedural constitutional constraints. And under the Electors Clause, a State's manner of appointing presidential electors "may"—not "shall"—be directed by the state legislature, implying that other branches of state governments retain a role in the process.

3. Purpose and Drafting History

Generally, it is the Constitution's text, rather than the purpose its authors may have had in drafting it, that is given legal effect.[225] As illustrated above, however, the text of the Clauses is indeterminate with respect to the role of state constitutions. In cases such as this, the intent of the drafters may help shed light on the text's original meaning.[226]

a. The Elections Clause

At the Philadelphia Convention and state ratifying conventions, the Elections Clause proved controversial, generating significant debate.[227] This debate focused on the allocation of authority between States and Congress, including whether Congress would have the power to make or alter state election laws.[228] The allocation

225. *See* Whittington, *supra* note 97, at 610 (2004).

226. *See* Keith E. Whittington, *Originalism, Constitutional Construction, and the Problem of Faithless Electors*, 59 ARIZ. L. REV. 903, 921 (2017).

227. *See* Natelson, *supra* note 50, at 23 (noting that because the Elections Clause was so controversial, "the historical record contains a massive number of references to it").

228. *Id.* at 23–40.

of power *within* a state, including the role of state constitutions, was not addressed.[229]

The first purpose of the Elections Clause was to impose upon states an affirmative duty to conduct federal elections.[230] As Alexander Hamilton observed in Number 59 of *The Federalist*, "[A]n exclusive power of regulating elections for the national government, in the hands of the State legislatures, would leave the existence of the Union entirely at their mercy."[231] If a state wanted to sabotage the federal government, it needed only to refuse to elect Representatives.[232] Federalists cited Rhode Island's refusal to send delegates to the Confederation Congress as an example of this danger.[233] Proponents of the Elections Clause made this self-preservation argument repeatedly in the state ratifying conventions.[234] The Elections Clause, by dictating that the time, place, and manner of electing Representatives "*shall* be prescribed," safeguards against this threat.

The second purpose of the Elections Clause was to divide authority between the states and Congress to prevent either from enacting election laws designed to favor certain candidates and thwart the

---

229. *See* Morley, *supra* note 1, at 27 ("The history of the Elections Clause . . . is silent on whether state constitutions may impose substantive limits on the authority of state legislatures over federal elections").

230. *See* Arizona v. Inter Tribal Council of Arizona, Inc., 570 U.S. 1, 8 (2013) (describing the Elections Clause as "the Framers' insurance against the possibility that a State would refuse to provide for the election of representatives to the Federal Congress.").

231. THE FEDERALIST NO. 59, at 361 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (writing that without a constitutional check, the states "could at any moment annihilate [the federal government] by neglecting to provide" for elections).

232. *See id.*

233. *See A Landholder (Oliver Ellsworth), Letter IV*, Nov. 26, 1787, *reprinted in* 14 DOCUMENTARY HISTORY, *supra* note 185, at 231, 233–34 (citing the case of Rhode Island).

234. *See* 2 ELLIOT'S DEBATES, *supra* note 199, at 326 (statement of John Jay at the New York ratifying convention) (expressing concern that "the states [might] neglect to appoint representatives" and signaling the need for "some constitutional remedy for this evil"); *id.* at 24 (statement of Caleb Strong at the Massachusetts ratifying convention) ("[I]f the legislature of a state should refuse to make [election rules], the consequence will be, that the representatives will not be chosen, and the general government will be dissolved.").

popular will. For the Anti-Federalists, assigning Congress ultimate authority over the manner of its own selection posed a significant threat. A congressional majority, they argued, could replace state election laws with new ones designed to entrench itself in power.[235] While some theories offered for how Congress might achieve this—extending term limits,[236] imposing new qualifications,[237] or altering the mechanism for selecting Senators[238]—were clearly foreclosed by the Constitution's text, others were more plausible. By manipulating the time and location of elections—such as by holding elections during harvest time[239] or solely in urban centers[240]—Congress could favor certain groups. Likewise, Congress could mandate at-large

235. *See Centinel, Letter VIII*, PHILA. INDEP. GAZETTEER, Jan. 2, 1788, *reprinted in* 15 DOCUMENTARY HISTORY, *supra* note 185, at 231, 232 ("[T]hat which gives Congress the absolute controul [sic] over the time and mode of its appointment and election . . . may establish hereditary despotism . . .").

236. *See Samuel*, INDEP. CHRON., Jan. 10, 1788, *reprinted in* 5 DOCUMENTARY HISTORY, *supra* note 185, at 678, 680 ("And there is nothing to hinder, but ample provision made, for Congress to make themselves perpetual. For by Art. I, Sect. 4 the Congress may at any time, make and alter the time, place and manner of choosing Representatives; and the time and manner of choosing Senators.").

237. *See Cornelius*, HAMPSHIRE CHRON., Dec. 18, 1787, *reprinted in* 4 DOCUMENTARY HISTORY, *supra* note 185, at 410, 413 ("By this Federal Constitution, each House is to be the judge, not only of the elections, and returns, but also of the *qualifications* of its members; and that, without any other rule than such as they themselves may prescribe.").

238. *See* Letter from Samuel Osgood, to Samuel Adams (Jan. 5, 1787), *reprinted in* 15 DOCUMENTARY HISTORY, *supra* note 185, at 263, 265 ("[I]f Congress should determine, that the People at large, or a certain Description of them, should vote on the Senators, it would only be altering the Manner of choosing them—If this be true, Congress will have the exclusive Right of pointing out the Qualification of the Voters for Senators . . . .").

239. *See* Cato (N.Y. Gov. George Clinton), *Letter VII*, N.Y. J., Jan. 3, 1788, *reprinted in* 15 DOCUMENTARY HISTORY, *supra* note 185, at 240, 241 ("Congress may establish a place, or places, at either the extremes, center, or outer parts of the states; *at a time and season too, when it may be very inconvenient to attend*; and by these means destroy the rights of election . . . .") (emphasis added).

240. *See Vox Populi*, MASS. GAZETTE, Oct. 30, 1787, *reprinted in* 4 DOCUMENTARY HISTORY, *supra* note 185, at 168, 170 (suggesting Congress might direct "that the representatives of this commonwealth should be chosen all in one town, (Boston, for instance) on the first day of March"); *Cornelius*, *supra* note 237, at 410, 413–14 (similar).

elections,[241] adopt plurality-victor rules,[242] or institute voice voting[243] to entrench a dominant faction. The Anti-Federalists wanted to weaken congressional authority or limit it to instances where states neglected to provide for elections.[244] Ultimate authority over federal elections, they argued, should lie with the states, which were closer to the people and elected more frequently.[245]

Federalists, however, saw state legislatures as the greater threat. As James Madison observed at the Philadelphia Convention, state legislatures had equal incentive to craft election laws favoring their own interests and candidates.[246] One concern was malapportionment.[247] At the Massachusetts ratifying convention, Judge Francis Dana and Rufus King pointed to Connecticut and South Carolina, where representatives were apportioned by municipal corporation rather than population, along with efforts by the Rhode Island legislature to enact a similar scheme.[248] Likewise, in Virginia, James Madison cautioned that "[s]ome states might regulate the elections

241. *See* 2 ELLIOT'S DEBATES, *supra* note 199, at 327 (reporting remarks of Melancton Smith at the New York ratifying convention).

242. *See* Federal Farmer, *Letter III*, Oct. 10, 1787, *reprinted in* 14 DOCUMENTARY HISTORY, *supra* note 185, at 31.

243. *See Centinel III*, PHILA. INDEP. GAZETTEER, Nov. 8, 1787, *reprinted in* 14 DOCUMENTARY HISTORY, *supra* note 185, at 59.

244. *See* Federal Farmer, *supra* note 192, at 318 ("[A]t most, congress ought to have power to regulate elections only where a state shall neglect to make them.").

245. *See* Letter from William Symmes, Jr., to Peter Osgood, Jr. (Nov. 15, 1787), *reprinted in* 14 DOCUMENTARY HISTORY, *supra* note 185, at 107–16 (stating that he did not think Congress would have the wisdom to make regulations within the states); *Vox Populi*, *supra* note 240, at 170 ("And it is a little remarkable, that any gentleman should suppose, that Congress could possibly be in any measure as good judges of the time, place and manner of elections as the legislatures of the several respective states.").

246. *See* 5 ELLIOT'S DEBATES, *supra* note 199, at 401.

247. *See* 2 *id.* at 27 (arguing state legislatures might "make an unequal and partial division of the states into districts for the election of representatives").

248. *See id.* at 49 (remarks of Judge Francis Dana); *id.* at 50–51 (remarks of Rufus King).

on the principles of equality, and others might regulate them otherwise."[249] These were not idle concerns; at the Philadelphia Convention, the South Carolina delegation sought to remove Congress's authority altogether to preserve their state's existing apportionment scheme.[250] Because state legislatures also controlled the means for their own election, Federalists argued such mischief could not be remedied without congressional oversight.[251]

Federalists felt Congress was the safest place to vest ultimate authority over federal elections. The diversity and national character of the House would prevent its capture by any one faction,[252] and the careful system of checks and balances between the House and the Senate provided a defense against abuse not present in the state legislatures.[253] As Theophilus Parsons noted at the Philadelphia Convention, the interests of the people and of the states were pitted against one another in the House and Senate, and election laws that unfairly benefitted one chamber would be rejected by the other such that no law "would ever obtain the consent of both branches of the legislature, but such as did not affect their neutral rights and the balance of government."[254] Thus, while both the states and Congress might be tempted to manipulate election laws to anti-republican ends, the relatively unchecked state legislatures had the

249. 3 *id.* at 367.

250. *See* 5 *id.* at 401 (motion by Charles Pinckney and John Rutledge of South Carolina); JACK RAKOVE, ORIGINAL MEANINGS: POLITICS AND IDEAS IN THE MAKING OF THE CONSTITUTION 223–24 (1996).

251. *See* 6 DOCUMENTARY HISTORY, *supra* note 185, at 1213, 1218 (arguing that, without congressional authority, "the people can have no remedy" against state electoral manipulations); 4 Elliot's Debates at 303 (noting that if the people dislike a state's election laws, "they can petition the general government to redress this inconvenience.").

252. *See* THE FEDERALIST NO. 60, at 367 (Alexander Hamilton) (Clinton Rossiter ed., 1961) ("The dissimilarity in the ingredients which will compose the national government . . . must form a powerful obstacle to a concert of views in any partial scheme of elections.").

253. *See* 2 ELLIOT'S DEBATES, *supra* note 199, at 26–27 (Theophilus Parsons) ("These two branches . . . have different constituents, and as they are designed as mutual checks upon each other, and to balance the legislative powers, there will be frequent struggles and contentions between them.").

254. *Id.*

greater opportunity to do so. In the end, the Federalists prevailed; Congress would have ultimate authority not only to alter state election laws, but also to make its own.[255]

The Elections Clause had two major purposes: ensuring states held federal elections and dividing authority over federal elections between the states and Congress. Both purposes reveal an overriding concern with unchecked authority over elections and a distrust of state legislatures in particular.[256] Thus, while these debates do not mention state constitutions specifically, it is hard to imagine the Framers intended the Elections Clause to eliminate this important check on state legislatures; when the Federalists spoke of the checks on Congress's Elections Clause authority, they referred to federal courts and the federal constitution.[257] Read broadly, the Elections Clause serves to impose additional checks on state legislatures, not to remove existing ones.

b. The Electors Clause

As with the Elections Clause, there is no indication the Electors Clause was intended to grant state legislatures exclusive and unconstrained authority over presidential elections.[258] There was no mention of state constitutions.[259] Rather, debates over the Electors

255. *See* 5 *id.* at 402 (amendment proposed by George Read of Delaware and agreed to by the Convention).

256. As Jamal Greene notes, the distrust of state legislatures demonstrated by Madison and others at the Philadelphia Convention may not reflect the broader views of the Framers or ratifiers. *See* Greene, *supra* note 196, at 1033. However, as he notes, the almost completely unchecked power the Elections Clause assigns to Congress is "difficult to justify . . . without adopting at least part of Madison's rationale." *Id.* at 1034.

257. *See* 4 ELLIOT'S DEBATES, *supra* note 199, at 71 (statement of John Steele at the North Carolina ratifying debates) ("The judicial power of [the federal] government is so well construed as to be a check . . . [i]f the Congress makes laws inconsistent with the Constitution, independent judges will not uphold them.").

258. *See* Smith, *supra* note 223, at 743 ("[T]here is no indication in the historical record that the [Electors Clause] was originally understood to grant independence to state legislatures.").

259. *See id.* ("At the Constitutional Convention, the Founders did not specifically address whether state legislatures operate independently of their constitutions when they

Clause centered on the more vexing question of how to elect the President.[260] During the Convention, delegates debated and voted down various methods, with most of the discussion focused on either direct popular election or selection by Congress.[261]

While popular election was more democratic,[262] opponents raised two primary concerns. First, they doubted whether voters would be able to make an informed decision or reach a national consensus.[263] Second, they worried a national popular election would favor larger and northern states over smaller and southern ones.[264] On the other hand, legislative appointment risked making the President dependent upon Congress.[265] The Electoral College answered both sets of concerns. Electors could be more informed, their numbers could be weighted to protect states' interests, and because they "would meet once and then forever dissolve," Presidential independence was ensured.[266]

But once the Convention settled on an Electoral College, the question shifted to how electors would be chosen. A similar debate emerged between those who favored popular election and those who favored legislative appointment, with no clear consensus.[267] Proposals were made under which electors would be "chosen by

---

exercise their Article II powers."); James C. Kirby, Jr., *Limitations on the Power of State Legislatures Over Presidential Elections*, 27 Law & Contemp. Probs. 495, 502 (1962)("The point simply did not occur to [the Framers].").

260. *See* RAKOVE, *supra* note 250, at 259.

261. *See* CLINTON L. ROSSITER, 1787: THE GRAND CONVENTION 198–200 (1969).

262. *See* 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 80 (Max Farrand ed. 1911) [hereinafter FARRAND'S RECORDS] (statement of James Wilson) (arguing popular election "would produce more confidence among the people . . . than an election by the national Legislature").

263. *See* Shlomo Slonim, *The Electoral College at Philadelphia: The Evolution of an Ad Hoc Congress for the Selection of a President*, 73 J. AM. HIST. 35, 40 (1986).

264. *See* Smith, *supra* note 223, at 749; RAKOVE, *supra* note 250, at 259.

265. *See* Slonim, *supra* note 263, at 37–38.

266. *See* RAKOVE, *supra* note 250, at 259–60; *see also* Smith, *supra* note 223, at 748–50 (discussing the debates).

267. *See* Smith, *supra* note 223, at 748–756.

the people,"[268] "chosen by the State Executives,"[269] "appointed by the Legislatures of the States,"[270] or chosen by "the Legislatures of the States."[271] Finally, just two weeks before the end of the Convention, a new proposal was put forward, which, borrowing the familiar language of the Articles of Confederation, would have electors "appoint[ed] in such manner as [the] Legislature may direct."[272] There was no meaningful discussion over this change.[273] The delegates simply adopted the language and proceeded to the more dramatic question of what to do if the College did not produce a majority.[274] Likewise, during the ratification debates, the mechanics of the Electoral College were eclipsed by other issues, and there was no discussion of state constitutions.[275]

This history does not suggest any clear overriding purpose behind the Electors Clause. Rather, the Clause was a compromise between several competing interests, none of which is furthered by insulating state legislatures from state constitutional constraints.[276] What is clearest from the historical record is that the text of the Electors Clause was indeterminate even as it was adopted[277] and ratified.[278]

*****

268. 2 FARRAND'S RECORDS, *supra* note 262, at 55–56.
269. *Id.* at 57.
270. *Id.*
271. *Id.* at 112.
272. *Id.* at 493–94.
273. *Id.*
274. *Id.* at 500–29.
275. *See* Smith, *supra* note 223, at 746.
276. *See id.* at 754.
277. *See id.* at 732–33, 745 ("[I]t is difficult to know precisely what the language of [the Electors Clause] meant to the Framers, let alone the extent to which they thought it put limitations on state constitutions.").
278. *See id.* at 747 ("Thus, even in the most basic sense, the meaning of the words 'in such manner as the legislatures thereof may direct' was unclear to the Ratifiers.").

The foregoing inquiry into the text, history, and purpose of the Elections and Electors Clauses reveals two points. First, textual arguments can be made in favor of either an independent or a constrained view of state legislatures under the Elections and Electors Clauses. Not only is the term "Legislature" amenable to more than one interpretation, but both the Clauses themselves and related constitutional provisions can be read to support either position. Second, neither the legislative history nor purpose resolves this indeterminacy. While reasonable minds may differ as to which set of arguments is most persuasive, the Supreme Court's reasoning in *Chiafalo* reminds us that textual indeterminacy does not require more than a plausible argument on either side.[279] Here, both interpretations are more than plausible, and thus the requirement is met.

B. Course of Deliberate Practice

Following *Chiafalo*'s lead, the liquidation analysis's second prong looks for a course of deliberate practice.[280] Here, two practices are relevant. First is the practice of states—via state legislatures and their citizens—enacting state constitutional provisions to regulate federal elections. Second is the practice of state courts reviewing state election laws under those provisions. Both practices enjoy a long and nearly uniform pedigree. While some commentators point to scattered departures from the norm during the late nineteenth century, under a liquidation framework, even if the issue was at one time briefly contested, a century of settled subsequent practice is more than sufficient to liquidate the Clauses' meaning.[281]

---

279. *See supra* notes 159–163 and accompanying text.

280. *See* supra notes 152–169 and accompanying text; *cf.* Baude, *supra* note 101, at 16–17.

281. In *Bruen*, the Supreme Court reaffirmed that liquidation is an appropriate framework "'where a governmental practice has been open, widespread, and unchallenged since the early days of the Republic.'" New York State Rifle & Pistol Ass'n, Inc. v. Bruen, 142 S. Ct. 2111, 2137 (2022) (quoting NLRB v. Noel Canning, 573 U.S. 513, 572 (2014)). But the Court has also looked to historical practices to shed light on constitutional text "even when that practice began after the founding era." *Noel Canning*, 573 U.S. at 525

1. State Constitutions Regulating Federal Elections

From the beginning, state constitutions have regulated both the procedure and substance of federal elections. After the federal constitution was ratified, several states adopted new constitutions, which included election provisions and some of which explicitly regulated federal elections. In 1792, for instance, Delaware adopted a new constitution under which congressional representatives would be "voted for at the same Places where Representatives in the State Legislature are voted for, and in the same Manner."[282] Other provisions applied to both state and federal elections alike; nearly every state constitution set out voter qualifications,[283] and most included express protections for the right to vote or guarantees of free and equal elections.[284]

Many of these provisions went beyond general principles and regulated specific aspects of election administration, such as whether votes would be cast by ballot or by voice. The 1790 Pennsylvania constitution, for example, required that "[a]ll elections shall be by ballot,"[285] as did the constitutions of at least four other states.[286] This was one of the most important, and most contested, issues of election administration in the post-Founding era, with

---

(citing Mistretta v. United States, 488 U.S. 361, 400–01 (1989)) (looking to historical practice after 1877); Dames & Moore v. Regan, 453 U.S. 654, 684 (1981) (looking to historical practice after 1952); The Pocket Veto Case, 279 U.S. 655, 689–90 (1929) (giving "great weight" to post-founding practice); *Ex parte* Grossman, 267 U.S. 87, 118–19 (1925) (looking to post-Founding practice to construe the constitution). *See also* Baude, *supra* note 101, at 59–63 (discussing the relevance of post-Founding practice and whether and to what extent early practice ought to be privileged in a liquidation analysis).

282. DEL. CONST. of 1792, art. VIII, § 2.

283. *See id.* art. IV, § 1; PA. CONST. of 1790, art. III, § 1; N.J. CONST. of 1776, art. IV; GA. CONST. of 1777, art. IX; MD. CONST. of 1776, art. XIV (amended 1810) (guaranteeing suffrage to all free white male citizens).

284. *See* DEL. CONST. of 1792, art. I, § 3; PA. CONST. of 1790, art. IX, § 5; GA. CONST. of 1777, art. X; KY. CONST. of 1792, art. XII, § 5; KY. CONST. of 1799, art. X, § 5; N.H. CONST. of 1792, art. XI; VT. CONST. of 1793, ch. 1, art. VIII; VT. CONST. of 1793, ch. 2, § 34; TENN. CONST. of 1796, art. XI, § 5.

285. PA. CONST. of 1790, art. III, § 2.

286. *See* GA. CONST. of 1789, art. IV, § 2; KY. CONST. of 1792, art. III, § 2; TENN. CONST. of 1796, art. III, § 3; OHIO CONST. of 1803, art. IV, § 2.

many concerned about the potential for fraud in ballot voting and for undue influence in voice voting.[287] Nonetheless, when states like Georgia and Kentucky sought to change these rules and switch to voice voting, they did so via the formal amendment process.[288] Other provisions encouraged voting, such as Georgia's imposition of a monetary penalty for those abstaining from elections,[289] while others protected voters by privileging them from arrest during elections so long as they were innocent of treason, felony, or breach of the peace.[290]

The next flurry of state constitutional development occurred during the Jacksonian and antebellum periods when several states made significant changes to their constitutions, some for the first time since the Founding.[291] These new state constitutions continued to regulate important aspects of election administration, such as voting by ballot or *viva voce*,[292] but also expanded into new areas. The Kentucky constitution set the hours of voting for all elections,[293] while California's constitution instituted a plurality-winner rule.[294] State constitutions also regulated federal elections in new ways. Maryland amended its constitution in 1810 to guarantee to every

287. *See* RAKOVE, *supra* note 250 at 204.

288. *See* GA CONST. of 1798, art. IV, § 2 ("In all elections by the people the electors shall vote *viva voce* until the legislature shall otherwise direct."); KY. CONST. of 1799, art. VI, § 16 ("In all elections by the people, and also by the senate and house of representatives, jointly or separately, the votes shall be personally and publicly given *viva voce*.").

289. GA. CONST. of 1777, art. XII.

290. *See* PA. CONST. of 1790, art. III, § 3; KY. CONST. of 1792, art. III, § 3; DEL. CONST. of 1792, art. IV, § 2; TENN. CONST. of 1796, art. III, § 2.

291. Until this point, several states operated under their pre-ratification constitutions. *See* VA. CONST. of 1776; N.J. CONST. of 1776; N.Y. CONST. of 1777; N.C. CONST. of 1776. Others, like Connecticut and Rhode Island, had no constitutions until this period. *See* CONN. CONST. of 1818; R.I. CONST. of 1843.

292. *See* OHIO CONST. of 1803, art. IV, § 2; LA. CONST. of 1812, art. VI, § 13; ALA. CONST. of 1819, art. III, § 7; MICH. CONST. of 1835, art. II, § 2; TEX. CONST. of 1845, art. VII, § 6; CAL. CONST. of 1849, art. II, § 6; MINN. CONST. art. VII, § 5 (renumbered from art. VII, § 6 in 1974); N.Y. CONST. of 1821, art. II, § 4; VA. CONST. of 1830, art. III, § 15; PA. CONST. of 1838, art. III, § 2; KY. CONST. of 1850, art. VIII, § 15.

293. *See* KY. CONST. of 1850, art. VIII, § 16.

294. *See* CAL. CONST. of 1849, art. XI, § 20.

free white male citizen the right to vote in all federal elections.[295] In 1838, Florida's Constitution provided that "[r]eturns of elections for members of Congress . . . shall be made to the secretary of state, in manner to be prescribed by law."[296] In 1842, Rhode Island specified that votes in congressional elections be "by ballot."[297] Congressional reapportionment was an area of particular focus, with state constitutions instituting districting criteria including compactness,[298] population equality,[299] and respect for county boundaries.[300]

State constitutions continued regulating federal elections throughout the Civil War. When West Virginia and Nevada entered the Union during the war, their constitutions included provisions related to voting by ballot, plurality winner rules, and congressional districting.[301] Several states also amended their constitutions to allow soldiers fighting in the war to vote while absent from their home states. Three of these applied explicitly to both federal and state elections,[302] while another four referred to elections generally and without further specification.[303]

Reconstruction saw another flurry of activity as Congress conditioned the readmission of former Confederate states on, among

---

295. *See* MD. CONST. of 1776, art. XIV (1810) ("[E]very free white male citizen . . . shall have a right of suffrage . . . in the election . . . for electors of the President and Vice-President of the United States, for Representatives of this State in the Congress of the United States, for delegates to the general assembly of this State, electors of the senate, and sheriffs.").

296. FLA. CONST. of 1838, art. VI, § 16. *See also* FLA. CONST. of 1865, art. VI, § 12.

297. *See* R.I. CONST. of 1842, art. VIII, § 2.

298. *See* VA. CONST. of 1850, art. IV, § 14.

299. *See* VA. CONST. of 1830, art. III, § 6.

300. *See* VA. CONST. of 1830, art. III, § 6; IOWA CONST. of 1846, art. IV, LEGISLATIVE DEPARTMENT, § 32; CAL. CONST. of 1849, art. IV, § 30.

301. *See* W. VA. CONST. of 1863, art. XI, § 6; *id.* art. III, § 2; NEV. CONST. art. IV, § 34 (repealed 2004); *id.* art. II, § 5; *id.* art. XV, § 14.

302. *See* CONN. CONST. of 1818, amend. XIII (1864); MD. CONST. of 1864, art. XII, § 11; R.I. CONST. of 1842, amend. IV (1864).

303. *See* N.Y. CONST. of 1846, art. II, § 1 (as amended in 1864); PA. CONST. of 1790, art. III, § 4 (1864); MICH. CONST. of 1850, art. VII, § 1 (as amended in 1866); KAN. CONST. art. V, § 3 (as amended in 1864) (eliminated by revision).

other things, adopting new state constitutions providing for universal male suffrage.[304] This same period saw new constitutions and amendments related to congressional districting[305] and popular election of presidential electors,[306] among other election-related provisions.[307]

Following Reconstruction, several southern states adopted new state constitutions with the explicit aim of circumventing the Fifteenth Amendment and restricting Black suffrage.[308] Beginning with Mississippi in 1890 and ending with Georgia in 1908, these new constitutions established poll taxes, literacy tests, grandfather clauses, and onerous registration rules and procedures.[309] While some of these provisions related solely to voter qualifications, many detailed the specific manner in which qualifications were to be assessed and voters registered.[310] Other provisions imposed direct regulations of time, place, or manner, including providing for

304. Act of Mar. 2, 1867, Pub. L. No. 39-153, § 5, 14 Stat. 428, 429 (1867).

305. *See* ALA. CONST. of 1867, art. VIII, § 1; VA. CONST. of 1870, art. V, §§ 12–13; TENN. CONST. art. X, § 5; CAL. CONST. art. IV, § 27 (repealed 1980); MONT. CONST. of 1889, art. VI, § 1; S.D. CONST. art. XIX, § 1; N.D. CONST. of 1889, art. IV, § 11 (renumbered from art. XVIII, § 214) (amended 1960) (held unconstitutional 1964); WYO. CONST. art. III, §§ 47, 49 (amended 1967; renumbered from APPORTIONMENT, §§ 1, 3 in 1938).

306. *See* S.C. CONST. of 1868, art. VIII, § 9; PA. CONST. art. VII, § 13 (renumbered from art. VIII, § 17, in 1967); COLO. CONST., SCHEDULE, §§ 19–20; LA. CONST. of 1879, art. CXCI.

307. *See* VA. CONST. of 1870, art. III, § 2; PA. CONST. art. VII, § 4 (renumbered from art. VIII in 1967); GA. CONST. of 1868, art. II, § 1; KY. CONST. § 147 (replacing voice voting with election "by secret official ballot" for all elections).

308. *See* Richard H. Pildes, *Democracy, Anti-Democracy, and the Canon*, 17 CONST. COMMENT. 295, 301–02 (2000) (explaining that restoration of white supremacy in the south was the "avowed purpose" of these new constitutions).

309. *See* MISS. CONST. of 1890, art. XII, §§ 243–244 (repealed 1975); VA. CONST. of 1902, art. II, §§ 18–23; GA. CONST. of 1877, art. II, § 1 (1908); *id.* art. VII, § 2.

310. *See* VA. CONST. of 1902, art. II, §§ 18–23.

voting by ballot,[311] which in the late nineteenth century was effective in disenfranchising illiterate Blacks.[312] Importantly, while these states also enacted discriminatory statutes, they relied on state constitutions to ensure black disenfranchisement would endure.[313]

Around the turn of the century, the ballot initiative emerged as the dominant means of state constitutional change. In forty-nine states, state legislatures may refer a proposed amendment to voters for their approval, and in sixteen states, voters may, by gathering a certain number of signatures, place an amendment on the ballot without the involvement of the state legislature.[314] Through these two mechanisms, states have adopted constitutional amendments

311. *See* ALA. CONST. art. VIII, § 179 (repealed 1996).

312. In an extreme example, South Carolina's "Eight-Box Ballot Law" was designed to disenfranchise illiterate black voters by requiring them to deposit ballots for individual offices in separate labeled boxes. *See* CHARLES L. ZELDEN, VOTING RIGHTS ON TRIAL: A HANDBOOK WITH CASES, LAWS, AND DOCUMENTS 75 (2002).

313. *See* Pildes, *supra* note 308, at 301 n.29 (describing constitutional disenfranchisement as "the capstone to the elimination of black political participation" and explaining that constitutional provisions "cast disfranchisement into the most endurable and symbolically significant legal form").

314. *See* Marvin Krislov & Daniel M. Katz, *Taking State Constitutions Seriously*, 17 CORNELL J.L. & PUB POL'Y 295, 302 & n.27 (2008).

concerning nearly every aspect of federal elections, including registration,[315] primaries,[316] ballots,[317] voting machines,[318] absentee voting,[319] voter ID,[320] and election integrity.[321] Several of these amendments explicitly constrain state legislatures, either by enacting new

315. *See* TEX. CONST. art. VI, § 4 (amended 1966) (amended by election through Texas Proposition 4 in 1891 to authorize the state legislature to provide for voter registration in cities); CONN. CONST. amend. X (adopted by election through Connecticut Question 2 in 1976) (pre-registration for 17-year-old citizens); OR. CONST. art. II, § 2 (amended 1932) (amended by election through Oregon Measure 5 in 1927 to require a voter be duly registered in order to vote); MD. CONST. art. I, § 2a (adopted by election through Maryland Question 2 in 2018 providing for same day registration).

316. *See* ARIZ. CONST. art. VIII, § 10 (amended by election through Arizona Proposition 103 in 1998).

317. *See* CAL. CONST. art. II, § 1 (as written in 1924) (renumbered and amended in 1976) (adopted by election through California Proposition 18 in 1924 providing for voting by ballot); N.D. CONST. art. II (renumbered from art. V in 1979) (adopted by election through North Dakota Amendment 2 in 1978); ARK. CONST. amend. 50, § 3 (repealed by election through Arkansas Proposed Amendment 1 in 2002 authorizing legislature to provide for secrecy in voting).

318. *See* KY. CONST. § 147 (amended 1945) (amended by election through the Kentucky Voting Machines Referendum of 1941).

319. *See* ME. CONST. art. IV-1, § 5 (amended by election through Maine Amendment 1 in 1921 to allow absentee voting); CAL. CONST. art. II, § 1 (as written in 1928) (renumbered and amended in 1976) (amended by election through California Proposition 18 in 1928 to allow absentee voting for civil and congressional service); ME. CONST. art. II, § 4 (amended by election through Maine Amendment 6 in 1951 to allow absentee voting for the armed forces and incapacitated persons); CONN. CONST. of 1818, amend. IX (adopted by election through Connecticut Question 5 in 1962 to allow absentee voting for servicemembers); N.D. CONST. art. II (renumbered from art. V in 1979) (amended by election through North Dakota Amendment 2 in 1978 to provide for absentee voting); CONN. CONST. of 1818, amend. XXXIX (adopted by election through Connecticut Question 1 in 1932) (same); MD. CONST. art. I, § 3 (renumbered from art. 1, § 1A in 1978) (amended by election through Maryland Amendment 3 in 1954) (same); KY. CONST. § 147 (amended by election through Kentucky Absentee Voting Referendum in 1945) (same).

Other amendments have expanded absentee voting to new groups of voters. *See* CAL. CONST. art. II, § 1 (as written in 1922) (renumbered and amended in 1976) (amended by election through California Proposition 22 in 1922) (military); FLA. CONST. of 1885, art. IV, § 2 (amended by election through Florida Amendment 2 in 1960) (same); MD. CONST. art. I, § 3 (renumbered from art. 1, § 1A in 1978) (amended by election through Maryland Amendment 1 in 1918) (same); MO. CONST. of 1875, art. VIII, § 9 (amended by election through Missouri Issue 11 in 1920) (same); MD. CONST. art. I, § 3

substantive rights for voters,[322] setting out rules for certain types of elections,[323] or taking power from the legislature and giving it to an independent redistricting commission.[324]

State constitutions have regulated federal elections and constrained state legislatures since the Founding. As elections evolved and states embraced direct democracy, the number and variety of election-related provisions in state constitutions increased. This longstanding practice, consistent across states, eras, and substantive areas of election law, demonstrates a deliberate course of action construing the practical meaning of the Elections and Electors Clauses.

(renumbered from art. 1, § 1A in 1978) (amended by election through Maryland Amendment 6 in 1956) (disabilities); MASS. CONST. amend. LXXVI (adopted by election through Massachusetts Question 4 in 1944) (same); MASS. CONST. amend. CV (adopted by election through Massachusetts Question 3 in 1976) (religion); CONN. CONST. of 1818, amend. XII (adopted by election through Connecticut Question 3 in 1964) (same); PA. CONST. art. VII, § 14 (amended by election through Pennsylvania Question 1 in 1985 for poll workers and religion) (amended by election through Pennsylvania Question 3 in 1997 to further expand absentee voting).

320. *See* MO. CONST. art. VII, § 11 (adopted by election through Missouri Amendment 6 in 2016); ARK. CONST. art. III, § 1 (amended by election through Arkansas Issue 2 in 2018); N.C. CONST. art. VI, §§ 2, 3 (amended by election through North Carolina Voter ID Amendment in 2018).

321. *See* MD. CONST. art. I, § 6 (renumbered from art. 1, § 3 in 1978) (amended by election through Maryland Amendment 4 in 1913).

322. *See* ILL. CONST. art. III, § 8 (adopted by election through Illinois Right to Vote Amendment in 2014); CAL. CONST. art. II, § 2.5 (adopted by election through California Proposition 43 in 2002).

323. *See* ARIZ. CONST. art. VII, § 17 (adopted by election through Arizona Proposition 101 in 1962).

324. *See* WASH. CONST. art. II, § 43 (amended by election through Washington Senate Joint Resolution 103 in 1983); MONT. CONST. art. V, § 14 (amended by election through Montana Measure C-14 in 1984); HAW. CONST. art. VI, § 2 (amended by election through Hawaii Question 1 in 1992); IDAHO CONST. art. III, § 2 (amended by Idaho Senate Joint Resolution 105 in 1994); N.J. CONST. art. II, § 2 (adopted by election through New Jersey Public Question 1 in 1995); COLO. CONST. art. V, § 44 (amended by election through Colorado Amendment Y in 2018); VA. CONST. art. II, § 6 (amended by election through Virginia Question 1 in 2020); ARIZ. CONST. art. IV-2, § 2 (amended by election through Arizona Proposition 106 in 2000); CAL. CONST. art. XXI (amended by election through California Proposition 20 in 2010).

2. State Court Review of Laws Regulating Federal Elections

The clearest evidence that state legislatures are constrained by state constitutions is the practice of state courts reviewing state election laws. Some of the earliest conflicts between state constitutions and election laws passed by state legislatures arose during the Civil War, when several states enacted soldier absentee voting laws in violation of state constitutional provisions requiring ballots be cast in person.[325] Some state supreme courts struck down these laws,[326] while others construed state constitutions to avoid conflict.[327]

325. *See* Smith, *supra* note 223, at 765.

326. *See* Bourland v. Hildreth, 26 Cal. 161 (Cal. 1864); *In re* Opinion of the Judges, 30 Conn. 591 (Conn. 1862); People *ex rel.* Twitchell v. Blodgett, 13 Mich. 127 (Mich. 1865); *In re* Opinion of the Justices, 44 N.H. 633 (N.H. 1863). *See also* Smith, *supra* note 223, at 765-67.

327. *See* Morrison v. Springer, 15 Iowa 304 (Iowa 1864); Lehman v. McBride, 15 Ohio St. 573 (Ohio 1863); State *ex rel.* Vandler v. Main, 16 Wis. 422 (Wis. 1863). A year after holding a soldier voter law unconstitutional, the New Hampshire Supreme Court changed course, holding that state legislatures could regulate the manner of elections "untrammeled" by the state constitution. *See In re* Opinion of the Justices, 45 N.H. 595, 605 (N.H. 1864). A few decades later, however, the New Hampshire Supreme Court changed course again and held that a soldier voting bill would be invalid under the state constitution as to state elections, though the Court expressed no view as to whether the law would be valid as to the election of members of Congress. *See In re* Opinion of the Justices, 113 A. 293, 299 (N.H. 1921).

From the Civil War through the early twentieth century, state courts consistently reviewed laws regulating federal elections, including laws relating to congressional redistricting,[328] voter registration,[329] absentee voting,[330] secret ballots,[331] and voting machines,[332] thus rejecting by implication the ISL theory. In contrast, only a handful of state courts embraced the ISL theory.[333] After the "one person, one vote" apportionment cases of the 1960s, chal-

328. *See* Brown v. Saunders, 166 S.E. 105, 107 (Va. 1932) ("When a State legislature passes [a Congressional] apportionment bill, it must conform to constitutional provisions prescribed for enacting any other law, and whether such requirements have been fulfilled is a question to be determined by the court, when properly raised."); Moran v. Bowley, 179 N.E. 526, 531–32 (Ill. 1932); Schrader v. Polley, 127 N.W. 848, 851 (S.D. 1910); Carroll v. Becker, 45 S.W.2d 533, 536–37 (Mo. 1932).

329. City of Owensboro v. Hickman, 14 S.W. 688, 689–90 (Ky. 1890); Franklin v. Harper, 55 S.E. 2d 221 (Ga. 1949); Southerland v. Norris, 22 A. 137 (Md. 1891).

330. *See* Chase v. Lujan, 149 P.2d 1003, 1010–11 (N.M. 1944) (striking down absentee voting law); Baca v. Ortiz, 61 P.2d 320 (N.M. 1936) (same); Jones v. Smith, 165 Ark. 425 (Ark. 1924) (upholding a state absentee voting law); Straughan v. Meyers, 187 S.W. 1159 (Mo. 1916) (same).

331. *See* DeWalt v. Bartley, 24 A. 185 (Pa. 1892) (upholding secret ballot law).

332. *See* Morrison v. Lamarre, 65 A.2d 217 (R.I. 1949) (law providing for "master levers" on voting machines did not violate state constitution). *See also* Constitutionality of statutes providing for the use of voting machines. 66 A.L.R. 855 (1930) (describing similar challenges).

333. *See* State v. Williams, 49 Miss. 640 (Miss. 1873) (state legislatures may schedule congressional elections notwithstanding contrary state constitutional provisions); *In re* Plurality Elections, 8 A. 881 (R.I. 1887) (state constitutional provision requiring a majority vote did not constrain the state legislature); Beeson v. Marsh, 34 N.W.2d 279, 285–87 (Neb. 1948) (state constitution did not apply to laws concerning appointment of presidential electors); Dummit v. O'Connell, 181 S.W.2d 691, 694–96 (Ky. 1944) (state constitution could not restrict state legislature's power to permit absentee voting); Parsons v. Ryan, 60 P.2d 910, 912 (Kan. 1936) (state legislatures not subject to state constitutional limits when deciding the manner of choosing presidential electors).

lenges to legislative redistricting plans under state constitutions became more common,[334] along with some challenges to congressional redistricting.[335] In recent years, since *Bush II* drew new attention to the nuts and bolts of election administration, the number of election law cases has more than doubled,[336] including numerous challenges brought under state constitutions.[337] Over the past two decades, state courts have reviewed state election laws relating to every aspect of federal elections, including redistricting,[338] Voter

334. *See* Samuel S.H. Wang, Richard F. Ober Jr., & Ben Williams, *Laboratories of Democracy Reform: State Constitutions and Partisan Gerrymandering*, 22 U. PA. J. CONST. L. 203, 253–56 (2019) (listing cases striking down redistricting maps under state constitutions).

335. *See, e.g.*, Assembly V. Deukmejian, 639 P.2d 939, 950 (Cal. 1982) (explaining how California's congressional district map violated both the federal and state "one person, one vote" requirements).

336. *See* Richard L. Hasen, *The Supreme court's Shrinking Election Docket 2001-2010: A Legacy of* Bush v. Gore *or Fear of the Roberts Court?*, 10 ELECTION L.J. 325, 327 (2011).

337. *See* Joshua A. Douglas, *State Judges and the Right to Vote,* 77 OHIO ST. L.J. 1, 13–32 (2016) (describing various challenges under state constitutions since 2000).

338. Arizona Minority Coal. for Fair Redistricting v. Arizona Indep. Redistricting Comm'n, No. CA-CV 07-0301 (Ariz. Ct. App. Apr. 20, 2008); Beauprez v. Avalos, 42 P.3d 642 (Colo. 2002); People *ex rel.* Salazar v. Davidson, 79 P.3d 1221 (Colo. 2003); *In re* 2003 Apportionment of the State Senate and U.S. Cong. Dists., 827 A.2d 844 (Me. 2003); LeRoux v. Sec'y of State, 640 N.W. 2d 849 (Mich. 2002); Erfer v. Commonwealth, 794 A.2d 325 (Pa. 2002); Parella v. Montalbano, 899 A.2d 1226 (R.I. 2006); League of Women Voters v. Commonwealth, 178 A.3d 737 (Pa. 2018); Pearson v. Koster, 359 S.W.3d 35 (Mo. 2012); League of Women Voters of Florida v. Detzner, 172 So.3d 363 (Fla. 2015); Johnson v. State, 366 S.W.3d 11 (Mo. 2012).

ID,[339] felon disenfranchisement,[340] voting machines,[341] polling hours,[342] absentee voting,[343] voter registration,[344] ballot access,[345] and campaign finance.[346] Finally, even as the ISL theory was invoked in the 2020 election cases, state courts reviewed an unprecedented number of state election laws under state constitutions.[347]

---

339. *See In re* Request for Advisory Op. Concerning Constitutionality of 2005 PA 71, 740 N.W.2d 444 (Mich. 2007); League of Women Voters of Ind., Inc. v. Rokita, 929 N.E.2d 758 (Ind. 2010); Democratic Party of Ga., Inc. v. Perdue, 707 S.E.2d 67 (Ga. 2011); City of Memphis v. Hargett, 414 S.W.3d 88 (Tenn. 2013); League of Women Voters of Wis. Educ. Network, Inc. v. Walker, 851 N.W.2d 302 (Wis. 2014); Milwaukee Branch of NAACP v. Walker, 851 N.W.2d 262 (Wis. 2014); Weinschenk v. State, 203 S.W.3d 201 (Mo. 2006) (per curiam); Applewhite v. Commonwealth, No. 330 M.D.2012, 2014 WL 184988 (Pa. Commw. Ct. Jan. 17, 2014); Martin v. Kohls, 444 S.W.3d 844, 852 (Ark. 2014).

340. *See* League of Women Voters of Cal. v. McPherson, 52 Cal. Rptr.3d 585 (Ct. App. 2006); May v. Carlton, 245 S.W.3d 340 (Tenn. 2008); Chiodo v. Section 43.24 Panel, 846 N.W. 2d 845 (Iowa 2014); Snyder v. King, 958 N.E.2d 764 (Ind. 2011); Madison v. State, 163 P.3d 757 (Wash. 2007) (en banc).

341. Favorito v. Handel, 684 S.E.2d 257 (Ga. 2009); Andrade v. NAACP of Austin, 345 S.W.3d 1 (Tex. 2011); Chavez v. Brewer, 214 P.3d 397, 408 (Ariz. Ct. App. 2009).

342. State *ex rel.* Bush-Cheney 2000, Inc. v. Baker, 34 S.W.3d 410 (Mo. Ct. App. 2000); Republican Party of Ark. v. Kilgore, 98 S.W.3d 798 (Ark. 2002) (per curiam).

343. Sheehan v. Franken, 767 N.W.2d 453 (Minn. 2009) (per curiam); *In re* Canvass of Absentee Ballots of Nov. 4, 2003 Gen. Election, 843 A.2d 1223 (Pa. 2004); Townson v. Stonicher, 933 So.2d 1062 (Ala. 2005).

344. Guare v. State, 117 A.3d 731 (N.H. 2015) (per curiam).

345. Nader for President 2004 v. Md. State Bd. of Elections, 926 A.2d 199 (Md. 2007); Walsh v. Katz, 953 N.E.2d 753 (N.Y. 2011)

346. Colo. Ethics Watch v. Senate Majority Fund , LLC, 269 P.3d 1248 (Colo. 2012); State v. Green Mountain Future, 86 A.3d 981 (Vt. 2013).

347. *See, e.g.*, Aguilera v. Fontes, No. CV 2020-014562, 2020 WL 11273092 (Ariz. Super. Ct. 2020); League of United Latin Am. Citizens of Iowa v. Pate, 950 N.W.2d 204 (Iowa 2020); Alaska Center Education Fund v. Fenumiai, No. 3AN-20-08354CI (Alaska Super. Ct. 3d Dist. 2020); Abbott v. Anti-Defamation League Austin, Sw., & Texoma Regions, 610 S.W.3d 911 (Tex. 2020); Arnett v. N.C. Bd. of Elections, No. 20 CVS 00570 (Gen. Ct. Just., Super. Ct. Div., Duplin Cnty. 2020); Ryan v. Benson, No. 20-000198-MZ (Mich. Ct. Claims 2020); State v. Ctr. for Tech. & Civic Life, No. 21-670, 671, 2022 WL 946604 (La. Ct. App. 2022); MOVE Tex. Action Fund v. DeBeauvoir, No. 03-20-00497-CV (Tex. Ct. App.); Middleton v. Andino, 488 F. Supp. 3d 261 (D.S.C. 2020); *In re* Hotze, 610 S.W.3d 909 (Tex. 2020); *In re* McCarty, 598 S.W.3d 485 (Tex. App. 2020); Ohio Democratic Party v. LaRose, 159 N.E.3d 1241 (Ohio Ct. App. 2020); League of Women Voters of Del., Inc. v. Dep't of Elections, 250 A.3d 922 (Del Ch. 2020); American Women v. Missouri, No.

C. Settlement

The final requirement for liquidation to occur is settlement, which requires that a longstanding practice achieve "sufficient uniformity" to put any significant interpretive debate to rest.[348] The *Chiafalo* court looked to both the acquiescence of institutional actors and the public's sanction of a given practice.[349] This Section examines each in turn.

1. Institutional Acquiescence

Whether a given interpretation of the constitution's text has been settled depends in part on whether it has been accepted by the relevant government institutions.[350] Here, there is evidence of acceptance by both institutions contemplated by the Clauses: state legislatures and Congress.

a. State Legislatures

The clearest evidence of settlement occurs when the losing side of an interpretive debate concedes and accepts the interpretation embraced by longstanding practice.[351] Here, the institution with the most to lose from a constrained interpretation of the Elections and Electors Clauses are the state legislatures themselves. But rather

---

20AC-CC00333 (Mo. Cir. Ct. 2020); Republican State Comm. of Del. v. Dep't of Elections, 250 A.3d 911 (Del. Ch. 2020); Grossman v. Secretary of the Commonwealth, 151 N.E.3d 429 (Mass. 2020); LaRose v. Simon, No. A20-1040, A20-1041, 2020 Minn. LEXIS 577 (Aug. 12, 2020); Am. Fed. of Tchr. v. Gardner, No. 216-2020-CV-0570 (N.H. Super. Ct. 2020); N.C. All. v. N.C. State Bd. of Elections, No. 20-CVS-8881, 2020 N.C. Super. LEXIS 27 (N.C. Super. Ct. 2020); Duggins v. Lucas, 431 S.C. 115 (S.C. 2020); Stringer v. North Carolina, No. 20-CVS-05615 (N.C. Super. Ct. 2020); W. Native Voice v. Stapleton, No. DA 20-0394, 2020 Mont. LEXIS 2334 (Mont. 2020); Sterne v. Adams, No. 20-CI-00538 (Ky. Cir. Ct. 2020); All. for Retired Am. v. Dunlap, No. CV-20-95 (Me. Super. Ct. 2020); Lay v. Goins, No. M2020-0083-SC-RDM-CV (Tenn. 2020); NAACP Pa. State Conf. v. Boockvar, No. 364-MD-2020 (Pa. Commw. Ct. 2020); Fisher v. Hargett, 604 S.W.3d 38 (Tenn. 2020).

348. *See supra* notes 170–172 and accompanying text. *Cf.* Baude, *supra* note 101 at 18.

349. *See* Baude, *supra* note 101, at 18–19.

350. *See id.* at 18.

351. *See id.*

than railing against state constitutions, state legislatures have long accepted that they remain subject to state constitutional constraints when they enact laws under the Elections and Elections Clauses.

State legislatures have, for instance, long complied with state constitutional provisions subjecting all laws—including those governing federal elections—to a governor's veto. At the Founding, only the Massachusetts and New York Constitutions included a veto.[352] In the leadup to the first presidential election 1788, Massachusetts presented its first law providing for the selection of Presidential electors to Governor Hancock for his signature.[353] Likewise, New York presented its first law providing for the election of federal Representatives to the Council of Revision—consisting of the governor, the chancellor, and two members of the state supreme court—for its approval.[354] As more state constitutions adopted vetoes, election laws remained subject to gubernatorial approval,[355] and in 1932, the Supreme Court in *Smiley v. Holm* observed that this "uniform practice" had gone unchallenged ever since.[356] This practice continues to this day, with election laws routinely being presented to—and often vetoed—by governors. State legislatures have also long accepted state constitutional constraints beyond the veto. Before the Massachusetts, New York, and New Hampshire legislatures passed their first laws under the Elections Clause, each debated whether their respective state constitutions required them to

352. *See* N.Y. CONST. of 1777, art. III; MASS. CONST. of 1780, ch. I, § I, art. II. *See also* John A. Fairlie, *The Veto Power of the State Governor*, 11 AM. POL. SCI. REV. 473, 474–75 (1917).

353. *See McPherson*, 146 U.S. at 29; Smith, *supra* note 223, at 760.

354. *See* Smith, *supra* note 223, at 760–61.

355. *See* Commonwealth of Pennsylvania, Vetoes by the Governor of Bills and Resolutions Passed by the Legislature Session of 1915, 449-50 (1915) (vetoing bill to reorder names of presidential candidates on the ballot).

356. Smiley v. Holm, 285 U.S. 355, 370 (1932) (citing Koening v. Flynn, 258 N.Y. 292, 300 (N.Y. 1932)) ("The uninterrupted practice in all of the states has been to create congressional districts by laws enacted in accordance with the Constitution of the respective states, whatever that may be.").

do so via joint or concurrent session.[357] This pattern of deference to state constitutions demonstrates state legislatures' acquiescence.

But state legislatures have done more than acquiesce; they have actively embraced state constitutional regulation of federal elections. For well over a century, state legislatures have drafted and enacted new election-related constitutional amendments. Nearly every state makes use of legislatively-referred amendments, which are first passed by the state legislature and then presented to voters for their approval.[358] As ballot initiatives supplanted conventions as the primary means of state constitutional amendment, state legislatures began referring amendments related to voter qualifications, such as universal male suffrage,[359] residency requirements,[360] poll taxes,[361] and enfranchisement of women,[362] along with amendments focused on the time, place, and manner of elections, including voter registration[363] and voting by ballot.[364]

Beginning in the Progressive Era, state legislatures referred a wide variety of election-related amendments to voters. In addition

357. *See* Smith, *supra* note 223, at 761–764; *id.* at 761 n. 194.

358. *See* Krislov & Katz, *supra* note 314 at 298.

359. *See* IOWA CONST. art. II, § 1 (amended by election through Iowa Amendment 1 in 1868).

360. *See* MINN. CONST. art. VII, § 1 (amended by election through Minnesota Amendment 1 in 1868).

361. *See* ARK. CONST. art. III (amended 1954) (amended by election through Arkansas Amendment 9 in 1908).

362. *See* COLO. CONST. art. VII, § 2 (amended 1989) (adopted by election through Colorado Women's Suffrage Amendment in 1893); IDAHO CONST. art. VI, § 2 (amended by election through Idaho Women's Suffrage Amendment in 1896).

363. *See* TEX. CONST. art. VI, § 4 (amended 1966) (amended by election through Texas Proposition 4 in 1891).

364. *See* CAL. CONST. art. II, § 5 (amended by election through California Amendment 2 in 1896).

to setting citizenship,[365] poll tax,[366] literacy,[367] and residency requirements,[368] and extending the franchise to women,[369] these amendments provided for absentee voting,[370] voter registration,[371] out-of-precinct voting,[372] and protections against vote-buying and corruption.[373] Through the mid and late twentieth century, state

365. *See* WIS. CONST. art. III, § 1 (amended by election through Wisconsin Question 4 in 1908); NEB. CONST. art. VI, § 1 (renumbered from art. VII, § 1 in 1920) (amended by election through Nebraska Amendment 1 in 1918); OR. CONST. art. II, § 2 (amended by election through Oregon Measure 1 in 1914).

366. *See* ARK. CONST. art. III (amended 1954) (amended by election through Arkansas Amendment 11 in 1926).

367. *See* OR. CONST. art. II, § 2 (amended by election through Oregon Measure 1 in 1924).

368. *See* ME. CONST. art. II, § 1 (amended by election through Maine Amendment 2 in 1919).

369. *See* TEX. CONST. art. VI, § 2 (amended by election through Texas Proposition 1 in 1921); ARK. CONST. art. III (amended 1954) (amended by election through Arkansas Amendment 8 in 1920); KAN. CONST. art. V (amended by election through Kansas Women's Suffrage Amendment in 1912); CAL. CONST. art. II, § 1 (as written in 1922) (renumbered and amended in 1976) (amended by election through California Proposition 4 in 1911); S.D. CONST. art. VII, § 2 (amended by election through South Dakota Women's Suffrage Amendment in 1918); OKLA. CONST. art. III, § 1 (amended by election through Oklahoma Question 97 in 1918); MICH. CONST. of 1908, art. III, § 1 (amended by election through Michigan Women's Suffrage Amendment in 1918); N.Y. CONST. of 1894, art. II, § 1 (amended by election through New York Amendment 1 in 1917); NEV. CONST. art. II, § 1 (amended by election through Nevada Women's Suffrage Amendment in 1914); MONT. CONST. of 1889, art. IX, § 2 (amended by election through Montana Amendment 1 in 1914); WASH. CONST. art. VI, § 1 (amended by election through Washington Women's Suffrage Amendment in 1910).

370. *See* ME. CONST. art. IV-1, § 5 (amended by election through Maine Amendment 1 in 1921 to allow absentee voting); CAL. CONST. art. II, § 1 (as written in 1922) (renumbered and amended in 1976) (amended by election through California Proposition 22 in 1922); MD. CONST. art. I, § 3 (renumbered from art. 1, § 1A in 1978) (amended by election through Maryland Amendment 1 in 1918); MO. CONST. of 1875, art. VIII, § 9 (amended by election through Missouri Issue 11 in 1920).

371. *See* OR. CONST. art. II, § 2 (amended by election through Oregon Measure 5 in 1927).

372. *See* CAL. CONST. art. II, § 1 (as written in 1924) (renumbered and amended in 1976) (adopted by election through California Proposition 18 in 1924 providing for voting by ballot).

373. *See* MD. CONST. art. I, § 6 (renumbered from art. 1, § 3 in 1978) (amended by election through Maryland Amendment 4 in 1913).

legislatures referred amendments that expanded absentee voting,[374] permitted the use of voting machines[375] and secret ballots,[376] provided for elections to fill Congressional vacancies,[377] and lowered the voting age.[378] On no less than seven occasions, state legislatures have referred amendments to take away their own power over congressional redistricting and transfer it to an independent commission.[379]

Even today, state legislatures look to state constitutions to regulate federal elections. In recent years, three states—Missouri, Ar-

374. *See* MD. CONST. art. I, § 3 (renumbered from art. 1, § 1A in 1978) (amended by election through Maryland Amendment 6 in 1956) (disabilities); MASS. CONST. amend. LXXVI (adopted by election through Massachusetts Question 4 in 1944) (same); MASS. CONST. amend. CV (adopted by election through Massachusetts Question 3 in 1976) (religion); CONN. CONST. of 1818, amend. XII (adopted by election through Connecticut Question 3 in 1964) (same); PA. CONST. art. VII, § 14 (amended by election through Pennsylvania Question 1 in 1985 for poll workers and religion).

375. *See* KY. CONST. § 147 (amended 1945) (amended by election through the Kentucky Voting Machines Referendum of 1941).

376. *See* COLO. CONST. art. VII, § 8 (amended by election through Colorado Measure 1 in 1946).

377. *See* ARIZ. CONST. art. VII, § 17 (adopted by election through Arizona Proposition 101 in 1962).

378. *See* GA. CONST. art. II, § 1 (amended by election through Georgia Amendment 6 in 1943); ALASKA CONST. art. V, § 1 (amended by election through Alaska Amendment 1 in 1970); MASS. CONST. amend. XCIV (adopted by election through Massachusetts Question 3 in 1970); MONT. CONST. art. IV, § 2 (amended by election through Montana Amendment 3 in 1970); ME. CONST. art. I, § 2 (amended by election through Maine Amendment 1 in 1970); NEB. CONST. art. VI, § 1 (amended by election through Nebraska Amendment 1 in 1970).

379. *See* WASH. CONST. art. II, § 43 (amended by election through Washington Senate Joint Resolution 103 in 1983); MONT. CONST. art. V, § 14 (amended by election through Montana Measure C-14 in 1984); HAW. CONST. art. VI, § 2 (amended by election through Hawaii Question 1 in 1992); IDAHO CONST. art. III, § 2 (amended by Idaho Senate Joint Resolution 105 in 1994); N.J. CONST. art. II, § 2 (adopted by election through New Jersey Public Question 1 in 1995); COLO. CONST. art. V, § 44 (amended by election through Colorado Amendment Y in 2018); VA. CONST. art. II, § 6 (amended by election through Virginia Question 1 in 2020).

kansas, and North Carolina—referred amendments to voters to impose Voter ID requirements,[380] while the Illinois legislature referred to voters an amendment designed to preclude voter ID laws.[381] Following the 2020 election and the COVID-19 pandemic, several state legislatures placed new election-related amendments on the ballot. In 2021, New York unsuccessfully referred amendments that would have changed congressional redistricting criteria and provided for no-excuse absentee voting and same-day registration.[382] The 2022 election saw legislatively-referred amendments relating to early voting[383] and primaries,[384] and, in perhaps the most extreme example of a constraint on state legislatures, the Alabama legislature referred an amendment for 2022 that prohibits itself from changing any election law within six months of a general election.[385]

Implicit in every effort to refer an election-related amendment to voters is the recognition that those amendments will be binding. That state legislatures continue to submit amendments to voters, rather than pass ordinary legislation, reflects their understanding of state constitutions as constraining legislative authority. Consider, for example, the many instances in which state legislatures referred amendments to voters seeking an affirmative *grant* of authority to pass new types of election-related legislation,[386] or where

380. *See* MO. CONST. art. VII, § 11 (adopted by election through Missouri Amendment 6 in 2016); ARK. CONST. art. III, § 1 (amended by election through Arkansas Issue 2 in 2018); N.C. CONST. art. VI, §§ 2, 3 (amended by election through North Carolina Voter ID Amendment in 2018).

381. *See* ILL. CONST. art. III, § 8 (adopted by election through Illinois Right to Vote Amendment in 2014).

382. *See* Proposal 1 (2021), S.B. 8833, 2019–20 Reg. Sess. (N.Y. 2020); Proposal 3 (2021), S.B. 1048, 2019–20 Reg. Sess. (N.Y. 2019), Proposal 4 (2021), S.B. 1049, 2019–20 Reg. Sess. (N.Y. 2019).

383. *See* CONN. CONST. art. VI, § 7 (amended by election through Connecticut Question 1 in 2022) (approved).

384. *See* Hawaii State and Local Primary Voting for 17-Year-Olds (2022), S.B. 2178, 31st Leg. (Haw. 2022).

385. *See* Amendment 4 (2022), H.B. 388, 2021 Reg. Sess. (Ala. 2021) (approved).

386. *See* TEX. CONST. art. VI, § 4 (amended 1966) (amended by election through Texas Proposition 4 in 1887 and Texas Proposition 4 in 1881) (voter registration); CONN.

state legislatures turned to referenda, rather than ordinary legislation, to change or repeal election-related constitutional provisions.[387] Or consider instances where state legislatures referred amendments with judicial review explicitly in mind; in 2018, the Arkansas legislature referred a Voter ID amendment to voters after the state supreme court struck down an earlier Voter ID statute,[388] and in 2014, the Illinois legislature referred an amendment designed to preclude Voter ID and other restrictive voting laws.[389] All these examples demonstrate state legislatures' acceptance both that state constitutions are binding and that courts will apply them to review state laws regulating federal elections.

CONST. of 1818, amend. XXXIX (adopted by election through Connecticut Question 1 in 1932) (absentee voting); KY. CONST. § 147 (amended by election through Kentucky Absentee Voting Referendum in 1945) (same); MD. CONST. art. 1, §§ 1, 3 (amended by Maryland Question 1 in 2008) (early voting); *id.* art. I, § 6 (renumbered from art. 1, § 3 in 1978) (amended by election through Maryland Amendment 4 in 1913) (election integrity); *id.* art. I, § 4 (renumbered from art. 1, § 2 in 1978) (amended by election through Maryland Question 5 in 1972) (limit for felons and mentally disabled); *id.* art. I, § 2A (adopted by election through Maryland Question 2 in 2018) (same-day registration); ARK. CONST. amend. 39 (adopted by election through Arkansas Amendment 39 in 1948) (voter registration). *See also* CONN. CONST. art. VI, § 7 (amended by election through Connecticut Question 1 in 2022) (early voting).

387. *See* ME. CONST. art. II, § 1 (amended by election through Maine Amendment 1 in 1965) (removing bar on pauper voting); MASS. CONST. amend. XCV (adopted by election through Massachusetts Question 3 in 1972) (same); WYO. CONST. art. VI, § 6 (amended by election through Wyoming Amendment B in 1996) (removing bar on voting by mentally ill unless judged to be mentally incompetent); IDAHO CONST. art. VI, § 3 (amended by Idaho House Joint Resolution 7 in 1982) (removing disqualifications; *id.* art. VI, § 2 (amended by Idaho House Joint Resolution 14 in 1982) (removing qualifications); ALASKA CONST. art. V, § 1 (amended by election through Alaska Amendment 2 in 1970) (eliminating English proficiency requirement); N.J. CONST. art. II, § 1 (amended by election through New Jersey Public Question 4 in 2007) (changing competency requirement).

388. *See* ARK. CONST. art. III, § 1 (amended by election through Arkansas Issue 2 in 2018); Martin v. Kohls, 444 S.W.3d 844, 852 (Ark. 2014).

389. *See* Illinois Right to Vote Amendment, H.R.J. Res. 52, 98th Gen. Assemb. (Ill. 2014); http://www.sj-r.com/article/20140408/NEWS/140409416 [https://perma.cc/27NP-9QKN] (noting that the Amendment's primary sponsor described its purpose as "prevent[ing] the passage of inappropriate voter-suppression laws and discriminatory voting procedures").

b. Congress

The Elections and Electors Clauses grant Congress final authority to make or alter laws regulating federal elections. Implicit in this authority is Congress's responsibility to carefully consider state election laws and to make changes as needed. Understanding how Congress has exercised this authority provides insight into its understanding of the relationship between state legislatures and state constitutions, and there is ample historical evidence that Congress has long accepted that state constitutions may regulate federal elections and constrain state legislatures.

i. Acts of Congress

When Congress has exercised its own authority under the Elections and Electors Clauses, it has implicitly recognized that state legislatures remain subject to the ordinary lawmaking process as laid out in state constitutions. Congressional redistricting provides one example. In 1862, Congress exercised its Elections Clause authority to require contiguous single-member districts, as opposed to at-large elections.[390] The 1862 Act also included a provision permitting Illinois to elect one representative at large, with the state's thirteen other Representatives being elected "as now prescribed by law in said State . . . ."[391] As Congress recognized, those districts had previously been prescribed "by law"—that is, according to the requirements of the Illinois constitution.[392] Likewise, the 1862 Act and others over the following decades continued to recognize that

390. *See* Apportionment Act of 1862, ch. 170, 12 Stat. 572. Congress also required single-member districts in 1842, but this requirement was dropped in the 1850 Apportionment Act before being restored in 1862. *See* Apportionment Act of 1842, 5 Stat. 491; Apportionment Act of 1850, 9 Stat. 433.

391. Apportionment Act of 1862, ch. 170, 12 Stat. 572.

392. *See* An Act to Establish Thirteen Congressional Districts, and to Provide for the Election of Representatives to the Congress of the United States, Under the Census of the Year One Thousand Eight Hundred and Sixty (1861).

congressional districts had been drawn by state legislatures "as provided by law."[393]

To eliminate any doubt, Congress in 1911 eliminated the statutory reference to redistricting by a state "legislature" and replaced it with language stating that Representatives were to be elected "by the districts now prescribed by law until such State shall be redistricted *in the manner provided by the laws thereof* . . . ."[394] This change reflected the fact that many state constitutions allowed for lawmaking by direct initiative. As Senator Burton, the sponsor of the change, explained:

> It was very natural in 1890, and even in 1900, that a provision should be incorporated that the State should be redistricted "by the legislature thereof," because that was the only law-making power; but since then a new method of making laws has been devised, and we can not afford to cling either to obsolete phraseology or, in our dealing with the States, to adhere to obsolete methods—that is, to ignore their methods of enacting laws.[395]

To ignore these new methods and require states to redistrict only through the state legislature, Senator Burton explained, would be "to fix one inflexible way" among the many constitutionally-permissible means of redistricting.[396] Other members of Congress did not dispute that initiatives and referenda were appropriate mechanisms through which states could enact election laws; rather, they questioned whether the change in language was necessary at all, as

393. *See* Apportionment Act of 1862, 12 Stat. 572; Apportionment Act of 1883, 22 Stat. 6; Apportionment Act of 1873, 17 Stat. 28; Apportionment act of 1893, 26 Stat. 736; Apportionment Act of 1901, 31 Stat. 734.

394. *See* Apportionment Act of 1911, 37 Stat. 14.

395. 47 Cong. Rec. 3508 (1911) (statement of Sen. Burton)

396. *Id.* at 3507 (statement of Sen. Burton).

the earlier language did not preclude a state legislature from submitting a new district map to the people in a referendum.[397] In response, proponents of the change pointed to the many states in which the legislature played no role at all in the initiative process.[398] They emphasized that in these states the people's right to referendum and initiative "does not come from the legislature at all," but rather from state constitutions.[399] Congress, of course, enacted the change and has used the new language to this day.[400]

In *Hildebrant*, the Supreme Court read this language as Congress's recognition of referenda and initiatives "as a part of the legislative power for the purpose of apportionment, where so ordained by the state Constitutions and laws."[401] Similarly, in *Smiley* the Court explained that because "Congress had no power to alter" the Elections Clause, the changed language in the 1911 Act "could but operate as a legislative recognition of the nature of the authority deemed to have been conferred by" the Clause to the state constitution.[402] And in *AIRC*, the Court reaffirmed that the purpose of the 1911 Act was "to recognize the legislative authority each State has to determine its own redistricting regime," including regimes that excluded the legislature.[403]

---

397. *Id.* at 3508 (statement of Sen. Shively) (noting that the earlier language "does not prohibit the legislature from arranging the districts by referendum of the act of the people").

398. *See id.* (statement of Sen. Clapp) ("The law of the State in that case does not require the legislature to submit anything to the people. The right of the people under the initiative and referendum . . . is absolutely independent of the legislature.").

399. *Id.* (statement of Sen. Works).

400. *See* 1941 Apportionment Act, 55 Stat. 761-762 (providing redistricting procedures "[u]ntil a State is redistricted in the manner provided by the law thereof"); 2 U.S.C. §2a(c) (same).

401. 241 U.S. at 569. *See also* Hawke v. Smith, 253 U.S. 221, 230–31 (1920) (noting the *Hildebrandt* Court held "that the referendum provision of the state Constitution, when applied to a law redistricting the state with a view to representation in Congress was not unconstitutional").

402. Smiley v. Holm, 285 U.S. 355, 372 (1932).

403. Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n (AIRC), 576 U.S. 787, 812 n.22 (2015).

Another example is 3 U.S.C. § 2, which provides that if a state is unable to select presidential electors after Election Day, "the electors may be appointed on a subsequent day in such a manner as the legislature of such State may direct." Though this language at first glance seems to suggest that Congress intended to commit the task of choosing backup electors to state legislative bodies, the legislative history in fact reveals the opposite to be true; Congress only empowered state legislatures to make this choice in accordance with the regular lawmaking process.[404] As Professor Levitt has explained, when Congress originally enacted the statute that would become 3 U.S.C. § 2 in 1845, it did not refer to state legislatures at all, but rather provided that "electors may be appointed . . . *in such manner as the State shall by law provide*."[405] As in the 1911 Apportionment Act, Congress in 1845 recognized that the Electors Clause granted power to the States and that such power could only be exercised "by law" according to state constitutions.[406] But while the changed language in the 1911 Act reflected Congress's conscious recognition of the role of state constitutions, there is no indication the change to the 1845 language was the result of any serious consideration by Congress.[407] Rather, the change was made by a commission charged with recodifying federal statutes into what would become the Revised Statutes of 1873.[408] No explanation was provided for the changed language.[409] Thus the only language em-

404. *See* Levitt, *supra* note 21, at 1071.

405. Act of Jan 23, 1845, Pub. L. No. 28-1, 5 Stat. 721 (emphasis added). *See also* Levitt, *supra* note 21, at 1076.

406. *See* Levitt, *supra* note 21, at 1078 ("There was no suggestion in the 1845 federal statute that the state legislature had any authority whatsoever beyond its capacity as a lawmaking body, unless state law assigned it that role.").

407. *See id.* at 1078–79 ("[T]here is little contemporaneous evidence that the change was intended to reflect a considered alteration in the body empowered to choose electors.").

408. *See id*. at 1079.

409. *See id.* at 1081 ("The commissioners tasked with revision gave no indication of any reason for making the change . . . .").

braced by Congress is that of the 1845 Act, which suggests that Congress accepted that the power conferred upon state legislatures by the Electors Clause was constrained by state constitutions.[410]

ii. Direct Review of State Constitutional Provisions

Congress's acceptance is also evident from its review and approval of state constitutions. Article IV, Section 3 of the Constitution grants Congress the power to admit new states to the Union.[411] Congress has generally done so by passing an enabling act laying out the process by which a territory can hold a constitutional convention to draft a state constitution.[412] These enabling acts required new state constitutions to include specific provisions as a condition of admission.[413] These conditions covered a wide range of substantive matters, from restrictions over land use to language requirements, civil rights, and family law.[414] In addition to these upfront conditions, Congress also reviewed and debated proposed new state constitutions to determine if they were consistent with the Constitution's guarantee of a republican form of government.[415]

Suffrage and political rights were among the most important issues Congress considered when reviewing state constitutions. In the years leading up to the Civil War, Congress debated whether to

410. *See id.* at 1086 ("The implication is that, at least in 1845, Congress thought that allowing states to direct the manner of appointing electors by law, and allowing the state legislature to direct the manner of the appointment of electors, amounted to the same thing: normal state lawmaking power and constraint.").

411. *See* U.S. CONST. art. IV. § 3, cl. 1 ("New States may be admitted by the Congress into this Union . . .").

412. *See, e.g.*, Ohio Enabling Act §§ 1, 4–5, 2 Stat. 173 (1802); Louisiana Enabling Act §§ 1–4, 2 Stat. 641 (1811); Illinois Enabling Act §§ 1, 3–4, 3 Stat. 429 (1818); Omnibus Enabling Act, 25 Stat. 676 (1889).

413. *See, e.g.*, Louisiana Enabling Act § 3, 2 Stat. 641 (1811).

414. *See* Eric Biber, *The Price of Admission: Causes, Effects, and Patterns of Conditions Imposed on States Entering the Union*, 46 AM. J. LEGAL HIST. 119, 130–31 (2004).

415. *See* Charles O. Lerche, Jr., *The Guarantee of a Republican Form of Government and the Admission of New States*, 11 J. POL. 578, 596 (1949).

permit clauses in the Michigan and Minnesota constitutions granting suffrage to aliens.[416] After the Civil War, Congress conditioned the readmission of Confederate states on their including universal male suffrage at all elections in their new constitutions.[417] The Senate also considered at length whether to make voting by ballot as opposed to *viva voce*—the prototypical "manner" regulation—a condition of readmission. Senator Charles Drake of Missouri offered an amendment to the 1867 Reconstruction Act requiring readmitted state constitutions to provide that in "all elections by the people the electors shall vote by ballot."[418] In his view, enshrining the secret ballot in state constitutions was necessary to ensure elections remained free from the undue influence *viva voce* voting enabled.[419] Implicit in Senator Drake's proposal was the understanding that state constitutional provisions regulating the manner of elections would constrain state legislatures, and despite considerable debate over the amendment there was no suggestion this was not the case.[420] To the contrary, those present agreed they had the same

416. *See id.* at 583–85.

417. *See* Biber, *supra* note 414, at 140–41.

418. *See* CONG. GLOBE, 40th Cong., 1st Sess. 165 (1867) (amendment of Sen. Drake). The original amendment offered by Senator Drake conditioned readmission on state constitutions requiring voting by ballot "in all elections by the people for State, county, or municipal officers." *See id.* at 99. The debate, however, focused on Congressional elections. *See id.* at 100 (statement of Sen. Drake) (discussing what to do if "a State, after having formed is constitution and entered into this compact, should send up representatives here elected by a *viva voce* vote, in direct defiance of its own contract with this Government"). After two days of debate, Senator Drake modified the text of his amendment after it had "been suggested to [him] that if it were adopted in its terms it might not include elections for members of Congress." *Id.* at 165.

419. *See id.* at 99 (statement of Sen. Drake) (emphasizing that without this amendment southern states would "form their constitutions and they will perpetuate *viva voce* voting in every one of these States; and when you have got that perpetuated in their constitution, good bye to the will of the loyal people of these States . . .").

420. *See id.* at 164(statement of Sen. Stewart) ("There are a great many things these people ought to put into their constitutions which are matters of substance. I presume they ought to provide in their constitutions for a judiciary system; I presume they ought to provide in their constitutions for a Legislature; I presume they ought to provide var-

power to require state constitutions to provide for voting by ballot as to require them to provide for universal suffrage.[421] Rather, they disagreed only as to whether Congress could require a state to agree to not change its constitution after admission[422] and whether it was proper to add new conditions at the eleventh hour.[423] If ever there was a moment to suggest that such a condition would violate the Elections Clause, this was it.

Of equal significance is the fact that Congress never rejected any state constitutional provision regulating federal elections. Most of

---

ious other things in their constitutions. The question is shall we make an entire constitution for them because there are material things which it is proper to put in a constitution?").

421. *See id.* at 103 (statement of Sen. Morton) ("We can prescribe the conditions upon which we will admit a State. We can say 'You shall put universal suffrage in the constitution,; or 'You shall put voting by ballot in the constitution, or we will not receive you.'); *id.* at 164 (statement of Sen. Yates) ("[W]e have just as much power and the same right under the Constitution to say that voting shall be by ballot as to say that these States shall provide in their constitutions that negroes shall vote at all.").

422. *See id.* at 103 (statement of Sen. Morton) (arguing that Congress could impose voting by ballot as a condition of readmission but that "after the State has been received, it is at liberty then to amend its constitution in any manner . . ."). Senator Conkling raised this constitutional question and debated whether such an agreement could be enforced. *See id.* at 100-01. In response, Senator Drake emphasized Congress's authority to judge its members' qualifications and to reject any Representatives elected by *viva voce* vote. *See id.* at 100 (statement of Sen. Drake).

423. *See id.* at 101 (statement of Sen. Trumbull) (arguing that additional conditions would not be "acting in good faith"); *id.* at 102 (statement of Sen. Wilson) ("I am for the ballot instead of the *viva voce* mode of voting . . . but I do not wish to make this new mode of voting a condition precedent to restoration. I fear this people will think we are trifling with them. I fear that our friends everywhere will think we are seeking here now grounds of difference rather than a reasonable plan of adjustment if we insist on making questions of this character conditions of the final restoration of these States to their practical relations."); *id.* at 164 (statement of Sen. Williams) ("At the last session of Congress we adopted a bill in which we provided that upon certain terms and conditions these States should be entitled to representation in Congress, and now we propose to add another condition, and we propose to make the mere mode of voting a question upon which shall turn the restoration of this Union."); *id.* at 164 (statement of Sen. Stewart) ("Nine of the ten States do [voting by secret ballot] now and will continue to do it undoubtedly, and Virginia very likely will change her constitution and adopt that form, so that there is not even a pretense of necessity for Congress acting a part which will be regarded as bad faith.").

the thirty-seven state constitutions approved by Congress contained provisions related to the manner of voting.[424] Others regulated the timing of elections,[425] imposed majority- or plurality-winner rules,[426] guaranteed free and equal elections,[427] or required state

424. *See* ALA. CONST. of 1819, art. III, § 7 ("[I]n all elections by the people, the electors shall vote by ballot until the General Assembly shall otherwise direct."); ALASKA CONST. of 1956, art. V, § 3 ("Secrecy of voting shall be preserved."); ARIZ. CONST. of 1912, art. VII, § 1 ("All elections by the people shall be by ballot . . . ."); ARK. CONST. of 1836, art. IV, § 8 ("All elections shall be *viva voce*, until otherwise directed by law . . . ."); CAL. CONST. of 1849, art. II, § 6 ("All elections by the people shall be by ballot."); COLO. CONST. of 1876 art. VII, § 8 ("All elections by the people shall be by ballot . . . ."); FLA. CONST. of 1838, art. VI, § 17 ("[I]n all elections by the people, the vote shall be by ballot."); HAW. CONST. of 1950 art. II, § 4 ("Secrecy of voting shall be preserved . . . ."); IDAHO CONST. of 1890, art. VI, § 1 ("All elections by the people must be by ballot."); ILL. CONST. of 1818, art. II, § 28 ("All votes shall be given viva voce . . . ."); IND. CONST. of 1816, art. II, § 13 ("All elections shall be by ballot . . . ."); IOWA CONST. of 1846, art. III, § 6 ("All elections by the people shall be by ballot."); KAN. CONST. of 1862, art. IV, § 1 ("All elections by the people shall be by ballot . . . ."); KY. CONST. of 1792, art. III, § 2 ("All elections shall be by Ballot."); LA. CONST. of 1812, art. VI, § 13 ("In all elections . . . the vote shall be given by ballot."); ME. CONST. of 1820, art. II, § 1 ("[E]lections shall be by written ballot.") MICH. CONST. of 1835 art II, § 2 ("All votes shall be given by ballot . . . ."); MINN. CONST. of 1857, art. VII, § 6 ("All elections shall be by ballot . . . ."); MISS. CONST. of 1817, art. III, § 3 (requiring that the first election after admission "be by ballot."); MONT. CONST. of 1889, art. IX, § 1 ("All elections by the people shall be by ballot."); NEV. CONST. of 1864, art. II, § 5 ("All elections by the people shall be by ballot . . . ."); N.M. CONST. of 1911, art. VII, § 5 ("All elections shall be by ballot."); OHIO CONST. of 1802, art. IV, § 2 ("All elections shall be by ballot."); OKLA. CONST. of 1907, art. III, § 6 ("In all elections by the people the vote shall be by ballot . . . ."); OR. CONST. of 1857, art. II, § 15 ("[I]n all elections by the people, votes shall be given openly, or viva voce . . . ."); S.D. CONST. of 1889, art. VII, § 3 ("All votes shall be by ballot . . . ."); TENN. CONST. of 1796, art. III, § 3 ("All Elections shall be by ballot."); UTAH CONST. of 1895, art IV. § 8 ("All elections shall be by secret ballot."); WASH. CONST. of 1889, art. VI, § 6 ("All elections shall be by ballot."); W. VA. CONST. of 1863, art. III, § 2 ("In all elections by the people the mode of voting shall be by ballot."); WIS. CONST. of 1848, art. III, § 3 ("All votes shall be given by ballot . . . ."); WYO. CONST. of 1889, art. VI, § 11 ("All elections shall be by ballot . . . . All voters shall by guaranteed absolute privacy in the preparation of their ballots, and the secrecy of the ballot shall be made compulsory.").

425. *See e.g.*, ARK. CONST. of 1836, art. IV, § 8 (setting general elections for the "first Monday in October, until altered by law"); HAW. CONST. of 1950, art. II, § 8; KAN. CONST. of 1859, art. IV, § 2.

426. *See e.g.*, ARIZ. CONST. of 1912, art. VII, § 7.

427. *See e.g.*, ARK. CONST. of 1836, art. II, § 5; ILL. CONST. of 1818, art. VIII, § 5.

legislatures to enact primary, registration, or absentee voting laws,[428] among others provisions.[429] In many newly admitted states, the first federal elections were held under rules laid out in these original state constitutions because no state legislature yet existed to prescribe new ones.[430] Congress approved of all these provisions, and explicitly blessed the practice in an 1850 election contest.[431] This acceptance demonstrates that, though Congress scrutinized other provisions, those regulating federal elections were uncontroversial.

iii. Resolution of Contested House Elections

Congress's acquiescence can also be gleaned by looking to its resolution of contested House elections. The Constitution confers on each chamber of Congress the sole authority to judge the qualifications of its members.[432] From time to time, disputed elections have involved conflicts between state constitutions and laws passed by state legislatures. It is important not to overstate the value of these cases in discerning Congress's views as an institution. When Congress resolves a disputed election, it does not sit as a court, nor is it constrained by law or precedent.[433] The Supreme Court has ob-

---

428. *See e.g.*, ARIZ. CONST. of 1912, art. VII, §§ 10, 12; FLA. CONST. of 1838, art. VI, § 2; HAW. CONST. of 1950 art. II, § 4. Notably, the original Texas constitution prohibited the legislature from requiring voter registration before later being amended. *See* TEX. CONST. of 1876, art. VI, § 4 ("[N]o law shall ever be enacted requiring a registration of the voters of this State").

429. *See e.g.*, IOWA CONST. of 1846, art. XII, § 7 (declaring that any country [sic] attached to a county for judicial purposes shall also be attached for election purposes); HAW. CONST. of 1950, art. II, § 8 (requiring at least forty-five days between primary and general elections).

430. *See, e.g*, ARIZ. CONST. of 1912, art. VII, § 11; CAL. CONST. of 1849, Schedule § 12; COLO. CONST. of 1876, art. VII, § 7; IOWA CONST. of 1846, art. XII, § 6.

431. *See* Hayward H. Smith, *Revisiting the History of the Independent State Legislature Doctrine*, 53 ST. MARY'S L.J. 445, at 544–45 (2022); *See also* CONG. GLOBE, 31st Cong. 1st Sess. 1779–89, 1795 (1850).

432. *See* U.S. CONST. art. I, § 5, cl. 1 ("Each House shall be the judge of the elections, returns and qualifications of its own members").

433. For a lengthy discussion of the non-judicial nature of contested House elections, *see* Smith, *supra* note 431, at 546–75.

served that the partisan nature of contested elections limits the degree to which we should rely on the reasoning in any one case.[434] Nonetheless, a review of these cases demonstrates Congress's consistent deference to state constitutions.

State constitutions featured in some of the earliest contested House elections, and in each case, there was no doubt they controlled. In 1791, James Jackson contested the election of Anthony Wayne, arguing that several voters had cast their ballots outside of their home counties in violation of the Georgia Constitution, which required that voters "have resided six months within the county."[435] The House voted to unseat Wayne, and there was no suggestion Georgia's constitution did not control.[436] In 1804, Representative William Hoge of Pennsylvania resigned his seat in Congress, prompting a special election, which was challenged on the ground that the Pennsylvania legislature had not yet enacted laws

434. *See* Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n (AIRC), 576 U.S. 787, 818–19 (2015) (noting that "it was perhaps not entirely accidental" that the declared winner of one such contested election "belonged to the same political party as all but one member of the House Committee majority responsible for the decision").

435. 3 ANNALS OF CONG. 463 (1792); *see also* GA. CONST. of 1789, art. IV, § 1. The Honest Elections Project, in its amicus brief filed in *Moore v. Harper*, argues that this historical contest is irrelevant to the ISL theory because the "residency requirement came from a provision of the Georgia constitution that spelled out voter qualifications." Brief of Amicus Curiae Honest Elections Project in Support of Petitioners at 11, *Moore v. Harper*, 142 S. Ct. 2901 (2022). The essence of the challenge, however, was not that the out-of-county voters were not qualified, but rather that they voted in the wrong place. *See* 3 ANNALS OF CONG. 460–61 (1792). This is apparent from the fact that, in 1791, Georgia's congressional elections were at-large, with each voter casting three ballots for candidates residing in each of three districts; *see also* MICHAEL J. DUBIN, UNITED STATES CONGRESSIONAL ELECTIONS 1788-1997 3 (1998). Thus, while Jackson's challenge cited the Georgia constitution's voter qualifications provisions, the constitutional rule dictating *where* qualified voters must cast their ballots was in fact a time, place, or manner regulation squarely within the ambit of the Elections Clause.

436. *See* 3 ANNALS OF CONG. 472 (1792). *See also* Smith, *supra* note 431, at 492.

providing for Congressional special elections.[437] In response, Representative William Findley[438] observed that every part of the special election had been provided for by law: the U.S. Constitution authorized the Governor to call a special election,[439] laws enacted by the Pennsylvania legislature established elections officers and their duties, and "the constitution of Pennsylvania prescribe[d] the manner that citizens shall vote, by ballot."[440] The House agreed the election was valid, and voted for the winner to retain his seat.[441]

Throughout the nineteenth and twentieth centuries, the House operated with the understanding that state constitutions were controlling. In several cases, the House scrutinized state election laws for compliance with state constitutions.

- In *Miller v. Thompson* (1850), the House considered the validity of votes cast in an Iowa county that had been split into a different congressional district from its neighbor in violation of the state constitution.[442] There was no question during debate that the state constitution controlled.[443]

---

437. *See* 14 ANNALS OF CONG. 839 (1804).

438. Findley's views likely carried special weight; before being elected to Congress, Findley had been a delegate to the Pennsylvania Constitutional Convention, where he helped draft the portion of the Pennsylvania Constitution requiring that all elections be "by ballot" alongside James Wilson, who helped draft the Elections Clause. *See* Smith, *supra* note 431, at 488 n.188.

439. *See* U.S. CONST. art. I, § 2 ("When vacancies happen in the Representation from any State, the Executive Authority thereof shall Issue Writs on Election to fill such Vacancies.").

440. *See* 14 ANNALS OF CONG. 849–50 (1804).

441. *See id.* at 857–58.

442. 1 HIND'S PRECEDENTS OF THE HOUSE OF REPRESENTATIVES OF THE UNITED STATES § 819, at 1062 (1907) [hereinafter HIND'S PRECEDENTS].

443. *See* CONG. GLOBE, 31st Cong., 1st Sess. 1301 (1850) (statement of Rep. Leffler) ("The rule upon which this case must be decided was laid down in the Constitution of the United States and in the constitution of the State of Iowa."); *id.* at 1306 (statement of Rep. Thompson) ("Could they vote in either of the two counties? This cannot be so, because the [Iowa] constitution required the voter to vote in the county in which he resided."); *id.* at 1310 (statement of Rep. Strong) ("The manner having been prescribed [in Article III, Section 6 of the Iowa constitution], it having been declared that the vote should be by ballot, a man had no constitutional privilege to vote in any other way.").

- In *McLean v. Broadhead* (1884) and *Frank v. Glover* (1888), the House determined that, because registration was not a voter qualification, Missouri's registration law did not violate the state's constitution.[444]
- In *Johnston v. Stokes* (1896), the House determined that a portion of South Carolina's voter registration law did violate the state constitution but upheld the election as the number of affected votes would not have changed the outcome.[445]
- In *Davison v. Gilbert* (1901), the committee determined that Kentucky's Congressional redistricting statute had been passed in accordance with the state constitution.[446]
- In *Gerling v. Dunn* (1919), the committee rejected the argument that using voting machines in a congressional election violated the New York state constitution because "[v]oting machines have been in use in New York State for many years, authorized by its constitution, provided for by its legislature, and sanctioned by its courts."[447]
- In *Paul v. Harrison* (1921), the House invalidated a Virginia election based on numerous state constitutional violations, writing that "there was such an utter, complete, and reckless disregard of the mandatory provisions of the fundamental law of the State of Virginia . . . that there was no legal election in those precincts."[448]
- In *Huber v. Ayres* (1951), the committee found that Ohio election boards had violated the state constitution by not rotating the names of candidates on the ballots, though the House declined to overturn the election.[449]
- In *Macy v. Greenwood* (1952), the committee considered a claim that New York voters had been registered in violation of

444. *See* H.R. Rep. No. 48-2613, at 2–5 (1885); H.R. Rep. No. 50-1887 (1888).
445. *See* H.R. Rep. No. 54-1229, at 14 (1896).
446. *See* H.R. Rep. No. 56-3000, at 4 (1901); *See id.* at 2.
447. *See* H.R. Rep. No. 65-1074 (1919).
448. *See* H.R. Rep. No. 67-1101, at 9 (1922).
449. *See* H.R. Rep. No. 82-906 (1951).

the state constitution but found insufficient evidence to support the challenge.[450]

Often, the House deferred to state supreme court decisions to decide whether state election laws were valid:

- In *Curtin v. Yocum* (1879), the House considered whether a Pennsylvania statute permitting unregistered voters to cast a ballot if they attested to their qualifications conflicted with a new amendment to the state constitution providing that "no elector shall be deprived of the privilege of voting by reason of his name not being registered."[451] The Pennsylvania Supreme Court had not yet interpreted the new provision, but the majority found that the statute had been "enacted to give effect" to the new amendment and found no conflict.[452] The minority was divided as to whether a conflict existed, but agreed the state constitution controlled.[453]
- In *California Contested Election Cases* (1886), a California congressional redistricting statute was challenged for not having been "read on three several days in each house" as required by the state constitution.[454] The committee adopted the view of the California Supreme Court, explaining that such deference was "well-established".[455]
- In *Cornett v. Swanson* (1896), the House considered a claim that Virginia's secret ballot law violation the state constitution by disenfranchising illiterate voters.[456] The Committee deferred

450. *See* H.R. Rep. No. 82-1599, at 6 (1952).

451. *See* H.R. Rep. 46-345, at 2–4 (1880); PA. CONST. of 1873, art. VIII, § 7 (1873).

452. *See* H.R. Rep. No. 46-345, at 5–6 (1880).

453. *See id.* at 13 (describing the 1874 statute as "repugnant" to the 1873 constitutional provision "which would seem to limit the power of the legislature to disfranchise an elector for nonregistration who is otherwise qualified"); *id.* at 21 (views of Reps. Field, Overton Jr., and Camp) ("We think, however that the registry law of 1874 is a valid law under the constitution of 1873.").

454. *See* H.R. Rep. No. 48-2613 (1885); CAL. CONST. of 1874, art. IV, § 15 (1874).

455. *See* H.R. Rep. No. 48-2613, at 4 (1885).

456. *See* H.R. Rep. No. 54-1473 (1896).

to the Virginia Supreme Court, which had upheld the law; a minority agreed that the Virginia constitution controlled but felt the Virginia Supreme Court's decision was dictum.[457]

- In *Davis v. Sims* (1904), Tennessee's secret ballot law was alleged to have violated the state constitution's "free and equal" elections clause because it only applied to some voters.[458] In reaching its decision, the House Committee examined at length decisions by the Kentucky, Virginia, Michigan, Massachusetts, and Pennsylvania supreme courts interpreting similar provisions in their state constitutions.[459]

In a few cases, candidates tried to invoke the ISL theory to argue state constitutions could not constrain state legislatures. *Shiel v. Thayer* (1862) is one example.[460] When Oregon was admitted to the Union in 1859, its constitution provided for a congressional election to be held in June 1860, at which George Shiel was elected.[461] At the presidential election held that November, however, Andrew Thayer received the most votes and claimed the June election was invalid because under the Elections Clause "a convention for a State has no power to fix the time and place for holding elections for Representatives and Senators, but that they must be prescribed by the Legislature of the State."[462] The House Committee, though, had "no doubt that the constitution of [Oregon] has fixed [the election date] beyond the control of the legislature."[463] On the House floor, the argument was raised that "no other power in a State" other than the legislature "has a right to prescribe" the time, place, or manner of a congressional election.[464] Representative Dawes, the chairman of the Committee, argued this flew "in the face of all the precedents

457. *See id.*
458. *See* H.R. Rep. No. 58-1382 (1904); TENN. CONST. art IV, §1.
459. *See* H.R. Rep. No. 58-1382, at 7–9.
460. *See* H.R. Rep. No. 37-4 (1861).
461. *See id.* at 1; OR. CONST. of 1857, art. II, § 14.
462. CONG. GLOBE, 37th Cong., 1st Sess. 353 (1861).
463. *See* H.R. Rep. No. 37-4, at 3.
464. CONG. GLOBE, 37th Cong., 1st Sess. 356 (remarks of Rep. Stevens).

of this House" and that the Elections Clause assigned authority not to the legislative body alone, but to the "constituted authority of the State," which included a constitutional convention.[465]

Likewise, in *West Virginia Contested Elections* (1874), the Committee considered whether to seat candidates elected in August under the state constitution or in October pursuant to a state statute.[466] The majority determined that the state constitution simply didn't regulate congressional elections, but Representative Speer went on to argue that the state legislature should control regardless.[467] A minority rejected this argument, arguing that "it makes no difference whatsoever" whether a "constitutional convention or the legislature" sets a congressional election.[468] Ultimately, the House rejected Speer's view, seating the winners of the election held under the state constitution.[469]

In each of these cases, spanning over a century, the House either rejected the ISL theory or assumed state constitutions controlled. Professor Morley, however, has argued that several of these cases evince Congress's embrace of the theory, despite coming out against the candidate who would have benefitted from its application.[470] He also points to a few nineteenth century cases in which the candidate who invoked the theory did not lose, though these cases are equivocal at best as to Congress's views.

Baldwin v. Trowbridge (1866) involved a conflict between the Michigan constitution, which required voters to cast their ballots "in the

---

465. *Id.* at 356–57. The Committee considered a similar issue in *Patterson v. Belford* in 1876 regarding a Colorado election held shortly after the state was admitted to the Union. *See* H.R. Rep. No. 45-15 (1877). As in *Shiel*, the House upheld the election held under the state constitution. *See* 1 HIND'S PRECEDENTS, *supra* note 442, §§ 523–24, at 660–67.

466. *See* H.R. Rep. No 43-7 (1874).

467. *See id.* at 5, 17.

468. *See id.* at 23.

469. *See* 1 HIND'S PRECEDENTS, *supra* note 442, § 522, at 660.

470. *See* Morley *supra* note 1, at 48. For a detailed rebuttal, *see* Smith, *supra* note 431, at 500–02.

township or ward" in which they were registered, and an 1864 statute providing for absentee voting by soldiers.[471] Augustus Baldwin argued the 1864 statute was unconstitutional and that therefore soldier votes cast for Rowland Trowbridge should not have been counted.[472] The majority presented two rationales in favor of Trowbridge. First, there was no conflict between the soldier-voting law and the state constitution.[473] Second, under the Elections Clause, the state constitution could not constrain the legislature.[474] The minority rejected the latter ground, citing the House's decision in *Shiel* just four years earlier.[475] While the House voted to seat Trowbridge,[476] the floor debate reveals that many who voted to seat Trowbridge opposed the ISL theory. Representative Dawes, the Committee chair, said he voted for Trowbridge because he saw no conflict between the soldier-voting law and the Michigan constitution, and emphasized that if there were a conflict he would have voted in favor of Baldwin and the state constitution.[477] Trowbridge himself argued there was no conflict.[478] In light of both the support for an alternative rationale and the opposition to the ISL theory, *Baldwin* simply does not demonstrate that Congress abandoned its longstanding acceptance of the role of state constitutions in regulating federal elections.

In *Iowa Contested Election Cases* (1880), the House considered a federal statute that required states to hold congressional elections

---

471. *See* CONG. GLOBE, 39th Cong., 1st Sess. 3460 (1866).

472. *See id.*

473. *See* H.R. Rep. No. 39-13, at 3 (emphasizing that if the Michigan constitution did not "fix[] the place of holding the election . . . there is no conflict between the law and the constitution and the argument is at an end.")

474. *See id.*

475. *See* H.R. Rep. No. 39-14, at 3 (stressing that Americans "everywhere supposed that they had the power to fix a limitation upon the action of their legislature, in determining the times, places, and manner of holding elections for all offices.").

476. *See* CONG. GLOBE, 39th Cong, 1st Sess. 845 (1866).

477. *See id.* at 822. Representative Davis also saw no conflict between the statute and the constitution. *See id.* at 844.

478. *See id.* at 840.

in November unless doing so required amending their constitutions regarding state elections.[479] Iowa's constitution required state officers and members of Congress to be elected simultaneously, so Iowa held its 1878 election in October as provided in the state constitution.[480] The Committee concluded that Iowa's election was proper.[481] The Committee clarified that its decision was not based on the provision of Iowa's constitution that set the date of the state's first congressional election in October of 1858, but nonetheless stated that "the time of electing members of Congress cannot be prescribed by the constitution of a State, as against an act of the legislature of a state or an act of Congress."[482] In short, while the ISL theory made a brief appearance, it was only in an aside about a constitutional provision already deemed irrelevant.

In another case, *Donnelly v. Washburn* (1880), the Committee considered a claim that unnumbered ballots in a Minnesota election violated the state constitution's requirement that "all elections shall be by ballot" as interpreted by the Minnesota Supreme Court.[483] The majority agreed and determined that the votes should not be counted.[484] The minority cited *Baldwin* and argued the Minnesota constitution did not apply to federal elections.[485] Ultimately, the House never voted on the matter.[486] Thus, while Washburn kept his seat, it cannot be inferred that Congress as an institution embraced the minority's reasoning.

2. Popular Acceptance

Nearly every constitutional provision that regulates federal elections was enacted with voters' approval, signaling its acceptance of

479. *See* H.R. Rep. No. 46-19, at 8–9 (1880).
480. *Id.* at 3–6.
481. *Id.* at 17–18.
482. *See id.* at 18.
483. *See* H.R. Rep. No. 46-1791.
484. *Id.* at 32.
485. *See id.* at 59.
486. *Id.*

the public's role in constraining state legislatures. In 49 states, legislatively referred amendments must be approved by voters.[487] In 18 states, voters may place amendments on the ballot with enough signatures—usually at least eight percent of the total votes cast for Governor in the prior election—and approve them without the legislature's involvement.[488] Some states also require that amendments win a certain percentage of overall votes, a supermajority of votes, or a majority of votes in successive elections.[489]

Over the past century, voters have initiated and adopted several state constitutional provisions regulating federal elections. Some were adopted in response to state supreme court rulings; in Arkansas, for instance, voters amended the state constitution to allow for voting machines after the state supreme court declared them unconstitutional.[490] Others were adopted in response to unpopular laws enacted by state legislatures. In 1949, Republican voters who feared Ohio's "straight ticket" ballot law would prevent Senator Robert Taft's reelection successfully initiated an amendment to repeal it;[491] similarly, in 1977, Ohio Republicans initiated an amendment to repeal the Democrat-controlled legislature's same-day registration law.[492] Voters have also turned to the initiative where state legislatures were unable to make needed changes. In 1964, when the Twenty-Fourth Amendment outlawed poll taxes in federal elections,[493] Arkansas was left without a voter registration system for

487. *See* Krislov & Katz, *supra* note 314, at 298.

488. *See id.* at 315. In some states, signatures must also come from a minimum number of the state's counties to ensure broad geographic support. *Id.*

489. *See id.* at 317.

490. *See* ARK. CONST. amend. LIV; Special, *Women Press Drive in Arkansas to Legalize the Voting Machine*, N.Y. TIMES, Mar. 18, 1962, at 52.

491. *See* OHIO CONST. amend. II; Special, *Ohio Vote Decision Could Assist Taft*, N.Y. TIMES, Nov. 6, 1949, at 39; Special, *Straight Ballot Outlawed in Ohio*, N.Y. TIMES, Nov. 9, 1949, at 17.

492. *See* Abe S. Zaiden, Special, *Repeal of Ohio's Instant Voter Registration Law Eyed*, WASH. POST, Aug 27, 1977, at A5.

493. *See* U.S. CONST. amend. XXIV.

federal elections.[494] The state legislature scrambled to pass a new system, but the Arkansas Supreme Court held it conflicted with the state constitution, leaving the state with different registration systems for state and federal elections.[495] In response, voters initiated and adopted an amendment creating a permanent registration system for all elections, which remains in effect today.[496]

In recent decades, voters have successfully initiated amendments addressing election administration,[497] establishing substantive rights,[498] requiring Voter ID,[499] creating independent redistricting commissions,[500] and setting congressional redistricting criteria.[501] Voters have also placed several election-related amendments on the ballot which, though unsuccessful, demonstrate the public's embrace of state constitutions as a mechanism for regulating elections.[502] Following the 2020 election, voters worked to place an unprecedented number of election-related amendments on the ballot.

---

494. *See* Calvin R. Ledbetter Jr., *Arkansas Amendment for Voter Registration without Poll Tax Payment*, 54 ARK. HIST. Q. 134, 138 (1995).

495. *See id.* at 148–50.

496. *See id.* at 159–61; ARK. CONST. amend. LI.

497. MICH. CONST. art. II, § 4 (amended by election through Michigan Proposal 3 in 2018) (providing straight-ticket voting, automatic registration, same-day registration, and no-excuse absentee voting); OR. CONST. art. II, § 2 (amended by election through Oregon Measure 13 in 1986) (30-day cutoff for voter registration).

498. CAL. CONST. art. II, § 2.5 (adopted by election through California Proposition 43 in 2002).

499. MISS. CONST. art. XII, § 249A (adopted by election through Mississippi Initiative 27 in 2011).

500. MICH. CONST. arts. IV–VI (amended by election through Michigan Proposal 2 in 2018); CAL. CONST. art. XXI (amended by election through California Proposition 20 in 2010); ARIZ. CONST. art. IV-2, § 2 (amended by election through Arizona Proposition 106 in 2000).

501. FLA. CONST. art. III, §§ 20, 21 (adopted by election through Florida Amendment 6 in 2010).

502. *See generally* Amendment 1, Nebraska Direct Primaries and Nonpartisan Elections (Neb. 1924); Initiative 30, Colorado Voter Registration (Colo. 2002); Proposition 39, California Reapportionment Commission (Cal. 1984); Proposition 14, California Redistricting Commission (Cal. 1982); Initiative 36, Colorado Selection of Presidential

For the 2022 election, signatures were collected for proposed amendments related to registration,[503] early voting,[504] ranked-choice voting,[505] voter ID,[506] absentee voting,[507] primary elections,[508] lines at polling places,[509] and even procedures for counting ballots.[510] This ongoing public engagement demonstrates the continuing popular acceptance of state constitutions as a vital check on state legislatures' regulation of federal elections.

* * * * *

As the above discussion illustrates, the three elements of Professor Baude's liquidation framework are satisfied. The Elections and Electors Clauses are indeterminate as to the role of state constitutions. Since the Founding, however, state constitutions have consistently constrained state legislatures when it comes to federal elections, and this deliberate course of practice has remained al-

---

Electors (Colo. 2004); Proposition 62, California Top-Two Primaries (Cal. 2004); Proposition 77, California Changes to Legislative and Congressional Redistricting (Cal. 2005); Amendment 4, Ohio Redistricting Commission (Ohio 2005); Amendment 2, Ohio Absentee Voting for All Electors (Ohio 2005); Measure 90, Oregon Open Primaries (Or. 2014); Proposition 121, Arizona Top-Two Primaries (Ariz. 2012); Amendment 2, Minnesota Voter Identification (Minn. 2012).

503. Initiative #21-9921, California Voter Identification and Registration Requirements Initiative (Cal. 2022).

504. H.J.R. 59, Resolution Approving an Amendment to the State Constitution to Allow for Early Voting (Conn. 2021).

505. Initiative #21-01, Florida General Election Ranked-Choice Voting Initiative (Fla. 2022); Missouri Top-Four Ranked-Choice Voting Initiative (Mo. 2022).

506. Proposition 309, Voter Identification Requirements for Mail-In Ballots and In-Person Voting Measure (Ariz. 2022); Initiative #21-9921, California Voter Identification and Registration Requirements Initiative (Cal. 2022).

507. Proposition 309, Voter Identification Requirements for Mail-In Ballots and In-Person Voting Measure (Ariz. 2022).

508. Initiative #21-01, Florida General Election Ranked-Choice Voting Initiative (Fla. 2022); South Dakota Top-Two Primary Initiative (S.D. 2022).

509. Initiative #21-9921, California Voter Identification and Registration Requirements Initiative (Cal. 2022).

510. Proposition 309, Voter Identification Requirements for Mail-In Ballots and In-Person Voting Measure (Ariz. 2022).

most completely uniform to the present day. Finally, state legislatures, Congress, and the public have all demonstrated their acquiescence to and active participation in this state of affairs.

CONCLUSION

The text of the Elections and Electors clauses is silent as to the role of state constitutions, but the subsequent history is anything but. Since the Founding, state constitutions have both directly regulated federal elections and constrained state legislatures' exercise of their authority under the Clauses.[511] This constraint has been both procedural and substantive in nature. Over time, the historical trend has been for state constitutions to take on a greater role in regulating the time, place, and manner of federal elections. In the past century and a half, nearly every election-related state constitutional provision was either approved and presented to voters by state legislatures or placed on the ballot and enacted by voters directly.[512] Together, this evidence demonstrates both a course of deliberate practice and a significant degree of institutional and popular acceptance, including by state legislatures themselves. This suggests that the meaning of the Elections and Electors Clauses with respect to state constitutions has been settled in favor of constraint.

This inquiry also provides another illustration of how historical practice and unwritten constitutional norms combine to construct constitutional meaning. To date, most of the commentary discussing historical practice and constitutional liquidation has focused on separation-of-powers issues.[513] As the Supreme Court's recent decision in *Chiafalo* demonstrates, however, longstanding practice

511. See Arizona State Legislature v. Arizona Indep. Redistricting Comm'n (AIRC), 135 S. Ct. 46 (2014).

512. *See* Eliza Sweren-Becker & Michael Waldman, *The Meaning, History, and Importance of the Elections Clause*, 96 WASH. L. REV. 997 (2021).

513. *See* Michael T. Morley, *The New Elections Clause*, 91 NOTRE DAME L. REV. ONLINE 79 (2016).

may also establish constitutional rules in the context of law and democracy.[514] Since the Founding, state constitutions have become important safeguards of free elections and voting rights. Recognizing the role they have assumed in our constitutional system is vital to the preservation of those protections.

514. Chiafalo v. Washington, 140 S. Ct. 2316 (2020).

THE ROBERTS COURT'S FUNCTIONALIST TURN IN ADMINISTRATIVE LAW

THOMAS A. KOENIG & BENJAMIN R. PONTZ*

The Supreme Court's administrative law jurisprudence has recently taken a functionalist turn. *West Virginia v. EPA*[1] is the latest installment in a series of cases in which the Court has asked questions of degree rather than kind and reasoned through issues in a fashion more integrated than stepwise. In other words, a broader analysis of the structural underpinnings and first principles of the Constitution's separation of powers has increasingly complemented deference rules and decision trees.

Administrative law observers are accustomed to characterizing the Roberts Court's approach to reviewing agency action as sounding in formalism. That is not entirely wrong. Indeed, when considering the separation of powers, the Court routinely voices formalist precepts like "[t]he entire 'executive Power' belongs to the President alone"[2] and that "the Constitution assigns 'all legislative Powers' to Congress and 'bar[s their] further delegation.'"[3]

---

* The authors are second-year students at Harvard Law School. For thoughtful feedback as well as incisive comments and advice, they are indebted to Professors Matthew Stephenson, Susannah Tobin, and Adam White, as well as Louis Capozzi, Tom Harvey, Eli Nachmany, and Jacob Richards. They also thank the Notes Editors of the *Harvard Journal of Law & Public Policy*: Joel Malkin, Arianne Minks, and Juliette Turner-Jones. Responsibility for this Note's ideas and remaining errors is the authors' own.

1. 142 S. Ct. 2587 (2022).

2. Seila Law v. Consumer Financial Protection Bureau, 140 S. Ct. 2183, 2197 (2020).

3. *West Virginia*, 142 S. Ct. at 2624 (Gorsuch, J., concurring) (quoting Gundy v. United States, 139 S. Ct. 2116 (2019) (Kagan, J., plurality)).

But the Court hits functionalist notes, too. In a host of recent cases,[4] the Court has assessed the validity of agency actions and structures against broader ideas like the checks and balances and principle of democratic accountability inherent in our constitutional structure. This emerging functionalism has complemented, though not supplanted, the Court's formalist instincts. The Roberts Court's functionalist turn leaves an administrative law doctrine focused as much on the balance of power as the separation of powers.

At one level, this development might seem surprising. It was Justice Antonin Scalia, after all, who proclaimed, "Long live formalism."[5] Formalist and textualist commitments have certainly motivated much of the Court's jurisprudence over the past several years in other areas of the law.[6] But at a broader level, this nascent functionalist turn is not surprising or necessarily unprincipled. Indeed, it is consistent with the Roberts Court's broader commitment to

4. In this Note, we focus in particular on cases including *West Virginia v. EPA*, 142 S. Ct. 2587 (2022), *Dep't of Commerce v. New York*, 139 S. Ct. 2551 (2019), and *Seila Law v. Consumer Financial Protection Bureau*, 140 S. Ct. 2183 (2020).

5. ANTONIN SCALIA, A MATTER OF INTERPRETATION 25 (1997).

6. *See, e.g.*, United States v. Taylor, 142 S. Ct. 2015, 2035 (2022) (Alito, J., dissenting) (pointing out that the Court's "categorical approach" to ascertaining crimes of violence privileges form over defendants' actual conduct, which must be "scrupulously disregarded"); Bostock v. Clayton County, 140 S. Ct. 1731, 1737 (2020) (privileging the "express terms of a statute" over the "limits of the drafters' imagination" in analyzing what a statute requires); Yates v. United States, 574 U.S. 528, 553–55, 565 (2015) (Kagan, J., dissenting) (arguing that the text "tangible objects" should matter more than the function of documents, to "preserve information," in determining whether fish fall within the meaning of a criminal statute). In fact, in 2015, Justice Kagan famously quipped, "We're all textualists now." Harvard Law School, *The Antonin Scalia Lecture Series: A Dialogue with Justice Elena Kagan on the Reading of Statutes*, YOUTUBE (Nov. 25, 2015), https://www.youtube.com/watch?v=dpEtszFT0Tg [https://perma.cc/5N7J-R9HH]. *But see infra* note 19.

methodologically constrained judging that takes a minimalist approach to reining in exercises of power that overstep constitutional boundaries.[7]

At the heart of the long-running formalism-functionalism debate is a pair of questions about the exercise of power: (1) What kind? (2) How much?[8] Formalism emphasizes the former, and functionalism emphasizes the latter.[9]

For formalists, as Professor M. Elizabeth Magill explains, "the structural provisions of the Constitution specify the type (legislative, executive, judicial) and place (Congress, President, Supreme Court) of all governmental power. The judge assessing the validity of an institutional arrangement must first identify the type of power being exercised and . . . make certain that that power is exercised

7. *See, e.g.*, Dep't of Homeland Security v. Regents of the Univ. of California, 140 S. Ct. 1891 (2020) (enjoining Trump administration's rescission of DACA on narrow procedural grounds); Masterpiece Cakeshop, Ltd. v. Colorado C.R. Comm'n, 138 S. Ct. 1719 (2018) (reversing state commission's decision on grounds of animus without reaching broader constitutional questions).

8. Although we use the formalism-functionalism dichotomy extensively in this Note, we have our doubts that it illuminates as much as it obfuscates. In that sense, the "functionalist turn" we identify may help advance the conversation about administrative law beyond the existing divide.

9. *But cf.* William N. Eskridge, Jr., *Relationships Between Formalism and Functionalism in Separation of Powers Cases*, 22 HARV. J.L. & PUB. POL'Y 21, 29 (1998) (arguing there is some overlap between the two) ("[W]e ought not consider functionalism and formalism as inevitably antipodal, or even independent, forces of constitutional law. Ultimately, we must appreciate how they are inextricably related. As theories of governance, formalism cannot avoid functional inquires [sic], any more than functionalism can avoid formalist lines. As bases for state legitimacy, neither formalism nor functionalism alone is sufficient. As argumentative modes, the formalist argument conjoined with a functional counterpart is much stronger than either argument standing alone."); John F. Manning, *Separation of Powers as Ordinary Interpretation*, 124 HARV. L. REV. 1939, 1950 (2011) ("[F]ocusing upon [the] differences [between formalism and functionalism], however real, overlooks an important tendency that the two approaches have in common: in some contexts, each approach relies on a freestanding separation of powers doctrine that transcends the specific meaning of any given provision of the Constitution.").

by an official residing in the appropriate governmental institution."[10] In the eyes of formalists, once an exercise of governmental power is classed as legislative, executive, or judicial, it is essential that the proper, constitutionally-appointed actor exercises said power.[11] In that way, powers stay separated.

Functionalists, on the other hand, eschew bright-line rules surrounding who must exercise what power.[12] Instead, as Professor Thomas Merrill explains, functionalists look to "an evolving standard designed to advance the ultimate purposes of a system of separation of powers"—namely, the maintenance of the *balance* of powers within our constitutional system.[13] As a result, functionalists like Professor Peter Strauss contend that "courts should view separation-of-powers cases in terms of the impact of challenged arrangements on the balance of power among the three named heads of American government."[14] Functionalists are less concerned with maintaining a strict separation of authorities. Instead, they ask how much infringement by one branch against another is too much. If the balance of power between the three branches remains largely intact, the functionalist will be satisfied.[15] In that way, functionalists view separation-of-powers questions as about *degree* rather than *kind*.

As Harvard Law School Dean John Manning has observed, both formalists and functionalists proceed based on their sense of the underlying spirit of the separation of powers: "[W]hat counts for functionalists is the apparent background purpose of balance

10. M. Elizabeth Magill, *The Real Separation in Separation of Powers Law*, 86 VA. L. REV. 1127, 1139–40 (2000).

11. *Id.* at 1141–42 (arguing that this poses a difficulty for formalists).

12. *See* Manning, *supra* note 9, at 1952.

13. Thomas W. Merrill, *The Constitution Principle of Separation of Powers*, 1991 SUP. CT. REV. 225, 231.

14. Peter L. Strauss, *Formal and Functional Approaches to Separation of Powers Questions—A Foolish Inconsistency?*, 72 CORNELL L. REV. 488, 522 (1987).

15. Magill, *supra* note 10, at 1142–43.

among the branches. What counts for formalists is the apparent background purpose of strict separation."[16]

In recent administrative law cases, the Roberts Court has begun to examine both the questions of "what kind of power" and "how much power," considering the values of both separation and balance. As a result, administrative law doctrine is beginning to move away from "yes or no" questions with clear-cut answers—traditionally the comfort zone of many textualists and formalists alike—towards more challenging line-drawing questions, which invite reflection on the broader values at stake when agency actions reach the judiciary. As Professor William Eskridge wrote in this journal twenty-five years ago, "neither formalism nor functionalism has wholly dominated American constitutional history."[17] The same can now be said of the Roberts Court's administrative law jurisprudence.[18]

Many have bemoaned these developments, alluding to white knights like the major questions doctrine coming to rescue hyper-

16. Manning, *supra* note 9, at 1946.

17. Eskridge, *supra* note 9, at 22.

18. This is not surprising. In terms of rules, legal reasoning, and modes of thought, "formalism and functionalism are frequently and maybe typically interconnected." *Id.* at 24. Nor is it an outlier from the perspective of Supreme Court history. As Professor Magill has written: "For its part, the Supreme Court vacillates between what are described as formalist and functionalist approaches, fully embracing neither, and sometimes borrowing from both. Thus, neither of the dominant approaches provides a consistent account of the methodology applied or the outcome of the cases." Magill, *supra* note 10, at 1138 (footnote omitted). For examples of cases wherein the Supreme Court has opted for a more functionalist approach to separation of powers questions, see Manning, *supra* note 9, at 1942–43 (citing Nixon v. Adm'r of Gen. Servs., 433 U.S. 425, 443 (1977); Commodity Futures Trading Comm'n v. Schor, 478 U.S. 833 (1986); Morrison v. Olson, 487 U.S. 654 (1988); Mistretta v. United States, 488 U.S. 361, 386 (1989)). For examples of cases wherein the Supreme Court has opted for a more formalist approach to separation of powers questions, see Manning, *supra* note 9, at 1943–44 (citing Buckley v. Valeo, 424 U.S. 1, 125-26 (1976) (per curiam); INS v. Chadha, 462 U.S. 919, 944–59 (1983)).

formalist decisions from counterintuitive (or undesired) conclusions.[19] But another way to read the recent separation-of-powers cases is to see a Court looking to context and structure—frequent tools of textualist statutory interpretation—alongside broader presumptive commitments in favor of preventing the concentration of power and safeguarding democratic accountability. Taken together, the Court seems to be resting horizontal separation-of-powers cases on the same edifice as existing vertical separation-of-powers cases.[20]

Such an approach remains methodologically consistent even if it falls outside the traditional formalist framework. Administrative law scholars (and students) have long sought to approach challenges to agency action with a series of yes or no questions, laid out as something of a decision tree. In the *Chevron* context, for example, one asks whether the statute is ambiguous. If so, then one asks whether the agency's interpretation is reasonable. If the answer is yes, the agency action is generally upheld. Trained in this paradigm, scholars understandably have an impulse to try to work cases like *West Virginia v. EPA*, *Barnhart v. Walton*,[21] or *United States v. Mead Corp.*[22] into such a decision tree. Indeed, after *West Virginia*, Nicholas Bednar rolled out an updated tree that added yet another branch to account for the Court's latest doctrinal innovation, the

19. *See, e.g.*, West Virginia v. EPA, 142 S. Ct. 2587, 2641 (2022) (Kagan, J., dissenting) ("Some years ago, I remarked that '[w]e're all textualists now." It seems I was wrong. The current Court is textualist only when being so suits it. When that method would frustrate broader goals, special canons like the "major questions doctrine" magically appear as get-out-of-text-free cards." (citation omitted)); Chad Squitieri, *Who Determines Majorness?*, 44 HARV. J.L. PUB. POL'Y 463 (2021) (arguing the major questions doctrine betrays fundamental textualist commitments). *But see* Louis J. Capozzi, III, *The Past and Future of the Major Questions Doctrine*, OHIO ST. L.J. (forthcoming 2022) (manuscript at 3) (on file with authors) ("Contrary to some scholars' claims, the Court did not invent the [major questions] doctrine in the past few decades. The clear statement rule applied in *West Virginia* claims roots extending at least into the mid-to-late nineteenth century, when courts narrowly construed delegations by legislatures to agencies.").

20. *See infra* Part II.

21. 535 U.S. 212 (2002).

22. 533 U.S. 218 (2001).

major questions doctrine.[23] And while that approach reaches the right bottom-line question—ultimately a court decides either that a question *is* or *is not* of the type we would expect to be delegated, for example—reaching the answer often requires a more holistic analysis than a decision tree of multiple, discrete steps implies.

In this emerging mode of analysis, the Court seems to be asking whether, when taken as a whole, the agency action "stays within the lines" along three key dimensions—(1) the *scope* of congressional delegations of authority to administrative agencies, (2) *what* agencies do with that delegated power, and (3) *how* these agencies exercise that power. Whether the agency action is still valid after being analyzed through these three lenses—not whether it "fell off" at a particular branch of a decision tree—is a more effective description of the case law. Such an approach still retains a methodological consistency by examining those three dimensions concurrently. While the Court's approach does not require examining the three dimensions in the same sequence, neither does it enable unconstrained judicial freewheeling. The same three constraints guide the resolution of every case, setting the stage for future litigation.

In Part One of this Note, we analyze recent administrative law cases to illustrate the Roberts Court's three-dimensional approach to incorporating functionalist considerations. In Part Two, we zoom out to examine the implications of this emerging functionalism, drawing an analogy to Justice O'Connor's approach to federalism cases. And in Part Three, we offer some thoughts about how this functionalist turn might be responsive to concerns about methodological inconsistency and judicial overreach.

23. *See* Nicholas Bednar, *Chevron's Latest Step*, YALE J. REG. (July 3, 2022), https://www.yalejreg.com/nc/chevrons-latest-step/ [https://perma.cc/A8BV-H9D9].

I. FUNCTIONALISM IN THREE DIMENSIONS

A. The Major Questions Doctrine: A Functionalist Variant of the Nondelegation Doctrine

"The nondelegation doctrine is the Energizer Bunny of constitutional law: No matter how many times it gets broken, beaten, or buried, it just keeps on going and going."[24]

The nondelegation doctrine is, once again, making a comeback. This time, though, it has arrived in new clothing: the major questions doctrine. This substantive canon illustrates the Court's functionalist turn in administrative law.[25] While the nondelegation doctrine would hold that Congress must decide certain questions itself, the major questions doctrine merely demands a clear statement from Congress that it has intended to delegate power to an agency to decide a certain question.

The Court's holding in *West Virginia* might indicate that the *functionalist*—as opposed to the *formalist*—variant of the nondelegation doctrine is gaining steam. In other words, as scholars debate the historical foundations of a strict formalist nondelegation doctrine,[26]

---

24. Gary S. Lawson, *Delegation and Original Meaning*, 88 VA. L. REV. 327, 330 (2002).

25. It is helpful to class the major questions doctrine as part of a class of "nondelegation canons," to use Professor Cass Sunstein's phrase. Professor Sunstein has explained that federal courts often employ "nondelegation canons" to "hold that federal administrative agencies may not engage in certain activities unless and until Congress has expressly authorized them to do so" rather than "invalidating federal legislation as excessively open-ended." *See* Cass R. Sunstein, *Nondelegation Canons*, 67 U. CHI. L. REV. 315, 316 (2000).

26. *Compare* Julian Davis Mortenson and Nicholas Bagley, *Delegation at the Founding*, 121 COLUM. L. REV. 277 (2021) (asserting no such historical foundation exists), *with* Ilan Wurman, *Nondelegation at the Founding*, 130 YALE L.J. 1490 (2021) (arguing the opposite). In *West Virginia*, Justice Kagan's dissent pointed to Mortenson and Bagley as having resolved the issue, West Virginia v. EPA, 142 S. Ct. 2587, 2642 (2022) (Kagan, J., dissenting), whereas Justice Gorsuch's concurrence cast doubt on that conclusion, pointing to an ongoing "battle of the law reviews," *id.* at 2625 n.6.

a more prudential approach has emerged that may *sometimes* reach the same conclusions, but generally asks different questions.[27]

At its core, the nondelegation doctrine arises out of the text and structure of the Constitution: Article I vests all "legislative powers" in Congress. A formalist argument can follow: Congress may not delegate away *legislative* powers to other actors (like administrative agencies). Quoting Professor Lawson's work,[28] Justice Gorsuch wrote in his *Gundy v. United States*[29] dissent that if Congress were able to "pass off its legislative power to the executive branch, the '[v]esting [c]lauses, and indeed the entire structure of the Constitution,' would 'make no sense.'"[30]

To varying degrees, leading thinkers within the conservative legal movement like Professors Michael McConnell[31] and Michael Rappaport[32] have advanced a categorical, formalist version of the nondelegation doctrine: Article I, Section 8 powers that are in fact "legislative"—namely, those that apply domestically and impact our "private rights" to life, liberty, and property—may not be delegated away at all. But Congress can freely delegate to the executive branch its non-"legislative" powers, like those that had previously been part of the King's royal prerogative powers, foreign affairs-related powers, and lawmaking authority impacting "public rights" (like welfare benefits).[33]

---

27. It is not clear that the entire Court has settled on a particular approach to *applying* the Major Questions Doctrine. For a discussion of how the visions of Chief Justice Roberts and Justice Gorsuch diverge, see Frances Williamson, *Implicit Rejection of* Massachusetts v. EPA: *The Prominence of the Major Questions Doctrine in Checks on EPA Power*, 2022 HARV. J.L. PUB. POL'Y PER CURIAM 23, 6–7.

28. *See* Lawson, *supra* note 24, at 340.

29. 139 S. Ct. 2116 (2019).

30. *Id.* at 2134–35 (2019) (Gorsuch, J., dissenting).

31. *See* MICHAEL MCCONNELL, THE PRESIDENT WHO WOULD NOT BE KING: EXECUTIVE POWER UNDER THE CONSTITUTION (2020).

32. *See* Michael B. Rappaport, *A Two-Tiered and Categorical Approach to the Nondelegation Doctrine*, *in* THE ADMINISTRATIVE STATE BEFORE THE SUPREME COURT: PERSPECTIVES ON THE NONDELEGATION DOCTRINE 195 (Peter J. Wallison & John Yoo, eds., 2022).

33. *See* MCCONNELL, *supra* note 31, at 227–28.

But a more functionalist nondelegation test may be emerging. Under this approach to nondelegation—advanced by Professor Lawson[34] and buoyed by Chief Justice Marshall's dicta in *Wayman v. Southard*[35] as well as Chief Justice Rehnquist's concurrence in the *Benzene* case[36]—a fine-grained analysis of what constitutes "legislative" power is not necessarily the driver of the nondelegation inquiry. Rather, the Court must determine whether, in light of the relevant context, Congress has made the important policy choice. Once Congress has made the hard trade-off, it is free to allow an agency to "fill up the details"[37] and even exercise a hefty amount of policymaking discretion as it effectuates that choice.

Therefore, the guiding light of the functionalist nondelegation inquiry is to ensure that Congress is making the overarching, tough call regarding the policy question. Distinguishing between *types* of power is not as important as ensuring that Congress retains a *degree* of control over "the important subjects" befitting a representative government. Discerning those subjects can be a context-specific,

---

34. *See* Gary Lawson, *A Private-Law Framework for Subdelegation*, *in* THE ADMINISTRATIVE STATE BEFORE THE SUPREME COURT: PERSPECTIVES ON THE NONDELEGATION DOCTRINE, *supra* note 32, at 123–60. Though we have framed Professor Lawson's proposed nondelegation test as functionalist, it is worth noting that his overarching theory of the separation of powers is expressly formalist. *See* Gary Lawson, *Territorial Governments and the Limits of Formalism*, 78 CALIF. L. REV. 853, 857–58 (1990) (positing that the Vesting Clauses provide for "a complete division of otherwise unallocated federal governmental authority" such that "[a]ny exercise of governmental power . . . must either fit within one of the three formal categories thus established [by Articles I–III] or find explicit constitutional authorization for such deviation.").

35. 23 U.S. 1, 43 (1825) ("The line has not been exactly drawn which separates those important subjects, which must be entirely regulated by the legislature itself, from those of less interest, in which a general provision may be made, and power given to those who are to act under such general provisions to fill up the details.").

36. Indus. Union Dep't, AFL-CIO v. Am. Petroleum Inst., 448 U.S. 607, 685 (1980) (Rehnquist, J., concurring) (writing that one of the "important functions" that the nondelegation doctrine serves is "ensur[ing] to the extent consistent with orderly governmental administration that important choices of social policy are made by Congress, the branch of our Government most responsive to the popular will").

37. *Wayman*, 23 U.S. at 43.

loose, and wooly inquiry—precisely the sort of inquiry at which a purely formalist Court might shudder.

But the functionalist variant of nondelegation is what guides the Chief Justice's opinion in *West Virginia*. There, the Court declined to interpret a vaguely worded provision of the Clean Air Act as granting the Environmental Protection Agency (EPA) the power, in effect, to shutter the coal-fired power generation industry and to favor power generation from renewable energy sources. Section 7411 of the Clean Air Act empowered the EPA to determine the "best system of emission reduction," figure out the "degree of emission limitation achievable through the application" of that "best system," and then place a limit on emissions from new stationary sources that "reflects" that amount.[38]

Writing for the majority, Chief Justice Roberts deemed it "not plausible" that Congress had empowered the EPA to unilaterally cap "carbon dioxide emissions at a level that will force a nationwide transition away from the use of coal to generate electricity."[39] The Chief Justice rejected the notion that this provision could allow the EPA to judge which type of energy production would be best for the "overall power system" as opposed to what is best for each individual power source.[40]

In doing so, the Chief Justice explicitly invoked the "major questions doctrine," under which "clear congressional authorization"[41] is required for a court to conclude that Congress intended to delegate to an administrative agency a decision "of such economic and political significance"[42]—namely, "how much coal-based generation there should be over the coming decades."[43]

---

38. West Virginia v. EPA, 142 S. Ct. 2587, 2601 (2022) (quoting 42 U.S.C. § 7411(a)(1) (2018)).

39. *Id.* at 2616.

40. *Id.* at 2611.

41. *Id.* at 2614 (quoting Util. Air Regul. Grp. v. EPA, 573 U.S. 302, 324 (2014)).

42. *Id.* at 2608 (quoting Food & Drug Admin. v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 160 (2000)).

43. *Id.* at 2613.

The upshot is that if Congress wants to authorize an agency to make a decision with great economic or social impact, the Court will require a clear statement.[44] Why? Because the presumption is that Congress itself must make such important calls.[45] And although the Court is not prohibiting Congress from delegating the power entirely, the major questions doctrine requires Congress to articulate consciously and clearly its desire for an agency to exercise that power.[46] This reinforces the functionalist idea that *how much* power is being exercised remains the linchpin of the separation of powers. It is no coincidence that the Chief's *West Virginia* majority opinion cites a dissent by then-Judge Kavanaugh on the D.C. Circuit,[47] whose articulation of the major questions doctrine emphasized that Congress must make the important calls. In the words of Professor Blake Emerson, this is evidence of a "formalist concern to

44. The Court's implementation of a clear statement rule for the delegation of decision-making with respect to "major questions" can be seen as raising the "legislative enactment costs" for Congress to pass constitutionally suspect laws (that is, laws that butt up against nondelegation principles). *See* Matthew Stephenson, *The Price of Public Action: Constitutional Doctrine and the Judicial Manipulation of Legislative Enactment Costs*, 118 YALE L.J. 2 (2018).

45. *See* Gundy v. United States, 139 S. Ct. 2116, 2142 (2019) (Gorsuch, J., dissenting) ("Although it is nominally a canon of statutory construction, we apply the major questions doctrine in service of the constitutional rule that Congress may not divest itself of its legislative power by transferring that power to an executive agency."); Sunstein, *supra* note 25, at 338 (discussing how "nondelegation canons," under which we may now class the major questions doctrine, "are designed to ensure that Congress decides certain contested questions on its own.").

46. In fact, Professor Christopher Walker has already offered a means for Congress to expressly weigh in on the hard question at issue. Specifically, Professor Walker has proposed a procedural mechanism for Congress to quickly ratify agency actions that have previously been struck down by federal courts on major questions doctrine grounds. *See* Christopher J. Walker, *A Congressional Review Act for the Major Questions Doctrine*, 45 HARV. J.L. & PUB. POL'Y (forthcoming 2022), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4230476 [https://perma.cc/TN8E-NZ8B].

47. United States Telecom Ass'n. v. FCC, 855 F.3d 381, 419 (D.C. Cir. 2017) (Kavanaugh, J., dissenting from denial of rehearing en banc).

preserve the separation of powers [giving] way to a functional analysis."[48]

Indeed, it is unsurprising that committed formalists like Professor Rappaport have critiqued the major questions doctrine and the approach adopted by the Court in *West Virginia*.[49] But the Roberts Court has not been wholly committed to formalism and is increasingly willing to use functionalist reasoning. Opting for a more functional major questions doctrine instead of, say, a more formalist nondelegation doctrine illustrates this phenomenon.

Even one of the Court's most committed formalists, Justice Gorsuch, signed onto the Chief's majority opinion in *West Virginia*. In his concurrence, Justice Gorsuch made clear that the major questions doctrine serves what we have characterized as a functionalist nondelegation principle.[50] He wrote: "The Court has applied the major questions doctrine for the same reason it has applied other similar clear-statement rules—to ensure that the government does 'not inadvertently cross constitutional lines.'"[51] The line at issue in the major questions doctrine context is that set forth by Article I's

48. Blake Emerson, *Major Questions and the Judicial Exercise of Legislative Power*, YALE J. REG. (Feb. 28, 2020), https://www.yalejreg.com/nc/major-questions-and-the-judicial-exercise-of-legislative-power-by-blake-emerson/ [https://perma.cc/A4QB-6BES].

49. *See* Michael Rappaport, *Against the Major Questions Doctrine*, THE ORIGINALISM BLOG (Aug. 15, 2022), https://originalismblog.typepad.com/the-originalism-blog/2022/08/against-the-major-questions-doctrinemike-rappaport.html [https://perma.cc/AK34-LEMK] ("[L]et me state my basic objection to the MQD: It neither enforces the Constitution nor applies ordinary methods of statutory interpretation. Thus, it seems like a made up interpretive method for achieving a change in the law that the majority desires.").

50. Justice Gorsuch tied the major questions doctrine to nondelegation—that is, constitutional—principles more expressly than the Chief Justice, whose majority opinion *could* be read as resting on more of an empirical proposition. That is, one might read Chief Justice Roberts's *West Virginia* majority as merely stating that it is unlikely as an empirical matter that Congress meant to give the EPA such broad power under the statute. *See also* Eli Nachmany, *There Are Three Major Questions Doctrines*, YALE J. REG. (July 16, 2022), https://www.yalejreg.com/nc/three-major-questions-doctrines/ [https://perma.cc/D7R4-SPKY].

51. West Virginia v. EPA, 142 S. Ct. 2587, 2620 (2022) (Gorsuch, J., concurring).

Vesting Clause: "In Article I, 'the People' vested '[a]ll' federal 'legislative powers . . . in Congress.'"[52] Citing Chief Justice Marshall's aforementioned opinion in *Wayman v. Southard*, Justice Gorsuch wrote that "this means that" Congress itself must regulate "the important subjects."[53] Going forward, then, the Court will filter most nondelegation concerns through the major questions doctrine. A functionalist nondelegation inquiry will therefore have arisen out of its formalist foundations.

B. What the Agency Actually Did

In addition (and closely related) to analyzing the scope of Congress's delegation of power to an agency, the Roberts Court simultaneously asks whether what the agency has done with its delegated power is lawful. It is not difficult to see how—in the context of the major questions doctrine—this inquiry gets wrapped up into the first question: If Congress has not authored a clear statement to convince the Court that it consciously delegated a great deal of policymaking authority to the agency, then an agency action assuming the opposite will be deemed out of bounds. In *West Virginia*, the EPA claimed that Congress had given it authority to push the American energy industry away from coal. Since Congress had not clearly stated that it was empowering the EPA to make such a momentous move, the Court ruled that the EPA's attempt to make such a move was unlawful. This is not at all unprecedented in the Roberts Court.[54]

---

52. *Id.* at 2617.

53. *Id.*

54. *See, e.g.*, NFIB v. OSHA, 142 S. Ct. 661, 665 (2022) (requiring clear authorization of agency action that would require "84 million Americans to either obtain a COVID-19 vaccine or undergo weekly medical testing at their own expense."); Alabama Ass'n of Realtors v. Dep't of Health & Hum. Servs., 141 S. Ct. 2485, 2489 (2021) ("Even if the text were ambiguous, the sheer scope of the CDC's claimed authority under § 361(a) would counsel against the Government's interpretation. We expect Congress to speak clearly when authorizing an agency to exercise powers of "vast 'economic and political significance.'") (citations omitted); King v. Burwell, 576 U.S. 473, 485-86 (2015) (refusing to defer to an agency's interpretation of a statute because it would involve "billions of

But the Court is not making such moves only in the context of the major questions doctrine. In fact, its wholesale retreat from *Chevron*[55] deference is part and parcel of the second piece of its functionalist turn. Rather than defer to agency interpretations of statutes, the Roberts Court largely conducts its own *de novo* reviews, and when it does, it tends not to find the ambiguity that would trigger deference to the agency's statutory interpretation.

In that way, *Chevron* appears to be going the way of the *Lemon* test: ignored to the point of withering away.[56] It garnered only one measly citation this term—a drive-by mention in a concurrence[57]—and the Court has not actually applied *Chevron* deference in more than five years.[58] And while some commentators expected the Court to formally overrule (or at least address the status of) *Chevron* this term, it instead appears to be the dog that did not bark.[59] In *American Hospital Association v. Becerra*,[60] the proposed vehicle to

---

dollars in spending each year" and would affect "the price of health insurance for millions of people"); Util. Air Regul. Grp. v. E.P.A., 573 U.S. 302, 324 (2014) ("EPA's interpretation is also unreasonable because it would bring about an enormous and transformative expansion in EPA's regulatory authority without clear congressional authorization.").

55. Chevron v. NRDC, 467 U.S. 837 (1984).

56. *See* Pereira v. Sessions, 138 S. Ct. 2105, 2121 (2018) (Alito, J., dissenting) (suggesting the Court is "ignoring" *Chevron* as a "maligned" precedent without overruling it). *See also* Capozzi, *supra* note 19, at 26 ("*West Virginia* shows the continued irrelevance of *Chevron* deference at the Supreme Court."). *Cf. also* Kennedy v. Bremerton School District, 142 S. Ct. 2407, 2427 (2022).

57. *See* Wooden v. United States, 142 S. Ct. 1063, 1075 (2022) (Kavanaugh, J., concurring).

58. The most recent cases in which the Court has stepped through an actual *Chevron* analysis appear to be Encino Motorcars v. Navarro, 579 U.S. 211 (2016) (working within the *Chevron* framework, but ultimately not according deference due to a procedural defect) and Cuozzo Speed Tech. v. Lee, 579 U.S. 261 (2016) (according *Chevron* deference to an agency's reasonable statutory interpretation).

59. *See, e.g.*, American Hospital Ass'n v. Becerra, 142 S. Ct. 1896 (2022); *see also* James Romoser, *In an opinion that shuns Chevron, the court rejects a Medicare cut for hospital drugs*, SCOTUS BLOG (June 15, 2022), https://www.scotusblog.com/2022/06/in-an-opinion-that-shuns-chevron-the-court-rejects-a-medicare-cut-for-hospital-drugs/ [https://perma.cc/GRT9-7WCH].

60. 142 S. Ct. 1896 (2022).

overturn *Chevron*, the Court, without invoking *Chevron*, determined that the agency's reading of the statute was not the best reading. The Court thus concluded that the agency had exceeded the scope of its delegated power by not complying with what the statute in fact demanded.[61]

American Hospital Association, as well as the Roberts Court's broader turn away from *Chevron*, largely seem consistent with the rest of the Court's functionalist turn. Although many argue that *Chevron* is at odds with formalism,[62] *Chevron* is ultimately something of a formalist methodology.[63] Taking it on its own terms, *Chevron* prescribes a regime of judicial deference when certain formal conditions are met.[64] To abrogate *Chevron* is, in effect, to require agency explanations to rise and fall on their own merits, free from a thumb on the scale.[65]

While this approach may not be "functionalist" in the sense of the Court examining the functional import of a particular interpretation, it nonetheless belies the notion that administrative law cases

---

61. *Id.* at 1903–06. *See also* Becerra v. Empire Health Foundation, 142 S. Ct. 2354 (2022) (upholding an HHS regulation as the best reading of a statute but not deploying or even mentioning *Chevron* deference).

62. *See, e.g.*, John O. McGinnis, *The Rise of Formalism and the Decline of Chevron*, LAW & LIBERTY (June 22, 2018), https://lawliberty.org/the-rise-of-formalism-and-the-decline-of-chevron/ [https://perma.cc/982K-L2R6].

63. Granted, this unique version of formalism offered by *Chevron* has been tempered by more searching, multi-factor inquiries into whether the framework of *Chevron* deference ought to apply in the first place. *See, e.g.*, United States v. Mead Corp., 533 U.S. 218 (2001).

64. *See* JOHN F. MANNING & MATTHEW C. STEPHENSON, LEGISLATION AND REGULATION: CASES AND MATERIALS 1111 (4th ed. 2021) ("[T]he overall thrust of *Chevron* is fairly clear: If the responsible administrative agency has reasonably resolved a statutory ambiguity, the reviewing court should accept the agency's resolution, even if the court would have resolved the question differently. If the agency's interpretation is unreasonable—if, for example, it contravenes the clear text of the statute—then the reviewing court should reject it.").

65. *See* BNSF Railway Company v. Loos, 139 S. Ct. 893, 908–09 (2019) (Gorsuch, J., dissenting); *see also* Bradley George Hubbard, *Deference to Agency Statutory Interpretations First Advanced in Litigation? The* Chevron *Two-Step and the* Skidmore *Shuffle*, 80 U. CHI. L. REV. 447 (2013) (arguing that agency litigating positions do not merit *Chevron* deference when not the product of reasoned policy making).

can be resolved in formalist decision trees. Instead, it calls for what amounts to *de novo* review of each element of an agency's decision, including how it was reached and its implications for broader questions about the separation of powers. Such a tack centers the Court's ex ante, holistic judgment. In other words, moving on from *Chevron*, once again places the Court in the position of evaluating the whole picture of how an agency reached its decision (alongside what that decision is) to assess whether it may carry the force of law. Fortunately, this posture is one of statutory interpretation, the bread and butter of judging.[66] It is functionalism in a different sense—one that gives great weight to the judiciary's prudential judgments—but it departs from procedural formalism just the same.

C. How the Agency Did What It Did

Apart from *what* agencies do, the Roberts Court has paid attention to *how* they do it, both as a matter of procedure and structure. Against the backdrop of both the Administrative Procedure Act (APA) in the procedural context and the principles undergirding the unitary executive theory in the structural context, the Roberts Court has added a functionalist dimension to its formalist analyses of agency action. Structural principles such as democratic accountability and control have frequently animated the functionalist turn in these contexts. What is left amounts to a more holistic review of agency action, one that asks not only whether an agency had the formal power to do what it did, but also whether it held or discharged that power in a manner consistent with our constitutional structure. This sort of "all things considered" review of agencies' actions and structures does not neatly proceed from major to minor

66. *Cf.* Raymond M. Kethledge, *Ambiguities and Agency Cases: Reflections After (Almost) Ten Years on the Bench*, 70 VAND. L. REV. EN BANC 315, 319 (2017) ("That a statute is complicated does not mean it is ambiguous. It just means that the judge needs to work harder to determine—in the sense of ascertain—the statute's meaning . . . . And I would suggest that the persistence and willingness of judges to work hard before declaring statutes ambiguous is an important but perhaps overlooked difference between judges.")

premises as a purely formalist approach would. Rather, it begins from formalist precepts and then asks a functionalist question: On net, does the agency action or structure square with constitutional first principles?

An early example of this paradigm in the APA context occurred midway through the Trump administration, when the Department of Commerce sought to add a question to the United States Census inquiring about respondents' citizenship status. The putative purpose of the question was to provide data that would help the Department of Justice better enforce the Voting Rights Act.[67] In announcing its decision to add the question, the Department of Commerce technically jumped through all the hoops of the APA. But the Court, in a 5-4 majority opinion authored by Chief Justice Roberts, held that mere compliance with the APA is not a complete shield when pretext is at play.[68] As the Court observed:

> We are presented … with an explanation for agency action that is incongruent with what the record reveals about the agency's priorities and decisionmaking process. It is rare to review a record as extensive as the one before us when evaluating informal agency action—and it should be. But having done so for the sufficient reasons we have explained, we cannot ignore the disconnect between the decision made and the explanation given. Our review

67. *See* Dep't of Commerce v. New York, 139 S. Ct. 2551, 2562 (2019).

68. Notably, the Court has upheld compliance with the APA as a *necessary* condition for an agency action to be upheld, just not a sufficient one. *See, e.g.*, Dep't of Homeland Security v. Regents of the Univ. of California, 140 S. Ct. 1891 (2020) (enjoining Trump administration's rescission of DACA as a violation of the APA); *see also* Fred Barbash & Deanna Paul, *The Real Reason the Trump Administration is Constantly Losing in Court*, WASH. POST. (Mar. 19, 2019, 12:05 PM) https://www.washingtonpost.com/world/national-security/the-real-reason-president-trump-is-constantly-losing-in-court/2019/03/19/f5ffb056-33a8-11e9-af5b-b51b7ff322e9_story.html [https://perma.cc/GMQ6-E4LP] (noting that, as of 2019, the Trump administration had a six-percent win rate in APA cases, largely stemming from insufficient attention to administrative procedure).

> is deferential, but we are "not required to exhibit a naiveté from which ordinary citizens are free."[69]

In other words, form is not all that matters. When "contrived reasons" underpin an agency's explanation, judicial review—if it is to be anything more than an "empty ritual"—demands more than a formalistic checkoff.[70] As Professor Benjamin Eidelson has argued, for the Roberts Court, the pretextual explanation at issue in the *Department of Commerce* case did not cut it on this front.[71] Nor did the "buck-passing"[72] or "post hoc"[73] explanations in *Regents of the University of California*.[74]

The Roberts Court's demand that the executive branch be candid about why it did what it did, shoulder responsibility for its decisions, and offer reasons for its moves early enough to invite meaningful public scrutiny (all while clearing the formal hurdles of the APA) fosters the very same value as the major questions doctrine: democratic accountability. While the major questions doctrine nudges our elected representatives in Congress to make the tough policy choices, this holistic review of agency action pushes presidential administrations to be open and honest about why they are doing what they are doing.

That transparency fosters democratic accountability. As Professor Eidelson explains: "Political accountability sometimes depends on the public's understanding not only *what* the government has done, but *why*."[75] Thus, the Court's recent rigorous review of stated rationales "reflect[s] a vision of courts as political ombudsmen—one might even say umpires—who will rarely second-guess the executive branch's policy judgments themselves, but who will police the

---

69. *Dep't of Commerce*, 139 S. Ct. at 2575 (citing United States v. Stanchich, 550 F.2d 1294, 1300 (2d Cir. 1977)).

70. *Id.* at 2576.

71. Benjamin Eidelson, *Reasoned Explanation and Political Accountability in the Roberts Court*, 130 YALE L.J. 1748, 1785–94 (2021).

72. *Id.* at 1761–64.

73. *Id.* at 1764–67.

74. 140 S. Ct. 1891 (2020).

75. Eidelson, *supra* note 71, at 1758.

reason-giving process to ensure that the public has a fair opportunity to evaluate and respond to those same decisions."[76] This more open-ended inquiry goes beyond box checking and attempts to uphold the core constitutional value of democratic control.

The Roberts Court has not confined its focus on democratic accountability and control to its scrutiny of executive branch agencies' stated rationales for their actions. Functionalist inquiries in the service of democratic responsiveness also mark the Roberts Court's approach to agency structure cases. The Court's answer to whether an agency is constitutionally structured might hinge, in part, on the *degree* of presidential control. Often in the context of opprobrium,[77] many have deemed the Roberts Court's removal jurisprudence—in cases such as *Free Enterprise Fund v. PCAOB*[78] and *Seila Law v. Consumer Financial Protection Bureau*[79]—as formalist through and through.[80] And although a formalist instinct to maintain the separation of powers certainly permeates these decisions, the Roberts Court has also incorporated functionalist considerations—such as

76. *Id.* at 1755.

77. Such distaste for formalism, particularly in the legal academy, is not new. In a 1988 *Yale Law Journal* article, Professor Frederick Schauer made note of "the pejorative connotations of the word 'formalism'"). *See* Frederick Schauer, *Formalism*, 97 YALE L.J. 509, 510 (1988).

78. 561 U.S. 477 (2010).

79. 140 S. Ct. 2183 (2020).

80. *See, e.g.*, Jodi L. Short, *Facile Formalism: Counting the Ways the Court's Removal Jurisprudence Has Failed*, YALE J. REG. (Dec. 14, 2020), https://www.yalejreg.com/nc/facile-formalism-counting-the-ways-the-courts-removal-jurisprudence-has-failed-by-jodi-l-short/ [https://perma.cc/TV3L-9Z2M] (concluding that *Free Enterprise Fund* and *Seila Law* are part and parcel of the Roberts Court's shift to "facile formalism"); Timothy G. Duncheon & Richard L. Revesz, Seila Law *as an Ex Post, Static Conception of Separation of Powers*, U. CHI. L. REV. ONLINE (Aug. 27, 2020), https://lawreviewblog.uchicago.edu/2020/08/27/seila-duncheon-revesz/ [https://perma.cc/QD3C-UV9Q] ("In his majority opinion in *Seila Law*, Chief Justice John Roberts embraces formalism, arriving at an apparently bright-line rule that a for-cause removal restriction on a single-headed agency with executive power violates Article II."); MANNING & STEPHENSON, *supra* note 64, at 766 (arguing that "*Seila Law* appears to have replaced *Morrison*'s functionalist multi-factor balancing test with a more categorical approach").

by analyzing *how much*, as opposed to *whether*, a particular arrangement infringes on the president's executive power—as part of its reasoning.[81]

In fact, a close reading of *Seila Law*, in particular, indicates that the Roberts Court sometimes employs functionalism in order to invalidate novel agency structures that run afoul of formalist commitments without overturning precedents that do the very same. The Chief Justice's *Seila Law* majority opinion did rest on formalist commitments. He explained that "[u]nder our Constitution, the 'executive Power'—all of it—is 'vested in a President.'"[82] The structure of the Consumer Financial Protection Bureau's (CFPB's) leadership—with a single-headed director who in turn had for-cause removal protections—ran afoul of that precept. In reaching this conclusion, the Chief Justice did not go so far as to overturn past precedents like *Humphrey's Executor v. United States*[83] and *Morrison v. Olson*.[84] Instead, he distinguished the CFPB's invalid structure from those that had been upheld as valid in *Humphrey's Executor* and *Morrison*. He did so on functionalist grounds.

The Chief Justice characterized *Humphrey's Executor* and *Morrison* as less severe infringements on the president's executive power. In *Humphrey's Executor*, he wrote, the Court upheld the for-cause removal protections for the multi-member Federal Trade Commission (FTC) on the grounds that it "performed legislative and judicial functions and was said not to exercise any executive power."[85]

---

81. *Cf.* Eskridge, *supra* note 9, at 23 ("As Judge Easterbrook suggests, the *Steel Seizure Case* is … exemplary of formalist reasoning. The *Steel Seizure Case,* however, rests just as firmly in functionalist reasoning."); *id.* at 22 ("Chief Justice Marshall wove formalist and functional lines of thinking and argumentation throughout the [*McCulloch v. Maryland*] opinion."); *see also* Collins v. Yellen, 141 S. Ct. 1761, 1784 (2021) ("[B]ecause the President, unlike agency officials, is elected, this control is essential to subject Executive Branch actions to a degree of electoral accountability).

82. 140 S. Ct. at 2191.

83. 295 U.S. 602 (1935).

84. 487 U.S. 654 (1988).

85. 140 S. Ct. at 2199.

And in *Morrison*, the good-cause tenure protections for an independent counsel, an inferior officer, were allowed because they "did not unduly interfere with the functioning of the Executive Branch."[86]

Chief Justice Roberts then framed the CFPB's removal protections for a single-headed director as being more severe infringements on the president's executive power. Unlike in *Humphrey's Executor*, the CFPB director could hardly be described as "a mere legislative or judicial aid."[87] Indeed, "the Director's enforcement authority includes the power to seek daunting monetary penalties against private parties on behalf of the United States in federal court—a quintessentially executive power not considered in *Humphrey's Executor*."[88] He then contrasted the CFPB setup's encroachment on the president's executive power with the more limited infringement wrought by the arrangement at issue in *Morrison*—an inferior officer with for-cause removal protections. While the CFPB Director exercised immense executive power—as they could "bring the coercive power of the state to bear on millions of private citizens and businesses"—the independent counsel in *Morrison* "lacked policymaking or administrative authority," could only train its exercise of executive power "inward," and "was confined to a specified matter."[89] Chief Justice Roberts then closed his constitutional analysis by noting that the CFPB structure even "foreclose[d] certain indirect methods of Presidential control."[90] He wrote:

> Because the CFPB is headed by a single Director with a five-year term, some Presidents may not have any opportunity to shape its leadership and thereby influence its activities. A President elected in 2020 would likely not appoint a CFPB Director until 2023, and a President elected in 2028 may *never* appoint one. That means an unlucky President might get elected on a consumer-protection

86. *Id.*
87. *Id.* at 2200.
88. *Id.*
89. *Id.*
90. *Id.* at 2204.

> platform and enter office only to find herself saddled with a holdover Director from a competing political party who is dead set *against* that agenda. To make matters worse, the agency's single-Director structure means the President will not have the opportunity to appoint any other leaders—such as a chair or fellow members of a Commission or Board—who can serve as a check on the Director's authority and help bring the agency in line with the President's preferred policies.[91]

In sum, the Chief Justice distinguished the question in *Seila Law* from non-formalist precedents like *Humphrey's Executor* and *Morrison* with the help of functionalism: He reasoned that the CFPB removal scheme infringed on the president's executive power more than these prior arrangements had. Even in response to functionalist questions of degree rather than formalist questions of kind, the CFPB's structure could not mount a constitutionally sound response. The Chief Justice distinguished from past functionally-reasoned precedents, thereby leaving them intact, by effectively answering the same functionalist question that the Court had posed in *Morrison*: Are "the removal restrictions . . . of such a nature that they impede the President's ability to perform his constitutional duty?"[92] He answered "no" with respect to the CFPB, while letting the Court's past "yeses" stand.

In other words, the *Seila Law* majority did not rely solely on the pure formalist approach to removal that Justice Scalia articulated so forcefully in his *Morrison* dissent.[93] Had it done so, it would have expressly invalidated precedents like *Humphrey's Executor*—as Justices Thomas and Gorsuch urged in their concurrence.[94] Rather, it explicitly noted a functionalist rationale for deeming the for-cause removal protections for the CFPB Director unconstitutional: the

---

91. *Id.* (emphasis in the original).

92. Morrison v. Olson, 487 U.S. 654, 691 (1988).

93. There, Justice Scalia stressed "the constitutional principle that the President had to be the repository of *all* executive power." *Id.* at 726 (Scalia, J., dissenting) (emphasis in the original).

94. *See Seila Law*, 140 S. Ct. at 2211 (Thomas, J., concurring).

protections infringed too much on the President's capacity to exert control over the executive branch.

To a large extent, the emergence of the functionalist turn in agency structure (that is, removal) cases is nothing new. It was present in *Seila Law*'s precursor case, *Free Enterprise Fund v. Public Company Accounting Oversight Board*.[95] With Chief Justice Roberts writing for the majority, the Court invalidated a provision of the Sarbanes-Oxley Act that insulated members of the Public Company Accounting Oversight Board (PCAOB)—which was empowered to oversee the accounting industry in the wake of various scandals—from removal.[96] Specifically, the act provided that PCAOB members could only be removable by the Securities and Exchange Commission (SEC) for good cause. SEC members already enjoy good-cause removal protections.[97] Chief Justice Roberts concluded that this double insulation model was unconstitutional, as it infringed too much on the president's control of the executive branch. He wrote: "This novel structure does not merely add to the Board's independence, but transforms it. Neither the President, nor anyone directly responsible to him, nor even an officer whose conduct he may review only for good cause, has full control over the Board."[98]

Much like Justice Kagan's dissent in *Seila Law*, Justice Breyer's dissent in *Free Enterprise Fund* critiqued the Chief Justice's majority opinion for being unduly formalist. Justice Breyer argued that the statutory scheme was permissible, given that it "will not restrict Presidential power significantly."[99] Though surely the Chief's *Free Enterprise Fund* opinion can be framed as formalist,[100] it nonetheless asked a question of *degree*: How much insulation was too much?

---

95. 561 U.S. 477 (2010).

96. MANNING & STEPHENSON, *supra* note 64, at 736.

97. *Id.*

98. 561 U.S. at 496.

99. *Id.* at 525 (Breyer, J., dissenting).

100. *See* MANNING & STEPHENSON, *supra* note 64, at 740 ("[I]t's … possible to read *Free Enterprise Fund* as signaling a more fundamental shift in the judicial approach toward a doctrine that is both stricter and more formalist in scrutinizing congressional encroachment on presidential removal power.").

How much presidential control was required? As Dean Manning explained:

> [T]he Court in *Free Enterprise Fund* ultimately relied on fairly high-level functional considerations to draw the constitutional line at issue. To be sure, the Court asserted that the Act compromised "the President's ability to ensure that the laws are faithfully executed." But, since the Court nowhere identified what it means to "take Care that the Laws be faithfully executed," its reference to that clause—and its reference to the Vesting Clause—served largely as placeholders for the Court's own functional assessment of how much accountability executive officers properly owe to the President.[101]

Moreover, just like in *Department of Commerce* and *Seila Law*, the Chief Justice stressed the importance of democratic accountability in *Free Enterprise Fund*: "Our Constitution was adopted to enable the people to govern themselves, through their elected leaders. The growth of the Executive Branch . . . heightens the concern that it may slip from the Executive's control, and thus from that of the people."[102]

II. IN THE ADMINISTRATIVE LAW AREA, IS THIS THE "O'CONNOR COURT"?

This emerging functionalist turn raises the question: in the administrative law area, might we see the Roberts Court as resembling more of an O'Connor Court? After all, it was Justice O'Connor who most forcefully articulated a functionalist case for the vertical separation of powers in the federalism context, and that basic logic might apply with equal force to the horizontal separation of powers in the administrative law domain.

---

101. John F. Manning, *The Supreme Court, 2013 Term—Foreword: The Means of Constitutional Power*, 128 HARV. L. REV. 1, 47 (2014).

102. 561 U.S. at 499.

New York v. United States[103] best demonstrates Justice O'Connor's functionalist mode of reasoning in federalism cases—the very same mode of analysis at work in the Roberts Court's administrative law jurisprudence. In *New York*, the Supreme Court invalidated a provision of the 1985 Low-Level Radioactive Waste Policy Amendments Act that compelled states to "take title" to waste they had not properly discarded prior to a certain date. Those states would then be held liable "for all damages directly or indirectly incurred."[104] The Court held that while Congress could provide monetary incentives to states to dispose of their waste, mandating that the states either take ownership of their waste or regulate it in accordance with Congress's dictates was impermissible.[105] Forcing the states to take ownership of the waste would "commandeer" the states in violation of the Tenth Amendment: ordering the states to regulate waste as Congress sets forth would amount to requiring the states to implement federal law.[106]

Writing for the Court in *New York*, Justice O'Connor observed that although a particular "result may appear 'formalistic'"[107]—and indeed, many have categorized her opinion as such[108]—in fact her opinion was motivated by an explicit desire to prevent the excessive concentration of power. This, in fact, is not the "epitome of formalistic reasoning,"[109] but functionalism in action. Justice O'Connor stressed that the Constitution "divides power among sovereigns and among branches of government precisely so that we may resist the temptation to concentrate power in one location as an expedient solution to the crisis of the day."[110] To apply Dean

103. 505 U.S. 144 (1992).

104. *Id.* at 153–54 (quoting 42 U.S.C. § 2021e(d)(2)(C) (1988)).

105. *Id.* at 175.

106. *Id.*

107. *Id.* at 187.

108. Erwin Chemerinsky, *Formalism and Functionalism in Federalism Analysis*, 13 GA. ST. U.L. REV. 959, 964 (1997) (arguing that "[t]he decision appears formalistic because it is formalistic").

109. *Id.* at 962.

110. 505 U.S. at 187.

Manning's framing of functionalism,[111] Justice O'Connor was stressing the *balance* of power between the federal and state governments.[112]

In this way, it would not matter if the states acquiesced to the federal government's encroachment on their domain.[113] Why? Because the separation of powers prevents a concentration of power that threatens the people's liberty.[114] In other words, the key question—more than "what kind of power"—is "how much power." And when the answer is "too much," the *concentration* of power matters as much as the *type* of power. As Justice O'Connor wrote in *Gregory v. Ashcroft*[115]: "Just as the separation and independence of the coordinate branches of the Federal Government serve to prevent the accumulation of excessive power in any one branch, a healthy balance of power between the States and the Federal Government will reduce the risk of tyranny and abuse from either front."[116]

And just like the Roberts Court has done in its administrative law rulings, Justice O'Connor grounded her functionalist approach in the constitutional value of democratic accountability:

> [W]here the federal government compels States to regulate, the accountability of both state and federal officials is diminished . . . . [W]here the federal government directs the States to regulate, it may be state officials who will bear the brunt of public disapproval, while the federal officials who devised the regulatory program may remain insulated from the electoral

111. *See* Manning, *supra* note 9, at 1952.

112. There is some evidence that Justice O'Connor adopted this same quasi-functionalist approach in the horizontal separation of powers context as well. For example, in *Lujan v. Defenders of Wildlife*, she joined Justice Blackmun's dissent wherein he critiqued Justice Scalia's majority opinion as taking an "anachronistically formal view of the separation of powers." 504 U.S. 555, 602 (1992) (Blackmun, J., dissenting).

113. 505 U.S. at 182.

114. *See* Coleman v. Thompson, 501 U.S. 722, 759 (Blackmun, J., dissenting) ("Rather, federalism secures to citizens the liberties that derive from the diffusion of sovereign power.") (quoted in *New York*, 505 U.S. at 181).

115. 501 U.S. 452 (1991).

116. *Id.* at 458.

> ramifications of their decision. Accountability is thus diminished when, due to federal coercion, elected state officials cannot regulate in accordance with the views of the local electorate in matters not pre-empted by federal regulation.[117]

The Roberts Court's administrative law jurisprudence seems to be doing the same: it is turning to a more functionalist approach in the service of democratic accountability. Rather than narrowly focusing on *what kind* of power is being exercised at a particular moment,[118] the Roberts Court—in its approach to applying the nondelegation and major questions doctrines, assessing agency actions themselves, and examining agency structure and compliance with procedure—seems more inclined to ask whether the challenge at issue comports with its underlying sense of what constitutional first principles such as democratic accountability demand. It is, in other words, a pragmatic functionalism, one that sets new terrain on

117. 505 U.S. at 168-69. In more recent years, the Supreme Court has continued to underscore the importance of preserving the vertical separation of powers, such as by enforcing the anti-commandeering doctrine, to promote political accountability. *See* Murphy v. Nat'l Collegiate Athletic Ass'n, 138 S. Ct. 1461, 1477 (2018) ("[T]he anticommandeering rule promotes political accountability. When Congress itself regulates, the responsibility for the benefits and burdens of the regulation is apparent. Voters who like or dislike the effects of the regulation know who to credit or blame. By contrast, if a State imposes regulations only because it has been commanded to do so by Congress, responsibility is blurred."). Moreover, the Roberts Court has continued this quasi-functionalist approach in the vertical separation of powers context. *See* Manning, *supra* note 101, at 42 ("At a minimum, the question of whether the individual mandate cuts too deeply against the federal-state balance struck by American federalism, and the question of where these lines should be drawn in general, turns on functional considerations about which reasonable people can differ.").

118. *Cf.* Loving v. United States, 517 U.S. 748, 776–77 (1996) (Scalia, J., concurring in part and concurring in judgment) (distinguishing delegating legislative power, which, on Justice Scalia's conception, is not allowed, from "assign[ing] responsibilities" to the executive, which, on that conception, is allowed); *see also* Whitman v. American Trucking Ass'n, 531 U.S. 457, 475–76 (2001) (acknowledging a certain degree of discretion that "inheres in most executive or judicial action" but insisting that delegations do not result in the *disposition* of legislative power by the executive) (citing Mistretta v. United States, 488 U.S. 361, 417 (1989) (Scalia, J., dissenting)).

which future administrative law battles will be fought and leaves lingering uncertainty about how those battles will play out.

III. THE CONSTRAINTS OF STRUCTURE AND TEXTUALISM

The Roberts Court's functionalist turn may lead some to worry that it fails to constrain the Court. For example, in the context of the major questions doctrine, adding a functionalist dimension to a textualist mode of interpretation may understandably raise suspicion from a variety of jurisprudential perspectives. But a more capacious account of textualism may offer at least tentative answers to these critiques, tempering the potential for this functionalist turn to become a vessel for unfettered judicial discretion.

On one hand, the Court's functionalist turn does seem less consistent with the traditionally conservative jurisprudential tenet of opting for bright lines over balancing. Committed formalists might viscerally chafe at the seemingly open-ended, normative inquiries that comprise this turn.[119] And they might wonder whether this turn will provide cover for judges to wield broad discretion to reach preferred policy outcomes (a concern likely shared by those on the left skeptical of the Court's conservative majority).[120]

But this functionalist turn need not inaugurate the type of unconstrained pragmatism that Judge Richard Posner famously advocated.[121] Contrary to Judge Posner's proposed approach that would prize socially beneficial consequentialism (in the eyes of the judge) over legal stodginess (ostensibly inherent in methodological consistency),[122] the Roberts Court's emerging approach binds judges along three dimensions—the scope and nature of the delegation it-

119. After all, as Professor Thomas Merrill has noted: "The principal criticism leveled against functionalism is not that it is too rigid but that it is not rigid enough." Merrill, *supra* note 13, at 234.

120. *Cf., e.g.*, Squitieri, *supra* note 19, at 464–66.

121. *See, e.g.*, RICHARD POSNER, THE FEDERAL JUDICIARY: STRENGTHS AND WEAKNESSES 376–97 (2017).

122. *See id.* at 17, 385–86 (2017).

self, what the agency does with the delegated power, and the process it uses to discharge its delegated power. And it asks whether the challenged action comports with the "social contract between the governed and their governors," the Constitution, "in a way that protects the 'exceptionally valuable' 'stability in [the] political system.'"[123] This inquiry squares with the functionalist aspiration to maintain fidelity to the Constitution while respecting the democratic branches' power to experiment where the Constitution is opaque.

This approach may expand the task of interpretation a bit beyond what Judge Frank Easterbrook envisioned.[124] He explained that while the "political branches have power to act pragmatically . . . judges do not."[125] But the Roberts Court seems to be suggesting that a constrained version of functionalism offers the predictability necessary to keep the elected branches in line without aggrandizing the judicial role. Done well, the Roberts Court's pairing of formalism with functionalism could reinforce the indispensable roles of the elected branches as the primary channels for political engagement while strengthening the bedrock values of democratic accountability and checks and balances particularly important in an increasingly complex federal government.

In other words, weighing functionalist considerations could *vindicate* the enterprise of forcing Congress to work out compromises in the text (leaving citizens less apt to run to the courts to solve their problems). Judges, then, have space to consider constitutional structure transparently rather than hiding such consideration in in-

123. Amul R. Thapar & Benjamin Beaton, *The Pragmatism of Interpretation: A Review of Richard A. Posner,* The Federal Judiciary, 116 MICH. L. REV. 819, 828 n.31 (2018) (quoting Frank H. Easterbrook, *Pragmatism's Role in Interpretation*, 31 HARV. J.L. & PUB. POL'Y 901, 902–05 (2008)).

124. *See* Easterbrook, *Pragmatism's Role in Interpretation* at 904–05.

125. *Id.* at 903.

tuitions about social good, and the political branches have clear instructions.[126] To Congress: delegate clearly. To the executive: act in accordance with the power delegated, and do so in an accountable and procedurally consistent way. If the political branches satisfy these demands, the Court will get out of the way, leaving the political branches to work out the policy challenges of modern government. Such ex ante transparency has immeasurable value for the rule of law.[127]

On the other hand, Justice Kagan also criticized the *West Virginia* majority for abandoning textualist precepts too. In her view, the best reading of the statute at issue *justified* the agency action, and the majority resorted to the major questions doctrine, a substantive canon, to get out of what the text demanded.[128] But the force of this critique might be blunted when we consider that functionalist considerations legitimate textualism itself. Part of the logic of textualism is that the actual language that Congress passes by way of the Article I Section 7 process of bicameralism and presentment is the product of hard-fought compromise. That is, Congress, not the Court, is the institution empowered by the Constitution to make the tough choices and trade-offs inherent in legislating. Therefore, the Court must respect the choices Congress has made—namely, the words on the page—provided that they do not run afoul of the

126. *Cf.* Thapar & Beaton, *supra* note 123, at 827 (citing Michael H. McGinley, Note, *Textualism as Fair Notice*, 123 HARV. L. REV. 542 (2009)) (arguing that methodological consistency creates incentives for prospective clarity by Congress, which reinforces the rule of law).

127. *See generally id.* at 829–30.

128. *See* West Virginia v. Env't Prot. Agency, 142 S. Ct. 2587, 2628 (Kagan, J., dissenting) ("The limits the majority now puts on EPA's authority fly in the face of the statute Congress wrote. The majority says it is simply 'not plausible' that Congress enabled EPA to regulate power plants' emissions through generation shifting. But that is just what Congress did when it broadly authorized EPA in Section 111 to select the 'best system of emission reduction' for power plants.") (citations omitted).

Constitution.[129] One-off statements from legislators, committee reports, or a vague sense of the purpose of the statute cannot override the actual compromise—enshrined in the text of the statute—that the members of Congress reached.

When viewed in this light, textualism is grounded in respect for Congress's constitutional power to do the legislating. A functionalist variant of the nondelegation inquiry—as embodied in the major questions doctrine—is the flip side of that coin: It amounts to requiring that Congress shoulder its responsibility to make the hard legislative choices, or at least—if it is going to duck those choices—to say so.[130] With power comes responsibility. Textualism and the major questions doctrine might not be at odds, then, so much as they are two means by which the Court vindicates these twin aspects of constitutional theory.

CONCLUSION

What is the upshot of the Roberts Court's functionalist turn? Why does it matter? Reckoning with the functionalist turn ought to shape Supreme Court litigation strategy going forward and alter perceptions of just how "rogue" the Roberts Court has allegedly gone.

Litigants should be aware of the Court's willingness to incorporate functionalist reasoning into its separation of powers decisions.

---

129. *See* John F. Manning, *Second-Generation Textualism*, 98 CALIF. L. REV. 1287, 1290 (2010) ("Second-generation textualism argues that lawmaking inevitably involves compromise; that compromise sometimes requires splitting the difference; and that courts risk upsetting a complex bargain among legislative stakeholders if judges rewrite a clear but messy statute to make it more congruent with some asserted background purpose. Simply put, when a statute speaks unambiguously, judges must presume that Congress chose its words for a reason; to assume otherwise would be to undercut Congress's ability to use semantic meaning to express and record its agreed-upon outcomes.").

130. *Cf.* Whitman v. American Trucking Ass'n, 531 U.S. 457, 468 (2001) ("Congress, we have held, does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions—it does not, one might say, hide elephants in mouseholes.").

They might increase their chances of prevailing at the Court if they craft arguments that are grounded in formalist precepts—by invoking the vesting clauses of Articles I and II, for example—and buttressed with functionalist considerations. This belt-and-suspenders, formalist-functionalist pairing could be especially potent for litigants when functionalist precedents stand in their way. Despite what critics may charge, the Roberts Court appears intent on not blowing up every precedent (or the administrative state, for that matter) that seems at odds with its baseline formalist commitments. Instead, it is pushing separation of powers doctrine in a formalist direction while cabining rather than invalidating conflicting precedents on *functionalist* grounds.[131] Litigants ought to take note, then, both of the existence of functionalist reasoning in these landmark decisions and how precisely the Court employs that functionalist reasoning.

Conceptualizing the Roberts Court's separation of powers jurisprudence in this manner also takes the sting out of some allegations that the Court has gone "rogue."[132] Our survey of some of the Court's major decisions in the horizontal separation of powers context cuts against the narrative that the Court is upending doctrine at lightning speed. Rather, the Court is mediating its formalism with functionalism. And as explained above, the Court's unique brand of functionalism is not as freewheeling as some might worry; it constrains judges in meaningful ways. Moreover, it leaves plenty of room for the political branches to solve problems. Congress and the executive branch can continue to tackle big policy problems, provided that they respect the formal and functional separation of

131. *Seila Law* is a case in point. As explained above, the Chief Justice's majority opinion employed formalist precepts to invalidate the CFPB's for-cause removal setup, but it then employed functionalist reasoning to avoid repudiating *Humphrey's Executor* and *Morrison* wholesale. *See supra* Section I.C.

132. *See, e.g.*, Jamelle Bouie, *How to Discipline a Rogue Supreme Court*, N.Y. TIMES (June 25, 2022), https://www.nytimes.com/2022/06/25/opinion/supreme-court-constitution.html [https://perma.cc/5JAA-VGDE].

powers. With a properly calibrated delegation, if an agency acts according to the authority it has been clearly granted, and wields its delegated power transparently, it *can* exercise broad power.

Finally, it is worth pointing out that the functionalist turn could be here to stay. Some might contend that "the Roberts Court" as we have framed it no longer exists. That is, many of the opinions we have cited in this Note were written by the Chief Justice himself, and since 2020, the Court's membership has shifted in a way that have led some to conclude that the Chief Justice has "lost control" of the Court to the other five conservative Justices.[133]

But at least in the separation of powers context, that formulation obscures far more than it illuminates. Even before the possibility of a five Justice majority without the Chief Justice emerged (that is, before Justice Barrett's confirmation), Chief Justice Roberts commanded majorities in separation-of-powers cases like *Free Enterprise Fund* and *Seila Law*. And post-2020, the Chief Justice himself authored the crucial decision of *West Virginia v. EPA*. It is not at all clear that the more committed formalist wing, led by Justice Thomas and Justice Gorsuch (as exemplified by their *Seila Law* concurrence) is in fact ascendant in the separation of powers context. And even then, that wing might be too fractured to repudiate the functionalist turn wholly.[134]

This is to say: the functionalist turn might have some staying power. Litigators and scholars alike ought to appreciate the functionalist turn for what it is—even if it cuts against pre-existing narratives or challenges certain ideological commitments. Whether it is "right" as a matter of law or "good" as a matter of policy is up

133. *See, e.g.*, Stephen I. Vladeck, *Roberts Has Lost Control of the Supreme Court*, N.Y. TIMES (Apr. 13, 2022), https://www.nytimes.com/2022/04/13/opinion/john-roberts-supreme-court.html [https://perma.cc/E8W7-J4JF].

134. For example, in a recent case dealing with potential Congressional infringement upon the judiciary's Article III prerogatives, Justice Gorsuch broke with Justice Thomas's formalist plurality opinion and joined a decidedly functionalist dissent penned by the Chief Justice. *See* Patchak v. Zinke, 138 S. Ct. 897, 914 (2018) (Roberts, C.J., dissenting).

for debate. In this paper, we have taken on a more modest task: describing the turn on its own terms, developing possible justifications for it, and placing it in the broader sweep of ongoing debates about the separation of powers. What is clear to us is that the functionalist turn exists. It deserves a label and further analysis.

THE MEANING OF "PUBLIC MEANING": AN ORIGINALIST DILEMMA EMBODIED BY *MAHANOY AREA SCHOOL DISTRICT*

FRANCES WILLIAMSON*

INTRODUCTION

In 2021, the Court heard the case *Mahanoy Area School District v. B. L.*, which forced the Court to answer the question of whether public schools could assert control over off-campus student speech.[1] While the majority ruled in the affirmative, Justices Thomas and Alito authored separate opinions that addressed the historical traditions of parental rights, teacher authority, and American public education. Though both Justices have donned the title of "originalists,"[2] their interpretations of the historical legal doctrine of parental delegation—*in loco parentis*—produced drastically

* I would like to thank the faculty members at Harvard Law who gave me wise feedback on this project. I would also like to thank the friends and family who provided useful insight and commentary throughout this process. Thank you to the amazing staff of JLPP for their tireless work.

1. *Mahanoy Area School District v. B. L. by and through Levy*, 141 S. Ct. 2038 (2021)

2. In an interview with The American Spectator, Justice Alito described how he incorporated originalist principles into his judicial approach. Although he always "'start[ed]'" with originalism, he believed that "'[s]ome of [the Constitution's] provisions are broadly worded. . . .We can look at what was understood to be reasonable at the time of the adoption of the [] Amendment. But when you have to apply that to things [] that nobody could have dreamed of then, I think all you have is the principle and you have to use your judgment to apply it. I think I would consider myself a practical originalist.'" Matthew Walther, *Sam Alito: A Civil Man*, THE AMERICAN SPECTATOR (April 21, 2014, 12:00 AM), https://spectator.org/sam-alito-a-civil-man; *see also* Steven G. Calabresi & Todd W. Shaw, *The Jurisprudence of Justice Samuel Alito*, 87 GEO. WASH. L.

different conceptualizations of school authority.[3] The approaches of Justices Thomas and Alito in *Mahanoy* reveal the inability of the originalist school of thought to cohesively define "original public meaning." This failure undermines the legitimacy of originalism as an interpretative tool: if jurists must use normative judgements to determine the level of generality[4] with which to define "public meaning," then can originalism really claim to provide interpretive certainty?

The two theories of public school speech regulation embraced by Justices Thomas and Alito in *Mahanoy* highlight a contextual difficulty in originalist interpretation of the historical record. Justice Alito envisions a limited version of the historical doctrine of *in loco parentis* that highlights the incompatibility between voluntary parental delegation of power and the compulsory education system.[5] Conversely, Justice Thomas relies on a limited historical record and

---

REV. 507, 513 (2019) ("This rejection of the theoretical in favor of the practical is at the center of Alito's jurisprudence."). Justice Thomas employs originalist jurisprudence in many of his opinions, and some scholars have described him as a "leading originalist" Justice. *Rosenkranz Originalism Conference Features Justice Thomas '74*, YALE LAW SCHOOL NEWS (November 4, 2019), https://law.yale.edu/yls-today/news/rosenkranz-originalism-conference-features-justice-thomas-74.

3. This paper will not address *parens patriae*, the Latin doctrine that describes how the government has the authority to protect any citizens who cannot protect themselves. This doctrine is distinct from *in loco parentis* and, according to some scholars, clashes with the concept of delegated authority: "While *in loco parentis* describes the relationship of an individual who has the care and custody of children in the place of the children's parents, the parental role ascribed to *parens patriae* is undertaken by a government to care for those who cannot care for themselves, such as children and the infirm. . . . This situation reveals the inherent clash between the notion that the state can be *in loco parentis* to schoolchildren yet still act as *parens patriae*." Susan Stuart, *In Loco Parentis in the Public Schools: Abused, Confused, and in Need Of Change*, 78 U. CIN. L. REV. 969, 972 (2010).

4. Randy E. Barnett, *William Howard Taft Lecture: Scalia's Infidelity: A Critique of "Faint-Hearted" Originalism*, 75 U. CIN. L. REV. 7, 11 (2006).

5. In 1852, Massachusetts became the first state to pass compulsory education statutes. By 1920, all states adopted some form of legislation requiring children under the age of 14 to attend school. Hayley Glatter, *Throwbacy Thursday: Massachusetts Passes the Nation's First Compulsory Education Law*, BOSTON MAGAZINE (May 17, 2018, 7:30 A.M.), https://www.bostonmagazine.com/education/2018/05/17/tbt-compulsory-education-massachusetts [https://perma.cc/4XVK-C3JM].

produces a stricter interpretation that gives public schools broad authority to punish off-campus speech. [6]

The "types" of originalist interpretations exercised by judges vary, and the opinions of Justices Thomas and Alito in *Mahanoy* showcase these variations. Ultimately, these two opinions highlight a weakness in originalism: the lack of governing principle as to which historical record to adopt and which historical "public meaning" to take into account. Originalism, a school of legal interpretation that prides itself on its objectivity, leaves a critical element ambiguous: failing to define the meaning of "public meaning".

This paper first presents an overview of *in loco parentis*. It begins with the articulation of the doctrine in Blackstone's *Commentaries* and traces the appearance of the doctrine through early American jurisprudence. This history serves as a backdrop for a discussion of the doctrine in modern free speech cases, culminating in an analysis of how Justices Thomas and Alito employed the historical record in their "originalist" defenses of opposite conclusions. The analysis presents a modern example of how two great legal minds, each performing a thorough examination of the historical record and the original meaning of a historical doctrine, reach opposite results. The final section of this paper describes how these disparate results connect to flaws that permeate originalism and expose fractures within the originalist school of thought.

6. Justice Thomas is routinely characterized as a "strong," or "strict" originalist. "Of all the justices on the Court, Thomas is unquestionably the most willing to . . . call on his colleagues to join him in scraping away precedent and getting back to bare wood—to the original general meaning of the Constitution." RALPH A. ROSSUM, *Understanding Clarence Thomas*, 12 (2019) ("As with too many layers of paint on a delicately crafted piece of furniture, precedent based on precedent—focusing on what the Court said the Constitution means in past cases as opposed to what the Constitution actually means—hides the constitutional nuance and detail [Thomas] wants to restore.").

I. HISTORY OF IN LOCO PARENTIS IN ENGLISH AND AMERICAN JURISPRUDENCE

A. English Doctrine

The doctrine of *in loco parentis* originates in William Blackstone's *Commentaries on the Laws of England*, published in 1765.[7] In Book One, Chapter 16 (titled "Of Parent and Child"), Blackstone wrote that:

> A father . . . may also delegate part of his parental authority, during his life, to the tutor or schoolmaster of his child; who is then *in loco parentis*, and has such a portion of the power of the parent committed to his charge, viz. that of restraint and correction, as may be necessary to answer the purposes for which he is employed.[8]

In Blackstone's conceptualization of the parent-child relationship, the father governed his offspring. Although the English law governing this relationship came from the Roman law of father and child, the English law "softened" that of their Roman predecessors; the father no longer maintained the power of life and death over his child, but he still enjoyed enough power to enforce "order and obedience" and punish his child in a "reasonable manner . . . for the benefit of his education."[9] Blackstone further described how the father could voluntarily delegate a portion of his authority to the "tutor or schoolmaster of his child."[10] This delegated authority allowed the tutor to discipline and govern the child as needed for the "purpose[] for which [the tutor was] employed."[11] But how much power did the parent delegate, and how did discipline by the tutor interrelate with discipline by the parent?

---

7. 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND *453.
8. *Id*.
9. *Id*. *452.
10. *Id*. *453.
11. *Id*.

In the 1850s, about one hundred years after Blackstone published his *Commentaries*, the issue of *in loco parentis* emerged in the context of public school authority in England.[12] Some schoolmasters interpreted the gambit of their authority under the historical doctrine to *exceed* that of the parent; they saw their role as "not so much *in loco parentis* as an authority over and above, and distinct from the parents."[13] The power of teachers in the English public school system "might actually encroach upon that of the parents."[14] But this interpretation did not go unquestioned, and the interpretations of these English schoolmasters faced the criticism that they improperly invaded the parental sphere.[15]

Despite criticism, the doctrine of *in loco parentis* carved a space in the cultural identity of English teachers in the eighteenth and nineteenth centuries. The teachers believed that "*in loco parentis* went beyond a mere delegation of rights and responsibilities connected with children" and was "recognised as part of their professional identity, connected with their self-perception as a group concerned with the welfare of children, and instrumentalised as a strategy for retaining effective disciplinary powers."[16] To English and Welsh teachers, the classroom was a space requiring firm, yet fair, discipline; it was an "idealised statement of the circumstances

12. Rob Boddice, *In loco parentis? Public-school authority, cricket and manly character*, 1855–62, 21 GENDER AND EDUCATION 159, 164-65 (2009). The doctrine also applied to the power of universities and institutions of higher education to punish their students: "the parental authority schools exercised under the *in loco parentis* doctrine included the authority to mold the moral character of the student." W. Burlette Carter, *Responding to the Perversion of* In Loco Parentis*: Using a Nonprofit Organization to Support Student-Athletes*, 35 IND. L. REV. 851, 857 (2002) (emphasis added). Carter cited a specific case from the early 1910s, and wrote that "[t]he court noted that the power extended beyond the school grounds 'to all acts of pupils which are detrimental to the good order and best interest of the school, whether committed in school hours, or while the pupil is on his way to or from school, or after he has returned home.'" *Id.* at 858.

13. Boddice, *supra* note 12, at 166 (emphasis added).

14. *Id*.

15. *Id*.

16. Andrew Burchell, In Loco Parentis*, Corporal Punishment and the Moral Economy of Discipline in English Schools, 1945–1986*, 15 CULTURAL AND SOCIAL HISTORY 551, 564 (2018) (emphasis added).

which ought to subsist between the two halves of the classroom dynamic [between the student and the teacher]."[17] Although *in loco parentis* involved language of delegation in Blackstone's original description (1765), by the nineteenth century, educators believed it "existed independently" of parental rights, and "parents could not refuse to delegate their authority."[18] *In loco parentis*, to some, did not rely on a parent's expectations of a teacher's role in his or her child's life.

This brief account of the English tradition of *in loco parentis* in public schools draws two themes into focus: the contentious power of the schoolmaster and the role of parental delegation. These two themes appeared in early American jurisprudence as courts in the United States faced similar questions of school power and parental authority, themes that are resurrected in the opinions of Justices Thomas and Alito in *Mahanoy*.

B. State v. Pendergrass (N.C. 1837)[19]

The first case that named *in loco parentis* as a doctrine applicable to the American education scheme[20] was *State v. Pendergrass*, wherein a schoolteacher was indicted for assault and battery of one of her students, a young girl.[21] At the beginning of the opinion, the Supreme Court of North Carolina conceded that it was "not easy to

17. *Id.* at 557.

18. *Id.* at 555.

19. Neither the majority, Justice Alito, nor Justice Thomas mention this case in their opinions in *Mahanoy*.

20. North Carolina did not institute compulsory education until around 1913. NORTH CAROLINA STATE DEPARTMENT OF PUBLIC INSTRUCTION, THE HISTORY OF EDUCATION IN NORTH CAROLINA 12 (1993) ("In 1913, the first Compulsory Attendance Act was passed which required all children between the ages of 8 and 12 to attend school at least four months per year."). *Pendergrass* was decided against a non-compulsory backdrop.

21. 19 N.C. 365 (1837). A description of the facts follows: "[T]he defendant kept a school for small children . . . . [A]fter mild treatment towards a little girl, of six or seven years of age, had failed, the defendant whipped her with a switch, so as to cause marks upon her body, which disappeared in a few days. Two marks were also proved to have existed, one on the arm, and another on the neck, which were apparently made with a larger instrument, but which also disappeared in a few days." *Pendergrass*, 19 N.C. at 365.

state with precision, the power which the law grants to schoolmasters and teachers, with respect to the correction of their pupils."[22] But the court stated that the power of the school teacher was "analogous to that which belongs to parents, and the authority of the teacher is regarded as a delegation of parental authority."[23] The court elaborated that the teacher stepped into the shoes of the parent when the parent was not present—that is, during the school day—and the teacher exercised "delegated duties" of "preserving discipline, and commanding respect."[24] The teacher was the master, and "[w]ithin the sphere of his authority, the master is the judge [of] when correction is required, and of the degree of correction necessary . . . ."[25] The North Carolina courts believed teachers could determine how best to punish a student and could carry the punishment out to the extent they deemed necessary—as long as they had no malicious intent.

This "wickedness of purpose"[26] was the only real restraint the court referenced in its description of teacher authority. A school teacher could abuse the delegated power or act in an inappropriate manner by acting in a severe and improper way. For example, if the teacher "endanger[ed] life, limbs or health, or . . . disfigure[d] the child, or cause[d] any other permanent injury," his actions "may be pronounced . . . immoderate, as not only being unnecessary for, but inconsistent with, the purpose for which correction is authorized."[27] While permanent, serious injury formed the boundary of a teacher's power, the court stated that a teacher's less excessive harms that did not cause serious injury (described as "indiscretions") were not worthy of legal correction and would "find their check . . . in parental affection, and in public opinion . . . ."[28] If not

22. *Id.*
23. *Id.*
24. *Id.* at 366, 368.
25. *Id.* at 366.
26. *Id.*
27. *Id.*
28. *Id.* at 368.

limited by the guardrails of public opinion, then the teacher's discipline and occasional excessive mistake was to "be tolerated as a part of those imperfections and inconveniences, which no human laws can wholly remove or redress."[29] The courts believed public opinion, not the law, provided the best remedy for the over-zealous punishment of children.

Despite its nod to parental affection and the restraining hand of public opinion, the court asserted an almost unlimited degree of teacher authority in the schoolroom, an authority that seemed to exist because of the initial parental delegation. By choosing to send his or her children to school, the parent placed the child under the substitute control of the teacher. The teacher had the power to act in almost any manner to maintain discipline and order in the classroom. Therefore, any transgression could be punished at the broad discretion of the schoolmaster. The risk of abuses of this power, such as malicious beatings or unfair judgment, were simply "imperfections" in an otherwise valid system of educational authority. Teachers were the parents of the classroom and were imbued with the analogous right to punish and discipline how they saw fit.[30] As long as the teacher did not permanently injure the child, he could, much like a parent, choose when, how, and to what extent he wanted to punish a child in his classroom.

29. *Id.*

30. Neither the majority, Justice Alito, nor Justice Thomas mention this case in their opinions in *Mahanoy*.

C. Lander v. Seaver (Vt. 1859)[31]

Like the *Pendergrass* court, the court in *Lander v. Seaver* granted teachers broad authority to punish children, although the court did limit the power to punish to the school yard itself.[32] About twenty years after *Pendergrass*, the Vermont Supreme Court answered the question whether a schoolmaster has "the right to punish his pupil for acts of misbehavior committed after the school has been dismissed, and the pupil has returned home . . . ."[33] The case concerned a beating a student received from his teacher the day after he verbally insulted the teacher, outside of school, in front of his peers.[34] The child's parents sued the teacher after he berated their son and struck him with a switch.[35] The court decided that "where the offence has a direct and immediate tendency to injure the school and bring the master's authority into contempt," the schoolmaster had the "right to punish the [student] for such acts if he comes again to school."[36] Even though the offense did not occur on school grounds, the teacher could discipline a student if his or her action's threatened the teacher's authority.

Unlike in *Pendergrass*, the *Lander* court addressed the specific issue of actions taken by a student outside of school hours and off school property (that is, not in the schoolhouse or on school grounds).[37] The court suggested that parental control and schoolmaster control work on a spectrum or sliding scale. When a student

---

31. Vermont did not institute compulsory education until around 1870. GEORGE G. BUSH, HISTORY OF EDUCATION IN VERMONT 37 (1900) ("By an act approved November 23, 1870, attendance at school was made compulsory upon all children between the ages of 8 and 14 years."). *Lander v. Seaver* was decided against a non-compulsory backdrop.

32. *Lander v. Seaver*, 32 Vt. 114, 120 (1859).

33. *Id.*

34. *Id.* at 115.

35. *Id.* at 115.

36. *Id.* at 120.

37. *Lander* provides an important point of overlap with modern student speech cases that *Pendergrass* did not address: forms of expression. The court highlights the negative

was at school, the teacher's authority found its maximum and parental authority waned, while the opposite was true when the student returned home. At home, "the parental authority is resumed and the control of the teacher ceases, and then for all ordinary acts of misbehavior the parent alone has the power to punish."[38] The crucial exception, however, came when the student's actions off school grounds targeted the school or the teacher and occurred within the hearing of other students, having the "direct and immediate tendency" to "lessen [the schoolmaster's] hold upon [the students] and his control over the school."[39] The court clarified this concept by writing that the insult to the teacher must be done "with a design to insult him."[40] The intent of the student and the *impact* of the student's speech (that is, whether or not the speech undermined the teacher's authority) formed a significant part of the calculus for determining if a teacher could punish a student's off-campus actions.

The *Lander* court, like the court in *Pendergrass*, distinguished the scope of parental authority from that of schoolmaster authority. While the parent had the natural restraint of tenderness and "intimacy" with his child, the schoolmaster had "no such natural restraint."[41] As a result, a teacher could not "safely be trusted with all a parent's authority, for he did not act from the instinct of parental

---

impact of the student's outside-of-school words, and elaborates that "writings and pictures placed so as to suggest evil and corrupt language, images and thoughts to the youth who must frequent the school" are included in the realm of activity that impairs the "usefulness of the school, the welfare of the scholars and the authority of the master." *Lander*, 32 Vt. at 121.

38. *Id*. at 120.

39. *Id*. The court elaborates that the student's punishable, off-campus offense must bear "upon the welfare of the school, or the authority of the master and the respect due to him," "stir up disorder and insubordination," or "heap odium and disgrace upon the master . . . ." *Id.* at 121.

40. *Id.* at 120. This notion of student intent rears its head in twentieth and twenty-first century cases.

41. *Id.* at 122

affection."[42] Although the court's idea of restraint for the schoolmaster was "judgment and wise discretion,"[43] a very permissive standard, the court saw a fundamental difference between parental and teacher authority. The court asserted that Blackstone's *Commentaries* supported the point of a restrained delegation of authority. Within 100 years of the *Commentaries*' publication, American judges[44] interpreted *in loco parentis* to mean a limited, though still great, delegation of parental authority to the schoolmaster, bounded by judgment and professional wisdom. In this respect, the interpretation espoused by early American judges deviated from the British tradition of *in loco parentis.* From the start, judges did not see *in loco parentis* as a justification for school teachers acting *exactly* like parents. Teachers had to exercise restraint in their exertion of delegated authority, and a schoolmaster was not *per se* the legal or moral equivalent of a parent.

D. Deskins v. Gose (Mo. 1885)[45]

Like in *Lander v. Seaver*, *Deskins v. Gose* involved the punishment of a student by his teacher for foul language used by the student on his way home from school. The teacher**,** the next day,

---

42. *Id.*

43. *Id.* The court meant "restraint" in the context of determining teacher liability for corporal punishment of a student. The court quoted contemporary sources that stated "if the punishment is immoderate, so that the child sustains a material injury, the master is liable in damages." *Id.* at 123. The court also cited a contemporary Massachusetts case where the "defendant asked the Judge to instruct the jury that the schoolmaster is liable only when he acts *malo animo*, from vindictive feelings, or under the violent impulses of passion or malevolence, and that he is not liable for errors of opinion or mistakes of judgment, provided he is governed by an honest purpose of heart, to promote by the discipline employed, the highest welfare of the school and the best interest of the scholar." *Id*.

44. It appears that the American tradition of the doctrine, under this interpretation, deviated from that of the British (described earlier in the paper). However, this deviation represents a possible point of further research, and it could be of import to note if the British system experienced similar interpretations of the doctrine later in the nation's history.

45. *Deskins v. Gose* occurred against a backdrop of compulsory education and a growing public school system. 85 Mo. 485 (1885).

whipped the child with a switch, and the child's parents sued.[46] The court held that the "rule of the teacher against profane swearing and fighting by pupils, either at school or on their way home, was reasonable and proper."[47] Since the teacher stood *in loco parentis* "[w]hile pupils [were] in his charge," he possessed "the power and authority . . . to inflict corporal punishment upon the refractory."[48] The *Deskins* court recognized the almost unlimited power of the teacher over the student[49] but, as in *Lander v. Seaver*, acknowledged that the teacher's exertion of the power was only reasonable "in proper cases."[50]

Notably, the court's additional descriptions of student behavior point to an important understanding of *in loco parentis* in the nineteenth century. When issuing their holding, the court wrote that, in a previous case:

> this court went to the extent of saying that when the pupil of a *public school* is released and sent back to his home, *neither the teacher nor directors had any authority to follow him to his home and govern his conduct while under the parental eye.* This court also held . . . [that if] a pupil had played truant . . . and was expelled . . . the rule was a reasonable one. Truancy is an act committed out of the school room, but being subversive of the good order and discipline of the school, may subject, as it did the scholar in this case, to suspension or expulsion. If the *effect of acts done out of the school room while the pupils are returning to their homes*, and *before parental control is resumed*, *reach within the school* room, and are *detrimental to good order* and the best interests of the school, no

46. *Id.* at 486–87.

47. *Id.* at 485.

48. *Id.*

49. The New Hampshire Supreme Court relied on a similar assumption in *Heritage v. Dodge*, 9 A. 722 (N.H. 1887), heard two years after *Deskins*. The court quoted Blackstone's *Commentaries* and wrote that the "the law clothes the teacher, as it does the parent, in whose place he stands, with power to enforce discipline by the imposition of reasonable corporal punishment." *Heritage*, 9 A. at 723. Because the school teacher showed reasonable judgment in doling out corporal punishment, he was not held personally liable. *Id*.

50. *Deskins*, 85 Mo. At 485.

> good reason is perceived why such acts may not be forbidden, and *punishment inflicted on those who commit them*.[51]

In other words, in *Deskins,* the Missouri Supreme Court articulated an overall theory of school authority over conduct committed outside the classroom that allowed the teacher to punish conduct at school and between school and home. The student's conduct *en route* home, however, needed to impact the classroom in a disruptive manner.[52] Once the child reached home, he fell under the exclusive control of his parents.

Deskins presents a different conclusion than that reached by the Vermont Supreme Court in *Lander v. Seaver*, which held that a schoolmaster had the right to punish students for misbehavior after school and once the "pupil has returned home."[53] While both courts acknowledged a teacher's broad authority under *in loco parentis* to inflict corporal punishment on a student whose actions disrupted class, *Deskins* concluded that actions done *in the home* were not punishable by the school. Less than three decades separated the rulings of these two courts, but one barred teacher authority from reaching into the home and the other did not. This subtle yet critical difference suggests that *in loco parentis* may not have had a uniform interpretation throughout the United States. In the nineteenth century, perhaps there was no national consensus among the judiciary at all about whether *in loco parentis* gave teachers the authority to regulate and punish a student's entirely at-home conduct.

II. *IN LOCO PARENTIS* IN MODERN AMERICAN JURISPRUDENCE

Almost a century after *Deskins*, the Supreme Court heard a case about student punishment. However, this case did not involve the right of a teacher to beat a student, but rather concerned the

---

51. *Id.* at 488 (emphasis added).

52. This standard is predictive of the standards the Court adopts in *Tinker, Morse*, and *Mahanoy*: to be punishable by a school, conduct not in the classroom must, at minimum, be disruptive of some sort of educational activity.

53. *Lander v. Seaver*, 32 Vt. 114, 120 (1859).

right of the teacher to punish a student for his or her conduct off-campus. These modern cases were decided against the uncertain backdrop of *Pendergrass*, *Seaver*, and *Deskins*, and the Supreme Court, much like the state courts discussed in the previous section, struggled with how to define the boundaries of teacher-parent authority.

A. Tinker v. Des Moines Independent Community School District (1969)

In one of the most famous free speech cases of the 1960s, the Supreme Court heard the case of three students who were suspended for wearing armbands to protest the United States' continued engagement in the Vietnam War.[54] The Court held that public school students do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate."[55] If a school wants to regulate or punish student speech on campus, the conduct in question must "materially and substantially interfere with the requirements of appropriate discipline in the operation of the school."[56] Because the Tinker children were not causing an actual disruption by wearing their armbands (that is, they were only engaging in symbolic behavior that did not directly interfere with a teacher's control of the classroom), the school failed to meet the burden imposed by the Court's standard.[57] Justice Black, however, dissented from this view in a manner that seemed to foreshadow Justice Thomas's later opinions: Justice Black compared "parental and educational authority and their proper roles in the formation of 'good citizens,'" which sounded "eerily similar to the arguments given in support of the doctrine . . . ."[58] Although neither the major-

54. Tinker v. Des Moines Independent Community School District, 393 U.S. 503, 504 (1969).

55. *Id.* at 506.

56. *Id.* at 509 (quoting *Burnside v. Byars*, 363 F.2d 744, 749 (5th Cir. 1966)).

57. *Tinker*, 393 U.S. at 509.

58. Tyler Stoehr, *Letting the Legislature Decide: Why the Court's Use of In Loco Parentis Ought to Be Praised, Not Condemned*, 2011 BYU L. REV. 1695, 1703 (2011).

ity's opinion nor Justice Black's dissent explicitly named the doctrine *in loco parentis*, "the majority's heated denunciation of the idea that 'school officials possess absolute authority over their students' stands as the polar opposite to Justice Thomas's portrayal of *in loco parentis* . . . ."[59] Despite this apparent reticence to reference *in loco parentis*,[60] the "Tinker Test" formed the core of Supreme Court jurisprudence on public school and teacher regulation of free speech and served as the backdrop for the cases analyzed below.

B. Morse v. Frederick (2007)

Almost forty years after their ruling in *Tinker*, the Supreme Court heard a case that pushed the boundaries of the "Tinker Test." At an off-campus school event, a group of teenage boys unfurled a banner that stated "Bong Hits 4 Jesus," and, when asked to take the sign down, one student refused.[61] The principal suspended the student for ten days on the justification that the student violated a school policy that barred any endorsement of illegal drug use.[62] The student sued the principal for a violation of his First Amendment right to free speech, and the case came before the Supreme Court in 2007.[63]

The Court held that the principal did not violate the student's right to free speech on the grounds that public school students do

59. *Id.* at 1702 (emphasis added).

60. The Court was equally reticent to include *in loco parentis* in its opinion in *Bethel School District v. Fraser*, 478 U.S. 675 (1986), and only mentions the doctrine once by name: "These cases recognize the obvious concern on the part of parents, and school authorities acting *in loco parentis*, to protect children—especially in a captive audience—from exposure to sexually explicit, indecent, or lewd speech." *Id.* at 684 (emphasis added). The Court employs *in loco parentis* in its opinion in *Hazelwood School District v. Kuhlmeier*, 482 U.S. 912 (1987), where the Court asserted that "students' First Amendment rights are recognized, but overruled by . . . [the fact that] schools are responsible not just for educating the children in their case, but also for overseeing their development into citizens of a democratic society." Stoehr, *supra* note 58, at 1707.

61. *Morse v. Frederick*, 551 U.S. 393, 397–98 (2007).

62. *Id.* at 398.

63. *Id.* at 399.

not have the same right to expression as adults.[64] While *Tinker* suggested public school students possessed a right to express their views on political issues without school discipline, the Court distinguished *Morse* on the grounds that a "cryptic"[65] and "pro-drug"[66] message did not fall into the same category as peacefully wearing black armbands; in *Morse*, the banner disrupted the school's compelling interest in discouraging illegal drug use.[67] The fact that the banner was displayed off-campus was insignificant. It was school interests, not geography, that outlined the limits of the school's disciplinary authority.

1. Justice Thomas's Concurrence

Justice Thomas's concurrence provided an alternative justification, one that rested on the historical tradition of public education:

> In my view, the history of public education suggests that the First Amendment,[68] as originally understood, does not protect student speech in public schools . . . .[P]ublic education proliferated in the early [1800s] . . . .If students in public schools were originally understood as having free-speech rights, one would have

64. *Id.* at 404–06.

65. *Id.* at 401.

66. *Id.* at 402.

67. *Id.* at 407.

68. In this opinion, Justice Thomas engaged with the Constitution and the First Amendment and states that both remained silent on the matter of free speech for public school students. *Id.* at 418–19 (Thomas, J., concurring). Since the Court did not ground its reasoning in *Tinker* in direct Constitutional evidence of the right, the right must not exist for students. *See id.* at 410–21. Justice Thomas noted that *Tinker* relied on *Meyer v. Nebraska*, 262 U.S. 390 (1923), to indicate that the Constitutional protection of free speech extended to school students, but *Meyer* occurred in the private school context and relied on the much-criticized *Lochner* opinion. *Morse*, 551 U.S. at 420 n.8 (Thomas, J., concurring). Justice Thomas further stated that "[i]n the name of the First Amendment, *Tinker* . . . undermined the traditional authority of teachers to maintain order in public schools," and argued that the Court interfered with a historical tradition that rightly placed the determination of proper discipline in the hands of local school districts. *Id.* at 421. The Constitution's silence on student speech barred the Court from assigning the right to students; without Constitutional grounding, the Court needlessly trampled on a historical, local tradition.

> expected [nineteenth]-century public schools to have respected those rights and courts to have enforced them. They did not.[69]

Justice Thomas went on to name the legal doctrine of *in loco parentis* as granting schools the court-supported right "to discipline students, to enforce rules, and to maintain order."[70] While conceding that widespread public education did not exist when Blackstone first recorded this notion of schoolmaster authority,[71] Justice Thomas stated that cases like *Pendergrass* were clear examples of "state courts [applying] the *in loco parentis* principle to public schools" accompanied by judicial reluctance "to interfere in the routine business of school administration."[72] In Justice Thomas's view, *Pendergrass* and other similar cases in the mid-1800s supported his assertion that "[c]ourts routinely preserved the rights of teachers to punish speech that the school or teacher thought was contrary to the interests of the school and its educational goals."[73] *In loco parentis* and the historical tradition surrounding the doctrine placed "almost no"[74] limits on school authority over their students, and, at most, "limited the imposition of excessive physical punishment."[75] That is, *in loco parentis* gave schools broad authority to act as parents.

To Justice Thomas, the history of public schooling[76] in the United States, and the Court's practice of generating exceptions to its *Tinker* Test,[77] indicated the Court got it wrong: students in public schools

69. *Id.* at 410–11.

70. *Id.* at 413.

71. *Id.* at 411-12.

72. *Id.* at 413–14 (emphasis added).

73. *Id.* at 414.

74. *Id.* at 419.

75. *Id.* at 416.

76. Justice Thomas describes this history succinctly: "Early public schools gave total control to teachers, who expected obedience and respect from students." *Id.* at 419.

77. Justice Thomas also criticized the Court's holding in *Tinker* and stated that "the better approach" was "to dispense with Tinker altogether." *Id.* at 422. The Court's habit of creating exceptions to the rule established in *Tinker* moved the Court farther from its original decision.

did not have a First Amendment right to free speech. Justice Thomas pushed back on the majority's logic in three main ways:

> (1) Under *in loco parentis*, speech rules and other school rules were treated identically; (2) the *in loco parentis* doctrine imposed almost no limits on the types of rules that a school could set while students were in school; and (3) schools and teachers had tremendous discretion in imposing punishments for violations of those rules.[78]

Further, the arguments that compulsory education changed the delegation of parental authority under *in loco parentis* held little sway with Justice Thomas. To him, parents still made the decision to send their children to public school, and if they did not like the rules, they could change them through civic engagement and legislative action—or by moving.[79] Any action taken by the Court to limit public school authority took control away from these traditional methods of regulation and gave the power, unjustly, to the judiciary.[80]

2. Justice Alito's Concurrence

Justice Alito's concurrence challenged Justice Thomas's central assumption; he sharply rebuked the idea that public schools had almost unlimited authority over their students' speech.[81]. Justice Alito quickly disregarded the doctrine of *in loco parentis* and stated that "[w]hen public school authorities regulate student speech, they act as agents of the State; they do not stand in the shoes of the students' parents."[82] What Justice Thomas called a historical principle Justice Alito labeled "a dangerous fiction"[83]:

---

78. *Id.* at 419 (emphasis added).

79. *Id.* at 420. *Accord* Stoehr *supra* note 58, at 1735–36 (arguing that compulsory education is not involuntary as long as parents have the options to homeschool their children, enroll their children in a private or charter school, or move).

80. *Id.* at 421.

81. *Morse*, 551 U.S. at 424 (Alito, J., concurring).

82. *Id.*

83. *Id.*

> It is even more dangerous to assume that such a delegation of authority somehow strips public school authorities of their status as agents of the State. Most parents, realistically, have no choice but to send their children to a public school and little ability to influence what occurs in the school. It is therefore wrong to treat public school officials, for purposes relevant to the First Amendment, as if they were private, nongovernmental actors standing *in loco parentis*.[84]

Justice Alito embraced the reality of modern schooling: compulsory education laws leave parents with few to no alternatives besides sending their children to public school. It is foolish to try and apply a fiction—that parents have options about where to send their children for school—to support the application of *in loco parentis* today. Public school teachers are not "parental" but "governmental"; teachers are state actors working for state institutions. With this justification, Justice Alito asserted that any modern doctrine outlining the limitation of students' free speech in public school had to come from "special characteristic[s] of the school setting," not from a historical—and inapplicable—doctrine of parental delegation of authority.[85]

C. Mahanoy Area School District v. B. L. (2021)

This disagreement between Justices Thomas and Alito appeared again, and most saliently, in the recent case of *Mahanoy Area School District v. B. L.* In *Mahanoy*, the Supreme Court faced the question of whether a public school could punish a student's off-campus speech.[86] B. L., a disgruntled cheerleader, posted a "snap" on her private Snapchat "story" that contained profane language and expressed her disappointment at failing to make both the varsity softball and varsity cheerleading teams.[87] Several of her approximately

84. *Id.*
85. *Id.*
86. *Mahanoy*, 141 S. Ct. 2038, 2042-3 (2021).
87. *Id.* at 2043.

250 "friends" on the app saw the content, photographed the message, and showed it to the cheerleading coaches.[88] As a result, B. L. was suspended from participation on the junior-varsity cheerleading team.[89] B. L.'s parents sued the school.[90]

The Court held that while schools could regulate speech on campus and at school-controlled events, students still maintained the right to free speech off campus (and on-campus, to a lesser degree).[91] Justice Breyer wrote that the "special characteristics" that allowed schools to limit and punish disruptive student speech did not "always disappear when a school regulate[d] speech that [took] place off campus"[92]; in some limited circumstances, public schools could regulate off-campus speech.[93] Justice Breyer justified the Court's limitation of schools' off-campus speech regulation in three ways: (1) "a school, in relation to off-campus speech, will rarely stand *in loco parentis*," (2) a school would be able to regulate "all the speech a student utters during the full 24-hour day" if allowed to control off-campus speech, and (3) a school "has an interest in protecting a student's unpopular expression, especially when the expression takes place off campus."[94]

For the first time in a majority opinion, the Court referenced *in loco parentis* by name. Justice Breyer discussed the historical doctrine but described it in a geographically-limited fashion: "The doctrine of *in loco parentis* treats school administrators as standing in the place of students' parents under circumstances where the children's actual parents cannot protect, guide, and discipline them. Geographically speaking, off-campus speech will normally fall within the zone of parental, rather than school-related, responsibility."[95] Justice Breyer elaborated that there was "no reason to believe

88. *Id.*
89. *Id.*
90. *Id.*
91. *Id.* at 2047.
92. *Id.* at 2045.
93. *Id.*
94. *Id.* at 2046.
95. *Id.*

B. L.'s parents had delegated to school officials their own control of B. L.'s behavior" at the off-campus convenience store where B. L. posted her profane "snap."[96]

3. Justice Alito's Concurrence

Justice Alito echoed Justice Breyer's opinion of *in loco parentis* in his concurrence. At the beginning of his opinion, Justice Alito wrote that "the doctrine of *in loco parentis* 'rarely' applies to off-premises speech."[97] In a close analysis of Blackstone's description of the doctrine, Justice Alito determined that *in loco parentis* only worked in the context of private education or tutelage; the doctrine primarily served as a "term in a private employment agreement between a father and those with whom he contracted for the provision of educational services for his child, and therefore the scope of the delegation that could be inferred depended on 'the purposes for which [the tutor or schoolmaster was] employed.'"[98] Justice Alito's interpretation of *in loco parentis* took into account the historical context of the *type* of education common in the time of Blackstone and early American jurisprudence: private schools and tutors voluntarily hired by parents, not compulsory education mainly carried out by large public schools. As a result, Justice Alito viewed Blackstone's description of the "delegation" of parental authority as voluntary and controlled by the parent. The tutor had authority when teaching, but the parent *retained* ultimate authority despite the temporary delegation. This model of education, however, no longer exists; "[t]oday, of course, the educational picture is quite different . . . . [It is] compulsory."[99] Parents do not enter into specific educational contracts with public schools, and the State's role in education has necessarily increased.

96. *Id.* at 2047.
97. *Id.* at 2049 (Alito, J., concurring).
98. *Id.* at 2051 (footnote omitted).
99. *Id.*

Unlike Justice Thomas's concurrence in *Morse*, Justice Alito's concurrence in *Mahanoy* undercut the application of *in loco parentis*, as applied in original jurisprudence, to modern American schools:

> If *in loco parentis* is transplanted from Blackstone's England to the [twenty-first] century United States, what it amounts to is simply a doctrine of inferred parental consent to a public school's exercise of a degree of authority that is commensurate with the task that the parents ask the school to perform. Because public school students attend school for only part of the day and continue to live at home, the degree of authority conferred is obviously less than that delegated to the head of a late-[eighteenth] century boarding school…[100]

Justice Alito remained firm in his analysis that the *scope* of the authority parents delegated to public schools today did not match the form of delegation envisioned by Blackstone. While parents delegated the power for schools to "carry out their state-mandated educational mission, as well as the authority to perform any other functions to which parents expressly or implicitly agree," they delegated nothing more; "authority," according to Blackstone, was what the parents *wanted* the educator to possess.[101] In the modern public school context, this relationship correlates weaker authority because students are actually with their parents for half of the day: the school is not housing them or raising them, rather educating them for part of the day.[102] Parents retain ultimate control and only delegate the authority necessary to educate their children and shuttle them to school-sponsored activities.[103]

Therefore, to Justice Alito, the Court needed to ask only one question: "whether parents who enroll their children in a public school can reasonably be understood to have delegated to the school the authority to regulate the speech in question."[104] If B. L.'s

100. *Id.* at 2052.
101. *Id.*
102. *Id.*
103. *Id.*
104. *Id.* at 2054.

parents did not reasonably delegate the power to Mahanoy School District to regulate their daughter's speech at a gas station, then the school cannot punish her. Enrollment in the public school district was not a "complete transfer of parental authority over a student's speech," and B. L.'s parents, had the "primary authority and duty to raise, educate, and form the character of their [daughter]."[105] It is unreasonable to think that B. L.'s parents authorized the school to deprive her of her right to free speech under the First Amendment.

Ultimately, Justice Alito's concurrence presented a view that student free speech existed on a spectrum.[106] On one end, the school comfortably exerted parent-delegated authority during school hours on campus and during extracurricular activities. On the other end, the school lacked almost any delegated authority to regulate "student speech that is not expressly and specifically directed at the school, school administrators, teachers, or fellow students and that addresses matters of public concern, including sensitive subjects like politics, religion, and social relations."[107] Public school regulation of student speech had no absolutes; school authority originated from the expectations and understandings of the students' parents. Therefore, if parents did not expect or want teachers disciplining their children for actions outside the classroom, then the teachers lacked the authority to do so.

4. Justice Thomas's Dissent

Justice Thomas's *Mahanoy* dissent argued the opposite of Justice Alito's concurrence. Justice Thomas stated that "150 years of history" support the suspension of B. L. and the parental authority of the public school.[108] At the highest level of generality, Justice Thomas agreed with the majority. He believed schools operate *in loco parentis* while the student was at school and that their authority

105. *Id.* at 2053.
106. *Id.* at 2054–55.
107. *Id.* at 2055.
108. *Id.* at 2059 (Thomas, J., dissenting).

diminished only slightly off-campus.[109] But he believed the majority omitted an "important detail" about the level of authority a school wielded when it operated as a substitute for the parents or *in loco parentis*.[110]

Justice Thomas's analysis of the history of *in loco parentis* led him to state that "schools historically could discipline students in circumstances like those presented [in *Mahanoy*]."[111] The majority, he asserted, neglected the historical record and did "not attempt to tether its approach to anything stable."[112] Justice Thomas cited *Lander v. Seaver* as one of the cases supporting his historically-based argument, and he opined that many "[c]ases and treatises from that era reveal that public schools retained substantial authority to discipline students."[113] The historical record provided clear evidence of expansive teacher authority when the teacher acted *in loco parentis*.

But Justice Thomas's most significant departure from the logic of the majority and Justice Alito's concurrence was his belief that schools could readily discipline off-campus speech: "although schools had less authority after a student returned home, it was well settled that they still could discipline students for off-campus speech or conduct that had a proximate tendency to harm the school environment."[114] This "proximate cause" language differed from the stricter limitation on school authority that the majority outlined in *Tinker* and reiterated in *Mahanoy*; if a student's after-school conduct *risked* harm to the school environment, the teacher could punish the student. Justice Thomas focused on the historical rule that the *effect* of speech, not the *location* of the speaker, governed a school's ability to regulate the student's expression. The "Lander test" supported this point and served as one example in

109. *Id.*
110. *Id.*
111. *Id.*
112. *Id.*
113. *Id.*
114. *Id.*

the historical tradition of schools controlling speech that could harm the school environment. Justice Thomas stated that the "Lander test focuses on the *effect* of speech, not its location."[115] Because of this historical precedent, Justice Thomas believed the majority erred in determining the public school could not punish B. L. for offensive and profane language directed at the school.[116] Essentially, Justice Thomas's analysis of *in loco parentis* recognized the school's authority to discipline a wide range of off-campus misconduct, unlike previous Court rulings.

III. ANALYSIS OF ORIGINALISM AND IN LOCO PARENTIS IN MAHANOY

Both Justices Thomas and Alito consider themselves originalists, but they applied differing levels of analysis when considering the historical record; Justices Thomas and Alito considered the culture surrounding the original usage of *in loco parentis*, but beyond this baseline commonality, the two approaches were stark opposites. Justice Alito saw *in loco parentis* as verbiage describing the voluntary, contract-like conveyance of parental authority to educators for a limited purpose, but Justice Thomas saw the doctrine as an almost "blank check" for schools to regulate student speech that impacted the school environment.[117] Justice Alito reached a different conclusion because of his use of, in his words, a form of "practical"

115. *Id.* at 2062.

116. Thomas also claims that B. L.'s participation in an extracurricular activity makes the school's ability to control her speech even stronger. *Id.*

117. One of the reasons Justices Thomas and Alito reach different conclusions could be because of different interpretations of the schools as either organs of the state or as substitute parents. This paper will not focus on the specifics of this point because "the Court has vacillated between [the] two conceptions of administrative authority . . .[and] has yet to affirmatively choose one over the other." Stoehr, *supra* note 58, at 1720. Digging into the specifics of this issue in these terms gives less insight into Justices Thomas and Alito's analyses of the historical record and would try to resolve an issue that the Court itself has not resolved. This paper only touches on this state-parental distinction as evidence of the Justices' different interpretive frameworks; I will not attempt to resolve the issue by declaring a "correct" interpretation one way or the other.

originalism[118] that takes into account the underlying principle of a historical doctrine and applies the principle to modern parent-school relationships. Justice Thomas, on the other hand, looked strictly at the original public meaning of the phrase, as interpreted by early American jurists and used in cases from the nineteenth century, and applied that same meaning in a modern context.[119] Jus-

118. This description of Justice Alito's originalism is borrowed from the Yale Law Journal Forum. Neil S. Siegel, *The Distinctive Role of Justice Samuel Alito: From a Politics of Restoration to a Politics of Dissent*, 126 YALE L.J. F. 164 (2016), http://www.yalelawjournal.org/forum/the-distinctive-role-of-justice-samuel-alito [https://perma.cc/W7ZA-4CJS]. Neil Siegel writes: "Unlike Justices Scalia and Thomas, Justice Alito is not to any significant extent an originalist. Although he has described himself as a 'practical originalist' on the ground that he believes 'the Constitution means something and that that meaning doesn't change,' his conduct on the Court suggests that the emphasis should be placed on the qualifier 'practical.' The higher the level of generality of the originalist inquiry, the less actual difference there is between originalism and living constitutionalism. And Justice Alito is fairly described as an originalist only at a high level of abstraction . . . ." *Id.* (footnotes omitted). In an interview with The American Spectator, Justice Alito described how he incorporated originalist principles into his judicial approach. Although he always "'start[ed]'" with originalism, he believed that "[s]ome of [the Constitution's] provisions are broadly worded . . . .We can look at what was understood to be reasonable at the time of the adoption of the . . . Amendment. But when you have to apply that to things . . . that nobody could have dreamed of then, I think all you have is the principle and you have to use your judgment to apply it. I think I would consider myself a practical originalist.'" Matthew Walther, *Sam Alito: A Civil Man*, THE AMERICAN SPECTATOR (Apr. 21, 2014, 12:00 AM), https://spectator.org/sam-alito-a-civil-man/ [https://perma.cc/2GYJ-UY6E]. The author of the article reflected that "[Justice] Alito is not widely recognized as a legal theorist in his own right. He is, in the strictest sense, a practical jurist. Since he has never been a full-time academic . . . , nearly everything he has ever said about the law and its interpretation has been in the courtroom rather than the classroom." *Id.* Justice Alito's opinion in *Mahanoy* seems to follow, to a tee, his self-described formula of a "practical" originalism. He takes into account the original meaning of *in loco parentis* but interprets it as an underlying principle that evolves with parental expectations; the original public meaning is not sacrosanct.

119. At the Rosenkranz Originalism Conference, Justice Thomas stated that "'Words have meaning at the time they are written. When we read something that someone else has written, we give the words and phrases used by that person natural meaning in context…." *Rosenkranz Originalism Conference Features Justice Thomas '74*, YALE LAW SCHOOL NEWS , (Nov. 4, 2019), https://law.yale.edu/yls-today/news/rosenkranz-

tices Thomas and Alito both believed they stayed true to the historical meaning of *in loco parentis*, but their reasoning and final opinions differ. So, which form of originalism is "right," and which is "wrong"?

The stark difference between the two approaches highlights a failure in originalism – the lack of a governing principle about *which* historical record is adopted and *which* historical "public meanings" are taken into account. *In loco parentis*, like many doctrines, derives meaning from both the principles it represents as well as the results it generates when applied to real-life situations. Abstractly, *in loco parentis* represents the relationship between parents and schools and how the delegated authority is balanced between the two spheres of control in a child's life; twenty-first century parents want to discipline children for the non-criminal content they post on their social media accounts, so schools lack the authority to doll out punishment for a tasteless Twitter post. As applied in specific instances in the 1800s, *in loco parentis* was used to justify corporal punishment of students for actions outside the classroom. Just as a child that cursed at a teacher in a field could be beaten the next day in class, should a child that posts a profanity-laden message about a teacher on Facebook face suspension from the principal? *Which of these two different original public meanings applies?*

This section examines these differences in Justices Thomas and Alito's opinions to highlight a deep flaw in originalism: the theory itself provides no justification for *which* approach to take, meaning jurists must look to normative value judgements when deciding *which* public meaning to apply. Justice Alito's "public meaning" focuses on the principle of parental authority as it was understood in

---

originalism-conference-features-justice-thomas-74#:~:text=For%20Justice%20Thomas%2C%20originalism%20is,the%20people%2C%E2%80%9D%20he%20said [https://perma.cc/UPK9-9777]. Thomas also declared that to some, the law seemed "'pliable, and perhaps much too pliable.'" *Id.* Thomas's view of original public meaning cuts against the idea that the law "ebb[s] and flow[s] based on preferences and prevailing popular opinions." *Id.* To Thomas, the public meaning of words at the time of the specific law's enactment gives the words their meaning. That meaning stays constant throughout time.

the nineteenth century and today, while Justice Thomas's "public meaning" focuses on how jurists at the time expected the doctrine to be applied; Justice Alito extracts an underlying principle from the historical record, while Justice Thomas investigates the historical applications of the doctrine. While Justice Alito's opinion fails to consider the specifics of the historical record, Justice Thomas hyper-analyzes a narrow subset of four cases[120] that disregards the understanding of the general public about the role of a parent in disciplining a child. The meaning of "public meaning" remains a glaring fault in originalism. A school of legal interpretation that prides itself on its objectivity leaves this critical element ambiguous.

What is the result of this failure in originalism? Two Justices, each analyzing the historical record, produce diametrically opposed answers to the same problem. This section provides an overview of popular critiques of originalism and connects those critiques with the issue of the different "public meanings" employed by Justices Thomas and Alito in *Mahanoy*.

A. Public Meaning Originalism and Criticisms

The appeal of originalism for many scholars and jurists is its objectivity: the original meaning of the text, not the personal beliefs of the interpreter, governs how the text should be read today. In response to critiques lodged against the first iteration of originalism—original intent originalism[121]—originalists "made a major

120. *Lander v. Seaver*, 32 Vt. 114 (Vt. 1859); *Deskins v. Gose*, 85 Mo. 485 (Mo. 1885); *Burdick v. Babcock*, 31 Iowa 562 (1871); *Dritt v. Snodgrass*, 66 Mo. 286 (1877); *King v. Jefferson City School Bd.*, 71 Mo. 628 (1880). However, Thomas only uses *Dritt* as an example of cases that distinguish *Lander*. Therefore, he only uses *Lander*, *Deskins*, *Burdick*, and *King* as examples from the historical record to support his argument of original public meaning and original public understanding. *See Mahanoy*, 141 S. Ct. at 2059.

121. Original intent originalism focused on the intent of the founders, and other constitutional drafters, at the time the Constitution was written; it did not necessarily take into account general understandings of the public at the time the Constitution was ratified.

conceptual move: they rearticulated originalism as original meaning originalism in place of original intent originalism." This approach "focused on the constitutional text's public meaning when it was adopted, which is grounded in original language conventions."[122] Public meaning originalism worries less about the *intent* of those who authored the Constitution and more about what they believed the words meant when they committed the phrases to paper. Therefore, originalists adhering to this popular approach typically look to "the Constitution's text and structure, contemporary dictionaries, contemporary usage in American public and private life—such as in newspapers, speeches, [] diaries,"[123] drafted legislation, and court cases.[124] These historical tools provide evidence of what the words meant when they were written; the historical record helps jurists divine the original public meaning. Originalism purports to stay true to the founders' intent and hold the branches of government accountable to the people: we must preserve the original words used to craft the Constitution because they formed the delicate balance of our governmental structure. The Constitution had, and has, a specific *meaning* that froze in time, and that meaning (meaning being singular) is the meaning the legal system should employ. Public meaning, therefore, sits at the heart of originalism and forms part of the justification for why originalism is the best interpretative approach.

However, many critics have poked holes in this logic. Despite its characterization as an empirical interpretive school, public meaning originalism requires judges to make normative decisions about

---

122. Lee Strang, *How Big Data Can Increase Originalism's Methodological Rigor: Using Corpus Linguistics to Reveal Original Language Conventions*, 50 UNIV. OF CAL. 1181, 1188 (2017).

123. *Id.* at 1194.

124. Phrased differently, "the publicly available context in which the Constitution's text was drafted and ratified provides additional information about the text's meaning, additional information that enhances its meaning. Contextual enrichment includes, among other things, the publicly available purposes for which the text was adopted, the text's immediate and long-term historical background, and the broader milieu in which the text was adopted." *Id.* at 1196.

whether to focus on original public meaning as embodied in abstract principles or on original public meaning as embodied in practical applications.[125] Ronald Dworkin first articulated one of these critiques, arguing that originalism was based on ambiguous "public meaning" that left many questions of interpretation unresolved.[126] Dworkin's theory implied that "detailed historical research [was] not necessary to establish founding intent" but that "abstract theorizing" could work in its place.[127] To Dworkin, the "Constitution represents the abstract intentions of the Founders, and those abstract intentions are more fundamental than any concrete intentions that they may have had."[128] Therefore, when an "originalist" encounters text, she must ask herself whether she is looking to the original meaning of the *application* the Framers sought to implement or to the original meaning of the *principles* the Framers sought to embody. In other words, she must choose between (1) meaning based on "expected application" and (2) meaning based on "semantic content."[129] Does the Eighth Amendment simply prohibit the use of punishments like draw and quarter (which were considered cruel by the eighteenth century public)? Or does the Eighth Amendment prohibit the use of punishments that would be considered "cruel," as the texts states, by the public at any point in time?[130] "On either the specific or the abstract version of originalism, the putative original meaning of the text has been fixed as of the time of enactment; the dilemma is precisely how to determine which version of meaning is in play."[131] The problem is not what the word "cruel" actually means, but which set of moral

125. These two phrases are borrowed from Adrian Vermeule's book, *Common Good Constitutionalism.* 95 (2022).

126. ADRIAN VERMEULE, COMMON GOOD CONSTITUTIONALISM 95 (2022).

127. Keith E. Whittington, *Dworkin's "Originalism": The Role of Intentions in Constitutional Interpretation*, 62 THE REVIEW OF POLITICS 197, 200 (2000).

128. *Id.* at 203.

129. Vermeule, *supra* note 126, at 95.

130. Barnett, *supra* note 4, at 11*. ("Does the text ban particular punishments of which they were aware, or does it ban all cruel and unusual punishments?").

131. Vermeule, *supra* note 126, at 96.

standards and expectations it carries with it. That question, Dworkin believes, originalism cannot answer on its own.

As an echo to Dworkin's critique, many scholars today point to the host of "originalist" varieties that are employed by jurists. "[S]elf-professed originalists may focus on framers' intent, ratifiers' intent, the dominant understanding of framers and ratifiers combined, or the public meaning of the text."[132] Public meaning may seem straightforward – it is the public's understanding of what the law meant at the time it was written. However, this interpretive tool assumes that the historical public was a monolith – the belief that there is a single public meaning[133] fails to take into account the diversity of opinion within the legal community, let alone general society.[134] "[O]riginalism's commitment to determinate meanings is in fundamental conflict with its quest for public meanings."[135] Did the public at the time of the Eighth Amendment's passage understand the law to apply only to the use of stockades? Or did the public believe the law targeted cruelty itself, not specific punishments? Some scholars claim that the search for public meaning is the

132. Mitchell N. Berman, *Originalism is Bunk*, 84 N.Y.U. L. REV. 1, 5 (2009).

133. James W. Fox, Jr. elaborates on this issue in his article, *Counterpublic Originalism and the Exclusionary Critique*: "The problem is that there will be multiple meanings and understandings lurking in what originalists would see as 'public' meaning. In that case the first step in this originalist two-step can be impossible to fix with precision. The heart of the argument will still be about public meaning in the first step, not about when or how to engage in 'construction.' While this concern is less of an issue with precise text (length of terms and minimum age for offices, for instance), for most clauses that actually need some level of interpretation or construction, the task is much less clear." 67 ALABAMA L. REV. 675, 710 (2016).

134. "The originalist model asserts that a particular meaning, intention, or understanding was both fixed *and* widely shared at the time of adoption. That is why current generations must follow this meaning, intention, or understanding today. For example, original meaning originalism considers legally binding the objective public meaning of the words at the time of adoption, which presumes a wide and durable consensus on meaning. But the honored authority's views or practices may not have been the consensus view or representative of what most other Founders, Framers, ratifiers, or citizens believed. On certain topics there may have been no consensus view. . . ." Jack M. Balkin, *The New Originalism and the Uses of History*, 82 FORDHAM L. REV. 641, 683 (2013).

135. *See* Fox, *supra* note 133, at 689.

"search for a historical impossibility."[136] Originalism itself provides no answer to these questions, and jurists must independently decide which approach yields the best normative result.

The cases leading up to *Mahanoy* offer a prime example of the uncertainty inherent in "original public meaning." The *Lander v. Seaver* (1859) court reached a different conclusion about the meaning of *in loco parentis* than the *Deskins v. Gose* (1885) court. *Lander* held that a schoolmaster had the right to punish students for misbehavior after school and once the "pupil has returned home,"[137] while *Deskins* stated that actions done *in the home* were not punishable by the school. *In loco parentis* did not have a uniform interpretation throughout the United States; in the nineteenth century, there was no "public meaning" about how the doctrine should apply to the balance of parent-teacher authority. Today, a jurist could not simply reference the historical meaning of *in loco parentis* without first distinguishing the contrary opinions asserted by other courts at the time. The result is that the "public meaning" of *in loco parentis* does not seem to have *one* "meaning."

B. Justice Alito's Public Meaning as the Underlying Principle

While Justice Thomas describes the historical record as one of almost unlimited schoolmaster authority in his *Morse* concurrence, Justice Alito declares the use of the record surrounding *in loco parentis* as *baseless*.[138] Justice Alito argues for a limited application of *in*

136. *Id.* at 714.

137. *Lander*, 32 Vt. at 120.

138. "There is no basis for concluding that the original public meaning of the free-speech right protected by the First and Fourteenth Amendments was understood by Congress or the legislatures that ratified those Amendments as permitting a public school to punish a wide swath of off-premises student speech. At the time of the adoption of the First Amendment, public education was virtually unknown, and the Amendment did not apply to the States….[R]esearch has found only one pre-1868 case involving a public school's regulation of a student's off-premises speech [*Lander v. Seaver*]…. This decision is of negligible value for present purposes. It does not appear that any claim was raised under the state constitutional provision protecting freedom

loco parentis because (1) the involuntary nature of compulsory education negates the doctrine's underlying principle, and (2) the traditional role of parents to raise their children is undermined by reading broad schoolmaster authority into the doctrine.[139]

1. Underlying Principle of Voluntary Delegation

Unlike Justice Thomas, Justice Alito argues that the rise of compulsory education in the late-nineteenth and early-twentieth centuries has gutted the doctrine of *in loco parentis*. Once based on the parent's voluntary delegation of power to an educator, the doctrine finds no place in a state-controlled public education system that re-

---

of speech. And even if flinty Vermont parents at the time in question could be understood to have implicitly delegated to the teacher the authority to whip their son for his off-premises speech, the same inference is wholly unrealistic today." *Mahanoy*, 141 S. Ct. at 2053 n.14 (Alito, J., concurring).

139. Justice Alito makes a third point that presents the most straightforward argument against a "transplant" of *in loco parentis*: the fact that the doctrine was formulated and applied in jurisprudence before the incorporation of the Bill of Rights to the states, and *long* before the government saw the right to free speech extend to students. Justice Alito writes that "the original public meaning of the free-speech right protected by the First and Fourteenth Amendments" was in no way understood by Congress or the ratifying legislatures "as permitting a public school to punish a wide swath of off-premises student speech." *Id*. When Congress ratified the First Amendment, a widespread system of public education did not exist, and the Bill of Rights "did not apply to the States." *Id.* Justice Alito uses the historical context of incorporation under the Fourteenth Amendment to criticize the application of *in loco parentis* to modern schools. Critics of Justice Thomas's dissent echo Justice Alito's argument. One argues that the relevance of *in loco parentis* "to First Amendment claims that were neither considered nor litigated [at the time] seems tangential at best….[I]n an area of the law in which First Amendment claims were inconceivable in the nineteenth century for all the reasons discussed above, the status quo offers no normative guidance….[T]he cases Justice Thomas cites in which nineteenth-century courts upheld various school disciplinary practices, 'neither the First Amendment nor any state constitutional free speech argument was even raised, and many of them did not involve censorship at all.'" Matthew D. Bunker and Clay Calvert, *Contrasting Concurrences of Clarence Thomas: Deploying Originalism and Paternalism in Commercial and Student Speech Cases*, 26 GA. ST. U.L. REV. 321, 345 (2010) (internal citation omitted). Since the doctrine was not historically applied in the First Amendment context, it should not apply to questions of student free speech.

quires students to attend some form of school. If the *principle* underlying the doctrine was one of parental authority, then it cannot map on to today's compulsory school system. Justice Alito states that if the doctrine was "transplanted" into the modern American public school, it simply amounts to "a doctrine of inferred parental consent to a public school's exercise of a degree of authority that is commensurate with the task that the parents ask the school to perform."[140] This statement marks a serious point of departure from Justice Thomas's vision of the doctrine.

As previously mentioned, Justice Alito hangs the relevance of *in loco parentis* on the notion of proportionality between parental expectations and school authority, an interpretation that he believes adheres to the historical public's understanding of what *in loco parentis* meant. In his view, a school can only do what a parent would expect the school to do as the educator of his or her child.[141] Justice Alito's approach seems to align with the idea that "the doctrine is now anachronistic in an era of involuntary delegation occasioned by compulsory attendance laws and of large public schools with responsibilities that often go beyond educational function."[142] Again, we see the expectations of the "educational functions" come into play – a school only has the authority to punish or control a child in their role as an educational institution that houses children

140. *Mahanoy*, 141 S. Ct. at 2052 (Alito, J., concurring).

141. Tyler Stoehr's article digs deeper into the notion of voluntary delegation and comes to the opposite conclusion of Justice Alito; the actual acts taken under the delegation of parental authority do not have to align with the specifics of parental expectations, only the initial delegation of power. Stoehr writes that "while the grantor *expects* conformity [with her expectations], she does not *require* it as a precondition of the grant of that authority. Rather, the grantor probably realizes that the grantee [the school] will still be allowed to exercise independent judgment, particularly in high-pressure or emergency situations, and while the grantor *may* have acted differently in these situations, as long as the grantee did his or her best to conform to what he or she believed was proper under the circumstances, the grantor cannot reasonably claim that the grantee did not possess the authority to act." Stoehr, *supra* note 58, at 1734. In other words, even if the parent who delegated the authority to the school would not, on their own, "have suppressed the speech in question, it does not follow that the administrator could not do so *under the authority that was originally delegated*." *Id.*

142. Stuart, *supra* note 3, at 971.

for only a portion of the day. Unlike Justice Thomas, Justice Alito believes the historical trappings of private tutors and boarding schools are inapplicable, and only the bare bones of *in loco parentis* remain.

This emphasis on the voluntariness of parental delegation suggests that Justice Alito sees the doctrine as based on the principle of parental authority and autonomy – as the views of parents evolve through time, so will the scope of the delegated authority. Unlike Justice Thomas, he believes the limits of school power are not frozen in time but fluctuate with parental expectations. This perspective, Justice Alito believes, is what the "public" understood *in loco parentis* to mean in the 1800s: parents vesting schools or tutors with authority while retaining ultimate control over their children.

The "original public meaning" of *in loco parentis* was not the school's ability to punish the child for any infraction, rather it was a principle of parental delegation. Justice Alito makes the normative judgment that fidelity to the *principle* underneath *in loco parentis* honors the history of the doctrine in a way that focusing solely on the *application* of the doctrine does not. While the historical record indicates nineteenth-century parents condoned corporal punishment or religious education,[143] schools performed those functions *because they met parental expectations*; the public understood the role of the schools to be limited to that delegation. For example, the use of corporal punishment under *in loco parentis* does not justify corporal punishment today. Instead, schools should only do what parents authorize. Justice Alito chooses to focus on the original public's understanding of *in loco parentis* as a delegatory principle, not as authorization for specific punishments. Since parents expect schools to adhere to state-mandated responsibilities, their voluntary delegation shrinks and the sweeping vision of *in loco parentis*

143. As Matthew Bunker and Clay Calvert write, "[u]nquestionably, *in loco parentis* may have supported the disciplinary practices of nineteenth-century American schools and justified courts of the period in granting considerable discretion to teachers and administrators in matters of discipline." Bunker and Calvert, *supra* note 139, at 345.

fades. Justice Alito's practical originalism produces a limited conception of *in loco parentis* – the opposite of Justice Thomas. Essentially, Justice Alito adopts an *abstract* approach to *in loco parentis* that focuses on ideas of parental control, while Justice Thomas adopts an approach that analyzes *specific* instances of the doctrine in the historical record.

2. Underlying Principle of the Parental Sphere

Justice Alito's second line of argument against the expansive power of *in loco parentis* involves the doctrine's clash with the traditional role of the parent to raise their child, a clash that again traces to public understanding of the *principle* of parental delegation. Justice Alito writes that "[i]n our society, parents, not the State, have the primary authority and duty to raise, educate, and form the character of their children."[144] Morality, religion, and definitions of "right and wrong" all fall under the parent's control.[145] When a school regulates the conduct of a student when the child is no longer on campus or at a school-sponsored event, the school reaches into the parent's sphere of authority. A school's intrusion in these areas is "unwelcome" and occurs when "teachers promulgate norms perceived as not only requisite for classroom cohesion but…as universal norms fostering good community citizens and

144. *Mahanoy*, 141 S. Ct. at 2053 (Alito, J., concurring).

145. The Court has recognized parental authority to determine the education of their children in *Meyer v. Nebraska*, where the Court held "[the language teacher's] right thus to teach and the right of parents to engage him so to instruct their children, we think, are within the liberty of the [Fourteenth] Amendment." 262 U.S. 390, 400 (1923). The Court also acknowledged that a parent had "the natural duty…to give his children education suitable to their station in life." *Id*. In other cases of the same era, the Court saw the parent's responsibility and right to control the moral and religious training of their children. *See Prince v. MA*, 321 U.S. 158, 165 (1944) ("The rights of children to exercise their religion, and of parents to give them religious training and to encourage them in the practice of religious belief, as against preponderant sentiment and assertion of state power voicing it, have had recognition here…"); *Pierce v. Society of Sisters*, 268 U.S. 510, 534 (1925) ("we think it entirely plain that the Act [requiring children to attend secular public school] unreasonably interferes with the liberty of parents and guardians to direct the upbringing and education of children").

character."[146] The farther the school reaches into the student's life, the closer it gets to colliding with the responsibilities, and rights, of the parent.

Justice Alito calls upon the strong historical tradition of parental "authority and duty" in his concurrence to justify the appropriateness of a limited interpretation of *in loco parentis*.[147] Even in the time of Blackstone, the parent's authority was ordained by natural law and seen as supreme. Therefore, the public would understand *in loco parentis* as not interfering with their parental rights. To this day, the "legal treatment of the parent-child relationship remains mired in ancient tradition…." If the Court wants to respect the rights of parents as understood by the nineteenth century public, Justice Alito suggests, *in loco parentis* cannot be excised from the past and thrown into the present; to do so would threaten the rights of parents to raise their children and disregard the public's original understanding of parental control as almost absolute. Unlike the public meaning employed by Justice Thomas, the public meaning Justice Alito chooses focuses on how the public *abstractly* understood the separation between the school and the parent. Justice Alito adopts an abstract original public meaning of *in loco parentis* and makes the normative value judgment that the *principle* of parental authority understood at the time the law was written best embodies the original meaning, not the specific *applications*.

C. Justice Thomas's Public Meaning as Application

Justice Thomas emphasizes the importance of American educational tradition and stresses the authority of the historical record. He starts his opinion by writing that the majority's overall points are correct – school authority waxes and wanes in relation to the student's geographic location (on- or off-campus). But Justice

146. Joan F. Goodman, *Should schools be in loco parentis? Cautionary thoughts*, 16 ETHICS AND EDUCATION 407, 412 (2021).

147. *Mahanoy*, 141 S. Ct. at 2053 (Alito, J., concurring).

Thomas asserts that the majority fails to address what level of authority a school has when it operates *in loco parentis*.[148] He provides an in-depth review of the "150 years of history supporting the [school's authority]."[149] Unlike Justice Alito's concurrence, Justice Thomas sees the historical record as applicable as it stands: the original meaning of *in loco parentis* does not "evolve" as parental expectations change, but has a set meaning that originated at its articulation by Blackstone and remained constant in its application by nineteenth-century jurists. Justice Thomas adopts an original public meaning of *in loco parentis* that uses the specific *applications* of the doctrine as evidence of its meaning; he makes the normative value judgment that these *applications* embody the original meaning, not the abstract *principle* of parental authority.

1. Adherence to Historic Applications

Justice Thomas anchors his original meaning interpretation to early American jurisprudence and educational treatises published in the eighteenth and nineteenth centuries, specifically *Lander v. Seaver* and *Deskins v. Gose*.[150] He references his concurrence in *Morse* when describing the zenith of school authority—while the student was at school—and references *Lander v. Seaver* to support his assertion that "authority also extended to when students were traveling to or from school." Justice Thomas's version of originalism deferred to what ordinary citizens at the time of the passage of the 14th

148. One of Justice Thomas's critics acknowledges that Blackstone's articulation of *in loco parentis* undeniably gives schools and teachers broad authority: "So did Blackstone really mean, when he described the common law responsibilities of the teacher as *in loco parentis*, that teachers would have nearly unbridled discretion in the charge of children? His language suggests he did…[We] find no outermost limits to the relationship of the teacher to the child than we do about the relationship of the parent to the child, at least from this minimal fraction of Blackstone's work that has been quoted time and again as the foundation for court decisions about student-school relationships." Stuart, *supra* note 3, 987 (emphasis added).

149. *Mahanoy*, 141 S. Ct. at 2059 (Thomas, J., dissenting).

150. In addition to *Lander* and *Gose*, Justice Thomas also incorporates T. Stockwell's *The School Manual, Containing the School Laws of Rhode Island*, which described the "well settled" rule of a school's broad authority to punish student conduct at home. *Id.*

Amendment would have understood the doctrine to entail, and Justice Thomas relies on *Lander v. Seaver*'s 1859 holding to support his point. He also references the Missouri Supreme Court's holding in *Deskins v. Gose*, decided less than thirty years after *Lander*. Justice Thomas interprets *Gose* as a direct endorsement of *Lander* and points to the Missouri court's citation of *Lander* as evidence:

> [W]hatsoever has a direct and immediate tendency to injure the school in its important interests, or to subvert the authority of those in charge of it, is properly a subject for regulation and discipline, and this is so *wherever* the acts may be committed.[151]

Justice Thomas does not address the other part of the *Gose* opinion, discussed previously in this paper, which outlined how student actions done *in the home* were not punishable by the school; although *Gose* endorsed *Lander*'s broad holding, it seemed to differ from the Vermont Supreme Court on this point. Justice Thomas's dissent, and Justice Alito's concurrence, do not address these differences. However, Justice Thomas does generally assert that even those cases that include general statements protecting the parent's control of the home attach this protection to child conduct that does not impact the school environment: "these courts made it clear that the rule against regulating off-campus speech applied only when that speech was 'nowise connected with the management or successful operation of the school.'"[152] Justice Thomas dubs this understanding "the Lander Test;" if the student's at-home conduct touched the classroom, the teacher could punish the student.

Justice Thomas also highlights *Gose*'s engagement with truancy as evidence of the wide acceptance that schools could reach into students' lives outside of school. As *Gose* and contemporary cases assert, "'[i]f the effects of acts done out of school-hours reach within the schoolroom during school hours and are detrimental to good order and the best interest of the pupils, it is evident that such acts

151. *Mahanoy*, 141 S. Ct. at 2060 n.* (Thomas, J., dissenting) (citing F. Burke, Law of Public Schools 116, 129 (1880) (citing *Lander*)).

152. *Id.* at 2060 (citing *King v. Jefferson City School Bd.*, 71 Mo. 628, 630 (1880)).

may be forbidden.'"[153] Justice Thomas incorporates an additional case from 1871, *Burdick v. Babcock*,[154] to support his point.[155] In *Burdick*, the Iowa Supreme Court asserted a powerful claim that Justice Thomas's dissent echoes: actions that disrupt a schoolroom *must* be punished, despite their geographic location.[156] The court in *Burdick* wrote that

> So, if, by the exercise of parental authority, the child is made to act in such a manner as to interfere with the progress of his fellow pupils, it is the *duty* of those having charge of the school to remove the evil by dismissing the pupil causing it. The *good of the whole school* cannot be sacrificed *for the advantage of one pupil who has an unreasonable father*.[157]

By referencing this case, Justice Thomas implicitly endorses an expansive view of school authority – the ability to trump an "unreasonable" parent. This endorsement cuts against Justice Alito's point of parental expectation as the backbone of *in loco parentis*. Justice Thomas does not assert that a parent's thoughts or expectations of the school's authority influences the authority a teacher can exert for the benefit of his or her classroom environment. A parent's desires can, and sometimes must, cave to the school's authority *in loco*

---

153. *Id.* (citing *Burdick v. Babcock*, 31 Iowa 562, 565, 567 (1871)).

154. Neither Justice Alito nor the majority mention this case in their opinions in *Mahanoy*.

155. Justice Thomas's dissent does not touch on the part of the *Burdick v. Babcock* opinion that states "Any rule of the school, not subversive of the rights of the children or parents, or in conflict with humanity and the precepts of divine law, which tends to advance the object of the law in establishing public schools, must be considered reasonable and proper." *Burdick*, 31 Iowa at 567.

156. "The child, through no fault of his own or of his parents, may be afflicted with a contagious disease, yet, as the good of other pupils demanded it, he may be for that reason forbidden attendance at the school. [internal citation omitted]. So, if, by the exercise of parental authority, the child is made to act in such a manner as to interfere with the progress of his fellow pupils, it is the duty of those having charge of the school to remove the evil by dismissing the pupil causing it. The good of the whole school cannot be sacrificed for the advantage of one pupil who has an unreasonable father." *Id.* at 569.

157. *Burdick*, 31 Iowa at 569 (emphasis added).

parentis of a broader student body.[158] Justice Thomas, like the historical cases he cites, focuses on the "effect of [student] speech, not its location."

Moreover, Justice Thomas identifies specific cases and applications of *in loco parentis* to form his interpretation of original public meaning. Unlike Justice Alito, who focused on principles, Justice Thomas looks at how judges actually used the doctrine to justify their decisions; he derives public meaning from the use of *in loco parentis* in four court cases: *Lander*, *Deskins*, *Burdick*, and *King*, an 1880 Missouri Supreme Court case. Justice Thomas's public meaning does not focus on abstract ideas of parental control and delegation, but grounds his interpretation in the practical application of the doctrine. To Justice Thomas, the best way to determine the public meaning is to look to instances where the doctrine was given legal authority.

2. Conspicuous Absence of the First and Fourteenth Amendments

Although somewhat tangential, another potential weakness of originalism appears in Justice Thomas's rejection of the argument that the First Amendment applies to public schools; in order to remain ideologically consistent, Justice Thomas rejects a body of constitutional law that recognizes some limited applications of free-speech protections in the public school context.

Justice Thomas's dissent has faced sharp criticism for not adequately addressing the incorporation of the First and Fourteenth Amendments. One critic levelled the complaint that the "evidence for [Justice Thomas's proposition that the First Amendment, as

158. Justice Thomas's point cuts against the argument that parents voluntarily give schools permission to care for their child only, not to punish their children for the protection of other children. A critic of this argument agrees with Justice Thomas's approach: "for any student at school, that students' parents have, by virtue of *in loco parentis* doctrine, given the school the authority to [control] *their child* . . . .it seems irrelevant that student safety is an 'institutional goal'" rather than an individualized decision for each student. Stoehr, *supra* note 58, at 1732 (emphasis added). Once a parent had delegated the authority, the school can use it however they wish.

originally understood, does not protect student speech in public schools], is slim to nonexistent." Justice Thomas noted that there were no public schools during the colonial period, meaning that there would necessarily be a complete absence of evidence from the period of the framing and ratification of the Bill of Rights[159] But critiques, like the one written here, seem to misunderstand Justice Thomas's point. He barely mentions the First and Fourteenth Amendments in his dissent—why?[160]

Unlike Justice Alito, Justice Thomas's argument presumes near-absolute authority for public schools. The original meaning of *in loco parentis* trumps the Court's modern interpretation of school authority in line with other constitutional principles. Justice Thomas's use of originalism, here and in *Morse*, to justify "abolishing an entire body of constitutional law on student-speech rights" reflects "a hallmark of originalism, namely that the 'original meaning of the Constitution may trump judicial doctrine of constitutional law at any time.'"[161] The Court's version of school authority that it began building in *Meyer v. Nebraska* crumbles under the weight of original meaning. As one scholar writes, "[w]hat is important here is that *in loco parentis* has made a deep imprint…it has become a way of referring to a generalized power to make decisions affecting children that might conceivably have something to do with schooling."[162] Unlike Justice Alito's concurrence, Justice Thomas's dissent seems to echo this statement; the authority of the school, and the tradition surrounding its power, exists independent of the Constitution.

159. Bunker and Calvert, *supra* note 139, at 343.

160. Justice Thomas only mentions the First Amendment in a reference to the majority's opinion, and he only references the Fourteenth Amendment to say that it does not apply to schools since they are not government actors. *Mahanoy*, 141 S. Ct. at 2059 (Thomas, J., dissenting).

161. Bunker and Calvert, *supra* note 139, at 327.

162. Bernard James, *Restorative Justice Liability: School Discipline Reform and the Right to Safe Schools* (pt. 2, *In Loco Parentis and the Duty to Protect*), 51 UNIV. OF MEM. L. REV. 577, 582 (2021) (emphasis added).

Towards the end of his dissent, Justice Thomas points out three issues he finds with the majority's opinion[163] and highlights the counterpoints his critics may assert:

> Plausible arguments can be raised in favor of departing from that historical doctrine. When the Fourteenth Amendment was ratified, just three jurisdictions had compulsory-education laws. [internal citation omitted]. One might argue that the delegation logic of *in loco parentis* applies only when delegation is voluntary [internal citation omitted]. The Court, however, did not make that (or any other) argument against this historical doctrine. Instead, the Court simply abandoned the foundational rule without mentioning it.[164]

The historical understanding of *in loco parentis* at the time of its articulation by Blackstone, and throughout the decades following, form the backbone of Justice Thomas's opinion; despite modern Supreme Court jurisprudence to the contrary, he considers the specific applications of the doctrine in four cases from the 1800s. Early jurisprudence and treatises point towards broad school authority based on the effect of student speech, and the First Amendment's protections do not apply.

D. Differences as a Failure of the Originalist Project

Can originalism survive critique when jurists utilizing "public meaning" reach such opposite conclusions? Is this a rare embarrassment to the originalist school of thought, or a chronic problem that decades of development have failed to resolve? Why spend so

---

163. Justice Thomas's first issue is that "the majority gives little apparent significance to B. L.'s decision to participate in an extracurricular activity." *Mahanoy*, 141 S. Ct. at 2062 (Thomas, J., dissenting). The second issue is that "the majority fails to consider whether schools often will have *more* authority, not less, to discipline students who transmit speech through social media." *Id.* The third issue is that "the majority uncritically adopts the assumption that B. L.'s speech, in fact, was off campus," although the "location of her speech is a much trickier question than the majority acknowledges." *Id*. at 2063.

164. *Id.* at 2061-62 (emphasis added) (internal citations omitted).

much time discussing a concept that one Justice only mentions once in his concurrence?[165]

Justice Alito's "public meaning" focuses on the principle of parental authority, while Justice Thomas's "public meaning" focuses on how jurists expected the doctrine to be applied. Justice Alito engages in an un-rigorous analysis of the historical record that does not take into account original understandings of jurists or schoolmasters. In contrast, Justice Thomas bases his version of original public meaning on only *four* cases that span 25 years and three states. Originalism itself provides no justification for *which* approach to take; it remains unclear whether Justice Thomas's or Justice Alito's "public meaning" generates the better, "originalist" result. Both Justices ultimately employed normative value judgements[166] when deciding *which* public meaning to apply. Justice Alito believed focusing on the historic understanding of the underlying principle adapted the doctrine to modern times: that is, parental expectations are the embodiment of *in loco parentis*, despite the evidence of case law, and should be respected by the public school system today. Justice Thomas, however, believed that analyzing the decisions of three state courts allowed him to extract a "public" understanding of the doctrine: that is, the application of *in loco parentis* during the 1800s spells out the exact limits, or *lack* of limits, the doctrine holds today. The "level of generality"[167] jurists should use in their historical analysis lies at the heart of the debate

165. Justice Thomas does not use the phrase "public meaning" in his dissent, while Justice Alito only mentions the phrase once: "There is no basis for concluding that the original public meaning of the free-speech right protected by the First and Fourteenth Amendments was understood by Congress or the legislatures that ratified those Amendments as permitting a public school to punish a wide swath of off-premises student speech. Compare *post*, at 2059 – 2061 (Thomas, J., dissenting)." *Mahanoy*, 141 S. Ct. at 2053 n.14 (Alito, J., concurring).

166. "Any interpretation of original public meaning is a wholly fictitious construct – a construct made possible only because. . . [at the Founding] there was no original understanding or settled means of fixing meaning." Larry Kramer, *Two (More) Problems With Originalism*, 31 HARV. J. OF L. AND PUB. POL. 907, 913 (2008).

167. Barnett, *supra* note 4, at 11*.

over public meaning. The *meaning* of "public meaning" remains a dilemma.

Public meaning sits at the heart of originalism and forms part of the justification for why originalism is the best interpretative approach. The Constitution had, and has, a specific *meaning* that froze in time, and that singular meaning is what the legal system should employ today. Original meaning is the cornerstone of originalism. Therefore, if originalists cannot agree on what the meaning *was*, they cannot agree on what the meaning *is*, and fractures among jurists will inevitably form. Some may view this disagreement within originalism as a strength – it illustrates the historical debates jurists must engage before coming to a conclusion. But to others, it represents a weakness in originalism and serves as yet another example of why the interpretive approach is ill-suited for modern jurisprudence. And, when "originalist" Supreme Court Justices disagree, the flaw is broadcast on the national stage.

CONCLUSION

Courts do not have a uniform voice when describing a school's role as disciplinarians. While some recent cases point towards a "substitute parent" model, others seem to envision the schools as organs of the state. And the multiple opinions issued in *Mahanoy* highlight this lack of certainty on the Court.

Justices Thomas and Alito present two different "originalist" opinions and come to different conclusions. This difference originates in their approach to analyzing the historical record: Justice Alito envisions a limited version of *in loco parentis* that focuses on the historical voluntariness of parental delegation, while Justice Thomas relies on a stricter "original meaning" interpretation that gives public schools broad authority to punish off-campus speech.

These interpretive differences indicate how the originalist judge's determination of the scope of the historical record and the context of historical jurisprudence warrant cautious and deliberate study.

A judge's decision to translate the underlying principle of a historical doctrine or the literal definition of the doctrine into modern jurisprudence is outcome determinative. When attempting to answer the question "what is the original meaning," originalist thinkers must wrestle with the questions of context and extent. A judge must decide how to incorporate historical doctrines, statutes, and public traditions that concern relationships between parties. Does the judge adopt the historical customs surrounding the relationships, or allow the expectations of the relationship to evolve into a modern context? Both approaches are "true" to the historical record and both involve a close study of the original meaning of the legal concept.

These questions strike at the core of the originalist project. *Mahanoy* displays the quintessential struggle of originalist scholars to decide which history they adopt, as well as the extent they let that history inform their understanding of modern jurisprudence. As mentioned earlier, this paper provides no *answers* or *solutions*; it does not attempt to praise Justice Thomas's or Justice Alito's opinion as the "true" originalism, or to criticize one as deviating from originalist principles. Instead, it presents a salient example of how two brilliant minds can perform a detailed examination of the historical record, apply "originalist" principles, and *fundamentally* disagree about the original "public meaning" and its implications for modern jurisprudence.

Hopefully, the lessons and analyses of this paper will encourage originalist scholars to think critically about how they approach these questions of historical interpretation and develop a consistent approach that honors and respects the historical traditions of American jurisprudence. Originalism has its flaws, and until the question of *which* public meaning is answered, it remains exposed to critique.