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PREFACE

Issue 2 is here! Thanks to the hard work of the staff of the *Harvard Journal of Law & Public Policy*, we are very excited to present an issue that captures the true breadth of the *Journal's* scope, ranging from another wonderful in-person symposium to interpretive theory to the first math-inclusive (do not fear!) piece in the *Journal's* recent history.

But before we get into this Issue's offerings, there are two pieces of exciting news. First, *JLPP* continued its strong streak of real-world impact in American law, racking up two citations at the Supreme Court this momentous term. Second, the *JLPP* membership has elected Hayley Isenberg of the Class of 2024 as the Editor-in-Chief for Volume 47. I am so excited to hand off the reins to Hayley who I know will do (and has already done) such great work for the *Journal*. Congratulations, Hayley!

This issue opens with a symposium on administrative law in the states. It includes both pieces based on remarks delivered at the in-person symposium this January and a few more additions from authors who could not make it. In addition to the authors published in this Issue, I would like to thank Judge Thomas B. Griffith for moderating the in-person event. Special 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.

We then present a moving remembrance of Senator Orrin Hatch delivered by Senator Mike Lee. Senator Hatch occupies a special place in the history of this *Journal* having served faithfully as an advisor to the *Journal* for many years. He will be deeply missed.

Following the remembrance, the Issue continues with three articles. First, Professor Cass R. Sunstein writes on whether the phrase "this Constitution" in the judicial oath requires judges to adopt an

originalist interpretive method. Next, William J. Haun explores the role that text, history, and tradition might play in interpreting the Free Exercise Clause. Finally, Professor Lorianne Updike Toler and Robert Capodilupo present an empirical study on whether and what kind of history is an effective constraint on judicial discretion.

The issue closes with an exceptional contribution from former student editor Brett Raffish who explores what he calls “The Necessary and Proper Investigatory Power.”

* * *

Thank you to all the members of the *JLPP* staff who worked on this Issue. Issue 2 presents the added difficulty of having its work concentrated in the middle of the academic year. I am so grateful for your hard work and essential input in the thick of your academic studies.

Mario Fiandeiro
Editor-in-Chief

LEARNING FROM LABORATORIES OF LIBERTY

ADAM J. WHITE*

The states are our laboratories of democracy.¹ But they are also laboratories of administration and laboratories of liberty. We all can learn from the states' experiments.

Scholarship on state administrative law and regulatory reform has flourished in recent years.² So has the work of state courts,

* Co-Executive Director, C. Boyden Gray Center for the Study of the Administrative State, Antonin Scalia Law School; Senior Fellow, American Enterprise Institute. The Gray Center is grateful to the Journal's editors for helping to develop this symposium, and for co-hosting a January 2023 panel discussion, featuring several of the symposium's authors, with the Harvard Federalist Society.

1. *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

2. The C. Boyden Gray Center for the Study of the Administrative State has prioritized scholarly research and debate on state administrative law and regulatory reform, hosting research roundtables to develop and workshop such papers. *See, e.g.*, James Broughel, *The Regulatory Budget In Theory And Practice: Lessons From The U.S. States*, HARV. J.L. & PUB. POL'Y PER CURIAM, Summer 2022, No. 25, at 11, <https://www.harvard-jlpp.com/wp-content/uploads/sites/21/2022/09/Budget-Symposium-vF.pdf> [<https://perma.cc/68VK-9Q6W>]; Aaron Saiger, *Derailing the Deference Lockstep*, 102 B.U. L. REV. 1879 (2022); Benjamin Silver, *Nondelegation in the States*, 75 VAND. L. REV. 1211 (2022); Daniel E. Walters, *Decoding Nondelegation After Gundy: What the Experience in State Courts Tells Us About What to Expect When We're Expecting*, 71 EMORY L.J. 417 (2022); Zachary S. Price, *Faithful Execution in the Fifty States*, 57 GA. L. REV. 651 (2023); Joseph Postell & Randolph J. May, *The Myth of the State Nondelegation Doctrines*, 74 ADMIN. L. REV. 263 (2022); Miriam Seifter, *Counter-majoritarian Legislatures*, 121 COLUM. L. REV. 1733 (2021); Daniel Ortner, *Ending Deference?: Why Some State Supreme Courts Have Chosen to Reject Deference and Others Have Not* (2021), <https://ssrn.com/abstract=3798079> [<https://perma.cc/T5AP-C4U4>]; Brian R. Knight & Trace E. Mitchell, *The Sandbox Paradox: Balancing the Need to Facilitate Innovation with the Risk of Regulatory Privilege*, 72 S.C. L. REV. 445 (2021); Daniel Ortner, *The End of Deference: How Some States Are Leading a (Sometimes Quiet) Revolution Against Administrative Deference Doctrine* (2020), <https://ssrn.com/abstract=3552321> [<https://perma.cc/5URF-Y4QM>].

taking harder looks at administrative law doctrines that too often are cited more reflexively than reflectively.

In Georgia, for example, the supreme court's presiding justice recently recognized that the state's own version of *Chevron* deference, adopted eight years ago, was a misapplication of the state's constitution and of prior precedent: "[O]ur history of deference is messy," he wrote, "our precedent is all over the place," and in an appropriate case the state court "should reconsider the matter."³ If the full court takes this path in a future case, then it will join Wisconsin and several others in reforming or rescinding the doctrine.⁴

Similarly, Kansas's supreme court recently reiterated the importance of legislative specificity and clarity, as embodied by non-delegation and void-for-vagueness doctrines: "The primary problem with a law that fails to 'provide explicit standards' for enforcement . . . is that such laws 'invite arbitrary power,'" the court explained. "That is, these laws 'threaten to transfer legislative power to' police, prosecutors, judges, and juries, which leaves 'them the job of shaping a vague statute's contours through their enforcement decisions.'"⁵

There is a bit of irony in this new era of state experiment. The modern administrative state itself was conceived and defended in terms of experiment—not just at the federal level,⁶ but in the states,

3. *Cazier v. Ga. Power Co.*, No. S22C0513, slip op. at 4 - 5 (Ga. Jan. 27, 2023) (Peterson, P.J., concurring in denial of cert.), <https://www.gasupreme.us/wp-content/uploads/2023/01/s22c0513.pdf> [<https://perma.cc/N69M-S28H>].

4. *See, e.g., Tetra Tech EC, Inc. v. Wisc. Dep't of Rev.*, 914 N.W.2d 21 (Wis. 2018); *see generally* Ortner, *The End of Deference*, *supra* note 2 (collecting examples).

5. *State v. Harris*, 311 Kan. 816, 822 (2020) (quoting *Sessions v. Dimaya*, 138 S. Ct. 1204, 1223, 1228 (2018) (Gorsuch, J., concurring)).

6. *See, e.g.,* President Franklin D. Roosevelt, Address at Oglethorpe University in Atlanta, Georgia (May 22, 1932) ("The country needs and, unless I mistake its temper, the country demands bold, persistent experimentation. It is common sense to take a method and try it: If it fails, admit it frankly and try another. But above all, try something."), <https://www.presidency.ucsb.edu/documents/address-oglethorpe-university-atlanta-georgia> [<https://perma.cc/RS59-Q2HU>].

too.⁷ We should think of the current debates in similar terms: informed by modern administrative experience and by a better understanding of constitutional principles.

States are learning from each other's experiments, most recently in Ohio, where the state supreme court's decision to recalibrate its deference to administrative agencies was informed by other states' decisions.⁸ But federal judges can learn from the states, too. As Judge Sutton recently observed, "state and federal courts may borrow historical, practical, and other useful insights from each other," particularly in "how best to construe generally phrased, sometimes implied, limitations on the powers of each branch."⁹

In short, there is "plenty of opportunity for state-federal dialogue" in administrative law.¹⁰ Too often, that dialogue has been a one-way conversation, from federal courts to the states. We hope that this symposium helps to foster conversation in the other direction. We are grateful to Justices Hagedorn, Hart, Peterson, Stegall, and Wecht for reflecting on their own states' respective experience, and to Judge Sutton for connecting these developments to federal law.

7. *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting). *State ex rel. Wisconsin Inspection Bureau v. Whitman*, State Commissioner of Insurance, 220 N.W. 929, 942 (Wis. 1928) ("Consequently the Legislature may withdraw powers which have been granted, prescribe the procedure through which granted powers are to be exercised, and, if necessary, wipe out the agency entirely.").

8. *TWISM Enterps. L.L.C. v. State Bd. of Registration for Prof. Engineers & Surveyors*, 2022 WL 17981386 (Ohio Dec. 29, 2022).

9. JEFFREY S. SUTTON, *WHO DECIDES?* 184 (2022).

10. *Id.*

ADMINISTRATIVE LAW IN THE STATES: AN INTRODUCTION TO THE SYMPOSIUM

HON. JEFFREY S. SUTTON*

Five States—Colorado, Georgia, Kansas, Pennsylvania, Wisconsin—and five distinct approaches to administrative law, each explained by a distinguished justice from each State’s high court. Perhaps there should be a round-robin tournament to pick the best one. Or perhaps Adam White, the symposium’s able organizer in chief, might judge the justices, declaring a winner after reading each justice’s submission and hearing them present their cases. Or perhaps I—federal judges have trouble resisting the temptation to pick winners—should decide who wins.

But maybe winning is not the right way to think about it. As these timely and thoughtful essays confirm, state courts are all over the map when it comes to their approaches to administrative law and to today’s most pressing issues: the permissible scope of explicit delegations of legislative power and the propriety of implied delegations of interpretive power. Sure, state courts sometimes identify winning insights suitable for export to other States and eventually even to the federal courts. Sure too, state courts may serve as a forum for trial-and-error approaches to new challenges, say the proper approach to administrative law during a pandemic. But as often as not, more often than not in truth, the state courts show variation, perhaps because variation is often due in a country this large and filled with so many different, sometimes competing, demands. If there can be a culture and cuisine of place, there can be an administrative law of place.

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

But who would know? While state administrative law historically has revealed many distinct approaches and insights, much of the attention on the topic for too long has gone to the federal side of things. Our obsession with federal law inclines us to notice changes in administrative law most of all through decisions of the U.S. Supreme Court, the Hubble Telescope for assessing American law. That lens reveals federal decisions cutting back on judicial deference to agency interpretations of law—the *Chevron* doctrine—and warning Congress that the Court may enforce the nondelegation doctrine more rigorously in the future. But that singular focus often misses key innovations in American administrative law where they first occur—in the States—then misses the lessons that the state experiences have to offer.

What was once invariably true about administrative law has become less true. Today’s symposium confirms a promising trend. For decades, state administrative law languished in academic circles.¹ Law review articles and casebooks alike consistently overlooked the busier and more diverse state administrative docket.² But state administrative law in recent decades has received much-needed and much-deserved attention.³ Just in time, too. As scholars, lawyers, and citizens alike grapple with the ever-expanding administrative state, there is much to gather from a careful study of

1. Jeffrey S. Sutton & John L. Rockenbach, *Response: Respect and Deference in American Administrative Law*, 102 B.U. L. REV. 1937, 1938–39 (2022) (describing the dearth of scholarship about state administrative law).

2. *Id.* at 1939 & nn.4–5.

3. See, e.g., Aaron Saiger, *Derailing the Deference Lockstep*, 102 B.U. L. REV. 1879, 1887–89 (2022); Sutton & Rockenbach, *supra* note 1, at 1938–39; JEFFREY S. SUTTON, WHO DECIDES? STATES AS LABORATORIES OF CONSTITUTIONAL EXPERIMENTATION 183–231 (2022); Daniel Ortner, *The End of Deference: How States (and Territories and Tribes) Are Leading a Sometimes Quiet Revolution Against Administrative Deference Doctrines* (CSAS Working Paper No. 21-23, 2021) (unpublished manuscript); Miriam Seifter, *Understanding State Agency Independence*, 117 MICH. L. REV. 1537 (2019); Miriam Seifter, *Further from the People? The Puzzle of State Administration*, 93 N.Y.U. L. REV. 107 (2018); Jason Iuliano & Keith E. Whittington, *The Nondelegation Doctrine: Alive and Well*, 93 NOTRE DAME L. REV. 619 (2017).

the assorted state approaches. And the state approaches vary indeed.

Take Wisconsin. Justice Brian Hagedorn highlights the “drastic changes” in the State’s approach to administrative law in recent years and the multi-branch sources of that change.⁴ In 2018, the Wisconsin Supreme Court “jettisoned” its “longstanding” three-tiered approach—“great weight,” “due weight,” “no weight”⁵—by which the courts assessed agency interpretations of laws.⁶ The majority in *Tetra Tech* divided over whether the Wisconsin Constitution’s separation of powers imperatives required the change or whether the Court, having “giveth” this trio of deference standards, could simply “taketh” them away.⁷ The debate became moot when the legislature endorsed the change soon after the decision. It codified a no-deference approach through an amendment to Wisconsin’s Administrative Procedure Act.⁸

Think about that. Wisconsin fixed a serious separation of powers challenge by calling on all three branches. The judicial branch initially identified the problem. But it could not settle on a way out. The legislature proposed a solution. And the governor signed the presented bill into law. The only government officials not directly included in the solution, as it happens, were in the State’s agencies. Wisconsin may be subject to “political polarization”⁹ but that

4. Brian Hagedorn, *The Administrative State and Separation of Powers in Wisconsin*, 46 HARV. J.L. & PUB. POL’Y 323, 323 (2023).

5. *Id.* at 324–25 (defining the three tiers as: (1) “great weight deference” in which courts deferred to longstanding, reasonable agency interpretations based on specialized experience and technical competence; (2) “due weight deference” in which courts deferred to an agency interpretation based on expertise unless the court found a different interpretation more reasonable; and (3) no deference, when “the question was one of first impression or the agency’s expertise or experience did not give it unique insight”).

6. *Id.* at 325–26 (discussing *Tetra Tech EC, Inc. v. Wis. Dep’t of Rev.*, 914 N.W.2d 21 (Wis. 2018)).

7. *Id.* at 326.

8. *Id.* The Wisconsin legislature, Justice Hagedorn adds, has made other changes to the administrative state outside of deference. *Id.* at 323 (noting the legislature and governor have “enacted a number of modifications to the administrative rules process”).

9. *Id.*

reality has not prevented the State from using cooperation and coordination among the three branches to wrestle with—and identify solutions for—modern problems of government.

What will this new approach mean in the future? Justice Hagedorn predicts that the rejection of deference will have its greatest impact in “cases where longstanding agency interpretations are overturned by courts.”¹⁰ The new approach, he anticipates, will have the “salutary effect” of refocusing disputes on the statutory text, not the reasonableness of an agency’s interpretation or the ineffable ambiguity (or not) of a law.¹¹ Absent legislative change, the default rule will be the court’s interpretation, not an agency’s.

That future became the fore with COVID-19.¹² The pandemic has generated many quarrels between the Badger State’s legislature and governor, frequently refereed by its High Court. Justice Hagedorn describes several cases that grappled with these issues, including debates about the scope of permissible rulemaking power, the governor’s authority to postpone an election, the Wisconsin Department of Health Services’ authority to promulgate a “Safer at Home” order, and the scope of power of a county health officer.¹³ Separation of powers principles undergirded the disputes, and at least two of the contests pressed the Court to decide the case on nondelegation grounds.¹⁴ So far at least, the Court has not used the nondelegation doctrine to deal with the disputes. In his separate writing in the “Safer at Home” case, Justice Hagedorn showed one reason why. Invoking the same separation of powers principles that the majority invoked, he “circumscribe[d]” the issues on

10. *Id.* at 327.

11. *Id.*

12. *Id.* at 328. Justice Hagedorn also identifies one pre-COVID separation of powers case in which the Wisconsin Supreme Court determined that agency rulemaking was a function of delegated legislative power rather than executive power. *Id.* (discussing *Koschkee v. Taylor*, 929 N.W.2d 600 (Wis. 2019)).

13. *Id.* at 329–335 (discussing *Wis. Leg. v. Evers*, No. 2020AP608-OA, unpublished slip op. (Wis. Apr. 6, 2020); *Wis. Leg. v. Palm*, 942 N.W.2d 900 (Wis. 2020); and *Becker v. Dane County*, 977 N.W.2d 390 (Wis. 2022)).

14. *Id.*

appeal by resolving the case on statutory interpretation grounds.¹⁵ Constitutional avoidance principles, fair enough, offer one way to handle these cases. Either way, given Wisconsin's even political divide reflected in a divided government, Justice Hagedorn sees no reason to think such separation of powers battles in the courts will abate soon.¹⁶

In Kansas, administrative law has risen to the top of the docket of its Supreme Court, sometimes in ways similar to Wisconsin, other times in ways of its own. Justice Caleb Stegall notes that Kansans voted on a constitutional amendment in 2022 that would have allowed the legislature to override agency rules and regulations through a majority vote.¹⁷ The amendment failed. But the reality that the people used scarce amendment resources to put the topic on the ballot highlights that separation of powers has become a matter of some salience in the State.¹⁸

With this framing, Justice Stegall traces the evolution of separation of powers in Kansas courts. He explains that a strict application of nondelegation principles¹⁹ eventually gave way to a pragmatic approach.²⁰ As it stands, Kansas courts now apply the nondelegation doctrine loosely—though not without limits—using a four-factor balancing test.²¹ In recent cases, Justice Stegall observes that the justices on the Kansas Supreme Court have indicated a willingness to draw crisper lines between the branches, signaling that change

15. *Id.* at 333.

16. *Id.* at 334–35 (noting also that several justices have expressed an interest in strengthening and expanding Wisconsin's nondelegation doctrine).

17. Caleb Stegall, *Something There is That Doesn't Love a Wall*, 46 HARV. J.L. & PUB. POL'Y 361, 361–62 (2023); *see also* H.R. 5014, 89th Gen. Assemb., Reg. Sess. (Kan. 2022).

18. Stegall, *supra* note 17, at 362 (noting further that Kansas politicians have recently campaigned on curtailing bureaucracy).

19. *See* *State v. Johnson*, 60 P. 1068, 1072 (Kan. 1900).

20. Stegall, *supra* note 17, at 365–67 (noting the Kansas Supreme Court has frequently refused “to strike down governmental combinations of power”).

21. *Id.* at 365–66 & n. 23 (identifying the factors as: (1) the nature of the power being exercised; (2) the degree of control by the legislature over the exercise of the power; (3) the nature of the goal; and (4) the result of blending the powers).

may be in the offing.²² In two recent cases, the Kansas Supreme Court relied on separation of powers principles to cabin the discretion afforded to prosecutors by criminal statutes.²³ That judicial response is not unusual through all corners of American law. Challenges to the imposition of criminal penalties have long been a fruitful source of successful nondelegation and non-deference challenges alike, whether in the state courts or the federal courts.²⁴

As with Wisconsin, Kansas does not follow certain facets of federal administrative law—or, just as accurately, federal law broke from the approach of these and other States. Justice Stegall explains that Kansas courts once applied the “doctrine of operative construction” to agency interpretations of statutes,²⁵ a model with hints of, if not the absoluteness of, *Chevron* deference.²⁶ But in 2009, the Kansas Supreme Court abandoned even that approach in favor of denying any deference to an agency’s statutory interpretation.²⁷ The legislature endorsed the decision through amendments to the Kansas Judicial Review Act.²⁸ Deference to an agency’s interpretation of its own rules and regulations—known as *Seminole Rock* or *Auer* deference at the federal level²⁹—suffered a similar fall in 2016.³⁰ As with its Wisconsin counterpart, the Kansas Supreme Court has fielded controversies related to the governor’s use of emergency powers in response to the COVID-19 pandemic.³¹ And

22. *Id.* at 367–68.

23. *Id.* at 371–72 (discussing *State v. Harris*, 467 P.3d 504 (Kan. 2020) and *State v. Ingham*, 430 P.3d 931 (Kan. 2018)).

24. See SUTTON, *supra* note 3, at 185, 225–28.

25. Stegall, *supra* note 17, at 369.

26. *Chevron U.S.A., Inc. v. Nat. Res. Defense Council, Inc.*, 467 U.S. 837 (1984).

27. Stegall, *supra* note 17, at 369–70 (explaining that some lower courts continued to apply the doctrine of operative construction until the Kansas Supreme Court issued a follow-up opinion in 2013 clarifying that the doctrine had been abandoned).

28. *Id.* at 370 & n. 43 (citing Kan. Stat. Ann. § 77-621(c)(4)).

29. *Auer v. Robbins*, 519 U.S. 452 (1997); *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410 (1945); see also *Kisor v. Wilkie*, 139 S. Ct. 2400 (2019).

30. Stegall, *supra* note 17, at 371.

31. *Id.* at 373–74.

as with Wisconsin, separation of powers considerations have raised “vexing” problems requiring continued, robust judicial focus.³²

While separation of powers and administrative law problems “vex[]” every symposium State, not all of them have diverged from federal approaches in resolving those problems. Georgia continues to defer to agency interpretations of ambiguous statutes and regulations—unlike Wisconsin and Kansas—and did so in some ways before *Chevron*.³³ Justice Nels Peterson writes that statutory deference has a long history in Georgia courts, “but the nature of the deference afforded has been inconsistent.”³⁴ In 2014, the Georgia Supreme Court tried to make clear that Georgia courts apply a form of deference akin to *Chevron* deference.³⁵ But even that clarification has not resolved the confusion, as “it is unclear just how consistently” Georgia courts apply a *Chevron*-like approach.³⁶ Regulatory deference—deference to an agency’s interpretation of its own rules—has a more recent pedigree. But, as Justice Peterson explains, it too is “imported” from federal precedents like *Seminole Rock* and *Auer*.³⁷

Justice Peterson identifies an increasing suspicion of deference in Georgia courts.³⁸ But rather than prompt a wholesale rejection of deference, as in Wisconsin or Kansas, the Georgia courts have taken a different tack: imposing a higher bar for identifying a material ambiguity.³⁹ This approach, as Justice Peterson points out, follows,

32. *Id.* at 374.

33. Nels S.D. Peterson, *Georgia Judicial Deference to Executive Branch Agency Legal Interpretations*, 46 HARV. J.L. & PUB. POL’Y 349, 353 (2023).

34. *Id.*

35. *Id.*; see *Cook v. Glover*, 761 S.E.2d 267, 271 (Ga. 2014).

36. Peterson, *supra* note 33, at 354.

37. *Id.* at 355.

38. *Id.* at 355, 357 (noting that “the current state of the law is increasingly the subject of criticism” and that the Georgia Supreme Court granted certiorari to consider whether to continue deferring to an agency’s interpretation of its regulations but that the court ultimately declined to resolve the question).

39. *Id.* at 349, 355–57.

if not helps to chart, a path that the federal courts also seem to be taking.⁴⁰

That the Georgia courts would defer to agency interpretations of law in a manner reminiscent of the federal courts—something Justice Peterson describes rather than endorses—is surprising given the many features of Georgia’s Constitution that distinguish it from the federal government’s. For one, the Georgia Constitution contains an explicit separation of powers clause, unlike the U.S. Constitution.⁴¹ For another, Georgia has a plural executive. That means it elects several members of the executive branch in addition to the governor. Who in the executive branch receives deference in that setting? And what if, in a dispute about, say, state election law, the Governor, Secretary of State, and Attorney General each has different views about the meaning of an election law? For still another, Georgia’s judges face elections,⁴² taking one of the explanations for *Chevron*—political accountability—off the table. At a minimum, these differences may explain why the Georgia courts have tightened their grasp on ultimate responsibility for interpretations of law by raising the threshold—clear ambiguity—for granting deference.⁴³

Reminiscent of the Georgia experience, Colorado historically has employed “inconsistent formulations” of agency deference as well.⁴⁴ Colorado courts, Justice Melissa Hart explains, have articulated “multiple slightly different deference standards,” sometimes even in the same opinion.⁴⁵ Not until 2021 did the Colorado

40. *Id.* at 359 (noting that the U.S. Supreme Court took a similar approach one month later in *Kisor v. Wilkie*, 139 S. Ct. 2400 (2019)).

41. *Id.* at 349–50; see GA. CONST. art. I, § II, para. III.

42. See GA. CONST. art. I, § VII, para. I.

43. See Peterson, *supra* note 3333, at 350–51 (explaining how Georgia courts interpret constitutional provisions that have existed in multiple iterations of the state constitution).

44. Melissa Hart, *Administrative Deference in Colorado*, 46 HARV. J.L. & PUB. POL’Y 337, 337 (2023).

45. *Id.* at 337–38 (citing *Coffman v. Colo. Common Cause*, 102 P.3d 999, 1005 (Colo. 2004), as one example of this phenomenon).

Supreme Court try to clarify the standard. Unlike Georgia, which embraced a form of *Chevron* deference, the Centennial State “decided to chart its own path rather than to adopt the federal approach.”⁴⁶

In *Nieto v. Clark’s Market, Inc.*,⁴⁷ the Colorado Supreme Court faced competing interpretations of the Colorado Wage Claim Act, with the lower courts adopting one interpretation and the state agency another.⁴⁸ In trying to resolve the tension, the Colorado Supreme Court rejected one federal option, *Brand X*,⁴⁹ a U.S. Supreme Court decision that empowers agencies to abrogate judicial interpretations of ambiguous statutes.⁵⁰ It then rejected *Chevron* itself, declining to adopt a “rigid” deference standard “that would require courts to defer” to reasonable agency interpretations.⁵¹ Instead, Colorado courts now treat agency interpretations as “persuasive evidence,” the value of which depends on several factors.⁵² These factors include: the agency’s expertise, the consistency, thoroughness, and force of the agency’s interpretation, and public feedback.⁵³ Sound familiar? Yes, Colorado, as Justice Hart acknowledges, is “charting the course set by the United States Supreme Court almost 80 years ago in *Skidmore*,”⁵⁴ a path, I might add, set by several state court decisions before that.⁵⁵ Even when a State goes

46. *Id.* at 339.

47. 448 P.3d 1140 (Colo. 2021).

48. Hart, *supra* note 44, at 339–44.

49. Nat’l Cable & Telecomms. Ass’n v. Brand X Internet Servs., 545 U.S. 967 (2005).

50. Hart, *supra* note 44, at 343–44.

51. *Id.* (quoting *Nieto*, 488 P.3d at 1149).

52. *Id.* at 344.

53. *Id.* at 345–47.

54. *Id.* at 347 (discussing *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944)).

55. Before *Skidmore*, many state courts had already reasoned that the long-held consistency and sound reasoning of an agency’s interpretation weighed in favor of affording it deference. *E.g.*, *Cino v. Driscoll*, 34 A.2d 6, 9 (N.J. 1943) (noting that a state agency’s “contemporaneous construction” of a statute “for over a decade is necessarily respected by [the court]”); *Kolb v. Holling*, 32 N.E.2d 811, 815 (N.Y. 1941) (affording “great weight” to the “practical construction” of a statute by a state agency that “has continued in operation over a long period of time”); *Cent. R.R. of N.J. v. Martin*, 175 A.

its own way—in Colorado’s case, rejecting *Chevron* and *Brand X*—it still may adopt other aspects of federal and state administrative law.

Even “margin[al]”⁵⁶ differences between state and federal administrative law—differences in emphasis if not in description—may produce differences in case outcomes. Consider Pennsylvania. Justice David Wecht explains that the State boasts a “comparatively lively” nondelegation docket,⁵⁷ as compared to the staid federal docket.⁵⁸ He discusses two recent decisions in which the Pennsylvania Supreme Court refused to enforce laws on nondelegation grounds. One statute empowered the School Reform Commission, an executive branch body, to suspend parts of the Public School Code or regulations from the Secretary of Education in “distressed” school districts.⁵⁹ In the other, the legislature empowered the American Medical Association, a private body, to modify in its discretion the impairment-rating methodology in the Workers’ Compensation Act.⁶⁰ In both cases, the court relied on the familiar principle (also found in the federal nondelegation doctrine) that the legislature must provide an “intelligible principle” when empowering agency action.⁶¹

637, 641 (N.J. 1934) (noting a state agency’s “sound, fair, and reasonable” interpretation that had been uniformly applied “for nearly half a century” counted as “strong evidence” that the agency’s view of a statute was correct); *Cannon v. Maxwell*, 171 S.E. 624, 625 (N.C. 1933) (explaining that “settled administrative practice as established by the uniform and long-continued interpretation of these statutes” is “not controlling” but “always entitled to due consideration”).

56. David N. Wecht & Lawrence McIntyre, *Nondelegation in Pennsylvania*, 46 HARV. J.L. & PUB. POL’Y 377, 387 (2023).

57. *Id.* at 377.

58. Notably, the U.S. Supreme Court has overturned statutes on nondelegation grounds only twice. *See* *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935); *Panama Ref. Co. v. Ryan*, 293 U.S. 388 (1935).

59. Wecht & McIntyre, *supra* note 56, at 378–82 (discussing *W. Phila. Achievement Charter Elementary Sch. v. Sch. Dist.*, 132 A.3d 957 (Pa. 2016)).

60. *Id.* at 382–86 (discussing *Protz v. Workers’ Comp. Appeal Bd.*, 161 A.3d 827 (Pa. 2017)).

61. *Id.* at 381 (noting that the Pennsylvania Supreme Court cited “many of the same standards that the United States Supreme Court applies in nondelegation cases”).

But, as Justice Wecht explains, Pennsylvania courts have tweaked the federal nondelegation doctrine. He notes “the importance of procedural safeguards” to cabin an agency’s exercise of power in addition to the “intelligible principle.”⁶² While it appears that few, if any, cases have invoked procedural safeguards alone as grounds for overturning a statute on nondelegation grounds, that possibility remains.⁶³ Justice Wecht ultimately rejects the idea that Pennsylvania has “a particularly strict nondelegation doctrine.”⁶⁴ He explains instead that the Pennsylvania statutes at issue in recent nondelegation cases lacked any intelligible principle whatsoever, distinguishing them from the various federal statutes that survived review under a linguistic framework that is similar if subject to different accents.⁶⁵

The symposium States showcase a variety of approaches to deference and the nondelegation doctrine. Some have borrowed from and built on federal approaches, while others have rejected them entirely.

That observation prompts two concluding questions.

The first: Do the experiences of these five States fairly represent the whole? Yes, as several fifty-state surveys confirm. As to deference, scholars have found that the States employ a wide range of approaches, ranging from full deference to a full rejection of deference.⁶⁶ One scholar classified seventeen different approaches to deference across the country.⁶⁷ As with Wisconsin and Kansas (which have rejected deference relatively recently), Colorado (which

62. *Id.*

63. *Id.* at 382 n.29.

64. *Id.* at 386.

65. *Id.* at 386–88.

66. *E.g.*, Michael Pappas, *No Two-Stepping in the Laboratories: State Deference Standards and Their Implications for Improving the Chevron Doctrine*, 39 MCGEORGE L. REV. 977, 984 (2008) (identifying “an array of different announced [deference] standards” that “generally fit into four categories: strong deference, intermediate deference, de novo review with the possibility of deference to agency expertise or experience, and de novo review with deference discouraged”); Ortner, *supra* note 3, at 73.

67. Ortner, *supra* note 3, at 73 (mapping seventeen different state approaches to deference).

recently rejected a deference model and now uses a respect model), and Georgia (which now limits deference through a high bar for ambiguity), the trend in most States points towards less rather than more deference.⁶⁸ Just recently, my State (Ohio) adopted a no-deference approach premised on the Ohio Constitution and on explicit disagreement with the federal *Chevron* model.⁶⁹

As for the nondelegation doctrine, the state courts have adopted several distinct approaches, which one scholar has categorized along a weak-moderate-strong continuum.⁷⁰ Scholars claim that the nondelegation doctrine is “alive and well” in its enforcement in the state courts.⁷¹ In reality, the vast majority of nondelegation challenges occur in state courts and have a much higher success rate (16%) than those in federal court (3%), according to one study.⁷²

The second question: What has caused the States to go their own way? A comparison between the 50 state constitutions on the one side and the federal constitution on the other reveals lots of structural distinctions, many unappreciated by American lawyers and many pertinent to administrative law. Start with the ease of amending state constitutions. Forty-six require a mere majority vote once an amendment reaches the ballot,⁷³ a marked contrast to the federal requirement that three-quarters of the States approve an amendment. The state constitutions as a result have evolved far more than the U.S. Constitution since 1776 and 1789. That evolution has invariably occurred in ways that have made state governments

68. *Id.* at 5 (finding “a large number of states abandoned deference” and “a significant number of states have also moved away from deference in less dramatic respects”).

69. *TWISM Enters., L.L.C. v. State Bd. of Registration for Pro. Eng’rs & Surveyors*, No. 2021-1440, 2022 WL 17981386, at *7–9 (Ohio Dec. 29, 2022).

70. Jim Rossi, *Institutional Design and the Lingering Legacy of Antifederalist Separation of Powers Ideals in the States*, 52 *VAND. L. REV.* 1167, 1191–1200 (1999).

71. Iuliano & Whittington, *supra* note 3, at 620. *But see* Joseph Postell & Randolph J. May, *The Myth of the State Nondelegation Doctrines*, 74 *ADMIN. L. REV.* 263, 267, 303 (2022) (taking the position that “the nondelegation doctrine is impotent even in states where it has been used to invalidate statutes in recent decades” and that past scholarship “mischaracterized” some of the state approaches).

72. Iuliano & Whittington, *supra* note 3, at 636.

73. SUTTON, *supra* note 3, at 343.

increasingly democratic. More officers to vote for in plural positions of the executive branch. More judges to vote for through judicial elections.⁷⁴ And more laws for the people to vote directly for through the initiative and the referendum. Such “hyperdemocracy” alters many of the assumptions that underpin delegation and deference debates at the federal level.⁷⁵ All of these differences help to explain why so many state courts use distinct, or non-existent, deference models and more vigorously enforce the nondelegation doctrine.⁷⁶

On top of that, many state legislatures follow a different rhythm from Congress. They often convene only a few times a year or in alternating years, and their members often work part time with few staff.⁷⁷ Those time and resource constraints might create incentives to delegate more authority to state agencies, such as the Pennsylvania statutes that delegated legislative power (as Justice Wecht put it) without “any standards at all.”⁷⁸

Justice Stegall ends his essay by invoking *Mending Wall*, Robert Frost’s poem about the neighbors who meet at their shared stone wall each spring to build back up what the winter has brought down. Just as it may be true that “Something there is that doesn’t love a wall/That wants it down,” it may be true that “there is something about power that doesn’t love a wall; that wants it down” too, Stegall says.⁷⁹ “It is in the centripetal nature of governmental power,” he adds, “to be restless until it is united in one place.”⁸⁰ It

74. See Sutton & Rockenbach, *supra* note 1, at 1941 (“[R]oughly 90% of state court judges in the country must face the ballot box under a wide range of selection methods: retention elections, partisan elections, or nonpartisan elections.”).

75. *Id.* at 1942–43; see Aaron Saiger, *Chevron and Deference in State Administrative Law*, 83 FORDHAM L. REV. 555, 568 (2014).

76. Saiger, *supra* note 3, at 1886–88 (cataloguing state institutional differences and explaining that “[t]hese factors strongly counseled state courts to resist any temptation to mirror federal deference doctrine”); see also Saiger, *supra* note 75, at 557.

77. See SUTTON, *supra* note 3, at 217–18.

78. Wecht & McIntyre, *supra* note 56, at 387.

79. Stegall, *supra* note 17, at 375 (quoting Robert Frost, *Mending Wall*, in NORTH OF BOSTON 11–13 (1917)).

80. *Id.*

is up to the courts, Stegall concludes, to remain steadfast in preserving those “walls of separation” created by our Founders, to ensure they are “kept in good repair,” to avoid the perils of “consolidated power.”⁸¹ I wholeheartedly second the point.

But just as separation of powers can be “vexing,” the same might be said about the meaning of the poem.⁸² *Mending Wall* may be subject to two interpretations, not just one. Yes, power, like winter, invariably imposes pressure on boundaries, and the courts have a critical role to play in putting the authority-limiting stones back in place. But another theme in the poem reflects ambivalence about what the neighbors do each year. For every reference to the benefits of walls, there is a twin reference to uncertainty about them. Yes, “Good fences make good neighbors,” the neighbor says twice.⁸³ But the author’s rebuttal—“Something there is that doesn’t love a wall”—gets a curtain call too.⁸⁴

System design when it comes to separation of powers—and issues like agency deference and agency delegation — also may not submit to just one winning answer either. The challenge for all courts in fortifying separation of powers walls is to avoid creating new balance of power problems of their own. Should it always be the courts, whether state or federal, that micro-manage these lines? Are courts invariably the answer to the who-decides question? Or is there room for cooperation and respect for distinct forms of institutional expertise? Hence Frost’s question: “Before I built a wall I’d ask to know/What I was walling in or walling out.”⁸⁵

Which is our question too. At least one part of the answer seems clear. To the extent some of today’s quandaries about administrative law do not submit to one winning answer, it would be foolish not to pay attention to all 51 American approaches to administrative law—and to learn from each of them.

81. *Id.*

82. *Id.* at 374.

83. Frost, *supra* note 79.

84. *Id.*

85. *Id.*

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THE ADMINISTRATIVE STATE AND SEPARATION OF POWERS IN WISCONSIN

HON. BRIAN HAGEDORN*

INTRODUCTION

The administrative state in Wisconsin has undergone drastic changes since 2010. Two developments are primarily responsible. First, Governor Scott Walker and the Republican legislature—elected in the Tea Party wave of 2010—enacted a number of modifications to the administrative rules process that have altered the legal landscape.¹ Second, the judiciary has increasingly been asked to step in and address legal issues related to the administrative state, a development due in part to political polarization and the rise of divided state government after the 2018 election.²

This essay focuses first on the significant transformation in judicial doctrines of deference to interpretations of law by Wisconsin agencies. Then, I provide a brief overview of several recent cases addressing the administrative state and the associated

* Justice, Wisconsin Supreme Court.

1. Benjamin Wallace-Wells, *Will the Tea Party Era End Where It Started—In Wisconsin?*, THE NEW YORKER (May 23, 2018), <https://www.newyorker.com/news/news-desk/will-the-tea-party-era-end-where-it-started-in-wisconsin> [<https://perma.cc/2BJB-KVfV>]; David Striffling, *The Quiet Revolution in Wisconsin Administrative Law*, MARQ. U. L. SCH. FACULTY BLOG (Sept. 11, 2017), <https://law.marquette.edu/facultyblog/2017/09/the-quiet-revolution-in-wisconsin-administrative-law/> [<https://perma.cc/94HX-G6WE>]; Kirsten Koschnick, Comment, *Making “Explicit Authority” Explicit: Deciphering Wis. Act 21’s Prescriptions for Agency Rulemaking Authority*, 2019 WIS. L. REV. 993.

2. Jens Handelsman Shugerman, *Hardball vs. Beanball: Identifying Fundamentally Anti-democratic Tactics*, 119 COL. L. REV. ONLINE 85, 117–18 (2019); see, e.g., Lisa M. Lawless, *Top 10 Recent Supreme Court Decisions*, WIS. LAWYER, Dec. 2020, at 18–21, 24–25.

jurisprudential debates on our court. Finally, I conclude with some thoughts on the path ahead.

I. THE END OF AGENCY DEFERENCE

While federal courts continue to grapple with various deference principles, Wisconsin has proceeded on a very different path. Our own administrative procedure act prescribes that “due weight shall be accorded the experience, technical competence, and specialized knowledge of the agency involved, as well as discretionary authority conferred upon it.”³ Over time, and in view of this statute (although not in strict reliance on it), the Wisconsin Supreme Court began to develop a three-tiered approach to reviewing the legal conclusions of state agencies.⁴

At the highest level, where an agency’s specialized expertise and technical competence grounded a longstanding interpretation of the law, courts gave that interpretation “great weight” deference.⁵ This meant courts deferred to an agency’s interpretation as long as it was reasonable, even if the court found another reading more reasonable.⁶

On the other hand, where a legal question was within an agency’s expertise and administrative responsibilities, but was less well-established or grounded in the unique capabilities of that agency, it was given a more modest “due weight” deference.⁷ Under this approach, an agency’s interpretation would govern unless the reviewing court found another interpretation more reasonable.⁸

Finally, if the question was one of first impression or an agency’s expertise or experience did not give it unique insight, courts would

3. WIS. STAT. § 227.57(10) (2019–20).

4. *See* Cnty. of Dane v. Lab. & Indus. Rev. Comm’n, 759 N.W.2d 571, 578 (Wis. 2009).

5. *Id.* at 578.

6. *Id.*

7. *Id.* at 578.

8. *Id.*

give no deference to an agency's reading of the law.⁹ The standard of review was purely *de novo*.¹⁰

Several observations are noteworthy. First, unlike in federal courts, this system of deference did not employ ambiguity as a threshold question.¹¹ Rather, the entire system was predicated on agency expertise with an eye toward uniformity and consistency in the way agencies administered a statutory scheme.¹² Second, this three-tiered scheme was highly malleable.¹³ The degree of statutory expertise could be in the eye of the beholder, which made the rubric less predictable.¹⁴ And in the real world, this line-drawing often had little practical significance.¹⁵ For example, the Wisconsin Supreme Court opined in 2009 that due weight deference and no deference often resulted in the same outcome because the court would engage in a serious construction of the statute under both standards of review—a task it apparently did not do when great weight deference was invoked.¹⁶

In 2017, however, the Wisconsin Supreme Court invited the parties, in a standard case reviewing an agency decision, to address the proper role of deference to state agencies.¹⁷ In a split opinion, the court jettisoned this longstanding three-tiered approach altogether.¹⁸

9. *Id.* at 578.

10. *Id.*

11. Compare *id.* at 578 with *Epic Sys. Corp. v. Lewis*, 138 S.Ct. 1612, 1629–30 (2018).

12. *Harnischfeger Corp. v. Lab. & Indus. Rev. Comm'n*, 539 N.W.2d 98, 102 (Wis. 1995), *abrogated by* *Tetra Tech EC, Inc. v. Wis. Dep't of Revenue*, 914 N.W.2d 21 (Wis. 2018).

13. Patience Drake Roggensack, *Elected to Decide: Is The Decision-Avoidance Doctrine of Great Weight Deference Appropriate in This Court of Last Resort?*, 89 MARQ. L. REV. 541, 548–60 (2006).

14. *Id.* at 556–58.

15. *County of Dane*, 759 N.W.2d at 578.

16. *Id.*

17. *Tetra Tech EC, Inc.*, 914 N.W.2d at 28.

18. *Id.* at 28.

Two justices argued that “only the judiciary may authoritatively interpret and apply the law in cases before our courts.”¹⁹ This, they stated, is a core judicial power that the executive may not invade and “the judiciary may not cede.”²⁰

Three other justices agreed that ending our policy of deference was appropriate.²¹ They expressed alarm, however, with the reach of the two-justice opinion’s broad constitutional declarations.²² Instead, they maintained that since our deference doctrines were simply judicial creations, they could be rescinded in the same manner.²³ What the judiciary giveth, the judiciary can taketh away. There was no need to dive into the unique constitutional role of the judiciary, they argued, lest that analysis extend into and unknowingly upend other areas of law.²⁴ In their view, restraint was the better course.²⁵

Several months following this decision, the legislature amended Wisconsin’s administrative procedure act and codified this no-deference approach.²⁶ The law now states: “Upon review of an agency action or decision, the court shall accord no deference to the agency’s interpretation of law.”²⁷

With all the debate nationally over judicial deference, Wisconsin provides an interesting laboratory both for how a change in deference can happen, and to what long-term effect. Based on my own short-lived experience with this change, its practical effect on the administrative state is unclear. Under the prior scheme, courts often applied due weight or no deference in cases with high stakes

19. *Id.* at 45 (Kelly, J., lead op.).

20. *Id.*

21. *Id.* at 73 (Ziegler, J., concurring); *id.* at 74 (Gableman, J., concurring) (joined by Roggensack, C.J.). The remaining two justices argued in support of the three-tiered scheme. *Id.* at 132 (A. Bradley, J., concurring) (joined by Justice Abrahamson).

22. *Id.* at 67–69 (Ziegler, J., concurring).

23. *Id.* at 67 (Ziegler, J., concurring); *id.* at 74 (Gableman, J., concurring).

24. *Id.* at 67–70 (Ziegler, J., concurring).

25. *Id.* at 67 (Ziegler, J., concurring); *id.* at 74 (Gableman, J., concurring).

26. 2017 Wis. Act 369, § 80.

27. WIS. STAT. § 227.57(11) (2019–20).

and those raising novel questions. Thus, the most acute impact moving forward should be felt in cases where longstanding agency interpretations are overturned by courts. And although not unheard of, these cases are rare. On a positive note, this overdue change has had the salutary effect of centering briefing on the text of the relevant law rather than on how much relevant expertise an agency has or whether a proffered agency interpretation is reasonable. It also may be that the most significant effects will involve how agencies do their jobs, rather than how courts review their work. When agencies know their interpretations of law can be reviewed in court and will be afforded no special treatment, it stands to reason that agencies will be less likely to stretch the law to achieve policy goals. Rather, they have a built-in incentive to get the law right, or least right enough to be held up in court.

II. SIGNIFICANT LITIGATION

In recent years, there has been a significant increase in litigation over the shape and permissible scope of the administrative state, with a particular focus on conflicts between the governor and the legislature. I highlight several cases to illustrate the breadth and diversity of these challenges.

In *Coyne v. Walker*,²⁸ the Wisconsin Supreme Court heard a challenge to statutory changes that gave the governor significant approval authority over the promulgation of administrative rules in state agencies.²⁹ While this may seem superficially unremarkable, it provoked an as-applied constitutional challenge to rules promulgated by the Department of Public Instruction.³⁰ This challenge was unique because that agency is headed by the Superintendent of Public Instruction—a separately elected constitutional officer in

28. 879 N.W.2d 520 (Wis. 2016), *overruled by* *Koschkee v. Taylor*, 929 N.W.2d 600 (Wis. 2019)

29. *Id.* at 524.

30. *Id.*

whom the Wisconsin Constitution vests the “supervision of public instruction.”³¹

While the court was not able to agree on why, four justices held that gubernatorial approval violated the constitution by giving the governor greater supervisory authority than the superintendent.³² Three years later, the issue presented itself again, and the court reversed itself. In *Koschke v. Taylor*,³³ the court concluded that rule-making itself is not an executive function; it is an exercise of delegated legislative power.³⁴ Therefore, enlarged gubernatorial authority does not implicate the executive power of the superintendent to supervise public instruction because it is not executive power at all.³⁵

This attempt to situate rulemaking as squarely and solely a legislative power is a consequential and controversial concept. There is a strong argument that at least some rulemaking might extend into what has traditionally been considered executive branch duties. For example, if the law requires the taxing of cigarettes, an administrative process that gives the legislature continued say over what is or is not a taxable cigarette could arguably be legislative intrusion into the execution of the law. This proposition also could have significant consequences for a revived nondelegation doctrine. If rulemaking is entirely an exercise of delegated legislative power, a prohibition on legislative delegations would seem to render all rulemaking unconstitutional.

In recent years, the COVID-19 pandemic coupled with divided government created a perfect storm for interbranch conflict; I will discuss three cases that arose as a result.

31. WIS. CONST. art. X, § 1 (“The supervision of public instruction shall be vested in a state superintendent and such other officers as the legislature shall direct; and their qualifications, powers, duties and compensation shall be prescribed by law.”).

32. *Coyne*, 879 N.W.2d at 525 (Gableman, J., lead op.) (announcing the mandate of the court).

33. 929 N.W.2d 600 (Wis. 2019)

34. *Id.* at 602–03, 605.

35. *Id.* at 602–03, 611.

The first skirmish occurred in April 2020 during a statewide lockdown.³⁶ On the afternoon of April 6, 2020, the day before the spring nonpartisan election, Governor Evers issued an executive order purporting to unilaterally postpone the election until June.³⁷ This would have affected not only a race for the Wisconsin Supreme Court and the presidential primary, but also races for local school and county boards across the state.³⁸

An hour after the executive order was issued, the Wisconsin Supreme Court received a petition for an original action and a motion for temporary injunction from the legislature.³⁹ That same day, we issued an order granting an injunction against enforcement of the governor's order.⁴⁰ The governor relied on statutory emergency powers and several general provisions of the Wisconsin Constitution relating to the constitution's purpose and the governor's duty to execute the laws.⁴¹ None of these supported the governor's order.⁴² Rather, the governor's order, the court held, was an invasion of "the province of the Legislature by unilaterally suspending and rewriting laws without authority."⁴³ While proceeding with in-person voting presented challenges, the Wisconsin Supreme Court determined the governor simply did not have the authority he asserted.⁴⁴

Just weeks later, another major separation of powers challenge came before the Wisconsin Supreme Court: *Wisconsin Legislature v. Palm*.⁴⁵ The secretary-designee of the Wisconsin Department of Health Services had issued a statewide "Safer at Home" order commanding individuals in Wisconsin to stay at home except for

36. Wis. Leg. v. Evers, No. 2020AP608-OA, slip op. at 1 (Wis. Apr. 6, 2020).

37. *Id.*

38. Wis. Exec. Order No. 74, at 2 (2020).

39. Wis. Leg. v. Evers, No. 2020AP608-OA, slip op. at 4.

40. *Id.*

41. *Id.* at 2.

42. *Id.* at 2–3.

43. *Id.* at 4.

44. *Id.* at 2–3.

45. 942 N.W.2d 900 (Wis. 2020).

certain “essential” activities and services.⁴⁶ Violators risked fines and even imprisonment.⁴⁷

Litigation over the order was not brought by a citizen, church, or other person impacted by the lockdown order, but by the Wisconsin Legislature.⁴⁸ The legislature made two arguments. First, it argued that this order constituted an administrative rule as defined by Section 227.01(13) of the Wisconsin Statutes.⁴⁹ Because the secretary-designee did not follow the proper rule-promulgation procedures, the legislature argued that the court should declare the order invalid.⁵⁰ Second, the legislature contended that even if the “Safer at Home” order was properly issued, it exceeded the authority granted to the secretary-designee under Section 252.02 of the Wisconsin Statutes.⁵¹ The court agreed with the legislature on both points.⁵²

Before reaching the merits, the majority briefly addressed standing.⁵³ It asserted that the legislature’s claims were grounded in the Wisconsin Constitution’s separation of powers, and that this was sufficient to address the merits of the claim.⁵⁴

On the first question, the court concluded the secretary-designee’s order satisfied the definition of an administrative rule—it was “a general order of general application” because it applied statewide to a class of people described generally and because new members could join that class.⁵⁵ The court explicitly incorporated constitutional concerns into its statutory analysis, relying on “the constitutional-doubt principle.”⁵⁶ The majority reasoned that if the

46. *Id.* at 905–06.

47. *Id.* at 906.

48. *Id.* at 905.

49. WIS. STAT. § 227.01(13) (2017–18).

50. *Wis. Leg. v. Palm*, 942 N.W.2d at 905.

51. *Id.*

52. *Id.* at 905.

53. *Id.* at 907–08.

54. *Id.* at 908.

55. *Id.* at 912.

56. *Id.*

secretary-designee had broad and indiscriminate power to control the state's response to communicable diseases, that grant of power would raise serious questions regarding the statute's constitutionality.⁵⁷ The court therefore read the statute narrowly to avoid a construction that would amount to a "sweeping delegation of legislative power."⁵⁸ The majority further emphasized the need for procedural safeguards on the broad assertions of power; it found them in the structure supporting promulgation of administrative rules.⁵⁹ In other words, the rulemaking process, which requires some measure of legislative input and acquiescence, constituted a legislative check on executive power.⁶⁰ Without it, the secretary-designee's power could be used in an arbitrary or oppressive manner.⁶¹

Relatedly, the criminal penalties in the secretary-designee's order troubled the court.⁶² It argued that an agency's directive cannot create a crime absent an agency promulgating a rule.⁶³ The court's reasoning was also animated by constitutional concerns with an unelected agency official unilaterally defining new crimes without notice.

On the second issue, the court determined that, even assuming rulemaking was not required, the secretary-designee exceeded her authority.⁶⁴

Whatever the statutes authorized, this broad control over citizens and businesses was too much.⁶⁵ The court again drew upon the constitution for interpretive guidance and determined these broadly

57. *Id.*

58. *Id.* (quoting *Indus. Union Dep't, AFL-CIO v. Am. Petroleum Inst.*, 448 U.S. 607, 646 (1980) (plurality)).

59. *Id.* at 913.

60. *Id.*

61. *Id.*

62. *Id.*

63. *Id.*

64. *Id.* at 905, 914–15.

65. *Id.* at 916.

worded statutory grants of power should be read narrowly to avoid potential constitutional intrusions.⁶⁶

Two concurrences took the separation of powers argument a step further.⁶⁷ One justice invoked the nondelegation doctrine and said that beyond the statutory claims, the secretary-designee simply does not have the power she asserts because the legislature could not have lawfully given her such broad, undefined powers.⁶⁸ Another justice similarly expressed that “[e]ndowing one person with the sole power to create, execute, and enforce the law contravenes the structural separation of powers established by the people.”⁶⁹

I dissented and brought a different focus to the questions presented.⁷⁰ I explained that no party raised a constitutional argument—even while acknowledging potential concerns “over the constitutional limits on executive power” implicated by the order.⁷¹ Instead, I argued that the court should have stayed focused on the statutory definition of an administrative rule because that was the issue presented.⁷² Conducting an in-depth statutory analysis, I concluded that while the secretary-designee’s directive was a “general order,” it was not one of “general application” and therefore did not meet the definition of a rule.⁷³ On the second issue related to the scope of the order, I concluded the legislature did not have standing.⁷⁴ I explained that this was a challenge to enforcement of the laws, and that “the legislature—as a constitutional body whose interests lie in enacting, not enforcing the laws—lacks standing to

66. *Id.* at 917.

67. *Id.* at 919–30 (R. Bradley, J., concurring); *id.* at 930–41 (Kelly, J., concurring).

68. *Id.* at 930–31 (Kelly, J., concurring).

69. *Id.* at 921 (R. Bradley, J., concurring).

70. *Id.* at 952–53 (Hagedorn, J., dissenting).

71. *Id.* at 952 (Hagedorn, J., dissenting).

72. *Id.* (Hagedorn, J., dissenting).

73. *Id.* at 968 (Hagedorn, J., dissenting).

74. *Id.* at 970 (Hagedorn, J., dissenting).

bring this claim.”⁷⁵ Persons harmed by the orders must be the ones to bring a claim like this.⁷⁶

This case profoundly affected the state and engendered widespread debate that continues today. And for legal purposes, the case presents an interesting example of the separation of powers impacting judicial analysis in different ways: the majority used it to circumscribe permissible interpretations and enforcement of a statute, and I used it to circumscribe what issues we could legitimately reach based on the parties and claims.

The third pandemic-related case, *Becker v. Dane County*,⁷⁷ brought nondelegation principles directly to the fore, but in a unique posture. During the pandemic, the Dane County⁷⁸ local health officer issued a series of orders affecting the citizens and businesses in the county.⁷⁹ Two citizens and a local business filed suit arguing that the local health officer did not have authority to issue an order.⁸⁰ Thus, the challenge was not to the substance of the order, but to the statutory and constitutional authority supporting its issuance.⁸¹ In particular, the plaintiffs argued that the court should revive the nondelegation doctrine in Wisconsin, and that this was the appropriate case to do so.⁸² While the court disagreed on both statutory and constitutional grounds, the opinions provide a case study in a court struggling to determine how to handle novel nondelegation claims.⁸³

As noted, this was not a traditional nondelegation case. It involved claims of sub-delegation from local municipal and county boards to the local health officer.⁸⁴ There was also debate over the

75. *Id.* at 952 (Hagedorn, J., dissenting).

76. *Id.* at 952, 970 (Hagedorn, J., dissenting).

77. 977 N.W.2d 390 (Wis. 2022).

78. Dane County is where Madison, the Capitol, is located.

79. *Becker*, 977 N.W.2d at 394.

80. *Id.* at 395.

81. *Id.* at 393.

82. *Id.* at 395, 401.

83. *Id.* at 404.

84. *Id.* at 394.

nature of the nondelegation claim at issue. Therefore, rather than focus on the specifics of the case, I will instead summarize the approaches taken in the various opinions.

The first approach – taken by three members of the court – explicitly rejected the invitation to modify Wisconsin law and largely applied existing precedent.⁸⁵ Under that precedent, the court examines the legislative grant of authority for an ascertainable purpose, and strives to ensure sufficient procedural and substantive safeguards.⁸⁶ The bar is low, with the rather functional aim of protecting against arbitrary exercises of power.⁸⁷ This means some cases may not require any substantive safeguards if the procedural safeguards are sufficient.⁸⁸ Applying this, these justices focused on the nature of the power exercised here: taking action to prevent and suppress a communicable disease.⁸⁹ They observed that the local health officer’s authority could be constrained in multiple ways – through either more focused judicial challenges to whether the order is reasonable and necessary or local revocation of authority.⁹⁰ Thus, they concluded, the substantive and procedural protections were sufficient to ensure power was not exercised arbitrarily.⁹¹

The second approach – taken by three justices in dissent – argued that we should overrule our cases and embrace a robust and broad view of nondelegation.⁹² It lamented the reliance on procedural safeguards in our cases and urged a renewed focus on substantive limitations.⁹³ In particular, although it focused on local sub-delegations of authority, it reasoned more broadly that “lawmaking means discretionary decisions that bind the public with the force of law,” and a complete and whole enactment must require “no

85. *Id.* at 401–02 (Karofsky, J., lead op.).

86. *Id.* at 401 (Karofsky, J., lead op.).

87. *Id.*

88. *Id.*

89. *Id.* at 402 – 03 (Karofsky, J., lead op.).

90. *Id.* at 403 – 04 (Karofsky, J., lead op.).

91. *Id.* at 404 (Karofsky, J., lead op.).

92. *Id.* at 414 (R. Bradley, J., dissenting).

93. *Id.* at 425, 434 – 35 (R. Bradley, J., dissenting).

further discretionary decisions of a substantive nature to carry its purpose into effect.”⁹⁴ Drawing a broad theoretical foundation, these principles were offered as a guide to nondelegation questions moving forward.

Finally, I concurred and wrote that I was open to reconsidering our approach to nondelegation, but that discarding one-hundred years of precedent for a new construct requires “a careful analysis of the original understanding of the Wisconsin Constitution.”⁹⁵ In my view, the parties did not provide that evidence.⁹⁶ However, based on my own research, I concluded a sufficiently analogous statute enacted immediately after adoption of the Wisconsin Constitution suggested the empowerment of a local health officer likely did not offend the original understanding of the separation of powers.⁹⁷ Taking a more narrow approach, I argued that historical evidence like this may prove a helpful way of navigating difficult nondelegation questions, and that establishing a broad judicial test for nondelegation was not necessary to decide the claim in this case.⁹⁸

CONCLUSION

Wisconsin is a microcosm of America. Its political divide is almost a perfect split.⁹⁹ And over the last four years, that has been reflected in divided government. Political activists and financial interests seem to be in a perpetual state of trench warfare. Each inch, each repository of power, is worth fighting for in the eyes of our battle-hardened activists.

94. *Id.* at 433 (R. Bradley, J., dissenting).

95. *Id.* at 406 (Hagedorn, J., concurring).

96. *Id.* (Hagedorn, J., concurring).

97. *Id.* at 411 (Hagedorn, J., concurring). I further stressed that other contrary evidence may exist and may shift the analysis but was not presented. *Id.*

98. *Id.*

99. Dan Balz, *Wisconsin: The Incubator for America's Tribal Politics*, THE WASHINGTON POST (Oct. 8, 2021, 11:12 AM), <https://www.washingtonpost.com/politics/2021/10/08/wisconsin-polarization-democrats-republicans/> [<https://perma.cc/7PEB-TKM8>].

It is no surprise that this political stasis has led to an increasing series of power struggles not just between competing political factions, but between the political and constitutional institutions supporting each side. Republicans in the legislature have sought to expand the reach of rulemaking, for example, seeing it as a needed check on the policy priorities of the Democratic governor.¹⁰⁰ And the governor has, at times, pursued sweeping executive action either directly or through state agencies while facing off with a legislature whose priorities do not align with his own.¹⁰¹

Future cases will continue to test how aggressive and active the Wisconsin judiciary wants to be in policing these fights. We will have to determine whether originalism will be our guide, or if we will pursue philosophies guided by practical or political concerns to direct our review. If, how, and when nondelegation principles will be brought to bear on the questions of the day remains to be seen. While our court has been a hotbed of high-profile and consequential legal battles, this much I am sure of: it is only the beginning.

100. Brandon Jubelirer, *Risky Precedents: A Brief Overview of the 2018 Wisconsin Lame Duck Laws & the Separation of Powers Doctrine*, MARQ. U. L. SCH. FACULTY BLOG (Mar. 22, 2019), <https://law.marquette.edu/facultyblog/2019/03/risky-precedents-a-brief-overview-of-the-2018-wisconsin-lame-duck-laws-the-separation-of-powers-doctrine/> [https://perma.cc/HS9S-J6S4].

101. *See, e.g., Fabick v. Evers*, 956 N.W.2d 856, 860, 869 (Wis. 2021).

ADMINISTRATIVE DEFERENCE IN COLORADO

HON. MELISSA HART*

Colorado has been described by one scholar as an “intermediate deference” state.¹ That is probably a fair description, though it might also be characterized as a generous one. The reality is that the Colorado Supreme Court has described its position on deference to the state’s administrative agencies in varied and sometimes inconsistent formulations.²

Indeed, even within one single decision, a careful reader can find multiple slightly different deference standards, all with citations to relevant precedent. Perhaps most striking is this paragraph from *Coffman v. Colorado Common Cause*³:

Moreover, we must give particular deference to the reasonable interpretations of the administrative agencies that are authorized to administer and enforce a particular statute. *Tivolino Teller House, Inc. v. Fagan*, 926 P.2d 1208, 1211 (Colo.1996). On review, an agency decision will be sustained unless arbitrary or capricious, section 24-4-106(7), C.R.S. (2004), or unsupported by the evidence or contrary to law, *Regents of the Univ. of Colorado v. Meyer*, 899 P.2d 316, 317 (Colo.App.1995). However, although we find persuasive an administrative interpretation of statute that is

* Associate Justice, Colorado Supreme Court. Many thanks to my law clerk, Angela Boettcher, for her help with this essay.

1. Michael Pappas, No Two-Stepping in the Laboratories: State Deference Standards and Their Implications for Improving the Chevron Doctrine, 39 MCGEORGE L. REV. 977, 1011 (2008).

2. See, e.g., *N. Colo. Med. Ctr. v. Comm. on Anticompetitive Conduct*, 914 P.2d 902 (Colo. 1996); *Huber v. Kenna*, 205 P.3d 1158 (Colo. 2009); *El Paso Cnty. Bd. of Equalization v. Craddock*, 850 P.2d 702 (Colo. 1993); *BP Am. Prod. Co. v. Colo. Dep’t of Revenue*, 369 P.3d 281 (Colo. 2016).

3. 102 P.3d 999 (Colo. 2004).

a reasonable construction consistent with public policy, *Aurora v. Bd. of County Comm'rs*, 919 P.2d 198, 203 (Colo.1996), it is for this court to determine all questions of law, interpret applicable statutes, and apply such interpretations to the facts, *Meyer, supra*. Likewise, even though an agency construction of statute should be given appropriate deference, its interpretation is not binding on this court. *See El Paso County Bd. of Equalization v. Craddock*, 850 P.2d 702, 704 (Colo.1993).⁴

In this one paragraph, first we see the importance of according “particular deference” to the agency tasked with enforcing a statute.⁵ However, what follows is the observation that the court will only “find persuasive an administrative interpretation,” with the understanding that it is ultimately the court’s job to interpret the law.⁶ Finally, the opinion says that an agency’s interpretation is entitled to “appropriate deference” but is “not binding” on courts.⁷ Colorado’s case law on deference to agency interpretation includes all of these approaches.⁸

It was only recently, however, that the Colorado Supreme Court was asked directly to take a position on whether the state aligned its law with federal law on the relationship between courts and administrative agencies. The ask came in a wage claim dispute, *Nieto v. Clark’s Market, Inc.*,⁹ and, as discussed further below, the court declined to adopt federal law on administrative deference.¹⁰ This essay begins by describing the interpretive challenges presented in *Nieto* and the court’s approach to those challenges. It then considers where the law of deference to agencies stands in Colorado, given

4. *Id.* at 1005.

5. *Id.*

6. *Id.*

7. *Id.* *See also* Colo. Min. Ass’n v. Bd. of Cnty. Comm’rs of Summit Cnty., 199 P.3d 718, 731 (2009) (citing *Lobato v. Indus. Claim Appeals Off.*, 105 P.3d 220, 223 (Colo. 2005) for the proposition that “[i]n reviewing the proper construction of a statute de novo, we may accord deference to the agency’s interpretation of its statute, but we are not bound by that interpretation”).

8. *See generally Coffman*, 102 P.3d.

9. 488 P.3d 1140 (Colo. 2021)

10. *Id.*

that the state has decided to chart its own path rather than adopt the federal approach.

I. NIETO V. CLARK'S MARKET

In *Nieto*, the Colorado Supreme Court faced the question of how to interpret the provisions of the Colorado Wage Claim Act¹¹ related to employer-provided vacation pay.¹² The case required the court to reconcile several different provisions of the Wage Act and in particular to determine whether they should be read together to create a separate “vesting” requirement for earned vacation pay.¹³ It also forced the court to confront directly what kind of deference it should accord the interpretation of the statute promulgated by the Colorado Department of Labor and Employment, Division of Labor Standards and Statistics (“CDLE”), the state agency responsible for enforcing the Wage Act.¹⁴

A. *The Colorado Wage Claim Act and Vacation Pay*

The subsection of the Wage Act that directly addresses vacation pay provides that:

“Wages” or “compensation” means:

...

(III) Vacation pay earned in accordance with the terms of any agreement. If an employer provides paid vacation for an employee, the employer shall pay upon separation from employment all vacation pay earned and determinable in accordance with the terms of any agreement between the employer and the employee.¹⁵

This provision standing alone suggests that vacation pay is due when it is “earned” and “determinable.” However, complicating

11. COLO. REV. STAT. § 8-4-101 (2020).

12. *Nieto*, 488 P.3d at 1140.

13. *Id.* at 1141–42.

14. *Id.* at 1148–49.

15. COLO. REV. STAT. § 8-4-101 (2020).

matters, “wages” and “compensation” are also generally defined at section 8-4-101(14)(a)(I), which provides that “[n]o amount is considered to be wages or compensation until such amount is earned, *vested*, and determinable.”¹⁶ And section 8-4-109(1)(a) requires that “wages or compensation for labor or service earned, *vested*, determinable, and unpaid” be paid immediately upon an employee’s discharge.¹⁷ Given these statutory provisions, the court was confronted with the question of whether vacation pay must be “vested” to be payable at the end of an employment relationship and, if so, what “vesting” means in the context of vacation pay.¹⁸

This question carries particular significance because the Wage Act does not itself create substantive rights beyond the right to payment at regular intervals, a prohibition on deductions from wages other than those specified by statute, and the right to payment of earned but unpaid wages and compensation upon separation from employment.¹⁹ However, the Wage Act does “nullif[y] any effort to circumvent its requirements by contract, providing that ‘any agreement . . . by any employee purporting to waive or modify such employee’s rights in violation of this article shall be void.’”²⁰ Thus, as described further below, whether an employer and employee can agree to a vesting requirement that impacts whether vacation pay is actually earned at separation is an important question on which the statute is not a model of clarity.

B. *Carmen Nieto’s Claims*

The question was presented to the court in the context of Carmen Nieto’s discharge from Clark’s Market in 2017 after her eight-and-a-half years of employment by the store.²¹ During her employment, Nieto earned vacation pay in accordance with the policy in the

16. *Id.* (emphasis added).

17. COLO. REV. STAT. § 8-4-109 (2020) (emphasis added).

18. *Nieto*, 488 P.3d at 1142–43.

19. COLO. REV. STAT. § 8-4-101–125 (2020).

20. *Nieto*, 488 P.3d at 1144 (discussing COLO. REV. STAT. § 8-4-121).

21. *Id.* at 1142.

Clark's Market employee handbook.²² Under that policy, "vacation time is earned during the anniversary year previous to [when] it is actually taken," and the amount earned each year "is based on . . . length of employment," as delineated in the policy.²³ The policy further explains that "[v]acation time cannot be carried over from year to year" and "must be taken in the twelve- (12) [sic] month period following the date it is earned."²⁴ Finally, and significantly, the policy includes a clause forfeiting unused vacation pay upon separation:

In the event you voluntarily leave Clark's Market and give at least two (2) weeks written notice, you will receive vacation benefits earned as of your last anniversary date but not taken by the date of separation. . . . If you are discharged for any reason or do not give proper notice, you will forfeit all earned vacation pay benefits.²⁵

In light of this forfeiture clause, Clark's did not include Nieto's earned but unused vacation pay in her final paycheck, and it refused her written demand for payment.²⁶ Nieto then sued Clark's Market for withholding her vacation pay.²⁷ She based her claim on the Wage Act's provision that an employer must "pay upon separation from employment all vacation pay earned and determinable in accordance with the [employee handbook]."²⁸ Nieto argued that her vacation pay was "earned and determinable," and that the portion of the handbook purporting to waive her right to vacation pay because she was discharged was void under the Wage Act.²⁹

Clark's Market moved to dismiss Nieto's complaint for failure to state a claim, arguing that the terms of Nieto's employment

22. *Id.*

23. *Id.*

24. *Id.*

25. *Id.*

26. *Id.*

27. *Id.*

28. *Id.*

29. *Id.*

agreement forfeited her earned vacation pay because she was terminated, so she had no right to that pay.³⁰ The trial court granted the motion, reasoning that the Wage Act “clearly and unambiguously gives employers the right to enter into agreements with its employees regarding vacation pay,” and that these agreements could include forfeiture clauses like the one in Nieto’s handbook.³¹ Thus, even though Nieto had accrued vacation pay, the court concluded that she had forfeited it.³² The Colorado Court of Appeals affirmed that decision, reasoning that the Wage Act “creates [no] substantive right to payment for accrued but unused vacation time” and “merely ‘establishes minimal requirements concerning when and how *agreed* compensation must be paid.’”³³

The Colorado Supreme Court reversed the court of appeals.³⁴ The court concluded that the language of the Wage Act was ambiguous and thus turned to other interpretive aids for guidance.³⁵ In particular, the court looked to the language and structure of the Wage Act, and to the Act’s purpose, legislative history, and administrative interpretation to conclude that “[a]lthough the [Wage Act] does not create an automatic right to vacation pay, when an employer chooses to provide such pay, it cannot be forfeited once earned by the employee.”³⁶ In reaching this conclusion, as discussed further below, the court had occasion to dig into the question of what kind of deference it would accord to the CDLE interpretation of the relevant statutory provisions.

C. Nieto’s Deference Analysis

After the court of appeals affirmed the decision of the trial court that Nieto was not entitled to her vacation pay, the CDLE, which is

30. Nieto v. Clarks’s Mkt., Inc., 2018 WL 10483997, at *1 (Colo. Dist. Ct. May 7, 2018).

31. *Id.* at *2.

32. *Id.*

33. Nieto v. Clark’s Mkt., Inc., 490 P.3d 479, 482 (Colo. App. 2019) (quoting Barnes v. Van Schaack Mortgs., 787 P.2d 207, 210 (Colo. App. 1990)).

34. Nieto v. Clark’s Mkt., Inc., 488 P.3d 1140, 1143 (Colo. 2021).

35. *Id.*

36. *Id.* at 1150.

responsible for enforcing the Wage Act, promulgated a rule directly contradicting the court's holding.³⁷ Nieto argued at the Colorado Supreme Court that state courts should give deference to agency interpretations in accordance with the rule announced by the United States Supreme Court in *National Cable & Telecommunication Ass'n v. Brand X Internet Services*^{38, 39}

In *Brand X*, the Supreme Court held that that the federal Administrative Procedure Act⁴⁰ permits a federal agency to abrogate a court's prior interpretation of an ambiguous statute.⁴¹ The Court explained that this power flowed directly from the reasoning of *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*^{42, 43} Under *Chevron*, a court is required to defer to an agency's reasonable interpretation of an ambiguous statute even if the court concludes that a better interpretation exists.⁴⁴ Therefore, an agency can look at an ambiguous statute even after a court has construed that statute and can select a different, reasonable interpretation.⁴⁵ The Court's majority thus explained that "[a] court's prior judicial construction of a statute trumps an agency construction otherwise entitled to *Chevron* deference only if the prior court decision holds that its construction follows from the unambiguous terms of the statute and thus leaves no room for agency discretion."⁴⁶

The Colorado Supreme Court declined Nieto's invitation to adopt *Brand X* deference for the Colorado Administrative Procedure Act.⁴⁷ Indeed, the court went further, explaining that "just as we decline to follow *Brand X*, we are unwilling to adopt a rigid

37. See Dep't of Lab. & Emp., 7 COLO. CODE REGS. 1103-7:2, Rule 2.17 (2019) [hereinafter CDLE Rule 2.17].

38. 545 U.S. 967 (2005).

39. *Nieto*, 488 P.3d at 1149.

40. 5 U.S.C. § 551 (2018).

41. *Brand X*, 545 U.S. at 983.

42. 467 U.S. 837 (1984).

43. *Brand X*, 545 U.S. at 982.

44. *Id.* at 982–83.

45. *Id.* at 983.

46. *Id.* at 982.

47. *Nieto v. Clark's Mkt., Inc.*, 488 P.3d 1140, 1149 (Colo. 2021).

approach to agency deference that would *require* courts to defer to a reasonable agency interpretation of an ambiguous statute even if a better interpretation is available.”⁴⁸ In so doing, the court noted that its precedent on the scope of deference to administrative interpretations of ambiguous statutory provisions had been inconsistent, explaining:

True, we have, at times, appeared to embrace *Chevron-style* deference for purposes of the Colorado Administrative Procedure Act. See, e.g., *N. Colo. Med. Ctr., Inc. v. Comm. on Anticompetitive Conduct*, 914 P.2d 902, 907 (Colo. 1996); *Huber v. Kenna*, 205 P.3d 1158, 1164 (Colo. 2009) (Martinez, J., concurring). But in other cases, we have made clear that, while agency interpretations should be given due consideration, they are “not binding on the court.” *El Paso Cnty. Bd. of Equalization v. Craddock*, 850 P.2d 702, 704–05 (Colo. 1993); see *BP Am. Prod. Co. v. Colo. Dep’t of Revenue*, 2016 CO 23, ¶ 15 n.5, 369 P.3d 281, 285 n.5; *Ingram v. Cooper*, 698 P.2d 1314, 1316 (Colo. 1985).⁴⁹

Having said that, the court noted that “[t]he CDLE interpretation of [the Wage Act] is in fact consistent with the statute’s purpose, language, structure, and legislative history,” and that the agency’s earlier interpretation of the statutory provision had been the same.⁵⁰ The court concluded, therefore, that the agency’s interpretation was “further persuasive evidence” that vacation pay, once earned, could not be forfeited.⁵¹

D. Administrative Deference in Colorado

Nieto tells us that Colorado does not take a “rigid” approach to deference in that the state courts will not bind themselves to accept an agency interpretation of an ambiguous statute.⁵² Where does that leave agency deference in Colorado law? Despite the variety of

48. *Id.*

49. *Id.*

50. *Id.*

51. *Id.*

52. *Id.*

different ways that deference has been described, ultimately, the starting position for Colorado courts is that they “review the proper construction of statutes de novo; in doing so, [they] accord deference to the agency’s interpretation of its statute, but [they] are not bound by it.”⁵³ This formulation suggests both independent responsibility and something called deference. It still leaves unclear what the contours of that deference might be.

Not long after the *Nieto* decision, the Colorado Supreme Court was again confronted with the question of how much deference an agency interpretation was due. In *Gomez v. JP Trucking, Inc.*,⁵⁴ the court explained that it would examine whether a particular agency interpretation had the “hallmarks” of agency work “possessing the power to persuade.”⁵⁵ The court went on to note that the Advisory Bulletin at issue in that case was “quite thorough,” that it considered a range of feedback, that it was consistent with other pronouncements by the same agency, and that its “reasoning [struck] us as valid.”⁵⁶

So, what are the indicia of agency interpretation that might give it “the power to persuade?” Examining the state’s previous rulings on deference, a couple of through lines emerge. First, when an agency is actually exercising some particular expertise in its interpretation, courts are more likely to say they defer to that

53. *Lobato v. Indus. Claim Appeals Off.*, 105 P.3d 220, 223 (Colo. 2005). *See also* *Anderson v. Longmont Toyota, Inc.*, 102 P.3d 323, 326 (Colo. 2004) (“[W]e give considerable weight to an agency’s interpretation of its own enabling statute, but we are not bound by the agency’s legal interpretations.”); *Specialty Rests. Corp. v. Nelson*, 231 P.3d 393, 397 (Colo. 2010) (same); *Bd. of Cnty. Comm’rs v. Colo. Pub. Utils. Comm’n*, 157 P.3d 1083, 1088 (Colo. 2007) (“[W]e may consider and defer to an agency’s interpretation of its own enabling statute and [of] regulations the agency has promulgated.”); *Washington Cnty. Bd. of Equalization v. Petron Dev. Co.*, 109 P.3d 146, 150 (Colo. 2005) (“While they do not bind our construction of the applicable law, we consult and ordinarily defer to the implementing agency’s guidance, rules, and determinations, if they accord with the constitutional and statutory provisions they implement.”).

54. 509 P.3d 429 (Colo. 2022).

55. *Id.* at 441.

56. *Id.*

interpretation.⁵⁷ Second, when agency interpretation has been inconsistent, it is very unlikely to receive deference.⁵⁸ *Gomez* suggests some other indicia: thoroughness, consideration of extensive feedback, and reasoning that strikes the court as valid.⁵⁹

These indicators, and even the notion of “the power to persuade,” strike me as quite inconsistent with the concept of “deference.” The dictionary defines deference as “respect and esteem due a superior or an elder.”⁶⁰ Black’s Law Dictionary explains that to “defer” is to “yield to the opinion of.”⁶¹ Both *Gomez* and *Nieto* employed the language of persuasion in discussing the significance of the relevant agency’s statutory interpretation.⁶² In neither case was there a suggestion that the agency possessed special expertise, so that may be an area in which Colorado courts will continue to truly defer — to recognize that “in some circumstances agencies [are] more

57. See *City of Boulder v. Colo. Pub. Utils. Comm’n*, 996 P.2d 1270, 1279 (Colo. 2000) (“[T]he PUC’s expertise and extensive staff support render it much better able to assess impacts to the public interest from a utility action than the courts. Accordingly, we defer to the PUC’s finding that a utility action benefits the public.”); *Mountain States Tel. & Tel. Co. v. Pub. Utils. Comm’n*, 763 P.2d 1020, 1030 (Colo. 1988) (“[I]n view of the commission’s special expertise in public utility regulation, we give great deference to the PUC in its selection of an appropriate remedy.”). Importantly, however, when the interpretation proposed by the agency does not derive from that agency’s particular expertise, courts do not accord the same deference. See, e.g., *Bd. of Cnty. Comm’rs*, 157 P.3d at 1089. (“Here, because the interpretation made by the PUC is not one that involves use of its technical expertise, for example ratemaking, we do not owe a high degree of deference to the PUC’s interpretation; nonetheless, we defer to it as a reasonable construction of the pertinent agency statutes and implementing rules, guidance, and determinations.”).

58. *Lobato*, 105 P.3d at 223 (“When the agency interpretation is not uniform or consistent, we do not extend deference and will look to other statutory construction aids.”). See also *Williams v. Kunau*, 147 P.3d 33, 36 (Colo. 2006) (“When the agency’s interpretation is not uniform or consistent we do not owe deference to that interpretation.”).

59. *Gomez*, 509 P.3d at 441.

60. *Deference*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/deference> [<https://perma.cc/3BJ5-6D69>].

61. *Defer*, BLACK’S LAW DICTIONARY (11th ed. 2019).

62. *Nieto v. Clark’s Mkt., Inc.*, 488 P.3d 1140, 1149 (Colo. 2021); *Gomez v. JP Trucking, Inc.*, 509 P.3d 429, 444 (Colo. 2022).

competent than courts to make these determinations.”⁶³ Otherwise, Colorado appears to be charting the course set by the United States Supreme Court almost 80 years ago in *Skidmore v. Swift & Co.*,⁶⁴ where it explained that agency interpretations, “while not controlling upon the courts by reason of their authority, do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance.”⁶⁵ Like the Court in *Skidmore*, Colorado’s review of agency interpretation — not quite deference — considers “the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control.”⁶⁶

63. William R. Anderson, *Chevron in the States: An Assessment and a Proposal*, 58 ADMIN. L. REV. 1017, 1017 – 18 (2006). See also Aaron Saiger, *Chevron and Deference in State Administrative Law*, 83 FORDHAM L. REV. 555, 580 (2014) (raising the question of how often state agencies are truly experts).

64. 323 U.S. 134 (1944).

65. *Id.* at 140.

66. *Id.*

GEORGIA JUDICIAL DEFERENCE TO EXECUTIVE BRANCH AGENCY LEGAL INTERPRETATIONS

HON. NELS S.D. PETERSON*

INTRODUCTION

As with many legal subjects, it may be tempting to think of “administrative law” only in terms of federal law.¹ But because state law often differs from federal law in important ways,² and because state agencies often escape federal oversight,³ state administrative law merits consideration. In Georgia, recent appellate decisions may indicate increasing skepticism of judicial deference to executive branch agency legal interpretations. But rather than changing course on deference, the principal impact of these decisions so far has been to reaffirm that deference is permissible only after a court has exhausted all interpretive tools and still found a legal text ambiguous.⁴ This renewed high bar for finding ambiguity may lower

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1. Cf. JEFFREY S. SUTTON, 51 IMPERFECT SOLUTIONS: STATES AND THE MAKING OF AMERICAN CONSTITUTIONAL LAW 7–10 (2018) (noting tendency to think of “constitutional law” as limited to federal constitutional law).

2. See, e.g., *Elliott v. State*, 824 S.E.2d 265, 272–73 (Ga. 2019) (explaining how state constitutional provisions that appear similar to federal provisions may carry different meanings); *State v. Turnquest*, 827 S.E.2d 865, 869–75 (Ga. 2019) (interpreting state constitutional provisions differently from equivalent federal provisions).

3. See, e.g., *Dep’t of Transp. & Dev. v. Beaird-Poulan, Inc.*, 449 U.S. 971, 973 (1980) (Rehnquist, J., dissenting from denial of certiorari) (noting that avenues for review of federal administrative determinations may be inapplicable to similar state determinations, even when the state agency is administering federal law).

4. *City of Guyton v. Barrow*, 828 S.E.2d 366, 367 (Ga. 2019).

the stakes of future deference debates; deference that applies only rarely is deference that matters less.⁵

I. GEORGIA-SPECIFIC CONSTITUTIONAL INTERPRETIVE PRINCIPLES
INFORM ENGAGEMENT WITH AGENCY DEFERENCE.

Unlike the United States Constitution, the Georgia Constitution has an explicit Separation of Powers provision.⁶ This provision is implicated when we consider whether the judiciary should defer to executive agency legal interpretations.⁷ For this reason, we must begin with a brief summary of Georgia-specific constitutional considerations.

Unlike the United States, Georgia has had multiple constitutions,⁸ adopting the current one only four decades ago.⁹ Many provisions of the current constitution existed in materially equivalent form in previous constitutions,¹⁰ and this has interpretive implications for the original public meaning of those provisions. Two presumptions are particularly significant. First, Georgia courts presume that a provision that was carried forward from a previous constitution into the 1983 Constitution without material change carries with it the same original public meaning the provision had when it first

5. See Matthew A. Melone, *Kisor v. Wilkie: Auer Deference is Alive but Not So Well. Is Chevron Next?* 12 N.E. U. L.R. 581, 621 (2020) (questioning whether it is “conceivable that regulatory ambiguities [will frequently] exist after all traditional tools of construction have been exhausted,” because it is likely that “such tools will provide cover for the courts to discern the true [meaning] of a regulation based on its structure, history, and purpose”).

6. GA. CONST. of 1983, art. 1, § 2, para. 3 (“The legislative, judicial, and executive powers shall forever remain separate and distinct; and no person discharging the duties of one shall at the same time exercise the functions of either of the others except as herein provided.”).

7. *City of Guyton*, 828 S.E.2d at 367.

8. *Elliott v. State*, 824 S.E.2d 265, 268 & n.3 (Ga. 2019).

9. GA. CONST. of 1983, art. 11, § 1, para. 6 (providing generally that constitution became effective July 1, 1983).

10. *Elliott*, 824 S.E.2d at 268 (“many of the provisions of the Constitution of 1983 first originated in an earlier Georgia Constitution”).

entered a Georgia constitution.¹¹ And second, Georgia courts presume that a provision that was carried forward from a previous constitution into the 1983 Constitution without material change carries with it any definitive and consistent construction that the Georgia Supreme Court has afforded it.¹² Both of these presumptions are rebuttable and may sometimes operate in tension with each other.¹³

A Separation of Powers provision first entered a Georgia constitution in the Constitution of 1777,¹⁴ has been in every constitution since then except for one,¹⁵ and the current language has been unchanged since 1877.¹⁶ The original meaning of that provision as it appears in the 1983 Constitution, therefore, is informed by legal context (including prior similar provisions¹⁷), the original meaning of its 1877 predecessor, and by whatever consistent and definitive constructions the Georgia Supreme Court handed down between 1877 and 1983.

Also relevant may be a provision in the 1983 Georgia Constitution that vests the judicial power in state courts.¹⁸ The initial sentence of this paragraph vests the judicial power “exclusively” in the “magistrate courts, probate courts, juvenile courts, state courts, superior

11. *Elliott*, 824 S.E.2d at 269–70.

12. *Id.* at 270–72.

13. *Id.* at 271 n.6.

14. GA. CONST. of 1777, art. I (“The legislative, executive, and judiciary departments shall be separate and distinct, so that neither exercise the powers properly belonging to the other.”)

15. The exception is GA. CONST. of 1865. See *Black Voters Matter Fund v. Kemp*, 870 S.E.2d 430, 446 n.27 (Ga. 2022) (Peterson, J., concurring).

16. *Id.*

17. See *id.* (citing GA. CONST. of 1798, art. 1, § 1 (“The legislative, executive, and judiciary departments of Government shall be distinct, and each department shall be confined to a separate body of magistracy . . .”); GA. CONST. of 1789, arts. 1–3 (separating three branches); GA. CONST. of 1777, art. 1 (“The legislative, executive, and judiciary departments shall be separate and distinct, so that neither exercise the powers properly belonging to the other.”); 1776 R. & REG. OF COLONY OF GA. 3d, 5th, & 7th (separating three branches)).

18. GA. CONST. of 1983, art. 6, § 1, para. 1.

courts, state-wide business court, Court of Appeals, and Supreme Court.”¹⁹ Four sentences later, the Constitution goes on to provide that, “[i]n addition, the General Assembly . . . may authorize administrative agencies to exercise quasi-judicial powers.”²⁰ While this language may appear permissive, the Georgia Supreme Court has pointed out that it actually is more restrictive than a previous version,²¹ which vested the judicial powers in the various classes of courts and in “such other courts as have been or may be established by law.”²² And the Supreme Court has held that the “quasi-judicial power” that the General Assembly may vest in administrative agencies is essentially just the power to decide a particular contested matter after a hearing with certain procedural requirements;²³ in other words, a power inferior to the judicial power vested exclusively in the courts.²⁴ The Georgia Supreme Court has not cited the judicial vesting provision as support for deference;²⁵ in fact, it has explicitly rejected an argument that this language authorizes conferring judicial power on administrative agencies.²⁶

19. *Id.*

20. *Id.*

21. *Sentence Review Panel v. Moseley*, 663 S.E.2d 679, 682 (Ga. 2008).

22. *Tax Assessors of Gordon Cnty. v. Chitwood*, 218 S.E.2d 759, 763 (Ga. 1975) (quoting GA. CONST. of 1945, art. 6, § 1, para. 1).

23. *See Hous. Auth. of Augusta v. Gould*, 826 S.E.2d 107, 111–12 (Ga. 2019).

24. *See Sons of Confederate Veterans v. Henry Cnty. Bd. of Comm’rs.*, 880 S.E.2d 177–78, (Ga. 2022) (“The judicial power is ‘that which declares what the law is, and applies it to past transactions and existing cases; it expounds and judicially administers the law; it interprets and enforces the law in a case in litigation.’”) (cleaned up) (quoting *Thompson v. Talmadge*, 41 S.E.2d 883, 891 (Ga. 1947)).

25. Most of the Georgia precedent defining quasi-judicial powers arises not from the context of separation of powers, but from that of determining appellate jurisdiction. This is so because under Georgia law, a challenge to quasi-judicial action by an administrative agency has different procedural requirements than does a challenge to an administrative action by the same agency. *See City of Cumming v. Flowers*, 797 S.E.2d 846, 852 (Ga. 2017) (“[F]or generations this Court has held that judicial and quasi-judicial decisions made by city and county governing authorities may be appealed to the superior court by certiorari . . .”).

26. *Moseley*, 663 S.E.2d at 682.

II. JUDICIAL DEFERENCE UNDER GEORGIA'S CONSTITUTION.

Some forms of judicial deference to agency interpretations may be consistent with the original meaning of the 1983 Constitution, but others that more closely resemble federal approaches to deference have recently been the subject of question.

A. *Georgia courts have a long tradition of affording some deference to agency statutory construction.*

Deference to executive branch legal interpretations has a long history in Georgia, but the nature of the deference afforded has been inconsistent. It was not until 2014 that Georgia Supreme Court precedent made explicit that Georgia courts apply *Chevron*²⁷-style deference to agencies' interpretations of statutes that the agency is charged with administering.²⁸ The court's recent articulation of the Georgia version of *Chevron* goes like this:

[I]t usually is for the courts to resolve [statutory] ambiguity by ascertaining the most natural and reasonable understanding of the text. But when it appears that the General Assembly has committed the resolution of such an ambiguity to the discretion and expertise of an agency of the Executive Branch that is charged with the administration of the statute, the usual rule may not apply. In those instances, the courts must defer to the way in which the agency has resolved the ambiguity in question, so long as the agency has resolved the ambiguity in the proper exercise of

27. *Chevron U.S.A., Inc. v. Nat. Res. Defense Council, Inc.*, 467 U.S. 837, 842–43 (1984) (holding that federal courts defer to an agency's reasonable interpretation of a statute which the agency administers, if the statute is ambiguous or silent on an issue).

28. *See Cook v. Glover*, 761 S.E.2d 267, 271 (Ga. 2014) (stating in the first Georgia Supreme Court decision ever to cite *Chevron* that “the level of deference this Court gives state administrative agency decisions interpreting ambiguous statutes is in accord with that identified by the United States Supreme Court in *Chevron* as appropriate for the judicial review of a federal administrative agency's statutory interpretation”).

its lawful discretion, and so long as the agency has resolved it upon terms that are reasonable in light of the statutory text.²⁹

This rule that courts *must* defer to a reasonable agency interpretation of ambiguous statutory text makes failure to do so reversible error.³⁰

Taken literally, the court's articulation of this rule suggests that a statute that has one most natural and reasonable understanding may nevertheless still be considered ambiguous if an inferior (but still reasonable) interpretation exists. Not only that, this articulation also suggests that if an agency charged with administering the statute adopts the inferior interpretation, it is reversible error for a court to refuse to adopt that inferior interpretation. Indeed, it is difficult to understand it any other way; the "usual rule" is that courts select the most natural and reasonable understanding of the text, but administrative deference is a circumstance in which that "usual rule" does not apply.

But it is unclear just how consistently this articulation is applied. The court has also held that agency statutory interpretations are "not binding on the courts" and "will be adopted only when they conform to the meaning which the court deems should properly be given."³¹ And the court does not always agree about just how ambiguous a statute has to be before deference is afforded to an agency interpretation.³² To some extent, Georgia's deference precedent

29. *Tibbles v. Teachers Ret. Sys. of Ga.*, 775 S.E.2d 527, 529 (Ga. 2015) (internal citation omitted).

30. *See Cook*, 761 S.E.2d at 272 (reversing a "plausible" construction by the court of appeals because the agency construction was "reasonable").

31. *Handel v. Powell*, 670 S.E.2d 62, 65 (Ga. 2008) (citing *McKee v. City of Geneva*, 627 S.E.2d 555, 555 (Ga. 2006) and *Sawnee EMC v. Ga. Pub. Serv. Comm'n*, 544 S.E.2d 158, 161 (Ga. 2001)).

32. *Compare, e.g., Sawnee EMC*, 544 S.E.2d at 162 (four-justice majority holding statute unambiguous and rejecting agency interpretation) *with id.* at 162–64 (three-justice dissent arguing statute was ambiguous and thus deference to agency interpretation was required). This sort of sharp division among judges is, of course, at least *some* evidence of ambiguity. *But see* ANTONIN SCALIA & BRYAN GARNER, *READING LAW: THE INTERPRETATION OF LEGAL TEXTS* 425 (2012) (explaining that ambiguity exists when there are competing interpretations of roughly equal plausibility).

could be accused, as the D.C. Circuit criticized precedent regarding the rule of lenity, of providing “little more than atmospheric, since it leaves open the crucial question -- almost invariably present -- of how much ambiguousness constitutes an ambiguity.”³³

Some of this lack of clarity may be a matter of history. The Georgia Supreme Court has stated that its application of *Chevron*-style deference long predates *Chevron* itself.³⁴ The court acknowledged that many of the relevant “earlier cases did not acknowledge it so explicitly.”³⁵ But perhaps the failure to acknowledge the deference rule was because those cases were not in fact applying such a rule.³⁶

*B. Whatever the answer to these historical questions, the current state of the law is increasingly the subject of criticism.*³⁷

Auer/Seminole Rock-style deference is of more recent and questionable origin.

Whatever one thinks about the history of Georgia’s deference to executive branch statutory construction, another type of deference is of much more recent origin. Georgia’s deference to agencies’ interpretations of their own rules and regulations, akin to federal *Auer/Seminole Rock*-style deference,³⁸ dates only to 1988, when the Georgia Supreme Court imported the doctrine from federal caselaw uncritically and without analysis.

33. *United States v. Hansen*, 772 F.2d 940, 948 (D.C. Cir. 1985).

34. *See Tibbles*, 775 S.E.2d at 529 & n.1 (citing, e.g., *Suttles v. Northwestern Mut. Life Ins. Co.*, 19 S.E.2d 396, 408 (Ga. 1942)).

35. *Id.* at 529 n.1.

36. *See Cazier v. Ga. Power Co.*, No. S22C0513, 2023 Ga. LEXIS 16 (Jan. 27, 2023) (Peterson, P.J., concurring in the denial of certiorari).

37. *See, e.g., id.*; *see also UHS of Anchor, L.P. v. Dep’t of Cmty. Health*, 830 S.E.2d 413, 418 n.16 (Ga. Ct. App. 2019) (“Some judges of this Court believe the time has come to reconsider such deference.”), *rev’d sub nom. Premier Health Care Invs., LLC v. UHS of Anchor, L.P.*, 849 S.E.2d 441 (Ga. 2020).

38. *See Auer v. Robbins*, 519 U.S. 452, 461 (1997) (noting that an agency’s interpretation of its own regulation is “controlling unless plainly erroneous or inconsistent with the regulation” (quoting *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 414 (1945) (punctuation omitted))).

In *Atlanta Journal v. Babush*,³⁹ the court considered whether a proceeding before the State Personnel Board was a “hearing” within the meaning of the Board’s rule prohibiting a “hearing” from being conducted in closed session.⁴⁰ The Board had interpreted the rule as not applying to the kind of proceeding at issue, an interpretation consistent with the Board’s approach in over 200 other similar proceedings during the previous four years.⁴¹ With little explanation, the court announced that it would adopt federal law principles: “We agree with the view expressed in *United States v. Larionoff*,^[42] that in construing administrative rules, ‘the ultimate criterion is the administrative interpretation, which becomes of controlling weight unless it is plainly erroneous or inconsistent with the [rule].’”⁴³ The only reasoning the court offered for this adoption of federal law was that if a court were to “apply a different interpretation from that of the agency, the agency would simply be forced to modify the rule.”⁴⁴

Some may find this reasoning unsatisfying; while an agency certainly might modify a rule if it disagrees with the way a court interprets it, the modified rule might not apply retroactively in whatever case the court’s different interpretation arose.⁴⁵ And the political accountability inherent in formal rulemaking (and the procedural requirements for such rules under the Georgia Administrative Procedures Act⁴⁶) is lost when an agency may adopt a new rule by interpretation, rather than rulemaking.

39. 364 S.E.2d 560 (Ga. 1988).

40. *Id.* at 562.

41. *Id.*

42. 431 U.S. 864, 872 (1977).

43. *Atlanta Journal*, 364 S.E.2d at 562.

44. *Id.*

45. *See, e.g.*, GA. CODE ANN. § 1-3-5 (2022); *Deal v. Coleman*, 751 S.E.2d 337, 342–43 & nn.12–13 (Ga. 2013).

46. GA. CODE ANN. §§ 50-13-1–23 (2022).

Five years ago, in *City of Guyton v. Barrow*,⁴⁷ the Georgia Supreme Court granted certiorari on whether that deference is appropriate, posing the question of “[w]hat level of judicial deference should be afforded to a state agency in its interpretation of its own internal rules and regulations?”⁴⁸ But the court ultimately declined to reach that question because the regulation at issue was not ambiguous; instead, it re-affirmed the principle that all the tools of construction must be exhausted before a regulation is found ambiguous and deference is applied.⁴⁹ The court expressly left open the question of whether its deference precedent was correct.⁵⁰ Since *City of Guyton*, the court has again noted the openness of this question.⁵¹

C. *A rediscovered principle is that courts apply deference to interpretation only of ambiguous text, and only text that is ambiguous after exhausting all canons of construction.*

Atlanta Journal did not only invent Georgia’s version of *Auer* deference, it also appeared to articulate a much lower standard for invoking deference than was the case under *Chevron*-style deference: it stated that an agency’s interpretation of a rule is “controlling” unless “it is plainly erroneous or inconsistent” with the text of the rule.⁵² But Georgia courts had previously -- and consistently -- said

47. 828 S.E.2d 366 (Ga. 2019)

48. *City of Guyton v. Barrow*, No. S18C0944, 2018 Ga. LEXIS 612, at *1 (Aug. 27, 2018) (order granting writ of certiorari).

49. “Some have argued that [deference to an agency’s interpretation of its own rules] is in tension with our role as the principal interpreter of Georgia law, and we granted certiorari here on that question. But any such tension could exist only in cases where we have exhausted all of our interpretive tools without determining a text’s meaning. This is not one of those cases.” *City of Guyton v. Barrow*, 828 S.E.2d 366, 367 (Ga. 2019).

50. *Id.*

51. See *Premier Health Care Invs., LLC v. UHS of Anchor, L.P.*, 849 S.E.2d 441, 447 n.5 (Ga. 2020) (refusing to defer to agency interpretation of statute found unambiguous after application of canons of statutory construction, and observing that, “like in *City of Guyton*, this case does not present the question of whether [the Court’s deference] case law should be reconsidered”).

52. *Atlanta Journal*, 364 S.E.2d at 562 (quoting *United States v. Larionoff*, 431 U.S. 864, 872 (1977)).

that deference to an agency's interpretation of a statute was warranted only when the statute was ambiguous.⁵³ *Atlanta Journal* appeared to flip the presumption in favor of deference.

Although in *City of Guyton* the Georgia Supreme Court was unable to reach the validity of *Auer* deference, it did correct this second issue. After noting the lower standard of *Atlanta Journal*, the *City of Guyton* court observed that before *Atlanta Journal*, "our long-held rule in interpreting statutes was that courts were to defer to an agency's construction only in cases where the meaning of a statute was ambiguous."⁵⁴ The court cited multiple cases for this proposition, all of which were decided decades before *Atlanta Journal*.⁵⁵ And the court noted that post-*Atlanta Journal*, cases had also articulated this higher standard.⁵⁶ The court definitively clarified that deference was proper only when a rule was ambiguous: "Although our statement in [*Atlanta Journal*] placed no qualifiers on judicial deference to agency interpretations, it is clear that we are to defer to an agency's interpretation only when we are unable to determine the meaning of the legal text at issue."⁵⁷

The *City of Guyton* court went on to explain that true deference-permitting ambiguity is not lightly found: "We may conclude that

53. *City of Guyton*, 828 S.E.2d at 369 (citing *Suttles v. Nw. Mut. Life Ins. Co.*, 19 S.E.2d 396, 408 (Ga. 1942) (a "[reasonable] administrative interpretation and practice, continued for a long period, should be accepted as controlling . . . only when the law is ambiguous and susceptible of different interpretations"); *Elder v. Home Bldg. & Loan Ass'n*, 3 S.E.2d 75, 77 (Ga. 1939) ("[W]here the invalidity of a statute is doubtful, [an agency's interpretation] has much weight with the court in determining its validity[.]"); *Standard Oil Co. of Ky. v. Rev. Comm'n*, 176 S.E. 1, 4 (Ga. 1934) ("The rulings of departmental and executive officers are at best persuasive, and may be of great force in cases of doubt[, and] . . . should be restricted to cases in which the meaning of the statute is really doubtful[.]" (citation and punctuation omitted))).

54. *See id.*

55. *See supra* note 53.

56. *City of Guyton*, 828 S.E.2d at 370 (citing *New Cingular Wireless PCS, LLC v. Ga. Dep't of Revenue*, 813 S.E.2d 388 (Ga. 2018) (requiring ambiguity before deference in construing regulation); *Tibbles v. Teachers Retirement Sys. of Ga.*, 775 S.E.2d 527 (2015) (requiring ambiguity before deference in construing statute)).

57. *Id.* at 369.

an ambiguity exists . . . only after we have exhausted all tools of construction.”⁵⁸ Indeed, “[a] significant criticism of *Auer/Seminole Rock* deference is that courts, faced with the task of interpreting difficult agency regulations, are often too eager to sidestep the obligation of discerning what the law is. A statute or regulation is not ambiguous merely because interpreting it is hard.”⁵⁹

This re-articulation of an old standard may have also had the effect of clarifying that deference-permitting ambiguity requires competing levels of plausibility. If any legal text with multiple plausible interpretations is ambiguous for deference purposes, then any time an agency interpretation is reasonable it should be deferred to; whether another interpretation is better would be beside the point. So, *City of Guyton*'s clarification that reasonableness alone is not enough may have made clear that ambiguity exists only when a text is subject to multiple different interpretations of nearly equivalent plausibility.⁶⁰ And if that is so, then deference will apply in far fewer cases.⁶¹

If this resolution sounds familiar, it might be because barely a month after *City of Guyton* was decided, the U.S. Supreme Court did precisely the same thing in *Kisor v. Wilkie*,⁶² in which it had granted certiorari to reconsider *Auer*.⁶³ In *Kisor*, the Court did not reach whether to overrule *Auer* because, just as the Georgia Supreme Court had done in *City of Guyton*, it instead clarified its precedent to make clear that “deference can arise only if a regulation is genuinely ambiguous.”⁶⁴ And the Court went on to make clear that,

58. *Id.* at 370.

59. *Id.* (citations omitted).

60. See also ANTONIN SCALIA & BRYAN GARNER, *READING LAW: THE INTERPRETATION OF LEGAL TEXTS* 425 (2012) (interpreting ambiguity as “[a]n uncertainty of meaning based . . . on a semantic dichotomy that gives rise to any of two or more quite different but almost equally plausible interpretations” (emphasis added)).

61. See Melone *supra* note 5.

62. 139 S. Ct. 2400 (2019).

63. *Id.* at 2409 (noting the Court “granted certiorari to decide whether to overrule *Auer* and (its predecessor) *Seminole Rock*”).

64. *Id.* at 2414.

as in *City of Guyton*, “when we use that term, we mean it -- genuinely ambiguous, even after a court has resorted to all the standard tools of interpretation.”⁶⁵ The Court concluded that the federal appellate court below “jumped the gun in declaring the regulation ambiguous,”⁶⁶ in part because it did not first “bring all its interpretive tools to bear,”⁶⁷ and so remanded for the court to do so in the first instance.⁶⁸ *Kisor* is, therefore, a case in point: the re-discovered emphasis on true ambiguity may well mean that far fewer cases will trigger deference-permitting ambiguity, shifting focus away from the underlying debate on the merits of deference regimes writ large.

CONCLUSION

Issues of federal judicial deference to federal agency determinations have long been the focus of debate. Similar debate exists in Georgia as to state law. But even if deference precedents are eventually overruled, that may have little impact. As the Georgia Supreme Court observed in *City of Guyton*, the renewed high standard for finding ambiguity may not often be met: “After using all tools of construction, there are few statutes or regulations that are truly ambiguous.”⁶⁹ This higher bar for deference may mean that deference will apply less often, dramatically lowering the stakes of future deference debates.

65. *Id.*

66. *Id.* at 2423.

67. *Id.*

68. *Id.* at 2424.

69. *City of Guyton*, 828 S.E.2d at 370.

SOMETHING THERE IS THAT DOESN'T LOVE A WALL

HON. CALEB STEGALL*

INTRODUCTION

Administrative law was on the ballot in Kansas last year. As one glossy mailer declared, “[u]nelected bureaucrats *make whatever regulations they want*” and Kansans ought to vote yes on a proposed constitutional amendment in order to “give every Kansan a voice in state government.”¹ The so-called “legislative veto” amendment—which was narrowly defeated—would have given the Kansas Legislature the ability to override executive branch rules and regulations by a simple majority vote.² I highlight the mailer and its message not to agree or disagree with it, but simply because it clarifies the core question of administrative law—*who decides?*

The mailer also offers a typical framing of the debate—either unelected bureaucrats decide, or ordinary Kansans do through their elected representatives. As Philip Hamburger recently put it, administrative law may become an “extralegal regime” if it “evades not only the law but also its institutions, processes, and rights. The central evasion is the end run around acts of [the legislature] and

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1. The mailer was paid for by Americans for Prosperity.

2. H.R. 5014, 89th Gen. Assemb., Reg. Sess. (Kan. 2022). The proposed language provided: “Whenever the legislature by law has authorized any officer or agency within the executive branch of government to adopt rules and regulations that have the force and effect of law, the legislature may provide by law for the revocation or suspension of any such rule and regulation, or any portion thereof, upon a vote of a majority of the members then elected or appointed and qualified in each house.”

the judgments of the courts by substituting executive edicts.”³ Professor Hamburger suggests that administrative law is a threat to “popular political power” devised by a “rulemaking class” which has “a dim view of popularly elected legislatures and a high view of its own rationality and specialized knowledge.”⁴

Striking the same chord, Kansas Attorney General and recent candidate for Governor, Derek Schmidt, campaigned on the idea that—as he put it—“the people’s elected representatives in Congress, not unelected bureaucrats, make the law. Reestablishing democratic control over the sprawling federal bureaucracy is, in my view, one of the most important steps we must take to preserve liberty for future generations.”⁵ For similar reasons, he urged voters to adopt the amendment because it “would return lawmaking authority to the lawmaking branch of government, the branch closest to the people.”⁶

But as the defeat in Kansas of this particular amendment shows, not everyone is worried about “unelected bureaucrats” running wild. Many Kansans likely agreed with the *Wichita Eagle* when it opined that talk about unelected bureaucrats was a “cheap scare [tactic]” designed to hide the fact that state employees in the executive branch—presumably hard-working and disinterested professionals—are “selected for their expertise in specialized fields such as public health and safety, utilities, the environment, pharmacy, nursing, optometry, dentistry and embalming, just to name a few.”⁷

3. PHILIP HAMBURGER, IS ADMINISTRATIVE LAW UNLAWFUL? 29 (2014).

4. *Id.*

5. News Release, Kan. Att’y Gen., Derek Schmidt, U.S. Supreme Court Term Good for Liberty, The Rule of Law (July 7, 2022), <https://ag.ks.gov/media-center/news-releases/2022/07/07/u.s.-supreme-court-term-good-for-liberty-the-rule-of-law> [https://perma.cc/479S-ZEUF].

6. Tim Carpenter, *Kansas Constitutional Amendment on Rules and Regulations: Voters to Decide Legislature Power*, KAN. REFLECTOR (Nov. 3, 2022, 8:30 AM), <https://kansasreflector.com/2022/11/03/kansas-constitutional-amendment-on-rules-and-regulations-voters-to-decide-legislature-power/> [https://perma.cc/R6CR-7D6C].

7. The Editorial Board, *Vote ‘No’ on Kansas Ballot Questions 1 and 2 and Protect our Constitution*, WICHITA EAGLE (Oct. 23, 2022); see also ADRIAN VERMEULE, COMMON

A former chair of the Kansas Democratic Party put it more bluntly: “It’s open season on the administration’s ability to run the government.”⁸ Whatever view one takes, the proposed amendment and the arguments surrounding it are ample evidence that administrative law remains a controversial and dynamic area of law—in Kansas and around the nation.

I. A BRIEF HISTORY OF SEPARATION OF POWERS IN KANSAS

Answering the question “who decides?” in matters of law and government is inextricably tied to deeper questions about the structure of government and its divisions of power between and among separate governing departments. Any discussion of administrative law—even a brief survey such as this—must begin with a history of the doctrines of separation of powers as they have developed within a particular jurisdiction. In Kansas, that history reveals evolving standards that remain dynamic and in flux.

In the decades following statehood, the Kansas Supreme Court routinely adhered to a principle of strict separation of powers as illustrated by our turn-of-the-century decision in *State v. Johnson*.⁹ In *Johnson*, we struck down a legislative conferral upon the judiciary of the power to set railroad rates, holding that “the functions of the three departments should be kept as distinct and separate as possible, except so far as the action of one is made to constitute a restraint upon the action of the other.”¹⁰

GOOD CONSTITUTIONALISM 135 (2022) (“[T]he administrative state is today the main locus and vehicle for the provision of the goods of peace, justice, and abundance central to the classical theory. The administrative state is where those goods are translated and adapted into modern forms such as health, safety, a clean environment under intelligent stewardship, and economic security.”).

8. John Hanna, *After Abortion Vote, Kansas Lawmakers’ Power Back on Ballot*, ASSOCIATED PRESS (Oct. 27, 2022), <https://apnews.com/article/2022-midterm-elections-health-legislature-state-governments-constitutions-60f6103f666d886be18917bdd32bba82> [<https://perma.cc/3D7Q-NV39>].

9. 61 Kan. 803 (1900).

10. *Id.* at 814.

The *Johnson* rule is one forerunner to the federal non-delegation doctrine. Keith Whittington and Jason Iuliano have explained that doctrine by noting that while “[t]here is no explicit textual prohibition on the delegation of legislative power to other actors, . . . such a rule has long been thought implicit in the U.S. Constitution,” as the “very idea of a separation of powers might suggest that executive officials should refrain from, or be barred from, exercising legislative powers.”¹¹ These scholars write that “[c]onsolidating the legislative and executive functions in the same hands has long been seen as a serious threat to liberty, and a core principle of liberal constitutional theory was to separate those distinct governmental functions in distinct governmental organs.”¹² Yet federal courts have typically upheld such delegations of legislative power by Congress so long as Congress also provides an “intelligible principle” to guide executive or judicial actors.¹³

In Kansas, the strict *Johnson* principle of non-delegation did not carry the day. Instead, in decisions both before and after *Johnson*,

11. Keith E. Whittington & Jason Iuliano, *The Myth of the Nondelegation Doctrine*, 165 U. PA. L. REV. 379, 389 (2017).

12. *Id.*

13. *Touby v. United States*, 500 U.S. 160, 165 (1991) (citing *J.W. Hampton, Jr., & Co. v. United States*, 276 U.S. 394, 409 (1928)). Justices Gorsuch and Alito recently expressed willingness to utilize the major questions doctrine—whereby “administrative agencies must be able to point to ‘clear congressional authorization’ when they claim the power to make decisions of vast ‘economic and political significance’”—as a path to reasserting strict non-delegation. See *West Virginia v. EPA*, 142 S. Ct. 2587, 2616 (2022) (Gorsuch, J., concurring); see also *Brown v. U.S. Dep’t of Educ.*, No. 4:22-CV-0908-P, 2022 WL 16858525, at *13 (N.D. Tex. Nov. 10, 2022) (holding that the federal student loan forgiveness under the HEROES Act fell under a “major-question” exception to *Chevron* deference, thereby requiring that an agency show “clear congressional authorization” for the exercise of any authority); *id.* (“Still, no one can plausibly deny that it is either one of the largest delegations of legislative power to the executive branch, or one of the largest exercises of legislative power without congressional authority in the history of the United States. In this country, we are not ruled by an all-powerful executive with a pen and a phone. Instead, we are ruled by a Constitution that provides for three distinct and independent branches of government. As President James Madison warned, ‘[t]he accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny.’”).

Kansas courts have genuflected to the principle that “the legislature possess[es] all the legislative power of the state [and] cannot delegate any portion of that power” but have nevertheless reasoned that given the variegated and complex society we live in, “it is generally found impracticable for [the legislature] to exercise this power in detail.”¹⁴ Thus, in *Coleman v. Newby*,¹⁵ the court held that the legislature “may mark out the great outlines, and leave those who are to act within these outlines to use their discretion in carrying out the minor regulations.”¹⁶ This paint-by-numbers approach allowing executive agents to fill in the blank spaces left in broadly written statutes has been the governing rule in Kansas for all of our history.¹⁷

Administrators have, however, repeatedly been told that they must color within the lines. Which is to say that our delegation doctrine is not without limits. Kansas law does recognize that “some direction must be given in order for a legislative delegation to be constitutional” and typically when challenges arise, they focus on the adequacy of that legislative standard.¹⁸ The legislature must—at minimum—guide agencies by “conditions, restrictions, limitations, yardsticks, guides, [or] broad outlines” which function as “adequate . . . guide rules” for agency action.¹⁹

The flexible and cooperative approach taken by Kansas courts to legislative delegations of power has—since the mid-twentieth

14. *Coleman v. Newby*, 7 Kan. 82, 88 (1871).

15. 7 Kan. 82 (1871)

16. *Id.* at 88.

17. *Blue Cross & Blue Shield of Kan., Inc. v. Praeger*, 276 P.3d 232, 277–78 (Kan. 2003) (“Where flexibility in fashioning administrative regulations to carry out statutory purpose is desirable in light of complexities in the area sought to be regulated, the legislature may enact statutes in a broad outline and authorize the administrative agency to fill in the details. . . . In testing a statute for adequacy of standards, the character of the administrative agency is important.”).

18. *State ex rel. Morrison v. Sebelius*, 285 Kan. 875, 916 (2008).

19. *See Wesley Med. Ctr. v. McCain*, 226 Kan. 263, 271 (1979) (delegation to administrative agency requires “adequate standards and guide rules”); *State ex rel. Donaldson v. Hines*, 163 Kan. 300, 309 (1947) (delegation to administrative agency must be guided by “conditions, restrictions, limitations, yardsticks, guides, rules, [or] broad outlines”).

century—come to define the separation of powers more broadly in Kansas. By the 1950s, the Kansas Supreme Court had completely abandoned the *Johnson* rule of strict separation. The court regularly refused to strike down governmental combinations of power in one place, often in the name of what was “practicable.”²⁰ By 1976, in *State ex rel. Schneider v. Bennett*,²¹ Kansas courts settled on a four-factor “balancing” test—still applied today²²—intended to permit cooperative sharing of power among the branches of government so long as no specific combination created a “significant interference” with the independent functioning of any department of government.²³

Soon after, in *State v. Mitchell*,²⁴ the cooperative nature of power sharing among the branches of government in Kansas was clarified

20. See, e.g., *State ex rel. Hawks v. City of Topeka*, 176 Kan. 240, 245 (1954) (upholding an act granting power to cities to acquire real estate for off-street parking by eminent domain on the grounds that “the absolute independence of the departments and the complete separation of the powers is impracticable, and was not intended”) (quoting *In re Sims*, 54 Kan. 1, 11 (1894) (Johnston, J., concurring)); *State ex rel. Anderson v. Fadely*, 180 Kan. 652, 695–96 (1957) (upholding an act creating the State Finance Council, holding “it cannot be overlooked as a practical matter that as between the legislative and the executive departments of our government the enactment contemplates comity and cooperation and not a blending of powers”).

21. 547 P.2d 786 (Kan. 1976).

22. *Solomon v. State*, 303 Kan. 512, 526 (2015) (describing the four factors as “(1) the essential nature of the power being exercised; (2) the degree of control by one branch over another; (3) the objective sought to be attained; and (4) the practical result of blending powers as shown by actual experience over a period of time”).

23. *Bennett*, 547 P.2d at 792 (“First is the essential nature of the power being exercised. Is the power exclusively executive or legislative or is it a blend of the two? A second factor is the degree of control by the legislative department in the exercise of the power. Is there a coercive influence or a mere cooperative venture? A third consideration of importance is the nature of the objective sought to be attained by the legislature. Is the intent of the legislature to cooperate with the executive by furnishing some special expertise of one or more of its members or is the objective of the legislature obviously one of establishing its superiority over the executive department in an area essentially executive in nature? A fourth consideration could be the practical result of the blending of powers as shown by actual experience over a period of time where such evidence is available.”).

24. 672 P.2d 1 (Kan. 1983)

when the Kansas Supreme Court adopted a rule of acquiescence.²⁵ In *Mitchell*, the court was required to determine “whether the Supreme Court has exclusive constitutional power to make rules pertaining to court administration”²⁶ In deciding whether a legislative enactment dictating a rule of court procedure violated the separation of powers, the *Mitchell* court held that “[a]lthough the Supreme Court has the constitutional power to determine court procedure, it may cooperate with the legislature in the exercise of that power. The Supreme Court’s acquiescence [to the statute in question] is an example of cooperation.”²⁷ The court followed the logic of this holding through to its inevitable conclusion, reasoning that because “the judiciary can acquiesce in legislative action” which dictates aspects of “the judicial function,” a problem only emerges “when court rules and a statute conflict”; and in “such circumstances,” the court’s rule “must prevail” and the statute must give way.²⁸

Recent history, however, suggests the Kansas Supreme Court may be backtracking from the blurred lines of separation embodied in the rules of practicability, cooperation, and acquiescence. In a 2015 case, for example, I criticized our court’s separation of powers jurisprudence, arguing that “in the name of balance, cooperation, and harmony, we have permitted breaches of the walls of separation between the departments so long as no single breach is determined to be ‘significant.’”²⁹ I would instead have adhered “to the basic principle . . . that ‘the functions of the three departments should be kept as distinct and separate as possible,’”³⁰ and would have held that when “the Government is called upon to perform a function that requires an exercise of legislative, executive, or judicial power, only the vested recipient of that power can perform

25. *Id.* at 18–19.

26. *Id.* at 19.

27. *Id.* at 3.

28. *Id.* at 23.

29. *Solomon v. State*, 364 P.3d 536, 553 (Kan. 2015).

30. *Id.* at 556 (Stegall, J., concurring).

it.”³¹ In so doing, the court could return to its “obligation to guard and protect a clear and strong wall of separation between each of the three great departments of government—keeping each within its proper province and protecting those provinces from colonization by the other two departments.”³²

And in 2022, a majority of the Kansas Supreme Court relied on separation of powers principles to evaluate the justiciability of legislative redistricting maps which considered political affiliations.³³ In that case, when evaluating whether “partisan gerrymandering” was a “political question” outside the scope of judicial review we took a “modest approach to questions that touch the core constitutional principle of separation of powers and the ongoing dictate that the coordinate departments of government accord one another the due and proper respect expected and owed under our unique constitutional arrangements.”³⁴ Thus, if “resolving a controversy is outside the scope of the competence of the judiciary, it is said to be ‘nonjusticiable’—that is, it is a matter committed by the structure of our Constitution to the legislative or executive branches of government.”³⁵ The court went on to note that “these branches are ultimately accountable . . . to the voters . . . [who] will—undoubtedly—have [their] say in the matter.”³⁶ Finally, the court observed that this “is not an unfortunate accident or a mistake in our constitutional structure, but rather ‘a consequence of the separation of powers among the legislative, executive, and judicial branches’”³⁷

31. *Id.* (Stegall, J., concurring) (quoting *Association of American Railroads*, 575 U.S. 43, 68 (2015) (Thomas, J., concurring)).

32. *Id.* at 545 (Stegall, J., concurring).

33. *E.g.*, *Rivera v. Schwab*, 512 P.3d 168, 185 (Kan. 2022); *In re Validity of Senate Bill 563*, 512 P.3d 220, 229 (Kan. 2022)

34. *Rivera*, 512 P.3d at 184–85.

35. *Id.* at 181.

36. *Id.*

37. *Id.* (quoting *Gannon v. State*, 319 P.3d 1196, 1218 (Kan. 2014)).

II. THREE RECENT DEVELOPMENTS IN KANSAS ADMINISTRATIVE LAW

In light of this history, I conclude this brief article by discussing three recent developments in Kansas administrative law concerning: (1) judicial deference; (2) prosecutorial discretion; and (3) emergency powers. Each of these areas of the law confronts—in important and unique ways—the core administrative law question of “who decides?”

A. *Judicial Deference*

When executive agencies make decisions, how do those decisions get reviewed? Kansas, like most states, has a judicial review act by which an aggrieved person can appeal an agency decision they don't like.³⁸ And embedded in the process of judicial review is the question of deference. That is, when an agency action is based on its own interpretation of a statute or a regulation, should a court defer to that agency interpretation? Under federal law, the answer—at the moment—appears to still be yes.³⁹ But in Kansas, recent developments have moved our state courts to afford far less deference to state agency decisions than that given by federal courts to similar federal agencies.

Prior to 2009, Kansas courts applied a version of *Chevron* deference we called the doctrine of operative construction—under which the interpretation of a statute by an administrative agency charged with the responsibility of enforcing the statute was entitled to judicial deference.⁴⁰ As such, we afforded “great” deference to an

38. KAN. STAT. ANN. §§ 77-601–31 (2022).

39. See *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 414 (1945) (deferring to agency interpretations of the agency's own regulations, unless that interpretation is “plainly erroneous or inconsistent with the regulations”); *Chevron, U.S.A., Inc. v. NRDC, Inc.*, 467 U.S. 837, 843–44 (1984) (deferring to agency interpretations if a statute is unclear, so long as they are a “permissible construction,” meaning one that is not “arbitrary, capricious, or manifestly contrary to the statute”).

40. *Matjasich v. State Dep't of Hum. Res.*, 21 P.3d 985, 988 (Kan. 2001).

agency's interpretation of its statutes.⁴¹ But by 2009, our court abandoned this doctrine, declaring that "[n]o significant deference is due" to an agency's construction of a statute.⁴² This change was codified in the 2009 amendments to the Kansas Judicial Review Act.⁴³ Yet in subsequent years, parties still argued—and lower courts still applied—the doctrine of operative construction.⁴⁴ In response, the Kansas Supreme Court "attempted to set the record straight with all the subtlety of a foghorn."⁴⁵ In *Douglas*, the court made it "crystal clear" that "we unequivocally declare here that the doctrine of operative construction . . . has been abandoned, abrogated, disallowed, disapproved, ousted, overruled, and permanently relegated to the history books where it will never again affect the outcome of an appeal."⁴⁶ Kansas courts now review a claim that an agency "erroneously interpreted or applied the law" under K.S.A. 77-621(c)(4), "without deference" to the agency's interpretation.⁴⁷

The same trend in Kansas administrative law has rejected giving any deference to an agency's interpretation of its own rules and regulations.⁴⁸ But this has not always been the case. For example, in our 2002 *Winston* decision, we recited the rule that "courts shall give deference to an agency's interpretation of its own

41. See, e.g., *Mitchell v. Liberty Mut. Ins. Co.*, 271 Kan. 684, 700 (2001) ("Usually, the legal interpretation of a statute by an administrative agency that is charged by the legislature with the authority to enforce the statute is entitled to great judicial deference . . .").

42. *Higgins v. Abilene Mach., Inc.*, 204 P.3d 1158 (Kan. 2009).

43. See Mary Feighny, *2009 Amendments to the Kansas Administrative Procedure Act and the Kansas Judicial Review Act*, 78-OCT. J. KAN. B. ASS'N 21, 23 (2009).

44. See, e.g., *Douglas v. Ad Astra Info. Sys., L.L.C.*, 213 P.3d 764, 769 (Kan. Ct. App. 2009), *rev'd*, 296 Kan. 552, 293 P.3d 723 (2013), and *abrogated by* *Redd v. Kan. Truck Ctr.*, 239 P.3d 66 (Kan. 2010) ("Under the doctrine of operative construction, the Board's interpretation of the law is entitled to judicial deference. If there is a rational basis for the Board's interpretation of a statute, it should be upheld upon judicial review.").

45. Michael S. Obermeier, *The Kansas Judicial Review Act: A Road Map*, 86-MAY J. KAN. B. ASS'N 24, 31 (2017).

46. *Douglas v. Ad Astra Info. Sys., L.L.C.*, 293 P.3d 723, 728 (Kan. 2013).

47. *Landrum v. Goering*, 397 P.3d 1181, 1187 (Kan. 2017).

48. *May v. Cline*, 372 P.3d 1242, 1245 (Kan. 2016).

regulation. . . . An agency's interpretation of its own regulation will not be disturbed unless the interpretation is clearly erroneous or inconsistent with the regulation."⁴⁹ In 2016, however, we once again announced an end to judicial deference to executive agencies on questions of law. Relying on the reasoning of *Douglas*, we held that the "interpretation of a regulation is a question of law. . . . We therefore owe no deference to an agency's interpretation of its own regulations and exercise unlimited review over such questions."⁵⁰

B. Prosecutorial Discretion

A second area of administrative law undergoing possible change in Kansas concerns prosecutorial discretion. While prosecutors are not traditionally viewed as "bureaucrats" in an executive agency, they are some of the most important actors in the arena of administrative law. That is, the day-to-day decisions of prosecutors fill in the blanks left by the legislature when it crafts necessarily broad and general criminal statutes. This "prosecutorial discretion" is an immensely powerful tool of the administrative state.⁵¹

Two recent cases at the Kansas Supreme Court have used the doctrines of separation of powers to limit the level of discretion the legislature may give to prosecutors.⁵² The basic principle is clear: when

49. *Winston v. State Dep't of Soc. & Rehab. Servs.*, 49 P.3d 1274, 1281 (Kan. 2002).

50. *May*, 372 P.2d at 1245.

51. See Peter L. Markowitz, *Prosecutorial Discretion Power at its Zenith: The Power to Protect Liberty*, 97 BOSTON L. REV. 489, 490–91 (2017) ("Modern presidents have asserted increasingly robust visions of the scope of their own prosecutorial discretion power—at times using prosecutorial discretion policies to achieve goals that they could not otherwise realize through the legislative process.").

52. See *State v. Harris*, 467 P.3d 504, 507–09 (Kan. 2020) (holding residual clause of statute prohibiting possession of weapon by convicted felon, which defined "weapon" to include dagger, dirk, switchblade, stiletto, straight-edged razor "or any other dangerous or deadly cutting instrument of like character" was unconstitutionally vague on its face); *State v. Ingham*, 430 P.3d 931, 943–44 (Kan. 2018) (Stegall, J., concurring) (questioning whether a statute criminalizing "[p]ossessing, manufacturing or transporting a commercial explosive" and defining "commercial explosive" as "chemical compounds that form an explosive; a combination of chemicals, compounds or materials, including, but not limited to, the presence of an acid, a base, dry ice or aluminum foil, that are

crafting a statute, the legislature must not delegate the ability to decide what the law says on an *ad hoc* basis to the executive or judicial branches.⁵³ Laws that delegate too much discretionary authority to non-legislative actors to define criminal conduct are necessarily void for vagueness. A vague law “invite[s] arbitrary power” and “threaten[s] to transfer legislative power to police and prosecutors, leaving them the job of shaping a vague statute’s contours through . . . enforcement decisions.”⁵⁴

Just as a criminal statute must put the public on notice of what conduct is prohibited in order to satisfy due process, so too must a statute provide “explicit standards” (i.e. an intelligible principle) for enforcement.⁵⁵ Impermissible delegations of the legislative power in the criminal context leave open the possibility of arbitrary law enforcement at the whims of potentially unaccountable police, prosecutors, and judges.⁵⁶ Within constitutional boundaries, publicly accountable legislators have the liberty to define criminal conduct, while prosecutors, judges, law enforcement officers, and juries are deliberately constrained by those legislative definitions. Put another way, the separation of powers requires that a criminal

placed in a container for the purpose of generating a gas or gases to cause a mechanical failure, rupture or bursting of the container; incendiary or explosive material, liquid or solid; detonator; blasting cap; military explosive fuse assembly; squib; electric match or functional improvised fuse assembly; or any completed explosive device commonly known as a pipe bomb or a molotov cocktail” was unconstitutionally vague, though the issue was not briefed before the court).

53. *Harris*, 467 P.3d at 507–09.

54. *Ingham*, 430 P.3d at 943 (Stegall, J., concurring) (quoting *Sessions v. Dimaya*, 138 S.Ct. 1204, 1223 (2018) (Gorsuch, J., concurring)).

55. *Harris*, 467 P.3d at 508.

56. *Kolender v. Lawson*, 461 U.S. 352, 358 (1983); *see also* *United States v. Davis*, 139 S. Ct. 2319, 2325 (2019) (“Vague statutes threaten to hand responsibility for defining crimes to relatively unaccountable police, prosecutors, and judges, eroding the people’s ability to oversee the creation of the laws they are expected to abide.”); *United States v. Reese*, 92 U.S. 214, 221 (1875) (“It would certainly be dangerous if the legislature could set a net large enough to catch all possible offenders, and leave it to the courts to step inside and say who could be rightfully detained, and who should be set at large. This would, to some extent, substitute the judicial for the legislative department of the government.”).

statute must “convey sufficient clarity to those who apply the ordinance standards to protect against arbitrary and discriminatory enforcement.”⁵⁷

C. *Emergency Powers*

A final example of Kansas administrative law in flux is the executive branch’s use of emergency powers. Nearly all government actors became reacquainted with this critical executive function—and its limits and controversies—during the global COVID-19 pandemic.⁵⁸ Early on during the pandemic, we heard a case that put those questions squarely before us.⁵⁹ In the spring of 2020, Kansas Governor Laura Kelly issued a COVID-19 emergency proclamation.⁶⁰ According to Kansas law, that proclamation could not last longer than 15 days unless ratified by a concurrent resolution of the Legislature. The Legislature did adopt House Concurrent Resolution 5025 which extended the Governor’s emergency declaration—but it also purported to delegate the legislative power to revoke executive orders issued under the emergency declaration to a smaller body consisting of legislative leaders called the Legislative Coordinating Council.⁶¹

Governor Kelly then issued a controversial executive order that, among other things, temporarily prohibited “mass gatherings.”⁶² The Legislative Coordinating Council immediately convened and voted to revoke this order, and Governor Kelly then brought an original action in our court asking us to determine whether the LCC overstepped its authority.⁶³ Our ultimate holding—that the LCC

57. *City of Lincoln Ctr. v. Farmway Co-Op, Inc.*, 316 P.3d 707, 714 (Kan. 2013) (quoting *City of Wichita v. Hackett*, 69 P.3d 621, 627 (Kan. 2003)).

58. Magnus Lundgren et al., *Emergency Powers in Response to COVID-19: Policy Diffusion, Democracy, and Preparedness*, 38 NORDIC J. OF HUMAN RIGHTS 305, 306 (2020) (noting the number of governments that declared states of emergencies in response to the pandemic was “equivalent to all SOEs declared globally since the 1980s.”).

59. *Kelly v. Legislative Coordinating Council*, 460 P.3d 832 (Kan. 2020).

60. *Id.* at 834.

61. *Id.* at 836–37.

62. *Id.* at 837.

63. KAN. STAT. ANN. § 48-904 et seq.

exceeded its lawful authority in revoking the executive order because the “plain text” of House Concurrent Resolution 5025 did not authorize the LCC to revoke the executive order—did not resolve the administrative law questions at the heart of the case.⁶⁴ As such, we declined to decide “whether a concurrent resolution passed by the Legislature can delegate its oversight authority under KEMA [the Kansas Emergency Management Act] to the LLC [Legislative Coordinating Council] . . . or whether Executive Order 20-18 was a legally valid or constitutional exercise of the Governor’s authority [under the Kansas Emergency Management Act].”⁶⁵

I wrote separately to address a part of the LCC’s argument—that absent some legislative oversight, emergency powers exercised by the executive may at some point entail an unconstitutional delegation of legislative authority. I found the argument that the legislature contemplated fixing this oversight authority with the LCC to be “at least colorable in light of the vexing separation of powers problems created when one branch of government delegates its power to another branch as the Legislature has done (in part) in [the Kansas Emergency Management Act].”⁶⁶ I noted that “[a]bsent a liberal interpretation of the Legislature’s ability to continually oversee the Governor’s exercise of delegated Legislative authority, the structure of KEMA itself risks violating the constitutional demand of separate powers.”⁶⁷

CONCLUSION

“‘Something there is that doesn’t love a wall/That wants it down,’ observed Robert Frost, blaming nature’s assault—winter’s ‘frozen

64. *Kelly*, 460 P.3d at 834.

65. *Id.*

66. *Id.* at 841 (Stegall, J., concurring).

67. *Id.* (Stegall, J., concurring) (citing *Solomon v. State*, 364 P.3d 536, 552 (Kan. 2015) (Stegall, J., concurring) (“The separation of powers contains no opt-out clause. The departments are not free to ignore the strictures of separate powers upon a mutual declaration of cooperation in furtherance of some jointly agreed upon governmental objective.”)).

ground swell.' As with nature, so too with governments."⁶⁸ I wrote those words in 2014 hoping to spark a more robust judicial focus on those vexing separation of powers problems.

I went on to observe that there is something about power that doesn't love a wall; that wants it down. It is in the centripetal nature of governmental power—if dispersed like so many iron filings across a surface—to be restless until it is united in one place, as though drawn by an unseen magnet beneath. Knowing this—and having a healthy fear of consolidated power—the drafters of both our national and Kansas constitutions structured our government to be crisscrossed by numerous “walls of separation.” The most important of these walls of separation are those that both hem in and protect the exercise of the three distinct forms of governmental power in our constitutional system—the executive, the legislative, and the judicial powers.⁶⁹

As the ground of Robert Frost's poetic pastures heaved and fell under the pressures of time and season change, so too does power ebb and flow within the governments of men—and under similar pressures. And “who decides?” remains a perennial question of equal importance to the ultimate questions concerning the actual decision being made. What is to prevent administrative law from becoming that “extralegal regime” feared by those suspicious of the rulemaking class of “unelected bureaucrats”? Ultimately, we must rely on those very walls of separation—if kept in good repair—to do the job.

68. *Solomon v. State*, 364 P.3d 536, 550 (Kan. 2015) (Stegall, J., concurring) (quoting Robert Frost, *Mending Wall*, in *NORTH OF BOSTON* 11–13 (1917)).

69. *Id.* at 550 (Stegall, J., concurring) (quotations omitted).

NONDELEGATION IN PENNSYLVANIA

HON. DAVID N. WECHT AND LAWRENCE MCINTYRE*

INTRODUCTION

The Supreme Court of the United States has struck down acts of Congress on nondelegation grounds only twice in that Court's entire history.¹ By contrast, the Supreme Court of Pennsylvania has invalidated two unconstitutional delegations in the last six years alone.² Given that successful nondelegation claims seem to be rare in the long history of the federal appellate courts,³ we explore the two recent Pennsylvania decisions in greater detail below and consider whether our own state's comparatively lively nondelegation docket is attributable to substantive doctrinal differences or simply to mere coincidence. We conclude it is the latter.

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1. *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935); *Panama Ref. Co. v. Ryan*, 293 U.S. 388 (1935).

2. *Protz v. Workers' Comp. Appeal Bd.*, 161 A.3d 827 (Pa. 2017); *W. Phila. Achievement Charter Elementary Sch. v. Sch. Dist. of Phila.*, 132 A.3d 957 (Pa. 2016).

3. See Cass R. Sunstein, *Nondelegation Canons*, 67 U. CHI. L. REV. 315, 322 (2000) ("It is true that the Supreme Court last invalidated a statute on nondelegation grounds in 1935. But it is also true the Court first invalidated a statute on nondelegation grounds in exactly the same year, notwithstanding a number of previous opportunities. . . . We might say that the [nondelegation] doctrine has had one good year, and 211 bad ones (and counting).").

I. DELEGATION OF LEGISLATIVE AUTHORITY TO AN UNELECTED
“SCHOOL REFORM COMMISSION”

The first of these recent nondelegation cases, *West Philadelphia Achievement Charter Elementary School v. School District of Philadelphia*,⁴ involved a challenge to provisions of Pennsylvania’s Public School Code⁵ that govern financially distressed school districts. This now partially invalidated “Distress Law” worked as follows. If a school district failed to meet certain state academic standards or budgetary requirements, the Commonwealth’s Secretary of Education could declare the district to be distressed.⁶ Upon such a declaration, the powers of the Philadelphia School Board would be suspended and a five-member School Reform Commission would be created to oversee the district.⁷ The Commission would include some members appointed by the Governor and some members appointed by the Mayor of Philadelphia.⁸ By law, the newly formed Commission would be given all powers previously possessed by the school board as well as broad statutory authority to suspend almost any requirement of the Public School Code or any regulation of the State Board of Education.⁹

4. 132 A.3d 957 (Pa. 2016)

5. *Id.* at 958; 24 P.S. §§ 1-101 – 27-2702.

6. *W. Phila. Achievement Charter Elementary Sch.*, 132 A.3d at 958.

7. *Id.* at 959.

8. *Id.*

9. 24 P.S. § 6-696(i)(3) (authorizing the Commission to “suspend the requirements of” the School Code and its associated departmental regulations). The Pennsylvania General Assembly did impose minor limits on the Commission’s authority. For example, the legislature placed a few provisions of the Public School Code beyond the reach of the Commission’s suspension power, though most of the non-suspendable provisions related to school board elections. The General Assembly also required the Commission to submit an annual report to the Governor and to the Education Committees of both the House and the Senate detailing the distressed district’s fiscal and academic performance. Finally, individual members of the Commission, as public employees, were subject to removal by the Governor for “malfeasance or misfeasance.” *W. Phila. Achievement Charter Elementary Sch.*, 132 A.3d at 971 (Baer, J., dissenting).

The Commonwealth's Secretary of Education triggered the Distress Law in 2001 when he declared the Philadelphia School District to be financially distressed.¹⁰ Given the Secretary's declaration, the Philadelphia School Board's powers were suspended and a five-member Commission was appointed to oversee the District.¹¹ The unelected Commission remained in control of the Philadelphia School District for more than fifteen years but failed to restore the District to solvency.¹²

In 2011, when one of Philadelphia's charter schools—the West Philadelphia Achievement Charter Elementary School—applied to the District for renewal of its charter, the Commission (*qua* School Board) tried to impose new conditions on the school's charter.¹³ For

10. *W. Phila. Achievement Charter Elementary Sch.*, 132 A.3d at 959. At the time, the District had a \$200 million budget shortfall that was projected to grow to \$1.5 billion within five years. See Dale Mezzacappa, *A History Lesson on Historic Day for School Reform Commission*, CHALKBEAT PHILA. (Nov. 16, 2017, 2:31 AM), <https://philadelphia.chalkbeat.org/2017/11/16/22184825/a-history-lesson-on-historic-day-for-school-reform-commission> [https://perma.cc/6SRT-SP34] (“By 2000, the District's teachers were preparing to strike and its budget was facing a \$200 million shortfall, projected to balloon to \$1.5 billion in five years.”).

11. *W. Phila. Achievement Charter Elementary Sch.*, 132 A.3d at 959.

12. As an unelected body tasked with making cuts to public education, the School Reform Commission—perhaps unsurprisingly—was not popular with the voters of Philadelphia. That backlash only grew as school closures, teacher layoffs, and missed budget deadlines dominated the headlines throughout the Commission's tenure. See Kristen A. Graham, *Notable Moments During 17 Years of Philly's School Reform Commission*, PHILA. INQUIRER, (Jun. 29, 2018), <https://www.inquirer.com/philly/education/src-timeline-20180629.html> [https://perma.cc/7N53-AQGS] (detailing the Commission's efforts to slash budgets, seek new revenue sources, layoff teachers and staff, and close schools). In 2015, Philadelphia voters overwhelmingly supported abolishing the School Reform Commission in a non-binding ballot resolution. See Mark Dent, *A Not-So-Brief History of Philly's Rocky Relationship with the SRC*, BILLY PENN (Nov. 2, 2017), <https://billypenn.com/2017/11/02/a-not-so-brief-history-of-phillys-relationship-with-the-src> [https://perma.cc/7UJK-7R5P] (“About 75 percent of voters answered yes on a ballot question about disbanding the SRC and returning control of the school district to Philadelphia.”). Eventually, in 2017, the Commission voted to disband itself and to return control of the District to a School Board appointed by the Mayor of Philadelphia. In the end, the Commission left the District with a projected \$900 million budget deficit—essentially just as “distressed” as it had been when the Commission took over in 2001. *Id.*

13. *W. Phila. Achievement Charter Elementary Sch.*, 132 A.3d at 959.

example, the Commission sought to cap West Philadelphia's enrollment at no more than 400 students.¹⁴ Had the School Board still been in charge of the District, this would not have been possible. The School Code allows for the placement of "reasonable conditions" on a school's charter only when the school is in "corrective action status" following a failure to meet "adequate yearly progress for at least four consecutive years."¹⁵ But West Philadelphia was *not* in corrective action status.¹⁶ The Commission therefore sought to suspend the corrective-action-status provision, thus allowing it to impose new conditions on *any* school, even those that had met all yearly progress standards.¹⁷

The Supreme Court of Pennsylvania ultimately held that the Commission's broad suspension powers violated the nondelegation doctrine.¹⁸ The court explained that Article II, Section 1 of the Pennsylvania Constitution states that "[t]he legislative power of this Commonwealth shall be vested in a General Assembly, which shall consist of a Senate and a House of Representatives."¹⁹ The nondelegation doctrine, which has been described as a "natural corollary" to that vesting clause,²⁰ prevents the General Assembly from delegating "to any other branch of government or to any other body or authority" the power to make law.²¹ This prohibition has its roots in separation-of-powers principles and was championed by many of the political theorists who influenced the framers of the

14. *Id.* at 960.

15. 24 P.S. § 17-1729-A(a.1).

16. *W. Phila. Achievement Charter Elementary Sch.*, 132 A.3d at 960.

17. *Id.* at 959–60.

18. *Id.* at 967.

19. PA. CONST. art. II, § 1.

20. *Chartiers Valley Joint Schs. v. Allegheny Cnty. Bd. of Sch. Dirs.*, 211 A.2d 487, 492 (Pa. 1965).

21. *Blackwell v. Pa. Ethics Comm'n*, 567 A.2d 630, 636 (Pa. 1989).

United States Constitution as well as the constitutions of the individual states.²²

Citing many of the same standards that the United States Supreme Court applies in nondelegation cases, the Supreme Court of Pennsylvania explained that, while the legislature may not delegate its lawmaking authority, it may establish “primary objectives or standards” and then entrust some other entity to “fill up the details” of the legislation.²³ In other words, the legislature must provide an “intelligible principle” to which the non-legislative body must conform.²⁴ The court also underscored that some Pennsylvania nondelegation decisions stress the importance of procedural safeguards like judicial review and notice-and-comment rulemaking, which prevent the arbitrary and capricious exercise of delegated power.²⁵

Applying these precepts, the court concluded that the General Assembly did not provide any guidance or standards in the Distress Law that instructed the Commission concerning when and

22. See JOHN LOCKE, *SECOND TREATISE OF GOVERNMENT* 87 (R. Cox ed. 1982) (stating that legislative power consists of the power “to make laws, and not to make legislators”); see generally BARON DE MONTESQUIEU, *THE SPIRIT OF THE LAWS* XI:6 (1748) (suggesting that political liberty requires a separation of legislative, executive, and judicial powers); *THE FEDERALIST* NO. 47 (Clinton Rossiter ed. 1961) (James Madison) (citing Montesquieu, and stating that “[t]he accumulation of all powers, legislative, executive, and judiciary, in the same hands . . . may justly be pronounced the very definition of tyranny”).

23. *W. Phila. Achievement Charter Elementary Sch.*, 132 A.3d at 964 (citing *Panama Ref. Co. v. Ryan*, 293 U.S. 388, 426 (1935) (“Congress may . . . establish primary standards, devolving upon others the duty to carry out the declared legislative policy[.]”)); *J.W. Hampton, Jr., & Co. v. United States*, 276 U.S. 394, 409 (1928) (requiring an “intelligible principle” to which the non-legislative body must conform).

24. *J.W. Hampton, Jr., & Co.*, 276 U.S. at 409.

25. In one case, for example, the statute at issue required that the administrative agency establish neutral operating procedures, develop standardized documents, and give the public notice of proposed agency rules and regulations before promulgating them. *Tosto v. Pa. Nursing Home Loan Agency*, 331 A.2d 198, 203 (Pa. 1975). In upholding that law, the Pennsylvania Supreme Court described such elements as “important safeguard[s] against the arbitrariness of ad hoc decision making.” *Id.* at 204.

how to wield its suspension power.²⁶ Instead, “the Legislature gave the [Commission] what amounts to *carte blanche* powers to suspend virtually any combination of provisions of the School Code—a statute covering a broad range of topics.”²⁷ Along with the lack of an intelligible principle, the law did not include safeguards to protect against arbitrary, *ad hoc* decision making, such as a requirement that the Commission hold hearings, allow for public notice and comment, or explain the grounds for its suspensions in a reasoned opinion.²⁸ Thus, the Court concluded that the legislature, in giving the Commission almost unbridled authority to suspend the School Code, unconstitutionally delegated its lawmaking authority.²⁹

II. DELEGATION OF LEGISLATIVE AUTHORITY TO THE AMERICAN MEDICAL ASSOCIATION

Only a year after *West Philadelphia Achievement Charter Elementary School*, the Pennsylvania Supreme Court heard another nondelegation challenge. In *Protz v. Workers’ Compensation Appeal Board*,³⁰ a provision of the state’s Workers’ Compensation Act³¹ was at issue.³² Under the challenged law, an employer paying workers’ compensation benefits could compel the claimant to undergo an impairment-rating evaluation (“IRE”) after the claimant had received benefits for roughly two years.³³ During the IRE, a physician would determine the “degree of impairment” caused by the claimant’s work injury using the methodology set forth in “the most recent

26. *W. Phila. Achievement Charter Elementary Sch.*, 132 A.3d at 965 (explaining that the Distress Law lacks “any discernable [*sic*] standards or restraints in relation to the selection of School Code provisions for suspension. Those high-level determinations are left entirely to the [Commission’s] discretion, and it is not apparent that any mechanism exists to either channel or test the [Commission’s] exercise of such discretion”).

27. *Id.*

28. *Id.* at 967.

29. *Id.* at 966.

30. 161 A.3d 827 (Pa. 2017)

31. 77 P.S. §§ 1-2710.

32. *Protz*, 161 A.3d at 830.

33. *Id.* at 831 n.2.

edition” of a book published by the American Medical Association (“AMA”) called the *Guides to the Evaluation of Permanent Impairment*.³⁴ If the claimant was rated at least fifty percent impaired, he or she would be eligible for lifetime disability benefits.³⁵ But if the IRE came back at less than fifty percent, the claimant would be considered only partially disabled and would be limited to a maximum of 500 weeks of workers’ compensation benefits.³⁶

When the legislature first enacted this statutory scheme in the mid-1990s, “the most recent edition” of the *Guides* was the Fourth Edition.³⁷ After that, the AMA released two major revisions: the Fifth Edition (in 2001) and the Sixth Edition (in 2008).³⁸ In other words, the legislature did not simply incorporate by reference the AMA’s existing methodology; it effectively gave the AMA the authority to modify Pennsylvania’s impairment-rating methodology whenever and however it wanted, with any changes automatically becoming law upon release.³⁹

The Pennsylvania Supreme Court found that the legislature’s delegation of authority to the AMA lacked an intelligible principle.⁴⁰

34. 77 P.S. § 511.2(1) (“When an employe[e] has received total disability compensation . . . for a period of one hundred four weeks,” the employee “shall be required to submit to a medical examination . . . to determine the degree of impairment due to the compensable injury, if any. The degree of impairment shall be determined . . . pursuant to the most recent edition of the American Medical Association ‘Guides to the Evaluation of Permanent Impairment.’”), *invalidated by* Protz v. Workers’ Comp. Appeal Bd., 161 A.3d 827 (Pa. 2017).

35. 77 P.S. § 511.2(2), *invalidated by* Protz v. Workers’ Comp. Appeal Bd., 161 A.3d 827 (Pa. 2017).

36. *Id.* (providing that a claimant with “a threshold impairment rating that is equal to or greater than fifty per centum” is presumed to be totally disabled); 77 P.S. § 511.2(7) (limiting partial disability payments to five hundred weeks).

37. Am. Med. Ass’n, *Guides to the Evaluation of Permanent Impairment* (4th ed. 1993).

38. AM. MED. ASS’N, *GUIDES TO THE EVALUATION OF PERMANENT IMPAIRMENT* (5th ed. 2001); AM. MED. ASS’N, *GUIDES TO THE EVALUATION OF PERMANENT IMPAIRMENT* (6th ed. 2008).

39. *See* 77 P.S. § 511.2(1) (stating that the most recent edition of the *Guides* is to be used when determining an individual’s degree of impairment).

40. *See* Protz, 161 A.3d at 835.

The court underscored that “[t]he General Assembly did not favor any particular policies relative to the *Guides*’ methodology for grading impairments, nor did it prescribe any standards to guide and restrain the AMA’s discretion to create such a methodology.”⁴¹ The court also emphasized that, as in the charter school case, the legislature included no procedural safeguards “to protect against ‘administrative arbitrariness and caprice.’”⁴² The General Assembly did not, for example, require that the AMA hold hearings, accept public comments, or explain the grounds for its methodology in a reasoned opinion, which then could be subject to judicial review.⁴³ Furthermore, the AMA physicians who author the *Guides* are not public employees subject to discipline or termination for misconduct.⁴⁴

In striking down the IRE statute for want of an intelligible principle, the court avoided the overarching question of whether the legislature can *ever* delegate to a private entity.⁴⁵ The court assumed, without deciding, that the intelligible principle inquiry governs

41. *Id.* Worse, it is not even clear that the General Assembly could have established the primary standards necessary to limit the AMA’s discretion given that the AMA is a private organization. This fact is significant for two reasons. First, there are obviously constitutional restrictions on the legislature’s ability to dictate to a private organization what it should or should not publish. See generally *Agency for Int’l Dev. v. All. for Open Soc’y Int’l, Inc.*, 570 U.S. 205, 218 (2020) (holding that the First Amendment prevents the government from forcing a private organization to profess publicly a viewpoint not held by the organization); cf. *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 641 (1994) (“At the heart of the First Amendment lies the principle that each person should decide for himself or herself the ideas and beliefs deserving of expression, consideration, and adherence.”). Second, use of the *Guides* is not unique to Pennsylvania law, making it unlikely that the AMA would take marching orders from any one state legislature. See AM. MED. ASS’N, *GUIDES TO THE EVALUATION OF PERMANENT IMPAIRMENT* 20 (6th ed. 2008) (“In the United States, 44 states, 2 commonwealths, and federal employee compensation systems (in about 90+% of US jurisdictions) either mandate or recommend using the *Guides* to measure impairment in workers’ compensation claims.”).

42. *Protz*, 161 A.3d at 836 (quoting *Tosto v. Pa. Nursing Home Loan Agency*, 331 A.2d 198, 203 (Pa. 1975)).

43. *Id.*

44. *Id.*

45. *Id.* at 837–38.

both public and private delegations alike.⁴⁶ While delegations to private persons or entities may strike some as more offensive to our constitutional order than delegations to the executive or judicial branches, neither the Pennsylvania Supreme Court nor the United States Supreme Court has directly held that a more restrictive test governs in such cases.⁴⁷ And there's at least a colorable argument that an intelligible principle is all that the Constitution requires for *any* delegation, public or private. As Justice Scalia explained in *Mistretta v. United States*,⁴⁸ when the legislature supplies an intelligible principle, it is not technically delegating *its lawmaking power* at all.⁴⁹ Thus, although the phrase "excessive delegation" is sometimes used in these cases, "what is really at issue is whether there has been *any* delegation of legislative power," which occurs only when the legislature "authorizes the exercise of executive or judicial power without adequate standards."⁵⁰ Despite this technical

46. See *id.* at 838 (explaining that the IRE provision "could not withstand constitutional scrutiny even if the AMA were a governmental body"). The United States Supreme Court similarly has avoided deciding whether the intelligible-principle test applies when the legislature delegates authority to a private person or group. In *Ass'n of Am. R.R. v. U.S. Dep't of Transp.*, 721 F.3d 666 (D.C. Cir. 2013), *vacated*, 575 U.S. 43 (2015), the D.C. Circuit struck down a statute delegating power to Amtrak, concluding that delegations to private entities are per se unconstitutional. On appeal, however, the United States Supreme Court resolved the case on very narrow, fact-specific grounds, finding that Amtrak is a public (rather than private) entity.

47. See, e.g., *Carter v. Carter Coal Co.*, 298 U.S. 238, 311 (1936) (stating that delegation to interested private parties "is delegation in its most obnoxious form" but nonetheless declining to apply different standards to private and public delegations); *Protz*, 161 A.3d at 837–38 (raising concerns regarding delegation to private parties but noting that Pennsylvania Supreme Court precedent has not unequivocally prohibited delegation to private actors).

48. 488 U.S. 361 (1989)

49. *Id.* at 419 ("The focus of controversy, in the long line of our so-called excessive delegation cases, has been whether the *degree* of generality contained in the authorization for exercise of executive or judicial powers in a particular field is so unacceptably high as to *amount* to a delegation of legislative powers.").

50. *Id.*; see also Alexander Volokh, *The New Private-Regulation Skepticism: Due Process, Non-Delegation, and Antitrust Challenges*, 37 HARV. J.L. & PUB. POL'Y 931, 957 (2014) ("The structure of non-delegation doctrine suggests that it should be irrelevant whether the recipient of the delegation is public or private: the focus is whether Congress has given up too much power, not to whom it's given the power.").

nuance, some have argued that a stricter inquiry should apply when the legislature vests private persons or groups with official authority.⁵¹

III. WHAT COULD EXPLAIN PENNSYLVANIA'S UNUSUALLY ACTIVE NONDELEGATION DOCKET?

From these recent cases, it might be tempting to assume that Pennsylvania must have a particularly strict nondelegation doctrine. After all, the Pennsylvania Supreme Court has been striking down laws on nondelegation grounds, while the United States Supreme Court has, since 1935, upheld every statute that has ever been challenged under the analogous federal theory.⁵² The United States Supreme Court has even upheld statutes with underlying intelligible principles so broad that critics argue they do practically nothing to guide the delegate's discretion.⁵³ Upon closer inspection,

51. See *Carter Coal*, 298 U.S. at 311 (“This is legislative delegation in its most obnoxious form; for it is not even delegation to an official or an official body, presumptively disinterested, but to private persons whose interests may be and often are adverse to the interests of others in the same business.”); James M. Rice, *The Private Nondelegation Doctrine: Preventing the Delegation of Regulatory Authority to Private Parties and International Organizations*, 105 CALIF. L. REV. 539, 572 (2017) (arguing that “the Supreme Court should revive the private nondelegation doctrine of *Carter Coal*”); *Tex. Boll Weevil Eradication Found., Inc. v. Lewellen*, 952 S.W.2d 454, 469 (Tex. 1997) (“[W]e believe it axiomatic that courts should subject private delegations to a more searching scrutiny than their public counterparts.”); David N. Wecht, *Breaking the Code of Deference: Judicial Review of Private Prisons*, 96 YALE L.J. 815, 834 (1987) (arguing that the nondelegation doctrine requires “heightened judicial scrutiny where matters of great concern to the state and interests protected by the Fourteenth Amendment are being handed over to private enterprise for the first time”).

52. For example, the United States Supreme Court has upheld delegations of authority to administrative agencies to regulate “excessive profits” during wartime, *Lichter v. United States*, 334 U.S. 742, 746 (1948), to fix “fair and equitable” commodities prices, *Yakus v. United States*, 321 U.S. 414, 423–26 (1944), to determine “just and reasonable” rates, *FPC v. Hope Natural Gas Co.*, 320 U.S. 591, 619–20 (1944) (Black, J., concurring), and to issue air quality standards that are “requisite to protect the public health,” *Whitman v. American Trucking Associations, Inc.*, 531 U.S. 457, 472 (2001).

53. See, e.g., *NBC v. United States*, 319 U.S. 190, 225–26 (1943) (holding that Congress supplied an intelligible principle when it instructed an agency to act in the “public interest”); *N.Y. Cent. Sec. Corp. v. United States*, 287 U.S. 12, 24–25 (1932) (same).

though, the statutes that the Pennsylvania Supreme Court struck down in 2016 and 2017 lacked *any* standards at all to guide and restrain the exercise of the delegated administrative functions, meaning that they were most like the statutes that the United States Supreme Court struck down in *Schechter Poultry* and *Panama Refining*.⁵⁴

If Pennsylvania's nondelegation jurisprudence differs from its federal counterpart, it's likely only at the margins. The United States Supreme Court perhaps has been more willing than the Pennsylvania Supreme Court to discern an intelligible principle based upon the underlying statute's background, context, and general purpose.⁵⁵ And, while the Pennsylvania Supreme Court and many other state courts have stressed the importance of "procedural mechanisms that serve to limit or prevent the arbitrary and capricious exercise of delegated power," the United States Supreme Court has not.⁵⁶ But the fact that these are fairly minor differences

54. *Mistretta*, 488 U.S. at 373 n.7 ("In *Schechter* and *Panama Refining* the Court concluded that Congress had failed to articulate any policy or standard that would serve to confine the discretion of the authorities to whom Congress had delegated power.").

55. One example of this phenomenon is *American Power & Light Co. v. SEC*, 329 U.S. 90 (1946), where the Court upheld a statute that instructed the SEC to forbid reorganization plans that "unfairly or inequitably" distribute voting power. *Id.* at 104. While those words may seem hollow, the Court found that the terms "derive much meaningful content from the purpose of the Act, its factual background and the statutory context in which they appear." *Id.* at 104. *Contra* *W. Phila. Achievement Charter Elementary Sch. v. Sch. Dist. of Phila.*, 132 A.3d 957, 965 (Pa. 2016) ("To the extent Respondents couch the legislative intention to remediate the School District's financial distress as a standard, moreover, we find this to be more aptly described as the legislative *objective*.").

56. *Protz v. Workers' Comp. Appeal Bd.*, 161 A.3d 827, 834 (Pa. 2017); *see* *Trinity Med. Ctr. v. N.D. Bd. of Nursing*, 399 N.W.2d 835, 845 n.6 (N.D. 1987) ("[C]lear legislative standards are no longer required to avoid an unconstitutional delegation where the rights of the public are protected against an abuse of administrative power by (1) adequate 'procedural safeguards' or (2) adequate 'administrative standards,' which have been established by the agency pursuant to a grant of rulemaking authority."); *White River Shale Oil Corp. v. Pub. Serv. Comm'n*, 700 P.2d 1088, 1091 (Utah 1985) ("As long as this delegation of authority is accompanied by adequate guiding standards and procedural safeguards to ensure that decision making by the commission is not arbitrary

tends to illustrate the flexibility inherent in the intelligible principle test.⁵⁷ By contrast, there are some originalist scholars and jurists who advocate for a truly strict nondelegation doctrine.⁵⁸ For now, though, Pennsylvania's nondelegation jurisprudence has not ventured down that path, and we still follow roughly the same "intelligible principle" standard that Chief Justice Taft announced almost a century ago.⁵⁹

and unreasoned, it is a constitutional delegation."); *State v. Broom*, 439 So. 2d 357, 362 (La. 1983) ("[T]o insure that the regulatory body is not given unbridled discretion there is a need to examine more acutely the procedural safeguards mandated by the Legislature and/or adopted by the administrative agency, while de-emphasizing the imperative need for comprehensive statutory standards."); *Adams v. N.C. Dep't of Nat. & Econ. Res.*, 249 S.E.2d 402, 411 (N.C. 1978) (holding that "the presence or absence of procedural safeguards is relevant to the broader question of whether a delegation of authority is accompanied by adequate guiding standards").

57. Indeed, the Pennsylvania Supreme Court has never struck down a statute that contained an intelligible principle but lacked other procedural safeguards. Nevertheless, it remains theoretically possible that the absence of an intelligible principle could be cured with adequate procedural safeguards that serve as a check on delegated power. See 1 KENNETH CULP DAVIS, *ADMINISTRATIVE LAW TREATISE* § 2.08, at 108 (1st ed. 1958) ("Putting some words into a statute that a court can call a legislative standard is not a very good protection against arbitrariness. The protections that are effective are hearings with procedural safeguards, legislative supervision, and judicial review."); Kenneth Culp Davis, *A New Approach to Delegation*, 36 U. CHI. L. REV. 713, 726 (1969) ("Safeguards are usually more important than standards, although both may be important. The criterion for determining the validity of a delegation should be the totality of the protection against arbitrariness, not just the one strand having to do with statutory standards.").

58. See, e.g., Gary Lawson, *Delegation and Original Meaning*, 88 VA. L. REV. 327, 328–29 (2002) ("After 1935, the Court has steadfastly maintained that Congress need only provide an 'intelligible principle' to guide decisionmaking, and it has steadfastly found intelligible principles where less discerning readers find gibberish." (footnote omitted)); *Gundy v. United States*, 139 S. Ct. 2116, 2136–37 (2019) (Gorsuch, J., dissenting) (arguing that the legislature can only delegate power (1) to "fill up the details"; (2) to make the application of a rule dependent on the finding of a specific fact; or (3) to assign non-legislative responsibilities to either the judicial or executive branch).

59. *J.W. Hampton, Jr., & Co. v. United States*, 276 U.S. 394, 409 (1928).

IN MEMORIAM: SEN. ORRIN HATCH

SEN. MIKE LEE*

Mr./Madam President,

Orrin G. Hatch will be remembered for many things. His forty-two years of service in this body are marked by successes, historic legislation, and statesmanship. He served longer as a U.S. Senator than any other in the history of the State of Utah or the Republican Party. At his retirement, he had passed more bills into law than any other legislator alive, an astounding seven-hundred-and-fifty. While the record of his service is remarkable and memorable, I invite the Senate and the nation to remember Senator Orrin Hatch by the things that he remembered, every day, here in the Senate and in his private life.

Every day upon entering his Senate Office, Orrin Hatch would look upon a prominently hung painting depicting his Utah pioneer grandfather and great-grandfather fording a stream on horseback. This image, like so much else in his life was a reminder of his pioneer legacy, ancestry, and destiny. In Utah, there is almost no more honorable title than that of pioneer. In the particular parlance of our state, a pioneer is not merely someone who goes where others haven't before. A pioneer looks toward the future without forgetting who he or she is. A pioneer, like those who settled the Salt Lake Valley and much of the Western United States, does so, not out of conquest or in search of glory, a pioneer goes and works out of duty, responsibility, and faith.

Orrin Hatch always remembered his roots. Raised the son of a mechanical laborer, he grew up in a family of little means. Orrin

* United States Senator for Utah. Originally delivered to the United States Senate in Washington, D.C., on April 26, 2022.

was one of nine children raised in a cramped depression-era home without indoor plumbing. Two of Orrin's siblings died young. Another -- his older brother Jesse -- made the ultimate sacrifice as a turret gunner flying over Austria mere months before the allied victory in Europe.

Orrin always remembered this example of work and sacrifice from his parents and brother. The sense of duty to God, family, and nation was the primary driver throughout his life. He served a two-year mission for The Church of Jesus Christ of Latter-day Saints in Ohio. He became the first in his family to graduate from college, attending Brigham Young University. He met Elaine Hansen, and the couple married in 1957. They later returned to Pittsburgh, Pennsylvania, and Orrin completed law school at the University of Pittsburgh School of Law while living in what used to be a chicken coop in his parents' backyard. He worked as a metalworker and a janitor to provide for his family while attending school.

Never one to make much of a fuss about it, Orrin Hatch just did the work that was expected of him. He knew that life was not easy and that he could not expect handouts. He developed the reputation of a fighter, and while a dedicated friend with an inviting laugh, he would never forget the lessons he learned young while in the amateur boxing ring.

After moving back to Utah and running a successful law practice, Orrin ran for Senate to fight for the moral fiber and everyday work ethic of Americans that he felt was not being represented in Washington. He won and set out to defend family values and constitutional principles. He would remember to do so throughout his career, pioneering the Hatch Amendment, a proposed Constitutional Amendment which would correct the erroneous claim that there is a constitutional right to abortion, and steadfastly advocating for a balanced-budget amendment to the Constitution.

Orrin Hatch defended life, religious liberty, economic responsibility, and personal freedom throughout his time in the Senate. His seven-hundred-and-fifty proposals that became law cover everything from welfare reform, regulatory restructuring, laws adjusting

the federal judiciary, to hallmark tax cuts. Hatch's tenure in the Senate was marked by his chairmanship of the Health, Education, Labor, and Pensions Committee, the Committee on the Judiciary, and the Finance Committee before serving as President Pro Tempore.

Senator Hatch helped rein in an activist federal judiciary and helped restore the true meaning of the Constitution to our courts.

Senator Hatch played a prime roll in the nomination of every Supreme Court justice for decades. He defended the Court and the honor of Justices with differing judicial philosophies.

Beyond his countless political accomplishments, Orrin Hatch was a dedicated father, grandfather, great-grandfather, and man of faith. He always remembered the most important things in life. He composed countless songs of praise and patriotism. He served as a volunteer leader in his church congregations and his communities. He founded the Orrin G. Hatch Foundation to carry on and remember his work and advocacy for collegiality and bipartisanship after his retirement from the Senate.

Orrin Hatch always remembered Utah. On weekends you would find him at the grocery store and his church congregation rubbing elbows with the people he knew and loved. He would talk about the politics of the day, but also the news affecting communities and families he cared for.

Those who knew him felt the care and interest he had. After I served as his Senate page as a high-school student, there were two photos on my bedroom wall: one of Karl Malone in his Utah Jazz jersey, and one of me with Senator Orrin Hatch.

Later, when I was serving as a missionary in Texas, Senator Hatch sent me a note and a \$10 check telling me to get a good lunch. I cherished the note -- and never could cash the check. The memory and memento were worth much more.

Orrin Hatch also always remembered to work. He would come to the Senate early and stay late. He would think years ahead and persistently pursue his plans. He would take the time to build coalitions behind ideas and bring about needed reforms. Senator

Hatch knew that the Senate was designed to be the cooling saucer where ideas would steep and percolate often over the course of years and decades.

Yet, Orrin always remembered the people behind the politics. He was a mentor and friend to Senators from both sides of the aisle and built deep friendships with those of all political backgrounds. He cherished a friendship with Senator Ted Kennedy and called the late Justice Ruth Bader Ginsburg a dear friend. He instilled his hallmark good humor and sense of duty on the newer members of the Senate. I was one of them. He greeted and accepted me warmly, only mentioning a few times the fact that I had, decades before, served as his Senate page. He was a force for collegiality and cooperation. While he remained dedicated to the principles and people that brought him to the Senate, he would work with anyone and everyone to get the job done.

Orrin Hatch was a giant of the Senate and a pillar in Utah. His influence, hearty laugh, and powerful advice are missed by us here and by millions in Utah. I know I speak for the entire Senate in sending our deep condolence and appreciation to Elaine; their children Brent, Marcia, Scott, Kimberly, Alysa, and Jess; as well as their grandchildren and great-grandchildren. The gift of Senator Hatch's life of service has made our State and our nation better.

As I said, Mr./Madam President, there is perhaps no more noble title in Utah than that of pioneer. Orrin Hatch was a pioneer, through and through. He followed in the footsteps of his forebearers, and he left a legacy of dedication, service, and truth. I commend his memory to the history of our republic in the words of a beloved hymn fittingly entitled, "They the Builders of the Nation"¹:

They, the builders of the nation,
Blazing trails along the way;
Stepping-stones for generations
Were their deeds of every day.

¹ Ida R. Alldredge, *They, the Builders of the Nation*.

Building new and firm foundations,
Pushing on the wild frontier,
Forging onward, ever onward,
Blessed, honored Pioneer!

I bid my friend Senator Hatch onward, ever onward. May we as
a nation forever remember his legacy is my prayer.

“THIS”

CASS R. SUNSTEIN*

ABSTRACT

The “supreme law of the land” includes “this Constitution,” and federal officers are “bound, by oath or affirmation, to support this Constitution.” In recent years, some people have argued that these words require oath-takers to be originalists and to follow the Constitution’s “original public meaning,” properly understood. An understanding of this argument requires an exploration of the diverse forms and conceptions of originalism, which raise puzzles of their own. Whether or not we embrace some form of originalism, the broader point is this: the claim that the term “this Constitution” mandates a contested theory of interpretation, including a contested form of originalism, belongs in the same category with many other efforts to resolve controversial questions in law by reference to the supposed dictate of some external authority. Whether maddening or liberating, there is nothing that communication just is, nor is there any such dictate. The choice is ours.

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I. "TO SUPPORT THIS CONSTITUTION"

Article VI of the Constitution says this:

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

The Senators and Representatives before mentioned, and the Members of the several State legislatures, and all executive and judicial Officers, both of the United States and of the several States, shall be bound by Oath or Affirmation, to support this Constitution; but no religious Test shall ever be required as a Qualification to any Office or public Trust under the United States.¹

The "supreme law of the land" includes "this Constitution," and federal officers (along with state legislators) are "bound, by oath or affirmation, to support this Constitution." Do these words have implications for constitutional interpretation? Might they settle longstanding debates? Some people think so.²

Emphasizing the importance of the oath, Professor Green concludes: "Those who swear the Article VI oath should . . . take the historic textually expressed sense as interpretively paramount."³ On one view, the term "this Constitution" is equivalent to "the

1. U.S. CONST. art. VI, cl. 2–3.

2. See Christopher Green, "This Constitution": Constitutional Indexicals as a Basis for Textualist Semi-Originalism, 84 NOTRE DAME L. REV. 1607 (2009), for a clear treatment. Green does not rely solely on the phrase "this Constitution"; he emphasizes several temporal indexicals. See *id.* at 1657–66. See also Evan Bernick and Christopher Green, *What is the Object of the Constitutional Oath?* (2019) [<https://perma.cc/9NW4-VJ9E>]; William Pryor, *Against Living Common Goodism*, 23 FED. SOC'Y. REV. 24 (2022).

3. Green, *supra* note 2, at 1674.

original public meaning of this Constitution,”⁴ and perhaps the oath requires that conclusion.

As we shall see, the argument is of general interest. It raises several questions about what, exactly, originalism should be taken to entail,⁵ and without attempting to resolve them, I shall devote considerable attention to those puzzles. It also tells us something about constraint and choice in interpretation more broadly.

Let us begin with the text.⁶ Simply as a matter of language, the referent of “this Constitution” -- what “this” refers to -- is clear.⁷ It

4. See Pryor, *supra* note 2. For discussion, see Christopher R. Green, *Originalism and the Sense-Reference Distinction*, 50 ST. LOUIS U. L.J. 555, 597 (2006). Green, *supra* note 2; Cass R. Sunstein, *Originalism*, 93 NOTRE DAME L. REV. 1671, 1674 (2018). For valuable and exceptionally illuminating general accounts, see Richard H. Fallon, Jr., *The Chimerical Concept of Original Public Meaning*, 107 VA. L. REV. 1421 (2021); Lawrence B. Solum, *The Public Meaning Thesis: An Originalist Theory of Constitutional Meaning*, 101 B.U. L. REV. 1953 (2021); Lawrence B. Solum, *Originalism Versus Living Constitutionalism: The Conceptual Structure of the Great Debate*, 113 NW. U. L. REV. 1243 (2019); Lawrence B. Solum, *The Fixation Thesis: The Role of Historical Fact in Original Meaning*, 91 NOTRE DAME L. REV. 1 (2015); Lawrence B. Solum, *The Constraint Principle: Original Meaning and Constitutional Practice* (2017) [<https://perma.cc/SH4R-46FF>]. There is a view of the sense—as opposed to the reference—of the Constitution’s terms, see Green, *supra* note 2, that plausibly binds public officials to the semantic meaning of those terms; but as I will emphasize, that form of originalism accommodates a great deal, including (for example) protection of same-sex marriage, protection of libel and obscenity, and prohibitions on life imprisonment. It is not clear that anyone objects to that form of originalism. See ADRIAN VERMEULE, COMMON GOOD CONSTITUTIONALISM (2022). But see DAVID A. STRAUSS, THE LIVING CONSTITUTION (2010).

5. For illuminating discussion, see Fallon, *supra* note 4; Solum, *The Public Meaning Thesis*, *supra* note 4; Mark D. Greenberg and Harry Litman, *The Meaning of Original Meaning*, 86 GEO. L.J. 569 (1998); Keith Whittington, *The New Originalism*, 2 GEO. J.L. & PUB. POL’Y 599 (2004).

6. I will mostly bracket here some complex questions about how, exactly, the Constitution was understood at the time of ratification, and whether its fixed character might have come later (1795? 1892? 2019? 2047?). See JONATHAN GIENAPP, THE SECOND CREATION 9–10 (2018) (“Many had initially assumed that the Constitution was an incomplete document, not least because they refused to think of it strictly, or even primarily, as a text. As a dynamic system that seamlessly blended text and surrounding practice, the Constitution was very much a work in progress. It was deeply indeterminate, by necessity and design, and accordingly the task of subsequent political generations would be to afford it ever-increasing coherence.”).

is the written Constitution of which Article VI is a part.⁸ The word “this” is what philosophers and linguists call an “indexical.”⁹ Indexicals like “now,” “here,” and “this” point us to their referent. It follows that the word “this” in the phrase “this Constitution” points to the written text of the Constitution of the United States in which the phrase appears. Other constitutions are not part of “the supreme law of the land,” and public officials are not bound, by oath or affirmation, to support other constitutions. That much is straightforward.

II. OPTIONS

Now turn to some constitutional questions, and ask how the oath of office might help to orient those who seek to answer them. (1) Does the First Amendment protect libelous speech?¹⁰ (2) Does the Equal Protection Clause or the Privileges or Immunities Clause forbid racial segregation?¹¹ (3) Does the Equal Protection Clause or the Privileges or Immunities Clause forbid sex discrimination?¹² (4) Does the vesting of legislative power in Congress forbid Congress from granting broad discretion to administrative

7. See Green, *supra* note 2, at 1649–1653. Alas (from the standpoint of conceptual clarity) some serious qualifications come from Jonathan Gienapp, who emphasizes that it was not at all clear, immediately after ratification, what the Constitution was, exactly, and what its relationship was to what preceded it. The rise of a consensus in favor of the idea of a fixed written constitution may well have come in the decade after ratification. GIENAPP, *THE SECOND CREATION* (2018). Among other things, Gienapp urges that the Constitution was “a ‘first draught’ . . . a work in progress, in need of activation and subsequent work—in essence an imperfect and unfinished object.” *Id.* at 81.

8. I am bracketing the possibility that “this Constitution” might be understood to include, or to incorporate, background principles of various kinds. See GIENAPP, *supra* note 6; VERMEULE, *COMMON GOOD CONSTITUTIONALISM*, *supra* note 4.

9. David Kaplan, *Demonstratives: An Essay on the Semantics, Logic, Metaphysics and Epistemology of Demonstratives and other Indexicals*, in THEMES FROM KAPLAN 481 (Joseph Almog, John Perry & Howard Wettstein eds., 1989).

10. See *New York Times v. Sullivan*, 376 U.S. 254 (1964).

11. See *Brown v. Bd. Of Educ.*, 347 U.S. 483, 488 (1954).

12. See *Craig v. Boren*, 428 U.S. 190, 192-93 (1976).

agencies?¹³ (5) Does the vesting of executive power in a President of the United States forbid Congress from creating independent regulatory agencies?¹⁴ (6) Does the Takings Clause forbid regulatory takings, or is it limited to physical takings?¹⁵ (7) Does Article III of the Constitution require plaintiffs to show an "injury in fact"?¹⁶ (8) Does the Fourteenth Amendment forbid affirmative action programs?¹⁷ (9) Does the Fifth or Fourteenth Amendment forbid racial discrimination by Congress?¹⁸ Now ask: How may, or how must, those who take the oath of office approach such questions?

To answer such questions, we need to start with these two: What does the phrase "this Constitution" mean?¹⁹ How do we interpret it? We might think that there is "this Constitution," and then there are theories of how best to interpret it. The *theories* are not "this Constitution." In the end, I believe that it is correct to insist on this point, and to separate theories of interpretation from the Constitution itself, but it will take us a while to get there.

Suppose that we are originalists, in the sense that we believe that interpreters must focus on the "original public meaning" of the document.²⁰ If so, we might get tempted to think that "this

13. See *Gundy v. United States*, 139 S. Ct. 2116, 2121 (2019).

14. See *Humphrey's Executor v. United States*, 295 U.S. 602, 608–09 (1935).

15. See *Lucas v. South Carolina Coast Council*, 505 U.S. 1003, 1028 (1992).

16. See *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 559–60 (1992).

17. See *Regents of the University of California v. Bakke*, 438 U.S. 265, 269–72 (1978).

18. See *Bolling v. Sharpe*, 347 U.S. 497, 498 (1954).

19. Green recognizes the issue: "The phrase 'this Constitution' on its own is not inherently a textual or historical self-reference, because the word 'this' does not always refer to a text or to the historical circumstance in which the text is spoken. . . . The bare use of 'this Constitution' in Article VI, then, leaves our constitutional ontology unspecified." Green, *supra* note 2, at 1642. A modest amendment: The word "this," in contexts of this (!) kind, typically refers to the text, though it is much less clear that it typically refers to the original meaning of the text.

20. On some of the complexities here, see Solum, *supra* note 4; Cass R. Sunstein, *supra* note 4. Emphasizing context, Solum does not restrict public meaning originalism to semantic meaning. The early emphasis on "original intentions" has largely given way to an emphasis on original meaning. See Solum, *supra* note 4. On original inten-

Constitution” is its original public meaning.²¹ That suggestion immediately raises another question: how do we understand the “original public meaning”?²² Things immediately become exceptionally complicated here, because public meaning originalism includes a family of approaches, and because the family’s members are very different from one another.²³ Consider in that light an assortment of possible approaches,²⁴ starting with several within the category of “originalists” and proceeding to nonoriginalist alternatives, and acknowledging that some of them might overlap²⁵:

tions, see Richard S. Kay, *Adherence to the Original Intentions in Constitutional Adjudication: Three Objections and Responses*, 82 NW. U. L. REV. 226 (1988); Larry Alexander & Saikrishna Prakash, “Is That English You’re Speaking?” *Why Intention Free Interpretation is an Impossibility*, 41 SAN DIEGO L. REV. 967, 969 (2004) (“Full blooded intentionalists consider all available evidence of the actual author’s intended meaning.”).

21. One of my principal goals here is to urge that this temptation should be resisted, on the ground that a contestable normative argument is needed to defend the view that the original public meaning should be deemed authoritative. It follows that different people, with different accounts of interpretation, can take the oath, and claim to follow it. For a bracing and even jarring account of why the temptation should be resisted as a matter of history itself, see GIENAPP, *supra* note 6.

22. For one (implicit) answer, see Note, *Blasphemy and the Original Meaning of the First Amendment*, 135 HARV. L. REV. 689 (2021), and in particular this conclusion: “In other words, the original public meaning of the First Amendment, whether in 1791 or in 1868, allowed for criminalizing blasphemy.” *Id.* at 690.

23. See generally Lawrence B. Solum, *What is Originalism? The Evolution of Contemporary Originalist Theory* (Georgetown Law Faculty Publications and Other Works, 2011), <https://scholarship.law.georgetown.edu/facpub/1353> [<https://perma.cc/Q9V5-HVX5>].

24. I am bracketing the fact that judges do not work on a clean slate, and they might find one or more of these approaches strongly favored or disfavored by precedents. How to square one’s preferred theory of interpretation with principles of stare decisis is of course an important and challenging question.

25. Most of these are discussed illuminatingly in Solum, *The Conceptual Structure of the Great Debate*, *supra* note 4. Solum discusses as well original law originalism, which draws attention to original constitutional law as it existed during the time of ratification. See *id.* at 1286–88; William Baude & Stephen E. Sachs, *Originalism’s Bite*, 20 GREEN BAG 2D 103 (2016). I greatly admire Baude and Sachs, but I do not discuss their approach separately here.

- (1) *Semantic originalism*: The Constitution must be interpreted in a way that is consistent with the original semantic meaning of its words.²⁶ On that view, "executive power" cannot be interpreted to diverge from its *semantic* meaning at the time of the founding,²⁷ but interpreters are not bound by the original understanding of what that power specifically entailed, or of how far it reached.²⁸ Interpreters must follow the words as a matter of semantics, but they need not focus on the original intent or the original public meaning. (Semantic originalism seems compatible with "living originalism," authorizing a set of rulings that depart dramatically from the original public meaning as enriched by the historical context, or from the expectations of the Constitution's ratifiers.²⁹)
- (2) *Sense-reference originalism*: The Constitution must be interpreted to fit with its original sense, but not necessarily its original referents.³⁰ On that view, the words "equal protection" cannot be interpreted in a way that departs from how they were taken at the time of ratification as a matter of

26. Lawrence B. Solum, *The Unity of Interpretation*, 90 B.U. L. REV. 551, 572 (2010).

27. See Solum, *The Constraint Principle*, *supra* note 4, at 34 ("Originalists agree that the 'meaning' (the semantic content or linguistic meaning) of the constitutional text was fixed at the time that each provision of the constitution was framed and ratified.").

28. I am bracketing for the present purposes the right understanding of "the construction zone," and will do that for much of the discussion here. Solum has discussed the issue illuminatingly in many places. See, e.g., *The Public Meaning Thesis*, *supra* note 4.

29. See JACK BALKIN, *LIVING ORIGINALISM* (2013). There is a puzzle here about what kind of enrichment is obligatory or acceptable. To see "the Senate" as the one in Washington, DC, rather than the one in ancient Rome, or the one associated with some university, does seem mandatory, which suggests that some kind of contextual enrichment is acceptable and obligatory, to make the Constitution readable. But this kind of enrichment need not lead us all the way to (3).

30. See Christopher Green, *Originalism and the Sense-Reference Distinction*, 50 ST. LOUIS U. L.J. 555, 558 (2006).

language (their “sense”), but interpreters are not bound by the original understanding of how they applied to actual cases (their “referents”).³¹ It might follow, for example, that the Fourteenth Amendment forbids racial segregation, even if the ratifiers did not believe that the Fourteenth Amendment forbids racial segregation. Similarly, it might follow that the First Amendment protects commercial advertising, even if the ratifiers did not believe that.

- (3) *Public meaning originalism, with the contextual enrichment of history (including contextual disambiguation)*: The Constitution must be interpreted in a way that fits with its original public meaning, including not only semantic meaning, but also the shared public context,³² which includes various forms of “contextual enrichment.”³³ Alert to the flexibility of semantic originalism and the risk of instability over time, James Madison vigorously endorsed this view toward the end of his life, in a plain effort to stabilize constitutional meaning.³⁴ In Solum’s words, public meaning “is meaning for the public, the citizenry of the United States, and hence is related to the legal concept of ‘ordinary meaning’ as distinguished from ‘technical meaning.’”³⁵ In Fal-

31. See *id.* Green does not claim that the original understanding is necessarily binding.

32. See generally Solum, *The Public Meaning Thesis*, *supra* note 4. This is the form of originalism discussed and challenged in Fallon, *supra* note 4, at 1459–60.

33. See Solum, *Public Meaning Originalism*, *supra* note 4, at 1983–1988.

34. See GIENAPP, *supra* note 6, at 327–33. The “meaning of a Constitution,” Madison wrote, had to be “fixed and known,” to ensure against “that instability which is incompatible with good government.” *Id.* at 329–30. Intriguingly, Madison took the opposite view during the debates over the Constitution. See *id.* at 333. A speculation: The elder Madison, seeing some of his life’s work at risk, might well have had an interest in seeking to stabilize it.

35. Solum, *The Public Meaning Thesis*, *supra* note 4, at 1963. Solum also writes: “There are caveats and possible exceptions, but the general implication . . . is that the meaning of the constitutional text is a function of the conventional semantic meanings of the words and phrases as they are enriched and disambiguated by the public con-

lon's words, "Rather than defining the original public meaning as limited to minimally necessary (for intelligibility) or historically noncontroversial meaning, mainstream public meaning originalists posit that constitutional provisions' original public meanings consist of minimal meanings *plus* some further content that, they maintain, can also be discovered as a matter of historical and linguistic fact."³⁶

- (4) *Original methods originalism*: The Constitution must be interpreted in a way that is consistent with the ratifiers' views about how it should be interpreted.³⁷ On that view, judges need to follow the ratifiers' *theory of interpretation*. If the ratifiers believed that judges should follow the original public meaning, judges must follow the original public meaning, and the meaning of that proposition should depend on what the ratifiers believed.³⁸
- (5) *Original expectations originalism*: The Constitution must be interpreted in a way that is consistent with the ratifiers' expectations about how it should be interpreted.³⁹ The fo-

text of constitutional communication. In unusual cases, there can be divergence between the meaning of constitutional provisions that were intended by its Framers and public meaning." *Id.* at 2048. The word "unusual" deserves to be underlined. The enriching and the disambiguating weaken the distinction between (3) and (5), at least when it comes to the questions with which this section began. See Fallon, *supra* note 4, at 1427, for the argument that "original public meanings, in the sense in which originalists use that term, are insufficient to resolve any historically contested or otherwise reasonably disputable issue." Solum disagrees. See Solum, *supra*. Fallon's argument obviously bears on the meaning of the oath of office, but I will assume here that some forms of originalism do, in fact, resolve some contested issues.

36. Fallon, *supra* note 4, at 1431.

37. See JOHN MCGINNIS & MICHAEL RAPPAPORT, ORIGINALISM AND THE GOOD CONSTITUTION (2013).

38. See Solum, *supra* note 23, at 19.

39. See RAOUL BERGER, GOVERNMENT BY JUDICIARY: THE TRANSFORMATION OF THE FOURTEENTH AMENDMENT (rev. ed. 1997); CHRISTOPHER L. EISGRUBER, CONSTITUTIONAL SELF-GOVERNMENT 25–26 (2001) (understanding originalism as relying on

cus here, unlike in (4), is on particular results. This view raises many questions, but it would follow, for example, that if the ratifiers had a narrow conception of “the freedom of speech,” current interpreters are bound by their view,⁴⁰ and that if the ratifiers believed that the vesting of executive power in the President required a strongly unitary presidency, current interpreters are bound by that view as well.

- (6) *Democracy-reinforcing judicial review*: The Constitution should be interpreted in a way that makes the democratic process work as well as possible, and that makes up for deficits in that process -- by, for example, vigorously protecting the franchise.⁴¹ On this view, interpreters should understand semantically ambiguous constitutional provisions by reference to the ideal of self-government. The idea of one-person, one-vote might well be defensible on this ground; judges should certainly look skeptically at restrictions on the right to vote, and at legislation that targets the politically powerless. Democracy-reinforcing judicial review might be defended by reference to the republican

original expectations). In principle, this approach is very different from, and far more constraining than, (1). But consider Solum’s suggestion: “The fact that original expected applications are distinct from original meanings should not imply that the two are unrelated. Expected applications of a text may offer evidence about its meanings, even if these applications are neither decisive evidence of meaning nor meaning itself.” Solum, *supra* note 23, at 19. As noted at various points, the line between (5) and (3) is not entirely clear; the two approaches will generally produce the same results (I think).

40. On the expectations of the founding generation, see Jud Campbell, *Natural Rights and the First Amendment*, 127 YALE L.J. 246 (2017). On the potentially close relationship between (3) and (5), see Solum, *The Public Meaning Thesis*, *supra* note 4, at 2047: “Campbell’s article shows how Public Meaning Originalism can incorporate thick eighteenth-century ideas.” If public meaning originalism does that, because of contextual enrichment, then (3) really does look close to (5).

41. See JOHN HART ELY, *DEMOCRACY AND DISTRUST* (1980); STEPHEN BREYER, *ACTIVE LIBERTY* (2006).

aspirations of the founding document. But it is not originalist.

- (7) *Moral readings*: The Constitution should be subject to a "moral reading," in the sense that its terms should be interpreted in a way that makes best moral sense of them.⁴² The moral reading is the judges' own, but judges live in society, and they are not free agents. When, for example, the Court struck down racial segregation, it might well be understood not to have spoken for the original understanding, but to have put the Fourteenth Amendment in its best moral light. Broad understandings of the principle of freedom of speech and of liberty rights might be understood in similar terms.⁴³
- (8) *Thayerism*: The Constitution should be interpreted in a way that gives the political process maximum room to maneuver, in the sense that reasonable doubts should be resolved favorably to Congress and the President.⁴⁴ (Note that this approach is incomplete; we need a background theory about how to discern meaning. We could imagine Thayerian originalists, who would uphold statutes and regulations against constitutional attack unless the violation of the document, on the right originalist premises, was clear. We could imagine moral reader Thayerians as well.)

42. See RONALD DWORKIN, *FREEDOM'S LAW* (1996). Some originalists do appear to be moral readers in practice. See, e.g., VERMEULE, *supra* note 4. For a vivid illustration, see *United States v. Vaello Madero*, 142 S.Ct. 1539, 1544–1552 (2022) (Thomas, J., concurring in the judgment). For a general treatment, see FRANK CROSS, *THE FAILED PROMISE OF ORIGINALISM* (2013). This fact does not, however, discredit originalism, though it might discredit (some) originalists.

43. See, e.g., *Griswold v. Connecticut*, 381 U.S. 479 (1965); *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503 (1969).

44. See James Bradley Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 HARV. L. REV. 129 (1893). VERMEULE, *supra* note 4, appears to be a common good Thayerian.

- (9) *Common law constitutionalism*: The Constitution should be interpreted in common-law fashion; it is best taken as the foundation for a process of case-by-case judgment, in which the document's text, and the original understanding or original public meaning, are relevant but do not have decisive roles.⁴⁵
- (10) *Common good constitutionalism*: The Constitution should be interpreted in a way that is consistent with principles of the common good, as they have been understood and elaborated over time.⁴⁶ Those principles, not firmly rooted in the original public meaning of the founding document, could be understood in different ways; they might be rooted in longstanding understandings in diverse traditions.

No originalist is drawn to (6), (7), (8), (9), and (10), though all originalists might be willing to embrace them in some sense.⁴⁷ Most of the prominent current *theorists* of originalism accept (1) and (3);⁴⁸ they may or may not accept (2), which is close to (1), at

45. STRAUSS, *supra* note 4.

46. See VERMEULE, *supra* note 4. I do not include minimalism on the list, love it though I do. See CASS R. SUNSTEIN, *ONE CASE AT A TIME* (1999). The reason is that minimalists favor narrow, shallow rulings, but they could also be (for example) common law constitutionalists, semantic originalists, moral readers (of a modest sort), or something else. To be sure, it would be difficult to imagine Thayerian minimalists.

47. This is a compressed sentence. Within the construction zone, originalists might be willing to entertain (6), (7), (8), and (10), and because of the role of precedent, they might be open to some version of (9), depending on their conception of *stare decisis*. See Solum, *supra* note 23, at 23 ("Confining 'Originalism' (in its focal meaning) to the view that original meaning must trump all other considerations is misleading. Moreover, this move has the unfortunate effect of defining the topography of argument in a way that eliminates plausible forms of originalism from the originalist camp, leaving only the most implausible and extreme views in contention."). Note also that there is an argument, historical in nature, that the founding generation was not originalist in the modern sense, and that originalism in that sense is a recent concoction (!). See GIENAPP, *supra* note 6; VERMEULE, *supra* note 4.

48. See Solum, *supra* note 23, at 1–2 (emphasizing that "almost all originalists agree that the linguistic meaning of each constitutional provision was fixed at the time that provision was adopted," and also that "originalists agree that our constitutional prac-

least as a matter of practice. Many of the most prominent current *practitioners* of originalism seem to embrace (5),⁴⁹ though this may be because they embrace (3), which, as noted, will generally produce similar results. My questions are these: Which, if any, of these approaches is ruled off-limits by the oath? Which is inconsistent with a commitment to support "this Constitution"?

III. WHAT THE OATH DOES AND DOES NOT DO

Suppose that we accept (1) and understand originalism to entail it, and to entail nothing more.⁵⁰ If so, there is a strong argument that oath-takers are indeed bound by it. To be President, someone must be at least thirty-five years of age;⁵¹ the impeachment power

tice both is (albeit imperfectly) and should be committed to the principle that the original meaning of the Constitution constrains judicial practice"). The emphasis on "linguistic meaning" raises a fair question, which is whether originalists disagree with anyone, or whether anyone disagrees with originalists. As Solum also says, "The question whether living constitutionalists actually disagree with these core principles of originalist theory is a complex one." *Id.* at 2. Those who accept (5), (6), (7), and (8) can accept (1) and almost certainly (2).

49. See, e.g., *McKee v. Cosby*, 139 S. Ct. 675 (2019) (Thomas, J., concurring in the denial of certiorari); *TransUnion v. Ramirez*, 141 S. Ct. 2190, 2214–2226 (2021) (Thomas, J., dissenting); *Gundy v. United States*, 139 S. Ct. 2116, 2131–2148 (2019) (Gorsuch, J., dissenting). Admittedly, this is a complicated matter. In my view, it is exceedingly difficult to justify the votes and the opinions in these cases without embracing original expectations originalism (noting as well that whether original expectations originalism does, in fact, support these results is a controversial matter). As noted in text, there is also a question to what extent semantic originalism can or should be subject to a kind of contextual enrichment, which would thicken it in various ways. The burden of the argument here is that whether or not the thickening is justified, it is contentious, and it is not compelled by the oath.

50. If so, originalism is of course a radically incomplete theory of interpretation, and to decide cases, a great deal of nonoriginalist work must be done, perhaps in the "construction zone." Note that some people might think that semantic originalism, so understood, is implausible, because texts cannot be understood without context. We should be careful with that thought. There are contexts (I live on planet Earth and speak English) and there are contexts (I have a time machine; I used it to go back to the United States when it was constituted; I know what people meant and understood).

51. U.S. CONST. art. II, §1, cl 5.

is not vested in the federal judiciary;⁵² there is a right to trial by jury, not to trial by magistrate.⁵³ If the semantic meaning of words shifts over time, it is fair to say what is binding is the original semantic meaning, not some new semantic meaning.⁵⁴ Imagine, for example, that the words “freedom of speech” come to mean “flight of birds” in, say, 2050. Even if that happens, the First Amendment would not forbid Congress from abridging the flight of birds. Almost everyone almost always accepts semantic originalism.⁵⁵ The challenge is that purely semantic originalism leaves constitutional meaning wide open, at least on contested issues.⁵⁶ It probably does not answer *any* of the questions posed

52. *See id.* art. I, §2, cl. 5; *id.* art. I, §3, cl. 6.

53. *Id.* art. III §2, cl 3.

54. But I do not mean by this proposition to conflate (1) with (3). We are speaking of semantic meaning, not (much) contextual enrichment.

55. We need the term “almost” in view of STRAUSS, *supra* note 4, and some well-known puzzles for semantic originalism, including the application of equal protection principles to the federal government. *See* *Bolling v. Sharpe*, 347 U.S. 497 (1954). Did the Justices who signed *Bolling v. Sharpe* violate their oath of office? That would be a strong claim. Compare with Solum, *supra* note 23, at 39:

The compatibilist story about the relationship between living constitutionalism and originalism can be articulated via the distinction between constitutional interpretation and constitutional construction that is associated with the New Originalism. Compatibilism could be the view that originalism and living constitutionalism have separate domains. Originalism has constitutional interpretation as its domain: the linguistic meaning of the Constitution is fixed. Living constitutionalism has constitutional construction as its domain: the vague provisions of the constitution can be given constructions that change over time in order to adapt to changing values and circumstances.

If the linguistic meaning is a weak constraint—if it refers to the meaning of the words, in the English language, at the time of construction—then living constitutionalists might have no problem with it. For example, they might agree that “the freedom of speech” is a binding term, but add that its purely semantic meaning, at the time of the founding, can coexist with modern free speech doctrine, which of course goes far beyond expected applications.

56. Madison feared this, *see* GIENAPP, *supra* note 6, at 327–33, but even so, I offer this point with some trepidation. If semantic originalism is not purely semantic, and if it

above;⁵⁷ it is hard, in practice, to see it as different from or as forbidding any form of "living constitutionalism."⁵⁸ Those who reject originalism⁵⁹ are entirely comfortable with (1).⁶⁰ They may well be comfortable enough with (2), which (as noted) seems close to (1).⁶¹

takes on board some aspects of historical understandings of terms, it gets closer to (3) and even to (5) (expected applications originalism). See Solum, *The Public Meaning Thesis: An Originalist Account of Constitutional Meaning*, *supra* note 4. On the open-endedness of semantic originalism, see VERMEULE, *supra* note 4; for a case in point, see Steven G. Calabresi & Hannah M. Begley, *Originalism and Same-Sex Marriage*, 70 U. MIA. L. REV. 648, 649–52 (2016).

57. I do not mean to suggest that semantic originalism answers no questions. Most constitutional questions are easy, and never get litigated; semantic originalism is the reason. There is also an argument that the term "due process of law" is purely procedural, simply as a matter of semantics, and also that the "equal protection of the laws" does not suggest a general antidiscrimination principle, simply as a matter of semantics.

58. JACK BALKIN, *LIVING ORIGINALISM* (2014); Jack Balkin, *Abortion and Original Meaning*, 24 CONST. COMMENT. 291 (2007). On Madison's fear of the openness of semantic originalism, see GIENAPP, *supra* note 6, at 333–37. In some ways, however, we can see Madison as urging that semantic originalism is at least necessary: "What a metamorphosis would be produced in the code of law if all its ancient phraseology were to be taken in its modern sense." *Id.* at 329. Thus Madison warned that "[i]f the meaning of the text be sought in the changeable meaning of the words composing it," then "the shape and attributes of the Government must partake of the changes to which the words and phrases of all living languages are constantly subject." *Id.*

59. Wise words from Solum: "The quest for agreement on a single definition of originalism is likely to prove Quixotic." Solum, *supra* note 23, at 6.

60. There is a question as to what, exactly, those who embrace semantic originalism commit themselves. I would have thought, for example, that semantic originalism, even with contextual enrichment, does not answer the question of whether the Second Amendment creates an individual right to bear arms, and that on that question, we are in the construction zone. But Solum urges, with respect to *District of Columbia v. Heller*, 554 U.S. 570 (2008): "Given the inevitable differences between judicial practice and constitutional theory, it is hard to imagine finding a clearer example of original public meaning originalism in an actual judicial decision." Lawrence B. Solum, *District of Columbia v. Heller and Originalism*, 103 NW. U. L. REV. 923, 940 (2009). In my view, *Heller* is closer to (5).

61. At least this is so if they accept the relevant distinction, which is controversial among philosophers of language. See Green, *supra* note 2, who acknowledges the point.

A. *The Oath and Originalism*

What about (3), (4) and (5)? Is the oath relevant to them? Both (3) and (5) seem to be embraced by the most prominent current practitioners of originalism.⁶² Here things become much harder. Many constitutions use a phrase of this kind (“this Constitution”), and yet it is generally understood that they should *not* be interpreted in terms of (3), (4), or (5), or in terms that make originalism a distinctive approach to constitutional interpretation.⁶³ This fact strongly suggests that the phrase “this Constitution” need not be taken to entail any particular view about how to interpret it, and that those who take an oath to support it need not endorse any theory of interpretation, though they will probably have to choose one.

To see the point, note that we could imagine a constitution that uses the phrase “this constitution” that was also thought and understood -- before, during, or after ratification -- to include a set of general concepts (say, “the freedom of speech,” or “executive”) whose meaning in particular cases would change over time.⁶⁴ In other words, we could imagine a constitution that was understood, as a matter of historical fact by those who ratified it, to call for semantic originalism (but nothing else). Suppose, however, that as a matter of historical fact, the ratifiers of the U.S. Constitution unanimously understood “this Constitution” in terms that fit with (3), (4), or (5). Suppose that they thought that the three approaches were one and the same, such that any effort to separate

62. See, e.g., *McKee v. Cosby*, 139 S. Ct. 675 (2019) (Thomas, J., concurring in the denial of certiorari); *TransUnion v. Ramirez*, 141 S. Ct. 2190, 2214–26 (2021) (Thomas, J., dissenting); *Gundy v. United States*, 139 S. Ct. 2116, 2131–48 (2019) (Gorsuch, J., dissenting).

63. See Conor Casey & Adrian Vermeule, *Argument By Slogan*, HARV. J.L. & PUB. POL’Y: PER CURIAM, Spring 2022.

64. I am bracketing the question of what it means, exactly, for a constitution to have a fixed meaning; some of the subsequent discussion will bear on that question.

them would have been unintelligible. What then? Would the oath require officials to follow the ratifiers?

We might think that this question immediately raises, or essentially is, another: the level of generality problem.⁶⁵ Is the phrase "the freedom of speech" to be interpreted in terms of a specific set of understandings (protecting, say, political dissent and commercial advertising, but not blasphemy⁶⁶ or obscenity)? Or should it be understood to set out an abstract term, whose specific consequences are not frozen in time, and might even change dramatically over a period of decades?⁶⁷ If the answer to the first question is "no" and the answer to the second question is "yes," we have rejected (5), or at least we have specified (5) in a way that leaves a great deal open.

If we agree that "this Constitution" is "the original understanding of this Constitution," then perhaps we will also agree, consistent with (3), (4), and (5), that the proper solution to the level of generality problem must be *historical*. It is a matter of uncovering a *fact*.⁶⁸ If so, whether a constitutional phrase was originally understood to be specific and fixed, or instead abstract and susceptible to different specifications over time, is not a philosophical or normative question. It is a question about the original understanding. To be sure, it might be exceedingly difficult to answer that question. But at least we have identified the right question, if we are to be faithful to "this Constitution." Or so it might be concluded.⁶⁹

65. See Casey & Vermeule, *supra* note 63, at 15.

66. See Note, *Blasphemy and the Original Meaning of the First Amendment*, 135 HARV. L. REV. 689 (2021).

67. See Green, *supra* note 2, for one version of that view.

68. Public meaning originalism is one version of this view. See, e.g., Solum, *The Fixation Thesis*, *supra* note 4, at 27–28.

69. Compare this suggestion from Green: "Functional and normative arguments are only relevant to an understanding of the nature of the actual Constitution to the extent that views about the function of a constitution or the norms that govern desirable results were, in fact, embodied in our actual 'this Constitution' of Article VI." Green, *supra* note 2, at 1613.

B. *The Heart of the Matter*

Now we arrive at the heart of the matter. Whether “this Constitution” should be identified with any particular historical understanding of how to interpret it is not, in fact, a question of history or one of fact. To see why, suppose that the ratifiers did, in fact, embrace a particular view of interpretation, and that that view just is the original understanding, consistent with (3), (4) or (5).⁷⁰ Or suppose that constitutional terms did have a specific public meaning, consistent with (3).

Without circularity, *we cannot say that the original understanding is binding because the original understanding was that the original understanding is binding.*⁷¹ The same would be true if we substitute the term *original public meaning for original understanding*. (I use the two terms interchangeably.⁷²) The original public meaning may or may not be the best way to interpret “this Constitution,” but it is simply not the same as “this Constitution.” Public meaning originalism may or may not be the right approach to interpretation, but it is not required by the oath.

Pointing to both text and history, Professor Green urges⁷³:

70. This is a disputed question. For relevant discussion, see Green, *supra* note 2; Jonathan Gienapp, *Written Constitutionalism, Past and Present*, 39 L. & HIST. REV. 321 (2021). See in particular Green’s suggestion: “A full survey of th[e] evidence supports an understanding of ‘this Constitution’ as a historical and textual self-reference, and taking the Constitution as binding.” Green, *supra* note 2, at 1613.

71. The historical issues are immensely complicated. Gienapp traces the shift, *after* the ratification period, to a conception of the Constitution as fixed (in the sense in which Gienapp uses that word). See GIENAPP, *supra* note 6.

72. It might be tempting to urge that this is not true of interpretation, as understood by originalists. In other words, it might be thought that the original public meaning, with contextual enrichment, is binding, and that we do not need a normative argument for that proposition. I deny that claim. If we want to use the original meaning with contextual enrichment, it must be for *reasons*, perhaps associated with the rule of law, democracy, or social welfare (but let’s hope not associated with the idea of legitimacy). See *infra* note 91.

73. Green, *supra* note 2, at 1666.

"This Constitution" is, then, located at the time of the Founding. The constituting of the United States happened at the Founding. It did not happen over generations and does not happen anew every day. The constitutional author distinguished itself from succeeding generations, identified its work of establishing the Constitution with the Founding's ratifying conventions, and spoke of the Founding as the time of its adoption. If we ask the Constitution what time it is -- that is, what it means by the term "now" -- it answers with the time of the Founding.

In an important sense, these claims are correct. The constituting of the United States did indeed happen at the Founding, and if we define that idea in a certain way, that is the only time that it happened.⁷⁴ (True, we could define it in other ways,⁷⁵ in which case it does indeed happen anew every day.) But does it follow, from these claims, that "this Constitution" must be understood in accordance with its original public meaning, as understood in (3), or with the ratifiers' view of how it should be understood, in accordance with (4) or (5)? Not at all. Those who take the oath are and must be bound by "this Constitution," and none other. But they need not agree that the meaning of the Constitution is identical to that which would follow from (3), (4), or (5).⁷⁶

74. GIENAPP, *supra* note 6, does complicate this view, though in the end I think it is compatible with it.

75. To be less obscure: The question when the United States was "constituted" could be taken in multiple ways. As a matter of law, it makes sense to answer with the ratification of the Constitution. *But see* *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 317 (1936) ("The Union existed before the Constitution."). This statement, and its implications, are illuminatingly discussed in VERMEULE, *supra* note 4.

76. *See* Vermeule, *supra* note 4. A qualification: If we understand the original public meaning in a very thin sense, to refer to the semantic meaning of the document, oath-takers might be bound by it. *See* Green, *supra* note 2, at 1624–25 (treatment of the sense-reference distinction). But as noted, purely semantic originalism leaves constitutional meaning wide open; it is hard, in practice, to see it as forbidding any form of "living constitutionalism." *See* Vermeule, *supra* note 4; Casey & Vermeule, *supra* note 63. In addition, and also as noted, there are some problems (not a lot) even for semantic originalism, as in the equal protection component of the Due Process Clause and

No one should doubt that the “supreme law of the land” includes “this Constitution,” and that federal officers⁷⁷ are “bound, by oath or affirmation, to support this Constitution.”⁷⁸ But people with different views about constitutional interpretation, and with favorable or unfavorable views about different forms of originalism, can agree to “support this Constitution.”⁷⁹ Nothing in the oath requires officials to subscribe to a particular conception of interpretation.⁸⁰ Diverse judges can “support this Constitution” while having diverse views about how to interpret it.

Here is another way to put the point. Throughout American history, many distinguished judges have not been self-identified originalists, and they did not spend a lot of time on the original understanding or the original public meaning. They might have been semantic originalists, or (better) they might not have been semantic originalists, but none of them spent a lot of time on semantic originalism. (That is an understatement.)⁸¹ Clear examples include Oliver Wendell Holmes, Louis Brandeis, Felix Frankfurter, Benjamin Cardozo, Charles Evans Hughes, Robert Jackson, John Marshall Harlan II, Thurgood Marshall, Lewis Powell, Ruth Bader

the application of the First Amendment’s Free Speech Clause to institutions other than Congress. See STRAUSS, *supra* note 4.

77. Article VI also applies to “the Members of the several State Legislatures.” U.S. CONST. art. VI, cl. 3.

78. *Id.*

79. *Id.*

80. It is true that different officials, at different times, take the oath of office to “this Constitution,” and it is the same Constitution. But those facts do not mean that they must simultaneously agree to the same approach to interpretation! Justices Thurgood Marshall, Antonin Scalia, Stephen Breyer, and John Roberts, for example, took the same oath (I did too, by the way, in 2009, twice, and again in 2021), without necessarily agreeing to interpret it in the same way or with the same methodology.

81. It might be tempting to note that the term “originalism” is relatively new, and to insist that for that reason, the fact that justices and judges did not embrace it, before it was a term, is not exactly surprising. The point is correct but not responsive. What I am emphasizing is not that the relevant people did not use the term; *they did not practice originalism in any form.* (At least they did not do so that often. In fact, they almost never did.)

Ginsburg, Henry Friendly, Harold Leventhal, Stephen Williams, and Richard Posner. It would be remarkable, a kind of miracle, if all of these justices violated their oath of office, or if they made some fundamental mistake about the meaning of the word "this."⁸²

IV. THE ILLUSION OF CONSTRAINT

There is a broader point in the background here, and let us now put it in the foreground. It involves the illusion of constraint.⁸³ In many cases, words do have unambiguous meanings, or relevantly unambiguous meanings, and real or imagined disputes are simple to resolve. The word "jury" does not include a "judge" or a "magistrate"; a "treaty" is not an ordinary contract; the grant of legislative power to Congress does not include the grant of executive power to Congress. Simply as a matter of text, some interpretations are out of bounds. But compare the question whether "the freedom of speech" includes blasphemy, obscenity, and commercial advertising, or indeed subsequent punishment of any kind. The operative phrase ("the freedom of speech") can be specified in many ways, consistent with its semantic meaning alongside a modest amount of contextual enrichment.⁸⁴ To identify the right specification, we need something other than a language lesson.

Or consider the phrase "equal protection of the laws,"⁸⁵ and take it as a matter of semantics. Do affirmative action programs violate "equal protection"? It might seem tempting to say that if state of-

82. Or about the meaning and consequences of other constitutional indexicals. See Green, *supra* note 2, at 1649.

83. See Fallon, *supra* note 4, for an illuminating discussion.

84. It is possible that the original public meaning might lead to a single specification, and original expectations originalism should narrow the field, though we might end up in the construction zone.

85. I am bracketing the view that as an original matter, "equal protection" was a relatively narrow idea, not a general antidiscrimination principle. (I agree with that view.) We could use the Privileges or Immunities Clause to make the same point. See Green, *supra* note 2, at 1633.

ficials discriminate on the basis of race, they are not treating people equally, essentially by definition. But the temptation should be resisted. English speakers could easily understand a guarantee of “equal protection” to allow and even to require affirmative action programs, just as they could easily understand such a guarantee to forbid or to allow discrimination on the basis of age, sex, disability, and sexual orientation.⁸⁶ Or consider the question whether a “case or controversy” requires plaintiffs to show an “injury in fact.”⁸⁷ The term “case or controversy” may or may not impose that requirement. The text does not tell us.⁸⁸ It would be easy to proliferate examples. Here again, a language lesson is insufficient.

The claim that the term “this Constitution”⁸⁹ mandates a contested⁹⁰ theory of interpretation belongs in the same category with many other efforts to resolve controversial questions in law by reference to the supposed dictate of some external authority. Whether maddening or liberating, the truth is that in important cases, there is no such dictate. The choice is ours.⁹¹

86. It remains possible for public meaning originalists to insist that equal protection has a specific meaning and that it does or does not forbid affirmative action programs, though we might end up in the construction zone.

87. See *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 559–60 (1992).

88. Again, the original public meaning might, and in fact it does (in my view). See Cass R. Sunstein, *Injury In Fact, Reformulated*, 2021 SUP. CT. REV. 349 (2021).

89. On some historical puzzles, see GIENAPP, *supra* note 6.

90. I have urged that semantic originalism is, by and large, not contested, while also noting that it might well have to be qualified in various ways. See, e.g., *Bolling v. Sharpe*, 347 U.S. 497, 499–500 (1954). I have also bracketed some historical puzzles. Note that in his later years, Madison himself adopted (3) on normative grounds, not so different from those offered in Solum, *supra* note 4. See GIENAPP, *supra* note 6, at 327–33.

91. Fallon offers a different version of this claim, as a challenge to the view that the original public meaning is a fact. Fallon, *supra* note 4. For a vigorous response, see Solum, *The Public Meaning Thesis*, *supra* note 4, at 2006–23.

Four qualifications are important:

(1) The oath does indeed obligate people to follow “this Constitution,” and not another. That is not a choice.

(2) The statement in text is emphatically not a suggestion that the choice is arbitrary or willful. For different views on whether and when we should choose to be original-

ists of various kinds, and on the criteria for the choice, see Solum, *The Public Meaning Thesis*, *supra* note 4, at 1967–2001; Sunstein, *supra* note 4. Very briefly, Solum believes that public meaning originalism rests on both claims about the actual meaning of the constitutional text (his Fixation Thesis and Public Meaning Thesis) and a claim that the Original Public Meaning ought to be treated as binding (his Constraint Principle). It is hazardous to disagree with Solum, but my view is that the original public meaning of the constitutional text (as he understands it, and distinct from the semantic meaning) is one of several possible meanings; there is nothing that communication just is (though there are many things that communication just isn't). We must decide today which of these meanings should guide constitutional practice. Solum seems to agree that we must choose today, and he offers an assortment of arguments for the choice he defends, but he argues that only the original public meaning qualifies as the "true" meaning (or in his words "communicative content") of the constitutional text. (In other words, I question both the Public Meaning Thesis and the Constraint Principle; Solum accepts both.) Madison, by the way, was (I think) broadly speaking with me on the issue of criteria (he spoke in terms of the need for stability, not in terms of the nature of meaning or communication), though he was with Solum on public meaning originalism, as I am not.

In my view, the only way to choose a theory of interpretation is broadly pragmatic in nature, a claim that in the abstract does not rule originalism either in or out. See Sunstein, *supra* note 4, at 1698. Whether or not they unite, interpreters of the world have nothing to lose but their chains. See Cass R. Sunstein, *Textualism and the Duck-Rabbit Illusion*, 11 CAL. L. REV. ONLINE 463, 475–76 (2020). The central issue is what approach to interpretation makes our constitutional order better rather than worse. Madison's support for (3), in his later years, is best understood as asking and answering that question (as noted, in favor of public meaning originalism). See GIENAPP, *supra* note 6, at 327–33. Note, however, that nothing in the central argument here—on the oath and the term "this Constitution"—depends on whether we agree with Solum or Madison. We might ultimately agree with either or both, and still insist that the oath does not require their view: People with diverse, reasonable views of interpretation are acting in accordance with the oath, and each should acknowledge that fact about reasonable people who disagree with them. (While we are down here, in the footnotes: The idea of "legitimacy" does not, in my view, argue strongly for public meaning originalism. Ratification was a long time ago, and the process was not exactly all-inclusive. But democratic considerations do bear strongly on the choice of a method of interpretation.)

(3) Semantic originalism has a strong claim on our attention. It is one thing to say that "the freedom of speech" includes blasphemy (which is consistent with semantic originalism); it is another thing to say that "the freedom of speech" includes riding horses or playing tennis. But even semantic originalism has to be justified on external grounds; it is not self-justifying, though it does seem to be plausibly "this Constitution." I have noted some complexity in the question of what kind of enrichment is

necessary to make semantic originalism even meaningful, without turning it into something like (3).

(4) We might choose a theory of interpretation that binds us. In fact, we had better.

**KEEPING OUR BALANCE:
WHY THE FREE EXERCISE CLAUSE NEEDS TEXT,
HISTORY, AND TRADITION**

WILLIAM J. HAUN*

In *Fiddler on the Roof*, the main character—Tevye der Milkhiker—begins the play with an ode to “Tradition.” The song recounts how the duties of religion, family, and work ensure continuity amid change. This enduring stability is tradition’s virtue—or as Tevye puts it, “how we keep our balance.” Without that balance, “our lives would be as shaky as a fiddler on the roof.”¹ *Fiddler’s* understanding of tradition—a means to ensure continuity amid change—would be a helpful corrective to current Free Exercise doctrine.

During the past decade, Free Exercise doctrine has become something like a fiddler on a roof. More than before, religious liberty is a prominent feature of the U.S. Supreme Court’s docket. These cases raise many doctrinal questions: What is religious speech?² When and how is government “neutral” toward religion?³ What does it mean for religious groups to participate equally in public

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1. JERRY BOCK ET AL., *Tradition*, in *FIDDLER ON THE ROOF* (1964).

2. *Masterpiece Cakeshop, Ltd. v. Colo. C.R. Comm’n*, 138 S. Ct. 1719, 1721 (2018).

3. *Id.* at 1723–24; *Roman Cath. Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63, 66 (2020).

programs?⁴ What protections do the religious have against government discretion?⁵ Do those protections change based on corporate status?⁶ What if the government admits it could accommodate a religious organization, but refuses to do so?⁷ Can a government refuse religious accommodations based on comparisons to secular accommodations, and if so, what is properly comparable?⁸ What makes a church employee a “minister”?⁹ And to what extent can civil courts intrude into a religious organization’s internal decisions?¹⁰ Although these myriad contexts call the Free Exercise “fiddler” to dance to many tunes, one thing is clear: the fiddler is dancing on unstable doctrine.

That is because current doctrine often rests on *Employment Division v. Smith*.¹¹ *Smith* refused to authorize a religious exemption from an “across-the-board-criminal prohibition on a particular form of conduct.”¹² The folk understanding of *Smith* is that the government never has to accommodate religious believers burdened by “neutral” and “generally applicable” laws. This baseline treatment continues even as five sitting Supreme Court justices acknowledge “compelling” reasons to overrule *Smith*.¹³ And, as will be discussed, *Smith*’s premises are disintegrating. In short, the Free Exercise Clause needs surer footing than *Smith*.

4. *Carson v. Makin*, 142 S. Ct. 1987, 1997 (2022) (discussing *Espinoza v. Mont. Dep’t of Revenue*, 140 S. Ct. 2246, 2255, 2261 (2020) and *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012, 2021 (2017)).

5. *Fulton v. City of Philadelphia*, 141 S. Ct. 1868, 1878 (2021).

6. *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 713–717 (2014).

7. *Zubik v. Burwell*, 578 U.S. 403, 407–08 (2016).

8. *Tandon v. Newsom*, 141 S. Ct. 1294, 1296 (2021).

9. *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 565 U.S. 171, 188–92 (2012).

10. *Our Lady of Guadalupe Sch. v. Morrissey-Berru*, 140 S. Ct. 2049, 2055 (2020).

11. 494 U.S. 872 (1990).

12. *Id.* at 872–74, 884.

13. *See, e.g., Fulton*, 141 S. Ct. at 1931 (Gorsuch, J., concurring) (“[N]ot a single Justice has lifted a pen to defend” *Smith*).

Smith should be abandoned and “text, history, and tradition” should be adopted in its place. This latter approach is taken by standard originalism,¹⁴ fully expressed in the Second Amendment context, and—notably for the Free Exercise Clause—already applies to other Religion Clause doctrines.¹⁵ On this approach, the Free Exercise Clause would presumptively protect a given religious exercise unless the opposing party can show a long, unbroken tradition of restriction that is analogous to the burden at issue. Text and history are already well-established interpretive commitments.¹⁶ But tradition’s contribution is less clear. This article explains the role tradition should play in Free Exercise doctrine.

The Free Exercise Clause “has infrequently been interpreted traditionally.”¹⁷ The complicating factor is Justice Scalia’s opinion for the Court in *Smith*.¹⁸ There, *Smith* responded to the textual ambiguity of the Free Exercise Clause toward religious accommodations

14. See, e.g., Michael W. McConnell, *Textualism and the Dead Hand of the Past*, 60 GEO. WASH. L. REV. 1127, 1136 (1998). Originalism and its statutory cousin, textualism, are “capacious term[s] for a variety of theories that are very different in their specifics.” Marc O. DeGirolami, *Traditionalism Rising*, J. CONTEMP. LEGAL ISSUES (forthcoming 2023) (manuscript at 18), <https://ssrn.com/abstract=4205351> [<https://perma.cc/EK4S-PK73>]. But the “Standard Approach” to defining those theories is to contrast them with theories that interpret a legal text using something other than the text’s original public meaning. J. Joel Alicea, *Liberalism and Disagreement in American Constitutional Theory*, 107 VA. L. REV. 1711, 1714 (2022). This article will limit its discussion of originalism to the standard approach, exemplified by Justice Scalia. See ANTONIN SCALIA, SCALIA SPEAKS 184 (Christopher J. Scalia & Edward Whelan eds., 2017) (describing Scalia’s originalism); see also *infra* Part I.B.

15. *Infra* Part II. The mantra of “text, history, and tradition” seems to have first gained interpretive force in the Second Amendment context (though there were earlier passing usages). See Dru Stevenson, “Text, History, and Tradition” as a Three-Part Test, DUKE CTR. FOR FIREARMS L.: SECOND THOUGHTS (Mar. 11, 2020), <https://sites.law.duke.edu/secondthoughts/2020/03/11/text-history-and-tradition-as-a-three-part-test/> [<https://perma.cc/E3GE-2URE>].

16. See Michael W. McConnell, Lecture, *Time, Institutions, and Interpretation*, 95 B.U. L. REV. 1745, 1747–51 (2015).

17. Marc O. DeGirolami, *The Traditions of American Constitutional Law*, 95 NOTRE DAME L. REV. 1123, 1148 (2020).

18. *Infra* Part II.D.

with Justice Scalia's preference: judicial restraint.¹⁹ *Smith* admits this was a "prefer[ence]," not a constitutional mandate.²⁰ And this preference overrode any regard for longstanding practices of religious accommodation—evidence that *Smith* (and Justice Scalia again in *City of Boerne v. Flores*²¹) deemed inappropriate for courts to consider.²² These choices make Free Exercise jurisprudence a doctrinal outlier.²³ Moreover, by jumping straight from the Free Exercise Clause's textual ambiguity on accommodation to *Smith*'s restraint preference, "restraint" is enforced by two abstract standards ("neutrality" and "general applicability") that have no necessary connection to the Clause's semantic or historical meaning—to say nothing of longstanding practices toward religious accommodation. Unsurprisingly, the result of these abstract standards is not restraint, but the interpretive tools that Justice Scalia considered unrestrained: legislative history, decisionmaker motive, and analysis of a law's disparate impacts. These tools not only license judicial manipulation to uphold government burdens on religion,²⁴ they remove the Free Exercise Clause from its ordinary understanding as a guarantee of religious liberty.²⁵

Here, because there are open methodological points related to tradition,²⁶ it is important to clarify what I mean when I refer to "text, history, and tradition." This article advocates for the use of

19. *Id.* Here, I am using "judicial restraint" as *Smith* did: ambiguity in constitutional text means "judges should defer to the decisions of present-day representative institutions." McConnell, *supra* note 14, at 1136.

20. *Emp. Div. v. Smith*, 494 U.S. 872, 890 (1990).

21. 521 U.S. 507 (1997).

22. *Smith*, 494 U.S. at 889–90; *City of Boerne*, 521 U.S. at 541–42 (Scalia, J., concurring).

23. *Infra* Part II.D.

24. See *Masterpiece Cakeshop, Ltd. v. Colo. C.R. Comm'n*, 138 S. Ct. 1719, 1737 (2018) (Gorsuch, J., concurring) ("Nor can any amount of after-the-fact maneuvering by our colleagues save the Commission.").

25. See *Fulton v. City of Philadelphia*, 141 S. Ct. 1868, 1904 (2021) (Alito, J., concurring) (evaluating the text of the Free Exercise Clause in "1791 (and today)"); see also *id.* at 1896 ("These words had essentially the same meaning in 1791 as they do today.").

26. See *N.Y. State Rifle & Pistol Ass'n v. Bruen*, 142 S. Ct. 2111, 2162 (2022) (Barrett, J., concurring) (highlighting open questions around "the manner and circumstances in which postratification practice may bear on the original meaning of the Constitution").

“text, history, and tradition” — in that order — when interpreting the Free Exercise Clause. Some have argued for a form of “tradition” that disregards text and original public meaning.²⁷ Others have argued for the role of “liquidation,” whereby an ambiguity in the Constitution’s original meaning is “settled” by a post-ratification practice or practices, regardless of their temporal endurance before and after ratification.²⁸ Neither tradition alone nor liquidation is my claim. Rather, a political community’s longstanding practices toward particular religious accommodations—practices that can come both before and after the Constitution’s ratification—should illuminate what text and history do not definitively resolve about the Free Exercise Clause’s original meaning. Illumination would result by the judiciary answering “historical, analogical questions,” akin to the Court’s approach in the recent Second Amendment decision, *New York State Rifle & Pistol Association v. Bruen*.²⁹ As *Bruen* said, this approach was adopted from a “similar” one governing Establishment Clause doctrine.³⁰ The church autonomy context reflects this approach too. All these contexts provide strong reasons for extending “text, history, and tradition” to the Free Exercise Clause.

In particular, this article makes three doctrinal suggestions: (1) moving from a grand unified theory governing all Free Exercise cases—as *Smith* sought—to context-specific rules rooted in

27. See Ernest Young, *Rediscovering Conservatism: Burkean Political Theory and Constitutional Interpretation*, 72 N.C. L. REV. 619, 674 (1994); David Strauss, *Common Law Constitutional Interpretation*, 63 U. CHI. L. REV. 877 (1996).

28. DeGirolami, *Traditionalism Rising*, *supra* note 14, at 20 (citing William Baude, *Constitutional Liquidation*, 71 STAN. L. REV. 1 (2019)).

29. *Bruen*, 142 S. Ct. at 2134.

30. *Id.* at 2130; see also, e.g., *Firewalker-Fields v. Lee*, 58 F.4th 104, 122 n.7 (4th Cir. 2023) (“So, in Establishment Clause cases, the plaintiff has the burden of proving a set of facts that would have historically been understood as an establishment of religion. This requires proving both a set of facts, like in all litigation, and proving that those facts align with a historically disfavored establishmentarian practice.” (citing *Bruen*, 142 S. Ct. at 2130 n.6)). As *Bruen* shows, this is a “legal inquiry” that can be decided at the pleading stage. See *Bruen*, 142 S. Ct. at 2130 n.6.

historical analogues;³¹ (2) limiting any inquiry into “compelling” interests to those that the opposing party shows, through longstanding practice, are well-accepted reasons to burden the religious exercise at issue;³² and (3) crafting distinct protections for religious institutions.³³ These changes reflect tradition’s insight: self-government requires enduring consent, and that consent is demonstrated by the American people’s longstanding practices toward their constitutional guarantees. Free Exercise doctrine, in both its substance and its administrability, would benefit from this practical wisdom.

I. TRADITION AS AN INTERPRETIVE AID TO TEXT AND HISTORY

Tradition’s distinct interpretive role is often “elided” when the Supreme Court discusses text and history.³⁴ It is therefore important to understand what tradition itself brings to the interpretive table. That is this section’s subject.

There are many ways to distinguish tradition from text and history. One could explain why tradition is not as widely used.³⁵ One could discuss tradition’s distinct justifications in morality and politics, contrast tradition with less standard forms of originalism, or distinguish tradition from “liquidation.”³⁶ These distinctions have been drawn well by others, especially Professor Marc DeGirolami.³⁷ Instead of retreading those grounds, this section will explain tradition’s distinct contribution to a jurisprudence of text, history, and tradition. The first subsection will explain how tradition’s

31. *Infra* Part III.B; *see also* *Am. Legion v. Am. Humanist Ass’n*, 139 S. Ct. 2067, 2087 (2019) (plurality opinion) (“While the *Lemon* Court ambitiously attempted to find a grand unified theory of the Establishment Clause, in later cases, we have taken a more modest approach that focuses on the particular issue at hand and looks to history for guidance.”).

32. *Infra* Part III.C.

33. *Infra* Part III.D.

34. *See* DeGirolami, *supra* note 14, at 17.

35. *See* DeGirolami, *supra* note 17, at 1124.

36. *See, e.g.*, DeGirolami, *supra* note 14, at 43.

37. *See supra* notes 14, 17.

supplemental contribution to text and history compensates for text and history's potential for overtheorizing and unworkable rules. The second subsection will explain how originalism's standard approach—the approach of text, history, and tradition—provides examples of how to operationalize tradition's supplementary role.

A. *Tradition compensates for the shortcomings of text and history.*

“Almost all interpreters, whatever their school of thought, agree that the constitutional text (including inferences from structure) is the place to begin, and that when the text is clear it is binding.”³⁸ A commitment to the primacy of text is rooted in certain theories about the binding nature of a written constitution.³⁹ A similar point can be made about the importance of history. Among all constitutional interpreters, “[t]he importance of the temporal dimension is well recognized.”⁴⁰ Where interpreters differ is not so much on the importance of *an* historical “moment,” but *what* that historical moment should be. For originalists, the history of “the moment at which the Constitution was adopted” matters.⁴¹ For living constitutionalists, the present moment’s—purportedly—“better informed understanding”⁴² is what matters. But no matter the preferred “moment,” history-based jurisprudence is accepted, and text-based jurisprudence is too.

However, interpreting text and history can be very mechanical and empirical.⁴³ That is not necessarily a problem. Technical tools

38. Michael W. McConnell, *Time, Institutions and Interpretation*, 95 B.U. L. REV. 1745, 1747 (2015).

39. See McConnell, *supra* note 14, at 1134–39.

40. McConnell, *supra* note 38, at 1751.

41. *Id.*

42. *Obergefell v. Hodges*, 576 U.S. 644, 671–72 (2015).

43. See *N.Y. State Rifle & Pistol Ass’n v. Bruen*, 142 S. Ct. 2111, 2130 n.6 (2022) (quoting William Baude & Stephen Sachs, *Originalism and the Law of the Past*, 37 L. & HIST. REV. 809, 810–811 (2019)); see also *Facebook, Inc. v. Duguid*, 141 S. Ct. 1163, 1174–75 (2021) (Alito, J., concurring) (discussing the interplay of canons of construction and “empirical” attempts to determine textual and historical evidence); *Bostock v. Clayton Cnty.*, 140 S. Ct. 1731, 1766 (2020) (Alito, J., dissenting) (arguing that “[d]ictionary

and rules can be quite helpful. And for both text and history interpretation—where the inquiries are either semantic or consider the meaning of a word in an isolated “moment”—technical methods can make sense.⁴⁴ But tradition-based evidence is different, because tradition does not “view[] authoritative history as the snapshot of a particular moment.”⁴⁵ Rather, by analyzing longstanding practice, tradition-based interpretation is analogical—finding meaning when “multiple institutions independently reach[] the same conclusion” on a practice “over a long period of time.”⁴⁶ This analogical inquiry, while necessarily comparative, “is not a mere likeness between diverse objects, but a proportion or relation of object to object.”⁴⁷ The interpretive insight of tradition comes not from more historically researched “facts,” but from immersing the interpreter in social memory.⁴⁸ That is, the interpreter ascertains how American culture *received* its past, demonstrated by longstanding practice.⁴⁹ By identifying interpretive meaning in how generations

definitions are valuable But they are not the only source of relevant evidence” in determining an “ordinary” meaning); see also John S. Ehrett, *Against Corpus Linguistics*, 108 GEO. L.J. ONLINE 50, 72–73 (2019) (“Hidden beneath the fig leaf of ‘science’ are the same value judgments that have long bedeviled all questions of textual interpretation—only this time, those underlying value commitments are harder to immediately ascertain.”).

44. Though technical approaches still have their limits and problems. See, e.g., Ehrett, *supra* note 43, at 72–73.

45. Michael W. McConnell, *Tradition and Constitutionalism Before the Constitution*, 1998 U. ILL. L. REV. 173, 174 (1998).

46. McConnell, *supra* note 38, at 1772.

47. *Analogy in Metaphysics and Scholastic Philosophy*, CATHOLIC ANSWERS, <https://www.catholic.com/encyclopedia/analogy> [<https://perma.cc/3X4Q-BF83>].

48. See Judge Neomi Rao, *The Province of Law*, 46 HARV. J.L. & PUB. POL’Y 87, 99 (2023) (“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.” (emphasis in original)).

49. See Josef Piper, *Tradition Concept and Claim* 16–22 (2010) (contrasting “historical knowledge” and accepting a tradition).

receive an understanding, the interpreter can retain “continuity with the past” and harmony with the Constitution as a whole.⁵⁰

Tradition’s regard for continuity can be in tension with restraint. Again, for purposes of this essay, I am discussing judicial restraint as it is deployed in *Smith*—the idea that, when faced with constitutional ambiguity, “judges should defer to the decisions of present-day representative institutions.”⁵¹ Restraint’s emphasis on presentism is in tension with tradition’s emphasis on endurance—that is, how “the words of the Constitution . . . have been understood by the people over the course of our constitutional history, from enactment through the present.”⁵² Some tradition advocates look at this distinction and conclude that traditionalists should be “neither committed to nor supportive of” standard originalism and judicial restraint.⁵³ But text, history, and tradition is after something different.

For text, history, and tradition, these tensions are good. Tradition’s practical focus helps ground text and history.⁵⁴ The authority for text and history rests on the political theory that, in short, “[i]f the Constitution is authoritative because the people of 1787 had an original right to establish a government for themselves and their posterity, the words they wrote should be interpreted—to the best of our ability—as they meant them.”⁵⁵ This piece assumes that this theory is correct.⁵⁶ But if it is correct, then the interpretive authority for text and history can rest in abstraction and eschew knowledge

50. McConnell, *supra* note 14, at at 1136–37; *see also Facebook*, 141 S. Ct. at 1175 (Alito, J., concurring) (“Empirical evidence might prove me wrong, but that’s not what matters.” What matters is whether such tools “accurately describe how the English language is generally used.”).

51. McConnell, *supra* note 14, at 1136.

52. *Id.*

53. *See Young, supra* note 27; *Strauss, supra* note 27.

54. McConnell, *supra* note 14, at 1128.

55. *Id.* at 1132.

56. *See id.*

from experience⁵⁷—a form of knowledge that “comes to man in many more forms than” syllogistic reasoning, empirical analysis, or filtering history by theory.⁵⁸ The knowledge of experience is sometimes called “social knowledge,”⁵⁹ and it recognizes that certain principles only receive full elucidation through application over time.⁶⁰

When an interpreter acquires meaning from practice, he will permit longstanding practices to distill the meaning suggested by the technical analyses of text and history.⁶¹ Such distillation does not,

57. For examples of privileging abstract conceptions of text and history, see, e.g., *Bostock v. Clayton Cnty.*, 140 S. Ct. 1731, 1750–51 (2020) (“One could easily contend that legislators only intended expected applications or that a statute’s purpose is limited to achieving applications foreseen at the time of enactment. However framed, the employer’s logic impermissibly seeks to displace the plain meaning of the law in favor of something lying beyond it.”); *Troxel v. Granville*, 530 U.S. 57, 91–92 (2000) (Scalia, J., dissenting) (“[W]hile I would think it entirely compatible with the commitment to representative democracy set forth in the founding documents to argue, in legislative chambers or in electoral campaigns, that the State has *no power* to interfere with parents’ authority over the rearing of their children, I do not believe that the power which the Constitution confers upon me *as a judge* entitles me to deny legal effect to laws that (in my view) infringe upon what is (in my view) an unenumerated right.”).

58. F.A. HAYEK, *THE CONSTITUTION OF LIBERTY* 125 (Ronald Hamowy ed., Routledge 2011) (1960).

59. See ROGER SCRUTON, *THE MEANING OF CONSERVATISM* 31 (3d ed., Palgrave Macmillan 2001) (1980).

60. See JOHN HENRY CARDINAL NEWMAN, *AN ESSAY ON THE DEVELOPMENT OF CHRISTIAN DOCTRINE* 185 (Univ. Notre Dame Press 1994) (1845) (distinguishing “a true development and a corruption”); cf. POPE JOHN PAUL II, *THE CATECHISM OF THE CATHOLIC CHURCH* 23 (2d ed. 2019) (1992) (“Yet even if Revelation is already complete, it has not been made completely explicit; it remains for the Christian faith gradually to grasp its full significance over the course of the centuries.”).

61. As shown by the cases discussed *infra*, the longstanding practices that tradition-based interpretation considers include those *both* before and after the Constitution’s ratification. If an interpreter only considers post-ratification evidence, he overlooks the lessons taught by a practice’s roots and soil—that is, the *how* and *why* a practice became longstanding. Moreover, a case that purported a basis in tradition, but only considered recent practice, is not tradition-based. And the opinion would probably reveal it. Cf. *Lawrence v. Texas*, 539 U.S. 558, 571–72 (2003) (“we think that our laws and traditions in the past half century are of most relevance here,” and then claiming that history and tradition are not “the ending point of the substantive due process inquiry”) (internal quotation marks and citation omitted).

by definition, authorize overriding what text and history definitively show. Rather, longstanding practice brings to light meaning left ambiguous by text and history. Proper tradition-based evidence, then, “illustrates, not obscures; corroborates, not corrects the body of thought from which it proceeds.”⁶² On this view, the interpreter is not a “technician,” willing to invalidate longstanding practices because his “archaeological excavation” cannot explain them on “rationalistic” grounds, or from a single moment’s “history.”⁶³ Nor is the interpreter an antiquarian, whose “wise and laudable” interest in returning to original practices would “reduce everything to antiquity by every possible device.”⁶⁴ An interpreter using tradition acknowledges that meaning does not change. Yet he also acknowledges the limits of that insight when interpretation does not only require knowing history, but also exercising judgment in applying historical meaning to present circumstances. The interpreter must ensure the historical meaning’s fitting application “to meet the changes of circumstances and situation.”⁶⁵ Tradition reveals the fitting application.

Tradition, as Edmund Burke illustrated,⁶⁶ gives insight into *how* original meaning should apply, because inherent to a successful tradition—that is, a tradition handed on to a new generation—is some proven good use.⁶⁷ By definition, then, successful traditions are not static—they show how a people carry out an understanding of their history. That endurance depends on “interpretation and reformulation in order [for the preserved practice] really to reach

62. NEWMAN, *supra* note 60, at 200.

63. Joseph Cardinal Ratzinger, *Preface*, ALCUIN REID, *THE ORGANIC DEVELOPMENT OF THE LITURGY* 11–12 (2d ed. 2005) (discussing tradition and proper development regarding the Catholic Mass).

64. Pope Pius XII, *Mediator Dei*, *ENCYCLICAL ON THE SACRED LITURGY* § 62 (1947).

65. *Id.* at § 63.

66. Burke never used the term “tradition,” but instead invoked “prescription,” a term that “originated in Roman property law, where it referred to ownership by virtue of long-term use, rather than by formal deed.” YUVAL LEVIN, *THE GREAT DEBATE* 140 (2014).

67. *Id.*

each new generation.”⁶⁸ As such, consulting a tradition helps an interpreter determine the difference between (acceptable) *translation* of original meaning to new contexts and (unacceptable) *transformation* of the original meaning to a new essence. By being immersed in how a practice underlying a constitutional provision applies over time, a judge therefore becomes immersed in the society’s tradition of the underlying substance. In being so immersed, the judge approaches interpretation like a “gardener,” determining the “the inner structural logic” of text and history well enough to ensure that, even as circumstances give rise to new questions and situations, constitutional meaning is faithfully transmitted to subsequent generations.⁶⁹

Tradition’s regard for enduring practice provides a check against overly theoretical approaches to text and history interpretation. As Professor Michael McConnell put it, “[t]he fundamental conceptual error with respect to all [judicial] methodologies, but especially originalism, is the belief that they will necessarily produce a single right answer to the disputed legal question.”⁷⁰ Rather, text and history “more often exclude[] certain possibilities” than they “provide[] clear answers.”⁷¹ If, in the face of that ambiguity, tradition is ignored, then the inertia of wanting a Single Right Answer will still insist on one—even if it means contravening longstanding practices that support an alternative reading of the original evidence. Insisting on such interpretations reflects a view of text and history that expects them to “accomplish too much” by “wrest[ing] a greater precision” than either warrant.⁷² Moreover, this approach sacrifices the judiciary’s distinct vantage point in the federal system: an

68. JOSEF PIEPER, *TRADITION* 50 (St. Augustine Press 2010).

69. See Ratzinger, *supra* note 63.

70. McConnell, *supra* note 38, at 1761.

71. *Id.* at 1761, 1787.

72. *Id.* at 1760; see also Thomas Merrill, *Bork v. Burke*, 19 HARV. J.L. & PUB. POL’Y 509, 520–21 (1996) (“[O]riginalism by its very nature requires that the interpreter comprehend and adopt the values, aspirations, and linguistic conventions of a society several steps removed in time from our own. . . . One can fairly question whether the average judge or lawyer . . . is capable of carrying off this kind of inquiry.”).

institution removed from political forces such that it can apply foundational principles to the “flesh-and-blood” of an actual case.⁷³ Tradition upholds the judicial role by taking the “range of plausible interpretations” from text and history and identifying “concrete practices” — ones of “substantial duration,” from both “the political organs of government” and also “individual citizens or groups of citizens” — that then become presumptively “determinative” of constitutional meaning.⁷⁴

For similar reasons, American constitutionalism “accords the past an authority that philosophy does not.”⁷⁵ This is evident in the embrace of *stare decisis*,⁷⁶ discussions of constitutional interpretation in the *Federalist Papers*,⁷⁷ the widespread influence of the British common law,⁷⁸ and the role of longstanding practice in foundational Supreme Court decisions, like *McCulloch v. Maryland*.⁷⁹ Indeed, James Wilson — known today for his commitment to natural law and natural rights — called custom “the most significant, and

73. See ALEXANDER BICKEL, *THE LEAST DANGEROUS BRANCH* 116 (1962).

74. DeGirolami, *supra* note 14, at 6–7. See also McConnell, *supra* note 16, at 1771 & n.106 (“I wrote of this methodology years ago under the name of ‘traditionalism,’” but “that name did not catch on,” as the Court would prefer “longstanding practice.”); *NLRB v. Noel Canning*, 573 U.S. 513, 513–14 (2014). For the presumptive role, see *infra* Part II.A–B (discussing *Bruen*’s use of presumptions and presumptions in the Establishment Clause context).

75. Anthony Kronman, *Precedent and Tradition*, 99 *YALE L.J.* 1029, 1034 (1991).

76. See *THE FEDERALIST NO. 78* (Alexander Hamilton) (Clinton Rossiter ed., 2003).

77. “Laws,” Hamilton says “are a dead letter without courts to expound and define their true meaning and operation.” *Id.* NO. 22, at 146 (Alexander Hamilton). And those meanings will be “liquidated and ascertained by a series of particular discussions and adjudications.” *Id.* NO. 37, at 225 (James Madison). As such, “the natural and obvious sense of [the Constitution’s] provisions, apart from any technical rules, is the true criterion of construction.” *Id.* NO. 83, at 496 (Alexander Hamilton). Because such “rules of legal interpretation” are determined by “conformity to the source which they are derived,” *id.* at 495, and American law draws on authority that is “ancient as well as numerous,” *id.* NO. 49, at 312 (James Madison) (emphases omitted), judges must be formed in the “long and laborious” study in not only law’s technical maxims, but also its origins in the people’s traditions, *id.* NO. 78, at 470 (Alexander Hamilton).

78. DANIEL J. BOORSTIN, *THE MYSTERIOUS SCIENCE OF THE LAW* 73 (1941).

79. 17 U.S. (4 Wheat.) 316, 401–407 (1819); see also BICKEL, *THE LEAST DANGEROUS BRANCH*, *supra* note 73, at 105 (discussing *McCulloch*).

the most effectual” sort of law, because its continuance shows “internal evidence, of the strongest kind, that the law has been introduced by common consent; and that this consent rests upon the most solid basis—experience as well as opinion.”⁸⁰ Such customs are identified and upheld by text, history, and tradition. That interpretive sequence assesses constitutional ambiguities by taking the longstanding practice of a given political institution or community and relating it—“at least analogically”—to “the historically defined hard core” of the guarantee at issue.⁸¹

B. Standard originalism operationalizes text, history, and tradition.

As standard originalism’s foremost expositor,⁸² it is no surprise that Justice Scalia offered the most thorough guidance for operationalizing tradition’s supplemental role to text and history.⁸³

Scalia’s guidance began with a crucial point: tradition “giv[es] content only to *ambiguous* constitutional text; no tradition can supersede the Constitution.”⁸⁴ Second, “tradition” cannot be invoked abstractly. Rather courts should identify traditions at “the most specific level,” regardless of whether the identified tradition is “protecting, or denying protection to, the asserted right.”⁸⁵ That is not to say that more “general” traditions are unhelpful. They can be helpful.⁸⁶ But the more general the tradition, the more “imprecise” its “guidance,” and the more important it becomes that the

80. JAMES WILSON, ON THE GENERAL PRINCIPLE OF LAW AND OBLIGATION (1790 – 1791), reprinted in COLLECTED WORKS OF JAMES WILSON 470 (Kermit L. Hall & Mark David Hall eds., 2007).

81. See ALEXANDER BICKEL, THE MORALITY OF CONSENT 18, 29 (1975).

82. See Samuel A. Alito Jr., *Remarks to the 2020 Federalist Society National Lawyers Convention*, 45 HARV. J.L. & PUB. POL’Y 83, 100 (2022).

83. McConnell, *supra* note 14, at 1136 (“What Scalia rejects is the idea that the nation should be governed not by the will of the people over time, but by the opinions of judges, or of the legal elite.”).

84. *Rutan v. Republican Party of Ill.*, 497 U.S. 62, 96 n.1 (1990) (Scalia, J., dissenting); see also *NLRB v. Noel Canning*, 573 U.S. 513, 573 (2014) (Scalia, J., concurring).

85. See *Michael H. v. Gerald D.*, 491 U.S. 110, 127 n.6 (1989) (plurality opinion) (Scalia, J.).

86. *Id.* (saying you can “consult and (if possible) reason from” them).

tradition is continuing and widespread before it can be determinative.⁸⁷ Third, the invoked tradition must be one of “unchallenged validity.”⁸⁸ A tradition has unchallenged validity when it “ha[s] not been vigorously opposed on constitutional grounds,” meaning it hasn’t been “litigated up to th[e Supreme] Court,” or “upheld only over [a historically vindicated] dissent.”⁸⁹ When unchallenged traditions are identified, they “are the best indication of what fundamental beliefs [a constitutional text] was intended to enshrine.”⁹⁰ Yet fourth, if the tradition itself is not going to resolve the case—but instead helps direct one of the Court’s “abstract tests”—then the Court should “craft[]” the test “so as to reflect[] those constant and unbroken traditions.”⁹¹

Yet Justice Scalia’s guidance for “text, history, and tradition” is in tension with his regard for judicial restraint.⁹² Scalia did not “articulate the connection between these methods, or . . . explain how to decide cases when they are in conflict.”⁹³ His judicial opinions suggest, however, that tradition should be subordinated to judicial restraint. As he said in *McIntyre v. Ohio Elections Commission*,⁹⁴ this is “the most difficult” issue for originalists.⁹⁵ That is because in cases where tradition-based evidence could illuminate ambiguities in

87. *Id.*

88. See *Rutan*, 497 U.S. at 96 n.1 (Scalia, J., dissenting) (explaining why *Brown v. Board of Education* was right to overrule *Plessy v. Ferguson*: “a tradition of unchallenged validity did not exist with respect to the practice in *Brown*”); see also *Noel Canning*, 573 U.S. at 573 (Scalia, J., concurring) (arguing that “a self-aggrandizing practice adopted by one branch well after the founding, often challenged, and never blessed by this Court” cannot contravene original understanding).

89. See *Rutan*, 497 U.S. at 96 n.1 (Scalia, J., dissenting).

90. *McIntyre v. Ohio*, 514 U.S. 334, 378 (1995) (Scalia, J., dissenting).

91. *United States v. Virginia*, 518 U.S. 515, 570 (1996) (Scalia, J., dissenting); *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 981 (1992) (Scalia, J., dissenting) (“in defining ‘liberty,’ we may not disregard a specific, ‘relevant tradition protecting, or denying protection to, the asserted right’” (quoting *Michael H. v. Gerald D.*, 491 U.S. 110, 127 n.6 (1989))).

92. *McConnell*, *supra* note 14, at 1137 & n.45.

93. *Id.* at 1137 n.45.

94. 514 U.S. 334 (1995).

95. *Id.* at 375 (Scalia, J., dissenting).

semantic or original meaning, “constitutional adjudication necessarily involves not just history but judgment: judgment as to whether the government action under challenge is consonant with the concept of the protected freedom . . . that existed when the constitutional protection was accorded.”⁹⁶ But Scalia’s preference for general rules that “hedge” judges in⁹⁷ was designed to prevent judges from rendering judgment on “the concept of the protected freedom” at issue. This led Justice Scalia to condition his evaluation of longstanding practice on what would, in his view, better limit judges. For example, in *McIntyre* he wrote that if “[a] governmental practice” restricting a Founding-era practice “has become general throughout the United States,” then it is presumptively constitutional—even if it began over a century after the Founding.⁹⁸ Similarly in *Brown v. Entertainment Merchants Association*,⁹⁹ Justice Scalia (for the Court) acknowledged that “long (if heretofore unrecognized) traditions of proscription” *could* allow governments to adopt “novel restriction[s]” on speech issues.¹⁰⁰ But, his reasoning discouraged their development, lest the Court encourage case-by-case adjudication.¹⁰¹ Scalia’s theoretical concerns about restraint also explain why he embraced tradition in the Establishment Clause context. Scalia’s concerns about limiting judicial judgment aligned with his opposition to “formulaic abstractions” that take decisions about permissible religious expression away from a community’s “long-accepted constitutional traditions.”¹⁰² But in the Free Exercise

96. *Id.*

97. See Antonin Scalia, *The Rule of Law As A Law of Rules*, 56 U. CHI. L. REV. 1176, 1180 (1989) (“Only by announcing rules do we hedge ourselves in.”).

98. *Id.* at 375–76 (“The earliest statute of this sort was adopted by Massachusetts in 1890 . . .”) (Scalia, J., dissenting).

99. 564 U.S. 786 (2011).

100. *Id.* at 792.

101. See *id.* *But cf. id.* at 821 (Alito, J., concurring) (“I would not squelch legislative efforts to deal with what is perceived by some to be a significant and developing social problem. If differently framed statutes are enacted by the States or by the Federal Government, we can consider the constitutionality of those laws when cases challenging them are presented to us.”).

102. *Lee v. Weisman*, 505 U.S. 577, 644 (1992) (Scalia, J., dissenting).

context—where “long-accepted constitutional traditions” regarding religious accommodation might increase case-by-case adjudication—Scalia preferred the formulaic abstraction (“neutrality” + “general applicability” = no relief).

While there can be a tension between tradition and restraint, standard originalism does not require a conflict. As Professor McConnell put it, “[t]he important point here is the sequencing.”¹⁰³ Both tradition and restraint “respect the will of the people as expressed at various points in time.”¹⁰⁴ Neither tradition nor restraint seek to “upend existing social policy and to substitute its opposite.”¹⁰⁵ But invoking restraint before tradition uproots restraint from any grounding in text, history, and analogically demonstrated practices. Such a jump means that deference to a present majority is no longer a command of text, history, or analogical practice. Rather, this “restraint” is just “the judges’ own view of what *should be* the constitutional constraint” that is allowed to “brush[] aside” “the conventional legal analyses of text, history, practice, and precedent.”¹⁰⁶ By contrast, as evidenced in recent Second Amendment and Religion Clause decisions, text, history, and tradition could achieve durable restraint by improving the court’s analytical precision. Judges could analogize the practice or regulation at issue to what is known about the constitutional provision’s original meaning. Over time, with the development of more specific historical analogies, the increased analogical precision would either define or displace the court’s resort to balancing tests.¹⁰⁷

103. McConnell, *supra* note 16, at 1788.

104. McConnell, *supra* note 14, at 1137 n.45.

105. McConnell, *supra* note 16, at 1781.

106. *Id.*

107. See *McIntyre v. Ohio Elections Comm’n*, 514 U.S. 334, 360 (1995) (Thomas, J., concurring); see also *id.* at 370–71; *Brown v. Ent. Merchs. Ass’n*, 564 U.S. 786, 839 (2011) (Thomas, J., dissenting) (“Whether the statute would survive an as-applied challenge . . . is a question for another day.”); *id.* at 806 (Alito, J., concurring) (“In considering the application of unchanging constitutional principles to new and rapidly evolving technology, this Court should proceed with caution. . .”).

II. TEXT, HISTORY, AND TRADITION IN PRACTICE

*New York State Rifle & Pistol Association v. Bruen*¹⁰⁸ is a recent Second Amendment decision that provides a comprehensive example of text, history, and tradition. And *Bruen*'s use of tradition is "adopt[ed from] a similar approach"¹⁰⁹ in recent Establishment Clause cases. This section will consider both those cases and *Bruen*, along with tradition's use in the church autonomy context. All these contexts contrast sharply with the Free Exercise Clause, where the *Smith* approach spurns text, history, and tradition.

A. *Bruen*.

Building on Justice Scalia's opinion for the Court in *District of Columbia v. Heller*,¹¹⁰ *Bruen* evaluated whether the Second Amendment allowed New York to condition a license to carry a gun on a "special need for self-defense."¹¹¹ The Court held that "the Constitution presumptively protects th[e] conduct" that is "cover[ed]" by a constitutional amendment's "plain text" — unless the government can "demonstrate that [its] regulation is consistent with this Nation's historical tradition of" regulating that conduct.¹¹² On this reading, the Constitution's text provides a presumption that government *cannot* restrict a clearly granted freedom. In response, "the government must affirmatively prove that" it can restrict the freedom based on "the historical tradition that delimits the outer bounds" of the right at issue.¹¹³ This can be satisfied via "analogical reasoning," which requires "that the government identify a well-established

108. 142 S. Ct. 2111 (2022).

109. *Bruen*, 142 S. Ct. at 2130 (citing *Am. Legion v. Am. Humanist Ass'n*, 139 S. Ct. 2067, 2087 (2019) (plurality opinion)).

110. 554 U.S. 570 (2008). *Heller* refers to a tradition-based approach in identifying acceptable limits on the right to keep and carry arms. *See id.* at 627. But in defining the right, Justice Scalia explained that the Second Amendment's history is "unambiguous[]." *See id.* at 580, 584.

111. *Bruen*, 142 S. Ct. at 2122.

112. *Id.* at 2126.

113. *Id.* at 2127.

and representative historical analogue” to the law at issue, “not a historical *twin*.”¹¹⁴

Bruen’s analogical analysis illustrates well how tradition supplements text and history. For example, *Bruen* says that the Court “look[s] to history” because the Second Amendment “was not intended to lay down a novel principle but rather a codified right inherited from our English ancestors.”¹¹⁵ Consulting tradition, then, identifies proper historical analogues and excludes “endorsing outliers that our ancestors would never have accepted.”¹¹⁶ *Bruen* distilled a tradition of analogous firearm regulation from “(1) medieval to early modern England; (2) the American Colonies and the early Republic; (3) antebellum America; (4) Reconstruction; and (5) the late 19th and early 20th centuries.”¹¹⁷ Yet none of this evidence was meant to serve antiquarian ends—such that a single category of evidence or isolated practices could displace the Second Amendment’s ordinary understanding. As *Bruen* put it, “when it comes to interpreting the Constitution, not all history is created equal.”¹¹⁸ Excluded from the inquiry would be “an ancient practice that had become obsolete . . . at the time of the adoption of the Constitution and never was acted upon or accepted in the colonies.”¹¹⁹ Similar caution is deployed toward post-enactment history. While a court can “liquidat[e] indeterminacies in written laws,” that is no license to “expand[] or alter[] them.”¹²⁰ “Thus, post-ratification adoption or acceptance of laws that are *inconsistent* with the original meaning of the constitutional text obviously cannot overcome or alter that text.”¹²¹ Even with that caveat, *Bruen* acknowledged that “other cases implicating unprecedented societal concerns or dramatic

114. *Id.* at 2133.

115. *Id.* at 2127 (internal quotation marks and citations omitted).

116. *Id.* at 2133 (quoting *Drummond v. Robinson*, 9 F.4th 217, 226 (3rd Cir. 2021)).

117. *Id.* at 2135–36.

118. *Id.* at 2136.

119. *Id.* (internal quotation marks and citation omitted).

120. *Id.* at 2137 (internal quotation marks and citation omitted).

121. *Id.* (internal quotation marks and citation omitted).

technological changes may require a more nuanced approach.”¹²² “Although [the Constitution’s] meaning is fixed according to the understandings of those who ratified it, the Constitution can, and must, apply to circumstances beyond those the Founders specifically anticipated.”¹²³

In adopting text, history, and tradition, *Bruen* “expressly rejected the application of any judge-empowering interest-balancing inquiry.”¹²⁴ At the same time, *Bruen* perceives no conflict between drawing precise historical analogies and the judicial role. Rather, “answering these kinds of historical, analogical questions” is “an essential component of judicial decisionmaking under our enduring Constitution.”¹²⁵

Under *Bruen*, a “text, history, and tradition test”¹²⁶ identifies how “earlier generations addressed the societal problem”—and those resolutions give rise to constitutional presumptions.¹²⁷ “[W]hen a challenged regulation addresses a general societal problem that has persisted since the 18th century, the lack of a distinctly similar historical regulation addressing that problem is relevant evidence that the challenged regulation is inconsistent with [the Constitution].”¹²⁸ At the same time, “if earlier generations addressed the societal problem, but did so through materially different means, that also could be evidence that a modern regulation is unconstitutional.”¹²⁹

B. A “similar approach” to the Establishment Clause.

Bruen is “adopt[ed from] a similar approach”¹³⁰ in recent Establishment Clause cases. Those cases “abandoned” the “ambitious,

122. *Id.* at 2132; *see also id.* at 2162 (Barrett, J., concurring).

123. *Id.* at 2132 (majority opinion).

124. *Id.* at 2129 (internal quotation marks and citation omitted).

125. *Id.* at 2134 (internal quotation marks and citation omitted).

126. *Id.* at 2161 (Kavanaugh, J., concurring).

127. *Id.* at 2131 (majority opinion).

128. *Id.*

129. *Id.*

130. *Id.* at 2130 (citing *Am. Legion v. Am. Humanist Ass’n*, 139 S. Ct. 2067, 2087 (2019) (plurality opinion)).

abstract, and ahistorical”¹³¹ attempt to impose a “grand unified theory” of “neutrality” on all public religious expression.¹³² Instead, starting with *Marsh v. Chambers*¹³³ and confirmed by *Kennedy v. Bremerton*,¹³⁴ Establishment Clause jurisprudence is governed by text, history, and tradition.

In *Marsh*, the Supreme Court upheld Nebraska’s practice of opening legislative sessions with prayer.¹³⁵ It did so by referencing “historical practices and understandings.”¹³⁶ “Standing alone,” *Marsh* said, “historical patterns cannot justify contemporary violations of constitutional guarantees, but there is far more here than simply historical patterns.”¹³⁷ What confirmed the historical analysis was enduring “practice.”¹³⁸ One simply cannot “cast aside” “two centuries of national practice” — such an “unambiguous and unbroken history” is a “part of the fabric of our society.”¹³⁹

Another legislative prayer case, *Town of Greece v. Galloway*,¹⁴⁰ built on *Marsh*. That case built out tradition’s distinct contribution to text and history. That is because, unlike *Marsh*, the “specific practice” of prayer in *Town of Greece* “lacked the very direct connection, via the First Congress, to the thinking of those who were responsible for framing the First Amendment.”¹⁴¹ Thus, appealing to the First Amendment’s ratification history was insufficient. Instead, *Town of Greece* explained that “[a]ny test the Court adopts must acknowledge a practice that was accepted by the Framers and has

131. *Kennedy v. Bremerton Sch. Dist.*, 142 S. Ct. 2407, 2427 (2022).

132. *Am. Legion*, 139 S. Ct. at 2087 (plurality opinion).

133. 463 U.S. 783 (1983).

134. 140 S. Ct. at 2427–2428.

135. *Marsh*, 463 U.S. at 786.

136. *Cnty. of Allegheny v. Am. Civ. Liberties Union*, 492 U.S. 573, 670 (1989) (Kennedy, J., concurring in part).

137. *Marsh*, 463 U.S. at 790.

138. *See id.*

139. *Id.* at 792.

140. 572 U.S. 565 (2014).

141. *Am. Legion v. Am. Humanist Ass’n*, 139 S. Ct. 2067, 2088 (2019) (plurality opinion).

withstood the critical scrutiny of time and political change.”¹⁴² And in *Town of Greece*, because the town’s practice “fi[t] within the tradition” carried out by the First Congress and other state legislatures, it was presumptively constitutional.¹⁴³

Further, in *American Legion v. American Humanist Association*—(upholding the constitutionality of the Bladensburg peace cross, a public religious memorial)—the Supreme Court’s analysis embraced tradition’s regard for social knowledge. There, the Court’s opinion relied on a historical Establishment Clause analysis, but not one that compared the Bladensburg cross to the Establishment Clause’s original meaning.¹⁴⁴ Rather, “[t]he passage of time gives rise to a strong presumption of constitutionality.”¹⁴⁵ That is because “[w]ith sufficient time, religiously expressive monuments, symbols, and practices can become embedded features of a community’s landscape and identity. The community may come to value them without necessarily embracing their religious roots.”¹⁴⁶ But, if such a community icon was removed “or radical[ly] alter[ed] at this date,” such an act “would be seen by many not as a neutral act but as the manifestation of a hostility toward religion that has no place in our Establishment Clause traditions.”¹⁴⁷

C. Church autonomy.

Tradition influences the use of text and history in “church autonomy” cases too. This autonomy has several “component[s],”¹⁴⁸ but, “in short,” it is the “power” of religious organizations “to decide

142. *Town of Greece*, 572 U.S. at 576.

143. *Am. Legion*, 139 S. Ct. at 2088 – 2089 (quoting *Town of Greece*, 572 U.S. at 577) (plurality opinion).

144. *Id.* at 2078 (majority opinion).

145. *Id.* at 2085.

146. *Id.* at 2084.

147. *Id.* at 2074 (internal quotation marks and citation omitted).

148. *Our Lady of Guadalupe v. Morrissey-Berru*, 140 S. Ct. 2049, 2060–61 (2020) (“[A] component” of church autonomy is the “ministerial exception,” but the doctrine is a “broad principle” covering “internal management decisions that are essential to the institution’s central mission.”).

for themselves, free from state interference, matters of church government as well as those of faith and doctrine.”¹⁴⁹

Tradition’s effect on church autonomy doctrine is obvious from the protection’s constitutional source. Church autonomy, says the Supreme Court, is neither the result of textualism nor purposivism, but rather “the foundation of our political principles,”¹⁵⁰ a “broad and sound view of the relations of church and state under our system of laws,”¹⁵¹ and a “sphere” of authority protected by the Free Exercise Clause working in conjunction with the Establishment Clause.¹⁵² The Court’s two most recent church autonomy cases on the merits—*Hosanna-Tabor v. EEOC*¹⁵³ and *Our Lady of Guadalupe v. Morrissey-Berru*,¹⁵⁴ both involving the right of religious organizations to select their ministers without judicial interference—are good examples.

Echoing tradition’s regard for social knowledge, both *Our Lady* and *Hosanna-Tabor* expressly rejected the use of “rigid formula” to identify who a “minister” is.¹⁵⁵ One reason why, as *Our Lady* explains, is that “judges cannot be expected to have a complete understanding and appreciation of the role played by every person who performs a particular role in every religious tradition.”¹⁵⁶ Therefore, the religious institution’s understanding is “important.”¹⁵⁷ Similarly, both *Hosanna-Tabor* and *Our Lady* specify that the goal of historical analysis isn’t to capture a given “moment’s” understanding, but rather to determine the kind of “practices” “that the founding generation sought to prevent a repetition

149. *Kedroff v. Saint Nicholas Cathedral of Russian Orthodox Church in N. Am.*, 344 U.S. 94, 116 (1952).

150. *Watson v. Jones*, 80 U.S. 679, 728 (1871).

151. *Id.* at 727.

152. *Our Lady*, 140 S. Ct. at 2060; *Hosanna-Tabor v. EEOC*, 565 U.S. 171, 181, 183–84, 188–89 (2012).

153. 565 U.S. 171 (2012).

154. 140 S. Ct. 2049 (2020).

155. *Our Lady*, 140 S. Ct. at 2067 (quoting *Hosanna-Tabor*, 565 U.S. at 190).

156. *Id.* at 2066.

157. *Id.*

of . . . in our country.”¹⁵⁸ This analysis of longstanding practice thus included both pre- and post-ratification evidence. For example, *Hosanna-Tabor* began with a discussion of historical British statutes and their effect on Founding era practices.¹⁵⁹ Practices that occurred post-ratification were also illustrative, including Thomas Jefferson’s response to John Carroll in 1806, when Carroll sought federal guidance on appointing a Catholic bishop for the territory acquired via the Louisiana Purchase.¹⁶⁰ James Madison’s reaction to the 1811 incorporation controversies surrounding the Anglican Church in Virginia was also considered.¹⁶¹ Likewise, *Our Lady* surveyed the historical importance of religious education across faiths, both at present and “from the earliest settlements in this country.”¹⁶²

D. Smith is the outlier.

Justice Scalia did not employ text, history, and tradition in *Smith*. Rather, he “filtered his originalism through the twin lenses of democracy and the need for clear rules over vague standards.”¹⁶³

Excluding evidence of longstanding practices regarding religious accommodation, *Smith* attempted to develop a bright line rule: “the right of free exercise does not relieve an individual of the obligation to comply with a ‘valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes).’”¹⁶⁴ *Smith*’s new test displaced the compelling interest test articulated in *Sherbert v. Verner*.¹⁶⁵ “Under the *Sherbert* test, governmental actions that substantially burden a religious practice must be justified by a compelling

158. *Id.* at 2061; see also *Hosanna-Tabor*, 565 U.S. at 183–184.

159. *Id.* at 182.

160. *Id.* at 184.

161. *Id.* at 184 – 85.

162. *Our Lady*, 140 S. Ct. at 2064–2066.

163. Amul R. Thapar, *Smith, Scalia, and Originalism*, 68 CATH. U. L. REV. 687, 695 (2019).

164. *Emp. Div. v. Smith*, 494 U.S. 872, 879 (1990) (quoting *United States v. Lee*, 455 U.S. 252, 263, n.3 (1982) (Stevens, J., concurring in the judgment)).

165. 374 U.S. 398 (1963); see *Fulton v. City of Philadelphia*, 142 S. Ct. 1868, 1893 (2021) (Alito, J. concurring) (recognizing the displacement).

governmental interest.”¹⁶⁶ *Smith*, however, claimed the compelling interest test was “never applied” to provide free-exercise accommodations,¹⁶⁷ and that this was for good reason because it would produce a “constitutional anomaly”¹⁶⁸ and “court[] anarchy.”¹⁶⁹

Smith displays the “sequencing” problem discussed above, whereby the supplementary role of tradition is discarded by jumping immediately from textual ambiguity to judicial restraint. “As a textual matter,” all *Smith* holds is that it “do[es] not think the [Free Exercise Clause] must” be construed to require accommodations.¹⁷⁰ Rather, *Smith* rests on a self-consciously pragmatic construction—calling its new interpretation “permissible,” “preferred,” and “sounder” than a pro-accommodation interpretation, but never required.¹⁷¹ Seven years later, when Justice Scalia would respond to historical evidence against *Smith* in *City of Boerne v. Flores*, he made similar defenses.¹⁷² These arguments led Scalia in both opinions to eschew any reliance on evidence of longstanding religious accommodations. “There is no reason to think [those practices] were meant to describe what was constitutionally required (and judicially enforceable), as opposed to what was thought to be legislatively or even morally desirable.”¹⁷³ That a legislature was “expected to be solicitous of [religious accommodation] in its legislation” does not mean “the appropriate occasions for [their] creation can be discerned by the courts.”¹⁷⁴ True, “[i]t may fairly be said that leaving accommodation to the political process will place at a relative disadvantage those religious practices that are not

166. *Smith*, 494 U.S. at 883 (citing *Sherbert*, 374 U.S. at 402–03).

167. *Id.* at 884–85.

168. *Id.* at 886.

169. *Id.* at 888.

170. *Id.* at 878.

171. *Id.*

172. See *City of Boerne v. Flores*, 521 U.S. 507, 539 (1997) (Scalia, J., concurring).

173. *Id.* at 541 (Scalia, J., concurring); see also *Smith*, 494 U.S. at 890.

174. *Smith*, 494 U.S. at 890.

widely engaged in.”¹⁷⁵ But that “unavoidable consequence of democratic government must be preferred” by judges.¹⁷⁶

III. FREE EXERCISE DOCTRINE SHOULD ADOPT TEXT, HISTORY, AND TRADITION

Free Exercise doctrine would benefit from abandoning *Smith* and instead applying text, history, and tradition. That approach would, like *Bruen*, presumptively protect religious exercise unless the opposing party shows a historically analogous tradition of restricting it. This section will begin by defending that approach against *Smith* and its failed promise of judicial restraint. This section will then offer specific ways in which Free Exercise doctrine could apply text, history, and tradition.

A. *Text, history, and tradition are more conducive to judicial restraint than Smith.*

As discussed, the engine behind *Smith* is a certain view of judicial restraint. This view of restraint might prompt some, who are otherwise supportive of text, history, and tradition interpretation, to resist using it in *Smith*'s place. On this view, “tradition” is the problem, because it is otherwise accepted that “text” and “history” should take priority over “restraint.” This objection argues that “tradition” could compromise “restraint” in at least three ways: (1) by giving judges a reason to depart from what we know of the Free Exercise Clause's original meaning; (2) by introducing a subjective debate over the proper way to characterize and analogize traditions to the practice at issue; and (3) by using political choices regarding religious accommodation as a presumptive indication of the Free Exercise Clause's meaning, tradition would erode the distinction between legislative discretion and constitutional mandate. These concerns are serious. But none is sufficient to keep the Free Exercise

¹⁷⁵. *Id.*

¹⁷⁶. *Id.*

Clause a doctrinal outlier from tradition's general use in Religion Clause jurisprudence and other areas of constitutional law.

To counter these concerns, first consider that *Smith* is hardly upholding judicial restraint. As discussed, *Smith* skipped from the Free Exercise Clause's textual ambiguity on the issue of accommodations to a preference of judicial restraint.¹⁷⁷ The result was "restraint" unmoored from text, history, and tradition—and thus not really restraint at all.¹⁷⁸ Instead, *Smith*'s preference is policed by "neutrality" and "general applicability," two open-ended inquiries that analyze a law's legislative history,¹⁷⁹ decisionmaker motive,¹⁸⁰ and its disparate impacts.¹⁸¹ Whether or not Justice Scalia intended it, *Smith*'s inquiries resemble the *Lemon* test that he rightly derided in the Establishment Clause context: "formulaic abstractions that are not derived from, but positively conflict with, our long-accepted constitutional traditions."¹⁸² And just like the *Lemon* test, the Supreme Court often distinguishes *Smith*'s inquiries, opting for a context-specific rule instead.¹⁸³ *Smith*'s context—an "across-the-

177. *Smith*, 494 U.S. at 890.

178. See Scalia, *supra* note 97, at 1184–85 ("It is, of course, *possible* to establish general rules, no matter what theory of interpretation or construction one employs. As one cynic has said, with five votes anything is possible.").

179. *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 557–558 (1993) (Scalia, J., concurring) (explaining that "[t]he Court analyzes the 'neutrality' and the 'general applicability'" questions "in separate sections . . . and allocates various invalidating factors to one or the other of those sections," while rejecting the need to make "a clear distinction between the two terms" and the "legislative motive" analysis).

180. *Fulton v. City of Philadelphia*, 141 S. Ct. 1868, 1919 (2021) (Alito, J., concurring) (identifying problems with applying the "neutrality" analysis and motivations).

181. See *id.* at 1921–22 (Alito, J., concurring) ("Cases involving rules designed to slow the spread of COVID-19 have driven that point home" that "[i]dentifying appropriate comparators" "has been hotly contested").

182. *Lee v. Weisman*, 505 U.S. 577, 644 (1992) (Scalia, J., dissenting); see also *Fulton*, 141 S. Ct. at 1922 (Alito, J., concurring) ("Much of *Smith*'s initial appeal was likely its apparent simplicity. . . . Experience has shown otherwise.").

183. *Am. Legion v. Am. Humanist Ass'n*, 139 S. Ct. 2067, 2080 (2019) (plurality) (discussing *Lemon* test); see also *Hosanna-Tabor v. EEOC*, 565 U.S. 171, 190 (2012) (*Smith* only applies to "outward physical acts"); *Espinoza v. Montana Dep't of Revenue*, 140 S. Ct. 2246 (2020) (no mention of *Smith*); *Carson v. Makin*, 142 S. Ct. 1987 (2022) (no mention); *Fulton*, 141 S. Ct. at 1877 ("falls outside *Smith*").

board-criminal prohibition on a certain form of conduct”¹⁸⁴—sheds little light on the lion’s share of Free Exercise cases. Treating *Smith* like the doctrinal baseline, then, does not restrain judges. Rather, judges can—and do—freely engage in “after-the-fact maneuvering”¹⁸⁵ to retrofit government action around *Smith*’s inquiries. “[S]ubscribing to *Smith*, particularly if one also believes the overstated claims of predictability made on its behalf, may mask the truth of what judges actually do with free exercise cases.”¹⁸⁶

Second, these concerns overlook the fact that tradition is a *supplementary* tool to text and history. Tradition does not override text and history. Rather, it allows courts to analogize from longstanding political or cultural practices toward religious exercise to resolve ambiguities within semantic and original meaning. Here—as virtually everyone in the *Smith* debate acknowledges—the text and original meaning¹⁸⁷ of the Free Exercise Clause are ambiguous about the constitutional mandate for religious accommodations.¹⁸⁸ Therefore, there must be some supplementary tool. For *Smith*, that

184. *Emp. Div. v. Smith*, 494 U.S. 872, 884 (1990).

185. *Masterpiece Cakeshop, Ltd. v. Colo. C.R. Comm’n*, 138 S. Ct. 1719, 1737–39 (2018) (Gorsuch, J., concurring).

186. MARC O. DEGIROLAMI, *THE TRAGEDY OF RELIGIOUS FREEDOM* 165 (2013).

187. Post-Civil War history cuts against *Smith*, as the Fourteenth Amendment’s framers “explicitly target[ed]” religion-neutral and generally applicable laws in the South “as examples of what would become unconstitutional” via incorporation. Kurt T. Lash, *The Second Adoption of the Free Exercise Clause: Religious Exemptions Under the Fourteenth Amendment*, 88 NW. U. L. REV. 1106, 1149 (1994).

188. *Supra* note 19 and accompanying text (*Smith* discussion on textual ambiguity); *City of Boerne v. Flores*, 521 U.S. 507, 544 (1997) (Scalia, J., concurring in part) (original meaning “more supportive of [*Smith*’s] conclusion than destructive”); McConnell, *supra* note 16, at 1761; Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 HARV. L. REV. 1409, 1415 (1990) (“possible interpretation”); Philip A. Hamburger, *A Constitutional Right of Religious Exemption: An Historical Perspective*, 60 GEO. WASH. L. REV. 915, 947–948 (1992) (“[T]he claim that the Free Exercise Clause provided a right of exemption from civil laws depends upon evidence that may be questioned.”); *Fulton*, 141 S. Ct. at 1882 (Barrett, J., concurring) (“history looms large,” but not “compelling”). Moreover, Justice Alito’s *Fulton* concurrence does not purport a conclusive original meaning answer either—partly because, as he explained, the original meaning of the Clause occurred “before the concept of judicial review took hold.” *Fulton*, 141 S. Ct. at 1907 (Alito, J., concurring).

supplementary tool was restraint. But its reasons for that preference—that judicial review of governmental practices could produce “danger[ous]” results,¹⁸⁹ be “horrib[ly]” standardless,¹⁹⁰ and be “a constitutional anomaly”¹⁹¹—have all proven hyperbolic.¹⁹²

Another proposal to keep *Smith* would root its inquiries in another preference: “principle,” one that would eschew tradition-based evidence by claiming the Free Exercise Clause only protects “religious worship as such.”¹⁹³ This is the view of Professor Vincent Phillip Muñoz. Professor Muñoz candidly admits that he does not favor the results his approach would produce—and for good reason. This proposal suffers from the Single Right Answer problem: by leaning heavily on theory and excluding practice, this approach attempts to wrest more from original meaning than it can provide.¹⁹⁴ As a result, the inability to administer *Smith* remains,¹⁹⁵

189. *Smith*, 494 U.S. at 888.

190. *Id.* at 890 n.5.

191. *Id.* at 886.

192. For example, there is historical evidence of judicially mandated religious accommodations. See Stephanie Barclay, *The Historical Origins of Judicial Religious Exemptions*, 95 NOTRE DAME L. REV. 55, 69 (2020). And judicial review of religious accommodations resembles “as-applied” relief. Stephanie Barclay & Mark Rienzi, *Constitutional Anomalies or As-Applied Challenges? A Defense of Religious Exemptions*, 59 B.C. L. REV. 1595, 1611 (2018). Moreover, the judicial outputs in such cases show the Supreme Court is “up to the task” of assessing “specific claims for exemptions as they ar[i]se.” *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 436 (2006).

193. See VINCENT PHILLIP MUÑOZ, RELIGIOUS LIBERTY AND THE AMERICAN FOUNDING 59 (2022) (“worship as such,” a “cumbersome modifier” intended to prohibit only “outlawing a practice on account of its religious character.”).

194. *Id.* at 306 (“The most fundamental tradition of American constitutionalism, moreover, is not reliance on tradition. . . . To follow the Founders requires that we follow their philosophical thinking.”).

195. For example, if a jurisdiction bans “all wine uses,” it bans religious wine uses too. But on Professor Muñoz’s theory, that is not a Free Exercise violation. To Muñoz, a jurisdiction would violate the Free Exercise Clause if it banned “religious uses of wine.” But what if the jurisdiction banned “all wine uses, including religious uses?” In every case, the violation of religious exercise is the same—but, to Muñoz, in only one is it clear that the Free Exercise Clause cares. See *id.* at 260 n.10 (calling a regulation on “drive-in spiritual services” “[a]n example of government regulation of religious exercises as such,” and noting—but not explaining whether it’s significant—that the order

while the content of the Free Exercise guarantee gets murkier.¹⁹⁶ And the virtue of tradition-based analysis—how ordinary Americans understood the real-world application of their political principles—is considered a barrier to taking a principle to its furthest extent.¹⁹⁷

By contrast, with text, history, and tradition, religious exercise that has a strong analogical connection to the Founding Era¹⁹⁸

“pertained exclusively to religious services”). While Muñoz claims that the Founders understood “the natural boundaries” of religious liberty “to be established by the laws of nature,” *see id.* at 60, applying his theory would seem to mark the boundaries on religious liberty by legislative pedantry.

196. For example, Professor Muñoz claims that *Lamb’s Chapel v. Center Moriches School District*, 508 U.S. 384 (1993), is correct, because it invalidated a New York school district’s “after-hours-school-use polic[y]” that “forb[ade] religious exercises as such.” MUÑOZ, *supra* note 193, at 263. Muñoz is right that *Lamb’s Chapel* is correct, but it’s not clear why he would think so. In *Lamb’s Chapel*, the religious exercise was “a film series dealing with family and child-rearing issues faced by parents today.” 508 U.S. at 387. Muñoz never explains how this is encompassed by what he calls “religious exercise as such,” a concept his book equates with “the natural right of religious worship.” MUÑOZ, *supra* note 193, at 67; *see also id.* at 263. Indeed, one might think a jurisdiction following his theory *could* prohibit showing this film series—because a film series is not worship, and Muñoz claims that “the state may make exclusions on the basis of religion as long as it does not exercise jurisdiction over religious exercises as such.” *Id.* at 269. In *Lamb’s Chapel*, the government rule prohibited using school premises after hours “for religious purposes.” 508 U.S. at 387. And the “six-part film series” was refused by the school district because it appeared “to be church related.” *Id.* at 389. Muñoz never explains why either this ban or this denial crossed the line from what he considers permissible (“exclusions on the basis of religion”) to what he considers impermissible (“jurisdiction over religious exercise as such”). Unlike Professor Muñoz’s theory, the Supreme Court doesn’t condition religious liberty on drawing such difficult lines. *See Good News Club v. Milford Central School District*, 533 U.S. 98, 126–27 (2001) (Scalia, J., concurring) (“we have previously rejected the attempt to distinguish worship from other religious speech, saying that the distinction has [no] intelligible content, and further, no *relevance* to the constitutional issue.” (internal quotation marks and citation omitted) (alterations in original).

197. MUÑOZ, *supra* note 193, at 226 (“[T]he aim of the inquiry is to determine as much as possible about the original meaning of the principle itself, *not* any particular expected applications of it, since these may fall short of or even contradict the principle.”).

198. This is not to say that the religious exercise at issue need have been exactly present at the Founding. Long practice, as in *American Legion*, does give rise to a presumption of constitutionality. *Am. Legion v. Am. Humanist Ass’n*, 139 S. Ct. 2067, 2082 (2019)

would be presumptively protected, unless the opposing party shows that a long history of analogous restriction can overcome that protection.¹⁹⁹ This approach possesses a built-in respect for enduring democratic judgment. It cannot contravene what is known about text and history, but it can help illuminate what they do not definitively resolve. That is because “[e]nduring cultural and political practices reflect the people’s judgments about what is consistent with their fundamental law.”²⁰⁰ This is the logic of “implied ratification” — whereby the Constitution “derives its continued authority from the implicit consent of each subsequent generation.”²⁰¹ Implied ratification only makes sense if the people’s longstanding practices can generally be presumed to reflect what the Constitution guarantees.²⁰² To quote natural lawyer James Wilson again, this is “evidence[] of the strongest kind” of enduring, “common consent.”²⁰³ The goal of this approach, then, is not one-sided. Sometimes, text, history, and tradition will benefit religious liberty. Other times, the best analogies might justify restriction. But in either case, Free Exercise doctrine would be more administrable than judicially invented inquiries into “neutrality” and “general

(plurality opinion). But more recent religious exercise that implicates the government’s reason for regulating in an analogous way would also receive the presumption. *See Ramirez v. Collier*, 142 S. Ct. 1264, 1288 (2022) (Kavanaugh, J., concurring) (suggesting that the “history of religious advisors at executions” shapes whether a compelling interest in banning audible prayer and religious touch in death chamber exists, even as “some of the history is not precisely on point”).

199. Religious liberty claimants may also use history and tradition—from that perspective, to affirmatively show that religious liberty presumptively includes the religious exercise at issue. *See infra* Part III.C (discussing *Ramirez*).

200. Marc O. DeGirolami, *First Amendment Traditionalism*, 97 WASH. U. L. REV. 1653, 1656 (2020).

201. McConnell, *supra* note 14, at 1132.

202. *See id.* Professor McConnell argues that implicit consent “must rest on more than the mere fact that the people have not often amended the Constitution through the Article V procedures,” as that process “is sufficiently onerous that the mere lack of amendments cannot, without more, be taken as proof of continued popular satisfaction with the Constitution.” *Id.* Rather, it is the continued “venerat[ion of] the Constitution” by the American people that shows enduring consent. *Id.*

203. WILSON, *supra* note 80, at 470.

applicability”—and the Clause’s substance would better reflect “the spirit of practical accommodation that has made the United States a Nation of unparalleled pluralism and religious tolerance.”²⁰⁴

Below are some specific ways in which these insights could be applied.

B. Developing context-specific rules, not a one-size-fits-all test.

One way text, history, and tradition could improve Free Exercise doctrine is, in place of *Smith*, courts could determine the propriety of burdens on religious exercise through analogical reasoning about longstanding practices. This approach would resemble *Bruen* and the Establishment Clause cases: religious exercise is presumptively protected by the Free Exercise Clause’s text, unless the opposing party shows an unbroken, analogous tradition of restriction. Used this way, tradition can help overcome the temptation toward a single test to rule all Free Exercise cases.

For example, by using analogical reasoning to reconcile new government regulations with religious exercise, the judiciary can ensure that “the Free Exercise Clause [does not] shrink every time the government expands its reach and begins to regulate work that has historically and traditionally been done by religious groups.”²⁰⁵ *Smith*, however, devised a rule from one context—“an across-the-board criminal prohibition” enacted by a legislature²⁰⁶—and purports to apply that rule to myriad contexts, without regard to whether those other contexts bear any resemblance to *Smith*’s. This dynamic creates many awkward fits, especially with growing regulatory power. Indeed, most religious freedom cases at the Supreme Court in the past decade have come from administrative

204. *Salazar v. Buono*, 559 U.S. 700, 723 (2010) (Alito, J., concurring in part and concurring in the judgement).

205. Transcript of Oral Argument at 23, *Fulton v. City of Philadelphia*, 141 S. Ct. 1868 (2021) (No. 19-123) (statement of Lori Windham).

206. *Emp. Div. v. Smith*, 494 U.S. 872, 884 (1990).

actions, not general, democratically enacted criminal laws.²⁰⁷ As Justice Scalia knew well, the administrative context is distinct from legislation. Unlike the legislature, regulatory bodies—premised on their “expertise” in technical knowledge—are generally disinclined to accommodate religious orthodoxy or account for social knowledge.²⁰⁸ Outsourcing decisions to that context “breaks down” *Smith’s* “political logic.”²⁰⁹ By contrast, a context-specific approach to religious exercise would allow text, history, and tradition to harmonize free exercise with modern government power.

Two recent Free Exercise cases suggest a shift like this is already underway. Tellingly, neither case cites *Smith*. In the first, *Espinoza v. Montana Department of Revenue*,²¹⁰ the Court invalidated a funding prohibition on religious schools in part because there was no “historic and substantial” tradition supporting such a ban.²¹¹ Rather, the only “tradition” of such bans that did exist were the

207. See *Carson v. Makin*, 142 S. Ct. 1987, 1993 (2022) (executive department funding determination); *Fulton*, 141 S. Ct. at 1875–76 (administrative decision from Department of Human Services); *Roman Cath. Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63, 65–66 (2020) (*per curiam*) (shutdown executive order); *Masterpiece Cakeshop, Ltd. v. Colo. C.R. Comm’n*, 138 S. Ct. 1719, 1723 (2018) (ruling of Colorado Civil Rights Commission); *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012, 2017 (2017) (agency funding rule); *Holt v. Hobbs*, 574 U.S. 352, 358 (2015) (department grooming policy); *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 696–97 (2014) (agency-crafted mandate); *Stormans, Inc. v. Wiesman*, 136 S. Ct. 2433, 2434 (2016) (Alito, J., dissenting from denial of certiorari) (state pharmacy board rules).

208. Antonin Scalia, *Rulemaking as Politics*, 34 ADMIN. L. REV. xxv, xxxi (1982) (“More needs to be done to bring the political, accommodationist, value-judgment aspect of rulemaking out of the closet.”); see also Philip P. Hamburger, *Exclusion and Equality: How Exclusion from the Political Process Renders Religious Liberty Unequal*, 90 NOTRE DAME L. REV. 1919, 1939–40 (2015) (“[T]he administrative idealization of scientism and centralized rationality usually renders administrative acts—compared with acts of Congress—relatively indifferent and even antagonistic to religion and religious concerns.”)

209. See Hamburger, *supra* note 208, at 1938; see also Brief for Dominican Sisters of Mary, et al. as Amici Curiae Supporting Petitioners at 3, *Zubik v. Burwell*, 578 U.S. 403 (2016) (No. 14-1418), 2016 WL 212595, at *3 (“HHS’s decision to gerrymander the exemption in this way was intentional; it knew that in significant cases, virtually identical religious groups would be treated differently based on nothing more than their classification under tax law.”).

210. 140 S. Ct. 2246 (2020).

211. *Id.* at 2258–59.

nineteenth-century Blaine Amendments, laws reflecting a “bigotry” toward Catholic immigrants—“hardly . . . a tradition that should inform our understanding of the Free Exercise Clause.”²¹² The Free Exercise Clause instead contains a “principle” of nondiscrimination against religious status.²¹³ And the post-ratification application of that principle illuminated no tradition denying religious schools the right to participate in neutral benefit programs.²¹⁴

In the second, *Carson v. Makin*,²¹⁵ the Supreme Court invalidated a Maine statute that prohibited tuition assistance payments from going to religious schools.²¹⁶ Echoing *Smith*, Maine (and Justice Breyer in dissent) attempted to distinguish *Espinoza* from *Carson*: Religious schools are not “‘bar[red] from receiving funding simply based on their religious identity,’ but instead ‘based on the religious use that they would make of it in instructing children.’”²¹⁷ This means the restriction only has “the effect of burdening a particular religious practice,” and under *Smith*, that is not a cognizable Free Exercise concern.²¹⁸ But *Carson* didn’t limit its analysis to “how the benefit and restriction are described” —the Court focused instead on how “the program operates.”²¹⁹ As in *Espinoza*, the Court said there was no “historic and substantial tradition” that could credit “promot[ing] stricter separation of church and state than the Federal Constitution requires.”²²⁰

212. *Id.* at 2259.

213. *Id.* at 2254 (quoting *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012, 2019 – 21 (2017)).

214. *Id.* at 2258 – 59.

215. 142 S. Ct. 1987 (2022).

216. *Id.* at 2002.

217. *Id.* at 2001 (quoting *Carson v. Makin*, 979 F.3d 21, 40 (1st Cir. 2020), *rev’d*, 142 S. Ct. 1987 (2022)).

218. *See Emp. Div. v. Smith*, 494 U.S. 872, 886 & n.3 (1990).

219. *Carson*, 142 S. Ct. at 2002.

220. *Id.* at 1997, 2002 (quoting *Espinoza v. Mont. Dep’t of Rev.*, 140 S. Ct. 2246, 2259 (2020)).

C. Determining “compelling” interests.

Text, history, and tradition could also be used to define the search for “compelling” interests. This way, those interests are interpreted “so as to reflect” the practices that illuminate how Americans applied the free exercise guarantee.²²¹ Three justices in *Fulton* suggested something like this, saying that the compelling interest test could replace *Smith* and be “rephrased or supplemented with specific rules.”²²² And Justice Scalia’s guidance for tradition’s use, discussed above, suggests some ways this could be implemented: Identify, at the most specific level of analogy, a tradition of burdening a particular religious exercise.²²³ This tradition must be one of “unchallenged validity,” meaning that Supreme Court jurisprudence has neither rejected such regulation nor put it into serious doubt.²²⁴ New regulatory traditions can emerge, but they must have roots in older, analogous ones.²²⁵

The Supreme Court gestured toward this approach in *Ramirez v. Collier*.²²⁶ There, the longstanding protection for clergy prayer in the death chamber meant that Texas lacked a compelling interest in denying an inmate’s request to have “his long-time pastor . . . pray with him and lay hands on him while he is being executed.”²²⁷ Although a statutory case, *Ramirez*’s compelling interest analysis mirrors what would occur under the Free Exercise Clause. In defining the compelling interest, the Court illustrated the role tradition plays

221. *United States v. Virginia*, 518 U.S. 515, 568 (Scalia, J., dissenting).

222. *Fulton v. City of Philadelphia*, 141 S. Ct. 1868, 1924 (2021) (Alito, J., concurring); see also *Ramirez v. Collier*, 142 S. Ct. 1264, 1288 (2022) (Kavanaugh, J., concurring) (arguing that a tradition-based analysis could ensure that “the Court does not merely point to its own policy assessment” when determining state interests).

223. See *Michael H. v. Gerald D.*, 491 U.S. 110, 127 n.6 (1989) (opinion of Scalia, J.).

224. See *Rutan v. Republican Party of Ill.*, 497 U.S. 62, 95 n.1 (1990) (Scalia, J., dissenting).

225. See *N.Y. State Rifle & Pistol Ass’n v. Bruen*, 142 S. Ct. 2111, 2133 (2022).

226. 142 S. Ct. 1264 (2022).

227. *Id.* at 1272.

in focusing the inquiry.²²⁸ Justice Kavanaugh, moreover, concurred to explain how “the history of religious advisors at executions” meant “the Court does not merely point to its own policy assessment of how much risk the State must tolerate in the execution room.”²²⁹ While “the history is not precisely on point,” because the nature of the execution here was different than in prior examples, “[s]till, the history generally demonstrates that religious advisors have often been present at executions.”²³⁰ That historical analysis, as the majority opinion says, evidenced a “tradition [that] continued throughout our Nation’s history” and “continues today”²³¹—a fact Justice Kavanaugh considered “perhaps even more relevant” than history.²³²

D. Crafting specific rules for institutional religious exercise.

Text, history, and tradition would also be helpful in building out distinct protections for religious institutions. This build-out could happen alongside or independent of the previous suggestions.

As explained, church autonomy cases are already incorporating tradition’s regard for social knowledge by adopting legal standards that are not rooted in abstractions.²³³ Similarly, recent Free Exercise decisions have relied on the distinctive knowledge and mission of religious institutions when crafting legal rules. For example, in *Fulton*, the Court’s ruling is colored by the “incongruity” of labeling a religious foster care agency a public accommodation when it is asked to evaluate marriages but disregard its religious understanding of marriage.²³⁴ Similarly in *Carson*, the Court rejected Maine’s “semantic” distinctions between restricting a religious school’s use

228. *See id.* at 1277–79 (citing “[a] tradition of such prayer continu[ing] throughout our Nation’s history” to undermine the need for “a categorical ban on audible prayer in the execution chamber”).

229. *Id.* at 1288 (Kavanaugh, J., concurring).

230. *Id.*

231. *Id.* at 1279 (majority opinion).

232. *Id.* at 1289 (Kavanaugh, J., concurring).

233. *Supra* Part II.C.

234. *Fulton v. City of Philadelphia*, 141 S. Ct. 1868, 1881 (2021).

of public money and its status as a religious organization.²³⁵ Doing otherwise would let courts “scrutiniz[e] whether and how a religious school pursues its educational mission,” thereby “rais[ing] serious concerns about state entanglement with religion and denominational favoritism.”²³⁶ To make this point, *Carson* explicitly connects free-exercise doctrine with the church autonomy cases.²³⁷ This parallel could be further developed should the Supreme Court consider “whether the freedom for religious employers to hire their co-religionists is constitutionally required,” especially as “federal statutory exemptions” and lower court decisions have long acknowledged it.²³⁸ Building out these tradition-based rules would allow courts to better distinguish “internal management decisions that are essential to the institution’s central mission” from decisions capable of secular regulation.²³⁹

CONCLUSION: KEEPING OUR BALANCE.

If the Free Exercise Clause is going to “translat[e]” its guarantees “into concrete restraints” over time, then it needs text, history, and tradition.²⁴⁰ Applying that approach would resolve the morass created by *Smith*’s unrestrained inquiries into “neutrality” and “general applicability.” Further, adopting text, history, and tradition would bring the Free Exercise Clause into line with the rest of Religion Clause jurisprudence, and the growing use of text, history, and tradition throughout constitutional law. Finally, and as important, by accounting for the people’s longstanding practices toward religious accommodation, the Free Exercise Clause would be neither a

235. *Carson v. Makin*, 142 S. Ct. 1987, 1999–2001 (2022).

236. *Id.* at 2001 (citing, *inter alia*, *Our Lady of Guadalupe Sch. v. Morrissey-Berru*, 140 S. Ct. 2049, 2068–69 (2020)).

237. *Id.* Four justices would reiterate this connection again in *Yeshiva Univ. v. YU Pride All.*, 143 S. Ct. 1, 2 (2022) (Alito, J., dissenting).

238. *Seattle’s Union Gospel Mission v. Woods*, 142 S. Ct. 1094, 1094 (2022) (Alito, J., statement respecting the denial of certiorari).

239. *Our Lady*, 140 S. Ct. at 2060.

240. *W. Va. Bd. of Educ. v. Barnette*, 319 U.S. 624, 639 (1943).

“living” text nor a “dead” letter. Rather, it would be as it should: an enduring guarantee.

THE CONSTRAINT OF HISTORY

LORIANNE UPDIKE TOLER & ROBERT CAPODILUPO*

Accepted wisdom dictates that history does not constrain the behavior of the Supreme Court. Rather, it is merely a tool used to legitimize legal outcomes predetermined by policy. Recent studies claim to have confirmed this state of play, providing “proof” for the cynic and impelling apologists to fashion new justifications. Yet this study of all cases referencing the Constitutional Convention provides evidence that history can constrain judicial interpretation of the Constitution.

As proof of concept, this Article analyzes the extent to which Justices’ use of primary and secondary sources when referencing the Constitutional Convention is associated with casting cross-partisan votes and the ideological outcome of the case more broadly. On average, we find evidence to

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suggest that the Justices are more likely to vote against their political priors when using secondary sources—predominantly, historical characterizations of the Convention in previous cases—and more likely to vote along ideological lines when relying only on primary sources. Further, our results suggest a Justice’s ideology alone provides an incomplete picture of judicial behavior.

This Article vindicates and challenges the major previous study, nuancing its findings by demonstrating that the constraint of history likely turns on the type of historical source that a Justice relies upon and challenges the assumption that only political preference matters in explaining case outcomes. Further, our evidence indicates that history matters and may even be called our law, though it requires a reckoning of how primary sources have been used and manipulated, calling for more transparent, humble, and deeper engagement with the historical record through expanded tools and training.

INTRODUCTION

In no fewer than three major decisions in the 2021 Term—*Dobbs v. Jackson Women’s Health Organization*, *Kennedy v. Bremerton School District*, and *New York State Rifle & Pistol Association v. Bruen*—the Supreme Court announced that historical considerations are not only relevant, but required in determining constitutional rights relevant to substantive due process, religion, and gun control.¹ Yale Law Professor Scott Shapiro sharply criticized the Court’s use of history in these opinions, tweeting: “Amazing how originalism

1. See *Dobbs v. Jackson Women’s Health Org.*, 142 S. Ct. 2228, 2253–54 (2022) (requiring substantive due process rights to be “deeply rooted in the history or tradition of our people” at the time “the Fourteenth Amendment was adopted”); *Kennedy v. Bremerton Sch. Dist.*, 142 S. Ct. 2407, 2428 (2022) (rejecting the *Lemon* test in determining Establishment Clause violations in favor of “analysis focused on original meaning and history”); *N.Y. State Rifle & Pistol Ass’n v. Bruen*, 142 S. Ct. 2111, 2126 (2022) (rejecting two-step circuit rule determining appropriate government regulation of guns consistent with the Second Amendment in favor of determining whether regulations are “consistent with this Nation’s historical tradition of firearm regulation”).

tracks the political positions of the Republican Party,”² and “There is something poignant about debates over originalism, as if it were a real interpretive methodology, and not just a Joker Card for getting the results originalists want.”³ The Court’s application of historical reasoning in more-recent cases like *SFFA v. Harvard* engendered similar ire from some commentators.⁴

This criticism mirrors decades of scholarship that presumes history incapable of constraining Justices’ political predilections—for either conservatives or liberals.⁵ Such criticism was crowned with “proof” in 2013 with Frank Cross’s book *The Failed Promise of Originalism*, which claimed to offer quantitative evidence of a lack of a relationship between the use of historical sources and the Justices varying from expected policy outcomes.⁶ The Court has

2. Scott Shapiro (@scottjshapiro), TWITTER (June 27, 2022, 10:33 AM), <https://twitter.com/scottjshapiro/status/1541429523354378248> [<https://perma.cc/4HE7-XEZ5>].

3. Scott Shapiro (@scottjshapiro), TWITTER (June 28, 2022, 8:16 AM), <https://twitter.com/scottjshapiro/status/1541757509878398976> [<https://perma.cc/3UG5-ASTK>].

4. See, e.g., Mark Graber, “History” and History in *Students for Fair Admissions*, BALKINIZATION (June 30, 2023, 9:19 AM), <https://balkin.blogspot.com/2023/06/history-and-history-in-students-for.html> [<https://perma.cc/6WKM-DTUV>]. Curiously, scholars on both sides of the political spectrum praised the Court’s application of history in other cases from this Term, such as *Moore v. Harper*. See Ilya Somin, *Steve Calabresi on Moore v. Harper*, VOLOKH CONSPIRACY (June 28, 2023, 8:34 PM), <https://reason.com/volokh/2023/06/28/steve-calabresi-on-moore-v-harper> [<https://perma.cc/D2B4-L9N9>] (posted on behalf of Professor Calabresi); Gerald N. Magliocca, *Poor Justice Story*, BALKINIZATION (June 23, 2023, 12:41 PM), <https://balkin.blogspot.com/2023/06/poor-justice-story.html>.

5. See, e.g., Alfred H. Kelly, *Clio & the Court: An Illicit Love Affair*, 1965 SUP. CT. REV. 119, 122 n.13 (1965); William J. Brennan, Jr., *The Constitution of the United States: Contemporary Ratification* 27 S. TEX. L. REV. 433, 435 (1986) (arguing that originalism is “arrogance cloaked as humility.”); Robert Post & Reva Siegel, *Originalism as a Political Practice: The Right’s Living Constitution*, 75 FORDHAM L. REV. 545, 554–55 (2006) (“No politically literate person could miss the point that the Reagan Administration’s use of originalism marked, and was meant to mark, a set of distinctively conservative objections to the liberal precedents of the Warren Court.”); Mitchell N. Berman, *Originalism is Bunk*, 84 N.Y.U. L. REV. 1 (2009).

6. See FRANK B. CROSS, *THE FAILED PROMISE OF ORIGINALISM* 183–89 (2013).

changed significantly since then,⁷ and, with that change, history is not only being used, but now seems to be *required* by the Court in making seismic constitutional decisions, raising its stakes as a method of interpretation. With these shifts, the time is ripe to test Cross's conclusion that history fails to constrain. Can history, in fact, constrain?

This Article's answer is a confident, but nuanced, "yes." In arriving at that answer, this Article conducts two investigations. First, it identifies the entire universe of the Supreme Court's references to the Constitutional Convention since the Court's inception to gain a clearer understanding of which sources the Justices tend to rely on when doing historical analysis.⁸ In addition, this study then analyzes the relationship between the use of historical citations and case outcomes across all 201 cases making reference to the Convention between the 1937-2021 Terms.

Our descriptive results show that Justices of all political backgrounds since the Court's inception have used a variety of primary and secondary sources. The top two sources relied upon were Max Farrand's *Records of the Federal Convention of 1787* and previous cases wherein the Court acts as historian, interpreting primary sources directly. Further, the empirical models provide significant evidence that the use of history can in fact, constrain. Specifically, we find that citation to secondary sources bears a strong, positive relationship to the Justices voting against policy preferences.⁹ Primary sources, however, seem to have a negative relationship with cross-partisan voting. That is, such sources appear instead to *reinforce* directional voting, with conservatives voting more conservatively, and liberals voting more liberally. This relationship maintained even when a Justice's ideology was held at a constant,

7. Since the publication of Cross's book in 2013, four Justices have been added to the Supreme Court: Neil Gorsuch, Brett Kavanaugh, Amy Coney Barrett, and Ketanji Brown Jackson.

8. See *infra* Section II.B.

9. See *infra* Section II.C.

indicating that history may better explain judicial behavior beyond what policy preference alone can predict.

Granted, these results are limited only to cases which reference the Constitutional Convention. We hypothesize that the inability of primary sources of the Convention to constrain Justices to vote against their priors may be due, in part, to the thinness of James Madison's notes. Madison acted as the Convention's primary scrivener, and his notes trailed off during the Convention's latter half when they became most legally relevant. Other plausible reasons include Justices' lack of familiarity with primary sources and their manipulability when considered in a vacuum. Secondary sources, on the other hand, are not only more familiar to the legal community, but they aggregate and synthesize primary sources into historical or legal arguments. They, therefore, are less manipulable and can withstand being used in the service of other arguments.

That Justices of all stripes (and across time) are turning to history supports positivist findings which may be explained by a natural instinct to understand and recreate origin stories. Our results also indicate that primary sources are not performing the job assigned them by originalists, vindicating Cross in part and requiring a reckoning by those advocating or requiring the use of history in constitutional interpretation. Because history is now required in at least some areas of constitutional interpretation, these authors advocate the hard work of digging into history so as to increase primary sources' purchase power. To that end, this Article concludes by providing a primer on primary source hierarchy, a new citation format for primary sources, and several proposals for expanding constitutional history tools and training.

This Article proceeds in three Parts. Part I canvasses the role of history in constitutional interpretation and the critique of its constraint, including an overview of Cross's study. Part II presents this study's methodology and results, and Part III explains those results and discusses three major consequences.

I. THE PRESUMED NON-CONSTRAINT OF HISTORY

To date, the accepted scholarly presumption is that history has no constraining impact on the Supreme Court's constitutional judgments. After 60 years of qualitative scholarship criticizing the Supreme Court's use of history as polemical, a quantitative study published in 2013 apparently "proved" this true, once-and-for-all,¹⁰ and even history's advocates accepted defeat. Before laying out results that both challenge and support this presumption, this Part situates this study within current scholarship on the Court's use of history *qua* history and provides the first publication history of the Constitutional Convention's records.

A. *The Role of History in Constitutional Jurisprudence*

Although Frank Cross targets originalism, the subject of his study and this counterpoint is more properly the Court's use of history writ large. Cross presumes that the *use* of certain sources *is* originalism.¹¹ Yet as Jack Balkin has so carefully shown, sources can be used in a variety of ways, not all of them originalist.¹² Thus, though this study looks at just one of the sources Cross investigates—the records of the Constitutional Convention (and canvasses it in much more depth)—it does not presume that its use constitutes originalism. Rather, it approaches its use as illustrative of all uses of history, leaving to a future study to parse how that source is being used by the Court.

10. See CROSS, *supra* note 6, at 173–76.

11. *Id.* at 45–72.

12. Jack M. Balkin, *The New Originalism and the Uses of History*, 82 *FORDHAM L. REV.* 641 (2013); see also PHILIP BOBBITT, *CONSTITUTIONAL FATE: THEORY OF THE CONSTITUTION* (1982); Richard Fallon, *A Constructivist Coherence Theory of Constitutional Interpretation*, 100 *HARV. L. REV.* 1189 (1987); Michael C. Dorf, *Integrating Normative and Descriptive Constitutional Theory: The Case of Original Meaning*, 85 *GEO. L. J.* 1766, 1800–10 (1997); SOTIRIOS A. BARBER & JAMES E. FLEMING, *CONSTITUTIONAL INTERPRETATION: THE BASIC QUESTIONS* (2007); Akhil Reed Amar, *Intratextualism*, 112 *HARV. L. REV.* 747 (1999).

With this important distinction in mind, this Section identifies all theories of constitutional interpretation that utilize history in some fashion and then canvasses the scholarly work to date on the constraining impact of history on the Supreme Court. Although three major theories employed by various Justices (originalism, pluralism, and the moral reading) use history, only originalism has been the subject of any qualitative or quantitative study on constraint. This is likely due to originalism's primordial purpose—to cabin the judicial overreach by the Warren and Burger Courts.

1. Constitutional theory and history at the Supreme Court

An exhaustive exposition of constitutional theories is beyond the scope of this Article, and overviews in other works can better serve the purpose.¹³ Additionally, a brief overview of originalism's history was provided in this study's prequel.¹⁴ However, as it pertains to the Supreme Court's use of history, a very brief overview of constitutional theory is in order.¹⁵

The precursors to modern constitutional theory, or the theory that still holds sway among jurists and theorists, can be found in Joseph Story's *Commentaries on the Constitution*¹⁶ and its antecedents—James Kent's *Commentaries*,¹⁷ James Wilson's *Lectures*,¹⁸ William

13. See, e.g., Keith E. Whittington, *Originalism: A Critical Introduction*, 82 *FORDHAM L. REV.* 375 (2013).

14. See Lorianne Updike Toler & J. Carl Cecere, *Pre-"Originalism"*, 36 *HARV. J. L. & PUB. POL'Y* 277, 286–298 (2013).

15. As this overview is limited to the theories ostensibly used or developed by the Justices, it will necessarily exclude certain important theories of interpretation, such as the paradigm-case method articulated by Jed Rubenfeld in *REVOLUTION BY JUDICIARY: THE STRUCTURE OF AMERICAN CONSTITUTIONAL LAW* (2005) and translation interpretive practice as found in LARRY LESSIG, *FIDELITY & CONSTRAINT: HOW THE SUPREME COURT HAS READ THE CONSTITUTION* (2019).

16. 1–3 JOSEPH STORY, *COMMENTARIES ON THE CONSTITUTION* (Hilliard, Gray & Co., 1833).

17. 1–4 JAMES KENT, *COMMENTARIES ON AMERICAN LAW* (O. Halsted, 1826).

18. JAMES WILSON, *LECTURES ON LAW* (1804).

Blackstone's *Commentaries*,¹⁹ and even Coke's *Institutes*,²⁰ among others.²¹ Yet its more palpable beginnings lay in James Thayer's 1893 *Harvard Law Review* Article wherein he outlined the "rule" of judicial review to be limited to clear cases of constitutional abrogation by the legislature.²² What came to be known as "Thayerian Deference" was followed assiduously by Justice Frankfurter,²³ which he famously expanded into the political question doctrine in his *Baker v. Carr* dissent.²⁴

Baker v. Carr and the reapportionment questions it addressed were situated within the great incorporation debates of the Warren Court era, with Justice Hugo Black at its fulcrum. In his *Adamson v. California* dissent, Black argued for total incorporation of Bill of Rights guarantees as against the states under the Fourteenth Amendment.²⁵ This he based in the historical intent of the framers of both the Bill of Rights and Fourteenth Amendments,²⁶ presaging originalist theories.

Black was not the only Justice of the Warren Court to hold fast to a theory of Constitutional interpretation. Justice Brennan is associated with the moral-reading theory (or moral or natural-law theory) of constitutional interpretation,²⁷ most famously theorized by Ronald Dworkin in *Law's Empire* and further developed by James

19. 1-4 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND (1765-69).

20. SIR EDWARD COKE, INSTITUTES OF THE LAWS OF ENGLAND IN FOUR PARTS (1628-1644).

21. See, e.g., HENRY BRACTON, DE LEGIBUS ET CONSUETUDINIBUS ANGLIAE (circa 1250); MATTHEW HALE, A HISTORY AND ANALYSIS OF THE COMMON LAW OF ENGLAND (1713).

22. James B. Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 HARV. L. REV. 129, 140 (1893).

23. Richard Posner, *The Rise and Fall of Judicial Self-Restraint*, 100 CALIF. L. REV. 519, 530-531 (2012).

24. See *Baker v. Carr*, 369 U.S. 186, 266-330 (1962) (Frankfurter, J., dissenting).

25. AKHIL REED AMAR, THE LAW OF THE LAND 36, 38-39 (2015).

26. *Id.*

27. James E. Fleming, *Fidelity, Change, and the Good Constitution*, 62 AM. J. COMPARATIVE L. 515, 521 (2014).

Fleming.²⁸ Moral reading engages history by espousing fidelity to the Founders' broad purposes, which facilitates the "best reading" of the Constitution as found in a broader array of sources.²⁹

The Warren Court and, to a lesser extent, the Burger Court that followed, was marked by great upheavals in the law. Reapportionment, Establishment, Free Speech, and Civil Rights jurisprudence were reimaged.³⁰ Theorists responded in kind, of which two main threads will be followed here, starting with the originalist thread. In 1977, Raoul Berger "provoked a storm of controversy" by publishing *Government by Judiciary*,³¹ arguing that the Supreme Court had interpreted the Fourteenth Amendment contrary to the intent of the Framers.³² Berger's arguments were rebuffed by Paul Brest in a seminal 1980 Article in the *Boston University Law Review*,³³ which

28. See RONALD DWORIN, *LAW'S EMPIRE* (1986); SOTIRIOS A. BARBER & JAMES E. FLEMING, *CONSTITUTIONAL INTERPRETATION: THE BASIC QUESTIONS* (2007); James E. Fleming, *Fidelity to Our Imperfect Constitution*, 65 *FORDHAM L. REV.* 1335 (1997); see also Scott J. Shapiro, *The "Hart-Dworkin" Debate: A Short Guide for the Perplexed*, in RONALD DWORIN 22, 35-43 (Arthur Ripstein ed., 2007) (surveying the debate between legal positivism and moral jurisprudence).

29. Fleming, *supra* note 28, at 1336 ("Dworkin has argued that commitment to interpretive fidelity requires that we recognize that the Constitution embodies abstract moral principles rather than laying down particular historical conceptions and that interpreting and applying those principles require fresh judgments of political theory about how they are best understood. He now calls this interpretive strategy the 'moral reading' of the Constitution.").

30. See, e.g., *Roe v. Wade*, 410 U.S. 113 (1973); *N.Y. Times Co. v. United States*, 403 U.S. 713 (1971); *Lemon v. Kurtzman*, 403 U.S. 602 (1971); *Miranda v. Arizona*, 384 U.S. 436 (1966); *Griswold v. Connecticut*, 381 U.S. 479 (1965); *Reynolds v. Sims*, 377 U.S. 533 (1964); *Gideon v. Wainwright*, 372 U.S. 335 (1963); *Engel v. Vitale*, 370 U.S. 421 (1962).

31. RAOUL BERGER, *GOVERNMENT BY JUDICIARY* xxi (2d ed. 1996).

32. *Id.* at 402-10.

33. Paul Brest, *The Misconceived Quest for the Original Understanding*, 60 *B.U. L. REV.* 204 (1980).

Ed Meese,³⁴ Robert Bork,³⁵ and Antonin Scalia³⁶ all responded to in turn, transmuted the oft-cited “intent of the Framers” into the ostensibly judicially-constraining theory of originalism. Responding to its many critics,³⁷ originalism evolved to include ever-increasing bodies of Framers, and “intent” became “understanding,” then “meaning.”³⁸ The “new originalism” espoused by most current originalist theorists focused squarely on the latter, with the semantic meaning of the text fixed at the time of ratification, constraining judicial interpretation.³⁹ When semantic meaning ran out, other sources could be considered in the “construction zone” (or space for interpretation not dominated by semantic meaning), yet just what could be considered here—broad purposes, intent, original expected applications, original legal methods, post-enactment

34. Edwin Meese III, Speech Before the D.C. Chapter of the Federalist Society Lawyers Division (Nov. 15, 1985) (“I would like to describe in more detail [that] this administration’s approach . . . [is to pursue a] jurisprudence that seeks to be faithful to our Constitution—a jurisprudence of original intention . . .”), in ORIGINALISM: A QUARTER-CENTURY OF DEBATE 72, 76 (Steven G. Calabresi ed., 2007).

35. See generally ROBERT H. BORK, THE TEMPTING OF AMERICA 148–49 (1990) (“If Brest’s point about the impossibility of choosing the level of generality upon neutral criteria is correct, we must either resign ourselves to a Court that is a ‘naked power organ’ or require the Court to stop making ‘constitutional’ decisions. But Brest’s argument seems to me wrong, and I think a judge committed to original understanding can do what Brest says he cannot.”)

36. Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CINN. L. REV. 849, 853 (1989); see also Antonin Scalia, Address Before the Attorney General’s Conference on Economic Liberties in Washington, D.C. (June 14, 1986), in U.S. DEP’T OF JUSTICE, ORIGINAL MEANING JURISPRUDENCE: A SOURCEBOOK 101, 106 (1987) (directing originalists to “change the label from the Doctrine of Original Intent to the Doctrine of Original Meaning”).

37. The literature here is legion, but bookends and telling examples include H. Jefferson Powell, *The Original Understanding of Original Intent*, 98 HARV. L. REV. 885 (1984) (attacking the claim that the Framers themselves intended for posterity to consult their understanding of the Constitution) and Eric Segall, *The Concession that Dooms Originalism: A Response to Professor Lawrence Solum*, 88 GEO. WASH. L. REV. ARGUENDO 33 (2020) (criticizing originalists for abandoning Thayerian deference).

38. See generally Lawrence B. Solum, *What Is Originalism? The Evolution of Contemporary Originalist Theory*, in THE CHALLENGE OF ORIGINALISM 16 (Grant Huscroft & Bradley W. Miller eds., 2011) (providing a history of originalism).

39. *Id.* at 22–23.

history and precedent—is under active, fierce dispute.⁴⁰ Many on the Rehnquist and Roberts Courts have espoused originalism to varying degrees.⁴¹

Pluralism is marked by less in-fighting but also less cohesion. In 1980, a few years after *Government by Judiciary*, John Hart Ely published his defense of the Warren Court's activism in *Democracy and Distrust*.⁴² Responding to one of Thayer's puzzles and influenced by the work of Alexander Bickel, Ely outlined a pluralistic theory of representation reinforcement, wherein judges could deviate from Thayerian deference in order to shore up democratic values essential to the Constitution's structure.⁴³ In 1982, Philip Bobbitt built on the pluralist motif in *Constitutional Fate*, outlining an approach wherein text, history, structure, doctrine (precedent), prudence, and ethical "modes" of arguments served equally in the judicial

40. See generally Randy E. Barnett & Evan D. Bernick, *The Letter and the Spirit: A Unified Theory of Originalism*, 107 GEO. L.J. 1, 1 (2013) ("The concept of constitutional construction is of central importance to originalist theory but is both underdeveloped and controversial among originalists."); John O. McGinnis & Michael B. Rappaport, *Original Methods Originalism: A New Theory of Interpretation and the Case Against Construction*, 103 NW. U. L. REV. 751, 751 (2009) ("[T]he Constitution should be interpreted using the interpretive methods that the constitutional enactors would have deemed applicable to it."); JACK M. BALKIN, *LIVING ORIGINALISM* (2011) (marrying originalism and living constitutionalism by recognizing thin semantic meaning and a healthy construction zone based on the Constitution's broad purposes and principles); and Segall, *supra* note 37 (arguing that the concession of under-determinate constitutional texts means that "there is no meaningful difference between most modern originalist theory and Living Constitutionalism").

41. See e.g., Elena Kagan Supreme Court Nomination Hearing: Day 2, *Kagan Confirmation Hearing, Day 2, Part 1*, C-SPAN, at 10:40 (June 29, 2010), <https://www.c-span.org/video/?294264-2/kagan-confirmation-hearing-day-2-part-1> [<https://perma.cc/M4E6-WLL3>] ("[W]e are all originalists."); *The Nomination of Judge Sandra Day O'Connor of Arizona to Serve as an Associate Justice of the Supreme Court of the United States: Hearings Before the S. Comm. on the Judiciary*, 97th Cong. 84 (1981) ("In analyzing a question the intent of the framers of [the Constitution] is vitally important.").

42. JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* (1980).

43. *Id.*

toolkit.⁴⁴ Richard Fallon further developed the theory by arguing that the different modes (which he limited to five) normally pointed to the same result, but when they could not, there was a natural hierarchy among them in which text and history had greatest sway.⁴⁵ Justice Benjamin Cardozo espoused a process-based idea of law that could be dubbed proto-pluralism,⁴⁶ and among more modern Courts, Justice Steven Breyer best embodies pluralism as a coherent theory, authoring his own take on the theory in *Active Liberty*.⁴⁷

The above lays out a very brief overview of the landscape of interpretive methodologies using history as practiced by the Court. This Section now turns to the literature on whether the history espoused by the various theories constrains.

2. Criticisms of the constraining effect of history

Alfred Kelly first addressed the constraint of history in *Clio and the Court: An Illicit Love Affair*.⁴⁸ Kelly begins his path-breaking Article by canvassing the Court's then 175-year interpretive permutations, highlighting periods when the Court was criticized for turning to history in some format to justify its judgments. He then narrows in on "the extended essay in constitutional history usually of what I should call the 'law-office' variety," occasionally used in the nineteenth century, and more pervasively and successfully deployed in the twentieth.⁴⁹ In a thinly-veiled critique of the Warren Court, Kelly chides that the Court's historical "essays," where used as "precedent-breaking devices" "were very bad history indeed."⁵⁰

44. PHILIP BOBBITT, *CONSTITUTIONAL FATE: THEORY OF THE CONSTITUTION* (1982).

45. See Richard H. Fallon, Jr., *A Constructivist Coherence Theory of Constitutional Interpretation*, 100 HARV. L. REV. 1189 (1987).

46. Edwin W. Patterson, *Cardozo's Philosophy of Law*, 88 U. PA. L. REV. 71, 89 (1939).

47. See STEPHEN BREYER, *ACTIVE LIBERTY: INTERPRETING OUR DEMOCRATIC CONSTITUTION* (2006).

48. Kelly, *supra* note 5, at 122 n.13.

49. *Id.* at 122–23.

50. *Id.* at 126.

Such were partisan, relying on evidence “wrenched from [] contemporary historical context,” carefully selecting material designed to prove its thesis and “suppressing all data that might impeach the desired historical conclusions.”⁵¹ In his view, this turn to “original meaning” was “an almost perfect excuse for breaking precedent.”⁵²

Two infamous instances wherein the Court employed such tactics turned out very bad indeed: *Dred Scott* and the *Income Tax Cases*.⁵³ The historical essay was renewed and reinvigorated in the mid-nineteenth century by “reform-minded libertarians” such as Justices Black, Douglas, and Rutledge in incorporating the Fifth Amendment in *Adamson v. California*, in reapportionment cases, and in “wall of separation” cases.⁵⁴ The Court’s “sudden attack of modesty” in refraining from using the historical essay to break with precedent in *Brown v. Board of Education*, Kelly concludes, is “that the competing [*Brown*] briefs exposed too grossly . . . the entire fallacy of law-office history.”⁵⁵

Kelly’s arguments have been oft repeated, but with different targets. Since the rise of originalism in the 1990s, designed as it was to constrain judges and encourage the rule of law over following the dictates of policy, critics have homed in on conservatives’ use of originalism, claiming it is mere window dressing for policy-based decision-making posing as judicial philosophy.⁵⁶ This argument, if true, eviscerates originalism’s purpose and core normative

51. *Id.*

52. *Id.* at 131–32.

53. *See id.* at 126 (discussing *Scott v. Sandford*, 60 U.S. (19 How.) 393 (1857)); *Pollock v. Farmers’ Loan & Trust Co.* (*Income Tax Cases*), 157 U.S. 429 (1885)). It must be noted, however, that while historical reasoning was employed by Justice Taney to justify his decision against Scott, Justice McLean also appealed to history to support his conclusion that Scott was entitled to freedom, remarking that “many [Blacks] . . . were citizens of the New England States, and exercised the rights of suffrage” at the time of the adoption of the Constitution. *Dred Scott*, 60 U.S. (19 How.) at 537 (McLean, J., dissenting).

54. Kelly, *supra* note 5, at 126–42 (discussing *Adamson v. California*, 332 U.S. 46 (1947)).

55. *Id.* at 145 (discussing *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954)).

56. *See supra* note 5 and accompanying text.

argument. Typical are Scott Shapiro's blunt tweets in the wake of the Supreme Court's June 2022 opinion announcements, that originalism "tracks the political positions of the Republican Party"⁵⁷ and mocking the "poignant . . . debates over originalism, as if it were a real interpretive methodology, and not just a Joker Card for getting the results originalists want."⁵⁸ Its critics believe that the history used in originalism has no constraining effect. Interestingly, though moral-reading and pluralism theories frequently employ history, no similar arguments have been lodged in those directions.

Most scholarly treatments making such claims are based on qualitative studies of Court opinions. Additionally, there are studies that have described the Court's use of history in discrete cases, many of which focus on use of *The Federalist*.⁵⁹ This Article's prequel looked at all sources, historical and otherwise, cited by the Court in each of 96 cases of constitutional first impression before the Rehnquist Court.⁶⁰

Before the instant project, only Cross's study had directly addressed the constraint of history (under the rubric of originalism).⁶¹ Another study, social scientists Michael A. Bailey and Forrest Maltzman's 2011 *The Constrained Court*, looked at the impact of originalism obliquely. There, Bailey and Maltzman determined that specific legal values constrained Justices' political priors.⁶² One

57. Shapiro, *supra* note 2.

58. Shapiro, *supra* note 3.

59. Melvyn R. Durchslag, *The Supreme Court and the Federalist Papers: Is There Less Here Than Meets the Eye?*, 14 WM. & MARY BILL OF RIGHTS J. 243, 246–47 (2005) (identifying three previous studies in addition to his own); Louis J. Sirico, Jr., *The Supreme Court and the Constitutional Convention*, 27 J. L. & POL. 63 (2011).

60. See Updike Toler & Cecere, *supra* note 14, at 298.

61. There is one study that looks at Supreme Court briefs that review plain meaning and intent in both constitutional cases and statutory interpretation, but its differences from either this or Cross's study is sufficient to discount it as looking at the constraint of history in constitutional interpretation. Robert M. Howard & Jeffrey A. Segal, *An Original Look at Originalism*, 36 LAW & SOC'Y REV. 113, 113–137 (2002).

62. MICHAEL A. BAILEY & FORREST MALTZMAN, *THE CONSTRAINED COURT* 65–68 (2011).

such constraining value was strict construction, which they loosely associated with originalism. However, they were unable “to measure the influence of strict constructionism broadly construed” for coding purposes; rather, they measured it only in relation to more easily codable free-speech cases.⁶³ In *The Failed Promise of Originalism*, as mentioned above, Cross coded the Court’s use of five “originalist” sources—Farrand’s *Records of the Federal Convention of 1787*, *The Federalist*, Elliot’s *Debates*, dictionaries, and the Declaration of Independence—since 1952.⁶⁴ He also looked at which Justices used these sources, including any Justice that cited to one of these sources in “at least thirty cases” in the sample, irrespective of political commitments.⁶⁵ Cross hypothesized that “[i]f originalism is generally constraining, it should yield decisions that do not consistently conform to the [ideological] preferences of the justices.”⁶⁶ Using data from the Spaeth, Epstein, Martin, Segal, Ruger & Benesh Supreme Court database on the ideological direction of a Justice’s vote in a given case,⁶⁷ Cross reported descriptive statistics for each “originalist” Justice on how their rate of voting with the “liberal” side in a case changed based on whether the Justice cited to one of the identified “originalist sources.”⁶⁸ After eyeballing the outcomes (as addressed in more detail below, no analytical statistics appear), Cross observed that “there is relatively little evidence of much constraint from the reliance on originalist sources,” and concluded that because originalism appeared to be “so manipulable in practice, the debate over its validity could have a theoretical philosophical value but lends little to actual judicial decisionmaking in practice.”⁶⁹ As

63. *Id.* at 13, 67.

64. See CROSS, *supra* note 6 at 47 (identifying sources tracked in his study).

65. *Id.* at 184.

66. *Id.*

67. To access these data, see The Supreme Court Database, WASH UNIV. L. SCH., <http://scdb.wustl.edu/index.php> [<https://perma.cc/59TK-YWVL>] (last visited July 6, 2022).

68. CROSS, *supra* note 6, at 184-85.

69. CROSS, *supra* note 6, at 19.

such, originalism “may be strategically used only for . . . legitimization.”⁷⁰ In short, originalism had failed.

Though his methodology lacked statistical rigor,⁷¹ Cross was received as authoritative. His study appeared to confirm the qualitative criticisms of other scholars and jurists that originalism was judicial policymaking by another name. Its publication sent constitutional theorists invested in originalism on a frenzied quest for alternative normative foundations on which to rest the theory.⁷² Interestingly, the debate over the constraint of history has centered on originalism; no study has looked at the constraining impact of history *qua* history as contained in *any* interpretive theory. Given the current outcry over originalism and the use of history in recent cases, the time has come to test history’s constraint again—this time, for all theories and Justices that employ this modality.

B. *The Publication of Constitutional Convention Records*

As explained in detail below,⁷³ we employed a search algorithm to find references to the Constitutional Convention to include in our dataset, but we also searched for all sources of the Convention to ensure we identified each and every use. This required finding all publications of the Convention’s records. In that process, we discovered that, while much has been written on the Constitutional Convention, a complete publication history of its records has never

70. *Id.* at 185.

71. Other flaws include couching the use of certain sources as originalism, not canvassing the sources completely, including the Declaration of Independence as a source for originalism when it is not a legal document nor frequently used by the Court, and making conclusions about the use of those sources but failing to show voting direction on a discrete level when Justices used history.

72. See William Baude, *Is Originalism Our Law?*, 115 COLUM. L. REV. 2349 (2015); JOHN O. MCGINNIS & MICHAEL B. RAPPAPORT, ORIGINALISM AND THE GOOD CONSTITUTION (2013).

73. See *infra* note 116 and accompanying text.

been published.⁷⁴ This made finding them somewhat difficult, as various delegates or their families published their recollections over the course of a century in widely disparate places.

The earliest records are, unsurprisingly, the most difficult to locate. Records and recollections of the Convention by its delegates began to be published almost immediately, beginning with Charles Pinckney's "Observations on the Plan of Government" in the fall of 1787.⁷⁵ A few of Robert Yates's notes of the Convention, recorded before his huffy departure on July 10th, were copied by co-delegate John Lansing and published posthumously to discredit Madison. This was done by Citizen Genêt, son-in-law to George Clinton, when Clinton was running against Madison for president in 1808.⁷⁶

74. Partial publication histories, however, do exist in the literature. See CHARLES WARREN, *THE MAKING OF THE CONSTITUTION* 794–804 (1928); James H. Hutson, *The Creation of the Constitution: The Integrity of the Documentary Record*, 65 *TEX. L. REV.* 1 (1986).

75. Charles Pinckney, *Observations on the Plan of Government submitted to the Federal Convention, in Philadelphia, on the 28th of May, 1787 (before Oct. 14, 1787)* (Francis Childs, New York); see also *SOUTH CAROLINA'S STATE GAZETTE* (Oct. 29–Nov. 29, 1787). Pinckney presumably wrote this speech prior to the Convention's convening (though heavily edited it post hoc), and it was ostensibly intended to accompany Pinckney's draft constitution. There is no evidence Pinckney ever delivered the speech in full, and his draft was never discussed or considered until the Committee of Detail convened to draft the Constitution on July 26th. James Wilson, *Outline of the Pinckney Plan, as published in 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787*, 128 (Max Farrand ed., (1911) (3d ed., 1966) [hereinafter Farrand]). The fate of this speech may be indicated by the subtitle of the pamphlet, "Delivered at different Times in the course of their Discussions," in that he referenced and drew from the speech throughout the Convention. Yates records that "Mr. C. Pinckney, a member from South Carolina, added, that he had reduced his ideas of a new system, which he read, and confessed that it was grounded on the same principle as those resolutions [presented by Edmund Randolph]." Yates *Notes of the Constitutional Convention (May 29, 1787)*, as published in 1 Farrand 23. John Franklin Jameson treated the presentation and provenance of Pinckney's draft in full in 1903. John Franklin Jameson, *Studies in the History of the Federal Convention of 1787*, 1 *AMERICAN HISTORICAL ASSOCIATION ANNUAL REPORT* 110 (1903).

76. *Letter to the Electors of President and Vice President of the United States by a Citizen of New York, Accompanied with an extract of the secret debates of the Federal Convention, held in Philadelphia, in the year 1787, taken by Chief Justice Yates* (New York, Henry C. Southwick,

Both preceded Congress's publication of the sparse *Official Journal* in 1819, containing delegate credentials, motions, and vote records.⁷⁷ Two years later, the first speeches of the Convention as recorded by Yates were published as the *Secret Proceedings and Debates of the Convention at Philadelphia, in the year 1787, for the purpose of forming the Constitution of the United States of America*.⁷⁸ Later in the decade, in 1828, William Pierce's sketches and notes of the

1808). Charles Warren attributes the authorship of this pamphlet to E.C. Genêt, or Citizen Genêt, WARREN, *supra* note 74, at 795, and his name was penciled into the copy of the pamphlet reviewed by this author in the College Pamphlets collection at the Benicke Rare Books and Manuscripts Library at Yale. After the "Citizen Genêt" affair, Genêt was pardoned and granted citizenship by Washington and moved to New York, where he married George Clinton's daughter. Publication of this pamphlet, which was not flattering to Madison and the Virginia Plan, together with an article entitled "Madison as a 'French Citizen'" were designed to promote the prospects of his father-in-law for president over that of Madison in 1808. Of Genêt's publication of Yates's notes, Farrand writes:

"[I]n publishing the *Secret Proceedings*, Genet took liberties with Lansing's copy of Yates' notes, liberties that appear to have exceeded those he permitted himself in the anti-Madison polemic in 1909. Lansing's copy of Yates' notes were thought to have been lost until two sheets from July 5, 1787 were discovered recently in Genet's papers at the Library of Congress. By comparing the contents of those sheets—the only ones known to exist—with what Genet actually published as occurring on July 5, 1787, it can be seen that he omitted half of the material on the sheets and altered every sentence that he published."

Hutson, *supra* note 74, at 12.

77. JOURNAL, ACTS AND PROCEEDINGS OF THE CONVENTION, ASSEMBLED IN PHILADELPHIA, MONDAY, MAY 14, AND DISSOLVED MONDAY, SEPTEMBER 17, 1787, WHICH FORMED THE CONSTITUTION OF THE UNITED STATES (Thomas B. Wait ed., 1819) [hereinafter OFFICIAL JOURNAL OF THE CONSTITUTIONAL CONVENTION].

78. SECRET PROCEEDINGS OF DEBATES OF THE CONVENTION AT PHILADELPHIA, IN THE YEAR OF 1787, FOR THE PURPOSE OF FORMING THE CONSTITUTION OF THE UNITED STATES OF AMERICA. FROM NOTES TAKEN BY THE LATE ROBERT YATES, ESQ., CHIEF JUSTICE OF NEW YORK, AND COPIED BY JOHN LANSING, JUN., ESQ., LATE CHANCELLOR OF THAT STATE, MEMBERS OF THAT CONVENTION. INCLUDING 'THE GENUINE INFORMATION' LAID BEFORE THE LEGISLATURE OF MARYLAND BY LUTHER MARTIN, ESQUIRE, THEN ATTORNEY GENERAL OF THAT STATE AND MEMBER OF THE SAME CONVENTION. ALSO, OTHER HISTORICAL DOCUMENTS RELATIVE TO THE FEDERAL COMPACT OF THE NORTH AMERICAN UNION (Albany, Websters & Skinners, 1821) (1987 reprint).

convention were published exclusively in the *Savannah Georgian* (and therefore enjoyed only limited circulation).⁷⁹

Finally, Madison's extensive notes were published posthumously in the second and third volume of Gilpin's 1840 edited collection of Madison's papers.⁸⁰ That same year, Alexander Hamilton's son, John Church Franklin, also published Hamilton's notes in *The Life of Alexander Hamilton*.⁸¹ Thereafter, Jonathan Elliot included Madison's notes in a more user-friendly format that supplanted Gilpin in an 1845 special fifth supplemental volume to *The Debates in the Several State Conventions*, originally published as a four-volume set in 1836 that included the state ratification debates, the Journal of the Convention, Yates's notes, and other documents.⁸² Although E. H. Scott republished Madison's notes in 1893,⁸³ Elliot's fifth volume

79. William Pierce, *Loose Sketches and Notes Taken in the Convention, SAVANNAH GEORGIAN* (April 19, 21–26, 1828) (also referred to as the *Daily Georgian*).

80. 1–3 THE PAPERS OF JAMES MADISON (Henry D. Gilpin ed., 1840). The debates commence on p. 683, vol. 2, and conclude on 1624, vol. 3 (continuously paginated).

81. 1–2 THE LIFE OF ALEXANDER HAMILTON (John Church Hamilton ed., 1840). Although the younger Hamilton lambasted Madison for publishing his notes posthumously, he justified publishing his father's "for the purpose of debate . . . will be only resorted to as far as absolutely necessary for his vindication . . ." 2 *id.* at 467. We are indebted to Lynn Uzzell for alerting to us to this early source.

82. THE DEBATES IN THE SEVERAL STATE CONVENTIONS, ON THE ADOPTION OF THE FEDERAL CONSTITUTION AS RECOMMENDED BY THE GENERAL CONVENTION AT PHILADELPHIA, IN 1787. TOGETHER WITH THE JOURNAL OF THE CONVENTION, LUTHER MARTIN'S LETTER, YATES'S MINUTES, CONGRESSIONAL OPINIONS, VIRGINIA AND KENTUCKY RESOLUTIONS OF '98-'99 AND OTHER ILLUSTRATIONS OF THE CONSTITUTION IN FOUR VOLUMES (Jonathan Elliot ed., 1836) ("[P]ublished under the sanction of Congress."); DEBATES OF THE ADOPTION OF THE FEDERAL CONSTITUTION. IN THE CONVENTION HELD AT PHILADELPHIA, IN 1787; WITH A DIARY OF THE DEBATES OF THE CONGRESS OF THE CONFEDERATION AS REPORTED BY JAMES MADISON, A MEMBER, AND DEPUTY FROM VIRGINIA. REVISED AND NEWLY ARRANGED BY JONATHAN ELLIOT. COMPLETE IN ONE VOLUME. 5 *id.* (1845).

83. JOURNAL OF THE FEDERAL CONVENTION KEPT BY JAMES MADISON (E.H. Scott ed., Albert, Scott & Co., 1893) (subtitled "Reprinted from the edition of 1840, which was published under direction of the United States government from the original manuscripts. A complete index specially adapted to this edition is added.).

continued to dominate the landscape until the appearance of Far-rand's volumes, and is still in use (especially by the Court) today.⁸⁴

Immediately prior to the turn of the century, several more collections of Convention records came to light. Publications embraced Rufus King's records,⁸⁵ William Pierce's notes (published again, this time more broadly),⁸⁶ and William M. Meigs's *Growth of the Constitution*,⁸⁷ including the first document published from the Committee of Detail's inter-workings—Edmund Randolph's preliminary sketch of the Constitution. Also during this time, in 1894, the State Department published their four-volume *Documentary History of the Constitution of the United States* "to give a literal print of the documents deposited" with them, including the official journal, relevant letters and papers, and Madison's notes.⁸⁸ The State Department collated and printed the papers in the order in which they were archived, often formatting the typeset as the original documents had been organized, including the August 6th report of the

84. See, e.g., *United States v. Morrison*, 529 U.S. 598, 646 n.14 (2000) (Souter, J., dissenting); *Bush v. Gore*, 531 U.S. 98, 155 (2000) (Breyer, J., dissenting).

85. King's notes are found in volume 1, covering 1755–94, of a six-volume set edited by his grandson, Charles K. King. 1 *THE LIFE AND CORRESPONDENCE OF RUFUS KING: COMPRISING HIS LETTERS, PRIVATE AND OFFICIAL HIS PUBLIC DOCUMENTS AND HIS SPEECHES* (Charles K. King, ed., 1894–1900).

86. *Notes of Major William Pierce on the Federal Convention of 1787*, 3 *AM. HIST. REV.* 310 (1898).

87. WILLIAM MONTGOMERY MEIGS, *THE GROWTH OF THE CONSTITUTION IN THE FEDERAL CONVENTION OF 1787: AN EFFORT TO TRACE THE ORIGIN AND DEVELOPMENT OF EACH SEPARATE CLAUSE FROM ITS FIRST SUGGESTION IN THAT BODY TO THE FORM FINALLY APPROVED: CONTAINING ALSO A FAC-SIMILE OF A HERETOFORE UNPUBLISHED MANUSCRIPT OF THE FIRST DRAFT OF THE INSTRUMENT MADE FOR USE IN THE COMMITTEE OF DETAIL* (J. B. Lippincott ed., c.1900).

88. 1 *DOCUMENTARY HISTORY OF THE CONSTITUTION OF THE UNITED STATES OF AMERICA, 1786-1870: DERIVED FROM THE RECORDS, MANUSCRIPTS, AND ROLLS DEPOSITED IN THE BUREAU OF ROLLS AND LIBRARY, OF THE DEPARTMENT OF STATE* iii (U.S. Dept. of State ed., 1894). The *Documentary History* was published again in 1905 and reproduced in 1998 by Rothman Press.

Committee of Detail, on which delegates scrawled handwritten notes.⁸⁹

In the first decade of 1900, James Franklin Jameson published many more Committee of Detail documents, including some of those in James Wilson's hand,⁹⁰ the Senate published the *Debates in the Federal Convention of 1787*,⁹¹ Gaillard Hunt edited a nine-volume compilation of Madison's Writings containing the Convention notes in volumes 3-4,⁹² and William Patterson,⁹³ Alexander Hamilton,⁹⁴ and James McHenry's notes were all published in the *American Historical Review*.⁹⁵

In 1911, Max Farrand edited and published his seminal *The Records of the Federal Convention of 1787*.⁹⁶ This three-volume work compiled and published all extant notes, including the nine Committee of Detail documents for the first time.⁹⁷ It also collated each delegates' notes into a more user-friendly format—by day of debate. However, its comprehensiveness and superior organization were offset by its bulk, each volume of the first edition being three inches

89. This varied typeset is most distinctive in setting off the various drafts of the Constitution, including two personal copies of the printed Committee of Detail report, complete with emendations and marginalia. See 1 *id.* at 285-308, 338-85.

90. John Franklin Jameson, *Studies in the History of the Federal Convention of 1787*, 1 AM. HIST. ASS'N ANNUAL RPT. 110 (1903).

91. DEBATES IN THE FEDERAL CONVENTION OF 1787, HELD AT PHILADELPHIA, ON THE ELECTION OF SENATORS, COMPILED BY A.P.C. GRIFFIN, CHIEF BIBLIOGRAPHER, LIBRARY OF CONGRESS, S. DOC. No. 57-404 (1st Sess. 1902).

92. 1-9 THE WRITINGS OF JAMES MADISON COMPRISING HIS PUBLIC PAPERS AND HIS PRIVATE CORRESPONDENCE, INCLUDING NUMEROUS LETTERS AND DOCUMENTS NOW FOR THE FIRST TIME PRINTED (Gaillard Hunt ed., 1900-1910).

93. William Paterson, *Notes on the Federal Convention*, 9 AM. HIST. REV. 310, 310-40 (1904).

94. Worthington Chauncey Ford, *Alexander Hamilton's Notes in the Federal Convention of 1787*, 10 AM. HIST. REV. 97, 97-109 (1904).

95. *Papers of Dr. James McHenry on the Federal Convention of 1787*, 11 AM. HIST. REV. 595, 595-624 (1906).

96. 1-3 THE RECORDS OF THE FEDERAL CONVENTION OF 1787 (Max Farrand ed., 1911).

97. 2 *id.* at 129-75; see also William B. Ewald & Lorianne Updike Toler, *Early Drafts of the U.S. Constitution*, 85 PA. MAG. HIST. & BIOGRAPHY 227 (2011) (surveying changes in the Constitution throughout drafting).

thick.⁹⁸ Although initial publication records for the 1911 printing are no longer kept by Yale University Press, which published Farrand's *Records*,⁹⁹ the volumes' bulk seems to have driven up their price and limited the print run, both impacting accessibility: in the preface to a 1927 Congressional compilation of Convention notes and records, the editor tellingly writes of the 1911 publication, "[t]his important publication was not only quite expensive but is now difficult to acquire at any price."¹⁰⁰ Farrand's hardback volumes were printed again in 1937, this time with a supplement of newly-found papers, but the circulation of these, too, dwindled over the course of the next 25 years, as the editor of yet another compilation indicated that previous editions of Convention records were not only "out of print [and] unavailable for teachers, students, lawyers, journalists, commentators, and 'we the people'" in general.¹⁰¹ Finally, much thinner cloth hardback and paperback sets were published in 1966,¹⁰² and then James Hutson of the Library of Congress (where Madison's Notes are now preserved once they transitioned there from the State Department¹⁰³) rearranged the 1937 supplemental volume and augmented it for the Constitution's

98. Authors' physical inspection of the original volumes.

99. Interview with Amy Schock, Sales Pub. Assistant, Yale Univ. Press (July 30, 2020).

100. 1 DOCUMENTS ILLUSTRATIVE OF THE FORMATION OF THE UNION OF THE AMERICAN STATES, n.39 (Charles C. Tansill ed., 1927).

101. *Adrienne Koch, Introduction, in* NOTES OF DEBATES IN THE FEDERAL CONVENTION OF 1787 REPORTED BY JAMES MADISON, at vii (Adrienne Koch ed., 1966).

102. A total of 800 cloth and 5,000 paperback for volume one, 2,000 cloth and 4,500 paperback for volume two, and 2,500 cloth and 3,000 paperback for volume three has sold to date. All cloth versions are out of print, and the paperback versions are back-listed. Email from Amy Schock, Sales Pub. Assistant, Yale Univ. Press, to Author (July 31, 2020) (on file with the author).

103. The State Department transferred an initial lot of more than 8,600 manuscripts in 1905, with those relating to the Convention following in 1922. DOROTHY S. EATON, *PROVENANCE OF THE JAMES MADISON PAPERS, INDEX TO THE JAMES MADISON PAPERS* (1965), <https://www.loc.gov/collections/james-madison-papers/articles-and-essays/provenance> [<https://perma.cc/G72J-YTDN>].

bicentennial in 1987.¹⁰⁴ Despite its comprehensiveness, hegemony¹⁰⁵ and successive printings, Farrand's *Records* remain in short supply and are expensive, even now.¹⁰⁶

In addition to Farrand's volumes, several more compilations have been published in the intervening century, including edited volumes of Madison's *Notes* by Hunt and Scott in 1920,¹⁰⁷ the U.S. House in 1927,¹⁰⁸ John Lansing's notes in 1939 by Princeton University Press,¹⁰⁹ Arthur Taylor's rearrangement of Madison's notes by provisions of the Constitution in 1941,¹¹⁰ a volume by the Ohio University Press in 1966,¹¹¹ and another edited by Winton Solberg in 1990.¹¹² To celebrate the Bicentennial, Wilbourn E. Benton edited a two-volume set of Convention records organized by section of the

104. SUPPLEMENT TO MAX FARRAND'S RECORDS OF THE FEDERAL CONVENTION OF 1787 (James H. Hutson, ed., 1987). Despite the addition of this volume, the entire set was not republished at this time.

105. Vasan Kesavan & Michael Stokes Paulsen, *The Interpretive Force of the Constitution's Secret Drafting History*, 91 GEO. L.J. 1113, 1120 (2003) (Calling Farrand's *Records* "the most complete compendium of the Philadelphia Convention proceedings").

106. As of September 25, 2019, a used set of the four volumes on Amazon sold for \$250. As of August 2020, individual volumes sell for \$38-58 each. There are still volumes left of the 5,000 1966 print run (4,982 total have sold since 1966), with 97 copies being sold to date this year in the US, and 23 copies out of YUP's London office. Schock, *supra* note 99.

107. THE DEBATES IN THE FEDERAL CONVENTION OF 1787 WHICH FRAMED THE CONSTITUTION OF THE UNITED STATES OF AMERICA (Gaillard Hunt & James Brown Scott eds., 1920).

108. DOCUMENTS ILLUSTRATIVE OF THE FORMATION OF THE UNION OF THE AMERICAN STATES (Charles C. Tansill ed., 1927).

109. THE DELEGATE FROM NEW YORK: OR, PROCEEDINGS OF THE FEDERAL CONVENTION OF 1787 FROM THE NOTES OF JOHN LANSING, JR. (Joseph Reese Strayer ed., 1939).

110. DRAFTING THE FEDERAL CONSTITUTION (Arthur Taylor Prescott ed., 1941).

111. NOTES OF DEBATES IN THE FEDERAL CONVENTION OF 1787 REPORTED BY JAMES MADISON (Adrienne Koch ed., 1966). A second, indexed edition was printed in 1984. The latter volume also placed emphasis on the various constitutional proposals of Edmund Randolph, William Patterson, and Alexander Hamilton, indicating that Madison's report of these proposals was not reliable, and therefore the proposals had been reconstructed. *Id.* at vi.

112. THE CONSTITUTIONAL CONVENTION AND THE FORMATION OF THE UNION (Winton U. Solberg, ed., 1990).

Constitution.¹¹³ Most recently, in 2011, Bill Ewald and the lead author re-transcribed Committee of Detail documents, published alongside facsimiles of the originals in a publication marking the centenary of Farrand's great accomplishment.¹¹⁴

In all, in the 235 years since the Convention, there have been 26 publications of various notes and documents, averaging just over one per decade, with a concentration of publications around the turn of the century. Since the 1966 paperback publication of Farrand, it remains the most authoritative and widely cited publication on the Convention.¹¹⁵ Indeed, as shall be seen, it is the Supreme Court's most-cited Convention records.

The Convention's publication historiography, the summary of the Supreme Court's theories employing history, and the short list of studies analyzing their use of history outlined above lays the groundwork for understanding how the records of the Convention have been employed by the Court, and whether such has constrained. As will be discussed in much more depth in the next section, the short answer to this question is that the Court has not been constrained by the records themselves. It is to this study, including its methodology and results, to which we now turn.

II. EMPIRICAL ASSESSMENT

This Part presents an empirical analysis of the Supreme Court's use of Convention records since the Founding. After providing an overview of the study's methodology in Section II.A, the categories and frequencies of the different sources that have been used to support the Court's assessment of the Convention for all cases since 1790 are described in Section II.B. Then, Section II.C analyzes how the use of historical sources is associated with constraint, using

113. 1-2 1787: DRAFTING THE U.S. CONSTITUTION (Wilbourn E. Benton, ed., 1986).

114. Ewald & Updike Toler, *supra* note 97.

115. See *infra* Figure 2 and accompanying text.

available data from all Supreme Court cases that cite to the Convention over the period of 1937-2021.

A. *Study Design*

This Article seeks to do two things: (1) identify all sources the Supreme Court has used when referencing the Constitutional Convention throughout its history; and (2) analyze whether there is a relationship between constrained voting behavior and the Court's use of such source materials to support historical references.

To answer these questions, we began by identifying every instance where a Supreme Court opinion references the Federal Constitutional Convention.¹¹⁶ After finding the relevant cases, we then tracked each opinion within a given case where a Justice discussed the Constitutional Convention, and whether that discussion, or a footnote to it, was supported by a citation to a primary or secondary source. Since 1790, 356 unique opinions across 315 cases have referenced the Convention.

The sources referenced were then categorized as either "primary" or "secondary" sources. Under these definitions, primary sources consisted of any historical source, including contemporaneous accounts of the Convention, the *Federalist*, antiquarian books written prior to 1830, statutes, English cases, accounts of the ratification

116. To identify these cases, we ran a capacious search on LexisNexis: (federal OR constitutional OR Philadelphia OR 1787 OR founding OR federalist OR Farrand) /p convention). We also searched for the 26 publications of the Convention's records. See *supra* Section I.B. We then read through each case to ensure that the opinion discussed the 1787 Philadelphia Convention, rather than only state constitutional conventions or ratification conventions. We also excluded cases where discussion of the Convention was included only in the counsel arguments, rather than any opinion written by a Justice. Lastly, we excluded opinions in cases dealing with acceptance or denial of a writ of certiorari. After identifying the cases where an opinion actually referenced the Federal Constitutional Convention, we were left with a population of 315 cases and 356 different opinions. See *Opinion-Level Reference Counts, 1790-2021*, in REPLICATION DATA FOR "THE CONSTRAINT OF HISTORY," available at https://docs.google.com/spreadsheets/d/1OAgqiY8_8IGFdtaxEskQsgoNN4ECmqmHoEVJ5wyvCMU/edit?usp=sharing [<https://perma.cc/GNF2-GRP4>].

debates and other historical sources like letters and speeches. Secondary sources referred only to previous U.S. cases, scholarly books written after 1830, and academic articles. These sources represent the entire population of materials cited by the Justices when discussing the Convention.¹¹⁷ However, reporting on which sources the Court most commonly uses is only half of this project. We also aim to find whether the use of such sources bears on the Justices' decisionmaking.

Most crucial for answering this question was to determine a way to capture the extent to which a Justice was "constrained" by history. According to Bailey & Maltzman, the Justices are constrained when they do not "simply base their decisions on the policy preferences they bring to the bench."¹¹⁸ Under this connotation, if some other factor besides partisan preference works to explain a Justice's voting behavior, that Justice should be considered constrained by that variable. Within the relevant literature, several factors appear to have a constraining relationship with judicial behavior. For instance, Bailey & Maltzman note that legal principles such as stare decisis and judicial deference significantly impact votes, thus constraining many Justices from voting solely for ideological grounds.¹¹⁹ Other studies have found a constraining effect of many other factors, including public opinion on the issue,¹²⁰ the fear of the

117. For a breakdown on the extent to which each source has been used by the Court since the Founding, see *infra* Section II.B.

118. See BAILEY & MALTZMAN, *supra* note 62, at ix.

119. See *id.* at 64–69.

120. See, e.g., Lee Epstein & Andrew D. Martin, *Does Public Opinion Influence the Supreme Court? Possibly Yes (But We're Not Sure Why)*, 13 U. PA. J. CONST. L. 263 (2010); BARRY FRIEDMAN, *THE WILL OF THE PEOPLE: HOW PUBLIC OPINION HAS INFLUENCED THE SUPREME COURT AND SHAPED THE MEANING OF THE CONSTITUTION* (2009). *But see* Ben Johnson & Logan Strother, *TRENDS: The Supreme Court's (Surprising?) Indifference to Public Opinion*, 74 POL. RSCH. Q. 18, 30 (2021) ("Our empirical analyses—in contrast to decades of published studies—reveal no statistically significant relationship between public mood and Court outputs.").

decision being ignored by the political branches,¹²¹ jurisprudential regimes,¹²² and the perception of the Court's institutional legitimacy.¹²³

This definition of “constraint”—that something other than raw politics bears on the Justices' votes—differs subtly from how Cross conceived of the term in *The Failed Promise of Originalism*. To Cross, constraint implicitly required that “decisions . . . do not consistently conform to the ideological preferences of the Justices.”¹²⁴ But this understanding is too narrow. While a greater share of cross-partisan votes may be evidence of constraint, it is not necessary for a Justice to happen to vote against her political priors in order for that vote to have been influenced, at least in part, by history. For example, in *Perpich v. Department of Defense*,¹²⁵ a unanimous Rehnquist Court held that the federal government retained the power to call state militias into overseas service without declaring a national emergency. Writing for the Court, Justice Stevens referenced the Constitutional Convention to support the proposition that Congress retained significant authority over the militia, since at the Founding “there was a recognition of the danger of relying on inadequately trained soldiers as the primary means of providing for the common defense.”¹²⁶ Under Cross's conception, only those Justices casting a cross-partisan vote—here, Justices White,

121. See Matthew E.K. Hall, *The Semiconstrained Court: Public Opinion, the Separation of Powers, and the U.S. Supreme Court's Fear of Nonimplementation*, 58 AM. J. POL. SCI. 352, 353 (2014).

122. See Mark J. Richards & Herbert M. Kritzer, *Jurisprudential Regimes in Supreme Court Decision Making*, 96 AM. POL. SCI. REV. 305, 305–06 (2002) (“Jurisprudential regimes structure Supreme Court decision making by establishing which case factors are relevant for decision making and/or by setting the level of scrutiny or balancing the justices are to employ in assessing case factors . . .”).

123. See Jeffrey A. Segal, Chad Westerland & Stefanie A. Lindquist, *Congress, the Supreme Court, and Judicial Review: Testing a Constitutional Separation of Powers Model*, 55 AM. J. POL. SCI. 89, 102 (2011).

124. CROSS, *supra* note 6, at 184.

125. 496 U.S. 334 (1990).

126. *Id.* at 340.

Kennedy, O'Connor, and Scalia—would be considered to be “constrained” by history. But just because the other Justices may have reached an outcome favorable to their political preferences does not necessarily mean that their engagement with historical sources did not also bear on their vote. The unanimous Court very well may have followed where the history led, suggesting a constraining effect of history independent from ideological outcomes.

The Failed Promise of Originalism is also woefully lacking in the use of any rigorous empirical methods. While some have heralded Cross's work for “using quantitative evidence to demolish popular myths concerning originalism[],”¹²⁷ Cross's methods never graduate beyond mere descriptive statistics and inferential eyeballing. Cross is content to conclude that observed differences between a Justice's ratio of casting a liberal vote when historical sources are cited and when they are not simply is the product of “random variation,” without conducting any inferential statistical analysis or even showing his work.¹²⁸

As detailed below, our study design differs from that of Cross's book in several ways. First, in addition to employing models that measure the relationship between the use of historical sources and the probability of a Justice casting a cross-partisan vote, we also estimate the probabilities of the Justices casting a conservative or liberal vote when historical sources are used regardless of their political priors. By examining the extent to which historical citations are associated with the direction of all Justices' votes, while holding ideology constant, we can begin to isolate the influence of history from that of mere politics.

Second, this study does not set out to be an evaluation of originalism. Such an endeavor would lack precision and is not possible in

127. John W. Compton, *What is Originalism Good For?*, 50 TULSA L. REV. 427, 435 (2015) (reviewing JOHN O. MCGINNIS & MICHAEL B. RAPPAPORT, ORIGINALISM AND THE GOOD CONSTITUTION (2013)); see CROSS, *supra* note 6; MARK A. GRABER, A NEW INTRODUCTION TO AMERICAN CONSTITUTIONALISM (2013)).

128. See CROSS, *supra* note 6, at 185.

any event given the nature of our data. Cross himself notes that originalism “remains of unclear meaning,” resigning his study to capaciously define the term as “any reliance on evidence from the framing era . . . whether in pursuance of original meaning, original intention, or some other theory.”¹²⁹ But originalism is not the only method of constitutional interpretation that finds historical evidence relevant.¹³⁰ In practice, Cross retreats from his ambitious endeavor of evaluating “originalism” to simply evaluating the use of the historical modality,¹³¹ equating “historical sources” with “originalist sources.”¹³² As such, Cross anachronistically labels as “originalist” Justices who left the bench years before the term was first used by Paul Brest in 1980.¹³³ While we may be “all originalists” now,¹³⁴ it is far from obvious that they were all originalists then, even if the Justices relied on historical sources from time to time.

Though Cross may be faulted for playing fast-and-loose with his research question, he cannot be criticized for failing to limit his study to the platonic idea of originalist Justices—we recognize the virtual impossibility of such a project. Therefore, we would like to be explicit in noting that our research question seeks only to evaluate the use of historical sources per se and does not attempt to delineate between how these sources are used by different interpretive methodologies.

Lastly, this Article’s exploration of the use of historical sources is limited only to those used in support of a reference to the Constitutional Convention. In this sense, our universe of sources is both

129. *Id.* at 44.

130. *See supra* Section I.A.

131. *See* PHILIP BOBBITT, *CONSTITUTIONAL INTERPRETATION* 12 (1990).

132. *See, e.g.,* CROSS, *supra* note 6, at 143.

133. *See* Paul Brest, *The Misconceived Quest for the Original Understanding*, 60 B.U. L. REV. 204, 234 (1980); *see also* Lawrence B. Solum, *What Is Originalism? The Evolution of Contemporary Originalist Theory*, in *THE CHALLENGE OF ORIGINALISM: THEORIES OF CONSTITUTIONAL INTERPRETATION* 13 (Grant Huscroft & Bradley W. Miller eds., 2011) (surveying the origins of originalism).

134. Elena Kagan Supreme Court Nomination Hearing: Day 2, *supra* note 41..

broader and narrower than that analyzed in Cross's book. His study looks at each time an "originalist source" is cited to by the Supreme Court, regardless of context. However, Cross limits his sources-of-interest only to *The Federalist*, *Elliot's Debates*, Farrand's *The Records of the Federal Convention of 1787*, The Declaration of Independence, and historical dictionaries.¹³⁵ By looking at all primary sources of the Convention—and counting all other sources used to support a legal or historical point about the lessons of the Convention¹³⁶—this Article provides a more capacious account of the historical sources used by the Court, though in a more limited context.

1. Cross-Partisan Vote Models

For our first set of models, we define constraint as Cross does—that a Justice is constrained by a historical source where she casts a vote in a case contrary to her ideological preference.¹³⁷ To derive this outcome variable, we employed data from the Martin-Quinn Scores on Justice ideology and the Spaeth, Epstein, Martin, Segal, Ruger & Benesh Supreme Court Database on the political disposition of votes in a case.

Martin-Quinn Scores present an estimate of every Supreme Court Justice's ideological disposition for each Term over the period of 1937-2021.¹³⁸ We chose to use the posterior mean Martin-Quinn Scores as our metric for judicial ideology over other comparable measures in the literature¹³⁹ because they cover the largest time series, measure all issue areas, and dynamically change for each Term

135. See CROSS, *supra* note 6, at 177.

136. See *supra* notes 116-117 and accompanying text.

137. See CROSS, *supra* note 6, at 184. To access the data used in our models for replication, see *Regression Data*, in REPLICATION DATA FOR "THE CONSTRAINT OF HISTORY," *supra* note 116.

138. See Martin-Quinn Scores, UNIV. OF MICH., <https://mqscores.lsa.umich.edu/> [<https://perma.cc/6Z3B-N2QP>] (last visited July 6, 2022); The Supreme Court Database, *supra* note 141.

139. See, e.g., Lee Epstein & Carol Mershon, *Measuring Political Preferences*, 40 AM. J. POL. SCI. 261 (1996); Jeffrey A. Segal & Albert D. Cover, *Ideological Values and the Votes of U.S. Supreme Court Justices*, 83 AM. POL. SCI. REV. 557 (1989).

as “the worldviews, and thus the policy positions, of [J]ustices evolve through the course of their careers.”¹⁴⁰ Martin-Quinn Scores are notated on a continuous scale, with negative numbers representing “liberal” preferences and positive numbers representing “conservative” preferences. The greater the absolute value of a Justice’s score, the more partisan that Justice was in a given Term. For example, Justice Douglas’s 1975 score of -7.923 represents the most liberal preference for any Justice in the set, while then-Justice Rehnquist’s 1979 score of 4.511 represents the most conservative preference.

The Supreme Court Database provides information on whether the outcome of each Justice’s vote in a given case reflects a “conservative” or “liberal” preference for all cases between the 1937 and 2021 Terms. “Liberal” outcomes represent those that support, for example, criminal defendants, civil liberties, “underdog[s],” economic equity, federal power, and judicial activism.¹⁴¹ “Conservative” outcomes represent the “reverse” of these.¹⁴² In cases where “no convention exists as to which is the liberal side and which is

140. Andrew D. Martin & Kevin M. Quinn, *Assessing Preference Change on the US Supreme Court*, 23 J. L. ECON. & ORG. 303, 303 (2007).

141. The Supreme Court Database, *Decision Direction*, WASH. UNIV. L. SCH., <http://supremecourtdatabase.org/documentation.php?var=decisionDirection> [<https://perma.cc/4AKD-WQBH>] (last visited July 5, 2022). For the individual vote-direction data used in these models, see The Supreme Court Database, *Direction of the Individual Justice’s Votes*, WASH. UNIV. L. SCH., <http://scdb.wustl.edu/documentation.php?var=direction> [<https://perma.cc/5TRE-AH27>] (last visited March 19, 2023).

142. These definitions, of course, fail to perfectly capture ideological nuance in every case. For instance, the Court’s holding in *Trump v. Vance*, 140 S. Ct. 2412 (2020), that the Manhattan District Attorney could lawfully subpoena President Trump’s tax records in furtherance of a criminal investigation, is coded in the database as a “conservative” outcome because it rules against the rights of a criminal defendant and increases the power of states vis-à-vis the federal government. As such, Justice Alito and Justice Thomas’s dissenting votes in that case are considered cross-partisan votes, as are Justice Breyer, Justice Ginsburg, Justice Kagan, and Justice Sotomayor’s votes with the majority. Still, as Cross himself acknowledges, this database “remains the best resource for research in this area, and the constitutional cases . . . tend to be more ideologically plain.” CROSS, *supra* note 6, at 177.

the conservative side” or where “the issue does not lend itself to a liberal or conservative description,” the Supreme Court Database does not assign a decision direction. All votes from these cases are thus excluded from our regression models.¹⁴³

Using these data, we were able to define whether a Justice was “constrained,” or voted against her political preference, in a given case. A Justice was considered “constrained” in her vote if (1) that Justice had a negative (liberal) Martin-Quinn Score for that term and voted for the “conservative” outcome in the case; or (2) that Justice had a positive (conservative) Martin-Quinn Score for that Term and voted for the “liberal” outcome.¹⁴⁴

Using this outcome variable, we devised four logistic regression models to estimate the statistical association between historical analysis of the Convention and the odds of a Justice casting a cross-

143. Such cases most often dealt with issues of federalism or executive power. The cases that referenced the Convention but were excluded from the model due to their lack of a decision direction were *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952); *United States v. Will*, 449 U.S. 200 (1980); *INS v. Chadha*, 462 U.S. 919 (1983); *Bowsher v. Synar*, 478 U.S. 714 (1986); *Morrison v. Olson*, 487 U.S. 654 (1988); *Mistretta v. United States*, 488 U.S. 361 (1989); *Freytag v. Comm’r*, 501 U.S. 868 (1991); *Lucia v. SEC*, 138 S. Ct. 2044 (2018); and *United States v. Arthrex, Inc.*, 141 S. Ct. 1970 (2021). References to Convention sources in these cases were still tallied for purposes of reporting their use in Section II.B, *infra*.

144. Because a Justice’s Martin-Quinn Score itself is based on the ideological valence of her votes in a given Term, issues of circularity may arise as “the measures for the independent and dependent variables are identical.” Lee Epstein & Carol Mershon, 40 *AM. J. POL. SCI.* 261, 263 (1996); see Andrew D. Martin & Kevin M. Quinn, *Can Ideal Point Estimates be Used as Explanatory Variables?*, at 2 (Oct. 8, 2005) (unpublished manuscript), <https://mqscores.lsa.umich.edu/media/resnote.pdf> [<https://perma.cc/3Y7J-PP6Z>]. Still, Martin-Quinn scores “do not measure ideology with reference to any particular kind of concrete outcome; rather, they measure ideology purely in terms of voting alignments.” Joshua B. Fischman & David S. Law, *What Is Judicial Ideology, and How Should We Measure It?*, 29 *WASH. U. J.L. & POL’Y* 133, 162 (2009). Despite this concern, Martin-Quinn scores are commonly used as explanatory variables in the relevant literature. See, e.g., Oleg Smirnov & Charles Anthony Smith, *Drift, Draft, or Drag: How U.S. Supreme Court Justices React to New Members*, 34 *JUSTICE SYS. J.* 228 (2013); Charles M. Cameron & Jee-Kwang Park, *How Will They Vote? Predicting the Future Behavior of Supreme Court Nominees, 1937-2006*, 6 *J. EMPIRICAL LEGAL STUDS.* 485 (2009).

partisan vote. The standard errors for each model are calculated using heteroskedasticity-consistent standard errors to improve robustness.¹⁴⁵

Model 1 presents the most basic specification,¹⁴⁶ regressing whether a cross-partisan vote was cast in an opinion on the total number of primary and secondary citations to the Convention in that opinion. For each vote in the dataset, we code the outcome variable as 1 for cases where the Justice casts a cross-partisan vote, and 0 where she does not. The log-odds of a Justice casting a cross-partisan vote is thus defined as:

$$(1) \log\left(\frac{Y_i}{1-Y_i}\right) = \alpha_0 + \beta_1 TotalPrimary_i + \beta_2 TotalSecondary_i + \varepsilon_i,$$

where *TotalPrimary* and *TotalSecondary* represent the total number of citations to a primary or secondary Convention source, respectively, in an opinion.¹⁴⁷ Only unique citations were included in

145. See J. Scott Long & Laurie H. Ervin, *Using Heteroscedasticity Consistent Standard Errors in the Linear Regression Model*, 54 AM. STAT. 217 (2000).

146. See Johnson & Strother, *supra* note 120, at 23 (“If there is a real and meaningful relationship between [our explanatory variables] and Supreme Court outputs, it should be evident before we begin to add [covariates] to the right-hand side of the equation.”).

147. As an exception to this rule, references to the Convention were not necessarily counted where an opinion uses the metonym “the plan of the Convention” to refer to the Constitution, a common practice in cases dealing with the abrogation of sovereign immunity. See, e.g., *Blatchford v. Native Village of Noatak*, 501 U.S. 775, 779 (1991) (“[A] State will therefore not be subject to suit in federal court unless it has consented to suit, either expressly or in the ‘plan of the convention.’”). Consistent with our decision not to include the Constitution itself as a Convention source, uses of this phrase would only be counted as references to the Convention where that phrase is included within a discussion of the Convention itself, and not simply its output. See, e.g., *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 803 (1995) (quoting *Wesberry v. Sanders*, 376 U.S. 1, 9 (1964)) (“After the Constitutional Convention convened, the Framers were presented with, and eventually adopted a variation of, ‘a plan not merely to amend the Articles of Confederation but to create an entirely new National Government with a National Executive, National Judiciary, and a National Legislature.’ In adopting that plan, the Framers envisioned a uniform national system . . .”).

these counts.¹⁴⁸ The constant α_0 represents the intercept term, and ε_i the error term for this model. This model pools all Justices and all votes in the cases in the observation period in which at least one opinion made reference to the Convention, yielding a sample size of 1755 individual votes.

Model 2 builds upon Model 1 by adding a series of vote-level, case-level, and Justice-level controls as explanatory variables. Under this specification, the log-odds of a Justice casting a cross-partisan vote equals:

$$(2) \log \left(\frac{Y_i}{1-Y_i} \right) = \alpha_0 + \beta_1 TotalPrimary_i + \beta_2 TotalSecondary_i + \beta_k \delta_i + \beta_m \varphi_i + \beta_n \gamma_i + \varepsilon_i$$

Here, δ_i represents a matrix of vote-level variables. First, the binary variable *Author* is assigned a 1 if the Justice is the author of the opinion and a 0 if she joins the opinion. Second, the binary variable *OpCourt* is coded as 1 where the Justice either authors or signs on to the opinion of the Court. Where the Justice authors a concurrence or concurrence-in-part, but still signs on to the majority opinion, the *OpCourt* variable remains at 1, unless the Justice's separate opinion contains a reference to the Convention. Concurrences in the judgment and dissents are given a value of 0 for this variable. Third, a value of 1 for the binary *Reference Only* variable captures instances where the opinion for which the Justice votes refers to the Convention but does support that reference with any citation.¹⁴⁹

148. That is, a reference to a source containing multiple page numbers (e.g., 3 Farrand, *Records of the Constitutional Convention* 478, 574) would count as only one primary-source reference. In contrast, multiple citations to the same source, separated by a semicolon (e.g., 2 Farrand, *Records of the Constitutional Convention* 478; *id.* at 574) would count as two primary-source references. This uniform system worked to standardize counting of sources when Justices referenced ranges of multiple pages of a source in a citation.

149. Common to the Court, especially in its earliest days, was the practice of including quotations from the Framers without citing them. For instance, in *Dred Scott v.*

This variable takes a 0 either where the Justice's opinion supports its reference to the Convention with a citation or does not reference the Convention at all. Fourth, a value of 1 for the binary *Little There* variable denotes that the Justice's opinion explicitly notes that the Convention records provide little useful material on the relevant issue.¹⁵⁰

Next, φ_i represents a matrix of covariates from the Supreme Court Database that vary across cases but do not change based on an individual Justice's vote in the case. This model includes 10 treatment-coded variables, each representing the issue area of a case.¹⁵¹ The binary variable *Precedent* notes whether that case formally altered a past precedent.¹⁵² The variables *FedUC* and *StateUC*

Sandford, Justice Campbell writes that "in the Federal Convention . . . Mr. Madison observed, 'that the States were divided into different interests not by their difference of size...but by other circumstances'" but cites no source to support either the quotation or the proposition. 60 U.S. (19 How.) 393, 498 (1856) (Campbell, J., concurring). While this reference to the Convention provides a clear quotation from some source, it is impossible from the opinion alone to discern the source material and its source-type, especially since multiple publications of Convention records were in print at the time.

150. See, e.g., *Sun Oil Co. v. Wortman*, 486 U.S. 717, 723 (1988) ("The first sentence of the Full Faith and Credit Clause was not much discussed at either the Constitutional Convention or the state ratifying conventions.").

151. These issue areas are criminal procedure, civil rights, First Amendment, due process, privacy, unions, economic activity, judicial power, federalism, and federal taxation. See The Supreme Court Database, *Issue Area*, WASH. UNIV. L. SCH., <http://scdb.wustl.edu/documentation.php?var=issueArea> [<https://perma.cc/8568-K5Y4>] (last visited Mar. 18, 2022). To avoid singularities, the miscellaneous issue is dropped as the baseline. Therefore, a case is only coded a 1 for one issue area at most. See T. Florian Jaeger, *Categorical Data Analysis: Away from ANOVAs (Transformation or Not) and Towards Logit Mixed Models*, 59 J. MEM. LANG. 434, 436 (2008).

152. See The Supreme Court Database, *Formal Alteration of Precedent*, WASH. UNIV. L. SCH., <http://scdb.wustl.edu/documentation.php?var=precedentAlteration> [<https://perma.cc/N8MS-YTZ2>] (last visited Mar. 18, 2022) (noting that this variable takes the value of a 1 where a majority opinion explicitly says a precedent of the Court has been overruled by that case, a dissent "clearly and persuasively [states] that precedents have been formally altered," the majority characterizes a case as being overruled in a subsequent opinion, or the majority "states that a precedent of the Supreme Court has been 'disapproved,' or is 'no longer good law.'"). Where the Court merely

respectively note if the Court held a federal or state law to be unconstitutional in the case.¹⁵³

Finally, γ_i represents the matrix of Justice-level controls that distinguish each Justice from the others in the dataset. Because these data are fully pooled,¹⁵⁴ we include several covariates to account for the Justices' differing backgrounds and ideologies. To capture a Justice's education background, the variables *HLS*, *YLS*, and *OtherLS* are assigned a 1 if the Justice attended Harvard Law School, the Yale Law School, or any other law school, respectively.¹⁵⁵ Similarly, the variables *Private*, *Judge*, *Academic*, and *Public*, respectively note whether a given Justice worked as an attorney in the private sector, as a judge on another court, as an academic, or as government attorney before being elevated to the Supreme Court. To control for the political partisanship of a given Justice, this model also includes the binary variable *GOPPres*, noting whether the Justice was appointed by a Republican President. Model 2 also includes

distinguishes the case at bar from precedent, or where alteration of precedent in no way occurs, the variable is given a 0. *See id.*

153. *See* The Supreme Court Database, *Declaration of Unconstitutionality*, WASH. UNIV. L. SCH., <http://scdb.wustl.edu/documentation.php?var=declarationUncon> [<https://perma.cc/XT53-9P3V>] (last visited Mar. 18, 2022). Municipal ordinances are considered state laws for the purpose of the *StateUC* variable. Cases that declare unconstitutional neither a state nor federal law are given a 0.

154. *See* Denise Kerkhoff & Fridtjof W. Nussbeck, *The Influence of Sample Size on Parameter Estimates in Three-Level Random-Effects Models*, 10 *FRONTIERS PSYCH.* 1067, at 3–5 (2019) (explaining the difficulties of fixed-effects regression with small group-level samples). To see this technique applied to a comparable research question, see, for example, Aníbal Pérez-Liñán & Ignacio Arana Araya, *Strategic Retirement in Comparative Perspective: Supreme Court Justices in Presidential Regimes*, 5 *J.L. & COURTS* 173, 179 (2017).

155. Biographical information on the Justices was gathered from *Justices*, OYEZ, <https://www.oyez.org/justices> [<https://perma.cc/YL5Z-L7MN>] (last visited July 5, 2022); *Lawyers, Judges & Jurists*, ENCYCLOPEDIA BRITANNICA, <https://www.britannica.com/browse/Lawyers-Judges> [<https://perma.cc/LB8K-BMWT>] (last visited July 5, 2022); and *Biographies of the Justices*, SCOTUSBLOG <https://www.scotusblog.com/biographies-of-the-justices/> [<https://perma.cc/S42D-NY7G>] (last visited July 5, 2022). The only Justice to be assigned a 1 value in more than one of these categories was Justice Sherman Minton, who received his LLB from Indiana University Maurer School of Law and his LLM from the Yale Law School. *See* OYEZ, *supra*.

the *MQ-Score* variable reporting the Justice's ideology score for that Term.¹⁵⁶

To further explore the intricacies of these hypothesized relationships, we devised two additional models that bifurcate the votes in the sample based on the ideological leaning of the casting Justice for that term.¹⁵⁷ As such, Model 3 replicates the specification of Model 2 only for votes cast by a Justice with a positive, or conservative-leaning, Martin-Quinn Score, and Model 4 replicates that specification for the Justices with a negative, or liberal-leaning Martin-Quinn Score. As these models include only subsets of the data, Model 3 contains 960 observations, representing the number of votes cast by conservative-leaning Justices, and Model 4 observes

156. Given the shifting policy preferences of the Republican Party over this period, see generally Brian D. Feinstein & Eric Schickler, *Platforms and Partners: The Civil Rights Realignment Reconsidered*, 22 *STUDS. AM. POL. DEV.* 1, 1–2 (2008) (outlining the evolution of America's political parties over the twentieth century), we thought it appropriate to include both variables to more closely proxy a Justice's ideological preferences, as appointment by a Republican President alone does not consistently reflect conservative ideological preferences. For example, Chief Justice Warren, Justice Stevens, and Justice Souter were all appointed by Republican Presidents and yet consistently reported liberal Martin-Quinn scores for a majority of their Terms on the Court. Because a Justice's Martin-Quinn Score itself is based on the ideological valence of her votes in a given Term, issues of circularity may arise as "the measures for the independent and dependent variables are identical." Lee Epstein & Carol Mershon, 40 *AM. J. POL. SCI.* 261, 263 (1996); see Andrew D. Martin & Kevin M. Quinn, *Can Ideal Point Estimates be Used as Explanatory Variables?*, at 2 (Oct. 8, 2005) (unpublished manuscript), <https://mqscores.lsa.umich.edu/media/resnote.pdf> [<https://perma.cc/3Y7J-PP6Z>]. Still, Martin-Quinn scores "do not measure ideology with reference to any particular kind of concrete outcome; rather, they measure ideology purely in terms of voting alignments." Joshua B. Fischman & David S. Law, *What Is Judicial Ideology, and How Should We Measure It?*, 29 *WASH. U. J.L. & POL'Y* 133, 162 (2009). Despite this concern, Martin-Quinn scores are commonly used as explanatory variables in the relevant literature. See, e.g., Oleg Smirnov & Charles Anthony Smith, *Drift, Draft, or Drag: How U.S. Supreme Court Justices React to New Members*, 34 *JUSTICE SYS. J.* 228 (2013); Charles M. Cameron & Jee-Kwang Park, *How Will They Vote? Predicting the Future Behavior of Supreme Court Nominees, 1937-2006*, 6 *J. EMPIRICAL LEGAL STUDS.* 485 (2009).

157. For a recent commentary on the methods of sample-bifurcated multivariate logistic regressions, see Jacob James Rich & Roberto A. Sussman, *Gaiha et al. Response*, 68 *J. ADOLESCENT HEALTH* 215, 215–16 (2021).

the 795 votes cast by the liberal leaning Justices. Besides this change in specification, all other variables are identical to those defined in Model 2.

2. Vote-Direction Models

Moving away from the stricter conception that constraint is necessarily evidenced by a Justice voting against her ideology, the subsequent models instead seek to measure the extent to which other factors besides ideology bear on vote outcomes. In this sense, we find evidence that a Justice may be constrained by another factor if we observe a relationship between the Justice's vote direction and that factor, holding ideology constant.

In these models, our outcome variable is *Conservative Vote*, noting whether the Justice's vote in a case was in the conservative direction. The four explanatory variables of interest relating to the use of Convention records are *Conservative Primary*, *Conservative Secondary*, *Liberal Primary*, and *Liberal Secondary*. Each of these continuous variables total the number of primary and secondary source-types used across all opinions of the same ideological outcome in a case.¹⁵⁸ As these are case-level variables, they do not vary across the individual opinions or votes of the Justices in that case. Model 5 is defined as:

$$(5) \log\left(\frac{Y_i}{1-Y_i}\right) = \alpha_0 + \beta_1 \text{ConPrimary}_i + \beta_2 \text{ConSecondary}_i + \beta_3 \text{LibPrimary}_i + \beta_4 \text{LibSecondary}_i + \varepsilon_i,$$

where the outcome variable measures whether the Justice votes for

158. Crucially, what determines the category that a reference falls in is the direction of the Justice's vote, see The Supreme Court Database, *Direction of the Individual Justice's Votes*, *supra* note 141, and not the casting Justice's ideological preference as determined by the Martin-Quinn Scores. Thus, for example, where a Justice with a conservative Martin-Quinn score uses a secondary source to support a reference to the Convention in an opinion with a liberal outcome, that reference would count towards the *Liberal Secondary* total for that case.

the conservative outcome in the case. This model pools all Justice votes over the observation period and includes 1755 total observations.

But while this basic specification may allow us to detect a relationship between references and the ideological direction of a case, it does not control for Justice ideology per se, undermining its power to evaluating any constraining connection of these sources. Therefore, Model 6 adds the aforementioned control matrices, including the *MQ-Score* variable, as explanatory variables, and is defined as:

$$(6) \log\left(\frac{Y_i}{1-Y_i}\right) = \alpha_0 + \beta_1 \text{ConPrimary}_i + \beta_2 \text{ConSecondary}_i + \beta_3 \text{LibPrimary}_i + \beta_4 \text{LibSecondary}_i + \beta_j \delta_i + \beta_k \varphi_i + \beta_l \gamma_i + \varepsilon_i,$$

where y_i equals the probability that a Justice votes for the conservative outcome and the matrices δ_i , φ_i , and γ_i are the same as previously defined. Because these models control for ideology, finding a statistically reliable association between the odds of voting conservative and any of the historical-source variables would allow us to reject the hypothesis that there is no relationship between the use of historical sources and case outcomes once Justice ideology is accounted for.

Finally, we once again bifurcated these models by Martin-Quinn score to analyze this question for subsets of conservative-leaning and liberal-leaning Justices once at a time. Model 7, which includes 960 observations, includes all votes cast by Justices with conservative-leaning Martin-Quinn Scores, regardless of the ideological direction of the vote in that case. Model 8, conversely, includes the 795 votes cast by a Justice with a liberal-leaning Martin-Quinn Score across these cases.

With these analytical models, we can begin to observe the extent of the controversial relationship between the Supreme Court's use of historical sources in elucidating the lessons of the Constitutional

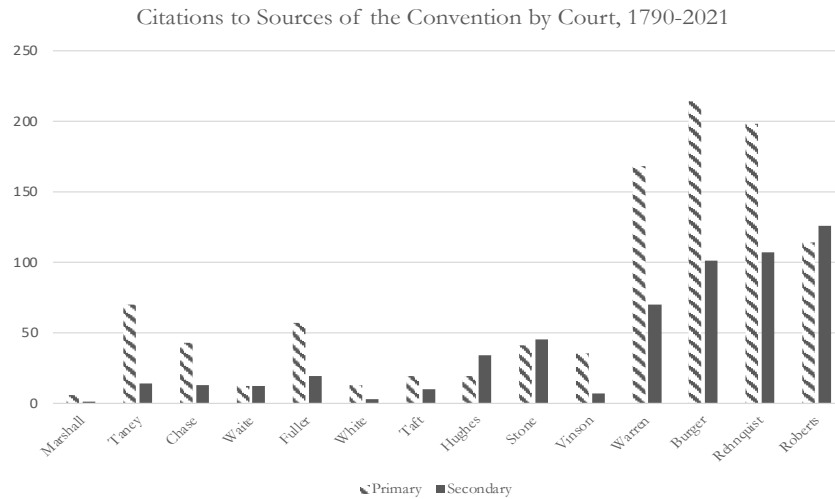
Convention and its rulings in a case. By looking at the outcomes of cross-partisan votes and of absolute vote directions, these models set out to evaluate history's role in constraining judicial behavior beyond the consideration of political allegiance alone.

B. *The Supreme Court's Use of Convention Sources, 1790-2021*

Before analyzing our empirical models, we will briefly turn back to the Supreme Court's inception to survey the trends in historical citation practices across the Court's longevity. While the Supreme Court held its first sitting in 1790, it actually was not until 1816 that the Court directly invoked the Convention in an opinion. In *Martin v. Hunter's Lessee*, Justice Story supported his opinion defending the Supreme Court's appellate jurisdiction over state court decisions by arguing that concerns over the "public mischiefs" arising from differing interpretations of federal law "could [not] have escaped the enlightened convention which formed the Constitution."¹⁵⁹ Consistent with the practices of the time, Justice Story did not support this assertion with any citation to a historical source.

Since then, the number of references to the Convention in Supreme Court opinions steadily grew over time. Figure 1 below depicts the frequency of citations to primary and secondary sources by each Court—as defined by the sitting Chief Justice—over the period of 1790-2021. While the Marshall Court only made 7 citations to support its discussions of the Convention, the Rehnquist Court made 305 citations to the Convention—198 of which were to primary sources. In fact, the Warren and Burger Courts alone had more source-supported citations to the Convention (553 citations) than all previous Courts combined (473 citations).

159. *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304, 342, 348 (1816).

Figure 1

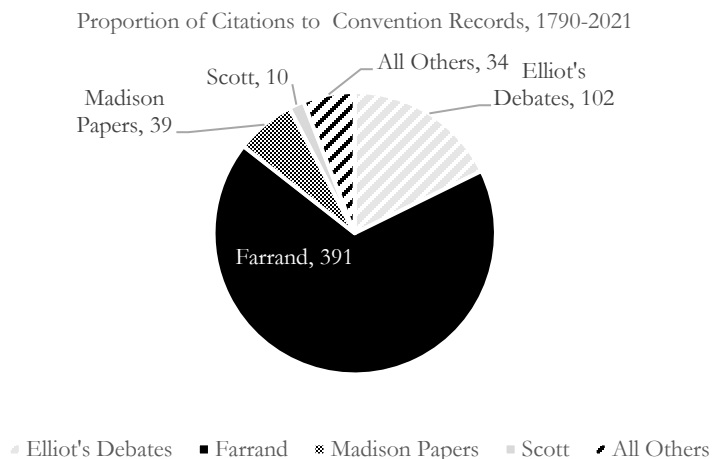
When looking at this period together, the Court made a total of 1,572 citations to sources describing the Convention. Of these, 1,006—roughly two-thirds—were to primary sources and 566 were to secondary sources such as previous cases, academic articles, and contemporary books.

Of all sources, Farrand's *Records of the Federal Convention* was the Court's clear favorite and was cited 391 times, as shown below in Figure 2. When citing to the actual Convention records, the Justices chose Farrand's volumes 68% of the time. The second most popular volume of Convention records was *Elliot's Debates*, cited 18% of the time, followed by the Madison Papers and Scott. Of the remaining versions of the Convention records,¹⁶⁰ only eleven of these have ever been cited to by the Court for a combined number of 34 times.¹⁶¹

160. See *supra* Section I.B.

161. These sources are 1787: DRAFTING THE U.S. CONSTITUTION (Wilbourn E. Benton ed., 1986) (cited twice); 1 DOCUMENTS ILLUSTRATIVE OF THE FORMATION OF THE UNION

Figure 2

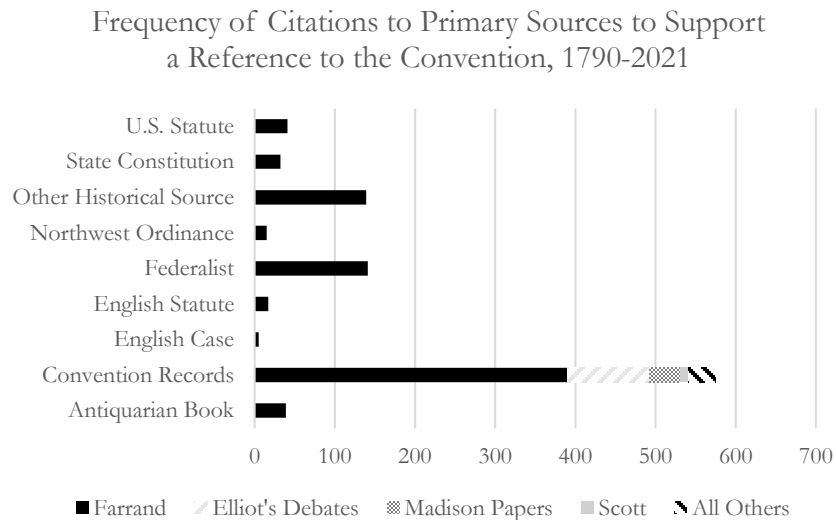


Beyond the Convention records, the most frequently cited primary source is *The Federalist*, which has been referenced 141 times

OF THE AMERICAN STATES (Charles C. Tansill ed., 1927) (cited twice); THE CONSTITUTIONAL CONVENTION AND THE FORMATION OF THE UNION (Winton U. Solberg ed., 1990) (cited once); THE DEBATES IN THE FEDERAL CONVENTION OF 1787 WHICH FRAMED THE CONSTITUTION OF THE UNITED STATES OF AMERICA (Gaillard Hunt & J. Scott eds., 1920) (cited four times); *Documentary History of the Ratification of the Constitution*, UNIV. OF WISC. CTR. STUD. AM. CONST. (cited once); 1-9 THE WRITINGS OF JAMES MADISON COMPRISING HIS PUBLIC PAPERS AND HIS PRIVATE CORRESPONDENCE, INCLUDING NUMEROUS LETTERS AND DOCUMENTS NOW FOR THE FIRST TIME PRINTED (Gaillard Hunt ed., 1900-10) (cited four times); DEBATES IN THE FEDERAL CONVENTION OF 1787, HELD AT PHILADELPHIA, ON THE ELECTION OF SENATORS, COMPILED BY A.P.C. GRIFFIN, CHIEF BIBLIOPHAGER, LIBRARY OF CONGRESS, S. DOC. No. 57-404 (1st Sess. 1902) (cited once); WILLIAM M. MEIGS, THE GROWTH OF THE CONSTITUTION IN THE FEDERAL CONVENTION OF 1787: AN EFFORT TO TRACE THE ORIGIN AND DEVELOPMENT OF EACH SEPARATE CLAUSE FROM ITS FIRST SUGGESTION IN THAT BODY TO THE FORM FINALLY APPROVED: CONTAINING ALSO A FAC-SIMILE OF A HERETOFORE UNPUBLISHED MANUSCRIPT OF THE FIRST DRAFT OF THE INSTRUMENT MADE FOR USE IN THE COMMITTEE OF DETAIL (J. B. Lippincott, 1900) (cited six times); OFFICIAL JOURNAL OF THE CONSTITUTIONAL CONVENTION, *supra* note 77 (cited five times); NOTES OF DEBATES IN THE FEDERAL CONVENTION OF 1787 REPORTED BY JAMES MADISON (Adrienne Koch ed., 1966) (cited three times); and DRAFTING THE FEDERAL CONSTITUTION (Arthur Taylor Prescott ed., 1941) (cited three times).

in Supreme Court opinions discussing the Convention. The Court has referenced U.S. statutes 41 times, antiquarian books 39 times (18 of which are to Blackstone's *Commentaries*), state constitutions 32 times, English statutes 17 times, the Northwest Ordinance 15 times, and English cases 5 times in this context. Additionally, the Court cited to other historical sources, such as letters, pamphlets, editorials, and speeches, 139 times when discussing the Convention. These figures are reported below in Figure 3.

Figure 3



The three traditional secondary sources the Court relied on were previous decisions by the Court, modern books, and law review articles. Figure 4 below depicts the frequency of these citations. Previous cases constituted the large majority of citations here, which the Court cited 313 times when discussing the Convention.

Often, the Court would rely on its previous interpretation of the Constitution and the Convention in citing to previous cases. It did this in *Michelin Tire v. Wages*, wherein Justice Brennan, writing for

the Court, synthesized his reading of Convention debates regarding tariffs, imports, and foreign commerce before citing to three cases, four papers from *The Federalist*, Farrand, and a letter from James Madison to a Professor Davis, in that order.¹⁶² For all primary and secondary sources, the Court cited to previous cases second most after Farrand, the vast majority of which referenced the Court interpreting primary records in a previous case, or acting itself as historian. Thus, the second most used authority on the Convention was the Court itself.

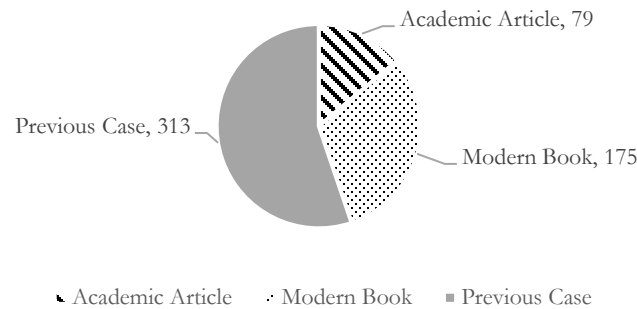
The next most relied upon secondary sources thereafter were modern books, which were cited to 175 times. Lastly, the Court has cited to 79 academic articles when discussing the Convention, all but one of which—an article in a political science journal¹⁶³—were law review articles, though many contained detailed legal histories. For the modern and antiquated books the Court references, 48% covered law or legal history. When looking for commentary and context on the Convention, the Court clearly prefers to rely on legal sources.

162. *Michelin Tire Corp. v. Wages*, 423 U.S. 276, 285 n.4 (1976).

163. See *United States v. Will*, 449 U.S. 200, 220 n.22 (1980) (citing Arthur P. Scott, *The Constitutional Aspects of the "Parson's Cause"*, 31 POL. SCI. Q. 558 (1916)).

Figure 4

Citations to Secondary Sources to Support a Reference to the Convention, 1790-2021



As demonstrated by the figures above, the Supreme Court has grown in its reliance on historical sources to understand the Convention over time, with this trend peaking during the Burger Court and continuing strong since. But though these figures may elucidate how the Court uses history, nose counting alone provides little insight into these sources' potential constraining relationship with case outcomes. We now turn to take up that question.

C. The Relationship between Citations to the Convention and Constraint, 1937-2021

After identifying the sources that the Supreme Court has used since the Founding to support its characterization of the Constitutional Convention, we now focus on the period between 1937 to the present in considering how use of these sources bears on voting outcomes. Our investigation here is limited to these dates, as reliable data on Justice ideology only extends back to the solidification of modern political parties in 1937.¹⁶⁴ Too, that year heralds the start

164. See Daniel E. Ho & Kevin M. Quinn, *Did a Switch in Time Save Nine?*, 2 J. LEGAL ANALYSIS 69, 70 (2010) (noting that around this time "the field of statistics was just maturing into a modern discipline; [t]he year 1936 was a wake-up call for measurement").

of the New Deal Court, which ushered in the modern era of American constitution law.¹⁶⁵ Thus, this year poses as a suitable place to begin our investigation of modern Supreme Court practice. Our sample includes all votes in the 201 cases with available data that referenced the Convention over this period.

Table 1 below reports descriptive statistics for the outcome variables and explanatory variables of interest included in our logistic regression models. Panel 1 displays the sample size, mean value, and standard deviation of these variables when all Justices are pooled together. Panels 2 and 3, respectively, report these values for only the subset of Justices that had a conservative or liberal Martin-Quinn Score at the time of a given case.

Table 1

VARIABLE	(1) ALL JUSTICES			(2) CON. JUSTICES			(3) LIB. JUSTICES		
	N	\bar{x}	SD	N	\bar{x}	SD	N	\bar{x}	SD
Reference	1755	0.50	0.50	960	0.54	0.50	795	0.45	0.50
Cross-Partisan Vote	1755	0.33	0.47	960	0.38	0.49	795	0.28	0.45
Con. Vote	1755	0.46	0.50	960	0.62	0.49	795	0.28	0.45
Total PS	1755	1.72	5.10	960	1.67	4.22	795	1.77	5.98
Total SS	1755	1.11	3.41	960	0.99	2.98	795	1.26	3.87
Ref. Only	1755	0.02	0.16	960	0.03	0.17	795	0.03	0.16
Little There	1755	0.06	0.25	960	0.06	0.24	795	0.07	0.25
Con. PS	1755	1.74	3.41	960	1.74	3.41	795	1.74	3.41
Con. SS	1755	0.80	1.70	960	0.80	1.70	795	0.79	1.70
Lib. PS	1755	1.87	6.02	960	1.81	5.86	795	1.95	6.22
Lib. SS	1755	1.47	4.33	960	1.43	4.19	795	1.52	4.48
MQ-Score	1755	-0.09	2.25	960	1.49	1.15	795	-2.00	1.70

165. See e.g., Bruce Ackerman, *Constitutional Politics/Constitutional Law*, 99 YALE L.J. 453, 457–58 (1989); Cass R. Sunstein, *Constitutionalism After the New Deal*, 101 HARV. L. REV. 421, 437–44 (1987).

As a preliminary matter, the sample data appear to be well-balanced between votes for opinions that reference the Convention and votes for those that do not, as demonstrated by the 0.50 mean of the *Reference* variable when all Justices are observed. This makes sense, as all opinions in a case were included in the models regardless of whether they referenced the Convention if at least one opinion in that case did so.

Much can be learned about the Justices' use of Convention sources from observing these descriptive data alone. Looking at all the Justices together, the mean of the *Cross-Partisan Vote* outcome variable notes the Justices voted against their ideology's side 33% in the observed cases. Among the Justices with a conservative ideology score, this average rises to 38% of the time and falls to 28% for those with a liberal score. Across all Justices, their votes aligned with the conservative outcome 46% of the time, as shown by the proportion of the *Conservative Vote* outcome variable. When broken down by ideology, conservative-leaning Justices reached the conservative outcome in 62% of their votes in these cases and liberal justices did so in 28%, mirroring their proportion of cross-partisan votes.

The average vote is for an opinion citing 1.72 primary sources and 1.12 secondary sources overall. By ideology, conservative Justices sign on to opinions that reference the Convention more frequently than liberal justices. The conservative Justices referenced the Convention *without* a citation to any source only slightly more frequently than the liberals, doing so about 2% of the time. Further, the Justices explicitly noted that Convention Records provided little helpful information, as indicated by the *Little There* variable, approximately 6.5% of the time. This figure does not appear to significantly differ based on ideology. Lastly, the average ideology of observed Justices, captured by the *MQ-Score* variable, leans slightly liberal at -0.09. The average conservative Justices has an ideology score of 1.49, while the average liberal Justice falls slightly more partisan with a score of approximately -2.0.

Turning now to our analytical models, **Table 2** below displays the results for the variables of interest in our models estimating the relationship between a Justice's use of primary or secondary sources to support a reference to the Convention and her probability of casting a vote contrary to her political ideology. Coefficients are reported as log-odds and levels of significance were calculated using heteroskedasticity-consistent standard errors.

Table 2

	<i>Dependent variable:</i>			
	Cross-Partisan Vote			
	(1)	(2)	(3)	(4)
Total Primary	-0.039** (0.016)	-0.040** (0.017)	-0.084*** (0.027)	0.009 (0.026)
Total Secondary	0.052** (0.023)	0.068*** (0.024)	0.225*** (0.045)	-0.097** (0.045)
Reference Only		-0.696 (0.426)	-0.225 (0.495)	-1.806 (1.399)
Little There		-0.893*** (0.285)	-2.226*** (0.364)	0.319 (0.558)
MQ-Score		0.084*** (0.031)	-0.284*** (0.085)	0.216*** (0.070)
Constant	-0.693*** (0.054)	1.457*** (0.557)	1.601** (0.801)	1.589 (1.107)
Observations	1,755	1,755	960	795
Log Likelihood	-1,112.541	-1,058.364	-556.177	-402.046
Akaike Inf. Crit.	2,231.082	2,174.727	1,170.355	862.093

Note:

*p<0.1; **p<0.05; ***p<0.01

Under this definition of “constraint,” Cross’s work would predict that we find “relatively little evidence of much constraint from the reliance on [historical] sources.”¹⁶⁶ These results, however, appear to tell a much more nuanced story. Rather than observing that historical citations have no association with the probability of constraint, we find statistically reliable evidence of a relationship on this outcome for both primary and secondary sources when all Justices are pooled. However, this relationship goes in the opposite direction depending on the type of source cited—primary sources appear to be linked to a decrease in the probability of a cross-partisan vote, while secondary sources appear to be linked to an increase in this outcome.

As suggested by the coefficients of the *Total Primary* variable in Models 1 and 2,¹⁶⁷ one additional citation to a primary source across all Justices and cases referencing the Convention—all else equal—is associated with a 3.8-3.9% approximate decrease in the odds that a Justice will vote against her political priors.¹⁶⁸ Looking at the entire subset pooled together, however, fails to tell the whole story. When broken up by ideological preferences, only those Justices with conservative ideology scores display this negative relationship between citing to primary sources and casting a cross-partisan vote.

166. CROSS, *supra* note 6, at 184.

167. Model 1 reports the outcome of our minimum-specification model, which solely measures the relationship between the counts of primary and secondary sources cited in an opinion in reference to the Convention and the probability to a cross-partisan vote for all Justices. Model 2 measures this same relationship, but includes the aforementioned Justice-level, opinion-level, and case-level controls to account for confounding variables. See *supra* Section II.A.1. The R script used is available at <https://drive.google.com/file/d/1uOiQsZ2LwBcs4zVVRE3h4G3TvKEUCeTq/view?usp=sharing> [<https://perma.cc/M8US-WMKK>].

168. A keen observer may notice that these figures are not explicitly reported in Table 3. That is because logistic regression models do not report the odds but rather the log-odds that an event will occur. See ANDREW GELMAN & JENNIFER HILL, *DATA ANALYSIS USING REGRESSION AND MULTILEVEL/HIERARCHICAL MODELS* 79-80 (Cambridge Univ. Press 2006). To calculate the change in odds, all else equal, we employed the formula: $y_i = e^{\beta_i}$. This formula will be applied to report changes in the respective odds of all subsequent coefficients discussed.

All else equal, an additional primary source citation is associated with about an 8.1% decrease in the odds that a conservative Justice will vote across the aisle. Contrastingly, the citing to primary sources appears to bear no relationship in either direction on the liberal Justices' being constrained.

Observed in a vacuum, these findings not only fail to upset the conclusion that reliance on history fails to "cause ideology to dissipate,"¹⁶⁹ but suggest that citations to primary sources further amplify the likelihood that a conservative Justice's vote will match her ideological preferences. In this sense alone, Cross may be correct—but Cross's study is incomplete. By looking only at the use of primary sources, *The Failed Promise of Originalism* in itself fails to account for the plethora of secondary sources—previous cases, books, and scholarly articles—used by the Justices to inform their understanding of the Convention.

When secondary sources are included, the use of history begins to paint a different picture. As reported in Models 1 and 2, citing to a secondary source characterizing the Convention is associated with a 5.3-6.9% increase in the odds that any Justice will cast a cross-partisan vote, all else equal. And while conservative Justices may be bolstered in keeping the party line when relying on primary sources, Model 3 suggests that a conservative Justice citing to a secondary source bears 25.2% increased odds of reaching the liberal outcome in a case. In contrast, the liberal Justices are slightly less likely to vote across the aisle when citing to a secondary source, as reported in Model 4.

The absence of a deep record of relevant Convention history or only cursory engagement with these sources also appears to undermine a Justice's departing from her political preferences. Across the literature, commentators have criticized a strong reliance on history alone, as "the fragmentariness and contestability of the historical record . . . [grants] substantial discretion" to a judge, who may then

169. CROSS, *supra* note 6, at 184.

fall back on political preferences to fill in the gaps.¹⁷⁰ Our results appear to support this point. Where a Justice's opinion explicitly notes that records of the Convention provide an ambiguous or unhelpful account, as captured by the *Little There* variable, the odds of her voting against her ideological bloc decreases by 59.1%, and by nearly 90% if she is a conservative. Similarly, we find some evidence suggesting that where a Justice makes reference to the Convention without supporting her discussion with a citation, her average odds of voting for the cross-partisan outcome is cut in half, though this finding is not statistically significant at the 0.05 level.

Nevertheless, the record is not always sparse, and the investigation of historical sources does not always appear to be futile. Across all opinions in cases that discuss the Convention, the Justices note that Convention history provides little useful material to work with only about 6% of the time. If anything, the fact that the Justices are far more likely to vote with their ideological side in these cases suggests that absence of historical sources implies the absence of constraint. Therefore, these results should not be seen as an indictment of historical methods per se, but of evidence of the decreased likelihood of constraint where the Court does not—or cannot—engage in rigorous historical reasoning.

And when the Justices do engage in historical reasoning, it appears to be linked across the board to increased odds of voting against their political preferences, especially for conservative-leaning Justices. But whether it “constrains” them, at least according to Cross's conception of the term, largely depends on the type of

170. Berman, *supra* note 5, at 89; see also Norman R. Williams, *The Failings of Originalism: The Federal Courts and the Power of Precedent*, 37 U.C. DAVIS L. REV. 761, 835 (2004) (noting that, in the context of federal courts, “[t]here is a large universe of practices for which the historical record provides no definitive guidance one way or the other”). Although not included in Table 2, *supra*, the coefficient for the control variable for cases involving the judicial power of Article III courts in Model 2 bears a statistically reliable, negative association with the probability of constraint, providing evidence for William's assertion that the paucity of the historical records renders historical reasoning an unhelpful guide in this context.

source on which the Justice relies. As we observe in the models described above, the average Justice's reliance on primary sources is related to a decrease in her probability of constraint, but citations to secondary sources increase this probability, all else equal. Thus, broad criticism that history "may not be the best tool to constrain the wayward judge" fails to appreciate the nuance of the observed relationship between different historical source-types and constraint.¹⁷¹

To further explore these relationships, we now will relax the requirement that a Justice casting a cross-partisan vote is a necessary condition of constraint. Rather, under this definition, a Justice is considered constrained where some other factor besides pure ideology contributes to explaining variances in her voting behavior.¹⁷² If decisions on the merits present the Justices with "unconstrained choice" driven only by policy attitudes,¹⁷³ we would expect to see little relationship between case outcomes and other possible factors, such as historical citations. On the contrary, the models reported in Table 3 below present evidence that the Justices' use of historical sources is relevant for understanding the reasons for their votes in a case.

Models 5 and 6 measure the relationship between the count of references to primary or secondary sources of the Convention cited across all conservative- or liberal-direction opinions in a case, and the probability that the average Justice will reach the conservative outcome. As the results of these models indicate, additional citations to primary and secondary sources in opinions reaching the conservative outcome appear to be associated with an increase in the probability that any Justice will vote in the conservative direction, all else equal. Likewise, additional citations to either source-

171. William Baude, *Originalism as a Constraint on Judges*, 84 U. CHI. L. REV. 2213, 2223 (2018).

172. See BAILEY & MALTZMAN, *supra* note 62, at 1.

173. JEFFREY A. SEGAL & HAROLD J. SPAETH, *THE SUPREME COURT AND THE ATTITUDINAL MODEL REVISITED* 96 (2002).

type in the liberal opinions relates to a decrease in the probability a Justice will reach the conservative outcome (and thus, an increase in the probability of her voting for the liberal side).

Table 3

	<i>Dependent variable:</i>			
	Conservative Vote			
	(5)	(6)	(7)	(8)
Conservative Primary	0.043** (0.019)	0.055*** (0.020)	0.137*** (0.044)	-0.003 (0.031)
Conservative Secondary	0.153*** (0.039)	0.167*** (0.045)	0.073 (0.066)	0.306*** (0.062)
Liberal Primary	-0.034** (0.014)	-0.034** (0.016)	-0.008 (0.022)	-0.067*** (0.022)
Liberal Secondary	-0.042* (0.023)	-0.057* (0.030)	-0.113*** (0.040)	0.023 (0.053)
MQ-Score		0.393*** (0.040)	0.293*** (0.086)	0.241*** (0.073)
Reference Only		-0.109 (0.326)	0.472 (0.490)	-1.652 (1.379)
Little There		0.970*** (0.237)	2.187*** (0.376)	0.003 (0.646)
Constant	-0.223*** (0.057)	-0.231 (0.583)	-1.793** (0.781)	1.553 (1.134)
Observations	1,755	1,755	960	795
Log Likelihood	-1,183.124	-1,011.385	-539.938	-390.993
Akaike Inf. Crit.	2,376.247	2,084.771	1,141.877	843.986

Note:

*p<0.1; **p<0.05; ***p<0.01

These relationships hold in Model 6, even when the controls—including the *MQ-Score* variable measuring Justice ideology—are

added into the calculation. The positive relationship between this variable, which reflects a stronger conservative ideology the greater its value, and the outcome of a conservative vote expectedly suggests that the more conservative in ideology a Justice is, the greater the probability of her voting for the conservative side.¹⁷⁴ As such, a Justice's political ideology likely matters in influencing the outcome of her vote—but it is not the *only* factor that matters. The statistically reliable coefficients for both source types suggest that these factors regarding the use of history are also relevant in explaining voting behavior, independent of ideological preference alone.

By looking at these outcomes for the subsets of only the conservative or liberal Justices, we can observe further evidence of how Justices of differing ideologies may be constrained by these citations. Model 7 observes this relationship for only Justices with a conservative-leaning, or positive, Martin-Quinn Score. These outcomes indicate that the additional citation to a primary source in conservative opinions is linked to a 14.5% increase in the odds that a conservative Justice votes with the conservative side, holding all other variables—including ideology—constant. Not only is this finding consistent with Model 3's finding of a negative relationship between conservatives citing to primary sources and cross-partisan votes, but also evidence of such sources bearing a relationship to voting outcomes that cannot be described by mere politics. Similarly, just as Model 3 found evidence of a positive relationship between secondary sources and a conservative casting a cross-partisan vote, Model 7 estimates that an additional citation to a secondary source in a liberal opinion is related to a 10.7% decrease in the odds that a conservative Justice will vote for her ideological side. Lastly, we do not find any reliable evidence of any relationship between citations to secondary sources in conservative opinions, or to

174. The opposite is also true in that the lower a Justice's Martin-Quinn Score, and thus the more liberal the Justice's ideology, the less probable it is that she will cast a conservative vote.

primary sources in liberal opinions, and the direction of a conservative Justice's vote.

With respect to secondary sources, the inverse appears to be true for the liberal Justices. As shown in Model 8, a conservative opinion's additional use of a secondary source is linked to a 35.8% increase in the odds of garnering a liberal Justice's vote. And like Model 7's finding of a positive relationship between citations to primary sources in the conservative opinions and conservative Justices casting conservative votes, Model 8 suggests that primary sources in liberal opinions bear a positive relationship on liberal Justices casting liberal votes.

Taken together, all these models suggest that determining the relationship between citations to the Convention and vote directions may depend on the type of source used and the ideological valence of the opinion in which it is cited. When viewing the Justices all together, it appears that both types of sources matter across opinion directions of both ideologies. In this sense, history—beyond unbridled politics—could be constraining on at least some of the Justices, some of the time. But when one focuses in on each ideological subset of Justice's, one observes a more nuanced relationship—same-ideology citations to primary sources are associated with greater odds of voting with the outcome of one's ideology, and cross-ideology citations to secondary sources are associated with lesser odds. This finding holds true for both conservative and liberal Justices and is generally congruous to Models 1-4's results with respect to cross-partisan votes.

The foregoing analysis provides us with evidence to challenge the conclusion that “[h]istory cannot serve its desired goal of constraining judges.”¹⁷⁵ At least in the context of the Constitutional Convention, such an absolutist assertion neglects the nuance of the relationship between history and constraint, and its variation

175. Erwin Chemerinsky, *History, Tradition, the Supreme Court, and the First Amendment*, 44 HASTINGS L.J. 901, 902 (1993).

depending on the type of source used and the ideology of the Justice using it.

III. HISTORY THAT CONSTRAINS

Our empirical results provide evidence for the claim that historical sources may, in fact, constrain—although it appears to be an unexpected type of historical source. Secondary, not primary sources, bear a strong, positive relationship to the average probability of constraint according to the pooled regression models. Whether in casting a cross-partisan vote or choosing to vote with the opinion because of its historical citations, the secondary sources appear to persuade, stay, and cabin judicial discretion. The reasons why primary sources are not doing the work may lie in the thinness of legally relevant Convention material, but more likely derive from a discomfort with primary sources or, more concerningly, motivated reasoning. In this vein, secondary sources may be harder to manipulate.

In this Part, we examine three implications of these findings. First, our results provide evidence for the belief that history indeed matters and vindicates its use and consideration as our law. This being the case, our study requires an accounting of two things: why the distinction between the constraining impact of secondary versus primary sources, and why history. As to the former, historical reasoning is not just some “neutral principle” that can direct judges to “transcend any immediate result that is involved”¹⁷⁶—in fact, our results suggest that, at least when primary sources are used, that is not always the case. As to the latter, the Court’s use of historical sources to guide its rulings suggests that there is certainly a positivistic impulse here. But acknowledging that does not answer the previous question of why Justices feel the impulse to turn to history. This turning, as with other turnings to mythical origin stories,

176. Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 19 (1959).

exhibits an intrinsic and deeply rooted desire in the American constitutional ethos to establish a profound and enduring connection with the Founders.¹⁷⁷

Second, our results demonstrate that primary sources are not king of the realm. In this sense, Cross is vindicated. Primary sources fail to have any significant pull—and may actually be dangerous in diminishing constraint as judged by cross-partisan voting. However, considering that history is now required as a matter of course in at least some areas of constitutional interpretation,¹⁷⁸ these results should prompt the bench and bar to engage more deeply in primary sources, not less. If indeed their lack of staying power is due to unfamiliarity, efforts should be made to enhance familiarity through the development and expansion of specific training and tools, enabling primary sources to effectively constrain.

Finally, these results indicate that history's relationship with case outcomes is most pronounced when it overlaps with *stare decisis* or, more precisely, when the Court cites to a prior Court's historical analysis. This highlights the potency of history in shaping legal decisions when it is woven into the fabric of precedent and the continuity of judicial reasoning.

With the ascendance of "history and tradition" to the forefront of constitutional interpretation, understanding the use and ramifications of historical analysis has become all the more pressing.¹⁷⁹ By identifying the strengths and shortcomings of past Courts in their applications of the historical modality, we hope to illuminate how judges can learn from past uses of past sources to refine and enhance their own use of history in legal decision making.

177. See AKHIL REED AMAR, *THE WORDS THAT MADE US: AMERICA'S CONSTITUTIONAL CONVERSATION, 1760-1840*, at 676 (2021).

178. See *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228, 2253–54 (2022); *Kennedy v. Bremerton Sch. Dist.*, 142 S. Ct. 2407, 2428 (2022); *N.Y. State Rifle & Pistol Ass'n v. Bruen*, 142 S. Ct. 2111, 2126 (2022).

179. See *Bruen*, 142 S. Ct. 2111, 2128.

A. *Why History Constrains*

We now turn to the study's mechanism, or our theory of why we obtained our results before detailing five of its major consequences.

1. Why primary sources display no evidence of cross-partisan constraint

Three possible explanations present for the negative relationship between Justices' use of primary sources and cross-partisan votes observed in our results: the paucity of useful information in Madison's Notes, the Justices' lack of training in using historical sources, and the use of historical sources as a means to reinforce partisan ends. We evaluate each hypothesis in turn.

a. The thinness of Madison's notes

One fairly simple reason why primary sources do not correlate with Justices voting across party lines is the nature of the underlying source: Madison's notes contain little legally relevant interpretive material. Thus, these results may be fairly limited to these particular primary sources.

Although many delegates took notes, the main recorder of the Convention was James Madison. He was young, unmarried, and had yet to inherit the family estate, his father still being alive.¹⁸⁰ He therefore had time on his hands to act as scrivener. Madison also came to the Convention with an agenda. His pet priorities included a legislative veto over state laws and popular representation in both

180. See JOHN KAMINSKI, *JAMES MADISON: CHAMPION OF LIBERTY AND JUSTICE* 21-24 (2017). Kaminski comments that, on arrival to Congress in 1781, Madison was unfettered by marriage, managing the plantation, or money concerns. *Id.* These circumstances continued until 1794, when his brother died in 1793, Madison married Dolley Payne Todd in 1794, and, finally, in 1801 when James Madison Sr. died. *Id.* at 84, 86. Madison was not the youngest delegate of the Convention who, at thirty-six was older than Alexander Hamilton (32), Gouverneur Morris (35) and Virginia Governor Edmund Randolph (34), but he was in the youngest third of the delegates. See Meet the Framers of the Constitution, NAT'L ARCHIVES, <https://www.archives.gov/founding-docs/founding-fathers> [<https://perma.cc/UXQ6-8A9G>] (last visited June 13, 2023).

houses of Congress.¹⁸¹ Yet neither of these provisions made it into the final Constitution. When popular representation failed in the Senate mid-Convention with the vote of July 16 solidifying the Great Compromise¹⁸² and the legislative veto died the next day,¹⁸³ Madison felt the sting. These disappointments, coupled with failing to gain a seat on the prestigious five-member Committee of Detail tasked to draft the Constitution—Governor Randolph was chosen from Virginia rather than him¹⁸⁴—seems to be a turning point for Madison. Thereafter, Madison writes darkly to Jefferson in Paris about the Constitution’s “embarrassment[s].”¹⁸⁵ After July 17, Madison’s notes thin per proposal.¹⁸⁶ Scholars have attributed this to Madison being sick,¹⁸⁷ tired,¹⁸⁸ and overworked with committee assignments.¹⁸⁹ It might also have been that Madison was depressed,

181. Before the Convention, Madison wrote to Edmund Randolph about seven objectives, Letter from James Madison to Edmund Randolph (Apr. 8, 1787), in 2 THE WRITINGS OF JAMES MADISON 336–40 (G. Hunt ed., 1901) and recorded his most prized proposal—a Congressional veto on state legislation—in what was meant as an introduction to his notes on the Constitutional Convention. *Id.* at 391–412. These pet provisions made it into the fifteen resolutions presented as part of Edmund Randolph’s Virginia Plan. *Madison’s Notes* (May 29, 1787), in 1 FARRAND, *supra* note 96, at 20–22.

182. *Madison’s Notes* (July 16, 1787), in 2 FARRAND, *supra* note 96, at 15–16.

183. *Madison’s Notes* (July 17, 1787), in 2 FARRAND, *supra* note 96, 28.

184. *Madison’s Notes* (July 24, 1787), in 2 FARRAND, *supra* note 96, at 106.

185. Letter from James Madison to Thomas Jefferson (Sept. 6, 1787), in 10 PAPERS OF JAMES MADISON, *supra* note 181, at 163–64; Letter from James Madison to Thomas Jefferson (24 Oct. 1787), in 10 *id.* at 214–15; cf. LANCE BANNING, THE SACRED FIRE OF LIBERTY: JAMES MADISON AND THE FOUNDING OF THE FEDERAL REPUBLIC 190, 232 (1995) (discussing these correspondences).

186. The volume of notes produced between August 6, 1787 when the Committee of Detail reports and September 17, 1787 when the Convention adjourns, covering 37% of the Convention’s summer, constitutes only a small fraction of the notes Madison took.

187. MARY SARAH BILDER, MADISON’S HAND: REVISING THE CONSTITUTIONAL CONVENTION, 141–42 (2015); see Letter from James Madison to Thomas Jefferson (July 18, 1787), in 3 FARRAND, *supra* note 96, at 60; Letter from James Madison to James McClurg (c. Aug. 25, 1787) in 10 THE PAPERS OF JAMES MADISON, *supra* note 181, at 157; Letter from James McClurg to James Madison (Sep. 5, 1787), in 5 *id.* at 162.

188. JACK RAKOVE, ORIGINAL MEANINGS: POLITICS AND IDEAS IN THE MAKING OF THE CONSTITUTION 82 (1997).

189. BILDER, *supra* note 187, at 142–44.

especially given his apparent failures to find permanent place for his most cherished ideas and solidify his reputation within the body he had worked to establish and preserve for posterity.¹⁹⁰ Regardless, his work product suffered from this point on. This is unfortunate, as it is only after a draft is produced by the Committee of Detail on August 6th that the Convention was able to debate the legally significant text of the Constitution, or what would become its clauses. For the Supreme Court, there is simply not much there in the Convention's most comprehensive records to grasp and parse.

In fact, the Court has taken notice of the paucity of legally relevant material in Convention records. Time and again, opinion writers would look to Convention records and note how little was there. This happened with enough frequency that we decided to record the phenomenon. We recorded *Little There* each time a Justice made a comment on how thin the record was from which they could draw any meaning for a particular clause. In roughly 10% of opinions, or 35 times within our complete dataset from 1790 to 2021, a Justice looked at Convention records and made a comment about how unavailing they were for the legal question before them. The first instance was Justice Campbell's dissent in *Jackson v. The Magnolia* in 1857,¹⁹¹ and the most recent was in Justice Kennedy's

190. See *Notes on Ancient & Modern Confederacies*, in 9 THE PAPERS OF JAMES MADISON, *supra* note 181 (“[Madison] was keenly disappointed when [his Congressional veto] was rejected by his colleagues at Philadelphia and was fearful that the plan adopted there would be short-lived.”); see also KAMINSKI, *supra* note 180, at 49 (“Madison was sorely disappointed in the final product. Actually, he believed he had failed.”)

191. *Jackson v. The Magnolia*, 61 U.S. (20 How.) 296, 332 (1868) (Campbell, J., dissenting) (“The clause ‘all cases of admiralty and maritime jurisdiction’ appears in the draught of the Constitution imputed to Charles Pinckney, and submitted at a very early stage of the session of the Convention. It was reported by the committee of detail in their first report, and was adopted without debate. In one of the sittings, in an incidental discussion, Mr. Wilson, of Pennsylvania, remarked: ‘That the admiralty jurisdiction ought to be given wholly to the national government, as it related to cases not within the jurisdiction of a particular state, and to a [scene] in which controversy with foreigners would be most likely to happen.’”).

majority opinion in *Zivotofsky v. Kerry* in 2015.¹⁹² Although the number of instances where the Justices commented on the record's thinness was slight, it is a persistent, consistent comment within our dataset, and a testament to the lack of legal depth in the Constitutional Convention's records.

The thinness of Madison's later notes also renders them less legally relevant. With rare exceptions,¹⁹³ Justices are therefore not able to rely on the Constitutional Convention's records to illuminate the Constitution. Frank Cross noticed the consequences of the record's thinness in his data: "Farrand is a relatively important originalist source but not one that clearly commands the Court's devotion. It has a remarkably high percentage of its citations in concurrence or dissent."¹⁹⁴ In all, the thinness of Madison's notes makes them unreliable as a source of meaning for the Constitution.

That there is little legally relevant material in Madison's notes does not fatally undermine the Convention's significance, however. Finding little in the record worthy of emulation, the Justices frequently imported legally relevant content from *The Federalist* and other sources authored by Convention delegates. That a little under half of all historical primary sources used in discussing the Convention were *not* Convention records (430/1006) is telling. Justices wanted to use the Convention but, finding its primary record sparse, would extract legal significance from what they considered the next

192. *Zivotofsky v. Kerry*, 576 U.S. 1, 12 (2015) ("As Zivotofsky notes, the Reception Clause received little attention at the Constitutional Convention.").

193. See, e.g., *Powell v. McCormack*, 395 U.S. 486, 548 (1969) (resting on "the intention of the Framers" as derived from Madison's *Notes* and "an examination of the basic principles of our democratic system"); *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 811 (1995) ("Given the Framers' wariness over the potential for state abuse, we must conclude that the specification of fixed qualifications in the constitutional text was intended to prescribe uniform rules that would preclude modification by either Congress or the States.").

194. CROSS, *supra* note 6, at 149 (italicization of Farrand omitted).

best thing, *The Federalist*.¹⁹⁵ Justices leaned on Convention delegates who spoke in state ratification debates or elsewhere about the Convention. Such occurred in the *Legal Tender Cases*, where Maryland delegate Luther Martin's later recollections about Convention dealings was quoted at length to shore up the dissent's interpretation of Congress' power to "emit Bills of Credit."¹⁹⁶ Justices, looking to derive Constitutional meaning from the Convention's inner workings, imported that meaning from non-Convention historical records.

The second half of the Convention did not go as Madison planned, and his dashed hopes possibly contributed to his *Notes* of the Convention thinning out near the end when they would have been the most legally relevant. The thinness of his notes has been remarked upon repeatedly by the Court, who have chosen not to rely on them for the Constitution's meaning, looking instead to other historical sources to supply the record's lack.

b. Lack of expertise

If the results here replicate beyond the specific tested source, another potential, benign reason for the perceived counterproductive use of primary sources may lay in the Justices' lack of expertise as historians. Although some Justices have studied history at some level,¹⁹⁷ no current or former Justice has ever become a professional historian, nor has the Court ever employed a professional

195. See, e.g., *Goldstein v. California*, 412 U.S. 546, 555 (1973) ("While the debates on the [Copyright Clause] at the Constitutional Convention were extremely limited, its purpose was described by James Madison in the *Federalist*").

196. U.S. CONST. art. I, § 10; see also *Legal Tender Cases*, 79 U.S. (12 Wall.) 457, 544 (1870) ("It was said there can be no question of the power of this government to emit bills of credit.").

197. For example, Justices Kagan, Kennedy, Scalia were all undergraduate history majors. See Carol Symes., *Famous History Majors*, U. ILL. DEP'T OF HIST., <https://history.illinois.edu/resources/careers/famous-history-majors> [https://perma.cc/78HZ-DV49] (last visited May, 5, 2023).

historian.¹⁹⁸ The resultant lack of familiarity with primary historical sources may lead to a lack of respect for the weight of history.

Primary sources are the currency of professional history. The hallmark of a good historian is time spent in archives culling through manuscripts. In the months and years preceding archive trips, historians learn the relevant language, including the pedestrian vernacular and signs and symbols unique to the era, and how to read the handwriting of their subject. Experienced historians know which archives hold relevant materials, and how to review holdings beforehand in order to plan research trips. They understand the mechanics of archival research—how to time meals to maximize research time, what resources to bring, and how and what documents to canvass in a given sitting.

Beyond knowing how to traverse physical manuscripts, historians are also familiar with digital collections and documentary editions relevant to their subject. They are intimately familiar with their subject in all ways, and literate in the surrounding primary and secondary sources such to place relevant facts in correct context. They understand source hierarchy according to time lapsed from an event and the indicia of source integrity, including the reliability of an event's scribes. They also understand the relevant secondary literature, which is most reliable, and which can provide the best primary source leads for their subject.

Historians are also aware of history's many holes. They know that in many areas, the historical record fails, leading to knowledge gaps. Or it can contradict itself, particularly where various sources record the same event differently. Historians know how to synthesize and transparently engage, acknowledge, and, where appropriate, resolve such gaps and inconsistencies.

Because no Justice has ever had professional historical training, it is fair to say that they do not know how to do most of the above

198. The person who has come closest to being the Court's historian is Maeva Marcus. See *THE DOCUMENTARY HISTORY OF THE SUPREME COURT OF THE UNITED STATES* (Maeva Marcus ed., Columbia University Press 1992).

things. More, while there are standards and theories for dealing with analogous legal problems, none have been imported from history to adequately deal with history's failings. In short, it is fair to say that Justices do not have the tools or training to engage in history in the way historians can and do.

This lack of expertise and the adjacent gap in standards and tools may translate into a lack of legal respect for the weight of history. Without serious engagement, including time spent in archives culling through relevant materials, Justices and those who support them may not appreciate history's depth nor difficulty. Casual, armchair historianship may lead a Justice, clerk or librarian to fail to appreciate the difficulty of the historical question at play, including the complexity of the relevant historical record.

This problem is reflected in our results for "references without citation." Whereas Cross's study included only citations to primary sources, we recorded references to the Constitutional Convention and corresponding citations information. This allowed us to capture those references to the Convention which had no corresponding citations. For this category of opinions, a Justice appeared to be less likely to cast a cross-partisan vote. This meant that Justices who did not emerge from their armchairs to do any historical work to support their reference were more or as likely to vote with their political priors, and provided evidence that no engagement with history had, perhaps unsurprisingly, negligible impact. It is quite possible that this result has a corollary in the impotence of primary source constraint. Casual engagement with history may lead to less understanding, appreciation, and respect for history, which in turn may correlate to its inability to constrain, explaining our results.

c. Motivated or reinforced reasoning

The more sinister explanation for primary sources not doing the work of cross-partisan constraint is that the Justices are doing law-office history à la Alfred Kelly. According to this explanation, such historical usage provides pretty window-dressing for decisions

motivated by political ideology, not law. As Justice Scalia has famously written, such selective, politically motivated use of sources is comparable to “look[ing] over the heads of the crowd and pick[ing] out your friends.”¹⁹⁹

To be clear, it is the view of these authors that such an exercise of judicial will rather than judgment displays the judiciary at its worst. It runs contrary to the design of the Constitution, wherein the “least dangerous” branch was to have “no influence over either the sword or the purse” but “merely judgment.”²⁰⁰ It is the emphatic duty of the nine Justices of the Supreme Court to “say what the law is,”²⁰¹ not sit as a policy-making supra-legislature. Such a role is antithetical to the rule of law and cannot be justified under the current constitutional order.

If this poor practice holds true and law-office history is the best explanatory mechanism for our results, it is not the province of only one side of the Court. Our results demonstrate that more citations to primary sources is linked to conservatives voting more conservatively *and* liberals to vote more liberally. If one side of the Court is guilty of the sin of using history instrumentally to accomplish political ends, both are. There can be no unilateral finger-wagging here.

Yet perhaps we should not be so quick to judge. As Bailey and Maltzman have carefully illustrated (as referenced above), Justices may appear to be voting with their political priors when in fact they have arrived at the same decision for other reasons, including legal reasons. “The first implication of our results is that we should be cautious about over-imputing policy motivations from Supreme Court cases that divide along ideological lines. An ideologically divided vote on the Court does not rule out the logical possibility that

199. ANTONIN SCALIA, *A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW* 36 (1997).

200. *THE FEDERALIST NO. 78*, at 465 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

201. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803).

justices were substantially influenced by legal factors.”²⁰² Bailey and Maltzman’s results then prove this logical possibility true.²⁰³

Our results show that something analogous is happening here. Yet instead of providing for an alternative explanation for votes along ideological lines, our results indicate that history is an additional, reinforcing impetus to vote along ideological lines. In our opinion-level models, the opinions that used the most primary sources garnered the most votes, and significantly so. Conservatives tended to vote more conservatively, and liberals tended to vote more liberally. But not to extremes. As shown by what happens in the absence of historically relevant material by the *Little There* statistic, Justices tend to vote even more with their priors. These results show that recourse to history can reinforce Justices’ political priors up to a point. Under the definition of constraint as a force other than policy that impacts a vote, our results could also be interpreted as the Justices being constrained by history in ways that correspond to their political priors. In this way, history can provide Justices with reinforcement for policy leanings rather than motivation to vote against them.

In reality, the most likely explanation is all of the above. In predicting cross-party voting, perhaps the thinness of Madison’s *Notes* makes them particularly less constraining. Justices have no professional training in history and therefore may misunderstand the complexity and power of primary sources, and perhaps Justices are influenced by *both* policy and history when interpreting the Constitution. It is not only history that is complex, but the Justices’ rationales. All of the above factors play into the mix in explaining the impotence of primary sources, especially those of the Constitutional Convention.

202. BAILEY & MALTZMAN, *supra* note 62 at 62.

203. *Id.* at 64–79.

2. Why secondary sources are associated with cross-partisan constraint

While primary sources were *not* positively correlated with cross-partisan votes, secondary sources were. Secondary sources thus prove an unaccounted, lurking variable in Cross's study, and correspondingly provide strong evidence of history's potential constraining influence.

Yet why would secondary but not primary sources constrain? Symmetrical reasons to those presented above are likely at play. First, secondary sources are accessible in every sense of the word: they generally require no translation nor transcription, they are written in modern prose and thus are more readable, and can be easily found in libraries or, if a legal journal article, in one or two databases. Justices, clerks, and librarians are trained in accessing such databases and libraries. Considering that most secondary sources in this study are legal in nature, the Court is clearly leaning into the physical and digital libraries and databases with which they have ready access. Because there is greater familiarity, it may be easier for the Justices to understand these sources and therefore be swayed by them.

Second, the familiarity of secondary sources, particularly the category of secondary sources most heavily used by the Court, may lend them greater influence. Whether it be article, book, or a former Court acting as historian (as they did in about 87% of all previous cases cited by the Court when referencing the Convention), Justices are accustomed to using these types of sources. Greater familiarity lends itself to understanding, and understanding to persuasion.

This is particularly true when the Court cites to a former Court acting as historian of the Convention. Not only is the Court familiar with itself and it is therefore more easily persuaded: here is a secondary source that also has precedential value. In this situation, the clarion call of this secondary sources is almost irresistible, as the historical value of the former interpretation is reiterated and

strengthened by its precedential value. This category of sources is the most prevalent in our study because it is the most influential.

Finally, the aggregate quality of secondary sources makes them harder to manipulate. Good historical work requires pooling dozens if not hundreds of primary sources together (painstakingly found in archives or digital or published equivalents) to synthesize a coherent story. Secondary sources arrive ready-made off-the-shelf products that can present facts and context together with little to no heavy lifting.

Such monoliths are hard to manipulate. They present a completed story or theory of history. Primary sources provide pieces of the greater whole. Standing alone, they are easier to sift, sort, and use in service to a variety of legal arguments. When pooled, they more readily stand on their own and cannot be swayed or bent in support of legal claims.

3. Why history

Our results suggest a turn to history. That secondary sources seem to constrain Justices to vote across party lines and that more primary sources predict majority wins both evince this. This turn is also witnessed in our descriptive results by the persistent, consistent *Little There* statistic referenced above. As reflected in this statistic, Justices cite to, but do not rely on, the Convention, essentially showing their historical work. Why show their work at all? Why the turn to history?²⁰⁴

The inclination toward history partakes of a natural human instinct that transcends the nine Justices now (or previously) serving on the Supreme Court, and even the legal profession itself. The quest for origin stories is made manifest in a variety of cultures, practices, and peoples throughout time. Indeed, the turn to history

204. It is important to note at this point that this question is separate and distinct from the normative value of history in constitutional interpretation, which has been canvassed by other authors. The question raised by our results is not *whether* history should be used, but *why* it is being used.

is of Biblical proportions, wherein the hearts of children instinctively turn to the fathers.²⁰⁵ Witness genealogical work, wherein individuals seek to understand where they came from by researching their forefathers. Since it became democratized in the 1990s when databases went online, genealogy has become the second most popular hobby in the United States.²⁰⁶ Before the age of the Internet, the Chinese have long been able to trace their lineage to an “honored ancestor,” and ancestor worship features prominently in that culture. One of five pillars of Islam is the *hajj*, or pilgrimage which re-enacts the journey of Hajar to find water for Ishmael and later followed by the prophet Muhammad. In an analogous vein, Jews find identity and purpose in their origin story of deliverance, exodus, and covenant through sacred rituals and celebrations. This is reminiscent of the Hebrew tradition of *zakhor*, wherein historical memory is a fixation on “primeval beginnings and paradigmatic first acts . . . [T]hrough the repetition of a ritual or the recitation or re-enactment of a myth, historical time is periodically shattered and one can experience again, if only briefly, the true time of the origins and the archetypes.”²⁰⁷ For Poles, despite the disintegration of Poland’s political borders and autonomous government through partition in the late-eighteenth century, their 1791 constitution provided a political origin story that helped forge them as a people until they could reclaim their independence and national identity more than a century later.²⁰⁸ The British are similarly obsessive

205. *Malachi* 4:6.

206. Gregory Rodriguez, *How Genealogy Became as Popular as Porn*, TIME MAGAZINE (May 30, 2014), <https://time.com/133811/how-genealogy-became-almost-as-popular-as-porn/> [<https://perma.cc/DQ55-S9FY>]; Alan Farnham, *Who’s Your Daddy? Genealogy Becomes \$1.6B Hobby*, ABC NEWS (Oct. 24, 2012), <https://abcnews.go.com/Business/genealogy-hot-hobby-worth-16b-mormons/story?id=17544242> [<https://perma.cc/994Z-TKAE>].

207. YOSEF HAYIM YERUSHALMI, ZAKOR: JEWISH HISTORY AND JEWISH MEMORY 6–7 (1982).

208. Poles still celebrate May 3 as “Constitution Day.”

about their origin stories, found in the tales of King Arthur, William the Conqueror, and the Great Charter.

In many ways, the turn to the Constitution's primordial history is nothing more than a fulfillment of the instinctual search for origins. Reaching for the history of the Constitution's creation is a turn to political fathers and America's founding scripture or covenant.²⁰⁹ This impulse is captured in part by Michael Dorf's "ancestral originalism," wherein current generations "look to the Founding for the genesis of a political philosophy that continues to influence us."²¹⁰ We seek to understand the legal past so that we can understand the legal present.

And yet it is more than instinct and understanding. The Justices are turning to history because they recognize the validity of the Framing contract and seek to re-enact the paradigmatic first act. The validity of the Constitution as fundamental law did not come about through ordinary politics.²¹¹ Its legitimizing procedure began with the extra-legal Convention but then made recourse to original constituents through ratification and gained the imprimatur of existing structures, as the Confederation Congress and state legislatures all played rolls in calling for state ratifying conventions.²¹² Consider Hamilton's framing in *Federalist* 78: "A constitution is, in fact, and must be regarded by judges as, a fundamental law....the Constitution ought to be preferred to the statute, the intention of the people to the intention of their agents."²¹³ Justices recognize the validity of this framing pageant and the fundamental law it produced when they make recourse to its history. But more, like *zakhor* or a *hajj*, Justices not only recognize the Constitution as fundamental law, but, in a sense, seek to participate in America's founding

209. Cf. PAULINE MAIER, *AMERICAN SCRIPTURE: MAKING THE DECLARATION OF INDEPENDENCE* (1998).

210. Michael Dorf, *Integrating Normative and Descriptive Constitutional Theory: The Case of Original Meaning*, 85 GEO. L.J. 1765, 1803 (1997).

211. BRUCE ACKERMAN, *WE THE PEOPLE: FOUNDATIONS*, 230-65 (1991).

212. PAULINE MAIER, *RATIFICATION* (2010).

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

ritual and become part of it by making a pilgrimage to the past. In this way, the Justices' history-seeking is a repetition of that history in the quintessentially human quest to participate, reify, and even sanctify our collective political memory.

B. The Consequences of History that Constrains

Now that possible mechanisms for our results have been set forth, this Section will now canvass three consequences of history that constrains. The first is that our results support a positivist view of history as an interpretive method—for all Justices on the Supreme Court sitting now and since the Warren and Burger Courts. The second is that primary sources are not the coin of the realm, and don't seem to do the job assigned them by originalists. In this sense, Cross is vindicated, but only in part. This may be due to the missing, lurking variable in his study of secondary sources and the fact that primary sources seem to impact both sides of the Court by reinforcing their political priors. This should act as a clarion call for legal historians to work to provide the kind of secondary sources that do constrain. Additionally, considering these results for primary history and that such is now required constitutional reading for bench and bar, both should scale up their historical credentials. Finally, our results suggest that history is most potent when it overlaps with stare decisis, or when the Court acts as historian, making history and stare decisis in this regard mutually reinforcing rather than exclusive.

1. History matters

The first consequence of this study is that history matters in constitutional interpretation. Not only are the Justices doing it, but it impacts their decision-making. This undergirds a positivist view of history as a modality of constitutional interpretation. As a starting position, this conclusion can only be true if our results are generalizable. Though we focus on the Convention, our results are not limited to its records. Primary sources captured in our data embrace

The Federalist, state ratification debates, Congressional Debates, letters and other historical material. Secondary sources include books, articles, and previous cases discussing history. Thus, at least those sources bearing on Justices' votes extend far beyond the Convention. Although its prequel did not contain any regression analysis, *Pre-"Originalism"*'s descriptive findings also demonstrated the Court's use of a broad range of sources over time.²¹⁴ Also, because the Convention is disfavored by most forms of new originalism (as a source of Intentionalism rather than Original Public Meaning),²¹⁵ and originalism constitutes one of the Court's main interpretive theories employing history, it is possible that other primary sources would have a more constraining relationship.

In the context of the Convention, our results underscore history as "our law."²¹⁶ In contrast to William Baude, we do not specify that *originalism* is our law, since, as discussed above, historical sources can be used by any interpretive theory that employs history.²¹⁷ Yet our results certainly show that interpreting the Constitution through the lens of history is an accepted, possibly even preferred modality of the Court.²¹⁸ This is more than genuflection, or Barnett's "gravitational force,"²¹⁹ but a genuine, earnest engagement by the Court in the practice of history.

And history is not the law of only one side of the Court. Our results make clear that the use of secondary historical sources is highly correlated with cross-party voting for *both* liberal and conservative wings of the Court. The use of primary sources appears to reinforce partisan voting for both sides as well. Although the current political-party orientation did not coalesce until the 1930s, citation to sources of the Convention has never been the exclusive

214. See Updike Toler & Cecere, *supra* note 14.

215. Dorf, *supra* note 210, at 1800.

216. Cf. William Baude, *Is Originalism Our Law?*, 115 COLUM. L. REV. 2349 (2015).

217. *Id.*

218. Cf. Jamal Greene, *Profiling Originalism*, 111 COLUM. L. REV. 356 (2011).

219. Randy E. Barnett, *The Gravitational Force of Originalism*, 82 FORDHAM L. REV. 411, 431 (2013).

province of one particular political strain or viewpoint.²²⁰ This fact holds in the modern era. Justices from all political orientations have cited to the Convention throughout the Court's history, and, since the development of the current two-party system, the constraining relationship has held. History is therefore not merely a conservative endeavor.

More, this study further clarifies that the use of constitutional history did not begin with the Rehnquist Court. Far from it. The descriptive results of this study show that the Court has made use of the Constitutional Convention in interpreting the Constitution almost from its inception. The first reference to the Constitutional Convention was in 1816 in *Martin v. Hunter's Lessee* prior to the publication of any records.²²¹ Although the *Official Journal* was published thereafter in 1819,²²² the Court did not cite to any specific records until 1843 after Madison published his notes.²²³ Citations to both primary and secondary sources for the next 110 years averaged just over 50 citations for each Court.²²⁴ Bringing up this average were the Taney and Stone Courts, which cited to primary and

220. Cf. *id.* at 147.

221. 14 U.S. (1 Wheat.) 304, 347–48 (1816) (“This is not all. A motive of another kind, perfectly compatible with the most sincere respect for State tribunals, might induce the grant of appellate power over their decisions. That motive is the importance, and even necessity, of uniformity of decisions throughout the whole United States upon all subjects within the purview of the Constitution. Judges of equal learning and integrity, in different States might differently interpret a statute, or a treaty of the United States, or even the Constitution itself; if there were no revising authority to control these jarring and discordant judgments and harmonize them into uniformity, the laws, the treaties, and the Constitution of the United States would be different in different States, and might perhaps never have precisely the same construction, obligation, or efficacy in any two States. The public mischiefs that would attend such a State of things would be truly deplorable, and it cannot be believed that they could have escaped the enlightened convention which formed the Constitution. What, indeed, might then have been only prophecy, has now become fact; and the appellate jurisdiction must continue to be the only adequate remedy for such evils.”).

222. OFFICIAL JOURNAL OF THE CONSTITUTIONAL CONVENTION, *supra* note 77.

223. See *Nelson v. Carland*, 42 U.S. 265, 271–72 (1843) (Catron, J., dissenting).

224. See *supra* Figure 7 and accompanying text.

secondary sources when discussing the Convention in excess of 80 times each.

This study confirms that the increased use of history pre-dates the rise of originalism. Beginning with the Warren Court, the Justices began using the Convention at a much higher rate. In fact, the regular rate increased by 4x, or 2x of the Taney and Stone Courts. Beginning with Chief Justice Warren's appointment, the Justices used more than 200 sources per Court when discussing the Convention. Combined citations for primary and secondary sources topped more than 550 during the Burger and Rehnquist Courts, and primary citations reached their peak at over 100 citations during the Burger Court. These findings are supported by *Pre-“Originalism,”* which showed high uses of all constitutional sources beginning with the Warren and Burger Courts,²²⁵ and by other studies, including Cross's book.²²⁶

These studies show that history is our law, and its use in constitutional interpretation has been continual and unattached to any political party on the Supreme Court since its inception. This historical usage cannot be called originalism, as it predated originalism's conception by Edwin Meese and its deployment by the Rehnquist and especially Roberts Court.²²⁷ This finding, supported by other studies, reorients our understanding of originalism's provenance. Although originalism was designed as a means to cabin the activism of the Warren and Burger Courts, they used history first. Thus, originalism used the tools of activism to promote restraint.²²⁸

2. Primary sources are not doing the work

The second consequence of this study is that it does not appear that primary sources are not doing the job assigned to them by

225. Updike Toler & Cecere, *supra* note 14, at 319–20.

226. CROSS, *supra* note 6, at 142–51.

227. DAVID STRAUSS, THE LIVING CONSTITUTION 31 (2010).

228. A follow-on study analyzing the Warren and Burger Courts' use of constitutional history in full is anticipated by the lead Author on this Article.

originalists. Our evidence suggests that the use of primary sources, in fact, is associated with a decrease in the probability of cross-partisan constraint. In this, Cross is vindicated, as originalism has failed to deliver on its original promise.

At least in part. Secondary historical sources proved Cross's lurking variable. Their use by Justices did bear a significant relationship to cross-partisan constraint, and thus those theories using history should take stock. In particular, this finding bears on the importance of the constitutional history cottage industry increasingly found in top law reviews.

Yet as primary sources are required reading in at least some areas of constitutional law,²²⁹ for all those calling for such, these results require a reckoning. Bench and bar must do better. To permit primary sources the same purchasing power as secondary sources, the legal profession and especially the Supreme Court must roll up their sleeves and engage in the hard work of history.

And they can. Primary sources are the bread and butter of legal scholarship. Indeed, one could say that reading law is reading history. Lawyers are accustomed to immersing themselves in primary legal sources when a new question is posed, so much so that they can understand and defend the nuances, intricacies, and contradictions of that area of law as well as the hierarchy and appropriate weighting of the various sources of law. The process is not so very different when engaging questions of history. As Max Radin said, "[i]t is quite true that lawyers are for the most part extremely bad historians."²³⁰ Still, "[t]oday's lawyers and judges, when analyzing historical questions, have more tools than ever before. They can look to an ever-growing body of scholarship."²³¹ If a lawyer (or

229. See *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228, 2253–54 (2022); *Kennedy v. Bremerton Sch. Dist.*, 142 S. Ct. 2407, 2428 (2022); *N.Y. State Rifle & Pistol Ass'n v. Bruen*, 142 S. Ct. 2111, 2126 (2022).

230. MAX RADIN, *LAW AS LOGIC AND EXPERIENCE* 138 (1940).

231. ANTONIN SCALIA & BRYAN A. GARNER, *READING LAW: THE INTERPRETATION OF LEGAL TEXTS* 304 (2013).

judge) can apply the same skillset she uses when answering legal questions to historical questions, history—and the law—will be well served. So long as the level of immersion is equal, she can succeed.

That said, new tools and trainings are needed such that bench and bar may become more fluent in primary sources. This will enable them to understand and respect them, rather than use them in service of other ends.

The remainder of this Section makes specific, practical recommendations for improving the federal judiciary's historical methodology. These include short surveys of where to find primary sources from the Framing, a proposed format for transparent historical citations in legal publications, and four other practical measures: the need for legal and historical academia to produce more secondary legal history monographs on point, a call for more judicially relevant indexing, a proposal for constitutional history clinics at top law schools, and a brief overview of various judicial trainings and resources and their gaps.

a. Finding primary sources

Whereas legal databases are largely comprehensive and have long pedigrees, when a lawyer turns to historical research, there are no equivalent tools at hand. This is in part because historical sources are more varied and vast, and more broad and specific, than their legal counterparts. Forms include those materials familiar to the lawyer—cases, statutes, contracts, deeds, orders, and treaties—and those less familiar, such as voting and legislative records and other multi-member body debates, census records, newspaper articles, immigration records, bills of lading, transportation timetables, photographs and paintings, birth, baptism, marriage and death certificates, landmarks, maps, letters, journals, and ephemera.²³² There is also less money to collect, organize, collate,

232. For an exhaustive, delightfully alliterative list of primary-source formats, see AKHIL REED AMAR, *AMERICA'S UNWRITTEN CONSTITUTION* 51 (2012).

catalogue, transcribe, publish, index, and digitize historical sources—not to mention the ongoing and painstaking task of preservation and restoration. Constitutional historical sources may be found in thousands of private and public archives across the United States and even into Western Europe. Almost all towns, universities, and states within the original 13 colonies have historical societies or archival departments with special collections. To these are added the thousands if not hundreds of thousands of private collections, auction houses, and the like. Superseding all in size and volume of materials are the National Archives and Records Administration as well as the Manuscript Division at the Library of Congress. Each depository's catalogue (not to mention digitized or search-friendly papers) is in various stages of completion. That the Historical Society of Philadelphia, whose Founding Era holdings are "unparalleled outside of the Library of Congress," was quite proud of having catalogued 25% of its 22 million holdings in 2005 demonstrates the state of play for the field.²³³

That said, barriers to entry are lowering. Accessing constitutional history will not, for the average legal question, require crossing archival thresholds and blowing dust off old documents. Beyond the usual suspects—the records of the Constitutional Convention and *The Federalist*, both eminently available—primary sources from the Framing are increasingly being neatly pre-packaged in consumer-friendly formats. The herculean, multi-decade effort of the largely unsung army of documentary editors begun in the 1950s publishing the papers of various Founders in documentary editions is quietly, slowly coming to a close.²³⁴ It is impossible to underestimate

233. Email from David Moltke-Hansen, Pres. of the Hist. Soc. of Pa. (Dec. 6–11, 2019) (on file with the Author).

234. Finished projects include (in order of completion) Alexander Hamilton's Papers, the First Supreme Court Papers Project, and the First Federal Congress Papers Project by Johns Hopkins University. See *The Papers of Alexander Hamilton*, UNIV. OF VA. PRESS ROTUNDA, <https://rotunda.upress.virginia.edu/founders/ARHN> [<https://perma.cc/3D3Q-Q9U2>] (last visited July 31, 2022); *The First Federal Congress*

Project, GEO. WASH. UNIV., <https://www2.gwu.edu/~ffcp/publications.html> [<https://perma.cc/TU2Q-WXQF>] (last visited July 31, 2022); Linda Greenhouse, *After 30 Years, Supreme Court History Project Turns a Final Page*, N.Y. TIMES (Dec. 30, 2006), <https://www.nytimes.com/2006/12/30/washington/30scotus.html> [<https://perma.cc/RQ2V-YKWZ>]. Although they have begun another project on the Bill of Rights, only two index volumes remain to be published after all 29 volumes of The Documentary History of the Ratification of the Constitution by the University of Wisconsin have been published. For a listing of completed and planned volumes, see *Documentary History of the Ratification of the Constitution*, UNIV. OF WISC. CTR. STUD. AM. CONST., <https://csac.history.wisc.edu/publications-2/dhrc/> [<https://perma.cc/2UTH-86NH>] (last visited July 31, 2022). Only four volumes of forty-seven remain to be published by and the Benjamin Franklin Papers at Yale. See *The Papers of Benjamin Franklin*, YALE UNIV., <https://franklinpapers.yale.edu/about-project> [<https://perma.cc/6WYY-CQ7X>] (last visited July 31, 2022). The George Washington Papers Project out of the University of Virginia is relatively close behind, with only two of seven series—the Revolutionary War Series and the Presidential Series—still in progress. See *The Papers of George Washington*, UNIV. OF VA., <http://gwpapers.virginia.edu/editions/letterpress/> [<https://perma.cc/TV92-DT9T>] (last visited July 31, 2022). One of four series comprehended within the James Madison Papers Project is completed, with a projected eleven more volumes to go out of fifty-two. See *Papers of James Madison*, UNIV. OF VA., <http://pjm.as.virginia.edu/editions> [<https://perma.cc/2KSY-K2YE>] (last visited July 31, 2022). The Adams Papers Project at the Massachusetts Historical Association, a project for three generations of Adamses published by Harvard University Press, has published an impressive fifty volumes to date in four editorial series since its creation in 1954, but only the Diaries series appears to be complete. See *The Adams Papers Volumes Published*, MASS. HIST. SOC'Y, https://www.masshist.org/adams_editorial/volumes [<https://perma.cc/PNU5-Z6EQ>] (last visited July 31, 2022). The Papers of Thomas Jefferson are split between Princeton, which published the first volume of any Founding Father Paper Project in 1950, and the Thomas Jefferson Foundation at Monticello. Princeton has published its 44th volume up through 1805, with the four years of Jefferson's presidency remaining. See *The Papers of Thomas Jefferson*, PRINCETON UNIV., <https://jeffersonpapers.princeton.edu/all-volumes> [<https://perma.cc/H26V-YM5E>] (last visited July 31, 2022). Monticello, focusing on Jefferson's retirement, has published fifteen volumes of material through 1820, with six years of Jefferson's life remaining. See *Completed Volumes*, MONTICELLO, <https://www.monticello.org/research-education/for-scholars/papers-of-thomas-jefferson/completed-volumes/> [<https://perma.cc/79XV-9TTN>] (last visited July 31, 2022). Another project of selected papers for John Jay through Columbia and UVA has published four of seven volumes. See William Baude & Stephen E. Sachs, *Originalism and the Law of the Past*, 37 LAW & HIST. REV. 809 (2019). A project for James Wilson has been started by Bill Ewald at the University of Pennsylvania Law School. Email from Bill Ewald (Feb. 7, 2019) (on file with the author).

the expanse of materials these projects canvass, nor the universe of new research they make possible, especially in relation to the Constitution.

Though there is no Westlaw or LexisNexis for historical sources, relevant databases, many of them free, have revolutionized access to the space and the volumes listed above. Free databases include the Avalon Project at Yale for seventeenth- and eighteenth-century sources and many works of the Enlightenment,²³⁵ the Founders Online for six founders' papers through the National Archives (in conjunction with UVA),²³⁶ ConSource for various collections related and indexed to the Constitution (many with images),²³⁷ and Quill for reading and dynamically analyzing the Constitutional Convention, the Bill of Rights, and the Reconstruction Era Amendments.²³⁸ Paid sites include the Electronic Enlightenment,²³⁹ Readex's Early American Imprints Evans Series for materials printed between 1639-1800,²⁴⁰ and UVA's Rotunda Project for almost all Founding Father Paper Projects, including the Ratification, First Supreme Court, and First Federal Congress Projects (neither of which are not in Founders Online).²⁴¹

The documentary editions and databases listed above relate only to the Framing: each era of constitution-making will have its own

235 . See *The Avalon Project*, YALE L. SCH., <https://avalon.law.yale.edu> [<https://perma.cc/WWN8-8PSN>] (last visited July 31, 2022).

236 . See *Founders Online*, NAT'L ARCHIVES, <https://founders.archives.gov> [<https://perma.cc/954Q-EQ9F>] (last visited July 31, 2022).

237 . See *ConSource*, QUILL PROJECT, <https://www.consource.org> [<https://perma.cc/H9JH-ZHDF>] (last visited July 31, 2022).

238. See QUILL PROJECT, <https://www.quillproject.net> [<https://perma.cc/DD47-54B8>] (last visited July 31, 2022).

239. See *Electronic Enlightenment*, OXFORD UNIV. PRESS, <https://www.e-enlightenment.com> [<https://perma.cc/8CFG-LT87>] (last visited July 31, 2022).

240. See *Early American Imprints, Series I*, READEX, <https://www.readex.com/content/early-american-imprints-series-i-evans-1639-1800> [<https://perma.cc/EL9N-7CTX>] (last visited July 31, 2022).

241. Rotunda is missing only the Benjamin Franklin Papers. See UNIV. OF VA. PRESS ROTUNDA, *supra* note 234.

set of sources and materials, and it is especially important to know and become familiar with sources from the Reconstruction Era, as so many constitutional cases implicate amendments emanating from this period.²⁴² The list is also non-exhaustive—providing an appropriate overview and annotated bibliography of various primary sources would require its own book. Although such a full-length primer does not exist, one is currently contemplated and on the research agenda for the lead author, and William Baude and Jud Campbell have compiled an eminently useful (and periodically updated) primer of early American primary sources with hyperlinks.²⁴³ In the meantime, interested persons should reference the excellent Yale Law School Guide to Research in American Legal History.²⁴⁴

It is not enough to simply cite to primary sources: one must know which are the *right* sources. Knowing source hierarchy, which sources to use for which events, and the inherent constraints of the sources will help the earnest advocate. Just as there is a hierarchy of controlling legal sources for each question of law, there is also a hierarchy of primary historical sources for each question of history. Lawyers should be familiar with this hierarchy, and cite to the *right* primary sources. Handwritten manuscripts or original set type formats for printed material are at the top of the food chain.²⁴⁵

242. As of this writing, the Quill Project, with its excellent tools for quantitatively analyzing multi-party constitutional negotiations and resulting texts, has finished editing the debates surrounding the Thirteenth Amendment. They are in the process of adding debates for the Fourteenth Amendment and will publish both sets of debates together. The Fifteenth will follow thereafter.

243. William Baude & Jud Campbell, *Early American Constitutional History: A Source Guide* (Mar. 13, 2023) (unpublished manuscript), <https://ssrn.com/abstract=2718777> [<https://perma.cc/BAU7-EKPR>].

244. JOHN B. NANN & MORRIS L. COHEN, *THE YALE LAW SCHOOL GUIDE TO RESEARCH IN AMERICAN LEGAL HISTORY* (2018).

245. RICHARD J. EVANS, *IN DEFENSE OF HISTORY* 94 (2000) (“[H]istorical knowledge[] relate[s] in the first place to the extent to which it is possible to reconstruct the past from the remains it has left behind—or, in other words, to historical research based on primary sources.”).

Although citing to manuscripts would certainly be impressive and will occasionally reveal new insights,²⁴⁶ it is not expected of advocates or even necessary where printed versions of the same materials are plentiful.

Yet even among printed material, there is also a relevant and important hierarchy. A general rule of thumb for printed materials is that the most recent publication of a set of documents is better than previous renditions. This is certainly true for the documentary editions since the 1950s. Though editing standards for each paper project and even within a paper project over its years of publication varies widely,²⁴⁷ these volumes are generally considered infinitely better in terms of historical integrity, transparency, comprehensiveness, annotations, and readability than any preceding publication.²⁴⁸ This means that advocates should use the “*Papers of*” projects for individual framers and institutions, and not the preceding “*Writings of*” compilations. The exceptions here are *The Federalist* and records of the Constitutional Convention. Among renditions of *The Federalist*, Jacob Cooke’s edition is an excellent resource for helping the reader understand *The Federalist* as a history, but finding one with a good index, particularly one based on the Constitution’s clauses such as is provided in Clinton Rossiter’s edition,²⁴⁹ will be particularly helpful for the advocate. Other than usefulness, however, any compilation of *The Federalist* is generally considered as good as any other—perhaps the index for each rendition is most important, but as these were very early bound together in a two volume set (the first collected edition being published in March 1788 while the second half of the series were being published in New York City newspapers, with the second to follow in May 1788

246. See, e.g., BILDER, *supra* note 187.

247. See EDITING DOCUMENTS AND TEXTS (Beth Luey, ed., 1990).

248. See MICHAEL E. STEVENS & STEVEN B. BURG, EDITING HISTORICAL DOCUMENTS: A HANDBOOK OF PRACTICE (1997).

249. THE FEDERALIST *vii* (Clinton Rossiter ed., 1961).

before numbers 78-85 appeared),²⁵⁰ republications are generally equally good, and, often, citing to the primary document alone suffices.²⁵¹ For Convention records, though it predates (and prefigures) modern documentary standards and is succeeded by more recent compilations,²⁵² as shown by the results of our study, the most authoritative and oft-cited publication of the records continues to be Max Farrand's *The Records of the Federal Convention* for good reason.

As with the law, it is important to cite to the most relevant source for the issue or event at hand. All else being equal, for history, the more contemporaneous the source is to the historical event, the more weight that source is given.²⁵³ Thus, even if comments about the Convention were made in *The Federalist*, the state ratification debates, or debates in the First Congress, these sources are removed in time and therefore accorded less weight by the historian than, say, Madison's *Notes*, ostensibly recorded extemporaneously in shorthand format and then written out in long-hand versions the same night.²⁵⁴ In the same vein, if the historical event at play is not discussed by the author of a primary record, it is bad form to use non-contemporaneous sources as evidence of that event: one does not reference the other, and therefore should not be used for support. Though this normative historical method may seem obvious, as our results show (with Justices regularly using sources removed in time and topic from a historical event), it occurs altogether too frequently in constitutional advocacy and interpretation.

250. *Id.*

251. THE BLUEBOOK: A UNIFORM SYSTEM OF CITATION, § 15.7 (b) (17th ed. 2000) ("Cite an entire *Federalist Paper* without indicating a specific edition, and include the author's name parenthetically.").

252. *See supra*, Section II.A.

253. *See* MARTHA C. HOWELL & PREVENIER WALTER, FROM RELIABLE SOURCES: AN INTRODUCTION TO HISTORICAL METHODS 61, 70-71 (2001).

254. James Madison, *Introduction to the Debates in the Convention*, reproduced in 2 THE PAPERS OF JAMES MADISON 716-17 (1840).

Finally, advocates should be aware of the limits of the sources. For instance, Madison revised his *Notes* later in life, which fact is not made clear in his preface. It is contended (and hotly disputed) that Madison's later political views may have impacted his judgment about how to report on the Convention.²⁵⁵ Such a claim, if true, would presumably impact the reliability of the *Notes*, shifting our focus and giving greater weight to other sources of the Convention. While the reliability of Madison's *Notes* is a subject of heated academic debate (with entire camps of historians dividing along its fault line), it is generally accepted that the reporting of the state ratification debates was compromised by the pro-Federalist sympathies of the reporters.²⁵⁶ Marshall, for instance, is said to have read speeches reported in the Virginia ratifying convention that he never gave.²⁵⁷ Such a speech or even sets of compromised notes should be accorded less weight, and the sources' limitations and reliability should be documented in the footnotes when using them as one would the unfavorable subsequent procedural history of a case or contrary authority. The more recent documentary editions such as *The Documentary History of the Ratification of the Constitution* have accounted for and dealt as best as possible with such documentary integrity issues, providing yet another reason to prefer them over other published sources such as the oft-used Elliot's *Debates*.²⁵⁸

255. BILDER, *supra* note 187.

256. Hutson, *supra* note 74, at 12–24.

257. *Id.* at 24.

258. For instance, editors of the *Documentary History of the Ratification of the Constitution* acknowledge John Marshall's declamation of the reported speech he claims never to have given but points out that Marshall comments favorably on the accounts of other delegates' speeches, potentially undermining his own declamation. IX DOCUMENTARY HISTORY OF THE RATIFICATION 905 (John P. Kaminski et al. eds., 1990). Additionally, they note that an oft-quoted speech Elliot records as given around July 2, 1788 by Thomas Treadwell was never delivered. Finally, editors noted the several inaccuracies as originally reported in the North Carolina debates.

b. Recommended primary source citation format

With few exceptions, current legal citation manuals do not account for citations to primary sources in a thorough or satisfying way.²⁵⁹ This has resulted in advocates and Justices citing to primary sources as if they were any other secondary source. The research therefore becomes more difficult to replicate. For instance, if only the volume and page of Farrand is cited, those looking at the Convention records on ConSource (or the 1960 Ohio University publication of the records) would have a difficult time finding the particular day of debate being referenced. Also, a certain quantum of transparency is lost through this method of citation; one does not know what day or even the original cited source, be it Yates's Notes, the Committee of Detail drafts, the *Official Journal*, or Madison's Notes, all of which are included in Farrand. If the reader was concerned about the authenticity of Madison (or Yates's) notes given their real or apparent biases, it would be important to provide this information.

We recommend a citation format that blends historical and legal methods, wherein the primary and secondary sources are clearly identified in conformance with *Bluebook* citation guidelines. This could appear as follows:

James Madison, *Notes of the Constitutional Convention* (May 29, 1787), in 1 THE RECORDS OF THE FEDERAL CONVENTION 21 (Max Farrand ed., 1911) (1966).

Such a format will provide needed clarity and transparency and signify a large step towards reconciling legal and historical methodologies, symbolically blending the two disciplines.

259. Exceptions include Blackstone's *Commentaries*, constitutions, and *The Federalist*. BLUEBOOK, *supra* note 251, at §§ 15.4(d), 15.7(b), and 11. Otherwise, the Bluebook directs the writer to cite to scholarly editions for works published before 1900, *id.* at § 15.4(c), but has no specific rule regarding unpublished manuscripts from that era.

c. Improving the federal judiciary's constitutional history

There are four ways of supporting the federal judiciary in doing better history. The first approach speaks to the Justices' preference for and constraint by secondary sources: scholars can produce more historical work bearing on constitutional issues as has been suggested by Akhil Amar.²⁶⁰ Relatedly, as the Justices prefer legal over historical journals, historians can consider publishing their articles in prominent law reviews, which will require a sensitivity to the demands of the profession, knowing that in the end, judgment must be rendered. While this approach is the most feasible at present, it still requires much to bridge the gap between scholarship and the Court. Justices must be aware of relevant historical articles and books—not to mention finding the time to read and process these often very lengthy treatises. Thankfully, a database of constitutional historical articles organized by clause or section of the Constitution for easy judicial reference was launched in October 2022 by Georgetown's Center for the Constitution.²⁶¹

A second means of improvement can be accomplished by documentary editors, digital archivists, and librarians, who can develop constitutional indices based on a deconstruction of the Constitution into interpretable parts: the clauses of the Constitution. In part because they are frequently indexed in this manner,²⁶² *The Federalist* has become the most-cited source from the Founding.²⁶³ To

260. Amar commends law professors to a careful study of the Constitution's text, history and structure, and suggests that law professors and students "can play useful roles in helping our fellow citizens learn things" about the Constitution and its history in his *Harvard Law Review* Foreword to the 1999 Supreme Court Term. Akhil Reed Amar, *The Document and the Doctrine*, 114 HARV. L. REV. 26, 26–28, 133–34 (2000).

261. The Originalist's Constitution, Georgetown Center for the Constitution, <https://www.law.georgetown.edu/constitution-center/constitution/> [https://perma.cc/ZSX4-JYVE].

262. See, e.g., the text of the Constitution collated to *The Federalist*. THE FEDERALIST 542–56 (Clinton Rossiter ed., 1961).

263. CROSS, *supra* note 6, at 135–40 (collecting statistics); Durchslag, *supra* note 59.

encourage contextualization of the documentary record, such indices, particularly those created digitally, can include a layer of secondary commentary by historians, linking to relevant articles and treatises. Thus far, only ConSource includes such an index, but it requires much work and does not include any secondary contextualization.

Another means of improving the Court's history is to serve Justices with history in a format with which they are most familiar: amicus briefs. However, other than two amicus briefs filed by this author with the help of her constitutional history students in the Federal²⁶⁴ and Second Circuit,²⁶⁵ originalist amici to date are generally partisan, and thus partake of the limits of general advocacy, including the ills of "law-office history."²⁶⁶ Briefs by historians are also usually partisan and even overtly political.²⁶⁷ The Justices need true friends of the Court writing neutral historical amici that favor neither party. They need briefs that can bear and present all of the complexities, gaps, and discrepancies good history yields and allow the Justices to make informed judgments. Such briefs could be supplied by constitutional history clinics at top law schools wherein students work with academics, appellate practitioners and

264. See Brief for Professor Lorianne Updike Toler as Amicus Curiae Supporting Neither Party, *Gorge Design Group LLC v. Xuansheng*, 2023 WL 2808069 (Fed. Cir. Apr. 6, 2023) (No. 21-1695), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4307938 [<https://perma.cc/B7SH-U35U>].

265. See Brief for Lorianne Updike Toler as Amicus Curiae Supporting Neither Party, *Soule v. Conn. Ass'n of Schs.*, No. 22-2332 (2d Cir. May 19, 2023), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4429519 [<https://perma.cc/P4SR-SACL>].

266. *But see, e.g.*, Brief for Const. Accountability Ctr. as Amicus Curiae Supporting Petitioner, *Torres v. Tex. Dep't of Pub. Safety*, 142 S. Ct. 2455 (2022) (No. 20-603) (amicus briefs filed by the left-leaning Constitutional Accountability Center using historical arguments).

267. See Joshua Stein, Note, *Historians Before the Bench: Friends of the Court, Foes of Originalism*, 25 YALE J. L. & HUMS. 359 (2013); Joseph D. Kearney & Thomas W. Merrill, *The Influence of Amicus Curiae Briefs on the Supreme Court*, 148 U. PA. L. REV. 743, 770 (2000) ("[Statistics showed] that the Court tended to favor liberal positions [filed by amicus curiae].").

historians to produce the kind of amici recommended above. Clinics could then be called upon to serve as special Court-appointed counsel in constitutional cases, especially those heard *en banc*. Not only would such clinics supply a need especially felt on the federal circuits, but it would double as valuable training for would-be appellate clerks and the next generation of appellate and Supreme Court advocates.

The fourth and final means of supplying better history for the federal judiciary is to be found in developing constitutional history training. Such trainings should address where to find sources as discussed above, better citations, and how to apply the various theories which call for constitutional history. These should be provided to various audiences within the federal judiciary: judges, clerks, and librarians. Training for judges is currently provided by Georgetown Law School's Center for the Constitution and by the lead author through the Judicial Education Initiative as part of its corpus linguistics trainings,²⁶⁸ but more should be developed, particularly by liberal-leaning institutions such as the Constitution Accountability Center and the neutral Federal Judicial Center and the Administrative Office of the U.S. Courts.

3. History is most potent when reinforced by stare decisis

These results demonstrate that history has the greatest pull when the Court itself acts as historian. Justices' use of secondary sources in either of our models had the most significant directional correlation to cross-partisan constraint. The most frequently used secondary source were previous cases, and in 206 of these 238 cases (86%), the Court interpreted primary sources directly. Thus, when the Court itself acted as a historian, later Courts saw that initial

268. Judicial Education Initiative currently runs a series of judicial trainings on corpus linguistics, which features one session on doing effective constitutional history research by the lead Author, but is hoping to develop dedicated constitutional history trainings in 2024.

interpretation as dispositive. Citing to previous Courts acting as historian would frequently cause liberals to vote conservative and conservatives to vote liberally. It appears then that history is at its strongest when overlaid with precedent, indicating that history and precedent can be mutually reinforcing rather than mutually exclusive.

This is an interesting finding for originalists. For strict originalists, *stare decisis* can prove an enigmatic puzzle. If the historical answer to a constitutional question is different from previous decisions, can a Court vary from *stare decisis*? Theoretical purists' answer tends in the affirmative, but Justices called upon to do the hard work of interpreting and living with the results in practice may hesitate. Indeed, in the Court's *Dobbs* decision, Justice Alito felt compelled to spell out a rubric for when *stare decisis* should give way to history.²⁶⁹ While in academia, Justice Barrett spent some time grappling with the problem as well.²⁷⁰

Yet here, it appears that Justices may be largely constrained by how their predecessors interpreted historical events. History was important as understood by former colleagues, as evidenced by the fact that the more previous cases cited, the stronger the positive relationship with cross-partisan constraint. These results indicate the possibility of a different relationship between history and *stare decisis* than is suggested by received wisdom. Perhaps they are not at so great odds, after all, and can, at times, be mutually reinforcing.

This Part has provided possible rationales for our results that secondary but not primary sources bear a positive, significant correlation with cross-partisan constraint because the latter are more familiar and aggregate primary sources together such to be less manipulable. It also provides an explanation for why the Court does

269. *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228, 2265 (2022).

270. See Amy Coney Barrett, *Originalism and Stare Decisis*, 92 NOTRE DAME L. REV. 1921 (2017).

history at all—it is a natural turn to political forefathers as the Justices seek to understand the present by reconnecting and even recreating the country’s origin story. Finally, three consequences of our results have been presented: although Cross is vindicated in part, they show that history is our law, primary source results require a reckoning and re-tooling of the way bench and bar does history, and that history has the strongest pull on the Justices when it is reinforced by precedent, or when previous Courts act as historians.

CONCLUSION

History seems to have a constraining impact on the Supreme Court’s decision-making. That said, Cross’s conclusions regarding the impact of primary source history, however inelegantly or unscientifically arrived, are vindicated. Originalism has failed in its primary purpose to constrain Justices’ discretion. At least in part: Cross did not account for two indicia of constraint which we find here. First, the increased use of primary sources seems to reinforce but have an impact independent of ideology, thus showing evidence of “constraint” by different measures. We also find that *secondary* historical sources have a significant relationship with Justices casting cross-partisan votes, providing strong evidence of Constraint, at least when Justices reference the Constitutional Convention. Reasons for these results may lie in the fact that secondary sources, as an aggregate of primary sources, are more familiar and thus harder to manipulate. This study shores up positivists’ claims about the Court’s turn to history, but requires a reckoning for those advocating its use. To increase the probability of primary source constraint, and especially in light of the Court’s recent requirements that lower courts use history when interpreting the Constitution, we provide a primer on framing primary source hierarchy and where to find them, introduce a more transparent legal citation

format for historical sources, and propose an expansion of current historical tools and training for bench and bar.

THE NECESSARY AND PROPER INVESTIGATORY POWER

BRETT RAFFISH*

ABSTRACT

*Congressional investigatory power is broad and sweeping. While the power is not boundless, few topics, people, and documents are ordinarily out of reach. Congress has often leveraged its inquiry power for good. But Congress has also, at times, abused it, costing many Americans their liberty and reputations. Possible abuse has not thwarted the Supreme Court from recognizing an inquiry power. In *McGrain v. Daugherty*, the Court held that the power to procure information to support the lawmaking process complied with the Necessary and Proper Clause's commands, vesting Congress with wide authority to probe.*

Founding era concerns, early Congressional practices, and Necessary and Proper Clause jurisprudence suggest that the Court's present characterization of Congressional investigatory power is likely only one of myriad ways to characterize the implied investigatory power, and it may be the wrong one. By superimposing characteristics from Congress's prior investigations over the Court's current characterization, different permutations of Congressional investigatory power emerge. This Note argues that the Court's current characterization and some inferior characterizations of Congress's implied power may not be viable when measured against the Necessary and Proper Clause's commands. Thus, Congress might lack power

to investigate some people or things for purposes that may be advanced under the Court's controlling characterization. This Note urges the Court to thwart future abuse and recalibrate the relationship between the people and Congress by adopting a three-part, Mazars-inspired doctrine that operationalizes Necessary and Proper Clause concepts.

INTRODUCTION

It is better to keep the wolf out of the fold, than to trust to drawing his teeth and talons after he shall have entered.¹

Congressional investigatory power, or Congress's implied power to procure information from people through compulsory processes,² is broad and sweeping. While the power is not boundless,³ few topics, people, and documents are ordinarily out of reach.⁴ Congress has often leveraged its inquiry

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1. THOMAS JEFFERSON, NOTES ON THE STATE OF VIRGINIA 162 (Wilson & Blackwell pr., 1803).

2. See Jack Gose, *The Limits of Congressional Investigating Power*, 10 WASH. L. REV. 61, 62 (1935).

3. See Kent B. Milikan, *Limitations on the Congressional Power of Investigation*, 8 WM. & MARY L. REV. 630, 630 (1967).

4. See MORTON ROSENBERG, WHEN CONGRESS COMES CALLING 13 (2017), <https://archive.constitutionproject.org/wp-content/uploads/2017/05/Chapter-3.pdf> [<https://perma.cc/VV3M-9ZNF>]; Milikan, *supra* note 3, at 632; Stephen G. Dormer, *The Not-So Independent Counsel: How Congressional Investigations Undermine Accountability Under the Independent Counsel Act*, 86 GEO. L.J. 2391, 2397 (1998); Martin Shapiro, *Judicial Review: Political Reality and Legislative Purpose: The Supreme Court's Supervision of Congressional Investigations*, 15 VAND. L. REV. 535, 535, 553 (1962); Claude Moore Fuess, *Congressional Immunity and Privilege*, 70 PROCEEDINGS OF THE MASSACHUSETTS HISTORICAL SOCIETY 148, 150 (1950).

power for good—to understand and make informed decisions about pressing public issues and events.⁵ But Congress has also, at times, abused it, needlessly costing many Americans their liberty and reputations.⁶ Possible abuse has not thwarted the Supreme Court from recognizing an inquiry power.⁷ In *McGrain v. Daugherty*, the Court held that the implied power to procure information complied with the Necessary and Proper Clause's commands, vesting Congress with wide authority to probe.⁸

Founding era concerns, early Congressional practices, and Necessary and Proper Clause jurisprudence suggest that the Court's present characterization of Congressional investigatory power is likely only one of myriad ways to characterize the implied investigatory power, and it may be the wrong one.⁹ By superimposing characteristics from Congress's prior

5. JAMES HAMILTON, *THE POWER TO PROBE* 6–12 (First Vintage Books ed., 1977); see generally Andrew McCaense Wright, *Congressional Due Process*, 85 MISS. L.J. 401, 404 (2015) (emphasizing importance of oversight); McKay Smith & Alan Wehbé, *A Bipartisan Vehicle for Change: Proposing A Novel Investigative Framework Designed to Improve and Empower Congressional Investigations*, 29 STAN. L. & POL'Y REV. 237, 244 (2018) (noting useful functions of oversight).

6. See, e.g., Michael Perino, *The Financial Crisis Inquiry Commission and the Politics of Governmental Investigations*, 80 UMKC L. REV. 1063, 1070 (2012); Joseph H. Harrison & Robert F. McCoy, *Constitutional Law—Congressional Investigations: Limitations on the Implied Power of Inquiry*, 28 NOTRE DAME L. REV. 373, 373 (1953); Fuess, *supra* note 4, at 152–55; ALAN BARTH, *GOVERNMENT BY INVESTIGATION* 14, 17, 82–83 (1955); Arthur M. Schlesinger Jr., *Introduction to the Previous Edition*, in ROBERT C. BYRD CENTER FOR LEGISLATIVE STUDIES, *CONGRESS INVESTIGATES: A CRITICAL AND DOCUMENTARY HISTORY* xxiii (Roger A. Bruns et al. eds., Revised 1st ed. 2011); Louis B. Boudin, *Congressional and Agency Investigations: Their Uses and Abuses*, 35 VA. L. REV. 143, 143–45 (1949); G. L. Tyler, *House Un-American Activities Committee*, in *ENCYCLOPEDIA OF AMERICAN CIVIL LIBERTIES* 780 (Paul Finkelman ed., 2006).

7. See *U.S. v. Poindexter*, 698 F. Supp. 300, 304 (D.D.C. 1988); *McGrain v. Daugherty*, 273 U.S. 135, 175–76 (1927).

8. *McGrain*, 273 U.S. at 160–61, 175.

9. That the investigatory power may be characterized and that *McGrain* and its subordinate characterizations may not be viable when measured against history and the

investigations over the Court's current characterization of Congressional investigatory power, different permutations of the power emerge. To ascertain each characterization's viability, courts must assess whether and to what extent each characterized power is "necessary and proper for carrying [an enumerated power] into Execution[.]"¹⁰ This Note contends that the *McGrain* court's characterization and some inferior ones may not be viable when measured against the Necessary and Proper Clause's commands. In other words, Congress might lack power to investigate some people or things for

Necessary and Proper Clause's commands are not new ideas. Justice Thomas began his *Trump v. Mazars, LLP* dissent by suggesting that the Congressional Petitioners' characterization of its implied power—"the implied power to issue legislative subpoenas"—"[wa]s too broad." 140 S. Ct. 2019, 2037–38 (2020) (Thomas, J., dissenting). Notably, he treated the disputed Congressional exercise as an extension of narrower implied power—an implied "power to subpoena private, nonofficial documents[.]" *Id.* at 2038. Measuring the narrowly characterized implied power against the Necessary and Proper Clause's commands and early Congressional practice, he concluded that Congress lacked the narrower power, and that *McGrain* was overinclusive to the extent that it included the narrower implied power. *See id.* at 2038–42, 2045, 2047. While Justice Thomas suggested that *McGrain* was unlikely valid, *id.* at 2044 (noting that "*McGrain* . . . misunderstands both the original meaning of Article I and the historical practice underlying it"), he also clarified that he was not commenting on "the constitutionality of legislative subpoenas for other kinds of evidence." *Id.* at 2038 n.1. This Note aims to fully grapple with *McGrain*, analyzing the breadth of its inferior characterizations and the permissibility of its characterization of the implied investigatory power. As indicated throughout, this Note assigns weight to some of the same historical events and concepts as Justice Thomas. This Note's undertaking, however, is broader and explores a range of arguments not covered or fully developed in Justice Thomas's dissent.

Scholarship examining Congressional inquiry often leaves undisturbed the Court's broad characterization of Congressional investigatory power. *See, e.g.,* William P. Marshall, *The Limits on Congress's Authority to Investigate the President*, 2004 U. ILL. L. REV. 781, 795, 814–26 (2004); Dormer, *supra* note 4, at 2392–93; James Hamilton et al., *Congressional Investigations: Politics and Process*, 44 AM. CRIM. L. REV. 1115, 1121 (2007).

10. U.S. CONST. art. I, § 8. Like Justice Thomas, this Note understands the Necessary and Proper Clause as the only textual basis to assess the inferior characterizations' viability. *See Mazars*, 140 S. Ct. at 2037–38; *see also Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 537, 559 (2012).

purposes that may be advanced under the Court's controlling characterization.

The Court should thwart future abuse and recalibrate "the balance of" power between Congress and the people¹¹ by adopting the following three-part, *Mazars*-inspired doctrine that operationalizes Necessary and Proper Clause concepts.¹² First, to ascertain whether Congress has power to investigate, courts should determine whether the expression of¹³ Congressional investigatory power is "Proper" to the extent that it: (1) is tethered to actual, legitimate ends;¹⁴ (2) is closely connected to a specific enumerated power;¹⁵ (3) does not acquire powers wholly allocated to other branches;¹⁶ and (4) does not violate a witness's constitutional rights.¹⁷ Second, courts should determine whether Congressional means are "Necessary" to the extent that they are "reasonably adapted"¹⁸ to achieve Congress's proposed legislative end.¹⁹ Finally, after examining Congressional ends and means, courts should holistically balance the parties' interests to assess whether Congressional

11. See BARTH, *supra* note 6, at 12; *cf. Mazars*, 140 S. Ct. at 2037 (Thomas, J., dissenting).

12. As suggested, this doctrine is modeled after that offered by the Court in *Mazars*. However, this Note synchronizes *Mazars* with Necessary and Proper Clause concepts and suggests additional doctrinal boundaries enumerated in Part IV of the Note.

13. For the purposes of this Note, a subpoena is considered an expression of the investigatory power. Thus, courts will examine whether Congress possesses power on a motion to quash.

14. See Marshall, *supra* note 9, at 815–16; *Mazars*, 140 S. Ct. at 2036.

15. See Gary Lawson & Patricia B. Granger, *The "Proper" Scope of Federal Power: A Jurisdictional Interpretation of the Sweeping Clause*, 43 DUKE L.J. 267, 271, 324, 330–31 (1993); see also *United States v. Comstock*, 560 U.S. 126, 134 (2010).

16. See Lawson & Granger, *supra* note 15, at 271, 297, 333–34; *Barenblatt v. United States*, 360 U.S. 109, 111–12 (1959).

17. See Lawson & Granger, *supra* note 15, at 271, 297, 328–29; *Barenblatt*, 360 U.S. at 111–12; UNIV. OF CAL. PRESS, *Current Documents: The Supreme Court Upholds Congressional Investigation of Communism in Education*, in CURRENT HISTORY, 37, 105 (1959).

18. *Comstock*, 560 U.S. at 143 (citing *United States v. Darby*, 312 U.S. 100, 121 (1941)).

19. *Mazars*, 140 S. Ct. at 2035–36.

ends are “Proper” to the extent that the exercise of compulsory power over an individual does not “upset the balance of”²⁰ power allocated between the people and Congress.²¹ If adopted, the doctrine detailed in this Note will ground the investigatory power in constitutional text and stymie future abuse.

Part I details the investigatory power’s origins, exercise, and judicial reception. Part II describes how the investigatory power presently operates and its costs. In Part III, this author suggests that, under Necessary and Proper Clause jurisprudence, Congress may lack power to reach certain people or objects. Finally, Part IV proposes the *Mazars*-inspired doctrine detailed above.

I. THE SWEEPING POWER

Ratified on June 21, 1788, Article I of the United States Constitution established Congress, America’s federal legislative branch.²² Unlike Parliament, who enjoyed supremacy among governmental institutions,²³ Congress has finite powers.²⁴ While Article I does not expressly entrust Congress with an investigatory power,²⁵ this Part details how the Court and

20. BARTH, *supra* note 6, at 12.

21. In some ways, this inquiry might resemble the first portion of the *Mazars* test. See *Mazars*, 140 S. Ct. at 2035–36.

22. See *Legislative Branch*, NAT’L CONST. CTR. (2023), <https://constitutioncenter.org/interactive-constitution/article/article-i> [<https://perma.cc/X5E7-V6UM>].

23. *Mazars*, 140 S. Ct. at 2038 (Thomas, J., dissenting); see generally Kenneth R. Mayer & Howard Schweber, *Does Australia Have a Constitution—Part II: The Rights Constitution*, 25 UCLA PAC. BASIN L.J. 265, 282 (2008) (describing Parliamentary sovereignty).

24. See *Mazars*, 140 S. Ct. at 2037; see also Tom G. Palmer, Limited Government and the Rule of Law, in CATO HANDBOOK FOR POLICYMAKERS 13–18 (8th ed.), https://www.cato.org/sites/cato.org/files/serials/files/cato-handbook-policy-makers/2017/2/cato-handbook-for-policy-makers-8th-edition-2_0.pdf [<https://perma.cc/VZB3-QC2G>].

25. *Mazars*, 140 S. Ct. at 2031.

Congress have nevertheless recognized the power as integral to federal lawmaking.²⁶

A. *Parliament's Investigatory Power*

English practice paved the way for Congressional compulsory power.²⁷ By 1604, Parliament had power, in one case, to summon “an Officer, and . . . view and search any Record or other thing of that kind[.]”²⁸ Early on, Parliament had exercised punitive power to address bribery, threats, libels, and election-related issues.²⁹ And by the late seventeenth century, “Parliament had numerous committees in place investigating government operations.”³⁰ All told, Parliament inquired into a range of matters, including “poor laws, prison administration, [and the] operations of the East India Company[.]”³¹

26. See generally MORTON ROSENBERG, CONG. RSCH. SERV., INVESTIGATIVE OVERSIGHT: AN INTRODUCTION TO THE LAW, PRACTICE AND PROCEDURE OF CONGRESSIONAL INQUIRY (1995); *Rules of Procedure for Senate Investigating Committees: Hearings Before the Subcomm. On Rules of the S. Comm. On Rules and Admin.*, 83rd Cong. 640 (1954) (excerpt from Felix Frankfurter, *Hands Off the Investigation*, NEW REPUBLIC (May 21, 1924)).

27. See Raoul Berger, *Congressional Subpoenas to Executive Officials*, 75 COLUM. L. REV. 865, 866 (1975); Michael Edmund O'Neill, *The Fifth Amendment in Congress: Revisiting the Privilege Against Compelled Self-Incrimination*, 90 GEO. L.J. 2445, 2451 (2002).

28. James M. Landis, *Constitutional Limitations on the Congressional Power of Investigation*, 40 HARV. L. REV. 153, 160 (1926) (quoting MATTHEW HALE, THE ORIGINAL INSTITUTION POWER AND JURISDICTION OF PARLIAMENTS 105 (1707)).

29. TELFORD TAYLOR, GRAND INQUEST: THE STORY OF CONGRESSIONAL INVESTIGATIONS 6–7 (1955).

30. Marshall, *supra* note 9, at 785. William Pitt had also remarked in 1742 that there had been “many parliamentary inquiries into the conduct of ministers of state[.]” William Pitt, *Second Speech of Lord Chatham on a Motion for Inquiring into the Conduct of Sir Robert Walpole*, in CHAUNCEY A. GOODRICH, SELECT BRITISH ELOQUENCE 84 (1897).

31. TAYLOR, *supra* note 29, at 8; see also Landis, *supra* note 28, at 162–63; Marshall, *supra* note 9, at 785 (“In the early eighteenth century, Parliament’s use of its investigatory powers was commonplace and extensive.”).

By the mid-eighteenth century, Parliament was extraordinarily powerful.³² In a 1742 address, William Pitt remarked that Parliament served as “[t]he Grand Inquest of the Nation[,]” meaning it had a “duty to inquire into every step of public management, both abroad and at home[.]”³³

B. Founding Attitudes Toward Legislative Power

By the time of the Framing, however, unbounded legislative power, and governmental power more generally, had concerned some.³⁴ Thomas Jefferson remarked that “concentrat[ed]” legislative power exemplified “despotic government” and further contended that it was vitally important to stem abuse before one branch garnered too much power.³⁵ In a letter to Jefferson, John Jay also opined that “legislative, judicial, and executive Power[]” should not be concentrated in a single branch.³⁶ James Madison echoed Jay in *Federalist 47*, remarking that “the very definition of tyranny” concerned “[t]he accumulation of all powers” in a single entity.³⁷

Some contemplated the scope of legislative power in the *Federalist Papers*. In *Federalist 52*, for example, Alexander Hamilton or Madison made clear that Congress would have only some of Parliament’s “supreme . . . authority[.]”³⁸ In *Federalist*

32. Mazars, 140 S. Ct. 2019, 2038 (2020) (Thomas, J., dissenting); 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND *162; FEDERALIST NO. 53, at 331 (James Madison) (Clinton Rossiter ed., 1961) (“Parliament is transcendent and uncontrollable[.]”).

33. Pitt, *supra* note 30, at 82–84.

34. See BARTH, *supra* note 6, at 4–7; see generally JOSEPH STORY, 1 COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 365–67, 373–74 (2nd ed., 1851).

35. JEFFERSON, *supra* note 2, at 160–61, quoted in THE FEDERALIST NO. 48, *supra* note, 32 at 311 (James Madison); BARTH, *supra* note 6, at 7.

36. Letter from John Jay to Thomas Jefferson (Aug. 18, 1786), <https://founders.archives.gov/documents/Jefferson/01-10-02-0189> [<https://perma.cc/UV3Q-L6F5>].

37. THE FEDERALIST NO. 47, *supra* note, 32 at 301 (James Madison).

38. THE FEDERALIST NO. 52, *supra* note, 32 at 329 (emphasis added) (Alexander Hamilton or James Madison).

78, Hamilton appeared to recognize that the people's power superseded legislative power.³⁹ Indeed, he suggested that a federal legislative body would be unable to police its own powers, and dismissed the idea that the Constitution could let legislators "substitute their *will* to that of their constituents."⁴⁰ If the people's will conflicted with the legislature's will, Hamilton suggested that courts prefer "the Constitution . . . to the statute, the intention of the people to the intention of their agents."⁴¹ Finally, Madison's remarks in *Federalist 48* reflected a skepticism toward legislative power.⁴² Madison held that Congress could surreptitiously usurp institutional power and run roughshod over the people it claimed to represent, opining that "it [wa]s against the enterprising ambition of this department that the people ought to indulge all their jealousy and exhaust all their precautions."⁴³

The Anti-Federalists were also skeptical of concentrated governmental power.⁴⁴ In *Brutus No. 1*, the author (likely Robert Yates)⁴⁵ remarked that "every body of men, invested with power, [is] ever disposed to increase it, and to acquire a superiority over every thing that stands in [its] way."⁴⁶ To the author, powerful elected officials would act in a self-interested manner, and correcting such abuse would be difficult.⁴⁷ The putative scope of the proposed Necessary and Proper Clause

39. THE FEDERALIST NO. 78, *supra* note, 32 at 467 (Alexander Hamilton).

40. *See id.*

41. *See id.*

42. THE FEDERALIST NO. 48, *supra* note 32, at 309 (James Madison).

43. *See id.*, quoted in BARTH, *supra* note 6, at 6–7.

44. Mitzi Ramos, *Anti-Federalists*, THE FIRST AMENDMENT ENCYCLOPEDIA (2009), <https://www.mtsu.edu/first-amendment/article/1175/anti-federalists> [<https://perma.cc/Z6TV-Q9KY>].

45. Gordon Lloyd, *Brutus I*, TEACHING AM. HIST., <https://teachingamericanhistory.org/document/brutus-i/> [<https://perma.cc/SYR9-EEDE>].

46. BRUTUS NO. 1, in THE ANTI-FEDERALIST PAPERS 287–88 (Ralph Ketcham ed., 2003).

47. *See id.* at 292–93.

appeared to drive some of the author's concerns. To the author, the Clause was so sweeping that it would result in "an entire consolidation" of federal power.⁴⁸

During the Constitutional Convention, James Wilson emphasized the people's supremacy over their government, remarking "that the supreme, absolute and uncontrollable authority, remain[ed] with the people[.]" not the legislative branch.⁴⁹ Madison too had echoed his earlier remarks, adding that "[e]xperience in all the States had evinced a powerful tendency in the Legislature to absorb all power into its vortex[.]" which, at least to Madison, presented "the real source of danger to the American Constitutions[.]"⁵⁰

C. Early Congressional Investigations

St. Clair Investigation. In 1792, Congress probed a military operation executed under President Washington.⁵¹ Despite a failed first motion,⁵² the House eventually approved a resolution broadly authorizing a committee "to call for such persons, papers, and records, as may be necessary[.]"⁵³

President Washington and several cabinet members discussed the investigation's implications.⁵⁴ The group believed

48. *See id.* at 286.

49. *Trump v. Mazars USA, LLP*, 140 S. Ct. 2019, 2038 (2020) (Thomas, J., dissenting) (quoting Statement of James Wilson in 2 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 426 (1836)).

50. 5 DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 345 (1845) (statement of James Madison).

51. *Mazars*, 140 S. Ct. 2019, 2038–40 (2020) (Thomas, J., dissenting) (highlighting *St. Clair* inquiry); *McGrain v. Daugherty*, 273 U.S. 135, 161 (1927); George C. Chalou, *General St. Clair's Defeat*, in 1 CONGRESS INVESTIGATES, *supra* note 6, at 3.

52. *See* 3 ANNALS OF CONGRESS 493 (1792).

53. *See id.*

54. Thomas Jefferson, *Cabinet Meetings* (Mar. 31, 1792), reprinted in 1 THE WRITINGS OF THOMAS JEFFERSON 303–04 (Albert Ellery Bergh ed., 1907), discussed in TAYLOR, *supra* note 29, at 23.

that Congress had power to investigate the St. Clair operation,⁵⁵ but Hamilton thought Congress could not reach certain information.⁵⁶ On Jefferson's account, Hamilton appeared concerned that Congress would inappropriately seek private information concerning "how far their own members and other persons in the government had been dabbling in stocks . . . [and] banks[.]"⁵⁷

Congress appeared to take the cabinet's concerns to heart.⁵⁸ On April 4, 1792, Congress resolved that Washington "cause the proper officers to lay before this House such papers of a public nature, in the Executive Department[.]"⁵⁹ The committee eventually sought participation from General St. Clair and others.⁶⁰

Post-St. Clair. The Supreme Court first addressed the legality of Congressional contempt processes in 1821 in connection with a bribe offered to a member.⁶¹ Noting that Article I did not include a contempt power, the Court questioned whether such a power might be implied.⁶² Although "the genius and spirit of . . . [American] institutions [we]re hostile to the exercise of implied powers[,]" Congressional power was far more

55. See 1 THE WRITINGS OF THOMAS JEFFERSON, *supra* note 54, at 304.

56. *See id.*

57. *See id.*

58. Chalou, General St. Clair's Defeat, 1792-93, in 1 CONGRESS INVESTIGATES, *supra* note 6, at 8.

59. 3 ANNALS OF CONGRESS 536 (1792).

60. *See* Chalou, *supra* note 6, at 12-14; James T. Currie, *The First Congressional Investigation: St. Clair's Military Disaster of 1791*, 20 PARAMETERS, 95, 97-99 (1990), <https://press.armywarcollege.edu/parameters/vol20/iss1/6/> [<https://perma.cc/Z334-YD3W>]; Matthew Waxman, *Remembering St. Clair's Defeat*, LAWFARE (Nov. 4, 2018), <https://www.lawfareblog.com/remembering-st-clairs-defeat> [<https://perma.cc/T4DR-YJ75>].

61. *Anderson v. Dunn*, 19 U.S. 204, 205 (1821).

62. *See id.* at 225.

circumscribed than Parliamentary power, alleviating concerns that an implied authority might be abused.⁶³ Furthermore, the Court insisted that Congressional contempt power was itself rather circumscribed, explaining that it involved “the least possible power adequate to the end proposed.”⁶⁴

Other important investigations followed.⁶⁵ Congress’s 1832 investigation into the Second Bank of the United States highlighted early disagreement over the appropriate scope of Congressional investigatory power.⁶⁶ Heading up the minority position, John Quincy Adams believed that the investigation’s political motivations set a “precedent of portentous evil” and provided “an odious persecution of individual citizens to prostrate the influence of personal or political adversaries by the hand of power.”⁶⁷ In his final report, Adams condemned the committee’s exercise of “inquisitorial power over multitudes of individuals having no connection with the bank other than that of dealing with them in their appropriate business of discounts, deposits and exchange[.]”⁶⁸ and believed that such actions were beyond the scope of Congressional power.⁶⁹ In addition to protesting the attenuated link between individuals and the inquiry subject, Adams further emphasized that the committee could not reach some private information,

63. *See id.* at 233.

64. *See id.* at 230–31 (emphasis in original) (internal quotation marks omitted).

65. Michael A. Zuckerman, *The Court of Congressional Contempt*, 25 J.L. & POL. 41, 46 (2009); TAYLOR, *supra* note 29, at 33.

66. John D. Macoll, *Second Bank of the United States*, in 1 CONGRESS INVESTIGATES, *supra* note 6, at 64; Mazars, 140 S. Ct. 2019, 2041–42 (2020) (Thomas, J., dissenting) (highlighting Second Bank investigation).

67. *Rep. of the Comm. of Inquiry by the H.R. at Wash., Concerning the Bank of the United States*, 22nd Cong. 71 (1832) (Mr. Adams’s Report).

68. *See id.* at 65–66.

69. *See id.* at 68.

making clear that “domestic or family concerns . . . [and officials’] moral, or political, or pecuniary standing in society” were off-limits.⁷⁰

Curiously, and seemingly in agreement with Adams, the majority maintained in their report that “they ha[d] not felt themselves at liberty to inquiry into the private concerns of any individuals, unless the public interest was involved in their transactions with the President and Directors of the Bank.”⁷¹ The majority suggested that they had looked only “generally . . . into the proceedings of the Bank[,]” and had done so to determine whether the bank had absconded the public interest, had abused its power, and should continue as an entity.⁷²

Nearly thirty years after the Second Bank investigation, the inquiry into the Harper’s Ferry insurrection sparked further debate regarding Congress’s power to compel participation in investigations.⁷³ Abolitionist Franklin Sanborn believed that Congress had overstepped and lacked any authority to compel him to testify.⁷⁴ James Redpath similarly declined to cooperate and testify, believing “the investigation was . . . unconstitutional[.]”⁷⁵ Thaddeus Hyatt, a prominent businessman,⁷⁶ remarked in a letter to the investigating committee that he “fe[lt] bound in duty . . . to ignore as usurpations the exercise of unconstitutional powers in a matter of import so grave

70. *See id.* at 66.

71. *Id.* at 18.

72. *See id.* at 18-19

73. *Mazars*, 140 S. Ct. at 2042 (highlighting Harper’s Ferry investigation).

74. Roger A. Bruns, *John Brown’s Raid on Harpers Ferry*, in *CONGRESS INVESTIGATES*, *supra* note 6, at 132.

75. *See id.* at 133.

76. *See id.* at 133–34.

and far-reaching as the present.”⁷⁷ Congress’s inquiry was, to Hyatt and others, something that extended far beyond Congressional power.⁷⁸

The recalcitrant witnesses were not without Congressional support. Speaking to whether to hold Hyatt in contempt, Senator Charles Sumner remarked that the situation before the Senate was “novel” because it concerned the use of compulsive power outside of the body’s usual ambit.⁷⁹ Namely, the investigatory power was most permissibly exercised when tethered to impeachments, elections, and member conduct; the body’s investigatory power was perhaps weaker when used by the legislative body to protect itself.⁸⁰ In any case, compelling private people to participate in investigations for purposes unrelated to those described above was, to Sumner, unconstitutional and unprecedented.⁸¹ Senator John Hale agreed, summarily concluding that the body entirely lacked “power . . . to summon witnesses[.]”⁸²

D. Judicial Response

While the Supreme Court had addressed the contempt power’s legality in 1821,⁸³ the Court first addressed the propriety of Congressional investigatory power nearly sixty years later in *Kilbourn v. Thompson*.⁸⁴ *Kilbourn* raised what was,

77. Letter from Thaddeus Hyatt to Investigating Committee (Jan. 28, 1860), https://glassian.org/Prism/Hyatt/thaddeus_hyatt_senate_letter_1860.html [<https://perma.cc/H9V4-QU3Y>], in Bruns, *supra* note 74, at 134.

78. See Bruns, *supra* note 74, at 134.

79. Charles Sumner, *Senate Debate Over Witness Thaddeus Hyatt*, in 1 CONGRESS INVESTIGATES, *supra* note 6, at 143.

80. See *id.*

81. See *id.* at 144.

82. See *id.* at 148–49.

83. *Anderson v. Dunn*, 19 U.S. 204, 205 (1821).

84. *Kilbourn v. Thompson*, 103 U.S. 168, 181 (1880).

by then, a perennial issue regarding whether and to what extent Congress could compel people to participate in investigations, “resurrect[ing]” Adams’s contention “that the non-official conduct of a citizen [wa]s immune from Congressional scrutiny[.]”⁸⁵ The *Kilbourn* court recognized that Congress lacked express authority to hold recalcitrant witnesses in contempt.⁸⁶ After examining Parliamentary practices,⁸⁷ the Court suggested that contempt was unlikely an inherited device; namely, unlike its English predecessor, Congress was not “a court” and Congress’s contempt powers were expressly reserved for their “own members” in cases concerning elections, Congressional misbehavior, and impeachment proceedings.⁸⁸

To the extent that Congress’s inquiry “could result in no valid legislation on the subject to which the inquiry referred[,]” Congress could not pry into any person’s private life.⁸⁹ Reasoning that Congress would unlikely be able to act on the information they received, the Court held that Congress lacked authority to compel the witness to participate.⁹⁰

In *McGrain v. Daugherty*, however, the Court clarified that Congress possessed a wide investigatory power.⁹¹ *McGrain* arose out of a probe into the Department of Justice and its activity concerning Teapot Dome,⁹² an affair related to the Harding presidency’s dealings.⁹³ Mally Daugherty, the AG’s

85. Landis, *supra* note 28, at 219.

86. *Kilbourn*, 103 U.S. at 182.

87. *See id.* at 183–84.

88. *See id.* at 189–91.

89. *See id.* at 190, 195.

90. *See id.* at 195–96.

91. *McGrain v. Daugherty*, 273 U.S. 135, 150 (1927).

92. *See id.* at 151–52.

93. Marshall, *supra* note 9, at 792; Todd David Peterson, *Congressional Oversight of Open Criminal Investigations*, 77 NOTRE DAME L. REV. 1373, 1389 (2002).

brother, refused to answer two Congressional subpoenas,⁹⁴ prompting the committee to order Daugherty's arrest for contempt.⁹⁵ The Court inquired whether Congress could permissibly "compel a private individual to appear before it" and testify for legislative purposes.⁹⁶

The Court first explained that, although Article I lacked explicit language conferring investigatory powers, such investigatory authority was historically accepted in both Congress and state legislatures "as an attribute of the power to legislate."⁹⁷ Drawing on *Kilbourn* and prior cases, the Court concluded that Congress possessed an "auxiliary" investigatory power "with process[es] to enforce it[.]"⁹⁸ The Court appeared to recognize that an investigatory power was necessary because it allowed Congress to obtain "information respecting the conditions which the legislation [wa]s intended[.]"⁹⁹ Furthermore, compulsory processes necessarily accompanied the investigatory power to allow Congress to forcibly obtain information from persons who might otherwise refuse to comply.¹⁰⁰ Notably, the Court dispensed with the challenger's concerns that the power "may be abusively and oppressively exerted" on the grounds that the potential for abuse was no greater than that presented by ordinary legislation.¹⁰¹ Witnesses could also rely on safeguards articulated in *Kilbourn*

94. *McGrain*, 273 U.S. at 152.

95. *See id.* at 153–54.

96. *See id.* at 160.

97. *See id.* at 161–65.

98. *See id.* at 174.

99. *See id.* at 175.

100. *See id.*

101. *Id.* Indeed, the Court "assume[d] . . . that neither houses will be disposed to exert the power beyond its proper bounds, or with out due regard to the rights of witnesses." *See id.* at 175–76; *see also* *Townsend v. United States*, 95 F.2d 352, 361 (D.C. Cir. 1938).

and other cases should Congress overreach.¹⁰² And, at the end of the day, Congress only had power to compel “testimony . . . to obtain information in aid of the legislative function[.]”¹⁰³ or “on which legislation could be had[.]”¹⁰⁴

Sinclair v. United States also arose out of the Teapot Dome scandal. A Congressional committee sought testimony from Harry F. Sinclair, an oil executive.¹⁰⁵ Sinclair refused to testify before a committee on the grounds that the committee had unnecessarily probed into “his private affairs[.]” which was not information “in aid of legislation.”¹⁰⁶ The Court acknowledged that Congress could not needlessly probe into Americans’ “personal and private affairs.”¹⁰⁷ However, the Court appeared to reason that the information sought was not “merely . . . private or personal[.]”¹⁰⁸ Rather, Congress had power to regulate “naval oil reserves” and “public lands[.]”¹⁰⁹ Because Sinclair possessed information that was conceivably related to an oil company’s federal lease, Sinclair held information that could have plausibly led to future legislation.¹¹⁰ Thus, the Court upheld Sinclair’s contempt conviction.¹¹¹

102. *McGrain*, 273 U.S. at 176.

103. *See id.*

104. *See id.* at 177.

105. Robert Curley, *Harry F. Sinclair*, BRITANNICA, <https://www.britannica.com/biography/Harry-F-Sinclair> [<https://perma.cc/6DRB-YNDZ>].

106. *Sinclair v. U.S.*, 49 S. Ct. 268, 290–91 (1929), *overruled by* *U.S. v. Gaudin*, 115 S. Ct. 2310 (1995).

107. *See id.* at 292.

108. *See id.* at 294.

109. *See id.*

110. *See id.*

111. *See id.* at 299.

In the late 1930s, Congress created the House Un-American Affairs Committee (“HUAC”), which investigated Communist involvement in different areas of American society.¹¹² Although prior committees had exercised compulsive power over private individuals, HUAC marked a “new phase of legislative inquiry”¹¹³ that instigated a spate of landmark Supreme Court decisions further defining the relationship between Congress and private Americans.¹¹⁴

In *Quinn v. United States*, Congress held the petitioner in contempt for refusing to answer HUAC’s “questions concerning alleged membership in the Communist Party.”¹¹⁵ The Court recognized various constraints on Congress’s investigatory power, like the Bill of Rights.¹¹⁶ Reasoning in part that the privilege against self-incrimination should be broadly construed, and that “a claim of the privilege d[id] not require any special combination of words[,]” the Court held that the witness was entitled to exercise “the privilege[.]”¹¹⁷

Watkins v. United States involved a challenge against a contempt conviction.¹¹⁸ The Court acknowledged that although Congress could investigate a wide variety of issues,¹¹⁹ Congress could not “expose the private affairs of individuals” for

112. Geoffrey R. Stone, *Free Speech in the Age of Mccarthy: A Cautionary Tale*, 93 CAL. L. REV. 1387, 1389, 1400 (2005); *House Un-American Affairs Committee*, HARRY S. TRUMAN LIB., <https://www.trumanlibrary.gov/education/presidential-inquiries/house-un-american-activities-committee#:~:text=HUAC%20was%20created%20in%201938,in%20a%20court%20of%20law>.

113. *Watkins v. United States*, 354 U.S. 178, 195 (1957).

114. *See also Tenny v. Brandhove*, 341 U.S. 367, 369 (1951).

115. *Quinn v. United States*, 349 U.S. 155, 157 (1955).

116. *See id.* at 161.

117. *See id.* at 162–63. The Court found similarly in *Emspak v. United States*, 349 U.S. 190, 202 (1955).

118. *Watkins*, 354 U.S. at 185.

119. *See id.* at 187.

its own sake.¹²⁰ Namely, the Court clarified that a Congressional “investigation[] conducted *solely* for the personal aggrandizement of the investigators or to ‘punish’ those investigated [we]re indefensible.”¹²¹ Although the Court recognized that HUAC’s resolution was ambiguous and far-reaching, it declined to invalidate it,¹²² examining whether the question put to the witness offered him sufficient information to determine whether to invoke the privilege against self-incrimination.¹²³ Finding the question vague and potentially irrelevant, the Court invalidated the witness’s contempt conviction.¹²⁴

Two years later, the Court found differently in *Barenblatt v. United States*. In *Barenblatt*, the witness, a college professor, declined to answer a HUAC subcommittee’s probes into alleged Communist Party associations.¹²⁵ The Court ultimately found HUAC’s authorizing resolution concrete and legitimate, and that the inquiry into the witness’s associations was tethered to HUAC’s authorizing resolution.¹²⁶ Moving to the pertinence of the question in connection with “the [investigation’s] subject matter[,]” the Court concluded that the witness lacked grounds to refuse to answer principally because he “was well aware of the Subcommittee’s authority and purpose to question him[.]”¹²⁷ Finally, the Court addressed whether the inquiry was barred on First Amendment

120. *Id.*

121. *Id.* (emphasis added).

122. *See id.* at 209.

123. *See id.* at 214.

124. *See id.* at 215.

125. *Barenblatt v. United States*, 360 U.S. 109, 114 (1959).

126. *See id.* at 116–21.

127. *See id.* at 123–24.

grounds.¹²⁸ Balancing the individual right against governmental need, the Court reasoned that the circumstances presented in the case weighed heavily in favor of Congress.¹²⁹ Indeed, the investigation was motivated by “valid legislative purpose[s]”—addressing Communism’s proliferation and preventing the “overthrow of the Government of the United States by force and violence[.]”¹³⁰ To determine whether subversive activities were afoot, the Court held that Congress was entitled to require witnesses to divulge their associations.¹³¹ Thus, for the foregoing reasons, *inter alia*, the Court upheld the contempt conviction.¹³²

Wilkinson v. United States similarly upheld a witness’s contempt conviction for refusing to answer questions related to Communist Party affiliations.¹³³ As in *Barenblatt*, the Court found that a HUAC subcommittee had acted within the scope of its authorizing resolution when it questioned the witness.¹³⁴ Furthermore, the Court rejected the witness’s argument that the committee had specifically targeted him based on “his opposition to the existence of the Un-American Activities Committee[.]”¹³⁵ Although the “subcommittee[] [was] aware[] of the petitioner’s opposition to the hearings, and” was specifically targeted by the committee once the witness “arrived in Atlanta as the representative of a group carrying on a public campaign to abolish” HUAC, the Court found that the committee had acted in furtherance of a legitimate public purpose

128. *See id.* at 126–27.

129. *See id.* at 134.

130. *See id.* at 127–28.

131. *See id.* at 130–32.

132. *See id.* at 134.

133. *Wilkinson v. United States*, 365 U.S. 399, 403–05 (1961).

134. *See id.* at 408.

135. *See id.* at 409.

by “investigat[ing] Communist propaganda activities in the South.”¹³⁶ In other words, the Committee had acted in furtherance of a valid purpose precisely because the committee had targeted a witness that was ostensibly affiliated with the Communist Party.¹³⁷ Thus, the Court upheld the witness’s contempt conviction.¹³⁸

E. Modern Doctrinal Developments

The Court re-affirmed Congress’s broad investigatory power in *Eastland v. U.S. Servicemen’s Fund*. In *Eastland*, a Senate subcommittee sought to subpoena a bank for records belonging to U.S. Servicemen’s Fund (“USSF”) members for the purpose of uncovering subversive activity,¹³⁹ prompting USSF to seek injunctive relief.¹⁴⁰ USSF and its members alleged, in part, that the subcommittee sought the information to embarrass and punish them, which USSF protested would chill private association.¹⁴¹ Analyzing the challenger’s claims, the Court explained that the Speech or Debate Clause effectively insulated subpoenas from judicial scrutiny.¹⁴² The Court then turned to evaluate whether the committee’s prospective subpoenas fell within Congress’s permissible bounds.¹⁴³ The Court found that investigatory activities and compulsory subpoenas were part and parcel of the “legisla-

136. *Id.* at 411.

137. *See id.*

138. *See id.* at 414–15.

139. *Eastland v. U. S. Servicemen’s Fund*, 421 U.S. 491, 493 (1975).

140. *See id.* at 495.

141. *See id.*

142. *See id.* at 502.

143. *See id.* at 503.

tive sphere[,]" and that the specific disputed inquiry involving USSF members' records was plainly permissible.¹⁴⁴ Furthermore, the Court rejected arguments that the subpoenas were issued to harass on the grounds that the inquiry nevertheless sought to obtain "information about a subject on which legislation may be had[,]" and that the Speech or Debate Clause precluded the Court from "look[ing] [in]to the motives alleged to have prompted" disputed Congressional actions or the plaintiffs' First Amendment claims.¹⁴⁵ The Court emphasized that "unworthy purpose[s]" and fruitless endeavors did not invalidate otherwise legitimate Congressional inquiries.¹⁴⁶ Although the Court recognized that a broad interpretation of the Speech or Debate Clause might permit Congress to abuse its authority, the Framers had contemplated and accepted such a consequence.¹⁴⁷

The Court's most recent doctrinal addition came in *Trump v. Mazars USA, LLP*, which involved President Trump's challenge against Congressional subpoenas seeking private financial information.¹⁴⁸ Trump contested that the subpoenas were invalid because they sought information beyond Congress's purview, in part, because of the information's private nature and because Congress sought the information to expose him.¹⁴⁹

The Court ultimately declined to extend its deferential approach to private Presidential documents on the grounds that existing standards would have left the most sensitive Presi-

144. *See id.* at 504–06.

145. *See id.* at 508–10.

146. *See id.* at 509.

147. *See id.* at 510.

148. *Trump v. Mazars USA, LLP*, 140 S. Ct. 2019, 2026 (2020).

149. *See id.*

dential information unprotected, disturbing the calibrated relationship between branches.¹⁵⁰ To determine the validity of a Congressional subpoena, the Court set forth a multi-part standard.¹⁵¹ The majority suggested that courts should consider whether: (1) “the asserted legislative purpose warrants the significant step of involving the President and his papers[;]” (2) the request for information is “broader than reasonably necessary to support Congress’s legislative objective[;]” (3) Congress has sufficiently demonstrated that its demand “advances a valid legislative purpose[;]” and (4) “burdens imposed on the President by” a Congressional request weigh against compliance.¹⁵²

Justice Thomas dissented on the grounds that the majority had not gone far enough to circumscribe the subpoena power with respect to private documents.¹⁵³ Indeed, Thomas suggested that *McGrain* was over-inclusive because it permitted Congress to forcibly obtain “private, nonofficial documents[.]” a power Congress may have lacked in the Founding era.¹⁵⁴ Thomas further noted that: (1) Congress lacked as much power as Parliament; and (2) at least some early legislative investigations sought only to obtain information “from government officials on government matters[.]”¹⁵⁵ Thus, Thomas concluded that the majority had erred by incompletely circumscribing the power with respect to private documents.¹⁵⁶

150. *See id.* at 2034.

151. *See id.* at 2035–36.

152. *See id.*

153. *See id.* at 2037 (Thomas, J., dissenting).

154. *See id.* at 2038.

155. *See id.* at 2038–42.

156. *See id.* at 2047.

II. UNDERSTANDING INVESTIGATORY COSTS

Congress has utilized its investigatory power in many cases to further the public interest.¹⁵⁷ Inquiries have helped Congress understand and make informed decisions about pressing issues, including Watergate, the Iran-Contra Affair, the attack on Pearl Harbor, “organized crime, anti-union activity, the sale of cotton, and the Vietnam War.”¹⁵⁸ Furthermore, the inquiry power is an invaluable oversight tool, allowing Congress to stymie wasteful spending and executive branch misconduct.¹⁵⁹ Whatever the scope of the investigatory power, it seems undeniable that Congress has, in many cases, put it to good and productive use.

At the same time, however, lawful and beneficial Congressional inquiries impede “the rights of . . . individual[s] to conduct . . . affairs free from governmental interference.”¹⁶⁰ In other words, no matter the reason for interference, compulsory process entails some loss of liberty. And in some cases,

157. See *About Investigations*, U.S. SENATE, <https://www.senate.gov/about/powers-procedures/investigations/overview.htm> [<https://perma.cc/EU43-XABK>]; James F. Fitzpatrick, *Enduring a Congressional Investigation*, LITIGATION, Summer 1992, at 16.

158. See *About Investigations*, *supra* note 157; PAUL C. LIGHT, INVESTIGATIONS DONE RIGHT AND WRONG: GOVERNMENT BY INVESTIGATION, 1945-2012 5–6, 12 (2013), <https://www.brookings.edu/wp-content/uploads/2016/06/LightPaperDec2013.pdf> [<https://perma.cc/T44H-X4CJ>]; Elaine Kamarck, *Congress in 2019: A Brief History of Congressional Investigations*, BROOKINGS (Jan. 2, 2019), <https://www.brookings.edu/blog/fixgov/2019/01/02/congress-in-2019-a-brief-history-of-congressional-investigations/> [<https://perma.cc/7JQP-AU6Q>]; see generally Kalah Auchincloss, *Congressional Investigations and the Role of Privilege*, 43 AM. CRIM. L. REV. 165, 177 (2006) (“The exposure of Watergate . . . restored minimal faith in the value of congressional inquiry[.]”).

159. Marshall, *supra* note 9, at 800; Landis, *supra* note 28, at 194–202; Wright, *supra* note 5, at 404; Smith & Wehbé, *supra* note 5, at 244.

160. Comment, *Congress v. The Courts: Limitations on Congressional Investigation*, 24 U. CHI. L. REV. 740, 742–43 (1957); *Watkins v. United States*, 354 U.S. 178, 206 (1957).

the costs of Congressional interference extend beyond the individual interest in avoiding participation. Some witnesses have been needlessly humiliated and maimed, have had their private information unnecessarily exposed, and have been called to testify for no legitimate reason.¹⁶¹ Also, in general, Congressional inquiries can be politically motivated and bitterly partisan endeavors,¹⁶² making it possible for Congress to occasionally run roughshod over witnesses who might be treated as means to greater political ends.¹⁶³

To reiterate, Congressional investigatory power is not boundless.¹⁶⁴ But the Court's approach is very permissive.¹⁶⁵ One author has suggested that "courts are loath to question the legislative motives of Congress[.]"¹⁶⁶ And, in practice, "[f]ew courts have actually ruled that an investigation has been impermissibly extended beyond the scope of Congress's legitimate purposes."¹⁶⁷ The bottom line is, while witnesses

161. See Gary B. Lovell, *Scope of the Legislative Investigational Power and Redress for Its Abuse*, 8 HASTINGS L.J. 276, 277 (1957); LIGHT, *supra* note 158, at 9; John W. Gilligan, *Congressional Investigations*, 41 J. CRIM. L. & CRIMINOLOGY 618, 619 n.7, 634 (1951); Hans Zeisel & Rose Stampler, *The Evidence: A Content Analysis of the HUAC Record, The Case against HUA*, 11 HARV. C.R.-C.L. L. REV. 263, 263, 296, 297 (1976).

162. Wright, *supra* note 5, at 415; Auchincloss, *supra* note 158, at 177; Fuess, *supra* note 4, at 151-52; Harrison & McCoy, *supra* note 6, at 373; Will Maslow, *Fair Procedure in Congressional Investigations: A Proposed Code*, 54 COLUM. L. REV. 839, 840 (1954); William C. Warren, *Congressional Investigations: Some Observations*, 21 FOOD DRUG COSMETIC L. J. 40, 44 (1966).

163. See Warren, *supra* note 162, at 44, 46; Fuess, *supra* note 4, at 151-52.

164. *Current Documents*, *supra* note 17, at 105.

165. See HAMILTON, *supra* note 5, at 116-17; Fitzpatrick, *supra* note 157, at 17; Shapiro, *supra* note 4, at 535, 553; Avrum M. Gross, Comment, *Constitutional Law: Congressional Investigation of Political Activity: Watkins v. United States Re-Examined*, 58 MICH. L. REV. 406, 409 (1960). It could be argued that the investigatory power is almost boundless. Warren, *supra* note 162, at 43-44; ROSENBERG, *supra* note 4, at 13 ("virtually plenary power").

166. Wright, *supra* note 5, at 415.

167. Jonathan P. Rich, *The Attorney-Client Privilege in Congressional Investigations*, 88 COLUM. L. REV. 145, 146 (1988).

have rights in the investigatory process,¹⁶⁸ it is not very difficult to lawfully connect witnesses to the Congressional forum. Put differently, a permissive doctrine may make it easier for Congress to, at a minimum, interfere with individual liberty interests. And, as suggested above, compliance may come with additional costs.¹⁶⁹

The phenomena described above raise the following question: are the foregoing costs inevitable? In Part III, this Note contends that, at least in some cases, they may not be.

III. UNDERSTANDING THE IMPLIED INVESTIGATORY POWER

Congress has finite powers.¹⁷⁰ Congress may, through Article I, Section 8's Necessary and Proper Clause, draw on non-enumerated powers to implement its enumerated powers.¹⁷¹ Thus, the investigatory power, which is not enumerated, must meet the Necessary and Proper Clause's commands.¹⁷² This Part argues that the investigatory power may not be, at least in some cases, "Necessary and Proper[.]"¹⁷³ meaning that

168. Smith & Wehbé, *supra* note 5, at 245; *United States v. Fort*, 443 F.2d 670, 678 (D.C. Cir. 1970).

169. While witnesses retain their rights, publicly exercising them can sometimes present a Hobson's choice: a witness who invokes the Fifth Amendment may protect private information from reaching the public domain, but the witness who remains silent may also be held in contempt should he withhold unprivileged information. BARTH, *supra* note 6, at 115.

170. *Nat'l Fed'n of Indep. Bus. V. Sebelius*, 567 U.S. 519, 533-34, 559 (2012); *Brzonkala v. Virginia Polytechnic Inst. & State Univ.*, 169 F.3d 820, 890 (4th Cir. 1999) (Wilkinson, J., concurring).

171. *See United States v. Kebodeaux*, 570 U.S. 387, 409 (2013) (Thomas, J., dissenting).

172. *Trump v. Mazars USA, LLP*, 140 S. Ct. 2019, 2037-38 (2020) (Thomas, J., dissenting); Monica M. Clark, *Challenging Privilege Claims in Congressional Inquiries*, 23 *GEO. J. LEGAL ETHICS* 539, 542 (2010).

173. U.S. CONST. art. 1, § 8.

Congress might lack power to reach certain people and objects for purposes that may be advanced under the Court's controlling characterization.

A. *The Necessary and Proper Clause*

Article 1, Section 8's terminal provision, the Necessary and Proper Clause, provides that "Congress shall have Power . . . to make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers[.]"¹⁷⁴ The Necessary and Proper Clause lacks a single, accepted meaning,¹⁷⁵ an issue that has drawn diverse scholarly debate.¹⁷⁶ Instead of offering a uniform interpretation, this Note presents some of the key events that are germane to the Clause's meaning. Specifically, this Note draws the reader's attention toward Madison and Hamilton's competing understandings of the Clause,¹⁷⁷ a debate the Court might be most receptive to following its less-than-deferential Necessary and Proper Clause analysis in *NFIB v. Sebelius*.¹⁷⁸

1. Early Events

As discussed in Part I, some Framers were highly skeptical of concentrated legislative power.¹⁷⁹ Anti-Federalists were some of the most vocal opponents of the Necessary and

174. *Id.*

175. John T. Valauri, *Originalism and the Necessary and Proper Clause*, 39 OHIO N.U. L. REV. 773, 775 (2013).

176. See generally Samuel L. Bray, "Necessary and Proper" and "Cruel and Unusual": *Hendiadys in the Constitution*, 102 VA. L. REV. 687, 688 (2016); John Mikhail, *The Necessary and Proper Clauses*, 102 GEO. L.J. 1045, 1046 (2014).

177. Randy E. Barnett, *The Original Meaning of the Necessary and Proper Clause*, 6 U. PA. J. CONST. L. 183, 188–202 (2003).

178. See *NFIB*, 567 U.S. at 559–61.

179. See BARTH, *supra* note 6, at 4–8; Judith A. Best, *Legislative Tyranny and The Liberation of the Executive: A View from the Founding*, 17 PRESIDENTIAL STUDIES Q. 697, 697 (1987).

Proper Clause's sweeping language, believing that the Clause would allow Congress to grow its institutional ambit.¹⁸⁰ The Federalists sought to assuage concerns by narrowly characterizing and framing Congressional power.¹⁸¹ Ultimately, however, Madison's and Hamilton's understandings of the Clause diverged.¹⁸²

i. The Narrow View

Madison, among others, narrowly construed the Clause.¹⁸³ In connection with the Second Bank's authorization, Madison remarked that "[w]hatever meaning th[e Necessary and Proper] clause may have, none can be admitted, that would give an unlimited discretion to Congress."¹⁸⁴ To Madison, the Clause authorized powers that: (1) were "means *necessary* to the *end*[";]" and (2) "would have resulted, by unavoidable implication["."¹⁸⁵ In other words, necessary "mean[t] *really* necessary in the sense that the end cannot be performed in some manner that does not infringe the retained liberties of the people."¹⁸⁶ Because the Second Bank of the United States was not

180. See BRUTUS NO. 1, in THE ANTI-FEDERALIST PAPERS, *supra* note 46, at 286; United States v. Comstock, 560 U.S. 126, 161 (2010) (Thomas, J., dissenting).

181. Barnett, *supra* note 177, at 185; *Comstock*, 560 U.S. at 161 (Thomas, J., dissenting); Gonzales v. Raich, 545 U.S. 1, 66 n.5 (2005) (Thomas, J., dissenting); Michael Parsons, *The Future of Federalism: A Uniform Theory of Rights and Powers for the Necessary and Proper Clause*, 11 GEO. J.L. & PUB. POL'Y 177, 182–83 (2013); Randy Barnett, *The Choice Between Madison and FDR*, 31 HARV. J.L. & PUB. POL'Y 1005, 1008 (2008).

182. Barnett, *supra* note 177, at 188–97.

183. Barnett, *supra* note 177, at 193–96; *Historical Background on Necessary and Proper Clause*, CONST. ANNOTATED, https://constitution.congress.gov/browse/essay/artI-S8-C18-2/ALDE_00001237/ [<https://perma.cc/76GP-JSGG>].

184. Statement of James Madison (Feb. 2, 1791), *reprinted* in M. ST. CLAIR CLARKE & D.A. HALL, LEGISLATIVE AND DOCUMENTARY HISTORY OF THE BANK OF THE UNITED STATES 41 (1832), *quoted* in Barnett, *supra* note 177, at 190.

185. See Statement of James Madison, *reprinted* in CLARKE & HALL, *supra* note 184, at 42.

186. Randy E. Barnett, *Necessary and Proper*, 44 UCLA L. REV. 745, 751 (1997).

“necessary to the Government” and only a “convenient” exercise of authority, it failed in Madison’s eyes to meet the Clause’s high bar.¹⁸⁷

Others agreed with Madison, and some went further.¹⁸⁸ Representative Wright remarked that the Necessary and Proper Clause forbade Congress from “creat[ing] constructive powers[.]”¹⁸⁹ Although inexplicit, Wright appeared to suggest that Congress had impermissibly flexed an *additional* power by creating a national bank.¹⁹⁰ Representative Stone recognized that “necessity was the most plausible pretext for breaking the spirit of the social compact” and, like Madison, rejected convenience as a plausible basis for exercising implied powers.¹⁹¹ Representative Giles agreed and argued that “the true exposition of a necessary mean to produce a given end, was that mean without which the end could not be produced.”¹⁹² Like Madison and Stone, Giles rejected “expediency” or convenience as a valid justification for action.¹⁹³

Jefferson appeared to take Madison’s view.¹⁹⁴ In a 1791 opinion, he acknowledged that while the creation of a federal bank may have helped Congress conveniently collect taxes, the Sweeping Clause only “allow[ed] . . . the means which [we]re

187. See Statement of James Madison, *reprinted in* CLARKE & HALL, *supra* note 184, at 44–45.

188. Barnett, *supra* note 177, at 194–95.

189. Statement of Robert Wright (Jan. 21, 1811), *reprinted in* CLARKE & HALL, *supra* note 184, at 198.

190. See *id.*

191. Statement of Michael Stone, *reprinted in* CLARKE & HALL, *supra* note 184, at 65–66; see generally Barnett, *supra* note 177, at 194.

192. Statement of William Giles, *reprinted in* CLARKE & HALL, *supra* note 184, at 72, *quoted in* Barnett, *supra* note 177, at 195.

193. See Statement of William Giles, *reprinted in* CLARKE & HALL, *supra* note 184, at 72.

194. Barnett, *supra* note 177, at 195–96; *Historical Background on Necessary and Proper Clause*, *supra* note 183.

'necessary,' not those which [we]re merely 'convenient' for effecting the enumerated powers."¹⁹⁵ Jefferson appeared to interpret the Clause to apply as a practical last resort; if Congress did not exercise the power, "the grant of [express] power would be nugatory[.]"¹⁹⁶

ii. The Broader View

Hamilton offered a much broader view of the Clause.¹⁹⁷ He contended that "necessary mean[t] no more than needful, requisite, incidental, useful, or conducive to."¹⁹⁸ However, Hamilton made clear that even if the Clause was "construed liberally[.]" it could only be used "in advancement of the public good."¹⁹⁹

Justice John Marshall, writing for the *M'Culloch v. Maryland* majority, understood the Clause like Hamilton.²⁰⁰ Marshall opined that the Necessary and Proper Clause provided Congress wide discretion, remarking that all Congress needed were "legitimate" ends and "means" that were "plainly adapted to th[ose] end[s], which . . . consist with the letter and

195. Thomas Jefferson, Jefferson's Opinion on the Constitutionality of a National Bank (Feb. 15, 1791), reprinted in PAUL LEICESTER FORD, THE FEDERALIST (1898), online at https://avalon.law.yale.edu/18th_century/bank-tj.asp [<https://perma.cc/37KU-QE3R>].

196. See *id.* In addition to debate surrounding the creation of the Second Bank, early American dictionaries support a narrower interpretation. Lawson & Granger, *supra* note 15, at 286.

197. Barnett, *supra* note 177, at 196–97; *Historical Background on Necessary and Proper Clause*, *supra* note 183.

198. Alexander Hamilton, Opinion on Constitutionality of an Act to Establish a Bank (Feb. 23, 1791), reprinted in CHRISTINA G. VILLEGAS, ALEXANDER HAMILTON: DOCUMENTS DECODED 188, 192 (2018), quoted in Barnett, *supra* note 177, at 196 (emphasis omitted).

199. Hamilton, reprinted in VILLEGAS, *supra* note 198, at 193.

200. Barnett, *supra* note 177, at 199; *M'Culloch v. Maryland*, 17 U.S. 316, 421 (1819).

spirit of the constitution[.]”²⁰¹ However, Marshall also recognized that a law may conflict with the Clause where it was meant to achieve “objects not intrusted to the government[.]”²⁰²

2. Modern Jurisprudence

The Necessary and Proper Clause’s contemporary meaning largely tracks Justice Marshall’s reasoning in *M’Culloch*. In *United States v. Comstock*, the Court explained that “the Necessary and Proper Clause grant[ed] Congress broad authority to enact federal legislation.”²⁰³ Relying on *M’Culloch*, the *Comstock* majority noted that the appropriate inquiry was “whether the . . . [disputed exercise] constitutes a means that is rationally related to the implementation of a constitutionally enumerated power.”²⁰⁴ To determine whether means were sufficiently connected to ends, the *Comstock* court examined whether: (1) the disputed law was tethered to an enumerated power;²⁰⁵ (2) the power or law was supported by “longstanding” congressional practice;²⁰⁶ (3) Congressional action was sufficiently tethered to Congress’s stated objective;²⁰⁷ (4) Congressional action subverted “state interests[;]”²⁰⁸ and (5) the enumerated power was adequately tethered to the disputed Congressional action.²⁰⁹

201. See *M’Culloch*, 17 U.S. at 421.

202. See *id.* at 423.

203. *United States v. Comstock*, 560 U.S. 126, 133 (2010).

204. See *id.* at 134.

205. See *id.* at 136–37.

206. See *id.* at 137.

207. See *id.* at 143.

208. See *id.*; cf. *Louisiana v. Becerra*, 577 F.Supp.3d 483, 501 (W.D. La. 2022).

209. *Comstock*, 560 U.S. at 146; see also *id.* at 149 (providing an overview of the Court’s five considerations).

The Court further addressed the scope of the Necessary and Proper Clause in *NFIB v. Sebelius*, which found that an individual healthcare mandate failed to comport with the Necessary and Proper Clause's commands.²¹⁰ As in *Comstock*, the Court reiterated that the Necessary and Proper Clause demanded deference to Congressional prerogative.²¹¹ However, "laws that undermine[d] the structure of government established by the Constitution" fell beyond the Clause's ambit.²¹² The *NFIB* court ultimately found that Congress had exceeded its Article I authority, reasoning that the individual mandate was broad and untethered to Congress's enumerated "commerce power[.]"²¹³ In other words, the individual mandate was so expansive that it had effectively become a separate power—one not merely implemented in service of another enumerated power.²¹⁴ Thus, the Court found the individual mandate impermissible as an implied authority.²¹⁵

B. Characterizing the Implied Investigatory Power

McGrain remains good law.²¹⁶ In assessing whether the "power to make investigations and exact testimony" was "so far incidental to the legislative function [enumerated in Article I, Section 1] as to be implied" through the Necessary and Proper Clause,²¹⁷ the *McGrain* court opined that "there [wa]s no [Constitutional] provision expressly investing either house

210. *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 559–60 (2012).

211. *See id.* at 559.

212. *See id.*

213. *See id.* at 560 (citations omitted).

214. *See id.*

215. *See id.* The Court reaffirmed broad Congressional prerogative under the Necessary and Proper Clause in *U.S. v. Kebodeaux*, 570 U.S. 387, 394 (2013).

216. *Trump v. Mazars USA, LLP*, 140 S. Ct. 2019, 2031 (2020); *see also id.* at 2045 (Thomas, J., dissenting).

217. *McGrain v. Daugherty*, 273 U.S. 135, 161 (1927).

[of Congress] with power to make investigations and exact testimony[.]”²¹⁸ By examining Founding-era Congressional and state investigatory practices and Supreme Court precedent, the Court ultimately found that Congress possessed an implied investigatory power that included compulsory enforcement processes.²¹⁹ The Court’s characterization of Congressional investigatory power left much to be desired: namely, what does the “power to make investigations and exact testimony” include?²²⁰

1. Understanding *McGrain*

The Court contemplated the implied power’s boundaries in *McGrain*, and ultimately codified the power (1) to procure information (2) for the purpose of supporting the lawmaking process.²²¹ As suggested in Part I, there has not been a re-examination whether *McGrain* correctly characterized the investigatory power in connection with the Necessary and Proper Clause; instead, the doctrine has functionally limited the power without disturbing *McGrain*’s foundational premise that procuring information is Necessary and Proper.²²² For example, the Court has held that Congress may not: (1) acquire power wholly allocated to other branches; (2) “expose for the sake of exposure[;]” (3) obtain Constitutionally protected information from recalcitrant witnesses;²²³ and (4) obtain *some* private information from the President.²²⁴

218. *Id.*

219. *See id.* at 160–77.

220. *See id.* at 161.

221. *See id.* at 161, 165, 171, 175.

222. *See Mazars USA, LLP*, 140 S. Ct. at 2045 (Thomas, J., dissenting).

223. *Watkins v. United States*, 354 U.S. 178, 187, 197–200 (1957); *Barenblatt v. United States*, 360 U.S. 109, 112 (1959); *Smith & Wehbe*, *supra* note 5, at 245.

224. *Mazars USA, LLP*, 140 S. Ct. at 2035–37.

Of all the foregoing limitations, only the third and fourth limitations—prohibitions on unconstitutional conduct and obtaining the President’s private records—substantively circumscribe the investigatory power’s ambit by delineating who and what may lie beyond a Congressional subpoena’s reach. The first two limitations—prohibitions on some investigatory purposes—are consistent with *McGrain* because they describe conduct that is categorically untethered to the lawmaking power. In other words, purposefully exposing information for its own sake or punishing witnesses are disconnected from Congress’s lawmaking functionality. Thus, such exercises lie beyond *McGrain*’s ambit and Congressional reach.

2. Re-characterizing the Investigatory Power

McGrain broadly characterized the implied investigatory power,²²⁵ capturing many inferior characterizations, or those that describe or characterize the power with greater specificity than the power to procure information for the purpose of supporting the lawmaking process.²²⁶ This section lays the foundation for the Necessary and Proper Clause analysis detailed below by describing *McGrain*’s subordinate or inferior characterizations.

225. *Trump v. Thompson*, 20 F.4th 10, 24 (D.C. Cir. 2021); cf. *Eastland v. U.S. Servicemen’s Fund*, 421 U.S. 491, 504 (1975).

226. *McGrain*, 273 U.S. at 161. See *supra* note 9 for a discussion on how Justice Thomas characterized powers in *Mazars*.

i. Status

By declining to specify *who* Congress may obtain information from,²²⁷ *McGrain* brought many under the investigatory power's ambit.²²⁸ The Court's characterization declined to specify who in American society Congress *may not* reach,²²⁹ sweeping up many, regardless of status.²³⁰ Thus, Congress has looked to a variety of people for information, including local,²³¹ state,²³² and federal public officials,²³³ private persons

227. *See id.*

228. *See generally* TODD GARVEY, CONG. RSCH. SERV., CONGRESSIONAL SUBPOENAS: ENFORCING EXECUTIVE BRANCH COMPLIANCE 1 n.2, 1–2 (Mar. 27, 2019) (explaining that “member[s] of the public” and officials have to obey a “valid congressional subpoena”); TODD GARVEY, CONG. RSCH. SERV., RESOLVING SUBPOENA DISPUTES IN THE JANUARY 6 INVESTIGATION 2 (Oct. 21, 2021).

229. *McGrain v. Daugherty*, 273 U.S. 135, 161 (1927).

230. *See* 1 Executive Sessions of the Senate Permanent Subcommittee on Investigations of the Committee on Government Operations, 83rd Cong., at XXIII (2003), <https://www.senate.gov/about/resources/pdf/mccarthy-hearings-volume1.pdf> [<https://perma.cc/4ZFB-HQSM>].

231. *See* Gilbert King, *The Senator and the Gangsters*, SMITHSONIAN MAG. (Apr. 18, 2012), <https://www.smithsonianmag.com/history/the-senator-and-the-gangsters-69770823/> [<https://perma.cc/7U2G-VS65>].

232. *See* Jon Ward, *Jan. 6 Committee Subpoenas State Officials Involved in Trying to Overturn 2020 Election*, YAHOO! NEWS (Feb. 15, 2022), <https://news.yahoo.com/jan-6-committee-subpoenas-state-officials-involved-in-trying-to-overturn-2020-election-224558652.html> [<https://perma.cc/6KBL-DXK9>]; Annie Grayer & Paul LeBlanc, *A Running List of Who the January 6 Committee Has Subpoenaed or Requested to Appear*, CNN POLITICS (Feb. 21, 2022), <https://edition.cnn.com/2021/11/10/politics/list-january-6-subpoenas/index.html> [<https://perma.cc/8SBB-Y2YR>].

233. GARVEY, CONGRESSIONAL SUBPOENAS, *supra* note 228, at 1–3. This Note considers executive privilege a defense to compliance. *See* Jonathan Shaub, *Executive Privilege and the Jan. 6 Investigation*, LAWFARE (Sept. 29, 2021), <https://www.lawfareblog.com/executive-privilege-and-jan-6-investigation> [<https://perma.cc/Y9EX-B8FP>].

who propelled themselves²³⁴ into the “public spotlight[,]”²³⁵ private persons involved in public controversies or those related to alleged government misconduct,²³⁶ and quintessentially private people.²³⁷ Overall, Congress has sought information from, among others, organizational leaders,²³⁸

234. See Andrew Glass, *Arthur Miller Testifies Before HUAC, June 21, 1956*, POLITICO (June 21, 2013), <https://www.politico.com/story/2013/06/this-day-in-politics-093127> [<https://perma.cc/5XTH-FP7M>]; Claudia Grisales, *Roger Stone, Alex Jones Among New Subpoenas Issued by Jan. 6 Panel*, NPR (Nov. 23, 2021), <https://www.npr.org/2021/11/22/1057038176/roger-stone-alex-jones-subpoenas-jan-6-panel-capitol?t=1647871272759> [<https://perma.cc/5DDY-B28K>]; June 12, 1956: *Paul Robeson Testifies Before HUAC*, ZINN ED. PROJ., <https://www.zinnedproject.org/news/tdih/paul-roberson-testifies-before-huac/> [<https://perma.cc/8M4Y-QM49>]. To some extent, private companies imbued in public controversies fall within this category. See Yoni Bard et al., *Looking at the Landscape of Congressional Investigations in 2022*, JDSUPRA (Mar. 17, 2022), <https://www.jdsupra.com/legalnews/looking-at-the-landscape-of-1249363/> [<https://perma.cc/P52Q-XKR6>].

235. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 339 (1974).

236. See Patricia Zengerle & Jan Wolfe, *U.S. House Panel Hits Pro-Trump Lawyers with Subpoenas Over U.S. Capitol Riot*, REUTERS (Mar. 1, 2022), <https://www.reuters.com/world/us/committee-probing-us-capitol-attack-subpoena-six-over-false-election-claims-2022-03-01/> [<https://perma.cc/P6JT-AVPH>].

237. Christine Blackerby, *Pleading the Fifth: Lillian Hellman and the HUAC Investigation of Hollywood*, SOCIAL ED., 2016, at 319, https://www.socialstudies.org/system/files/publications/articles/se_8006316.pdf [<https://perma.cc/Q4YM-B9D7>]; see generally Mazars, 140 S. Ct. at 2039 (Thomas, J., dissenting) (discussing a putative claim of authority over “private parties”).

238. See Ashley Gold, *Senate Panel Votes to Subpoena Big Tech CEOs*, AXIOS (Oct. 1, 2020), <https://www.axios.com/senate-panel-votes-to-subpoena-big-tech-ceos-24523011-c411-49d7-b90f-673783b7bf3.html> [<https://perma.cc/X96C-FD5K>]; Nick Sobczyk, *Oil Companies Will Be Subpoenaed After Historic Congressional Hearing*, SCI. AM.: E&E NEWS (Oct. 29, 2021), <https://www.scientificamerican.com/article/oil-companies-will-be-subpoenaed-after-historic-congressional-hearing/> [<https://perma.cc/B89F-WUP6>].

lawyers,²³⁹ teachers,²⁴⁰ persons employed in the motion picture industry,²⁴¹ over thirty members of the Titanic crew following the ship's wreck,²⁴² and mobsters.²⁴³

The foregoing illustrates that *McGrain* may capture several inferior characterizations of Congressional investigatory power. Below, this Note distills one important layer of specificity that might be added to the *McGrain* characterization:²⁴⁴ *status*. Indeed, the power to procure information includes an ability to acquire information from *people*. Thus, the general power to procure information can be re-characterized as:

- *the power to procure information from government (federal, state, and local) officials*
- *the power to procure information from private persons*
 - *quintessentially private persons*
 - *private persons who occupy prominent roles in society*
 - *private persons tethered to public controversies*
 - *private persons tethered to governmental conduct*

239. See Hugo Lowell, *US Capitol Attack Committee Subpoenas Rudy Giuliani and Other Trump Lawyers*, *GUARDIAN* (Jan. 18, 2022), <https://www.theguardian.com/us-news/2022/jan/18/us-capitol-attack-committee-subpoenas-rudy-giuliani-and-other-trump-lawyers> [<https://perma.cc/4M5D-LE5E>].

240. Livia Gershon, *How One Group of Teachers Defended Academic Freedom*, *JSTOR Daily* (Dec. 29, 2016), <https://daily.jstor.org/how-one-group-of-teachers-defended-academic-freedom/> [<https://perma.cc/S3P7-AB9A>].

241. Blackerby, *supra* note 237, at 319.

242. "TITANIC" DISASTER, S. REP. NO. 62-806, at 2 (1912), <https://www.senate.gov/about/resources/pdf/TitanicReport.pdf> [<https://perma.cc/J6A2-NFUK>].

243. Paul Camacho, *The Kefauver Hearings: A Window into the Evolution of Money Laundering and Financial Sleuthing*, *LINKEDIN* (June 30, 2017), <https://www.linkedin.com/pulse/kefauber-hearings-window-evolution-money-laundering-paul-camacho/> [<https://perma.cc/A5EN-WSLU>].

244. *McGrain v. Daugherty*, 273 U.S. 135, 161 (1927).

ii. Attenuation

Status aside, Congress may compel many to participate, without great sensitivity toward how closely connected a person is to the matter of an investigation.²⁴⁵ Understood one way, *Eastland* suggests that as long as the witness might have some information in his possession tethered to an investigation's subject matter, it may be said that compulsory process is being used to support legislation.²⁴⁶ Indeed, *Eastland* pointed to a few facts suggesting that the entity could have information connected to an inquiry.²⁴⁷ Ultimately, though, *Eastland* does not appear to require a witness to have actually been involved in the controversy, only that they could have information that could further the legislative mission. And there is, of course, no requirement that the witness actually possess the information sought.

Wilkinson may illustrate just how loosely connected a witness might be to a pending investigation. In 1958, HUAC conducted hearings in Atlanta, which "were meant to investigate Communist 'colonization' of the textile industry, Communist Party activity in the South, and the distribution of 'foreign' Communist propaganda[.]"²⁴⁸ Frank Wilkinson was a "nationally known opponent of HUAC" and traveled "to Atlanta to support" two HUAC opponents who had been compelled

245. This Note comments on initial compulsion to participate, not subsequent questions posed to a witness.

246. *Eastland v. U.S. Servicemen's Fund*, 421 U.S. 491, 506 (1975).

247. *See id.* (subpoena legitimate where Congress examined funding of activities that could "undermin[e]" troops' morale, and where USSF "operated on or near military and naval bases, . . . its facilities became 'the focus of dissent' to declared national policy[.]" and where USSF's funding source was unknown).

248. *When HUAC Investigated its Critics*, DEFENDING RIGHTS AND DISSENT, <https://www.rightsanddissent.org/news/when-huac-investigated-its-critics/> [<https://perma.cc/B3TN-XLXY>].

to testify.²⁴⁹ After Wilkinson's arrival, HUAC subpoenaed Wilkinson to testify, even though Wilkinson was not and "had never been a textile worker and who had never . . . been to the South[.]"²⁵⁰ Despite Wilkinson's attenuated relationship to the inquiry, the Court ultimately upheld Wilkinson's contempt conviction.²⁵¹

The foregoing analysis adds another layer: status *in relation to the subject under inquiry*. Put differently, Congressional investigatory power not only includes an ability to reach people of different social or public statuses, as described above, but people who are more or less connected to the subject under inquiry. Thus, the investigatory power is:

- *the power to compel participation from witnesses (all or, specified above, status-specific)*
 - *who may or may not have been involved in the controversy*
 - *who may possess relevant information*
 - *whose connection to the topic area is more or less attenuated*

iii. The Nature of the Requested Information

McGrain did not expressly limit *what* information Congress may obtain.²⁵² Thus, *McGrain* may capture the power to procure most kinds of information, whether public or private, from witnesses.²⁵³ While *Watkins* clarified that Congress lacked "general authority to expose the private affairs of individuals[,]" *Watkins* appeared to inexplicitly stipulate that demanding private information was permissible as long as it

249. *Id.*

250. *Id.*

251. *Wilkinson v. United States*, 365 U.S. 399, 401–05 (1961).

252. *McGrain*, 273 U.S. at 161.

253. ROSENBERG, *supra* note 26, at 1 ("all sources of information"); Milikan, *supra* note 3, at 632; *Mazars*, 140 S. Ct. at 2044 (Thomas, J., dissenting).

was tethered to a legitimate investigatory exercise.²⁵⁴ Therefore, although “[t]here is . . . no general power to inquire into the private affairs of individuals[,]”²⁵⁵ little information is practically off-limits.²⁵⁶ The Court made this principle—the notion that Congress may obtain most kinds of information—clear in *Eastland* by expressly rejecting a challenge against a subpoena on the grounds that the subpoena sought information related to private parties’ “beliefs” and “associations[.]”²⁵⁷ Although some private Presidential information is off-limits after *Mazars*, *Mazars* “[e]ft the core of” Congressional investigatory “power untouched.”²⁵⁸

Couched within this Note’s re-characterization framework, *McGrain* may include:

- *the power to procure quintessentially private information (associations, beliefs, etc.) from various witnesses (see layers 1 and 2)*
- *the power to procure information that is in the public record from various witnesses (see layers 1 and 2)*

iv. The Investigatory Purpose

Finally, *McGrain* authorized investigations if they have a legislative tether.²⁵⁹ The Court has added boundaries, suggesting that Congress cannot acquire power wholly allocated to other branches.²⁶⁰ Indeed, Congress is not “a law enforcement or trial agency[;]” it may not investigate exclusively to expose or support

254. *Watkins v. United States*, 354 U.S. 178, 187 (1957).

255. *First Amendment Does Not Justify Refusal to Answer Pertinent Question of Congressional Committee*, 56 COLUM. L. REV. 798, 799 (1956).

256. See ROSENBERG, *supra* note 26, at 1.

257. *Eastland v. U.S. Servicemen’s Fund*, 421 U.S. 491, 508 (1975).

258. *Trump v. Mazars USA, LLP*, 140 S. Ct. 2019, 2045 (2020) (Thomas, J., dissenting).

259. *McGrain*, 273 U.S. at 161.

260. *Barenblatt v. United States*, 360 U.S. 109, 112 (1959).

legislators' "personal aggrandizement[.]"²⁶¹ Beyond these limitations, mixed purposes may still be fair game; in compelling a witness to participate, Congress may have a legitimate legislative objective, but it may also have other objectives,²⁶² like spotlighting an issue or political gain.²⁶³

Placed within the framework detailed above, the *McGrain* characterization may include: *the power to procure [layer 3: any] information from [layers 1 and 2: any] witnesses for lawmaking purposes and other purposes [layer 4].*

v. Summary

The analysis detailed above suggests that numerous permutations and characterizations of the investigatory power necessarily fall within *McGrain's* broad ambit. This Note addresses below whether the inferior characterizations detailed above, and the *McGrain* characterization as a whole, are Necessary and Proper.

C. *The Necessary and Proper Investigatory Power*

As suggested in *McGrain*, Article I does not expressly vest Congress with an investigatory power.²⁶⁴ However, a power may be implied as long as it is "necessary and proper for carrying into Execution" other "Powers[.]"²⁶⁵ This Section addresses how *McGrain* and some inferior characterizations may be inconsistent with the Necessary and Proper Clause's commands.

261. *Watkins v. United States*, 354 U.S. 178, 187, 200 (1957).

262. One author has emphasized that "investigation is a multi-purpose congressional tool." Shapiro, *supra* note 4, at 542.

263. *See id.* at 542–47; Gilligan, *supra* note 161, at 619 n.7; Gross, *supra* note 165, at 409, 413; Warren, *supra* note 162, at 43–44; Fuess, *supra* note 4, at 151.

264. *Mazars*, 140 S. Ct. at 2031.

265. U.S. CONST. art. 1, § 8.

1. An Attenuated Investigatory Power

Despite conflicted understandings of the Necessary and Proper Clause's meaning, it was generally understood that the Clause did not vest Congress with *new* authority; rather, it provided Congress with un-enumerated authority connected to enumerated powers.²⁶⁶ For example, Hamilton remarked in *Federalist* 33 that the Necessary and Proper Clause was "perfectly harmless[,] in part, because it "must be sought for in the specific powers upon which th[e Clause wa]s predicated."²⁶⁷ In other words, implied powers accompanied express powers.²⁶⁸ Modern Necessary and Proper Clause jurisprudence tracks the Clause's original understanding to the extent that the Court has affirmed that implied power must be tethered to enumerated power.²⁶⁹ Ultimately, an implied authority should be "'narrow in scope'"²⁷⁰ and "'incidental' to the exercise of" enumerated power;²⁷¹ it should not, if permitted, "work a substantial expansion of federal authority."²⁷² This section examines the investigatory power's growth and the ways in which it may generally expand power.

266. See Barnett, *supra* note 177, at 185–86, 192, 194, 196, 200; *Mazars*, 140 S. Ct. at 2037 (Thomas, J., dissenting); see also *M'Culloch v. State*, 17 U.S. 316, 411, 420–21, 423 (1819); *Historical Background on Necessary and Proper Clause*, *supra* note 183.

267. THE FEDERALIST NO. 33, *supra* note 32, at 203 (Alexander Hamilton).

268. *Id.*; see also THE FEDERALIST NO. 44 (James Madison); see generally *Mazars*, 140 S. Ct. at 2037.

269. See *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 560 (2012).

270. See *id.* (quoting *United States v. Comstock*, 560 U.S. 126, 148 (2010)).

271. See *id.* (quoting *M'Culloch*, 17 U.S. at 418).

272. See *id.*

i. The Growth of Power

To assess expansion and attenuation, a court could compare the implied power's present ambit to the power's original ambit.²⁷³ Using early Congressional actions as interpretive guides,²⁷⁴ this Note concludes that the implied power to exercise compulsory power over witnesses for lawmaking purposes likely departs from Congress's early investigatory power, suggesting that the modern power grows authority.²⁷⁵

First, the earliest Congressional investigations did not entail the exercise of compulsory power over any individual, private or public, for regular lawmaking purposes.²⁷⁶ For example, in 1790, at Robert Morris's insistence,²⁷⁷ the House sought to "inquire into the receipts and expenditures of public monies during" Morris's tenure as a federal finance official.²⁷⁸ The 1792 St. Clair investigation also principally involved governmental subject matter: it inquired into a military operation.²⁷⁹

273. *Trump v. Mazars USA, LLP*, 140 S. Ct. 2019, 2040 (Thomas, J., dissenting).

274. *See id.*; *Harmelin v. Michigan*, 501 U.S. 957, 980 (1991), *cited in* *Gall v. United States*, 552 U.S. 38, 65 n.2 (2007) (Alito, J., dissenting); *Bowsher v. Synar*, 478 U.S. 714, 723 (1986).

275. In this section, this Note highlights some of the same historical events as Justice Thomas in his *Mazars* dissent, including, but limited to, St. Clair and the 1827 Committee on Manufacturers. *See generally Mazars USA, LLP*, 140 S. Ct. at 2038–42. However, the reader will find this Note's analysis different than Justice Thomas's dissent, which focused heavily on Congress's ability to obtain private documents. *See id.* at 2037, 2038 n.1, 2045, 2047.

276. *See* ERNEST J. EBERLING, CONGRESSIONAL INVESTIGATIONS 93–94 (1928); *Mazars USA, LLP*, 140 S. Ct. at 2040–41 (Thomas, J., dissenting) (debate over the 1827 Committee's authority).

277. *See* Michael S. Rosenwald, 'Grand Inquisitors of the Realm': How Congress Got Its Power to Investigate and Subpoena, WASH. POST (Mar. 11, 2019), <https://www.washingtonpost.com/history/2019/03/11/grand-inquisitors-realm-how-congress-got-its-power-investigate-subpoena/> [https://perma.cc/3NAC-UVQA].

278. *See* 2 Annals of Cong. 1514 (1790).

279. Currie, *supra* note 60, at 96–99; Chalou, General St. Clair's Defeat, 1792–93, in 1 CONGRESS INVESTIGATES, *supra* note 51, at 10–14; *Trump v. Mazars USA, LLP*, 140 S. Ct. 2019, 2040 (Thomas, J., dissenting).

All told, it would be over thirty years after Article I's ratification and the St. Clair investigation until the House seriously considered compulsory process for regular lawmaking purposes.²⁸⁰ And, at the time, the power's putative use was greatly contested.²⁸¹ Further, it would be over thirty more years until the Senate first harnessed compulsory power for regular lawmaking purposes.²⁸² Thus, the addition of compulsory processes for ordinary lawmaking purposes, in light of its long absence in both chambers, evinces growth.²⁸³ Of course, one should be cautious here not to overstep. Early Congressional practice suggests that it may have been understood that Congress had some power to probe (at least in the oversight context). But the introduction of a new purpose may signal broadening and expansion.

Second, and relatedly, the scope of the investigatory power must be viewed in light of Congress's changing legislative authority.²⁸⁴ Up until 1937, a period that covered *McGrain*, the Court "fairly narrowly" construed Congress's commerce powers,²⁸⁵ limiting Congress's legislative authority. During the New Deal, however, the Court's understanding of the

280. See EBERLING, *supra* note 276, at 93–94.

281. See *Mazars USA, LLP*, 140 S. Ct. at 2041; M. Nelson McGeary, *Congressional Investigations: Historical Development*, U. CHI L. REV. 425, 426–27, <https://chicagounbound.uchicago.edu/cgi/viewcontent.cgi?article=2662&context=uclev> [<https://perma.cc/95W6-36Z2>].

282. See McGeary, *supra* note 281, at 427; *Mazars USA, LLP*, 140 S. Ct. at 2042.

283. Cf. *Mazars USA, LLP*, 140 S. Ct. at 2042 (suggesting that Harper's Ferry investigation supports idea that "legislative subpoenas to private parties were a 19th century innovation"); *id.* at 2041 (noting that 1827 Committee "debate [wa]s particularly significant because of the arguments made by both sides" and previewing that "[o]pponents argued that this power was not part of any legislative function").

284. The author greatly thanks Professor Gary Lawson for his observation that *McGrain* was decided before federal power significantly expanded.

285. Jordan Goldberg, *The Commerce Clause and Federal Abortion Law: Why Progressives Might Be Tempted to Embrace Federalism*, 75 FORDHAM L. REV. 301, 308–09 (2006).

commerce power greatly changed, and Congress was eventually vested with wide, almost plenary authority.²⁸⁶ While the Court has clawed back its expansive interpretation, it has not returned to its *McGrain*-era understanding of the commerce power.²⁸⁷ As Congress's legislative authority expanded, so did the putative scope of investigatory power: an increase in the number and variety of areas subject to federal legislation²⁸⁸ ostensibly expanded the number and variety of people subject to compulsory process to support legislation.²⁸⁹ In other words, there may have been growth of federal investigatory power since the Framing and *McGrain* due, in part, to the growth of Congressional regulatory power more generally.

A different dimension of the foregoing proposition concerns legislative output. For its first seventy years, Congress passed about 150 public acts per session.²⁹⁰ In the post-New Deal era, Congressional output, in some sessions, exceeded 1,000 public acts.²⁹¹ The number of public acts does not necessarily equate to an increase in the use of compulsory process. But as

286. *See id.* at 309-10; RANDY BARNETT, RESTORING THE LOST CONSTITUTION: THE PRESUMPTION OF LIBERTY 315-17 (2004); Gary Lawson, *The Rise and Rise of the Administrative State*, 107 HARV. L. REV. 1231, 1236 (1994).

287. *See* Ilya Somin, THE IMPACT OF JUDICIAL REVIEW ON AMERICAN FEDERALISM 2, 24 (2013), https://www.law.gmu.edu/assets/files/publications/working_papers/1345JudicialReviewonAmericanFederalism.pdf [<https://perma.cc/R7Y7L-Y4JB>]; Jim Chen, *The Story of Wickard v. Filburn: Agriculture, Aggregation, and Commerce*, in CONSTITUTIONAL LAW STORIES 3, 22-24, 26-28 (Michael C. Dorf ed., 2d ed. 2009), <http://osaka.law.miami.edu/~schnably/Chen,Filburn.pdf> [<https://perma.cc/7QG5-2NBN>].

288. *See* Chen, *supra* note 287, at 3.

289. *See generally* HAMILTON, *supra* note 5, at 116 (noting the private areas that may now be regulated).

290. *See* Stephen Ansolabehere et al., *Divided Government and Significant Legislation: A History of Congress from 1789 to 2010*, 42 SOC. SCI. HIST. 81, 89-90 (2017).

291. *See id.*

legislative productivity increases, the number of potential opportunities to exercise compulsory power to support the legislative process might increase, potentially expanding the power's putative scope.

Third, some modern investigations deviate from early ones in character.²⁹² Early Congressional investigatory power appeared largely confined to subject matter concerning public expenditures, the use and misuse of resources or public office, or activity affecting the Congressional body.²⁹³ Many investigations were plausibly tethered to the public purse—Congress's appropriation powers²⁹⁴—like the St. Clair investigation,²⁹⁵ the 1800 investigation into Treasury Secretary Oliver Wolcott,²⁹⁶ the 1809 investigation into War Department expenditures,²⁹⁷ the 1810 investigation into various executive departments,²⁹⁸ the 1810 investigation into Brigadier General James Wilkinson,²⁹⁹ the 1820 and 1822 Post Office investigations,³⁰⁰ and the 1824 investigation into the Treasury secretary.³⁰¹ Some early investigations may have also probed other governmental activity or activity connected to the federal

292. In his dissent, Justice Thomas made an observation regarding eighteenth century legislative investigations cited by *Mazars amici*, explaining that they “sought to compel testimony from government officials on government matters.” *Mazars USA, LLP*, 140 S. Ct. at 2039–41 (Thomas, J., dissenting). This Note understands this observation as commentary on the character of those investigations.

293. Landis, *supra* note 28, at 170–71; EBERLING, *supra* note 276, at 37–38, 42, 53, 93; TAYLOR, *supra* note 29, at 33–34.

294. See generally *Overview of the Appropriations Clause*, CONST. ANNOTATED, https://constitution.congress.gov/browse/essay/artI-S9-C7-1/ALDE_00001095/ [<https://perma.cc/K7PJ-7B88>] (last visited Jan. 28, 2023).

295. See Landis, *supra* note 28, at 170–71, 171 n.68.

296. *Id.* at 171.

297. *Id.* at 172–73, 173 n.81; EBERLING, *supra* note 276, at 63.

298. Landis, *supra* note 28, at 173.

299. *Id.* at 173–74, 174 n.88.

300. *Id.* at 176–77.

301. EBERLING, *supra* note 276, at 86–87.

government, like the 1801 inquiry into the Governor of the Mississippi Territory,³⁰² the 1818 investigation into the Bank of the United States,³⁰³ and the 1818 investigation into executive agency clerks.³⁰⁴ Others, of course, concerned the Congressional body, looking into libels, bribery, and member conduct.³⁰⁵

Unlike early uses of the investigatory power, the modern power might tether itself to a broader array of subjects, some not as closely connected to governmental conduct or activities.³⁰⁶ Indeed, some investigations have probed comic books,³⁰⁷ television violence,³⁰⁸ news documentaries,³⁰⁹ TV quiz shows,³¹⁰ content moderation,³¹¹ performance enhancing

302. 1 AMERICAN STATE PAPERS 233 (Walter Lowrie & Walter S. Franklin eds., 1834), cited in Landis, *supra* note 28, at 172 n.80.

303. Landis, *supra* note 28, at 175, 175 n.91. The Second Bank of the United States was Congressionally created and could be supervised by Congress. See *id.* at 175 n.91; *Renewal of the Second Bank of the United States Vetoed*, LIBRARY OF CONG., <https://guides.loc.gov/this-month-in-business-history/july/renewal-second-bank-united-states-vetoed>.

304. EBERLING, *supra* note 276, at 65.

305. See *id.* at 41–42, 54, 66.

306. See generally *Mazars*, 140 S. Ct. at 2037 (Thomas, J., dissenting) (distinguishing *St. Clair* as "an investigation of Government affairs").

307. Amy Kiste Nyberg, *William Gaines and the Battle over EC Comics*, in *A COMICS STUDIES READER* 58, 59–60 (Jeet Heer & Kent Worcester eds., 2009).

308. William Boddy, *Senator Dodd Goes to Hollywood*, in *THE REVOLUTION WASN'T TELEVISED* 161, 162 (Lynn Spiegel & Michael Curtin eds., 1997).

309. S.L. Alexander, *CBS News and Subpoenas Duces Tecum, 1971-1987*, 10 *COMM. & L.* 3, 5 (1988).

310. KENT ANDERSON, *TELEVISION FRAUD* 140–41 (1978).

311. Zoe Richards, *House Republicans Subpoena Apple, Facebook and Google Over Content Moderation*, *NBC NEWS* (Feb. 15, 2023), <https://www.nbcnews.com/politics/congress/house-gop-subpoenas-facebook-google-content-moderation-rcna70910>.

drug use in professional baseball,³¹² the proliferation of a political ideology in different areas of American society,³¹³ banking practices,³¹⁴ organized crime,³¹⁵ corruption in organized labor,³¹⁶ and internet sex trafficking.³¹⁷

To be fair, some of these subject areas and the activities under investigation could, however remotely, involve governmental conduct, or at least conduct that involves governmental actors. For example, the investigation into labor activities was motivated by an earlier finding “that racketeers had invaded the business of supplying uniforms to the U.S. Government[.]”³¹⁸ HUAC, too, looked into “whether Communists worked in the federal government[.]”³¹⁹ Nevertheless, the conduct in these investigations was not limited to the governmental: the labor activities investigation “covered a wide range of labor unions and corporations in the United States”³²⁰ and HUAC tethered itself to “[c]ivil servants, movie stars,

312. Edward Lazarus, *Congress’ Decision to Subpoena Former Baseball Players to Testify*, CNN (Mar. 29, 2005), <https://www.cnn.com/2005/LAW/03/17/lazarus.steroids/>.

313. *Barenblatt v. United States*, 360 U.S. 109, 119–21 (1959); *Wilkinson v. United States*, 365 U.S. 399, 408 (1961); Stone, *supra* note 112, at 1389; Dara L. Schottenfeld, *Witches and Communists and Internet Sex Offenders, Oh My: Why It Is Time to Call Off the Hunt*, 20 ST. THOMAS L. REV. 359, 366 (2008).

314. *Subcommittee on Senate Resolutions 84 and 234*, UNITED STATES SENATE, <https://www.senate.gov/about/powers-procedures/investigations/pecora.htm> [<https://perma.cc/KT6A-2TPN>] (last visited Jan. 28, 2023).

315. *Special Committee on Organized Crime in Interstate Commerce*, UNITED STATES SENATE, <https://www.senate.gov/about/powers-procedures/investigations/kefauver.htm> [<https://perma.cc/R8B4-YRU3>] (last visited Jan. 28, 2023).

316. *Guide to Senate Records: Chapter 18 1946-1968*, NAT’L ARCHIVES, <https://www.archives.gov/legislative/guide/senate/chapter-18-1946-1968.html#18E-7>.

317. *Senate Permanent Subcommittee v. Ferrer*, 199 F. Supp. 3d 125, 136 (D.D.C. 2016).

318. *Guide to Senate Records*, *supra* note 316.

319. “Which Side Are You On?,” U.S. HOUSE OF REP.: HISTORY, ART & ARCHIVES (Aug. 17, 2020), https://history.house.gov/Blog/2020/August/8_17_20_Pete_Seeger/.

320. *Guide to Senate Records*, *supra* note 316.

playwrights, musicians, and teachers[.]”³²¹ All considered, the broadening of the investigatory ambit might signal growth.

Fourth, some modern investigations appear to deviate from early ones in scope. From the beginning, private people could have tethered themselves to government operations and controversies, like private contractors in the St. Clair matter, at least making it possible for them to become subjects of a Congressional inquiry.³²² Furthermore, some early investigations involving the Congressional body implicated private individuals, and at least a couple of investigations concerning governmental activities actually involved private people.³²³ Still, some modern investigations have appeared to cast comparably wider nets over the private American population.³²⁴ The

321. “Which Side Are You On?”, *supra* note 319.

322. Michael Stern, *Justice Thomas’s Dissent in Trump v. Mazars*, POINT OF ORDER (Sept. 10, 2020), <https://www.pointoforder.com/2020/09/10/justice-thomass-dissent-in-trump-v-mazars/> [<https://perma.cc/3EE3-4V4L>].

323. *Id.* The Wilkinson matter, for example, involved, among others, Daniel Clark and Daniel Coxe; Clark was engaged in business dealings with Wilkinson and Coxe was Clark’s business associate who was involved in a prior proceeding related to Wilkinson. See George C. Chalou, *James Wilkinson – The Spanish Connection*, in 1 CONGRESS INVESTIGATES: A DOCUMENTED HISTORY, 1792-1974 116, 119 (eds. Arthur M. Schlesinger, Jr. & Roger Bruns, 1975), 1983 edition cited in Stern, *supra* note 322; Michael Wohl, *Not Yet Saint Nor Sinner: A Further Note on Daniel Clark*, LOUISIANA HISTORY: THE JOURNAL OF THE LOUISIANA HISTORICAL ASSOCIATION, vol. 24, 1983, at 195. For others included in the Wilkinson matter, see 11 ANNALS OF CONG. 2289–90.

324. *Final Report of the Select Committee on Improper Activities in the Labor or Management Field*, 86th Cong. 870-71 (1960) (numerous unions and businesses under investigation); M.J. HEALE, AMERICAN ANTICOMMUNISM 186–88 (1990) (Congress reached over 200+ film industry members, 100+ teachers, journalists, and a church official); GARY A. DONALDSON, WHEN AMERICA LIKED IKE 52 (2017) (600 witnesses called by Kefauver Committee were “mostly” criminals); Zach Schonfeld, *Here’s a List of the People Who Have Been Subpoenaed by the Jan. 6 Committee*, HILL (June 7, 2022), <https://thehill.com/homenews/house/3514712-heres-a-list-of-the-people-who-have-been-subpoenaed-by-the-jan-6-committee/>; Elizabeth Goitein, *Congressional Access to Americans’ Private Communications*, BRENNAN CTR. FOR JUSTICE (Sept. 28, 2021), <https://www.brennancenter.org/our-work/analysis-opinion/congressional-access-americans-private-communications> [<https://perma.cc/QW5K-DJK9>]; see generally Lloyd

Court seemed to recognize this phenomenon in *Watkins*, remarking that HUAC was novel because it “involved a broad-scale intrusion into the lives and affairs of private citizens.”³²⁵ But the Court did not then appreciate the phenomenon’s potential doctrinal significance—that growth might suggest expansion and attenuation.

One critical caveat to this analysis, however, is that Congress used impressively open-textured language when authorizing some of its earliest investigations.³²⁶ It may be argued that this phenomenon counsels against the proposition that there has been growth with respect to who Congress may reach because Congress could have, at least in theory, reached anyone if it so chose.³²⁷ While this Note appreciates the foregoing, this Note assigns greater analytical weight to Congressional practice, which appears to have expanded since the Republic’s early days.

Fifth, the 1827 Committee on Manufacturer’s investigation is a highly instructive baseline from which further expansion of Congress’s ability to investigate could be measured.³²⁸ One

K. Garrison, *Congressional Investigations: Are They a Threat to Civil Liberties?*, AM. BAR ASSOC. J., vol. 40, 1954, at 125. For an overview of some of the earliest investigations, see generally EBERLING, *supra* note 276, at 36–95; Landis, *supra* note 28, at 170–81; TAYLOR, *supra* note 29, at 22–34; George C. Chalou, *St. Clair’s Defeat, 1792*, in 1 CONGRESS INVESTIGATES: A DOCUMENTED HISTORY, 1792-1974, *supra* note 323, at 9–17; Herman J. Viola, *The Burning of Washington 1814*, in 1 CONGRESS INVESTIGATES: A DOCUMENTED HISTORY, 1792-1974, *supra* note 323, at 255–59; Herman J. Viola, *Andrew Jackson’s Invasion of Florida, 1818*, in 1 CONGRESS INVESTIGATES: A DOCUMENTED HISTORY, 1792-1974, *supra* note 323, at 340–49; Roger A. Bruns, *John C. Calhoun-The Rip Rap Imbroglia, 1826*, in 1 CONGRESS INVESTIGATES: A DOCUMENTED HISTORY, 1792-1974, *supra* note 323, at 482–98. This Note acknowledges that “many” of the St. Clair investigation’s “records were not preserved[,]” Stern, *supra* note 322, and recognizes the foregoing as a limitation on the proposition that modern investigations cast comparably wider nets.

325. *Watkins v. United States*, 354 U.S. 178, 195 (1957).

326. See Stern, *supra* note 322; see, e.g., EBERLING, *supra* note 276, at 42, 54, 64.

327. See Stern, *supra* note 323.

328. See generally *Mazars*, 140 S. Ct. at 2040–41 (Thomas, J., dissenting).

key dimension of the investigation was its subject matter—it contemplated a tariff.³²⁹ Congress may “lay and collect Taxes, Duties, and Imposts[.]”³³⁰ so the legislation contemplated was ostensibly, closely tethered to Congress’s enumerated powers.³³¹ A tariff had been implemented only years earlier,³³² further supporting an inference that the object of Congressional action was under Congress’s limited legislative authority. The investigation also appeared to center around a piece of legislation “then under consideration by the House[.]”³³³ This is unlike the modern power, which does not need to tether itself to a piece of legislation being considered.³³⁴

A different noteworthy aspect of the Committee investigation concerned putative need for compulsory process. The proposed tariff of 1828 covered a highly contentious issue, which “found violent partisans within and without Congress.”³³⁵ Compulsory process was entertained after the committee “found many conflicting memorials before them, and . . . the truth could not be arrived at by oral testimony.”³³⁶ To the extent that this historical example suggests that Congress take steps to obtain information before compulsory pro-

329. Landis, *supra* note 28, at 177.

330. U.S. CONST. art. I, § 8, cl. 1.

331. See generally BRANDON MURRILL, CONG. RSCH. SERV., R44707, PRESIDENTIAL AUTHORITY OVER TRADE: IMPOSING TARIFFS AND DUTIES 1 (2016).

332. F.W. Taussig, *The Tariff History of the United States (Part I)*, TEACHING AMERICAN HISTORY, <https://teachingamericanhistory.org/document/the-tariff-history-of-the-united-states-part-i/> [<https://perma.cc/93FG-QFM9>] (last visited Jan. 28, 2023).

333. Landis, *supra* note 28, at 177.

334. *Watkins*, 354 U.S. at 187.

335. Landis, *supra* note 28, at 177.

336. See EBERLING, *supra* note 276, at 94–95.

cess is sought, this practice departs from the scope of the modern power, which, under *Eastland*, does not appear to require legislators to do such a thing.³³⁷

Finally, one last observation worth noting concerns the expanded use of compulsory process, sometimes with oversight by fewer people. The first part of this proposition concerns expanded use of the subpoena power, at least when measured against some accounts of its earliest exercises.³³⁸ For example, one committee “served” in excess of 8,000 subpoenas between 1957 and 1959.³³⁹ Others, in more recent years, have issued hundreds.³⁴⁰ Of course, investigations do not always involve a high volume of subpoenas. But the idea that the scope of the modern exercise may greatly dwarf the early power might signal expansion.

Relatedly, practices concerning supervision over compulsory process have ostensibly shifted.³⁴¹ Notably, “there has been a move away from formal initiations of investigations[;]” further, with increased occurrence, committees are delegated subpoena power, and that power can be, but is not always, delegated to committee chairs.³⁴² A couple of chairs have leveraged this power to unilaterally issue numerous subpoenas,

337. Under *Eastland*, “the courts [cannot] interfere with a subpoena concerning a legitimate area of congressional investigation.” *United States v. American Tel. & Tel. Co.*, 551 F.2d 384, 391 (D.C. Cir. 1976).

338. See *supra* note 324 (sources providing overview of some early investigations); cf. Michael Stern, *Upcoming Supreme Court Case Threatens Congressional Subpoena Power*, LAWFARE (June 20, 2023), <https://www.lawfaremedia.org/article/upcoming-supreme-court-case-threatens-congressional-subpoena-power> (“For the first century or so, Congress issued subpoenas rarely[.]”).

339. HAMILTON, *supra* note 5, at 63.

340. See *id.*; *Subpoena Precedent*, CO-EQUAL, <https://www.co-equal.org/guide-to-congressional-oversight/subpoena-precedent> [<https://perma.cc/E96L-E74U>] (last visited Jan. 28, 2023).

341. Wright, *supra* note 5, at 450.

342. See *id.*; HAMILTON, *supra* note 5, at 209.

one of them more than 1,000.³⁴³ The foregoing seems at least in tension with the notion that House investigatory power delegation occurred “[v]ery sparingly” early on and the idea that “[w]itnesses were not to be produced save where the House had previously ordered an inquiry[.]”³⁴⁴

All told, the foregoing shows a broadening of the investigatory power and, thus, ostensible growth, suggesting that the implied power may not be Necessary and Proper as presently characterized. Before proceeding, it is important to address a potential counterargument. Some may argue that using early Congressional practices as a baseline from which expansion is measured is methodologically self-serving.³⁴⁵ This author disagrees. A historical baseline set any earlier is improper, since it would not, as others have highlighted, adequately account for Article I’s departure from Parliamentary and colonial legislative practices.³⁴⁶ The Framing “represented a break with the past” and greatly shaped the way people perceived legislatures and government more generally.³⁴⁷ Thus, “[i]t is . . . risky . . . to rely upon Parliamentary practice or what occurred among colonial legislatures as a guide to understanding whether the post-1776 American government possessed authority to engage in a particular activity.”³⁴⁸ On the other hand, later dates may suffer from bootstrapping issues. If there had been an improper expansion, measuring the expanded power from a time in which power had already expanded would not recognize the initial, earlier expansion.

343. *Subpoena Precedent*, *supra* note 340.

344. EBERLING, *supra* note 276, at 34; Wright, *supra* note 5, at 450.

345. Cf. Stern, *supra* note 322.

346. EBERLING, *supra* note 276, at 97; *Trump v. Mazars USA, LLP*, 140 S. Ct. 2019, 2039-40 (2020) (Thomas, J., dissenting); O’Neill, *supra* note 27, at 2457.

347. See O’Neill, *supra* note 27, at 2457.

348. *Id.*

ii. The Pre-Jurisdictional Power

The juncture at which courts assess the validity of implied power exercises may raise additional concerns about expansion. When courts review the validity of Congressional subpoenas, exercises of the implied power, they must arguably draw inferences about the nature of the implied power to conclude that it is permissibly linked to Congress's limited legislative ambit.³⁴⁹ Below, this Note details how an understanding of the investigatory power that is too wide and deferential could leave room for error, permitting Congress to use the implied power to advance powers not enumerated,³⁵⁰ potentially evincing growth.

First, to validate a Congressional inquiry, a court must infer that an investigation will be generally legislatively productive.³⁵¹ As suggested in *McGrain*, Congress may compel participation only "on [subjects] which legislation could be had[.]"³⁵² In other words, courts must infer that Congress is not necessarily inquiring just to inquire or other impermissible purposes;³⁵³ its investigation should help it further the legislative mission in some conceivable manner.³⁵⁴ However, not all investigations produce legislation,³⁵⁵ nor do they need to.³⁵⁶ The Court has explained that "[t]he very nature of the investigative function—like any research—is that it takes the

349. See generally Shapiro, *supra* note 4, at 537–39, 542, 550–53.

350. Cf. *id.* at 549, 553 ("[T]he Court would have to strike down all investigations if it realistically examined them for legislative and nothing but legislative purpose.").

351. See *id.* at 535–38, 550–52.

352. *McGrain v. Daugherty*, 273 U.S. 135, 177 (1927).

353. Shapiro, *supra* note 4, at 536–38, 548.

354. See *id.* at 538, 548, 550; see also Kent B. Millikan, *Limitations on the Power of Congressional Investigations*, 8 WM. & MARY L. REV. 630, 631–32 (1967).

355. HAMILTON, *supra* note 5, at 137.

356. LOUIS FISHER, CONG. RSCH. SERV., RL31836, CONGRESSIONAL INVESTIGATIONS: SUBPOENAS AND CONTEMPT POWER 6 (2003).

searchers up some ‘blind alleys’ and into nonproductive enterprises.”³⁵⁷ And Congress need not identify an “end result” or that any putative end result actually falls within its limited legislative authority.³⁵⁸

To the extent that Congress exclusively and uniformly acts within its granted “legislative Powers[.]”³⁵⁹ the foregoing phenomenon is not problematic because it could be said that compulsory process, the implied power, is categorically used in service of Congress’s legislative powers. In other words, there is a close connection between the implied power and legislative power more generally. A problem arises, however, to the extent Congress might use its implied power to service ends, in addition to legislative ones, that do not squarely fall within its limited legislative authority.³⁶⁰ This potential delta—the difference between implied power exercises that are exclusively connected to legislative ends and those that are not—may be attributed to permissive judicial treatment of the implied power; in some cases at least, the indicia of non-legislative purposes can be reasoned away or ignored.³⁶¹ For example, courts may not examine “the motives alleged to have prompted” a legislative exercise, notwithstanding an alleged

357. *Eastland v. U.S. Servicemen’s Fund*, 421 U.S. 491, 509 (1975). Congressional investigations need not ultimately produce legislation, and even prior evidence of a fruitless topic area does not “invalidate . . . continued authorization.” *Gross, supra* note 165, at 409.

358. *Eastland*, 421 U.S. at 509.

359. U.S. CONST. art. 1, § 1.

360. See Shapiro, *supra* note 4, at 542–48, 553–54; *Gross, supra* note 165, at 413; Gilligan, *supra* note 161, at 619 n.7; Warren, *supra* note 162, at 43–44; BARTH, *supra* note 6, at 22–23, 70–71; see generally ROBERT K. CARR, THE HOUSE COMMITTEE ON UN-AMERICAN ACTIVITIES 6–7 (1952); Richard J. Leon, *Congressional Investigations: Are Partisan Politics Undermining Our Vital Institutions?*, 31 SUFFOLK U. L. REV. 825, 827–28 (1998); Reid P. F. Stuntz, *Congressional Oversight and Investigations 101*, 20 THE HEALTH LAW. 24, 25 (2008).

361. See Shapiro, *supra* note 4, at 538–39, 549, 550–53; HAMILTON, *supra* note 5, at 116–17.

“unworthy purpose[.]”³⁶² As suggested above, outcome does not matter: “the legitimacy of a congressional inquiry [is not] to be defined by what it produces.”³⁶³ And “[t]he wisdom of congressional approach or methodology is not open to judicial veto.”³⁶⁴ Again, if courts hold Congress to its legislative authority, the foregoing is unlikely an issue. But to the extent that deferential treatment of the power converts the power into something more—something that lets Congress act beyond the legislative authority, even if Congress has a legislative tether, there might be growth.

Second, even if Congress has a legislative purpose, a court must arguably infer that the ends of compulsory process will fall within Congress’s enumerated authorities. In *McGrain*, the Court tethered the investigatory power to Congress’s general legislative power,³⁶⁵ which is not an enumerated power.³⁶⁶ Article I, Section 1 provides, in relevant part, that “[a]ll legislative Powers herein granted shall be vested in a Congress of the United States[.]”³⁶⁷ Article I suggests that Congress has no

362. *Eastland v. U.S. Servicemen’s Fund*, 421 U.S. 491, 508–09 (1975).

363. *Id.* at 509.

364. *Id.*

365. *McGrain v. Daugherty*, 273 U.S. 135, 161, 174–75 (1927).

366. See Gary Lawson, Comment, *Burning Down the House (and Senate): A Presentment Requirement for Legislative Subpoenas Under the Orders, Resolutions, and Votes Clause*, 83 TEX. L. REV. 1373, 1383 (2005).

367. U.S. CONST. art. 1, § 1.

general plenary lawmaking power,³⁶⁸ only authority “expressed in the text of the written Constitution.”³⁶⁹ Thus, Congressional action must fall “within Congress’s . . . jurisdiction”—an enumerated power—for it to comply with the Necessary and Proper Clause; otherwise, the Clause would provide an end-run around or impermissibly expand Congress’s limited legislative ambit.³⁷⁰ While *McGrain* may not have tethered the investigatory power to an enumerated power, it at least required a connection between the implied power and topics “on . . . which legislation could be had[,]”³⁷¹ ostensibly requiring courts to infer that an inquiry is tethered to legislative ends that fall under an enumerated power (e.g., an area Congress may permissibly legislate).

The dilemma here is similar to the one stated above. Courts have some tools that let them approximate whether Congress is acting within its authority. For instance, a court may look to a committee’s general mandate or prior Congressional interest in an area.³⁷² At the end of the day, though, the ultimate product of compulsory process is forthcoming and unknown. It seems contrary to the idea of implied and enumerated powers to permit Congress to exercise implied power in service of some legislative power that ultimately exceeds Congress’s

368. See *United States v. Lopez*, 514 U.S. 549, 566 (1995); William N. Eskridge, Jr. & Neomi Rao, *Article I, Section 1: General Principles*, NAT’L CONST. CTR., <https://constitutioncenter.org/the-constitution/articles/article-i/clauses/749> [<https://perma.cc/CWW5-JFLZ>] (last accessed Jan. 28, 2023).

369. Randy E. Barnett, *The Continuing Relevance of the Original Meaning of the Thirteenth Amendment*, 15 GEO. J.L. & PUB. POL’Y 1, 4 (2017); Lawson, *supra* note 366, at 1383; *Buckley v. Valeo*, 424 U.S. 1, 132 (1976).

370. See Lawson & Granger, *supra* note 15, at 271 (emphasis omitted); see also *id.* at 324; 330–31.

371. *McGrain v. Daugherty*, 273 U.S. 135, 177 (1927).

372. *Senate Permanent Subcommittee v. Ferrer*, 199 F. Supp. 3d 125, 135–36 (D.D.C. 2016).

enumerated powers.³⁷³ But this Note offers two ways in which this phenomenon could arise.

The first way concerns putative error at the ‘pre-jurisdictional’³⁷⁴ juncture—on a motion to quash, when implied power exercises are evaluated. Suppose Congress uses its implied power to explore whether it can legislate in a given area and, later, ultimately concludes (or a court concludes) that it lacks power to legislate. Even if a court initially, correctly found that Congress could legislate in the investigative subject area, the implied power has perhaps, in that case, practically attached to an end that cannot be had, a non-enumerated end. In this situation, the notion that Congress could use the implied power in service of non-enumerated authority would appear to grow Congressional authority.

Separately, the phenomenon could also arise where Congress acts “in an area where legislation would apparently be unconstitutional” but where a court generously infers that Congress may act notwithstanding—for example, by reasoning that “the committee’s findings may result in repeal of unconstitutional legislation already existing[.]”³⁷⁵ To the extent that Congress is acting in area that exceeds its enumerated powers, it may be said that the implied power expands power to the extent that it is used in connection with non-enumerated authority. This notion holds true even if Congress’s objective is a laudable one, like trying to act within its powers by repealing unconstitutional legislation. The foregoing illustrates some circumstances under which the implied power may grow Congressional power.

373. See generally Lawson & Granger, *supra* note 15, at 271, 324, 331.

374. See generally *id.* at 271.

375. Gross, *supra* note 165, at 409; see also *United States v. Dennis*, 72 F. Supp. 417, 420 (D.D.C. 1947).

Finally, a court must arguably infer that a witness has actually done a thing that allows Congress to exercise authority over him. The Court clarified in *NFIB* that “[t]he individual [healthcare] mandate” was impermissible, in part, because it “vest[ed] Congress with the extraordinary ability to create the necessary predicate to the exercise of . . . [Congress’s express commerce] power.”³⁷⁶ In other words, Congress could not manufacture its own authority by forcing people to engage in an activity that had to occur before Congress could act. This phenomenon could arise in the investigations context if a witness was not actually engaged in the activity over which Congress asserts authority, but where Congress sought to compel the witness’s participation anyway. In this scenario at least, the only basis for control over the witness would be the activity that Congress has made the witness engage in. This Note understands *Eastland* to require some facts suggesting that a witness may have relevant information,³⁷⁷ which could be understood to approximate a witness’s connection to the Congressional forum (e.g., whether the witness has engaged in the activity over which Congress has authority). However, to the extent *Eastland* falls short of requiring a definite connection to the Congressional forum, it seems at least possible for Congress to achieve what *NFIB* prohibited if it brought someone within its ambit who had not first performed some activity under Congress’s powers. This Note appreciates, however, that this theory is novel and speculative.

iii. The Investigatory Power as a “Great Power”

Professor William Baude has observed that “some powers are so great, so important, or so substantive, that we should

376. See *Nat’l Fed’n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 560 (2012).

377. *Eastland v. U.S. Servicemen’s Fund*, 421 U.S. 491, 506 (1975).

not assume that they were granted by implication, *even if* they might effectuate an enumerated power.”³⁷⁸ The investigatory power, at least as the Court articulated in *McGrain*, may be one such “great power.”³⁷⁹

First, the use of non-enumerated, auxiliary authorities³⁸⁰ suggest that the investigatory power might stand alone. Subpoenas and contempt prop up the investigatory power; if Congress cannot demand people to participate, and enforce those demands, then its power to inquire into things is effectively nullified.³⁸¹ The foregoing phenomenon is somewhat analogous to the enumerated power to “lay and collect Taxes[.]”³⁸² As Professor Baude suggests, the taxing power could have been implied to effectuate enumerated federal programs—yet, the power was so significant that it had to be enumerated.³⁸³ The investigatory power shares some similarities with the taxing power. Both powers permit the government to extract something from private people “without individualized consent[.]”³⁸⁴ So, both powers include a core power and an accompanying enforcement mechanism.³⁸⁵ Article I enumerates the power to request money from the people. With the Necessary and Proper Clause’s help, Congress can, through the taxing power, implement “all known and appropriate means of effectually collecting . . . revenue[.]”³⁸⁶ But Article I does not enumerate a power to request information

378. William Baude, *Rethinking the Federal Eminent Domain Power*, 122 YALE L.J. 1738, 1749 (2013).

379. *See id.*

380. *McGrain v. Daugherty*, 273 U.S. 135, 174 (1927).

381. *See* BARTH, *supra* note 6, at 17; GARVEY *supra* note 228, at 2.

382. U.S. CONST. art. I, § 8, cl. 1; *see generally* Baude, *supra* note 378, at 1756.

383. *See* Baude, *supra* note 378, at 1754–56.

384. *Id.* at 1757.

385. *See generally id.* at 1750

386. *Murray’s Lessee v. Hoboken Land & Improvement Co.*, 59 U.S. 272, 281 (1856).

from people. So, compulsory power in service of the investigatory power tethers itself to non-enumerated authority. In other words, the investigatory power involves compounded implied authorities where the second order authority involves compulsory process that gives effect to the first order authority. This phenomenon could suggest that the investigatory power is, a great power, meaning it should have been enumerated.³⁸⁷

Second, the investigatory power appeared to be a fairly important parliamentary mechanism, which may suggest that it is a great power.³⁸⁸ Nearly a century before the Framing, “Parliament had numerous committees in place investigating government operations.”³⁸⁹ William Pitt famously opined that Parliament was duty-bound “to inquire into every step of public management[.]”³⁹⁰ Just before the American Founding, James Wilson famously remarked, in reference to the House of Commons, that members served as “grand inquisitors of the realm. The proudest ministers . . . have appeared at the bar of the house, to give an account of their conduct, and ask pardon for their faults.”³⁹¹ By 1827, it was suggested in the House that “[t]he common law of Parliament . . . dictate[d] that the legislature *must* possess the power . . . to procure the information it needed[.]”³⁹² The foregoing pronouncements

387. Further, as Professor Gary Lawson highlights, the absence of text granting Congress compulsory power is significant and bolsters the argument above, especially since compulsory process is expressly granted elsewhere in the Constitution. See Lawson, *supra* note 366, at 1384.

388. See Baude, *supra* note 378, at 1756 (looking to parliamentary practice).

389. Marshall, *supra* note 9, at 785.

390. Pitt, *supra* note 30, at 84.

391. JAMES WILSON, 3 THE WORKS OF THE HONOURABLE JAMES WILSON 219 (1804).

392. 3 HINDS' PRECEDENTS § 1816 (1907) (emphasis added).

suggest that the inquiry power was a vital attribute of Parliament's institutional role, and it is doctrinally important that Parliament's compulsory power was not enumerated.

2. An Improper Investigatory Power

In *M'Culloch*, Justice Marshall explained that "all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional."³⁹³ *M'Culloch* raised what is now a perennial question: which ends are off-limits? In *Federalist 33*, Hamilton explained that laws that "usurp[]" state authority are "not granted by the Constitution."³⁹⁴ The Supreme Court appeared to inexplicitly recognize Hamilton's proposed boundary line in *Printz* and *Comstock*, evincing that modern jurisprudence is sensitive to state interests.³⁹⁵ Furthermore, it has been suggested that Congressional action may not acquire executive or judicial functions or violate rights held by the people.³⁹⁶ Indeed, as the Supreme Court succinctly stated in *NFIB*, "laws that undermine the structure of government established by the Constitution" fall beyond the Clause's ambit.³⁹⁷

393. *M'Culloch v. Maryland*, 17 U.S. 316, 421 (1819).

394. THE FEDERALIST NO. 33, *supra* note, 32 at 205 (Alexander Hamilton); *see generally* Lawson & Granger, *supra* note 15, at 271, 328, 330–32.

395. *Printz v. United States*, 521 U.S. 898, 924 (1997); *United States v. Comstock*, 560 U.S. 126, 144 (2010).

396. *See* Lawson & Granger, *supra* note 15, at 271, 297, 324, 328–29, 333–34; *see also* *Operation Rescue Nat'l v. United States*, 975 F. Supp. 92, 96 (D. Mass. 1997), *aff'd*, 147 F.3d 68 (1st Cir. 1998); *Town of Greece v. Galloway*, 572 U.S. 565, 604–10 (2014) (Thomas, J., concurring); *cf.* *Nat'l Fed'n of Indep. Bus. V. Sebelius*, 567 U.S. 519, 559 (2012).

397. *Nat'l Fed'n of Indep. Bus.*, 567 U.S. at 559; *see also* *United States v. DeLeon*, No. CR 15-4268 JB, 2018 WL 4100949, at *6 (D.N.M. Aug. 28, 2018).

i. Popular Sovereignty

In *Federalist* 33, Hamilton explained “that the national government, like every other, must judge, in the first instance, of the proper exercise of its powers, and its constituents in the last.”³⁹⁸ However, “[i]f the federal government” exceeds “the just bounds of its authority and make[s] a tyrannical use of its powers, the people . . . must appeal to the standard they have formed, and take such measures to redress the injury done to the Constitution[.]”³⁹⁹ In other words, the people may ultimately decide what is Necessary and Proper by electing representatives who will or will not wield their power in a manner consistent with the electorate’s views. If the people believe that Congress should not exercise their power in a certain manner, they will ostensibly elect or pressure their representatives to not act in that manner—a position most recently argued by *Mazars amici* who suggested that if “legislative abuses occur, it is up to the voters to impose their will on their elected representatives[.]”⁴⁰⁰

Modern Congressional investigatory power may upset “the structure of government established by the Constitution”⁴⁰¹ in some contexts by usurping the people’s will and voice. The Tenth Amendment provides that “[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.”⁴⁰² Some have suggested that “to the People” refers to

398. THE FEDERALIST NO. 33, *supra* note 32, at 203 (Alexander Hamilton).

399. *Id.*

400. Brief of Niskanen Center et al. as Amici Curiae in Support of Respondents, *Trump v. Mazars USA LLP*, 140 S. Ct. 2019 (2019) (Nos. 19-715, 19-760), 2020 WL 1434017, at *17.

401. *Nat’l Fed’n of Indep. Bus. V. Sebelius*, 567 U.S. 519, 559 (2012).

402. U.S. CONST. amend. X.

popular sovereignty, or “delegations of power from the sovereign to the sovereign’s agents” — the people to their government representatives.⁴⁰³

While *McGrain* left the people’s ability to elect their representatives untouched, the mechanics of the modern power may create significant distance between the people’s voice and the exercise of power, making it difficult, at least in some contexts, to say that the people agreed to the exercise. Although members approving rules and resolutions have, in theory, tacitly consented to a committee’s future actions by investing them with subpoena powers, compulsory process may fall under the purview of single or small clusters of legislators.⁴⁰⁴ For example, in *Watkins*, the Court suggested that “committees and subcommittees, sometimes one Congressman, are endowed with the full power of the Congress to compel testimony.”⁴⁰⁵ Indeed, even the disputed action before the Court in *Watkins* arose out of a request by only two legislators.⁴⁰⁶ Even today, not all committees demand majority approval before subpoenas are issued.⁴⁰⁷

The notion that only a few legislators may ultimately determine how Congressional power is wielded over individuals greatly distinguishes the investigatory power from other implied powers, whose exercise has been challenged only after

403. Kurt T. Lash, *The Original Meaning of an Omission: The Tenth Amendment, Popular Sovereignty, and “Expressly” Delegated Power*, 83 NOTRE DAME L. REV. 1889, 1924, 1926 (2008).

404. *Watkins v. United States*, 354 U.S. 178, 200–01 (1957); *Subpoena Precedent*, *supra* note 340; Christopher F. Corr & Gregory J. Spak, *The Congressional Subpoena: Power, Limitations and Witness Protection*, 6 BYU J. PUB. L. 37, 38–40 (1992).

405. *Watkins*, 354 U.S. at 200–01.

406. *See id.* at 201.

407. JANE A. HUDIBURG, CONG. RSCH. SERV., R44247, A SURVEY OF HOUSE AND SENATE COMMITTEE RULES ON SUBPOENAS 5–6 (2021).

such actions have passed through the legislative process,⁴⁰⁸ involving committee deliberation, approval in both legislative chambers, and executive authorization.⁴⁰⁹ The attenuation between the people's voice and the exercise of power over them might suggest that the current structure of Congressional investigations conflicts with principles of popular sovereignty, "upset[ting] the balance of" power between the people and the federal government⁴¹⁰ and "undermin[ing] the structure of government established by the Constitution[.]"⁴¹¹

ii. Protections for the Individual

The modern power may also conflict with the Constitution's "spirit[.]"⁴¹² Anti-Federalists were deeply concerned that officials would not only abuse "power, when they ha[d] acquired it . . . [by] gratifying their own interest and ambition," but that the people would lack the political will power to stymie the abuse.⁴¹³ As suggested above, Congress may investigate any matter as long as there is some legislative tether.⁴¹⁴ Therefore, legislators may compel participation—interfere with the individual's liberty interests—even if political gain or self-interest conceivably make up a great portion of the reason for compulsion; in other words, legislators' predominating interests

408. See, e.g., *United States v. Comstock*, 560 U.S. 126, 130 (2010); *Nat'l Fed'n of Indep. Bus. V. Sebelius*, 567 U.S. 519, 540 (2012); *United States v. Kebodeaux*, 570 U.S. 387 (2013).

409. *The Legislative Process*, U.S. HOUSE OF REPRESENTATIVES, <https://www.house.gov/the-house-explained/the-legislative-process> [<https://perma.cc/K5AX-KNVT>] (last visited Jan. 29, 2023).

410. BARTH, *supra* note 6, at 12.

411. *Nat'l Fed'n of Indep. Bus.*, 567 U.S. at 559.

412. *M'Culloch v. Maryland*, 17 U.S. 316, 421 (1819).

413. BRUTUS NO. 1, in *THE ANTI-FEDERALIST PAPERS*, *supra* note 46, at 292–93.

414. See *McGrain v. Daugherty*, 273 U.S. 135, 161 (1927).

other than legislation may conceivably⁴¹⁵ subordinate the individual's liberty interests.

The phenomenon detailed above conflicts with Founding skepticism toward legislative power and the notion that the people reign supreme over their government,⁴¹⁶ suggesting that the modern power's ambit might be improper because it tips the scale too heavily in favor of the legislature.⁴¹⁷ Indeed, Hamilton suggested that the people reigned supreme over the legislature, remarking that if the people's will conflicted with legislative action, courts should prioritize "the intention of the people to the intention of their agents[,]" or the people's elected representatives.⁴¹⁸ Others agreed that the people reigned supreme,⁴¹⁹ including James Wilson who notably remarked during the Convention "that the supreme, absolute and uncontrollable authority, *remain[ed]* with the people[,]" not the legislative branch.⁴²⁰ Because the investigatory power might permit individual legislators to "substitute their *will* to

415. Shapiro, *supra* note 4, at 543, 546; Gilligan, *supra* note 161, at 619 n.7; Zeisel & Stamler, *supra* note 161, at 263, 268, 297; Maslow, *supra* note 162, at 840; Fitzpatrick, *supra* note 157, at 17; Auchincloss, *supra* note 158, at 177; Warren, *supra* note 162, at 43-44.

416. See *Trump v. Mazars USA, LLP*, 140 S. Ct. 2019, 2038 (2020) (Thomas, J., dissenting).

417. See BARTH, *supra* note 6, at 12.

418. THE FEDERALIST NO. 78, *supra* note, 32 at 467 (Alexander Hamilton).

419. Andrew G. I. Kilberg, *We the People: The Original Meaning of Popular Sovereignty*, 100 VA. L. REV. 1061, 1072-75 (2014).

420. 2 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 456 (Jonathan Elliot 2 ed., 1901), *quoted in Mazars*, 140 S. Ct. at 2038 (Thomas, J., dissenting).

that of . . . constituents[.]”⁴²¹ the power may conflict with the Constitution’s “spirit”⁴²² and improper.⁴²³

iii. The Forgotten Executive

McGrain ignored key Necessary and Proper Clause language, which further disturbs the relationship between Congress and the people. As Professor Lawson identified, the Necessary and Proper Clause only extends to “laws[.]” meaning “Congress has power to enact *legislation* (*subject to presentment*) that is ‘necessary and proper for carrying into Execution the foregoing Powers[.]’”⁴²⁴ Yet, Congressional investigations and subpoenas can skirt presentment—they may be governed by rules and resolutions.⁴²⁵ This phenomenon is troubling to the extent that it deprives the executive of effectuating her constitutional role as a check on legislative power.⁴²⁶ Indeed, through the presentment process, the executive ordinarily gets to decide how much coercive power the federal government may permissibly exercise over people. A law imposing too harsh of a penalty may be vetoed. Distance from the executive’s voice, thus, may be a detriment to the people, who may benefit if the executive disagrees with the manner in which Congress wields its authority. And, ultimately, it may also be a detriment to the executive, who loses her say.

421. THE FEDERALIST NO. 78, *supra* note, 32 at 467 (Alexander Hamilton).

422. *M’Culloch v. Maryland*, 17 U.S. 316, 421 (1819).

423. Justice Thomas appears to inexplicitly suggest this point when discussing the difference between Parliamentary and Congressional power. See *Mazars USA, LLP*, 140 S. Ct. at 2038 (Thomas, J., dissenting).

424. Lawson, *supra* note 366, at 1385 (emphasis added) (quoting U.S. CONST. art. 1, § 8, cl. 18).

425. HUDIBURG, *supra* note 407, at 7–11, 17–22.

426. *Cf.* Lawson, *supra* note 366, at 1385 (“The presentment power is a sensible and natural way for presidents to protect executive prerogatives against legislative overreaching.”).

3. An Unnecessary Investigatory Power

This Note does not dispute the proposition that “legislative judgment” may be “impossible without access to information.”⁴²⁷ However, compelling Congressional interests do not necessarily justify all means.⁴²⁸ “Necessary”⁴²⁹ has at least two plausible original meanings, and both govern how Congress may wield non-enumerated power to achieve its ends.

To the extent that Madison’s interpretation of the Necessary and Proper Clause is dispositive of the Clause’s original meaning, “Necessary”⁴³⁰ “means *really* necessary in the sense that the end cannot be performed in some manner that does not infringe the retained liberties of the people.”⁴³¹ Indeed, Congressional action “would have resulted by unavoidable implication” principally because acting in a certain auxiliary manner was perhaps the sole way to achieve Congress’s objective.⁴³²

In contrast, “Necessary”⁴³³ may mean “no more than that one thing is convenient, or useful, or essential to another.”⁴³⁴ Justice Marshall suggested that “employ[ing] the means necessary to an end . . . is generally understood as employing any means *calculated to produce* the end, and not as being confined to those single means, without which the end would be entirely unattainable.”⁴³⁵ The term’s contemporary meaning aligns most closely with Justice Marshall’s interpretation;

427. Marshall, *supra* note 9, at 799.

428. *Cf. Mazars*, 140 S. Ct. at 2036.

429. U.S. CONST. art. I, § 8, cl. 18.

430. *Id.*

431. Barnett, *supra* note 186, at 751.

432. *See* Statement of James Madison, *reprinted in* CLARKE & HALL, *supra* note 184, at 42.

433. U.S. CONST. art. I, § 8.

434. *M’Culloch v. State*, 17 U.S. 316, 413–14 (1819).

435. *See id.* (emphasis added).

“Necessary”⁴³⁶ action is simply that which is “really calculated to attain the end[.]”⁴³⁷ Put differently, an action is necessary and therefore valid under the modern interpretation if the means are “reasonably adapted” to fit putative Congressional ends.⁴³⁸

i. A High-Level Analysis

The Court’s current articulation may not be meaningfully conceptualized to implement Congress’s lawmaking powers due to its potential over-inclusivity. The *Barenblatt* court suggested that “[t]he scope of the power of inquiry, in short, is as penetrating and far-reaching as the *potential* power to enact and appropriate under the Constitution.”⁴³⁹ To the Court’s credit, it is not difficult to imagine a scenario where a large investigatory ambit *may* be calibrated to produce actionable information. For example, uncovering the influence of crime within different sectors might conceivably require Congress to interview many to gauge whether and to what extent such activity had pervaded institutions or organizations.⁴⁴⁰ However, it is also not difficult to imagine a scenario in which Congress need not have an ability to reach every matter it could possibly legislate on or all members of American society. For example, the 1792 St. Clair investigation sought to examine a military failure; in other words, the subject under investigation was a discrete happening that ostensibly had a finite

436. U.S. CONST. art. I, § 8.

437. *Burroughs v. United States*, 290 U.S. 534, 548 (1934), *quoted in* *United States v. Comstock*, 560 U.S. 126, 135 (2010).

438. *United States v. Darby*, 312 U.S. 100, 121 (1941), *quoted in* *Comstock*, 560 U.S. at 143.

439. *Barenblatt v. United States*, 360 U.S. 109, 111 (1959).

440. *See generally* G. Robert Blakey & Ronald Goldstock, “*On the Waterfront*”; *RICO and Labor Racketeering*, 17 AM. CRIM. L. REV. 341, 341 (1980).

number of causal tethers.⁴⁴¹ Thus, it would have been odd to vest Congress with a sweeping power to reach most for that investigation. In other words, setting the power at its *most* inclusive ambit would unlikely have been meaningfully calibrated to achieve Congress's end objective.

The Court's articulation of the implied contempt power further suggests that the investigatory power need not be at its widest and most expansive ambit to be effective or necessary. Indeed, the Court emphasized in *Anderson* that the contempt power could only be exercised in "the least possible [manner] adequate to the end proposed[.]"⁴⁴² Thus, it does not follow that the investigatory power, which entails compulsory process, must also be at its widest and most permissive ambit.

ii. If not Congress, then who?

Madison's view may invalidate Congressional interference where information could be obtained through less restrictive or intrusive means.⁴⁴³ For example, Congress would unlikely be able to obtain information from a witness where Congress could obtain the same information through voluntary compliance, the collective knowledge and experience of its members,⁴⁴⁴ information obtained through public reports or litigation, and information generally within the public domain. Because Congress may achieve its ends by relying on less intrusive means, it is unlikely necessary under Madison's view,

441. SEE *PORTRAITS in Oversight: General St. Clair's Defeat*, LEVIN CTR. HOME, <https://www.levin-center.org/congress-first-investigation-general-st-clairs-defeat/>.

442. *Anderson v. Dunn*, 19 U.S. 204, 231 (1821) (emphasis omitted).

443. See generally Barnett, *supra* note 186, at 751. In some ways, the *Mazars* majority inexplicitly embraced this view by proscribing "access to the President's personal papers when other sources could provide Congress the information it needs." *Mazars*, 140 S. Ct. at 2036.

444. 4 Cong. Debates 863 (Statement of Wright) ("[P]robably some gentleman may supply" the information sought).

in many cases, to exercise compulsory power over individuals to reach the same result.

iii. If not the target, then who?

Under *Eastland*, Congress likely needs to show why it chose the witness it did, but, as suggested above, a witness's connection to an inquiry may be attenuated. As long as a witness could have relevant information in their possession, they may be compelled to participate. But this is not meaningful calibration.

First, the nature and value of the putative information in the witness's possession matters. Highly germane information may support interference more than less relevant information. New information may prove more valuable than that which is cumulative or redundant. And highly sensitive information may strengthen an opposing interest in avoiding compulsion.

Second, the witness's nexus to the inquiry matters. Because investigations involve interference with a subject's liberty interests, greater attenuation may suggest that compulsory exercise is not needed because there may be others, more closely related, who might supply Congress with the information it needs. Relatedly, a subject who Congress can show was directly involved in a controversy might expect to be the subject of compulsory exercise perhaps more than someone uninvolved, which speaks to the strength of the private interest in avoiding compulsory process.

Third, Congressional interests matter. Congressional need may not justify the intrusion or interference, especially where Congressional interests are weaker and the subject is more distantly related to the inquiry. An investigation's overall am-

bit and breadth matters here. Taking a step back from the witness before the court, it is appropriate to ask Congress why it needs to exercise compulsory power over large groups of people to obtain its ends. Weak ends may justify less interference. Put differently, the collective cost of compulsory power over many may not justify the ends sought. All things considered, *McGrain* and *Eastland* do not adequately appreciate the foregoing considerations.

4. An Inherent Investigatory Power?

Some have suggested that Congressional investigatory power “is inherent in” Congress’s general lawmaking power.⁴⁴⁵ For example, in *Watkins*, the Supreme Court stated that “[t]he power of the Congress to conduct investigations is inherent in the legislative process.”⁴⁴⁶ The distinction between inherent and implied authority is potentially significant. To the extent that the investigatory power is inherent, the power may not need to comply with the Necessary and Proper Clause’s commands.⁴⁴⁷

This Note dispenses with the inherent power argument on three related grounds. First, inherent and implied powers

445. Wright, *supra* note 5, at 414; Peterson, *supra* note 93, at 1412. Inherent powers are not necessarily tied to Constitutional text. See Sarah H. Cleveland, *Powers Inherent in Sovereignty: Indians, Aliens, Territories, and the Nineteenth Century Origins of Plenary Power over Foreign Affairs*, 81 TEX. L. REV. 1, 6 (2002); Simon P. Hansen, *Whose Defense Is It Anyway? Redefining the Role of the Legislative Branch in the Defense of Federal Statutes*, 62 EMORY L.J. 1159, 1188 (2013).

446. *Watkins v. United States*, 354 U.S. 178, 187 (1957).

447. Robert Longley, *What are Inherent Powers? Definition and Examples*, THOUGHTCO. (June 23, 2021), <https://www.thoughtco.com/inherent-powers-definition-and-examples-5184079> [<https://perma.cc/49RM-WLQG>]; WILLIAM J. RICH, 3 MODERN CONSTITUTIONAL LAW § 35:3 (3rd ed.).

may ultimately be one-and-the-same,⁴⁴⁸ meaning the analysis detailed above is undisturbed even if the investigatory power is characterized as inherent, rather than implied. Second, to the extent that implied and inherent powers are distinct, the investigatory power is presently characterized as an “auxiliary to” Congressional lawmaking power, suggesting that the Court understands that the investigatory power is implied rather than inherent.⁴⁴⁹ In other words, notwithstanding *Watkins*’ use of “inherent[,]”⁴⁵⁰ the Court nevertheless considers the investigatory power an implied power.⁴⁵¹

Finally, it is eminently unclear how the investigatory power is, as a matter of course, *inherently* as capacious as that prescribed in *McGrain*. As suggested in Part I, the investigatory power undisputedly descends from Parliamentary practice.⁴⁵² But as Justice Thomas appeared to suggest in his *Mazars* dissent, there is good reason to be skeptical of arguments tethering Congressional power to Parliamentary power because, unlike Parliament, Congress possesses limited, enumerated authority,⁴⁵³ and it would be odd to assume that Congress inherited such a consequential power.⁴⁵⁴

448. David M. Driesen & William C. Banks, *Implied Presidential and Congressional Powers*, 41 CARDOZO L. REV. 1301, 1302 n.2 (2020), Joseph J. Anclien, *Broader Is Better: The Inherent Powers of Federal Courts*, 64 N.Y.U. ANN. SURV. AM. L. 37, 40 & 40 n.10 (2008), cited in Driesen & Banks, *supra*, at 1302 n.2.

449. *McGrain v. Daugherty*, 273 U.S. 135, 174 (1927), quoted in *Trump v. Mazars USA, LLP*, 140 S. Ct. 2019, 2031 (2020).

450. *Watkins v. United States*, 354 U.S. 178, 187 (1957).

451. *Mazars*, 140 S. Ct. at 2031.

452. Berger, *supra* note 27, at 866.

453. *Mazars*, 140 S. Ct. at 2038 (Thomas, J., dissenting); see Lawson, *supra* note 366, at 1382.

454. See Lawson, *supra* note 366, at 1384 (“[I]t would require absurdity of a very high level to infer the existence of a power as potent as the power to issue and enforce subpoenas.”)

IV. A MAZARS-TYPE APPROACH

To stymie further abuse and restore the “balance of powers”⁴⁵⁵ between Congress and the people,⁴⁵⁶ this Note urges the Court to adopt the following three-part, *Mazars*-inspired approach⁴⁵⁷ that is administrable, tethered to Founding-era principles, and carefully balances Congressional need with individual liberty.

A. Justification & Goals

Any approach must be administrable, recognize Congress’s reliance interests, and appreciate the Court’s potential concerns about stifling legitimate Congressional action. First, this Note purposefully crafts the doctrine below to be easily administrable by lower courts. To its credit, the *McGrain* standard is easy to apply: if the inquiry is tethered to potential legislative action, the inquiry is generally valid.⁴⁵⁸ Thus, without an equally administrable standard, the Court might be reluctant to abandon *McGrain*.

Second, any doctrinal approach must recognize legitimate Congressional reliance interests.⁴⁵⁹ Although this Note thinks *McGrain* greatly erred, *McGrain* is longstanding, well-established precedent. Thus, the Court may be reluctant to overturn *McGrain* or completely stymie access to information and people that Congress may presently reach. Therefore, this Note accounts for Congressional reliance interests by declining to categorically abridge Congressional access to certain people or information. Furthermore, this Note recognizes

455. BARTH, *supra* note 6, at 12.

456. *Cf. Mazars*, 140 S. Ct. at 2037.

457. *See id.* at 2035.

458. *See McGrain v. Daugherty*, 273 U.S. 135, 161 (1927).

459. *Mazars*, 140 S. Ct. at 2031–33.

Congressional need. Although Part III casts doubt on whether much of *McGrain* is justifiable under the Necessary and Proper Clause, this Note does not dispute the idea that Congress has a compelling interest in obtaining information through compulsory processes in many cases.⁴⁶⁰

Finally, the Court may be concerned about stifling Congressional action, in part, because Congressional action represents the people's will.⁴⁶¹ However, any potential concern is significantly mitigated in the instant context because of the investigatory power's unique attenuation from the people's will. Still, the solution detailed below is crafted with deference in mind to alleviate concerns that the court might stymie the people's will.

B. *Mazars*

The solution detailed in this Note draws heavily from the doctrine recently set forth in *Mazars*. While the *Mazars* majority did not expressly couch its standard in Necessary and Proper Clause jurisprudence, the majority appeared to implement Necessary and Proper Clause concepts.⁴⁶² Because the implied investigatory power must comport with Necessary and Proper Clause jurisprudence,⁴⁶³ this Note takes some of the doctrinal principles offered in *Mazars* and couches them in Necessary and Proper Clause terms. In other words, it repurposes and synchronizes some of the doctrinal concepts offered in *Mazars* with Necessary and Proper Clause jurisprudence. Furthermore, this Note adds jurisprudential components *Mazars* may have missed, and fleshes out some of the vague and amorphous standards detailed in *Mazars*.

460. *See id.* at 2033.

461. Barnett, *supra* note 186, at 750.

462. Trump v. Mazars USA, LLP, 140 S. Ct. 2019, 2035 (2020).

463. Clark, *supra* note 172, at 542.

C. The Doctrine

Procedural Posture. Congress exercises its investigatory power by issuing subpoenas.⁴⁶⁴ Therefore, courts would most likely apply the doctrine detailed below to evaluate Congressional investigatory power on a motion to quash.⁴⁶⁵

Step 1. Once a witness has moved to quash a subpoena, a lower court reviewing the motion will apply a three-part test to determine whether an investigatory exercise is “Proper.”⁴⁶⁶ A court will ask if the subpoena (1) is tethered to actual, legitimate ends;⁴⁶⁷ (2) does not acquire powers wholly allocated to other branches and does not violate the witness’s rights;⁴⁶⁸ and (3) concerns a subject matter that is connected to a specific enumerated power.⁴⁶⁹

First, courts must ensure that Congress possesses legitimate ends.⁴⁷⁰ Ends verification in Necessary and Proper Clause jurisprudence dates back to *M’Culloch* with Justice Marshall’s pronouncement to “[l]et the end be legitimate, let it be within the scope of the constitution[.]”⁴⁷¹ Thus, consistent with Necessary and Proper Clause jurisprudence, courts should consider Congressional ends.

However, instead of broadly demanding and adjudicating legislators’ subjective intentions, which one author has noted

464. See GARVEY, CONGRESSIONAL SUBPOENAS: ENFORCING EXECUTIVE BRANCH COMPLIANCE, *supra* note 228, at 2.

465. *Mazars*, 140 S. Ct. at 2028.

466. U.S. CONST. art. I, § 8.

467. See Marshall, *supra* note 9, at 815–16; *M’Culloch v. State*, 17 U.S. 316, 423 (1819).

468. See Lawson & Granger, *supra* note 15, at 271, 297, 328–29, 333–34; *Barenblatt v. United States*, 360 U.S. 109, 111–12 (1959).

469. See Lawson & Granger, *supra* note 15, at 271, 324, 330–31; see also *United States v. Comstock*, 560 U.S. 126, 134 (2010).

470. *M’Culloch*, 17 U.S. at 423.

471. See *id.*

“may raise more problems than . . . cure,”⁴⁷² courts might dually require legislators and witnesses to produce indicia of legitimacy and illegitimacy, respectively. As the *Mazars* court suggested, a court might first demand a “detailed . . . legislative purpose[.]”⁴⁷³ A court may then look to other indicia. For example, a court might require Congress to provide a detailed explanation why it chose to subpoena the specific witness before the court. A detailed explanation, as in the legislative purpose context, might show that Congress has not arbitrarily selected the witness. A court might also examine whether a committee has been productive.⁴⁷⁴ A committee that has not acted on the information it has received for a length of time may suggest that it is not operating within a legitimate area.⁴⁷⁵ A court might also consider the class of witnesses previously examined and the nature of the information obtained from prior witnesses. A vast probe into sensitive areas with repeating questions may suggest an impermissible dragnet.⁴⁷⁶ Similarly, witnesses of a certain class that are targeted more often than others might suggest that compulsory process is being used to arbitrarily single some out.

Moreover, a court might require legislators to offer actual, specific examples of legislation that could be conceivably sought from an investigation,⁴⁷⁷ potential questions that the investigators might ask the witness, the investigation’s anticipated completion date, and the number of potential witnesses. Courts might then analyze the foregoing inputs by applying a laugh test: is Congress *really* acting in pursuit of

472. Marshall, *supra* note 9, at 816.

473. Trump v. Mazars USA, LLP, 140 S. Ct. 2019, 2036 (2020).

474. *But see* Eastland v. U. S. Servicemen’s Fund, 421 U.S. 491, 509 (1975).

475. *See generally* Zeisel & Stamler, *supra* note 161, at 263, 297.

476. *See generally id.*

477. Wilkinson v. United States, 365 U.S. 399, 410 (1961).

legitimate ends? Or is Congress likely interfering with the witness for other impermissible purposes?

Second, courts should ensure that any potential legislation does not interfere with powers allocated to other branches and does not violate a witness's rights.⁴⁷⁸ Powers exercised in a manner that violates a witness' rights or acquires authority allocated to other branches is clearly "[in]consistent with the letter and spirit of the constitution[.]"⁴⁷⁹ Thus, it is vital to *continue* to apply these standards,⁴⁸⁰ notwithstanding the introduction of a more streamlined doctrine. A revised doctrine could require presentment,⁴⁸¹ or it could use presentment as a factor that might weigh in favor of a finding that Congress has not usurped executive power.

Finally, courts must ensure that investigations are tethered to specific enumerated powers, a requirement for implied powers.⁴⁸² A court might first assess the inquiry's posture: is it connected to existing or pre-existing legislation or is it tethered to prospective action? An inquiry tethered to future unexplored areas may suggest greater attenuation between the compulsory exercise and Congress's authority. Again, Congress may mitigate these concerns by producing examples of legislation connected to the inquiry's subject matter as well as specific examples of legislation it may produce.⁴⁸³ This may help a court infer with greater certainty whether the putative

478. See Lawson & Granger, *supra* note 15, at 271, 297, 328–29, 333–34; Barenblatt v. United States, 360 U.S. 109, 111–12 (1959).

479. See *M'Culloch v. State*, 17 U.S. 316, 423 (1819).

480. *Trump v. Mazars USA, LLP*, 140 S. Ct. 2019, 2032 (2020).

481. Lawson, *supra* note 366, at 1372.

482. *United States v. Comstock*, 560 U.S. 126, 134 (2010); see Lawson & Granger, *supra* note 15, at 271, 324, 330–31.

483. See *Wilkinson v. United States*, 365 U.S. 399, 410 (1961); see generally ROSENBERG, *supra* note 26, at 5.

end lies under Congress's authorities. A court might then require Congress to reveal what information it hopes to obtain from the witness before the court, and how that information relates back to the area over which Congress has authority; this would effectively move the pertinence inquiry up to stage of the initial compulsory exercise.⁴⁸⁴ Finally, a court might require Congress to show by a preponderance of the evidence that the witness has, in fact, engaged in the activity under Congress's powers.

Step 2. Assuming that Congress possesses "Proper" ends, courts should then determine whether Congressional means are "Necessary"—that is, the means are "reasonably adapted"⁴⁸⁵ to achieve the proposed legislative end.⁴⁸⁶ Here, a court might require Congress to show by a preponderance of the evidence that the witness possesses the information it suspects the witness to possess.⁴⁸⁷ Actual knowledge may be too restrictive, but modern jurisprudence is too permissive, and this standard will correct for that. A court might then require Congress to show that the information "will advance its consideration of the possible legislation."⁴⁸⁸ In other words, the information the witness possesses will further the legislative mission. A court might also examine whether Congress could obtain the information through less restrictive means.⁴⁸⁹ While compulsion need not be a last resort, Congress should be unable to exercise compulsion when "other sources could

484. See generally ROSENBERG, *supra* note 26, at 5.

485. *United States v. Darby*, 312 U.S. 100, 121 (1941).

486. *Trump v. Mazars USA, LLP*, 140 S. Ct. 2019, 2035–36 (2020).

487. *Wilkinson v. United States* offered "probable cause," which is awfully generous and leaves much room for error. 365 U.S. 399, 412 (1961).

488. See *Mazars*, 140 S. Ct. at 2036.

489. See generally *id.* at 2035–36.

[or have] reasonably provide [or provided] Congress the information it needs [or needed] in light of its particular legislative objective."⁴⁹⁰

Step 3. Finally, courts should holistically determine whether Congressional action is "Proper" by balancing Congressional need against the private interest.⁴⁹¹ The Court appeared to recognize the appropriateness of holistic balancing in *Mazars*, suggesting that "courts should carefully assess whether the asserted legislative purpose warrants the significant step of involving the President and his papers," and that courts should exercise caution when "assess[ing] the burdens imposed on the President by a subpoena."⁴⁹² Here, a court might determine legislative need by examining the weight behind the compulsory exercise. Congress may demonstrate a weightier need to obtain information from a particular witness if more legislators have agreed to the exercise. Congress may also identify the weight of its interests in play.⁴⁹³ The private witness may strengthen his interest against participating by pointing to evidence that participation may subject him to extraordinary costs, embarrassment, job loss, and so forth. The private witness may strengthen his interest by pointing to an investigation's holistic reach:⁴⁹⁴ sweeping compulsory process that has produced little may suggest that further compulsory process is unnecessary in his case.

D. Speech or Debate Clause

Some might suggest that Article I's Speech or Debate Clause bars judicial probing. Article I, Section 6 provides, in relevant

490. *See id.*

491. *See id.* at 2036.

492. *See id.*

493. *See generally id.*

494. *See generally* Zeisel & Stamler, *supra* note 161, at 263.

part, that “for any Speech or Debate in either House,” members of Congress “shall not be questioned in any other Place.”⁴⁹⁵ In *Eastland*, the Court justified its wide deference to Congressional subpoenas on the grounds that the Speech or Debate Clause proscribed a more probing evaluation of Congressional action.⁴⁹⁶ Thus, notwithstanding the analysis detailed in Part III, one could argue that the Speech or Debate Clause conceivably bars the Court from employing the doctrine detailed above. In other words, investigatory costs remain consequences of Constitutional text.⁴⁹⁷

The foregoing argument is likely misplaced for two reasons. First, *Mazars* appeared to deviate from *Eastland* to the extent that it did not appear to extend the Speech or Debate Clause’s protections to challenges brought by the President against some Congressional subpoenas.⁴⁹⁸ Indeed, nowhere in the *Mazars* opinion did the Court discuss the Speech or Debate Clause,⁴⁹⁹ despite *amici* having raised the issue.⁵⁰⁰ Thus, *Mazars* may suggest that the Speech or Debate Clause does not bar judicial probing into pre-compliance Congressional investigatory action.

Second, while this Note reserves an extended discussion of the Speech or Debate Clause’s meaning for a later work, the doctrine detailed in this Note is at least consistent with *Eastland*’s interpretation of the Speech or Debate Clause.

495. U.S. CONST. art. I, § 6.

496. *Eastland v. U. S. Servicemen’s Fund*, 421 U.S. 491, 501 (1975).

497. *See id.*

498. *Mazars*, 140 S. Ct. at 2030–36.

499. *See id.*

500. Brief of Amici Curiae the Lugar Center and the Levin Center at Wayne Law in Support of Respondents at 6, *Trump v. Mazars USA LLP*, 140 S. Ct. 2019 (2020) (Nos. 19-715, 19-760); Brief of Boston University School of Law Professors Sean J. Kealy and James J. Wheaton as Amici Curiae in Support of Respondents at 18, *Trump v. Mazars USA LLP*, 140 S. Ct. 2019 (2020) (Nos. 19-715, 19-760).

Eastland plainly held that if activities “fall within the sphere of legitimate legislative activity[,]” then they are “immune from judicial” probing.⁵⁰¹ The test detailed above is simply one way to determine whether activity falls within the range permissible Congressional activities. Thus, *Eastland* would unlikely bar the doctrine detailed in this Note.

CONCLUSION

Congressional investigatory power is presently inconsistent with the Necessary and Proper Clause’s commands. To prevent stymie future abuse, this Note urges the Court to adopt a *Mazars*-inspired doctrine that operationalizes the Necessary and Proper Clause’s commands.

501. *Eastland v. U. S. Servicemen’s Fund*, 421 U.S. 491, 501 (1975) (quoting *Tenney v. Brandhove*, 341 U.S. 367, 376 (1951)) (internal quotation marks omitted).