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WHEN DID THE ARTICLES OF CONFEDERATION CEASE TO BE LAW?

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I. INTRODUCTION

Professors Lawson and Seidman have done it again with a provocative article entitled *When Did the Constitution Become Law?*[1] I must confess that upon first reading their article as it was going to press in late 2001 I was seething with envy. The question of when did the Constitution become law is one that has received virtually no attention.[2] It is the kind of arcane question of constitutional law that only dedicated

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1 Gary Lawson & Guy Seidman, *When Did the Constitution Become Law?*, 77 NOTRE DAME L. REV. 1 (2001) [hereinafter Lawson & Seidman, *When Did the Constitution Become Law?*]. For another recent and provocative article by Lawson and Seidman, see Gary Lawson & Guy Seidman, *The Hobbesian Constitution: Governing Without Authority*, 95 NW. U. L. REV. 581 (2001) [hereinafter Lawson & Seidman, *The Hobbesian Constitution*].

2 Although Lawson and Seidman's article-length creativity is to be celebrated, it is worth remembering that the question of when the Constitution was adopted reared its ugly head a few years ago at the University of Minnesota. *See* Contest, *Was George Washington Constitutional?*, 12 CONST. COMMENT. 137 (1995) (arguing that President Washington was a citizen of Virginia, which was not one of the first nine States to ratify the Constitution, and was therefore not a citizen of the United States at the time of the adoption of the Constitution under Article VII, and hence was ineligible to be President under Article II, § 1, cl. 5); *cf.* U.S. CONST. art. II, § 1, cl. 5 (Presidential Eligibility Clause) ("No Person except a natural born Citizen, or a Citizen of the United States, *at the time of the Adoption of this Constitution*, shall be eligible to the Office of President; neither shall any Person be eligible to that Office who shall not have attained to the Age of thirty five Years, and been fourteen Years a Resident within the United States.") (emphasis added). For the sole published response to this contest, see Jordan Steiker et al., *Taking Text and Structure Really Seriously: Constitutional Interpretation and the Crisis of Presidential Eligibility*, 74 TEX. L. REV. 237 (1995).

formalists and historicists would really care about.[3] Even after 213 years (or should I say 212 years?!),[4] there is much in constitutional law that remains to be said, about the past that is. And it is the kind of question that makes for a great trivia question in constitutional law because it forces constitutional lawyers to think carefully about text, history, and structure . . . as well as the early nineteenth-century conventional wisdom handed down from no American jurist more celebrated than Chief Justice John Marshall.[5]

According to that conventional wisdom, elaborated by Chief Justice Marshall in the case of *Owings v. Speed*,[6] the Constitution did not become law until the spring of 1789,[7] although Article VII of the Constitution plainly states that "[t]he Ratification of the Conventions of nine States, shall be sufficient for the Establishment of this Constitution between the States so ratifying the Same,"[8] and the requisite nine ratifications occurred in the early summer of 1788.[9]

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3 To be sure, Lawson and Seidman do make clear the modern significance of their seemingly arcane inquiry. *See infra* text accompanying notes 19–27.

4 According to the conventional wisdom, the effective date of the Constitution was March 4, 1789, when the first session of the First Congress began. *See* Owings v. Speed, 18 U.S. (5 Wheat.) 420, 422 (1820) (Marshall, C.J.). Marshall's conclusion implies only 212 years under the Constitution. According to Lawson and Seidman, the effective date of (at least part of) the Constitution was definitely sometime in the early summer of 1788. *See* Lawson & Seidman, *When Did the Constitution Become Law?*, *supra* note 1, at 2. Their conclusion implies 213 years under the Constitution.

5 On Chief Justice Marshall's legacy, see, for example, Symposium, *The Legacy of Chief Justice John Marshall*, 43 WM. & MARY L. REV. 1321 (2002); and Symposium, *Chief Justice John Marshall and the United States Supreme Court, 1801–1835*, 33 J. MARSHALL L. REV. 743 (2000).

6 18 U.S. (5 Wheat.) 420 (1820) (Marshall, C.J.).

7 *See id.* at 422–23.

8 U.S. CONST. art. VII.

9 New Hampshire became the ninth State to ratify the Constitution on June 21, 1788. *See* General Ratification Chronology, 1786–1791, *in* 8 DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION xxi (John P. Kaminski & Gaspare J. Saladino eds., 2000) [hereinafter DHRC]. Virginia became the tenth State to ratify the Constitution just a few days later on June 25, 1788, 8 *id.*, ostensibly without knowledge of New Hampshire's ratification. *See* Lawson & Seidman, *When Did the Constitution Become Law?*, *supra* note 1, at 1 n.2. New York became the eleventh State to ratify the Constitution on July 20, 1788. 8 DHRC, *supra*, at xxi.

Importantly, North Carolina and Rhode Island did not ratify the Constitution until after the spring of 1789, when the new federal government was fully effective. North Carolina became the twelfth State to ratify the Constitution on November 21, 1789, after the passage of the Judiciary Act of 1789 and the submission of the Bill of Rights to the States (to name just two actions taken by the new federal government), after having refused to ratify the Constitution on August 2, 1788. 8 *id.* Rhode Island, the true renegade State, became the last of the original thirteen States to ratify the Constitution on May 29, 1790, 8 *id.*, after significant pressure by the First Congress to

The facts of the case are fascinating. In that 1820 case, in what was effectively the taking of private property for public use without just compensation, John C. Owings claimed that a statute passed by the Virginia Legislature in December of 1788 impaired the obligation of contract represented by his land patent issued by the Commonwealth of Virginia, in violation of the Contracts Clause of Article I, Section 10, which provides that "[n]o state shall . . . pass any . . . Law impairing the Obligation of Contracts."[10] Owings could not, of course, raise any federal takings claims given that there was no restriction on state takings of private property in the original Constitution.[11] Chief Justice Marshall, in a short and arguably hastily written opinion, ruled against Owings on the basis that the Constitution did not become law until (at least) March 4, 1789, when the first session of the First Congress began.[12]

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join the Union, *see* Bruce Ackerman & Neal Katyal, *Our Unconventional Founding*, 62 U. CHI. L. REV. 475, 480 (1995), and then only after a very close vote of 34 to 32. *See* 8 DHRC, *supra*, at xxi.

10 U.S. CONST. art. I, § 10, cl. 1.

11 *See, e.g.*, Barron v. Mayor of Baltimore, 32 U.S. (7 Pet.) 243, 247–48 (1833). The Takings Clause, U.S. CONST. amend. V ("[N]or shall private property be taken for public use, without just compensation."), was not incorporated against the States as a matter of judicial doctrine until 1897. *See* Chicago, Burlington & Quincy R.R. v. Chicago, 166 U.S. 226, 241 (1897) (Harlan, J.) (holding that the Takings Clause of the Fifth Amendment was incorporated against the States by the Due Process Clause of the Fourteenth Amendment). The framers of the Fourteenth Amendment also contemplated the incorporation of the Takings Clause against the States by the same clause. *See* AKHIL REED AMAR, THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION 182 n.4 (1998) (discussing Representative John Bingham's conception of the Takings Clause as guaranteed by the Fourteenth Amendment's Due Process Clause).

12 Wrote Chief Justice Marshall,

> Both Governments could not be understood to exist at the same time. The new Government did not commence until the old Government expired. It is apparent that the Government did not commence on the Constitution being ratified by the ninth State; for these ratifications were to be reported to Congress, whose continuing existence was recognised by the Convention, and who were requested to continue to exercise their powers for the purpose of bringing the new government into operation. In fact, Congress did continue to act as a government until it dissolved on the first of November, by the successive disappearance of its members. It existed potentially until the 2d of March, the day preceding that on which the members of the new Congress were directed to assemble.

Owings, 18 U.S. (5 Wheat.) at 422.

In fact, as Chief Justice Marshall acknowledged in his next paragraph, the new government could not be fully effective until a President was sworn into office, *see id.* at 422–23, which would make the effective date of the Constitution April 30, 1789. But to be even more precise, and as Chief Justice Marshall failed to acknowledge, the new government could not be *completely* effective until a Supreme Court existed as

In their article, Lawson and Seidman take on this Marshallian conventional wisdom. There is much to be admired in Lawson and Seidman's exposition, both substantively and methodologically. They should be thanked for bringing the little-known case of *Owings v. Speed* into the legal limelight.[13] They should be praised for critically questioning the longstanding conventional wisdom and for asking what may seem to be the tough questions of constitutional law.[14]

More importantly, they should be congratulated for finally correcting the longstanding conventional wisdom. They marshal (no pun intended) much evidence to show that Chief Justice Marshall just had

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well. *See infra* note 34, which would make the effective date of the Constitution sometime between the passage of the Judiciary Act of 1789, 1 Stat. 73, on September 24, 1789, and February 2, 1790, the date the Supreme Court was organized. *See* A Brief Overview of the Supreme Court, *at* http://www.supremecourtus.gov/about/about.html (last updated Sept. 16, 2002); History of the Supreme Court, *at* http://supreme.lp.findlaw.com/supreme_court/supcthist.html (last visited Sept. 19, 2002).

13 A search of the relevant database reveals that there are only seven citations to the case in the legal literature (at least that literature that is electronically available), excluding their article. Search of WESTLAW, JLR Library (January 1, 2002). *See* Ackerman & Katyal, *supra* note 9; Hans W. Baade, *"Original Intent" in Historical Perspective: Some Critical Glosses*, 69 TEX. L. REV. 1001 (1991); Hans W. Baade, *Time and Meaning: Notes on the Intertemporal Law of Statutory Construction and Constitutional Interpretation*, 43 AM. J. COMP. L. 319, 337 n.144 (1995); David P. Currie, *The Constitution in the Supreme Court: State and Congressional Powers, 1801–1835*, 49 U. CHI. L. REV. 887, 921 n.237 (1982); James W. Ely, Jr., *The Marshall Court and Property Rights: A Reappraisal*, 33 J. MARSHALL L. REV. 1023 (2000); Mark R. Killenbeck & Steve Sheppard, *Another Such Victory? Term Limits, Section 2 of the Fourteenth Amendment, and the Right to Representation*, 45 HASTINGS L.J. 1121, 1149 n.133 (1994); Ted L. Wills, Note, *Religious Landmarks, Guidelines for Analysis: Free Exercise, Takings, and Least Restrictive Means*, 53 OHIO ST. L.J. 211, 215 n.35 (1992). Indeed, no major constitutional law casebook lists the case in its table of cases.

For another article-length effort by Lawson and Seidman discussing another obscure case with fascinating implications for constitutional law, see Lawson & Seidman, *The Hobbesian Constitution*, *supra* note 1 (discussing Cross v. Harrison, 57 U.S. (16 How.) 164 (1854)).

14 In this regard, Professor Ackerman also deserves a lot of credit for asking the tough questions of constitutional law, whether or not one subscribes to his views of the Constitution. *See* 2 BRUCE ACKERMAN, WE THE PEOPLE: TRANSFORMATIONS 32–95 (1998) (asking whether the adoption of the Constitution was illegal under the Articles of Confederation); *id.* at 99–252 (asking whether the Thirteenth and Fourteenth Amendments' proposal and adoption were unconstitutional); Ackerman & Katyal, *supra* note 9. For a forceful response to Professor Ackerman's provocative claims about the constitutionality of the Thirteenth and Fourteenth Amendments, see John Harrison, *The Lawfulness of the Reconstruction Amendments*, 68 U. CHI. L. REV. 375 (2001).

it wrong when it comes to the effective date of the Contracts Clause.[15] Indeed, Professor Pfander first made the point in 1998: "[b]y its terms, then, the Ratification Clause makes clear that the constitutional limits in Article I, Section 10 were to take effect on the date of the ninth ratification (or, for such subsequent ratifiers as North Carolina and Rhode Island, on the date of their accession)."[16] There is no question, in my mind at least, that the Contracts Clause was effective in the early summer of 1788,[17] well before the Virginia Legislature

15 *See* Lawson & Seidman, *When Did the Constitution Become Law?*, *supra* note 1, at 13 ("[T]he evidence is overwhelming that at least some parts of the Constitution—those which did not require implementation by the new federal legislature and executive—were in effect immediately upon ratification."). It should not come as too much surprise that Chief Justice Marshall made a legal mistake. This was not his first. *See, e.g.*, Alex Kozinski, *That Unfortunate Immortal Phrase*, 1987 UTAH L. REV. 977.

16 *See* James E. Pfander, *History and State Suability: An "Explanatory" Account of the Eleventh Amendment*, 83 CORNELL L. REV. 1269, 1293 (1998). Pfander argues,

> [Article VII] clearly declares the effectiveness of the Constitution as running not from the date of its completion (in September 1787), but from the date of its approval by the requisite number of states (in June 1788). It also leaves open the possibility that states might join the Union after the Constitution's effectiveness (as did Rhode Island and North Carolina) and subject themselves to the federal restrictions of Article I as of the date of their accession.

Id. at 1276–77.

17 I intentionally refer to the early summer of 1788 instead of a specific date for the birthdate of our Constitution. Lawson and Seidman strongly believe that the Constitution was adopted on June 21, 1788, the date of New Hampshire's decisive ninth ratification. *See* Lawson & Seidman, *When Did the Constitution Become Law?*, *supra* note 1, at 24 (stating that the Constitution was adopted on June 21, 1788 and that "[a]ll subsequent events, such as notification to Congress and the other states and verification by Congress of the authenticity of the ratifying documents, merely communicate or give evidence of the relevant event").

There are, however, at least two other possibilities: the date that New Hampshire's ratification was received by the Confederation Congress, which was somewhere around July 2, 1788, *see id.* at 2, 5, or more relevantly, perhaps the date that the other eight States became aware of New Hampshire's ratification, at which point their right to repeal their ratifications lapsed. *Cf.* Michael Stokes Paulsen, *A General Theory of Article V: The Constitutional Lessons of the Twenty-Seventh Amendment*, 103 YALE L.J. 677, 683 (1993) (arguing that Congress may repeal proposals and the States may repeal ratifications of amendments to the Constitution until, but not after, the necessary three-quarters of the States have ratified the amendments).

The proper resolution of the Constitution's birthdate would take a little more space than is available here, but whether that date be June 21, 1788, or some day shortly thereafter, it is beyond question that the Constitution was adopted in the early summer of 1788. *See* Lawson & Seidman, *When Did the Constitution Become Law?*, *supra* note 1, at 2 (making same point).

passed a statute impairing Mr. Owings's land patent.[18] Owings should not have lost his case for the reasons given by Chief Justice Marshall.

Lawson and Seidman should also be applauded for making clear the modern significance of their seemingly arcane inquiry.[19] They discuss the *Oneida Indian Nation* cases[20] of the early 1980s.[21] The facts of those cases are also fascinating. The Oneida Indian Nation sued the State of New York in order to recover five million acres of land in upstate New York that it claimed were purchased by the State of New York through an unconstitutional treaty made on September 22, 1788, after the Constitution was adopted in the early summer of 1788 and after New York joined the Union on July 26, 1788.[22] The State Treaty Clause of Article I, Section 10 provides that "[n]o State shall enter into any Treaty, Alliance, or Confederation."[23] The federal district court "flatly dismissed"[24] the Oneida Nation's claim that the treaty was

18 Lawson and Seidman rightly express no hesitation on this question. *See* Lawson & Seidman, *When Did the Constitution Become Law?*, *supra* note 1, at 8 ("It is virtually certain that *Owings* was wrongly decided."); *id.* at 24 (stating that Chief Justice Marshall was "simply wrong" as to the effective date of the Contracts Clause, U.S. CONST. art. I, § 10, cl. 1); *id.* at 35 (referring to "Chief Justice Marshall's ancient blunder"); *id.* ("How could [Chief Justice Marshall] make such an obvious mistake in *Owings* about something as basic as the effective date of the Constitution?").

19 In addition to the point made in the text, Lawson and Seidman offer two other reasons for their inquiry that deserve brief mention. They claim that the effective date of the Constitution may have some important implications for an ongoing debate by Professors Ackerman and Amar as to the legality of the adoption of the Constitution. *See id.* at 3–4. For the debate between Ackerman and Amar, see *id.* at 3 n.10 (citing 1 BRUCE ACKERMAN, WE THE PEOPLE: FOUNDATIONS 41–44 (1991); 2 BRUCE ACKERMAN, WE THE PEOPLE: TRANSFORMATIONS 49–68 (1998); Ackerman & Kaytal, *supra* note 9, at 539–58; Akhil Reed Amar, *The Consent of the Governed: Constiutional Amendment Outside Article V*, 94 COLUM. L. REV. 457, 462–87 (1994); Akhil Reed Amar, *Philadelphia Revisited: Amending the Constitution Outside Article V*, 55 U. CHI. L. REV. 1043, 1047–60 (1988)). Lawson and Seidman also claim that the effective date of the Constitution is something to get right purely as a matter of history. *See* Lawson & Seidman, *When Did the Constitution Become Law?*, *supra* note 1, at 4.

20 *See* Oneida Indian Nation v. New York, 520 F. Supp. 1278 (N.D.N.Y. 1981), *aff'd in part, rev'd in part*, 691 F.2d 1070 (2d Cir. 1982), *remanded to* 649 F. Supp. 420 (N.D.N.Y. 1986), *aff'd*, 860 F.2d 1145 (2d Cir. 1988); *see also* Oneida Indian Nation v. New York, 102 F.R.D. 445 (N.D.N.Y. 1983), *rev'd*, 732 F.2d 261 (2d Cir. 1984); Oneida Indian Nation v. New York, 102 F.R.D. 450 (N.D.N.Y. 1983), *remanded to* 757 F.2d 19 (2d Cir. 1985), *motion to recall mandate denied*, 771 F.2d 51 (2d Cir. 1985).

21 *See* Lawson & Seidman, *When Did the Constitution Become Law?*, *supra* note 1, at 2–3; *id.* at 31–35 (describing the chronology of the lawsuit).

22 *See id.* at 31–32. For a full presentation of the facts, see *Oneida Indian Nation*, 860 F.2d at 1148–49; *Oneida Indian Nation*, 520 F. Supp. at 1286–88.

23 U.S. CONST. art. I, § 10, cl. 1.

24 Lawson & Seidman, *When Did the Constitution Become Law?*, *supra* note 1, at 3 (citing *Oneida Indian Nation*, 520 F. Supp. at 1323).

unconstitutional on the strength of Chief Justice Marshall's declaration in *Owings v. Speed*.[25] To the extent that the *Oneida Indian Nation* cases fully turned on the effective date of the Constitution,[26] I am convinced that a good chunk of upstate New York properly belongs to the Oneida Indian Nation, the choice of remedies aside.[27]

Not surprisingly, Lawson and Seidman go well beyond the specific questions of the effective date of the Contracts Clause in *Owings* and the State Treaty Clause in *Oneida Indian Nation* and the correction of Chief Justice Marshall's "ancient blunder"[28] to announce a general theory of constitutional effectiveness. According to this theory, "[d]ifferent clauses of the Constitution actually became effective at different points in time."[29] They aptly refer to this theory as "a multi-tiered theory of constitutional effectiveness."[30]

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25 The conclusion of the federal district court is well worth repeating:

> Crucial to the plaintiffs' argument is their assertion that the Constitution was in effect on September 22, 1788, the date on which the Treaty was concluded. The plaintiffs contend that the Constitution became effective after ratification by the ninth State on June 21, 1788, with New York ratifying in July of 1788.
>
> However, the Supreme Court long ago concluded otherwise in a case in which the issue was whether the provisions of the Constitution applied to acts of state legislatures in 1788. . . .
>
> The Court in *Owings* ruled that the Constitution did not become operative until the first Wednesday in March of 1789, the date set by resolution of the old government. Therefore, plaintiffs' claims under the Constitution must fail.

Oneida Indian Nation, 520 F. Supp. at 1323.

26 To be sure, there were a host of issues in the *Oneida Indian Nation* case other than effective date of Article I, Section 10 of the Constitution. *See Oneida Indian Nation*, 860 F.2d at 1145–67 (determining if the issue was a non justiciable political question, if the Eleventh Amendment provided New York immunity from the suit, if the Oneida Indian Nation had standing to challenge the validity of the treaties, and if the Oneida Indian Nation stated a claim upon which relief could be granted); *Oneida Indian Nation*, 520 F. Supp. at 1283–1329 (same). Whether the case fully turned on the effective date of Article I, Section 10 of the Constitution may well be worth a separate article.

27 Lawson and Seidman hold open the possibility that "[p]erhaps concerns about justiciability or remedies would, and should, have ultimately prevented the Oneidas from reclaiming their land." Lawson & Seidman, *When Did the Constitution Become Law?*, *supra* note 1, at 34–35.

28 *Id.* at 35.

29 *Id.* at 4; *see also id.* at 9 (stating that "the Constitution becomes operative in stages, so that different portions of the document create rights and obligations at different points in time"); *id.* at 37 ("The Constitution became law over a period of time beginning on June 21, 1788.").

30 *Id.* at 8–27.

A short summary of the theory is both necessary and proper. The theory comes in two broad tiers. One tier consists of provisions such as the Contracts Clause, the State Treaty Clause and others contained in Article I, Section 10 that limit the power of the States. These provisions are "self-executing"[31] in that they require no additional action by any governmental actors and hence became effective at the date of adoption of the Constitution.[32]

The second tier consists of provisions such as many of those contained in Article I, Article II, and though Lawson and Seidman do not quite mention it, Article III. These provisions are not self-executing, and hence became effective at points after the date of adoption of the Constitution. For example, the legislative, executive, and judicial powers of the newly established federal government (obviously) could not be effective until it had legislative, executive, and judicial personnel to exercise those powers.[33] Thus, much of Articles I and II only became effective well after the early summer of 1788 when the Constitution was adopted. As Lawson and Seidman explain, "[t]he national government could not pass laws, make treaties, or appoint officers until the Congress and the President were, both formally and function-

31 *Id.* at 10.

32 *See id.* at 8–10, 23–24. Some provisions of Article I, § 10, namely those "clauses" in Article I, § 10, cl. 3, *conditionally* deny power to the States, holding out the possibility that State action is not unconstitutional if Congress provides its consent. *See* U.S. CONST. art. I, § 10, cl. 3 ("No State shall, *without the Consent of Congress,* lay any Duty of Tonnage, keep Troops, or Ships of War in time of Peace, enter into any Agreement or Compact with another State, or with a foreign Power, or engage in War, unless actually invaded, or in such imminent Danger as will not admit of delay." (emphasis added)). In contrast to the other clauses of Article I, Section 10, these clauses are not nearly as self-executing, and perhaps are not effective at the date of adoption of the Constitution in the early summer of 1788, but on April 30, 1789, when there was both a Congress and a President. Lawson and Seidman do not discuss these clauses.

33 *See* Lawson & Seidman, *When Did the Constitution Become Law?, supra* note 1, at 28 ("The new government clearly could not exercise legislative, executive, or judicial authority until it had legislative, executive, and judicial personnel capable of carrying those powers into effect."); *see also id.* at 9 ("[O]ne could say that the provisions of the Constitution that require legislative and presidential action—and this includes some of the most important provisions—could not be *fully* 'in effect' until *all* of the executory steps necessary for its establishment had taken place." (emphasis added)); *id.* at 19 (discussing early state constitutions) ("Other provisions that require action by officials under the new government cannot, of course, take effect until those officials are in place."); *id.* at 23 ("[S]ome provisions were incapable of taking effect immediately [in the early summer of 1788] because they required action by governmental actors who did not yet exist.").

ally, in office. These provisions thus did not become legally operative until April 30, 1789."[34]

One important conclusion of their "multi-tiered theory of constitutional effectiveness" is that Chief Justice Marshall was partially right but mostly wrong to declare that the Constitution commenced on March 4, 1789. The date aside, he was wrong to believe that the Constitution must be effective or ineffective in toto.[35] The important insight from Lawson and Seidman is that some of the Constitution's provisions did not become effective until March 4, 1789, or even April 30, 1789, but many "self-executing" provisions did become effective in the early summer of 1788. Thus, Lawson and Seidman maintain that

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34 *Id.* at 9. Some provisions of Article I became effective on March 4, 1789, when Congress convened for the first time, or shortly thereafter when there was a quorum in each of the House of Representatives and the Senate. These provisions of Article I do not depend on the presence or absence of non-legislative constitutional actors. *See, e.g.*, U.S. CONST. art. I, § 2, cl. 5 ("The House of Representatives shall chuse their Speaker and other Officers . . . ."); *id.* art. I, § 3, cl. 5 ("The Senate shall chuse their other Officers, and also a President pro tempore, in the Absence of the Vice President, or when he shall exercise the Office of President of the United States."); *id.* art. I, § 5, cl. 1 ("Each House shall be the Judge of the Elections, Returns and Qualifications of its own Members, and a Majority of each shall constitute a Quorum to do Business; but a smaller Number may adjourn from day to day, and may be authorized to compel the Attendance of absent Members, in such Manner, and under such Penalties as each House may provide."); *id.* art. I, § 5, cl. 2 ("Each House may determine the Rules of its Proceedings, punish its Members for disorderly Behaviour, and, with the Concurrence of two thirds, expel a Member."); *id.* art. I, § 5, cl. 3 ("Each House shall keep a Journal of its Proceedings, and from time to time publish the same, excepting such Parts as may in their Judgment require Secrecy; and the Yeas and Nays of the Members of either House on any question shall, at the Desire of one fifth of those Present, be entered on the Journal.").

What about much of Article III? Although Lawson and Seidman hardly discuss Article III, *see* Lawson & Seidman, *When Did the Constitution Become Law?*, *supra* note 1 at 29–31, the Constitution could not be fully effective until there was a Supreme Court, which did not occur until sometime around February 2, 1790. *See supra* note 12. The Supreme Court is a necessary and sufficient part of the judicial power of the United States. *See* U.S. CONST. art. III, § 1 ("The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish."); *id.* art. III, § 2, cl. 2 ("In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the supreme Court shall have original Jurisdiction. In all the other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.").

35 *See* Lawson & Seidman, *When Did the Constitution Become Law?*, *supra* note 1, at 9 ("Marshall [assumed] in *Owings* . . . that the Constitution must be operative or not as a whole."); *id.* at 28 ("Marshall's all-or-nothing view of constitutional effectiveness is simply unwarranted.").

"[o]ne could therefore agree with [Chief Justice] Marshall that some of the Constitution's provisions did not take effect until March or April 1789, but still maintain that Owings should have won his case because the Contracts Clause was effective upon ratification."[36] This much of their "multi-tiered theory of constitutional effectiveness" should be (relatively) uncontroversial.

Although there is much in their article with which I agree, there is one lingering doubt that I have about their multi-tiered theory of constitutional effectiveness.[37] This one lingering doubt is the subject of this Essay. Lawson and Seidman's multi-tiered theory of constitutional effectiveness begs the question of what happened in the period between the Constitution's adoption date in the early summer of 1788 and the spring of 1789 when much of Articles I and II became effective (the "transition period"). Indeed, Chief Justice Marshall's conventional wisdom begs the same question.

When did the Articles of Confederation cease to be law?[38] There are only two possible answers. Was the old regime under the Articles of Confederation legally defunct in the early summer of 1788 when the Constitution was adopted? Or was the old regime under the Articles of Confederation legally operative, continuing to exercise authority under the Articles of Confederation until a Congress and a President came into being in the spring of 1789?[39] This is the question of transition between the two regimes of the Articles of Confederation and the Constitution.

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36 *Id.* at 10.

37 This is not to say, of course, that I have no other quibbles with other points in their article. I do, but they pale in comparison to the one presented in the text. *See* E-mail from Vasan Kesavan, to Gary Lawson, Professor, Boston University School of Law (Dec. 19, 2001) (on file with author).

38 Admittedly, this query begs the question of whether the Articles of Confederation enjoyed the status of law immediately prior to the adoption of the Constitution in the early summer of 1788. James Madison, among others, thought not, given the many breaches of the Articles of Confederation by the States. *See, e.g.*, THE FEDERALIST No. 43, at 279–80 (James Madison) (Clinton Rossiter ed., 1961) (advocating for the new Constitution in light of the ineffectiveness of the Articles of Confederation). The legal status of the Articles of Confederation during the Founding (and the legality of the Constitution's adoption under the Articles of Confederation) is the subject of a longstanding debate between Professors Ackerman and Amar, *see supra* note 19, and I will not enter that debate here. I assume for present purposes that the Articles of Confederation enjoyed the status of law until displaced by the Constitution. The question concerning the legality of the Constitution's adoption under the Articles of Confederation has no bearing on the transition question that I explore in this Essay.

39 There is a third possibility to be taken up in short order: was the old regime under the Articles of Confederation legally operative under the Constitution only as to certain transitional matters?

Lawson and Seidman have an answer. Early in their article, after observing that some transition authority was necessary to verify ratifications and to set a time for the first Congressional elections and the first presidential election in the several States,[40] they conclude that "the new government could not totally displace the government established under the Articles of Confederation immediately upon the ninth ratification, because the new government did not yet exist. Provisions had to be made for an orderly transition to the new constitutional regime."[41] It is not clear from this statement whether Lawson and Seidman believe that during the transition period the Confederation Congress merely had limited transitional authority under the Constitution to put all of the Constitution into effect,[42] or if the Confederation Congress also had legal authority under the Articles of Confederation to do all of the things it had been doing theretofore.

Elsewhere in their article, however, Lawson and Seidman make clear that they believe that the Confederation Congress exercised legal authority under the Articles of Confederation during the transition period. After presenting their multi-tiered theory of constitutional effectiveness and the obvious point that the Constitution is not entirely self-executing,[43] they conclude that "[t]his also means that the preexisting authorities, such as the institutions created by the Articles of Confederation, were not immediately displaced by ratification of the new Constitution. The machinery of the old regime could continue until the machinery of the new regime was in place."[44] Indeed, at one (and only one) point in their article, Lawson and Seid-

40 *See* Lawson & Seidman, *When Did the Constitution Become Law?*, *supra* note 1, at 5. For the constitutional provisions relating to the first Congressional and Presidential elections, see U.S. CONST. art. I, § 4, cl. 1 ("The Times, Places and Manner of holding Elections for Senators and Representatives shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators."); *id.* art. II, § 1, cl. 4 ("The Congress may determine the Time of chusing the Electors, and the Day on which they shall give their Votes; which Day shall be the same throughout the United States.").

41 Lawson & Seidman, *When Did the Constitution Become Law?*, *supra* note 1, at 5.

42 The fact that the intervention of the Confederation Congress (or some body) was necessary to put all of the Constitution into effect surely does not mean that the Confederation Congress was exercising authority under the Articles of Confederation. The decisions made by the Continental Congress to set a time for the first Congressional and Presidential elections and to pick a location for the seat of the new federal government were not decisions made pursuant to the authority of the Articles of Confederation. How could they be? The old regime did not and could not empower the Confederation Congress to take these actions relating to a subsequent regime.

43 *See id.* at 23.

44 *Id.* at 23–24.

man refer to the phenomenon as "'granting a continuance' to preexisting institutions."[45] Thus, according to this transition theory, the transition between the two regimes of the Articles of Confederation and the Constitution was "gapless" (my word, not theirs).

There is, of course, at least one other possibility—and one that Lawson and Seidman, in uncharacteristic fashion, completely fail to mention. That possibility is that the Confederation Congress was a legal nullity after the adoption of the Constitution in the early summer of 1788, implying that the Framers and Ratifiers (or more simply, the Founders) were without a federal government during the transition period. Although some parts of the Constitution such as Article I, Section 10 became effective on the adoption date and some parts of the Constitution such as Article I, Section 8 became effective after the adoption date, one could say that the whole Constitution, as of the adoption date, "occupied the field" of governmental authority at the federal level, thereby pre-empting all other then-existing governmental authority under the Articles of Confederation.

This possibility is non-frivolous. The Founders would not have been shocked to understand that they would be without a federal government during the transition period. To put it mildly, the Founders (at least those who supported the Constitution) were not fans of the federal government under the Articles of Confederation.[46] Indeed, many of the Founders thought that the federal government under that regime was hardly worthy of the moniker of government.[47] If

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45 *Id.* at 18.

46 The purpose of the Constitution was "to form a more perfect Union," for "We the People of the United States," U.S. CONST. pmbl., by (among other things) remedying the many defects of the Articles of Confederation. *See, e.g.*, 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 18–19, 24–27 (Max Farrand ed., rev. ed. 1966) (1832) (including remarks of Governor Edmund Randolph enumerating "the defects of the confederation") [hereinafter RECORDS OF THE CONVENTION]; Letter from James Madison, former President of the United States, to Davis, Professor, (1832), *in* 3 *id.* at 520 ("In expounding the Constitution and deducing the intention of the framers, it should never be forgotten, that the great object of the Convention was to provide, by a new Constitution, a remedy for the defects of the existing one . . . ."); *see also* 4 *id.* at 141 (index entry at "Confederation, discussions on defects"). For key essays written by Alexander Hamilton and James Madison discussing the defects of the Articles of Confederation, see THE FEDERALIST NOS. 15 & 16 (arguing against a government by States, not individuals), 21 (discussing the current weakness of the federal government), 22 (discussing the defects in commerce), 24–27 (discussing the defects of defense), and 30 (discussing the defects of taxation).

47 I owe the phrase "moniker of government" to a conversation with Professor Lawson commenting on Professor Seidman's opinion of the government under the Articles of Confederation. During the Virginia ratifying convention, the ratifying convention of which we have the most extensive records of debates, Anti-Federalist John

there were no federal government during the transition period, the Founders would almost undoubtedly have looked to the governments of the several States to pick up any slack.[48] Moreover, the Founders were oftentimes without a Congress under the Articles of Confederation anyway (and when Congress did convene, it was often ineffective because a quorum was hardly achieved).[49] Thus, according to this transition theory, there was an interregnum between the Articles of Confederation and the Constitution.

Lawson and Seidman jump to the all-too-quick conclusion that the transition between the two regimes of the Articles of Confederation and the Constitution was gapless. Although they fail to acknowledge the possibility that the transition between the two regimes was not gapless, they do leave open the possibility. They are correct that "the existence of the Constitution did not necessarily preclude the continuing validity of the Articles of Confederation."[50] They are also undoubtedly correct that "[t]here is nothing illogical about the simultaneous existence of the governmental institutions under the Articles [of Confederation] and the prohibitions on state action contained in the Constitution."[51] The question is not whether their transition theory is necessarily precluded by the Constitution or whether their transition theory is illogical, but whether the Constitution, carefully considered, actually provides for their transition theory.

In all fairness, it should be noted that the transition question was not an area of focus for Lawson and Seidman. They do, however, an-

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Dawson put the point best when he recognized that "[t]he defects of the articles by which we are present confederated, have been echoed and re-echoed, not only from every quarter of this House, but from every part of the continent." Remarks of John Dawson at the Virginia Ratifying Convention (June 24, 1788), *in* 10 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 1489 (John P. Kaminski & Gaspare J. Saladino eds., 1993); *see also* 10 *id.* at 1800 (including an index entry at "Articles of Confederation, defects of"); 10 *id.* at 1811 (including an index entry at "Congress under Articles of Confederation, deficiencies of").

48 *Cf.* Gary Lawson & Guy Seidman, *The First "Establishment" Clause*, 78 NOTRE DAME L. REV. 83, 95 (2002) ("[T]here could not possibly be an issue of a 'gap' involving most governmental powers, because those powers were lodged in the States rather than in the Confederation organization.").

49 *See* 34 JOURNALS OF THE CONTINENTAL CONGRESS, 1774–1789, at vii (Roscoe R. Hill ed., 1937) [hereinafter JOURNALS] (summarizing attendance of the States for the five years of the Continental Congress from 1783–1784 to 1787–1788). The same principle of occasional meeting carried over to the Constitution. *See* U.S. CONST. art. I, § 4, cl. 2 ("The Congress shall assemble *at least once* in every Year, and such Meeting shall be on the first Monday in December, unless they shall by Law appoint a different Day." (emphasis added)).

50 Lawson & Seidman, *When Did the Constitution Become Law?*, *supra* note 1, at 4.

51 *Id.* at 28.

swer the transition question, and importantly, they do so needlessly. The transition question is logically distinct from their question as to the effectiveness of the Constitution. Their "multi-tiered theory of constitutional effectiveness" is no less valid if there was or was not a federal government under the Articles of Confederation during the transition period.

In this Essay, I take up the question whether the transition between the Articles of Confederation and the Constitution was gapless or whether there was an interregnum[52] during the transition period. The question is perhaps best put by the following hypothetical: assuming that the Confederation Congress made a treaty in the fall of 1788, the winter of 1788–1789, or the early spring of 1789, would that treaty be the law of the land?[53]

I will be among the first to admit that the inquiry into the transition between the Articles of Confederation and the Constitution is really arcane. It is really arcane in a way that Lawson and Seidman's inquiry into the effective date of the Contracts Clause[54] and the State Treaty Clause[55] is simply not. Unlike that inquiry, which properly resolves the case of Mr. Owings, and perhaps the cases of the Oneida Indian Nation, nothing of consequence seems to turn on whether or not there was a federal government under the Articles of Confederation during the transition period. But that is not to say that the transition question is unimportant. It is only after 213 years of the Republic that we are systematically addressing the question of when the Constitution became effective. While we are at it, we might as well get it right as a matter of constitutional history.[56] Why not spill just a little more ink on the transition question?

In what follows, I hope to persuade you that Lawson and Seidman's transition theory is at best not proved and at worst incorrect. Part II reviews the textual argument. Part III reviews Lawson and Seid-

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52 *See infra* text accompanying note 125.

53 The significance of the choice of treaty and not statute for the hypothetical shall become clear shortly. *See infra* text accompanying notes 61–63. The hypothetical is discussed in Part V *infra*.

54 U.S. CONST. art. I, § 10, cl. 1.

55 *Id.*

56 *Cf.* Lawson & Seidman, *When Did the Constitution Become Law?*, *supra* note 1, at 4. Lawson and Seidman noted,

> If history books had consistently reported the year of the Norman Conquest as 1067 and we now discovered that it actually happened in 1066, it probably would not change much of consequence in the world, but one might as well get it right. This is particularly true with something as basic as the effective date of the Constitution.

Id.

man's extra-textual evidence supporting their transition theory. Part IV introduces new extra-textual evidence into the debate. Part V takes account of the journey and proposes a theory of transition.

II. READING THE TEXT OF THE CONSTITUTION

As a "most ardent textualist,"[57] I logically start with the text of the Constitution.[58] There are arguably only three provisions in the original Constitution that directly bear on the transition question. Let us briefly review these three provisions.

The first provision is, of course, Article VII which declares that "[t]he Ratification of the Conventions of nine States, shall be sufficient for the Establishment of this Constitution between the States so ratifying the Same."[59] Article VII makes clear that the requisite ratifications are enough to establish the Constitution as a new regime as between the States so ratifying, superseding the old regime of the Articles of Confederation. It would seem that an *establishment* of the Constitution as a whole is the *disestablishment* of the Articles of Confederation as a whole, in the absence of any provision to the contrary elsewhere in the Constitution.[60] But Article VII does not explicitly address the transition question. It is plausible that the Confederation Congress had legal authority under the Articles of Confederation during the transition period.

The second provision is the Supremacy Clause, which declares that

> [t]his 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 su-

57 *See id.* at 23.

58 Of course, even the "most ardent textualist" will recognize that context is important to interpretation and have recourse to extra-textual evidence. *See, e.g., id.*

59 U.S. CONST. art. VII.

60 Interestingly, the draft of Article VII referred to by the Framers to the Committee of Style provided: "The ratification of the Conventions of nine States shall be *sufficient* for *organising* this Constitution between the said States." *See* 2 RECORDS OF THE CONVENTION, *supra* note 46, at 579. For other descriptions of the meaning of Article VII, see, for example, 2 *id.* at 468 (remarks of James Wilson) (referring to "commencement of the plan"); 2 *id* (remarks of Gouverneur Morris) (referring to "introduction of the Government"); 2 *id.* at 475 (remarks of Rufus King) (referring to "operation of the Govt."); and 2 *id.* (remarks of Roger Sherman) (referring to "execut[ing] the Constitution"). In the course of ratification, Article VII was described as a requirement that nine States are "sufficient to put the government in motion." *See, e.g.*, Reply to a Landholder II, *in* 3 RECORDS OF THE CONVENTION, *supra* note 46, at 299; Remarks of Gov. Edmund Randolph at the Virginia Ratifying Convention (June 4, 1788), *in* 3 RECORDS OF THE CONVENTION, *supra* note 46, at 308.

> preme 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.[61]

The Supremacy Clause makes clear by negative implication that the laws of the Confederation Congress are not the law of the land as far as the Constitution is concerned. Although treaties "made" (note the past tense) by the Confederation Congress are the law of the land, only laws which "shall be made" (note the future tense) by the Congress under the Constitution are the law of the land.[62] When the Framers wanted to give prospective force to the acts of the Confederation Congress, they knew how to do so. The Supremacy Clause suggests that there could be a gap between the two regimes of the Articles of Confederation and the Constitution because the acts of the Confederation Congress were a legal nullity under the Constitution anyway. But the Supremacy Clause, like Article VII, does not explicitly address the transition question. It is plausible that the Confederation Congress had legal authority under the Articles of Confederation during the transition period. And the Supremacy Clause only begs the more interesting question whether a treaty made by the Confederation Congress after the early summer of 1788, but before at least March 4, 1789,[63] would be the law of the land under the "third clause" of the Supremacy Clause.

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

62 Professor Pfander has also amply made this point in discussing the phrase "and the Laws of the United States which shall be made in Pursuance thereof" in the Supremacy Clause. *See, e.g.*, Pfander, *supra* note 16, at 1277 ("While [the Supremacy Clause] provides for the supremacy of the new Constitution itself and of any laws passed 'in Pursuance thereof,' the Clause notably refrains from making the provisions of the old Articles of Confederation and the acts of the old Congress supreme and binding upon the states."); *id.* at 1296 ("This description includes all statutes that the new post-ratification Congress might choose to enact (within constitutional limits), but it excludes laws that the old Congress had enacted under the aegis of the Articles of Confederation."); *id.* at 1298 ("By limiting supremacy to '[t]his Constitution, and the Laws . . . made in Pursuance thereof,' the Supremacy Clause omits any binding effect for any of the laws of Congress passed in the Articles of Confederation era.").

63 I say "at least" March 4, 1789, because the treaty-making power under the Constitution is vested in the President and the Senate, *see* U.S. CONST. art. II, § 2, cl. 2, and there was no President until sometime around April 30, 1789. *Cf.* Lawson & Seidman, *When Did the Constitution Become Law?*, *supra* note 1, at 2 ("Provisions that require the action of the President did not become effective until a President had been properly elected and sworn into office on April 30, 1789."). Under Lawson and Seidman's transition theory, it would seem that, in order for there to be a gapless transition vis-à-vis the treaty-making power, the *Confederation Congress* could make a treaty after March 4, 1789, but before April 30, 1789—a period of time during which the First Congress was in session! *See* Session Dates of Congress (March 4, 1789 to present), *at* http://

The third provision and, I submit, the most interesting one, is the Engagements Clause, which is juxtaposed with the Supremacy Clause. The Engagements Clause provides that "[a]ll Debts contracted and Engagements entered into, before the Adoption of this Constitution, shall be as valid against the United States under this Constitution, as under the Confederation."[64] Nowhere do Lawson and Seidman mention the Engagements Clause in the course of their article.[65] The Engagements Clause impliedly addresses the transition question. By making valid only the Engagements entered into by the Confederation Congress before the *adoption* of the Constitution, the Engagements Clause squarely suggests by negative implication that engagements entered into by the Confederation Congress after the *adoption* of the Constitution shall not be valid against the United States under the Constitution as under the Articles of Confederation.[66] This would make perfect sense if there were no Confederation Congress after the adoption of the Constitution.

The point is made more striking by comparing the Engagements Clause with its precursor in the Articles of Confederation. Article XII of the Articles of Confederation declared that "[a]ll bills of credit emitted, monies borrowed and debts contracted by, or under the authority of Congress, before the assembling of the United States, in pursuance of the present confederation, shall be deemed and considered as a charge against the United States."[67] This clause, unlike the Engagements Clause, squarely suggests that engagements entered into

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clerk.house.gov/histHigh/Congressional_History/Session_Dates/sessionsAll.php (last updated Oct. 1, 2002).

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

65 A search of the relevant database reveals that there are only five citations to the Clause by name in the legal literature (at least the literature that is electronically available). Search of WESTLAW, JLR Library (Jan. 1, 2002).

66 Interestingly, the draft of the Engagements Clause referred by the Framers to the Committee of Style provided, "All debts contracted and engagements entered into, by or under the authority of Congress shall be as valid against the United States under this constitution as under the confederation." 2 RECORDS OF THE CONVENTION, *supra* note 46, at 571. This draft did not employ the phrase "before the adoption of this Constitution."

In their reply, Lawson and Seidman suggest that, as an intratextual matter, the difference in word choice between "adoption" in the Engagements Clause and "Establishment" in Article VII might be taken to mean that the time of the Constitution's adoption and that of its establishment are different moments. *See* Lawson & Seidman, *supra* note 48, at 94. This intratextual inference fails to persuade because the words "adoption" and "establishment" are elegant variations on the same idea, and because the Engagements Clause and Article VII ought to be presumed to be read *in pari materia.*

67 ARTICLES OF CONFEDERATION art. XII. (U.S. 1781).

by the Congress after the adoption of the Articles of Confederation but before the date the first Congress under the Articles of Confederation was to "assemble" were valid against the United States.[68] Of course, no analogous language appears in the Engagements Clause. The Engagements Clause does not say, "All Debts contracted and Engagements entered into, before the assembling of the Congress in pursuance of the Constitution, shall be as valid against the United States under this Constitution, as under the Confederation." But whatever the Engagements Clause does and does not say, the Clause does not explicitly address the transition question. And the spirit or intention of the Engagements Clause would seem to favor a gapless transition of obligations.

What shall we make of these three provisions as a coherent whole? The answer should be obvious. It is beyond dispute that the text of the Constitution does not explicitly address the transition question.[69] As a matter of the most careful textual analysis, it is plausible that Lawson and Seidman are correct that there was a gapless transition between the two regimes of the Articles of Confederation and the Constitution. It is also equally plausible, however, that there was an interregnum between the two regimes. The text of the Constitution does not provide an answer to the transition question.[70]

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68 *But see* 3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1828 (Fred B. Rothman & Co. 1991) (1833) ("The articles of confederation contained a similar stipulation in respect to the bills of credit emitted, monies borrowed, and debts contracted, by or under the authority of congress, *before the ratification of the confederation.*" (emphasis added)).

69 *See also* Lawson & Seidman, *When Did the Constitution Become Law?*, *supra* note 1, at 6.

70 As this Essay was going to press, I became aware of a fourth provision of the Constitution that bears on the transition question and which I had previously overlooked. Article I, Section 10 provides that "[n]o State shall enter into any Treaty, Alliance, or Confederation." U.S. CONST. art. I, § 10, cl. 1. This "self-executing" provision, of course, took effect immediately upon the adoption of the Constitution. See Lawson & Seidman, *When Did the Constitution Become Law?*, *supra* note 1, at 24. (noting that "Article I, Section 10 restraints on state power . . . do take effect immediately"); Lawson & Seidman, *supra* note 48, at 95 (stating that the aforementioned part of Article I, Section 10, Clause 1 was "one of the immediately operative provisions of the Constitution"). This provision squarely suggests that ratifying States under the Constitution are prohibited from simultaneous membership in the Union under the Articles of Confederation, which is a "Confederation" for the purposes of Article I, Section 10. *See also* ARTICLES OF CONFEDERATION arts. I, II, III (U.S. 1781) (using "confederacy," "Confederation," and "firm league of friendship" to describe governmental regime). James Madison, for his part, described the Articles of Confederation as a treaty between the several States, *see* 1 RECORDS OF THE CONVENTION, *supra* note 46, at 314–15; THE FEDERALIST NO. 43, at 279–80 (James Madison) (Clinton Rossiter ed., 1961), but

Indeed, it may be that the lack of an express transition provision has some important implications. According to Lawson and Seidman, "[i]t is interesting and significant that the Framers did not write the details of a transitional period into Article VII."[71] The significance of the omission may be in one direction or another, and we will need some background rule of interpretation to decide. We should remember that textual arguments by negative implication are sometimes tricky.[72] To resolve the transition question, we will need recourse to extra-textual evidence. To that evidence, I now turn.

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whether the Articles of Confederation is precisely a "Treaty," "Alliance," or "Confederation" for the purposes of Article I, Section 10 is not of particular importance here.

In their reply, Lawson and Seidman also briefly make note of this constitutional provision, and claim that this clause "does not forbid [ratifying States] from continuing to participate in an *existing* treaty or alliance with other States," by which they evidently mean other non-ratifying States. Lawson & Seidman, *supra* note 46, at 99 n.66 (emphasis added). This reading of Article I, Section 10, emphasizing the prospective nature of the phrase "enter into" and its negative implication, is a little too wooden, even for my formalist tastes. There is little doubt in my mind that *existing* treaties, alliances, or confederations involving the ratifying States were null and void upon the adoption of the Constitution—just as existing ex post facto laws or bills of attainder on the statute books of ratifying States would be null and void upon the adoption of the Constitution. *See* U.S. CONST. art. I, § 10, cl. 1 ("No State shall . . . pass any Bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts . . . ."). To be sure, given the consistent prospective phraseology of Article I, Section 10, this interpretation is all or nothing: either past and prospective State actions are prohibited or only prospective State action is prohibited. Neither Lawson and Seidman's interpretation nor mine are inevitable, and Article I, Section 10 is a rather blunt instrument for dissecting the transition question. That said, Lawson and Seidman's interpretation of Article I, Section 10 goes too far as there is nothing in that section that forbids ratifying States from continuing to participate in the Union under the Articles of Confederation even after the First Congress convened in March of 1789. Perhaps other parts of the Constitution make clear that the Constitution is an exclusive Union among ratifying States. *See* U.S. CONST. pmbl; *id.* art. VI, cl. 2; *id.* art. VII. Special thanks to Jonathan F. Cohn for helping me to work through these interesting possibilities.

71 Lawson & Seidman, *When Did the Constitution Become Law?*, *supra* note 1, at 6.

72 Textual arguments from negative implication (i.e., "*expressio unius est exclusio alterius*") must be contextually and sensitively applied to avoid wooden readings of the Constitution. *See, e.g.*, Akhil Reed Amar, *Some Opinions on the Opinion Clause*, 82 VA. L. REV. 647, 653 n.30 (1996); Akhil Reed Amar & Neal Kumar Katyal, *Executive Privileges and Immunities: The* Nixon *and* Clinton *Cases*, 108 HARV. L. REV. 701, 702–08 (1995); David M. Golove, *Against Free-Form Formalism*, 73 N.Y.U. L. REV. 1791, 1815–36 (1998). For a classic exposition of this canon of interpretation, see THE FEDERALIST NOS. 32, 83 (Alexander Hamilton).

III. REVIEWING LAWSON AND SEIDMAN'S EXTRA-TEXTUAL EVIDENCE

In Part I.C of their article, Lawson and Seidman take up their "multi-tiered theory of constitutional effectiveness."[73] In a sub-section entitled "Lessons from the Law," they carefully set forth the interpretive rules for three kinds of key legal instruments: treaties, state constitutions, and statutes.[74] They correctly point out that all three kinds of legal instruments were understood to be effective on their adoption date, unless otherwise specified.[75] They also correctly point out that all three kinds of legal instruments were understood to be capable of containing provisions that would be effective at different times.[76] This much is wholly unassailable.

These two insights, however, do not bear on the transition question. A legal instrument may contain provisions that would be effective at different times in the future, but may nonetheless completely invalidate a prior legal instrument as of the date of the new legal instrument's date of adoption. In order to determine an answer to the transition question, we need an interpretive baseline. For example, does the absence of a transition rule mean that the old regime continued to exercise authority after the new regime was adopted but before the new regime became effective, unless otherwise specified—implying a gapless transition? Or does the absence of a transition rule mean that no one continued to exercise authority after the new regime was adopted but before the new regime became effective, unless otherwise specified—implying an interregnum?

We might search for such an interpretive baseline in the early state constitutions in effect during the Founding (as well as those in effect soon after the adoption of the Constitution),[77] although this

73 *See* Lawson & Seidman, *When Did the Constitution Become Law?*, *supra* note 1, at 8–27.

74 *See id.* at 13–24.

75 *See id.* at 13 ("All three kinds of instruments were clearly understood presumptively to operate from their moment of effectiveness."); *id.* at 23 ("[W]ith respect to every major governmental instrument that was available as a model in the late eighteenth century, the rule respecting effectiveness was the same: such instruments take effect from the moment of their adoption unless there is some provision that says otherwise.").

76 *See id.* at 13 ("[A]ll three kinds of instruments were understood to be capable of taking effect in stages, with different provisions generating legal effects at different times."); *id.* at 23 ("Legal instruments need not be effective or ineffective in total at any particular moment in time.").

77 Needless to say, early state constitutions in effect after the Founding deserve less interpretive weight than those in effect during the Founding, although both may well serve to illustrate the prevailing interpretive baseline at the Founding. *Cf.* Steven

method is surely not error-proof.[78] It does, however, seem a logical place to look. As Lawson and Seidman usefully document, the Framers used the early state constitutions to draft the Constitution,[79] and it is fair to say that the Ratifiers used the same to understand it.[80]

It is not surprising that the early state constitutions addressed the transition question. Indeed, to their credit, Lawson and Seidman present most, if not all, of this evidence.[81] They observe that "[o]ne common approach was to make express provision for the continuance in office of existing public officials until the machinery of their new governments was operative."[82]

For example, the North Carolina Constitution of 1776 provided that officials of the old regime would continue to exercise authority after the new regime was adopted but before the new regime's officials would be put into place.[83] They aptly refer to this transition rule as one "'granting a continuance' to preexisting institutions."[84] The

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G. Calabresi & Saikrishna B. Prakash, *The President's Power To Execute the Laws*, 104 YALE L.J. 541, 550–51 (1994) (questioning the legitimacy of relying on "the Constitution's postenactment 'legislative' history").

78 *See* Lawson & Seidman, *When Did the Constitution Become Law?*, *supra* note 1, at 15–16 (noting the limitations of using the early state constitutions as a source of constitutional meaning); *see also* THE FEDERALIST NO. 47, at 307 (James Madison) (Clinton Rossiter ed., 1961) (similar).

The use of the early state constitutions to squeeze meaning from the Constitution is an interpretivist/originalist technique that deserves to be explicated by someone in a separate essay. Generally, the technique is one of many "intertextual" techniques. More specifically, the technique is a sort of comparative constitutional law, but one frozen in the late eighteenth-century. *Cf.* Akhil Reed Amar, Comparative Constitutional Law, American Style (2001) (unpublished manuscript, on file with author) (using old and modern state constitutions to interpret the Constitution).

79 *See* Lawson & Seidman, *When Did the Constitution Become Law?*, *supra* note 1, at 15 & nn.60–61; *see also* MAX FARRAND, THE FRAMING OF THE CONSTITUTION OF THE UNITED STATES 128–29 (1913) (stating that in the drafting of the Constitution at the Philadelphia Convention "the state constitutions were continually drawn upon").

80 References to the early State Constitutions abound in important Founding-era materials such as the public writings of the Federalists and Anti-Federalists and the recorded debates of the several State ratifying conventions. For a classic exposition, see THE FEDERALIST NO. 47, *supra* note 78, at 303–08 (James Madison) (surveying the early State constitutions in discussing the separation of powers).

81 *See* Lawson & Seidman, *When Did the Constitution Become Law?*, *supra* note 1, at 15–21.

82 *Id.* at 17.

83 *See* N.C. CONST. of 1776, coda ("This Constitution is not intended to preclude the present Congress from making a temporary provision, for the well ordering of this State, until the General Assembly shall establish government, agreeable to the mode herein before described.").

84 Lawson & Seidman, *When Did the Constitution Become Law?*, *supra* note 1, at 18.

influential Massachusetts Constitution of 1780 contained a similar, but considerably more prolix provision,[85] and this provision was essentially copied in the New Hampshire Constitution of 1784.[86] Lawson and Seidman also report that the Delaware Constitution of 1776,[87] the South Carolina Constitution of 1778,[88] and the Virginia Constitution of 1776[89] "also expressly provided for the continuation in office of various officials until new elections were held under the new constitutions."[90] The Pennsylvania Constitution of 1790 also contained an elaborate transition provision providing that the old regime's executive and judicial (but not legislative) officials continue to exercise authority until a given date after the new regime's adoption.[91]

Interestingly, at least some of the transition rules of these early state constitutions were not gapless: the old regime continued to exercise authority after the new regime's adoption but before the new regime's elections were held; the old regime did not continue to exercise authority up to the point in time where the new regime's officials came into office. Put differently, the early state constitutions

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85 The Massachusetts Constitution of 1780 provided:

> To the end there may be no failure of justice, or danger arise to the commonwealth from a change of the form of government, all officers, civil and military, holding commissions under the government and people of Massachusetts Bay in New England, and all other officers of the said government and people, at the time this constitution shall take effect, shall have, hold, use, exercise, and enjoy, all the powers and authority to them granted or committed, until other persons shall be appointed in their stead; and all courts of law shall proceed in the execution of the business of their respective departments; and all the executive and legislative officers, bodies, and powers, shall continue in full force, in the enjoyment and exercise of all their trusts, employments, and authority; until the general court, and the supreme and executive officers under this constitution, are designated and invested with their respective trusts, powers, and authority.

MASS. CONST. of 1780, pt. 2, ch. VI, art. IX.

86 The New Hampshire Constitution of 1784 provided:

> To the end that there may be no failure of justice or danger arise to this state from a change in the form of government, all civil and military officers, holding commissions under the government and people of New Hampshire, and other officers of the said government and people, at the time this constitution shall take effect, shall hold, exercise and enjoy all the powers and authorities to them granted and committed, until other persons shall be appointed in their stead.

N.H. CONST. of 1784, pt. II, para. 84.

87 DEL. CONST. of 1776, art. 27.

88 S.C. CONST. of 1778, art. II.

89 VA. CONST. of 1776, paras. 11, 14.

90 Lawson & Seidman, *When Did the Constitution Become Law?*, *supra* note 1, at 18.

91 PA. CONST. of 1790, scheds. §§ 2–4.

contemplated some interregnum, just less than one that would exist in the absence of the transition rule.[92]

What do Lawson and Seidman make of this evidence from the early state constitutions regarding the transition question? According to Lawson and Seidman:

> All of these provisions made sense only on the assumption that pre-existing governmental institutions had authority *only to the extent that such authority was recognized by the new constitutions.* And that, in turn, assumes that the new constitutions were, to the extent possible, operative from the moment of their adoption.[93]

The italicized language—language emphasized by Lawson and Seidman—is the interpretive baseline from the early state constitutions on the transition question. In the absence of a provision granting the old regime's institutions authority in the period following the new regime's adoption but before the new regime is fully effective, the old regime's institutions have no authority. So say the early state constitutions and those Founders who would read them. The interpretive baseline on the transition question does suggest Lawson and Seidman's conclusion that "the new constitutions were, to the extent possible, operative from the moment of their adoption."[94] So far, so good.

Lawson and Seidman then discuss a different provision in the New Jersey Constitution of 1776 (among others) specifically granting continuing effect to the old regime's laws in the new regime to the extent not incompatible with the new regime and "until altered" by the new regime's legislature.[95] Recall that the Supremacy Clause, in

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92 This conclusion is not completely inescapable. One could argue (desperately, in my view) that the transition rules specified by these state constitutions providing for the old regime's continuance in the period between the new regime's adoption and the new regime's elections simply displaced a baseline of the old regime's continuance in the period between the new regime's adoption and the new regime's officeholding.

93 Lawson & Seidman, *When Did the Constitution Become Law?*, *supra* note 1, at 18.

94 *Id.*

95 The New Jersey Constitution of 1776 provided:

> [A]ll the laws of this Province . . . shall be and remain in full force, until altered by the Legislature of this Colony (such only excepted, as are incompatible with this Charter) and shall be, according as heretofore, regarded in all respects, by all civil officers, and others, the good people of this Province.

N.J. CONST. of 1776, art. XXI.

Other early state constitutions contained similar provisions. *See* MASS. CONST. of 1780, part II, ch. VI, art. VI ("All the laws which have heretofore been adopted, used and approved in the Province, Colony or State of Massachusetts Bay, and usually practised on in the courts of law, shall remain and be in full force."); N.Y. CONST. of 1777, art. XXXV (stating that English common and statutory law, as well as acts of the New

contrast, does not by negative implication make the Confederation Congress's laws the law of the land under the Constitution.[96] The New Jersey Constitution of 1776 did not also provide for a transition provision similar to the ones discussed above.[97] Lawson and Seidman then ask the pertinent question whether "[i]n states like New Jersey that did not expressly provide for the continuation in office of pre-constitutional authorities, did the rule of immediate operation instantaneously wipe out the existing governmental authorities, even before the new institutions were in place?"[98]

They answer "obviously no,"[99] an answer that is downright surprising given their conclusion just a page earlier in their article that "[a]ll of these provisions made sense only on the assumption that preexisting governmental institutions had authority *only to the extent that such authority was recognized by the new constitutions.*"[100] They offer two explanations, although they claim that their answer "can be reached through several lines of reasoning."[101]

The first explanation is that "one could say that a reference to 'all the laws' that remain in effect under the new constitution includes laws concerning governmental structure."[102] In saying so, Lawson and Seidman seem to be concerned with the old regime's ability to put the new regime into place—by specifying, for example, the date and time of elections for the new regime's officials. Elsewhere, they refer to the "transitional action by the preexisting authorities."[103] The fact that the old regime retains authority to put the new regime into place does not mean that the old regime retains other governmental authority. Any of the old regime's authority to put the new regime into place is

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York colonial legislature through April 19, 1775, "shall be and continue the law of this State"); S.C. CONST. of 1776, art. XXIX ("the resolutions of this or any former congress of this colony, and all laws now of force here, (and not hereby altered,) shall so continue until altered or repealed"). These provisions, when read in conjunction with the Supremacy Clause, reinforce the conclusion derived from negative implication that the Supremacy Clause does not make the Confederation Congress's laws the law of the land under the Constitution. This conclusion is, of course, not completely inescapable. One could argue that these provisions granting continuing effect to the old regime's laws to the extent not incompatible with the new regime are merely declaratory and clarifying. *Cf.* Akhil Reed Amar, *Constitutional Redundancies and Clarifying Clauses*, 33 VAL. U. L. REV. 1 (1998).

96 *See supra* text accompanying note 62.

97 *See supra* text accompanying notes 81–91.

98 Lawson & Seidman, *When Did the Constitution Become Law?*, *supra* note 1, at 19.

99 *Id.*

100 *Id.* at 18.

101 *Id.* at 19.

102 *Id.*

103 *Id.* at 21.

derived from the new regime, not the old regime. In the instant context, one could say that the Constitution granted the Confederation Congress authority to put the Constitution into place, and that the Constitution otherwise prohibited the Confederation Congress from exercising any governmental authority under the Articles of Confederation.[104]

The second explanation is that "one could say that the continuation of the existing authorities was implicit in the new constitution, even without an express provision preserving their authority."[105] One could say this. As Lawson and Seidman put it, in the absence of an express transition provision, "it would not be bizarre to say that the new constitution implicitly retained the existing governmental institutions until their replacements had taken office."[106] But one could also say the opposite. It would not be bizarre to say that the new constitution contemplated an interregnum. The question is less whether it would be bizarre and more whether it is the best reading of such a state constitution to conclude that the old regime had continuing authority until the new regime became fully effective.

How do Lawson and Seidman interpret the evidence from the state constitutions in reading the Constitution? Consider the reasoning of Lawson and Seidman on this crucial question:

> Although the Constitution could have expressly provided for a transitional period, as did many of the contemporaneous state constitutions, its failure to do so poses no great problem for originalist textualists. . . . It is clear that the Constitution, even without saying so expressly, contemplates that its provisions for legislative and executive action do not take effect until appropriate steps have been taken to put the new government into place. This also means that the preexisting authorities, such as the institutions created by the Articles of Confederation, were not immediately displaced by ratification of the new Constitution. The machinery of the old regime could continue until the machinery of the new regime was in place.[107]

Given the entirety of the evidence, it is befuddling that Lawson and Seidman conclude that the Constitution, once adopted, did not (as opposed to merely could not) displace the Congress under the Articles of Confederation. The fact that the Constitution's provisions for legislative and executive (and for that matter, judicial) action were

104 *See also supra* note 42.

105 Lawson and Seidman, *When Did the Constitution Become Law?*, *supra* note 1, at 19–20.

106 *Id.* at 20.

107 *See id.* at 23–24.

not "fully" effective until legislative and executive (and judicial) personnel were in place has no bearing on the transition question in and of itself. We need an interpretive baseline. It is here that their answer to the transition question is most vulnerable. Their conclusion that the transition was gapless is seriously under-motivated by their own evidence. Indeed, the evidence from the early state constitutions suggests that the better answer (though by no means an absolutely unassailable one) is that in the absence of a transition rule, there is an interregnum between the old regime and the new regime.

As a matter of Lawson and Seidman's extra-textual evidence and their inferences from the Constitution's text and structure, it remains possible that the transition between the Articles of Confederation and the Constitution was gapless and that it was not gapless. In order to resolve the transition question, we must look to additional evidence not marshaled by Lawson and Seidman. To this additional evidence, I now turn.

IV. ADDITIONAL EXTRA-TEXTUAL EVIDENCE ON THE TRANSITION QUESTION

In this part, I offer additional extra-textual evidence on the transition question. This evidence enables a more complete analysis of the transition question. The evidence is presented in three chunks: the public writings of the Federalists and Anti-Federalists, the secret drafting history of the Constitution, and the journals of the Confederation Congress.

A. Reading the Public Writings of the Federalists and Anti-Federalists

The public writings of the Federalists and Anti-Federalists are a good—even very good—extra-textual source of constitutional meaning.[108] There is, unfortunately, little in those writings that sheds light on the transition question. But there is a little. In *The Federalist No. 43*, James Madison introduced and discussed Article VII. Again, Article VII provides that "[t]he Ratification of the Conventions of nine States, shall be sufficient for the Establishment of this Constitution between the States so ratifying the Same."[109]

108 *See* Akhil Reed Amar, *Of Sovereignty & Federalism*, 96 YALE L.J. 1425, 1498 n.285 (1987); John F. Manning, *Textualism and the Role of* The Federalist *in Constitutional Adjudication*, 66 GEO. WASH. L. REV. 1337, 1342–45 (1998); David McGowan, *Ethos in Law and History: Alexander Hamilton,* The Federalist, *and the Supreme Court*, 85 MINN. L. REV. 755, 819–39 (2001).

109 U.S. CONST. art. VII.

"This article," said Madison, "speaks for itself."[110] He quickly made clear why Article VII requires the participation of the people through conventions and why Article VII requires less than all of the original thirteen States to establish the Constitution.[111] Madison then asked two questions. First, "On what principle the Confederation, which stands in the solemn form of a compact among the States, can be superseded without the unanimous consent of the parties to it?"[112] Second, "What relation is to subsist between the nine or more States ratifying the Constitution, and the remaining few who do not become parties to it?"[113]

The first question essentially asked whether the adoption of the Constitution was legal or not, which is also the subject of an ongoing debate between Professors Ackerman and Amar,[114] and well beyond the subject of this Essay. The second question, however, does bear (a little) on the transition question. How so, you ask?

Madison was plainly positing that some States would not be part of the new Union . . . at least for some period of time, but probably not forever.[115] All of the thirteen States were, of course, a part of the

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110 THE FEDERALIST NO. 43, *supra* note 70, at 279 (James Madison).

111 *See id.*

> The express authority of the people alone could give due validity to the Constitution. To have required the unanimous ratification of the thirteen States, would have subjected the essential interests of the whole to the caprice or corruption of a single member. It would have marked a want of foresight in the convention, which our own experience would have rendered inexcusable.

Id.

112 *Id.*

113 *Id.*

114 *See supra* note 19 (discussing this debate).

115 The original Constitution openly reflects this expectation. *See* U.S. CONST. art. I, § 2, cl. 3 ("[A]nd until such enumeration shall be made, the State of New Hampshire shall be entitled to chuse three, Massachusetts eight, Rhode Island and Providence Plantations one, Connecticut five, New York six, New Jersey four, Pennsylvania eight, Delaware one, Maryland six, Virginia ten, North Carolina five, South Carolina five, and Georgia three."). The Framers and Ratifiers also believed that all thirteen States would likely be a part of the new Union. For the Framers' reflections, see, for example, 2 RECORDS OF THE CONVENTION, *supra* note 46, at 565 (preamble of draft of Constitution referred to the Committee of Style) ("We the People of the States of New-Hampshire, Massachusetts, Rhode-Island and Providence Plantations, Connecticut, New-York, New-Jersey, Pennsylvania, Delaware, Maryland, Virginia, North-Carolina, South-Carolina, and Georgia, do ordain, declare and establish the following Constitution for the Government of Ourselves and our Posterity."). For other reflections, see, for example, THE FEDERALIST NOS. 9, 11–13 (Alexander Hamilton), NOS. 10, 14 (James Madison). *But cf.* 2 RECORDS OF THE CONVENTION, *supra* note 46, at 469

Articles of Confederation, a point made explicit by its preamble.[116] Although Madison was admittedly not addressing the specific question of transition, he was impliedly addressing the general question of the relationship between the old and new regimes. Madison answered the second question thus:

> The second question is not less delicate; and the flattering prospect of its being merely hypothetical forbids an over-curious discussion of it. It is one of those cases which must be left to provide for itself. *In general, it may be observed that although no political relation can subsist between the assenting and dissenting States, yet the moral relations will remain uncanceled.* The claims of justice, both on one side and on the other, will be in force, and must be fulfilled; the rights of humanity must in all cases be duly and mutually respected; whilst considerations of a common interest, and, above all, the remembrance of the endearing scenes which are past, and the anticipation of a speedy triumph over the obstacles to reunion, will, it is hoped, not urge in vain *Moderation* on one side, and *Prudence* on the other.[117]

Madison was quite content to sidestep the tough questions of Article VII. The italicized language strongly suggests that the political relation represented by the Articles of Confederation, composed of assenting and dissenting States, could not govern the political relation represented by the Constitution, at least in the absence of any expression to the contrary. And common sense suggests that it would be very odd (though perhaps not absolutely unthinkable) for the Confederation Congress, representing all of the original thirteen States, to have transitional authority for (potentially) less than all of the original thirteen States. Any theory of transition must take this possibility into account. We shall revisit this commonsensical point in short order.[118]

B. Reading the Secret Drafting History of the Constitution

Another good extra-textual source of constitutional meaning—and as we shall soon see, one that is particularly insightful in the instant context—is the secret drafting history of the Constitution from

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(remarks of John Dickinson) (discussing precursor to Article VII and asking "whether the refusing States in the Confederacy could be deserted").

116 *See* ARTICLES OF CONFEDERATION pmbl. (U.S. 1781) ("Articles of Confederation and perpetual Union between the States of Newhampshire, Massachusetts-bay, Rhode island and Providence Plantations, Connecticut, New-York, New-Jersey, Pennsylvania, Delaware, Maryland, Virginia, North-Carolina, South-Carolina and Georgia.").

117 THE FEDERALIST NO. 43, *supra* note 70, at 280 (James Madison) (emphasis added).

118 *See infra* Part V.

the Philadelphia Convention of 1787.[119] The drafting evolution of and the debates surrounding the three provisions of the Constitution canvassed in Part II—Article VII, the Supremacy Clause, and the Engagements Clause—may reveal something about the assumptions inherent in those provisions with respect to the Constitution's adoption and effective dates.

Nowhere do Lawson and Seidman mention the secret drafting history of the Constitution in the course of their article. This may be an indication that there is little in the Philadelphia records of probative value, or an indication that the Philadelphia records are not admissible or relevant sources of constitutional meaning—or less charitably, an oversight. Putting the interpretive force of the Philadelphia records as a whole to the side for the moment, it is worth checking to see what in fact the Philadelphia records do reveal.

The secret drafting history of the Engagements Clause provides some very interesting clues as to how the Framers thought about the questions of the Constitution's adoption and effective dates while drafting the Constitution. The starting point for our inquiry is Resolution 15 of the Committee of the Whole House, proposed sometime around June 13.[120] That resolution provided that:

> Resolved. that provision ought to be made for the continuance of Congress and their authorities until a given day after the reform of the articles of Union shall be adopted; and for the completion of all their engagements.[121]

There is no question that Resolution 15 was concerned with the Confederation Congress and not the Congress under the Constitution. The "first clause" of Resolution 15 provided that the Confederation Congress ought to be continued after the Constitution's adoption date but some time before the date the first Congress under the Constitution was to convene. Importantly, this clause did not envision that the Confederation Congress should continue to sit up to the date the first Congress under the Constitution was to convene, but only to some time before then—hence, the reference to a "given day." In other words, this clause did envision some gap between the Confederation Congress and the Congress under the Constitution, just less of one than would otherwise exist in the absence of the clause. The "sec-

119 The role of the secret drafting history of the Constitution in constitutional interpretation is the subject of a forthcoming article. *See* Vasan Kesavan & Michael Stokes Paulsen, *The Interpretive Force of the Constitution's Secret Drafting History*, 91 GEO. L.J. (forthcoming 2003).

120 *See* 1 RECORDS OF THE CONVENTION, *supra* note 46, at 231, 237.

121 1 *id.* at 231 (footnote omitted).

ond clause" of Resolution 15 clarified the scope of the "first clause" and made clear that Resolution 15 extended to the completion of the Confederation Congress's engagements as well.

Less than a week later, the Framers as a whole took up Resolution 15. Their short debate is worth considering carefully. Only three Framers spoke on the resolution. The first person to speak on the resolution was Gouverneur Morris. The records show that Morris "thought [that] the assumption of their engagements might as well be omitted; and that Congs. ought not to be continued till all the States should adopt the reform; since it may become expedient to give effect to it whenever a certain number of States shall adopt it."[122]

Morris's opening statement that "the assumption of their engagements might as well be omitted"—a reference to the second clause of Resolution 15—may be taken to mean that it is unnecessary to specify the second clause given the first clause of Resolution 15. Admittedly, the meaning of this opening statement is not entirely clear, but for present purposes, it is the remainder of Morris's remarks that are of importance. His statement that "Congs. ought not to be continued till all the States should adopt the reform; since it may become expedient to give effect to it whenever a certain number of States shall adopt it" squarely presents the key issue. Morris makes clear that the Confederation Congress ought not to be continued from the date of the proposal of the Constitution to the date of adoption of the Constitution by all thirteen States because it may become expedient to give effect to "the reform" (that is, the Constitution) after a certain number of States shall have adopted it (bear in mind that Morris's statement was made before the substance of Article VII was agreed to).[123] Morris takes it as a given that the Confederation Congress ought not to be continued after the date the Constitution shall have been adopted but before the date the first Congress under the Constitution was to convene. Morris thus clearly envisioned a gap between the two regimes of the Articles of Confederation and the Constitution. Morris's statement also addresses in part the question of the Constitution's adoption and effective dates. His statement makes use of the word "adopt" as in adoption and the word "effect" as in effective, suggesting that the adoption date and the effective date are indeed different.

The second person to speak was James Madison. According to Madison, "the clause can mean nothing more than that provision ought to be made for preventing an interregnum; which must exist in

122 2 *id.* at 46–47.

123 The substance of Article VII was agreed to on August 30–31, 1787. *See* 2 *id.* at 468–69, 475, 482.

the interval between the adoption of the New Govt. and the commencement of its operation, if the old Govt. should cease on the first of these events."[124] In explaining the purpose of the clause, Madison hits the nail on its head. The purpose of Resolution 15 was obviously to provide for the continuation of the Confederation Congress after the Constitution's adoption date but before the date the first Congress under the Constitution was to convene. Indeed, Madison's use of the word "interregnum" is significant. An interregnum is "the period of time between the end of a sovereign's reign and the accession of a successor," a point made apparent by the word's Latin roots *inter-* for "between" and *regnum* for "reign."[125] Madison seems to be saying that an interregnum would exist in the absence of Resolution 15. This is fully in accord with the historical baselines of constitutions, statutes, and treaties that Lawson and Seidman so carefully set forth.[126] Madison also seems to be saying that an interregnum would be undesirable. His response to Gouverneur Morris reads as if he were saying, "Gouverneur, you are over-reading Resolution 15. The resolution does little more than prevent an interregnum, and there is nothing undesirable about that."

The third and final Framer to speak on Resolution 15 was James Wilson. The records show that he "did not entirely approve of the manner in which the clause relating to the engagements of Congs. was expressed; but he thought [that] some provision on the subject [of engagements] would be proper in order to prevent any suspicion that the obligations of the Confederacy might be dissolved along with the Governt. under which they were contracted."[127] Wilson was concerned with the second clause of Resolution 15, and that some provision would be made respecting the engagements of the Confederation Congress. That some provision would be the Engagements Clause, proposed in substantially its final form and agreed to by the Framers on August 22–23, 1787.[128] Wilson's statement has no probative value on the key issue of the transition between the two regimes of the Articles of Confederation and the Constitution.

After these three statements, the records show that the Framers as a whole took up "the question on the 1st part—relating to [the] continuance of Congs."[129] The recorded vote was three States for and six

124 2 *id.* at 47.

125 *See* WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1132 (1986).

126 *See supra* Part III.

127 2 RECORDS OF THE CONVENTION, *supra* note 46, at 47.

128 *See* 2 *id.* at 377, 392.

129 2 *id.* at 47.

States against, and so clause 1 of Resolution 15 was disagreed to.[130] The records also show that the second clause "as to completion of their engagements" was disagreed to without discussion.[131]

What does the secret drafting history of the Constitution mean? This is an easy question. The Framers did consider the question of whether the Confederation Congress ought to be continued after the Constitution's adoption date but before the date the first Congress under the Constitution was to convene, and they expressly rejected a resolution that would have mostly prevented an interregnum between the two regimes of the Articles of Confederation and the Constitution. Although the text is capable of supporting Lawson and Seidman's theory of gapless transition between the two regimes as well as an alternative theory of an interregnum between the two regimes, the secret drafting history of the Constitution is only capable of supporting the latter. Had Lawson and Seidman read the foregoing secret drafting history of the Constitution, they would have at least been forced to openly acknowledge the possibility of a transition gap between the two regimes.

What weight should the secret drafting history of the Constitution have in this debate? This is a huge question. I will only mark the fault lines, leaving to another day a more full discussion of the role of the secret drafting history of the Constitution in constitutional interpretation.[132] There are three main possibilities: (1) the use and use-fruits of the Philadelphia records are inadmissible;[133] (2) the use of the Philadelphia records is inadmissible, but the use-fruits are admissible; and (3) the use and use-fruits of the Philadelphia records are admissible.

Professor Lawson believes that the Philadelphia records are generally weak evidence of constitutional meaning,[134] but it is not entirely clear whether he would exclude the Philadelphia records from an "original public meaning"[135] inquiry into constitutional meaning. In

130 *See* 2 *id.*

131 *See* 2 *id.*

132 *See* Kesavan & Paulsen, *supra* note 119.

133 *Cf.* Kastigar v. United States, 406 U.S. 441, 462 (1972) (interpreting the Self Incrimination Clause of the Fifth Amendment and holding that when forcing *B* to testify in *A*'s case, the government can not use *B*'s testimony, or any fruits derived from the testimony, in any later criminal case against *B*).

134 *See* E-mail from Gary Lawson, Professor, Boston University School of Law, to Vasan Kesavan (Jan. 1, 2002) (on file with author).

135 Professor Lawson has popularized the use of the phrase. *See, e.g.*, Gary Lawson, *On Reading Recipes . . . And Constitutions*, 85 GEO. L.J. 1823, 1826–34 (1997); Gary Lawson, *Proving the Law*, 86 NW. U. L. REV. 859, 875 (1992). The meaning of the phrase is the subject of a forthcoming article, *see* Kesavan & Paulsen, *supra* note 119,

other work, Professors Lawson and Seidman do consult the secret drafting history of the Constitution.[136] If one believes that the use and use-fruits of the Philadelphia records are admissible, as I do, then the question is how we should consider the secret drafting history of the Constitution with respect to the entirety of evidence that Lawson and Seidman and I muster.

It is here that there is a good case for giving the secret drafting history of the Constitution some significant weight. The other evidence is threadbare on the specific issue of the transition between the two regimes. In the absence of other extra-textual evidence of constitutional meaning such as history or constitutional structure on the specific issue of the transition between the two regimes, the secret drafting history of the Constitution would seem to be an especially good source of constitutional meaning. Would not the Framers' subjective understanding of the drafting of the Engagements Clause bear on the meaning of the text of the Constitution itself?

Moreover, the arrow from the secret drafting history points in the same direction as the arrows from Lawson and Seidman's review of constitutions, statutes, and treaties: as of the date of the adoption of the new regime, the old regime is dead, unless otherwise specified. As a matter of interpretive baselines, the secret drafting history of the

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but may be summarized for present purposes by the following statement by Oliver Wendell Holmes concerning statutory interpretation:

> [A statute] does not disclose one meaning conclusively according to the laws of language. Thereupon we ask, not what this man meant, but what those words would mean in the mouth of a normal speaker of English, using them in the circumstances in which they were used. . . . But the normal speaker of English is merely a special variety, a literary form, so to speak, of our old friend the prudent man. He is external to the particular writer, and a reference to him as the criterion is simply another instance of the externality of the law . . . . We do not inquire what the legislature meant; we ask only what the statute means.

Oliver Wendell Holmes, *The Theory of Legal Interpretation*, 12 HARV. L. REV. 417, 417–19 (1899).

136 *See, e.g.*, Gary Lawson, *Controlling Precedent: Congressional Regulation of Judicial Decision-Making*, 18 CONST. COMMENT. 191, 206 & n.64 (2001); Gary Lawson & Christopher D. Moore, *The Executive Power of Constitutional Interpretation*, 81 IOWA L. REV. 1267, 1309 & n.198 (1996); Gary Lawson & Patricia B. Granger, *The "Proper" Scope of Federal Power: A Jurisdictional Interpretation of the Sweeping Clause*, 43 DUKE L.J. 267, 293 & n.108 (1993). In addition, Professor Lawson also believes that early precedents interpreting the Constitution are "surely admissible," *see* Lawson, *supra*, at 215 n.84, and it would seem to follow that the secret drafting history of the Constitution is also surely admissible (after all, both were "invisible" to the Ratifiers).

Engagements Clause confirms that the Confederation Congress was a legal nullity after the Constitution's adoption.[137]

C. *Reading the Journals of the Confederation Congress*

One final extra-textual source of constitutional meaning for this Essay is precedent.[138] So what did the Confederation Congress do after June 21, 1788, and before March 4, 1789? And is that good evidence of whether there was an interregnum between the Articles of Confederation and the Constitution or not?

During the transition period, the Confederation Congress took some actions with respect to implementing the Constitution. Lawson and Seidman correctly point out that the Confederation Congress took no action with respect to setting the times, places, or manner of holding elections for Senators or Representatives because the States could take such action on their own.[139] They also correctly point out

137 In their reply, Lawson and Seidman downplay the importance of the "mental states" of James Madison, Governeur Morris, and James Wilson, as well as Resolution 15 of the Committee of the Whole House. *See* Lawson & Seidman, *supra* note 48, at 91–93. I wholeheartedly agree with Lawson and Seidman that "mental states" are "*evidence* of meaning" and "not *constitutive* of meaning." *Id.* at 91. They usefully set forth three standards for evaluating whether mental states are good evidence of meaning: "if they were formed by someone who (1) considered all of the relevant arguments, (2) was capable of synthesizing all of the relevant arguments, and (3) was unlikely to be unduly influenced by various biases that would interfere with sound processing of the evidence." *Id.* at 92. They then almost casually assert that "there is simply no reason to think that the expressions of which we have a record meet these criteria." *Id.* at 92–93. If the direct acknowledgment of the transition question in Resolution 15 of the Committee of the Whole House, the informed discussion and debate among three Framers, and the decision by the Framers in light of this discussion and debate to reject Resolution 15 do not satisfy Lawson and Seidman's three standards for evaluating mental states, then I find it most difficult to imagine what mental states would be good evidence of meaning.

138 For some thoughts on the proper role of precedent in an original public-meaning approach to constitutional interpretation, see Vasan Kesavan & Michael Stokes Paulsen, *Is West Virginia Unconstitutional?*, 90 CAL. L. REV. 291, 380–83 (2002); and Kesavan & Paulsen, *supra* note 119. For some thoughts on the proper role of precedent in constitutional interpretation more generally, see Akhil Reed Amar, *The Supreme Court, 1999 Term—Foreword: The Document and the Doctrine*, 114 HARV. L. REV. 26 (2000); and Gary Lawson, *The Constitutional Case Against Precedent*, 17 HARV. J.L. & PUB. POL'Y 23 (1994).

139 *See* Lawson & Seidman, *When Did the Constitution Become Law?*, *supra* note 1, at 10–11. Lawson and Seidman noted,

> The Constitution itself prescribed the qualifications for electors for the House and Senate, and the states were empowered to set their own times and places for congressional elections. Thus, the states could provide entirely for the election of members of the new Congress without any help

that the Confederation Congress "legislated"[140] on or about September 13, 1788, with respect to the time of choosing Presidential electors[141] and the choice of a location for the seat of the new federal government.[142] These administrative actions were taken pursuant to the resolution accompanying the Constitution sent by the Philadelphia Convention to the Confederation Congress.[143] These actions were perhaps taken pursuant to the spirit or intention but not the letter of the Constitution, since the resolution accompanying the Constitution is not a part of the Constitution itself.[144] These actions were

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> from the Confederation Congress. Accordingly, the [Philadelphia] Convention did not request, and the Confederation Congress did not provide, any machinery for implementing the constitutional directives on congressional elections.

Id. (footnotes omitted).

Cf. U.S. CONST. art. I, § 4, cl. 1 ("The Times, Places, and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators.").

140 *See* Lawson & Seidman, *When Did the Constitution Become Law?*, *supra* note 1, at 12.

141 *See* 34 JOURNALS, *supra* note 49, at 515–19; *cf.* U.S. CONST. art. II, § 1, cl. 3 ("The Congress may determine the Time of chusing the Electors, and the Day on which they shall give their votes; which Day shall be the same throughout the United States.").

142 *See* 34 JOURNALS, *supra* note 49, at 515–19, 521–23. These two actions were taken only after many failed attempts to do so, given disagreement over the seat of the new federal government. For the many failed attempts, see 34 *id.* at 358–60, 367–68, 383–88, 392–404, 415–19, 455–57, 481–84, 487–88, 495–97.

143 2 RECORDS OF THE CONVENTION, *supra* note 46, at 665. The resolution provided,

> Resolved,
>
> That it is the Opinion of this Convention, that as soon as the Conventions of nine States shall have ratified this Constitution, the United States in Congress assembled should fix a Day on which Electors should be appointed by the States which shall have ratified the same, and a Day on which the Electors should assemble to vote for the President, and the Time and place for commencing Proceedings under this Constitution.

2 *id.*

Interestingly, a similarly worded resolution was part of the draft Constitution submitted by the Framers to the Committee of Style and Arrangement, *see* 2 *id.* at 579 (arts. XXII, XXIII), but was removed from the body of the Constitution by that Committee.

144 It is not necessary to conclude that these administrative actions of the Confederation Congress were taken pursuant to the Constitution; if not constitutional, these actions were extra-constitutional, but not unconstitutional. Moreover, if the Confederation Congress had not taken such actions, one could well imagine that some representative body comprised of the States that had ratified the Constitution would have been able to take these basic steps to put the whole Constitution into effect. *Cf.* Law-

most certainly not taken pursuant to the Articles of Confederation, and hence shed no light on the transition question.[145]

The question that remains is what did the Confederation Congress do during the transition period other than the foregoing administrative actions. Lawson and Seidman do not discuss any of this history. The starting point for this inquiry is the Journals of the Continental Congress.

We begin with the events of early July, 1788. The Confederation Congress learned of New Hampshire's all-important ninth ratification on or about July 2, 1788.[146] One important item was then on the Confederation Congress's agenda: the admission of Kentucky into the Union as an independent State.[147] Kentucky was then, of course, a part of Virginia. Virginia had granted her consent to Kentucky's statehood in the form of enabling acts. The Second Enabling Act—the operative enabling act at the time—required that the Confederation Congress admit Kentucky into the Union by July 4, 1788. The Committee of the Whole of the Confederation Congress reported that Kentucky be admitted into the Union pursuant to the Articles of Con-

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son & Seidman, *When Did the Constitution Become Law?*, *supra* note 1, at 11 (discussing the Confederation Congress's choice of a date for the first meeting of the Electoral College) ("Perhaps it would have been possible for the states to agree among themselves on a uniform date for the presidential election through some vehicle other than the Confederation Congress, but the preexisting Congress was the obvious locus for that choice.").

145 In their reply, Lawson and Seidman attach too much importance to the resolution accompanying the Constitution as an "official resolution of the Constitutional Convention as whole" that the Confederation Congress would continue to exist as a legal entity after the adoption of the Constitution. *See* Lawson & Seidman, *supra* note 48, at 96. The fact that the Confederation Congress was thought by the Philadelphia Convention to exist for a very limited purpose of fixing dates (and a place) under the Constitution says *nothing* about the Confederation Congress's continuing legal authority under the Articles during the transition period, *even though* the resolution refers to the same "United States in Congress assembled" as in the Articles of Confederation. Lawson and Seidman recognize that perhaps the Confederation Congress "*only* had the authority to issue non-binding pronouncements," but reject that possibility as "unlikely." *Id.* at 97. If they are correct, it is most certainly not because of the resolution accompanying the Constitution. Indeed, if we are to attach any importance to this resolution, its limited scope and negative implication strongly suggest the opposite conclusion, especially when we remember the rejection of a proposal by the same Framers as a whole to grant the Confederation Congress a "continuance" after the adoption of the Constitution. *See supra* text accompanying notes 121, 129–30.

146 *See* 8 DHRC, *supra* note 9, at xxi; 34 JOURNALS, *supra* note 141, at 281.

147 For a short summary of the Kentucky statehood movement, see Kesavan & Paulsen, *supra* note 138, at 375–78.

federation,[148] and just one day before the operative enabling act was to expire (and only a day after the Confederation Congress learned of the Constitution's adoption), the Confederation Congress considered the issue of Kentucky's statehood. What did they say?

> *Resolved* . . . that the said Legislature and the inhabitants of the district aforesaid [Kentucky] be informed, that as the constitution of the United States is now ratified, Congress think it *unadviseable* [sic] to adopt any further measures for admitting the district of Kentucky into the federal Union as an independent member thereof *under the Articles of Confederation and perpetual Union*; but that Congress thinking it expedient that the said district be made a separate State and member of the Union as soon after proceedings shall commence under the said constitution as circumstances shall permit, recommend it to the said legislature and to the inhabitants of the said district so to alter their acts and resolutions relative to the premisses [sic] as to render them conformable to the provisions made in the said constitution to the End that no impediment may be in the way of the speedy accomplishment of this important business.[149]

Thus, the Confederation Congress voted to delay the admission of Kentucky into the Union. Why they did so is not entirely clear. The italicized language in the resolution indicates that the Confederation Congress thought that it would be "unadviseable" but not necessarily "unlawful" to admit Kentucky into the Union. The remainder of the italicized language suggests a stronger point: the Confederation Congress could only admit Kentucky into the Union "under the Articles of Confederation." It seemed clear that the Confederation Congress could not admit Kentucky into the Union "under the Constitution."

The Kentucky precedent is important because it was the very first event during the transition period to implicitly resolve the legal status of the Articles of Confederation. The best interpretation of the Kentucky precedent, I submit, is that the Confederation Congress lacked power to admit new States into the Union during the transition pe-

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148 *See* 34 JOURNALS, *supra* note 141, at 194. The Committee reported,

> That in their opinion it is expedient that the district of Kentucky be erected into an independent state and therefore they submit the following resolution, That the address and resolutions from the district of Kentucky with the acts of the legislature of Virginia therein specified be referred to a committee consisting of a member from each state, to prepare and report an act for acceding to the independence of the said district of Kentucky and for receiving the same into the Union as a member thereof, in a mode conformable to the Articles of Confederation.

34 *id.* (footnotes omitted).

149 34 *id.* at 293–94 (emphasis added).

riod,[150] although this interpretation is not absolutely required.[151] If the Confederation Congress lacked the power to admit new States into the Union under the Articles of Confederation—a power ostensi-

150 For similar observations, see TEMPLE BODLEY, HISTORY OF KENTUCKY (BEFORE THE LOUISIANA PURCHASE IN 1803) 433 (1928).

> [A] resolution [was] adopted reciting that the ninth state had ratified the Constitution, and therefore Congress was powerless to admit Kentucky into the Federal Union, but that, as Congress believed it expedient that Kentucky should be admitted, its inhabitants and Virginia should take steps to secure admission to the Union under the new Constitution.

Id; s*ee also id.* ("Thus, by its own procrastination, Congress had made itself incapable of receiving Kentucky into the Confederation, and the hope of separation was needlessly and indefinitely deferred."); *id.* at 435 ("[The Confederation Congress's] failure to act on Kentucky's admission before the Confederation expired left the people of the district facing complex problems of legal power and political expediency with reference to their sorely-needed statehood."); *id.* ("Virtually, however, neither Congress nor Confederation longer existed.").

For a contrary observation, see Ackerman & Katyal, *supra* note 9, at 523. Ackerman and Katyal maintain that the Confederation Congress did not lack the power to admit new States into the Union (presumably under the Articles of Confederation) during the transition period. They offer two reasons. First, "[The Confederation] Congress did not respond to the new situation by declaring itself legally incompetent, but simply found further action inexpedient." *Id.* Second,

> this was done over the opposition of the Virginia delegation—which wanted a formal confirmation of its compact with Kentucky—even though Virginia had already ratified the new Constitution. Rather than supposing that their state's recent ratification was tantamount to a renunciation of the Articles, the Virginians protested when their fellow congressmen found it "inexpedient" to push forward on so delicate a matter!

Id.

On the first reason, one may disagree as to the best interpretation of the Confederation Congress's resolution. On the second reason, it is possible that the Virginians were acting unconstitutionally in the summer of 1788—just as, according to Lawson and Seidman, the Virginians acted unconstitutionally in the winter of 1788. *Cf.* Lawson & Seidman, *When Did the Constitution Become Law?*, *supra* note 1, at 35 n.126. Indeed, Virginia's interpretation of the effect of the adoption of the Constitution on the Confederation Congress's power to admit Kentucky into the Union (presumably under the Articles of Confederation) may have been significantly biased—the Kentucky statehood movement had dragged on for years and both Virginians and Kentuckians were eager to bring the statehood movement to a conclusion.

151 In earlier work, I failed to acknowledge the possibility that the Confederation Congress may have retained legal authority under the Articles of Confederation during the transition period—thereby overreaching in the opposite direction of Lawson and Seidman. *See* Kesavan & Paulsen, *supra* note 138, at 377 ("The Continental Congress voted to delay the admission of Kentucky into the Union (remember that with the adoption of the Constitution, the Continental Congress lacked legal authority under the Articles of Confederation).").

bly given by Article XI of the Articles of Confederation[152]—it would seem that the Confederation Congress would have lacked other powers under the Articles of Confederation. The Kentucky precedent suggests that the Confederation Congress was legally defunct during the transition period. Alternatively, one might maintain that the power to admit new States into the Union—a power that goes to the very essence of the structure of the Union—is special enough to be treated in a different way than all other federal governmental powers. On this reading, the Confederation Congress may not have had the power to admit new States into the Union during the transition period but may have retained all other powers under the Articles of Confederation.

The Kentucky precedent notwithstanding, the Confederation Congress addressed a number of other issues during the summer and fall of 1788. The principal issues concerned financial affairs (e.g., requisitions, foreign loans, copper coinage, and prize money), foreign relations (e.g., negotiations with Spain concerning the navigation of the Mississippi River, the reception and retirement of foreign ministers, and the redemption of captives held in the Barbary States), the western territory, military affairs (e.g., troops and supplies and the use of federal troops in Pennsylvania), Indian affairs, and postal affairs (e.g., post routes and mails and mail contracts).[153] This activity does suggest that the Confederation Congress continued to be legally operative under the Articles of Confederation during the transition period.

What is most interesting about the Kentucky precedent and the other activities of the Confederation Congress during the transition period is the participation of the non-ratifying States—North Carolina and Rhode Island—and for almost all of July, the participation of another then-non-ratifying State, New York.[154] The key issue that involved the participation of the non-ratifying States pertained to

152 *See* ARTICLES OF CONFEDERATION art. XI (U.S. 1781) ("Canada acceding to this confederation, and joining in the measures of the United States, shall be admitted into, and entitled to all the advantages of this Union: but no other colony shall be admitted into the same, unless such admission be agreed to by nine States.").

153 *See* 34 JOURNALS, *supra* note 141, at iii–iv, viii. Ackerman and Katyal state,

> [The Confederation Congress] examined the prospect of new Dutch loans, continued the Spanish negotiations, negotiated with the Indians, and pursued other diplomatic issues. On the home front, it considered a new requisition, devised new procedures for the survey and distribution of western lands, and dispatched federal troops to quell disturbances in Pennsylvania.

Ackerman & Katyal, *supra* note 9, at 521 (citations omitted).

154 New York ratified the Constitution on July 20, 1788. *See supra* note 9. For examples of non-ratifying States voting on matters pertaining to the organization of

implementing the Constitution: the choice of a location for the seat of the new federal government.[155] The obvious choices were Philadelphia or New York, and it was only after a fierce struggle between Federalists and Anti-Federalists that New York was selected as the seat of the new federal government. The non-ratifying States helped to make the difference in the selection of New York as the nation's next capitol: "Federalists were often busy lobbying these nonratifying states in order to win the capitol for their favorite city."[156]

These Federalists hoped to have their cake and eat it too. On August 6, 1788, Alexander Hamilton proposed that the votes by delegates from non-ratifying States shall not be "construed directly or indirectly to imply either on their part or on the part of the states which they represent an approbation of the constitution aforesaid or of any part thereof or any manner or kind of obligation on the part of any such state . . . ."[157] The original resolution provided that "the Delegates of [North Carolina and Rhode Island] have thought fit to vote upon the said ordinance in virtue of the right of suffrage vested in them by the Articles of Confederation and perpetual Union . . . ."[158] All of this seems a little odd. The delegates of the Confederation Congress at the time seemed to recognize how strange it was for the non-ratifying States to participate in transitional matters relating to the Constitution. Transitional matters aside, it remains possible that the Confederation Congress was legally operative under the Articles of Confederation as to other (non-transitional) matters.

Consider also the views of Alexander Hamilton. On August 12, 1788, Hamilton wrote a very interesting letter to Jeremiah Olney, a delegate to the Confederation Congress from Rhode Island, discussing the participation of the non-ratifying States on the important transitional matter that remained. Hamilton wrote in relevant part:

> A doubt might perhaps be raised about your right to a vote under the present circumstances. There is not a member of Congress but one who has even *pretended* to call your right in question. 'Tis agreed generally that the power of organising the government is given by the ratifying states to the United States in Congress assembled, who are mere agents under a special authority and therefore the non adopting states stand on the same footing with the adopting. Nor can the exercise of that right operate in any manner upon

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the new federal government under the Constitution, see Ackerman & Katyal, *supra* note 9, at 524 n.146 (citing sources).

155 *See supra* note 142.

156 Ackerman & Katyal, *supra* note 9, at 524.

157 *See* 34 JOURNALS, *supra* note 141, at 403–04.

158 34 *id.* at 403 n.2.

> your situation. If the United States should even be considered as a foreign power, you might have a choice in such a question.[159]

Hamilton's letter furnishes a few clues. First, the letter indicates that the authority of the Confederation Congress during the transition period and the participation of the non-ratifying States in transition matters was at least a debatable question. As Hamilton put the point, "A doubt might perhaps be raised about your right to a vote under the present circumstances." Second, the letter crisply suggests that the Confederation Congress only had legal authority under the Constitution as to certain transition matters. As Hamilton put the point, the Confederation Congress was an assembly of "mere agents under a special authority." Note how Hamilton observed that this power was given to the Confederation Congress "by the ratifying states" (either impliedly from the Constitution itself or extra-constitutionally). An early draft of an implementing act of the Confederation Congress provided that "the ratifications of the several States are to be considered as containing virtual authority and Instructions to their Delegates in Congress to make the preparatory Arrangements recommended by the said Convention to be made by Congress."[160] Third, the letter indicates that the Confederation Congress might have greater powers under certain circumstances. In the realm of foreign relations, the non-ratifying States might have a say. As Hamilton put the point, "If the United States should even be considered as a foreign power, [Rhode Island] might have a choice in such a question." Hamilton's choice of language regarding this extraordinary case is equivocal. The non-ratifying States "might," but not necessarily "would," have a say in these matters. Taken as a whole, Hamilton's letter suggests that the transition between the Articles of Confederation and the Constitution was not gapless.

The most interesting part of the inquiry into precedent relates to the activities of the Confederation Congress for the new federal year beginning November 3, 1788. The journal entry states, "Pursuant to the Articles of the Confederation only two Gentlemen attended as delegates . . . ."[161] These delegates were Benjamin Contee of Maryland and Hugh Williamson of North Carolina.[162] Some of the delegates from Virginia, South Carolina, New Jersey, and Massachusetts ap-

159 Letter from Alexander Hamilton to Jeremiah Olney (Aug. 12, 1788), *in* 5 THE PAPERS OF ALEXANDER HAMILTON 199, 199 (Harold C. Syrett & Jacob E. Cooke eds., 1962). The letter is quoted in part in Ackerman & Katyal, *supra* note 9, at 524 n.146.

160 34 JOURNALS, *supra* note 141, at 387.

161 34 *id.* at 604 (footnote omitted).

162 34 *id.*

peared in November and December of 1788; some of the delegates of Pennsylvania appeared in January of 1789, and the delegates from Rhode Island, New York, and New Hampshire did not appear until February of 1789.[163] An editor's note for the journal entry for November 3, 1788 provides some elaboration:

> This is the first day of the federal year 1788–1789. From this date to March 2, 1789, delegates from the various states appeared and presented their credentials, so that it would have been possible at any time that seven states were present for the secretary to have read the credentials and for Congress to have begun its sessions. Because of the organization of the new Government under the Constitution, the Continental Congress for 1788–1789, never transacted any business.[164]

This editor's note is fascinating, suggesting that the Confederation Congress could have transacted business after November 3, 1788, but did not perhaps because it was inexpedient to do so.

Does the very fact that all of the original thirteen States sent delegates to the Confederation Congress for the new federal year 1788–1789 mean that the Confederation Congress had legal authority under the Articles of Confederation during the transition period?[165] Maybe. As Professor Ackerman and then-student Katyal stated (in another context), "This is curious behavior for states who were allegedly treating the Articles as nullities."[166] But maybe not. It is a most slippery exercise to infer from the fact that delegates were sent to the Confederation Congress alone that the Confederation Congress had real legal authority under the Articles of Confederation. This Confederation Congress might well have been a "rump" congress acting as a de facto regime.[167]

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163 34 *id.* at 604–05.

164 34 *id.* at 604 n.1.

165 This was the only time in the history of the Continental Congress that all of the original thirteen States sent delegates to Congress (seven States constituted a quorum). *See* Roscoe R. Hill & Herbert Putnam, *Prefatory Note* to 34 JOURNALS, *supra* note 141, at v; *see also* Ackerman & Katyal, *supra* note 9, at 520 (noting this point). For the appointments by the several States of delegates to the Confederation Congress, see 34 JOURNALS, *supra* note 141, at 609–16; and Ackerman & Katyal, *supra* note 9, at 520 n.132.

166 Ackerman & Katyal, *supra* note 9, at 557.

167 Indeed, Professor Ackerman has argued that the Thirty-Ninth Congress—the Congress that proposed the Fourteenth Amendment—was a "rump" Congress because of the Northerners' (Republicans') exclusion of Southern senators and representatives. *See 2* ACKERMAN, *supra* note 14, at 99–252. What is sauce for the goose is sauce for the gander. The mere fact that the Thirty-Ninth Congress convened is not

Some scholars might take issue with the statement that the Confederation Congress transacted no business after that time. As Ackerman and Katyal also noted, "The final important act of the Confederacy [under the Articles] was not in November [of 1788], but in January [of 1789]—when its governor for the Northwest Territory, Arthur St. Clair, negotiated a treaty with the Wyandot."[168] This treaty, known as the Treaty of Fort Harmar, was made on January 9, 1789, but was never approved by the Confederation Congress pursuant to the Articles of Confederation. The First Senate ratified this treaty on September 22, 1789.[169]

It is difficult to say that the making of the Treaty of Fort Harmar is evidence that the Confederation Congress had legal authority under the Articles of Confederation during the transition period. The treaty was made by a deputy, not the Confederation Congress, and was not considered by the latter. Indeed, the ratification of the treaty by the First Senate strongly suggests that the treaty was not the law of the land until September 22, 1789, although it remains possible that the First Senate re-ratified the treaty out of an abundance of caution.

What weight should precedent have in this debate? The question is especially complicated by the fact that the Confederation Congress did very little after the adoption of the Constitution in the early summer of 1788 and virtually nothing after the beginning of the new federal year in November of 1788. The fact that the Confederation Congress continued to exist (even if not in session) until the spring of 1789 is evidence of a gapless transition between the Articles of Confederation and the Constitution, maybe even strong evidence, but surely not conclusive evidence. On this point, Lawson and Seidman would probably agree.[170] The precedent (whatever its precise scope) of the Confederation Congress is not so much more persuasive than the precedent of the Virginia Legislature passing the unconstitutional statute at issue in *Owings*, although it is harder to dismiss the action of all thirteen original States as equally anomalous.

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dispositive of its legal status, just as the mere fact that the Confederation Congress convened after the adoption of the Constitution is not dispositive of its legal status.

168 Ackerman & Katyal, *supra* note 9, at 558.

169 *See id.* at 558 n.247 (citing sources); *see also* First Federal Congress Project, The Senate and Foreign Affairs, *in* Birth of the Nation: The First Federal Congress 1789–1791, *at* http://www.gwu.edu/~ffcp/exhibit/p9/p9_8.html (last modified Jan. 25, 2002) (online exhibit).

170 *See* Lawson & Seidman, *When Did the Constitution Become Law?*, *supra* note 1, at 35 n.126.

V. TOWARD A GENERAL THEORY OF TRANSITION

A short summary of our interpretive journey is appropriate. The text of the Constitution provides no clear and convincing answer to the transition question. The extra-textual evidence from the early state constitutions suggests that the transition between the Articles of Confederation and the Constitution was not gapless. The extra-textual evidence from the public writings of the Federalists weakly suggests the same. The extra-textual evidence from the secret drafting history of the Constitution strongly suggests the same. Finally, the extra-textual evidence from precedent suggests the opposite—that the transition between the Articles of Confederation and the Constitution was in fact gapless.

The transition question is truly a tough nut to crack. The chief problem with the transition question is that we are trying to posit an alternative universe whose precise facts are under-specified. This is a problem with much of constitutional law. We are left to fill in the holes based on faithful interpretation of the evidence from (at least) text, history, and structure.[171] Sometimes the vectors of relevant evidence are of varying length and direction.

How should we think about a general transition theory? The virtue of Lawson and Seidman's answer to the transition question, though they do not mention it, is that the transition between the two regimes of the Articles of Confederation and the Constitution was gapless. It would seem that given a choice between an interregnum and not, one would prefer not. But then again, there was at the time nothing terribly shocking about having no federal governmental authority for the relatively short period of time between the Constitution's adoption and its full effective date.

There are some practical considerations worthy of attention. Maybe the lame duck Confederation Congress had full legal authority under the Articles of Confederation during the transition period but chose not to overreach, absent exigent circumstances. Any such action, taken by the Confederation Congress in good faith and with the support of pro-Constitution leaders such as James Madison, George

171 It is well beyond the scope of this Essay to argue that text, history, and structure must be a part of good constitutional interpretation. *Cf.* Akhil Reed Amar, *A Neo-Federalist View of Article III: Separating the Two Tiers of Federal Jurisdiction*, 65 B.U. L. REV. 205, 207–08 n.7 (1985) (stating that "interpretivist" methodology is valuable whether or not one subscribes to its results). Here, I do consciously omit doctrine and other considerations such as prudence and ethics. For a general discussion of those three arguments in constitutional interpretation, see PHILIP BOBBITT, CONSTITUTIONAL FATE: THEORY OF THE CONSTITUTION 39–73, 93–119 (1982).

Washington, and James Wilson to name just a few, presumably would have had the support of the Founders. This would be a prudential but not strictly legal limitation of transition authority—the old regime should not take action (pursuant to the power of the old regime, of course) with respect to matters that can await consideration by the new regime. And what about the run-of-the-mill matters performed by the federal government under the Articles of Confederation? For example, who would keep the soldiers clothed, fed, and paid and the post office in operation?[172]

It was not indispensably necessary to have a federal government in existence during the transition period in order to keep the country running. There could be effective transition between the two regimes of the Articles of Confederation and the Constitution without an interim federal government. The purpose of the Engagements Clause was to provide that the obligations of the federal government under the Articles of Confederation would be obligations of the new federal government under the Constitution as well. And the several state governments could pick up any slack.

There is at least one crucial logistical consideration as well. A gapless transition implies that during the transition period the Confederation Congress had legal authority under the Articles of Confederation to govern for the benefit of all of the original thirteen States, even though the new regime was among and only for the benefit of the ratifying States. This is very odd, but perhaps not absolutely unthinkable. A hypothetical example involving the Confederation Congress during the transition period reveals the oddity. Imagine that only the sufficient number of nine States under Article VII ratified the Constitution before the First Congress convened. (This was not the case because Virginia and New York ratified soon after New Hampshire did, becoming the tenth and eleventh States respectively to join the Union.) Thus, the Confederation Congress would be composed of the nine ratifying States and four non-ratifying States. Given that the consent of nine States was necessary under the Articles of Confederation for most governance matters,[173] it is possible that all nine *ratifying* States could have their way if they wanted to do *X* in the

172 Ackerman and Katyal raise a similar set of questions:

> [i]f [the Confederation] Congress had dissolved, how would the Dutch be convinced to float a loan for continued payment of interest on the national debt? Who would conduct diplomacy with foreign powers? Who would deal with Native Americans? On a more humdrum but hardly unimportant level, who would run the Confederacy's postal service?

Ackerman & Katyal, *supra* note 9, at 522.

173 *See* ARTICLES OF CONFEDERATION arts. IX, X, XI, (U.S. 1781).

transitional regime.[174] But that is not the only possibility. What if all nine ratifying States did not agree among themselves to do *X*? In such a case, at least one *non-ratifying* State could have a decisive vote in doing *X*, which if done, would bind ratifying and non-ratifying States alike. Indeed, at the extreme, five ratifying States and four non-ratifying States could agree to do *X*. If the Confederation Congress had legal authority during the transition period, then one must take into account the oddity of giving non-ratifying States any say in the transitional regime.[175] This seems too odd to be true.

The interesting question that remains relates to necessity. What if Great Britain or France had attacked the United States between the early summer of 1788 and the spring of 1789? Would the Confederation Congress have had authority under the Articles of Confederation to enter into a treaty of peace? Would that treaty of peace be the law of the land under the Supremacy Clause?

Surely the United States did not cease to exist as a nation during the transition period.[176] One answer to this hypothetical question is, of course, that the Confederation Congress had legal authority under the Articles of Confederation during the transition period to make and ratify such a treaty of peace. But the argument from necessity surely does not mean that the Confederation Congress necessarily had such authority. Another answer is that in such an emergency there would have been a de facto regime comprised of all of the original thirteen States, or more precisely, of the States that had ratified the

174 In addition, the nine ratifying States could also have their way if they did *not* want to do *X* because any five or more of them would have blocking rights under the Articles (thirteen States minus five ratifying States is eight States—one less than the number needed under most governance matters). Lawson and Seidman astutely note this point in their Reply. *See* Lawson & Seidman, *supra* note 48, at 98 (noting that the nine ratifying States "could block any action that threatened to interfere with the smooth future functioning of the new government," including treaties and achieving a quorum).

175 It is worth remembering, too, that there is nothing magical about the number nine in Article VII—the Framers considered lower and higher numbers, *see* 2 RECORDS OF THE CONVENTION, *supra* note 46, at 468–69, but settled on the number nine probably because it was "a respectable majority of the whole" and "a number made familiar by the constitution of the existing Congress." *See* 2 *id.* at 469 (remarks of Gov. Edmund Randolph). Had the Framers chosen a lower number, such as seven or eight, for Article VII as James Wilson advocated, *see* 2 *id.* at 468–69, the assent of at least one *non-ratifying* State would have been *required* in order for the Confederation Congress under the Articles to do *X*. This strikes me as preposterous.

176 On the birthdate of the United States as 1776, see THE DECLARATION OF INDEPENDENCE (U.S. 1776).

Constitution at that point in time.[177] This de facto regime of ratifying States would have had the power to make and ratify a treaty of peace, which would bind its successor regime.[178] Perhaps the first Senate would have re-ratified such a treaty of peace out of an abundance of caution. The important point is that there is a difference—a legal difference—between a de facto regime and a de jure one.

A general transition theory is limited by our ability to peer into the hypothetical past. There are some reasons to think that the Confederation Congress had legal authority under the Articles of Confederation during the transition period, but better reasons to think otherwise. The takeaway point is this: the answer to the transition question is hardly an open-and-shut case.[179]

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177 For a good general discussion of de facto regimes and their power to bind their successor regimes, see generally Harrison, *supra* note 14 (arguing for the legitimacy of the Reconstruction Congress and their enactment of the Thirteenth and Fourteenth Amendment).

178 The de facto regime of ratifying States would probably be governed by majority rule of the number of States. As a corollary, a de facto regime (or regimes) or non-ratifying States would have the power to make and ratify a treaty of peace for those States, and obviously not be bound by the de facto regime of ratifying States.

179 In the closing pages of their reply, Lawson and Seidman attempt to shift the burden of proof onto me. Their argument is that "[s]omeone who asserts that the Constitution forbids a ratifying State from participating in the Confederation during the period of transition is claiming a constitutional restriction on States and therefore bears the burden of proof." Lawson & Seidman, *supra* note 48, at 100. This burden-of-proof argument fails for three reasons. First, a constitutional restriction on ratifying States not to participate simultaneously (even for a short time period) in *another* governmental regime comprised of ratifying *and* non-ratifying States is of a fundamentally different kind than a constitutional restriction on ratifying States not to do *X* because *X* is a power given to the federal government or retained by "We the People" of the United States; the former is a division of power between two Unions with different members, whereas the latter is a division of power within one Union. The appropriate presumption is that the Constitution is presumed to be an exclusive Union for and among ratifying States. *See supra* note 70 (citing constitutional provisions). Second, I took this project in principal part because of what I took to be a compelling interpretive baseline/presumption from Lawson and Seidman's careful research into early constitutions, statutes, and treaties: the new regime displaces the old, unless otherwise specified. If I have misread Lawson and Seidman on this important point, *mea culpa.* When it comes to choosing between a specific presumption of the transition question and a general presumption of the exclusivity of the Union under the Constitution, on the one hand, and a general one of the powers retained by the several States, on the other hand, I will choose the former, and leave it to the gentle reader to decide, based on the presumption and the arguments presented, which of us has the better case.

VI. CONCLUSION

Professors Lawson and Seidman are surely to be congratulated for bringing to the fore the fascinating question of when the Constitution became law. After 213 and not 212 years of the Republic (as we can now confidently say), Lawson and Seidman have now put to rest a longstanding but neglected question of constitutional law. Lawson and Seidman also deserve credit for announcing a general theory of constitutional effectiveness that, for the most part, is correct. But Lawson and Seidman are to be criticized for pushing one valuable conclusion too far. That some parts of the Constitution were not effective at the adoption date does not necessarily mean that the old regime continued to exercise authority until the new regime became effective. One could say that (1) Article I, Section 10 of the Constitution was effective in the early summer of 1788 and that (2) Article I, Section 8 of the Constitution was effective in the spring of 1789 and also say that (3) there was an interregnum between the early summer of 1788 and the spring of 1789. Lawson and Seidman unnecessarily conclude that the transition between the Articles of Confederation and the Constitution was gapless. They do so on the barest of evidence. On this point, their theory of constitutional effectiveness is simply not proved.