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# THE MANY AND VARIED ROLES OF HISTORY IN CONSTITUTIONAL ADJUDICATION

*Richard H. Fallon, Jr.\**

## INTRODUCTION

Appeals to history, and to the authority of decisions made in the past, occur nearly ubiquitously in constitutional law. For the most part, these appeals occasion little specific notice or methodological controversy. There is, of course, a sharp, ongoing, frequently overheated debate about constitutional originalism—a theory, or family of theories, that holds, roughly, that the original meaning of the constitutional language is both unchanging and, insofar as it is clear and determinate, almost invariably controlling.<sup>1</sup> But increasingly tired, stylized debates of the form “Originalism: For or Against?” tend to obscure three deep truths about constitutional interpretation.

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\* Ralph S. Tyler, Jr. Professor of Constitutional Law, Harvard Law School. I am grateful to Curt Bradley, Dan Meltzer, Jim Pfander, and Amanda Tyler for extremely helpful comments on prior drafts, to comments from my fellow panelists (A.J. Bellia, Brad Clark, Tara Grove, and Justice Antonin Scalia) and members of the audience (especially Scott Dodson) at a session of the Federal Courts Section of the American Association of Law Schools on “The Role of History in the Federal Courts Canon,” and to Max Rosen for outstanding research assistance.

1 On varieties of originalism, see generally Thomas B. Colby & Peter J. Smith, *Living Originalism*, 59 DUKE L.J. 239, 244–45 (2009) (describing originalism as a “smorgasbord of distinct constitutional theories”). Although all originalists appear to agree that the “original meaning (‘communicative content’) of the constitutional text is fixed at the time each provision is framed and ratified,” Lawrence B. Solum, *Originalism and Constitutional Construction*, 82 FORDHAM L. REV. 453, 456 (2013), they disagree about such matters as (1) the nature of the historical phenomena that fix constitutional meaning, (2) whether constitutional “meaning” suffices to dictate the outcome of constitutional cases or must be supplemented in some cases by judge-created constitutional “construction,” and (3) whether courts should ever decide constitutional cases based on precedents that deviate from the Constitution’s original (and fixed) meaning. See, e.g., Richard H. Fallon, Jr., *Are Originalist Constitutional Theories Principled, or Are They Rationalizations for Conservatism?*, 34 HARV. J.L. & PUB. POL’Y 5, 6–14 (2011). Although most of the versions of originalism currently on offer are not sufficiently clearly defined to avoid considerable discretion in application, more determinate forms are in principle possible. See *id.* at 15–20.

First, nearly all of those who characterize themselves as nonoriginalists readily acknowledge the importance to constitutional adjudication of evidence bearing on the original meaning of constitutional language.<sup>2</sup> Cases in which nonoriginalist Justices of the Supreme Court have cast their arguments almost exclusively in originalist terms are revelatory in this respect. A much noted example comes from *District of Columbia v. Heller*,<sup>3</sup> in which the majority and principal dissenting opinions debated the scope of the Second Amendment right to bear arms almost entirely on originalist grounds.<sup>4</sup>

Second, few originalists are exclusive originalists. That is, very few believe that evidence from the Founding era is the only consideration that ought to matter to constitutional adjudication.<sup>5</sup>

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2 See Jack M. Balkin, *The New Originalism and the Uses of History*, 82 *FORDHAM L. REV.* 641, 657 (2013) (“Nonoriginalists and living constitutionalists tend to agree that adoption history is very important.”); Mitchell N. Berman, *Originalism Is Bunk*, 84 *N.Y.U. L. REV.* 1, 24–25 (2009) (“Not a single self-identifying non-originalist of whom I’m aware argues that original meaning has no bearing on proper judicial constitutional interpretation.”); Richard H. Fallon, Jr., *The Political Function of Originalist Ambiguity*, 19 *Harv. J.L. & Pub. Pol’y* 487, 488 (1996) (“[M]ost views—my own included—assume that original understanding and purposes are relevant to constitutional interpretation. Differences emerge only over how, and how weightily, these considerations enter the interpretive matrix.”); Peter J. Smith, *How Different Are Originalism and Non-Originalism*, 62 *HASTINGS L.J.* 707, 722 (2011) (“Notwithstanding the caricature of non-originalism that many originalists have offered, most non-originalists—or at least most scholars or judges who do not readily identify as originalists—believe that the original meaning is highly relevant and often dispositive.” (footnotes omitted)); David A. Strauss, *Common Law Constitutional Interpretation*, 63 *U. CHI. L. REV.* 877, 881 (1996) (“Virtually everyone agrees that the specific intentions of the Framers count for something.”).

3 554 U.S. 570 (2008).

4 See *id.* at 576–77 (relying on “[n]ormal meaning . . . [that would] have been known to ordinary citizens in the founding generation” to find that the Second Amendment includes an individual right to bear arms); *id.* at 637 (Stevens, J., dissenting) (relying on the fact that “there is no indication that the Framers of the [Second] Amendment intended to enshrine the common-law right of self-defense in the Constitution” to find that the Amendment contains no such individual right); *id.* at 683 (Breyer, J., dissenting) (relying on colonial history not only to demonstrate that the Second Amendment does not contain an individual right to bear arms, but also to demonstrate that, assuming the existence of such a right, the particular D.C. regulation would have been compatible with it); see also Lawrence B. Solum, *District of Columbia v. Heller and Originalism*, 103 *Nw. U. L. REV.* 923, 924 (2009) (“Collectively, the opinions in *Heller* represent the most important and extensive debate on the role of original meaning in constitutional interpretation among the members of the contemporary Supreme Court.”).

5 See, e.g., ANTONIN SCALIA & BRYAN A. GARNER, *READING LAW: THE INTERPRETATION OF LEGAL TEXTS* 413–14 (2012) (characterizing the doctrine of stare decisis as an exception to the authors’ otherwise originalist philosophy); Steven G. Calabresi & Julia T. Rickert, *Originalism and Sex Discrimination*, 90 *TEX. L. REV.* 1, 2, 9 (2011) (arguing that originalist methods seek to discover an original conceptual meaning that must then be applied to new facts and that correct applications cannot be determined by the Framers’ “unenacted factual beliefs”). An increasing number of originalists reach this conclusion by distinguishing between original meaning, which is the object of constitutional “interpretation” but is often vague or ambiguous, and constitutional “construction,” which requires further judg-

Third, and most important, an obsession with debating the merits of a frequently underdefined notion of originalism as opposed to an equally underspecified conception of nonoriginalism distracts attention from the wide varieties of historical inquiry that both originalists and nonoriginalists recognize as relevant in constitutional decisionmaking. When the debate about originalism is temporarily put to one side, it emerges that the most familiar foci of originalist concern—original intent, original understandings, and original public meanings<sup>6</sup>—constitute just three of a myriad of historical reference points that nearly everyone, originalists included, at least implicitly accepts as mattering to constitutional law. Moreover, when the multiple dimensions of history’s pertinence are laid out, it becomes evident that even when the original intent, understanding, or public meaning possesses agreed determinative significance, that state of affairs is contingent, not necessary—as widespread practice, including that of most self-described originalists, attests.

My principal aim in this Article is to develop the third of these points, involving the multiplicity of roles that history plays in constitutional analysis, though I shall also say a few things in connection with the first two. Much of my effort will be taxonomic, aimed at mapping some of the kinds of historical inquiry in which participants in constitutional debate—including judges and Justices—frequently, and mostly unselfconsciously, engage. A systematic rethinking of the roles of history in constitutional practice, beginning with an effort at taxonomy, ought to cool the temperature of debates about originalism by revealing that nearly all originalists share a very broad swath of often unacknowledged methodological common ground with nearly all nonoriginalists. In so saying, I do not claim that methodological overlap is complete. Indeed, partly because there has been so little specific attention to the varied roles of nonoriginalist history in constitutional adjudication,<sup>7</sup> I do not expect full agreement either among originalists or among nonoriginalists

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ment in rendering determinate what, as a matter of purely historical fact, was indeterminate. See, e.g., Balkin, *supra* note 2, at 646 (“[Original meaning] thus leaves most important constitutional controversies in what Lawrence Solum calls the ‘construction zone’ [in which] . . . the adopters only begin a transgenerational project of governance that others must continue.”); Solum, *supra* note 1, at 483 (“Originalists may be tempted to argue that the original meaning of the constitutional text provides an answer to every constitutional question. Once they understand the distinction between interpretation and construction, originalists become open to the possibility that the linguistic meaning of the constitutional text may sometimes underdetermine the outcome of constitutional cases.”).

6 On the differences among the meanings of these terms, see *infra* Section I.C.

7 I do not mean to suggest that issues of this kind have been wholly ignored. A recent, path-breaking work on general issues concerning nonoriginalist history in constitutional adjudication is that of Balkin, *supra* note 2. Important explorations of the nature and value of specific kinds of nonoriginalist history include Curtis A. Bradley & Trevor W. Morrison, *Historical Gloss and the Separation of Powers*, 126 HARV. L. REV. 411 (2012); Curtis A. Bradley & Neil S. Siegel, *Historical Practice, Textual Ambiguity, and Constitutional Adverse Possession*, 2015 SUP. CT. REV. (forthcoming), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2547962](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2547962); and Caleb Nelson, *Originalism and Interpretive Conventions*, 70 U. CHI. L. REV. 519, 575–77 (2003) (cataloguing points of disagreement).

about how much weight specific kinds of historically grounded considerations should exert in all cases. But I do hope to spur further conversation concerning the justifiability of reliance on particular kinds of history, including nonoriginalist history, in particular kinds of cases, in which most originalists and most nonoriginalists could profitably engage with one another. For this purpose, the outlier positions—which are the only positions at which I shall direct critical fire in this Article—are exclusive originalism, which holds that nothing should matter except the best available evidence of Founding-era meaning, and the view, if anyone actually holds it,<sup>8</sup> that the present should not submit to rule by “the dead hand of the past.”<sup>9</sup>

In developing the theses just sketched, I shall rely primarily, though not exclusively, on illustrative examples drawn from federal courts law. Among the advantages of this focus, federal courts cases seldom present issues of high political salience. To the extent that ideological divisions exist, they tend to be entangled in partly independent debates about the nature and significance of constitutional federalism.<sup>10</sup> Perhaps as a result, arguments in and around federal courts cases have tended to exhibit less methodological self-consciousness and defensiveness, and to elicit fewer line-in-the-sand denunciations of either originalism or nonoriginalism, than debates in some other areas of constitutional law. In a search for common ground, the federal courts field therefore offers a promising place to start.<sup>11</sup>

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8 Adam M. Samaha, *Dead Hand Arguments and Constitutional Interpretation*, 108 COLUM. L. REV. 606, 615–16 (2008) (“No reputable interpretive method avoids the dead hand issue because no reputable method disregards constitutional text.”).

9 Cf. Paul Brest, *The Misconceived Quest for the Original Understanding*, 60 B.U. L. REV. 204, 225 (1980) (“Even if the adopters freely consented to the Constitution, . . . their consent cannot bind succeeding generations. We did not adopt the Constitution, and those who did are dead and gone.” (footnote omitted)); Paul Horwitz, *The Past, Tense: The History of Crisis—and the Crisis of History—in Constitutional Theory*, 61 ALB. L. REV. 459, 479 (1997) (reviewing LAURA KALMAN, *THE STRANGE CAREER OF LEGAL LIBERALISM* (1996) (identifying threats posed by originalist constitutional theory as presenting “the classic ‘dead hand’ problem: why should we, the living, be ruled by the dead hand of the past?”)); Michael W. McConnell, *Textualism and the Dead Hand of the Past*, 66 GEO. WASH. L. REV. 1127, 1127 (1998) (“The first question any advocate of constitutionalism must answer is why Americans of today should be bound by the decisions of people some 212 years ago.”).

10 See Richard H. Fallon, Jr., *The Ideologies of Federal Courts Law*, 74 VA. L. REV. 1141 (1988) (tracing the influence across a number of debates of competing Nationalist and Federalist models of judicial federalism).

11 In an earlier article, I noted that for decades, if not for centuries, debates about congressional power to define and limit the power of the federal courts had mostly assumed the validity of originalist premises. See Richard H. Fallon, Jr., *Jurisdiction-Stripping Reconsidered*, 96 VA. L. REV. 1043 (2010). Given the long-prevailing assumption that originalist considerations controlled, I argued that the Supreme Court’s substantially nonoriginalist analysis in *Boumediene v. Bush*, 553 U.S. 723 (2008), which posed a question involving Congress’s capacity to withdraw federal habeas corpus jurisdiction, should provoke new methodological self-consciousness within the corner of federal courts law that involves jurisdiction-stripping. This Article proceeds from a different organizing premise. With regard to interpretive methodology, I shall assume—without trying to prove—that analysis within the federal courts field reflects a familiar pattern in constitutional law.

In arguing that many kinds of history matter to constitutional adjudication, I partly follow in the footsteps of a recent, insightful article by Jack Balkin,<sup>12</sup> who also sought to identify varieties of historical argument that figure in constitutional debate. Although I am much indebted to Balkin, my analysis and conclusions diverge from his in as many respects as they overlap. Balkin's central theses focus on rhetoric and persuasion in the process of what he calls constitutional "construction," not interpretation.<sup>13</sup> He eschews claims concerning the legal obligations of judges and lawyers to weigh many of the kinds of historically grounded considerations that he identifies.<sup>14</sup> By contrast, my argument involves the implicitly recognized duty of judges to take account of a variety of sometimes contested historical phenomena in order to render legally proper decisions. Perhaps as a result, of the eleven types of historical argument that Balkin identifies,<sup>15</sup> as many as five have no

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Paralleling pre-*Boumediene* debates about congressional control of federal jurisdiction, some other pockets exist in which originalist assumptions dominate. See, e.g., *District of Columbia v. Heller*, 554 U.S. 570 (2008); see also *supra* note 4 and accompanying text (discussing *Heller*). In doctrinal areas of comparable if not larger significance, however, original public meanings and the Framers' intent constitute an afterthought, at most. See, e.g., DAVID A. STRAUSS, *THE LIVING CONSTITUTION* 33–34 (2010).

12 See Balkin, *supra* note 2.

13 Balkin posits a distinction between constitutional "meaning" and the processes of constitutional "construction" by which judges give determinate content to vague or ambiguous meaning. See *id.* at 650. Having done so, he focuses his analysis almost exclusively on types of historical argument invoked in constitutional construction. See *id.* at 650–54.

14 See *id.* at 649–51.

15 Balkin's highly original typology of historically based constitutional arguments includes those that:

1. elucidate[ ] the meaning of the text (arguments from text);
2. reveal[ ] the structural logic underlying the constitutional system (arguments from structure);
3. reveal[ ] the underlying purposes or principles behind the Constitution or some part of the Constitution (arguments from purpose);
4. resolve[ ] gaps or ambiguities by choosing the interpretation that is the most just or that otherwise has the best consequences (arguments from consequences);
5. show[ ] how previous judicial precedents require a particular result (arguments from precedent);
6. appeal[ ] to existing political settlements or conventions among political actors (arguments from convention);
7. appeal[ ] to the people's customs and lived experience (arguments from custom);
8. appeal[ ] to natural law or natural rights (arguments from natural law);
9. appeal[ ] to important and widely honored values of Americans and American political culture (arguments from national ethos);
10. appeal[ ] to American political traditions and to the meaning of important events in American cultural memory (arguments from political tradition); or
11. appeal[ ] to the values, beliefs, and examples of culture heroes in American life (arguments from honored authority).

*Id.* at 660.

counterparts in my catalogue, which also includes a number of entries of which Balkin makes no mention.

Beyond documenting that a diverse set of historically based considerations influences and sometimes governs constitutional adjudication, this Article develops three main themes. First, even when historical analysis focuses on the Founding era, either the original public meaning of constitutional language or the proper application of that meaning to particular cases frequently cannot be identified as a matter of simple historical fact. Although there are many historical facts with a bearing on constitutional adjudication, original public meanings and especially their proper applications often lie outside the category of empirical fact.

Second, partly as a result, although historical analysis is empirically and appropriately pervasive in constitutional adjudication, a blending of historical with normative analysis is also empirically and appropriately pervasive. My argument for the evaluative aspect of these claims reflects an assumption, which I shall defend, that American legal argument and adjudication constitute a “practice,” the norms of which inhere in the often tacit understanding of judges, lawyers, and others trained in law and legal argument concerning how to “go on.”<sup>16</sup> According to a practice-based theory, it is a mistake to assume, as some do, that the ultimate determinant of legal validity necessarily inheres in the commands of the Framers, the expectations of the Constitution’s ratifiers, or any other single historical phenomenon. Rather, claims of constitutional validity and authority depend on current agreement manifest in the judgments of officials, judges, lawyers, and others concerning the contemporary legal significance of past events. This agreement begins with foundational matters. We agree, for example, that the Constitution is valid law and that the Articles of Confederation no longer are. We also agree about many matters bearing on legal interpretation, as I shall elaborate in complex detail. We accept, for example, that decisions of the Supreme Court have at least some capacity to determine correct outcomes in future cases. Insofar as exclusive originalists maintain that events in the Founding era necessarily determine what the law of the United States is or requires today, and deny that the authority and meaning of the Constitution depend on widely shared, often tacit norms of practice, they stand on faulty jurisprudential foundations.

Third, despite the controlling significance of norms of practice, no simple, algorithmic formula dictates how pertinent kinds of history fit together to yield determinate conclusions in many cases that provoke constitutional controversy. The best model for understanding how norms of practice operate in such cases is that of the common law.<sup>17</sup> Although statements of controlling interpretive norms are helpful, human foresight is limited, and

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16 See *infra* Section III.B.

17 My argument may reflect a specific application of the broader portrayal of constitutional adjudication as closely analogous to common law adjudication offered by STRAUSS, *supra* note 10, at 33–49.

history teaches that efforts at rule-like formulation of methodological principles should, accordingly, be viewed as revisable.

The argument develops as follows. Part I presents the thesis that the Supreme Court frequently undertakes a multiplicity of history-based inquiries and weighs a variety of historically grounded considerations. Part I also argues (as some originalists recognize, but stringently exclusive originalists do not) that the original meaning of constitutional language was frequently vague or indeterminate. Accordingly, the Constitution's application to current issues would often require a mix of historical and normative analysis even if original history were the only kind of history that mattered.

Part II offers a preliminary exploration of why so many kinds of historical inquiry bear on constitutional and sometimes on statutory cases.<sup>18</sup> Part III advances a jurisprudential argument in favor of a multi-factored approach to constitutional decisionmaking. Arguing that the foundations of law, including American constitutional practice, necessarily reside in social facts involving what is accepted as binding law, Part III establishes the radical, revisionary character of calls for exclusive originalism.

Part IV defends what—adapting vocabulary from Professor David Strauss<sup>19</sup>—I call a common law approach to determining the relative importance of varied kinds of historical phenomena in reaching conclusions of constitutional law. It analyzes a mixture of “easy” and “hard” federal courts cases to illustrate that almost no one, outside the context of a methodological debate about how to resolve understandably disputable cases, actually is an exclusive originalist, but that widespread convergence of judgment about the proper decision of constitutional cases typically occurs anyway. Part IV explains calls for exclusive originalism as the product of a largely misplaced anxiety about untrammelled judicial subjectivity. Part V provides a brief conclusion.

## I. SOME VARIETIES OF CONSTITUTIONALLY PERTINENT HISTORY

The theses that history matters to constitutional law in a variety of ways, and that historical analysis frequently is necessarily blended with normative analysis, are best developed by example. Some of the pertinent examples track familiar categories, but others emerge from examinations of phenomena that are not always distinguished. My list of types of historical inquiry that matter to constitutional analysis begins with considerations that originalists have emphasized and to which some assign a lexical priority. As will

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18 Originalism in constitutional interpretation and textualism in statutory interpretation share many premises and are often linked as elements of a single theory. *See, e.g.,* SCALIA & GARNER, *supra* note 5, at 33 (advocating an interpretive approach aimed at “determining the application of a governing text to given facts on the basis of how a reasonable reader, fully competent in the language, would have understood the text at the time it was issued”). Accordingly, nearly all of my arguments regarding the practice-based nature of constitutional interpretation, and their implications for originalism, would apply in whole or part to textualist theories of statutory interpretation.

19 *See, e.g.,* Geoffrey R. Stone, *Editor's Note to* STRAUSS, *supra* note 11, at xiv.

become evident, however, even nonoriginalists exhibit a concern with the kinds of historical evidence that originalists put at the center of their theories, and even originalists widely assume the relevance of post-Founding history for a multitude of purposes. In developing my list of historical considerations pertinent to constitutional analysis, I proceed in rough chronological order, beginning with the deeper past and then moving forward. But my order of presentation implies no claims about relative significance to contemporary analysis.

### A. *Linguistic and Cultural Antecedents to Constitutional Law*

The Constitution of the United States is written in English, by English speakers, for English speakers. It presupposes rules of English grammar and syntax. A common language and a common background for the discernment of legally authoritative prescriptions constitute preconditions for the intelligibility, and indeed for the existence, of the Constitution and arguments surrounding it.

Some ridicule reliance on eighteenth-century dictionaries as a tool of constitutional analysis.<sup>20</sup> In my view, it would be more ridiculous to ignore the meaning of words in the historical past than to seek to ascertain it. Nevertheless, dictionary-based inquiries should proceed with caution.<sup>21</sup>

Although dictionary definitions are indispensable in establishing what philosophers of language call the original “semantic” meaning<sup>22</sup> and lawyers more often call the literal meaning<sup>23</sup> of constitutional provisions, semantic meaning is often vague or ambiguous, and in some instances it may even misrepresent the communicative content of constitutional language. To borrow a nonlegal example, an emergency ward doctor who tells a patient “you are not going to die” does not communicate a prediction of eternal life, even though that is indeed the semantic meaning of the sentence that she speaks.<sup>24</sup> In the constitutional context, a requirement that presidents be “natural born” citizens does not preclude the election of someone whose

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20 See, e.g., James J. Brudney & Lawrence Baum, *Oasis or Mirage: The Supreme Court's Thirst for Dictionaries in the Rehnquist and Roberts Eras*, 55 WM. & MARY L. REV. 483, 483 (2013); Saul Cornell, *Meaning and Understanding in the History of Constitutional Ideas: The Intellectual History Alternative to Originalism*, 82 FORDHAM L. REV. 721, 724 (2013).

21 See generally Gregory E. Maggs, *A Concise Guide to Using Dictionaries from the Founding Era to Determine the Original Meaning of the Constitution*, 82 GEO. WASH. L. REV. 358 (2014) (providing guidelines for use, including cautions).

22 See, e.g., PATRICK GRIFFITHS, AN INTRODUCTION TO ENGLISH SEMANTICS AND PRAGMATICS 21 (Heinz Giegerich ed., 2006) (“Semantics is the study of context-independent knowledge that users of a language have of word and sentence meaning.”).

23 See Lawrence B. Solum, *Communicative Content and Legal Content*, 89 NOTRE DAME L. REV. 479, 487 (2013).

24 See, e.g., Andrei Marmor, *The Pragmatics of Legal Language*, 21 RATIO JURIS 423, 426 (2008).

mother gave birth by Caesarian section, even though the semantic meaning of Article II, § 1 leaves that possibility open.<sup>25</sup>

### B. *Legal Historical Contexts of Constitutional Lawmaking*

Because meaning depends on context, in law as elsewhere, the history of the drafting and ratification of constitutional provisions often has vital importance. With regard to the federal courts canon, scholars have thus conducted exhaustive research into the legal history and practice that likely either triggered the drafting of particular provisions or informed understandings of how relevant provisions would operate in practice. To cite just a few well-known examples, scholars have sought to establish history potentially relevant to the meaning of the phrase “cases or controversies” in Article III;<sup>26</sup> to the scope and legal status of sovereign immunity in Britain and the American colonies and to the purposes that drove the drafting of the Eleventh Amendment;<sup>27</sup> and to both British and American habeas corpus practice that formed the background to the Constitution’s inclusion of the Suspension Clause, which bars the writ’s suspension except in cases of invasion or rebellion.<sup>28</sup>

It is important to be clear about the point of inquiries by lawyers and judges into the historical context in which legal provisions were adopted. Information establishing the context of the drafting and enactment of constitutional language neither solely constitutes nor invariably identifies relevant constitutional meaning. Among other considerations, judgments need to be made about which elements of historical context possess relevance for legal purposes. For example, British practice in allowing suits by parties who had

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25 U.S. CONST. art. II, § 1, cl. 5 (“No Person except a natural born Citizen . . . shall be eligible to the Office of President.”).

26 See, e.g., Raoul Berger, *Standing to Sue in Public Actions: Is It a Constitutional Requirement?*, 78 YALE L.J. 816, 819 (1969); Bradley S. Clanton, *Standing and the English Prerogative Writs: The Original Understanding*, 63 BROOK. L. REV. 1001, 1001–08 (1997); Louis L. Jaffe, *The Citizen as Litigant in Public Actions: The Non-Hohfeldian or Ideological Plaintiff*, 116 U. PA. L. REV. 1033 (1968); Ann Woolhandler & Caleb Nelson, *Does History Defeat Standing Doctrine?*, 102 MICH. L. REV. 689 (2004).

27 Leading contributions to the literature include Akhil Reed Amar, *Of Sovereignty and Federalism*, 96 YALE L.J. 1425, 1481–84 (1987); Bradford R. Clark, *The Eleventh Amendment and the Nature of the Union*, 123 HARV. L. REV. 1817, 1818 (2010); William A. Fletcher, *A Historical Interpretation of the Eleventh Amendment: A Narrow Construction of an Affirmative Grant of Jurisdiction Rather than a Prohibition Against Jurisdiction*, 35 STAN. L. REV. 1033, 1058–59 (1983); John J. Gibbons, *The Eleventh Amendment and State Sovereign Immunity: A Reinterpretation*, 83 COLUM. L. REV. 1889, 1895–99 (1983); Thomas H. Lee, *Making Sense of the Eleventh Amendment: International Law and State Sovereignty*, 96 NW. U. L. REV. 1027, 1053–57 (2002); and James E. Pfander, *History and State Suability: An “Explanatory” Account of the Eleventh Amendment*, 83 CORNELL L. REV. 1269, 1272 (1998).

28 See WILLIAM F. DUKER, *A CONSTITUTIONAL HISTORY OF HABEAS CORPUS* 141 (1980); PAUL D. HALLIDAY, *HABEAS CORPUS: FROM ENGLAND TO EMPIRE* (2010); Paul D. Halliday & G. Edward White, *The Suspension Clause: English Text, Imperial Contexts, and American Implications*, 94 VA. L. REV. 575 (2008); Amanda L. Tyler, *The Forgotten Core Meaning of the Suspension Clause*, 125 HARV. L. REV. 901 (2012).

not themselves suffered injury from challenged conduct<sup>29</sup> may or may not bear on the best interpretation of Article III's "case or controversy" requirement.<sup>30</sup> To reach a conclusion, one would need to know a good deal more about intended or widely anticipated continuities and discontinuities between British and American practice and about historically prevailing conceptions of the U.S. Constitution's separation of powers, which marked a sharp break with British practice in some respects.<sup>31</sup> Similarly, in light of structural differences between the United States and Britain, it is not obvious how much, if at all, British practice informed American understandings and expectations regarding state sovereign immunity, or whether British practice should be determinative in gauging the territorial scope of the Suspension Clause.

C. *Original Intentions or Purposes, Original Understandings,  
and Original Public Meanings*

Over time, constitutional originalists have altered their accounts of the object of their historical inquiries. First-generation originalists tended to characterize the "intent of the Framers" as fixing constitutional meaning.<sup>32</sup> An analogous but distinctive notion is that of the Framers' purposes. Other originalists have sought evidence of "the original understanding."<sup>33</sup> Today, most originalists maintain that "original public meaning" should furnish the touchstone of constitutional analysis.<sup>34</sup> In my view, all of these terms mark

29 See, e.g., Berger, *supra* note 26, at 827; Jaffe, *supra* note 26, at 1035.

30 Cf. Woolhandler & Nelson, *supra* note 26, at 691 (arguing that early historical practice, properly understood, neither "compels acceptance of the modern Supreme Court's vision of standing" nor does it "defeat standing doctrine").

31 See, e.g., John F. Manning, *Textualism and the Equity of the Statute*, 101 COLUM. L. REV. 1, 56 (2001). Among other things, the U.S. Constitution established an independent judiciary with the power of judicial review, *see id.* at 56 n.228, rejected the British principle of parliamentary sovereignty, *see id.*, and created an executive branch headed by a president whose powers did not encompass all elements of the British monarch's "royal prerogatives." See, e.g., Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849, 859–60 (1989).

32 See, e.g., RAOUL BERGER, *GOVERNMENT BY JUDICIARY* 403 (2d ed. 1997); Edwin Meese III, U.S. Att'y Gen., Speech Before the American Bar Association (July 9, 1985), in *THE GREAT DEBATE: INTERPRETING OUR WRITTEN CONSTITUTION* 1, 1 (1986); Robert H. Bork, *The Constitution, Original Intent, and Economic Rights*, 23 SAN DIEGO L. REV. 823, 823 (1986); Richard S. Kay, *Adherence to the Original Intentions in Constitutional Adjudication: Three Objections and Responses*, 82 NW. U. L. REV. 226, 228 (1988).

33 See, e.g., Kurt T. Lash, *Of Inkblots and Originalism: Historical Ambiguity and the Case of the Ninth Amendment*, 31 HARV. J.L. & PUB. POL'Y 467, 467–68 (2008); John C. Yoo, *The Judicial Safeguards of Federalism*, 70 S. CAL. L. REV. 1311, 1374 (1997); *see also* Alden v. Maine, 527 U.S. 706, 716–19 (1999) (examining evidence of the "original understanding" of the Constitution's ratifiers).

34 See, e.g., Vasani Kesavan & Michael Stokes Paulsen, *The Interpretive Force of the Constitution's Secret Drafting History*, 91 GEO. L.J. 1113, 1132 (2003); Solum, *supra* note 23, at 498; Keith E. Whittington, *Originalism: A Critical Introduction*, 82 FORDHAM L. REV. 375, 377, 380 (2013).

appropriate objects of historical investigation—as I believe that widespread and frequently uncontroversial constitutional practice indicates. Nonetheless, they differ importantly from one another.

### 1. Intent of the Framers

In nearly all contexts, the identifiable intentions or purposes of a speaker function as an important indicator of the meaning of the speaker's utterances.<sup>35</sup> To be clear, speakers' intentions do not always constitute the meaning of what they say. People can either fail to say what they mean or say things that they do not mean. Nevertheless, a speaker's intent is often crucially relevant to what ordinary people understand a speaker to have communicated in ordinary conversation.<sup>36</sup>

Although it is now well known that problems attend the ascription of unitary intents to the multimember bodies that enact legislation or draft or ratify constitutional provisions,<sup>37</sup> the idea of legislative or the Framers' intent is complex and ambiguous in multiple ways.<sup>38</sup> Different authors use it to refer, variously, to the psychological expectations of individual legislators concerning the application of laws for which they voted (as illumined, for example, by legislative history),<sup>39</sup> the "illocutionary" intent of the members of the legislature to say what a statute says,<sup>40</sup> and a complex or collective group intention to effect reasonable changes in the law through statutory or constitutional language.<sup>41</sup> As this brief catalogue might suggest, the notion of intent is difficult entirely to dispense with in ascribing meaning to language adopted by rational beings with an evident aim—whether individually or collectively—of communicating. Even textualists who deride the idea that legislators or constitution drafters share a single or even dominant psychological intention thus say that their interpretive methodology requires the

35 See, e.g., PAUL GRICE, *STUDIES IN THE WAY OF WORDS* 117 (1989) (characterizing the utterer's meaning as "basic" and other notions of meaning as "(I hope) derivative").

36 Even those philosophers of language who do not equate the meaning of an utterance with the speaker's intent typically regard the speaker's intention as relevant to utterance meaning. See, e.g., Scott Soames, *Deferentialism: A Post-Originalist Theory of Legal Interpretation*, 82 *FORDHAM L. REV.* 597, 598 (2013).

37 See, e.g., John F. Manning, *Textualism and Legislative Intent*, 91 *VA. L. REV.* 419, 428–31 (2005); Kenneth A. Shepsle, *Congress Is a "They," Not an "It": Legislative Intent as Oxymoron*, 12 *INT'L REV. L. & ECON.* 239, 244 (1992).

38 See generally RICHARD EKINS, *THE NATURE OF LEGISLATIVE INTENT* 13, 15–47, 218–43 (2012) (distinguishing various conceptions of legislative intent and defending as central the intention to change the law in the complex, reasoned way that a statute or constitutional provision does).

39 See, e.g., Nicholas S. Zeppos, *Legislative History and the Interpretation of Statutes: Toward a Fact-Finding Model of Statutory Interpretation*, 76 *VA. L. REV.* 1295, 1335–60 (1990).

40 See, e.g., Scott Soames, *Toward a Theory of Legal Interpretation*, 6 *N.Y.U. J.L. & LIBERTY* 231, 244 (2011). This seems to be so minimal a conception of legislative intent as to be unobjectionable even to textualists. See, e.g., Manning, *supra* note 37, at 431 (denying that legislatures have a collective intent beyond the text that they enact).

41 See EKINS, *supra* note 38, at 218–43.

ascription of an “objective intent” to statutory or constitutional provisions and to those who enacted, drafted, or ratified them.<sup>42</sup>

Nonoriginalists, too, exhibit at least a sometime concern with the intent of the Framers. For example, in *NLRB v. Noel Canning*,<sup>43</sup> in which an opinion concurring only in the judgment argued that the original public meaning of the Recess Appointments Clause<sup>44</sup> permitted the President to fill only such vacancies as might arise for the first time between sessions of Congress,<sup>45</sup> Justice Breyer, who wrote for the majority, defended his broader interpretation—encompassing intra-session recesses—with claims about what the Founders likely “intend[ed].”<sup>46</sup> In an earlier majority opinion in *Federal Election Commission v. Akins*, Justice Breyer had similarly suggested the pertinence to a standing question of “whether ‘the Framers . . . ever imagined that *general directives* [of the Constitution] . . . would be subject to enforcement by an individual citizen’” in the absence of a statutory authorization to sue.<sup>47</sup>

## 2. The Framers’ Purposes

Even those who recurrently reject claims that legislatures can have intentions analogous to those of individuals attach interpretive significance to the widely shared purposes that motivated the adoption of constitutional language.<sup>48</sup> Debates about the meaning of the Eleventh Amendment exemplify the point. Amid a welter of disagreements about other matters, nearly everyone seems to agree that the meaning of the Eleventh Amendment turns on the purposes of those who drafted and ratified it. Although the Eleventh Amendment makes no explicit reference to state sovereign immunity,<sup>49</sup> it was indisputably drafted and ratified to overrule a Supreme Court decision that rejected a state’s immunity defense against a suit in federal court, brought by a citizen of one state against another state pursuant to federal

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42 See, e.g., ANTONIN SCALIA, *A MATTER OF INTERPRETATION* 3, 17 (Amy Gutmann ed., 1997) (“We look for a sort of ‘objectified’ intent—the intent that a reasonable person would gather from the text of the law, placed alongside the remainder of the *corpus juris*.”); John F. Manning, *What Divides Textualists from Purposivists?*, 106 COLUM. L. REV. 70, 79 (2006); Caleb Nelson, *What Is Textualism?*, 91 VA. L. REV. 347, 353–57 (2005) (discussing textualists’ search for statutes’ “objectified intent”).

43 134 S. Ct. 2550 (2014).

44 U.S. CONST. art. II, § 2, cl. 3 empowers the President to “fill up all Vacancies that may happen during the Recess of the Senate.”

45 See *Noel Canning*, 134 S. Ct. at 2578 (Scalia, J., concurring in the judgment).

46 See *id.* at 2564–65 (majority opinion).

47 524 U.S. 11, 22 (1998) (alterations in original) (quoting *United States v. Richardson*, 418 U.S. 166, 178 n.11 (1974)).

48 See SCALIA & GARNER, *supra* note 5, at 33; Solum, *supra* note 23, at 500.

49 U.S. CONST. amend. XI (“The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.”). The suit in *Hans v. Louisiana*, 134 U.S. 1 (1980), involved a suit against the State of Louisiana brought by a citizen of Louisiana.

diversity jurisdiction.<sup>50</sup> Canvassing that history, the Supreme Court in *Hans v. Louisiana*,<sup>51</sup> relied on the purposes of the Eleventh Amendment's Framers to hold that it barred an unconsented suit against a state, brought by one of its own citizens, to which the literal terms of the Amendment did not extend.<sup>52</sup> That purpose, the Court held, was to adopt the view of "the minority [rather] than . . . [of] the majority of the [C]ourt in the decision of the case of *Chisholm v. Georgia*."<sup>53</sup>

In *Seminole Tribe of Florida v. Florida*,<sup>54</sup> the Court again emphasized the pertinence of the purpose with which a constitutional provision is drafted and ratified when it affirmed that analysis based on the literal language "of the Eleventh Amendment is directed at a straw man."<sup>55</sup> According to Chief Justice Rehnquist's majority opinion, "we long have recognized that blind reliance upon the text of the Eleventh Amendment is 'to strain the Constitution and the law to a construction never imagined or dreamed of.'"<sup>56</sup> So reasoning, the majority echoed *Hans* in ascribing to the Eleventh Amendment the specific purpose of overruling *Chisholm v. Georgia* and of implicitly endorsing what the Court took to be the original public meaning of Article III: "*Hans* . . . recognized that the decision in *Chisholm* was contrary to the well-understood meaning of the Constitution."<sup>57</sup> Although indeed relying on the language of the Eleventh Amendment, the dissenting opinions felt as much obligation as the majority to identify purposes in connection with which their alternative interpretations made practical sense. Justice Souter thus wrote that, in light of "the Framers' general concern with curbing abuses by state governments, it would be amazing if the scheme of delegated powers embodied in the Constitution had left the National Government powerless to render the States judicially accountable for violations of federal rights."<sup>58</sup>

*Plaut v. Spendthrift Farm, Inc.*<sup>59</sup> exhibits a similar concern with a constitutional provision's purposes. *Plaut* posed the question whether Congress could validly nullify a final judicial judgment. In answering that question in the negative, the Supreme Court relied on the purposes for which leading members of the Founding generation had supported an independent judiciary. According to Justice Scalia's majority opinion, the Framers, who had "lived among the ruins of a system of intermingled legislative and judicial powers,"<sup>60</sup> wished to insulate final judicial judgments from legislative revi-

50 See *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419 (1793).

51 134 U.S. 1.

52 See *id.* at 12.

53 *Id.*

54 517 U.S. 44 (1996).

55 *Id.* at 69.

56 *Id.* (quoting *Monaco v. Mississippi*, 292 U.S. 313, 326 (1934)).

57 *Id.*

58 *Id.* at 155 (Souter, J., dissenting).

59 514 U.S. 211 (1995).

60 *Id.* at 219.

sion.<sup>61</sup> That identifiable purpose bore on, even if it did not strictly determine, the appropriate interpretation of Article III's grant of judicial power.<sup>62</sup>

Although reliance on the Framers' purposes triggers no methodological objection in some cases, it has proven controversial in others, largely because of a well-known problem about levels of generality: the more abstract the terms in which a purpose is described, the more broadly it is likely to reach.<sup>63</sup> To put the point in vocabulary that I shall echo going forward, although many historical facts bear on the question of a constitutional provision's purpose, there is often no simple, historical fact of the matter concerning what that purpose was or how it ought to be described once self-consciousness about the proper level of generality enters the picture. In general, the broader the consensus about the level of generality pertinent to a particular disputed issue, the less controversial an inquiry into the purposes of the drafters and ratifiers of a constitutional provision is likely to be (even if, as in the cases of the Eleventh Amendment, different investigators reach different conclusions). The central point is that nearly everyone regards such inquiries as appropriate in some cases.

### 3. Original Understanding

Although lawyers and judges speak nearly ubiquitously of "constitutional interpretation," this term contains an often ignored ambiguity. In one usage, interpretation applies to all ascriptions of meaning to, and to all applications of, legal language.<sup>64</sup> In another sense, interpretation is an intellectual activ-

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61 See *id.* at 221 ("This sense of a sharp necessity to separate the legislative from the judicial power, prompted by the crescendo of legislative interference with private judgments of the courts, triumphed among the Framers of the new Federal Constitution.").

62 See *id.* at 218–19 ("The record of history shows that the Framers crafted this charter of the judicial department with an expressed understanding that it gives the Federal Judiciary the power, not merely to rule on cases, but to *decide* them, subject to review only by superior courts in the Article III hierarchy . . . . By retroactively commanding the federal courts to reopen final judgments, Congress has violated this fundamental principle.").

63 See, e.g., John F. Manning, *Federalism and the Generality Problem in Constitutional Interpretation*, 122 HARV. L. REV. 2003, 2010 (2009) ("Purposivists . . . are willing to shift the level of generality at which a statute's policy or purpose is articulated in order to achieve rational results that they presume the legislature would have wanted if it had focused on the issues before the Court."); Laurence H. Tribe & Michael C. Dorf, *Levels of Generality in the Definition of Rights*, 57 U. CHI. L. REV. 1057, 1058 (1990) (arguing that when the Court seeks to determine whether an "asserted [constitutional] right" falls within the protection of a previously articulated right, "[t]he more abstractly one states the already-protected right, the more likely it becomes that the claimed right will fall within its protection"); cf. RONALD DWORKIN, *FREEDOM'S LAW* 7 (1996) ("There is of course room for disagreement about the right way to restate these abstract moral principles, so as to make their force clearer for us, and to help us to apply them to more concrete political controversies.").

64 See, e.g., FREDERICK SCHAUER, *PLAYING BY THE RULES* 207 (1991) (observing that "every application of a rule is also an interpretation").

ity that responds to uncertainty or puzzlement.<sup>65</sup> Distinction between these two senses of interpretation, and between the kinds of cases that do and do not trigger puzzlement, suggests the utility of a somewhat specialized meaning—which I shall stipulatively adopt—for references to “the original understanding.” More specifically, I shall reserve the term “original understanding” for cases in which, as an original matter, the meaning or application of a constitutional provision would have produced little or no uncertainty or puzzlement and no intellectually sophisticated process of interpretation would even have been required. In such cases, it would be apt to say, members of the Founding generation simply and nearly universally understood what the Constitution meant without needing to “interpret” it.<sup>66</sup>

Historical evidence indicates that some members of the Founding generation distinguished “understanding” from “interpretation” in the way that I am suggesting: there was no need for interpretation in clear cases in which everyone understood or should have understood what the Constitution meant.<sup>67</sup> But I do not mean to hinge my claim for the utility of that distinction on a claim of historical fact. An intuitive distinction exists—even if it blurs at the edges—between cases of clear meaning that is readily and almost universally grasped or understood and puzzling or disputable cases that provoke a need for reflection or interpretation.

Cases that provoke puzzlement, uncertainty, or disagreement understandably dominate the standard federal courts curriculum as they do constitutional law casebooks. If we take a broader lens view of the legal landscape, however, cases of puzzlement or uncertainty—and the kind of analysis that they call for—stand out as anomalous. So far as I am aware, for example, no one has ever disputed that Article I requires the agreement of both houses of Congress in order for a bill to become law or—with respect to the application of Article I—that the 1789 Judiciary Act was enacted in accordance with Article I. In this case and in many others, we can say, as a matter of historical fact, that the original understanding of Article I requires both houses to act for a bill to become law or that the 1789 Judiciary Act was validly enacted within the original understanding of Article I. We could not say the same, however, with respect to some other questions, many of which we know to have been matters of historical uncertainty, puzzlement, or debate.

So far as I am aware, no one disparages the relevance to constitutional law of historical research aimed at establishing whether there was or was not

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65 See ANDREI MARMOR, *THE LANGUAGE OF LAW* 108 (2014); SCHAUER, *supra* note 64, at 207–08 (recognizing that “we ordinarily do not think” of most applications as interpretations “for there is a sense in which to interpret a text or a rule is to deal with a *quandary*”).

66 See ANDREI MARMOR, *INTERPRETATION AND LEGAL THEORY* 22 (1992); DENNIS PATTERSON, *LAW AND TRUTH* 86–88 (1996).

67 See RICHARD H. FALLON, JR. ET AL., *HART AND WECHSLER’S THE FEDERAL COURTS AND THE FEDERAL SYSTEM* 70 (6th ed. 2009) [hereinafter *HART & WECHSLER*] (identifying a Founding-era conception of judicial review under which “courts and commentators of the time apparently thought it proper to invalidate legislation on constitutional grounds only in cases of such relatively clear legislative or executive overreaching that little or no ‘interpretation’ was required”).

a clear original understanding—existing as a matter of historical fact—of what particular constitutional provisions meant or how they applied or would have applied to particular cases. So to recognize is not necessarily to stipulate that original understandings, where they exist, should always control constitutional outcomes. Even if everyone in the Founding era understood the death penalty to be consistent with the Eighth Amendment prohibition against cruel and unusual punishment,<sup>68</sup> some would maintain that the “meaning” of the Eighth Amendment prohibits capital punishment today—and may, indeed, have forbidden it then.<sup>69</sup>

#### 4. The Original Public Meaning

Today, most originalists describe the ultimate object of original historical inquiry by judges and lawyers as “the original public meaning” of constitutional language.<sup>70</sup> As standardly employed, this term not only subsumes what I just characterized as the original understanding in doubt-free cases, but also extends more broadly, to encompass judgments concerning the meaning of constitutional provisions even when the historical record discloses either grounds for or evidence of uncertainty or disagreement. Reference to some known cases of original disagreement may help to clarify the sometime need for interpretive judgment—in the special, puzzlement-resolving sense of that term that I emphasized above—in identifying or at least in applying the original public meaning.<sup>71</sup>

- Members of the Framing generation notoriously disagreed about whether one or more provisions of Article I of the Constitution authorized Congress to charter a Bank of the United States.<sup>72</sup> When an uncertain President George Washington asked the advice of Secretary of State Jefferson and Secretary of the Treasury Hamilton, Jefferson said no, but Hamilton answered affirmatively.<sup>73</sup>
- In a matter of potential significance for the federal courts curriculum, we know that a lame-duck Federalist Congress expanded the size of the federal judiciary in 1801, but also that a Republican Congress almost immediately repealed the 1801 Judiciary Act and divested sixteen recently nominated and confirmed federal judges of their judgeships.<sup>74</sup> The debate about the repealing legislation registered

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68 See U.S. CONST. amend. VIII.

69 See, e.g., Mark D. Greenberg & Harry Litman, *The Meaning of Original Meaning*, 86 GEO. L.J. 569, 603–13 (1998).

70 See, e.g., Kesavan & Paulsen, *supra* note 34, at 1132; Solum, *supra* note 23, at 498.

71 As the historian Jack Rakove has written, the “moment” of framing and ratification “involved processes of collective decision-making whose outcomes necessarily reflected a bewildering array of intentions and expectations, hopes and fears, genuine compromises and agreements to disagree.” JACK N. RAKOVE, *ORIGINAL MEANINGS* 6 (1996).

72 See Joseph M. Lynch, *The Federalists and the Federalist: A Forgotten History*, 31 SETON HALL L. REV. 18, 21–23 (2000).

73 See *id.*

74 See, e.g., JAMES F. SIMON, *WHAT KIND OF NATION* 163–68 (2002).

disagreement among the Founding generation about whether Article III's guarantee of tenure during "good behavior" applied to cases involving the abolition of judgeships for economy reasons (rather than the removal of particular judges due to disapproval of their decisions in office).<sup>75</sup>

- Debates during the state ratifying conventions revealed disagreement whether Article III's authorization of federal jurisdiction of suits involving a state and a citizen of another state divested the states of the sovereign immunity that they would have claimed in their own courts.<sup>76</sup> A majority of the Justices answered in the affirmative in *Chisholm v. Georgia*,<sup>77</sup> but Justice Iredell dissented.<sup>78</sup>
- Early jurists disagreed about whether the provision of Article III authorizing the Supreme Court to exercise appellate jurisdiction of cases arising under the Constitution and laws of the United States encompassed review of state court judgments.<sup>79</sup>
- Disagreement persisted until after the Civil War about whether the Constitution permits state court judges to issue writs of habeas corpus commanding action by federal officials.<sup>80</sup>

Cases of interpretive disagreement or uncertainty such as these are crucial in appraising the various roles that historical inquiries play in constitutional adjudication. In such cases, we cannot say as a simple matter of historical fact that the disputed language had an original public meaning that was sufficiently determinate to resolve a disputed question of constitutional interpretation one way or the other. The historical facts establish disagreement, not agreement, about meaning or at least about proper constitutional application. So to recognize is by no means to suggest that history is irrelevant to the decision of historically disputed or disputable questions. To the contrary, many historical facts may have some bearing. We can, for example, discover what dictionaries said about the meaning of disputed terms. We can unearth potentially relevant background legal history. We can ascertain what particular people said or thought. But these historical facts will not suffice to give relevantly determinate content to the idea of "original public meaning" without some further judgment about how and why, for example, Hamilton was right and Jefferson was wrong—or vice versa—about whether Article I empowered Congress to charter a Bank of the United States. To put the point another way, there is no simple historical

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75 See BARRY FRIEDMAN, *THE WILL OF THE PEOPLE* 53–54 (2009).

76 See U.S. CONST. art. III, § 2; Susan Randall, *Sovereign Immunity and the Uses of History*, 81 NEB. L. REV. 1, 47–60 (2002) (surveying these debates in both the conventions and the popular press).

77 2 U.S. (2 Dall.) 419 (1793).

78 See *id.* at 429, 449–50 (Iredell, J., dissenting).

79 See HART & WECHSLER, *supra* note 67, at 434–45 (discussing state court resistance to Supreme Court review).

80 See *id.* at 398–403.

fact of the matter about whether a Bank of the United States was constitutionally permissible. The question is one that requires the exercise of interpretive judgment in light of relevant historical facts. We might, for example, adjudge Hamilton's arguments more persuasive than Jefferson's (or vice versa). But, due to the vagueness or indeterminacy of language, there will always be a gap between knowable empirical facts and appropriate conclusions regarding the application of constitutional language to particular, disputed or reasonably disputable cases.

Cases of original vagueness or indeterminacy, as starkly illuminated by historical examples of interpretive disagreement, pose significant methodological issues for anyone who thinks that original meanings possess relevance to constitutional adjudication. But the issue possesses special urgency for originalists. Confronted with a need for methodological choice, some accept that the original meaning of a constitutional provision can be vague or indeterminate and, when this is so, postulate that judges must engage in "construction," involving the creation of doctrine to answer questions that the Constitution's meaning leaves unresolved.<sup>81</sup> On this account, finding the original meaning of constitutional language is the first step in resolving constitutional controversies, but it will often leave such controversies unresolved. As in the modern case of *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*,<sup>82</sup> some institution must render determinate what legal language leaves indeterminate, and the courts are an obviously eligible candidate. Where courts play this role, the disciplines that attend "construction"—which is an irreducibly value-laden enterprise—become crucially relevant.

According to Jack Balkin, who emphasizes the distinction between constitutional meaning and constitutional construction, originalists can and should recognize the relevance of a variety of kinds of post-Founding history to questions of constitutional construction.<sup>83</sup> He accepts, however, that the meaning of constitutional provisions became fixed at the time of their ratification.<sup>84</sup>

Other originalists reject the idea that the Constitution requires construction in the sense of judicial creation of doctrine that goes beyond constitutional meaning.<sup>85</sup> In their view, a provision's original public meaning is

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81 See, e.g., RANDY E. BARNETT, *RESTORING THE LOST CONSTITUTION* 100–09 (2004); KEITH E. WHITTINGTON, *CONSTITUTIONAL CONSTRUCTION* (1999); KEITH E. WHITTINGTON, *CONSTITUTIONAL INTERPRETATION* 5–14 (1999); Randy E. Barnett, *Interpretation and Construction*, 34 HARV. J.L. & PUB. POL'Y 65, 65 (2011) (arguing the merits of keeping construction separate from interpretation); Solum, *supra* note 1, at 457 (focusing on the role of the "interpretation-construction distinction" in New Originalism); Whittington, *supra* note 34, at 403.

82 467 U.S. 837 (1984).

83 See Balkin, *supra* note 2, at 650–55.

84 *Id.* at 645–46.

85 See, e.g., SCALIA & GARNER, *supra* note 5, at 15; John O. McGinnis & Michael B. Rappaport, *Original Methods Originalism: A New Theory of Interpretation and the Case Against Construction*, 103 NW. U. L. REV. 751, 773 (2009) [hereinafter McGinnis & Rappaport, *Original Methods Originalism*]. *But see* John O. McGinnis & Michael B. Rappaport, *The Abstract*

determinable in every case, and, what is more, meaning, once ascertained, will always dictate the correct results of constitutional cases. Sophisticated adherents of this position do not, as I understand them, maintain that any simple empirical fact of the matter supplies vague or disputed provisions with the determinate content needed to resolve uncertain or disputed cases. Rather, to render determinate what otherwise would be indeterminate, originalists of this stripe often say that a judgment concerning the original public meaning should reflect what a “reasonable” person in the eighteenth or early nineteenth century would have thought.<sup>86</sup> In other words, in order to resolve any particular case, judges should apply constitutional language as a reasonable person of the Founding era would have applied it.

As the historian Jack Rakove emphasizes, however, “[a]n imaginary originalist reader who never existed historically can never be a figure from the past; the reader remains only a fabrication of a modern mind.”<sup>87</sup> Moreover, if reasonable people differed as a matter of historical fact—as in the examples that I have given—then we would need to determine what it would have been “most reasonable” to think. When Thomas Jefferson and Alexander Hamilton, or James Madison and John Jay, articulately disagreed with one another, the “right” answer to a disputed question of original public meaning cannot depend on a statistical calculation of how many of the public likely agreed with one and how many with the other. Rather, determining how an imagined reasonable person would have resolved a dispute among reasonable people requires a further evaluative judgment.<sup>88</sup> Once more, the modern example of *Chevron U.S.A. Inc. v. Natural Resources Defense Council*,

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*Meaning Fallacy*, 2012 U. ILL. L. REV. 737, 752 n.54 (2012) (“It is theoretically possible that the interpretive rules may not resolve every uncertainty, especially uncertainty resulting from vagueness. . . . [T]hen one might be in a situation involving construction, where the original meaning does not provide an answer.”).

86 See, e.g., Kesavan & Paulsen, *supra* note 34, at 1132–33, 1144–55; Gary Lawson & Guy Seidman, *Originalism as a Legal Enterprise*, 23 CONST. COMMENT. 47, 48 (2006).

87 Jack N. Rakove, *Joe the Ploughman Reads the Constitution, or, The Poverty of Public Meaning Originalism*, 48 SAN DIEGO L. REV. 575, 586 (2011).

88 See, e.g., Alan D. Miller & Ronen Perry, *The Reasonable Person*, 87 N.Y.U. L. REV. 323, 391 (2012) (maintaining that “a positive definition of reasonableness is a logical impossibility” because “no positive definition can satisfy” all of the axioms that a positive definition would need to embrace). McGinnis and Rappaport seek to respond to the problem of historical indeterminacy by proposing that modern interpreters should apply the interpretive methods that reasonable, well-informed judges and lawyers would have employed to gauge the meaning of a constitutional provision at the time of its enactment. McGinnis & Rappaport, *Original Methods Originalism*, *supra* note 85, at 751. But this move only postpones, without avoiding, the need for normative judgment if—as a number of scholars have concluded—reasonable members of the Founding generation differed among themselves about applicable norms of constitutional interpretation. See, e.g., Cornell, *supra* note 20, at 736 (“McGinnis and Rappaport . . . treat Founding-era legal culture in an anachronistic manner and assume the existence of a consensus on issues that were actually deeply contested in 1788.”); Stephen M. Feldman, *Constitutional Interpretation and History: New Originalism or Eclecticism?*, 28 B.Y.U. J. PUB. L. 283, 304 (2014) (maintaining that “interpretation during the founding era and subsequent decades was eclectic”).

*Inc.*<sup>89</sup> proves instructive. It inscribes in law the common sense recognition that vague or ambiguous legal language will often bear more than one reasonable interpretation and that reasonable people will disagree in their judgments concerning how it applies to particular cases.

The Founding generation's disputes among reasonable people about the meaning of constitutional language are importantly instructive for another reason as well. Many of their disputes were ideologically inflected.<sup>90</sup> In cases of ambiguity or uncertainty, American lawyers and Justices at least since John Marshall have gravitated toward the candidate to furnish the correct legal meaning that would render legal texts wisest, best, or most sensible.<sup>91</sup> As Chief Justice Marshall put it in *McCulloch v. Maryland*,<sup>92</sup> "general reasoning" refutes the proposition that, given a choice, a court should adopt an interpretation of the Constitution that would render the achievement of its largest purposes "difficult, hazardous, and expensive."<sup>93</sup> Accordingly, it should occasion no surprise that in disputes about the meaning of constitutional provisions, even the most venerated statesmen frequently fell into ideologically identifiable alignments—as, for example, in debates about whether Article I authorized Congress to charter a Bank of the United States or whether Article III forbade abolition of the judgeships created by the 1801 Judiciary Act.<sup>94</sup>

The point is worth belaboring because in many disputed cases focused on questions about the original public meaning, evidence plain on the face of the historical record indicates the existence of grounds for uncertainty or controversy. In these cases, historical evidence is relevant, but it cannot furnish a full answer to the legal question that a court must resolve.<sup>95</sup>

89 467 U.S. 837 (1984).

90 See John Harrison, *On the Hypotheses That Lie at the Foundations of Originalism*, 31 HARV. J.L. & PUB. POL'Y 473, 474 (2008) (observing that among the Founding generation, "interpreters' positions on constitutional questions overwhelmingly lined up with what they thought were good ideas"). Professor Harrison reports drawing this conclusion based upon his reading of DAVID P. CURRIE, *THE CONSTITUTION IN CONGRESS: THE FEDERALIST PERIOD, 1789–1801*, at 116–22 (1997).

91 Randy E. Barnett, *An Originalism for Nonoriginalists*, 45 LOY. L. REV. 611, 645–46 (1999) (arguing that, when the original meaning of a text, "[d]ue to either ambiguity or generality," is "underdeterminate," that text "should be given the meaning that is most respectful of the rights of all who are affected and rules of construction most respectful of these rights should be adopted to put general constitutional provisions into legal effect").

92 17 U.S. (4 Wheat.) 316 (1819).

93 *Id.* at 408, 411.

94 See, e.g., FRIEDMAN, *supra* note 75, at 53–54; SIMON, *supra* note 74, at 163–67.

95 See Rakove, *supra* note 87, at 593 ("The adopters of the Constitution inhabited a world that was actively concerned with the nature of language . . . [and] the instability of linguistic meanings, and . . . arguments about the definitions of key words and concepts were themselves central elements of political debate.").

#### D. Liquidation Through Practice

Recognizing that the Constitution was vague or ambiguous on many important points, James Madison maintained that its meaning would need to be “liquidated” or settled by precedent and practice.<sup>96</sup> Today we often equate precedent exclusively with judicial precedent. But the term reaches more broadly. As Madison foresaw, historical evidence of settlement through nonjudicial practice sometimes figures importantly in constitutional law. Here are a few examples:

- Article II provides for the President to make treaties and appoint various officers “by and with the Advice and Consent of the Senate.”<sup>97</sup> In an early instance, President George Washington appeared before the Senate to seek its advice in person, but the occasion went badly, and Washington never repeated the exercise.<sup>98</sup> The practice of Washington and subsequent presidents, as acquiesced in by the Senate, has established that the President need not come before the Senate in order to act with the Senate’s advice.<sup>99</sup>
- The First Judiciary Act and a number of its successors required the Justices of the Supreme Court to “ride circuit” and thereby act, in effect, as lower court judges during periods when the Court was not in session.<sup>100</sup> Some members of the Founding generation thought that the requirement of circuit riding breached Article III by failing to respect its distinction between judges of the Supreme and of the inferior courts.<sup>101</sup> When the Supreme Court finally had occasion to pronounce on that question in 1803, it ruled that “practice and acquiescence under it” had settled the constitutional issue.<sup>102</sup>
- In 1793, with European powers at war, Secretary of State Thomas Jefferson, acting on behalf of President George Washington, wrote to the Justices of the Supreme Court, soliciting their “advice” concerning the various parties’ legal rights of access to American ports.<sup>103</sup> In response, Chief Justice John Jay and the associate Justices wrote to the President citing separation-of-powers grounds for refusing to proffer the requested advice.<sup>104</sup> Although the Justices’ letter was not technically an opinion of the Court with *stare decisis* effect, *The Correspondence of the Justices* is almost universally regarded as having liquidated

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96 See THE FEDERALIST NO. 37, at 229–30 (James Madison) (Clinton Rossiter ed., 1961).

97 U.S. CONST. art. II, § 2, cl. 2.

98 See GORDON S. WOOD, EMPIRE OF LIBERTY 89 (2009).

99 See Jean Galbraith, *Prospective Advice and Consent*, 37 YALE J. INT’L L. 247, 257–60 (2012) (describing the evolution of the practice of “subsequent” advice-giving).

100 Act of Sept. 24, 1789, ch. 20, § 4, 1 Stat. 73, 74–75.

101 See BRUCE ACKERMAN, THE FAILURE OF THE FOUNDING FATHERS 163–76 (2005).

102 See *Stuart v. Laird*, 5 U.S. (1 Cranch) 299, 309 (1803).

103 See HART & WECHSLER, *supra* note 67, at 50–51.

104 See *id.* at 52.

the meaning of Article III as flatly forbidding the federal judiciary from issuing advisory opinions.<sup>105</sup>

- In *Vermont Agency of Natural Resources v. United States ex rel. Stevens*,<sup>106</sup> the Supreme Court treated the practice of early Congresses in authorizing *qui tam* actions—in which private citizens sue on behalf of the government to recover on false claims against the government—as having settled the permissibility of such suits under Article III, despite the absence of a prior, on-point judicial decision upholding the authorization.<sup>107</sup>

Although practically no one doubts that historical practice has settled constitutional meaning in these and some other cases, the idea of “liquidation” through practice—despite its Madisonian provenance—remains obscure in some respects.<sup>108</sup> Debated questions include these<sup>109</sup>: (1) Is the capacity to “liquidate” or settle meaning limited to practices that began closely proximately in time to the Constitution’s adoption, or can liquidation occur through later practice? If original meanings are regarded as authoritative in all cases, and if liquidation refers to the resolution of originally perceived indeterminacies within an originally identifiable range of permissible meanings,<sup>110</sup> then one might think the former. Alternatively, one might use the term “liquidation” to refer to any form of settlement through historical practice. (2) Once practice has “liquidated” the meaning of a constitutional term, does the meaning as thus liquidated become fixed forever, or can evolving practice endow vague or ambiguous terms with historically changing meanings? In the leading historical study, Professor Caleb Nelson suggests that the former understanding enjoyed broad currency in the Founding generation,<sup>111</sup> but he also acknowledges that then-prevailing views on this point do not necessarily hold authoritative significance today.<sup>112</sup> (3) Must

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105 See *id.* at 52–54. My references to *The Correspondence of the Justices* encompass the compilation of sources found in HART & WECHSLER, *supra* note 67; see *id.* at 50 n.4 (citing 3 THE CORRESPONDENCE AND PUBLIC PAPERS OF JOHN JAY, 1782–1793, at 486–89 (Henry P. Johnston ed., New York, G.P. Putnam’s Sons 1891) and 15 THE PAPERS OF ALEXANDER HAMILTON 111 n.1 (Harold C. Syrett ed., 1969)).

106 529 U.S. 765 (2000).

107 See *id.* at 774 (“We are confirmed in this conclusion by the long tradition of *qui tam* actions in England and the American Colonies.”).

108 For a path-breaking historical and analytical study, see Nelson, *supra* note 7, at 552 n.137.

109 I am grateful to Curt Bradley for pressing these questions in commenting on an earlier draft.

110 According to Nelson, *supra* note 7, at 536–38, James Madison reflected a predominant current of legal thinking in the Founding generation in believing that legal meaning was necessarily original meaning that, following the passage of time, could only be settled through retrospective inquiries.

111 See *id.* at 527.

112 See *id.* at 552–53 (“[I]f an instruction to follow settled liquidations is not itself part of the Constitution’s ‘meaning,’ then present-day originalists are free to consider alternative approaches to the Constitution’s indeterminacies.”).

thoughtful deliberation of constitutional validity occur in order for legislative or executive practice to constitute a binding liquidation? Madison, for example, thought that some early congressional precedents settled constitutional meaning, but that others, because they “were passed with little deliberation,” did not.<sup>113</sup> This view would obviously give rise to further debates about the authority of many particular actions and practices.

Overall, perhaps the safest conclusion is that all agree that historical inquiries are necessary and appropriate to determine whether historical practice has “liquidated” the meaning of otherwise vague or ambiguous constitutional provisions,<sup>114</sup> and if so how, but that a number of questions about the nature and conditions of liquidation remain unsettled.

### E. *Historical “Gloss”*

Closely related to the idea of settlement of constitutional meaning through liquidation, but possibly more capacious, is that of longstanding and seldom questioned practice as a “gloss” on constitutional meaning.<sup>115</sup> The canonical citation for the authority of historical gloss comes from Justice Frankfurter’s concurring opinion in *Youngstown Sheet & Tube Co. v. Sawyer*,<sup>116</sup> in which he maintained that “a systematic, unbroken, executive practice, long pursued to the knowledge of the Congress and never before questioned, engaged in by Presidents who have also sworn to uphold the Constitution, . . . may be treated as a gloss on ‘executive Power’ vested in the President by . . . Art. II.”<sup>117</sup>

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113 *Id.* at 527.

114 For other historical examples, see, e.g., *Tutun v. United States*, 270 U.S. 568, 576 (1926) (holding that uncontested petitions for naturalization satisfy the case or controversy requirement because “[t]he function of admitting to citizenship has been conferred exclusively upon courts continuously since the foundation of our Government” and “[t]he constitutionality of this exercise of jurisdiction has never been questioned”); *The Laura*, 114 U.S. 411, 416 (1885) (“[T]he practice [under federal legislation] and acquiescence under it, ‘commencing with the organization of the judicial system, affords an irresistible answer, and has indeed fixed the construction.’” (quoting *Stuart v. Laird*, 5 U.S. (1 Cranch) 299, 309 (1803))).

115 For analysis of the frequently unanalyzed notion of historical gloss, see Bradley & Morrison, *supra* note 7, at 417–24.

116 343 U.S. 579 (1952).

117 *Id.* at 610–11 (Frankfurter, J., concurring). For arguable examples of the Supreme Court’s acceptance of historical practice as constituting a gloss on constitutional meaning, see for example *Am. Ins. Ass’n v. Garamendi*, 539 U.S. 396, 415 (2003) (affirming a presidential power to suspend pending legal claims based on “the fact that the practice goes back over 200 years, and has received congressional acquiescence throughout its history”); *Dames & Moore v. Regan*, 453 U.S. 654, 686 (1981) (finding that the President had the power to suspend claims in American courts against Iran in part on the basis of “a history of [congressional] acquiescence”); *United States v. Curtiss-Wright Exp. Corp.*, 299 U.S. 304, 327–28 (1936) (relying on historical practice to find that Congress could constitutionally delegate to the President the power to criminalize arms sales to countries involved in a conflict in Latin America); *The Pocket Veto Case*, 279 U.S. 655, 689 (1929) (relying in part on “[l]ong settled and established practice” to find that a bill presented to the President

Depending on how the concept of “liquidation” is construed, the idea of historical practice constituting a “gloss” on constitutional language may call for somewhat broader ranging historical inquiries. For example, nothing inherent in the notion of “gloss,” as Justice Frankfurter described it, restricts the glossing power to the Framing generation,<sup>118</sup> nor limits settlement through practice to a range of meanings that was originally contemplated and regarded as permissible. In *NLRB v. Noel Canning*, for example, Justice Breyer’s majority opinion asserted that “[the] Court has treated practice as an important interpretive factor even when the nature or longevity of that practice is subject to dispute, and even when that practice began after the founding era.”<sup>119</sup>

Speaking to one of the most important questions surrounding the notion of historical gloss, Justice Scalia’s opinion concurring in the judgment in *Noel Canning* maintained that practice can settle constitutional meaning only when the original public meaning was ambiguous.<sup>120</sup> Although the majority did not expressly disagree, this asserted limitation can prove elusive for at least two reasons. First, ambiguity (or vagueness) comes in degrees. In the *Noel Canning* case, for example, one of the disputed issues involved whether the President’s power to “fill up all Vacancies that may happen during the Recess of the Senate”<sup>121</sup> extended to vacancies that predated a recess’s commencement. Justice Scalia thought unambiguously not.<sup>122</sup> By contrast, Justice Breyer’s majority opinion reasoned that even if “the most natural meaning” of the word “happen” would limit the Recess Appointments Clause to vacancies that developed while the Senate was out of session, this was not “the only possible way to use the word,” since “happen” can also mean “exist.”<sup>123</sup> However one judges that analysis, no sharp line may mark the point at which a sufficient degree of ambiguity exists to license glossing by practice.

Second, and perhaps more important, practice and precedent can help to shape perceptions of when constitutional language is or is not relevantly

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fewer than ten days before an inter-session recess that the President neither signs nor returns does not become a law); *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 401 (1819) (“[A] doubtful question . . . in the decision of which . . . the respective powers of those who are equally the representatives of the people, are to be adjusted . . . ought to receive a considerable impression from [the practice of the Government].”). See generally Bradley & Morrison, *supra* note 7, at 417–24 (examining the prevalence of the historical gloss argument in connection with debates over the scope of presidential power).

118 See Bradley & Siegel, *supra* note 7, at 2 (distinguishing a “liquidation” approach from a “historical gloss” approach).

119 134 S. Ct. 2550, 2560 (2014).

120 See *id.* at 2617 (Scalia, J., concurring in the judgment) (“What the majority needs to sustain its judgment is an ambiguous text and a clear historical practice. What it has is a clear text and an at-best-ambiguous historical practice.”).

121 U.S. CONST. art. II, § 2, cl. 3.

122 See *Noel Canning*, 134 S. Ct. at 2617 (Scalia, J., concurring in the judgment).

123 *Id.* at 2567.

vague or ambiguous.<sup>124</sup> In *Noel Canning*, for instance, “the majority’s decision to regard the text as ambiguous seems itself to have been affected by its understanding of the purpose of the Recess Appointments Clause, historical practice, and the consequences of an alternative interpretation.”<sup>125</sup> As Justice Breyer put it, the Court was hesitant to “render illegitimate thousands of recess appointments reaching all the way back to the founding era.”<sup>126</sup> Although the majority’s analysis provoked controversy in *Noel Canning*, in part because of the majority’s labored efforts to establish ambiguity where the dissenting Justices saw none,<sup>127</sup> the phenomenon of what Professors Bradley and Siegel call “constructed constraint”<sup>128</sup>—in which practical considerations influence the perception and not merely the resolution of ambiguity—is widespread in constitutional law, with prior interpretations frequently affecting appraisals of the meanings best ascribed to constitutional language.<sup>129</sup> To cite just one particularly clear example, historical practice and precedent seem crucial to the currently uncontroversial construal of the First Amendment—which provides that “Congress shall make no law . . . abridging the freedom of speech”<sup>130</sup>—as precluding abridgments of free speech by the federal executive and judicial branches.

As an empirical matter, the Supreme Court has most frequently credited the argument that longstanding historical practice can put a gloss on constitutional meaning in matters involving the separation of powers.<sup>131</sup> But it has pursued similar analyses in other contexts. For example, the Burger Court relied on historical practice as settling the constitutionality of federal and state tax exemptions to religious institutions.<sup>132</sup>

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124 See Bradley & Siegel, *supra* note 7, at 38.

125 *Id.*

126 *Noel Canning*, 134 S. Ct. at 2577.

127 See *id.* at 2617 (Scalia, J., concurring in the judgment) (characterizing the relevant constitutional text as “clear”).

128 See Bradley & Siegel, *supra* note 7, at 3.

129 See Richard H. Fallon, Jr., *A Constructivist Coherence Theory of Constitutional Interpretation*, 100 Harv. L. Rev. 1189, 1252–54 (1987) (describing how nontextual factors guide ascriptions of meaning to constitutional language).

130 U.S. CONST. amend. I (emphasis added).

131 See Bradley & Morrison, *supra* note 7, at 417 (“[A]rguments based on historical practice are common in controversies relating to the separation of powers.”); Jane E. Stromseth, *Understanding Constitutional War Powers Today: Why Methodology Matters*, 106 YALE L.J. 845, 876 (1996) (reviewing LOUIS FISHER, *PRESIDENTIAL WAR POWER* (1995)) (“[W]here the constitutional text is genuinely ambiguous or silent, as it is regarding issues such [as] the President’s power as Commander in Chief to deploy forces abroad for foreign policy purposes in peacetime or the precise scope of the President’s authority to ‘repel sudden attacks,’ longstanding and consistent historical practice can shed light on how we should understand the President’s constitutional power today.”).

132 See *Walz v. Tax Comm’n*, 397 U.S. 664, 678 (1970) (“It is obviously correct that no one acquires a vested or protected right in violation of the Constitution by long use, even when that span of time covers our entire national existence and indeed predates it. Yet an unbroken practice of according [this tax] exemption to churches, openly and by affirma-

The Supreme Court has not always treated even long-established practices as immune from constitutional invalidation, either in separation of powers cases,<sup>133</sup> under the First Amendment,<sup>134</sup> or in other contexts.<sup>135</sup> Nor, to repeat, is the line between “liquidation” through precedent and “glossing” by practice a clear one—even when it is widely agreed that historical practice has settled some matter decisively. For example, all of the current Justices seem to agree that early congressional practice in hiring a chaplain establishes that prayers at the beginning of congressional sessions do not violate the Establishment Clause,<sup>136</sup> even though they may disagree about exactly why this practice has the significance that it does, and even though they divide sharply about whether and if so how far early congressional practice with regard to chaplains bears on the constitutionality of governmentally sponsored prayers at other public events.<sup>137</sup> For now, all I mean to insist on is that nearly everyone seems to agree that longstanding historical practice can at least sometimes constitute a “gloss” on constitutional language and that the glosses need not necessarily originate in the near aftermath of the Founding as part of a self-conscious effort to “liquidate” or fix the Constitution’s meaning.

#### F. *Historical Traditions*

Historical traditions often shape judicial interpretations of the Constitution. The roles played by traditions in doing so appear quite various. In some cases, inquiry into the content of traditions may overlap with other forms of historical inquiry, such as those involving original public meanings,

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tive state action, not covertly or by state inaction, is not something to be lightly cast aside.”).

133 See *INS v. Chadha*, 462 U.S. 919, 944, 968 (1983) (rejecting the constitutionality of the legislative veto despite vast usage of the veto “over the past five decades,” *id.* at 968 (White, J., dissenting), and explaining that “[c]onvenience and efficiency are not the primary objectives—or the hallmarks—of democratic government and our inquiry is sharpened rather than blunted by the fact that congressional veto provisions are appearing with increasing frequency in statutes which delegate authority to executive and independent agencies,” *id.* at 944); Bradley & Morrison, *supra* note 7, at 423 (“[C]ourts do not always treat the presence or absence of longstanding practice as dispositive.”).

134 See *Walz*, 397 U.S. at 702 (Douglas, J., dissenting) (“[*Engel v. Vitale*, 370 U.S. 421 (1962)] brought many protests, for the habit of putting one sect’s prayer in public schools had long been practiced.”).

135 See, e.g., *Loving v. Virginia*, 388 U.S. 1 (1967) (invalidating a state prohibition against interracial marriage on equal protection and due process grounds).

136 See, e.g., *Town of Greece v. Galloway*, 134 S. Ct. 1811, 1845 (2014) (Kagan, J., dissenting) (agreeing with “the Town and Court” that “a long history, stretching back to the first session of Congress (when chaplains began to give prayers in both Chambers), ‘ha[s] shown that prayer in this limited context could coexist with the principles of disestablishment and religious freedom’” (quoting *id.* at 1820) (majority opinion) (internal quotation marks omitted)).

137 See *id.* at 1845 (disagreeing with the majority about whether prayer at the beginning of public sessions of a town’s governing body “fits within the tradition” of permissible governmentally sponsored prayer (quoting *id.* at 1819 (majority opinion))).

liquidation, and historical gloss. Within the federal courts canon, an example comes from the “public rights” tradition, which at least some Justices of the Supreme Court appear to regard as partly defining the original meaning of Article III’s provision that “[t]he 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.”<sup>138</sup> In interpreting this language, the Supreme Court has frequently appealed to tradition as its basis for distinguishing two categories of cases. In those involving “private rights,” the Court typically insists that “the essential attributes of the judicial power” must be vested in Article III courts if they are to be vested in federal adjudicative tribunals at all.<sup>139</sup> By contrast, in cases involving what it has classified as “public rights,” the Court has often said that Congress has greater discretion to provide for adjudication by non-Article III tribunals such as administrative agencies, the adjudicative officials of which lack Article III’s life tenure and salary protection.<sup>140</sup>

The contours of the public rights tradition are much contested.<sup>141</sup> Supreme Court decisions in recent decades have offered alternative, some-

138 U.S. CONST. art. III, § 1.

139 See, e.g., *Stern v. Marshall*, 131 S. Ct. 2594, 2619 (2011) (citing *Commodity Futures Trading Comm’n v. Schor*, 478 U.S. 833, 851 (1986)) (finding a bankruptcy court lacked jurisdiction to enter final judgment on a common law tort claim because the claim did not fall within the public rights exception); *Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33, 53 (1989) (“[I]f a statutory cause of action, such as respondent’s right to recover a fraudulent conveyance . . . is not a ‘public right’ for Article III purposes, then Congress may not assign its adjudication to a specialized non-Article III court lacking ‘the essential attributes of the judicial power.’” (quoting *Crowell v. Benson*, 285 U.S. 22, 51 (1932))).

140 See, e.g., *Thomas v. Union Carbide Agric. Prods. Co.*, 473 U.S. 568, 589 (1985) (“In essence, the public rights doctrine reflects simply a pragmatic understanding that when Congress selects a quasi-judicial method of resolving matters that ‘could be conclusively determined by the Executive and Legislative Branches,’ the danger of encroaching on the judicial powers is reduced.” (quoting *N. Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 68 (1982) (plurality opinion))).

141 Compare HART & WECHSLER, *supra* note 67, at 332–33 (suggesting “three main classes of cases have formed the doctrine’s core”: (1) “‘claims against the United States’ for ‘money, land or other things’”; (2) “[d]isputes arising from coercive governmental conduct outside the criminal law[,]” such as coerced payment of duties at the United States’ border; and (3) immigration issues and the surrounding body of law (quoting *Ex parte Bakelite Corp.*, 279 U.S. 438, 452 (1929))), with Caleb Nelson, *Adjudication in the Political Branches*, 107 COLUM. L. REV. 559, 566 (2007) (defining “public rights” as “interests that enjoyed legal protection, but that belonged to ‘the whole community, considered as a community, in its social aggregate capacity,’” which historically divided into three categories: “(1) proprietary rights held by government on behalf of the people, such as the title to public lands . . . ; (2) servitudes that every member of the body politic could use but that the law treated as being collectively held, such as rights to sail on public waters . . . ; and (3) less tangible rights to compliance with the laws established by public authority ‘for the government and tranquility of the whole’” (quoting 4 WILLIAM BLACKSTONE, COMMENTARIES \*5–\*7)).

times conflicting formulations.<sup>142</sup> The Justices have also disagreed about the ultimate significance of the distinction between public and private rights in resolving modern constitutional questions.<sup>143</sup> There can be no doubt, however, that the tradition of distinguishing public from private rights has profoundly shaped judicial doctrine governing the irreducible role of Article III courts in the constitutional scheme and, correlatively, the permissibility of congressional reliance on non-Article III tribunals.

In other contexts, appeals to tradition play a different role in cases involving non-Article III federal adjudicators—one that is less obviously connected, if connected at all, with determinations of original public meaning, liquidation, or even historical gloss. For instance, it appears to have emerged as common ground that the substantive component of the Due Process Clause “protects those fundamental rights and liberties which are, objectively, ‘deeply rooted in this Nation’s history and tradition.’”<sup>144</sup> Some Justices believe that the protection of the Due Process Clause should extend further.<sup>145</sup> Others, with greater allegiance to originalism, have expressed

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142 See *Stern*, 131 S. Ct. at 2614–15 (describing the “varied formulations of the public rights exception in this Court’s cases” as, inter alia: “a matter that can be pursued only by grace of the other branches,” (citing *Murray’s Lessee v. Hoboken Land & Improvement Co.*, 59 U.S. (18 How.) 272, 284 (1855)); “[a matter] that ‘historically could have been determined exclusively by’ [the other] branches,” (quoting and citing *N. Pipeline*, 458 U.S. at 68 (plurality opinion)); a right that “flow[s] from a federal statutory scheme,” (citing *Thomas*, 473 U.S. at 584–85); a matter “‘completely dependent upon’ adjudication of a claim created by federal law,” (quoting and citing *Schor*, 478 U.S. at 856); a matter “limited to a ‘particularized area of the law,’” (citing *N. Pipeline*, 458 U.S. at 85 (plurality opinion)); and a matter whose facts are “‘particularly suited to examination and determination by an administrative agency specially assigned to that task’” (quoting *Crowell*, 285 U.S. at 46)). So too did the Court allude to a prior conception of “public rights” that it had previously rejected. See *Stern*, 131 S. Ct. at 2613 (“Shortly after *Northern Pipeline*, the Court rejected the limitation of the public rights exception to actions involving the Government as a party.”); see also *N. Pipeline*, 458 U.S. at 69 (“[A] matter of public rights must at a minimum arise between the government and others.” (internal quotation marks omitted)). Justice Scalia wrote with frustration of the “sheer numerosity” of these tests in his concurrence. See *Stern*, 131 S. Ct. at 2620–21 (Scalia, J., concurring).

143 Compare *Stern*, 131 S. Ct. at 2611 (majority opinion) (finding dispositive the conclusion that “[the Plaintiff’s] counterclaim cannot be deemed a matter of ‘public right’ that can be decided outside the Judicial Branch”), with *id.* at 2626 (Breyer, J., dissenting) (“The presence of ‘private rights’ does not automatically determine the outcome of the question but requires a more ‘searching’ examination of the relevant factors.” (quoting *Schor*, 478 U.S. at 854)).

144 *Washington v. Glucksberg*, 521 U.S. 702, 720–21 (1997) (quoting *Moore v. City of E. Cleveland*, 431 U.S. 494, 503 (1977)).

145 See, e.g., *Lawrence v. Texas*, 539 U.S. 558, 572 (2003) (“[H]istory and tradition are the starting point but not in all cases the ending point of the substantive due process inquiry.” (quoting *Cnty. of Sacramento v. Lewis*, 523 U.S. 833, 857 (1998) (Kennedy, J., concurring)) (internal quotation marks omitted)); *Michael H. v. Gerald D.*, 491 U.S. 110, 141 (1989) (Brennan, J., dissenting) (rejecting an interpretive approach that renders the Constitution “a stagnant, archaic, hidebound document steeped in the prejudices and superstitions of a time long past”); *Bowers v. Hardwick*, 478 U.S. 186, 199 (1986) (Black-

doubts that the Due Process Clause originally conferred any substantive protections at all.<sup>146</sup> Nonetheless, nearly all seem to agree that historical tradition in recognizing an asserted right—such as a right of parents to control their children’s upbringing<sup>147</sup> or of competent adults to refuse unwanted

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mun, J., dissenting) (“Like Justice Holmes, I believe that ‘[i]t is revolting to have no better reason for a rule of law than that so it was laid down in the time of Henry IV.’ . . . I believe we must analyze respondent Hardwick’s claim in the light of the values that underlie the constitutional right to privacy.” (quoting Oliver Wendell Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 469 (1897))); see also DWORKIN, *supra* note 63, at 139 (criticizing Justice Scalia’s reliance on a common law historical tradition to disclaim the right to die in *Cruzan v. Dir., Mo. Dep’t of Health*, 497 U.S. 261 (1990) (Scalia, J., concurring), as follows: “[T]here are many examples in constitutional history of constraints on liberty that were unquestioned for long periods of history but were then reexamined and found unconstitutional because lawyers and the public as a whole had developed a more sophisticated understanding of the underlying ethical and moral issues. . . . Longstanding practice is an even worse guide to constitutional law when technological change has created entirely new problems or exacerbated old ones.”).

146 See *McDonald v. City of Chi.*, 561 U.S. 742, 791 (2010) (Scalia, J., concurring) (“Despite my misgivings about Substantive Due Process as an original matter, I have acquiesced in the Court’s incorporation of certain guarantees in the Bill of Rights.”). Analysis has revealed deep challenges in identifying the content of pertinent traditions, which can often be described either broadly or narrowly. In *Michael H.*, 491 U.S. at 127, for example, Justices Scalia and Brennan disagreed over the level of generality at which to define the fundamental right in question. Scalia characterized the claim before the Court as involving the purported parental rights of an “adulterous natural father,” *id.* at 127 n.6 (plurality opinion of Scalia, J.). By contrast, Justice Brennan viewed the father as coming within a tradition of legal respect for the more general rights associated with “parenthood,” *id.* at 139 (Brennan, J., dissenting). As both Justices acknowledged, their specific disagreement reflected divergent assumptions about the level of generality at which rights and rights-generating traditions should be defined. See *id.* at 127 n.6 (plurality opinion of Scalia, J.) (“Though the dissent has no basis for the level of generality it would select, we do: We refer to the most specific level at which a relevant tradition protecting, or denying protection to, the asserted right can be identified.”); *id.* at 139 (Brennan, J., dissenting) (“If we had looked to tradition with such specificity in past cases, many a decision would have reached a different result.”). For commentary on Justices Scalia and Brennan’s debate over levels of generality in defining fundamental rights, see J.M. Balkin, *Tradition, Betrayal, and the Politics of Deconstruction*, 11 CARDOZO L. REV. 1613, 1614–29 (1990) (“Tradition, it thus appears, rather than solving our problems, has proven to be a very troublesome concept.”); Louis Michael Seidman, *Confusion at the Border: Cruzan, “The Right to Die,” and the Public/Private Distinction*, 1991 SUP. CT. REV. 47, 68–69 (1992) (finding it uncertain what result Justice Scalia’s level of generality analysis would properly have yielded regarding “the right to die” as explored in *Cruzan*, 497 U.S. 261); Tribe & Dorf, *supra* note 63, at 1058 (“The more abstractly one states the already-protected right, the more likely it becomes that the claimed right will fall within its protection.”).

147 See *Meyer v. Nebraska*, 262 U.S. 390, 399–401 (1923) (finding parental rights to control their children’s education among “those privileges long recognized at common law”); see also *Pierce v. Soc’y of Sisters*, 268 U.S. 510, 534–35 (1925) (reframing *Meyer*’s stated right as the “liberty of parents and guardians to direct the upbringing and education of children under their control”).

medical care<sup>148</sup>—provides support for claims that the right in question enjoys constitutional protection under the Due Process Clause.<sup>149</sup> Especially for otherwise originalist Justices, who do not believe that the Due Process Clause originally protected any substantive (as distinguished from procedural) rights, the purpose of inquiries into tradition is to determine what the Due Process Clause, as previously interpreted by the courts to have a substantive component, should now be interpreted to mean.<sup>150</sup>

In another form of reliance on historical tradition, some Justices have also maintained that evidence of longstanding tradition can defeat claims of constitutional right that otherwise might succeed. Justice Scalia, for example, has argued that judicially developed tests for gauging constitutionality “cannot supersede—and indeed ought to be crafted so as to reflect—those constant and unbroken national traditions that embody the people’s understanding of ambiguous constitutional texts.”<sup>151</sup> Others of course disagree. In *United States v. Virginia*,<sup>152</sup> a majority of the Supreme Court, over Justice Scalia’s protest, barred the traditionally sanctioned exclusion of women from the Virginia Military Institute. In *Loving v. Virginia*,<sup>153</sup> the Court similarly held that prohibitions against interracial marriage violate the Equal Protection Clause, despite plausible arguments that such prohibitions accorded with long-settled tradition. For current purposes, the important conclusion is that even if evidence of traditional practice does not always determine the outcome of constitutional cases, it is sometimes relevant, in diverse ways, to constitutional analysis.

### G. *Historical Novelty*

In a variety of contexts, the Supreme Court has accepted arguments that the historical novelty of a form of governmental action weighs against its con-

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148 See *Glucksberg*, 521 U.S. at 724; *Cruzan*, 497 U.S. at 278 (“The principle that a competent person has a constitutionally protected liberty interest in refusing unwanted medical treatment may be inferred from our prior decisions.”); see also Seidman, *supra* note 146, at 69 (identifying a “tradition restricting state interference with private decisions to refuse treatment”).

149 See *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1028 & n.15 (1992) (interpreting the Takings Clause as embodying principles that have “become part of our constitutional culture” and that bar some “regulatory” as well as physical deprivations of property even though “early constitutional theorists did not believe the Takings Clause embraced regulations of property at all”).

150 See, e.g., *McDonald*, 561 U.S. at 791–805 (Scalia, J., concurring) (first offering “misgivings about Substantive Due Process as an original matter,” but then arguing that the right to bear arms is fundamental and thus deserves protection under the standing judicial interpretation of the Due Process Clause).

151 *United States v. Virginia*, 518 U.S. 515, 568 (1996) (Scalia, J., dissenting) (emphasis omitted).

152 *Id.* at 519 (majority opinion).

153 388 U.S. 1, 2 (1967).

stitutional permissibility.<sup>154</sup> As so deployed, the concept of novelty does not merely call attention to the absence of support from tradition for a claim of constitutional right or prerogative. More strongly, it supports a presumption of unconstitutionality, at least in some contexts.<sup>155</sup> For example, in the important federal courts case of *Alden v. Maine*<sup>156</sup> the Court cited the absence of congressional attempts to subject the states to suit for statutory violations prior to 1908 as supporting its conclusion that Congress could not compel states to submit to suits against them in their own courts.<sup>157</sup> In *Printz v. United States*,<sup>158</sup> the Court similarly treated the unprecedented character of a statute directing state executive officials to enforce federal law as a factor helping to establish its constitutional invalidity.<sup>159</sup> The Court's attention to historical novelty in these cases is hardly anomalous. In *National Federation of Independent Business v. Sebelius (NFIB)*,<sup>160</sup> five Justices thought that the lack of precedent for a mandate on individuals to purchase health insurance furnished a reason to hold that Congress lacked the authority to impose such a mandate under the Commerce Clause.<sup>161</sup>

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154 See *Va. Office for Prot. & Advocacy v. Stewart*, 131 S. Ct. 1632, 1641 (2011) (“Lack of historical precedent can indicate a constitutional infirmity.”); Sam Camardo, Note, *Clio on Steroids: Historical Silence as a Presumption of Unconstitutionality*, 62 CASE W. RES. L. REV. 523, 526 (2011) (criticizing the Court for adopting “[a] presumption that an unprecedented governmental action is invalid because of its novelty”); Michael C. Dorf, *The Troubling Emergence of Novelty-Skepticism on the Supreme Court*, VERDICT (July 1, 2013), <http://verdict.justia.com/2013/07/01/the-troubling-emergence-of-novelty-skepticism-on-the-supreme-court> (identifying “a troubling development that cuts across doctrinal areas: a recent tendency of the Justices to presume that novel forms of legislation are unconstitutional in light of their novelty”).

155 See Dorf, *supra* note 154. The Court's reliance on novelty as a ground for invalidating legislation has proven deeply controversial, in both concept, see, e.g., Camardo, *supra* note 154, at 526, and application, see, e.g., *Printz v. United States*, 521 U.S. 898, 953 n.12 (1997) (Stevens, J., dissenting) (suggesting that Congress's “sparing use” of the commanding power suggests not the power's constitutional infirmity, but Congress's laudable “concern for the prerogatives of state government”).

156 527 U.S. 706 (1999).

157 See *id.* at 744–45.

158 521 U.S. 898 (1997).

159 See *id.* at 905–09; see also *id.* at 905 (“[C]ontemporaneous legislative exposition of the Constitution . . . , acquiesced in for a long term of years, fixes the construction to be given its provisions.’ Conversely if, as petitioners contend, earlier Congresses avoided use of this highly attractive power, we would have reason to believe that the power was thought not to exist.” (quoting *Myers v. United States*, 272 U.S. 52, 175 (1926))).

160 132 S. Ct. 2566 (2012).

161 See *id.* at 2586 (opinion of Roberts, C.J.) (finding dispositive the fact that “Congress has never attempted to rely on [the Commerce] power to compel individuals not engaged in commerce to purchase an unwanted product”); *id.* at 2649 (Scalia, Kennedy, Thomas & Alito, JJ., dissenting) (similarly referring to “the relevant history [which] is . . . that Congress . . . has never before used the Commerce Clause to compel entry into commerce”); see also Balkin, *supra* note 2, at 711 (detailing how challengers to Obamacare eschewed an originalist approach in favor of a constitutional attack based on the challenged legislation's “unprecedented” character (citing JOSH BLACKMAN, UNPRECEDENTED: THE CONSTITUTIONAL

With respect to the Constitution's rights-conferring provisions, Justice Kennedy's opinion in *Romer v. Evans*<sup>162</sup> relied on the novelty of a Colorado constitutional amendment in denying a range of constitutional protections to persons of "homosexual orientation" as a ground for holding it invalid. "It is not within our constitutional tradition to enact laws of this sort," he wrote.<sup>163</sup> Again in *United States v. Windsor*, in invalidating a provision of the Federal Defense of Marriage Act (DOMA) that denied federal recognition to same-sex marriages sanctioned by state law, Justice Kennedy appealed to the relevance of historical novelty: "DOMA, because of its reach and extent, departs from this history and tradition of reliance on state law to define marriage. '[D]iscriminations of an unusual character especially suggest careful consideration to determine whether they are obnoxious to the [C]onstitution[ ] . . . .'"<sup>164</sup> As that formulation suggests, the line between reliance on novelty as an indicator of unconstitutionality and traditional practice as a gauge of affirmative constitutional mandates can be a fine or elusive one. Clearly, however, majorities of the Justices regard historical evidence of novelty as pertinent to the resolution of some cases.<sup>165</sup>

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CHALLENGE TO OBAMACARE (2013)); Dorf, *supra* note 154 (describing *NFIB v. Sebelius* as a leading example of novelty skepticism). In *Medellín v. Texas*, 552 U.S. 491, 532 (2008), the Court similarly ruled that the "unprecedented" nature of a presidential memorandum directing state courts to give effect to a decision of the International Court of Justice weighed against the directive's constitutionality. *Id.* ("[T]he Government has not identified a single instance in which the President has attempted (or Congress has acquiesced in) a Presidential directive issued to state courts, much less one that reaches deep into the heart of the State's police powers and compels state courts to reopen final criminal judgments and set aside neutrally applicable state laws.").

162 517 U.S. 620 (1996).

163 *Id.* at 633.

164 *United States v. Windsor*, 133 S. Ct. 2675, 2692 (2013) (first alteration in original) (quoting *Romer*, 517 U.S. at 633).

165 In the context of the First Amendment's Free Speech Clause, an impressive coalition of Justices has agreed that any historically novel, content-based restrictions will trigger strict judicial scrutiny. In *Brown v. Entertainment Merchants Ass'n*, 131 S. Ct. 2729 (2011), for example, in striking down a statute restricting the sale or rental of violent video games to minors, the majority refused to create a category of unprotected speech absent "persuasive evidence that a novel restriction on content is part of a long (if heretofore unrecognized) tradition of proscription." *Id.* at 2734. Although Justice Thomas dissented, he did so based on an interpretation of the historical record as severely limiting the First Amendment rights of minors. *See id.* at 2759 (Thomas, J., dissenting). Justice Breyer would have upheld the statute, but he agreed with the majority that strict scrutiny applied. *See id.* at 2761–62 (Breyer, J., dissenting). Justice Alito concurred, joined by Chief Justice Roberts, finding the statute impermissibly vague. *See id.* at 2742 (Alito, J., concurring). In *United States v. Stevens*, 559 U.S. 460 (2010), only Justice Alito dissented from a majority opinion rejecting the "freewheeling authority to declare new categories of speech outside the scope of the First Amendment," absent identification of a category that has "been historically unprotected." *Id.* at 472. In the earlier, now canonical case of *Near v. Minnesota ex rel. Olson*, 283 U.S. 697 (1931), the Court had similarly relied on historical novelty as a ground for skepticism of constitutionality under the First Amendment: "The fact that for approximately one hundred and fifty years there ha[d] been almost an entire absence of attempts

*H. History Pertinent to the Synthesis of New Law into Prior Law  
in Contexts of Transformative Change*

All agree that constitutional amendments can transform what the Constitution meant previously. Similarly, a newly enacted statute can revise the prior statutory landscape. But the scope of any particular transformation can provoke uncertainty or controversy.

Viewed from one perspective, debates about the meaning of constitutional amendments and of statutes with potentially transformative implications are merely a subspecies of debate about original public meanings and pose no distinctive methodological challenge. In some cases, however, it would be more misleading than illuminating to conceptualize the implications of a new amendment or statute as involving a linguistic fact, fixed at the moment of pertinent language's ratification or enactment. According to a leading philosopher of language, the paradigm case of "a sentence *S*" having a linguistic meaning is one in which:

[A] speaker uses [that] sentence *S* to assert or stipulate . . . what a reasonable hearer or reader who knows the linguistic meaning of *S*, and is aware of all relevant intersubjectively available features of the context of the utterance, would rationally take the speaker's use of *S* to be intended to convey and commit the speaker to.<sup>166</sup>

In constitutional law, especially in cases involving broadly transformative alterations of the status quo ante, it will often be the case that neither the amendment's authors nor those in the surrounding legal community will have anticipated or thought through all of an amendment's potential implications. In some such cases, history reveals, defining and delimiting the reach of a transformative amendment or statute requires judges to go beyond specifically shared intersubjective understandings and to engage in an intellectually challenging process that Bruce Ackerman labels one of "synthesis."<sup>167</sup>

One important example involves the Fourteenth Amendment. The Fourteenth Amendment clearly had transformative purposes. A Reconstruction Congress demanded ratification from defeated states of the former Confederacy as a condition of their renewed representation in Congress.<sup>168</sup> Nevertheless, diverse congressional constituencies apparently preferred

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to impose previous restraints upon publications relating to the malfeasance of public officers is significant of the deep-seated conviction that such restraints would violate constitutional right." *Id.* at 718.

166 Soames, *supra* note 36, at 598.

167 See 1 BRUCE ACKERMAN, *WE THE PEOPLE: FOUNDATIONS* 304 (1991).

168 See, e.g., Thomas B. Colby, *Originalism and the Ratification of the Fourteenth Amendment*, 107 *Nw. U. L. Rev.* 1627, 1629 (2013) (pointing to resulting constitutional difficulties). For an argument that the circumstances of the Fourteenth Amendment's ratification do not undermine its constitutional validity, see John Harrison, *The Lawfulness of the Reconstruction Amendments*, 68 *U. Chi. L. Rev.* 375 (2001).

vagueness to clarity on vital points.<sup>169</sup> Not surprisingly under the circumstances, courts began to struggle with questions about how to synthesize the Fourteenth Amendment with prior constitutional understandings almost immediately after the Amendment's ratification.<sup>170</sup> They continue to do so.

Although numerous examples populate the pages of the *United States Reports*, here I shall offer just one, drawn from the heart of the federal courts curriculum. In *Fitzpatrick v. Bitzer*,<sup>171</sup> the Supreme Court held that, the Eleventh Amendment notwithstanding, Section 5 of the Fourteenth Amendment authorizes Congress to abrogate the states' immunity from unconsented suit for constitutional violations.<sup>172</sup> In subsequent cases, the Court has worked out the scope and implications of that ruling by holding that in order to pass constitutional muster, a statute seeking to abrogate the states' immunity must be congruent with and proportional to an identified pattern of constitutional violations.<sup>173</sup> The Court's "congruence and proportionality" test for permissible abrogation of state sovereign immunity under Section 5 of the Fourteenth Amendment may or may not reflect a sensible synthesis of pre-Civil War and Reconstruction assumptions about federal supremacy and state sovereignty, but it is difficult to conceptualize as a simple determination of the original meaning of the Fourteenth Amendment.

The need for synthesis is also striking with regard to a number of Reconstruction statutes that, if taken literally, would topple traditional, seemingly settled understandings concerning the relationship of the states and the federal government and, especially, of federal judicial power to oversee the operation of state governments. Clear examples come from 42 U.S.C. § 1983, which Congress originally enacted in 1871 and which creates a cause of action for damages and injunctive relief against state officials who violate federal constitutional or statutory rights.<sup>174</sup> Among the questions that the Supreme Court has had to decide in applying § 1983 are these:

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169 See, e.g., ERIC FONER, RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION, 1863-1877, at 257-58 (1988) (noting that "[o]n the precise definition of equality before the law, Republicans differed among themselves," that "[e]ven moderates [in Congress] understood Reconstruction as a dynamic process, in which phrases like 'privileges and immunities' were subject to changing interpretation" and that moderates further "preferred to allow both Congress and the federal courts maximum flexibility in implementing the Amendment's provisions").

170 See *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36, 73-74 (1873) (severely limiting the scope of the Fourteenth Amendment's Privileges or Immunities Clause based on an imputed purpose to preserve a historically rooted distinction between privileges and immunities of state citizenship and privileges and immunities of national citizenship).

171 427 U.S. 445 (1976).

172 *Id.* at 451-56.

173 See, e.g., *City of Boerne v. Flores*, 521 U.S. 507, 520 (1997) ("There must be a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end.").

174 The text of § 1983 provides:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . subjects, or causes to be subjected, any citizen of the United States . . . to the deprivation of any rights, privileges, or immunities

- Are all officials who violate constitutional rights—including judges and prosecutors—absolutely liable for damages relief, or may some, under some circumstances, claim “official immunity” based on analogies to the immunity that officials enjoyed in suits at common law?<sup>175</sup>
- Does the authorization of injunctive relief override preexisting doctrines that would have precluded courts of equity from enjoining pending state criminal prosecutions?<sup>176</sup>
- When, if ever, should prior state court decisions operate as bars to federal adjudication under doctrines of claim and issue preclusion?<sup>177</sup>
- Does the § 1983 cause of action extend to current or former state prisoners who could instead have asserted their constitutional claims in habeas corpus actions?<sup>178</sup>

With respect to questions such as these, to all of which the Supreme Court has given complex answers that deviate from the statute’s “literal meaning,”<sup>179</sup> it frequently seems folly to expect a clear original understanding, in part for reasons involving uncertainty and reasonable disagreement. Rather, the challenge for the courts is to figure out how most sensibly to resolve particular disputes in light of history-based considerations that include prior practice, settled expectations, motivating congressional purposes, and other enactment history. Judges most typically do so by appealing to a normatively soaked notion of what a reasonable legislator would have intended or a reasonable interpreter would have understood the meaning or implications of a legal enactment to be.<sup>180</sup>

Some might reply that, even if I am correct about what the Supreme Court has done historically, the Court has erred by straying into the domain of normative analysis. As I have argued, however, reasonable members of the generations that enacted relevant texts—viewing them in their legal, linguistic, and historical contexts—would frequently have divided about their meaning, or at least about how they applied to particular cases, and would have done so on normatively suffused grounds.<sup>181</sup> In such cases, a modern interpreter also must make partly normative judgments.

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secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

42 U.S.C. § 1983 (2012).

175 For an overview of debates surrounding official immunity doctrine, see HART & WECHSLER, *supra* note 67, at 994–1011.

176 For a summary of pertinent doctrine and surrounding debates, see *id.* at 1083–128.

177 See *id.* at 1320–34.

178 See *id.* at 1334–46.

179 Cf. Solum, *supra* note 23, at 487 (“In law, we refer to semantic content as ‘literal meaning.’” (citations omitted)).

180 See Richard H. Fallon, Jr., *Three Symmetries Between Textualist and Purposivist Theories of Statutory Interpretation—and the Irreducible Roles of Values and Judgment Within Both*, 99 CORNELL L. REV. 685, 690–724 (2014).

181 See *supra* subsection I.C.4.

### I. *Prior Judicial Decisions and Their Historical Meanings*

Above I referred to the potential of nonjudicial practice to settle questions of constitutional meaning and application. But lawyers more commonly think of settlement as coming through judicial precedent.<sup>182</sup>

Viewed from one perspective, a judicial precedent is a kind of historical fact, the significance of which can provoke debate. The question of significance takes on special importance insofar as a precedent decides a question about the original public meaning of a constitutional or statutory provision in a way that subsequent judges could plausibly think mistaken. In such cases, a judicial precedent not only resolves a particular case, but also leaves a question for the future: Which historical phenomena—those bearing on the original meaning of a provision or those bearing on the best interpretation of the precedent—matter more?

In recent decades, courts and commentators have heatedly debated questions involving the authority of precedents that might be judged erroneous if measured against originalist criteria.<sup>183</sup> Despite disagreement on much else, most judges, Justices, and commentators agree that the doctrine of stare decisis sometimes, but not always, authorizes or requires courts to act

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182 See, e.g., *Michigan v. Bay Mills Indian Cmty.*, 134 S. Ct. 2024, 2036 (2014) (“Stare decisis, we have stated, ‘is the preferred course because it promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process.’ Although ‘not an inexorable command,’ stare decisis is a foundation stone of the rule of law, necessary to ensure that legal rules develop ‘in a principled and intelligible fashion.’ For that reason, this Court has always held that ‘any departure’ from the doctrine ‘demands special justification.’ (quoting *Payne v. Tennessee*, 501 U.S. 808, 827, 828 (1991), *Vasquez v. Hillery*, 474 U.S. 254, 265 (1986), and *Arizona v. Rumsey*, 467 U.S. 203, 212 (1984))).

183 See, e.g., Larry Alexander, *Constrained by Precedent*, 63 S. CAL. L. REV. 1, 4 (1989) (examining how courts are constrained by incorrectly decided precedents); Randy E. Barnett, *Trumping Precedent with Original Meaning: Not as Radical as It Sounds*, 22 CONST. COMMENT. 257, 262 (2005) (noting the difficulty that precedent can pose for originalism); Michael J. Gerhardt, *The Role of Precedent in Constitutional Decisionmaking and Theory*, 60 GEO. WASH. L. REV. 68, 73 (1991) (examining the interaction between precedent and theories of constitutional interpretation); John Harrison, *The Power of Congress over the Rules of Precedent*, 50 DUKE L.J. 503, 505 (2000) (examining precedent and congressional power); Gary Lawson, *The Constitutional Case Against Precedent*, 17 HARV. J.L. & PUB. POL’Y 23, 24 (1994) (arguing that, in some circumstances, precedent is unconstitutional); Henry Paul Monaghan, *Stare Decisis and Constitutional Adjudication*, 88 COLUM. L. REV. 723, 723 (1988) (arguing that much precedent cannot be reconciled with originalism); Caleb Nelson, *Stare Decisis and Demonstrably Erroneous Precedents*, 87 VA. L. REV. 1, 3 (2001) (arguing for a conception of stare decisis without a presumption against overruling “demonstrably erroneous precedent”); Michael Stokes Paulsen, *Abrogating Stare Decisis by Statute: May Congress Remove the Precedential Effect of Roe and Casey?*, 109 YALE L.J. 1535, 1538 (2000) (examining the power of Congress to abrogate stare decisis); Michael Stokes Paulsen, *The Intrinsically Corrupting Influence of Precedent*, 22 CONST. COMMENT. 289, 289 (2005) [hereinafter Paulsen, *Intrinsically Corrupting Influence*] (arguing that stare decisis always corrupts constitutional theories of interpretation); Frederick Schauer, *Precedent*, 39 STAN. L. REV. 571, 572 (1987) (examining the justifications for and effects of precedent).

contrary to what otherwise would be the best interpretation of constitutional language.<sup>184</sup> In weighing when precedent should trump original meanings, moreover, nearly all agree that the answer may depend on more history.<sup>185</sup> As a historical matter, what has happened since the precedent-setting decision was rendered? If reliance has developed—a question largely of historical fact—then the reliance provides a reason to adhere to the precedent.<sup>186</sup> On the other hand, if reliance has not developed, or if further historical experience has undermined the viability of the precedent, then this more recent history will also assume legal significance.<sup>187</sup>

Another historically focused question arising within the doctrine of *stare decisis* involves what, exactly, a precedent established. To take just one currently live example, an important debate has developed around *Ex parte Young*,<sup>188</sup> in which the Supreme Court upheld a federal injunction barring the Attorney General of Minnesota from enforcing a statute that violated the Fourteenth Amendment.<sup>189</sup> In a relatively undisputed aspect of its decision, the Court ruled that the Eleventh Amendment did not bar injunctive relief against a state official acting in his official capacity, even though the judicial order precluded the state from enforcing its law.<sup>190</sup> In addition, many commentators have long viewed *Ex parte Young* as having established a more general federal right to sue directly under the Constitution for injunctive relief

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184 See SCALIA & GARNER, *supra* note 5, at 413; Richard H. Fallon, Jr., *Constitutional Precedent Viewed Through the Lens of Hartian Positivist Jurisprudence*, 86 N.C. L. REV. 1107, 1129–31 (2008).

185 The Supreme Court laid out some of the pertinent considerations in *Planned Parenthood of Southeastern Pennsylvania v. Casey*:

[W]hen this Court reexamines a prior holding, its judgment is customarily informed by a series of prudential and pragmatic considerations . . . . Thus, for example, we may ask whether the rule has proven to be intolerable simply in defying practical workability, *Swift & Co. v. Wickham*, 382 U.S. 111, 116 (1965); whether the rule is subject to a kind of reliance that would lend a special hardship to the consequences of overruling and add inequity to the cost of repudiation, *e.g.*, *United States v. Title Ins. & Trust Co.*, 265 U.S. 472, 486 (1924); whether related principles of law have so far developed as to have left the old rule no more than a remnant of abandoned doctrine, *see Patterson v. McLean Credit Union*, 491 U.S. 164, 173–74 (1989); or whether facts have so changed, or come to be seen so differently, as to have robbed the old rule of significant application or justification, *e.g.*, *Burnet [v. Coronado Oil & Gas Co.]*, 285 U.S. 393, 412 (1932)] (Brandeis, J., dissenting).

505 U.S. 833, 854–55 (1992).

186 See, *e.g.*, *Payne*, 501 U.S. at 828 (“Considerations in favor of *stare decisis* are at their acme in cases involving property and contract rights, where reliance interests are involved . . .”).

187 See, *e.g.*, *State Oil Co. v. Khan*, 522 U.S. 3, 21 (1997) (noting the appropriateness of overruling when “the theoretical underpinnings of [prior] decisions are called into serious question”); *Patterson*, 491 U.S. at 173 (terming overruling justified when a past decision is “irreconcilable” with intervening developments).

188 209 U.S. 123 (1908).

189 *Id.* at 168.

190 *Id.* at 155–56.

from ongoing constitutional violations.<sup>191</sup> Professor John Harrison has challenged that interpretation on historical grounds. He contends that *Ex parte Young* instead merely applied, without extending, a traditional equitable doctrine authorizing antisuit injunctions in cases in which the party seeking equitable relief would have had a valid defense in an action at law.<sup>192</sup> On this reading, *Ex parte Young* created no precedent for the award of federal injunctive relief against allegedly unlawful and even unconstitutional conduct in other circumstances.

In a recent case, Chief Justice Roberts, writing for four dissenters, would have adopted a restrictive, historically based interpretation of *Ex parte Young* analogous to that which Professor Harrison has advanced,<sup>193</sup> but with a distinctive twist. The Chief Justice appeared to view *Ex parte Young* as the well-spring for a constitutional (rather than merely a common law) cause of action under the Supremacy Clause to enjoin coercive state action that violates the Constitution.<sup>194</sup> But, like Harrison, Chief Justice Roberts would read *Ex parte Young* and the modern cause of action that he traces to it as authorizing only “the pre-emptive assertion in equity of a defense that would otherwise have been available in the State’s enforcement proceedings”<sup>195</sup>—and not, as others have contended, as encompassing actions to enforce states’ affirmative duties under federal law (such as those to make payments under federally funded programs).<sup>196</sup> Debates about the historical foundations and meaning of *Ex parte Young* have grown heated<sup>197</sup> largely because those on both sides assume that constitutional litigation may turn on the out-

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191 See HART & WECHSLER, *supra* note 67, at 891.

192 John Harrison, *Ex Parte Young*, 60 STAN. L. REV. 989, 990–91 (2008).

193 See *Douglas v. Indep. Living Ctr. of S. Cal.*, 132 S. Ct. 1204, 1211–13 (2012) (Roberts, C.J., dissenting) (Chief Justice Roberts was joined in his dissent by Justices Scalia, Thomas, and Alito).

194 *Id.* at 1213.

195 *Id.* (quoting *Va. Office for Prot. & Advocacy v. Stewart*, 131 S. Ct. 1632, 1642 (2011) (Kennedy, J., concurring) (internal quotation marks omitted)).

196 See, e.g., Carlos M. Vázquez, *Night and Day: Coeur d’Alene, Breard, and the Unraveling of the Prospective-Retrospective Distinction in Eleventh Amendment Doctrine*, 87 GEO. L.J. 1, 21 (1998) (“If *Edelman* merely protects states from suits seeking money from the state treasury, then *Ex parte Young* is not a narrow exception to a broad rule of immunity for state actors; rather, it establishes a bright line between federal-law suits against states and federal-law suits against state officials.”); Stephen I. Vladeck, *Douglas and the Fate of Ex Parte Young*, 122 YALE L.J. ONLINE 13, 16 (2012) (“*Young* is part of a jurisprudential imperative recognizing the ability of litigants to enjoin *any* unconstitutional state action without a distinct statutory right to do so—because the Constitution itself may in some cases require such a remedy.”).

197 See, e.g., Vladeck, *supra* note 196, at 14 (noting that “scholars continue to debate the origins and scope of the 1908 [*Ex parte Young*] decision”); Larry Yackle, *Young Again*, 35 U. HAW. L. REV. 51, 58 (2013) (“It is arguable that *Young* proceeded from the premise that a claim that state rail rates conflicted with the Federal Constitution could be advanced under the authority of the Supremacy Clause.”).

come.<sup>198</sup> Once again, the point that deserves emphasis is that the historical question involves matters other than the original public meaning of constitutional language. Centrally at stake is the question of what *Ex parte Young* held as a historical matter, and thus provides a precedent for, rather than what the Constitution originally meant.

*J. History Tending to Discredit Precedents*

Given the authority normally accorded to judicial precedents under the doctrine of stare decisis, some Justices and commentators have argued—without so far arousing prominent cries of methodological resistance—that extraordinary pressures on the courts that rendered particular rulings should undermine those rulings’ claims to adherence. In *Hamdi v. Rumsfeld*,<sup>199</sup> Justice Scalia disparaged the precedential significance of *Ex parte Quirin*,<sup>200</sup> in which the Court upheld the use of a military commission to try an American citizen accused of war crimes, as “not this Court’s finest hour.”<sup>201</sup> As bases for that conclusion, Justice Scalia pointed out that “[t]he Court upheld the commission and denied relief in a brief *per curiam* issued the day after oral argument concluded”<sup>202</sup> and that when the Court finally explained its reasoning in a written opinion issued several months later, its distinction of an earlier precedent sought “to revise [that case] rather than describe it.”<sup>203</sup> Although Justice Scalia did not say so, historical evidence suggests that President Franklin Roosevelt, through *ex parte* communications by his Attorney General, had threatened the Justices with defiance if the Court forbade the use of a military tribunal to try an alleged traitor who had taken up arms against the United States in wartime.<sup>204</sup>

In *Seminole Tribe of Florida v. Florida*,<sup>205</sup> Justice Souter similarly suggested that the earlier case of *Hans v. Louisiana*,<sup>206</sup> which had advanced an expansive interpretation of state sovereign immunity under the Eleventh Amendment, should receive less than full-blooded precedential authority because it was decided under a different kind of threat: if the Court had upheld the

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198 For a wise overview of the controversy, see David L. Shapiro, *Ex Parte Young and the Uses of History*, 67 N.Y.U. ANN. SURV. AM. L. 69, 87 (2011) (hypothesizing that scholars have tended to read *Ex parte Young* through the lens of their own ideologically charged preferences and expectations).

199 542 U.S. 507 (2004).

200 317 U.S. 1 (1942).

201 *Hamdi*, 542 U.S. at 569 (Scalia, J., dissenting).

202 *Id.*

203 *Id.* at 570 (describing *Ex parte Quirin*’s description—or revision—of *Ex parte Milligan*, 71 U.S. (4 Wall.) 2 (1866)).

204 See Alexandra D. Lahav, *Rites Without Rights: A Tale of Two Military Commissions*, 24 YALE J.L. & HUMAN. 439, 446 (2012) (describing how Roosevelt conveyed to his Attorney General, Francis Biddle, a statement emphatically declaring that he would not hand over the defendants tried in a military commission pursuant to any writ of habeas corpus and Biddle then conveyed this message to the Justices on the Court).

205 517 U.S. 44 (1996).

206 134 U.S. 1 (1890).

existence of federal jurisdiction to enforce the Contract Clause against the states in suits alleging nonpayment of debts, states would flout the ensuing judgments.<sup>207</sup> Under these circumstances, Justice Souter thought it “not wholly surprising that the *Hans* Court found a way to avoid the certainty of the State’s contempt”<sup>208</sup> by offering a broad interpretation of the Eleventh Amendment, but he maintained that even if “history explains” *Hans*, it “does not honor[ ] *Hans*.”<sup>209</sup> He implied, though he did not state explicitly, that these circumstances bore on the proper approach to and analysis of *Hans* by the Supreme Court in a case in which *Hans* was cited as a potentially controlling precedent.<sup>210</sup>

### K. *Changed Historical Circumstances*

In a variety of contexts, the outcome of constitutional controversies hinges on substantially historical inquiries into whether circumstances have changed materially since the time of a prior legal event. As I have noted already, such inquiries feature centrally in decisions concerning whether *stare decisis* governs.<sup>211</sup> In another set of cases, the question involves the possibility that historically changed understandings have undermined the assumptions on which earlier interpretations of federal statutes or even the Constitution rested.

Within the universe of constitutional cases, *Brown v. Board of Education*<sup>212</sup> unquestionably provides the most famous example. In holding public school segregation inherently unconstitutional under the Equal Protection Clause despite prior rulings applying the “separate but equal doctrine,” Chief Justice Warren’s unanimous opinion cited both changes in the significance of public education and advances in psychological knowledge.

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207 See *Seminole Tribe*, 517 U.S. at 121 (Souter, J., dissenting).

208 *Id.*

209 *Id.* at 122.

210 See *id.* (“The ultimate demerit of the case centers, however, not on its politics but on the legal errors on which it rested.”). A number of commentators have also sought to undermine the precedential authority of Supreme Court decisions by pointing out unsavory circumstances surrounding their rendition. See, e.g., ROBERT M. COVER, JUSTICE ACCUSED 166 n.\* (1975) (questioning “whether the modern lawyer and scholar must forsake all the slavery cases as too infused with a substantive issue to be of any use in understanding our federal system” in the context of a discussion of *Prigg v. Pennsylvania*, 41 U.S. (16 Pet.) 539 (1842)); Edward A. Purcell, Jr., *Understanding* *Curtiss-Wright*, 31 LAW & HIST. REV. 653, 713–15 (2013) (suggesting that a “doubly troubling precedent” should receive little to no precedential weight due to the circumstances surrounding its decision).

211 See *supra* notes 183–87 and accompanying text.

212 347 U.S. 483 (1954).

With the details of *Brown's* analysis remaining controversial,<sup>213</sup> a case at the heart of the federal courts curriculum, *Erie Railroad Co. v. Tompkins*,<sup>214</sup> may illustrate even more convincingly that courts sometimes cannot ignore changed legal and factual understandings in interpreting federal statutes and the Constitution. Virtually from the time of the Founding, the Federal Rules of Decision Act has provided that “[t]he laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply.”<sup>215</sup> In an 1842 decision in *Swift v. Tyson*,<sup>216</sup> the Supreme Court held that the phrase “the laws of the several states” did not comprise at least some state court decisions interpreting and applying “general principles of commercial law.”<sup>217</sup> In so holding in *Swift*, and in subsequent cases that built on it, the Court apparently assumed that there existed a body of “general” common law, reflecting custom and reason, that was not necessarily and distinctively the law of any particular state or jurisdiction.<sup>218</sup> Where general law applied, the odd practical consequence, at least from a modern perspective, was that state court interpretations did not bind federal courts under the Rules of Decision Act, nor did federal judicial interpretations bind state courts under the Supremacy Clause.<sup>219</sup>

By the middle of the twentieth century, the view that there existed a body of “general” common law that was neither federal law nor state law, and that neither federal nor state courts could interpret with ultimate authority, appeared to many if not most jurists to have grown untenable.<sup>220</sup> A question then arose about the continuing supportability of the doctrine that had developed on the foundation of *Swift v. Tyson*. In *Erie*, the Supreme Court repudiated its prior interpretation of the Rules of Decision Act and held that state common law rulings constitute “state law” binding on the federal courts in common law diversity actions unless a federal rule of decision applies.<sup>221</sup>

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213 See generally WHAT *BROWN V. BOARD OF EDUCATION* SHOULD HAVE SAID (Jack M. Balkin ed., 2001) (collecting suggestions for improvements in *Brown's* legal analysis); Mark G. Yudof, *School Desegregation: Legal Realism, Reasoned Elaboration, and Social Science Research in the Supreme Court*, 42 LAW & CONTEMP. PROBS. 57, 70 (1978) (“Virtually everyone who has examined the question now agrees that the Court erred [in its reliance on the specific social science data in question]. The proffered evidence was methodologically unsound.”).

214 304 U.S. 64 (1938).

215 28 U.S.C. § 1652 (2012).

216 41 U.S. (16 Pet.) 1 (1842).

217 *Id.* at 18, 22.

218 For a brief survey of surrounding history and relevant literature, including subsequent extensions of *Swift*, see HART & WECHSLER, *supra* note 67, at 553–58.

219 See *id.*

220 Perhaps the most influential attack came in *Black & White Taxicab & Transfer Co. v. Brown & Yellow Taxicab & Transfer Co.*, 276 U.S. 518, 533 (1928) (Holmes, J., dissenting) (attacking the assumption that there is “a transcendental body of law outside of any particular State but obligatory within it [upon federal courts] unless and until changed by statute”).

221 See *Erie Railroad Co. v. Tompkins*, 304 U.S. 64, 78 (1938).

The Alien Tort Statute (ATS),<sup>222</sup> which has survived without amendment since 1789, presents modern courts with an analogous interpretive conundrum. The ATS confers federal court jurisdiction in “civil action[s] by an alien for a tort only, committed in violation of the law of nations.”<sup>223</sup> In the words of one commentator, it “was enacted . . . as a national security statute” to afford remedies to British merchants, creditors, and others for injuries “for which the United States bore responsibility under contemporaneous international law.”<sup>224</sup> In *Sosa v. Alvarez-Machain*,<sup>225</sup> in which a modern plaintiff sought to rely on the ATS to recover for international human rights violations occurring outside the United States, the Supreme Court agreed unanimously that the ATS was jurisdictional only; it neither created a cause of action nor conferred an independent authority on federal courts “to mold substantive law.”<sup>226</sup> Yet the ATS clearly presupposed not only the existence of “the law of nations,” but also the availability of some source of law—which may have been “general” law—authorizing tort actions in cases involving breaches of the law of nations. So reasoning, Justice Souter’s opinion for the Court held that federal courts could entertain suits under the ATS for torts that would have been actionable under the ATS at the time of the ATS’s enactment.<sup>227</sup> Over the protest of Justice Scalia, joined by Chief Justice Rehnquist and Justice Thomas,<sup>228</sup> Justice Souter also held that no development subsequent to 1789 had “categorically precluded federal courts from recognizing a claim under the law of nations as an element of [judge-made federal] common law.”<sup>229</sup>

Further perplexities and disputes surrounding modern doctrines involving federal common law may similarly fall within the category of cases in which judges must take account of changed historical circumstances in order to resolve cases with constitutional dimensions. As acknowledged in *Sosa*, and contrary to many a law student’s misimpression, *Erie* did not abolish the category of federal common law, but only of federal *general* common law.<sup>230</sup> Today there are important enclaves of federal common law, but it is real federal law, binding on state courts under the Supremacy Clause as much as on federal courts.<sup>231</sup> Given changed historical understandings, the Supreme

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222 28 U.S.C. § 1350 (2012).

223 *Id.*

224 Thomas H. Lee, *The Three Lives of the Alien Tort Statute: The Evolving Role of the Judiciary in U.S. Foreign Relations*, 89 NOTRE DAME L. REV. 1645, 1646 (2014).

225 542 U.S. 692 (2004).

226 *Id.* at 713.

227 *See id.* at 729–32.

228 *See id.* at 739 (Scalia, J., concurring in part and concurring in the judgment).

229 *Id.* at 725 (majority opinion). A subsequent decision in *Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659, 1669 (2013), limited the reach of the ATS by reading it in light of a presumption that statutes lack extraterritorial application.

230 *See generally* HART & WECHSLER, *supra* note 67, at 607–742 (discussing federal common law).

231 *See id.* at 616–17 (citing Henry J. Friendly, *In Praise of Erie—And of the New Federal Common Law*, 39 N.Y.U. L. REV. 383, 405, 421–22 (1964)).

Court now must wrestle with a number of issues involving the current status of pre-*Erie* cases that crafted or relied on “general” common law rules of decision in a universe in which a modern federal common law rule of decision would preempt state law and bind state courts under the Supremacy Clause. The lively debates over whether, and if so when and why, customary international law forms a part of the federal common law of the United States turn largely on issues of this nature.<sup>232</sup>

*L. Historical Trend Lines Bearing on Intra-Temporal Coherence*

I referred earlier to the pertinence of Founding-era legal culture in determining how constitutional and statutory language should be read and how judges should decide cases.<sup>233</sup> But understandings of the appropriate judicial role, and surrounding conceptions of proper interpretive methodology, change over time. When the trend line exhibits disparities between the jurisprudential or methodological assumptions exhibited in past judicial decisions and those that have more recently gained approval, questions emerge about whether norms of current practice can justify the revision of prior precedents that have not otherwise proved unworkable. Resolving these questions requires a mix of historical and normative analysis.

A recent example of doctrinal reform to reflect changed understandings of appropriate constraints on judicial decisionmaking involves “prudential” standing doctrine. As formulated by the Supreme Court in cases decided during the twentieth and early twenty-first centuries, the doctrine of standing involves proper parties to litigate legal issues in federal court.<sup>234</sup> Emphasizing standing’s roots in the separation of powers, a number of past decisions insisted that standing has a prudential as well as a constitutional component.<sup>235</sup> As the Supreme Court pointed out in *Lexmark International, Inc. v. Static Control Components, Inc.*,<sup>236</sup> however, the notion that the federal courts could make prudential decisions not to decide cases within their statutory jurisdiction coheres badly with repeated affirmations in other contexts that the federal courts have a virtually unflagging obligation to exercise all of the jurisdiction that the Constitution and laws of the United States confer on them.<sup>237</sup> In light of that historically sharpening disparity,<sup>238</sup> *Lexmark* not

232 For overviews of the issues and a survey of the literature, see HART & WECHSLER, *supra* note 67, at 675–85; Ernest A. Young, *Sorting Out the Debate over Customary International Law*, 42 VA. J. INT’L L. 365 (2002).

233 See *supra* Section I.B.

234 See, e.g., *Flast v. Cohen*, 392 U.S. 83, 95 (1968) (“[N]o justiciable controversy is presented . . . when there is no standing to maintain the action.”).

235 See, e.g., *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 11–13 (2004); *Warth v. Seldin*, 422 U.S. 490, 499–500 (1975).

236 134 S. Ct. 1377 (2014).

237 See *id.* at 1386 (identifying “tension” between prudential standing doctrine and the principle affirmed in *Sprint Communications, Inc. v. Jacobs* “that a federal court’s obligation to hear and decide cases within its jurisdiction is virtually unflagging” (quoting *Sprint Commc’ns, Inc. v. Jacobs*, 134 S. Ct. 584, 591 (2013)) (internal quotation marks omitted)).

only trimmed one branch of prudential standing doctrine, but also intimated that further retrenchment may lie ahead.<sup>239</sup> More generally, I think it fair to say that the Court's unanimous decision in *Lexmark* reflects an uncontroversial assumption that recent history and precedent, including precedent involving appropriate interpretive methodologies, sometimes requires a rethinking—which necessarily blends historical with normative considerations—of previously settled doctrines.

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The point of the foregoing summary is fivefold. First, historical inquiry and analysis are pervasive in constitutional law, as demonstrated by a number of cases and issues—most of which have not been thought to raise any large question of methodological principle—at the center of the federal courts canon. Second, the types of historical inquiry and analysis that bear on constitutional adjudication are highly diverse, by no means limited to questions about the original understanding or original public meaning of constitutional language. Third, the original public meaning as it features in constitutional analysis is frequently indeterminate in its application to particular cases. As a result, conclusions about the proper application of law to resolve particular issues often cannot rest directly on any historically discernible fact—for the discernible facts stop short of establishing the necessary conclusion—but instead must reflect judgments about how uncertainty or disagreement would best have been resolved in the historical past, in a sense of “best” that cannot be wholly value-free. Fourth, in cases of conflict between the decisions that judges otherwise would render in light of evidence of the original public meaning and other historically grounded considerations (such as, for example, liquidated meaning, historical gloss, tradition, or *stare decisis*), the judicial view of the most reasonable application of the original public meaning does not always prevail. Instead, the Justices make judgments that

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238 As emphasized by Martin H. Redish, *Abstention, Separation of Powers, and the Limits of the Judicial Function*, 94 *YALE L.J.* 71, 72 (1984), abstention doctrine had always been at odds with the resounding dictum of Chief Justice John Marshall in *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 404 (1821), that “[w]e have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given.” But subsequent practice deviated considerably from the *Cohens* dictum. See David L. Shapiro, *Jurisdiction and Discretion*, 60 *N.Y.U. L. Rev.* 543, 543–45, 574–75 (1985) (maintaining that “suggestions of an overriding obligation, subject only and at most to a few narrowly drawn exceptions, are far too grudging in their recognition of judicial discretion in matters of jurisdiction” and that judicial discretion to decline to exercise jurisdiction “has ancient and honorable roots at common law as well as in equity”). In the last several decades, the Court has expressed increasing skepticism in varied circumstances of claims of judicial authority to decline to exercise jurisdiction that Congress has conferred. See *Sprint Commc'ns*, 134 S. Ct. at 591 (emphasizing the “virtually unflagging” obligation of federal courts to exercise the jurisdiction that Congress has given them (citing *Colo. River Water Conservation Dist. v. United States*, 424 U.S. 800, 817 (1976))); *Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706, 716 (1996) (same).

239 See *Lexmark*, 134 S. Ct. at 1387–88 & n.4.

blend historical with normative considerations. Fifth, even in cases in which judges and Justices perceive a conflict between the original meaning of constitutional language and some other history-based consideration, few if any Justices of the Supreme Court have consistently maintained that the original meaning—the identification of which may itself require normative judgments—should always determine judicial outcomes.<sup>240</sup>

## II. PRELIMINARY EXPLANATIONS

Before inquiring whether most or all of the historical phenomena that matter in constitutional adjudication ought to matter, it will be useful to explore how and why the current state of affairs has developed. Because the leading causal factors emerge so nearly self-evidently from the Part I's catalogue of types of historically rooted reasoning, I shall be very brief.

### A. *The Fixation Thesis*

In thinking about how a diverse set of historical phenomena can bear on constitutional analysis, we can best begin with “the fixation thesis” that, according to Professor Lawrence Solum, represents the central tenet of originalist constitutional theory: events involved in the drafting and ratification of a constitutional provision determine its meaning.<sup>241</sup> Although Solum advances the fixation thesis as a pillar of constitutional originalism, either a weak version of that thesis or a weaker analogue thereto defines a consensus starting point among constitutional analysts. With rare exceptions, all agree that the Framers’ intent, the original public understanding, or the original public meaning of constitutional language (to the extent that it can be ascertained) at least provisionally fixes constitutional meaning and that it also continues to fix constitutional meaning into the distant future, absent some significant consideration dictating a different conclusion.<sup>242</sup> The two main disagreements involve the determinacy with which historical evidence can establish an original meaning in some cases<sup>243</sup> and the questions of whether and when a “fixed” meaning might become unfixed as a result of stare decisis, historical gloss, traditional practice, or changed historical circumstances. But it is important to recognize common ground. If, for example, a dispute arose about the meaning of a constitutional amendment that had been ratified a year earlier, the notion that courts could reject the original understanding or original public meaning and decide on the basis of some other consideration would seem preposterous.

240 See, e.g., Fallon, *supra* note 184, at 1129–31 & nn.83–84.

241 See Solum, *supra* note 1, at 459; Lawrence B. Solum, *We Are All Originalists Now*, in ROBERT W. BENNETT & LAWRENCE B. SOLUM, *CONSTITUTIONAL ORIGINALISM* 1, 36–63 (2011).

242 See *supra* note 2 and accompanying text.

243 On disagreements among originalists with respect to this question, see *supra* notes 81–89 and accompanying text.

Accordingly, all of the forms of historical evidence that bear on the original intent, original understanding, or original public meaning possess relevance to at least some interpreters. Given what I have just said about a virtual consensus acknowledging the relevance of Founding-era history, here I refer more qualifiedly to “at least some interpreters” because, as Part I emphasized, the original intent, original understanding, and original public meaning represent different objects of historical inquiry.<sup>244</sup> Even among originalists, debate surrounds the question of their relative pertinence. Strikingly, moreover, some participants in constitutional debate may have no consistent, settled view on the question of exactly which kinds of historical facts—for example, those bearing on the Framers’ intent or purposes, or those evidencing public understandings—determine constitutional provisions’ original meanings. Whether self-consciously or not, some interpreters, perhaps because they recognize the importance of continuity with the Founding era but lack a settled view of exactly how that continuity should be maintained, may make decisions on a case-by-case basis, sometimes emphasizing the original understanding, sometimes original intentions, sometime original purposes, and so forth. As Part I may have intimated and as I shall explain more fully below, I do not regard eclecticism of this kind as necessarily mistaken.

### B. *Vague, Indeterminate, or Contestable Original Meaning*

Despite reasonable disagreement about the proper focus of original historical inquiry, I now want to bracket the points of dispute insofar as possible and emphasize more generally that historical facts alone will frequently fail to prove the existence of an original intent, original understanding, or original public meaning that is sufficiently clear and determinate to resolve modern controversies. On this point I adopt an admittedly controversial view, but one that should attract broad (even if not unanimous) agreement. Several routes lead to the same conclusion. One involves embrace of a distinction that many originalists endorse between constitutional meaning, which is often vague, and the judicial constructions or implementing doctrines that courts must develop to reach determinate results in disputed cases.<sup>245</sup> Another acknowledges the possibility of reasonable disagreement about original meaning but allows for the exercise of normatively guided judgment in ascertaining which of the contending candidates is most reasonable or best supported and thus is correct. Further, in an implicit recognition that historical indeterminacy is ineradicable, nearly everyone agrees that there are at least some circumstances in which practice and judicial precedent can—in Madison’s word—“liquidate” the meaning of otherwise unclear constitu-

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244 See *supra* Part I.

245 See *supra* notes 81–84 and accompanying text. I previously defended such a distinction, which I characterized as one between constitutional meaning and the doctrines through which the Constitution’s meanings implemented, in RICHARD H. FALLON, JR., IMPLEMENTING THE CONSTITUTION 5–7 (2001).

tional language,<sup>246</sup> and that there are other circumstances in which practice that postdates the Founding era can put a gloss on vague language or in which tradition can guide its proper interpretation. The absence of a determinate original meaning that is ascertainable as a pure matter of historical fact also helps to define the challenge of what Part I labeled as “synthesis”: How would a reasonable or wise or prudent interpreter understand a newly enacted or ratified provision as having altered the preexisting legal landscape, as that provision was surely intended to do, but without necessarily having wiped the slate clean in a way that would entail adverse, probably unforeseen consequences?<sup>247</sup>

My references to vague or indeterminate original meanings of course beg a central question: If vagueness, indeterminacy, and ambiguity come in degrees—as I assume that they do—how much suffices to license consideration of post-Founding history, including longstanding practice and judicial precedent, as potential grounds for judicial decision?<sup>248</sup> Though emphasizing common ground, I do not wish to obscure important sources of disagreement.

### C. *Doubts About Meanings Provisionally Liquidated Through Practice and Precedent*

Assume that a provision becomes part of the Constitution at Time 1 (T1). Practice or judicial precedent liquidates or “precisifi[es]”<sup>249</sup> the relevant language at Time 2 (T2). A controversy about the application of the provision then erupts at Time 3 (T3). In debates about precedent-based constitutional adjudication, the most obvious and heated question involves whether a T2 interpretation or construction that ignored, rejected, or misunderstood the actual T1 meaning should control a later dispute, notwithstanding its originally mistaken character. I shall come to that issue below. For the moment, in explicating how and why a variety of kinds of historical inquiry play roles in constitutional adjudication, I want to focus on two more mundane issues. Both can arise even on the assumptions that the original constitutional meaning was and remains vague or disputable and that the precedent most centrally in issue does not flatly contravene the vague original meaning.

First, the historical meaning of a constitutional precedent established at T2 may itself be in issue (as distinguished from the T1 meaning of the under-

246 THE FEDERALIST NO. 37, at 197–98 (James Madison) (Clinton Rossiter ed., 1999); see, e.g., Barnett, *supra* note 91, at 645–46.

247 See *supra* Section I.H (discussing “synthesis”).

248 See Richard H. Fallon, Jr., *Appraising the Significance of the Subjects and Objects of the Constitution: A Case Study in Textual and Historical Revisionism*, 16 U. PA. J. CONST. L. 453, 474–77 (2013) (discussing the degree of certainty required for judicial decision as to the original meanings of constitutional language).

249 See Soames, *supra* note 36, at 604–05 (describing the need for “precisification” when “the asserted or stipulative content of a legal provision is vague, and facts crucial to the resolution of the case fall within the range of this vagueness”).

lying constitutional provision). Above I discussed the debate that has recently erupted concerning how judges and lawyers understood the ruling in *Ex parte Young* at the time of its decision. In this context, nonoriginalist history obviously matters.<sup>250</sup> The content of purportedly longstanding practices and traditions can also provoke historical debate and interpretive disagreement, even on the assumption that historical gloss is permissible or that traditional practice can possess authoritative weight.<sup>251</sup>

Second, past decisions that otherwise would have counted as permissible interpretations or liquidations of either the Constitution's or a statute's original meaning may become contestable because of subsequent historical developments. As Part I explained, *Swift v. Tyson*, which appears to have assumed the existence of a body of general law that is neither federal law binding on state courts under the Supremacy Clause nor state law binding on the federal courts under the Rules of Decision Act, may exemplify the challenge presented by past decisions founded on faulty jurisprudential assumptions.<sup>252</sup> Claims that past decisions rested on erroneous methodological premises involve similarly historical judgments about those precedents' foundations.

#### D. Conflicts Between Precedent and Original Meaning

Above I noted that the most contentious question arising within the doctrine of constitutional precedent is when, if ever, courts should adhere to an originally erroneous judicial decision—or, analogously, to an originally erroneous liquidation or historical gloss—to reach an outcome contrary to that indicated by the Constitution's original understanding or original public meaning. But I know of no Justice of the Supreme Court, including those presently serving, who has held consistently to the view that subsequent historical developments can never displace the authority of original constitutional meaning.<sup>253</sup> The self-identified originalist Justices Antonin Scalia and Clarence Thomas exemplify the historical pattern. Justice Scalia defends judicial practice in sometimes adhering to initially mistaken precedents as an “exception” to his otherwise originalist philosophy.<sup>254</sup> Justice Thomas, too, has joined opinions that would be difficult or impossible to support on originalist grounds.<sup>255</sup> Qualified acceptance of the authority of nonoriginal-

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250 See *supra* notes 188–98 and accompanying text.

251 See *supra* note 146.

252 41 U.S. (16 Pet.) 1 (1842).

253 See Fallon, *supra* note 184, at 1129–31 & nn.83–84.

254 See, e.g., SCALIA & GARNER, *supra* note 5, at 411–13.

255 For example, in *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992), Justice Thomas joined an opinion by Justice Scalia that relied on prior Court decisions to support its holding that the Takings Clause restricts “regulatory as well as physical deprivations” of property, despite historical evidence that the Clause was not originally so understood. *Id.* at 1028 n.15. Justice Thomas also joined an opinion in *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 213–31 (1995), that relied on precedent to subject federal affirmative action programs to strict judicial scrutiny, notwithstanding often voiced arguments that the con-

ist precedent expands, rather than contracts, the range of historical considerations pertinent to constitutional adjudication. Anyone who believes that *stare decisis* can ever trump original meanings will sometimes have reason to inquire into historical phenomena that respectively bear on the T1 meanings of constitutional provisions, on the T2 meanings of T2 precedents, and on the criteria for overruling precedents in order to return to T1 understandings.

In my view, for reasons that I shall discuss more in Part III, historical practice in acknowledging that precedential meanings can sometimes displace what otherwise would be identified as original meanings possesses enormous legal significance. Most obviously, if treated as authoritative, historical practice would explain judges' and Justices' consistent attention to nonoriginalist historical considerations even when those considerations point to results that diverge from the Constitution's original meaning. For the moment, however, I am content to note that disagreement exists on this point—though I want to recall, in doing so, that a question of parallel importance has also been left hanging: How much indeterminacy, vagueness, or ambiguity concerning original meaning is enough to justify reliance on nonoriginalist history as a permissible liquidation of or gloss on original meaning?<sup>256</sup>

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From my account of why even those judges and Justices who accept some version of the fixation thesis nevertheless accord significance to a broad range of historically based considerations, it is possible to draw some general, even if partially speculative, conclusions.

First, T1 meaning is frequently an object of both conceptual and evidentiary dispute. Conceptually, there are disagreements and uncertainty about whether to equate original meaning with the Framers' intentions or purposes, historically understood meanings, or public meanings as understood by hypothesized "reasonable" people who might have disagreed with some or even many of their historically actual contemporaries. With respect to evidence, disagreement about constitutional meaning or application was an easily provable historical phenomenon with respect to many points.

Second, the contestability and vagueness of T1 meaning naturally and almost inevitably give pertinence to a number of historical factors either in ascribing T1 meaning or in developing doctrines to implement it, regardless of whether one associates it with the Framers' intent, the original understanding, or the original public meaning of constitutional language.

Third, the need to liquidate, specify, or precisify vague or disputed original meaning introduces a still further number of historically grounded con-

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stitutional provision on which the decision was based, the Due Process Clause of the Fifth Amendment, was not originally understood to bar racially discriminatory legislation.

<sup>256</sup> See *supra* notes 119–23 (discussing disagreement among the Justices in *Noel Canning*).

siderations—sometimes put under the headings of historical gloss or historical tradition—into efforts to ascribe constitutional meaning at T3 and thereafter, following the exercise of judgment and possible commission of error in ascribing meaning at T2.

Fourth, throughout the process of assigning relative significances to sometimes competing historical considerations, judges and Justices experience pervasive pressures to make historically grounded judgments that produce practically sensible, workable, and just outcomes. Perhaps the most potent testimony to this conclusion emerges from the sometimes grudging but apparently unanimous acknowledgment of every Justice ever to have served on the Supreme Court that erroneous judicial precedent should sometimes prevail over what they otherwise would have adjudged to be the Constitution's original meaning.<sup>257</sup> The pressure to adhere to precedent reaches its zenith in cases in which its rejection would have morally or practically adverse consequences that would likely trigger widespread public outrage.<sup>258</sup>

Fifth, notwithstanding the diversity of potentially relevant historical considerations, judges and Justices pervasively understand their role as one of resolving current controversies based on past, authoritative decisions by others, including the Constitution's authors and ratifiers, officials who have helped to liquidate or gloss vague constitutional provisions, and the courts. The "dead hand of the past"<sup>259</sup> is not an enemy of sound current adjudication but an almost universally acknowledged constituent thereof. In so recognizing, moreover, we would do well to revise the metaphor. The varieties of historical consideration that matter to constitutional law function less as a single hand, whether dead or living, than as a multitude of hands that have contributed to and continue to shape our current constitutional law. None of these hands is easily discarded. In the much quoted words of Justice Holmes, insofar as law is concerned, "continuity with the past is not a duty, it is only a necessity."<sup>260</sup>

We cannot, however, cease our investigations with this celebration of Holmes's enduring insight. To the contrary, Holmes's epigram frames, rather than resolves, the issues with which participants in constitutional debate frequently must struggle, involving which elements of the past furnish the most relevant touchstones for particular decisions.

### III. A JURISPRUDENTIAL PERSPECTIVE ON THE VARIETIES OF LEGALLY PERTINENT HISTORY

The summary points with which I respectively concluded Parts I and II are mostly empirical or analytical, not unequivocally normative, but in my

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257 See *supra* note 253 and accompanying text.

258 See Fallon, *supra* note 184, at 1118–46.

259 See Horwitz, *supra* note 9, at 471.

260 See OLIVER WENDELL HOLMES, *Learning and Science*, in COLLECTED LEGAL PAPERS 138, 139 (1920).

view they have normative implications, including these: (1) it is legally permissible for judges to place weight on multiple kinds of historical phenomena in deciding constitutional cases; (2) indeed, judges may sometimes have an obligation to do so; (3) the original understanding or best original interpretation of the meaning of constitutional language should not always control the outcome of constitutional litigation; and (4) in identifying legally pertinent history and in determining which elements of it should dictate the outcome in particular cases, judges necessarily and appropriately blend historical with normative analysis.

The route to these conclusions requires a short journey into the domain of analytical jurisprudence, to explain how current and historical judicial practice support claims about legally authorized judicial action and judicial obligation. Because I have covered the relevant terrain in previous writing,<sup>261</sup> I shall move swiftly here.

#### A. *The Fallacy of “The Command Theory”*

I said above that either some version of the fixation thesis—which holds that the Constitution’s meaning is fixed, at least initially, at the time of its ratification<sup>262</sup>—or a weaker analogue is almost indisputably true. In referring to a weaker analogue, I meant to leave open the possibility that the Constitution’s meaning might change at T2 or T3 under some, so far unspecified, circumstances. In this Part, the question involves the foundational questions that one must answer in order to determine whether either the fixation thesis or the analogue that I have posited as an alternative is true or false. What makes it the case that the Constitution’s meaning is either unchangeable or changeable? Practical as well as theoretical consequences may hinge on the answer.

One possible answer to questions about whether the Constitution’s meaning can change under any circumstances, and how we can know whether change is possible, would echo a jurisprudential theory known as “the command theory.”<sup>263</sup> According to the command theory, law represents the command of the sovereign; reciprocally, the commands of the sovereign constitute law.<sup>264</sup> Applied to the Constitution, this theory would identify what the Constitution calls “We the People” as the sovereign lawgiver and postulate that “We the People” directed that the Constitution should stand as the supreme law of the United States unless and until amended in the manner specified by Article V.<sup>265</sup>

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261 See Fallon, *supra* note 184, at 1148–50 (discussing “superprecedents”).

262 See *supra* note 241 and accompanying text.

263 See, e.g., JOHN AUSTIN, *THE PROVINCE OF JURISPRUDENCE DETERMINED* (1832), reprinted in JOHN AUSTIN, *THE PROVINCE OF JURISPRUDENCE DETERMINED AND THE USES OF THE STUDY OF JURISPRUDENCE* xxv, 13–14 (Isaiah Berlin et al. eds., 1954) (1832) (postulating that the “commands” of the sovereign constitute the law).

264 See *id.* at 13–14.

265 See STRAUSS, *supra* note 11, at 36–37 (explicating the application of the command theory).

If the command theory were correct, it would provide strong support for—and perhaps dictate—the maximally robust version of the fixation thesis that I have referred to as exclusive originalism: the Constitution’s meaning was fixed definitively by what “We the People” meant at T1, or by what reasonable people at T1 took it to mean, regardless of anything that may have happened at T2, and T1 meaning (as appropriately identified) therefore holds legal precedence over any other consideration at T3.<sup>266</sup> Difficulties in applying the command theory of course might arise. Disagreements could persist about how to determine what the Framers intended or about what the original public meaning was. Nonetheless, efforts to resolve disagreement would need to accord with the command theory’s fundamental tenets.

It would serve no good purpose, however, to attempt to work out the details of an exclusive originalist position that would satisfy the command theory. As recognized by nearly all participants in modern jurisprudential debate—including positivists, natural lawyers, and those who try to straddle the positivist/natural law divide—the command theory is bankrupt.<sup>267</sup> Although superficially appealing to some, the command theory’s explanation of why the Constitution is law today almost precisely reverses the order of pertinent considerations. The Constitution does not enjoy the status of law because the Framers commanded that we should obey it. At earlier times, King George and the British Parliament and then the Articles of Confederation asserted analogous claims to obedience, but no one today regards their commands as valid law in the United States. Rather, if we ask why or in virtue of what the Constitution is the supreme law of the United States, the short answer is that it enjoys that status because it is accepted as the supreme law—not because the Founding generation commanded future generations to obey it, nor because the processes of its adoption established continuing obligations of obedience to it.<sup>268</sup>

The significance of recognizing that the foundations of American constitutional law lie in current acceptance of the Constitution as authoritative emerges when we press the questions of who has accepted what and of what besides the written Constitution might also enjoy lawful status as a result of acceptance. Upon analysis, it will turn out that just as acceptance confers the status of supreme law upon the written Constitution of the United States,

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266 See McConnell, *supra* note 9, at 1132 (locating “the theoretical foundation of originalism” in the premise that “[a]ll power stems from the sovereign people, and the authority of the Constitution comes from their act of sovereign will in creating it,” and reasoning that “[i]t follows that the Constitution should be interpreted in accordance with their understanding”).

267 Perhaps because the command theory is a positivist theory, which seeks to identify law and explicate its nature by reference to social facts rather than moral criteria, the canonical critique is that offered by the leading modern positivist, H.L.A. Hart. See H.L.A. HART, *THE CONCEPT OF LAW* 18–78 (Peter Cane et al. eds., 2d ed. 1994); *id.* at 79–80 (providing a concise summary of the critique).

268 See Fallon, *supra* note 184, at 1126 (attributing the theoretical foundations of this insight to HART, *supra* note 267).

acceptance also underwrites the authority of the interpretive assumptions and practices that make the Constitution meaningful and it give it life.<sup>269</sup>

### B. A Practice-Based Theory of Law

With the Constitution's status as the supreme law depending on acceptance, the best jurisprudential theory will be a practice-based theory, in the sense of "practice" in which philosophers sometimes use that term.<sup>270</sup> So employed, it refers to activities that are constituted by the convergent or overlapping understandings, expectations, and intentions of multiple participants.<sup>271</sup> In the most widely embraced practice theory of law, Professor H.L.A. Hart referred to the criteria that officials and especially judges apply in identifying what the law is and means as "rules of recognition" that he suggested could be traced to a master "rule of recognition."<sup>272</sup> Hart's reliance on the concept of a rule of recognition was misleading.<sup>273</sup> As he later made explicit, he did not mean to imply that judges and legal officials who practiced or applied rules of recognition could necessarily state the rule or rules to which they conformed.<sup>274</sup> Rather, Hart used the term "rule" in the sense explicated by the philosopher Ludwig Wittgenstein,<sup>275</sup> who—on a non-skeptical interpretation—identified the ability to follow a rule with the shared, often tacit, understandings of most or all participants in collective activities concerning how to "go on" in ways that others will acknowledge as appropriate or correct.<sup>276</sup> In a formulation that Hart embraced, "the test of whether a man's actions are the application of a rule is not whether he can

269 See Kent Greenawalt, *The Rule of Recognition and the Constitution*, 85 MICH. L. REV. 621, 654 (1987) (asserting that "the force of precedent . . . is an aspect of our law because of acceptance"); Steven D. Smith, *Stare Decisis in a Classical and Constitutional Setting: A Comment on the Symposium*, 5 AVE MARIA L. REV. 153, 168 (2007) (observing that "it would seem that stare decisis is legally secured on the same basis as the Constitution itself").

270 See, e.g., Fallon, *supra* note 184, at 1118.

271 *Id.*; see Michael Sean Quinn, *Practice-Defining Rules*, 86 ETHICS 76, 76 (1975). For other influential discussions of the concept of a practice, see ALASDAIR MACINTYRE, *AFTER VIRTUE: A STUDY IN MORAL THEORY* 187–88 (2d ed. 1984); Thomas Morawetz, *The Rules of Law and the Point of Law*, 121 U. PA. L. REV. 859, 859–60 (1973); John Rawls, *Two Concepts of Rules*, 64 PHIL. REV. 3, 3–4 (1955).

272 See HART, *supra* note 267, at 94–95, 100–10.

273 See Fallon, *supra* note 184, at 1127.

274 See HART, *supra* note 267, at 101 ("In a modern legal system where there are a variety of 'sources' of law, the rule of recognition is correspondingly more complex: the criteria for identifying the law are multiple and commonly include a written constitution, enactment by a legislature, and judicial precedents.").

275 See LUDWIG WITTGENSTEIN, *PHILOSOPHICAL INVESTIGATIONS* (G.E.M. Anscombe trans., 1953). For explorations of Wittgenstein's views about the nature of rule-following, see WITTGENSTEIN: TO FOLLOW A RULE (Steven H. Holtzman & Christopher M. Leich eds., 1981).

276 See JULES L. COLEMAN, *THE PRACTICE OF PRINCIPLE* 81 (2001).

formulate it but whether it makes sense to distinguish between a right and a wrong way of doing things in connection with what he does.”<sup>277</sup>

I would add as a further qualification that many of the “rules” of American legal practice, which are frequently tacit rather than canonically inscribed, are vague or indeterminate in some applications. Interpretive disagreement is commonplace, as every lawyer knows. In cases of disagreement, a practice-based jurisprudential theory helps to elucidate the core of agreement from which disagreement emerges, without necessarily resolving or even aspiring to resolve it.

### C. *The Varieties of History Pertinent to Constitutional and Legal Interpretation*

Within a practice-based theory of law, the widespread, openly acknowledged behavior of judges and Justices in taking account of a multiplicity of historically rooted factors—and in not always affording lexical priority to original meanings of legal enactments, as best they could be identified without reference to subsequent historical phenomena—helps to support an argument that their practice in doing so, which frequently requires normatively inflected judgments, is legally authorized and sometimes required.<sup>278</sup> This is a deliberately cautious, preliminary statement of a position to which I shall shortly give a more robust formulation. For the moment, however, I need to proceed cautiously, due to the challenge posed by the phenomenon of interpretive and methodological disagreement in constitutional practice.

Although the Supreme Court frequently ascribes legal significance to a wide variety of historical phenomena, judicial opinions, as well as surrounding commentary, include strident debate about the permissibility of courts doing so. In particular, some Justices, echoed by more law professors, sometimes complain that courts have no legally legitimate authority to deviate from the Constitution’s T1 meaning, even when other historical considerations would indicate that they ought to do so.<sup>279</sup>

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277 See HART, *supra* note 267, at 289 (characterizing his view as “similar” to that—which is quoted in the text—of PETER WINCH, *THE IDEA OF A SOCIAL SCIENCE* 58 (R.F. Holland ed., 1958)). Although Hart put officials and especially judges at the center of his account of the rule or rules of recognition, see HART, *supra* note 267, at 256, the practice of judges and Justices of the Supreme Court needs to be seen as nested among, and sensitive to, the understandings and practices of nonjudicial officials—on whom the enforcement of judicial rulings may depend—and of the concerned public. See Fallon, *supra* note 184, at 1138–42. Judicial practices that deviated too far from public understandings of appropriate judicial behavior in identifying and applying the applicable law could not long survive in a political democracy in which judicial appointment occurs through politically accountable processes. See *id.* at 1140–42.

278 See Fallon, *supra* note 184, at 1129–31 (developing a similar argument with respect to the legal permissibility of precedent-based decisionmaking).

279 See, e.g., *Boumediene v. Bush*, 553 U.S. 723, 832–34 (2008) (Scalia, J., dissenting) (Scalia was joined in his dissent by Chief Justice Roberts and Justices Thomas and Alito.); Barnett, *supra* note 183, at 269–70; Lawson, *supra* note 183, at 29–30, 33; Paulsen, *Intrinsically Corrupting Influence*, *supra* note 183, at 291.

In considering how judges and concerned citizens should appraise arguments that a certain kind of historical consideration should be deemed irrelevant or insubstantial in a particular case, even though courts have taken account of it in the past, Ronald Dworkin's theory of legal interpretation as "constructive interpretation"—which correctly postulates that the foundations of law are inherently practice-based—furnishes a helpful framework.<sup>280</sup> According to Dworkin, theories of legal interpretation should be tested against the twin criteria of "fit" and normative attractiveness.<sup>281</sup> To be eligible for adoption, a legal theory must fit both legal authorities and widely accepted methodological practices reasonably well. But considerations of fit are not wholly independent of appraisals of moral desirability. Taking these two concerns simultaneously into account, judges, according to Dworkin, should adopt the interpretation that is normatively best.<sup>282</sup>

Dworkin's methodological recommendation seems to me to be roughly correct in its account of what American judges do and ought to do in cases in which no relatively determinate, widely practiced, tacit norm of adjudication dictates the relative significance of competing historical considerations.<sup>283</sup> In such cases, a judge has no choice but to exercise judgment, and the requisite judgment has an irreducibly normative dimension. To put the point differently, a judge who simply wants to follow the law in such cases confronts a body of law the interpretation of which requires normatively inflected judgment if it is to yield a determinate outcome to the case at hand; and a nearly universally accepted norm of practice establishes that judges must pronounce

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280 See RONALD DWORIN, *LAW'S EMPIRE* 52–73 (1986). Although Professor Dworkin, like Professor Hart, championed a practice-based theory of law, *see id.* at 45–53, his theory differed importantly from Professor Hart's, which Dworkin aspired to refute and displace. Despite the scope of Dworkin's ambition, many of his objections to Hart's theory resulted from a principal focus on different questions. See Richard H. Fallon, Jr., *Reflections on Dworkin and the Two Faces of Law*, 67 *NOTRE DAME L. REV.* 553, 557 (1992). Whereas Professor Hart was mostly concerned to explain the nature of a legal system, many of Professor Dworkin's central insights involved legal interpretation, especially in hard or otherwise contestable cases. *See id.* Indeed, as Hart recognized in a postscript to the second edition of his jurisprudential classic *The Concept of Law*, there is no ultimate inconsistency between his social-fact-based, "positivist" account of the nature of a legal system and a theory of adjudication, such as Dworkin's, that calls for judges to take normative considerations into account in determining what the law means or requires in hard cases. *See* HART, *supra* note 267, at 241 ("It is not obvious why there should be or indeed could be any significant conflict between enterprises so different as my own and Dworkin's conceptions of legal theory."). Accordingly, my embrace of Dworkin's theory that legal interpretation is a form of "constructive interpretation" does not imply a rejection of Hart's view—on which I relied earlier—that the foundations of law lie in social facts.

281 See HART, *supra* note 26, at 229–30, 254–58.

282 *See id.*; *see also* DWORIN, *supra* note 63, at 2–3 (explaining the possibility of identifying judicial liberals and conservatives as reflective of the irreducible element of moral judgment in legal interpretation).

283 See COLEMAN, *supra* note 276, at 100 (characterizing the rule of recognition in the United States as a conventional "framework for bargaining" that may frequently "involve moral or political arguments" about "how to go on").

determinate conclusions. It is simply not open to a judge to pronounce that neither of the parties to a case can prevail because no widely acknowledged interpretive norm clearly governs.

Embrace of a response to hard cases that requires judges to weigh considerations of normative attractiveness along with fit invites attack from two directions. According to one criticism, permitting judges to make normative judgments in determining which historically rooted considerations to take into account is objectionably subjective: judges with different values will reach different conclusions. As I have said, however, there is no evident alternative in cases of methodological disagreement. Absent determinative guidance from clear rules, judges, lawyers, and other participants in constitutional practice must decide for themselves what methodological approach they ought to use.

From another perspective, demands that judgments of appropriate interpretive methodology should “fit” existing practice are viciously circular and substantively misguided: the “fit” criterion effectively stipulates that the improper practice of past judges can license improper future practice.<sup>284</sup> This criticism rightly points out that any practice-based theory of law contains an irreducible element of circularity: what is accepted as law determines what the law is, either directly in cases of consensus or partly when otherwise disputable questions must be resolved based on a mix of fit with past practice and normative attractiveness. Though the circle cannot be broken entirely, a practice-based jurisprudential theory at least explains the necessary foundations of any functioning legal system in practices of acceptance.<sup>285</sup>

Once the criterion of “fit” is accepted, any theory that denies the occasional relevance to constitutional adjudication of a broad range of historical considerations, and disallows the need for normative judgment in determining how to weigh them in particular cases, fares extremely poorly. As Part I suggested, the norms that undergird current practice do not demand that conclusions regarding the original intent or original public meaning of constitutional or statutory language must invariably take priority over other historically grounded considerations. Settlement by practice or precedent often occurs. Changed understanding of the judicial role and its foundations can unsettle precedent. Synthesis often requires the blending of historically inflected concerns across historical eras.

Acknowledgment of the possibility and significance of shifting understandings of the judicial function introduces a further complexity. Among other things, it furnishes a reminder that tacit norms of practice can evolve, as I signaled above in discussing the pertinence of “historical trend lines bearing on intra-temporal coherence,” such as those that have prodded the Supreme Court’s recent reevaluation of decisions involving “prudential”

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284 Cf. *NLRB v. Noel Canning*, 134 S. Ct. 2550, 2592, 2605, 2614, 2617 (2014) (Scalia, J., concurring in the judgment) (criticizing an “adverse possession” approach to the separation of powers under which past constitutional usurpations are said to justify future deviations from original constitutional norms).

285 See Fallon, *supra* note 184, at 1131.

standing.<sup>286</sup> Sometimes discontinuities in widely shared conceptions of the judicial role may be sharp, as in the case of the jurisprudential revolution that vindicated the New Deal and surrounding conceptions of governmental power and authority.<sup>287</sup> Sometimes changes in judicial practice and the tacit norms that surround it may be more subtle and gradual, as reflected, for example, in the influence of public opinion on judges' and Justices' historically shifting sense of what is legally thinkable or unthinkable.<sup>288</sup> In recent decades, increasing reliance on originalist and textualist interpretive premises may reflect other alterations in prevailing, tacit understandings of the nature and limits of properly judicial authority.<sup>289</sup> Nevertheless, any theory that purported wholly to reject the authority of "the dead hand of the past" would fail the "fit" test even more grossly. At and after T2, judges, other public officials, and the public embrace the authority of the Constitution and of decisions implementing and interpreting it as largely—even if not entirely—definitive of the American legal system.

Arguing on normative grounds, proponents of exclusive originalism (and a paired, highly stringent version of "textualism" in statutory cases)<sup>290</sup> frequently emphasize the desirability of constraining judicial choice in ascribing legal meaning.<sup>291</sup> But the constraint that they offer is often more chimerical than real, especially when one recognizes, as Part I argued, that an original meaning of constitutional language that is sufficiently determinate to resolve concrete cases frequently cannot be identified as a matter of simple historical fact.<sup>292</sup> In cases of indeterminacy or dispute, judgments about the Constitution's meaning, construction, or application have an inescapably normative dimension—as they have since the days when Hamilton and Madison, Jefferson and Jay disagreed with one another.

Acknowledging the indeterminacy of their approaches, originalists sometimes say that at least they offer more constraints on judicial subjectivity than do their rivals.<sup>293</sup> In my view, the difference becomes more than slight

286 See *supra* Section I.L.

287 For an account that characterizes the resulting shift as reflecting a *de facto* constitutional amendment, see ACKERMAN, *supra* note 167, at 47–50, 99–130.

288 For a sustained examination of the effect of public opinion on the Supreme Court and the Justices' evolving conceptions of their role-based powers and obligations, see FRIEDMAN, *supra* note 75.

289 On the increasing influence of originalism on constitutional thinking, including by judges and Justices, see Jamal Greene, *Selling Originalism*, 97 GEO. L.J. 657 (2009).

290 See *supra* note 18 and accompanying text.

291 See, e.g., SCALIA, *supra* note 42, at 17–18 ("The *practical* threat is that, under the guise or even the self-delusion of pursuing unexpressed legislative intents, common-law judges will in fact pursue their own objectives and desires . . .").

292 See, e.g., Cornell, *supra* note 20, at 736 (maintaining that a number of interpretive methodological as well as substantive issues "were actually deeply contested in 1788"); Nelson, *supra* note 7, at 575–77 (arguing that the "original meaning" of the Constitution depended on the "applicable interpretive conventions").

293 See, e.g., J. Daniel Mahoney, *Thoughts on Originalism*, 72 NOTRE DAME L. REV. 1225, 1232–33 (1997) (acknowledging that "[t]he discovery of original meaning is a daunting but not impossible task," but arguing that, notwithstanding this challenge, "[t]he great

only for those versions of exclusive originalism that would preclude judges from ever displacing T1 meanings (in full recognition of the vagaries surrounding their identification) with the premises of T2 precedents, liquidations, glosses, traditions, and syntheses. This no-holds-barred, let-the-chips-fall-where-they-may form of exclusive originalism—which, I emphasize, is not the only or even the predominant form of originalism—seems to me to be both hubristic in its rejection of more than 200 years of American interpretive tradition and reckless in its proud obliviousness to potential consequences. Most originalists, I emphasize once more, appear to concur in this judgment. Potentially at risk are the constitutional validity of paper money and Social Security,<sup>294</sup> the continuing authority of *Brown v. Board of Education*,<sup>295</sup> and the applicability of the Bill of Rights to the states.<sup>296</sup> Justice Scalia has reportedly said “I am an originalist, but I am not a nut.”<sup>297</sup> The implied contrast is apt. Full-blooded exclusive originalism would be a nutty view.

At the same time, a total rejection of the authority of past decisionmakers to fix binding law for the present would engender a degree of legal uncertainty that only an anarchist could welcome. Although allusion to “the dead hand problem”<sup>298</sup> may have attractions as a rhetorical trope in arguments against exclusive originalism, the solution to that “problem” surely does not reside in a denial that lawmakers at T1 can legally and morally legitimately control events at and T3 insofar as their legal authority to do so is accepted as a matter of social fact.

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In concluding this Part, I must take care not to overstate what my arguments against exclusive originalism, in particular, have established. Debate about appropriate interpretive methodology is a part of our interpretive practice.<sup>299</sup> Accordingly, arguments to the effect that judges and Justices should henceforth hew exclusively to the Framers’ intent or the most reasonable original specification of original public meanings cannot be dismissed as simply legally out of bounds. Such contentions need to be confronted and refuted. What is more, the arguments for and against exclusive originalism

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virtue of originalism for judges that are required to decide constitutional cases is that it leads them in the direction of objectivity and away from the imposition of a personal agenda in the name of the law”); Scalia, *supra* note 31, at 856, 863 (acknowledging that “it is often exceedingly difficult to plumb the original understanding of an ancient text,” but nevertheless suggesting that originalism, notwithstanding its imperfections, is the best available theory because it offers more determinacy than its rivals).

294 See Monaghan, *supra* note 183, at 733–34, 744–45 (listing the constitutional validity of Social Security and paper money as difficult to justify on originalist principles).

295 See STRAUSS, *supra* note 11, at 12.

296 See *id.* at 15.

297 See JEFFREY TOOBIN, *THE NINE* 103 (2007).

298 See HORWITZ, *supra* note 9, at 479 (internal quotation marks omitted).

299 See Fallon, *supra* note 184, at 1144–46.

have an irreducibly comparative dimension. In response to arguments that exclusive originalism would be normatively unattractive, the exclusive originalist fairly parries: Compared with what? This is an important question, which I shall discuss at length in Part IV. In so acknowledging, however, I want to be clear about how this seeming concession relates to the central themes of this Part. If the arguments for exclusive originalism could succeed at all, they would need to succeed on normative and comparative, rather than narrowly jurisprudential, grounds involving the mistaken command theory. As this Part has shown, it is simply fallacious to maintain that law, inherently and necessarily, represents the commands of T1 lawmakers, interpreted as T1 lawmakers would have intended or most reasonably understood them, or that the legal meaning of a constitutional or statutory provision is necessarily fixed irrevocably at the moment of its enactment.

#### IV. A COMMON LAW-LIKE APPROACH TO THE VARIED ROLES OF HISTORY IN CONSTITUTIONAL (AND SOMETIMES STATUTORY) ADJUDICATION

Before going forward, we should pause to take stock. Part I identified a diverse variety of historically based phenomena that sometimes matter to constitutional adjudication. Part II offered an explanation of how and why it has come about that judges and Justices accord legal significance to many types of historically rooted inquiry, even if they accept some version of the fixation thesis or a weaker analogue. Moving into the terrain of analytical jurisprudence, Part III rejected the “command theory” that might, if it were valid, support an exclusive originalist approach to constitutional adjudication. Instead, it argued that the best theory of law will be practice-based. In light of the conjoined theses of Parts I and II, Part III further argued that no interpretive theory as confining as the most stringent versions of exclusive originalism fits our practice at all well. Neither, of course, does any theory that categorically renounces “dead hand” control.

At this point, however, we are still left with a question that includes both empirical and normative elements: Which kinds of historical considerations do and should matter, and how much should they matter, under which circumstances? Although I have offered severe criticisms of exclusive originalism, and argued provisionally for its rejection, much hinges on finding an acceptable answer to the question that I have just posed. In the absence of a normatively acceptable response, some relatively stringent form of exclusive originalism might, after all, emerge as the best—or as the least bad—interpretive theory, almost by default.

This Part defends an interpretive approach that assesses the relative legal significance of a multitude of historically grounded considerations on a flexible, common law-like basis. After first sketching the basic elements of such an approach, this Part illustrates how it would work in practice through discussion of both hypothetical and actual constitutional cases. These applications should help to refute objections that a more rigidly specified theory is needed to avoid rampant subjectivity and unpredictability in constitutional adjudication.

These applications also support a number of important generalizations, which I shall offer in Section C, about when originalist considerations do and do not, and should and should not, prevail in constitutional argument. Although flexible and subject to exceptions, these generalizations mark what I hope will be important elements of common ground concerning the roles of different kinds of historically based arguments in most originalist and nonoriginalist theories alike (though not, of course, in the exclusive originalist theories that I regard as outliers). A final Section attempts to make sense of what might appear to be exclusively originalist rhetoric in judicial opinions.

#### A. *The Basic Elements of a Common Law-Like Approach*

To questions involving the comparative constitutional significance of varied kinds of historically grounded factors, my answer is inelegant, but also serviceable and prudent: different priority rules appropriately apply to different kinds of cases, as the immanent norms of constitutional practice—in the sense explicated in Part III—wisely recognize.<sup>300</sup> To be more precise, most

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300 In an article written more than twenty-five years ago, I defended a multi-factor approach to constitutional adjudication. See Fallon, *supra* note 129. That article began with a descriptive summary of the kinds of arguments on which the Supreme Court routinely relies in at least some constitutional cases. See *id.* at 1194–209. These include arguments asserting claims about the necessary meaning of the Constitution’s language, concerning the original intent or original public meaning of particular provisions, drawing implications from the Constitution’s overall structure, relying on precedent, and appealing to considerations of normative desirability. Beyond its organizing typology, my article advanced two main arguments. First, although the various types of constitutional argument can be described as conceptually distinct from one another, in practice they are pervasively interdependent. See *id.* at 1240–42, 1252–68. By training and instinct, well-socialized participants in American constitutional practice gravitate to accounts of the arguments within the various categories that render them mutually consistent. Significantly, the relevant consistency extends into the category of value arguments. It is no accident, I argued, that those engaged in constitutional argument and adjudication so regularly reach conclusions that they find normatively palatable if not ideal. Second, in cases in which it proves impossible to achieve a principled “coherence” among the various categories of argument, I argued that those categories have lexical rankings. See *id.* at 1243–46. The highest, I wrote, attaches to arguments based on the Constitution’s text. See *id.* at 1244. A textually insupportable conclusion cannot be reached, however powerful the arguments that otherwise would support it. The second priority, I argued, goes to arguments based on the Framers’ intent or the original public meaning of constitutional language. See *id.* at 1244–45. Arguments from constitutional structure, precedent, and value arguments trail in the hierarchy. See *id.* at 1245–46.

In retrospect, I believe that my earlier article did a better job of framing a problem that previously had been largely overlooked than of solving the problem that it framed. That problem—recognition of an analogue of which also motivates this Article—is that our constitutional practice not only legitimates diverse kinds of arguments, but also, in doing so, generates the possibility of conflict among them. In cases of conflict, one then must ask: Which of the pertinent considerations should determine the outcome? Insofar as the coherence-seeking process that I described permits this question to arise, I am now uncertain that it has a categorical answer.

people who are well trained in and socialized into American constitutional practice—which is to say, most judges and lawyers—will have no doubt about how to “go on” correctly in most cases, including those involving a conflict between different kinds of historically grounded considerations.

Other, “hard” cases will of course provoke disagreement. No sensible person has ever thought that disputable cases could be avoided entirely. In hard cases, the need for interpreters to exercise normative judgment becomes palpable, but not undesirable. It is difficult if not impossible to imagine a legal theory in which good judging did not require good judgment.

When judges and lawyers explain why a particular result is the right one in a case in which different historical considerations point in different directions, they often offer generalized methodological explanations—involving, for example, the significance of the original public meaning of constitutional language or the applicability or nonapplicability of the “policy” of stare decisis.<sup>301</sup> Such explanations are appropriate and often illuminating. But methodological explanations of this kind aim to describe or interpret norms of practice that are frequently flexible and dynamic. Accordingly, judicial explanations—even when cast in seemingly categorical form—should be understood as revisable in the way that statements of common law rules generally are, subject to being distinguished or allowing for exceptions in future cases.

This acknowledgment of the revisable character of methodological generalization by no means disparages critical analysis or demands for principled consistency. The traditional hallmark of legal reasoning inheres in its analytical rigor. A common law-like approach offers no amnesty to fuzzy thinking. Insistence on as much precision as the nature of the subject matter permits is always in order. Self-contradiction reveals legal arguments, like all others, as bankrupt.

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Professor Balkin’s recent article about the roles of nonoriginalist history in constitutional adjudication, *see generally* Balkin, *supra* note 2, attacks the kind of categorization of constitutional arguments that my earlier article—like the well-known work of Philip Bobbitt on “modalities” of constitutional argument—develops. *See* PHILIP BOBBITT, CONSTITUTIONAL FATE 9–119 (1982); PHILIP BOBBITT, CONSTITUTIONAL INTERPRETATION 12–13 (1991). According to Balkin, a multitude of kinds of historical argument pervades and cuts across the categories that Professor Bobbitt and I tried to distinguish. *See generally* Balkin, *supra* note 2. I do not now quarrel in any way with Professor Balkin’s claim that judges and lawyers engage in historically based argumentation of all of the kinds that he identifies. *See supra* note 15 (summarizing Balkin’s eleven-part catalogue). As noted above, however, the alternative categorization that I have developed in this Article seeks to map out the varieties of historical consideration that judges and lawyers not only sometimes appeal to, but widely regard as capable of authoritatively settling or unsettling a claim of constitutional meaning, at least in some cases.

301 *See, e.g.*, *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 63 (1996) (noting that the Court treats stare decisis as “a principle of policy” and not as “an inexorable command” (citations omitted) (internal quotation marks omitted)).

What is more, the kind of cataloguing project on which I have embarked in this Article not only invites, but also shows the need for, critical examination of the categories of historical argument that I have identified and the concepts on which they depend. To cite just a few examples of the kind of scholarly work that can contribute to critical thinking, Caleb Nelson has very usefully exposed possible ambiguities in the Madisonian notion of “liquidation” of constitutional meaning through practice and precedent.<sup>302</sup> As noted above, important questions include whether “liquidation” necessarily occurred either close to the Founding era or not at all and whether liquidation at one time necessarily fixes constitutional meaning forevermore.<sup>303</sup> Following Nelson’s work, others need to consider more clearly exactly what “liquidation” is, when and how it can occur, and what degree of permanence it implies. In other recent scholarship, Curtis Bradley and Trevor Morrison have similarly probed the sometimes complacent notion that longstanding executive practice, when acquiesced in by Congress, can constitute a gloss on constitutional meaning, and they have offered analytical benchmarks for justifiable claims of acquiescence.<sup>304</sup> More recently still, Curtis Bradley and Neil Siegel have shown the importance of distinguishing the concepts of liquidation and historical gloss—at least in usages that treat the latter as more capacious than the former—and of attending carefully to the normative costs and benefits of crediting the latter as a source of constitutional authority.<sup>305</sup> By its nature, a common law approach relies on critical analysis and debate to promote intellectual progress. Any decent, practice-based interpretive theory will include a theory of mistakes that permits judges to reject or revise some (though not all) elements of prior practice as either incongruous with other elements or as normatively indefensible.<sup>306</sup>

The normative case for a common law-like approach to the weighing of sometimes competing, historically based considerations has two main elements, both of which reflect loosely Burkean premises.<sup>307</sup> The first involves a respect for the accreted wisdom implicit in longstanding but organically evolving structures of law and categories of legal analysis.<sup>308</sup> The second embodies a skepticism of current human capacity to anticipate and resolve sagaciously, via rigid prescriptive theories such as exclusive originalism, all of the currently unimaginable interpretive challenges that law and government will confront in the future. In this context, prudence counsels acknowledgment of the limits of human foresight in crafting and pledging adherence to categorical interpretive rules.

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302 See generally Nelson, *supra* note 7.

303 See *supra* Section I.D.

304 See generally Bradley & Morrison, *supra* note 7.

305 See generally Bradley & Siegel, *supra* note 7.

306 See RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* 118–23 (1977).

307 My argument here, including the invocation of Burke, largely follows the more general argument of STRAUSS, *supra* note 11, at 33–49, in favor of a common law-like approach to constitutional adjudication.

308 See *id.* at 42.

### B. *A Common Law Approach in Practice*

The obvious risk of a common law approach is that the immanent norms of constitutional practice may prove less constraining than I have suggested. If so, an authorization of case-by-case judicial judgment in appraising sometimes competing historical considerations would threaten pervasively unpredictable or ideologically driven constitutional decisions. But that risk is substantially smaller than proponents of exclusively originalist theories often acknowledge. If we bracket abstract methodological debates about the relative merits of competing prescriptive theories—as has perhaps typically happened in the discussion of federal courts issues, at least when discussion has not become methodologically self-conscious—those schooled in constitutional practice will converge in their judgments far more often than not. In this Section, I first offer support for the claim that methodological eclecticism pursuant to a common-law-like approach will not typically produce any more eccentric, ideologically charged judgments than would more rigid interpretive theories by examining a number of “easy” cases. Having supported my claim about the convergence of judgment in a selection of easy cases, I attempt further to illustrate how a common law-like approach might function by examining two hard cases in which methodological disagreements admittedly come to the fore.

#### 1. Some “Easy” Cases

In examining easy cases, I begin with a hypothetical issue concerning which I expect nearly every legally trained person—and perhaps other informed citizens as well—to share a confident legal intuition that the original understanding of constitutional language ought to control the outcome. I then briefly discuss four cases in which legal scholars have advanced arguments based on the original public understanding or public meaning that would call for relatively dramatic revisions of long settled practice or precedent. In each of these cases, I argue that some other kind of historical consideration should be, and I believe very widely would be, regarded as determinative.

##### a. Removal of Life-Tenured Judges

Imagine that either political liberals or Tea Party conservatives earn a watershed victory in a future set of presidential and congressional elections. Looking to consolidate their victory by remaking the federal judiciary, party leaders seek legal advice on whether they can, by legislation, remove all sitting federal judges from office and thereby permit the President, with the advice and consent of the Senate, to reconstitute the federal judiciary.

Confronting this hypothetical case, I would expect nearly every competent lawyer to conclude that the plan violates the guarantee of Article III that federal judges will hold office during “good [b]ehaviour.”<sup>309</sup> Without more

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309 U.S. CONST. art. III, § 1.

facts than I have provided, nothing in the hypothetical furnishes any ground for uncertainty or puzzlement about the appropriateness of adherence to this linguistically and historically intuitive conclusion about original constitutional meaning, which more than two hundred years of subsequent practice have ratified.

Seeking traction for a contrary argument, a devil's advocate—or a partisan—might point to the historical experience of 1802, in which, after a watershed election, Congress repealed the 1801 Judiciary Act (which had been enacted by a lame duck Congress following the 1800 elections) and thereby effectively removed sixteen federal judges.<sup>310</sup> Although the Supreme Court never passed on the constitutionality of that action,<sup>311</sup> surrounding legislative debates included assertions by members of the newly installed Republican majority that Article III imposed no barrier to the abolition of judgeships for the nonpunitive purpose of promoting economy and efficiency in governmental operations.<sup>312</sup> Perhaps trouble lurks here for advocates of a common law-like approach to the pertinence of various kinds of history and for exclusive originalists alike. Perhaps a good lawyer should maintain a cautiously noncommittal attitude about the original public meaning of Article III's "good behavior" guarantee, at least prior to the completion of more historical research. Maybe the T1 meaning of the Good Behavior Clause was relevantly indeterminate. But my legal instincts make me deeply skeptical that a single, historically controverted, seemingly partisan congressional action in 1802 could either authoritatively establish or definitively liquidate the original meaning of Article III in a way that would permit the removal of all current federal judges. To the contrary, subsequent practice bespeaks a longstanding traditional adherence to what appears intuitively to have been the Good Behavior Clause's original public meaning.

#### b. Advisory Opinions

In an informative historical study, Professor Stewart Jay has argued that, the judgment expressed in *The Correspondence of the Justices* to the contrary notwithstanding,<sup>313</sup> the original public meaning of Article III imposed no barrier to advisory opinions by Article III judges.<sup>314</sup> Against the background of British history and prior practice, Jay maintains, President Washington and Secretary of State Jefferson correctly interpreted Article III as permitting the President to solicit the Supreme Court's legal advice in a matter of high public importance.<sup>315</sup>

Suppose that Congress, by statute, were to prescribe a mechanism by which the President might solicit advisory opinions. Should the Supreme

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310 See *supra* notes 74–75 and accompanying text.

311 See ACKERMAN, *supra* note 101, at 179–98.

312 See SIMON, *supra* note 74, at 49–73.

313 See *supra* notes 104–05 and accompanying text.

314 See STEWART JAY, *MOST HUMBLE SERVANTS* (1997).

315 See *id.* at 10–101 (marshaling pertinent evidence).

Court reconsider the constitutional permissibility of advisory opinions based solely on the best evidence now available of the original public meaning of Article III?

In my judgment, which I would again expect nearly all lawyers schooled in American constitutional practice to share, the answer would be clearly not. The question posed in my hypothetical case has been settled through liquidation, the results of which judicial precedent has now ratified. At an early point in our history, *The Correspondence of the Justices* and the acceptance of its rationale by the Supreme Court, presidents, and the American public placed advisory opinions in the category of the constitutionally forbidden.<sup>316</sup> Since then, the President and Congress have functioned tolerably successfully without them. Subsequent judicial decisions adverting to the impermissibility of advisory opinions<sup>317</sup> constitute just one further consideration helping to mark the question as beyond reconsideration based solely on evidence of Article III's original public meaning.

### c. Expansion of the Supreme Court's Original Jurisdiction

Chief Justice John Marshall hinged his analysis in *Marbury v. Madison*<sup>318</sup> on the proposition that Congress, by purporting to vest the Supreme Court with original jurisdiction in a case in which Article III limited the Court to the exercise of appellate jurisdiction, had presented the question whether the Court must give effect to an unconstitutional law.<sup>319</sup> In an article published in 2007, Professors Steven Calabresi and Gary Lawson argue at length that Marshall's analysis contravened the original public meaning of Article III.<sup>320</sup> According to them, the Constitution's enumeration of cases within the Court's original jurisdiction established a floor, not a ceiling.<sup>321</sup> If Calabresi and Lawson are right, and if the original public meaning controls, Congress, today, could expand the original jurisdiction of the Supreme Court.

But does and should the original public meaning govern? The answer that emerges from the implicit norms of constitutional practice is, I submit, decisively negative. The most relevant legal history is not the history bearing on the original public meaning of Article III, but the historical status of *Marbury v. Madison*. Today *Marbury* stands as perhaps the most iconic precedent in the federal courts canon and, indeed, in American constitutional law more

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316 See *supra* note 105 and accompanying text.

317 See, e.g., *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 101 (1998) (holding that federal courts must not enter “a hypothetical judgment—which comes to the same thing as an advisory opinion, disapproved by this Court from the beginning”).

318 5 U.S. (1 Cranch) 137 (1803).

319 See *id.* at 176 (“The question, whether an act repugnant to the constitution, can become the law of the land, is a question deeply interesting to the United States . . .”).

320 See generally Steven G. Calabresi & Gary Lawson, *The Unitary Executive, Jurisdiction Stripping, and the Hamdan Opinions: A Textualist Response to Justice Scalia*, 107 COLUM. L. REV. 1002 (2007).

321 See *id.* at 1038.

generally.<sup>322</sup> It would take much more than new evidence about the original public meaning of Article III to justify overruling *Marbury* on a point material to its central holding, especially when nothing in the intervening years has revealed the unworkability of the Court's decision and historical circumstances have not changed in relevant respects.

d. State Court Habeas Corpus Jurisdiction to Protect Against Unlawful Federal Detention

Through much of the nineteenth century, state courts asserted habeas corpus jurisdiction to inquire into the lawfulness of detentions by federal officials.<sup>323</sup> Many federal courts scholars believe that the state courts that did so stood on firm constitutional ground.<sup>324</sup> In their view, the Constitution—as properly originally understood—relied on state judiciaries to safeguard against deprivations of liberty by the executive branch if Congress should decline to create lower federal courts, as Article III contemplates that it might have. But the Supreme Court reached a contrary judgment in several nineteenth century cases culminating in *Tarble's Case*.<sup>325</sup> Over the dissent of Chief Justice Chase,<sup>326</sup> the Court reasoned in *Tarble's Case* that the constitutional supremacy of the federal government over state governments implied the impermissibility of state courts asserting habeas corpus jurisdiction over federal officials.<sup>327</sup>

Suppose that a state court, today, were to assert habeas corpus jurisdiction to review the lawfulness of the detention by military officials of a member of the United States armed forces. Should the Supreme Court reexamine the jurisdictional question, based solely on evidence involving the Constitution's original public meaning? In my judgment, the answer would again be no—provided that, as in *Tarble's Case*, a federal court would have jurisdiction to entertain a comparable habeas petition.<sup>328</sup>

An obvious consideration involves stare decisis. *Tarble's Case* has stood for over 100 years without proving either practically unworkable or otherwise normatively problematic. In this case, however, unlike those that I have discussed previously, my appeal to stare decisis includes an important proviso. Absent the availability of federal habeas jurisdiction, which formed a part of the background to *Tarble's Case* of which the Supreme Court explicitly took

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322 For an argument that *Marbury's* ascent to that status did not occur immediately, but began only during the late nineteenth and early twentieth centuries, see Keith E. Whittington & Amanda Rinderle, *Making a Mountain Out of a Molehill? Marbury and the Construction of the Constitutional Canon*, 39 HASTINGS CONST. L.Q. 823 (2012).

323 See HART & WECHSLER, *supra* note 67, at 402–04.

324 See, e.g., Akhil Reed Amar, *Of Sovereignty and Federalism*, 96 YALE L.J. 1425, 1509 (1987); see also Daniel J. Meltzer, *Congress, Courts, and Constitutional Remedies*, 86 GEO. L.J. 2537, 2565 (1998).

325 80 U.S. (13 Wall.) 397 (1871).

326 See *id.* at 412–13 (Chase, C.J., dissenting).

327 See *id.* at 407 (majority opinion).

328 See *id.* at 412.

note, a holding that the Constitution precluded state court jurisdiction would raise practical and moral red flags. Potentially at stake, as Chief Justice Chase protested in his dissenting opinion, would be the right of citizens to protection “against arbitrary imprisonment in a large class of cases.”<sup>329</sup>

In appraising whether a state court could exercise habeas corpus jurisdiction in a case brought by a member of the armed services to challenge her detention by federal officials, I would therefore hesitate to rely on stare decisis alone if Congress had somehow validly cut off federal habeas corpus jurisdiction. The practical and constitutional stakes would be too high. Whether Congress could in fact withdraw federal habeas corpus jurisdiction in circumstances not involving rebellion or invasion<sup>330</sup> is of course at least highly doubtful under *Boumediene v. Bush*,<sup>331</sup> a case that I shall discuss separately below. But if we put *Boumediene* to one side, or imagine that Congress had purported to preclude federal jurisdiction while signaling its preparedness to accept state court jurisdiction or possibly even authorizing it, I would anticipate a near consensus that the correctness of the ruling in *Tarble’s Case* ought to be reexamined, partly in light of evidence of the original public meaning of the Suspension Clause. As I have emphasized, no sensible person believes that the original public meaning never matters in constitutional analysis, nor that stare decisis should always prevail.

In order to resolve the case that I initially imagined, however, a judge would not need to confront the hypothetical issue of state judicial power in the absence of federal habeas corpus jurisdiction. A court reviewing the imagined statute would do best to hold that when Congress vests the lower federal courts with jurisdiction to review the lawfulness of detentions by the federal executive branch—as the initial hypothetical imagines that it has done—it impliedly precludes state court jurisdiction.<sup>332</sup> If the case were decided on this basis, it would present no occasion to decide whether the rationale of *Tarble’s Case* would prevail, or what bearing it would have, if no mechanism existed by which a federal court could review the lawfulness of detentions by the federal executive branch alleged to violate the Constitution, laws, and treaties of the United States.<sup>333</sup>

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329 *Id.* at 413 (Chase, C.J., dissenting).

330 See U.S. CONST. art. I, § 9, cl. 2 (“The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it.”).

331 553 U.S. 723 (2008).

332 See HART & WECHSLER, *supra* note 67, at 405 (explicating this possible basis for decision).

333 If we instead imagine a hypothetical situation in which Congress had explicitly sought to remove the habeas jurisdiction of federal courts, without express allusion to the possibility of state court jurisdiction, the case would resemble *Boumediene* in several respects, including this: as a matter of statutory interpretation, it seems unlikely that Congress would have wanted to bar federal jurisdiction if it knew that the constitutionally mandated alternative to federal habeas review would be state court habeas jurisdiction. And, absent more facts, such as a constitutionally valid suspension of the writ, *Boumediene* would

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Although I could easily amass further examples, doing so would advance no good purpose. The two most salient points should have emerged with sufficient clarity. First, although evidence of original meaning matters crucially to constitutional adjudication, nearly everyone schooled in constitutional practice also acknowledges—at least when not pushed into methodological combat—that original history should not always trump other historically based considerations. Second, implicit norms and conventions of legal practice will frequently produce convergent conclusions among judges and lawyers about which historical considerations matter most in particular cases. In short, a common law-like approach neither invites nor licenses rampant judicial subjectivity with regard to a broad swathe of issues.

## 2. Hard Cases

Once again, however, I do not wish to claim too much. In the federal courts canon as elsewhere, hard as well as easy cases arise. For illustrative purposes, I shall discuss just two. In the first, *Boumediene v. Bush*,<sup>334</sup> methodological concerns involving the pertinence of diverse historical factors specifically divided the Supreme Court. A second, equally divisive set of cases in which originalist arguments have played large roles focuses on issues of state sovereign immunity. In discussing these cases, the single point that I would emphasize most strongly is that any argument in favor of exclusive originalism cuts against the grain of nearly everyone's sense of appropriate methodology in the "easy" cases that I canvassed above. So recognizing, nonexclusive originalists will frequently find themselves in the same methodological boat with nonoriginalists, even in hard cases.

### a. *Boumediene v. Bush*

No case in the federal courts canon more vividly exhibits judicial disagreement about issues of interpretive methodology than *Boumediene v. Bush*.<sup>335</sup> In response to a constitutional challenge to the Military Commissions Act's (MCA) partial stripping of habeas jurisdiction, the Government maintained that the Suspension Clause conferred no rights on noncitizens detained outside the sovereign territory of the United States at Guantanamo Bay.<sup>336</sup> The Supreme Court disagreed in a 5-4 opinion by Justice Kennedy in which the majority implicitly if not explicitly rejected claims that original public meanings—as they best can be reconstructed—necessarily determine the outcome even of cases of first impression. According to Justice Kennedy,

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preclude the withdrawal of all habeas jurisdiction to review the executive detention of prisoners held within the United States or at Guantanamo Bay. See *Boumediene*, 553 U.S. at 771.

334 553 U.S. 723.

335 *Id.*

336 See *id.* at 739.

a prior case, *INS v. St. Cyr*,<sup>337</sup> had established that “‘at the absolute minimum’ the [Suspension] Clause protects the writ [of habeas corpus] as it existed when the Constitution was drafted and ratified.”<sup>338</sup> But the Court’s cases, Justice Kennedy continued, “ha[d] been careful not to foreclose the possibility that the protections of the Suspension Clause have expanded along with post-1789 developments that define the present scope of the writ.”<sup>339</sup>

In finding that the MCA’s jurisdiction-stripping provision violated the Suspension Clause, Justice Kennedy first examined pertinent evidence concerning the Clause’s original public meaning and pronounced it inconclusive with respect to the specific question before the Court. The issue, he explained, was one that the Founding generation could not have anticipated, due to “the unique status of Guantanamo Bay and the particular dangers of terrorism in the modern age.”<sup>340</sup> “[D]eclin[ing] . . . to infer too much, one way or the other, from the lack of historical evidence on point,”<sup>341</sup> Justice Kennedy reviewed a variety of judicial precedents, all decided during the twentieth century, involving “the Constitution’s extraterritorial application.”<sup>342</sup> Their outcomes, he determined, reflected the principle that “questions of extraterritoriality turn on objective factors and practical concerns, not formalism.”<sup>343</sup> After identifying a variety of objective factors and practical concerns, he concluded that whatever “practical obstacles” might attend the extension of habeas corpus jurisdiction to noncitizen prisoners in other foreign locales, the Suspension Clause “has full effect at Guantanamo Bay,” a territory “over which the Government has total military and civil control.”<sup>344</sup>

Justice Scalia wrote for four dissenters who denied the applicability of the Suspension Clause to noncitizens at Guantanamo.<sup>345</sup> In his view, the Court’s analysis should have ended with its inquiry into the Suspension Clause’s original public meaning.<sup>346</sup> Absent clear evidence that the Founding generation would have viewed the MCA as unconstitutional, he thought the Court had no legal basis for invalidating the statute’s relevant provision.<sup>347</sup>

In appraising the methodological disagreement between the majority and dissenting opinions in *Boumediene*, we should aim first for precision of

337 533 U.S. 289 (2001).

338 *Boumediene*, 553 U.S. at 746 (quoting *St. Cyr*, 533 U.S. at 301).

339 *Id.* (citing *St. Cyr*, 533 U.S. at 300–01).

340 *Id.* at 752.

341 *Id.*

342 *Id.* at 755.

343 *Id.* at 764.

344 *Id.* at 747, 771.

345 *See id.* at 826 (Scalia, J., joined by Roberts, C.J., and Thomas and Alito, JJ., dissenting). In a separate dissenting opinion authored by Chief Justice Roberts, the same Justices also argued that even if the Suspension Clause applied, the MCA did not violate it. *See id.* at 801–26 (Roberts, C.J., joined by Scalia, Thomas, and Alito, JJ., dissenting).

346 *See id.* at 832–34 (Scalia, J., dissenting).

347 *See id.*

description. Justice Kennedy did not contest the relevance of originalist historical inquiry to constitutional analysis. To the contrary, he conducted such an inquiry. Nevertheless, as between him and the dissenters, multiple bones of contention emerged, including the best interpretation of both originalist history<sup>348</sup> and the precedent most centrally on point, *Johnson v. Eisentrager*.<sup>349</sup>

At the outset of his dissent, Justice Scalia framed the central methodological disagreement between himself and the majority as involving a conjunction of issues, comprising not only the authority of original public meanings, but also of rules of interpretation that, he said, mandated judicial deference to Congress and the President. “In light of . . . principles” that call for judicial deference to legislative and executive decisions in the domains of foreign and military affairs, he wrote, the Court had “no choice but to affirm” the validity of the challenged provision of the Military Commissions Act once it determined that originalist sources did not point clearly to a conclusion of unconstitutionality.<sup>350</sup>

In my view, the principles of deference to which Justice Scalia appealed in *Boumediene* made the case a genuinely hard one. Countering, Justice Kennedy cited a general constitutional principle favoring recognition of judicial authority to “say ‘what the law is.’”<sup>351</sup> But that principle needs more careful, narrower statement than Justice Kennedy gave it. A variety of constitutional doctrines, prominently including standing and the political question doctrine, sometimes preclude the judicial department from saying what the law is, as the Court occasionally emphasizes.<sup>352</sup> Nevertheless, Justice Scalia claimed too much when he stated as a categorical matter that principles of judicial deference in disputes involving foreign affairs should yield only to clear evidence of contrary original public meanings.<sup>353</sup> Above I discussed a hypothetical case in which Congress purported to authorize the President to seek an advisory opinion from the Supreme Court. An authorizing statute would be unconstitutional, I argued, even if the original public meaning of Article III did not clearly forbid advisory opinions. That judgment would remain secure even if the imagined provision for advisory opinions extended only to issues bearing on foreign affairs, with respect to which Congress and the President claimed entitlement to interpretive deference. In *The Correspondence of the Justices*, Secretary of State Jefferson had cited delicate foreign

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348 See *id.* at 834–41 (disputing the majority’s account of the original history and concluding that the writ of habeas corpus did not extend to noncitizens outside the territory of the United States).

349 339 U.S. 763 (1950); see *Boumediene*, 553 U.S. at 834–41 (Scalia, J., dissenting) (disputing the majority’s interpretation of *Eisentrager*).

350 *Boumediene*, 553 U.S. at 832 (Scalia, J., dissenting).

351 *Id.* at 765 (majority opinion) (quoting *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803)).

352 See, e.g., *Clapper v. Amnesty Int’l USA*, 133 S. Ct. 1138 (2013) (standing); *Nixon v. United States*, 506 U.S. 224 (1993) (political question).

353 *Boumediene*, 553 U.S. at 832 (Scalia, J., dissenting).

relations implications among President Washington's reasons for seeking judicial advice.<sup>354</sup>

A later passage in Justice Scalia's *Boumediene* dissent can be read—though perhaps it does not need to be—as asserting even more categorically that because “the text and history of the Suspension Clause provide no basis for” the Court's ruling, that ruling would have remained indefensible “even if” precedent had supported it.<sup>355</sup> As I have emphasized, sometimes the original public meaning does and ought to dictate the outcome of constitutional disputes, notwithstanding contrary T2 interpretations. As I have also emphasized, however, the original public meaning is not always decisive. Accordingly, to the extent that the *Boumediene* dissent may have intended to rest on categorical claims about the authority of original public meanings (without need for invocation of special principles of judicial deference), it bore an unmet burden of explanation. If the original public meaning does not necessarily govern in the “easy” cases that I discussed above, then why should it have dictated the outcome in *Boumediene*?

At the end of the day, the result in *Boumediene* depended on the integration, weighing, and balancing of a mix of historically rooted factors among others. Normative concerns played an appropriate role, despite the obviousness of normative disagreement between the majority (which worried about Guantanamo becoming a zone of judicially unchecked governmental prerogative) and the dissenters (who feared a dangerous judicial interference with executive and military authority to combat international terrorism).<sup>356</sup> As I have said, good judging requires good judgment, even and perhaps especially when judges differ in their normative assessments. However one concludes that the case should have come out, its difficulty should be acknowledged. It would be not merely superficial, but also inaccurate, to characterize *Boumediene* as flatly pitting the claims of a stringent version of exclusive originalism, on the one hand, against those of a rival theory that wholly rejects the authority of the dead hand of the past, on the other.<sup>357</sup>

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354 See HART & WECHSLER, *supra* note 67, at 50–51 (quoting Secretary Jefferson's letter as reporting that misinterpretation of the law by the executive branch might prove “dangerous to the peace of the United States”).

355 *Boumediene*, 553 U.S. at 849 (Scalia, J., dissenting) (“In sum, because I conclude that the text and history of the Suspension Clause provide no basis for our jurisdiction, I would affirm the Court of Appeals even if *Eisentrager* did not govern these cases.”).

356 Compare *id.* at 765 (majority opinion) (“The necessary implication of the [Government's] argument is that by surrendering formal sovereignty over any unincorporated territory to a third party, while at the same time entering into a lease that grants total control over the territory back to the United States, it would be possible for the political branches to govern without legal constraint.”), with *id.* at 831 (Scalia, J., dissenting) (“Henceforth, as today's opinion makes unnervingly clear, how to handle enemy prisoners in this war will ultimately lie with the branch that knows least about the national security concerns that the subject entails.”).

357 Indeed, I do not even read Justice Kennedy's opinion as foreclosing the possibility that clear original meaning could have trumped T2 precedent. Despite his avowal that the Court had “not . . . foreclose[d] the possibility” that the protections of the Suspension

b. State Sovereign Immunity and the Eleventh Amendment

In a series of closely divided cases decided during the 1990s, centrally including *Seminole Tribe of Florida v. Florida*<sup>358</sup> and *Alden v. Maine*,<sup>359</sup> the Supreme Court interpreted the Eleventh and Tenth Amendments as giving robust protection to state sovereign immunity.<sup>360</sup> In both *Seminole Tribe* and *Alden*, the majority and dissenting opinions jostled about the pertinence of particular judicial precedents. But the *Seminole Tribe* majority, in particular, emphasized that it thought *Hans v. Louisiana*,<sup>361</sup> decided in 1890, had correctly grasped and applied the original public meaning when it held that the Eleventh Amendment immunized the states from unconsented suit by private citizens.<sup>362</sup> Though written by Justices who never claimed to be exclusive originalists, the dissenting opinions in *Seminole Tribe* also rested their judgments about the inapplicability of state sovereign immunity principally on arguments purporting to establish the original meanings of Article III and the Eleventh Amendment.<sup>363</sup>

All agree that Congress drafted and the states ratified the Eleventh Amendment in response to the Supreme Court's decision in *Chisholm v. Georgia*,<sup>364</sup> which held that the state's plea of sovereign immunity could not survive the language of Article III that authorizes federal jurisdiction of suits between a state and citizens of another state.<sup>365</sup> The modern dispute concerns the scope of the Eleventh Amendment's repudiation of *Chisholm*. In the view of the majority Justices in *Seminole Tribe*, the Eleventh Amendment categorically ratified the states' preexisting sovereign immunity from unconsented suits against them by private individuals.<sup>366</sup> In the view of the dissent-

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Clause might have expanded over time, *id.* at 746 (majority opinion), his determination that the original meaning was relevantly unclear meant that he had no occasion to conclude that precedent could authoritatively supersede the Clause's original meaning in a case in which that meaning was clear and relevantly determinate.

358 517 U.S. 44 (1996).

359 527 U.S. 706 (1999).

360 Although earlier cases had treated issues involving state sovereign immunity as arising under the Eleventh Amendment and Article III, *Alden* treated the question whether states may claim immunity from suit in their own courts as having a Tenth Amendment dimension. *See id.* at 713–14, 739.

361 134 U.S. 1 (1890).

362 *See Seminole Tribe*, 517 U.S. at 69 (“*Hans*—with a much closer vantage point than the dissent—recognized that the decision in *Chisholm* was contrary to the well-understood meaning of the Constitution.”).

363 *See id.* at 110 (Souter, J., joined by Stevens, Ginsburg, and Breyer, JJ., dissenting) (“The history and structure of the Eleventh Amendment convincingly show that it reaches only suits subject to federal jurisdiction exclusively under the Citizen-State Diversity Clauses.”); *see also Alden*, 527 U.S. at 762 (Souter, J., joined by Stevens, Ginsburg, and Breyer, JJ., dissenting) (“While sovereign immunity entered many state legal systems as part of the common law . . . , it was not understood to be indefeasible or to have been given any such status by the new National Constitution . . . .”).

364 2 U.S. (2 Dall.) 419 (1793).

365 *See* U.S. CONST. art. III, § 2.

366 *See Seminole Tribe*, 517 U.S. at 69–72.

ers, by contrast, the Eleventh Amendment carefully identifies *Chisholm's* mistake in permitting an unconsented suit against a state by citizens of another state whose only basis for bringing an action in federal court, to assert a claim predicated on state law, lay in Article III's grant of diversity jurisdiction. According to the dissenting Justices, neither the Eleventh Amendment nor the Tenth constitutionally immunized the states from suits brought by their own citizens that allege violations of the Constitution, laws, or treaties of the United States.<sup>367</sup> The literal language of the Eleventh Amendment does not reach such actions, the dissenters emphasized.<sup>368</sup> They also maintained that principles of sound government well recognized by the Founding generation called for the availability of federal jurisdiction to enforce the states' obligations under federal law.<sup>369</sup>

In my view, the dissenting opinions in *Seminole Tribe* and *Alden* offered more persuasive accounts of the Constitution's language and history than did the majority opinions.<sup>370</sup> The "diversity theory" of the Eleventh Amendment that underlies the principal dissent in *Seminole Tribe*—which holds that the Eleventh Amendment erected a categorical bar only against those federal court suits against states that are predicated on the diversity of citizenship between a private plaintiff and a defendant state—makes sense of the Amendment's otherwise puzzling language while permitting Congress to authorize federal jurisdiction in suits under the Constitution, laws, and treaties of the United States in which the supremacy of federal law may be at stake. To anticipate a theme that I shall develop more fully below, I also have no quarrel with the dissenting Justices' decision to let originalist history occupy analytical center stage. If the best evidence bearing on original pub-

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367 See *id.* at 110 (Souter, J., dissenting); see also *Alden*, 527 U.S. at 762 (Souter, J., dissenting).

368 See *Seminole Tribe*, 517 U.S. at 109–10 (Souter, J., dissenting) (identifying "two plausible readings" of the language of the Eleventh Amendment, neither consistent with the majority's conclusion).

369 *Id.* at 155 ("Given the Framers' general concern with curbing abuses by state governments, it would be amazing if the scheme of delegated powers embodied in the Constitution had left the National Government powerless to render the States judicially accountable for violations of federal rights.").

370 In another challenge to the dissenters' position, Bradford Clark, *supra* note 27, argues that the Founding generation broadly believed that Congress could not impose statutory duties on the sovereign states and that states could not be sued for constitutional violations. Against the background of that understanding, he maintains, the Eleventh Amendment had the clear, limited purpose of correcting *Chisholm's* mistaken conclusion that Article III permitted out-of-state citizens to sue states in federal court based on diversity of citizenship, and that it understandably left unaltered, without further comment, the still-settled understanding that Congress could not regulate the states or subject them to suit. Here suffice it to say that Professor Clark's historical conclusions are not obviously correct, see, e.g., Carlos M. Vázquez, *The Unsettled Nature of the Union*, 123 HARV. L. REV. F. 79, 79–80 (2011), and that their adoption into constitutional doctrine would contravene the holding of *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 528 (1985), that Congress has broad power under the Commerce Clause to regulate state activities (even if it cannot subject the states to unconsented suits for violation of their statutory duties).

lic meaning points toward a sensible result and does not contravene settled precedent, there may be no need to go further. Finally, I believe that the *Seminole Tribe* and *Alden* dissents derived stronger support from precedent than did the Court's majority. To decide *Seminole Tribe* as it did, the Court had to overrule *Pennsylvania v. Union Gas Co.*<sup>371</sup> Although *Union Gas* was a recent precedent, decided without majority opinion by a narrowly divided Court, the *Seminole Tribe* majority acknowledged that it could not be distinguished persuasively and that it would control unless overruled.<sup>372</sup> By contrast, the dissent could distinguish *Hans v. Louisiana* on the ground that it, unlike *Union Gas* and *Seminole Tribe*, did not involve a congressionally authorized cause of action.<sup>373</sup> In *Alden*, which permitted states to claim sovereign immunity from suit in state as well as federal court, I believe that the dissenting opinion's arguments were even more compelling. To reach its conclusion, the majority had to rely on tenuous distinctions of a litany of cases.<sup>374</sup>

These, however, are conclusory observations, not arguments, and I offer them principally to mark a transition to the central point that I wish to make here. As we look to the future, the decisions in *Seminole Tribe* and *Alden* now possess the status of nonoriginalist historical fact. The doctrine of stare decisis applies. The question is whether those who reject the *Seminole* and *Alden* decisions' historical and textual analysis, or otherwise find their reasoning unpersuasive, should acquiesce. In a characteristically thoughtful article, my colleague David Shapiro has answered yes.<sup>375</sup> As Shapiro emphasizes, "the doctrine [of sovereign immunity] as it has evolved" includes numerous "loop-holes and limitations."<sup>376</sup> Of perhaps greatest significance, although the Eleventh Amendment (as construed by the Supreme Court) normally bars suits in which the plaintiff names a state or state agency as the defendant, it typically permits suits pleaded against state officials in which a plaintiff seeks prospective injunctive relief.<sup>377</sup> Other remaining avenues of possible relief include actions for damages against government officials in their individual capacities,<sup>378</sup> suits by the United States,<sup>379</sup> actions authorized by Congress pursuant to Section 5 of the Fourteenth Amendment,<sup>380</sup> and bankruptcy

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371 491 U.S. 1 (1989).

372 See *Seminole Tribe*, 517 U.S. at 63–66.

373 See *id.* at 69.

374 See HART & WECHSLER, *supra* note 67, at 936–37 (noting that "[t]he majority's treatment of precedent raised a number of questions" involving *Gen. Oil Co. v. Crain*, 209 U.S. 211 (1908); *Reich v. Collins*, 513 U.S. 106 (1994); and *Nevada v. Hall*, 440 U.S. 410 (1979)).

375 David L. Shapiro, *The Role of Precedent in Constitutional Adjudication: An Introspection*, 86 TEX. L. REV. 929 (2008).

376 *Id.* at 956.

377 See, e.g., *Edelman v. Jordan*, 415 U.S. 651 (1974); *Ex parte Young*, 209 U.S. 123 (1908).

378 See, e.g., *Monroe v. Pape*, 365 U.S. 167 (1961).

379 See, e.g., *Alden v. Maine*, 527 U.S. 706, 755 (1999).

380 See *Fitzpatrick v. Bitzer*, 427 U.S. 445 (1976).

proceedings.<sup>381</sup> Admittedly, the scheme of remedies available under current law has important gaps. Because officials sued in their individual capacities enjoy one or another form of official immunity,<sup>382</sup> compensatory relief is often unavailable. In its absence, some victims of rights violations will lack either standing or adequate incentives to sue for injunctions.<sup>383</sup> Other “loopholes,” though available in theory, seldom apply.

Nevertheless, Professor Shapiro persuades me that the prevailing doctrinal equilibrium, in which injunctions are normally available against ongoing violations of federal rights, is at least functionally tolerable (even though well short of ideal). Thus persuaded, I also concur in his assessment that stare decisis ought to control.<sup>384</sup> All who agree with Professor Shapiro and me about the incorrectness of the initial decisions in *Seminole Tribe* and *Alden* should at least recognize that the stare decisis question is now a serious one, even if they would resolve it differently.

What I want to emphasize, however, is that acknowledging the difficulty of this issue should occasion no embarrassment to proponents of a common law-like approach. Decisions about whether to overrule precedents that were wrongly decided at T2 frequently ought to be experienced as difficult at T3. I shall say more about the difficulty of the issues originally presented in *Seminole Tribe* and *Alden* below.

C. *Hard and Easy Cases: Some Generalizations About When Originalist Considerations Do and Do Not (and Should and Should Not) Prevail*

In pointing out the possibility of broad convergence concerning proper constitutional outcomes even in the absence of canonical rules assigning lexical priorities to competing, historically grounded considerations—a convergence, I want to emphasize, that includes both most originalists and most nonoriginalists—I have so far relied on an intuitive distinction between “easy” cases and “hard” ones. Although the terms of that distinction defy formal definition, in this Section I shall try to provide a bit more elucidation. By doing so, I hope to lay the foundation for—and then to advance—some generalizations concerning when originalist considerations deserve to predominate in constitutional debate. In my view, the generalizations that I shall offer are both descriptively and normatively important ones. Neverthe-

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381 See *Cent. Va. Cmty. Coll. v. Katz*, 546 U.S. 356 (2006).

382 See, e.g., *Harlow v. Fitzgerald*, 457 U.S. 800 (1982).

383 See, e.g., Ruth Colker, *The Section Five Quagmire*, 47 UCLA L. REV. 653 (2000).

384 Among the arguments for denying strong stare decisis effect to *Seminole Tribe* and *Alden* is that the doctrine may be too internally conflicted to be deemed settled, partly as a result of *Katz*, 546 U.S. 356, which held that the Court’s determination in *Seminole Tribe* that Congress lacked Article I power to subject the states to unconsented suit did not apply to the Bankruptcy Clause. As Justice Thomas argued in dissent, *Katz* is difficult if not impossible to reconcile persuasively with *Seminole Tribe*. See HART & WECHSLER, *supra* note 67, at 927. For a rejection of Professor Shapiro’s position and an argument that *Seminole Tribe* and *Alden* ought to be overruled, see Thomas D. Rowe, Jr., *Exhuming the “Diversity Explanation” of the Eleventh Amendment*, 65 ALA. L. REV. 457 (2013).

less, they are only generalizations, offered in the provisional spirit of a common law-like approach.

Hard and easy cases, as I have used the terms, can be distinguished along two dimensions. One involves the judgments of particular people, the other the potential for reasonable disagreement. With regard to both, the starting point for analysis lies in a recognition that the implicit norms of American constitutional practice reflect commitments to two fundamental and occasionally competing goals. Roughly described, they are the goals of getting matters settled, if not by the Constitution then by T2 precedents or practice,<sup>385</sup> on the one hand, and of achieving just and practical outcomes, on the other.<sup>386</sup>

It could go almost without saying that individual interpreters will almost invariably experience cases as easy when all pertinent historical considerations point to a conclusion that they regard as reasonably workable and just. Where the salient historical factors cohere, judicial embarkation on a bold new course would require the assertion of a raw form of judicial power that our practice strongly disfavors, even if it does not preclude it entirely. Putting aside cases in which judges and Justices may believe that practical or moral imperatives might justify them in testing the outer limits of judicial power,<sup>387</sup> and keeping in mind the sometimes competing interests in getting matters settled and getting matters settled wisely, I would offer three further generalizations for which the analysis of Parts I, II, and III provides support.

First, when no overt conflict exists among the various possible mechanisms of settlement by history, *and* when the settlement to which at least one such mechanism (such as the original understanding, precedent, liquidation through practice, or historical gloss) decisively points is reasonably just and practical, cases involving the associated rule of decision will normally prove easy. Of the “easy” cases that I discussed above, the one imagining congressional abolition of life tenure for federal judges most directly exemplifies this proposition. Outside the distorting vortex of partisan controversy, the pertinent original understanding or public meaning of Article III seems reasonably clear. No settled practice or squarely on-point judicial precedent deviates

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385 For a highly influential but also controversial argument that achieving settlement is the foremost goal of the Constitution and surrounding interpretive practice, see Larry Alexander & Frederick Schauer, *On Extrajudicial Constitutional Interpretation*, 110 HARV. L. REV. 1359 (1997).

386 See STRAUSS, *supra* note 11, at 101–11 (explaining the distinction between getting matters settled and getting matters settled correctly and emphasizing the primacy of the Constitution’s text and originally understood meaning when the former is more important than the latter).

387 Cf. Richard H. Fallon, Jr., *Interpreting Presidential Powers*, 63 DUKE L.J. 347 (2013) (defending a two-tiered approach to the interpretation of presidential powers that can justify expansive conclusions about presidential authority in cases of extraordinary exigency).

from this baseline historical norm.<sup>388</sup> In addition, the protection of judges against removal for partisan reasons accords with modern rule-of-law ideals.

Second, in cases in which the T2 historical settlement of an issue by practice or precedent is reasonably just and practical as measured by current norms, judges, Justices, and other well socialized participants in constitutional practice will normally accept it even if the best evidence of T1 public meaning might point to a contrary conclusion. This, I think, is the best explanation for the second and third of the “easy” cases that I discussed, involving advisory opinions and expansion of the Supreme Court’s original jurisdiction. More generally, I know of no cases in which the Supreme Court has rejected longstanding practice or clearly on-point precedent to return to the original public meaning of constitutional language when a majority of the Justices thought that doing so produced an unjust or practically regrettable result. I put the point with caution, however, in light of cases in which the Justices have professed indifference to the practical consequences of reverting to a conclusion that the Constitution’s original meaning dictates.<sup>389</sup>

Third, matters once settled by precedent can come unsettled when subsequent decisions undermine the methodological foundations of an earlier case and its revision would not produce significantly untoward practical consequences. The Supreme Court’s recent reexamination of prudential standing may be best explained on this basis.<sup>390</sup> At the same time, the Court’s hesitation about pressing revisions to their logical limit—for example, by renouncing all of prudential standing doctrine root and branch—bespeaks a reluctance to upset too much practically sensible, workable doctrine.

By contrast, I would conjecture that cases are most likely to be hard for individuals when pertinent historical considerations at least initially appear to be misaligned with one another<sup>391</sup> *and* the interest in achieving just and

388 *Stuart v. Laird*, 5 U.S. 299 (1803), in which the Supreme Court might have addressed the issue, almost wholly avoids it. For a discussion of the surrounding political climate and the Supreme Court’s avoidance of the highly charged issue of the constitutionality of divesting confirmed judges of their judgeships, see ACKERMAN, *supra* note 101, at 163–76.

389 See, e.g., *Stern v. Marshall*, 131 S. Ct. 2594, 2619 (2011) (invalidating a provision of the Bankruptcy Act insofar as it authorized adjudication by a bankruptcy court of common law counterclaims against an estate and observing that, despite arguments that the decision “will create significant delays and impose additional costs on the bankruptcy process,” “the fact that a given law or procedure is efficient, convenient, and useful in facilitating functions of government, standing alone, will not save it if it is contrary to the Constitution” (quoting *INS v. Chadha*, 462 U.S. 919, 944 (1983))); *Chadha*, 462 U.S. at 959 (invalidating a decades-old practice of legislative vetoes reflected in more than 200 statutes on originalist and textualist grounds and observing that “[t]here is no support in the Constitution or decisions of this Court for the proposition that the cumbersomeness and delays often encountered in complying with explicit constitutional standards may be avoided”).

390 See *Lexmark Int’l, Inc. v. Static Control Components, Inc.*, 134 S. Ct. 1377, 1385–88 (2014).

391 Cf. Fallon, *supra* note 129 (emphasizing the interdependence of different kinds of argument and the capacity of arguments within one category to trigger a reconsideration of other arguments in different categories).

practical outcomes exerts a pressure to deviate from a currently prevailing settlement. For me, as I indicated above, the question whether Supreme Court Justices should now adhere to *Seminole Tribe* and *Alden*, even if they think those decisions mistaken, occupies this category. In my view, the rulings in those cases not only reflect error, but also have undesirable, even if not disastrous, practical consequences. But not every case inviting a rejection of practice or precedent need occasion apprehensions of difficulty.

For the most part, the more important that a question is for practical purposes, the stronger the interest in getting it settled right. I thus said above that the case for accepting *Seminole Tribe* and *Alden* depended in part on the argument that those cases seldom frustrate the effective implementation of federal law, largely due to the availability of suits for injunctive relief.<sup>392</sup> Correspondingly, my reluctance to accede to all aspects of the constitutional holding in *Tarble's Case* reflects the potential importance of the question in issue, involving the availability or non-availability of habeas corpus relief if—and this is a “big ‘if’” in the aftermath of *Boumediene*—circumstances could permissibly develop in which federal habeas jurisdiction did not exist.<sup>393</sup> In this and other cases, an important practical function of appeals to original meanings is to support arguments for rejecting currently prevailing settlements in the interest of getting matters settled right, as measured by normative as well as historical standards.<sup>394</sup>

The other dimension along which hard and easy questions can be distinguished reflects the scope of disagreement within our constitutional culture. *Seminole Tribe* furnishes an illustration. For the Justices in the majority, the case presumably did not seem a difficult one. They thought that both the original public meaning and the most important precedents—a category from which they excluded the squarely on-point ruling in *Pennsylvania v. Union Gas Co.*,<sup>395</sup> which issued from a divided Court without a majority opinion—supported their position. Indeed, they felt a sufficient commitment to that position to decide a spate of cases substantially revising and invigorating the doctrine of state sovereign immunity during the decade of the 1990s.<sup>396</sup>

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392 See *supra* notes 375–84 and accompanying text.

393 See *supra* notes 329–33 and accompanying text.

394 This recognition appears to have animated first-generation originalists. See John Harrison, *Forms of Originalism and the Study of History*, 26 HARV. J.L. & PUB. POL'Y 83, 83–84 (2003) (emphasizing first-generation originalists' dislike for liberal Warren Court precedents); Keith E. Whittington, *The New Originalism*, 2 GEO. J.L. & PUB. POL'Y 599, 599–602 (2004) (noting ideological outlook of early originalists); see also Balkin, *supra* note 2, at 675 (maintaining that the liberal Justices of the Warren Court era had also turned to “adoption history” when they “needed a source of authority beyond precedent” to overturn long-standing precedent and “remake the constitutional status quo in the image of legal liberalism”).

395 491 U.S. 1 (1989).

396 In addition to *Seminole Tribe*, see for example *Alden v. Maine*, 527 U.S. 706 (1999), and *Florida Prepaid Postsecondary Education Expense Board v. College Savings Bank*, 527 U.S. 627 (1999). See also *Fed. Mar. Comm'n v. S.C. State Ports Auth.*, 535 U.S. 743 (2002) (extending state sovereign immunity to proceedings before a federal administrative agency).

Interestingly, the dissenting Justices also appear to have believed unequivocally and even passionately that both the original public meaning and the best arguments from precedent supported their side.<sup>397</sup> From an external perspective, however, both the pro- and anti-sovereign immunity camps had plausible arguments. Defined in light of reasonable disagreement, hard cases require the exercise of judgment that is not only disputable, but actually disputed; they mark the limits of the consensus and convergence that happily predominate—even if only increasingly precariously—within American constitutional practice. In emphasizing the constraints that practice-based norms establish, a common law-like approach to the significance of varied historical considerations in constitutional adjudication must also acknowledge the limits of those constraints.<sup>398</sup>

#### D. *Two Puzzles Dissolved*

Having defended a practice-based, common law-like approach to the role of history in constitutional adjudication in which the original meaning of constitutional language is always pertinent, but not always decisive, I should conclude this Part by addressing, head-on, what may appear to be two mysteries about originalist analysis. The first involves the apparent invocation of exclusive originalist premises in some cases by judges and Justices who demonstrably eschew exclusive originalism in others. The second arises from the tacit willingness of nonoriginalists to analyze some cases exclusively or nearly exclusively in originalist terms.

##### 1. Sometimes Exclusive Originalism

My argument that almost no one adheres consistently to exclusive originalism leaves a puzzle: How should we account for assertions in constitutional debate—including passages in important Supreme Court opinions—that appear to rely on exclusively originalist premises? For example, Justice Scalia's *Boumediene* dissent includes language that could be read this way, even though—as I have suggested—it does not need to be.<sup>399</sup> At least for Supreme Court Justices, none of whom has ever adhered consistently to an exclusively originalist stance,<sup>400</sup> the best explanation may be that prescrip-

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397 Among other measures, the same four Justices persisted in dissent in cases applying decisions extending sovereign immunity and, joined by Justice O'Connor, effectively created an exception to the prior sovereign immunity rulings for cases involving Congress's exercise of the bankruptcy power. See *supra* note 381 and accompanying text. As recently as the 2013 Term, Justice Ginsburg stated that she is still not reconciled. See *Michigan v. Bay Mills Indian Cmty.*, 134 S. Ct. 2024, 2056 (2014) (Ginsburg, J., dissenting) (predicting that the “immoderate . . . immunity” upheld in cases such as *Seminole Tribe* and *Alden* “will [not] have staying power”).

398 On the interaction of the “internal” and “external” constraints that individual judges and Justices experience, see Richard H. Fallon, Jr., *Constitutional Constraints*, 97 CALIF. L. REV. 975 (2009).

399 See *supra* note 355 and accompanying text.

400 See Fallon, *supra* note 184, at 1129–30.

tions for decision on exclusively originalist grounds reflect a default position, not an invariant imperative. Justice Scalia, for instance, has written that the principle of stare decisis represents a sometime “exception” to his otherwise textualist and originalist philosophy.<sup>401</sup>

If advanced as a default position only, and stated with sufficient abstraction, the proposition that clear original understandings or public meanings should govern constitutional controversies should provoke no dissent, as I have recognized already. Even defenders of a common law approach to constitutional adjudication acknowledge that relevant meanings of plain text should determine outcomes absent significant contravening reasons.<sup>402</sup> That said, genuinely exclusive originalism has champions in the academic community, if not on the bench.<sup>403</sup> Under these circumstances, it would help considerably to clarify the actual stakes of methodological debate if judicial opinions displayed more caution in using what might appear to be exclusive originalist rhetoric.

## 2. Originalist Analysis by Nonoriginalists

A related puzzle is why nonoriginalist Justices would conduct their analyses largely if not exclusively on originalist grounds in cases such as *District of Columbia v. Heller*<sup>404</sup> and *Seminole Tribe*.<sup>405</sup> In light of what I have just said, however, that is a pseudo-puzzle, not a real one. As I have emphasized, everyone agrees that original understandings and original public meanings matter to constitutional analysis. They may even represent an agreed starting point in cases in which prior judicial precedent has not established a controlling doctrinal framework. Moreover, when original understandings or public meanings yield a practically sensible conclusion that other potentially relevant considerations (such as precedent) do not contraindicate, no norm of practice requires analysis to go further. Any confusion emanating from *Heller* and *Seminole Tribe* should dissipate against this background. Once again, however, it would have helped to safeguard against misunderstanding for the dissenting Justices in those cases to have made clear that they were at most presumptive rather than exclusive originalists or adhered only to a weaker analogue of the fixation thesis.

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401 See SCALIA & GARNER, *supra* note 5, at 413–14; cf. Paulsen, *Intrinsically Corrupting Influence*, *supra* note 183, at 289–90 (arguing that regardless of the criteria that a theory might uphold as properly determinative of constitutional meaning, only corruption can result from requiring an otherwise justified theory to accommodate precedents that the theory must mark as mistaken).

402 See, e.g., STRAUSS, *supra* note 11, at 103–04 (explaining the importance of settling constitutional matters based on common ground).

403 See *supra* note 279 and accompanying text.

404 554 U.S. 570 (2008).

405 517 U.S. 44 (1996).

## CONCLUSION

History matters pervasively to constitutional adjudication, both generally and in the domain of federal courts law. In this Article, although my concerns are general, I have focused especially closely on the federal courts canon, where methodological debates have flared only infrequently and where common ground is therefore easier to discern than in some other fields. In no area of constitutional law, however, should debates about the merits and demerits of originalism—of which there are multiple, sometimes significantly divergent subspecies—obscure the varieties of historical considerations to which the Supreme Court regularly, and frequently uncontroversially, accords significance. Apart from a few exclusive originalists and probably even a smaller number of opponents of any control by “the dead hand of the past,” nearly everyone agrees that historical factors sometimes pertinent to constitutional adjudication may include: the linguistic and cultural antecedents of constitutional law; Founding-era legal practice; the original intentions and purposes of the Framers, original understandings, and the original public meanings of constitutional language; historically early practices that effectively “liquidated” otherwise indeterminate constitutional meanings; longstanding practices (even if not necessarily early ones) constituting a “gloss” on the Constitution’s text; tradition; the novelty of particular kinds of challenged governmental action; contexts of transformational change that require judicial synthesis of new law and prior law; the original precedential significance of prior cases; facts that might tend to undermine the authority of judicial precedents; changed circumstances; and historical trend lines, especially with regard to interpretive assumptions and methodology.

Against this sweeping background, thoughtful originalists and nonoriginalists should recognize that they share not only significant common ground, but also important common challenges—a number of which I have sought to illuminate—in sorting out which historically grounded considerations deserve to matter most under which circumstances. Implicitly if not explicitly, exclusive originalist theories frequently trade on the assumption that original meanings are both historically discoverable and determinate in their applications. But the latter premise is often false. Among the challenges for originalists and nonoriginalists alike is to determine when nonoriginalist history can authoritatively give legal content to constitutional language that was originally vague or ambiguous. Closely related is the challenge of determining when the degree of vagueness or ambiguity becomes significant enough to allow for possibly conclusive resolution by precedent or practice. Further shared challenges arise in applying the doctrine of *stare decisis*.

Having framed these challenges, I have argued that no single, elegant principle prescribes which sources of historical authority should dictate the outcome in all cases. But I have also argued, and sought to demonstrate by example, that tacit norms of practice point to clear conclusions and produce widespread convergence in judgment about which historical phenomena

matter most in very many cases. By doing so, those practice-based norms largely obviate any apparent need to choose once and for all among grandly abstract methodological theories. The norms to which I have called attention are of course themselves vague and indeterminate in many applications. They permit, and in some cases make urgent, a disciplined critical inquiry into which of the many elements of the historical past that contribute to our current law properly control the outcome of particular cases. But a largely bottom-up, case-by-case approach is, I believe, the most promising path to progress in plumbing the actual and proper roles of historical inquiry in constitutional law. And that, today, is a vastly broader and much more important topic of inquiry than the much mooted question of “Originalism: For or Against?”. It is past time for both originalists and nonoriginalists so to recognize.