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All That Is Liquidated Melts into Air: Five Meta-Interpretive Issues

D. A. Jeremy Telman

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Abstract

The promise of originalism is that it helps us to fix constitutional meaning and constrain constitutional decision-makers. There are significant constitutional questions that originalism can help resolve, at least to the extent that constitutional decision-makers buy in to originalism. However, even assuming that originalism is normatively desirable, there are certain issues that are fundamental to constitutional decision-making but that originalism cannot help us resolve. The Framers were hopelessly divided on them, and they may not be susceptible to Madisonian "liquidation." That is, at least some of these issues still generate live controversies even though they some of them seem to have been resolved by adjudication, legislation or long-standing practice.

This paper identifies five such issues, which seem the most fundamental. These issues are "meta-interpretive" because they are subjects of interpretation while also providing the framework for resolving other interpretive issues. That is, they establish the parameters within which constitutional decision-makers can resolve particular interpretive issues. Those who follow debates about and within originalist theory are familiar with the notion that original meaning sometimes runs out. At that point, even originalists concede, constitutional decision-makers resort to modalities of constitutional interpretation other than originalism. My unique claim here is that original meaning runs out very early in the process and that originalist interpretation therefore takes place within a non-originalist meta-interpretive frame.

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I. INTRODUCTION: THE LIMITS OF MADISONIAN LIQUIDATION

> *All new laws . . . are considered as more or less obscure and equivocal, until their meaning be liquidated and ascertained by a series of particular discussions and adjudications.*
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> -James Madison[1]

> *All that is solid melts into air, all that is holy is profaned, and man is at last compelled to face with sober senses his real conditions of life, and his relations with his kind.*
>
> -Karl Marx & Friedrich Engels[2]

Originalism has come to inform a great deal of our contemporary discussion of constitutional issues. Even the non-originalist Justice Kagan has proclaimed that "we are all originalists now,"[3] but as originalism becomes more widely accepted, the term's meaning has become less clear. In order to mitigate the vagueness of the term, I have adopted Larry Solum's definition of originalism, comprising two components. First, the "fixation thesis," affirms that the meaning of each constitutional clause "is fixed at the time [it] is framed and ratified."[4] Second, the "constraint principle"

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[1] THE FEDERALIST No. 37, at 229 (James Madison) (Willmoore Kendall & George W. Carey, eds., 1966).

[2] KARL MARX & FREDERICK ENGELS, THE COMMUNIST MANIFESTO 17 (orig. 1848, English trans., New York, 1948).

[3] Confirmation Hearing on the Nomination of Elena Kagan to be an Associate Justice of the Supreme Court of the United States: Hearing Before the S. Comm. on the Judiciary, 111th Cong. 62 (2010) (testimony of Elena Kagan).

[4] Lawrence B. Solum, *Originalism and the Unwritten Constitution*, 2013 U. ILL. L. REV. 1935, 1941 [hereinafter Solum, *Unwritten Constitution*]. The implications of Jonathan Gienapp's work for the fixation thesis have not yet emerged. Gienapp contends that the

stands for the view that the meaning of the constitutional text should constrain those who interpret, implement, and enforce constitutional doctrine.[5] That is, originalists seek to find the original meaning and, having found it, treat it as dispositive of constitutional disputes. Originalism in constitutional interpretation promises to fix constitutional meaning and constrain constitutional decision-makers.

My focus here is on fixation. The Framers were hopelessly divided on what I am calling meta-interpretive issues.[6] Madison believed that such issues could be "liquidated." That is, he thought that, even if the constitutional text and ratification history did not resolve disputes as to the Constitution's original meaning, such disputes could be resolved through adjudication, legislation or long-standing practice.[7] However, as will be indicated below, some fundamental issues that seem to have been settled can arise anew. When such jurisprudential disruptions occur, they can be as seismic as a political revolution: all that once was liquidated now melts into air. The very templates for constitutional interpretation no longer govern, undermining the bases for originalist interpretation.

The issues that I discuss in this Article are "meta-interpretive" because they are subjects of interpretation while also providing the framework for resolving other interpretive issues. That is, they establish the parameters within which constitutional decision-makers can resolve particular interpretive issues. Those who follow debates about and within originalist theory are familiar with the notion that original meaning sometimes runs

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Framers did not think of the Constitution as fixing meaning in 1789, but that they came to do so over the course of the 1790s. JONATHAN GIENAPP, THE SECOND CREATION: FIXING THE AMERICAN CONSTITUTION IN THE FOUNDING ERA (2018). However, originalists who adhere to the fixation thesis can, consistent with Gienapp's thesis, do so based on fidelity to how the Framers came to think of the Constitution in the 1790s or based on normative theory untethered to the accidents of history.

[5] Solum, *Unwritten Constitution*, *supra* note 4, at 1942.

[6] *See, generally, e.g.*, DAVID P. CURRIE, THE CONSTITUTION IN CONGRESS: THE FEDERALIST PERIOD, 1789–1801 (1999) [hereinafter CURRIE, CONSTITUTION IN CONGRESS] (detailing constitutional controversies that occupied Congress in the early Republic); DAVID P. CURRIE, THE CONSTITUTION IN THE SUPREME COURT, THE FIRST HUNDRED YEARS, 1789–1888 3–58 (1985) (discussing the constitutional controversies that occupied the federal courts in the early Republic); GIENAPP, *supra* NOTE 4 (reviewing the most important constitutional controversies from the Founding through 1796).

[7] For the most recent, thorough treatment of the subject, *see* William Baude, *Constitutional Liquidation*, 71 STAN L. REV. (forthcoming 2019), *available at* https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3214035.

out.[8] At that point, even originalists concede, constitutional decision-makers resort to modalities of constitutional interpretation other than originalism.[9] My unique claim here is that original meaning runs out very early in the process and that originalist interpretation therefore takes place within a non-originalist meta-interpretive frame.

One might think that, with all of its variants,[10] at least one version of originalism must be capable of resolving each of these issues. However, because meta-theoretical issues arise outside of the originalist framework, no version of originalism can address them. First-generation originalist intentionalism only highlights the controversies, as is clear, for example, from the congressional debate over the national bank,[11] the Pacificus-Helvedius debate,[12] the debate over the Jay Treaty,[13] and from numerous other controversies great and small that divided the Framers in the 1790s.

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[8] *See*, *e.g.*, Randy E. Barnett, *Interpretation and Construction*, 34 HARV. J.L. & PUB. POL'Y 65, 69 (2011) (acknowledging that the meaning of the Constitution sometimes runs out and that "[o]riginalism is not a theory of what to do when original meaning runs out"); Lawrence B. Solum, *Semantic Originalism* 19 (Univ. of Ill. Coll. of Law Ill. Pub. Law & Legal Theory Research, Paper Series No. 07-24, 2008), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id_1120244 (observing that when the meaning of the constitutional text is underdetermined, original meaning "runs out" and must be supplemented with constitutional construction).

[9] *See* ERIC J. SEGALL, ORIGINALISM AS FAITH 98–99 (2018) [hereinafter SEGALL, ORIGINALISM AS FAITH] (arguing that Solum's two originalist principles play a very small role in the zone of construction and thus do not help judges decide hard constitutional questions).

[10] One critic of originalism has identified seventy-two different theoretical strains within the originalist camp. Mitchell N. Berman, *Originalism Is Bunk*, 84 N.Y.U. L. REV. 1, 14 (2009); *see also* Thomas B. Colby, *The Sacrifice of the New Originalism*, 99 GEO. L.J. 713, 719–20 (2011) (listing various strains within originalism, including original intent, original meaning, subjective and objective meaning, actual and hypothetical understanding, standards and general principles, differing levels of generality, original expected application, original principles, interpretation, construction, normative and semantic originalism); James E. Fleming, *Jack Balkin's Constitutional Text and Principle: The Balkinization of Originalism*, 2012 U. ILL L. REV. 669, 670 (arguing that originalists are united only in their rejection of moral readings of the Constitution).

[11] *See* CURRIE, CONSTITUTION IN CONGRESS, *supra* note 6, at 78–80 (describing disagreement over the constitutionality of a national bank between Madison, Jefferson, and Edmund Randolph on one side, and Hamilton and Fisher Ames on the other); GIENAPP, *supra* note 4, at 202–47 (recounting the congressional debate over the Bank).

[12] THE PACIFICUS-HELVEDIUS DEBATES OF 1793–1794: TOWARD THE COMPLETION OF THE AMERICAN FOUNDING (Morton J. Frisch, ed. 2011).

[13] On the Jay Treaty, see GIENAPP, *supra* note 4, at 264–322 (highlighting the ways in which the debate over the treaty revealed ambiguities in the constitutional text).

As already noted, New Originalist textualism acknowledges that original meaning runs out. As I have explained elsewhere,[14] more recent originalist innovations, such as John McGinnis and Michael Rappaport's original methods originalism[15]or Stephen Sachs's original law originalism,[16] also cannot resolve difficulties when different modalities of constitutional interpretation point in different directions. Various normative defenses of originalism, such as Randy Barnett's libertarian variant[17] or Lee Strang's Aristotelian strain,[18] may resolve some issues for people who adhere to those normative perspectives, but I don't know very many Aristotelians, and there are plenty of people who will not be persuaded by libertarian arguments.[19] There remains Jack Balkin's living originalism,[20] but Balkin's project regards the Constitution as providing but a framework in which contemporary actors work out the Constitution's meaning *for us*.[21] It is therefore no criticism of Balkin to say that his approach will not resolve these meta-interpretive issues but only lay out the parameters for debate.

This Article identifies five such issues. First, is the Constitution best understood as the creation of a sovereign "We, the People," or is it a

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[14] D. A. Jeremy Telman, *Originalism and Second-Order* Ipse Dixit *Reasoning in* Chisholm v. Georgia, 67 CLEV. ST. L. REV. (forthcoming 2019) [hereinafter Telman, *Second-Order* Ipse Dixit].

[15] *See* JOHN O. MCGINNIS & MICHAEL B. RAPPAPORT, ORIGINALISM AND THE GOOD CONSTITUTION 116–38 (2013) (defending a theory of constitutional interpretation tied to the methods of interpretation available at the time of the Framing).

[16] *See* Stephen E. Sachs, *Originalism as a Theory of Legal Change*, 38 HARV. J.L & PUB. POL'Y 817, 874–83 (2015) [hereinafter Sachs, *Legal Change*] (propounding a theory that constitutional interpreters ought to be bound by the original law as lawfully changed).

[17] RANDY E. BARNETT, RESTORING THE LOST CONSTITUTION: THE PRESUMPTION OF LIBERTY (Rev'd ed. 2013).

[18] LEE J. STRANG, ORIGINALISM'S PROMISE: A NATURAL LAW ACCOUNT OF ORIGINALISM (forthcoming Cambridge University Press, 2019).

[19] Indeed, McGinnis and Rappaport and Baude and Sachs offer their approaches to originalism as alternatives to older, normative defenses of the originalist project. *See* MCGINNIS & RAPPAPORT, *supra* note 15, at 3–7 (rejecting various normative defenses of originalism as inadequate); William Baude, *Is Originalism Our Law?* 115 COLUM. L. REV. 2349, 2351 (2015) (observing that normative approaches are problematic because normative values are contested as are "empirical claims about whether those values are served and at what expense"); Sachs, *Legal Change*, *supra* note 16, at 826 (observing that non-originalists do not think originalism is normative but that the real problem with normative originalism is that just because something is good does not make it legally binding).

[20] JACK BALKIN, LIVING ORIGINALISM (2011) [hereinafter BALKIN, LIVING ORIGINALISM].

[21] *See id*. at 10 (rejecting the original expected applications version of originalism).

compact among sovereign States? Second, is the enumeration of powers in Article I, § 8 a catalogue of all of Congress's powers or merely a specification of some congressional powers, which may be supplemented? The third issue is a corollary to the second. Does the scope of the Commerce Clause turn on the meaning of the word "commerce," or should we favor a structural reading of the Constitution that would empower Congress to forge solutions to national problems that the States cannot or will not address? Fourth, what is the scope of executive power contemplated in Article II, and relatedly, did the Framers put Article I first in order to prioritize legislative power? Finally, there is the question of the constitutionality and the scope of judicial review. Although nobody today questions the power of the federal judiciary to "say what the law is,"[22] controversy remains over whether Marshall's *Marbury* decision was constitutionally warranted. Moreover, the doctrine of constitutional review has metamorphosed into a concept of judicial supremacy that generates still further controversy, although not, as of yet, at the Supreme Court.

We tend not to acknowledge our uncertainties about these meta-interpretive issues, but when we do, we recognize the instability of the interpretive ground on which we stand. We then retreat, wisely, into the fiction that these meta-interpretive issues are resolved. They are not.

II. INTERPRETIVE MODALITIES

Before I explore in further detail why these five issues are not likely targets for Madisonian liquidation, I should say a bit more about interpretive modalities and why they sometimes cannot be reconciled. There have been numerous attempts at enumerating typologies of legal reasoning.[23] In my reading of the constitutional opinions, I see Justices engaged in nine well-recognized interpretive modalities: textualism, intentionalism,

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[22] Marbury v. Madison, 5 U.S. 138, 177 (1803).

[23] *See, e.g.*, PHILIP BOBBITT, CONSTITUTIONAL FATE: THEORY OF THE CONSTITUTION 3–121 (1984) [hereinafter BOBBITT, CONSTITUTIONAL FATE] (identifying six (different) modalities of constitutional interpretation); JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 44–69 (1980) (identifying six modes of non-originalist interpretation); Jack Balkin, *The New Originalism and the Uses of History*, 82 FORDHAM L. REV. 641, 659–61 (2013) (identifying eleven "topics" (*topoi* or modalities) of constitutional argument); Richard H. Fallon, Jr., *A Constructivist Coherence Theory of Constitutional Interpretation*, 100 HARV. L. REV. 1189, 1189–90 (1987) (identifying five interpretive modalities).

structuralism, purposivism (or teleology) and appeals to precedent, history, morals, logic, or common sense. Like Philip Bobbitt, I acknowledge that there may be additional modalities,[24] but these seem to me to be the main ones. The Justices freely deploy whichever interpretive modality strikes them as fitting for the case. They frequently combine interpretive modalities as all supporting the same outcome, but review of the briefs of the parties to the litigation suggest that the modalities are often at odds.

Disputes can arise within an interpretive modality. That is, one may have textual arguments on both sides of a dispute, and such textual ambiguities may not be susceptible to Madisonian liquidation. However, more often, when the issue cannot be resolved, it is because different modalities point towards different resolutions.

What happens when different modalities lead to different conclusions, as they often do? For Bobbitt, conflicts among different modalities must be resolved by recourse to individual moral sensibility or conscience,[25] which are more likely to be stated than argued. In some circumstances, arguments that arise in different modalities may be incommensurable. That is, if you are a textualist, my purposive arguments will not persuade you, regardless of how well-grounded they are in research into the *Weltanschauung* of the Framers and the political theory of the late eighteenth century. I, in turn, may shrug my shoulders with Gallic indifference to your textual arguments if I cannot reconcile your rendering of the text with my understanding of the Constitution's general purposes. In extreme cases, arguments that resonate with a person inclined toward one modality may not register at all with someone whose hierarchy of interpretations works differently. Imagine, for example, how unpersuasive a living constitutionalist's argument would be to a strict constructionist and vice versa.

III. FIVE META-INTERPRETIVE ISSUES THAT ORIGINALISM CANNOT RESOLVE

Originalism cannot help us resolve these five meta-interpretive issues because with respect to all them, the following is true: 1) the constitutional

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[24] *See* BOBBITT, CONSTITUTIONAL FATE, *supra* note 23, at 8 (acknowledging that his list of modalities might not be complete and that it could be supplemented).

[25] *See* PHILIP BOBBITT, CONSTITUTIONAL INTERPRETATION 168 (1991) (contending that the Constitution relies "on the individual moral sensibility when the modalities of argument clash").

text itself does not resolve the issues; 2) the issues either were not raised during the debates surrounding the Constitution's drafting and ratification or they were raised but remained unresolved; and 3) interpretive modalities lead to different resolutions of the issues and the modalities cannot be reconciled. Some issues that satisfy these three criteria nonetheless have been resolved through Madisonian liquidation. That is, although the issue was a live one at the time of the Founding, through deliberate constitutional reasoning, a course of practice evolved and has become settled. For example, although Madison and Hamilton disagreed about the scope of power to tax and spend for the general welfare,[26] the Supreme Court decided in the 1930s in favor of Hamilton's broader construction of the clause,[27] and that reading has not been subsequently questioned.

Within the space limitations of this symposium issue, I can do little more than set out the terms of the debate over these meta-theoretical issues. The full elaboration of their contents could easily fill an entire volume.

A. We the People Versus the States

Does our federal government derive its sovereignty from the people or did the states delegate to the federal government aspects of their sovereign endowments? The Court first addressed issues of state sovereignty in *Chisholm v. Georgia*, in which a citizen of South Carolina sought to sue the State of Georgia in federal court,[28] as seems to be permitted under Article III of the Constitution.[29]

The members of the *Chisholm* Court had great claims to understanding the original meaning of the Constitution and its position on state sovereignty. Justice Iredell's opinion is now regarded as vindicated with the passage of the Eleventh Amendment.[30] He alone rejected the exercise of

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[26] U.S. CONST. art. I, § 8, ¶ 1.

[27] *See* United States v. Butler, 297 U.S. 1, 66 (1936) (noting that Justice Story sided with Hamilton and concluding that Justice Story's reading of Congress's power to tax for the general welfare was correct).

[28] Chisholm v. Georgia, 2 U.S. 419 (1793).

[29] U.S. CONST. art. II, § 2, ¶ 1 (providing for federal jurisdiction in "controversies . . . between a State and citizens of another State").

[30] *But see* John V. Orth, *Truth About Justice Iredell's Dissent in* Chisholm v. Georgia *(1793)*, 73 N.C. L. REV. 255, 263 (1994) (arguing that the Eleventh Amendment went well beyond Justice Iredell's opinion, which limited itself to the subject of assumpsit). While Iredell's opinion is sometimes described as a "dissent," the Justices of the pre-Marshall

jurisdiction, but of the five Justices who heard the case, he alone did not attend the Constitutional Convention,[31] apparently for want of means rather than want of interest.[32] In reaching his conclusion, Justice Iredell rejected two possible interpretations offered by the U.S. government through its Attorney General, Edmund Randolph.[33] Randolph not only attended the Constitutional Convention, he introduced the Virginia Plan.[34] Although he refused to sign the document at the end of the Constitutional Convention, Randolph changed his mind[35] and, as chair of the Virginia ratification convention, where some of the most storied debates took place,[36] became one of the Constitution's great advocates.[37]

The other Justices, who agreed with Randolph's view that the exercise of jurisdiction was proper, included John Jay, one of the authors of *The Federalist Papers*, and James Wilson, a member of the Constitutional Convention's Committee of Detail[38] and also a leader of Pennsylvania's

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Court delivered their opinions *seriatim*. That is, each Justice wrote for himself. There were no majority, concurring, or dissenting opinions. Telman, *Second-Order* Ipse Dixit, *supra* note 14. Justice Iredell opinion is called a dissent because he alone rejected the exercise of jurisdiction over Chisholm's claims.

[31] WILLIAM R. CASTO, THE SUPREME COURT IN THE EARLY REPUBLIC: THE CHIEF JUSTICESHIPS OF JOHN JAY AND OLIVER ELLSWORTH 62 (1995) [hereinafter CASTO].

[32] *See* Willis P. Whichard, *James Iredell: Revolutionist, Constitutionalist, Jurist*, *in* SERIATIM: THE SUPREME COURT BEFORE JOHN MARSHALL 198, 206–07 (Scott Douglas Gerber ed., 1998) [hereinafter GERBER, SERIATIM] (ascribing Iredell's absence from the Convention to his "accursed poverty" but noting his influence on the North Carolina delegation through correspondence).

[33] *See Chisholm*, 2 U.S. at 430 (Iredell, J.) ("[A]fter the fullest consideration, I have been able to bestow on the subject, and the most respectful attention to the able argument of the Attorney-General, I am now decidedly of the opinion that no such action as this before the Court can legally be maintained.").

[34] 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, 20–22 (Max Farrand ed., 1911).

[35] PAULINE MAIER, RATIFICATION: THE PEOPLE DEBATE THE CONSTITUTION, 1787–1788 261 (2010) (describing Randolph as having "made his peace" with ratification as "the anchor of our political salvation, with amendments to follow under Article V").

[36] *Id*. at 257 (observing that Patrick Henry forced the Virginia Convention to "confront big questions . . . that had not been explored, certainly not with equal rhetorical flare, in any previous ratifying convention").

[37] *Id.* at 260 (describing Randolph as the "obvious person" to answer Patrick Henry's criticisms of the Constitution); *id.* at 320 (quoting contemporary commentary that Randolph "amazed everyone" with his enthusiastic support for ratification).

[38] William Ewald, *The Committee of Detail*, 28 CONST. COMMENT. 197, 202 (2012).

ratifying convention.[39] Many scholars consider Wilson "as crucial a member of the Constitutional Convention as any other, including James Madison."[40] Justice William Cushing served as Vice President of the Massachusetts ratifying convention.[41] John Blair represented Virginia in the Constitutional Convention[42] and was a staunch defender of a strong national government at the Virginia ratifying convention.[43] Prior to that, he had been an important legislator[44] and jurist in Virginia[45] before being among the first men whom George Washington nominated to the Supreme Court.[46]

These Framers disagreed on the question of whether states were sovereign. At least two Justices rejected the notion that the United States derived its sovereignty in any way from the states.[47] Justice Wilson was emphatic: "As to the purposes of the Union, therefore, Georgia is NOT a sovereign State."[48] Chief Justice Jay emphasized what he called the "great and glorious principle, that the people are the sovereign of this country." It followed, in his view, that states would not be "degraded" in the slightest if their fellow sovereigns appeared in their courts.[49] Iredell disagreed, adopting the view that the United States derived its sovereignty from the

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[39] MAIER, *supra* note 35, at 103–15 (describing Wilson's role as the only member of the federal convention present and as the chief expounder and defender of the Constitution at the Pennsylvania convention).

[40] Randy E. Barnett, *The People or the State?* Chisholm v. Georgia *and Popular Sovereignty*, 93 VA. L. REV. 1729, 1733 (2007) [hereinafter Barnett, *The People or the State?*]; *see also* Mark D. Hall, *James Wilson: Democratic Theorist and Supreme Court Justice*, in SERIATIM, *supra* note 32 at 126, 129 (citing seven prominent scholars of the Founding era who rank Wilson just behind Madison as the most important figures at the Constitutional Convention).

[41] *See* MAIER, *supra* note 35, at 193 (describing Cushing as vice president of the convention and a leading federalist).

[42] *See* Wythe Holt, *John Blair*: "*A Safe and Conscientious Judge,"* in SERIATIM, *supra* note 32 at 155-97.

[43] CASTO, *supra* note 31, at 59.

[44] *See id*. at 162 (noting that, according to Madison's records, Blair never spoke at the Convention).

[45] *See id*. at 158-61.

[46] *Id*. at 162.

[47] *See* Barnett, *The People or the State?*, *supra* note 40 (stressing the *Chisholm* Court's rejection of state sovereignty and arguing that the Eleventh Amendment also did not embrace the expansion notion of state sovereignty associated with that Amendment today).

[48] Chisholm v. Georgia, 2 U.S. 419, 457 (1793) (Wilson, J.).

[49] *Id*. at 479 (Jay, C.J.).

states and that the states retained whatever sovereign powers were not delegated under the Constitution to the federal government.[50]

There are textual arguments on both sides, not that they played any role in *Chisholm*. The Preamble's "We the People," [51] suggests popular sovereignty, notwithstanding the obvious fact that there was no "we the People of the United States" until the Constitution was ratified.[52] However, the Preamble, to the extent that it says anything about sovereignty, is contradicted by Article VII. Article VII provides that nine states must ratify the Constitution in order for it to be established.[53] Article VII twice invokes "states" and never mentions people at all. The text thus seems to point in both directions, but I would give the clear dictates of Article VII the advantage over the Preamble's incantatory invocation of the people.

Article VII gains further support from the historical fact that the Constitution was in fact debated in and ratified by state conventions.[54] John Marshall responded that those conventions were separate from state legislatures and were organized by state as a matter of convenience rather than out of principle.[55]

However, neither the textual nor the historical arguments in favor of popular sovereignty seem dispositive. A purposive argument in favor of popular sovereignty seems to have trumped strong textual and historical arguments. The Preamble's reference to "a more perfect union"[56] provides the slender textual hook on which we can hang a more robust purposive

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[50] *Id*. at 435 (Iredell, J.). Justices Blair and Cushing restricted themselves to rather straightforward textual readings of Article III. For them, whether or not states were sovereign, the Constitution clearly provided for federal jurisdiction over claims brought against them by U.S. citizens. *See id*. at 450–51 (Blair, J.) (rejecting the argument that states could be plaintiffs but not defendants in suits brought under Article III); *id.* at 466 (Cushing, J.) (restricting himself to the construction of Article III).

[51] U.S. CONST. pmbl.

[52] *See* Gary Lawson & Guy Seidman, *Originalism as a Legal Enterprise*, 23 CONST. COMMENT. 47, 49 (2006) ("[T]he Constitution itself identifies its author as 'We the People of the United States,' which is clearly a legal fiction rather than an historical fact.").

[53] *See* U.S. CONST. art. VII ("The Ratification of the Conventions of nine States, shall be sufficient for the Establishment of this Constitution between the States so ratifying the Same.").

[54] *See generally* MAIER, *supra* note 35.

[55] *See* McCulloch v. Maryland, 17 U.S. 316, 403 (1819) (contending that, although the people act in their states, their actions do not thereby become acts of the several states).

[56] U.S. CONST. pmbl.

interpretation. Early case law stressed that the more perfect union was one that would exceed the weak Confederation under which the several states hobbled through the 1780s.[57] There is, however, no constitutional text that indicates that the more perfect union would entail either the reduction of state sovereignty or the notion that the federal government's powers derive from a sovereign people.

The issue of the source of the federal government's sovereign powers continually arises anew, in different guises throughout our constitutional history, and is never settled. Madison's Virginia Resolution expressly took the position that the states were "parties to the constitutional 'compact,'" and Kentucky's Resolution proclaimed that states had the right to nullify any unauthorized federal acts.[58] John C. Calhoun's contract theory of federalism justified nullification of federal laws and secession from the Union.[59] Even after the Civil War, adherents of the "Lost Cause" continued to proclaim that they fought not to defend slavery but for the constitutional principles of "federative" rather than "national" government.[60] As evidenced by the Louisiana and Mississippi state sovereignty commissions, the ideology of state sovereignty informed and energized Southern resistance to integration and civil rights legislation.[61]

In *United States v. Curtiss-Wright*, Justice Sutherland adopted an

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[57] *See, e.g.* Cohens v. Virginia, 19 U.S. 264, 417 (1821) ("We would not expect to find in the Constitution a diminution of the powers of the government."); McCulloch, 17 U.S. at 404–05 (allowing that the Confederation was a compact among states but denying that the Constitution entailed any recognition of state sovereignty); *Chisholm v. Georgia*, 2 U.S. 419, 463 (Wilson, J.) (stating that the Constitution vested executive, legislative and judicial powers in the federal government).

[58] CURRIE, CONSTITUTION IN CONGRESS, *supra* note 6, at 269.

[59] *See* SAMUEL BEER, TO MAKE A NATION 224 (1993) (discussing the bases for Calhoun's position in Montesquieu's political theory).

[60] *See* ALEXANDER H. STEPHENS, 1 A CONSTITUTIONAL VIEW OF THE LATE WAR BETWEEN THE STATES 9–12 (1868–70) (rejecting the claim that those who defended the confederacy favored slavery and arguing the Civil War was a contest between forces representing opposed constitutional principles).

[61] *See* JOHN DITTMER, LOCAL PEOPLE: THE STRUGGLE FOR CIVIL RIGHTS IN MISSISSIPPI 60 (1994) (detailing the Mississippi State Sovereignty Commissions' espionage and surveillance work on individuals and groups promoting integration and civil rights); JENNY IRONS, RECONSTITUTING WHITENESS: THE MISSISSIPPI STATE SOVEREIGNTY COMMISSION 48 (2010) (highlighting the invocation by Sovereignty Commissions and similar bodies of the purported illegitimacy of federal encroachment on state sovereignty to draw attention away from white supremacist ideology)

intermediate position, viewing Congress's powers as emanating from state sovereignty[62] but regarding executive authority as derived from the powers of the British Crown.[63] Popular sovereignty played no role in his understanding of the Constitution. In 1995, Justice Thomas authored a bitter dissent on behalf of three others. He wrote that "[t]he ultimate source of the Constitution's authority is the consent of the people of each individual State, not the consent of the undifferentiated people of the Nation as a whole."[64] That resistance to a sovereignty conferred on the United States by an undivided people of the United States still fuels the extraordinary expansion of state sovereignty under the Eleventh Amendment[65] and the anti-commandeering doctrine,[66] both products of the Rehnquist Court's new federalism.[67]

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[62] *See* United States v. Curtiss-Wright Corp., 299 U.S. 304, 316 (1936) (treating the enumeration of congressional powers in Article I as a carve out "from the general mass of legislative powers then possessed by the states").

[63] *See id*. at 316–17 (arguing that sovereignty as to foreign affairs ("external sovereignty") passed from the Crown not to the several colonies or states but to the United States upon the colonies' separation from Great Britain).

[64] U.S. Term Limits v. Thornton, 514 U.S. 779, 845 (1995) (Thomas, J., dissenting).

[65] *See, e.g.*, Alden v. Maine, 527 U.S. 706 (1999) (holding that "the powers delegated to Congress under Article I of the United States Constitution do not include the power to subject nonconsenting States to private suits for damages in state courts"); Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank & United States, 527 U.S. 627 (1999) (applying *City of Boerne*'s "congruent and proportional" test to suits seeking to vindicate rights created under Congress's Fourteenth Amendment enforcement power and brought against states without their consent); Seminole Tribe of Fla. v. Florida, 517 U.S. 44 (1996) (finding that the Constitution's Indian Commerce Clause does not provide a basis for jurisdiction in federal court against a state that does not consent to suit).

[66] *See, e.g.*, Printz v. United States, 521 U.S. 898 (1997) (finding that provisions of the Brady Handgun Violence Prevention Act impermissibly commandeered state and local law officers by requiring them to conduct background checks on prospective handgun purchasers); New York v. United States, 505 U.S. 144 (1992) (finding that Congress lacks the power to compel states to provide for the disposal of low-level radioactive waste generated within their borders).

[67] *See, e.g.*, Susanna F. Fischer, *Is Anything Obscene Anymore: Between Scylla and Charybdis: The Disagreement Among the Federal Circuits Over Whether Federal Law Criminalizing the Intrastate Possession of Child Pornography Violates the Commerce Clause*, 10 NEXUS 99, 104–05 (2005) (describing new federalism as the movement by five Supreme Court Justices who seek to uphold the principles of federalism underlying our system of dual federal and state sovereignty); Robert F. Nagel, *The Future of Federalism*, 46 CASE W. RES. L. REV. 643, 643 (1996) (calling new federalism a "'revolutionary states-rights movement within the court").

The tension between state sovereignty and popular sovereignty has not been resolved, and perhaps it need not be resolved. However, we should realize that our current understanding of the sources of federal power does not correspond with the express opinions of at least some of the Framers. That contradiction suggests that we should not presume to know the Constitution's original design with respect to the relationship between the powers of the federal government and those of the states.

B. Does Enumeration Matter?

Our federal government is one of limited powers. The enumeration of Congress's powers in Article I, § 8 provides the best textual evidence of that limitation. The Federalists saw no need for a Bill of Rights because Article I's enumeration was supposed to set out the limitations of the powers of the federal government.[68] In 1941, the Supreme Court stated in *United States v. Darby* that the Tenth Amendment states but a truism that whatever is not delegated is reserved.[69] The Supreme Court has never retreated from the position that the Tenth Amendment adds no limitation to federal power beyond that already apparent from the Article I enumeration.[70]

But is that enumeration in fact a limitation? Richard Primus has called into question our cozy assumption that the enumeration is and has always been understood as a limitation on Congress's powers. Primus points out that an enumeration that does not express itself as a limitation is not an effective limitation, and the Framers knew that.[71] He calls the enumeration

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[68] *See* Michael J. Klarman, *The Founding Revisited*, 125 HARV. L. REV. 544, 560 (2011) (reviewing PAULINE MAIER, RATIFICATION: THE PEOPLE DEBATE THE CONSTITUTION, 1787–1788 (2010)) (noting arguments of Hamilton and others that the Constitution needed no bill of rights because the enumeration was an effective limitation on Congress's powers).

[69] United States v. Darby, 312 U.S. 100, 124 (1941) ("The amendment states but a truism that all is retained which has not been surrendered.").

[70] *See* New York v. United States, 505 U.S. 144, 156 (1992) (affirming *Darby*'s statement that the Tenth Amendment "states but a truism").

[71] *See* Richard A. Primus, *The Limits of Enumeration*, 124 YALE L.J. 576, 615 (2014) [hereinafter Primus, *Limits of Enumeration*] (noting that, for most Framers, the most important mechanisms for constraining Congress were neither external limits, such as a Bill of Rights, nor internal limits, such as an enumeration, but process limits, such as separation of powers and democratic accountability); Richard A. Primus, *"The Essential Characteristic": Enumerated Powers and the Bank of the United States*, 118 MICH. L. REV. (forthcoming 2019), manuscript at 4, *available at* https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3197330 [hereinafter Primus,

as limitation theory "a talking point that most [Framers] dismissed as implausible."[72] Second, Primus points out that James Madison's first elaboration of his theory that the constitutional enumeration of Congress's powers was a limitation on its powers came in 1791[73]—not during the drafting of the Constitution nor during the ratification debates.[74] During the debate over the Constitution's ratification, he questioned the value of an enumeration as a tool of limitation.[75] However, in the context of a debate over Congress's powers to establish a national bank, Madison now saw things differently.[76]

This may seem like typical scholarship calling into question a well-established orthodoxy, and it is, but only in the best possible sense. As Primus argues in another article, although we often invoke enumeration as a limitation on Congress's power, courts mostly allow Congress to regulate just about anything they want to regulate.[77] As if reciting a catechism, courts rehearse the adage that ours is a government of enumerated powers, referencing the Article I enumeration as the textual evidence for the proposition, even as they permit Congress to regulate just about anything a state could regulate.[78] John Marshall opened the door to such regulation when he opined that Congress has implied powers even without the Necessary and Proper Clause.[79] He placed that view beyond peradventure

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Essential Characteristic] (observing that "at the [Constitutional] Convention, during the ratification process, and into the 1790s, any number of well-informed Americans denied the enumeration principle, the internal limits canon, or both").

[72] Primus, *Limits of Enumeration*, *supra* note 71, at 614.

[73] Primus, *Essential Characteristic*, *supra* note 71, at 7 (observing that the notion that Congress was limited to its enumerated powers was novel to Madison in 1791).

[74] *See id*. at 11–26 (detailing Madison's views on enumerated powers from 1785–88).

[75] *See id*. at 7 (noting that Madison in 1787 saw no need to limit Congress's power and did not think an enumeration would be an effective means for doing so).

[76] *See id* at 41–48 (elaborating Madison's reasons for rejecting the Bank and his development of the argument about enumeration as limitation in that context).

[77] *See* Richard A. Primus, *Why Enumeration Matters*, 115 MICH. L. REV. 1, 2–3 (2016) [hereinafter Primus, *Why Enumeration Matters*] (observing that the constitutional enumeration imposes virtually no meaningful constraints on Congress's powers and it has not done so for some time).

[78] *See id* at 20–21 (noting that "Congress exercises something very close to a general legislative power" and "everyone knows it").

[79] *See* McCulloch v. Maryland, 17 U.S. 316, 409–10 (1819) ("The government which has a right to do an act . . . must, according to the dictates of reason, be allowed to select the means. . . ."); *see also id*. at 419 (repeating the argument and calling it "too apparent for controversy").

with his broad reading of "necessary" to encompass whatever was convenient.[80] And yet, as Primus observes, enumeration still matters as what he calls a "continuity tender," which he defines as "an inherited statement that members of a community repeat in order to affirm their connection to the community's history, even though they may no longer hold the values or face the circumstances that made the statement sensible for some of their predecessors."[81]

Primus's work should cause us some cognitive dissonance. We may accept, and pass on to our students, the received wisdom that the Article I enumeration matters in how constitutional adjudicators should construe Congress's power. We remain conscious of the contrary reality that the enumeration, frequently invoked, does very little work in constitutional adjudication. The disconnect between our continuity tender and our constitutional reality can give rise to phenomena beyond cognitive dissonance. We may become cynical about constitutional truisms that have no content, or we may become dissatisfied with modes of constitutional discourse that do not accord with our political experience.

C. "Commerce" or National Problems

If enumeration matters, the Commerce Claus[82] is one of the most important of Congress's enumerated powers. John Marshall determined that "commerce" means "intercourse."[83] While the Clause's scope narrowed during the *Lochner* Era to exclude manufacture, since 1937, the Clause's scope has remained fairly broad. However, many originalists think the courts have gotten it wrong, because they think that "commerce" in the eighteenth century meant "trade," not "manufacture."[84] Congress could

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[80] *Id*. at 413–14.

[81] Primus, *Why Enumeration Matters*, *supra* note 77, at 5.

[82] *See* U.S. CONST. art. I, § 8, ¶ 3 (granting Congress power "to regulate Commerce . . . among the several States").

[83] Gibbons v. Ogden, 22 U.S. 1, 189 (1824).

[84] *See, e.g.*, Randy E. Barnett, *New Evidence of the Original Meaning of the Commerce Clause*, 55 ARK. L. REV. 847, 856–62 (2003) (finding that the term "commerce" connoted only trade and exchange of goods when used in the *Pennsylvania Gazette* between 1728 and 1800); Randy E. Barnett, *The Original Meaning of the Commerce Clause*, 68 U. CHI. L. REV. 101 (2001) (finding that the word "commerce" was used to mean only trade and exchange of goods in the records of the Constitutional Convention, the ratification debates and the *Federalist Papers*); Thomas R. Lee & James C. Phillips, *Data-Driven Originalism*, unpublished manuscript at 36–37 (forthcoming in U. PENN. L. REV (2018)), *available at*

thus regulate railways and roads, but it could not regulate work conditions or work hours. As with the people versus the states, if we are going to privilege textualist modalities, the stronger arguments support the narrow reading of the Commerce Clause. But the analysis need not end with the text.

Jack Balkin thinks that the courts that have construed the Commerce Clause broadly have gotten things right. He comes to a different conclusion because, in this instance at least, he favors a purposive approach over a textual approach for establishing the reach of the Commerce Clause.[85] For him, the question is not "what does 'commerce' mean," but "why did the Framers put the Commerce Clause in Article I, § 8." His conclusion is that they did so to enable the federal government to craft national solutions to national problems beyond the capacity or the will of the states.[86]

The tension between the textualist approach and Balkin's approach nicely illustrates the potential incommensurability of different interpretive modalities. Textualists are unmoved by Balkin's evidence of the Framers' overall intentions. Balkin is unwilling to concede that the textualists are right about what "commerce" meant in the eighteenth century.[87] However, regardless of the eighteenth-century meaning of "commerce," Balkin embraces a broad application of the Commerce Clause today, not because Balkin is a living constitutionalist but because his originalism looks beyond the text to the principles embodied in the text.[88] Unless one wants to adopt the stance that one mode of constitutional interpretation is superior to all others, originalism cannot resolve the tension between two modalities of originalist constitutional interpretation.

SSRN: https://ssrn.com/abstract=3036206 (finding that the dominant meaning of commerce in the eighteenth century related to trade, not manufacturing).

[85] *See* BALKIN, LIVING ORIGINALISM, *supra* note 20, at 140 (describing his approach to the Commerce Clause as "linked to the general structural purpose of Congress's enumerated powers").

[86] *See id*. (arguing that Congress's Commerce Clause powers were designed "to give Congress power to legislate in all cases where states are separately incompetent or where the interests of the nation might be undermined by unilateral or conflicting state action").

[87] *See id*. (faulting modern originalists for ignoring the broader, social implications of "commerce" as "intercourse").

[88] *See id*. at 1 (describing his "text and principle" approach to constitutional interpretation and construction).

D. The Scope of Article II

The Framers were sharply divided on the scope of executive power. Our terse Article II provides little guidance as to the scope of executive power in matters great and small. For example, we now accept it as a given that the President, rather than Congress, has the power to appoint the heads of government departments. The matter was not clear to the first Congress, which debated the topic heatedly in June 1789 before resolving the matter by a vote of thirty-one to nineteen in favor of the President's appointment power.[89]

Article I's enumeration may or may not limit Congress's legislative power. Article II contains no analogous enumeration,[90] and so, according to proponents of the Vesting Clause thesis, Article II vests the President with all executive power, as understood at the time of the Framing, except for such powers delegated to Congress in Article I.[91] Proponents of the Vesting Clause thesis now claim extensive implied executive powers despite Justice Jackson's reminder, in the Steel Seizure cases, that there is an enumeration in Article II and that the powers vested in the President are actually quite modest. Rejecting the Solicitor General's reliance on the Vesting Clause thesis, Justice Jackson dryly noted, "[I]t is difficult to see why the forefathers bothered to add several specific items, including some trifling ones."[92]

Drawing on the Vesting Clause thesis, Sai Prakash has recently argued

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[89] GEOREGE J. LANKEVICH, THE FEDERAL COURT, 1787–1801 18 (1986).

[90] *See* U.S. CONST. art. II, § 1 ("The executive power shall be vested in one President").

[91] *See, e.g.*, Steven G. Calabresi & Saikrishna B. Prakash, *The President's Power to Execute the Laws*, 104 YALE L.J. 541 (1994) (arguing that the President has the powers and privileges of an eighteenth-century British monarch, except those powers expressly delegated to Congress); Gary Lawson & Guy Seidman, *The Jeffersonian Treaty Clause*, 2006 U. ILL. L. REV. 1 (2006) ("[T]he 'executive Power' also includes foreign affairs powers that are not otherwise allocated to specific institutions by the Constitution"); Michael D. Ramsey, *The Textual Basis of the President's Foreign Affairs Power*, 30 HARV. J.L. & PUB. POL'Y 141 (2006) (contending that the eighteenth-century notion of "executive power" entailed control over foreign affairs); John C. Yoo, *Treaty Interpretation and the False Sirens of Delegation*, 90 CAL. L. REV. 1305, 1309 (2002) (claiming that Article II's Vesting Clause creates a presumption in favor of presidential authority in matters relating to foreign affairs).

[92] *See* Youngstown Sheet & Tube v. Sawyer, 343 U.S. 579, 640–41 (1952).

that the Presidency was imperial from the beginning.[93] Julian Davis Mortenson contends that the Vesting Clause thesis is demonstrably wrong because "the first sentence of Article II simply cannot bear the weight of the Vesting Clause thesis."[94] This seems like a traditional battle within originalism in which various interpretive modalities can be trotted out. In such battles, we can work towards a resolution. Nevertheless, some originalists have given up on the matter and argued that originalism ought not to apply to executive power.[95]

However, there is a missing piece of information that the originalist literature does not address. If Prakash is right about vast executive powers being a part of the U.S. Constitution from the start, why did the Framers put Article I, enumerating congressional powers, first? Why not start with the President, if the President wields vast executive powers? The question is not rhetorical. It may have been an eighteenth-century constitutional tradition that one starts with the legislative branch. However, it also may have been that the Framers thought that the directly-elected Representatives have the closest proximity to the sovereign people and so the allocation of powers from the sovereign governed to the governors should begin there. Finally, it may be that the Framers listed legislative powers first because they intended to vest the people's representatives in Congress with the vast majority of federal powers.

The Constitution itself provides no answer, and, as Prakash and Mortensen's competing renditions of the scope of executive power suggest, legislative history also does not resolve the matter. Thus far, Mortensen claims only to have disproved the Vesting Clause thesis. He does not claim that there could be no basis in other parts of Article II for expansive executive powers.[96] In any case the allocation of powers between the executive and the legislature has not been liquidated through adjudication or practice.

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[93] SAIKRISHNA BANGALORE PRAKASH, IMPERIAL FROM THE BEGINNING: THE CONSTITUTION OF THE ORIGINAL EXECUTIVE (2015).

[94] Julian David Mortensen, *Article II Vests Executive Power, Not the Royal Prerogative*, unpublished manuscript on file with the author, at 5.

[95] *See* Michael D. Ramsey, *Presidential Originalism?* 88 B.U. L. REV. 353 (2008) (providing reasons for why originalism ought not to apply to the executive branch).

[96] Mortensen, *supra* note 94, at 95.

E. Judicial Review

My last meta-interpretive issue is the scope of judicial review. Many of these issues arise in the context of constitutional interpretation. John Marshall established that "it is emphatically the province and the duty of the judicial department to say what the law is."[97] Rightly or wrongly, that opinion achieved Madisonian liquidation. But the scope and status of judicial review resists liquidation. As Eric Segall has emphasized, both early originalists and the Framers seemed to call for a great deal of deference to legislative enactments.[98] Alexander Hamilton called for judicial intervention only "if there should happen to be an irreconcilable variance between" a statute and the Constitution.[99] The originalist movement began as a response to the perceived excesses of the Warren and Burger Courts, which first-generation originalists viewed as inadequately deferential to the people's elected representatives.[100] They too called for deference to legislatures, but since the 1980s, originalists have been less clear about the parameters of judicial review.[101]

There is a second way in which the scope of judicial review evades liquidation. Today, we assume judicial supremacy as a cornerstone of our doctrine of separation of powers. However, the Supreme Court did not really embrace the doctrine of judicial supremacy until 1958 in *Cooper v. Aaron*.[102] Josh Blackman has recently argued[103] that the modern notion of judicial supremacy entails two doctrines. Judicial supremacy means that

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[97] Marbury v. Madison, 5 U.S. 137, 177 (1803).
[98] SEGALL, ORIGINALISM AS FAITH, *supra* note 9, at 15–30.
[99] THE FEDERALIST NO. 78, at 467 (Alexander Hamilton).
[100] SEGALL, ORIGINALISM AS FAITH, *supra* note 9, at 6.
[101] *See, e.g.*, Colby, *supra* note 10, at 714–15 (noting that the "new originalism" has abandoned the emphasis on judicial constraint that inspired its original popularity); Eric J Segall, *The Constitution According to Justices Scalia and Thomas: Alive and Kickin'*, 91 WASH. U. L. REV. 1663 (2014) (discussing recent constitutional decisions in which Justices Scalia and Thomas have voted to overturn precedent or struck down legislation); Geoffrey Stone, *The Roberts Court, Stare Decisis, and the Future of Constitutional Law*, 82 TULANE L. REV. 1533, 1548 (2008) (noting that originalism can be "passivist" or "activist" and criticizing the Roberts Court for ignoring precedent).
[102] Cooper v. Aaron, 358 U.S. 1 (1958).
[103] Josh Blackman, *The Irrepressible Myths of* Cooper v. Aaron, 107 GEO. L.J. (forthcoming 2019), *available at* https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3142846.

the Supreme Court is the ultimate arbiter of constitutional meaning.[104] Judicial universality means that when the Supreme Court decides one case, its ruling applies to all potential litigants.[105] Blackman rejects both of these doctrines.[106]

In at least one respect, Blackman's scholarship is similar to Primus's. Both seek to undercut firmly established doctrines. Both can support their revisionist approach with a reading of our constitutional history. Southern governors who saw no reason to comply with the Court's desegregation decisions could point to the example of Abraham Lincoln, who did not think the Court's *Dred Scott* decision was binding on the U.S. government.[107] Justice Brennan's one-way ratchet permitted Congress to determine what the Fourteenth Amendment required.[108] Presidents routinely determine which laws are to be faithfully executed, and immunity doctrines and the political question doctrine place their decisions beyond judicial reach. In short, despite the received wisdom that the Supreme Court is the ultimate and universal arbiter of constitutional meaning, political bodies often ignore the Court's dictates or find ways to evade having the constitutionality of their decisions reviewed.

IV. CONCLUSION: THE CONTINUED ROLE OF ORIGINALISM

Although I expect that people who view themselves as originalists will resist my assessment that originalism cannot resolve meta-interpretive issues, my analysis changes little about the practice of constitutional interpretation. We will, because we must, continue to treat these meta-interpretive issues as settled. If we do not do so, we have no interpretive ground on which to stand. Originalist interpretive approaches remain relevant, both as debates about meta-interpretive issues arise and for addressing ordinary interpretive puzzles within the parameters established by the fiction that these meta-interpretive issues have been resolved. But they have not been resolved, and their resolution eludes originalist modes

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[104] *Id*., manuscript at 3.
[105] *Id*.
[106] *Id*., manuscript at 3–4.
[107] *Id*., manuscript at 4.
[108] *See* Katzenbach v. Morgan & Morgan, 384 U.S. 641 (1966) (holding that Congress can, pursuant to Section Five of the Fourteenth Amendment, determine by statute that certain practices are unconstitutional, even if the Supreme Court has previously found those practices to be constitutionally permissible).

of inquiry. Originalist interpretation takes place within a meta-interpretive frame beyond originalism's reach.