

## AGAINST TEXTUALISM

*William Michael Treanor\**

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### INTRODUCTION

Over the past twenty years, textualism, the interpretive approach that looks to the Constitution’s original public meaning, has established itself as the dominant form of originalism, supplanting intentionalism, the interpretive approach that interprets the Constitution in accordance with Framers’ and ratifiers’ intent. Textualists ground their approach in democratic theory, contending that the Constitution is best understood as reflecting the choices of “We the People.” They also contend that textualism constrains judicial discretion and thus is superior to other forms of constitutional interpretation that ultimately lack an anchor other than in the subjective values of judges.<sup>1</sup>

As the name of the movement suggests, textualism’s search for original public meaning centers on the Constitution’s text. The movement’s adherents—both academics, such as Professors Amar, Calabresi, and Prakash, and judges, such as Justices Scalia and Thomas—follow a common set of

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\* Dean and Paul Fuller Professor, Fordham Law School. I am grateful to John McGinnis for putting together this important Symposium and for giving me the opportunity to participate. I would also like to thank my colleagues at Fordham who provided invaluable comments on this Article at a day-long workshop on Fordham faculty scholarship, and I would particularly like to thank Ben Zipursky for leading that discussion and for his great suggestions. Finally, my son Liam, who is currently studying the Constitution in seventh grade, asked if I would dedicate this Article to him, and I am glad to do so. (I have promised my daughter Katherine, who has not yet begun seventh grade, that I will dedicate the next article to her.)

<sup>1</sup> For examples of these justifications of the textualist approach, see ANTONIN SCALIA, *A MATTER OF INTERPRETATION* 37–41, 44–47 (1997); KEITH E. WHITTINGTON, *CONSTITUTIONAL INTERPRETATION: TEXTUAL MEANING, ORIGINAL INTENT, AND JUDICIAL REVIEW* 152–57 (1999); Akhil Reed Amar, *The Supreme Court: 1999 Term, Foreword, The Document and the Doctrine*, 114 HARV. L. REV. 26, 27–37, 53–54 (2000); Akhil Reed Amar, *Intratextualism*, 112 HARV. L. REV. 747, 748–55 (1999); Frank H. Easterbrook, *Textualism and the Dead Hand*, 66 GEO. WASH. L. REV. 1119 (1998) (commenting on Jed Rubenfeld, *The Moment and the Millennium*, 66 GEO. WASH. L. REV. 1085 (1998)); Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849, 857 (1989). On the rise of textualism, see Randy E. Barnett, *An Originalism for Nonoriginalists*, 45 LOY. L. REV. 611, 611–29 (1999); Vasani Kesavan & Michael Stokes Paulsen, *The Interpretive Force of the Constitution’s Secret Drafting History*, 91 GEO. L.J. 1113, 1134–48 (2003).

interpretive practices. Those practices are concisely set out in *The President's Power to Execute the Laws* a classic 1994 article by Professors Calabresi and Prakash.<sup>2</sup> Calabresi and Prakash lay out a textualist flow chart:

(1) Consider the plain meaning of the words of the Constitution, remembering to construe them holistically in light of the entire document. (2) If the original meaning of the words remains ambiguous after one consults a dictionary and a grammar book, consider next any widely read explanatory statements made about them in public contemporaneously with their ratification. These might shed light on the original meaning that the text had to those who had the recognized political authority to ratify it into law. (3) If ambiguity persists, consider any privately made statements about the meaning of the text that were uttered or written prior to or contemporaneously with ratification into law. These statements might be relevant if, and only if, they reveal something about the original public meaning that the text had to those who had the recognized political authority to ratify it into law. (4) If ambiguity still persists, consider lastly any postenactment history or practice that might shed light on the original meaning the constitutional text had to those who wrote it into law. Such history is the least reliable source for recovering the original meaning of the law, but may in some instances help us recover the original understanding of an otherwise unfathomable and obscure text.<sup>3</sup>

There is an obvious logic to this approach. It would seem unassailable that, if we are to interpret what the Constitution meant to the public when it was adopted, we should start with the words used and what they meant. In determining what words meant, we look principally to dictionaries and grammars and turn to other sources only when dictionaries and grammars fail to reveal the meaning of the words used. We assume that the document should be read as a coherent whole, and so, when there are multiple possible meanings of a word, we assume that the same meaning is employed throughout the document. Holistic interpretation also means that we can derive meaning from the physical structure of the document: We can learn meaning by studying which clauses are physically linked in the document, the overall structure of the document into Articles, and similar matters of placement.

Among the attractions of this textualist methodology is that it seems to constrain judicial discretion: courts recover original meaning by following a number of determinate steps. Moreover, it has the appeal of being a methodology that anyone can employ. One need not be trained as an historian (or know a great deal of history) to recover original meaning. Someone who can read texts closely and has access to old dictionaries and grammars can determine original meaning.

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<sup>2</sup> Steven G. Calabresi & Saikrishna B. Prakash, *The President's Power to Execute the Laws*, 104 YALE L.J. 541 (1994).

<sup>3</sup> *Id.* at 553.

This interpretive approach, however, simply assumes a certain set of interpretive conventions, and this Article argues that, as an historical matter, those assumptions are incorrect. Above all, at the time of the Founding, text was not central to meaning in the way that textualists assume; it was only one of the relevant factors in constitutional interpretation, and the Founding generation did not have the almost aesthetic sense of the document that textualists have.

In this Article, I discuss the interpretive conventions of the Founding generation. My argument largely draws on my previous historical work analyzing the origins of judicial review<sup>4</sup> and critiquing Professor Amar's textualist approach to the Bill of Rights.<sup>5</sup> Here, I bring together that research to make two primary claims suggested by my historical studies.

First, an analysis of interpretive conventions must start with the institutional role of the interpreter. The Constitution was not read by the Founding generation in an unmediated way: The identity of the reader was central to the reading. Specifically, when courts reviewed statutes for constitutionality—which they did in the years before *Marbury*<sup>6</sup> with a frequency that previous scholars have failed to see—they were principally concerned with matters of structure and process. When courts reviewed statutes that affected entities of constitutional dimension that had not been involved in the statute-making process—juries and courts themselves—and when federal courts reviewed state legislation that trespassed on national powers or that implicated other states, they engaged in a very searching review; that searching review led them to overturn statutes even when there was no clear textual mandate for doing so. Conversely, except in these limited areas, courts upheld statutes even when there were strong textual arguments that the statutes were unconstitutional. If courts today seek to read the Constitution as it was originally read, part of that interpretive process involves reading the Constitution as courts originally read it, and courts did not assign text the dominant role in interpreting the Constitution in the way that modern textualists posit. I develop this position in Part I.

In Part II, I turn from the question of interpretive prism to the question of what factors, other than institutional roles, were deemed relevant to constitutional interpretation at the time of the Founding. As an initial matter, I contend that the way in which the Constitution was drafted—often at great speed and with many critical questions unresolved—suggests the appropriateness of an open-ended interpretive process that considers many variables and does not limit the analysis to text. These variables include broad principles of governance, policy concerns, and legislative history. By looking

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<sup>4</sup> William Michael Treanor, *Judicial Review Before Marbury*, 58 STAN. L. REV. 455 (2005) [hereinafter Treanor, *Judicial Review*].

<sup>5</sup> William Michael Treanor, *Taking Text Too Seriously: Modern Textualism, Original Meaning, and the Case of Amar's Bill of Rights*, 106 MICH. L. REV. 487 (2007) [hereinafter Treanor, *Taking Text Too Seriously*].

<sup>6</sup> *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803).

at concrete examples from the early Republic, I then argue that this is, in fact, how interpretation occurred, both in court cases and in political decisionmaking. In contrast, textualist readings often assign significance to aspects of the document that were not significant to the Founding generation, assuming a care in drafting and an attention to the placement of text in the document that is not consistent with the way in which the Founding generation approached the Constitution. This Part posits that, if we are to recapture the original public meaning, we should look beyond text in precisely the same way that the Founding generation did, looking to drafting history, the spirit of the document, and structural and policy concerns.

There is a great divide in constitutional law between the scholars who stress philosophy and values and those who stress history and originalism. It is a split that cannot be bridged, much like the division between farmers and cowboys in “Oklahoma.”<sup>7</sup> My purpose here is not to revisit that controversy and to argue that history and originalism reflect the superior approach, although that is my belief. In this Article, I simply assume that the goal of constitutional interpretation should be to recapture original public meaning because original public meaning accords with the decision of We the People to ratify the Constitution. If one takes that goal seriously, textualism is not the constitutional metric to use.

#### I. EARLY JUDICIAL CONSTITUTIONAL INTERPRETATION

If there is a dominant popular view about the origins of judicial review, it is that judicial review began with *Marbury*. Reflecting this view, Alexander Bickel observed, “If any social progress can be said to have been ‘done’ at a given time and by a given act, it is Marshall’s achievement. The time was 1803; the act was the decision in the case of *Marbury v. Madison*.”<sup>8</sup> Scholars who have actually studied the early caselaw recognize that Bickel was wrong, but they also have failed to see the extent to which the exercise of judicial review was a normal practice in the early Republic. Thus, in the leading historical account, Sylvia Snowiss finds only five cases in the period between the end of the federal convention and the issuance of the decision in *Marbury* in which courts found statutes unconstitutional.<sup>9</sup>

In fact, judicial review was fairly common. In my study of the pre-*Marbury* caselaw, I found thirty-one cases during the years between the convention and *Marbury* in which a court invalidated a statute on constitutional grounds. I found another seven cases in which statutes were upheld but in which at least one judge would have held the statute unconstitu-

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<sup>7</sup> OSCAR HAMMERSTEIN II (lyrics) & RICHARD RODGERS (music), *The Farmer and the Cowman*, in *OKLAHOMA!* (1947).

<sup>8</sup> ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS I* (1962).

<sup>9</sup> SYLVIA SNOWISS, *JUDICIAL REVIEW AND THE LAW OF THE CONSTITUTION* 36–37 & nn.57–60 (1990).

tional.<sup>10</sup> Although not everyone accepted judicial review, the overwhelming majority of judges in the early Republic who had occasion to confront the issue found judicial review implicit in the Constitution.<sup>11</sup>

For example, of the pre-*Marbury* Supreme Court Justices, no one rejected judicial review, and only one—Justice Chase—ever questioned the Court’s power to invalidate congressional statutes.<sup>12</sup> He suggested uncertainty about the legitimacy of judicial review in the 1796 case of *Hylton v. United States*.<sup>13</sup> *Hylton* involved a challenge to a federal tax on carriages as violative of the Constitution’s provisions that “direct Taxes shall be apportioned among the several States . . . according to their respective Numbers,”<sup>14</sup> and that “No Capitation, or other direct, Tax shall be Laid, unless in Proportion to the Census or Enumeration herein before directed to be taken.”<sup>15</sup> Chase said that he did not need to reach the question of whether the Court could invalidate statutes because he was voting to uphold the statute.<sup>16</sup> The other Justices simply upheld the statute, implicitly taking the position that it was within their power to review congressional statutes for constitutionality.

By 1800, even Chase had embraced the view that judicial review was legitimate, observing in *Cooper v. Telfair*<sup>17</sup> that, while there was no Supreme Court case invalidating a congressional statute, “[i]t is . . . a general opinion, it is expressly admitted by all this bar, and some of the Judges have, individually in the Circuits, decided that the Supreme Court can declare an act of congress to be unconstitutional.”<sup>18</sup> Further, he embraced judicial review in a grand jury charge he gave the same year.<sup>19</sup>

Justice Chase’s reference in *Cooper* to individual Justices invalidating statutes while riding circuit refers to the 1792 decision in *Hayburn’s Case*.<sup>20</sup> In *Hayburn’s Case*, two judges, riding circuit, found unconstitutional a federal statute that had required circuit courts to review pension applications,

<sup>10</sup> Treanor, *Judicial Review*, *supra* note 4, at 497–554.

<sup>11</sup> In the early years of the Republic, members of Congress also generally accepted judicial review as legitimate. See Maeva Marcus, *Judicial Review in the Early Republic*, in LAUNCHING THE EXTENDED REPUBLIC 25 (Ronald Hoffman & Peter Albert eds., 1996).

<sup>12</sup> See *Hylton v. United States*, 3 U.S. (3 Dall.) 171, 175 (1796) (Chase, J.). For a discussion, see Treanor, *Judicial Review*, *supra* note 4, at 542–43.

<sup>13</sup> 3 U.S. (3 Dall.) 171.

<sup>14</sup> U.S. CONST. art. I, § 2, cl. 3.

<sup>15</sup> U.S. CONST. art. I, § 9, cl. 4.

<sup>16</sup> *Hylton*, 3 U.S. (3 Dall.) at 175 (Chase, J.).

<sup>17</sup> 4 U.S. (4 Dall.) 14 (1800).

<sup>18</sup> *Id.* at 19 (Chase, J.). For a discussion, see Treanor, *Judicial Review*, *supra* note 4, at 533.

<sup>19</sup> Justice Samuel Chase, Charge to the Grand Jury of the Circuit Court for the District of Pennsylvania (Apr. 12, 1800), reprinted in 3 DOCUMENTARY HISTORY OF THE SUPREME COURT OF THE UNITED STATES 408, 412 (Maeva Marcus ed., 1990) [hereinafter DHSC] (“The Judicial power . . . [is] the only proper and competent authority to decide whether any Law made by Congress . . . is contrary to or in Violation of the federal Constitution.”); Treanor, *Judicial Review*, *supra* note 4, at 522 n.342.

<sup>20</sup> 2 U.S. (2 Dall.) 409 (1792).

subject to the ultimate decision by the Secretary of War;<sup>21</sup> in that case, all six members of the Court appear to have been theoretically prepared to hold a statute unconstitutional.<sup>22</sup> Moreover, in *Ware v. Hylton*,<sup>23</sup> another major early case, the Court held a state statute providing debtors with relief unconstitutional;<sup>24</sup> as a result, well before *Marbury*, the Court had exercised the power of judicial review over state legislation. Finally, the historical record suggests that, before *Marbury*, the Court also invalidated federal legislation: although the evidence is cursory, it appears that there were three cases in which a part of the Judiciary Act of 1789 was found unconstitutional in the wake of the subsequent adoption of the Eleventh Amendment.<sup>25</sup>

The frequency of the exercise of judicial review and the general acceptance of the practice indicates that judicial review was part of the background interpretive practices of the Founding generation. Equally significant, there were consistent patterns in the manner in which courts acted as they reviewed the constitutionality of statutes. If our goal is to recover original public meaning, this is a fundamental part of this effort. If courts today have as their goal acting as those who adopted the Constitution would have had them act, their goal is not simply to read the Constitution as the Founding generation did, it is to read the Constitution as the Founding generation's courts did. In other words, recovering the original meaning involves not simply understanding what the words themselves meant; it involves recovering the conventions governing the interpretive role of particular actors as they construed those words. Thus, the judicial role is part of the relevant interpretive framework.

Examination of the early caselaw indicates what that judicial role was. In the years before *Marbury*, federal and state courts invalidated statutes in two categories of cases, and these decisions reflect the dominance of structural, rather than textual, concerns. Thus, structural concerns shaped constitutional interpretation by courts.

The first category in which statutes were invalidated consists of legislation that affected the decisionmaking authority or autonomy of juries or courts. In these cases, the courts invalidating statutes were protecting constitutional departments that had not been part of the political process that had produced the legislation. Courts here were strikingly aggressive. Of the twenty-one cases in this category, there were colorable arguments on

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<sup>21</sup> See Proceedings of the U.S. House of Representatives (Apr. 13, 1972), reprinted in 6 DHSC, *supra* note 19, at 48–49 (Rep. Boudinot's description of the oral decision of the Court); Treanor, *Judicial Review*, *supra* note 4, at 533–34 (discussion of factual background in *Hayburn's Case*).

<sup>22</sup> *Hayburn's Case*, 2 U.S. (2 Dall.) at 410–14; see also Treanor, *Judicial Review*, *supra* note 4, at 538 (discussing views of *Hayburn's Case* decisions).

<sup>23</sup> 3 U.S. (3 Dall.) 199 (1796)

<sup>24</sup> *Id.*

<sup>25</sup> See *Hollingsworth v. Virginia*, 3 U.S. (3 Dall.) 378 (1798); *Moultrie v. Georgia*, 5 DHSC, *supra* note 19, at 289, 511; *Brailsford v. Georgia*, 5 DHSC, *supra* note 19, at 604 & n.36. For discussion of these decisions, see Treanor, *Judicial Review*, *supra* note 4, at 548.

behalf of the statute in eighteen, and courts repeatedly struck down statutes when there was no obvious inconsistency between the legislation and constitutional text.<sup>26</sup>

The other category of cases also reflects structural concerns. It involves state statutes that were deemed to run afoul of the U.S. Constitution or that were overturned by federal courts because of their inconsistency with state constitutions; cases in the latter group primarily occurred in contexts where the state legislation had consequences that extended beyond the state—such as grants of citizenship or boundary disputes between states. There were ten cases in this category. Two were Rhode Island state cases in which a court found a state statute violated the federal Contract Clause.<sup>27</sup> These were straightforward cases in which the inconsistency between the federal constitutional provision and the state statute was clear. Rhode Island was famous (or infamous) for its anticreditor legislation.<sup>28</sup> The other eight cases involved federal courts striking down state statutes. By my count, in seven of these eight cases, there were plausible grounds for upholding the statute.<sup>29</sup>

The emphasis on nontextual concerns in this caselaw is evidenced by an examination of the most prominent case in each category.

The most prominent case in the first category (statutes affecting juries or courts) was the Virginia General Court's 1793 decision in *Kemper v. Hawkins*.<sup>30</sup> The case's prominence can be attributed to the fact that it was the product of an ongoing series of high-profile disputes between Virginia's legislatures and its courts implicating judicial autonomy, that it was published in book form the following year, and that the judges who participated in the case were of great stature.<sup>31</sup> Most notably, on the bench were Spencer Roane, who, at least according to legend, would have been Chief Justice if Thomas Jefferson had been able to select the Chief (rather than Adams who, of course, picked Marshall)<sup>32</sup> and St. George Tucker, the author of the first treatise on American constitutional law.<sup>33</sup>

At issue in the case was a state statute that created a district court and gave district court judges the power to issue injunctions. The relevant con-

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<sup>26</sup> Treanor, *Judicial Review*, *supra* note 4, at 458 (summarizing findings).

<sup>27</sup> For discussion, see *id.* at 502–03.

<sup>28</sup> FORREST McDONALD, *NOVUS ORDO SECLORUM: THE INTELLECTUAL ORIGINS OF THE CONSTITUTION 175–76* (1985).

<sup>29</sup> Treanor, *Judicial Review*, *supra* note 4, at 458 (summarizing findings).

<sup>30</sup> 3 Va. (1 Va. Cas.) 20 (1793).

<sup>31</sup> See CHARLES GROVE HAINES, *THE AMERICAN DOCTRINE OF JUDICIAL SUPREMACY 150–57* (2d ed. 1932); Treanor, *Judicial Review*, *supra* note 4, at 513–17.

<sup>32</sup> See MARGARET E. HORSNELL, *SPENCER ROANE 33–34* (1986) (noting the legend, but questioning it).

<sup>33</sup> CHARLES T. CULLEN, *ST. GEORGE TUCKER AND LAW IN VIRGINIA, 1772–1804*, at 188–89 (1987); Treanor, *Judicial Review*, *supra* note 4, at 520. The treatise is ST. GEORGE TUCKER, *BLACKSTONE'S COMMENTARIES: WITH NOTES OF REFERENCE TO THE CONSTITUTION AND LAWS OF THE UNITED STATES; AND OF THE COMMONWEALTH OF VIRGINIA* (Philadelphia, Birch & Small 1803).

stitutional provision provided that the Virginia Assembly had the power to appoint judges to the Supreme Court of Appeals, the General Court, the Chancery Court, and the Admiralty Court.<sup>34</sup> The question before the General Court was whether the legislature had the power to create a court not provided for in the constitution, assign to that court judges who did not enjoy tenure protection, and give those judges the equity power when the constitution provided for the creation of a court that would be able to exercise the equity power—the Chancery Court.<sup>35</sup>

All five judges held the statute unconstitutional. Significantly, while the five opinions embodied a range of approaches, their analyses were not principally textual, but reflected structural concerns such as the need for an independent judiciary, invoked the constitution's spirit, repeatedly referred to the legislature's ongoing fights against the courts, and raised policy concerns. While one can certainly imagine how one would write a wholly textualist opinion invalidating the statute, and while some of the opinions employed textualist arguments, the judicial opinions reflected a range of rationales, and textual arguments were not in the ascendant. I will focus here on the opinions of the two most prominent judges—Roane and Tucker—to illustrate how the judges reasoned.<sup>36</sup>

Judge Roane's opinion is notable for its antitextualism. He began by observing that his first reaction had been to reject the challenge to the statute's unconstitutionality because it did not run afoul of the constitution's text: "I doubted how far the judiciary were authorized to refuse to execute a law, on the ground of its being against the spirit of the Constitution."<sup>37</sup> But he changed his mind:

My opinion, on more mature consideration, is changed in this respect, and I now think that the judiciary may and ought not only to refuse to execute a law expressly repugnant to the Constitution; but also one which is, by a plain and natural construction, in opposition to the fundamental principles thereof.<sup>38</sup>

"By fundamental principles," he explained, "I understand, those great principles growing out of the Constitution, by the aid of which, in dubious

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<sup>34</sup> VA. CONST. of 1776, § XI ("The two Houses of Assembly shall, by joint ballot, appoint Judges of the supreme Court of Appeals, and General Court, Judges in Chancery, [and] Judges of Admiralty.").

<sup>35</sup> *Kemper*, 3 Va. (1 Va. Cas.) at 21, 66 (Tyler, J.).

<sup>36</sup> For analysis of the other three opinions (as well as Roane's and Tucker's), see William Michael Treanor, *The Case of the Prisoners and the Origins of Judicial Review*, 143 U. PA. L. REV. 491, 529–38 (1994) [hereinafter Treanor, *Case of the Prisoners*]; Treanor, *Judicial Review*, *supra* note 4, at 514–17. As I discuss in these articles, Judge Tyler's opinion centered on his concerns about judicial independence and the state legislature's demonstrated willingness to undermine that independence. *Kemper*, 3 Va. (1 Va. Cas.) at 64. Judge Henry combined a textual point (the constitution established only one court with the power to issue injunction, the court of chancery, while the challenged statute established a second) with the policy concern that the legislature could not be relied on to protect judicial independence. *Id.* at 53. Judge Nelson's opinion combined textual and structural arguments. *Id.* at 34.

<sup>37</sup> *Id.* at 35 (Roane, J.).

<sup>38</sup> *Id.* at 35–36.

cases, the Constitution may be explained and preserved inviolate; those land-marks, which it may be necessary to resort to, on account of the impossibility to foresee or provide for cases within the spirit, but without the letter of the Constitution.”<sup>39</sup> Thus, Roane explicitly followed the constitution’s spirit, not its text. He concluded that the statute was unconstitutional because the district court judges would be “the creatures of the Legislature itself [and] will not dare to oppose an unconstitutional law . . . [which] would pave the way to an uncontrolled power in the Legislature.”<sup>40</sup>

Although he did not reject text in the way that Roane did, Tucker followed his fellow judge in invoking the concept of spirit as an interpretive guide. He began his opinion by observing: “I shall first state my own impressions, arising from the text of the constitution, and the spirit of our government . . . .”<sup>41</sup> He stressed the fact that the district court was not constitutionally established and thus was not constitutionally protected. He reviewed the history of legislative attempts to undermine judicial authority and observed, “the judiciary can never be independent, so long as the existence of the office depends upon the will of the ordinary legislature, and not upon a constitutional foundation.”<sup>42</sup> The constitution, he reasoned, created courts whose judges would serve during good behavior; it should therefore be construed to mean that the legislature could not create other courts whose judges did not enjoy such tenure: “[S]uch an arrangement must ever render the judiciary the mere creature of the legislative department, which both the constitution and the bill of rights most pointedly appear to have guarded against.”<sup>43</sup>

The invocation of “spirit” in the two opinions should be highlighted. Roane understood himself to be invalidating a statute even though it was consistent with the text of the constitution. The “spirit” of the constitution, which included the need for judicial autonomy and power, was the key to his decision. The “spirit” trumped text. Tucker, in contrast, did not explicitly reject text, but text was not his core concern. It did not explain the result. Like Roane, Tucker believed that the “spirit” of the government necessitated judicial independence. He drew on history to show that tenure in office was critical to judicial independence and that the legislature would seek to undermine the judiciary. His decision to invalidate the statute was thus consistent with the “spirit” of the constitution and made sense because recent history showed why the statute was dangerous. Finally, the decision to invalidate the statute was consistent with the purpose underlying the constitutional text: the creation of courts where the judges did not serve during good behavior “must ever render the judiciary the mere creature of the legislative department, which both the constitution and the bill of rights most

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<sup>39</sup> *Id.* at 40.

<sup>40</sup> *Id.* at 41.

<sup>41</sup> *Id.* at 68 (Tucker, J.).

<sup>42</sup> *Id.* at 86.

<sup>43</sup> *Id.* at 92–93.

pointedly appear to have guarded against.<sup>44</sup> Tucker's opinion is consistent with the larger purpose behind the constitution, but also suggests he engaged in gap-filling—resolving a question that the text did not address.

Just as *Kemper* is the most prominent case from this period involving judicial review of legislation affecting judges and juries, *Van Horne's Lessee v. Dorrance*<sup>45</sup> is the most prominent instance of federal judicial review of state legislation. It, like *Kemper*, was almost immediately published in book form.<sup>46</sup> Its logic convinced Chase—the Supreme Court's lone fence-sitter on the judicial review issue—to embrace judicial review,<sup>47</sup> and its phrasing and analytic structure were picked up by Marshall in *Marbury*.<sup>48</sup> As in *Kemper*, constitutional text plays little role in the result.

The case grew out of an ongoing controversy concerning land that both Connecticut and Pennsylvania had argued was within their boundaries. Ultimately, Connecticut conceded its claim to the area, but there continued to be a dispute about whether land titles that could be traced to Connecticut grants were superior to land titles that could be traced to Pennsylvania grants. The Pennsylvania statute at issue in *Van Horne's Lessee* vested property in Connecticut claimants and provided that the rival Pennsylvania claimants could receive an equivalent in land as compensation.<sup>49</sup>

The provision of the Pennsylvania Constitution of 1776 that protected private property claims provided “[t]hat all men . . . have certain natural, inherent and unalienable rights, amongst which are . . . acquiring, possessing and protecting property.”<sup>50</sup> The absence of an explicit compensation requirement was not unusual. While there was a Takings Clause in the Fifth Amendment, the takings principle was fairly novel at this point: only Massachusetts and Vermont had explicit compensation requirements in their state constitutions.<sup>51</sup> Nonetheless, Justice Paterson in his jury charge read a compensation requirement into the provision quoted above. He stated:

The legislature . . . had no authority to make an act divesting one citizen of his freehold, and vesting it in another, without a just compensation. It is inconsistent with the principles of reason, justice and moral rectitude; it is incompatible with the comfort, peace and happiness of mankind; it is contrary to the principles of social alliance in every free government; and lastly, it is contrary

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<sup>44</sup> *Id.*

<sup>45</sup> 2 U.S. (2 Dall.) 304 (C.C.D. Pa. 1795).

<sup>46</sup> See JULIUS GOEBEL, HISTORY OF THE SUPREME COURT—VOLUME I: ANTECEDENTS AND BEGINNINGS TO 1801, at 590 n.177 (1971).

<sup>47</sup> See Justice Samuel Chase, Charge to the Grand Jury of the Circuit Court for the District of Pennsylvania (Apr. 12, 1800), reprinted in 3 DHSC, *supra* note 19, at 412 & n.5; Treanor, *Judicial Review*, *supra* note 4, at 522.

<sup>48</sup> SNOWISS, *supra* note 9, at 112.

<sup>49</sup> *Van Horne's Lessee*, 2 U.S. (2 Dall.) at 313, 316–18.

<sup>50</sup> PA. CONST. of 1776, Declaration of Rights, art. I.

<sup>51</sup> William Michael Treanor, *The Original Understanding of the Takings Clause and the Political Process*, 95 COLUM. L. REV. 782, 790–91 (1995).

both to the letter and spirit of the Constitution. In short, it is what every one would think unreasonable and unjust in his own case.<sup>52</sup>

Like Judges Roane and Tucker, Paterson appealed to the constitution's "spirit." Admittedly, he also appealed to "text," but the text did not do much of the work. This argument is not framed as an exegesis of the constitution's protection of the right of "acquiring, possessing, and protecting property." Rather, the emphasis is on first principles: "[T]he principles of reason, justice and moral rectitude; . . . the comfort, peace and happiness of mankind; . . . the principles of social alliance, in every free government."<sup>53</sup>

Paterson thus found that a compensation requirement was part of the property clause. Yet the Pennsylvania law did provide for compensation in land. Having read a compensation requirement into the property clause of the state constitution, Paterson then read an additional requirement that compensation must be in money (and that the compensation in land provided for under the statute was therefore unacceptable): "No just compensation can be made, except in money. Money is a common standard, by comparison with which the value of any thing may be ascertained. . . . It is obvious, that if a jury pass upon the subject, or value of the property, their verdict must be in money."<sup>54</sup> Again, first principles give content to the constitutional text.

The caselaw surveyed suggests that the early courts engaged aggressively in the protection of the constitutional boundaries that the political process did not protect. In *Kamper* and twenty other cases, they overturned statutes that undermined either judicial authority or the power of juries, and, as *Kamper* illustrates, they often did it when the text did not dictate invalidation of the statutes. Similarly, federal courts in eight cases overturned state statutes. In seven of the eight cases, the statute was reconcilable with constitutional text—as it was reconcilable in *Van Horne's Lessee*—but the court nonetheless struck down the statute.<sup>55</sup>

Yet outside these areas, courts were wholly deferential. Except for the two Rhode Island Contract Clause cases mentioned briefly above (which can also be seen as cases involving boundary protection),<sup>56</sup> I have not found

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<sup>52</sup> *Van Horne's Lessee*, 2 U.S. (2 Dall.) at 310.

<sup>53</sup> *Id.*

<sup>54</sup> *Id.* at 315.

<sup>55</sup> For further analysis of the caselaw, see Treanor, *Judicial Review*, *supra* note 4, at 517–33, 549–54.

<sup>56</sup> These cases are discussed *supra* in the text accompanying notes 27–28. These two Rhode Island decisions (unreported except for articles in contemporaneous newspapers) held state debtor relief statutes unconstitutional because they ran afoul of the federal Contract Clause. *See id.* The Contract Clause is generally considered to have been placed in the Constitution to ensure that states would not enact legislation favoring in-state debtors at the expense of out-of-state creditors. *See* Charles A. Bieneman, Note, *Legal Interpretation and a Constitutional Case: Home Building and Loan Association v. Blaisdell*, 90 MICH. L. REV. 2534, 2544–45 (1992). Although the newspaper accounts do not report whether the creditors involved in these cases were from outside Rhode Island, by enforcing the clause

a single case in which a court invalidated a statute passed by a co-equal legislature that did not implicate either juries or courts.<sup>57</sup> It is not that there were no serious challenges to such statutes. There were, for example, a series of constitutional challenges at the circuit court level to prosecutions under the Alien and Sedition Acts, but they all failed.<sup>58</sup>

Another serious case was *Hylton v. United States*,<sup>59</sup> the only pre-*Marbury* case in which the Supreme Court confronted the constitutionality of a congressional statute that did not affect either courts or juries. As previously noted,<sup>60</sup> the case involved a challenge to a federal tax on carriages—which imposed a tax of \$1 to \$10 per carriage, depending on size—on the grounds that the tax violated the Constitution’s provisions that “direct taxes shall be apportioned among the several States . . . according to their respective Numbers”<sup>61</sup> and that “no Capitation, or other direct, Tax shall be Laid, unless in Proportion to the Census or Enumeration herein before directed to be taken.”<sup>62</sup> The Court, finding the carriage tax was not a direct tax, unanimously upheld the statute.<sup>63</sup> The editors of the Supreme Court Documentary History tartly observe: “The Court’s judgment affirmed that Congress could exercise wide latitude in its method of taxation, unhampered, to a large extent, by the Article I language on direct taxes.”<sup>64</sup> David Currie reaches a similar conclusion: “In *Hylton*, the Justices relied mostly on unverified tradition and their own conception of sound policy, paying little attention to the Constitution’s words.”<sup>65</sup>

Of the three opinions in the case, two were strongly nontextual. Justice Chase’s was one. Chase explicitly deferred to congressional judgment: “The deliberate decision of the National Legislature, (who did not consider a tax on carriages a direct tax, but thought it was within the description of a duty), would determine me, if the case was doubtful, to receive the construction of the legislature . . . .”<sup>66</sup> With respect to his own analysis, he started with the premise that “[t]he great object of the Constitution was to give Congress a power to lay taxes, adequate to the exigencies of government . . . .”<sup>67</sup> Chase then said that a carriage tax that was allocated on the

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the state court was ensuring that the state legislature could not undercut the property interests of out-of-state creditors, people not involved in the state’s political process.

<sup>57</sup> Treanor, *Judicial Review*, *supra* note 4, at 498–503.

<sup>58</sup> See JAMES MORTON SMITH, *FREEDOM’S FETTERS* 232–235, 354–55, 379–81 (1967).

<sup>59</sup> 3 U.S. (3 Dall.) 171 (1796).

<sup>60</sup> See *supra* text accompanying notes 14–16.

<sup>61</sup> U.S. CONST. art. I, § 2, cl. 3.

<sup>62</sup> U.S. CONST. art. I, § 9, cl. 4.

<sup>63</sup> *Hylton*, 3 U.S. (3 Dall.) at 175 (Chase, J.); *id.* at 180 (Paterson, J.); *id.* at 182 (Iredell, J.).

<sup>64</sup> *Hylton v. United States*, 7 DHSC, *supra* note 19, at 369. For a defense of the opinions, see Bruce Ackerman, *Taxation and the Constitution*, 99 COLUM. L. REV. 1, 20–25 (1999).

<sup>65</sup> DAVID CURRIE, *THE CONSTITUTION IN THE SUPREME COURT: THE FIRST HUNDRED YEARS, 1789–1888*, at 33 (1985).

<sup>66</sup> *Hylton*, 3 U.S. (3 Dall.) at 173 (Chase, J.). As previously noted, in the opinion, Justice Chase also explicitly reserved the question of whether the Court could invalidate congressional statutes.

<sup>67</sup> *Id.*

basis of the number of people in a state would mean that people in different states with exactly the same carriage would pay different amounts.<sup>68</sup> It followed that a carriage tax could not be a direct tax: “If it is proposed to tax any specific article by the rule of apportionment [among the states], and it would evidently create great inequality and injustice, it is unreasonable to say, that the Constitution intended such tax should be laid by that rule.”<sup>69</sup> Chase was thus not concerned with explicating the term “direct tax”; rather, he reasoned that, given the importance of Congress’s power of taxation, if an item could not be equitably taxed under the Constitution’s provisions regulating direct taxes, a tax on that item could not be a direct tax.

Justice Iredell’s opinion was analytically quite similar to Chase’s in its nationalism and dominance by structural and policy concerns. Iredell’s central argument was that a tax could not be a direct tax if the rule that the Constitution mandated for direct taxes—the rule of apportionment—would lead to individuals from different states being taxed differently.<sup>70</sup> Because the carriage tax was such a tax, it could not be constitutional.

The final opinion is Paterson’s, and his argument was, in critical part, intentionalist.<sup>71</sup> Indeed, it is striking that in the Supreme Court’s major pre-*Marbury* judicial review case, the one member of the Philadelphia convention to write an opinion delivered a textbook example of what Jefferson Powell and other scholars have maintained was not part of the original understanding: Paterson grounded his conclusions in the Philadelphia debates.<sup>72</sup> Invoking his experience as a drafter, Paterson said that the “direct taxes” clauses were included in the Constitution because southern delegates did not want Congress to tax land or slaves.<sup>73</sup> The clauses were thus a “work of compromise”<sup>74</sup> that was “radically wrong . . . [and could not] be supported by any solid reasoning.”<sup>75</sup> Lacking intellectual coherence or moral legitimacy, the clauses, he reasoned, should be construed narrowly: “Why should slaves, who are a species of property, be represented more than any other property? The rule, therefore, ought not to be extended by

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<sup>68</sup> *Id.* at 174.

<sup>69</sup> *Id.*

<sup>70</sup> *Id.* at 181–83 (Iredell, J.). Because the Constitution contemplates direct taxes and because the rule of apportionment to be used for direct taxes involves people from different states being taxed at different rates, Iredell’s argument is flawed, suggesting his deep deference to Congress.

<sup>71</sup> *Id.* at 175–81 (Paterson, J.).

<sup>72</sup> I have previously used the early judicial review case *The Case of the Prisoners* to argue that the Founding generation looked to drafters’ subjective intent. See Treanor, *Case of the Prisoners*, *supra* note 36, at 496, 527–28, 548 (1994). The literature on this topic is voluminous. For a recent analysis and literature survey, see Robert G. Natelson, *The Founders’ Hermeneutic: The Real Original Understanding of Original Intent*, 68 OHIO ST. L.J. 1239 (2007) (arguing that the Founders thought that the subjective intent of the ratifiers was relevant). The classic treatment is, of course, H. Jefferson Powell, *The Original Understanding of Original Intent*, 98 HARV. L. REV. 885 (1985).

<sup>73</sup> *Hylton*, 3 U.S. (3 Dall.) at 177 (Paterson, J.).

<sup>74</sup> *Id.* at 178.

<sup>75</sup> *Id.*

construction.”<sup>76</sup> Thus, Paterson contended that the direct tax provision should be construed as only applying to the two types of taxes that Southerners had been concerned about at the convention: taxes on land and taxes on slaves.<sup>77</sup> This part of the opinion, then, not only belies Powell’s thesis, it belies the interpretive approach championed by modern textualists. Paterson read into the direct taxes clauses a limitation that has no textual basis—a limitation to slaves and land.

Having made this intentionalist argument, Paterson then made a policy argument: A tax that required states to pay on the basis of their population was a bad way to tax wealth because “numbers do not afford a just estimate or rule of wealth.”<sup>78</sup> This counseled against requiring that carriage taxes be direct taxes within the meaning of the Constitution.

Finally, Paterson offered a textualist argument. He quoted the discussion of taxes from Adam Smith’s *Wealth of Nations*. Smith stated that consumption taxes, such as carriage taxes, were indirect taxes. Paterson reasoned that carriage taxes were consumption taxes and thus fell into the category of indirect taxes.<sup>79</sup>

Paterson’s argument here is not fully satisfactory. Two uses of the term “indirect taxes” were prevalent during this era. One was Smith’s, which Alexander Hamilton, arguing on behalf of the statute, had pressed before the Court; the other, advanced by Hylton’s attorney, was that an indirect tax was one that could be passed on to third parties—a reading that would have led to the invalidation of the statute.<sup>80</sup> Both readings are plausible. It is also not clear which, if either, the drafters had in mind. When the direct taxes clause was under consideration during the Philadelphia debates, a confused Rufus King rose to his feet and “asked what was the precise meaning of direct taxation.”<sup>81</sup> Madison’s notes observe: “No one ans[w]er[d].”<sup>82</sup>

Paterson did not explain why, as a textual matter, Smith’s definition was superior. But what is more important is that, despite the fact that textualist arguments were made by attorneys for both sides, those arguments did not enter into two of the three opinions and only entered into the third as a secondary argument. The minimal attention the Court paid to text in *Hylton* underscores the limited significance the Founders attached to text as they engaged in judicial review.

My summary of the opinions in *Kemper*, *Van Horne’s Lessee*, and *Hylton* illustrates the larger point reflected in my analysis of all the cases in

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<sup>76</sup> *Id.*

<sup>77</sup> *Id.* at 177.

<sup>78</sup> *Id.* at 178.

<sup>79</sup> *Id.* at 180–81 (quoting ADAM SMITH, AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS 482–83, 490–91 (1776)).

<sup>80</sup> See CURRIE, *supra* note 65, at 35–36 & n.41.

<sup>81</sup> 2 MAX FARRAND, THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 350 (1937).

<sup>82</sup> *Id.*

which pre-*Marbury* courts invalidated statutes: Judges in the Founding era were not textualists when they engaged in constitutional interpretation. They acted aggressively to protect the basic constitutional boundaries that were not protected by the political process itself. Outside of that area, they were wholly deferential and invalidated literally no statutes even in situations such as *Hylton* where there were strong textualist arguments against the statute.

If one seeks to interpret the Constitution as We the People adopted it, this limited judicial role should be part of the package. Courts should act aggressively to police constitutional boundaries that are not protected by the political process, and they should otherwise be deferential. Under this approach, federal courts would, for example, deferentially review legislation that affects the power of Congress or the Executive, since both branches are involved in the process of passing legislation. Similarly, like the Supreme Court in *Hylton*, they would deferentially review congressional legislation implicating the states, since states have representation in the congressional legislative process.<sup>83</sup> Courts would, in contrast, more aggressively review legislation that affects their own power and the power of the juries (as early courts did) and federal courts would closely review state legislation affecting national power (as the early federal courts did). This should be the prism through which modern courts view their role as constitutional interpreters.

Two qualifications should be noted here.

First, there are different ways to view the idea that the judicial role is that of protecting constitutional actors not protected by the political process itself. One is to view this role in precisely the way embodied in the early caselaw. Courts would thus protect their power and the power of juries and would additionally look closely at state legislation that implicates other states or national authority. Another view is that this approach should be more broadly understood as embodying the concept that the judicial role is to protect against the failure of process. Thus, a representation-reinforcement theory of judicial review, such as that developed by John Hart Ely, can be squared with the original interpretive conventions outlined here.<sup>84</sup> Similarly, one could argue that the early caselaw should be read

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<sup>83</sup> For the classic statement of the argument that the federal political process protects the interests of the states, see Herbert Wechsler, *The Political Safeguards of Federalism: The Role of States in the Composition and Selection of the National Government*, 54 COLUM. L. REV. 543 (1954).

<sup>84</sup> See JOHN HART ELY, *DEMOCRACY AND DISTRUST* 105–80 (1980). In his representation-reinforcement theory, Ely focuses on two areas in which courts can appropriately subject legislation to close scrutiny. First, courts should act to clear the “channels of political change,” *id.* at 103, by, for example, protecting the right to vote. See *id.* at 116–25. As Ely observes, “We cannot trust the ins to decide who stays out, and it is therefore incumbent on the courts to ensure not only that no one is denied the right to vote for no reason, but also that where there is a reason (as there will be) it had better be a very convincing one.” *Id.* at 120. Second, courts should “facilitat[e] the representation of minorities.” *Id.* at 135. Ely thus argues that courts should exercise the power of judicial review expansively to “assur[e] the protection of minorities.” *Id.* at 172.

broadly and that a broad approach would lead to courts aggressively protecting individual rights and the rights of minorities because these rights are not adequately considered in majoritarian deliberations. The choice between these different ways of viewing the early precedent, however, is outside the scope of this Article.

The other qualification is that my discussion is concerned with the interpretive frame governing judicial readings of the unamended Constitution and the Bill of Rights. With the passage of time, courts began to exercise the power of judicial review more aggressively and, in particular, to protect individual rights.<sup>85</sup> If courts seek to read constitutional language as courts would have read it at the time of its adoption, that means something very different for the Fourteenth or Nineteenth Amendments than it does for the unamended Constitution or the Bill of Rights.

## II. SUBSTANTIVE INTERPRETATION

Early caselaw bears not only on the question of how courts read the Constitution but on interpretive conventions more broadly. Early political debates also illustrate these interpretive conventions. Together, this early history indicates that text was only one of the relevant metrics for early interpreters—along with Framers' and ratifiers' intent, policy, practice, and larger questions of structure—and that, even when text was the interpretive focus, it was generally not as closely probed as modern textualists would have it. Modern textualism thus often produces readings that are a testament to modern conventions or the ingenuity of modern textualists, rather than a reflection of original meaning.

Multiple factors create a gap between original public meaning and the readings offered by modern textualists. Textualists assume that a great degree of care was taken in the choice of words and that words had a clear meaning; they assume that words have a consistent meaning throughout the document, that placement of clauses was fully considered, that surplusage was weeded out, and that every possible situation that could arise was contemplated.<sup>86</sup> This view misses the messiness of the drafting process and the extent to which critical questions were not resolved. One explanation for why the Founders were not textualists is that they understood the limits of the text they had drafted and adopted.

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<sup>85</sup> See William E. Nelson, *The Changing Conception of Judicial Review: The Evolution of Constitutional Theory in the States, 1790–1860*, 120 U. PA. L. REV. 1166, 1184 (1972) (“By the 1850s, the courts had articulated a new theoretical justification for judicial enforcement of constitutional safeguards. . . . [J]udicial review was needed ‘to secure to weak and unpopular minorities and individuals, equal rights with the majority,’ ‘to prevent majorities in times of high political excitement from passing partial laws’ and to protect ‘minorities against the caprices, recklessness, or prejudices of majorities.’” (citations omitted)).

<sup>86</sup> See Treanor, *Taking Text Too Seriously*, *supra* note 5, at 495–500.

The Constitution was, after all, drafted under circumstances that were less than ideal for careful consideration: it was written in a relatively brief period of time in a room whose windows were, despite the summer heat, shut to prevent spying.<sup>87</sup> The document, while a stunning achievement, also had its flaws, as a product of human effort inevitably does. Thus, as previously discussed in the context of *Hylton*,<sup>88</sup> the drafters inserted the “direct taxes” clauses in the Constitution without anyone seeming to know what the clause meant. The *Hylton* opinions can therefore be seen as the Court grappling with constitutional provisions that were poorly drafted and had no coherent underlying theory. Similarly, it seems that there was no clear view among the Framers about the meaning of the Ex Post Facto Clause, the subject of *Calder v. Bull*.<sup>89</sup> To cite an example of great significance today, the records of the Philadelphia Convention indicate that the language vesting in Congress the power to “declare war” was more a product of delegates’ dissatisfaction with the original proposal that Congress should have the power to “make war,” rather than a considered conception of what the power to “declare war” meant. Their focus was on why “make war” was a bad approach, rather than on why “declare war” captured their intended meaning. Moreover, Madison and Gerry, who proposed the “declare war” language, said, as they made the motion, that they wanted to “leav[e] to the Executive the power to repel sudden attacks,” but they did not propose language that would authorize the President to do so.<sup>90</sup>

Another fairly recent controversy highlights what seems to have been a drafting error. The Impeachment Judgment Clause provides:

Judgment in cases of impeachment shall not extend further than to removal from office, and disqualification to hold and enjoy any office of honor, trust, or profit under the United States: but the party convicted shall nevertheless be liable and subject to indictment, trial, judgment and punishment, according to law.<sup>91</sup>

The clause provides that one impeached by the House and convicted by the Senate can subsequently be criminally prosecuted. Traditional canons of interpretation would suggest that the clause should be read to mean, as well, that one impeached by the House but not convicted by the Senate cannot be subsequently criminally prosecuted because the rule explicitly extends only

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<sup>87</sup> DAVID O. STEWART, *THE MEN WHO INVENTED THE CONSTITUTION: THE SUMMER OF 1787*, at 81–82 (2007).

<sup>88</sup> See *supra* text accompanying notes 80–82.

<sup>89</sup> 3 U.S. (3 Dall.) 386 (1798); see CURRIE, *supra* note 65, at 43–45; LEONARD W. LEVY, *ORIGINAL INTENT AND THE FRAMERS’ CONSTITUTION* 71 (1988).

<sup>90</sup> For the debate on the proposal to give Congress the power to “make” war and the decision to vest in Congress the power to “declare” war, see 2 FARRAND, *supra* note 81, at 318–19. For my analysis of this debate and the conflicting interpretations it has inspired, see William Michael Treanor, *Fame, the Founding, and the Power to Declare War*, 82 CORNELL L. REV. 695, 713–19 (1997).

<sup>91</sup> U.S. CONST. art. I, § 3, cl. 7.

to those convicted by the Senate.<sup>92</sup> This was, of course, President Clinton's situation, having been impeached, but not convicted. But it seems clear that the Impeachment Judgment Clause was just badly drafted and should not be read to bar prosecution of one impeached by the House but not convicted by the Senate.<sup>93</sup>

Moreover, much of the document's polish was the work of Gouverneur Morris, who, as the draftsman for the Committee of Style, put together the various proposals and votes into a final document. As he wrote to Timothy Pickering, the Constitution "was written by the fingers which write this letter."<sup>94</sup> Morris's central role as drafter and the fact that he was far from a mere compiler are relevant to the question of how closely we ought to read the text and also highlight the messiness of the drafting process.

Morris's draft emerged from the Committee of Style and was presented to weary delegates at the end of the Philadelphia proceedings.<sup>95</sup> Some of his changes were the subject of subsequent discussion—his "We the People" preamble, for example—but other important aspects of his version of the document were not, despite the significance that modern textualists attach to them. Thus, the basic division of the part concerning the three branches into Articles I, II, and III and the vesting clauses that preceded each Article were Morris's creation and were not discussed.<sup>96</sup> Morris also made substantive changes that the record of the debates indicate went unnoticed. He or one of the other members of the committee inserted the Contracts Clause

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<sup>92</sup> See Memorandum for the Attorney General from Randolph D. Moss, Assistant Attorney General, Office of Legal Counsel, Whether a Former President May Be Indicted and Tried for the Same Offenses for Which He Was Impeached by the House and Acquitted by the Senate (Aug. 18, 2000), available at <http://www.usdoj.gov/olc/expresident.htm>. The Memorandum observes that the "the well-known canon of statutory construction, *expressio unius est exclusio alterius*, 'the expression of one is the exclusion of others'" would suggest that a President who was impeached, but not convicted, could not be subsequently prosecuted; because the Impeachment Judgment Clause explicitly provides that a President who is impeached and convicted *can* be criminally prosecuted, the implication would be that one who has been impeached by the House and convicted by the Senate *cannot* be criminally prosecuted. *Id.*, pt. II.A.1.

<sup>93</sup> See *id.*, pt. II.A. 2, 3. When the Impeachment Clause was first drafted, the Constitution provided that the Supreme Court would be the tribunal for trying impeachments. The Constitution was subsequently revised to make the Senate the tribunal, but there was no discussion of the clause in light of the change. Early comments on the impeachment power (from drafter James Wilson and ratifier Edmund Pendleton, and in St. George Tucker's and Justice Story's treatise) uniformly indicate that an official acquitted by the Senate could still be criminally prosecuted. The clause seems to have been framed in the way it was because in England the House of Lords could impose criminal sanctions as part of the consequences for conviction of impeached defendants. The drafters wanted to make clear the differences between the United States system (where criminal sanctions could only be imposed outside of the impeachment process) and the English unitary system (in which criminal sanctions could be imposed in the context of the House of Lords' conviction of the impeached defendant). See *id.*

<sup>94</sup> CLINTON ROSSITER, 1787: THE GRAND CONVENTION 225 (1966). For discussion of Morris's role, see Treanor, *Taking Text Too Seriously*, *supra* note 5, at 507.

<sup>95</sup> 2 FARRAND, *supra* note 81, at 582 (Report of the Committee of Style, Sept. 12, 1787); *id.* at 633 (Congress voted on September 15, 1787 to engross Constitution).

<sup>96</sup> *Id.* at 590–603 (1937).

into the Constitution, even though it had been previously voted down.<sup>97</sup> He revised the Territories Clause so that new territories could be permanently kept as territories, rather than eventually being incorporated as states, and, by his own admission, he crafted the change in such a way so as to escape notice. He subsequently wrote:

I always thought that, when we should acquire Canada and Louisiana it would be proper to govern them as provinces, and allow them no voice in our councils. In wording the third section of the fourth article, I went as far as circumstances would permit to establish the exclusion. Candor obliges me to add my belief, that, had it been more pointedly expressed, a strong opposition would have been made.<sup>98</sup>

He also seems to have converted a comma into a semicolon in the General Welfare Clause, arguably to convert a limitation on the taxing power into a general grant of power, although the comma was eventually reinserted.<sup>99</sup> According to Republican Albert Gallatin, Roger Sherman caught the punctuation change and changed the punctuation back to the original before the document was engrossed.<sup>100</sup>

The Bill of Rights drafting process did not have anyone quietly making subtle, but consequential, changes at the end of the drafting process, but, as my recent article critiquing Professor Amar's *Bill of Rights* shows, there is a great gap between the assumptions underlying the Bill of Rights drafting process and the conclusions that a textualist reader such as Amar draws from looking at the final document.<sup>101</sup>

Here is my favorite: Amar declares that it is very significant that the Ninth and Tenth Amendments are next to each other and that they are at the end of the Bill of Rights: "If the Ninth is mainly about individual rights, why does it not speak of individual 'persons' rather than the collective 'the people'? If the Tenth is only about states' rights, why does it stand back-to-back with the Ninth, and what are its last three words doing there, mirroring the Preamble's first three?"<sup>102</sup>

In response to Amar's question, here is why: When Madison proposed the Bill of Rights, he intended that the new amendments would be directly inserted into the constitutional text. They were ordered in a way that tracked where they were to be inserted into the Constitution. What was to become the Ninth Amendment was part of his Fourth Proposal and was to be inserted into Article I, Section 9, between Clause 3 and Clause 4, the

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<sup>97</sup> See MCDONALD, *supra* note 28, at 272–73 (suggesting that Hamilton, rather than Morris, likely bore responsibility for the insertion of the Contract Clause).

<sup>98</sup> 3 FARRAND, *supra* note 81, at 404. For a discussion, see MCDONALD, *supra* note 28, at 282–83, and Treanor, *Taking Text Too Seriously*, *supra* note 5, at 508.

<sup>99</sup> Treanor, *Taking Text Too Seriously*, *supra* note 5, at 507 n.104.

<sup>100</sup> *Id.*

<sup>101</sup> See generally *id.*

<sup>102</sup> AKHIL REED AMAR, THE BILL OF RIGHTS 121 (1998).

placement suggesting that it was to be a limitation on congressional power. What was to become of the Tenth Amendment was part of his Eighth Proposal (along with a separation of powers amendment). The Eighth Proposal was to form a new Article VII, indicating that it would be an interpretive gloss on the document. It was not, however, to be at the very end of the document. The current Article VII, which says that the Constitution is to go into effect when ratified by nine states, was to become Article VIII.<sup>103</sup> In Madison's conception, then, the Ninth and Tenth Amendments were to be inserted into very different parts of the Constitution—one near the beginning, the other near the end—and the Tenth Amendment was not to be at the document's end.

Roger Sherman then suggested that the Bill of Rights be placed as a group at the end of the document, because that was consistent with the practice of statutory amendments and because the Bill of Rights was to be adopted by the states, whereas the Constitution had been adopted by the people. Over Madison's objection, the House agreed. It then moved what was to become the Ninth Amendment back in the list of amendments, presumably so that it would gloss the rights amendments, which now preceded it. As it left the House, the Ninth Amendment was Article Fifteen, Madison's separation of powers amendment was Article Sixteen, and our Tenth Amendment was Article Seventeen. The Senate then rejected the separation of powers amendment. This marks the first time the Ninth and Tenth Amendments were next to each other and at the end of the Bill of Rights.<sup>104</sup> Amar finds meaning in what was only happenstance, and the story of the Ninth and Tenth Amendments illustrates how the text can look very different to those reading it more than 200 years later than it did to those who participated in the drafting process.

At a more fundamental level, it is important to recognize the indeterminacy of critical parts of the Constitution. Basic questions were unresolved. For example, as the ratification debates show, the Necessary and Proper Clause was subject to different interpretations from the very start.<sup>105</sup> The allocation of military powers between the President and Congress was, in Corwin's memorable phrase, an "invitation to struggle"<sup>106</sup> between the branches. Separation of powers doctrine was in flux as the Founders struggled to reach the ideal point between the British Executive (too powerful) and the Governors established by the first state constitutions (too weak).<sup>107</sup> Conceptions of rights were also changing, with the excesses of revolution-

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<sup>103</sup> Treanor, *Taking Text Too Seriously*, *supra* note 5, at 514–15.

<sup>104</sup> *Id.* at 516–18. For my critique of Amar's reading of "the people," see *id.* at 519–31.

<sup>105</sup> 3 THE FOUNDERS' CONSTITUTION 238–44 (Philip B. Kurland & Ralph Lerner eds., 1987); JOSEPH M. LYNCH, NEGOTIATING THE CONSTITUTION: THE EARLIEST DEBATES OVER ORIGINAL INTENT 31–34 (1999).

<sup>106</sup> EDWARD S. CORWIN, THE PRESIDENT: OFFICE AND POWERS 200 (1940)

<sup>107</sup> GORDON S. WOOD, THE CREATION OF THE AMERICAN REPUBLIC, 1776–1787, at 148, 156–57 (1969).

ary era state governments producing increased concern for individual rights.<sup>108</sup>

We may have lost sight of all this uncertainty and imperfect drafting. The Founding generation had not. Madison, for example, observed during the debates about the Bank Bill and whether it was constitutional: “It is not pretended that every insertion or omission in the constitution is the effect of systematic attention. This is not the character of any human work, particularly the work of a body of men.”<sup>109</sup>

The opinions discussed in the previous section—*Hylton*, *Van Horne’s Lessee*, and *Kamper*—similarly reflect the fact that the Founders knew that proper constitutional interpretation was not primarily about parsing text. Text was not irrelevant, but other factors were to be considered. Among these were larger principles of government, such as the need for strong protection of private property championed in *Van Horne’s Lessee*; the necessity for a vigorous national taxing authority in *Hylton*; and the need for an independent judiciary in *Kamper*. The Founders looked to the rationale for the original understanding in *Hylton* and considered the lessons of experience in *Kamper*.

Other decisions from this era routinely draw significantly on nontextual concerns. Indeed, it is hard to find any full opinion from the pre-*Marbury* era that does not draw on nontextual arguments as a guide to constitutional interpretation. Legal tradition is a primary factor in Chase’s and Paterson’s opinions in *Calder v. Bull*.<sup>110</sup> Chase also invoked natural justice in *Calder*,<sup>111</sup> although Iredell sharply disagreed with the legitimacy of drawing on ideas of justice in determining whether statutes were unconstitutional.<sup>112</sup> Wilson in *Ware v. Hylton* (another case involving the same Hylton as in the carriage tax case) concluded that a Virginia statute was invalid because it was inconsistent with the law of nations, which was, in Wilson’s reading, an extraconstitutional basis for judicial review.<sup>113</sup> The Supreme Court Justices riding circuit in *Hayburn’s Case* wrote a letter to Washington indicating that their decision was based on their conclusion that the challenged statute, which made judicial decisions in disability cases subject to review by the Secretary of War, was “radically inconsistent” with broad principles of judicial “[i]ndependence.”<sup>114</sup> In *Ham v. M’Claws*,<sup>115</sup> the South Carolina Court of Common Pleas invoked natural law, observing: “It is

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<sup>108</sup> See, e.g., *id.* at 403–13 (discussing Framers’ concerns of abuses of legislative power in the states in the period after independence).

<sup>109</sup> 3 FOUNDERS’ CONSTITUTION, *supra* note 105, at 245.

<sup>110</sup> 3 U.S. (3 Dall.) 386 (1798).

<sup>111</sup> *Id.* at 386, 388 (Chase, J.).

<sup>112</sup> *Id.* at 398–400 (Iredell, J.).

<sup>113</sup> *Ware v. Hylton*, 3 U.S. (3 Dall.) 199, 281 (1796) (Wilson, J.).

<sup>114</sup> James Wilson, John Blair, and Richard Peters to George Washington (Apr. 18, 1792), *reprinted in* 6 DHSC, *supra* note 19, at 53–54; see also Treanor, *Judicial Review*, *supra* note 4, at 535.

<sup>115</sup> 1 S.C.L. (1 Bay) 91 (Ct. C.P. 1789).

clear, that statutes passed against the plain and obvious principles of common right, and common reason, are absolutely null and void, as far as they are calculated to operate against those principles.”<sup>116</sup> In *Bowman v. Middleton*,<sup>117</sup> the court invalidated a colonial era statute on the grounds that “it was against common right, as well as against Magna Carta.”<sup>118</sup> In *Zylstra v. Charleston*,<sup>119</sup> two of the four judges invalidated a statute because it was inconsistent with a jury trial right that it found existed in common law and that was “not the creature of the constitution.”<sup>120</sup>

It is striking that the early Supreme Court decision that, according to David Currie, best reflects the modern textualist approach is *Chisholm v. Georgia*.<sup>121</sup> The gap between textualism and original public meaning is suggested by the fact that the public soon rejected Chisholm’s conclusion, with the adoption of the Eleventh Amendment. But it should be added that even *Chisholm* was not purely textualist. Wilson’s constitutional opinion is grounded in “general jurisprudence”<sup>122</sup> and his reflections on the lessons of European history.<sup>123</sup> Jay’s opinion invokes policy concerns: “The extension of the judiciary power of the United States to [suits against a state by a citizen of another state], appears to me to be wise, because it is honest, and because it is useful.”<sup>124</sup> As Currie observes, the Jay and Wilson opinions are “evidence that at least two prominent Justices believed ‘general jurisprudence,’ sound policy, and the experience of other nations were more immediately relevant to the interpretation of our written Constitution than we are likely to think they should be.”<sup>125</sup>

Thus, judicial decisions frequently looked to nontextual factors in interpreting the Constitution. The same is true of early political debates about constitutional meaning. In a recent article, Professor Natelson studies the congressional debates about the first constitutional controversy—whether Congress had a role in the removal of federal officers—and he finds repeated use of ratification history by Congressmen.<sup>126</sup> He also finds one instance in which a Congressman who had also been a Philadelphia delegate, Abraham Baldwin, invoked drafters’ intent.<sup>127</sup> Natelson further chronicles a series of other arguments that Congressmen used that drew on nontextual sources. Congressman White appealed to English practice as evidencing the proper scope of congressional removal power. Congressmen Lee and

<sup>116</sup> *Id.* at 95–96.

<sup>117</sup> 1 S.C.L. (1 Bay) 250 (Ct. C.P. 1792)

<sup>118</sup> *Id.* at 251–52.

<sup>119</sup> 1 S.C.L. (1 Bay) 375 (Ct. C.P. 1794)

<sup>120</sup> *Id.* at 383 (Waties, J.); *see also id.* at 391 (Bay, J.) (following Waties, J.).

<sup>121</sup> *See* CURRIE, *supra* note 65, at 56.

<sup>122</sup> *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419, 453 (1793) (Wilson, J.).

<sup>123</sup> *Id.* at 459–63.

<sup>124</sup> *Id.* at 479 (Jay, J.).

<sup>125</sup> CURRIE, *supra* note 65, at 15.

<sup>126</sup> Natelson, *supra* note 72, at 1300–05.

<sup>127</sup> *Id.* at 1302.

Jackson invoked Montesquieu. Congressmen Vining, Jackson, Bench, and White all sought to use lessons from history to determine whether, as a constitutional matter, Congress should have the power to remove federal officers.<sup>128</sup>

The second great constitutional debate, which concerned the Bank Bill,<sup>129</sup> used sources of meaning other than text. A central issue with respect to the bank's constitutionality was the meaning of the Necessary and Proper Clause. Natelson reports a series of comments about ratifiers' intent from Congressmen, and no one in Congress objecting to its relevance, although he finds one Congressman denying the relevance of Framers' intent.<sup>130</sup>

In the executive branch, Jefferson argued against the bank, appealing to Framers' and ratifiers' intent. Hamilton's arguments on behalf of the bank's constitutionality are a veritable treasure trove of the types of nontextual arguments that can be used to construe a clause. He used ratifiers' intent, although he rejected Framers' intent. He used prior practice by the federal government—specifically, “the act concerning light houses, beacons, buoys and public piers”—to argue that a broad reading of the term “necessary” had been previously employed by the government. He raised a policy argument: a broad reading of the word “necessary” was indispensable for the operation of government.<sup>131</sup> He also argued that, under any system of government, not just under the United States Constitution, grants of power should be construed “liberally”:

The means by which national exigencies are to be provided for, national inconveniences obviated, national prosperity promoted, are of such infinite variety, extent and complexity that there must of necessity be great latitude of discretion in the selection and application of those means. Hence consequently, the necessity and propriety of exercising the authorities intrusted to a government on principles of liberal construction.<sup>132</sup>

Most strikingly, in a passage that echoes Roane's appeal beyond the letter of the law in *Kemper*, Hamilton declared:

The moment the literal meaning is departed from there is a chance of error and abuse. And yet an adherence to the letter of its powers would at once arrest the motions of the government.<sup>133</sup>

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<sup>128</sup> *Id.* at 1301–03.

<sup>129</sup> In 1791, Congress considered and ultimately enacted legislation to charter the Bank of the United States. President Washington, after seeking his Cabinet's input, signed the legislation. Underlying the debate was the fact that the Constitutional Convention had considered and rejected a proposal granting Congress the power to charter corporations. See LEVY, *supra* note 89, at 7–11.

<sup>130</sup> Natelson, *supra* note 72, at 1303–05.

<sup>131</sup> Alexander Hamilton, Opinions on the Constitutionality of the Bank (Feb. 23 1791), in 3 FOUNDERS' CONSTITUTION, *supra* note 105, at 250.

<sup>132</sup> *Id.*

<sup>133</sup> *Id.*

As we have seen, Hamilton's appeal beyond the letter of the Constitution was not idiosyncratic. In the early Republic, nontextualist arguments were a standard form of constitutional interpretation.

#### CONCLUSION

This Article has challenged the prevailing assumption that textualist readings recover the Constitution's original public meaning by showing the importance of nontextual factors in early constitutional interpretation.

I have argued that, for a judge seeking to apply original public meaning, the threshold question is "how did the Founding generation think courts should interpret the Constitution?" The early caselaw shows that courts aggressively used the federal Constitution and state constitutions to protect the power and autonomy of courts and juries; federal courts also closely circumscribed state powers when they appeared to violate the federal Constitution or implicated federal powers or other states. Outside of these areas, courts were wholly deferential. This caselaw thus indicates that, for a court, recovering original meaning necessitates a central focus on structural concerns—protecting juries, courts, and the national government—rather than text.

As a substantive matter, the Founding generation also looked beyond text to determine constitutional meaning. They consistently relied on a range of factors, such as structural concerns, policy, ratifiers' and drafters' intent, and broad principles of government. To exclude such nontextual factors from constitutional interpretation is to depart from original public meaning because the Founders gave these factors great weight in ascertaining meaning.