

## ARTICLES

### RULE ORIGINALISM

*Jamal Greene\**

*Constitutional rules are norms whose application depends on an interpreter’s identification of a set of facts rather than on her exercise of practical judgment. This Article argues that constitutional interpreters in the United States tend to resolve ambiguity over constitutional rules by reference to originalist sources and tend to resolve uncertainty over the scope of constitutional standards by reference to nonoriginalist sources. This positive claim unsettles the frequent assumption that the Constitution’s more specific or structural provisions support straight-forward interpretive inferences. Normatively, this Article offers a partial defense of what it calls “rule originalism,” grounded in the fact of its positive practice, its relative capacity for restraining judges, and, above all, its respect for the constitutional choice of rules versus standards. Finally, this Article argues that this limited justification for rule originalism suggests a liberalization of barriers to government institutional standing in cases involving the meaning of constitutional rules.*

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\* Dwight Professor of Law, Columbia Law School. I would like to thank William Eskridge, Kent Greenawalt, Vicki Jackson, Michael McConnell, Tom Merrill, David Pozen, William Simon, and workshop participants at Columbia Law School, Yale Law School, and the Hugh and Hazel Darling Foundation Originalism Works-in-Progress Conference at the University of San Diego School of Law for thoughtful comments on the ideas reflected in this Article. Zachary Bannon and Thomas White provided valuable research assistance.

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#### INTRODUCTION

Constitutional cases can be hard in more than one way.<sup>1</sup>

One kind of hard case addresses the contested meaning of a constitutionally specified fact or set of facts, the presence or absence of which triggers a governmental power, a governmental limitation, or an individual entitlement. For example, Article II of the Constitution specifies that the President must be “a natural born Citizen, or a Citizen of the United States, at the time of the Adoption of this Constitution.”<sup>2</sup> The presidential eligibility of someone born outside the country but made a citizen at birth by statute depends on whether “natural born Citizen” tracks *jus soli* principles.<sup>3</sup> Let us call this a case about the meaning of a constitutional rule.

A second kind of hard case is about a difficult judgment an actor must make as to whether a fact or set of facts reaches a constitutionally specified threshold. The judgment triggers a governmental power, a governmental limitation, or an individual entitlement, and the question asks the adjudicator to reach the judgment herself or to evaluate the

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1. See generally Ronald Dworkin, *Hard Cases*, 88 *Harv. L. Rev.* 1057 (1975) [hereinafter Dworkin, *Hard Cases*] (examining limits of rules and precedent in judicial decisionmaking).

2. U.S. Const. art. II, § 1, cl. 5.

3. Compare Paul Clement & Neal Katyal, *On the Meaning of “Natural Born Citizen,”* 128 *Harv. L. Rev. Forum* 161, 161 (2015), <http://harvardlawreview.org/2015/03/on-the-meaning-of-natural-born-citizen/> [http://perma.cc/A4PQ-SRGA] (relying on “British common law and enactments of the First Congress” to assert that “the original meaning of the phrase ‘natural born Citizen’ includes persons born abroad who are citizens from birth based on the citizenship of a parent”), with Mary Brigid McManamon, *Opinion, Ted Cruz Is Not Eligible to Be President*, *Wash. Post* (Jan. 12, 2016), [http://www.washingtonpost.com/opinions/ted-cruz-is-not-eligible-to-be-president/2016/01/12/1484a7d0-b7af-11e5-99f3-184bc379b12d\\_story.html](http://www.washingtonpost.com/opinions/ted-cruz-is-not-eligible-to-be-president/2016/01/12/1484a7d0-b7af-11e5-99f3-184bc379b12d_story.html) [http://perma.cc/CW56-JRFS] (“[T]he law is clear: The framers of the Constitution required the president of the United States to be born in the United States.”).

reasonableness of the judgment made by others. The exercise of judgment is crucial in distinguishing this kind of question from the first kind. Here, it can be expected that across the full range of factual scenarios, different actors will reasonably reach different conclusions about whether the threshold has been cleared. This divergence reflects the nature of the question posed rather than anyone's error or irrationality. Let us call this second type a case about the scope of a constitutional standard.

This second category comprises the mine run of publicly salient constitutional disputes. Do government restrictions on corporate political spending in the run-up to an election abridge the freedom of speech?<sup>4</sup> Does a public university's race-based affirmative action policy deny the equal protection of the laws to a rejected white applicant?<sup>5</sup> Does a state requirement that physicians have admitting privileges at a local hospital before being legally permitted to perform an abortion deprive pregnant women of their liberty without due process of law?<sup>6</sup>

This Article's animating claim is that the U.S. constitutional culture privileges different modes of interpretation when addressing these different kinds of constitutional questions. Judges, lawyers, and constitutional scholars tend to answer questions about the meaning of a constitutional rule with reference to the original understandings and expectations of the Constitution's drafters and ratifiers. They tend to answer questions about the scope of constitutional standards and principles through various forms of living constitutionalism that account for evolving social understanding, precedent, and prudential considerations. In other words, Americans are originalist with respect to constitutional rules but not with respect to constitutional standards: We are all originalists *sometimes*.<sup>7</sup>

The notion that the conventionally appropriate mode of interpretation varies with the structure of the constitutional question has eluded most constitutional theorists. It is familiar learning that interpreters tend to apply more evolutionary methods to the more general provisions of the Constitution and not necessarily to its more specific or

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4. See *Citizens United v. FEC*, 558 U.S. 310, 339 (2010) (holding that restrictions on corporate campaign spending abridge the freedom of speech).

5. See *Fisher v. Univ. of Tex.*, 136 S. Ct. 2198, 2210–13 (2016) (affirming that the use of race as a factor in admissions was not an equal protection violation); *Grutter v. Bollinger*, 539 U.S. 306, 327–28 (2003) (holding that using race as a factor in law school admissions did not violate the Equal Protection Clause).

6. See *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292, 2318 (2016) (holding that the state law imposes an undue burden on women seeking abortions).

7. Cf. Laurence H. Tribe, Comment, *in* Antonin Scalia, *A Matter of Interpretation: Federal Courts and the Law* 65, 67 (Amy Gutmann ed., 1997) (“We are all originalists now, Dworkin says.”).

technical provisions.<sup>8</sup> But accounts that emphasize this variation, often marshaled in opposition to originalism, too often assume that specific or technical provisions lend themselves to originalism because—and just to the degree that—they fail to raise interesting interpretive problems.<sup>9</sup> This assumption is flawed. Not all constitutional questions concerning specific provisions are “technical,” and as noted, specific constitutional language can nonetheless give rise to hard cases. The notion that questions about relatively specific provisions tend toward originalism requires empirical demonstration. The notion that such provisions *should* tend toward originalism requires normative argumentation.

Some scholars have argued that originalism itself requires attention to the degree to which the provision at issue is a rule, standard, or principle, such that faithful originalism is compatible with, indeed requires, evolving applications.<sup>10</sup> It is difficult to understand the impulse to label a wide range of different interpretive moves as “originalism” except from the vantage of an ideological project,<sup>11</sup> whether to buoy originalism<sup>12</sup> or to emasculate it.<sup>13</sup> Ideological projects have their place within constitutional theory, but one casualty of this particular set of

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8. See, e.g., *United States v. Lovett*, 328 U.S. 303, 321 (1946) (Frankfurter, J., concurring) (distinguishing constitutional claims that “derive from broad standards of fairness” and those that derive “from very specific provisions of the Constitution” and relying on historical meaning to define the second); Ronald Dworkin, *Freedom’s Law: The Moral Reading of the American Constitution* 7–8 (1996) (explaining that it is appropriate to use the framers’ perspectives to interpret the Third Amendment but not the Fourteenth Amendment); David A. Strauss, *Foreword: Does the Constitution Mean What It Says?*, 129 *Harv. L. Rev.* 1, 59 (2015) [hereinafter Strauss, *Does the Constitution*] (arguing that “when a provision is specific it must be applied strictly according to its terms, but provisions like the Commerce Clause . . . and the Equal Protection Clause enact principles . . . and their content can be filled in over time by courts and other interpreters”).

9. See, e.g., *Lovett*, 328 U.S. at 321; Jack M. Balkin, *Living Originalism* 42 (2011).

10. See Balkin, *supra* note 9, at 3 (“The method of text and principle requires fidelity to the original meaning of the Constitution, . . . to the rules, standards, and principles stated by the Constitution’s text.”); Steven G. Calabresi & Gary Lawson, *The Rule of Law as a Law of Law*, 90 *Notre Dame L. Rev.* 483, 503 (2014) (explaining the Constitution “makes extensive use” of both rules and standards and that “[t]o discover the meaning of the Constitution, one cannot start with a presumption in favor of one or the other kind of formulation”).

11. See, e.g., Jonathan R. Macey, *Originalism as an “Ism,”* 19 *Harv. J.L. & Pub. Pol’y* 301, 301–02 (1996) (arguing originalism is a “philosophical orientation that relates to social ordering” and is superior to alternative methods of interpretation).

12. See, e.g., William Baude, *Is Originalism Our Law?*, 115 *Colum. L. Rev.* 2349, 2352 (2015) (arguing originalism is the foundation of constitutional law and legal practices); Stephen E. Sachs, *Originalism as a Theory of Legal Change*, 38 *Harv. J.L. & Pub. Pol’y* 817, 820 (2014) [hereinafter Sachs, *Originalism as a Theory*] (identifying “a clerical originalist strain in our legal thought”).

13. See Balkin, *supra* note 9, at 3–5 (describing how even originalist interpretation has had to evolve); Thomas B. Colby, *The Sacrifice of the New Originalism*, 99 *Geo. L.J.* 713, 714–15 (2011) (arguing originalism no longer has a claim to its initial purpose or the appeal of judicial constraint, which it abandoned in order to gain theoretical defensibility).

projects is a sober account of the place of original expected applications in American constitutional law. Defenders of originalism have explained away resort to original expectations as serving an evidentiary function—where the real action is in the original public meaning of the Constitution’s text<sup>14</sup>—or else as simply a mistake.<sup>15</sup> But if one takes practice seriously as the foundation of a positive rather than an ideological project, then originalists’ disparaged “ex”—original expectations—recovers some of its luster.

If originalists tend to miss that different approaches interpreters apply to different kinds of constitutional cases are indeed *different*, pluralists tend to miss that those approaches vary systematically along the dimension of case type. The most influential pluralist accounts assume that (if and when it is time to fish or cut bait<sup>16</sup>) an adjudicator’s priorities among interpretive approaches are driven by individual acts of conscience,<sup>17</sup> by purely ideological or pragmatic considerations,<sup>18</sup> or by implicit reference to a conventional and transsubstantive hierarchy of approaches.<sup>19</sup> The canonical literature lacks an account of *when* rather than *whether* Americans are originalist, structuralist, doctrinalist, and so forth. This Article provides a piece of that missing account.

Part I clears some definitional underbrush, situating this Article’s understanding of rules and standards within the rich constitutional theory and jurisprudential literature on the topic. Canonical accounts of the rule–standard—or more often, rule–principle<sup>20</sup>—distinction tend to

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14. See, e.g., Vasan Kesavan & Michael Stokes Paulsen, *The Interpretive Force of the Constitution’s Secret Drafting History*, 91 *Geo. L.J.* 1113, 1118 (2003) (advocating for the use of the Constitution’s nonpublic history as a way of ascertaining the document’s original meaning).

15. See Steven G. Calabresi, *The Political Question of Presidential Succession*, 48 *Stan. L. Rev.* 155, 161 n.37 (1995) (“There are very serious reasons to question whether *any* weight at all should be given . . . to Madison’s secret legislative history from Philadelphia.”).

16. See Richard H. Fallon, Jr., *A Constructivist Coherence Theory of Constitutional Interpretation*, 100 *Harv. L. Rev.* 1189, 1193 (1987) [hereinafter Fallon, *Constructive Coherence Theory*] (arguing that interpreters do not typically face this dilemma because they construe various approaches to point in the same direction).

17. See, e.g., Philip Bobbitt, *Constitutional Interpretation* 155–62 (1991) (arguing an adjudicator choosing among modes of solving a constitutional question cannot default to an overarching rule to guide the decisionmaking).

18. See generally Mark Tushnet, *Red, White, and Blue: A Critical Analysis of Constitutional Law* 1–17 (1988) (critiquing the use of grand theories in judicial interpretation).

19. See Fallon, *Constructive Coherence Theory*, supra note 16, at 1243–46 (identifying implicit rankings at play in constitutional interpretation; in order from most to least persuasive: arguments from text, arguments of historical intent, arguments of theory, arguments from precedent, and arguments of value).

20. See infra note 57 (explaining the overlap between standards and principles for the purposes of this Article’s discussion).

emphasize, variously, that rules are dispositive and principles not<sup>21</sup> or that rules are specific and principles not.<sup>22</sup> What unifies these accounts is the degree of practical judgment one can anticipate in applying a norm to a set of facts. Rules mean to foreclose such judgment, whereas standards or principles mean to invite it.

Part II argues that U.S. judges are implicitly sensitive to this distinction in constitutional cases. The distinction motivates their interpretive instincts, and those same instincts shape their assessments of which provisions are rules and which are standards. In cases in which judges perceive rules, their instincts are originalist. In cases in which they perceive standards, their instincts are not. Likewise, one can observe a substantial degree of reflexivity in the relationship between different constitutional norms and their corresponding interpretive strategies. Dynamic interpretation exerts pressure on a judge's understanding of a norm as a rule or a standard. These judgments are mutually constructed.

Part III offers a qualified defense of the positive practice Part II describes. Originalism is often defended on institutional or democratic grounds. It is said to provide disciplining criteria for judicial judgment<sup>23</sup> and to do so in the name of a constituent power.<sup>24</sup> Some scholars have defended originalism in rule-consequentialist terms, arguing that the practice of originalism makes attractive policy outcomes more likely.<sup>25</sup> This Article defends rule originalism on three alternative grounds: on the basis of its consistency with positive practice; as potentially redemptive of originalism's erstwhile promise of judicial restraint (an echo to the institutional ground described above); and, importantly, in what one may call functionalist terms.

This last justification is teleological rather than consequentialist or deontological. It does not assume that good outcomes will result from rule originalism, nor does it assume that democratic commitments obligate judges toward originalism. Indeed, while Part III represents a normative intervention, it should not be understood as prescriptive. It offers *prima facie* reasons for a practice on the basis of the values the practice promotes but does not instruct adjudicators on how to proceed

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21. See, e.g., Robert Alexy, *A Theory of Constitutional Rights* 57 (Julian Rivers trans., Oxford Univ. Press 2002) (1986); Ronald M. Dworkin, *The Model of Rules*, 35 *U. Chi. L. Rev.* 14, 25 (1967) [hereinafter Dworkin, *The Model of Rules*].

22. Joseph Raz, *Legal Principles and the Limits of Law*, 81 *Yale L.J.* 823, 838 (1972).

23. Michael W. McConnell, *Active Liberty: A Progressive Alternative to Textualism and Originalism?*, 119 *Harv. L. Rev.* 2387, 2415 (2006) (book review).

24. See Richard S. Kay, *Original Intention and Public Meaning in Constitutional Interpretation*, 103 *Nw. U. L. Rev.* 703, 715–19 (2009).

25. See Randy E. Barnett, *Restoring the Lost Constitution: The Presumption of Liberty* 5 (rev. ed. 2014) [hereinafter Barnett, *Restoring the Lost Constitution*] (arguing originalism enables constitutional interpretation that enhances individual liberty); John O. McGinnis & Michael B. Rappaport, *Originalism and the Good Constitution* 11 (2013) (arguing originalist interpretation of the Constitution will promote human welfare).

in any given case or set of cases. The set of considerations that should properly influence adjudicative outcomes in constitutional cases, and the relative weights that should attach to those considerations, implicate the role morality of judges, a topic beyond the scope of this Article.

The basic claim is that originalism respects the structure of and purpose behind constitutional rules. Rules determine the application of law to fact prospectively rather than in the moment. They are primarily devices for settlement and coordination among governmental actors and between government and the people rather than heuristics for furthering constitutional purposes. As such, subsequent practices and understandings have limited epistemic value in understanding a rule's content and requirements. Such practices might well have pragmatic or prudential value for an adjudicator determining whether a rule should apply, and so arguments drawing on evolving understandings are best marshaled in favor of limitations on rules rather than as reasons for reinterpreting them.

Significantly, this argument in defense of rule originalism is not originalist all the way down. If the best justification for rule originalism is its fitness for securing the settlement and coordination benefits of constitutional rules, then it follows that judges should not depart from the settled meaning of a rule except for pragmatic or prudential reasons. That is, this Article's partial defense of rule originalism is strongest in cases of first impression. It does not necessarily support originalism as a vehicle for changing a rule's settled understanding.

Part IV discusses the potential implications of this defense of rule originalism for certain standing questions. Rule originalism is less useful when practice has completely or partially settled a rule's application.<sup>26</sup> But settlement through practice takes time and can therefore undermine the coordination benefits of constitutional rules. Settlement through practice also tends to privilege the executive in the separation of powers struggles that rules are often designed to forestall.<sup>27</sup> When such conflicts are not political questions, federal courts should consider relaxing standing requirements in order to adjudicate rules questions sooner rather than later.

This suggestion intervenes in a debate over legislative standing that recently divided the Court in *Arizona State Legislature v. Arizona Independent Redistricting Commission*.<sup>28</sup> There, Justice Scalia, joined by Justice Thomas, argued in dissent that Article III's case or controversy

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26. See, e.g., *NLRB v. Noel Canning*, 134 S. Ct. 2550, 2559 (2014) (“[I]n interpreting the [Recess Appointments] Clause, we put significant weight upon historical practice.” (emphasis omitted)).

27. For a discussion of the pro-executive bias likely to result from settlement of separation of powers disputes through historical practice, see Curtis A. Bradley & Trevor W. Morrison, *Historical Gloss and the Separation of Powers*, 126 Harv. L. Rev. 411, 440–47 (2012).

28. 135 S. Ct. 2652 (2015).

provision does not and should not extend to separation of powers disputes brought by governmental institutions.<sup>29</sup> This Article disagrees. While it is important to apply the political question doctrine, when applicable, to separation of powers conflicts, limiting standing can be quite damaging insofar as it delays but does not preclude jurisdiction. It is precisely the Court's originalists who should agree most.<sup>30</sup>

## I. THE JURISPRUDENCE OF RULES

The literature on the relationship between rules, standards, and principles in constitutional law and theory is voluminous and sophisticated. This Part clarifies this Article's point of entry into those debates.

### A. *A Working Definition*

I define constitutional rules in terms of the expectations the constitutional community brings to interpretive questions: When those questions arise from the meaning of constitutional language that does not appear to anticipate the exercise of judgment as to its scope, a constitutional rule is at issue. For example, Article I of the Constitution provides as follows:

If any Bill shall not be returned by the President within ten Days (Sundays excepted) after it shall have been presented to him, the Same shall be a Law, in like Manner as if he had signed it, unless the Congress by their Adjournment prevent its Return, in which Case it shall not be a Law.<sup>31</sup>

The meaning of this provision, which permits what is known as a "pocket veto," seems to be reasonably well specified by its text, and anyone would assume that it was designed to be well specified. But in 1929, the Court had to decide whether the "adjournment" to which the clause refers is only the final adjournment ending a Congress or instead includes an interim adjournment between the first and second sessions.<sup>32</sup> This is a question about the meaning of a constitutional rule.

Likewise, in *NLRB v. Noel Canning*, the Supreme Court had to determine the meaning of the Article II phrase "the Recess of the Senate."<sup>33</sup> The President has greater authority to make appointments if the phrase refers to an adjournment for any period than if it refers only

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29. See *id.* at 2694 (Scalia, J., dissenting, joined by Thomas, J.).

30. See Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. Cin. L. Rev. 849, 861 (1989) [hereinafter *Scalia, Originalism: The Lesser Evil*] (noting that, with the passage of time, originalism can be "too bitter a pill").

31. U.S. Const. art. I, § 7, cl. 2.

32. See *The Pocket Veto Case*, 279 U.S. 655, 680 (1929).

33. 134 S. Ct. 2550, 2556 (2014) (internal quotation marks omitted) (quoting U.S. Const. art. II, § 2, cl. 3).



to an adjournment sine die.<sup>34</sup> *Noel Canning* is also a case about the meaning of a constitutional rule.

By contrast, provisions empowering Congress to “regulate,”<sup>35</sup> requiring that persons be accorded “equal” treatment,<sup>36</sup> or requiring that states not deprive persons of life, liberty, or property without “due process of law”<sup>37</sup> do not seem to contemplate that the full scope of application is known at the time of drafting. These provisions are best understood as raising questions about constitutional standards.

The denomination of questions as implicating constitutional rules versus constitutional standards is not necessarily a function of the constitutional text. Interpreters might believe there are rules of constitutional dimension that the text does not memorialize.<sup>38</sup> Some examples might include the rule that the President’s removal power is exclusive of Congress,<sup>39</sup> that states may not impose their own qualifications on congressional candidates,<sup>40</sup> or that Congress may not abrogate state sovereign immunity pursuant to its Article I powers.<sup>41</sup>

The presence of these atextual cases underscores the important point that this Article’s distinction between rules and standards does not track the “interpretation–construction distinction” that has come to be associated with “New Originalists.”<sup>42</sup> Professor Lawrence Solum and others have distinguished constitutional “interpretation”—“the activity that aims at discovery of the linguistic meaning of the various articles and amendments that form the United States Constitution”—from constitutional “construction”—which “gives legal effect to the semantic content of [the Constitution’s] text.”<sup>43</sup> Identifying either a constitutional rule or standard need not entail identifying the linguistic meaning of a text, and judges “in the wild” do not typically draw even an implicit distinction between linguistic and legal meanings in the mine run of cases.

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34. See *id.* at 2562. An adjournment sine die is one that does not specify a date for the legislature to return. See *id.* at 2560–61.

35. U.S. Const. art. I, § 8, cls. 3, 5.

36. *Id.* amend. XIV, § 1.

37. *Id.*

38. See Stephen E. Sachs, *Constitutional Backdrops*, 80 *Geo. Wash. L. Rev.* 1813, 1820 (2012) (posing the question, “[W]hether *even* if the text is the exclusive source of constitutional law, some legal rules external to the Constitution . . . are nonetheless protected from repeal”).

39. See *Myers v. United States*, 272 U.S. 52, 176 (1926) (invalidating a law denying the President unrestricted power of removal of first-class postmasters).

40. See *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 838 (1995).

41. See *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 72–73 (1996).

42. See, e.g., Lawrence B. Solum, *The Interpretation-Construction Distinction*, 27 *Const. Comment.* 95, 100 (2010).

43. *Id.* at 101, 103; see also Barnett, *Restoring the Lost Constitution*, *supra* note 25, at 118–22; Keith E. Whittington, *Constitutional Interpretation: Textual Meaning, Original Intent, and Judicial Review* 5–7 (1999).

This Article's definition of constitutional rules and standards does not derive from any particular philosophical account; it is generated by and answers only to constitutional practice. That being said, identifying and examining the leading accounts helps to clarify the Article's claim and enables the argument to benefit from some of the rich thinking those accounts have generated.

Professors Henry Hart and Albert Sacks give us a canonical account of the distinction between rules and standards in law.<sup>44</sup> In their magisterial *The Legal Process*, they defined a rule as "a legal direction which requires for its application nothing more than a determination of the happening or non-happening of physical or mental events—that is, determinations of *fact*."<sup>45</sup> A standard, by contrast, is "a legal direction which can be applied only by making, in addition to a finding of what happened or is happening in the particular situation, a qualitative appraisal of those happenings in terms of their probable consequences, moral justifications, or other aspect of general human experience."<sup>46</sup>

These definitions are consistent with this Article's, though with a caveat. As Part II elaborates, rules and standards are necessarily normative categories in constitutional law. Denominating a norm as one or the other depends on other, perhaps subconscious, judgments about constitutional interpretation and the outcomes that interpretation is thought to support. For that reason, this Article describes rules and standards in terms of the understandings the interpreter brings to the adjudicative project rather than in terms of any inherent features of the Constitution's text. Rules are norms the interpreter understands in essentially factual terms that require no "qualitative appraisal."<sup>47</sup>

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44. See Henry M. Hart, Jr. & Albert M. Sacks, *The Legal Process: Basic Problems in the Making and Application of Law* 139–41 (William N. Eskridge, Jr. & Philip P. Frickey eds., Found. Press 1994) (1958).

45. *Id.* at 139.

46. *Id.* at 140.

47. Professor Jack Balkin has described the difference between rules and standards in terms similar to mine. For him, "[r]ules are distinguished from standards by how much practical or evaluative judgment they require to apply them to concrete situations." Balkin, *supra* note 9, at 349 n.12. Balkin further argues that both rules and standards are distinct from principles inasmuch as they "are normally conclusive in deciding a legal question, although decisionmakers can make exceptions later on." *Id.* By contrast, principles "are norms that, when relevant, are not conclusive but must be considered in reaching a decision." *Id.*

This Article breaks with Balkin's distinction between standards and principles only marginally, but I do not share his view that positive constitutional norms such as freedom of speech and equal protection of the laws are best described as principles rather than standards. See *id.* While it is true that both the freedom of speech and equal protection guarantees in the Constitution are subject to limitation when justiciable, within U.S. constitutional culture it is more accurate to describe these limitations as defining the scope of the right rather than defining the circumstances under which the right is "outweighed." Cf. Daryl J. Levinson, *Rights Essentialism and Remedial Equilibration*, 99 *Colum. L. Rev.* 857, 937 (1999) (arguing that constitutional rights are neither conceptually separate from

B. *Rules and Standards in Constitutional Law*

The rules–standards distinction has been a subject of constitutional law talk for years. In her 1991 *Harvard Law Review* foreword, Professor Kathleen Sullivan distinguished what she called a “Justice of rules” from a “Justice of standards.”<sup>48</sup> Sullivan was describing a longstanding debate between those who believe the best way for the Court to adjudicate constitutional cases is to *articulate*, respectively, rule-like or standard-like decisional norms.<sup>49</sup>

This Article is not about that debate. Whether the Court should articulate decisions in rule-like or standard-like terms is interesting and important, but it does not relate directly to how adjudicators understand the structure of the constitutional question they are being asked. Thus, to use one of Sullivan’s examples, Justice Scalia’s majority decision in *Employment Division v. Smith*, holding that religious accommodation claims are generally unavailable with respect to neutral laws of general applicability,<sup>50</sup> is rule-like insofar as it specifies a set of criteria that, once identified, are essentially decisive of the constitutional controversy. The rule-like nature of the opinion is motivated by a desire to promote transparency and predictability, two of the values generally believed to follow from the application of rules as defined by Sullivan.<sup>51</sup> Concurring in the judgment, Justice O’Connor preferred a standard-like approach that contemplated judicial balancing in every instance in which a court was faced with a substantial burden on religious practice, regardless of the motivation behind the law.<sup>52</sup>

Even though Justice Scalia and Justice O’Connor disagreed about whether the Court should adjudicate free exercise cases through rules or standards, both of their views are consistent with understanding the Free Exercise Clause as a constitutional standard as this Article defines the term: Disagreement about the range of laws that qualify as prohibitions on the free exercise of religion is inherent rather than aberrational. Indeed, the discretion that a constitutional standard invites is why Justice Scalia thought it important to constrain adjudicators via a rule-like

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nor normatively privileged over constitutional remedies). The constitutional norms that really do meet Balkin’s (and my) definition of principles include, among others, norms guaranteeing the separation of powers and federalism, as well as the nonjusticiable norms that appear in the Preamble. See U.S. Const. pmb1.

48. Kathleen M. Sullivan, Foreword: The Justices of Rules and Standards, 106 Harv. L. Rev. 22, 121 (1992).

49. See *id.* at 57–59; see also Antonin Scalia, The Rule of Law as a Law of Rules, 56 U. Chi. L. Rev. 1175, 1179–80 (1989) [hereinafter Scalia, Rule of Law as Law of Rules] (defending an apex constitutional court’s use of rules rather than balancing tests).

50. *Emp’t Div., Dep’t of Human Res. v. Smith*, 494 U.S. 872, 878–79 (1990).

51. See Pierre J. Schlag, Rules and Standards, 33 UCLA L. Rev. 379, 384–89 (1985) (outlining popular arguments for rules and standards); Sullivan, *supra* note 48, at 58.

52. See *Smith*, 494 U.S. at 894–95 (O’Connor, J., concurring in the judgment).

doctrinal formulation.<sup>53</sup> His view about the nature of judicial decision rules follows from a normative perspective on judicial discretion, not from the epistemic structure of the Free Exercise Clause or the kinds of questions it raises. Consistent with this observation, and despite Justice Scalia's authorship of the majority opinion, the *Smith* case contained no originalist argumentation or briefing.<sup>54</sup>

C. *Rules and Standards in Jurisprudence*

There is another long-running debate over rules that is more proximate to, though also distinct from, this Article's themes. This is the supraconstitutional debate over the nature of legal rules, especially in relation to legal principles. While the literature on constitutional decision rules sits within constitutional law and theory, the debate over the nature of legal rules and principles falls within the rubric of analytic jurisprudence. This discourse begins with Professor Ronald Dworkin's critique of legal positivism<sup>55</sup> and in recent years has centered on Professor Robert Alexy's articulation of principles as "optimization requirements" that are categorically distinct from rules.<sup>56</sup> This Article's use of the term "rule" does not have the technical significance that Dworkin, Alexy, or their critics assign to it, as the project is not jurisprudential in nature. It will nonetheless be fruitful to mine this debate for insights that are helpful to the positive legal analysis that follows.<sup>57</sup>

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53. See Scalia, *Rule of Law as Law of Rules*, supra note 49, at 1179–80.

54. See *Smith*, 494 U.S. at 872; see also Ira C. Lupu, *Employment Division v. Smith* and the Decline of Supreme Court-Centrism, 1993 *BYU L. Rev.* 259, 260 (noting the lack of originalist interpretation in the Court's opinion).

55. Dworkin, *The Model of Rules*, supra note 21, at 17–22.

56. See Alexy, supra note 21, at 47–54 ("Principles are *optimization requirements*, characterized by the fact that they can be satisfied to varying degrees, and that the appropriate degree of satisfaction depends not only on what is factually possible but also on what is legally possible.").

57. An expositional point is in order. This section generally speaks of "principles" rather than "standards" despite some terminological discomfort in doing so. The jurisprudence literature has tended to focus on the rule–principle distinction, without preserving a special space for standards. See, e.g., *id.* at 57. This tendency likely derives from the nature of the questions of interest to scholars of analytic jurisprudence. When Dworkin announced his definitions of rules and principles, he assumed that this distinction was relevant (or rather, was thought by others to be relevant) to exploring the nature of a legal system. See Dworkin, *The Model of Rules*, supra note 21, at 22–24. Insofar as principles contemplate wide adjudicative discretion or are not legally dispositive even when valid, they pose a challenge to someone wishing to understand them as law. *Id.* By contrast, this Article concerns not the nature of law but rather the practice of U.S. constitutional interpretation, an exercise whose foundational assumptions include both the legality and the justiciability of the Constitution's abstract clauses. For that reason, it may be clearer to describe those clauses as "standards," which more strongly implies that they represent justiciable and authoritative legal norms. Still, because the jurisprudential literature tends to use the term "principles," this Article does so as well when drawing on that literature. Since the Article's primary interest is in rules, developing a further distinction between standards and principles is not worth the candle here. See *id.* at 31.

Scholars who have explored the distinction between rules and principles tend to distinguish them along one of two dimensions: what one might call the dimensions of finality and specificity. For some scholars, most prominently Dworkin and Alexy, the distinction between rules and principles is that rules are either dispositive or invalid,<sup>58</sup> whereas principles are defeasible considerations that may remain valid even if they do not prevail in a given case.<sup>59</sup> For instance, to use an example Dworkin relies on, Justice Black argued that the First Amendment is absolute, such that once one is understood to have a free speech right (for example) that right may not be balanced away.<sup>60</sup> On Dworkin's and Alexy's views, Justice Black believed the First Amendment stated a rule: Once it was determined that a case engaged the amendment, that determination settled the case.<sup>61</sup> On this view, the difference between rules and principles is a difference in kind rather than a difference in degree.<sup>62</sup>

Professor Joseph Raz challenges this definition of rules. For him, rules and principles differ along the dimension of specificity rather than finality.<sup>63</sup> Rules prescribe relatively specific acts whereas principles prescribe relatively unspecific acts.<sup>64</sup> Thus, a ban on smoking is a rule, since the kinds of acts it bans fall within a narrow range. By contrast, a requirement to pursue happiness is a principle, since the range of acts it regulates is quite broad.<sup>65</sup> On this view of the rule–principle distinction, Justice Black's belief that the First Amendment is not susceptible to balancing bears no necessary relation to its status as a rule or a principle. Principles may be dispositive just as rules may be, but because principles

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58. See Alexy, *supra* note 21, at 57 (“In that rules insist that one does exactly as required, they contain a decision about what is to happen within the realm of the legally and factually possible.”); Ronald Dworkin, *Taking Rights Seriously* 24 (1977) (“If the facts a rule stipulates are given, then either the rule is valid, in which case the answer it supplies must be accepted, or it is not, in which case it contributes nothing to the decision.”).

59. See Alexy, *supra* note 21, at 57 (“It does not follow from the fact that a principle is relevant to a case that what the principle requires actually applies. Principles represent reasons which can be displaced by other reasons.”); Dworkin, *The Model of Rules*, *supra* note 21, at 26 (“All that is meant, when we say that a particular principle is a principle of our law, is that the principle is one which officials must take into account, if it is relevant, as a consideration inclining in one direction or another.”).

60. See Hugo L. Black, *The Bill of Rights*, 35 *NYU L. Rev.* 865, 874–75 (1960).

61. See Dworkin, *The Model of Rules*, *supra* note 21, at 27–28 (summarizing the argument that the First Amendment is “an absolute”).

62. See Alexy, *supra* note 21, at 57–59; Dworkin, *The Model of Rules*, *supra* note 21, at 24–25. Dworkin and Alexy do not understand rules and principles in identical terms. For example, Alexy denies that an exception to a rule in a particular case or even in many cases defeats the definitive character of a rule. See Alexy, *supra* note 21, at 57–58.

63. See Raz, *supra* note 22, at 838.

64. *Id.*

65. *Id.*

prescribe less specific acts, they “tend to be more vague and less certain than rules.”<sup>66</sup> The difference is in degree, not in kind.<sup>67</sup>

This conceptual vocabulary can help us to understand what is distinctive about what this Article calls constitutional rules. A constitutional rule is a constitutional norm whose scope of application is not *expected* to be subject to reasonable disagreement. A constitutional standard is a constitutional norm whose scope of application is inherently unclear at the margins, such that reasonable disagreement is anticipated (and indeed does some work in fixing the content of the norm). As a shorthand, conflicts over constitutional rules result either from ambiguity or from failure of will in applying them, while conflicts over constitutional standards result from vagueness.<sup>68</sup>

This feature of constitutional rules and standards is common to both the “finality” and the “specificity” views of legal rules. If one believes that rules are uniquely dispositive, then it should be the case that once one knows what a rule requires, one must either apply the rule or depart from it. For a principle, understanding what it requires does not tell us how to apply it, for it must be weighed against other relevant principles. As Alexy writes, “Principles lack the resources to determine their own extent in the light of competing principles and what is factually possible.”<sup>69</sup> On this view, then, the use of a principle anticipates—in a constitutive sense—that there may be disagreement as to how the principle is to be applied in any given instance of conflict.

If one instead adopts the view that rules are relatively specific and principles not, then one can still, again, expect application of principles to anticipate reasonable disagreement as to scope. It is true that Raz views this difference as one of degree; since a prescription may always be stated in more specific terms, one might also anticipate some disagreement as to the scope of rule application.<sup>70</sup> Even if “no smoking” is a rule, adjudicators might disagree over its application to electronic cigarettes, which do not burn tobacco.<sup>71</sup> Still, this judgment is of a different sort than the judgment that characterizes adjudication of constitutional standards. The application of a ban on electronic cigarettes is unclear because of an unanticipated technology. Had the drafter

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66. *Id.* at 841.

67. *Id.* at 838.

68. *Solum* has emphasized the importance of the distinction between ambiguity and vagueness to constitutional adjudication. See *Solum*, *supra* note 42, at 97–98. An ambiguous phrase “has more than one sense,” whereas a vague expression has many “borderline cases.” *Id.*; see also Barnett, *Restoring the Lost Constitution*, *supra* note 25, at 121.

69. Alexy, *supra* note 21, at 57.

70. See Raz, *supra* note 22, at 838.

71. “No vehicles in the park,” the most famous hypothetical legal norm, is a rule in this sense. See H.L.A. Hart, *Positivism and the Separation of Law and Morals*, 71 *Harv. L. Rev.* 593, 607 (1958). The example is effective precisely because the rule’s content is intended to be straightforward and appears so at a glance.

been aware of electronic cigarettes, she presumably would have drafted more carefully; at the least, one can construct a rule–principle distinction in which a norm represents a rule to the degree that the presence of unanticipated cases prompts a reevaluation of the norm’s content.

Thus, one can draw a *categorical* distinction between rules and principles even if specificity is the dimension of difference. It is a categorical distinction not in respect to the inherent structure of particular norms or verbal formulations but rather in respect to the expectations the adjudicator brings to her task. As this Article defines them, constitutional rules are understood by adjudicators as norms designed to eliminate their discretion in applying the norm to particular cases, whether or not that elimination is successful in practice.

Let us pause to consider the word “discretion,” which is ambiguous in this context. As Dworkin notes, there are at least three forms of adjudicative discretion.<sup>72</sup> In what Dworkin calls its weak form, discretion means that “the standards an official must apply cannot be applied mechanically but demand the use of judgment.”<sup>73</sup> In what he calls another weak form, discretion means that “some official has final authority to make a decision and cannot be reviewed and reversed by any other official.”<sup>74</sup> In its strong form, discretion means the official “is simply not bound by standards set by the authority in question.”<sup>75</sup> At a minimum, constitutional rules aim to eliminate discretion both in its first weak form and in the strong form.

Dworkin believes that the first weak form of discretion is not interesting.<sup>76</sup> No serious legal professional or scholar believes that legal rules obviate the need for the exercise of judgment.<sup>77</sup> Either rules or principles may lead to hard cases. But in adjudicating principles, hard cases are fully expected; with rules, they are surprising. A hard case might arise because of ambiguity as to what the rule means to prescribe. To return to the First Amendment example, when the Constitution says “Congress shall make no law,”<sup>78</sup> one may wonder what is meant by Congress (Does the Confederation Congress count?), or perhaps what is meant by “law” (Are regulations laws?). One may also wonder whether the rule is absolute or instead has exceptions (What about hate speech?<sup>79</sup>). Finally, a hard First Amendment case might result from

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72. See Dworkin, *The Model of Rules*, *supra* note 21, at 32–33.

73. *Id.* at 32.

74. *Id.*

75. *Id.* at 33.

76. *Id.* at 35.

77. See *id.* (“The proposition that when no clear rule is available discretion in the sense of judgment must be used is a tautology.”).

78. U.S. Const. amend. I.

79. See, e.g., *R.A.V. v. City of St. Paul*, 505 U.S. 377, 381–92 (1992) (striking down a city ordinance that prohibited certain forms of symbolic hate speech).

uncertainty as to which kinds of laws qualify as abridgements of the freedom of speech (What about a time, place, or manner restriction?<sup>80</sup>).

To put it another way, the Constitution might attempt to fix the application of one of its prescriptions but fail in that attempt. That failure generates a question about a constitutional rule. Alternatively, the Constitution might attempt to leave open the application of its prescriptions and succeed in that attempt. That success generates a question about a constitutional standard. As the next Part describes, American constitutional lawyers treat these kinds of questions differently, and with good reason.

## II. THE POSITIVE CASE

The foundational claim of this Article, which this Part elaborates, is that the U.S. constitutional culture tends to rely on originalist methods in resolving questions about constitutional rules and tends to use non-originalist methods in resolving questions about constitutional standards. Substantiating that claim requires one to define the constitutional culture and specify a methodology for identifying its practices.

The constitutional culture is a diverse community of lawyers, judges, scholars, public officials, and law-curious others. The community is so diverse, in fact, that it is difficult to identify a consensus as to its practices except at a high level of generality: Original understandings matter, precedent is relevant, *Brown v. Board of Education*<sup>81</sup> (whatever it means<sup>82</sup>) is correct, and so forth. Achieving greater specificity than this usually requires a narrowing of the community, often in ways not obvious to the narrower. Methodologically, the best measure of any particular account starts, as this Article does, with the law sense of a scholar who is part of the community and familiar with its norms. That law sense is then tested through the crucible of peer evaluation and subsequent influence. If the account resonates with other members of the community, then it is likely an accurate one.

In developing an account of rule originalism, this Part draws from the case law of the U.S. Supreme Court. The Court's reasoning and opinion-writing practices do not exhaust the constitutional culture. There are other courts, of course, and there are forms of constitutional discourse that do not resemble adjudication. Still, the practices of the

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80. See, e.g., *Ward v. Rock Against Racism*, 491 U.S. 781, 784–90 (1989) (upholding a New York City noise-control ordinance).

81. 347 U.S. 483 (1954).

82. See, e.g., *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 746–47 (2007) (outlining a discussion of whether *Brown's* heritage is a prohibition of “government classification and separation on grounds of race” or the requirement of admitting students to public schools on a “nonracial basis”); Brad Snyder, *How the Conservatives Canonized Brown v. Board of Education*, 52 Rutgers L. Rev. 383, 390–91 (2000) (questioning how *Brown* gained its hallowed place in U.S. constitutional law).



Court are certainly an important part of the constitutional culture of the United States. Identifying a trend within those practices places a heavy burden on anyone who would argue against the trend's significance within that culture.<sup>83</sup>

The measure of any positive account of constitutional practices is not whether it covers all cases without exception. Rather, the measure is whether it supplies the *best* account, the one that most accurately fits the available data. That is, it takes a positive theory to beat a positive theory, bearing in mind that ad hoc pluralism is itself a positive theory a scholar may wish to invoke and defend. This observation is a version of what Professor William Baude has called “the bear principle,” based on the old joke about needing only to outrun one’s friend when confronting an approaching bear in the woods.<sup>84</sup> The principle applies as much to positive theories as to normative ones.

This Part begins, in section II.A, with the aspect of the account that is easiest to substantiate: The Court tends to use dynamic forms of interpretation when confronted with questions about constitutional standards. Section II.B argues that, by contrast, the Court tends to use originalism when addressing questions about constitutional rules. Section II.C discusses and rejects alternative positive accounts, namely those that declare instances of originalism to be rare, to be ubiquitous, or to be unpredictable.

#### A. *Standard Nonoriginalism*

Originalism has been used to describe a wide variety of interpretive practices.<sup>85</sup> For reasons made clear below, this Article uses the term to describe the view that the Constitution should be interpreted by reference to the understandings and expectations of its drafters or ratifiers. U.S. constitutional practice is not generally originalist in this relatively narrow sense. Nonoriginalist Supreme Court opinions are common and expected. Nearly all of the Court’s most canonical rights decisions, from *Brown* to *Griswold v. Connecticut*<sup>86</sup> to *Roe v. Wade*,<sup>87</sup> ignore or trivialize original expectations, and the original meaning or scope of the relevant provisions are not significant subjects of the Court’s analysis in its most publicly salient constitutional-issue areas, including abortion,<sup>88</sup> affir-

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83. See Baude, *supra* note 12, at 2370 (“[T]he Supreme Court’s practice is a readily available source of evidence of official attitudes, it is often thought to be inconsistent with originalism, and it is an important place to start.”).

84. See *id.* at 2407.

85. See Mitchell N. Berman, *Originalism Is Bunk*, 84 N.Y.U. L. Rev. 1, 8 (2009) (“Originalism comes in many flavors; varied distinct theses are fairly described as ‘originalist’ in tighter or looser senses.”).

86. 381 U.S. 479 (1965).

87. 410 U.S. 113 (1973).

88. See *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 847 (1992).

mative action,<sup>89</sup> the Commerce Clause,<sup>90</sup> capital punishment,<sup>91</sup> and the First Amendment.<sup>92</sup> Indeed, the originalism movement that emerged in the 1980s was an explicit response to the absence of originalist analysis in the Court's case law.<sup>93</sup>

The history of originalism did not, of course, end in the 1980s, and it is fair to ask what, if anything, might have changed since then. Some of the Court's recent majority opinions have been conspicuously originalist, relying on its view of original meanings or understandings to contravene existing precedent. Most famously, the Court held in *District of Columbia v. Heller*<sup>94</sup> that the Second Amendment protects an individual right to bear arms even though the Court had historically tied the Amendment solely to militia service.<sup>95</sup> Justice Scalia's majority opinion in *Heller* was self-consciously originalist, and notably, even Justice Stevens's dissenting argument leaned heavily on his assessment of founding-era expecta-

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89. See *Grutter v. Bollinger*, 539 U.S. 306, 323 (2003); Jamal Greene, Fourteenth Amendment Originalism, 71 Md. L. Rev. 978, 988–89 (2012) [hereinafter Greene, Fourteenth Amendment] (noting Justices Scalia and Thomas do not critique affirmative action in originalist terms); see also Eric Schnapper, Affirmative Action and the Legislative History of the Fourteenth Amendment, 71 Va. L. Rev. 753, 753 (1985) (“With one exception, this entire body of case law is devoid of any reference to the original intent of the framers of the fourteenth amendment.”).

90. See *United States v. Lopez*, 514 U.S. 549, 584 (1995) (Thomas, J., concurring).

91. See *Kennedy v. Louisiana*, 554 U.S. 407, 469 (2008) (Alito, J., dissenting); *Baze v. Rees*, 553 U.S. 35, 94 (2008) (Thomas, J., concurring in the judgment).

92. See Kurt T. Lash, The Second Adoption of the Establishment Clause: The Rise of the Nonestablishment Principle, 27 Ariz. St. L.J. 1085, 1085 (1995) (arguing “the Court has generally . . . dismissed the issue of historical intent” when interpreting the Establishment Clause as incorporated by the Fourteenth Amendment); see also *Brown v. Entm’t Merchs. Ass’n*, 546 U.S. 786, 821 (2011) (Thomas, J., dissenting) (“The Court’s decision today does not comport with the original public understanding of the First Amendment.”); *Citizens United v. FEC*, 558 U.S. 310, 425–32 (2010) (Stevens, J., dissenting); Leonard W. Levy, Legacy of Suppression: Freedom of Speech and Press in Early American History 1 (1960) (arguing against the “proposition . . . conventionally accepted in both law and history that the Framers of the First Amendment had a very broad understanding of freedom of speech and press”); Michael W. McConnell, The Origins and Historical Understanding of Free Exercise of Religion, 103 Harv. L. Rev. 1409, 1413 (1990).

93. See Robert H. Bork, The Tempting of America: The Political Seduction of the Law 6–7 (1990) (“The orthodoxy of original understanding . . . [is] anathema to a liberal culture that for fifty years has won a succession of political victories from the courts . . .”); Edwin Meese, III, The Supreme Court of the United States: Bulwark of a Limited Constitution, 27 S. Tex. L. Rev. 455, 464–66 (1986) (arguing for “a jurisprudence of original intention”); see also James E. Fleming, Fidelity to Our Imperfect Constitution 17 (2015) (noting “canonical originalists” like Justice Scalia and Judge Bork “spent their whole careers railing against” cases with little or no originalist analysis).

94. 554 U.S. 570 (2008).

95. See, e.g., *United States v. Miller*, 307 U.S. 174, 178 (1939) (holding the Second Amendment does not protect the right to keep and bear arms that have no “reasonable relationship to the preservation or efficiency of a well regulated militia”).

tions.<sup>96</sup> Likewise, the Court has taken an identifiably originalist turn in a series of criminal procedure cases involving Sixth Amendment rights to a jury trial and to confrontation of witnesses.<sup>97</sup>

These cases are the exceptions that prove the rule. They are noteworthy precisely because originalism does not represent the Court's usual mode of analysis. The best explanation for the originalism of the Sixth Amendment cases is that Justice Scalia's jurisprudential commitments to originalism and to discretion-limiting devices—whether in rules or standards cases—led him to be more favorable to defendants in some criminal procedure contexts.<sup>98</sup> Since he was a “crossover” vote in such cases, the majority was disproportionately likely to cater to his preferred approach.

*Heller* might be a different story. The language of constitutional rules and standards adds insight both to the originalist majority opinion and to Justice Stevens's curiously originalist dissent in *Heller*. The Second Amendment's proscription on “infringe[ments]” upon the right to bear arms is a classic constitutional standard, but the threshold disagreement in *Heller* was not over what counts as an infringement. Rather, it was about the circumstances under which the right is activated.<sup>99</sup> This is a subtle distinction, irrelevant in most cases, but conspicuous in *Heller*. The dissent's position was that, whatever kinds of constraints the right to bear arms imposes, the right is not triggered except in the context of militia regulation.<sup>100</sup> Whether the Second Amendment applies only to militia service or instead to infringements on civilian possession and use is a categorical inquiry; it is a question about a rule, not a standard. As section II.B elaborates below, originalism is unremarkable in this context.

Recently, several scholars have argued or implied that the Court's approach in cases that this Article has described as implicating constitutional standards is best described as originalist. In separate articles, Professors Stephen Sachs and Baude have argued that courts that rely heavily on precedent and evolving interpretation in adjudicating constitutional cases may be acting consistently with originalism. For Sachs, originalism is best understood as a theory of legal change rather than, for

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96. See *Heller*, 554 U.S. at 640, 652–62 (Stevens, J., dissenting) (explaining “why [the Court's] decision in *Miller* was faithful to the text of the Second Amendment and the purposes revealed in its drafting history”).

97. See *Crawford v. Washington*, 541 U.S. 36, 60–61 (2004) (noting a shift toward a more originalist understanding of the Confrontation Clause); *Apprendi v. New Jersey*, 530 U.S. 466, 518 (2000) (“Today's decision . . . marks . . . a return to . . . the original meaning of the Fifth and Sixth Amendments.”).

98. See Stephanos Bibas, *Originalism and Formalism in Criminal Procedure: The Triumph of Justice Scalia, the Unlikely Friend of Criminal Defendants?*, 94 *Geo. L.J.* 183, 194 (2005) (explaining that Justice Scalia's “reading of the Sixth Amendment dovetailed . . . with solicitude for criminal defendants' due process rights”).

99. See *Heller*, 554 U.S. at 577 (majority opinion).

100. See *id.* at 636–37 (Stevens, J., dissenting).

example, a theory of linguistic meaning.<sup>101</sup> On this account, an originalist demands, at a definitional minimum, that legal change occur through processes that count as legitimate by the lights of the generation that ratified the relevant legal provision. Stare decisis, for example, was a well-accepted mode of secular legal change for the founding generation. For Baude, likewise, contemporary use and acceptance of stare decisis is consistent with originalism insofar as that acceptance is grounded in the high place of stare decisis within founding-era legal thought.<sup>102</sup>

Balkin also argues that what this Article calls standard nonoriginalism is, in fact, originalism, but his claim differs from that of Sachs and Baude. For Balkin, originalism requires interpreters to account for the nature of constitutional language as a rule, standard, or principle.<sup>103</sup> The use of precedent, consequences, moral theories, and other interpretive devices to build out the application of constitutional standards over time is not only consistent with originalism but is what it prescribes.<sup>104</sup>

This Article does not engage these arguments directly. The three accounts just described are all about what originalism *is*. This question might be relevant to certain political or philosophical debates, but when it is answered by describing originalism as all-encompassing (or nearly so), it loses its usefulness in identifying interesting variation in interpretive practice. Sometimes courts rely on a relatively narrow set of historical resources in answering constitutional questions. At other times, they treat such resources with indifference or even hostility. If these approaches vary systematically across types of cases or questions, a positive analysis of constitutional practice should want to specify that variation. Calling it all originalist is ultimately part of a normative rather than a positive project.

#### B. *Rule Originalism*

Proving that the Court tends to resort to originalism in cases about constitutional rules would require a complex coding exercise, a large dataset, and sophisticated empirical analysis. Under the circumstances, proof is too ambitious an aim. Instead, I hope to supply enough data to support a strong hypothesis that others are free to test, whether through intuition, anecdote, or more rigorous methods.

Some coding is of course unavoidable. A typical constitutional opinion contains multiple modes of analysis. Often a majority opinion, not unlike a brief, argues that each mode—text, history, structure, precedent, and consequences—points toward the same conclusion, or is at least not

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101. See Sachs, *Originalism as a Theory*, *supra* note 12, at 820.

102. See Baude, *supra* note 12, at 2359–60.

103. See Balkin, *supra* note 9, at 3.

104. See *id.* at 6–7 (arguing that fidelity to the Constitution and original meaning requires future generations to engage in constitutional interpretation and construction when the Constitution uses vague standards or abstract principles).

inconsistent with that conclusion.<sup>105</sup> To argue that an opinion is originalist only when originalism is the sole mode of analysis or when it is announced as dispositive is too demanding a measure. Rather, this section codes as originalist those opinions in which analysis of *The Federalist Papers*, the debates in the Philadelphia or state ratifying conventions, or the views or expectations of members of the founding generation (whether real or hypothetical) form a significant part of the opinion's affirmative analysis.<sup>106</sup> An opinion in which those views or expectations either are not mentioned, are merely gestured at, or are described only as consistent with an outcome reached through other methods is not an originalist opinion.

This section begins with two periods during which the Court is sometimes said to have been nonoriginalist: the antebellum years and the Warren Court era. If rule originalism is evident during these relatively fallow periods, it can lend support to an intuition that identification of constitutional rules is linked to originalist analysis.<sup>107</sup>

1. *Antebellum Cases*. — Some commentators have suggested that *Dred Scott v. Sandford*<sup>108</sup> may have been the Court's first original intent opinion.<sup>109</sup> Those commentators are wrong.<sup>110</sup> Early Courts often reasoned by reference to the expectations calcified at the moment of constitutional

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105. See Fallon, Constructive Coherence Theory, *supra* note 16, at 1190–91.

106. What counts as the relevant founding generation of course depends on the provision under analysis, though identifying the appropriate provision, and therefore which founders to interrogate and heed, may itself be subject to motivated reasoning. See Greene, Fourteenth Amendment, *supra* note 89, at 979 (discussing originalists' thin treatment of the Reconstruction era relative to the eighteenth-century founding).

107. See Ran Hirschl, *Comparative Matters: The Renaissance of Comparative Constitutional Law* 260 (2014) (discussing the “most difficult case” principle in which presence of an outcome variable in its most challenging environment can substantially support a causal inference).

108. 60 U.S. 393 (1857).

109. See Christopher L. Eisgruber, *Dred Again: Originalism's Forgotten Past*, 10 *Const. Comment.* 37, 49 (1993) (arguing that Chief Justice Taney may have been the first jurist to utilize originalist reasoning in a Supreme Court opinion); William E. Nelson, *History and Neutrality in Constitutional Adjudication*, 72 *Va. L. Rev.* 1237, 1237–38 (1986) (“[The] process of using history to interpret the Constitution . . . can be traced back at least to the 1857 case of *Scott v. Sandford*.”); see also Cass R. Sunstein, *The Dred Scott Case: With Notes on Affirmative Action, the Right to Die & Same-Sex Marriage*, 1 *Green Bag* 2d 39, 40 (1997) (calling *Dred Scott* “one of the first great cases unambiguously using the ‘intent of the framers’”).

110. Although what follows focuses on Supreme Court opinions, it is notable that congressional debate over the role of the House of Representatives in considering the Jay Treaty, which Professor H. Jefferson Powell calls “the most sustained early congressional discussion of constitutional hermeneutics,” was replete with extratextual references to the state ratification debates. H. Jefferson Powell, *The Original Understanding of Original Intent*, 98 *Harv. L. Rev.* 885, 917–20 (1985). President George Washington relied in part on his personal knowledge of the Philadelphia Convention debates in deciding to reject the House's position. See *id.* at 921.

drafting or ratification without accounting for subsequent practices, precedents, or evolving thinking.

The various seriatim opinions in the Court's first significant decision, *Chisholm v. Georgia*,<sup>111</sup> decided in 1793, could easily be called originalist in this sense, though the case's proximity to the Constitution's ratification complicates any methodological assessment. *Chisholm* held that the Article III grant of federal court jurisdiction in cases between "a State and citizens of another State"<sup>112</sup> applied even when the state was the defendant in an assumpsit action, thereby working an implicit constitutional abrogation of state sovereign immunity. The modern Court has described the *Chisholm* majority as having ignored original understanding,<sup>113</sup> but it is more accurate to say that the majority simply adopted a different view of a genuine constitutional ambiguity. Notably, two of the majority Justices, Justices Blair and Wilson, were signatories to the Constitution,<sup>114</sup> and a third, Chief Justice Jay, was a co-author of *The Federalist Papers*.<sup>115</sup>

Chief Justice Jay framed his inquiry in terms of the nature of American sovereignty in light of the Revolution and post-Revolution events. The people of the United States, he wrote, "continued to consider themselves, in a national point of view, as one people; and they continued without interruption to manage their national concerns accordingly."<sup>116</sup> Though his opinion is largely grounded in text and in a democratic ethos, it quite clearly grounds itself in the politics of the 1780s.<sup>117</sup>

Justice Blair's opinion employed mostly textual and structural argument: The jurisdictional language of Article III appears to privilege neither citizens nor states, and the very possibility of federal jurisdiction over controversies involving states (as in state-state disputes, for example) defeats the claim that states have some incorruptible sovereign dignity.<sup>118</sup> Still, even this opinion speaks in the language of the consequences that "were intended" by the Constitution rather than what is or must be.<sup>119</sup> Justice Cushing's opinion makes a similar set of arguments and is explicit about the need to divine the "intent" and expectations of "the framers of

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111. 2 U.S. (2 Dall.) 419 (1793).

112. U.S. Const. art. III, § 2, cl. 1; *Chisholm*, 2 U.S. (2 Dall.) at 425.

113. See *Alden v. Maine*, 527 U.S. 706, 721 (1999) ("[T]he majority failed to address either the practice or the understanding that prevailed in the States at the time the Constitution was adopted.").

114. Teaching with Documents: Observing Constitution Day, Nat'l Archives, <http://www.archives.gov/education/lessons/constitution-day/signers.html> [<http://perma.cc/HF54-5WMA>] (last visited Sept. 30, 2016).

115. *The Federalist* No. 5 (John Jay) (Clinton Rossiter ed., 2003).

116. *Chisholm*, 2 U.S. (2 Dall.) at 470 (opinion of Jay, C.J.).

117. See *id.* at 470–71, 474–79.

118. See *id.* at 450–51 (opinion of Blair, J.).

119. See *id.*

the Constitution.”<sup>120</sup> Presaging the Eleventh Amendment, Justice Cushing’s opinion offers further that “[i]f the Constitution is found inconvenient in practice in this or any other particular, it is well that a regular mode is pointed out for amendment.”<sup>121</sup> Referring to Article V as the repository for prudential concerns is a signal originalist move.

Justice Wilson’s wide-ranging opinion is not easily characterized methodologically. It touches upon the corporate character of a state,<sup>122</sup> the notion of sovereignty under traditional principles of jurisprudence,<sup>123</sup> and the democratic foundations of state power.<sup>124</sup> The part of his opinion that appears most lawyerly to modern American eyes is his discussion of whether the Constitution in fact abrogates Georgia’s sovereign immunity.<sup>125</sup> Here the opinion repeatedly uses the language of what the American people intended, drawing, for example, on the failure of the Articles of Confederation grounded in its state-centered character.<sup>126</sup>

Justice Iredell argued that, absent a congressional statute, the Article III grant of jurisdiction could only be considered an abrogation of sovereign immunity if the kind of suit at issue in *Chisholm* would lie against a state at common law.<sup>127</sup> He found that it would not.<sup>128</sup> Notably for this Article’s purposes, he began his analysis by asking what “the Framers of the Constitution . . . meant” by “controversies” between a state and a citizen of another state.<sup>129</sup> Moreover, Justice Iredell explicitly used the time the Constitution was adopted as his temporal point of reference for crystallizing the state of the common law and the expectations embedded within the Constitution.<sup>130</sup>

*Calder v. Bull*<sup>131</sup> stands as another early U.S. Supreme Court constitutional decision in which the Court’s mode of analysis focused conspicuously on the intentions and expectations of the Constitution ab initio. The question was whether a Connecticut law voiding a decision of the probate court violated the prohibition on state ex post facto laws in the federal Constitution.<sup>132</sup> Garnering the agreement of all but Justice Cushing, Justice Chase found that the clause applied only to criminal laws.<sup>133</sup> The opinion’s interpretive approach zeroes in directly on the

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120. *Id.* at 467–69 (opinion of Cushing, J.).

121. *Id.* at 468.

122. See *id.* at 455–56 (opinion of Wilson, J.).

123. See *id.* at 453–58.

124. See *id.* at 463–64.

125. See *id.* at 464–66.

126. See *id.*

127. See *id.* at 437 (opinion of Iredell, J.).

128. See *id.* at 439.

129. *Id.* at 432.

130. See *id.* at 434–35, 437.

131. 3 U.S. (3 Dall.) 386 (1798).

132. *Id.* at 387 (opinion of Chase, J.).

133. See *id.* at 390–91.

mischievous that animated the clause—namely, a purported history of arbitrary and vindictive abuses of criminal process by the British Parliament.<sup>134</sup> Against this history, and in light of the Constitution's general reservation of state legislative authority, Justice Chase wrote, a literal reading of the *ex post facto* clauses—that is, one that would apply them indiscriminately to all laws—was inappropriate.<sup>135</sup>

In a third and much later antebellum case, *Cherokee Nation v. Georgia*,<sup>136</sup> the question was whether the Cherokee Nation was a “foreign state,” which would enable it to sue in federal court and contest alleged treaty violations by Georgia.<sup>137</sup> Here, unlike in *Chisholm* and *Calder*, there was quite a bit of water under the bridge. As Chief Justice Marshall acknowledged in his opinion:

[The Cherokee] have been uniformly treated as a state from the settlement of our country. The numerous treaties made with them by the United States recognize them as a people capable of maintaining the relations of peace and war, of being responsible in their political character for any violation of their engagements, or for any aggression committed on the citizens of the United States by any individual of their community. Laws have been enacted in the spirit of these treaties. The acts of our government plainly recognize the Cherokee nation as a state, and the courts are bound by those acts.<sup>138</sup>

Moreover, the Chief Justice suggested that the tribe's substantive claims were compelling. In violation of treaties between the Cherokee Nation and the United States, Georgia had passed a series of laws annexing tribal land and denying Indians the right to appear in court to assert their property and treaty rights.<sup>139</sup> Just before the case was heard, the state had executed a Cherokee citizen for murder in defiance of a federal court order, and President Andrew Jackson had removed federal troops from Cherokee land at Georgia's request.<sup>140</sup> Many contemporary observers considered Georgia's actions to be a trial balloon for the doctrine of nullification, given its obvious implications for the integrity of the union. As Chief Justice Marshall wrote, “If courts were permitted to indulge their sympathies, a case better calculated to excite them can scarcely be imagined.”<sup>141</sup>

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134. See *id.* at 390.

135. See *id.* at 389.

136. 30 U.S. (5 Pet.) 1 (1831).

137. See *id.* at 15–16 (discussing Article III, Section 2, Clause 1 of the U.S. Constitution).

138. *Id.* at 16.

139. Rennard Strickland, *The Tribal Struggle for Indian Sovereignty: Story of the Cherokee Cases*, in *Indian Law Stories* 61, 65 (Carole Goldberg, Kevin K. Washburn & Philip P. Frickey eds., 2011).

140. *Id.* at 66–67.

141. *Cherokee Nation*, 30 U.S. (5 Pet.) at 15.



Neither long-standing practice nor the imbalanced equities of the case proved decisive, however. Rather, what was dispositive for Chief Justice Marshall was that “the framers of our constitution had not the Indian tribes in view, when they opened the courts of the union to controversies between a state or the citizens thereof, and foreign states.”<sup>142</sup> Chief Justice Marshall asserted that U.S. courts were not an important forum for justice for tribal citizens “[a]t the time the constitution was framed.”<sup>143</sup> Moreover, the Constitution itself lists “the Indian Tribes” separately from “foreign Nations” in the Commerce Clause.<sup>144</sup> Marshall was not simply making a structural or “intratextual” point.<sup>145</sup> He wrote specifically that, in constructing the Commerce Clause, “*the convention* considered [Indian tribes] as entirely distinct” from foreign nations.<sup>146</sup>

To the argument that Indian tribes are separately enumerated in Article I, Section 8 only for clarity and emphasis rather than to suggest mutual exclusivity, the Chief Justice dismissed the idea by reference to the “view” of “the convention.”<sup>147</sup> Language including Indian tribes as foreign nations “would have suggested itself to *statesmen* who considered the Indian tribes as foreign nations, and were yet desirous of mentioning them particularly.”<sup>148</sup> To the argument that Indian tribes might be foreign nations notwithstanding the language of the Commerce Clause, Chief Justice Marshall wrote that the constitutional context did not permit him to “impute to the convention the intention to desert its former meaning.”<sup>149</sup> If *Cherokee Nation v. Georgia* is not an originalist decision, then nothing is.

One should qualify that claim, as always with constitutional interpretive claims, by considering the possibility that Chief Justice Marshall’s originalism was epiphenomenal. It would be reasonable to suppose that constitutional history was not genuinely constraining but rather provided a persuasive rhetoric of constraint, which is especially useful in cases of great political moment. If the use of originalism follows only from the political character of a dispute or some other idiosyncratic reason, rather than from the structure of the questions the dispute presents, it would present a challenge to this Article’s thesis.

There are undoubtedly many constitutional cases throughout history in which political calculations motivated a judge’s interpretive choices.

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142. *Id.* at 18.

143. *Id.* This assertion is contested. See Jill Norgren, *The Cherokee Cases: The Confrontation of Law and Politics* 101 (1996).

144. U.S. Const. art. I, § 8, cl. 3; see *Cherokee Nation*, 30 U.S. (5 Pet.) at 18.

145. See Akhil Reed Amar, *Intratextualism*, 112 *Harv. L. Rev.* 747, 748 (1999) (outlining the intratextualist technique of constitutional interpretation).

146. *Cherokee Nation*, 30 U.S. (5 Pet.) at 18 (emphasis added).

147. *Id.* at 19.

148. *Id.* at 19 (emphasis added).

149. *Id.*

The evidence is unusually strong that *Cherokee Nation* is not such a case. The jurisdictional question in *Cherokee Nation* was genuinely difficult. William Wirt, the former Attorney General who represented the Cherokee before the Supreme Court, harbored his own internal doubts.<sup>150</sup> Chief Justice Marshall, moreover, seemed receptive to the Cherokee claims on the merits. Wirt had sought through back channels to solicit Chief Justice Marshall's views prior to bringing suit.<sup>151</sup> Without discussing the jurisdictional hurdle, Chief Justice Marshall wrote in a letter to Wirt's surrogate, Judge Carr, that he "wished sincerely that both the Executive and Legislative departments had thought differently on the subject" of the Indian Removal Act, which sought to displace tribes living within state territory.<sup>152</sup> In the opinion itself, Chief Justice Marshall suggested that a different vehicle would produce a different result,<sup>153</sup> and Justice Story's dissenting opinion appears to have been written at the Chief Justice's suggestion.<sup>154</sup>

The opportunity for a more suitable vehicle arrived the next year in what became *Worcester v. Georgia*,<sup>155</sup> and this time Chief Justice Marshall held in favor of Cherokee rights. Specifically, the Court found that Georgia laws requiring whites to obtain a license to visit tribal lands were preempted by federal treaties with the Cherokee.<sup>156</sup> It seems that the problem with *Cherokee Nation* really was purely jurisdictional. It is also noteworthy that Chief Justice Marshall's lengthy opinion in *Worcester* is not originalist. It describes the continuous history of U.S.–Indian relations without privileging the moment of constitutional founding or mentioning drafters, the convention, or anyone's intentions.<sup>157</sup> The preemption question at the heart of *Worcester* is about the application of a constitutional standard to a set of facts. Originalism was accordingly not the default mode of inquiry.

There are distinctions within originalism, of course, and this Article does not suggest that they are trivial or unworthy of study. As Professor H. Jefferson Powell has chronicled in his canonical article on the original understanding of original intent, the originalism practiced in early American cases bears the hallmarks of English statutory interpretation, whose norms did not abide using the subjective intentions of legislative drafters as an interpretive resource.<sup>158</sup> Powell writes, "The 'intent of the

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150. See Norgren, *supra* note 143, at 99–100.

151. See Strickland, *supra* note 139, at 69–70.

152. *Id.* at 70 (quoting Joseph C. Burke, *The Cherokee Cases: A Study in Law, Politics, and Morality*, 21 *Stan. L. Rev.* 500, 510 (1969)).

153. See *Cherokee Nation*, 30 U.S. (5 Pet.) at 20 ("The mere question of right might perhaps be decided by this court in a proper case with proper parties.").

154. See Strickland, *supra* note 139, at 71.

155. 31 U.S. (6 Pet.) 515 (1832).

156. See *id.* at 561.

157. See *id.* at 542–61.

158. See Powell, *supra* note 110, at 902–04.

act' and the 'intent of the legislature' were interchangeable terms; neither term implied that the interpreter looked at any evidence concerning that 'intent' other than the words of the text and the common law background of the statute."<sup>159</sup> At the time of Powell's article, this observation counted as a critique of prominent originalists, whose writings were focused on the subjective intentions of the framers.<sup>160</sup> Today, interpretation grounded in an "objectified" original intent is not only considered originalist but is originalism's dominant normative manifestation.<sup>161</sup>

This discussion reveals that a discourse that takes the ideological fight over originalism as its starting point can miss important features of the available data. *Chisholm*, *Calder*, and *Cherokee Nation* are all cases about the meaning of constitutional rules. Article III either abrogates state sovereign immunity or it does not. The Ex Post Facto Clause either applies outside of criminal law or it does not. An Indian tribe either is a foreign state under Article III or it is not. These have the character of factual questions that do not lend themselves to qualifiers (such as "on balance") that imply sensitivity to context or practical reasoning. Reasonable people might disagree as to how these ambiguities are best resolved, and indeed both *Chisholm* and *Cherokee Nation* were decided over dissents. But disagreement about the meaning and scope of these provisions reflects a failure or oversight in constitutional design and foresight rather than any inherent vagueness.<sup>162</sup>

In adjudicating these cases, the Court adhered to the view that the appropriate point of reference in divining the meaning and application

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159. *Id.* at 897–98.

160. See Stephen B. Presser, *The Original Misunderstanding: The English, the Americans, and the Dialectic of Federalist Constitutional Jurisprudence*, 84 *Nw. U. L. Rev.* 106, 108 (1989).

161. See Randy E. Barnett, *An Originalism for Nonoriginalists*, 45 *Loy. L. Rev.* 611, 620 (1999) (arguing that intent should be construed from the text, not an otherwise unexpressed source); Colby, *supra* note 13, at 739 ("H. Jefferson Powell's evidence that the Framers did not intend intentionalist interpretation . . . is actually a feather in the New Originalism's cap; Powell's sources by and large support the claim that the Framers *did* intend the text to be interpreted according to its objective public meaning.").

162. This premise may be a fiction. Constitutions memorialize political compromises and may contain instances of calculated ambiguity, even with respect to rules. See generally John F. Manning, *Separation of Powers as Ordinary Interpretation*, 124 *Harv. L. Rev.* 1939, 1945 (2011) ("Like most bargained-for texts, the Constitution's structural provisions thus leave many important questions unaddressed."). The abrogation of state sovereign immunity via Article III's jurisdictional provisions might be an example. See John F. Manning, *The Eleventh Amendment and the Reading of Precise Constitutional Texts*, 113 *Yale L.J.* 1663, 1674 (2004) (arguing that the U.S. Constitution itself is a product of political negotiation and compromise); James E. Pfander, *Rethinking the Supreme Court's Original Jurisdiction in State-Party Cases*, 82 *Calif. L. Rev.* 555, 627–36 (1994). The point is not that the original understanding tells us what the Constitution "means" in some immanent sense, but rather that interpreters *treat* original understanding in this way for certain kinds of constitutional questions.

of the relevant provisions was the time of enactment. The various Justices assumed that the expectations that attached at that time—whether those of the framers or ratifiers or of the Constitution itself—should be honored in the here and now. Dispute over the significance of this temporal reference point has long marked the red and white roses of U.S. constitutional theory: Is the Constitution living or is it dead?<sup>163</sup> It is easy to read the opinions in *Chisholm*, *Calder*, and *Cherokee Nation* as siding against the notion of a living constitution, at least as to the questions those Courts were answering.

Contrast this approach with Chief Justice Marshall's approach in *McCulloch v. Maryland*.<sup>164</sup> As in *Cherokee Nation*, Chief Justice Marshall's majority opinion begins with a discussion of prior practice and is explicit about the political stakes involved,<sup>165</sup> but unlike in *Cherokee Nation*, established practice gives rise to a strong presumption as to the outcome. The Bank of the United States, whose constitutionality Maryland had placed at issue in *McCulloch*,<sup>166</sup> had originally been chartered by the first Congress with the approval of President Washington, who had sought the counsel of Attorney General Edmund Randolph, Secretary of State Thomas Jefferson, and Secretary of the Treasury Alexander Hamilton.<sup>167</sup> It was chartered over Jefferson's and Randolph's opposition, as well as that of James Madison, whom Washington asked to prepare a potential veto message.<sup>168</sup> As President, Madison initially let the charter lapse after a twenty-year run, but he later changed his mind in response to a fiscal crisis and signed the second bank bill into law in 1816.<sup>169</sup> Wrote Chief Justice Marshall, "It would require no ordinary share of intrepidity to assert that a measure adopted under these circumstances was a bold and plain usurpation, to which the Constitution gave no countenance."<sup>170</sup>

This preamble appears long before Chief Justice Marshall's memorable injunction that the Necessary and Proper Clause must be construed liberally, for it is part of a "constitution intended to endure for ages to

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163. See, e.g., Antonin Scalia, Common-Law Courts in a Civil-Law System: The Role of the United States Federal Courts in Interpreting the Constitution and Laws, in *A Matter of Interpretation: Federal Courts and the Law* 3, 38 (Amy Gutmann ed., 1997) ("[T]he Great Divide with regard to constitutional interpretation is not that between Framers' intent and objective meaning, but rather that between *original* meaning (whether derived from Framers' intent or not) and *current* meaning.").

164. 17 U.S. (4 Wheat.) 316 (1819).

165. See *id.* at 400–01.

166. *McCulloch* was a test case, so it was not Maryland alone. See Daniel A. Farber, The Story of *McCulloch*: Banking on National Power, in *Constitutional Law Stories* 33, 44 (Michael C. Dorf ed., 2d ed. 2009).

167. See Fed. Reserve Bank of Phila., The First Bank of the United States 3 (2009), <http://www.philadelphiafed.org/publications/economic-education/first-bank.pdf> (on file with the *Columbia Law Review*).

168. *Id.*

169. *Id.* at 12.

170. *McCulloch*, 17 U.S. (4 Wheat.) at 402.

come, and, consequently to be adapted to the various crises of human affairs.”<sup>171</sup> It is possible to understand this language as originalist of a sort, and some commentators have so construed it.<sup>172</sup> Chief Justice Marshall’s argument was that giving deference to Congress to determine the means through which its powers may be executed satisfied “the intention of those who gave these powers.”<sup>173</sup> But in the context of the *McCulloch* opinion, this language serves to deemphasize founding-era expectations as to whether Congress had been given the power to incorporate a bank. The suggestion that Congress’s Article I powers be judged “not directly, but at one remove”<sup>174</sup> is a delegation that reflects a judgment about judgment. Words and phrases like “regulate” and “necessary and proper” may be applied differently by reasonable people to the same set of facts, and so efficient and democratic governance counsels that courts leave their application to Congress in the first instance. The reasoning of *McCulloch* reveals Chief Justice Marshall’s understanding of the case to be about standards rather than rules.<sup>175</sup>

This subsection began with a reference to *Dred Scott*. As noted above, *Dred Scott*’s holding that black Americans could not be citizens of a state for Article III purposes is self-consciously originalist. It is also a case about the meaning of a constitutional rule—namely, the rule that individuals may invoke the diversity jurisdiction of the federal courts only if they are citizens of a state.<sup>176</sup> Chief Justice Taney’s originalism is often disparaged (along with all else he touches),<sup>177</sup> but it should have been expected in light of the nature of the question he was answering.

This discussion lends some support to the idea that rule originalism has long characterized U.S. constitutional interpretation, but this Article does not depend on this claim. It nonetheless buttresses the assertion

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171. *Id.* at 415 (emphasis omitted).

172. See, e.g., Steven G. Calabresi, The Tradition of the Written Constitution: Text, Precedent, and Burke, 57 Ala. L. Rev. 635, 646 (2006) (“Marshall may have been wrong about the original meaning of the Commerce [Clause], but his opinion[] in . . . *McCulloch* [was] an attempt at a textual and originalist interpretation . . .”).

173. *McCulloch*, 17 U.S. (4 Wheat.) at 415.

174. *United States v. Lopez*, 514 U.S. 549, 616 (1995) (Breyer, J., dissenting).

175. Notice that in *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803), Chief Justice Marshall gave no deference to what he construed to be Congress’s judgment, in § 13 of the Judiciary Act, that Congress had the authority to expand the original jurisdiction of the Supreme Court. See *id.* at 173–76. For Chief Justice Marshall, the clauses of Article III allocating original and appellate jurisdiction, read as a whole, deny Congress the power to make that assignment. See *id.* at 174. One could describe this aspect of *Marbury* as implicating the meaning of a constitutional rule. Though Marshall’s discussion on this point is not overtly originalist, neither is it nonoriginalist.

176. *Dred Scott v. Sandford*, 60 U.S. 393, 426–27 (1857) (holding that *Dred Scott* was not a citizen of Missouri and as such was not entitled to sue in federal court based on Article III of the Constitution). Individuals who are subjects of a foreign state may also invoke diversity jurisdiction. See U.S. Const. art. III, § 2, cl. 1.

177. See Jamal Greene, *The Anticanon*, 125 Harv. L. Rev. 379, 407 (2011).

that rule originalism characterizes modern U.S. constitutional interpretation. The next two sections push into the twentieth century and beyond.

Before getting there, however, it is important to take note of something else that *McCulloch* helps us to see. Whether the Constitution's enumerated powers, including the Necessary and Proper Clause, qualify as rules or standards was not a threshold question in *McCulloch* but rather went straight to the merits. Recall Chief Justice Marshall's discussion of the word "necessary."<sup>178</sup> Sometimes the word "import[s] an absolute physical necessity, so strong, that one thing, to which another may be termed necessary, cannot exist without that other."<sup>179</sup> At other times the word "imports no more than that one thing is convenient, or useful, or essential to another."<sup>180</sup> In other words, sometimes it signifies a rule and sometimes a standard. *Which one* is precisely what divided *McCulloch*'s merits position from Maryland's.<sup>181</sup>

The fact that the inquiry into whether a constitutional question is about a rule or a standard can bleed into the merits should not deter us. This Article's claim is not that the structure of the question an interpreter faces is self-evident, nor is it that it necessarily commands the consensus of the constitutional community (though it often does), nor is it that the constitutional text supplies the answer. The text is a focal point of constitutional interpretation in the United States,<sup>182</sup> but the range of questions it answers standing alone is a narrow if not null set.<sup>183</sup> The Article's argument is rather that the method to which constitutional interpreters default often reflects a set of assumptions the interpreter makes about the nature of the question she is answering. Those assumptions emerge not from metaphysics but from substantive views about constitutional law.<sup>184</sup> What is remarkable is that what follows from those assumptions—originalist methods for rules but not standards—is not a source of conflict but rather a shared premise of constitutional interpreters in the United States.

2. *The Warren Court.* — The most famously nonoriginalist Court was the Warren Court,<sup>185</sup> whose decisions inspired the originalism movement

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178. See *McCulloch*, 17 U.S. (4 Wheat.) at 413–19.

179. *Id.* at 413.

180. *Id.*

181. See *id.* at 413 ("But the argument on which most reliance is placed, is drawn from the peculiar language of this clause.").

182. See Reva B. Siegel, Text in Contest: Gender and the Constitution from a Social Movement Perspective, 150 U. Pa. L. Rev. 297, 298 (2001); David A. Strauss, Common Law, Common Ground, and Jefferson's Principle, 112 Yale L.J. 1717, 1733–34 (2003).

183. See Curtis A. Bradley & Neil S. Siegel, Constructed Constraint and the Constitutional Text, 64 Duke L.J. 1213, 1216 (2015); Strauss, Does the Constitution, *supra* note 8, at 3.

184. See Calabresi & Lawson, *supra* note 10, at 496 ("There is no single, noncontroversial way to determine the extent to which a norm is rule-like.").

185. See Frank B. Cross, Originalism—The Forgotten Years, 28 Const. Comment. 37, 44 (2012).

of the 1980s. Nearly all of the Warren Court's famous decisions are nonoriginalist. Less obvious is that nearly all of the Warren Court's famous decisions are cases about the application of constitutional standards. Most of the cases that give the Warren Court its reputation involve the Equal Protection Clause,<sup>186</sup> the First Amendment,<sup>187</sup> or the Due Process Clause.<sup>188</sup> These provisions contain the Constitution's most recognized standards.

The Warren Court did of course adjudicate cases involving the meaning of constitutional rules. Two cases involving structural features of the federal political process—*Powell v. McCormack*<sup>189</sup> and *Wesberry v. Sanders*<sup>190</sup>—provide perhaps the clearest examples. *Powell* required the Court to determine whether Article I, Section 5, which provides that “[e]ach House shall be the judge of the . . . qualifications of its own members,” permits the House of Representatives to refuse to seat an elected Representative based on his or her failure to meet qualifications other than those enumerated in Article I, Section 2.<sup>191</sup> That section limits House membership to persons who are at least twenty-five years old, have been a citizen for seven years, and are inhabitants of the state in which they are elected.<sup>192</sup>

Adam Clayton Powell, Jr. filed suit after the House voted to exclude him based on various corruption allegations.<sup>193</sup> Writing for a 7-1 majority, Chief Justice Warren understood the key issue to be a prototypical rule question: “the meaning of the phrase to ‘be the Judge of the Qualifications of its own Members.’”<sup>194</sup> In determining that the Constitution empowered the House to judge only the constitutionally enshrined qualifications of members, the Court did not entertain the possibility that the Constitution was living, adaptable, or anything other than fixed at the moment of its adoption. Indeed, the Court specifically and forcefully rejected living constitutionalism in this context.

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186. See, e.g., *Harper v. Va. State Bd. of Elections*, 383 U.S. 663 (1966); *Reynolds v. Sims*, 377 U.S. 533 (1964); *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954).

187. See, e.g., *United States v. O'Brien*, 391 U.S. 367 (1968) (holding that a law against the mutilation of draft cards was not a violation of free speech rights but announcing a standard that places a heightened burden on government regulation of expressive conduct); *N.Y. Times Co. v. Sullivan*, 376 U.S. 254 (1964) (holding that common law defamation suits are constrained by the First Amendment); *Engel v. Vitale*, 370 U.S. 421 (1962) (holding teacher-led prayers in public schools are a violation of the Establishment Clause of the First Amendment).

188. See, e.g., *Griswold v. Connecticut*, 381 U.S. 479 (1965); *Bolling v. Sharpe*, 347 U.S. 497 (1954).

189. 395 U.S. 486 (1969).

190. 376 U.S. 1 (1964).

191. See *Powell*, 395 U.S. at 489–93.

192. U.S. Const. art. I, § 2, cl. 2.

193. See *Powell*, 395 U.S. at 489–90.

194. *Id.* at 521 (quoting U.S. Const. art. I., § 5).

Chief Justice Warren—*Powell* edition—is a model originalist. In considerable detail, the opinion canvasses English and colonial practices regarding legislative decisions to exclude members<sup>195</sup> and the debates in the Philadelphia Convention and in the state ratifying conventions.<sup>196</sup> Chief Justice Warren did consider post-ratification practice and noted that on several occasions after ratification both the House and the Senate had excluded elected candidates for reasons going beyond the qualifications listed in Article I, Section 2.<sup>197</sup> Remarkably, however, Chief Justice Warren—the author of *Brown*<sup>198</sup>—argued that post-ratification practice bears limited interpretive weight when it departs from original intent. He writes:

Had these congressional exclusion precedents been more consistent, their precedential value still would be quite limited . . . . Particularly in view of the Congress' own doubts in those few cases where it did exclude members-elect, we are not inclined to give its precedents controlling weight. *The relevancy of prior exclusion cases is limited largely to the insight they afford in correctly ascertaining the draftsmen's intent.* Obviously, therefore, the precedential value of these cases tends to increase in proportion to their proximity to the Convention in 1787.<sup>199</sup>

Without a theory of why a case like *Brown* engages different interpretive instincts than a case like *Powell*, this language seems disingenuous. This Article supplies such a theory.

A second Warren Court political-process decision, *Wesberry*, provides another useful test, especially when paired with the Court's decision the same Term in *Reynolds v. Sims*.<sup>200</sup> *Wesberry* held that the Constitution requires that congressional districts be equal in population.<sup>201</sup> *Reynolds* held that the Constitution requires roughly the same equality for state legislative districts.<sup>202</sup> The two decisions came down within four months

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195. See *id.* at 522–31. The opinion places great weight on the resolution of the famous John Wilkes case. Wilkes was thrice reelected to Parliament after being convicted of seditious libel, and each time Parliament refused to seat him. See *id.* at 527–28. In 1782, Wilkes successfully persuaded the House of Commons to expunge the expulsion resolutions on the ground that they had been, in effect, nullified by the people themselves. See *id.* at 528.

196. See *id.* at 532–41.

197. See *id.* at 544–46.

198. See *Brown v. Bd. of Educ.*, 347 U.S. 483, 492–93 (1954) (“In approaching this problem, we cannot turn the clock back to 1868 when the Amendment was adopted, or even to 1896, when *Plessy v. Ferguson* was written. We must consider public education in the light of its full development and its present place in American life throughout the Nation.”).

199. *Powell*, 395 U.S. at 545–47 (emphasis added).

200. 377 U.S. 533 (1964).

201. *Wesberry v. Sanders*, 376 U.S. 1, 7–8 (1964).

202. The *Reynolds* Court permitted “[s]omewhat more flexibility” in state legislative districting than is permitted in congressional apportionment. *Reynolds*, 377 U.S. at 578.



of each other, with identical majorities.<sup>203</sup> *Wesberry* is a thoroughgoing originalist opinion, and *Reynolds* is not originalist at all. Why?

For one thing, *Wesberry* was written by originalist Justice Black and *Reynolds* by Chief Justice Warren, but as seen above, Warren was fully capable of writing an originalist opinion. More significant was that the constitutional question in *Wesberry* was different. Article I, Section 2 provides that “[t]he House of Representatives shall be composed of Members chosen every second Year by the People of the several States . . . .”<sup>204</sup> Justice Black’s opinion reads an equality requirement into the words “the People,” understanding the language to enact a rule that, within each state, legislative districts should be of equal size.<sup>205</sup> *Wesberry* is clearly originalist. Justice Black wrote that the constitutional provision must be “construed in its historical context,”<sup>206</sup> the question is framed as what “the Framers of the Constitution intended”<sup>207</sup> or “meant,”<sup>208</sup> the disposition means to honor “a principle tenaciously fought for and established at the Constitutional Convention,”<sup>209</sup> and nearly every word of the opinion is devoted to elaborating the views held at the Philadelphia Convention and articulated in *The Federalist Papers*. Justice Harlan’s dissenting opinion bemoans the opinion’s inattention to contrary precedent<sup>210</sup> and contemporary consequences,<sup>211</sup> opening with a consequentialist lament: “I had not expected to witness the day when the Supreme Court of the United States would render a decision which casts grave doubt on the constitutionality of the composition of the House of Representatives.”<sup>212</sup>

Contrast *Wesberry* with *Reynolds*. *Reynolds* was decided not on the basis of Article I, Section 2, which does not apply to state legislative districting, but rather the Equal Protection Clause, a constitutional standard.<sup>213</sup> *Reynolds* contains not a word about the intentions of the framers or drafters of the Fourteenth Amendment (or any other constitutional provision), the original understandings of the ratifying generation, or the lessons of preconstitutional practices. Rather, the opinion is replete

203. The lineups for each majority opinion were Chief Justice Warren and Justices Black, Douglas, Brennan, White, and Goldberg.

204. U.S. Const. art. I, § 2, cl. 1.

205. See *Wesberry*, 376 U.S. at 7–8 (“[T]he command of Art. I, § 2, that Representatives be chosen ‘by the People of the several States’ means that as nearly as is practicable one man’s vote in a congressional election is to be worth as much as another’s.” (quoting U.S. Const. art. I, § 2, cl. 1)). Early in U.S. history, congressional delegations were typically elected at large. See *id.* at 8.

206. *Id.* at 7.

207. *Id.* at 8.

208. *Id.* at 9.

209. *Id.* at 8.

210. See *id.* at 45–47 (Harlan, J., dissenting).

211. See *id.* at 48.

212. *Id.* at 20.

213. See *Reynolds v. Sims*, 377 U.S. 533, 560 (1964).

with references to the case law of the Court and reasons from first principles.<sup>214</sup> The only relevant “history” for the Court was “a continuing expansion of the scope of the right of suffrage in this country.”<sup>215</sup> Justice Harlan’s dissent this time was not consequentialist: “The Court’s constitutional discussion . . . is remarkable . . . for its failure to address itself at all to the Fourteenth Amendment as a whole or to the legislative history of the Amendment pertinent to the matter at hand.”<sup>216</sup> The Court’s failure to discuss history in *Reynolds* seems ever more remarkable in light of the almost polar opposite mode of inquiry it took in *Wesberry*. The structure of the question the Court took itself to be answering provides a ready explanation.

The juxtaposition of *Wesberry* and *Reynolds* calls to mind the discussion above of the symbiosis between an interpreter’s judgment as to whether a constitutional question is a rule or a standard and the degrees of freedom the answer affords. That is, one suspects that a conclusion that the Court has broad latitude to depart from original understanding motivates its assessment of the kind of question it is answering, and vice versa.

We see this dialectic at play in the Warren Court’s criminal procedure jurisprudence. The criminal procedure revolution the Warren Court fomented and witnessed was enabled, at least notionally, by its resolution of the debate over whether and how the Fourteenth Amendment incorporates the Bill of Rights. Total incorporation, which Justice Black urged,<sup>217</sup> would have maintained the rule-like structure of many of the criminal procedure provisions of the Constitution, especially in the Fifth and Sixth Amendments. Both selective incorporation, often associated with Justice Brennan,<sup>218</sup> and nonincorporation, embodied by Justice Frankfurter,<sup>219</sup> require a judge to determine the interplay between particular criminal procedural rights and the due process standard of the Fourteenth Amendment. In other words, the Court’s leading originalist

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214. See, e.g., *id.* at 565 (“Logically, in a society ostensibly grounded on representative government, it would seem reasonable that a majority of the people of a State could elect a majority of that State’s legislators.”).

215. *Id.* at 555.

216. *Id.* at 590 (Harlan, J., dissenting). The inconsistency in Justice Harlan’s dissents does not undermine this Article’s claims. Dissenting opinions obey different interpretive and rhetorical conventions than majority opinions. See Lani Guinier, Foreword: Demosprudence Through Dissent, 122 *Harv. L. Rev.* 4, 18–23 (2008).

217. See, e.g., *Adamson v. California*, 332 U.S. 46, 68–72 (1947) (Black, J., dissenting) (arguing that “one of the chief objects” of the Fourteenth Amendment “was to make the Bill of Rights[] applicable to the states”).

218. See, e.g., William J. Brennan, Jr., *The Bill of Rights and the States*, 36 *N.Y.U. L. Rev.* 761, 769 (1961) (describing selective incorporation of the Bill of Rights as a “process of absorption”).

219. See, e.g., Felix Frankfurter, Memorandum on “Incorporation” of the Bill of Rights into the Due Process Clause of the Fourteenth Amendment, 78 *Harv. L. Rev.* 746, 748 (1965).

framed the incorporation question in terms of a set of rules, which in turn invited originalism, and its leading living constitutionalists framed it in terms of a standard, which invited dynamic interpretation.

Consider *Rochin v. California*.<sup>220</sup> Police came upon Rochin in his apartment and witnessed him swallow two morphine capsules.<sup>221</sup> Concerned that a criminal suspect was destroying evidence, they took Rochin to a hospital, intubated him, and pumped an emetic solution into his stomach, whereupon he vomited out the capsules.<sup>222</sup> The question was whether convicting him on the basis of this evidence violated the Constitution.<sup>223</sup> Likening the sequence of events to a coerced confession, Justice Frankfurter wrote for the majority that the officers' conduct "shock[ed] the conscience" and therefore violated the Due Process Clause of the Fourteenth Amendment.<sup>224</sup>

Justice Frankfurter was conscious of the dependent relationship between the structure of the relevant constitutional question and the interpretive methods those questions call for:

In dealing not with the machinery of government but with human rights, the absence of formal exactitude, or want of fixity of meaning, is not an unusual or even regrettable attribute of constitutional provisions. Words being symbols do not speak without a gloss. On the one hand the gloss may be the deposit of history, whereby a term gains technical content. Thus the requirements of the Sixth and Seventh Amendments for trial by jury in the federal courts have a rigid meaning. No changes or chances can alter the content of the verbal symbol of "jury"—a body of twelve men who must reach a unanimous conclusion if the verdict is to go against the defendant. On the other hand, the gloss of some of the verbal symbols of the Constitution does not give them a fixed technical content. It exacts a continuing process of application. When the gloss has thus not been fixed but is a function of the process of judgment, the judgment is bound to fall differently at different times and differently at the same time through different judges.<sup>225</sup>

This excerpt provides a rough synopsis of this Article's positive thesis. Unlike his understanding of "due process of law," Justice Frankfurter construed the meaning of "jury" to form part of a constitutional rule with a fixed content that resists evolving application.<sup>226</sup>

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220. 342 U.S. 165 (1951).

221. *Id.* at 166.

222. *Id.*

223. *See id.* at 168.

224. *Id.* at 172–73.

225. *Id.* at 169–70.

226. *See id.*

Prior Court dicta concerning the size of a jury appear to support this view.<sup>227</sup> Tellingly, when the Court later revisited the question of jury size in *Williams v. Florida*, the majority used the views of the framers to rebut what it called a “historical accident” that should not be “immutably codified into our Constitution.”<sup>228</sup> Justice White’s majority opinion in *Williams* devotes much effort to arguing that the framers intended the word “jury” to be understood flexibly.<sup>229</sup> In other words, his opinion tries to argue that “jury” was *intended* to be a standard, not a rule. In light of the symbiosis this Article identifies, Justice White’s line of argument is to be expected.

Justice Black concurred in the judgment in *Rochin*.<sup>230</sup> For him, the officers’ forcible extraction of evidence violated Rochin’s Fifth Amendment right against self-incrimination, incorporated jot for jot against the states.<sup>231</sup> Justice Black criticized the “evanescent standards of the majority’s philosophy,” preferring “faithful adherence to the specific guarantees in the Bill of Rights.”<sup>232</sup> It is easy, then, to overlook that the judgment itself was not the sole ground of concurrence between the two philosophic foes. Justice Black and Justice Frankfurter agreed, as Justice White and Justice Frankfurter did implicitly, that the appropriate interpretive approach follows from the structure of the constitutional question. “Some constitutional provisions are stated in absolute and unqualified language,” Justice Black wrote in *Rochin*, referencing the First Amendment.<sup>233</sup> “Other constitutional provisions do require courts to choose between competing policies, such as the Fourth Amendment which, by its terms, necessitates a judicial decision as to what is an ‘unreasonable’ search or seizure.”<sup>234</sup> Consistent with this commitment, Justice Black’s opinions applying the Fourth Amendment do not use originalist methods.<sup>235</sup>

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227. See *Thompson v. Utah*, 170 U.S. 343, 349–50 (1898) (asserting that the jury referred to in the Sixth Amendment reflects “the meaning affixed to [it] in the law as it was in this country and in England at the time of the adoption of” the Constitution, meaning “a jury constituted, as it was at common law, of twelve persons”).

228. 399 U.S. 78, 89–90 (1970).

229. *Id.* at 92–100.

230. *Rochin*, 342 U.S. at 174 (Black, J., concurring).

231. *Id.* at 174–75.

232. *Id.* at 175, 177.

233. *Id.* at 176; see also Black, *supra* note 60, at 867 (“It is my belief that there are ‘absolutes’ in our Bill of Rights, and that they were put there on purpose by men who knew what words meant, and meant their prohibitions to be ‘absolutes.’”).

234. *Rochin*, 342 U.S. at 176.

235. See, e.g., *Cooper v. California*, 386 U.S. 58 (1967); *Preston v. United States*, 376 U.S. 364 (1964); *District of Columbia v. Little*, 339 U.S. 1 (1950). Justice Black also joined Chief Justice Warren’s opinion in *Trop v. Dulles*, 356 U.S. 86 (1958), which committed the Court to interpreting the Eighth Amendment’s ban on cruel and unusual punishments in light of “the evolving standards of decency that mark the progress of a maturing society.” *Id.* at 101.

3. *Other Cases.* — Many of the Court’s most thoroughgoing originalist opinions emerge from cases about the meaning of a constitutional rule. As noted above, a truly disciplined positive account of the relationship between originalism and rules would leave no bandwidth for the normative inquiry of Part III or the justiciability implications discussed in Part IV. What follows instead is a sample of rule-originalist opinions designed to give the reader a window into an intuition that, this Article argues, is a general one.

Begin with two recent decisions that Part IV revisits below: *Arizona State Legislature v. Arizona Independent Redistricting Commission (AIRC)*<sup>236</sup> and *NLRB v. Noel Canning*.<sup>237</sup> At issue in *AIRC* was whether, consistent with the Elections Clause, a state could vest the conclusive power to construct congressional districts in an independent redistricting commission rather than in the state legislature.<sup>238</sup> The Elections Clause states, as immediately relevant, that “[t]he Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof . . . .”<sup>239</sup> The constitutional question, then, was whether the word “Legislature” as used in that provision could encompass an independent commission incorporated into the state constitution through a ballot initiative.<sup>240</sup>

Justice Ginsburg, who wrote the majority opinion, is not an originalist, nor is any other member of her five-Justice majority.<sup>241</sup> Yet the foundation of the opinion’s merits analysis resides in the eighteenth century: “The dominant purpose of the Elections Clause, the historical record bears out, was to empower Congress to override state election rules, not to restrict the way States enact legislation.”<sup>242</sup> Justice Ginsburg constructed the historical record from a standard originalist toolkit: founding-era dictionaries, *The Federalist Papers*, the Convention debates, and debates in the state ratifying conventions.<sup>243</sup> The opinion notes that “[t]he Framers may not have imagined the modern initiative process,” but rather than using that observation as an invitation to dynamic interpretation, Justice Ginsburg instead situated the initiative within a conception of popular governance that she associated with Madison, Hamilton, and the Declaration of Independence.<sup>244</sup>

In *Noel Canning*, another of the Court’s nonoriginalists, Justice Breyer, wrote a largely, though not entirely, originalist opinion. Article II

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236. 135 S. Ct. 2652 (2015).

237. 134 S. Ct. 2550 (2014).

238. *AIRC*, 135 S. Ct. at 2658–59.

239. U.S. Const. art. I, § 4, cl. 1.

240. *AIRC*, 135 S. Ct. at 2659.

241. Justice Ginsburg’s opinion was joined by Justices Kennedy, Breyer, Sotomayor, and Kagan.

242. *AIRC*, 135 S. Ct. at 2671.

243. *Id.* at 2671–72.

244. See *id.* at 2674–75.

gives the President the power “to fill up all Vacancies that may happen during the Recess of the Senate, by granting Commissions which shall expire at the End of their next Session.”<sup>245</sup> This power stands as an exception to the ordinary requirement of obtaining the Senate’s advice and consent to the appointment of federal officers.<sup>246</sup> *Noel Canning* required the Court to determine the meaning of “vacancies that may happen” and “the recess of the Senate.”<sup>247</sup> The recess appointments power was designed to ensure the continuity of government during the long periods in which it was assumed the Senate would be unable to convene.<sup>248</sup> In the horse-and-buggy era, one would not expect anything other than a lengthy recess, but in the modern era the Senate might take a break for a month or a weekend. Moreover, whether a President could use the recess appointments power to fill a vacancy that arose while the Senate was in session but that continued into a recess was ambiguous from the start. Presidents had a long history of filling appointments in this way, and making their own determinations as to when the Senate was in recess, but the Senate also had a long history of objections.<sup>249</sup>

Justice Breyer’s majority opinion begins its analysis with the admonition that “in interpreting the [Recess Appointments] Clause, we put significant weight upon historical practice.”<sup>250</sup> In light of that assertion, one could be forgiven in coding the opinion as nonoriginalist. The opinion indeed devotes much of its analysis to post-ratification practices of the political branches, and the Court’s conclusions that an intrasession recess qualifies as “the recess of the Senate” and that a vacancy that arises during a session may be filled through a recess appointment are both consistent with those practices.<sup>251</sup> But Justice Breyer’s opinion reaches both conclusions only after canvassing the original meaning of these terms and concluding that they are ambiguous.<sup>252</sup> Consistent with his jurisprudential orientation, it may well be that Justice Breyer was committed to being guided by practice and by conse-

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245. U.S. Const. art. II, § 2, cl. 3.

246. *Id.* cl. 2.

247. *NLRB v. Noel Canning*, 134 S. Ct. 2550, 2567 (2014) (emphasis omitted) (internal quotation marks omitted) (quoting U.S. Const. art. II, § 2, cl. 3).

248. See *id.*; Michael B. Rappaport, *The Original Meaning of the Recess Appointments Clause*, 52 *UCLA L. Rev.* 1487, 1498 (2005).

249. See *Noel Canning*, 134 S. Ct. at 2562–64, 2570–73.

250. *Id.* at 2559 (emphasis omitted).

251. *Id.* at 2567, 2573 (internal quotation marks omitted) (quoting U.S. Const. art. II, § 2, cl. 3).

252. See *id.*; Baude, *supra* note 12, at 2373 (arguing that despite Justice Scalia’s critique of Justice Breyer’s citations to historical practice, their opinions “actually do agree . . . about the role of the text and its original meaning”). Justice Breyer’s sources included founding-era dictionaries, the Convention debates, contemporaneous state practice, and the views of Thomas Jefferson. See *Noel Canning*, 134 S. Ct. at 2561, 2567–68.

quences,<sup>253</sup> but it is telling that—rather than ignoring original intentions, which happens all the time in Court opinions—he appeared to find it necessary to conclude that those intentions were unclear. In fact, Justice Breyer even justified his decision to look to historical practice by referring to Madison’s articulation of what “was foreseen at the birth of the Constitution”—namely that “difficulties and differences of opinion” in interpreting the Constitution “might require a regular course of practice to liquidate & settle the meaning of some of them.”<sup>254</sup>

Perhaps the best known example of well-established political practices coming into tension with the original understanding of a constitutional rule is *INS v. Chadha*.<sup>255</sup> Congress had created an administrative structure under which the Attorney General was empowered to suspend removal of certain deportable aliens, subject to a veto by a vote of the House of Representatives.<sup>256</sup> The question was whether this scheme violated the Constitution’s bicameralism and presentment requirements.<sup>257</sup> Congress had included one-house-veto provisions in hundreds of laws over a half century leading up to the *Chadha* decision; such provisions served as a counterweight to the broad delegation to agencies that had come to characterize the modern administrative state.<sup>258</sup>

The *Chadha* Court made no bones about the power of original understanding in the face of later contrary practice. Chief Justice Burger’s analysis for the majority begins by noting that “[c]onvenience and efficiency are not the primary objectives—or the hallmarks—of democratic government and our inquiry is sharpened rather than blunted by the fact that congressional veto provisions are appearing with increasing frequency . . . .”<sup>259</sup> Rather, the opinion argues, the practices relevant to the constitutionality of the one-house veto were those anticipated by and familiar to the framers.<sup>260</sup> The Chief Justice emphasizes the centrality of bicameralism and presentment to the Constitution’s drafters, and Madison and Hamilton in particular, using the Convention debates and *The Federalist Papers* as his main text.<sup>261</sup> Other constitutional provisions thought consistent with bicameralism and presentment as the

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253. See Stephen Breyer, *Making Our Democracy Work: A Judge’s View* 80–87 (2011) (describing Justice Breyer’s pragmatic approach to constitutional interpretation that draws from a variety of sources).

254. *Noel Canning*, 134 S. Ct. at 2560 (quoting Letter from James Madison to Spencer Roane (Sept. 2, 1819), in 8 *Writings of James Madison* 450 (Gaillard Hunt ed., 1908)).

255. 462 U.S. 919 (1983).

256. See *id.* at 923–25.

257. See U.S. Const. art. I, § 7, cl. 2 (“Every Bill which shall have passed the House of Representatives and the Senate shall, before it becomes a law, be presented to the President of the United States . . . .”).

258. See *Chadha*, 462 U.S. at 967 (White, J., dissenting); *id.* at 984–87.

259. *Id.* at 944 (majority opinion).

260. *Id.* at 946–50.

261. See *id.*

sole avenues for legislation are presented as reflecting what “the Framers intended.”<sup>262</sup>

In both the majority opinion and the dissenting opinion of Justice White, the weight of original understandings in their analyses turns on the authors’ assessments of the specificity of the relevant provisions and the constitutional intentions that specificity infers.<sup>263</sup> For Chief Justice Burger, “[e]xplicit and unambiguous provisions of the Constitution prescribe and define the respective functions of the Congress and of the Executive in the legislative process. . . . [T]he precise terms of those familiar provisions are critical to the resolution of these cases . . . .”<sup>264</sup> And here is Justice White:

The Constitution does not directly authorize or prohibit the legislative veto. Thus, our task should be to determine whether the legislative veto is consistent with the purposes of Art. I and the principles of separation of powers which are reflected in that Article and throughout the Constitution. We should not find the lack of a specific constitutional authorization for the legislative veto surprising, and I would not infer disapproval of the mechanism from its absence. From the summer of 1787 to the present the Government of the United States has become an endeavor far beyond the contemplation of the Framers. Only within the last half century has the complexity and size of the Federal Government’s responsibilities grown so greatly that the Congress must rely on the legislative veto as the most effective, if not the only means to insure its role as the Nation’s lawmaker. But the wisdom of the Framers was to anticipate that the Nation would grow and new problems of governance would require different solutions. Accordingly, our Federal Government was intentionally chartered with the flexibility to respond to contemporary needs without losing sight of fundamental democratic principles.<sup>265</sup>

For this constitutional question, as with the question in *Noel Canning*, the race to contemporary practice as a source of interpretive authority required an originalist pit stop, if only to establish that what appears to be a constitutional rule should not be so understood. In countless cases involving constitutional standards, no stop is needed.

One could go on. There are many cases in which the Court adopts originalist analysis to answer constitutional-rule questions, often so instinctively that it escapes a casual reader’s notice. In *Myers v. United States*, Chief Justice Taft began his analysis of whether the President’s power of removal is exclusive with a detailed discussion of the lessons of the

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262. Id. at 955.

263. See id. at 946–59 (majority opinion), 978–84 (White, J., dissenting).

264. Id. at 945 (majority opinion).

265. Id. at 977–78 (White, J., dissenting) (footnote omitted).



Convention debates, the practices of the First Congress, and various statements by Hamilton.<sup>266</sup> In *Nixon v. United States*, Chief Justice Rehnquist turned to the framers for guidance on whether the Court has power to review the use of a Senate committee to hear evidence in an impeachment trial against a federal officer.<sup>267</sup> For the Court, that power turns on whether the Senate's "sole power to try all Impeachments" gives rise to a rule of exclusivity that precludes judicial second-guessing.<sup>268</sup> In *Utah v. Evans*, the Court, via Justice Breyer, used proceedings in Philadelphia, eighteenth-century dictionaries, and contemporaneous legal documents to find that the Constitution's requirement of an "actual [e]numeration" for Census purposes<sup>269</sup> does not preclude certain statistical imputation methods by the lights of what "the Framers expected."<sup>270</sup> Or take *Freytag v. Commissioner*, in which the Court held that the Chief Judge of the Tax Court could be empowered to appoint special trial judges because that court was a "Court[] of Law" within the meaning of the Appointments Clause.<sup>271</sup> The Court's substantive discussion began with references to "the Framers'" views of the appointments power.<sup>272</sup> The very first paragraph of Justice Blackmun's majority opinion begins thus: "The leading Framers of our Constitution viewed the principle of separation of powers as the central guarantee of a just government."<sup>273</sup> A quote from Federalist No. 47 follows that sentence.

It is common for questions about the meaning of constitutional rules to arise in separation of powers cases, for a Constitution ordinarily aspires to define the relations between the institutions of state with some specificity. But governmental structure is not the sole domain of rules questions. *Dred Scott v. Sandford* was a rights case, as was *District of Columbia v. Heller*. The potential for a constitutional-rule case arises whenever a rights question turns on whether someone falls into a constitutionally fixed category of rights bearers. Justice Blackmun's opinion in *Roe*, otherwise famously indifferent to the original expectations of the Fourteenth Amendment's framers or ratifiers,<sup>274</sup> relies on the relatively liberalized abortion regulation of the nineteenth century in support of the claim that a fetus is not a "person" within the meaning of that Amendment.<sup>275</sup> And although *Santa Clara County v.*

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266. See 272 U.S. 52, 109–39 (1926).

267. See 506 U.S. 224, 229–35 (1993).

268. *Id.* at 233–35 (discussing Article I of the U.S. Constitution).

269. U.S. Const. art. I, § 2, cl. 3.

270. 536 U.S. 452, 474–79 (2002).

271. See 501 U.S. 868, 888–92 (1991).

272. *Id.* at 884–85.

273. *Id.* at 870.

274. J. Harvie Wilkinson III, Of Guns, Abortion, and the Unraveling Rule of Law, 95 Va. L. Rev. 253, 256, 258 (2009).

275. See *Roe v. Wade*, 410 U.S. 113, 158 (1973).

*Southern Pacific Railroad*,<sup>276</sup> the case sometimes cited for the proposition that corporations are persons within the meaning of the Fourteenth Amendment,<sup>277</sup> contains no analysis or even discussion of that constitutional question, subsequent analyses of corporate constitutional personhood have been squarely originalist in form.<sup>278</sup>

C. *Alternative Hypotheses*

The claim that resort to originalism turns on the structure of the constitutional question is in tension with at least three well-pedigreed positions in constitutional theory. The first is that U.S. courts are never or virtually never originalist, a position associated with Professor David Strauss. The second position is that U.S. courts are always originalist, which is associated with Baude and Balkin. The third position is that U.S. courts are sometimes originalist and sometimes not, but that the difference turns on factors other than the structure of the constitutional question the interpreter understands herself to be answering, which is associated with Professors Philip Bobbitt and Richard Fallon. This section addresses each of these positions in turn. In comparing this Article's position to the ones it rejects, the measure of the best account is not whether counterexamples are evident. Judges have many reasons for using history or declining to do so. Instead, the measure is which account best accommodates current practices, even if the fit is imperfect.

Strauss has for many years defended a common law approach to constitutional interpretation.<sup>279</sup> Strauss's case for common law constitutionalism is both normative and positive. He argues not just that, for various reasons discussed in Part III below, originalist methods are inferior to evolving ones, but also that originalist cases are rare. "The original understandings play a role only occasionally, and usually they are makeweights, or the Court admits that they are inconclusive,"<sup>280</sup> he writes. "In controversial areas at least—leaving aside such things as the length of the president's term of office—the governing principles of constitutional law are the product of precedents, not of the text or the original understandings."<sup>281</sup>

Much of this Part has endeavored to show that Strauss is wrong. It is true that much of constitutional law is worked out through precedents and that the text and original understandings—at least at a narrow level

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276. 118 U.S. 394 (1886).

277. See, e.g., *Wheeling Steel Corp. v. Glander*, 337 U.S. 562, 574 (1949) (Jackson, J., concurring in the judgment).

278. See, e.g., *id.* at 577–81 (Douglas, J., dissenting); *Conn. Gen. Life Ins. v. Johnson*, 303 U.S. 77, 85–90 (1938) (Black, J., dissenting); Elizabeth Pollman, *Reconceiving Corporate Personhood*, 2011 *Utah L. Rev.* 1629, 1642.

279. See David A. Strauss, *Common Law Constitutional Interpretation*, 63 *U. Chi. L. Rev.* 877, 890 (1996).

280. David A. Strauss, *The Living Constitution* 33 (2010).

281. *Id.* at 44.

of generality—often play little or no role. But it is not true that the areas in which original understandings predominate are uncontroversial or involve questions so obvious that they fail to generate litigation. It is not just *Heller* and *Crawford* and *Apprendi* but also *AIRC* and *Evans* and *Chadha* and *Powell* and *Wesberry* and *Cherokee Nation* and many other cases implicating the meaning of a constitutional rule. The determinant is not *whether* a constitutional norm is unclear but rather *how* it is unclear.

This argument also sits uncomfortably beside the view opposite Strauss's that U.S. constitutional interpretation is always or usually originalist. Section II.A above discusses this set of views. In brief, Baude has argued that certain practices that scholars code as nonoriginalist, notably reliance on precedent and evolving construction of vague provisions, are consistent with founding-era approaches to interpretation and so can be recoded as originalist.<sup>282</sup> Balkin argues that originalist interpretation requires that interpreters pay attention to and take guidance from the structure of a constitutional norm as a rule, standard, or principle.

As noted above, this Article does not challenge these accounts directly. I do not believe the reason participants in the constitutional culture are comfortable with evolving interpretations of constitutional standards or reliance on precedent is because of the founding-era pedigree of such methods, but that point of disagreement with Baude (to the extent it is even a disagreement) is not crucial to this Article's thesis. I also would not ascribe nearly as capacious a definition as either Baude or Balkin gives to "originalism," but I have no real quarrel here with their wish to understand it broadly. As noted, however, one consequence of their broad, deliberately counterintuitive definitions of originalism is that these definitions force them to focus their attention on their own "difficult" cases. Because they are most interested in constitutional standards, both Baude and Balkin repeat Strauss's mistake of assuming that cases about structural or rule-like constitutional provisions are too easy to raise interesting interpretive questions.

Baude's only reference to the kinds of cases that result in rules questions appears in a section of his article that refers to questions such as "Who is the President?," "Who is in Congress?," and "Who is on the Supreme Court?."<sup>283</sup> He calls these "easy" cases and writes that "there is nearly universal agreement about how to answer them"—namely the constitutional text.<sup>284</sup> As noted, these are not always easy questions: *Powell v. McCormack* was quite explicitly about who is in Congress. The meaning of the Natural Born Citizen Clause as applied to those who are made

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282. See Baude, *supra* note 12, at 2356–61. There is more nuance to Baude's argument than reported here. For example, reliance on precedent is only consistent with original understandings insofar as its authority comes from reliance interests rather than from any capacity to alter constitutional meaning. See *id.* at 2361. This distinction marks a crucial point of divergence between Baude and Balkin. See Balkin, *supra* note 9, at 121–22.

283. Baude, *supra* note 12, at 2367.

284. *Id.* at 2367–68.

citizens at birth based on congressional acts is hardly straightforward and was heavily debated during the primary season of the 2016 presidential election.<sup>285</sup> This Clause defines who may be President. What distinguishes these cases, again, is not that they are easy (indeed, the text is sometimes quite inadequate in answering them), but that they are governed by constitutional rules. And because these cases are not always easy, one needs an account that shows rather than simply tells what interpretive inferences the cases support.

This Article is sympathetic to Balkin's distinction between rules and standards and the implications that follow from that identification. Still, all of the in-depth examples appearing in Balkin's book, *Living Originalism*, involve constitutional standards.<sup>286</sup> When he discusses rules, briefly, his examples are all the kinds of rules whose application he assumes to be uncontroversial: "There are only two houses of Congress, each state gets two senators, the president can veto legislation when it is presented to him, the president's term lasts only four years, and the president cannot be elected to more than two full terms."<sup>287</sup> These examples create several misimpressions that this Article seeks to correct. First, it suggests, like Baude's examples, that rules are too easily understood to give rise to interesting interpretive questions.<sup>288</sup> Second, in not including any hard cases, it suggests that an interpreter may readily and categorically distinguish provisions as rules or not rules, when this question is often contested. Third, Balkin's examples are suggestive of the fallacy that constitutional provisions either *are* rules or *are not* rules—constitutively—when in fact this determination depends on the question one is asking about them.<sup>289</sup> Whether "Congress shall make no law abridging the freedom of speech" *is* a rule changes depending on whether one is asking what "Congress" means or what "abridging the freedom of speech" means.<sup>290</sup> Because he is distracted (willfully) by the question of what originalism is, Balkin offers no sustained account of what internal variation within his version of originalism looks like.

A third position on the place of originalism within constitutional law is offered by pluralists, such as Bobbitt and Fallon, who offer accounts that emphasize the heterogeneity of interpretive methods. This Article's thesis is that interpretive methods are heterogeneous: So far so good. But this Article also claims that the heterogeneity of methods is systematic, varying with the structure of the question the interpreter understands herself to be answering. Neither Bobbitt's nor Fallon's influential pluralist accounts makes anything like this claim. For Bobbitt, an interpreter's

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285. See McManamon, *supra* note 3 (discussing political debate over Senator Ted Cruz's eligibility for president).

286. See Balkin, *supra* note 9.

287. *Id.* at 42.

288. See *supra* notes 270–274 and accompanying text.

289. See *supra* notes 270–275 and accompanying text.

290. U.S. Const. amend. I.

choice of modality is an exercise of conscience that depends on no trans-modal or metarule.<sup>291</sup> This assertion is not necessarily incompatible with this Article's claim. For the claim is not that the Constitution "itself" imposes any rule governing how its norms should be interpreted but rather that within the American constitutional culture, interpreters relate particular modes of analysis to their understandings of how those norms are meant to operate. Assessing whether norms count as rules or standards is internal to the interpreter's modal commitment. The further claim that this link is consistent across such commitments—i.e., the notion that even prudentialists or doctrinalists at least implicitly link rules with the historical modality—does not register within Bobbitt's work.

Fallon's influential work on constitutional pluralism proposes that different interpretive methods do not tend to diverge, that judges within the American system tend to argue that all methods lead to the same happy endings.<sup>292</sup> This tendency reflects not just a desire to avoid cognitive dissonance but also the inherent interdependency of different kinds of constitutional arguments.<sup>293</sup> If and when judges are unable to achieve what Fallon calls "constructivist coherence," they adopt a hierarchy of approaches that does not depend on the kind of question they understand themselves to be answering. That hierarchy begins with text and "arguments concerning the framers' intent," and it proceeds down to "constitutional theory, precedent, and moral and policy values."<sup>294</sup> Fallon offers no account of the origins of this hierarchy or how it might vary across case type. As with that of other pluralists, Fallon's analysis infers that whether interpreters are originalist or not depends on extralegal or idiosyncratic considerations, or else is random.

A final alternative hypothesis is not associated with any extant theories but is sufficiently plausible to warrant discussion. It may be that the Court tends to use historical modes of interpretation in cases of first impression and nonhistorical modes in cases in which stare decisis comes into play. Because questions governed by constitutional rules are relatively less likely to generate litigation, this Article's identification of rules with originalism could be missing an important covariance.

A comprehensive test of this alternative hypothesis is beyond the scope of this Article, which does not mean to exclude other potential explanations for originalist analysis. It is not the case, however, that the Court is invariably originalist in cases of first impression. *McCulloch* is not best understood in originalist terms, nor is the due process holding in *Dred Scott*, and yet both involved constitutional questions of first impression. The presence of these counterexamples suggests that the "first impression" theory is at best incomplete. It is also worth noting that

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291. See Bobbitt, *supra* note 17, at 113–14, 125, 155–58.

292. See Fallon, *Constructive Coherence Theory*, *supra* note 16, at 1189–94.

293. See *id.* at 1193.

294. *Id.* at 1194.

discovering systematic resort to historical sources in cases of first impression would be newsworthy and would require the same normative assessment Part III makes below with respect to rule originalism.

### III. THE NORMATIVE CASE

Originalism is subject to frequent and often persuasive criticism. This Part begins, in section III.A, with three of those criticisms: (1) the so-called dead hand argument, (2) the bad-consequences argument, and (3) the relative incompetence of judges to do the necessary historical work. It explains that each of these applies equally, or even a fortiori, to rule originalism.

Section III.B then seeks to redeem rule originalism, in part, by articulating the distinctive benefit of using originalism for constitutional rules rather than constitutional standards. Specifically, rule originalism is reflected in positive law, provides relatively transparent criteria for judgment, and, when used in cases of first impression, is an accepted means of settling the law in a way that enables settlement and coordination. This argument for rule originalism is grounded in a teleology of constitutional rules as distinct from standards. The argument is not sufficient to make out a prescriptive case for using rule originalism, given the valid criticisms of section III.A, but it counts as a *prima facie* reason to use rule originalism for an interpreter who (like most judges) is committed to constitutional fidelity as a deontological value.

#### A. *The Case Against Rule Originalism*

This section identifies three broad categories of criticism of originalism: the dead hand objection, the bad-consequences argument, and the historical-competence argument. Each of these objections applies equally, or a fortiori, to rule originalism.

1. *The Dead Hand Objection.* — The dead hand argument against originalism is, at bottom, a democratic objection.<sup>295</sup> The basic idea is that the law that governs us should be *our* law, a set of norms that the governed consented to or had some role in authoring. The severity of the objection grows in proportion to our distance from the founding,<sup>296</sup> and it is exacerbated by a difficult and practically unavailable amendment process that is itself susceptible to a dead hand objection.<sup>297</sup>

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295. See Richard A. Primus, *When Should Original Meanings Matter?*, 107 Mich. L. Rev. 165, 192 (2008).

296. *Id.* at 194 (arguing that the dead hand problem arises as the polity changes “marginally” over time).

297. See *id.* at 195–96.

The dead hand argument is sometimes rendered as an argument about the illiberal nature of founding-era theories of representation.<sup>298</sup> The fifty-five delegates who gathered in Philadelphia in the summer of 1787 were all white men, and at least fifteen of them, including of course Washington and Madison, owned slaves.<sup>299</sup> The thousands of participants at the thirteen state ratifying conventions were chosen under suffrage rules that generally excluded women, blacks, American Indians, and non-property-owners.<sup>300</sup>

This kind of political exclusion speaks to the quality of the document the drafting and ratification process produced, but it is tangential to the dead hand argument in its strongest form. Even if the drafting and ratification of the Constitution had been ideally representative, the dead hand objection would hold because it is intertemporal in nature. The problem, according to the dead hand argument, is not that the framers were white or men but that they are dead, and so is anyone who had any hand in endowing them with political authority.

Forms of living constitutionalism respond imperfectly to the dead hand problem. Judicial adherence to current precedents or judicial judgments about modern circumstances represent the modern American people in only an attenuated way. No one would design a democratic system that operates through these channels.<sup>301</sup> Moreover, the dead hand problem seems to prove too much. It is not just an argument against originalism but against all of constitutionalism.<sup>302</sup> Any rejection of originalism that rests wholly on the dead hand problem must offer a theory of constitutional fidelity that surmounts or mitigates the objection or else must reject the Constitution altogether.

Living constitutionalism, even if imperfect, does mitigate the dead hand objection somewhat. An interpretive method that binds itself fastidiously to the founding generation's work doubles down on the problem of representation. Moreover, the intertemporal problem and the problem of illiberalism interact more subtly than the above discussion suggests. Accepting the Constitution as one's own is an act of faith in a political project.<sup>303</sup> That faith is strengthened by an understanding of that project

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298. See generally Thurgood Marshall, *Reflections on the Bicentennial of the United States Constitution*, 101 *Harv. L. Rev.* 1 (1987) (recalling founding-era views on slavery and other sins).

299. Jack N. Rakove, *Philadelphia Story*, *Wilson Q.*, Spring 1987, at 105, 105.

300. See Akhil Reed Amar, *America's Constitution: A Biography* 7, 503–05 n.2 (2005); Charles A. Beard, *An Economic Interpretation of the Constitution of the United States* 64–72 (1913).

301. See Jeremy Waldron, *The Core of the Case Against Judicial Review*, 115 *Yale L.J.* 1346, 1346–53 (2006) (arguing “judicial review of legislation is inappropriate as a mode of final decisionmaking in a free and democratic society”).

302. See Balkin, *supra* note 9, at 42; Michael W. McConnell, *Textualism and the Dead Hand of the Past*, 66 *Geo. Wash. L. Rev.* 1127, 1127 (1998) [hereinafter McConnell, *Textualism*].

303. See generally Sanford Levinson, *Constitutional Faith* (1988).

as having the capacity to respond to modern problems in a way that is consistent with modern sensibilities.<sup>304</sup> Those sensibilities may have either a redemptive or a restorative orientation.<sup>305</sup> Modern interpreters expand or contract their visions of the authority of founding-era versus Reconstruction-era principles in response to these orientations.<sup>306</sup> A rigid form of originalism reaffirms the idea of a Constitution that is closed for business.

The dead hand problem can become downright pathological when originalism is used to overrule long-settled practices. The democratic authority of the Constitution is grounded in the people's implicit consent to the legal and political arrangements it affirms.<sup>307</sup> A truly settled practice around which political actors and ordinary Americans have arranged their activities and projects should be presumed to command their assent. In light of the intertemporal problem, an undemocratic actor's decision to overturn such practices based on original understandings goes beyond the pedantic and into the realm of the tyrannical.

The dead hand problem applies just as much, and maybe more so, to rule originalism.<sup>308</sup> Constitutional rules often govern quite important political arrangements, and original views about their content and requirements have no more democratic purchase than original views about the content and requirements of constitutional standards. Worse, what makes constitutional rules distinctive is that they are impervious to new information. The likelihood of the framers being shortsighted increases in proportion to the specificity with which they articulate constitutional norms.<sup>309</sup> Constitutional actors and subjects may tolerate bad choices the framers made when the precise meaning of those choices is uncontested, but rule originalism supposes that interpreters seek to be guided even by choices whose content is ambiguous. When reasonable people disagree about the meaning of a constitutional rule, the dead hand objection seems to counsel a firm thumb on the scale of current practices and values.

2. *Bad Consequences.* — A second broad category of objection to originalism is a concern about the consequences of adhering to the framers' intentions and understandings.<sup>310</sup> There are at least two prongs to the argument from consequences. First, one might worry that the consequences will be illiberal or anachronistic. Prior generations were morally regressive, tolerating slavery, dehumanization of women, and

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304. See Jamal Greene, *Originalism's Race Problem*, 88 *Denv. U. L. Rev.* 517, 521–22 (2011).

305. See Balkin, *supra* note 9, at 11.

306. See Greene, *Fourteenth Amendment*, *supra* note 89, at 998–99.

307. See Primus, *supra* note 295, at 189.

308. See Balkin, *supra* note 9, at 42.

309. See *id.*

310. See, e.g., Frederic Bloom & Nelson Tebbe, *Countersupermajoritarianism*, 113 *Mich. L. Rev.* 809, 816–19 (2013).



tribal genocide. Those generations also dealt with governance problems that were in many ways less complex than what Americans face today, given the exponentially larger size of the country and the growing interdependency of its people and institutions. Under the circumstances, the pragmatic consequence of binding interpretation to original constitutional understandings does not inspire confidence.

Professors John McGinnis and Michael Rappaport disagree.<sup>311</sup> They have argued that the primary benefit of relying on original understandings is that, in general, those understandings are the product of supermajoritarian agreement.<sup>312</sup> There is good reason, they argue, to expect relatively good consequences to follow from principles and policies endorsed by supermajorities.<sup>313</sup> The subsequent views of judges and ordinary legislative majorities can claim no such mandate.

The most sympathetic form of this argument is as an epistemic claim. In a world of perfect knowledge, interpreters could assess the social and political consequences of constitutional construction directly. In such a world, it is not at all obvious that the best policies would be those supported by supermajorities. It would depend on who comprised the supermajorities and what the policies entailed substantively, particularly in respect to the rights of dissenters. In a second-best world of low information and moral dissensus, however, we might as well go with supermajoritarian views.

There are several problems with this argument. First, supermajority requirements have the intertemporal problem discussed above. As a second best, there are good reasons to support the principles and policies of modern Americans as opposed to those of ancient ones. Whether those reasons outweigh the reasons for supporting the policies of supermajorities over those of ordinary majorities cannot be answered in the abstract. The difficulty is twofold. First, these kinds of rules of thumb are incommensurable, and second, even if they were not, comparing them would depend on the length of time and the size of the supermajority. The age of the U.S. Constitution and the difficulty of its amendment process do not give one confidence that McGinnis and Rappaport are right.

Moreover, even in this second-best world, it is true, for sure, that the supermajorities that ratified much of the Constitution—and especially its rules—were morally challenged, low-information voters relative to their posterity. Even in the abstract, there are reasons to significantly discount their preferences. Finally, McGinnis and Rappaport's argument proves too much, for it is an argument not just in favor of originalism but against judicial review. Political actors whose actions are evaluated by judges applying the Constitution are making competing judgments about

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311. See McGinnis & Rappaport, *supra* note 25, at 2.

312. See *id.*

313. See *id.* at 12–13.

what it requires, and their democratic credentials are ordinarily superior to those of judges.<sup>314</sup>

A second and distinct consequentialist concern has to do with reliance. Wholly apart from whether original understandings were “good” or “bad” at the time, adhering to founding-era views might upset reliance interests that current arrangements have generated. The need to organize around a new equilibrium generates transaction costs that might outweigh whatever benefit one seeks to gain in honoring original understandings. This concern does not arise when originalism is coupled with a robust doctrine of stare decisis or yields to historically validated practices, but the more it is adulterated in this way the less it is originalism, which is the point.

Rule originalism shares and reinforces this consequentialist problem. As noted, many of the Constitution’s rules were enacted in the eighteenth century by populations that tolerated the intolerable. Not incidentally, some of the original constitutional rules are bad rules. By my lights, the Electoral College is one. The Natural Born Citizen Clause is another. Equal suffrage in the Senate is a third. To the degree that Justice Story was correct in *Prigg v. Pennsylvania* that the Fugitive Slave Clause authorized slave catcher self-help as a constitutional rule,<sup>315</sup> that was a bad rule with tragic consequences. Readers will have their own “favorites.”<sup>316</sup>

3. *Historical Competence.* — A third objection to originalism is that it seems to require lawyers and judges to be expert historians. Underlying this objection are a technical and a related conceptual problem. The technical problem is that history is a learned discipline whose professional norms do not align with those of lawyers.<sup>317</sup> Lawyers and judges are usually not trained in how to work with primary sources, how to detect bias, or what modes of evidence count as reliable or sufficient for a given period.<sup>318</sup> The conceptual problem is the hermeneutic objection to originalism associated with Professors Paul Brest<sup>319</sup> and Mark Tushnet.<sup>320</sup> Deciphering how a multimember body, whether a convention or a citi-

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314. See Waldron, *supra* note 301, at 1361.

315. 41 U.S. 539, 613 (1842).

316. Some of those choices are even collected in an edited volume. *Constitutional Stupidities, Constitutional Tragedies* (William N. Eskridge, Jr. & Sanford Levinson eds., 1998). The very idea that progressive scholars can produce a volume of this sort (and likely left much on the cutting room floor) tends to support this Article’s positive thesis.

317. See Saul Cornell, *Originalism on Trial: The Use and Abuse of History in District of Columbia v. Heller*, 69 Ohio St. L.J. 625, 639 (2008).

318. See Martin S. Flaherty, *History “Lite” in Modern American Constitutionalism*, 95 Colum. L. Rev. 523, 549–55 (1995).

319. See Paul Brest, *The Misconceived Quest for the Original Understanding*, 60 B.U. L. Rev. 204, 214–15 (1980).

320. See Mark V. Tushnet, *Following the Rules Laid Down: A Critique of Interpretivism and Neutral Principles*, 96 Harv. L. Rev. 781, 796–800 (1983) [hereinafter Tushnet, *Rules Laid Down*].

zenry, intended or expected to apply a constitutional provision requires aggregation of incommensurable views (or, often, nonviews) and an imaginative reconstruction of historical context.<sup>321</sup> Think of the risk of microbial contamination that plagues efforts to confirm signs of life on Mars.<sup>322</sup> Likewise, when we plunge deep into the past, what we inevitably find there are the parts of ourselves that we took with us.

There are responses to this objection. One is that the historical work originalist lawyers do is properly different from the work of historians and should not be judged by historical standards. The lawyer's (or judge's) question is not about the lessons of history as such but is about the state of the law at a particular moment in history.<sup>323</sup> Legal professionals may perform this task poorly or well, but there is little question that it is what they are trained to do when engaged in the workaday tasks of statutory or contractual interpretation.<sup>324</sup> Why should constitutional law be any different?

Here's why. Constitutional law is almost always public law. The parties are not just individuals, their modern elected or politically accountable representatives often have a view about the appropriate disposition, and constitutional holdings are very difficult to overrule through democratic means. These differences generate a greater burden of justification for abiding by one's own contested and law-office-historical views about original understandings in the face of contrary laws, executive action, political practice, settled precedent, or intrajudicial dissensus. The democratic process is a competing arbiter of disagreement over matters of public law.<sup>325</sup> The judge's technical competence in ascertaining the law's requirements is one of the things judicial review has going for it in this competition. It is quite important for this emperor to have clothes.

Rule originalism as a distinct subspecies does nothing to mitigate the difficulty of assessing the state of the law in the eighteenth century. There are, however, arguments that it is nonetheless able to meet its burden of justification. Section III.B addresses those arguments below.

### B. *The Case for Rule Originalism*

Rule originalism is no more democratic than originalism in general. There is no special reason to expect that adhering to originalism in cases

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321. See Brest, *supra* note 319, at 217; Tushnet, *Rules Laid Down*, *supra* note 320, at 800.

322. See Nat'l Acads. of Scis., Eng'g & Med., *Review of the MEPAG Report on Mars Special Regions 5* (2015) (on file with the *Columbia Law Review*).

323. See Sachs, *Originalism as a Theory*, *supra* note 12, at 821–22.

324. See Michael W. McConnell, *The Role of Democratic Politics in Transforming Moral Convictions into Law*, 98 *Yale L.J.* 1501, 1525 (1989) (reviewing Michael J. Perry, *Morality, Politics, and Law* (1988)); Sachs, *Originalism as a Theory*, *supra* note 12, at 887–88.

325. See generally Waldron, *supra* note 301, at 1350 (discussing the tension between democratically adopted legislation and antimajoritarian judicial-review practices).

implicating the meaning of a constitutional rule is likely to lead to better outcomes. The opposite expectation might be more appropriate. There is also little reason to suppose judges are any better historians with respect to rules than with respect to other constitutional norms.

This section argues that rule originalism nonetheless has distinct value. First, as Part II seeks to show, rule originalism best describes U.S. constitutional law. That fact alone counts as a normative argument, though not a conclusive one, in favor of rule originalism. Second, rule originalism supplies relatively transparent criteria for answering questions about the meaning of constitutional rules. The capacity for originalism to promote judicial restraint is an institutional defense that has not survived the advent of new originalism.<sup>326</sup> Rule originalism reinvigorates the institutional argument. Finally, adhering to original expectations helps to secure the coordination benefits of settled practices without sacrificing fidelity to constitutional meaning. To the degree that constitutional fidelity is an important value in itself, rule originalism is one way to promote it.

1. *On “Is” and “Ought.”* — In constitutional law, if not in other legal domains, “is” implies “ought.” The basis for constitutional authority is its implicit acceptance by the American people. As noted above, persistent and long-standing practices, including judicial practices, should be presumed to have won that acceptance.<sup>327</sup> A judge’s bedrock obligation is to fit his or her arguments into the established conventions of judicial practice. If Part II is correct, it would feel off-key for a judge to ignore or to background original understandings in rules cases or to adopt a narrow form of originalism in standards cases. Arguably, that judge would be disregarding the law.<sup>328</sup>

We can make this argument in somewhat more formal terms. The notion that “is” does not imply “ought” has sometimes been attributed to David Hume and is generally used to insist on a distinction between statements of fact and statements of value, especially in moral discourse.<sup>329</sup> The idea is that an ethical proposition cannot be derived from exclusively nonethical premises.<sup>330</sup> One of the ways in which scholars have tried to defeat this truism is to note that norms of obligation can enable us to base evaluative judgments upon the existence of certain kinds of facts. Professor John Searle calls these facts “institutional facts,”

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326. See Colby, *supra* note 13, at 714 (explaining that originalism gained widespread acceptance in the legal community by abandoning the promise of judicial constraint).

327. See McConnell, *Textualism*, *supra* note 302, at 1132–33.

328. See Baude, *supra* note 12, at 2392.

329. See John R. Searle, *How to Derive “Ought” From “Is,”* 73 *Phil. Rev.* 43, 43 (1964). The relevant passage from Hume appears in 3 David Hume, *A Treatise of Human Nature*, at pt. I, § 1 (L.A. Selby-Bigge ed., Clarendon Press 1896) (1739).

330. See Campbell Brown, *Minding the Is-Ought Gap*, 43 *J. Phil. Logic* 53, 53–54 (2014).

for they presuppose “systems of . . . constitutive rules or conventions.”<sup>331</sup> Constitutional judging is just such an institution. One can derive the view that judges ought to behave in a certain way from the fact that the law comprises that form of behavior.

It is imprudent to dwell long in these fields. While the existence of a consistent legal practice is one reason for a U.S. judge to behave as if that practice creates a duty of continuity, it is a weak reason at the U.S. Supreme Court level, and it does not exhaust the sources of judicial duty at any level.<sup>332</sup> The point is simply that adopting the view that consistent legal practice gives rise to a judicial duty of continuity entails either a normative argument in favor of rule originalism or a rejection of the positive evidence Part II offers.

2. *Judicial Restraint.* — Originalism was once defended primarily on its capacity to restrain judges.<sup>333</sup> The basic idea is that judges who are otherwise without criteria for deciding how to apply many of the Constitution’s more abstract clauses could discipline their judgments by appealing to a set of relatively transparent professional norms.<sup>334</sup> Judges who instead exercise their own moral judgments about the meaning of terms like “equal” and “due” and “cruel” run more directly into the teeth of the countermajoritarian difficulty.

This argument for originalism focuses on standards rather than rules, since standards are precisely the norms that tempt judges to vague decisional criteria. The problem, though, is that the Constitution has lots of standards, and constitutional fidelity seems to require judges to take stock of them.<sup>335</sup> Judges have a duty to obey the law, even if the law requires the exercise of judgment. Forms of new originalism that tend to focus on the original meaning of the words rather than the specific expectations of the framers or the ratifying generation have back-grounded or rejected entirely the idea of judicial restraint as a maxim or even a desideratum of a theory of constitutional interpretation.<sup>336</sup>

To the extent that the capacity for judicial restraint is an attractive feature of an interpretive method, rule originalism is one response. Since

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331. Searle, *supra* note 329, at 55.

332. See John Finnis, *On the Incoherence of Legal Positivism*, 75 *Notre Dame L. Rev.* 1597, 1603 (2000).

333. See Keith E. Whittington, *The New Originalism*, 2 *Geo. J.L. & Pub. Pol’y* 599, 602 (2004) [hereinafter Whittington, *New Originalism*].

334. See Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 *Ind. L.J.* 1, 10 (1971).

335. See Balkin, *supra* note 9, at 24 (noting constitutional drafters “use standards or principles because they want to channel politics but delegate the details to future generations”); Calabresi & Lawson, *supra* note 10, at 487 (noting that the Constitution “is infused with standards to a degree that often escapes notice”).

336. See Whittington, *New Originalism*, *supra* note 333, at 608–09; see also Randy E. Barnett, *Scalia’s Infidelity: A Critique of “Faint-Hearted” Originalism*, 75 *U. Cin. L. Rev.* 7, 12 (2006).

rule originalism is attentive to the different kinds of norms within the Constitution, it is not susceptible to a criticism that it elevates judicial restraint above the text. Of course, since the rule–standard dichotomy is at least to some degree constructed by the interpreter, the capacity of rule originalism to constrain is intelligible only in relative terms. This capacity depends on the benefits of methodological transparency. Sunshine may disinfect constitutional reasons no better than it disinfects wounds; still, *ceteris paribus*, one can expect self-consciously narrow examinations of constitutional meaning to offer greater prospects for constraint than self-consciously broad ones.

As practiced in courts, rule originalism may yet be susceptible to a different criticism that new originalism aims to surmount—namely that it is not grounded in a persuasive theory of authority. As this Article has described it, rule originalism has tended to focus on original intentions and expectations rather than original meaning *per se*. Even apart from the dead hand objection already discussed, it is difficult to say why, in theory, anyone’s subjective beliefs and expectations as to the law’s content should bind future generations or even contemporaneous Americans.<sup>337</sup> One answer to this objection would be to limit rule originalism to original-meaning originalism, which would be contrary to historical practice. This Article provides another answer. It concedes the point and seeks to justify rule originalism on the basis of that practice, its institutional advantages, and the teleological justifications discussed below.

3. *A Teleology of Rules.* — Rules have purposes. More precisely, legal drafters who enact rules do so for particular reasons. Rules are typically designed to promote certainty and predictability. Raz writes, “Since the law should strive to balance certainty and reliability against flexibility, it is on the whole wise legal policy to use rules as much as possible for regulating human behavior because they are more certain than principles and lend themselves more easily to uniform and predictable application.”<sup>338</sup> When the values of stability and predictability outweigh the values of flexibility and practicality, drafters incline toward rules.<sup>339</sup> When the weight of values is reversed, drafters incline toward standards.<sup>340</sup> Whether or not those reasons in fact motivated any particular drafters, it is reasonable to ascribe those reasons to them in the course of constitutional interpretation and construction.<sup>341</sup>

A constitution has good reasons for codifying both relatively rigid rules and relatively fluid standards. Because the application of rules is

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337. But see Jed Rubenfeld, *Revolution by Judiciary: The Structure of American Constitutional Law* 12–18 (2005) (arguing that intentions embodied in “paradigm cases” reflect commitments that bind future generations).

338. Raz, *supra* note 22, at 841.

339. See Schlag, *supra* note 51, at 400.

340. See *id.*

341. See Calabresi & Lawson, *supra* note 10, at 503.

predictable, rules enable political actors and ordinary citizens to coordinate their behavior on the basis of a shared set of assumptions. For this reason, rules are ordinarily (though not solely) associated with governmental structure. Professor Michael McConnell compares constitutional rules to the rules of basketball: “If the rules were constantly up for grabs,” he writes, “players would be forced to spend their time in rulemaking rather than in playing basketball.”<sup>342</sup> Standards instead reflect both humility and wisdom. The future application of constitutional norms in the face of changing factual contexts, technologies, and values is unknown and may call for different judgments than the ones that suit the present generation.

These purposes carry implications for constitutional interpretation. Fidelity to the teleology of constitutional rules suggests an interpretive inquiry whose sources do not change over time.<sup>343</sup> The fact that a rule is at issue tells us to expect political practice, social evolution, or technological change subsequent to enactment to have limited epistemic value. For rules, the value of settlement overwhelms the informational value of subsequent practice, and so the mode of interpretation should also privilege predictability. Here is Raz again: “Since in the use of rules the premium should be on certainty, whereas in the use of principles the premium is on flexibility, it is wise to accept relatively simple methods of resolving conflicts between rules which will not detract from the predictability of their application.”<sup>344</sup>

In parallel, fidelity to the choice of constitutional standards suggests an ecumenical interpretive inquiry, one that is open to new and evolving sources of wisdom and authority. The decision to employ a standard is a decision to give significant discretion to downstream actors and interpreters in order “to meet changes in circumstance and opinion.”<sup>345</sup> For standards, subsequent information in the form of developing conventions, shifting values, and new data goes directly to the substance of the constitutional norm. For rules, by contrast, such information may tell us whether the rule is a good one or a bad one, should be adhered to or not, but it does not tell us about the rule’s content or requirements. Fidelity to a constitutional standard requires us to incorporate new information into the decisional process. Fidelity to a constitutional rule requires us not to do so.

I suspect that some instinct toward fidelity attracts judges to rule originalism. Still, these functionalist claims do not make out a complete argument in its favor, even laying to one side the objections section III.A

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342. McConnell, *Textualism*, *supra* note 302, at 1130.

343. Of course, the conclusions one draws from originalist sources can change, but surely one can expect greater settlement when only interpretations change rather than when both interpretation and what is being interpreted change.

344. Raz, *supra* note 22, at 842.

345. *Id.* at 847.

catalogs. Rather, they argue only in favor of an interpretive strategy that is stable and is attentive to prevailing practices. As McConnell writes, being guided by the teleology of rules “implies a form of constitutional interpretation in which it matters more that issues be decided in a stable, consistent, and predictable fashion than that they be decided in accordance with any particular methodology.”<sup>346</sup> For McConnell, that means “a strong doctrine of stare decisis” and a commitment to judicial supremacy.<sup>347</sup> Indeed, the prevailing interpretive approach of the High Court of Australia, which Australians call “legalism,” marries originalism with a commitment to stare decisis precisely to promote the value of stability that the rule of law should, in the High Court’s view, support.<sup>348</sup> Importantly, Australia has no federal bill of rights, and so the High Court rarely entertains individual rights questions. When the primary purpose of constitutional norms is to establish a governmental architecture and enable intergovernmental coordination, predictability is especially valuable.

For this reason, the teleological justification for rule originalism cannot be indifferent to the degree to which subsequent historical practice has wholly or partly settled an issue. Using rule originalism to upset practices around which government and the people have organized their affairs is in tension with the purpose of adopting constitutional rules. Rules reflect a judgment that the value of settlement outweighs the incremental value of learning about best practices. A corollary is that the cost of unsettling a stable but unfaithful equilibrium may outweigh the value of honoring the rule’s substantive content.

There are interpretive strategies other than originalism or stare decisis that may yield a parallel degree of settlement. For example, one could interpret constitutional rules according to one’s best assessment of what Rawls (or Nozick, if you prefer<sup>349</sup>) would have decided. This strategy would raise a very serious “fit” problem.<sup>350</sup> Rule originalism has the benefit of strong sociological legitimacy, though it is important to note, again, that this justification does not recommend any particular form of originalism. Indeed, the historical absence of any distinction between

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346. McConnell, *Textualism*, supra note 302, at 1130.

347. *Id.*

348. See *Ex rel McKinlay v Commonwealth* (1975) 135 CLR 1, 17 (Austl.) (Barwick, CJ) (“The only true guide and the only course which can produce stability in constitutional law is to read the language of the Constitution itself... and to find its meaning in legal reasoning.”); Tony Blackshield & George Williams, *Australian Constitutional Law and Theory* 322 (3d ed. 2002); see also Owen Dixon, *Swearing In of Sir Owen Dixon as Chief Justice* (Apr. 12, 1952), in (1952) 85 CLR xi, xiv (Austl.) (“There is no other safe guide to judicial decisions in great conflicts than a strict and complete legalism.”).

349. Cf. John Hart Ely, *Democracy and Distrust* 58 (1980) (“We like Rawls, you like Nozick. We win 6-3. Statute invalidated.”).

350. See Dworkin, *Hard Cases*, supra note 1, at 1058–60.



different forms of originalism in the practice of constitutional adjudication tends to buttress this Article's thesis.

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This section has offered a set of normative arguments that supports the positive practice of rule originalism. It is important to reiterate that these arguments are not prescriptive. They provide a set of justifications for rule originalism, but those justifications are not conclusive in light of the dead hand, consequentialist, and competence arguments outlined in section III.A. The next Part takes up the question of what follows from a justification for rule originalism grounded in the teleological arguments discussed above.

#### IV. RULE ORIGINALISM AND THE SEPARATION OF POWERS

One of the examples offered in section II.B to make out the positive case for rule originalism was an Arizona case in which the state legislature challenged a constitutional amendment that gave an independent commission the power to draw congressional district lines.<sup>351</sup> As discussed, the merits argument concerned the meaning of a constitutional rule—the import of the word “legislature” in the Elections Clause—and the Court's methodology was originalist.

There was an additional threshold question in the *AIRC* decision that helps model the problem this part addresses. The question was whether the Arizona legislature had standing to litigate the case. The Arizona Independent Redistricting Commission argued that the state legislature did not have standing to challenge legislative maps unless and until the legislature could identify a specific legislative act that the ballot initiative establishing the independent commission forestalled.<sup>352</sup> The United States as amicus curiae argued that the state legislature would need to pass a competing districting plan and have the secretary of state reject that plan.<sup>353</sup> The Court rejected these arguments, holding that the legislature's standing was based on the fact that the Arizona Constitution made the Commission's redistricting plan conclusive.<sup>354</sup>

Justice Scalia, joined by Justice Thomas, dissented and also argued that the legislature lacked standing.<sup>355</sup> Based on his view of the original understanding of what constituted cases or controversies under Article

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351. *AIRC*, 135 S. Ct. 2652, 2658–59 (2015).

352. *Id.* at 2663.

353. *Id.*

354. *Id.* at 2665.

355. *Id.* at 2694 (Scalia, J., dissenting).

III, Section 2,<sup>356</sup> Justice Scalia argued that disputes between governmental institutions over the allocation of political power do not qualify.<sup>357</sup> For Justice Scalia, the constitutional standing requirements were a device for maintaining the separation of powers.<sup>358</sup> Complaints by a government subunit, he wrote, should be resolved “in the context of a private lawsuit in which the claim or defense depends on the constitutional validity of action by one of the governmental subunits that has caused a private party concrete harm.”<sup>359</sup> Justice Scalia’s dissenting opinion includes a list of cases that, it maintains, could have been decided much earlier had the Court permitted institutional standing for governmental actors to resolve separation of powers conflicts:<sup>360</sup> *Myers v. United States*, involving the constitutionality of limits on presidential removal of executive officials;<sup>361</sup> *Zivotofsky v. Kerry*, on Congress’s power to override the President’s decision to list Jerusalem rather than Israel as the place of birth of passport holders born in the city;<sup>362</sup> *Wellness International Network, Ltd. v. Sharif*, on whether bankruptcy courts have the constitutional authority to adjudicate state law counterclaims;<sup>363</sup> and *NLRB v. Noel Canning*, the Recess Appointments Clause case discussed in section II.B.<sup>364</sup>

This Article illuminates why Justice Scalia’s perspective on institutional standing, though well-pedigreed, was problematic and even perverse. It also helps us to formulate rational distinctions between the cases the opinion mentions, thereby arresting the parade of horrors. Let’s play out what could follow from a holding that the Arizona legislature did not have standing in *AIRC*. The Commission’s congressional redistricting plan would stand. Individual plaintiffs—whether political parties, associations representing minorities, or perhaps ordinary voters who were not placed in their preferred districts<sup>365</sup>—might still be able to sue on the ground that any map created by the Commission is invalid. In the nature of individual litigation, though, one cannot say whether they would sue. After all, the Republican-controlled Arizona state legislature did not challenge the Commission’s first redistricting plan, the one that followed the 2000 census, presumably because Republicans took six of Arizona’s eight congressional seats in the 2002

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356. Notably, Justice Scalia appears to have understood this requirement as stating a rule rather than a standard. See *id.* at 2695.

357. See *id.* at 2694.

358. See *id.* at 2695 (citing *Allen v. Wright*, 468 U.S. 737, 752 (1984)).

359. *Id.*

360. *Id.*

361. 272 U.S. 52 (1926).

362. 135 S. Ct. 2076 (2015).

363. 135 S. Ct. 1932 (2015).

364. 134 S. Ct. 2550 (2014); see *supra* section II.B.

365. Individual voters challenged the Commission’s state map on equal protection grounds in a case that reached the Supreme Court. See *Harris v. Ariz. Indep. Redistricting Comm’n*, 136 S. Ct. 1301, 1305 (2016).

election.<sup>366</sup> (Republicans took just four of the state's nine seats in the 2012 election that preceded the lawsuit.)<sup>367</sup> And so someone might sue, or might not. Another election might pass, or two, or three. Eventually, someone would sue and the state would face the prospect of its Commission's work being declared void ab initio.<sup>368</sup> Anyone elected under a map drawn by the Commission, presumably since 2000, could, on this hypothetical, be in danger of being declared improperly elected.

It is possible, perhaps even likely, that a reviewing court would consider the established practices of the Commission since 2000 to be relevant both to the merits and to the remedy in a case raising this question. Notice, however, that before Justice Scalia's death, he and Justice Thomas were the two justices least likely to find those established practices relevant. Justice Scalia wrote pejoratively in *Noel Canning* that relying on long-standing executive practice rather than strictly adhering to the original meaning of the text resembles "an adverse-possession theory of executive authority."<sup>369</sup> Putting these views together, Justice Scalia was advocating a regime in which the Court refuses to intervene on the request of the Arizona state legislature or, in *Noel Canning*, the Senate, but instead waits an indefinite length of time—more than 200 years in the case of *Noel Canning*—so that, a political practice having developed, the Court can disregard that practice and return to the original understanding. All in the name of separation of powers! Scalia's blunt version of originalism created the very absurdity he protested.

There are three sources of difficulty that must be resolved in harmony to prevent the kind of result Justice Scalia advocated in *AIRC* and *Noel Canning*. The first is the Supreme Court's traditional reluctance to grant institutional standing. Justice Scalia was correct that doing so is rare.<sup>370</sup> The second is the passage of time. When there is a long gap between the commencement of an act and the Court's resolution of a constitutional challenge to it, strong reliance interests can rightfully tilt the Court's judgment in favor of the status quo. This tendency might be especially strong, again rightfully, when the judgment was made by politically accountable government actors who were elected and acted under prevailing assumptions about the scope of their power. The third source of difficulty is the Court's interpretive method. The choice between approaches that draw upon the lessons of social and political

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366. See Howard Fischer, Republicans File New Challenge to Congressional District Lines, *Ariz. Daily Star* (Sept. 24, 2013), [http://tucson.com/news/state-and-regional/republicans-file-new-challenge-to-congressional-district-lines/article\\_b4e17c62-6d33-5aa4-9221-82f498c12588.html](http://tucson.com/news/state-and-regional/republicans-file-new-challenge-to-congressional-district-lines/article_b4e17c62-6d33-5aa4-9221-82f498c12588.html) [<http://perma.cc/GGF8-8JBF>].

367. See *id.*

368. In *AIRC*, the Arizona State Legislature requested only prospective invalidation. See *AIRC*, 135 S. Ct. 2652, 2658–59 (2015). But there is no telling what relief a future litigant would request or receive.

369. *Noel Canning*, 134 S. Ct. at 2592 (Scalia, J., concurring in the judgment).

370. See *AIRC*, 135 S. Ct. at 2695–96 (Scalia, J., dissenting).

practice and those that do not is a consequential one in this context. Faced with these sources of difficulty, Justice Scalia resolved the problem in the most disharmonious possible way: Refuse institutional standing, ignore the passage of time, and adopt originalism. His jurisprudential ideology appears to have committed him to this position.

Rule originalism urges more nuance. For the rule originalist, whether to adopt a static approach to interpretation depends in the first instance on whether the question at issue is about the meaning of a rule or the application of a standard. Recall that the strongest justification for rule originalism is teleological: Originalism about rules and nonoriginalism about standards match the respective reasons for adopting rules and standards. On this justification, the question of whether to grant institutional standing also should depend, at least in part, on whether the interpreter is facing a rule question or a standard question. Denying institutional standing invites the political branches to work through the problem over time, while allowing such standing pretermits that political negotiation. Accordingly, such standing should be more freely available in cases about the meaning of constitutional rules. Subsequent political practices have epistemic value in understanding the substance of constitutional standards but have little (or at least diminishing) epistemic value in understanding the substance of constitutional rules. As noted, however, this justification should not treat long-standing practices with indifference. Once a practice is firmly embedded within the legal system, rule originalism should permit the practice to mitigate the interpreter's instinct toward original understandings.

We now have some new tools to bring to *AIRC* and the cases Justice Scalia discussed in his dissent. As noted, *AIRC* involved a rule question, and the Court granted institutional standing. Refusing to do so would have invited the perverse outcome discussed above. *Noel Canning* involved a rule question, and the Court has never faced the question of Senate standing to resolve the meaning of the Recess Appointments Clause. As Justice Scalia's *AIRC* dissent implies, the Court likely would have rejected Senate standing, as it would have been unprecedented. But the central problem in *Noel Canning*—what to do with a long-standing practice that appears to be inconsistent with original understandings but is more consistent with modern technology and expectations—would have been substantially mitigated had the Senate been able to litigate the case in the nineteenth century.<sup>371</sup>

Rule originalism less clearly counsels relaxation of standing requirements in a case like *Myers*.<sup>372</sup> It is possible, as noted, to characterize the

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371. See Jamal Greene, *The Supreme Court as a Constitutional Court*, 128 *Harv. L. Rev.* 124, 127 (2014) (arguing that “*Noel Canning* is as much about when the Court should engage interpretative questions as it is about how it should do so”).

372. *Myers v. United States*, 272 U.S. 52 (1926).

President's exclusive removal power as an atextual rule,<sup>373</sup> but it is also possible to regard it as an application of "the executive Power,"<sup>374</sup> a constitutional standard. Neither characterization is either obvious or uniquely correct. We should accordingly expect contestation over which is more faithful to the constitutional design. The exclusive power of removal is not subject to incremental qualification, but the "executive-ness" of an exercise of presidential power is a matter of degree. Notice that when the Court limited the *Myers* holding to "purely" executive officers less than a decade after *Myers*, its opinion was conspicuously nonoriginalist.<sup>375</sup>

*Zivotofsky* involved a question about the foreign affairs power, and the Article III exclusivity issue in *Wellness International Network* is an interpretation of "the judicial power." Both powers are readily characterized as involving constitutional standards. The precise degree to which the foreign affairs power is subject to congressional limitation or amendment and the kinds of claims administrative courts—unknown at the founding—have the power to adjudicate are questions that become easier rather than harder to answer on contact with subsequent political and social practices. Those practices have epistemic rather than simply practical value. Justice Kennedy's majority opinion in *Zivotofsky* pays far more heed to precedent, to prudential concerns, and to international law than to original understandings.<sup>376</sup> Justice Sotomayor's analysis in *Wellness International Network* is entirely doctrinal.<sup>377</sup>

This section has focused on government institutional standing, but the justification for rule originalism might suggest relaxation of the rules of individual standing as well. After all, if there are good teleological reasons to adjudicate rules questions relatively early, then why should those reasons be limited to intergovernmental litigation? This point has some force but is less consequential than the point about institutional standing. First, constitutional rules typically (though not always)<sup>378</sup> emerge from structural provisions that regulate the relationship between governmental institutions. Second, a special pathology afflicts the Court's treatment of institutional standing. It denies such standing even in the presence of a strong institutional interest, such as the Senate's interest in

373. See *supra* note 39 and accompanying text (noting there may be constitutional rules not memorialized within the constitutional text).

374. U.S. Const. art. II, § 1, cl. 1; see Calabresi & Lawson, *supra* note 10, at 499 (noting though the "rules/standards spectrum is a spectrum," the Article II Vesting Clause "has important standard-like features").

375. See *Humphrey's Ex'r v. United States*, 295 U.S. 602, 603 (1935); see also Scalia, *Originalism: The Lesser Evil*, *supra* note 30, at 851–52 (lauding the originalism of *Myers* and lamenting the nonoriginalism of *Humphrey's Executor*).

376. See *Zivotofsky v. Kerry*, 135 S. Ct. 2076, 2083–94 (2015).

377. See *Wellness Int'l Network, Ltd. v. Sharif*, 135 S. Ct. 1932, 1942 (2015) ("Our precedents make clear that litigants may validly consent to adjudication by bankruptcy courts.").

378. See *supra* section II.B.

presidential appointments that skirt advice and consent, or the interest of members of Congress in the President's line-item vetoes,<sup>379</sup> or the Attorney General's interest in the threat of a one-house veto of his decision to suspend deportation.<sup>380</sup> This Article urges that, in cases about the meaning of constitutional rules, the Court should have no special aversion to the standing of political actors or institutions. The very separation of powers objections that the Court relies on in denying standing in such cases resurface when the Court is later tempted to ignore the reigning political equilibrium in deference to original understandings.

There is another way out that bears mention. The decision to refuse institutional standing in a case in which institutional interests are plainly at issue invites the conclusion that the case presents a political question. While in theory questions of standing are jurisdictional matters distinct from the prudential question of whether to decline jurisdiction on political question grounds, the doctrines are deeply intertwined. The constitutional commitment of a question to the political branches, the lack of manageable judicial standards, and other indicia of a nonjusticiable political question<sup>381</sup> reflect a separation of powers instinct that dovetails with the Court's general resistance to intergovernmental standing. For anyone squeamish about relaxing such standing, the problem of conflict between certain long-standing political practices and original understandings may instead be resolved by declaring a political question and being done with it.<sup>382</sup>

There is much to like about this solution. The problem with denying standing is that doing so delays adjudication but does not prevent it, thereby engineering a potential conflict between practice and constitutional rules. A political question judgment forecloses judicial resolution altogether. Relaxed institutional standing and rigid enforcement of the political question doctrine are compatible in theory. The Court has never suggested that whether a case raises a political question depends on *when* it is adjudicated (though it is not difficult to imagine instances in which that judgment would be plausible). In practice, however, one attracted to a robust political question doctrine would have good reason to be skeptical of relaxed governmental standing. Inviting courts to resolve intergovernmental conflicts sooner rather than later is likely to affect their assessment of which controversies are truly outside their competence. Standing determinations are hardly immune to motivated rea-

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379. See *Raines v. Byrd*, 521 U.S. 811, 813–14 (1997).

380. See *INS v. Chadha*, 462 U.S. 919, 922 (1983).

381. See *Baker v. Carr*, 369 U.S. 186, 217 (1962) (listing common case characteristics that give rise to a political question).

382. An amicus brief in *Noel Canning* urged just this resolution. See Amicus Curiae Brief of Professor Victor Williams in Support of Petitioner and Urging Reversal at 10, *NLRB v. Noel Canning*, 134 S. Ct. 2550 (2014) (No. 12-1281), 2013 WL 5323363.

soning.<sup>383</sup> Rule originalism is, in this sense, a conservative doctrine with activist implications.

One senses in modern U.S. politics a none-too-subtle judicialization of political conflict that unsettles the assumptions of the Hart-and-Sacks legal order. A brief examination of three recent exemplars of that disquieting trend helps to synthesize this Article's core claims. That examination begins with an Appropriations Clause challenge to the Patient Protection and Affordable Care Act (ACA), followed by state challenges to the Obama Administration's executive action on immigration, before concluding with a brief discussion of potential litigation over Senator Ted Cruz's eligibility to be President under the Natural Born Citizen Clause.

In September 2015, a district judge in Washington, D.C., held that the House of Representatives had standing to complain that the federal government unconstitutionally spent money on sections of the ACA without a congressional appropriation.<sup>384</sup> Whatever one thinks of the House's claim that it has suffered an institutional injury in this case, this Article does not suggest that standing should be liberalized. It is possible to imagine an Appropriations Clause claim that constitutes a dispute over the meaning of a rule—for example, what is "Money"?—but this case does not involve such a claim. The legal dispute in the case is an interpretive disagreement over whether the ACA authorizes the President to draw upon a permanent appropriation or instead requires temporary appropriations.<sup>385</sup> It is true that if the House succeeds on its merits claim, as the district court must assume in adjudicating a standing argument, the President has violated the Appropriations Clause. But that conditional conclusion is not in dispute, and so the case is not about the meaning of a constitutional rule. What is in dispute is the meaning of a federal statute. It is not surprising, then, that the court's merits opinion contained no discussion of the original meaning of the Appropriations Clause.<sup>386</sup>

Last term, the Supreme Court heard argument on a challenge by twenty-six states to the Obama Administration's decision to defer immigration enforcement and grant work authorization to a class of undocumented immigrants.<sup>387</sup> The Fifth Circuit and the district court both held that individual states had standing and ruled against the Administration

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383. See, e.g., Richard H. Fallon, Jr., *The Fragmentation of Standing*, 93 *Tex. L. Rev.* 1061, 1098–99 (2015).

384. See U.S. Const. art. I, § 9, cl. 7 ("No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law . . ."); *U.S. House of Representatives v. Burwell*, 130 F. Supp. 3d 53, 76–77 (D.D.C. 2015).

385. See *U.S. House of Representatives v. Burwell*, No. 14-1967 (RMC), 2016 WL 2750934, at \*7 (D.D.C. May 12, 2016).

386. See *id.*

387. See *United States v. Texas*, 136 S. Ct. 2271, 2271 (2016) (mem.).

on the merits.<sup>388</sup> The Court affirmed the judgment of the Fifth Circuit by a 4-4 split, with no opinion.<sup>389</sup> The constitutional question in the case was whether the exercise of enforcement discretion violates the President's obligations under the Take Care Clause,<sup>390</sup> a classic constitutional standard. Should a future Court reach the merits on the constitutional question, its analysis will likely focus intently on the historical, post-ratification relations between Congress and the President and on prior political and legal precedent. Original understanding will be of limited relevance, and this Article provides no special reason for leniency in considering whether a state has standing.

Finally, there was much discussion during the 2016 presidential primary season of Senator Cruz's constitutional eligibility for the presidency.<sup>391</sup> Cruz was born in Canada to a U.S. citizen mother and a noncitizen father.<sup>392</sup> Under the nationality law in place at the time of his birth, Cruz was born a citizen. The interpretive question subject to public debate was whether the Constitution's requirement that the president be a "natural born Citizen"<sup>393</sup> requires him or her to have been born in the United States or its territories. Unlike the Appropriations Clause and deferred action questions, the question of whether an American born abroad under a statutory grant of citizenship at birth is eligible to be president is a classic constitutional-rule question. One would predict debate over this question to focus heavily on original understandings, and indeed it has.<sup>394</sup>

For a rule originalist, this conclusion carries implications for standing. On the mighty assumption that a court believes the case to be justiciable,<sup>395</sup> rule originalism recommends a relatively liberal approach

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388. *Texas v. United States*, 809 F.3d 134, 146 (5th Cir. 2015), *aff'd* by an equally divided court, 136 S. Ct. 2271 (2016) (mem.); *Texas v. United States*, 86 F. Supp. 3d 591, 677 (S.D. Tex. 2015), *aff'd*, 809 F.3d 134, 146 (5th Cir. 2015).

389. *Texas*, 136 S. Ct. at 2271.

390. *Id.*

391. See, e.g., Alan Rappeport, *Lawsuit Questions Ted Cruz's Eligibility to Be President*, N.Y. Times: First Draft (Jan. 15, 2016, 1:41 PM), <http://www.nytimes.com/politics/first-draft/2016/01/15/lawsuit-questions-ted-cruzs-eligibility-to-be-president/> (on file with the *Columbia Law Review*).

392. Deroy Murdock, *Will Ted Cruz's Canadian Birth Prove to Be a Liability in a General Election?*, Nat'l Rev. (Feb. 19, 2016, 4:00 AM), <http://www.nationalreview.com/article/431552/ted-cruzs-natural-born-citizen-canadian-birth-problem> (on file with the *Columbia Law Review*).

393. U.S. Const. art. II, § 1, cl. 5.

394. See, e.g., *supra* note 3 (referring to sources that seek to resolve the question of Senator Cruz's eligibility through historical inquiry).

395. See Akhil Reed Amar, *Opinion, Why Ted Cruz Is Eligible to Be President*, CNN (Jan. 14, 2016), <http://www.cnn.com/2016/01/13/opinions/amar-cruz-trump-natural-born-citizen> [<http://perma.cc/49R6-VALL>] (arguing that the American people should conclusively adjudicate this kind of question at the ballot box). The Cruz case provides a potential example of a situation in which the political question determination turns on the timing and posture of litigation. The case for the political question doctrine seems stronger were



to standing. If Cruz's eligibility is susceptible to resolution by courts, there are very good reasons to resolve it before he becomes President rather than have it linger indefinitely during a Cruz presidency. Cruz becoming President would provide a compelling pragmatic reason to ignore eighteenth-century evidence suggesting his lack of qualification—presidency by adverse possession, so to speak—but it would not help a judge understand the meaning of the rule embodied within the Natural Born Citizen Clause.

#### CONCLUSION

One of Professor Alexander Bickel's most memorable observations was that an apex court should tailor its docket to its mode of inquiry. For Bickel, this meant that a court committed to deciding cases according to principle rather than expediency had to limit its merits decisions in a way that made that high-minded approach possible.<sup>396</sup> As Professor Gerald Gunther archly observed, Bickel's novelty was "100% insistence on principle, 20% of the time."<sup>397</sup>

This Article also has argued that a court's approach to constitutional implementation relates to its docket in surprising ways, but it turns Bickel on his head. Constitutional interpretation in the United States obeys what this Article has called rule originalism. Interpreters tend to pursue originalist methods, narrowly conceived, when they face questions about the meaning of constitutional rules, and they tend to pursue nonoriginalist methods when they face questions about the application of constitutional standards. The instinct toward rule originalism operates across substance and across judicial ideology. It will usually result in nonoriginalist analysis, but this will not always be so, and it will not be so even in some hard cases. In a sense, the present constitutional culture maintains a twenty-percent insistence on originalism, one hundred percent of the time.

This division is best justified on teleological grounds: A static interpretive mode respects the settlement and coordination function of rules, which will often operate to set out the division of powers between government actors. But if originalism is appropriate for constitutional rules, and if the reason it is appropriate for constitutional rules is because it promotes constitutional settlement, some further implications for separation of powers might follow. Specifically, it might follow that courts should more liberally permit government institutional standing to more expeditiously resolve disputes over constitutional rules, lest the

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Cruz to have won a presidential election than it would if a state were, for example, to leave Cruz off a primary ballot based on its view that he was not eligible to be president.

396. See Alexander M. Bickel, *The Least Dangerous Branch: The Supreme Court at the Bar of Politics* 68–71 (1962).

397. Gerald Gunther, *The Subtle Vices of the "Passive Virtues"—A Comment on Principle and Expediency in Judicial Review*, 64 *Colum. L. Rev.* 1, 3 (1964).

executive bias that hangs over historical practice distort constitutional meaning without contributing much epistemic value.<sup>398</sup> This conclusion suggests, paradoxically, that the best reasons for originalism draw on originalism's capacity for judicial constraint and yet support a functional enlargement of judicial authority.

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398. See Bradley & Morrison, *supra* note 27, at 440–47 (explaining why Congress has limited ability to check growing executive power).