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The Originalist's Dilemma

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Article

The Marshall Court and the Originalist's Dilemma

Peter J. Smith[†]

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Originalism remains a controversial interpretive methodology, but in federalism cases all of the Justices on the Rehnquist Court appeared to embrace it. Originalism, of course, presupposes that the Constitution has a fixed, original meaning. But the nature of a constitution, Chief Justice John Marshall explained in *McCulloch v. Maryland*, requires that “only its great outlines should be marked, its important objects designated, and the minor ingredients which compose those objects be deduced from the nature of the objects themselves.”¹ To Marshall, this was one of the Constitution’s great virtues.² But others saw vice. During the debate over whether to ratify the Constitution, Anti-Federalists charged that the Constitution was deliberately ambiguous, and that judges, acting under the guise of constitutional interpretation, would construe it instrumentally to permit expansive federal power.³ Federalists responded by arguing that the Constitution was a straightforward charter, and to the extent that it—like all written documents—contained ambiguities, they would be resolved by judges constrained by the rules of “universal jurisprudence” and traditional methods of interpretation.⁴ Like any other “new law[,]” Madison explained, the Constitution would be “obscure and equivocal, until [its] meaning be liquidated and ascertained by a series of particular discussions and adjudications.”⁵

Federalist advocates of ratification and Anti-Federalist opponents thus generally agreed that the Constitution’s generalities would sometimes be given particular meaning in the course

1. 17 U.S. (4 Wheat.) 316, 407 (1819).

2. To Marshall, the alternative was not feasible: “A constitution, to contain an accurate detail of all the subdivisions of which its great powers will admit, and of all the means by which they may be carried into execution, would partake of the prolixity of a legal code, and could scarcely be embraced by the human mind.” *Id.* Worse still, a governing charter that dealt too intimately with details “would probably never be understood by the public.” *Id.*

3. See *infra* notes 45–57 and accompanying text.

4. 4 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 71 (Jonathan Elliot ed., 1937) [hereinafter ELLIOT’S DEBATES] (remarks of John Steele at the 1788 North Carolina convention); THE FEDERALIST NO. 37, at 229 (James Madison) (Clinton Rossiter ed., 1961); see *infra* notes 62–71 and accompanying text.

5. THE FEDERALIST NO. 37 (James Madison), *supra* note 4, at 229.

of judicial decision making, even if they disagreed about whether this was a cause for concern. This early understanding—that the Constitution’s meaning could be “fixed” through postratification practice—enables originalists to reconcile the theory that the Constitution’s meaning cannot perpetually evolve with the reality that the Constitution and the historical materials to which we look today to discern original meaning may in fact leave many important questions unresolved.⁶ Even if the meaning of a constitutional provision was not fully settled at the time of ratification, it could be fixed by precedent, and the originalist today is as bound by that fixed meaning as he would be by the meaning of constitutional provisions that were unambiguous upon ratification.

In the first decade of the new republic, the most significant constitutional questions were addressed, albeit not always resolved, in the political branches.⁷ But the Court had many opportunities to “liquidate” the meaning of the Constitution during John Marshall’s thirty-four-year tenure as Chief Justice. In the words of David Currie, “[t]he Court under Marshall had a unique opportunity to put meat on the largely bare bones of the Constitution.”⁸ The most significant opinions during Marshall’s tenure represented a “vigorous affirmation of national authority and of vigorous enforcement of constitutional limitations on the states.”⁹ His Court announced a sweeping view of Con-

6. See Caleb Nelson, *Originalism and Interpretive Conventions*, 70 U. CHI. L. REV. 519, 555–56 (2003) (discussing several questions on which members of the founding generation disagreed and which remain unclear today).

7. The most prominent examples are the debate over whether Congress has power to create a national bank, see DAVID P. CURRIE, *THE CONSTITUTION IN CONGRESS: THE FEDERALIST PERIOD, 1789–1901*, at 36–41 (1997), whether the President has inherent authority to remove an executive officer, see *id.* at 78–80, and whether the House of Representatives has authority to decline to appropriate funds for the execution of a treaty, see *id.* at 211–22. The Court did issue some important decisions during that time. See, e.g., *Calder v. Bull*, 3 U.S. (3 Dall.) 386, 393–94 (1798) (holding that the Ex Post Facto Clause, U.S. CONST. art. I, § 10, cl. 1, prohibits only retroactive criminal laws); *Ware v. Hylton*, 3 U.S. (3 Dall.) 199, 236–37 (1796) (holding that the Court had authority to invalidate a state law for unconstitutionality); *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419, 425 (1793) (holding that the Court had jurisdiction to hear an original action in assumpsit against the State). But for the most part, “[i]n the twelve years of its existence before the appointment of John Marshall as Chief Justice, the Supreme Court had decided few significant constitutional questions.” DAVID P. CURRIE, *THE CONSTITUTION IN THE SUPREME COURT: THE FIRST HUNDRED YEARS 127* (1985) [hereinafter CURRIE, SUPREME COURT].

8. CURRIE, SUPREME COURT, *supra* note 7, at 62–63.

9. *Id.* at 62.

gress's incidental powers under the Necessary and Proper Clause, in the course of upholding the legality of the Bank of the United States;¹⁰ first suggested the existence of a dormant Commerce Clause as a limitation on state regulatory authority;¹¹ affirmed the Court's authority to review state court decisions denying federal rights;¹² asserted federal jurisdiction over suits against state officers;¹³ broadly construed Article III federal question jurisdiction;¹⁴ and narrowly construed the States' immunity from suit in federal court.¹⁵

The Marshall Court's assertive nationalism poses a challenge to the modern originalist. Justice Scalia, for example, has repeatedly asserted that the Constitution should be interpreted as it was understood when it was drafted and ratified,¹⁶ and has criticized those who have interpreted it according to the different meaning that subsequent generations have ascribed to it.¹⁷ However, as I have recently explained, Justice Scalia's opinions in federalism cases make clear that *his* understanding of the original understanding rests more heavily on the views of founding-era Anti-Federalists than on the views of the more nationalist Federalists, such as Alexander Hamilton or James Wilson.¹⁸

What, then, is Justice Scalia to make of the decisions of the Marshall Court, many of which were in tension with the more narrow view of federal authority that found currency among Anti-Federalists at the time of the ratification, and among Jef-

10. *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 421 (1819).

11. *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 37–47 (1824).

12. *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 410–11 (1821); *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304, 327–31 (1816).

13. *Osborn v. Bank of the United States*, 22 U.S. (9 Wheat.) 738, 867 (1824).

14. *Id.* at 738.

15. *Id.* at 847–58; *Cohens*, 19 U.S. at 405–12.

16. See, e.g., Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849, 854 (1989) [hereinafter Scalia, *Originalism*].

17. See, e.g., Antonin Scalia, *Common-Law Courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws*, in A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 3, 44–45 (Amy Gutmann ed., 1997) [hereinafter Scalia, *Common-Law Courts*]; Scalia, *Originalism*, *supra* note 16, at 854.

18. See Peter J. Smith, *Sources of Federalism: An Empirical Analysis of the Court's Quest for Original Meaning*, 52 UCLA L. REV. 217, 217–21 (2004); see also *Printz v. United States*, 521 U.S. 898, 915 n.9 (1997); *Blatchford v. Native Vill. of Noatak*, 501 U.S. 775, 779–86 (1991); *Pennsylvania v. Union Gas Co.*, 491 U.S. 1, 29–45 (1989) (Scalia, J., concurring in part and dissenting in part).

personian Republicans at the time of Marshall's tenure on the Court? After all, the original understanding appears to have been that the answers to questions left unresolved by the Constitution, or not anticipated at the time of ratification, could be fixed in the course of subsequent adjudications. Moreover, Justice Scalia himself appears to have embraced this understanding as a way to reconcile the theory that the Constitution has an unvarying, fixed meaning with the reality that the Constitution was, at least at the founding, filled with ambiguity.¹⁹ To the extent that the significant questions addressed by the Marshall Court truly had been "obscure and equivocal"²⁰ at the time of the ratification, the Marshall Court's resolution of those questions supplied a fixed meaning.

The decisions of the Marshall Court pose a dilemma for the modern originalist. Discounting the significance of Marshall Court decisions—in order to declare an original understanding that is more solicitous of the views of framing-era opponents of the Constitution—risks infidelity to the original understanding of how constitutional ambiguities would be resolved. However, accepting the nationalist implications of decisions of the Marshall Court, and thus remaining faithful to the original understanding of how constitutional ambiguities would be resolved, risks undervaluing the views of Anti-Federalists in the quest to define the original understanding.

Originalism thus appears to tug the originalist in two opposite directions. On the one hand, an originalist who, like Justice Scalia, believes that the Constitution was not originally understood to confer broad power on the federal government, can discount the nationalistic decisions of the Marshall Court on the ground that they are simply inconsistent with the original understanding.²¹ In other words, the originalist can assert that the questions resolved by the Marshall Court were in fact not left "obscure and equivocal" by the Constitution, and that the Marshall Court simply answered them in a manner inconsistent with the original understanding. The originalist who takes this view must still decide whether to follow decisions of

19. See, e.g., *Printz*, 521 U.S. at 905 ("Because there is no constitutional text speaking to this precise question, the answer to the [plaintiffs'] challenge must be sought in historical understanding and practice, in the structure of the Constitution, and in the jurisprudence of this Court."); *Union Gas Co.*, 491 U.S. at 29–45 (Scalia, J., concurring in part and dissenting in part).

20. THE FEDERALIST NO. 37 (James Madison), *supra* note 4, at 229.

21. See *infra* notes 225–38 and accompanying text.

the Marshall Court, but only because of the command of *stare decisis*, not because of the command of originalism itself.

On the other hand, the originalist who is skeptical of broad federal power may nevertheless be compelled *by originalism itself* to accept even the expansively nationalistic decisions of the Marshall Court. To the extent that one cannot plausibly argue that all of the questions addressed by that Court were clear at the time of the ratification, the original understanding appears to demand the conclusion that the answers to those questions and any others necessary to the reasoning were fixed by the Marshall Court's decisions—even if they would have been resolved differently had, say, Roger Taney or Salmon Chase been Chief Justice rather than John Marshall.

How did the members of the Rehnquist Court actually treat the decisions of the Marshall Court in federalism cases? For this Article, I reviewed every federalism decision since 1970 to determine whether the Justices who generally constituted the majority in federalism cases treated decisions of the Marshall Court differently than did the frequent dissenters in such cases.²² I considered both the frequency of citation to Marshall Court decisions and, in those instances in which there were references to Marshall Court decisions, the purpose for which the decision was cited. When the Justices did cite decisions of the Marshall Court, I attempted to consider both the substantive points of law for which the decisions were cited and the fidelity of the use of the decision to the original implication of the Marshall Court opinion.

The study reveals that in federalism cases, the Justices in the majority were significantly more likely than the dissenters to ignore federalism decisions of the Marshall Court altogether, whereas the dissenters were far more likely to premise arguments about the original understanding on Marshall Court decisions. When the Justices of the majority did rely on Marshall Court decisions, they were substantially more likely than the dissenters to cite qualifying statements about the limited scope of federal authority. The dissenters, in contrast, were considerably more likely to rely on the more expansive nationalistic implications of Marshall Court decisions.

The results of the study demonstrate that the Justices, while professing fidelity to the principles of originalism, did not robustly, or at least consistently, adhere to the original under-

22. See *infra* Part II.B.2.

standing of how constitutional ambiguities would attain fixed meaning through adjudication. More important, the study has implications for originalism as a methodology of constitutional interpretation. Proponents of originalism contend that originalism minimizes the risk of judicial instrumentalism more effectively than other methods of constitutional interpretation.²³ The study suggests, however, that this justification for originalism is overstated. By relying explicitly or implicitly on the vague distinction between holdings and dicta to temper (or invigorate) the doctrine of constitutional ambiguities, a Justice can ignore (or accept) pronouncements of the Marshall Court according to how well they correspond to the Justice's own conception of the original understanding or to the Justice's own instrumentalist goals.

This Article proceeds in three parts. Part I sets the context, by providing an overview of originalism as an interpretive methodology, and then explaining ratification-era views of how constitutional ambiguities would be resolved. Part II provides a brief history of Marshall's elevation to the Court and of the Court's federalism decisions during his tenure. It then presents the findings of the study, which show that there is a demonstrable difference in how the members of the federalism majority and the dissenters treated decisions of the Marshall Court. Finally, Part III addresses some of the implications of the disagreement over the extent of the binding force of decisions of the Marshall Court.

I. ORIGINALISM AND THE ORIGINAL UNDERSTANDING OF CONSTITUTIONAL AMBIGUITY

The Rehnquist Court led a federalism revival, often (albeit by a narrow majority) favoring the States over the federal government in disputes involving the Constitution's allocation of authority.²⁴ Although the Court did not follow one consistent

23. See, e.g., Scalia, *Originalism*, *supra* note 16, at 863; see also Scalia, *Common-Law Courts*, *supra* note 17, at 41–47.

24. Chief Justice Rehnquist and Justices O'Connor, Scalia, Kennedy, and Thomas typically voted to uphold claims of state sovereignty, and Justices Stevens, Souter, Ginsburg, and Breyer generally dissented. Indeed, federalism cases decided by the Rehnquist Court after Justice Breyer's appointment most often produced this identical line-up in 5-4 decisions against the challenged assertion of federal power. See, e.g., *Fed. Mar. Comm'n v. S.C. State Ports Auth.*, 535 U.S. 743 (2002); *Bd. of Trs. of the Univ. of Ala. v. Garrett*, 531 U.S. 356 (2001); *United States v. Morrison*, 529 U.S. 598 (2000); *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62 (2000); *Alden v. Maine*, 527 U.S. 706 (1999); *Coll. Sav.*

methodology in deciding federalism cases, it often employed originalism in seeking to resolve contemporary problems of federalism. To appreciate the role of decisions of the Marshall Court in conducting such an inquiry, it is necessary to understand both originalism and the various original understandings of how constitutional ambiguities would be resolved.

A. ORIGINALISM AS A METHOD OF CONSTITUTIONAL INTERPRETATION

Originalism is a theory of constitutional interpretation that assigns dispositive weight to the original understanding of the Constitution or the constitutional provision at issue. Originalism requires that a provision of the Constitution be interpreted as it was understood when it was drafted and ratified, not according to the different meanings that subsequent generations have ascribed to it. Originalism therefore requires reference to framing- or ratification-era understandings to determine the meaning of the Constitution today.²⁵

Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd., 527 U.S. 666 (1999); Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank, 527 U.S. 627 (1999); Printz v. United States, 521 U.S. 898 (1997); Seminole Tribe v. Florida, 517 U.S. 44 (1996); United States v. Lopez, 514 U.S. 549 (1995). However, there were some notable exceptions. *See, e.g.*, Gonzales v. Raich, 125 S. Ct. 2195 (2005) (Justices Scalia and Kennedy joined Justices Stevens, Souter, Ginsburg, and Breyer in holding that Congress has power to regulate the purely local cultivation, possession, and use of marijuana); Tennessee v. Lane, 541 U.S. 509 (2004) (Justice O'Connor joined Justices Stevens, Souter, Ginsburg, and Breyer in holding that Title II of the Americans with Disabilities Act validly abrogated the states' sovereign immunity); Nev. Dep't of Human Res. v. Hibbs, 538 U.S. 721 (2003) (Chief Justice Rehnquist and Justice O'Connor joined Justices Stevens, Souter, Ginsburg, and Breyer in holding that the Family and Medical Leave Act validly abrogates the states' sovereign immunity); U.S. Term Limits, Inc. v. Thornton, 514 U.S. 779 (1995) (Justice Kennedy joined Justices Stevens, Souter, Ginsburg, and Breyer in holding that the states lack power to restrict the number of terms federal representatives may serve). The pattern of 5-4 decisions was substantially the same during the first eight years of William H. Rehnquist's tenure as Chief Justice. *See, e.g.*, Blatchford v. Native Vill. of Noatak, 501 U.S. 775 (1991); Gregory v. Ashcroft, 501 U.S. 452 (1991); Welch v. Tex. Dep't of Highways & Pub. Transp., 483 U.S. 468 (1987). The only notable exceptions before Justice Breyer's appointment were *Pennsylvania v. Union Gas Co.*, 491 U.S. 1 (1989), in which Justice White cryptically joined a plurality of four Justices to hold that Congress had authority pursuant to the Commerce Clause to abrogate the states' sovereign immunity, and *New York v. United States*, 505 U.S. 144 (1992), in which Justice Souter added a sixth vote in favor of the State's claim. The Court overruled *Union Gas* in *Seminole Tribe*, 517 U.S. at 66.

25. This description of originalism may be deceptively simple, as there is disagreement among originalists over the role of constitutional text, Framer

Of course, as the most prominent adherents of the view concede, “[t]here is plenty of room for disagreement as to what original meaning was, and even more as to how that original meaning applies to the situation before the court.”²⁶ In addition, although some originalists appear to seek answers to constitutional questions by simply asking, “How would the originals have answered this question then?”²⁷ more nuanced approaches to originalism aim to “preserve original meaning, not just *in the original context* but *as applied in the current context*,”²⁸ through a process of what Lawrence Lessig has called “translation.”²⁹ At bottom, however, originalists agree that the meaning of the Constitution does not change to suit modern preferences; its contemporary meaning *is* its original meaning.

The principal conventional defenses of originalism fall into two categories: “social-contractarian” defenses and “judicial-constraint” defenses. The social-contractarian defenses hold that “judges may displace legislative decisions in the name of the Constitution, but only because the Constitution is a social contract to which consent was validly given through ratification.”³⁰ Contractarian views, in turn, “imply originalist . . . interpretation by the judicial branch,” because it would be impossible to enforce the bargain struck by the people without reference to their understanding of the bargain.³¹

intent, and other arguably relevant considerations. See Richard S. Kay, “Originalist” Values and Constitutional Interpretation, 19 HARV. J.L. & PUB. POL’Y, 335, 336–40 (1996); Smith, *supra* note 18, at 226–28.

26. Scalia, *Common-Law Courts*, *supra* note 17, at 45; accord ROBERT H. BORK, *THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW* 163 (1990).

27. Lawrence Lessig, *Fidelity in Translation*, 71 TEX. L. REV. 1165, 1171 (1993). Lessig refers to this approach as “one-step fidelity,” and cites the writings of Robert Bork as an example. See *id.* at 1183 (citing BORK, *supra* note 26, at 144). This approach fails, Lessig argues, because “although sensitive to the effects of context upon meaning in the *original* context, it is blind to the effects of context upon the *application* meaning in the *application* context.” *Id.* at 1189.

28. *Id.*

29. See *id.* at 1173; Lawrence Lessig, *Understanding Changed Readings: Fidelity and Theory*, 47 STAN. L. REV. 395, 396–401 (1995); Lawrence Lessig, *Translating Federalism: United States v. Lopez*, 1995 SUP. CT. REV. 125, 144–68; see also BRUCE ACKERMAN, *WE THE PEOPLE: FOUNDATIONS* 140–62 (1991); Barry Friedman & Scott B. Smith, *The Sedimentary Constitution*, 147 U. PA. L. REV. 1, 6–7 (1998).

30. Michael C. Dorf, *Integrating Normative and Descriptive Constitutional Theory: The Case of Original Meaning*, 85 GEO. L.J. 1765, 1766 (1997).

31. Frank H. Easterbrook, *Textualism and the Dead Hand*, 66 GEO. WASH. L. REV. 1119, 1121 (1998); see also Randy E. Barnett, *An Originalism*

The “judicial-constraint” defenses of originalism posit that only originalist methodology effectively limits the ability of unelected judges to impose their own views under the guise of constitutional interpretation. Stated simply, if constitutional meaning is fixed by an understanding ascertainable by conventional historiographic methods—in contrast to an approach under which constitutional meaning is subject to evolving, extra-textual norms—unelected judges cannot impose their own views under the guise of constitutional interpretation.³²

Justice Scalia has argued that the “main danger in judicial interpretation . . . is that the judges will mistake their own predilections for the law,” and that “[n]onoriginalism, which under one or another formulation invokes ‘fundamental values’ as the touchstone of constitutionality, plays precisely to this weakness.”³³ Proponents of originalism concede that often it is difficult to achieve consensus on what the original understand-

for *Nonoriginalists*, 45 LOY. L. REV. 611, 613 (1999); Michael W. McConnell, *Textualism and the Dead Hand of the Past*, 66 GEO. WASH. L. REV. 1127, 1132 (1998). Social-contractarian defenses rely heavily on democratic theory. Proponents argue that originalism is faithful to both the legitimately and democratically expressed aspirations of the founding generation, see BORK, *supra* note 26, at 143; McConnell, *supra*, at 1132, and *current* expressions of majority will through democratic processes, see BORK, *supra* note 26, at 163; Scalia, *Originalism*, *supra* note 16, at 862. For criticisms of the social-contractarian defenses of originalism, see PHILIP BOBBITT, *CONSTITUTIONAL INTERPRETATION* 13–15 (1991); Paul Brest, *The Misconceived Quest for the Original Understanding*, 60 B.U. L. REV. 204, 230 (1980); Dorf, *supra* note 30, at 1796–800; Daniel A. Farber, *The Originalism Debate: A Guide for the Perplexed*, 49 OHIO ST. L.J. 1085, 1097–99 (1989); Thomas C. Grey, *Do We Have an Unwritten Constitution?*, 27 STAN. L. REV. 703, 710–14 (1975); Stephen R. Munzer & James W. Nickel, *Does the Constitution Mean What It Always Meant?*, 77 COLUM. L. REV. 1029, 1032 (1977); Jed Rubenfeld, *The Moment and the Millennium*, 66 GEO. WASH. L. REV. 1085, 1108–10 (1998). For a response to these critiques of originalism, see Richard S. Kay, *Adherence to the Original Intentions in Constitutional Adjudication: Three Objections and Responses*, 82 NW. U. L. REV. 226, 227 (1988).

32. See BORK, *supra* note 26, at 163; Scalia, *Common-Law Courts*, *supra* note 17, at 41–47; Scalia, *Originalism*, *supra* note 16, at 863; see generally RAOUL BERGER, *FEDERALISM: THE FOUNDERS’ DESIGN* 9–20 (1987) (surveying the evolution of the concept of “original intention” and its role in limiting the scope of judicial review). The social-contractarian and judicial-constraint defenses are obviously related. Originalists contend that originalism is the only method of constitutional interpretation that is consistent with the notion that the Constitution is a form of law, albeit a special kind of law. Like any other law, the Constitution “has a fixed meaning ascertainable through the usual devices familiar to those learned in the law.” Scalia, *Originalism*, *supra* note 16, at 854; see also BORK, *supra* note 26, at 143; JOHN HART ELY, *DEMOCRACY AND DISTRUST* 3 (1980).

33. Scalia, *Originalism*, *supra* note 16, at 863.

ing was;³⁴ but they argue that “the practical defects of originalism are defects more appropriate for the task at hand—that is, less likely to aggravate [this] most significant weakness of the system of judicial review.”³⁵ The “originalist at least knows what he is looking for: the original meaning of the text,” not some broader and more amorphous notion grounded in the judge’s own views of justice and morality.³⁶

Originalism continues to spark a lively debate in the academy, and the literature is rich with criticisms of the approach.³⁷ On the Court, however, the originalists appear to have prevailed, at least in federalism cases.³⁸ The Rehnquist Court often decided federalism cases by narrow 5-4 majorities,³⁹ but the disagreement between the majority and the dissent rarely was over methodology; instead, the debates tended to be over what the original understanding actually was. To be sure, some dissenting Justices occasionally suggested other methods of identifying the boundaries between federal and state power.⁴⁰ On the

34. See BORK, *supra* note 26, at 163; Scalia, *Originalism*, *supra* note 16, at 863.

35. Scalia, *Originalism*, *supra* note 16, at 863.

36. Scalia, *Common-Law Courts*, *supra* note 17, at 45. For critiques of the judicial constraint defense, see CHARLES A. MILLER, *THE SUPREME COURT AND THE USES OF HISTORY* 25–28 (1969); Ronald Dworkin, *The Forum of Principle*, 56 N.Y.U. L. REV. 469, 498–500 (1981); James H. Hutson, *The Creation of the Constitution: The Integrity of the Documentary Record*, 65 TEX. L. REV. 1, 13–24 (1986); Alfred H. Kelly, *Clio and the Court: An Illicit Love Affair*, 1965 SUP. CT. REV. 119, 122 n.13, 156; Munzer & Nickel, *supra* note 31, at 1032–33; Paul L. Murphy, *Time to Reclaim: The Current Challenge of American Constitutional History*, 69 AM. HIST. REV. 64, 77 (1963); Smith, *supra* note 18, at 281–86.

37. In addition to the criticisms specific to the social-contractarian and judicial-constraint defenses, a frequent attack on originalism is that it purports to assign clear meaning to a document that is indeterminate with respect to many questions, particularly at a high level of specificity. See JACK N. RAKOVE, *ORIGINAL MEANINGS* 10 (1996); Ronald Dworkin, *Comment*, in *A MATTER OF INTERPRETATION*, *supra* note 17, at 115, 122; Paul Finkelman, *The Constitution and the Intentions of the Framers: The Limits of Historical Analysis*, 50 U. PITT. L. REV. 349, 352–55 (1989); Michael J. Perry, *The Legitimacy of Particular Conceptions of Constitutional Interpretation*, 77 VA. L. REV. 669, 695–98 (1991); Smith, *supra* note 18, at 284–86.

38. See, e.g., *Alden v. Maine*, 527 U.S. 706 (1999); *id.* at 760–814 (Souter, J., dissenting); *Seminole Tribe v. Florida*, 517 U.S. 44 (1996); *id.* at 76–100 (Stevens, J., dissenting); *id.* at 100–85 (Souter, J., dissenting); *U.S. Term Limits, Inc., v. Thornton*, 514 U.S. 779 (1995); *id.* at 845–926 (Thomas, J., dissenting).

39. See *supra* note 24.

40. See, e.g., *Printz v. United States*, 521 U.S. 898, 976–77 (1997) (Breyer, J., dissenting) (discussing European views of federalism).

whole, however, the debate in the Court's later federalism cases was waged on originalist terms. The consensus on the Court about the propriety of originalism in federalism cases provides an opportunity to assess how originalism has been deployed in practice.

B. THE ORIGINAL UNDERSTANDING OF HOW CONSTITUTIONAL AMBIGUITIES WOULD BE RESOLVED

1. Fixing Constitutional Meaning

Even originalism's stoutest advocates concede that it is easier to state the originalist's task than to perform it.⁴¹ The difficulty stems in large part from the nature of the framing and ratification of the Constitution. The Constitution proposed by the delegates to the Philadelphia convention directly addressed many of the thorny issues that had threatened the convention with failure.⁴² In part due to the document's focus on lofty questions of government structure, however, the drafters left ambiguous the answers to many other important questions that were sure to arise in the young republic. For the system to function and endure, there would have to be some means of ascribing meaning to the Constitution where its text otherwise was silent or ambiguous.

There is an obvious tension between the theory of originalism, which holds that the Constitution has fixed meaning that courts are bound to respect, and the reality of the framing, which produced a document rife with indeterminacy. To address this tension, originalists have looked to James Madison's theory of liquidation of constitutional meaning. As Caleb Nelson recently argued, the originalist can accommodate theory to reality by accepting the conventional account that the Constitution, to the extent that it was ambiguous, would attain fixed meaning, in James Madison's words, "by a series of particular

41. See, e.g., BORK, *supra* note 26, at 163; Scalia, *Common-Law Courts*, *supra* note 17, at 45.

42. For example, the proposed Constitution guaranteed the states equal representation in the Senate, *see* U.S. CONST. art. I, § 3, cl. 1; rejected Madison's proposal of a congressional power to negative state laws (and a proposal to authorize coercive military force to resolve conflicts between state and federal law), preferring instead contingent supremacy for federal statutes, *see id.* art. VI, cl. 2; and prohibited Congress from abolishing the slave trade before 1808, *id.* art. I, § 9, cl. 1.

discussions and adjudications.”⁴³ As explained below, by this Madison summed up the view that constitutional ambiguities could be resolved through the basic experience of governing in a constitutional republic—in Congress, in public debate, and in the courts. To the extent that the Constitution was ambiguous, Madison hoped that its meaning ultimately would be “settled by precedents.”⁴⁴

Relying on Madison’s theory is particularly compelling for the originalist, because the ratification debates suggest something of a consensus (at least between the warring Federalist and Anti-Federalist camps) that case-by-case adjudication in the courts would play a central role in assigning fixed constitutional meaning when the text of the Constitution was ambiguous. The debate was prompted by the proposed Constitution’s provisions that, if construed broadly or purposively, could result in expansive authority for the federal government and a diminished sphere of authority for the States. In his essays arguing against ratification of the Constitution, the Anti-Federalist “Brutus”⁴⁵ warned that federal judges, exercising largely unchecked power, would apply established—and inherently malleable—rules of construction to constitutional ambiguities to permit expansive federal authority.⁴⁶ Brutus warned that in exercising this power of construction, the federal courts would seize on textual ambiguities to give the Constitution “such a construction as to extend the powers of the general gov-

43. THE FEDERALIST NO. 37 (James Madison), *supra* note 4, at 229; see Nelson, *supra* note 6, at 527–29, 556; see also THE FEDERALIST NOS. 78–83 (Alexander Hamilton), *supra* note 4.

44. Letter from James Madison to Samuel Johnston (June 21, 1789), in 12 THE PAPERS OF JAMES MADISON 250 (Charles F. Hobson & Robert A. Rutland eds., 1979).

45. The *Essays of Brutus* “appeared in the *New York Journal* between October 1787 and April 1788, during which time the first seventy-seven papers of *The Federalist* also appeared,” and they were “widely reprinted and referred to.” 2 THE COMPLETE ANTI-FEDERALIST 358 (Herbert J. Storing ed., 1981) [hereinafter ANTI-FEDERALIST].

46. Brutus reasoned that Article III’s extension of the federal judicial power to cases “arising under” the Constitution, and its conferral of equity jurisdiction, would authorize federal courts to construe the limits of federal authority, *Essays of Brutus* No. 11, N.Y.J., Jan. 31, 1788, reprinted in 2 ANTI-FEDERALIST, *supra* note 45, at 417, 419, and to do so according to prevailing rules of construction, which would empower them to “explain the [C]onstitution according to the reasoning spirit of it, without being confined to the words or letter,” *id.*; see also *Essays of Brutus* No. 15, N.Y.J., Mar. 6, 1788, reprinted in 2 ANTI-FEDERALIST, *supra* note 45, at 437, 440.

ernment, as much as possible, to the diminution, and finally to the destruction, of that of the respective states.”⁴⁷

First, Brutus argued, federal judges would naturally favor the government that they served.⁴⁸ Second, the Constitution provided virtually no checks on the power of federal judges.⁴⁹ Third and most important, Brutus asserted, the proposed Constitution was filled with provisions that virtually invited federal judges to declare that federal power was limitless. Most of the provisions that “convey powers of any considerable importance,” Brutus maintained, are “conceived in general and indefinite terms, which are either equivocal, ambiguous, or which require long definitions to unfold the extent of their meaning.”⁵⁰ Federal judges inevitably would rely on these provisions—including the Arising Under Clause in Article III,⁵¹ the Preamble,⁵² the Necessary and Proper Clause,⁵³ and the General Welfare Clause⁵⁴—to construe the Constitution to “abolish

47. *Essays of Brutus* No. 12, N.Y.J., Feb. 7, 1788, reprinted in 2 ANTI-FEDERALIST, *supra* note 45, at 422, 422.

48. *Essays of Brutus* No. 11, N.Y.J., Jan. 31, 1788, *supra* note 46, at 420–21.

49. *Essays of Brutus* No. 15, N.Y.J., Mar. 20, 1788, reprinted in 2 ANTI-FEDERALIST, *supra* note 45, at 437, 437. Brutus assumed that Congress would have no power of correction over decisions of the Supreme Court construing the Constitution. See *Essays of Brutus* No. 11, N.Y.J., Jan. 31, 1788, *supra* note 46, at 420; *Essays of Brutus* No. 12, N.Y.J., Feb. 7, 1788, *supra* note 47, at 423. Brutus further assumed that in any event, federal judges would effectively control the extent of congressional power over them, by virtue of their power to declare Acts of Congress void for inconsistency with the Constitution. See *Essays of Brutus* No. 15, N.Y.J., Mar. 20, 1788, *supra*, at 440, 442. The problem was particularly acute, Brutus argued, because of Article III’s protections for judicial tenure and salary. *Id.* at 439.

50. *Essays of Brutus* No. 11, N.Y.J., Jan. 31, 1788, *supra* note 46, at 420–21.

51. U.S. CONST. art. III, § 2, cl. 1; see *Essays of Brutus* No. 11, N.Y.J., Jan. 31, 1788, *supra* note 46, at 419.

52. U.S. CONST. pmb.; see *Essays of Brutus* No. 12, N.Y.J., Feb. 7, 1788, *supra* note 47, at 424 (“[I]t is obvious [the Preamble] has in view every object which is embraced by any government.”); *Essays of Brutus* No. 11, N.Y.J., Jan. 31, 1788, *supra* note 46, at 420.

53. U.S. CONST. art. I, § 8, cl. 18; see *Essays of Brutus* No. 11, N.Y.J., Jan. 31, 1788, *supra* note 46, at 420 (arguing that the Necessary and Proper Clause “leaves the legislature at liberty, to do every thing, which in their judgment is best”).

54. U.S. CONST. art. I, § 8, cl. 1; see *Essays of Brutus* No. 12, N.Y.J., Feb. 7, 1788, *supra* note 47, at 425 (arguing that the General Welfare Clause’s “most natural and grammatical” reading is “to authorise the Congress to do any thing which in their judgment will tend to provide for the general welfare, and this amounts to the same thing as general and unlimited powers of legis-

entirely the state governments, and to melt down the States into one entire government.”⁵⁵

Brutus did not go so far as to argue that the courts would engage in a transparent power-grab. The more likely course, he argued, was that judges would “extend the limits of the general government gradually, and by insensible degrees, and to accommodate [sic] themselves to the temper of the people.”⁵⁶ His ultimate prediction nevertheless was dire: “The judicial power will operate to effect . . . an entire subversion of the legislative, executive and judicial powers of the individual states.”⁵⁷

More important for present purposes, Brutus’s polemics reveal that he assumed that courts would construe the Constitution in the same manner that they construed statutes. For Brutus, this was a reason to oppose ratification, because a court applying the “rules laid down for construing a law”⁵⁸ to the Constitution would surely engage in mischief. In Brutus’s view, a constitution should be a simple “compact of a people with their rulers,” with the power of “construction” vested in the legislature; if the “rulers break the compact, the people have a right and ought to remove them and do themselves justice.”⁵⁹ But the proposed Constitution was not such a simple compact, Brutus argued, and its meaning would inevitably be determined by federal judges. Although Brutus was perhaps the most articulate voice among the Constitution’s opponents, other prominent Anti-Federalists shared his view that the Constitution was filled with ambiguities⁶⁰ and that those ambiguities

lation in all cases”).

55. *Essays of Brutus* No. 15, N.Y.J., Mar. 20, 1788, *supra* note 49, at 441; accord *Essays of Brutus* No. 12, N.Y.J., Feb. 7, 1788, *supra* note 47, at 424.

56. *Essays of Brutus* No. 15, N.Y.J., Mar. 20, 1788, *supra* note 49, at 441.

57. *Essays of Brutus* No. 11, N.Y.J., Jan. 31, 1788, *supra* note 46, at 420; see also *id.* at 422 (“This power in the judicial, will enable them to mould the government, into almost any shape they please.”). Brutus’s critique thus focused on the two principal Anti-Federalist articles of faith: that the Constitution effected too great a consolidation of power in the national government, and that the Constitution was fundamentally antidemocratic. See GORDON S. WOOD, *THE CREATION OF THE AMERICAN REPUBLIC, 1776–1787*, at 520 (1969); Smith, *supra* note 18, at 239.

58. See *Essays of Brutus* No. 11, N.Y.J., Jan. 31, 1788, *supra* note 46, at 419.

59. *Essays of Brutus* No. 15, N.Y.J., Mar. 20, 1788, *supra* note 49, at 442.

60. See, e.g., ALPHEUS THOMAS MASON, *THE STATES RIGHTS DEBATE* 134 (1964) (quoting remarks of Smilie at the Pennsylvania ratifying convention); 2 ELLIOT’S DEBATES, *supra* note 4, at 243 (remarks of Smith at the New York convention); 4 *id.* at 187 (remarks of Caldwell at the first North Carolina convention); *id.* at 70 (Galloway at the first North Carolina convention); *id.* at 242

would be resolved by judges applying the principles of construction generally applied to statutes.⁶¹

The Federalists responded by arguing that although the proposed Constitution had—quite remarkably—produced agreement on a wide range of divisive issues,⁶² some ambiguity was inevitable.⁶³ Such ambiguity was no more fatal for a Constitution, Madison and Hamilton argued, than it was for a statute. Indeed, “[a]ll new laws, though penned with the greatest technical skill, and passed on the fullest and most mature deliberation, are considered as more or less obscure and equivocal, until their meaning be liquidated and ascertained by a series of particular discussions and adjudications.”⁶⁴ Accord-

(resolution of the first North Carolina convention); *id.* at 34, 50 (Bloodworth at the first North Carolina convention); *id.* at 54, 65, 68 (Spencer at the first North Carolina convention); 3 THE DEBATES, RESOLUTIONS, AND OTHER PROCEEDINGS, IN CONVENTION, ON THE ADOPTION OF THE FEDERAL CONSTITUTION 164 (Jonathan Elliot ed., 1827–1830) [hereinafter ELLIOT’S DEBATES (1827 ed.)] (remarks of Bloodworth at the first North Carolina convention); Letters of Centinel No. 2, FREEMAN’S J. (Philadelphia), 1787, reprinted in 2 ANTI-FEDERALIST, *supra* note 45, at 143, 147.

61. See 3 ELLIOT’S DEBATES (1827 ed.), *supra* note 60, at 164 (remarks of Bloodworth at the first North Carolina convention); HERBERT STORING, WHAT THE ANTI-FEDERALISTS WERE FOR 54 (1981); *Address of a Minority of the Maryland Ratifying Convention*, MD. GAZETTE, May 6, 1788, reprinted in 5 ANTI-FEDERALIST, *supra* note 45, at 92, 95; Essays by Cincinnatus No. 2, N.Y.J., Nov. 8, 1787, reprinted in 6 ANTI-FEDERALIST, *supra* note 45, at 10, 12; Letter from Samuel Osgood to Samuel Adams (Jan. 5, 1788), reprinted in 15 JOHN P. KAMINSKI & GASPARE J. SALADINO, THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 263, 265 (1984); Letters from the Federal Farmer No. 4, COUNTRY J. (Poughkeepsie, N.Y.), Oct. 12, 1787, reprinted in 2 ANTI-FEDERALIST, *supra* note 45, at 245, 248; *The Address and Reasons of Dissent of the Minority of the Convention of Pennsylvania to Their Constituents*, PA. PACKET AND DAILY ADVERTISER, Dec. 18, 1787, reprinted in 3 ANTI-FEDERALIST, *supra* note 45, at 145, 154–57.

62. See THE FEDERALIST NO. 37 (James Madison), *supra* note 4, at 230 (“The real wonder is that so many difficulties should have been surmounted, and surmounted with a unanimity almost as unprecedented as it must have been unexpected.”).

63. See THE FEDERALIST NO. 82 (Alexander Hamilton), *supra* note 4, at 491–93; THE FEDERALIST NO. 37 (James Madison), *supra* note 4, at 227–29; accord Letter from James Madison to Samuel Johnston (June 21, 1789), *supra* note 44, at 250 (explaining that the “exposition of the Constitution” would be a “copious source” of interpretive difficulties “until its meaning on all great points shall have been settled by precedents”); see also 1 ELLIOT’S DEBATES (1827 ed.), *supra* note 60, at 115 (remarks of Theophilus Parsons at the Massachusetts convention) (“[N]o compositions which men can pen, could be formed, but what would be liable to the same charge [of ambiguity].”); RAKOVE, *supra* note 37, at 158–59.

64. THE FEDERALIST NO. 37 (James Madison), *supra* note 4, at 229; see *id.* NO. 22 (Alexander Hamilton), at 150; *id.* NO. 78 (Alexander Hamilton), at 468;

ing to the Federalist defense of the proposed Constitution, “when ambiguities demanded resolution, intervening experience would provide the foundation for determining the course that the interpretation or revision of the Constitution should then take.”⁶⁵

Madison and Hamilton believed that courts would—and ought to—construe the Constitution according to the same principles of interpretation on which they relied to construe statutes. Their view was a “restatement in somewhat abstract terms of the old common law assumption, shared by the Philadelphia Framers, that the ‘intent’ of any legal document is the product of the interpretive process and not some fixed meaning that the author locks into the document’s text at the outset.”⁶⁶ In this sense, the Federalist defense of the Constitution was no different than the Anti-Federalist critique; Federalists and Anti-Federalists agreed that the courts would construe the Constitution in the same manner that they construed statutes, and that in the process the courts would fix the meaning of ambiguous constitutional provisions.

Federalists and Anti-Federalists disagreed, however, over the desirability—or at least acceptability—of judicial interpretation of the Constitution. The Federalists argued that Brutus’s account of the dangers of judicial construction of the Constitution was hyperbolic. First, Federalists argued that “[t]he rules of legal interpretation are rules of *common sense*, adopted by the courts in the construction of the laws In relation to [a constitution of government], the natural and obvious sense of its provisions, apart from any technical rules, is the true criterion of construction.”⁶⁷ There thus was little reason to fear, as

id. NO. 82 (Alexander Hamilton), at 491.

65. RAKOVE, *supra* note 37, at 160; *see also* Philip A. Hamburger, *The Constitution’s Accommodation of Social Change*, 88 MICH. L. REV. 239, 306–12 (1989). Even more ambivalent defenders of the Constitution were willing to overlook the problem of constitutional ambiguity. *See, e.g.*, MASON, *supra* note 60, at 157 (noting that at the Virginia ratifying convention, Edmund Randolph observed, “My objection is, that the [Necessary and Proper Clause] is ambiguous, and that that ambiguity may injure the states. . . . But, sir, are we to reject [the Constitution], because it is ambiguous in some particular instances? . . . [I]ts adoption is necessary to avoid the storm which is hanging over America . . .”).

66. H. Jefferson Powell, *The Original Understanding of Original Intent*, 98 HARV. L. REV. 885, 910 (1985).

67. THE FEDERALIST NO. 83 (Alexander Hamilton), *supra* note 4, at 496–97; *see also* 4 ELLIOT’S DEBATES, *supra* note 4, at 71 (remarks of John Steele at the first North Carolina convention) (“Is it not a maxim of universal jurispru-

Brutus did, that the courts would “find in the Constitution anything shocking or surprising to the ordinary reader.”⁶⁸

Second, the Federalists, led by Hamilton, addressed the Anti-Federalists’ contention that the federal courts’ power to construe the Constitution is fundamentally antidemocratic. Hamilton argued that the Constitution “is, in fact, and must be regarded by the judges, as a fundamental law,” and that it “therefore belongs to them to ascertain its meaning, as well as the meaning of any particular act proceeding from the legislative body.”⁶⁹ It was essential that the courts maintain this power of interpretation over both statutes and the Constitution, Hamilton argued, because in those cases in which there is an

irreconcilable variance between the two, that which has the superior obligation and validity ought, of course, to be preferred; or, in other words, the Constitution ought to be preferred to the statute, the intention of the people to the intention of their agents.⁷⁰

In other words, the power of the courts to construe the Constitution does not “suppose a superiority of the judicial to the legislative power”; it supposes, rather, only that “the power of the people is superior to both, and that where the will of the legislature, declared in its statutes, stands in opposition to that of the people, declared in the Constitution, the judges ought to be governed by the latter rather than the former.”⁷¹

Whereas Brutus and the Anti-Federalists feared that interpretation would lead to a federal government of unlimited powers, Madison, Hamilton, and the Federalists believed that legal interpretation was an inevitable—and inevitably innocuous—process that involved the straightforward application of common sense to text. As Jefferson Powell has argued, many Anti-Federalists, including Brutus, would have preferred a compact in the nature of a contract among the States that left

dence, of reason and common sense, that an instrument or deed of writing shall be so construed as to give validity to all parts of it, if it can be done without involving any absurdity?”).

68. Powell, *supra* note 66, at 911.

69. THE FEDERALIST NO. 78 (Alexander Hamilton), *supra* note 4, at 467.

70. *Id.*

71. *Id.* at 467–68. Hamilton also responded to Brutus’s contention that the “real effect of this system of government, will . . . be brought home to the feelings of the people, through the medium of the judicial power.” *Essays of Brutus* No. 11, N.Y.J., Jan. 31, 1788, *supra* note 46, at 417. The courts, he argued, would have “no influence over either the sword or the purse,” and would have “neither FORCE nor WILL but merely judgment; and must ultimately depend upon the aid of the executive arm even for the efficacy of its judgments.” THE FEDERALIST NO. 78 (Alexander Hamilton), *supra* note 4, at 465.

no room for disagreement over what powers the States had ceded; they “assumed the validity of the anti-interpretive tradition’s equation of construction and corruption.”⁷² But the leading Anti-Federalists, perhaps because they hoped to generate opposition to the Constitution by arguing that if ratified it would be construed as a quasi-statute,⁷³ agreed with Madison and Hamilton that constitutional ambiguities would be resolved through case-by-case judicial interpretation.

Often it is difficult to discern with confidence the original understanding of the Constitution, particularly as applied to a specific problem that arises today, because supporters and opponents of ratification offered conflicting accounts of the Constitution’s meaning. In such cases, there are several plausible accounts of the original understanding.⁷⁴ In contrast, it is generally easier to identify an original understanding of questions expressed at a higher level of generality.⁷⁵ That appears to be the case here. Federalists and Anti-Federalists were in substantial agreement about the manner in which constitutional ambiguities would be resolved; one can therefore assert, albeit with the sort of tentativeness that must accompany any attempt to discern one metaunderstanding from the wealth of views expressed during the ratification period, that the original understanding of constitutional ambiguities was that they would sometimes be addressed—and constitutional meaning fixed—through subsequent adjudication.

2. Qualifications to the Conventional Account

The risk of oversimplification is great, however, when attempting to discern original meaning. Thus a few important qualifications to the conventional account of the original under-

72. See Powell, *supra* note 66, at 912.

73. See *id.* at 905.

74. One approach, which the federalism majority consistently followed, is to cite Anti-Federalist concerns about the meaning of the Constitution to demonstrate that the delegates at the state ratification conventions would never have voted to ratify the Constitution unless it accommodated those concerns. See Smith, *supra* note 18, at 259–62. The other approach is to argue that the Constitution was ratified *notwithstanding* the Anti-Federalists’ frequently expressed disapproval of many provisions of the proposed Constitution, and that their statements demonstrated their “understanding” of the Constitution. Thus, the originalist can argue, Anti-Federalist fears were realized upon ratification. The dissenters in federalism cases on the Rehnquist Court consistently followed this approach. *Id.* at 262–65.

75. See *id.* at 284.

standing of how constitutional ambiguities would be resolved are in order here. First, many during the framing era believed that adjudication was not the only way to resolve constitutional ambiguities. Madison, for example, believed that Congress's deliberations could "liquidate"⁷⁶ and fix meaning as well. During the debate over the President's power to remove an executive officer, for example, Representative Madison acknowledged that "in the ordinary course of government . . . the exposition of the laws and [C]onstitution devolves upon the Judiciary," but argued that in deciding the "limits of the powers of the several departments," none of the branches "has more right than another to declare their sentiments on that point."⁷⁷ Similar sentiments appear in the debate over whether Congress has power to create a national bank.⁷⁸ But even the questions about removal and the bank ultimately were answered—if not permanently fixed—by judicial determination, even as the courts gave deference to the views expressed by the early Congresses.⁷⁹

Second, in a series of articles and an important recent book, Larry Kramer has disputed the conventional account that the Framers believed that constitutional ambiguities would be resolved through invocation of the power of judicial review.⁸⁰

76. See THE FEDERALIST NO. 37 (James Madison), *supra* note 4, at 229.

77. 1 ANNALS OF CONG. 520 (J. Gales ed., 1789) (remarks of Rep. James Madison on June 17, 1789); *accord id.* at 514 ("The decision that is at this time made [about the President's power to remove an executive officer] will become the permanent exposition of the Constitution.").

78. See, e.g., 2 ANNALS OF CONG. 1954 (1791) (remarks of Fisher Ames on Feb. 3, 1791) ("The Constitution contains the principles which are to govern in making laws; but every law requires an application of the rule to the case in question.").

79. See *Humphrey's Executor v. United States*, 295 U.S. 602, 630–31 (1935) (holding that Congress has the power to restrict the President's power to remove an official who exercises quasi-legislative or quasi-judicial authority; arguing that the debate in first Congress pertained only to a purely executive officer); *Myers v. United States*, 272 U.S. 52, 112–17 (1926) (holding that the President enjoys the power to remove executive officers, and relying on the first Congress's debate over the removal power); *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 402 (1819) (upholding the constitutionality of a law creating a national bank) ("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 [C]onstitution gave no countenance. These observations belong to the cause; but they are not made under the impression, that, were the question entirely new, the law would be found irreconcilable with the [C]onstitution.").

80. LARRY D. KRAMER, THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW (2004) [hereinafter KRAMER, PEOPLE THEMSELVES]; Larry D. Kramer, *Foreword: We the Court*, 115 HARV. L. REV. 4

Kramer argues that the role of the courts in determining constitutional meaning was understood at the ratification to be sharply limited, at least in cases involving the limits of federal power.⁸¹ He contends that modern originalist accounts of the courts' role—at least in policing the boundaries of congressional authority—are ahistorical, and that the historical record reveals instead a strong preference for “popular constitutionalism,”⁸² under which ultimate “interpretive authority remained with the people.”⁸³

Kramer does not deny that “an idea of judicial review had already emerged before the Constitution was adopted”; he contends, rather, that “the practice that emerged in the 1780s was not yet well-established or fully developed and, to the extent it had proponents, was different in kind from what commentators today . . . mean when they talk about judicial review.”⁸⁴ Kramer acknowledges the colloquy between Brutus and Publius, as the pseudonymous author of *The Federalist*, about the role of the courts in liquidating constitutional meaning, but Kramer argues that it was not representative of popular sentiment at the time of the ratification.⁸⁵ Kramer also recognizes that the Framers understood that “a written charter would contain ambiguities and uncertainties and that these would need to be authoritatively resolved.”⁸⁶ He contends, however, that

Americans at the Founding also believed that such questions could, and should, be settled by popular and political means, even though this might entail periods during which some questions of constitutional meaning could remain unsettled and subject to ongoing controversy. Permitting judges to resolve legitimate disagreements about the meaning of the Constitution would have violated core principles of republicanism, which held that such questions could only be settled by the sovereign people. Disputes over what the Constitution meant, in the Founders' view, had to be resolved by popular action—whether

(2001) [hereinafter Kramer, *We the Court*]; Larry D. Kramer, *Putting the Politics Back into the Political Safeguards of Federalism*, 100 COLUM. L. REV. 215 (2000) [hereinafter Kramer, *Political Safeguards*]; Larry D. Kramer, *When Lawyers Do History*, 72 GEO. WASH. L. REV. 387 (2003) [hereinafter Kramer, *Lawyers*].

81. Kramer, *Political Safeguards*, *supra* note 80, at 232, 240, 287–88.

82. KRAMER, PEOPLE THEMSELVES, *supra* note 80, at 8; Kramer, *We the Court*, *supra* note 80, at 16.

83. Kramer, *We the Court*, *supra* note 80, at 49.

84. Kramer, *Lawyers*, *supra* note 80, at 387.

85. Kramer, *Political Safeguards*, *supra* note 81, at 246–51.

86. *Id.* at 237.

at the polls; through a process of petitioning, mobbing, and holding extralegal conventions; or by revolutionary violence.⁸⁷

It was “the people themselves—working through or responding to their agents in the government—who were responsible for seeing that the Constitution was properly interpreted and implemented. The idea of turning this responsibility over to judges,” Kramer argues, “was unthinkable.”⁸⁸

As I understand Kramer’s project to have evolved,⁸⁹ it is not to deny *any* role to the courts in construing the Constitution and resolving ambiguities, even in federalism cases. As he concedes, the Framers’ apparent view that politics could settle constitutional controversies was naïve, and courts are, particularly by modern standards, a “natural choice” to determine constitutional meaning.⁹⁰ But there is a “world of difference,” he argues, “between judicial supremacy and judicial sovereignty.”⁹¹ Under the former, courts have the “last word” on constitutional meaning; under the latter, courts have the “only word.”⁹² “Nothing in the doctrine of judicial supremacy,” Kramer contends, “requires denying either that the Constitution has qualities that set it apart from ordinary law, or that these qualities confer legitimate interpretive authority on political actors as a means of ensuring continued popular input in shaping constitutional meaning.”⁹³

There remains substantial controversy over Kramer’s core assertion about the courts’ limited role in policing the boundaries of Congress’s power.⁹⁴ But even accepting Kramer’s ac-

87. *Id.*; see also *id.* at 257.

88. Kramer, *We the Court*, *supra* note 80, at 12–13.

89. See Kramer, *Lawyers*, *supra* note 80, at 388 (conceding that his critics are “not wrong to say that I have ‘proved something of a moving target,’ for coming to understand the historical origins of judicial review has been an ongoing and unfolding process”).

90. Kramer, *We the Court*, *supra* note 80, at 13.

91. *Id.*

92. *Id.*

93. *Id.* Kramer also does not purport to be an originalist. See Larry Kramer, *On Finding (and Losing) Our Origins*, 26 HARV. J.L. & PUB. POL’Y 95, 105–06 (2003) (“It makes no sense to address a new problem by resort to an original blueprint after the design has been modified many times.”).

94. See, e.g., Kramer, *Lawyers*, *supra* note 80 at 387–89; see also Norman R. Williams, *The People’s Constitution*, 57 STAN. L. REV. 257 (2004). Compare JESSE H. CHOPER, *JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS* (1980), Jack N. Rakove, *Once More Into the Judicial Breach*, 72 GEO. WASH. L. REV. 381 (2003), and Herbert Wechsler, *The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government*, 54 COLUM. L. REV. 543 (1954), with Larry Alexander & Lawrence

count, there is no fundamental inconsistency in asserting that the Framers believed that the constitutional ambiguities could be resolved *either* through adjudication *or* through popular and political means. That Madison believed that congressional deliberation⁹⁵ or popular action⁹⁶ could fix constitutional meaning does not mean that he rejected the notion that the courts could fix it in appropriate cases, as well. Indeed, his discussion in *The Federalist* No. 37 and in other sources suggests that he saw both as viable means of liquidating the meaning of constitutional ambiguities.⁹⁷

In any event, at least five Justices appeared unwilling to accept Kramer's view of judicial review in cases involving challenges to Congress's authority.⁹⁸ To those Justices—and perhaps to the Justices in the dissent, as well⁹⁹—the doctrine of judicial review was alive and well in federalism cases. On their own terms, then, the Justices appeared to embrace—albeit with strikingly different degrees of confidence in federalism cases¹⁰⁰—the ratification-era belief that the Court would play a

B. Solum, *Popular? Constitutionalism?*, 118 HARV. L. REV. 1594 (2005), Bradford R. Clark, *Unitary Judicial Review*, 72 GEO. WASH. L. REV. 319 (2003), Saikrishna Prakash & John Yoo, *Against Interpretive Supremacy*, 103 MICH. L. REV. 1539 (2005), Saikrishna B. Prakash & John C. Yoo, *Questions for the Critics of Judicial Review*, 72 GEO. WASH. L. REV. 354 (2003), G. Edward White, *The Constitutional Journey of Marbury v. Madison*, 89 VA. L. REV. 1463 (2003), and John C. Yoo, *The Judicial Safeguards of Federalism*, 70 S. CAL. L. REV. 1311 (1997).

95. See *supra* note 77 and accompanying text.

96. See, e.g., James Madison, Virginia Resolutions (Dec. 21, 1798), reprinted in 4 ELLIOT'S DEBATES, *supra* note 4, at 528–29; see generally Theodore W. Ruger, “A Question Which Convulses a Nation”: *The Early Republic's Greatest Debate About the Judicial Review Power*, 117 HARV. L. REV. 826, 869 (2004).

97. See *supra* notes 62–66 and accompanying text.

98. See, e.g., *Printz v. United States*, 521 U.S. 898, 898 (1997); *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 579–80 (1985) (Rehnquist, J., dissenting); *id.* at 580 (O'Connor, J., dissenting).

99. Justices Stevens, Souter, Ginsburg, and Breyer have asserted that they are willing to invalidate a statute of Congress on federalism grounds under rational basis scrutiny, even if they seem unwilling to do so under other judicially constructed limits. See *United States v. Morrison*, 529 U.S. 598, 638 (2000) (Souter, J., dissenting, joined by Stevens, Ginsburg, and Breyer, JJ.); *id.* at 663 (Breyer, J., dissenting, joined by Stevens, J.).

100. Compare *Morrison*, 529 U.S. at 617–18 (rejecting the argument that “Congress may regulate noneconomic, violent criminal conduct based solely on that conduct's aggregate effect on interstate commerce” because the “Constitution requires a distinction between what is truly national and what is truly local”), and *United States v. Lopez*, 514 U.S. 549, 564 (1995) (“Although Justice Breyer argues [in dissent] that acceptance of the Government's rationales

significant role in construing the Constitution to liquidate meaning. And it is on their own terms that I consider their use of originalism in deciding federalism cases.

Third, Gary Lawson and Michael Stokes Paulsen have offered an account of originalism that rejects not only the Madisonian theory of liquidation through adjudication of constitutional ambiguities, but also the use of precedent itself in many constitutional cases.¹⁰¹ According to this view, a court can no more give force to precedent that incorrectly interpreted the Constitution than it could give force to a statute or an executive action that is inconsistent with the Constitution. "If the Constitution says X and a prior judicial decision says Y," Lawson argues, "a court has not merely the power, but the obligation, to prefer the Constitution."¹⁰² Indeed, Lawson contends, "If the Constitution is supreme law, it is supreme over all competing sources of law," statutory, judicial, or otherwise.¹⁰³ If taken seriously, this argument would preclude a court today from giving dispositive effect to an earlier decision in a constitutional case when the earlier decision was inconsistent with the original meaning as discerned today, notwithstanding Madison's

would not authorize a general federal police power, he is unable to identify any activity that the States may regulate but Congress may not."), *with Morrison*, 529 U.S. at 638 (Souter, J., dissenting) (arguing that the Court's "substantial effects' analysis is not a factual enquiry, for Congress in the first instance with subsequent judicial review looking only to the rationality of the congressional conclusion, but one of a rather different sort, dependent upon a uniquely judicial competence"), and *Lopez*, 514 U.S. at 604 (Souter, J., dissenting) ("The practice of deferring to rationally based legislative judgments 'is a paradigm of judicial restraint.' In judicial review under the Commerce Clause, it reflects our respect for the institutional competence of the Congress on a subject expressly assigned to it by the Constitution and our appreciation of the legitimacy that comes from Congress's political accountability in dealing with matters open to a wide range of possible choices." (quoting *FCC v. Beach Commc'ns, Inc.*, 508 U.S. 307, 314 (1993))).

101. See Gary Lawson, *The Constitutional Case Against Precedent*, 17 HARV. J.L. & PUB. POL'Y 23 (1994); Michael Stokes Paulsen, *Abrogating Stare Decisis by Statute: May Congress Remove the Precedential Effect of Roe and Casey?*, 109 YALE L.J. 1535 (2000).

102. Lawson, *supra* note 101, at 27–28.

103. *Id.* at 30. Paulsen's argument is more modest. He argues that although stare decisis in constitutional adjudication is not unconstitutional, neither is it constitutionally compelled. Paulsen, *supra* note 101, at 1543–51. Accordingly, he argues that Congress has authority to abrogate stare decisis in constitutional cases. *Id.* at 1567–99. "The upshot of such a statute would be that courts would be obliged to overrule a prior interpretation of the Constitution if persuaded that the prior interpretation was incorrect on the merits." *Id.* at 1538.

theory about the liquidation of constitutional meaning through adjudication.

There are serious difficulties with this view. The Constitution itself confers on federal courts the “judicial Power,” which in light of history and context can reasonably be read to authorize reliance on precedent in constitutional adjudication.¹⁰⁴ Wholesale abandonment of the doctrine of stare decisis in constitutional adjudication risks not only upsetting reliance interests, but also facilitating judicial about-faces that undermine public confidence in the legitimacy of the Court’s judgments. The risk of judicial instrumentalism—which proponents of originalism claim the methodology minimizes—likely would increase absent the constraining force of precedent. The theory that constitutional supremacy is inconsistent with a system that accords binding force to judicial decisions that departed from original meaning. Moreover, it ignores the possibility that the Constitution was originally understood to accommodate and perhaps embrace the use of precedent in constitutional cases—and Madison’s and Hamilton’s account of how constitutional ambiguities would be resolved might be important evidence of such an understanding.¹⁰⁵

Whatever methodological or theoretical defects there may be in Lawson’s and Paulsen’s suggestion, for present purposes it is sufficient to note that it is not (and surely does not purport to be) a valid *descriptive* account of recent judicial practice. Although Justice Thomas has on occasion suggested a willingness to abandon hundreds of years of precedent in constitutional

104. See Richard H. Fallon, Jr., *Stare Decisis and the Constitution: An Essay on Constitutional Methodology*, 76 N.Y.U. L. REV. 570, 577–81 (2001).

105. Lawson’s and Paulsen’s provocative articles are part of a larger debate over whether stare decisis and originalism are fundamentally at odds. The seminal treatment is Henry P. Monaghan’s *Stare Decisis and Constitutional Adjudication*, in which he considered whether it is possible to be a strict originalist when so much of the Court’s jurisprudence is inconsistent with the original understanding. 88 COLUM. L. REV. 723 (1988). Monaghan suggested that stare decisis can explain the gap. See *id.* at 747–48. He argued that, at least in some important cases, it ought to bridge the gap, and that in other cases it promotes other values, such as the conception that the law is impersonal. *Id.* at 752–53. Monaghan’s treatment sparked a lively debate over whether originalism is consistent with stare decisis. In addition to Lawson’s and Paulsen’s articles, see Dorf, *supra* note 30, at 1800–21 (offering an account of originalism that is consistent with the use of stare decisis), and Fallon, *supra* note 104 (arguing that stare decisis enjoys constitutional legitimacy because it is widely accepted as such and contributes to the cause of reasonable justice).

cases,¹⁰⁶ for the most part the Justices accept the binding force of precedent in constitutional cases.¹⁰⁷ Indeed, even Justice Scalia acknowledges that “almost every originalist would adulterate [originalism] with the doctrine of stare decisis.”¹⁰⁸

The final qualification about the account I present here of the original understanding of how constitutional ambiguities would be resolved relates to the scope of application of the theory of liquidation, and specifically to the famously elusive distinction between dicta and holdings. Even accepting the account presented here of the original understanding of how constitutional ambiguities would be resolved, how much of what the Court says in addressing a constitutional question actually fixes constitutional meaning? The question is particularly important when considering opinions by Chief Justice Marshall, given his tendency to resolve—or at least offer thoughts about—questions not necessarily presented in the cases before him.¹⁰⁹

One possibility is utterly conventional: only the holding of a case can fix the meaning of an ambiguous constitutional provision; dicta, in contrast, have never been binding in the Anglo-American judicial tradition, and thus could not fix constitutional meaning. If what Madison, Hamilton, and others had in mind in anticipating judicial liquidation of constitutional meaning was simply that the Court’s holdings would become binding interpretations of the Constitution, then there is nothing particularly novel about their understanding—other than, perhaps, the suggestion that the courts would in fact have a role to

106. See, e.g., *Camps Newfound/Owatonna, Inc. v. Town of Harrison*, 520 U.S. 564, 610–21 (1997) (Thomas, J., dissenting); *United States v. Lopez*, 514 U.S. 549, 585–602 (1995) (Thomas, J., concurring).

107. I say “for the most part” because the Court has frequently stressed that stare decisis “is not an inexorable command,” particularly in constitutional cases. See *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 854 (1992).

108. Scalia, *Originalism*, *supra* note 16, at 861; accord Antonin Scalia, *Response*, in *A MATTER OF INTERPRETATION*, *supra* note 17, at 129, 139 [hereinafter *Scalia, Response*] (“The demand that originalists alone . . . forswear stare decisis is essentially a demand that they alone render their methodology so disruptive of the established state of things that it will be useful only as an academic exercise and not as a workable prescription for judicial governance.”).

109. See *CURRIE, SUPREME COURT*, *supra* note 7, at 125–26 (describing Marshall’s decisions as being characterized by “rhetorical flourish, bare assertion, plentiful dicta, multiple holdings, inattention to favorable precedent, and emphasis on the undesirable consequences of an interpretation at variance with his own”).

play in deciding constitutional meaning. But even if Madison and Hamilton merely expected that constitutional ambiguities gradually would be resolved according to something like the common law method, “[t]o slight [certain important statements in Marshall’s] opinions as dicta, though such they were on a technical view, is to disregard significant aspects of his labors and the way in which constitutional law develops.”¹¹⁰

In any event, it is easier to assert that only holdings fix constitutional meaning than it is to distinguish between holdings and dicta in practice. There is substantial agreement on the core principle that dicta has persuasive but not binding effect, largely for the reasons offered by Chief Justice Marshall in *Cohens v. Virginia*.¹¹¹ The disagreement is definitional: as Michael Dorf has noted, “we would find a consensus for the judgment that everything that is not holding is dictum and everything that is not dictum is holding, but little in a way of a substantive definition of either term.”¹¹² Most conventional definitions of dicta—statements that are not “necessary” to the decision in the precedent case or, to use Marshall’s language, that “go beyond the case”—are circular, because the “very issue in many disputed cases . . . is precisely how far the earlier case went.”¹¹³

Courts and commentators sometimes assert that a statement is dictum if it was not essential to the outcome of the case.¹¹⁴ This formulation focuses on the facts and the outcome in the precedent case, and asks which facts were material to the decision. According to this view, elaborations of legal principle that are broader than the narrowest proposition that could have decided the case given its particular facts are considered dicta.¹¹⁵ Although frequently deployed in practice, this

110. Felix Frankfurter, *John Marshall and the Judicial Function*, 69 HARV. L. REV. 217, 221 (1955).

111. 19 U.S. (6 Wheat.) 264, 399–400 (1821) (“The question actually before the Court is investigated with care, and considered in its full extent. Other principles which may serve to illustrate it, are considered in their relation to the case decided, but their possible bearing on all other cases is seldom completely investigated.”).

112. Michael C. Dorf, *Dicta and Article III*, 142 U. PA. L. REV. 1997, 2004–09, 2040–41 (1994).

113. *Id.* at 2003.

114. See JULIUS STONE, LEGAL SYSTEM AND LAWYERS’ REASONINGS 267–80 (1964); Larry Alexander, *Constrained by Precedent*, 63 S. CAL. L. REV. 1, 18 (1989); Dorf, *supra* note 112, at 2008–24; Arthur L. Goodhart, *Determining the Ratio Decidendi of a Case*, 40 YALE L.J. 161, 162 (1930).

115. Michael Dorf offers as an example Chief Justice Rehnquist’s narrow

formulation of the distinction between holdings and dicta has serious potential for judicial manipulation to serve instrumental ends, and often results in a patchwork of precedent that provides little guidance to lower courts and potential litigants.¹¹⁶ The competing explanation of the distinction between holdings and dicta focuses on the rationale of the precedent case. Under this definition, courts are bound by statements that form part of the rationale of the decision in the precedent case, even if, when viewed from a post hoc perspective, they were not technically essential to the result.¹¹⁷ Although this formulation of the distinction between holdings and dicta raises definitional problems of its own—specifically, there is no neat way to determine the “rationale” of the precedent decision¹¹⁸—it is more consistent with the rule of law and a greater obstacle to judicial instrumentalism.¹¹⁹

If one imports the expansive view of what counts as dicta—the “facts-and-outcomes” approach—to the context of liquidation of constitutional ambiguities, then early decisions of the Supreme Court correspondingly will be treated as having resolved fewer ambiguous questions. If, on the other hand, one follows the rationale-focused approach to distinguishing between holdings and dicta, then early decisions will be treated as having addressed and presumably fixed a greater range of ambiguities. At a minimum, the distinction between holdings and dicta is sufficiently indeterminate that we must be cautious in invoking it as a basis for claims that statements by a prior Court are not binding, either as a matter of stare decisis or the original understanding of how constitutional ambiguities would be resolved.

treatment of *Roe v. Wade* in his plurality opinion in *Webster v. Reproductive Health Services*, 492 U.S. 490, 517–21 (1989). See Dorf, *supra* note 112, at 2007–08, 2030–33.

116. MELVIN A. EISENBERG, *THE NATURE OF THE COMMON LAW* 53 (1988); Alexander, *supra* note 114, at 20, 28–29 (“[R]estricting a rule to the facts of the precedent case is inconsistent with constraint by precedent.”); Dorf, *supra* note 112, at 1999, 2024; Linda Meyer, “Nothing We Say Matters”: Teague and New Rules, 61 U. CHI. L. REV. 423, 459–76 (1994); Henry P. Monaghan, *Taking Supreme Court Opinions Seriously*, 39 MD. L. REV. 1, 5–6 (1979).

117. See Alexander, *supra* note 114, at 32–33; Dorf, *supra* note 112, at 2040–48; Monaghan, *supra* note 105, at 763–65; see also Michael Abramowicz & Maxwell Stearns, *Defining Dicta*, 57 STAN. L. REV. 953 (2005).

118. See, e.g., Alexander, *supra* note 114, at 18 n.21 (listing sources); Dorf, *supra* note 112, at 2036 nn.142–43 (listing sources).

119. See Dorf, *supra* note 112, at 2049–66.

These qualifications suggest that caution, rather than confidence, is warranted in asserting that the original understanding was that constitutional ambiguities would be resolved by the Court, which would offer fixed meaning in the course of case-by-case adjudication. The Court itself, however, appears to have accepted this account of the original understanding of how constitutional ambiguities would be resolved, by applying an originalist methodology to constitutional interpretation (at least in federalism cases) while following the doctrine of stare decisis. At a minimum, the Court often treats decisions of the early Court as entitled to great deference because most of the Justices of that era participated directly in the ratification debates, and all were members of the founding generation and thus in a better position to assess the original understanding than a modern-day judge.¹²⁰ For present purposes, it is the Justices' own understanding of the original understanding that is important, because it is against that understanding that we can judge their treatment of decisions of the Marshall Court.

II. THE MARSHALL COURT, THE REHNQUIST COURT, AND FEDERALISM

It is not difficult to see how, in light of both originalism and the original understanding of how constitutional ambiguities would be resolved, decisions of the Marshall Court are relevant to answering disputed questions of federalism today. Yet therein lies the tension: whereas the Rehnquist Court was most often identified with an aggressive defense of state authority, the Marshall Court consistently upheld claims of broad federal authority while announcing limits on state power. Moreover, the Marshall Court's approach to constitutional interpretation was consistent with Madison's and Hamilton's predictions, while simultaneously confirming the Anti-Federalists' fears. As Marshall explained in *Gibbons v. Ogden*, "We know of no rule for construing the extent of such powers, other than is given by the language of the instrument which

120. See, e.g., *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 856 (1995) (Thomas, J., dissenting) (declining to rely on the views of Joseph Story because he "was not a member of the Founding generation, and his Commentaries on the Constitution were written a half century after the framing. Rather than representing the original understanding of the Constitution, they represent only his own understanding"); cf. *Printz v. United States*, 521 U.S. 898, 905 (1997) ("contemporaneous legislative exposition of the Constitution . . . , acquiesced in for a long term of years, fixes the construction to be given its provisions" (quoting *Myers v. United States*, 272 U.S. 52, 175 (1926))).

confers them, taken in connection with the purposes for which they were conferred.”¹²¹ Marshall’s Court often self-consciously played the role that Madison envisioned for it, tackling an “obscure and equivocal” document, “liquidat[ing] and ascertain[ing]” its meaning in “a series of particular discussions and adjudications.”¹²² This Part first provides an overview of the Marshall Court’s important federalism decisions and then presents the results of a study of the Rehnquist Court’s treatment of those decisions in federalism cases.

A. A BRIEF HISTORY OF THE MARSHALL COURT

President Washington famously warned in his Farewell Address about the dangers of partisanship, but by the time Washington left office, the Federalist and Republican parties had already become rival political forces.¹²³ The principal point of disagreement between the parties was over the extent of the powers that the Constitution vested in the national government, and derivatively over how strictly to construe the charter. Federalists continued to apply traditional methods of statutory construction to the Constitution, which yielded interpretations authorizing broad federal power. In contrast, Republicans, in many ways the intellectual and ideological heirs of the Anti-Federalists,¹²⁴ began to warn that “the ‘wiles of construction’ could be controlled only by a narrow reading of the Constitution’s expansive language.”¹²⁵ Hamilton, the most eloquent voice among the nationalist Federalists, argued that “sound maxim[s] of construction” required that the Constitu-

121. 22 U.S. (9 Wheat.) 1, 189 (1824).

122. THE FEDERALIST NO. 37 (James Madison), *supra* note 4, at 229.

123. The divide was apparent as early as Washington’s first term, when Alexander Hamilton served as Secretary of the Treasury and Thomas Jefferson served as Secretary of State. The most celebrated disagreement between Hamilton and Jefferson concerned the constitutionality of a national bank. Compare Alexander Hamilton, Final Version of an Opinion on the Constitutionality of an Act to Establish a Bank (1791) [hereinafter Hamilton, Opinion] (arguing for an expansive definition of federal power), reprinted in 8 PAPERS OF ALEXANDER HAMILTON 97, 119–26 (Harold Syrett ed., 1965), with Thomas Jefferson, Opinion on the Constitutionality of a National Bank (1791) (arguing for a narrow definition of federal power), reprinted in THOMAS JEFFERSON: WRITINGS 416, 416–20 (Merrill D. Peterson ed., 1984).

124. See, e.g., 4 D. MALONE, JEFFERSON AND HIS TIME: JEFFERSON THE PRESIDENT 25–26 (1970) (noting Jefferson’s distrust of government strength); Jeff Powell, *The Compleat Jeffersonian: Justice Rehnquist and Federalism*, 91 YALE L.J. 1317, 1364 (1982) (noting Jefferson’s goal of limited government).

125. Powell, *supra* note 66, at 923.

tion's affirmative grants of authority be "construed liberally."¹²⁶ Jefferson, the most cogent voice among the devolutionist Republicans, responded that "[t]he States supposed that by their tenth amendment they had secured themselves against constructive powers."¹²⁷

Not all of the Federalists were quite as nationalist as Hamilton. By 1800, President Adams had purged his cabinet of Hamiltonians, and in May of that year he appointed John Marshall, whom Adams viewed as ideologically compatible, to be Secretary of State.¹²⁸ But Marshall shared Hamilton's belief that a strong national government would be better at the art of governing¹²⁹ and would save popular government and the Revolution "from their excesses."¹³⁰ In October 1800, one month before the national elections, Chief Justice Oliver Ellsworth announced that he planned to resign from the Court because of his waning health.¹³¹ President Adams nominated Marshall on January 20, 1801, and he was confirmed by the Senate on

126. Hamilton, Opinion, *supra* note 123, at 105.

127. Letter from Thomas Jefferson to Justice William Johnson (June 12, 1823), reprinted in THE POLITICAL WRITINGS OF THOMAS JEFFERSON 146, 148 (Edward Dumbauld ed., 1955); see also Letter from Thomas Jefferson to Gideon Granger (1800), reprinted in THOMAS JEFFERSON ON DEMOCRACY 30, 30 (Saul Padover ed., 1939) ("[T]he true theory of our Constitution is surely the wisest and best, that the States are independent as to everything within themselves, and united as to everything respecting foreign nations. Let the General Government be reduced to foreign concerns only . . .").

Jefferson's critique of constitutional interpretation ultimately became the core argument in the Virginia and Kentucky Resolutions, which Jefferson and Madison (at that point a Republican) wrote to protest the Alien and Sedition Acts of 1798. See Powell, *supra* note 66, at 924–27. The resolutions argued that the Constitution was a contract among sovereign states, which retained ultimate authority to resolve disputes over its meaning and to strike down acts of Congress that violated it. See Thomas Jefferson, Kentucky Resolutions (Nov. 10, 1798, Nov. 14, 1799) reprinted in 4 ELLIOT'S DEBATES, *supra* note 4, at 540, 540–45; James Madison, Virginia Resolutions (Dec. 21, 1798), reprinted in 4 ELLIOT'S DEBATES, *supra* note 4, at 528, 528–29.

128. See R. K. NEWMYER, JOHN MARSHALL AND THE HEROIC AGE OF THE SUPREME COURT 141 (2001).

129. See THE FEDERALIST NO. 27 (Alexander Hamilton), *supra* note 4, at 174–75.

130. WOOD, *supra* note 57, at 517. Serving in the militia during the war made Marshall a nationalist, NEWMYER, *supra* note 128, at 29, and his subsequent experience in the Virginia House of Delegates convinced him that the legislature was driven largely by parochialism, *id.* at 28, 39, 42.

131. GEORGE LEE HASKINS & HERBERT A. JOHNSON, 2 THE OLIVER WENDELL HOLMES DEVISE HISTORY OF THE SUPREME COURT OF THE UNITED STATES: FOUNDATIONS OF POWER: JOHN MARSHALL, 1801–15, at 103 n.158 (1981).

January 27, after the Republicans had swept the Presidency, the House, and the Senate, but before the transfer of power.¹³² “Strengthening the federal judiciary, since it was the only hedge against Republican dominance, was the one subject on which the lame-duck Federalists could unite.”¹³³ Marshall’s Supreme Court soon became the Federalists’ only “pocket of resistance to Jeffersonian Republicanism.”¹³⁴

“[F]ate and ambition made Jefferson president and Marshall chief justice,” and the two men came to “symbolize[] and personalize[] the competing constitutional persuasions of the age.”¹³⁵ Their most famous conflict was over the events that led to, and the decision in, *Marbury v. Madison*,¹³⁶ in which Marshall both rebutted Jefferson’s earlier argument that the States ought to retain ultimate authority to interpret the Constitution¹³⁷ and insisted that the executive is bound by the rule of law.¹³⁸ After *Marbury*, Marshall’s Court consistently rejected the “state-sovereignty and constitutional-compact themes of Republican constitutional thought.”¹³⁹ The Court chose instead to apply to the Constitution the traditional methods of construction that Madison and Hamilton believed were appropriate and that Anti-Federalist opponents of ratification frequently warned would apply.¹⁴⁰

132. NEWMYER, *supra* note 128, at 142, 146.

133. *Id.* at 134. The Judiciary Act of 1801, which the Federalists enacted before the Republicans took office, created sixteen new federal circuit judgeships, expanded the jurisdiction of the federal courts, and reduced the number of Supreme Court justices from six to five, effective at the next vacancy. Act of Feb. 13, 1801, ch.4, 2 Stat. 89. The Act was repealed by the Republicans in 1802, *see* Repeal Act of Mar. 8, 1802, ch. 8, 2 Stat. 132, but by that time Marshall was already on the bench.

134. Powell, *supra* note 66, at 942.

135. NEWMYER, *supra* note 128, at 147.

136. 5 U.S. (1 Cranch) 137 (1803).

137. *Compare id.* at 177–78 (“It is, emphatically, the province and duty of the judicial department, to say what the law is So, if a law be in opposition to the [C]onstitution; . . . the court must determine which of these conflicting rules governs the case”), with Thomas Jefferson, Kentucky Resolutions (Nov. 19, 1798, Nov. 14, 1799), *reprinted in* 4 ELLIOT’S DEBATES, *supra* note 4, at 540, 540 (“[T]his government, created by this compact, was not made the exclusive or final judge of the extent of the powers delegated to itself . . . ; but that, as in all other cases of compact among parties having no common judge, each party has an equal right to judge for itself, as well of infractions as of the mode and measure of redress.”).

138. *See Marbury*, 5 U.S. at 172–73 (concluding that mandamus may lie against the Secretary of State).

139. Powell, *supra* note 66, at 942.

140. *See supra* notes 45–71 and accompanying text.

Marshall and Jefferson clearly disagreed about matters of federalism, as well, but the Marshall Court did not issue its most significant decisions on that topic until after Jefferson had left office.¹⁴¹ During Marshall's thirty-four-year tenure as Chief Justice, his Court addressed a wide range of issues related to the powers of the state and federal governments. It is not my purpose here to explore these decisions in detail, but instead to highlight the most important Marshall Court federalism decisions to provide context for the results of the study.¹⁴²

The Marshall Court pledged fidelity to the doctrine of enumerated powers,¹⁴³ but its decisions on the scope of federal power expansively defined Congress's incidental authority and planted the seeds for later broad constructions of Congress's power to regulate interstate commerce. In *McCulloch v. Maryland*,¹⁴⁴ the Court held, in an opinion by Chief Justice Marshall, that Congress has broad incidental powers beyond those expressly authorized in Article I.¹⁴⁵ The Court also offered a broad construction of the sweep of the Necessary and Proper Clause and held that Congress had power to create a national bank.¹⁴⁶ In *Gibbons v. Ogden*,¹⁴⁷ the Court, again in an opinion by Marshall, defined "commerce" as all "commercial intercourse," not just the exchange of goods, and thus held that Congress has power to license vessels traveling between two states.¹⁴⁸ Although the Court conceded that the "completely internal commerce of a State . . . may be considered as reserved for the State itself,"¹⁴⁹ it suggested that Congress may regulate

141. Jefferson appointed three Justices before his second term ended in 1809, and after 1811, only Marshall and one other Justice—Bushrod Washington—were Federalists. Yet decisions of the Marshall Court were almost always unanimous and were almost always written by Marshall. See CURRIE, SUPREME COURT, *supra* note 7, at 196.

142. For a more exhaustive review, see *id.* at 61–198.

143. See *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 194–95 (1824) (conceding that the commerce power is limited to that "commerce which concerns more states than one The completely internal commerce of a State, then, may be considered as reserved for the State itself."); *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 405 (1819) (conceding that the federal government is one of "enumerated powers" and may "exercise only the powers granted to it").

144. 17 U.S. (4 Wheat.) 316 (1819).

145. *Id.* at 324–26.

146. *Id.* at 422.

147. 22 U.S. 1.

148. *Id.* at 189–90, 204.

149. *Id.* at 195.

commerce that merely “extend[s] to or affect[s] other states.”¹⁵⁰ This provided a doctrinal basis for the Court’s more expansive constructions of the Commerce Clause in the twentieth century.¹⁵¹

The Marshall Court was also aggressive in construing constitutional limits on the power of the States. In *McCulloch*, for example, the Court held that the States cannot tax or regulate the activities of the federal government, and therefore invalidated Maryland’s tax on the national bank¹⁵²—even though, the Court suggested in dicta, state banks would not similarly be immune from federal taxation.¹⁵³ In *Gibbons*, Marshall suggested that Congress’s power to regulate interstate commerce is exclusive,¹⁵⁴ laying the doctrinal foundation for the dormant Commerce Clause.¹⁵⁵

The Marshall Court also narrowly construed the States’ immunity from suit. In *Cohens v. Virginia*,¹⁵⁶ Marshall stated that the Eleventh Amendment does not preclude Supreme Court review of suits commenced by States.¹⁵⁷ Marshall also provided an account of the Eleventh Amendment that is consistent with the narrow “diversity theory” of the provision’s appli-

150. *Id.* at 194.

151. *See, e.g.*, *Wickard v. Filburn*, 317 U.S. 111, 118–29 (1942) (holding that Congress has the power to regulate the growing of wheat for on-farm consumption).

152. 17 U.S. 316, 431–36.

153. *Id.* at 435. Chief Justice Marshall reasoned that whereas a state tax imposed on a federal instrumentality falls principally on persons outside the state—and thus on persons with no electoral control over state decision making—a federal tax would not impose such externalities, because the states are represented in Congress. *See id.* at 428, 435. The Court later disregarded the Chief Justice’s dicta. *See Collector v. Day*, 78 U.S. 113, 126–27 (1871), *overruled in part by Graves v. New York ex rel. O’Keefe*, 306 U.S. 466, 486 (1939) (permitting nondiscriminatory federal taxation of state government officials’ salaries).

154. 22 U.S. at 209; *see also id.* at 227–29 (Johnson, J., concurring) (resting decision on ground that federal power to regulate commerce is exclusive). Marshall later seemed to retreat from this position. *See Willson v. Black-Bird Creek Marsh Co.*, 27 U.S. (2 Pet.) 245, 252 (1829) (upholding a state law that authorized construction of a dam to obstruct a navigable creek).

155. *See* 1 LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 1043–46 (3d ed. 2000) (explaining the theoretical underpinnings of the dormant Commerce Clause, as expressed in *Gibbons*). *But cf.* Norman R. Williams, *Gibbons*, 79 N.Y.U. L. REV. 1398, 1499 (2004) (arguing that Marshall purposely avoided embracing the dormant Commerce Clause because he foresaw the danger of allowing the Court to determine such allocations of power).

156. 19 U.S. (6 Wheat.) 264 (1821).

157. *Id.* at 405–07.

cation.¹⁵⁸ More sweepingly, he suggested that Article III's provision extending the judicial power to cases arising under federal law embraces suits involving States, notwithstanding a State's claim of sovereign immunity.¹⁵⁹ In *Osborn v. Bank of the United States*,¹⁶⁰ Marshall's opinion for the Court held that the Eleventh Amendment does not bar a suit against a state officer, in part because a contrary interpretation might impede the enforcement of federal law.¹⁶¹ In *Bank of the United States v. Planters' Bank of Georgia*,¹⁶² the Court held that the Eleventh Amendment does not bar a suit against a corporation in which the State is a shareholder.¹⁶³ Marshall's justifications for this conclusion—that the State was not a party, the State was acting in its proprietary capacity, and the State had consented to suit by giving the bank the capacity to sue and be sued—suggested broad exceptions to Eleventh Amendment immunity.¹⁶⁴

The Marshall Court also defined the federal judicial power expansively. In *Martin v. Hunter's Lessee*,¹⁶⁵ one of the few significant decisions of the Marshall Court that the Chief Justice did not write,¹⁶⁶ the Court held that Congress had power to authorize the Supreme Court to review state judgments, and thus effectively held that the Court had power to determine the con-

158. See *id.* at 406–07. According to the diversity theory, the Eleventh Amendment limited the federal judicial power only when jurisdiction is based on the Citizen-State Diversity Clause of Article III. See William Fletcher, *The Diversity Explanation of the Eleventh Amendment: A Reply to Critics*, 56 U. CHI. L. REV. 1261, 1264 (1989); William A. Fletcher, *A Historical Interpretation of the Eleventh Amendment: A Narrow Construction of an Affirmative Grant of Jurisdiction Rather Than a Prohibition Against Jurisdiction*, 35 STAN. L. REV. 1033, 1035 (1983); John J. Gibbons, *The Eleventh Amendment and State Sovereign Immunity: A Reinterpretation*, 83 COLUM. L. REV. 1889, 1936–38 (1983).

159. *Cohens*, 19 U.S. at 392.

160. 22 U.S. (9 Wheat.) 738 (1824).

161. *Id.* at 847–58.

162. 22 U.S. (9 Wheat.) 904 (1824).

163. *Id.* at 906–08.

164. See also *United States v. Peters*, 9 U.S. (5 Cranch) 115, 139–41 (1809) (enforcing over an Eleventh Amendment defense a decree against representatives of a deceased state treasurer).

165. 14 U.S. (1 Wheat.) 304 (1816).

166. Justice Story wrote the opinion in *Martin* after Marshall recused himself because he had appeared as counsel in the case before he was on the bench and because his family had an interest in the lands at issue. CURRIE, SUPREME COURT, *supra* note 7, at 91.

stitutionality of state legislation.¹⁶⁷ The Court also suggested that Congress is *required* to authorize such review,¹⁶⁸ although this view remains highly controversial.¹⁶⁹ In *Osborn* and the companion *Planters' Bank* case, the Court held that Congress had power to confer jurisdiction over all suits by or against the bank,¹⁷⁰ because the bank's ability to contract, which was based on the federal statute creating the bank, "forms an original ingredient in every cause."¹⁷¹

"[A]t Marshall's death it could still be said, as in 1789, that the federal government was neither feeble nor of unlimited powers."¹⁷² The narrow holdings in decisions of the Marshall Court tended to be nationalistic, but not unjustifiably so. However, the Court's opinions more often than not suggested expansive constructions of federal power and corresponding limits on state authority.

B. THE REHNQUIST COURT'S TREATMENT OF FEDERALISM DECISIONS OF THE MARSHALL COURT: A STUDY

How have the federalism decisions of the Marshall Court endured? I reviewed every federalism case decided by the Court since 1970, shortly before President Nixon appointed William H. Rehnquist to the Supreme Court, to assess how the Justices treated decisions of the Marshall Court. I compared the way in which the Justices who consistently voted to favor state auton-

167. 14 U.S. at 338–49; *see also Cohens*, 19 U.S. at 387, 391 (extending *Martin* to review of state criminal cases). *Martin* was not the first time that the Court invalidated a state law. It also did so six years earlier in *Fletcher v. Peck*, which invalidated a Georgia law under the Contracts Clause, U.S. CONST. art. I, § 10. 10 U.S. (6 Cranch) 87, 139 (1810).

168. 14 U.S. at 330–31. For elaborations of Justice Story's theory, see Akhil Reed Amar, *The Two-Tiered Structure of the Judiciary Act of 1789*, 138 U. PA. L. REV. 1499, 1501–05 (1990); Lawrence Gene Sager, *Foreword: Constitutional Limitations on Congress' Authority to Regulate the Jurisdiction of the Federal Courts*, 95 HARV. L. REV. 17, 34–35 (1981).

169. Compare Herbert Wechsler, *The Courts and the Constitution*, 65 COLUM. L. REV. 1001, 1005–06 (1965) (arguing that Congress need not confer appellate jurisdiction on the Supreme Court to review decisions of state courts), with Henry M. Hart, Jr., *The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic*, 66 HARV. L. REV. 1362 (1953) (testing the limits of Wechsler's argument).

170. *Osborn v. Bank of the United States*, 22 U.S. (9 Wheat.) 738, 823–24 (1824); *Bank of the United States v. Planters' Bank of Georgia* 22 U.S. (9 Wheat.) 904, 908–10 (1824).

171. *Osborn*, 22 U.S. at 824.

172. CURRIE, SUPREME COURT, *supra* note 7, at 194.

omy over federal authority¹⁷³ relied—or chose not to rely—on decisions of the Marshall Court with the way in which the consistent dissenters in federalism cases¹⁷⁴ treated those decisions. The study reveals that Justices in the federalism majority were substantially more likely to discount the nationalistic implications of Marshall Court decisions—or ignore them altogether—than were the Justices in the dissent, who were significantly more likely to urge fidelity to the spirit of Marshall Court decisions.

1. Preliminary Matters

First, a note about scope. To review every federalism case decided by the Court since 1970,¹⁷⁵ I needed a workable definition of federalism. Naturally, this required some arbitrary line drawing. The “federalism” cases that I considered exhibit the following characteristics: (1) they involved in a direct way¹⁷⁶ the extent of the power of the federal government or the state governments,¹⁷⁷ or the boundary between federal and state

173. I have included the following Justices in this group: William Rehnquist, Sandra Day O'Connor, Antonin Scalia, Anthony Kennedy, Clarence Thomas, and Lewis Powell. Throughout this Article, this group is referred to as “the federalism majority” or simply “the majority.”

174. I have included the following Justices in this group: David Souter, John Paul Stevens, Ruth Bader Ginsburg, Stephen Breyer, Harry Blackmun, Thurgood Marshall, William Brennan, and Byron White. Throughout this Article, this group is referred to as “the federalism dissent” or simply “the dissenters” or “the dissent.”

175. Although I refer to the “Rehnquist Court” throughout this Article, it might seem technically more accurate to refer to the “Rehnquist and Burger Courts,” in light of the temporal range of the cases I considered. I have refrained from using that label, however, because my specific interest is in the Justices who served (for at least some time) after William Rehnquist became Chief Justice. The study, in other words, considers how the Justices of the Rehnquist Court treated decisions of the Marshall Court, but a more complete picture emerges when we include cases that involved those Justices but were decided before 1986. In any event, because federalism was Chief Justice Rehnquist’s signature issue, the bulk of cases relevant to the study were decided after 1986.

176. Many cases indirectly involve the powers of the federal and state governments or the boundary between federal and state power. To take but one obvious example, the debate over whether the Fourteenth Amendment incorporated the protections of the Bill of Rights was in no small part a debate over federalism—that is, over whether the Constitution limited the powers of the state governments in the area of criminal procedure. Such cases turn on an interpretation of the Fourteenth Amendment, which I have mostly excluded from the study. *See infra* note 186.

177. I have also excluded several categories of cases that involve limits imposed by specific constitutional provisions on the respective powers of the state

power; and (2) they required for decision reference to (a) a provision of the Constitution as originally ratified, (b) the Tenth Amendment,¹⁷⁸ (c) the Eleventh Amendment,¹⁷⁹ or (d) a principle inferred from the structure of the Constitution. Under this definition, I reviewed cases involving state sovereign immunity,¹⁸⁰ Congress's power to regulate interstate commerce,¹⁸¹ the dormant Commerce Clause,¹⁸² preemption,¹⁸³ federal common law,¹⁸⁴ abstention,¹⁸⁵ and several other topics.¹⁸⁶

and federal governments, because those cases implicate structural principles or concerns over individual rights that transcend concerns over federalism. For example, I have not included cases involving the Bill of Attainder or Ex Post Facto Clauses, U.S. CONST. art. I, § 9, cl. 3 & § 10, cl. 1, or any of the other provisions in Article I, sections 9 and 10, even though those provisions expressly limit the powers of the state and federal governments. For the same reason, I have excluded habeas cases and cases that turn on interpretation of the Amendments (other than the Tenth) in the Bill of Rights.

178. Although the Tenth Amendment was not part of the Constitution as originally ratified, it confirmed the theory of enumerated powers, which the Constitution's proponents had offered to allay Anti-Federalist concerns about the breadth of the national government's power. *See, e.g.*, JAMES WILSON, SPEECH AT A PUBLIC MEETING IN PHILADELPHIA (Oct. 6, 1787), reprinted in 13 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 337, 339 (John P. Kaminski & Gaspare J. Saladino eds., 1981); THE FEDERALIST NO. 45 (James Madison), *supra* note 4, at 327 ("The powers delegated by the proposed Constitution to the federal government are few and defined. Those which are to remain in the State governments are numerous and indefinite.").

179. Although the Eleventh Amendment, which Congress formally proposed to the states for ratification in 1794, was not ratified until late 1797, *see* U.S. CONSTITUTION SESQUICENTENNIAL COMM., HISTORY OF THE FORMATION OF THE UNION UNDER THE CONSTITUTION 63 (1941), the Court has held that it "confirmed, rather than established, sovereign immunity as a constitutional principle; it follows that the scope of the States' immunity from suit is demarcated not by the text of the Amendment alone but by fundamental postulates implicit in the constitutional design." *Alden v. Maine*, 527 U.S. 706, 728–29 (1999).

180. These cases involve the scope of both state and federal authority. *See, e.g.*, *Alden*, 527 U.S. at 712 (holding that states enjoy immunity from suit in their own courts); *Seminole Tribe v. Florida*, 517 U.S. 44 (1996) (holding that Congress lacks power under Article I to authorize private suits against states in federal court).

181. *See* U.S. CONST., art. I, § 8, cl. 3.

182. The Court has long interpreted the affirmative grant of power to Congress to regulate interstate commerce to imply limits on the power of the states over interstate commerce. *See, e.g.*, *Camps Newfound/Owatonna, Inc. v. Town of Harrison*, 520 U.S. 564, 571 (1997); *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 34–42 (1824).

183. *See* U.S. CONST. art. VI, § 1, cl. 2; *California v. ARC America Corp.*, 490 U.S. 93, 100–01 (1989).

184. Although limits on the power of the federal courts to develop common law often are phrased in terms of the separation of powers, the development of federal common law also raises federalism concerns because of the Supremacy

As this brief statement about the scope of the study reveals, there is an uncomfortable imprecision in any attempt to draw conclusions from even a “comprehensive” consideration of Supreme Court federalism decisions. Even if the question of scope could be easily resolved, problems would still arise in an analysis of the Court’s treatment of Marshall Court decisions. As will become evident, one cannot draw conclusions from the Court’s treatment of precedent from the Marshall Court without a careful consideration of context. It is one thing when the dissent relied heavily on a Marshall decision and the majority declined even to cite it; it is another when both the majority and the dissent relied on the same decision, each claiming that it supports its view of the original understanding. In the latter set of cases, I had to exercise judgment about how to character-

Clause. See generally Bradford R. Clark, *Federal Common Law: A Structural Reinterpretation*, 144 U. PA. L. REV. 1245 (1996) (discussing constitutional and federalism questions raised by federal common law and suggesting that some federal common law rules are consistent with the Constitution but have been mischaracterized).

185. Judicial solicitude for “Our Federalism,” *Younger v. Harris*, 401 U.S. 37, 44 (1971), has led the Court to develop a complex doctrine in which federal courts abstain from hearing cases “where necessary to promote the integrity of state law and respect the autonomy of state judicial bodies.” 1 *TRIBE*, *supra* note 155, at 568; see also David L. Shapiro, *Jurisdiction and Discretion*, 60 N.Y.U. L. REV. 543 (1985).

186. The most conspicuous absence from this list is the Fourteenth Amendment, which (along with the other Reconstruction Amendments) was intended to be “a limitation[] of the power of the States and an enlargement[] of the power of Congress.” *Ex parte Virginia*, 100 U.S. 339, 345 (1880). I have excluded most Fourteenth Amendment cases because the Amendment was ratified more than thirty years after Marshall left the Court. In Fourteenth Amendment cases, the Court is concerned—to the extent that its methodology is originalist—with the original understanding in 1868. See *id.* at 344–45. This inquiry requires reference to the debates between the proponents and opponents of Reconstruction, and the Marshall Court’s views are at best secondary—even if the Court has borrowed the test from *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 321 (1819), in construing Congress’s power to enforce the Reconstruction Amendments. See *South Carolina v. Katzenbach*, 383 U.S. 301, 326–27 (1966); *Ex parte Virginia*, 100 U.S. at 345–46. However, I have included those cases that involve the Fourteenth Amendment along with an interpretation of the original Constitution or the Tenth or Eleventh Amendments. Accordingly, I have included cases involving whether Congress has acted validly pursuant to Section 5 of the Fourteenth Amendment to abrogate the states’ sovereign immunity, because those cases also turn on an interpretation of the Eleventh Amendment and the constitutional structure. See, e.g., *Nev. Dep’t of Human Res. v. Hibbs*, 538 U.S. 721 (2003). Conversely, I have not included cases involving Congress’s Section 5 power when the question of abrogation was not at issue. See, e.g., *City of Boerne v. Flores*, 521 U.S. 507 (1997).

ize the Justices' treatment of the Marshall decision. Notwithstanding the fact that subjective judgments sometimes crept into my analysis at the margins, on the whole it was not difficult to make objective judgments about the manner in which the Justices of the majority and the dissent in federalism cases since 1970 cited Marshall Court decisions.¹⁸⁷

2. Results

My review of recent federalism cases reveals that the Justices who composed the federalism majority and the Justices who composed the dissenting voting bloc varied demonstrably in their treatment of important statements, explications, qualifiers, and outright dicta from Marshall decisions. The Justices who composed the federalism majority were significantly more likely than the dissenters to ignore altogether federalism decisions of the Marshall Court. The dissenters, in contrast, were far more likely to premise arguments about the original understanding on Marshall Court decisions. When the Justices of the majority did use Marshall Court decisions, they were substantially more likely than the dissenters to rely upon qualifying statements about the limited scope of federal authority. The dissenters, in contrast, were considerably more likely to rely on the more expansive nationalistic implications of Marshall Court decisions.

Below, I summarize the results of the study by grouping recent federalism decisions by subject matter and comparing the ways in which the Justices in the competing federalism voting blocs cited, or did not cite, Marshall decisions. As a primer

187. When the Court in a unanimous decision cited a decision of the Marshall Court, it is equally defensible to attribute the views cited to both the more conventional majority and dissenting blocs, or simply not to attribute them to either side. *See, e.g.,* Quackenbush v. Allstate Ins. Co., 517 U.S. 706, 716 (1996) (citing *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 404 (1821), for the proposition that the federal courts have a duty to exercise the jurisdiction conferred by Congress). I have chosen the latter path. I have also excluded the relatively rare cases in which the voting breakdown differs significantly from the conventional federalism voting pattern. For example, in *Reeves, Inc. v. Stake*, Chief Justice Burger and Justices Stewart, Marshall, and Rehnquist joined Justice Blackmun's opinion holding that South Dakota's policy of preferring in-state cement customers did not violate the dormant Commerce Clause. 447 U.S. 429, 446–47 (1980). Justices Powell, Brennan, White, and Stevens dissented, noting that the "need to ensure unrestricted trade among the [s]tates created a major impetus for the drafting of the Constitution." *Id.* at 447 (Powell, J., dissenting) (citing *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 190 (1824)).

for the differences in how the competing blocs cited Marshall Court decisions, consider the way they treated *Marbury* in federalism cases. *Marbury*, which was not expressly a case about federalism, stands today for at least three important, general propositions: First, the Court has the power, and the obligation in appropriate cases, to review acts of Congress for constitutionality.¹⁸⁸ Second, there ought to be a legal remedy for every legal wrong.¹⁸⁹ And third, the Court has authority to compel an official of the executive branch to perform a ministerial, legal duty.¹⁹⁰ The Justices in the federalism majority cited *Marbury* in federalism cases to support the proposition that the Courts enjoy the power of judicial review—specifically, that the Courts retain a role in policing the boundary of the federal power.¹⁹¹ In contrast, the dissenters cited *Marbury* in state sovereign immunity cases for the proposition that a State’s violation of federal law, that is, a legal “wrong,” justifies congressional abrogation of the States’ immunity from suit—that is, permits creation of a legal “remedy.”¹⁹² The Justices’ differential treatment of *Marbury* is emblematic of the way in which they treated federalism decisions of the Marshall Court.

a. Cases Addressing State Sovereign Immunity

The most pronounced difference between the majority’s and the dissent’s treatment of Marshall decisions is in cases in-

188. 5 U.S. (1 Cranch) 137, 176–80 (1803) (“It is emphatically the province and duty of the judicial department to say what the law is. Those who apply the rule to particular cases, must of necessity expound and interpret that rule.”).

189. *Id.* at 163–66 (“The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury.”). Of course, there was no remedy for Mr. Marbury. *Id.* at 166–80.

190. *Id.* at 166–68 (“[W]here a specific duty is assigned by law, and individual rights depend upon the performance of that duty, it seems equally clear that the individual who considers himself injured, has a right to resort to the laws of his country for a remedy.”)

191. See, e.g., *United States v. Lopez*, 514 U.S. 549, 566 (1995); *id.* at 575, 579 (Kennedy, J., concurring); *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 243 (1985); *Garcia v. San Antonio Metro. Trans. Auth.*, 469 U.S. 528, 567 (1985) (Powell, J., dissenting). The majority also cited *Marbury*’s more specific holding about the Court’s jurisdiction under Article III to support the conclusion that Congress cannot authorize the Court to hear suits against unconsenting States. See *Seminole Tribe v. Florida*, 517 U.S. 44, 65 (1996).

192. See, e.g., *Alden v. Maine*, 527 U.S. 706, 812 (1999) (Souter, J., dissenting); *Hess v. Port Auth. Trans-Hudson Corp.*, 513 U.S. 30, 54 (1994) (Stevens, J., concurring).

volving state sovereign immunity. The difference is stark because, for the most part, the Justices in the majority did not cite Marshall's constructions of the Eleventh Amendment at all. The dissenters, in contrast, regularly relied on Marshall's account of the original understanding of both the Eleventh Amendment and Article III in contesting the majority's interpretation of the States' immunity from suit.

The Marshall Court discussion most relevant to recent disputes about the scope of state sovereign immunity is in *Cohens v. Virginia*,¹⁹³ in which Marshall provided a narrow account of the Eleventh Amendment's application. Marshall explained that the Eleventh Amendment's "motive was not to maintain the sovereignty of a State from the degradation supposed to attend a compulsory appearance before the tribunal of the nation," but rather was to bar from federal court a narrow class of private suits seeking to compel the States to satisfy their debts.¹⁹⁴ He argued that the Eleventh Amendment did not otherwise "chang[e] the relations between the whole and its parts, as to strip the government of the means of protecting, by the instrumentality of its Courts, the [C]onstitution and laws from active violation."¹⁹⁵ Marshall also argued explicitly that Article III's grant of judicial power over suits arising under federal law embraced all suits involving States, notwithstanding a State's claim of sovereign immunity.¹⁹⁶ However, Marshall's discussion on these controversial points was not necessary to the Court's narrower conclusion that the Eleventh Amendment did not preclude Supreme Court review of suits commenced by, rather than against, States.¹⁹⁷

Perhaps for this reason, the majority rarely cited *Cohens* in cases defining the scope of state sovereign immunity.¹⁹⁸ In *Welch v. Texas Department of Highways & Public Transportation*,¹⁹⁹ Justice Brennan relied in his dissent on *Cohens*'s ac-

193. 19 U.S. (6 Wheat.) 264 (1821).

194. *Id.* at 406–07.

195. *Id.* at 407.

196. *Id.* at 392.

197. *Id.* at 405–12.

198. The majority did, however, rebuke the dissent for urging the Court to overrule *Hans v. Louisiana*, 134 U.S. 1 (1890), in part because the Court in *Hans* had "a much closer vantage point than the dissent" for assessing the original meaning of the Constitution. *Seminole Tribe v. Florida*, 517 U.S. 44, 69 (1996).

199. 483 U.S. 468 (1987).

count of the Eleventh Amendment.²⁰⁰ The majority took him to task for placing “too much weight” on *Cohens*, because the statements on which his dissent relied “were unnecessary to the decision.”²⁰¹ In the more recent and important decisions in *Seminole Tribe v. Florida*²⁰² and *Alden v. Maine*,²⁰³ the majority did not rely on the relevant passages in *Cohens* at all.²⁰⁴

When the majority cited decisions of the Marshall Court in state sovereign immunity cases, it generally cited decisions that did not involve sovereign immunity. The majority, moreover, typically either cited statements in those decisions that conceded limitations on federal authority, or relied on statements in those decisions to imply decidedly less nationalistic consequences than other portions of the same opinions suggest.²⁰⁵ In *Alden*, the Court cited *Martin v. Hunter's Lessee*²⁰⁶—which held that the Court has power to review state judgments

200. *Id.* at 507–09 & n.14 (Brennan, J., dissenting).

201. *Id.* at 482 n.11. Justice Powell also argued for the Court that Justice Brennan erroneously relied on dicta in *United States v. Peters*, 9 U.S. (5 Cranch) 115 (1809), and *Governor of Georgia v. Madrazo*, 26 U.S. (1 Pet.) 110 (1828). *Welch*, 483 U.S. at 491–92.

202. 517 U.S. at 76 (holding that Congress lacks power under Article I to abrogate the states' sovereign immunity in federal court).

203. 527 U.S. 706 (1999) (holding that Congress lacks authority to abrogate the states' sovereign immunity in state court).

204. The Court in *Seminole Tribe* did cite *Cohens* in a footnote, but it was solely to support the proposition that the Court “is empowered to review a question of federal law arising from a state-court decision where a State has consented to suit.” 517 U.S. at 71 n.14. *Cohens* did not address the question of state consent, although the case involved a suit commenced by a State. The only time the majority cited *Osborn v. Bank of the United States*, 22 U.S. (9 Wheat.) 738 (1824), in a state sovereign immunity case was in *Idaho v. Coeur d'Alene Tribe*, in which Justice Kennedy interpreted *Osborn* narrowly to suggest that the Court would not have entertained the suit if a suit against the State had been available in a state forum. 521 U.S. 261, 272 (1997) (“[I]f it was within the power of the plaintiff to make the State a party to the suit it would ‘certainly [be] true’ that a suit against state officials would be barred, but if the ‘real principal’ is ‘exempt from all judicial process’ an officer suit could proceed.” (alteration in original) (quoting *Osborn*, 22 U.S. (9 Wheat.) at 842–43)). Justice Souter disputed this reading in his dissent. 521 U.S. at 315 n.12 (Souter, J., dissenting).

205. See Vicki C. Jackson, *Coeur D'Alene, Federal Courts and the Supremacy of Federal Law: The Competing Paradigms of Chief Justices Marshall and Rehnquist*, 15 CONST. COMMENT. 301, 321 (1998) (arguing that Chief Justices Marshall and Rehnquist had “very different visions—of law . . . , of the importance of remedies against government officers for wrongs committed in their office, and of the relative roles of the state and federal courts in securing the supremacy of federal law”).

206. 14 U.S. (1 Wheat.) 304 (1816).

and determine the constitutionality of state legislation,²⁰⁷ and suggested that state courts might not be adequate fora for the resolution of federal questions²⁰⁸—for the general proposition that the federal government is limited by the doctrine of enumeration.²⁰⁹ The Court in *Alden* also cited *McCulloch v. Maryland*²¹⁰ and *Osborn*, two decisions generally viewed as announcing broad conceptions of federal power, for the proposition that the federal government lacks authority to act “through instrumentalities of the States.”²¹¹ Similarly, the Court in *Atascadero State Hospital v. Scanlon*²¹² cited *Martin* for the proposition that state judges are fully competent to adjudicate questions of federal law.²¹³ However, the passage cited goes on to caution that with “respect to the powers granted to the United States,” state judges “are not independent,” and argues that Supreme Court review of state decisions is essential because of the risk that state judges might “unintentionally transcend their authority, or misconstrue the [C]onstitution.”²¹⁴

On the other hand, the dissent in state sovereign immunity cases consistently cited both the Marshall Court’s pronouncements on the meaning of Article III and the Eleventh Amendment, and the Marshall Court’s other decisions addressing the relationship between the state and federal governments. The dissenting Justices relied on Marshall’s account in *Cohens* of the scope of the Eleventh Amendment to demonstrate that it bars only suits premised on the Citizen-State Diversity Clause of Article III,²¹⁵ that *Hans* was wrongly decided,²¹⁶ and that the

207. *Id.* at 343–44, 351.

208. *Id.* at 334–35.

209. *Alden v. Maine*, 527 U.S. 706, 739 (1999).

210. 17 U.S. (4 Wheat.) 316 (1819).

211. *Alden*, 527 U.S. at 753.

212. 473 U.S. 234 (1985).

213. *Id.* at 238 n.2 (citing *Martin*, 14 U.S. at 341–44).

214. *Martin*, 14 U.S. at 344.

215. See *Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank*, 527 U.S. 627, 660 (1999) (Stevens, J., dissenting); *Seminole Tribe v. Florida*, 517 U.S. 44, 112–13 (1996) (Souter, J., dissenting); *Welch v. Tex. Dep’t of Highways & Pub. Transp.*, 483 U.S. 468, 508 (1987) (Brennan, J., dissenting); *Atascadero*, 473 U.S. at 296 n.51 (Brennan, J., dissenting); *Employees of the Dep’t of Pub. Health & Welfare v. Dep’t of Pub. Health & Welfare*, 411 U.S. 279, 313 (1973) (Brennan, J., dissenting).

216. See *Fitzpatrick v. Bitzer*, 427 U.S. 445, 458–59 n.1 (1976) (Stevens, J., concurring) (citing *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264 (1821), for the proposition that the Eleventh Amendment is “not literally applicable” to citizens’ suits against their own States).

protection of state dignity is an insufficient basis on which to construct a jurisprudence of state sovereign immunity.²¹⁷ The dissenters cited *Osborn* for the same proposition,²¹⁸ and *Martin*, *McCulloch*, and *Gibbons v. Ogden*²¹⁹ for the proposition that the States are not sovereign, for purposes of immunity, with respect to obligations validly imposed by federal law.²²⁰ The dissenters also relied squarely on other Marshall decisions in arguing that Article III did not incorporate the doctrine of sovereign immunity,²²¹ that the Court should construe state immunity narrowly to allow a broad range of suits against state officers,²²² and that the States do not enjoy the status of full sovereigns for purposes of immunity under the law of nations.²²³ Justice Brennan summarized the dissenters' views when he argued that the Marshall Court's "decisions reflect a consistent understanding of the limited effect of the [Eleventh] Amendment on the structure of federal jurisdiction outside the state-citizen and state-alien diversity clauses."²²⁴

217. Fed. Mar. Comm'n v. S.C. State Ports Auth., 535 U.S. 743, 770, 772 (2002) (Stevens, J., dissenting); *Seminole Tribe*, 517 U.S. at 96–97 (Stevens, J., dissenting).

218. *Seminole Tribe*, 517 U.S. at 113 (Souter, J., dissenting); *Welch*, 483 U.S. at 509 (Brennan, J., dissenting); *Atascadero*, 473 U.S. at 297–98 (Brennan, J., dissenting).

219. 22 U.S. (9 Wheat.) 1 (1824).

220. See *Alden*, 527 U.S. at 776 n.16, 800 (Souter, J., dissenting) (citing *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819)); *Seminole Tribe*, 517 U.S. at 153 (Souter, J. dissenting) (citing *McCulloch*, 17 U.S. at 410); *Welch*, 483 U.S. at 514 n.17 (Brennan, J., dissenting) (citing *Martin*, 14 U.S. at 334–35); *id.* at 518 (citing *Gibbons*, 22 U.S. at 196–97).

221. See *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62, 97 n.6 (2000) (Stevens, J., dissenting) (citing *Schooner Exch. v. McFaddon*, 11 U.S. (7 Cranch) 116 (1812)); *Nevada v. Hall*, 440 U.S. 410, 416–18 (1979) (same).

222. *Idaho v. Coeur d'Alene Tribe*, 521 U.S. 261, 315 n.12 (1997) (Souter, J., dissenting) (quoting *Osborn*, 22 U.S. at 843); *Seminole Tribe*, 517 U.S. at 172 (Souter, J., dissenting) (citing *Osborn*, 22 U.S. at 738, and *United States v. Peters*, 9 U.S. (5 Cranch) 115 (1809)); *Will v. Mich. Dep't of State Police*, 491 U.S. 58, 92–93 (1989) (Stevens, J., dissenting) (citing *Osborn*, 22 U.S. at 738, and *Governor of Ga. v. Madrazo*, 26 U.S. (1 Pet.) 110, 124 (1828)); *Atascadero*, 473 U.S. at 291 (Brennan, J., dissenting) (citing *Madrazo*, 26 U.S. 110; *Peters*, 9 U.S. 115); *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 143, 148 n.32, 165 n.50 (1984) (Stevens, J., dissenting) (citing *Osborn*, 22 U.S. at 738, *Wise v. Withers*, 7 U.S. (3 Cranch) 331 (1806), and *Little v. Barreme*, 6 U.S. (2 Cranch) 170 (1804)).

223. See *Welch*, 483 U.S. at 500 n.4 (Brennan, J., dissenting) (quoting *Schooner Exch. v. McFaddon*, 11 U.S. (7 Cranch) 116 (1812)). See generally Peter J. Smith, *States as Nations: Dignity in Cross-Doctrinal Perspective*, 89 VA. L. REV. 1 (2003).

224. *Atascadero*, 473 U.S. at 290 (Brennan, J., dissenting).

b. Cases Addressing the Scope of Congressional Authority

In cases construing the scope of congressional power, the Justices in the majority regularly cited statements in Marshall Court decisions acknowledging that the federal government is a government of limited and enumerated powers. Those Justices also tended to cite the limiting language in Marshall decisions that otherwise announced broad interpretations of congressional authority. The dissenters, in contrast, often cited the Marshall Court's more expansive constructions of Congress's power, and responded to the majority's treatment of Marshall decisions by citing Marshall's narrow construction of the Tenth Amendment.

Decisions of the Marshall Court often provided something for everyone, and cases construing Congress's affirmative powers were no exception. Although the Court in *McCulloch* and *Gibbons* offered expansive interpretations of congressional authority, Chief Justice Marshall prefaced those discussions by conceding that the federal government is one of "enumerated powers" and may "exercise only the powers granted to it."²²⁵ The Justices in the majority generally cited only Marshall's limiting statements in those cases, not his statements about broad federal authority.²²⁶ Conversely, the dissenters tended to ignore Marshall's observations about the enumeration and focused instead on the statements defining federal power expansively and construing the Tenth Amendment narrowly.²²⁷

225. *McCulloch*, 17 U.S. at 405; see also *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 195 (1824) ("The enumeration presupposes something not enumerated . . .").

226. See *Printz v. United States*, 521 U.S. 898, 936–37 (1997) (Thomas, J., concurring) (citing *McCulloch*, 17 U.S. at 405); *United States v. Lopez*, 514 U.S. 549, 553, 566 (1995) (citing *Gibbons*, 22 U.S. at 189–90, and *McCulloch*, 17 U.S. at 316); *South Dakota v. Dole*, 483 U.S. 203, 218 (1987) (O'Connor, J., dissenting) (citing *McCulloch*, 17 U.S. at 405); see also *United States v. Morrison*, 529 U.S. 598, 607, 616 n.7 (2000) ("[T]hat those limits may not be mistaken, or forgotten, the [C]onstitution is written" (quoting *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 176 (1803))); *Alden*, 527 U.S. at 739 ("[The federal government] can claim no powers which are not granted to it by the [C]onstitution, and the powers actually granted must be such as are expressly given, or given by necessary implication." (quoting *Martin*, 14 U.S. (1 Wheat.) at 326)); *Printz*, 521 U.S. at 937 (Thomas, J., concurring) (citing *Marbury*, 5 U.S. at 137).

227. See *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 801 (1995) (citing *Sturges v. Crowninshield*, 17 U.S. (4 Wheat.) 122, 193 (1819), for the proposition that the Tenth Amendment merely confirms the enumeration); *Nat'l League of Cities v. Usery*, 426 U.S. 833, 862 (1976) (Brennan, J., dissenting) (citing *Gibbons*, 22 U.S. at 196, *McCulloch*, 17 U.S. at 404–07, and *Mar-*

Consider the Court's later decisions construing Congress's power to regulate interstate commerce, in which the majority and the dissent sparred over the implications of the decision in *Gibbons*. In holding that Congress had authority to license vessels traveling between two states,²²⁸ the Court in *Gibbons* conceded generally that the "internal commerce of a state . . . may be considered as reserved for the state itself," but asserted that commerce "among" the states includes commerce conducted solely within a state if it "extend[s] to or affect[s] other States."²²⁹ The federalism majority relied on *Gibbons's* limiting language,²³⁰ whereas the dissent cited *Gibbons's* broader implications for the scope of the commerce power.²³¹

The majority and dissent also differed in their treatment of Marshall Court decisions in considering whether there are limits on federal authority implied by the constitutional structure. The Justices of the federalism majority relied on *McCulloch* for the proposition that the constitutional structure implies limits on the powers of the federal government,²³² even though

tin, 14 U.S. at 324–25, for the proposition that "nothing in the Tenth Amendment constitutes a limitation on congressional exercise of powers delegated by the Constitution to Congress").

228. 22 U.S. (9 Wheat.) at 189–90.

229. *Id.* at 194; *see also id.* ("Commerce among the States, cannot stop at the external boundary line of each State, but may be introduced into the interior.").

230. *See Lopez*, 514 U.S. at 553; *id.* at 593–96 (Thomas, J., dissenting) (citing *Gibbons's* limiting language and offering a narrow construction of *Gibbons's* reference to commerce that "extend[s] to or affect[s] other States"); *see also Morrison*, 529 U.S. at 618 (citing *Cohens*, 19 U.S. (6 Wheat.) at 426, for the proposition that Congress "cannot punish felonies generally").

231. *See Morrison*, 529 U.S. at 641, 648–49 (Souter, J., dissenting); *Lopez*, 514 U.S. at 604, 609 (Souter, J., dissenting); *id.* at 615–16, 631 (Breyer, J., dissenting); *see also* *Pennsylvania v. Union Gas Co.*, 491 U.S. 1, 20 (1989) (citing *Gibbons* for the proposition that because the commerce power is plenary, states ceded immunity in the plan of convention for claims arising out of obligations imposed by Congress under the commerce power).

232. *See Alden*, 527 U.S. at 752–53 (citing *McCulloch*, 17 U.S. at 424, for the proposition that Congress cannot direct the states to accomplish federal objectives); *Term Limits*, 514 U.S. at 849, 853–54 (Thomas, J., dissenting) (citing *McCulloch* for the proposition that the people of the various states retained their separate political identities upon the ratification of the Constitution); *South Carolina v. Baker*, 485 U.S. 505, 533 (1988) (O'Connor, J., dissenting) (citing *McCulloch's* observation that "the power to tax involves the power to destroy," 17 U.S. at 431, for the proposition that "[f]ederal taxation of state activities is inherently a threat to state sovereignty"); *Fed. Energy Regulatory Comm'n v. Mississippi*, 456 U.S. 742, 795 n.34 (1982) (citing *McCulloch*, 17 U.S. at 316, for the proposition that Congress cannot direct the state legislatures to act); *Hall*, 440 U.S. at 433–34 (Rehnquist, J., dissenting) (citing

McCulloch itself suggested that because the constitutional structure itself protects States, judicial protections are unnecessary.²³³ The dissenters, in contrast, cited *McCulloch* for the propositions that the federal government enjoys broad incidental powers²³⁴ and that there are implied limits on state authority.²³⁵ The dissenters also consistently relied on statements in *McCulloch* and *Gibbons*²³⁶ that the only restraints on Congress's power to regulate interstate commerce inhere in the political process.²³⁷ Similarly, the dissenters cited *Cohens* and *Martin* to support more general notions of federal supremacy.²³⁸

McCulloch for the proposition that when the Constitution is silent on an issue, the Court should look to the "constitutional plan" to determine questions of federalism; and later concluding that States have constitutional immunity from state-law suits in other states' courts); *cf. Alden*, 527 U.S. at 753 (citing *Osborn* for the proposition that there are limits to Congress's power to pursue federal objectives through the state courts).

One notable exception is Justice Kennedy's reliance on *McCulloch* in his concurring opinion in *Term Limits*, in which he rejected the argument that because the states ratified the Constitution, the people can delegate power only through the states or by acting in their capacities as citizens of particular states. *See* 514 U.S. at 840–41 (Kennedy, J., concurring) (quoting *McCulloch*, 17 U.S. (4 Wheat.) at 403). In *Term Limits*, of course, Justice Kennedy joined the frequent dissenters to create a new federalism majority.

233. *McCulloch*, 17 U.S. at 435–36.

234. *See, e.g., Printz*, 521 U.S. at 942 nn.1–2 (Stevens, J., dissenting) (arguing that Congress can compel state officials to administer a federal regulatory program; citing *McCulloch*'s broad definition of Congress's incidental authority); *Nat'l League of Cities v. Usery*, 426 U.S. 833, 859, 861–62 (1976) (Brennan, J., dissenting) (citing *McCulloch*, 17 U.S. at 405–06).

235. *See infra* notes 244–49 and accompanying text.

236. *See Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 197 (1824) ("The wisdom and the discretion of [C]ongress, their identity with the people, and the influence which their constituents possess at elections, are, in this, as in many other instances . . . the sole restraints on which they have relied, to secure them from its abuse. They are the restraints on which the people must often rely solely, in all representative governments."); *McCulloch*, 17 U.S. at 435–36 (explaining why the States should not be immune from federal taxation even though the federal government is immune from state taxation).

237. *See United States v. Morrison*, 529 U.S. 598, 648–49 (2000) (Souter, J., dissenting) (citing *Gibbons*, 22 U.S. at 197); *Baker*, 485 U.S. at 519 (citing *McCulloch*, 17 U.S. at 435–36); *Garcia v. San Antonio Metro. Trans. Auth.*, 469 U.S. 528, 552 (1985) (citing *McCulloch*, 17 U.S. at 435); *Fed. Energy Regulatory Comm'n*, 456 U.S. at 754 n.18 (citing *Gibbons*, 22 U.S. at 196); *Hodel v. Va. Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 276, 290 (1981) (citing *Gibbons*, 22 U.S. at 196); *Nat'l League of Cities*, 426 U.S. at 857, 866–87 n.7, 878 (Brennan, J., dissenting) (citing *Gibbons*, 22 U.S. at 197, and *McCulloch*, 17 U.S. at 405–06); *cf. Term Limits*, 514 U.S. at 822 (citing *McCulloch*, 17 U.S. at 428–29, for the theory of national popular sovereignty).

238. *See Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank*,

c. *Cases Addressing Limits on State Authority*

The Justices also offered starkly different accounts of the implications of Marshall Court decisions for the scope of the States' power. The Justices of the federalism majority generally cited narrowing language in Marshall Court decisions to argue against limitations on state power. The dissenters, in contrast, robustly cited Marshall Court decisions to argue that the constitutional text and structure impose meaningful limits on States' authority.

The difference is most starkly apparent in the dueling opinions in *U.S. Term Limits, Inc. v. Thornton*,²³⁹ in which Justice Kennedy joined the four conventional dissenters in invalidating Arkansas's attempt to impose term limits on federal representatives.²⁴⁰ Justice Thomas's dissent is representative of the conventional federalism majority's treatment of decisions of the Marshall Court with respect to limitations on state authority. Justice Thomas's premise was that the "ultimate source of the Constitution's authority is the consent of the people of each individual State, not the consent of the undifferentiated people of the Nation as a whole."²⁴¹ He cited *McCulloch* for support, quoting Chief Justice Marshall's comment that "[n]o political dreamer was ever wild enough to think of breaking down the lines which separate the States, and of compounding the American people into one common mass."²⁴² Justice Thomas,

527 U.S. 627, 660 (1999) (Stevens, J., dissenting) ("[W]hen there is a conflict between a State's interest and a federal right, it 'would be hazarding too much to assert, that the judicatures of the states will be exempt from the prejudices by which the legislatures and people are influenced, and will constitute perfectly impartial tribunals.'" (quoting *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 386 (1821))); *Seminole Tribe v. Florida*, 517 U.S. 44, 120 (1996) (Souter, J., dissenting) (same); *Garcia*, 469 U.S. at 548 ("[T]he sovereignty of the States is limited by the Constitution itself. . . . [F]or example, . . . [b]y providing for final review of questions of federal law in this Court, Article III curtails the sovereign power of the States' judiciaries to make authoritative determinations of law." (citing *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304 (1816))); *Fed. Energy Regulatory Comm'n*, 456 U.S. at 760–61 (rejecting the conclusion that "would allow the States to disregard . . . the preeminent position held by federal law throughout the Nation" (citing *Martin*, 14 U.S. at 340–41)).

239. 514 U.S. 779 (1995).

240. *Id.* at 838 (Kennedy, J., concurring).

241. *Id.* at 846 (Thomas, J., dissenting).

242. *Id.* at 849 (quoting *McCulloch*, 17 U.S. (4 Wheat.) at 403); *see also id.* at 853 ("*McCulloch* seemed to assume that the people had 'conferred on the general government the power contained in the [C]onstitution, and on the States the whole residuum of power.'" (quoting *McCulloch*, 17 U.S. (4 Wheat.)

however, rejected the more broadly nationalistic implications of the full passage in *McCulloch* from which the quote was drawn.²⁴³

In contrast, Justice Stevens's opinion in *Term Limits* relied heavily on *McCulloch* for the proposition that the Constitution imposes implied limits on state authority. He argued that *McCulloch* demonstrates that the States' reserved powers do not extend to those powers that the States never enjoyed, such as the power to create qualifications for federal representatives.²⁴⁴ More important, Justice Stevens's opinion relied on *McCulloch* for a conception of national popular sovereignty: "The Congress of the United States . . . is not a confederation of nations in which separate sovereigns are represented by appointed delegates, but is instead a body composed of representatives of the people."²⁴⁵ For support, Justice Stevens quoted Marshall's statement in *McCulloch* that "[t]he government of the Union . . . is, emphatically, and truly, a government of the people. In form and in substance it emanates from them. Its powers are granted by them, and are to be exercised directly on them, and for their benefit."²⁴⁶

at 410)); *cf. id.* at 871 (citing *Barron ex rel. Tiernan v. Mayor of Baltimore*, 32 U.S. (7 Pet.) 243, 249 (1833), which held that the Fifth Amendment's Takings Clause did not apply to the states, for the proposition that "one should not lightly read [constitutional] provisions . . . as implicit deprivations of state power").

243. *Id.* at 849 n.2. The full passage in *McCulloch*, which Justice Kennedy cited in his concurrence, *id.* at 840–41 (Kennedy, J., concurring), provides:

The Convention which framed the [C]onstitution was indeed elected by the State legislatures. But the instrument . . . was submitted to the people. . . . It is true, they assembled in their several States—and where else should they have assembled? No political dreamer was ever wild enough to think of breaking down the lines which separate the States, and of compounding the American people into one common mass. Of consequence, when they act, they act in their States. But the measures they adopt do not, on that account, cease to be the measures of the people themselves, or become the measures of the State governments.

17 U.S. (4 Wheat.) at 403.

244. *See Term Limits*, 514 U.S. at 796 n.12 (majority opinion) (explaining that *McCulloch* rejected the argument that the Constitution's silence on the subject of state power to tax corporations chartered by Congress implies that the states have "reserved" power to tax such federal instrumentalities (citing *McCulloch*, 17 U.S. at 430)).

245. *Id.* at 821.

246. *Id.* (quoting *McCulloch*, 17 U.S. at 404–05). Similarly, Justice Stevens relied on *McCulloch* in arguing that permitting states to impose term limits on federal representatives would "undermin[e] the uniformity and the national character that the Framers envisioned and sought to ensure," and "sever the

This pattern largely held in preemption and dormant Commerce Clause cases, as well. Although the voting blocs did not always form as neatly in these categories of cases,²⁴⁷ in general the Justices of the federalism majority cited narrow language in Marshall Court decisions that suggest solicitude for state autonomy.²⁴⁸ Conversely, the dissenters cited the more nationalistic implications of *Gibbons* and other Marshall Court decisions.²⁴⁹

III. THE IMPLICATIONS FOR ORIGINALISM

A. THE ORIGINALIST'S DILEMMA

In one sense, the demonstrable difference in the way that the Justices in the federalism majority and those in the federalism dissent treated decisions of the Marshall Court is entirely unsurprising. After all, the Court routinely divided 5-4 in fed-

direct link that the Framers found so critical between the National Government and the people of the United States." 514 U.S. at 822 ("Those means are not given by the people of a particular State, not given by the constituents of the legislature, . . . but by the people of all the States. They are given by all, for the benefit of all—and upon theory, should be subjected to that government only which belongs to all." (quoting *McCulloch*, 17 U.S. at 428–29)).

247. See, e.g., *CTS Corp. v. Dynamics Corp. of Am.*, 481 U.S. 69 (1987) (Powell, J., joined by Rehnquist, C.J., and Brennan, Marshall, O'Connor, JJ. and joined in part by Scalia, J.) (upholding state regulation of corporate stock against preemption challenge).

248. See, e.g., *Camps Newfound/Owatonna, Inc. v. Town of Harrison*, 520 U.S. 564, 613, 635 (1997) (Thomas, J., dissenting) (relying on *Wilson v. Black-Bird Creek Marsh Co.*, 27 U.S. (2 Pet.) 245, 252 (1829), and *Brown v. Maryland*, 25 U.S. (12 Wheat.) 419 (1827), in arguing that dormant Commerce Clause doctrine is not an exclusive limitation of state autonomy); *CTS Corp.*, 481 U.S. at 89 (quoting *Trs. of Dartmouth Coll. v. Woodward*, 17 U.S. (4 Wheat.) 518, 636 (1819), for the proposition that corporations are creatures of state law); *Hughes v. Oklahoma*, 441 U.S. 322, 340 n.3 (1979) (Rehnquist, J., dissenting) (citing *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1 (1824) to support his argument that the Court should reject a Commerce Clause challenge to a state's prohibition on sales of minnows out of state).

249. See, e.g., *Camps Newfound*, 520 U.S. at 571 (citing Justice Johnson's concurrence in *Gibbons* for the proposition that commerce must be "free from all invidious and partial restraints," 22 U.S. at 231); *W. Lynn Creamery Inc. v. Healy*, 512 U.S. 186, 202 (1994) (citing *Brown v. Maryland*, 25 U.S. (12 Wheat.) 419 (1827) as having an expansive view of the dormant Commerce Clause because it concluded that a burden placed at any point on the stream of commerce will result in a disadvantage to the out-of-state producer); *Hughes*, 441 U.S. at 326 & n.3 (Brennan, J.) (citing *Gibbons*, 22 U.S. at 209, and *Wilson*, 27 U.S. at 245, as support for robust limitations on state regulation of commerce).

eralism cases.²⁵⁰ One would expect to find that the competing positions were informed by competing views of the original source material, including precedent. Viewed in the context of originalism, however, the difference in treatment of Marshall Court decisions suggests much more.

In light of the original understanding of how constitutional ambiguities would be resolved, the Marshall Court's nationalistic interpretations of the Constitution pose a potential dilemma for the modern originalist—or at least for the modern originalist whose view of the original understanding relies heavily on the ratification-era statements of Anti-Federalists. As I demonstrated recently, the Justices of the federalism majority regularly cited Anti-Federalist concerns about the meaning of the Constitution in order to demonstrate that the delegates at the state ratification conventions would never have voted to ratify the Constitution unless it accommodated those concerns.²⁵¹ These Justices implicitly argued that “although the Anti-Federalists lost the war over whether the Constitution should be ratified, there is no reason to think that the Anti-Federalists lost every specific battle over how the various provisions of the Constitution should be understood.”²⁵² Accordingly, these Justices cited Anti-Federalist views to demonstrate that Anti-Federalist hopes, and not fears, were realized upon ratification.²⁵³

The modern originalist who believes that Anti-Federalist views deserve equal time in the quest to determine the original understanding might, at least at first blush, be inclined to discount the decisions of the Marshall Court. Decisions of the Marshall Court systematically ignored, at least implicitly in the course of their reasoning, the ratification-era views of the Anti-Federalists. Indeed, Jeffersonian Republicans—the ideological heirs of the Anti-Federalists—reacted with revulsion to many of the Marshall Court's most important federalism decisions, denouncing them as unwarranted extensions of federal authority or impermissible limitations on state authority.²⁵⁴

250. See *supra* note 24 and accompanying text.

251. See Smith, *supra* note 18, at 259–62; see also, e.g., *Alden v. Maine*, 527 U.S. 706, 718–19, 724–25 (1999); *Welch v. Tex. Dep't of Highways and Pub. Transp.*, 483 U.S. 468, 483 (1987); *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 568 (1985) (Powell, J., dissenting).

252. Smith, *supra* note 18, at 259.

253. See *id.* at 259–62.

254. “The Judiciary of the United States,” Jefferson wrote, “is the subtle

Yet the modern originalist seems, even putting aside for a moment the doctrine of *stare decisis*, to be bound by originalism itself to accept the decisions of the Marshall Court, at least to the extent that they addressed questions that were left “obscure and equivocal”²⁵⁵ upon ratification of the Constitution. The original understanding appears to have been that the answers to questions left unresolved by the Constitution, or not anticipated at the time of ratification, would be fixed in the course of subsequent adjudications. According to the original understanding, the Marshall Court’s resolution of such questions created fixed meaning where the original understanding was ambiguous, meaning by which the modern originalist is bound.

Of course, an originalist who believes that the Constitution was not originally understood to confer broad power on the federal government can discount the nationalistic decisions of the Marshall Court on the ground that they are simply inconsistent with the original understanding.²⁵⁶ But to do so, the originalist must be able to assert that the questions resolved by the Marshall Court were in fact not left “obscure and equivocal”²⁵⁷ by the Constitution, and that the Marshall Court simply answered them wrongly.²⁵⁸ The originalist who takes this view might still choose, as a matter of *stare decisis*, to follow decisions of the Marshall Court, but might not feel compelled to do so by originalism itself.²⁵⁹

It is difficult even for the most confident originalist, however, to argue that the historical record provides clear answers to all of the contentious questions addressed by the Marshall Court, let alone that the Marshall Court answered them incorrectly. And the original understanding appears to demand the conclusion that the answers to *those* questions were fixed by the Marshall Court’s decisions, even though the questions might have been resolved differently if the Chief Justice had

corps of sappers and miners constantly working underground to undermine the foundations of our confederated fabric. They are construing our [C]onstitution from a coordination of a general and special government to a general and supreme one alone.” NEWMYER, *supra* note 128, at 322. Jefferson summed up the prevailing view among his party’s faithful when he remarked, “Nothing should be spared to eradicate this spirit of Marshallism.” *Id.* at 146.

255. THE FEDERALIST NO. 37 (James Madison), *supra* note 4, at 229.

256. See Scalia, *Originalism*, *supra* note 16, at 861.

257. THE FEDERALIST NO. 37 (James Madison), *supra* note 4, at 229.

258. See Scalia, *Originalism*, *supra* note 16, at 861–62.

259. See Scalia, *Response*, *supra* note 108, at 139–40.

been less nationalistic than John Marshall. Even the originalist who is skeptical of broad federal power thus may be compelled by *originalism itself* to accept the expansively nationalistic decisions of the Marshall Court.

The results of the study presented above suggest that the Justices in the federalism majority tended to follow what they discerned to be the original understanding, rather than the more expansive nationalistic implications of the Marshall Court's decisions. The Justices in the federalism dissent, in contrast, treated decisions of the Marshall Court—including their nationalistic implications—as having established constitutional meaning. In other words, the Justices in the majority reacted to the dilemma by preferring their own account of the original understanding to that of the Marshall Court. In contrast, the Justices in the dissent did not face a dilemma, because they treated the Marshall Court's views and the original understanding as one and the same.

B. CONSEQUENCES

What consequences for originalism follow from the majority's and the dissent's differential treatment of decisions of the Marshall Court? First, the results of the study presented above demonstrate that the Justices, while professing fidelity to the principles of originalism, did not robustly, or at least consistently, adhere to the original understanding of how constitutional ambiguities would attain fixed meaning through adjudication. Second and more important, the study suggests that one of the principal justifications for originalism—that it will constrain the discretion of judges to impose their own views in the course of decision making—might not be accurate as a descriptive matter. By relying, explicitly or implicitly, on the vague distinction between holdings and dicta to temper (or invigorate) the doctrine of constitutional ambiguities, a Justice can ignore (or accept) pronouncements of the Marshall Court according to how well they correspond to the Justice's own conception of the original understanding or to the Justice's own instrumentalist goals.

Before elaborating on these themes, a few preliminary thoughts are in order. I do not insist that the Marshall Court correctly answered every question that it addressed, either as a matter of the original understanding or according to some other methodology of constitutional interpretation. Nor do I insist that the Justices on the Rehnquist Court expressly or consis-

tently professed fidelity to the account provided above of the original understanding of how constitutional ambiguities would be resolved, although other proponents of originalism have.²⁶⁰ Furthermore, I do not claim that the Court ought to adhere particularly closely to the decisions (and the reasoning) of the Marshall Court simply because Madison and others apparently believed that the Court would play a special role in fixing the meaning of ambiguous constitutional provisions. What is important for present purposes is that all of the Justices appeared to accept some form of originalism as the appropriate constitutional methodology in federalism cases. To the extent that they professed fidelity to a relatively strict version of originalism,²⁶¹ the Justices' own constitutional methodology required adherence to *all* original understandings. Originalism in its strict form does not condone following the original understanding with respect to some matters and not with respect to others; the originalist must take the bitter with the sweet. In light of the original understanding of how constitutional ambiguities would be resolved, the Justices' treatment of Marshall Court decisions tells us something about their fidelity to originalism, and about originalism itself.

260. See Nelson, *supra* note 6. At a minimum, the Justices who frequently dissent in federalism cases do not accept the theory of liquidation in cases addressing the scope of the Fourteenth Amendment, choosing instead a nonoriginalist approach to construing its meaning. Compare *United States v. Virginia*, 518 U.S. 515 (1996) (holding that exclusion of women from a public military academy violates the Fourteenth Amendment), with *RAOUL BERGER, GOVERNMENT BY JUDICIARY* 20–245 (2d ed. 1977) (arguing that the Fourteenth Amendment as originally understood does not prohibit gender classifications). The Justices of the majority have not explicitly embraced the theory either, although Justice Scalia recently offered something like Madison's theory of liquidation as a guide for interpreting the scope of Congress's power to enforce the Fourteenth Amendment. See *Tennessee v. Lane*, 541 U.S. 509, 862–64 (2004) (Scalia, J., dissenting) (declining to adhere to the Court's twentieth-century decisions expansively construing Congress's Section 5 power in contexts other than racial discrimination, with respect to which the Court gave the provision a "more expansive scope . . . from the beginning" (citing *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36, 81 (1873))).

261. "According to the strict form of originalism, the Constitution derives its authority from its ratification during particular periods in American history. Under this view, any departure from the understandings of those discrete periods robs constitutional interpretation of its claim to legitimacy." Dorf, *supra* note 30, at 1766. Dorf argues that Raoul Berger is the strictest originalist among originalism's prominent proponents, and he cites Justice Scalia's writings, as well. See *id.* at 1766 nn.2 & 3.

1. Fidelity to the Original Understanding of How Constitutional Ambiguities Would Be Resolved

Proponents and opponents of the ratification agreed that questions left ambiguous by the Constitution would attain fixed meaning through the process of construction. Madison, Hamilton, Brutus, and the others who offered this view appeared to have had in mind something more than simply importing to constitutional adjudication the doctrine of *stare decisis*. That doctrine, after all, permits a Court to overrule prior precedent after considering a “series of prudential and pragmatic considerations designed to test the consistency of overruling a prior decision with the ideal of the rule of law.”²⁶² In the Framers’ view, however, constitutional meaning, once resolved, would remain fixed, subject only to the amendment process.²⁶³ Even to the extent that the Framers envisioned that judicial constructions of the Constitution would be subject to ongoing revision according to the common-law method of adjudication, they do not appear to have anticipated significant evolution of constitutional meaning over time.²⁶⁴

In practice, however, the Court has, from its very earliest days, treated decisions addressing constitutional meaning as subject to judicial revision. Indeed, the Court has often made clear that it will not adhere to *stare decisis* as rigidly in cases involving constitutional interpretation, because, unlike decisions involving statutory interpretation, Congress is not free to alter the Court’s constitutional decisions.²⁶⁵ Marshall himself is notorious for his general hostility to precedent,²⁶⁶ although of course there was much less of it when he wrote his opinions for the Court. More important, the Court has not always followed strict originalism in determining constitutional meaning, and

262. *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 854–55 (1992).

263. *See, e.g.*, MASON, *supra* note 60, at 160 (remarks of Edmund Randolph at the Virginia Ratifying Convention) (acknowledging that the Necessary and Proper Clause is ambiguous and that the “ambiguity may injure the states,” but arguing that if the ambiguities are not properly “explain[ed]” by Congress, then “the states can combine in order to insist on amending the ambiguities”); NELSON, *supra* note 6, at 526–47 (discussing the notion of “fixed meaning”).

264. *See* 1 ANNALS OF CONG., *supra* note 77, at 514 (remarks of Rep. James Madison, June 17, 1789) (stating that the determination of the scope of the President’s power to remove an executive officer “will become the permanent exposition of the Constitution”).

265. *See, e.g.*, *Patterson v. McLean Credit Union*, 491 U.S. 164, 172–73 (1989).

266. *See* CURRIE, SUPREME COURT, *supra* note 7, at 196.

thus has not always faithfully adhered to the original theory of how constitutional ambiguities would be resolved.²⁶⁷

Today, however, originalism is ascendant on the Court, at least in federalism cases. One would expect to find that originalist Justices follow not only the original understanding of constitutional provisions, but also the original understanding of the manner in which constitutional ambiguities would be resolved.²⁶⁸ Accordingly, one would also expect to find that the most faithful originalist Justices hew most closely to the Marshall Court's pronouncements on the scope of federal and state power. After all, the Marshall Court offered the first constructions of some of the most important questions left unresolved by the text of the Constitution.

This has not been the case. As the discussion above demonstrates,²⁶⁹ the Justices who most often sided with the States in federalism disputes were substantially more likely than the

267. Marshall's participation in the ratification debates almost certainly informed his decisions for the Court. Although his approach to constitutional interpretation was generally consistent with modern originalism, Friedman & Smith, *supra* note 29, at 11 & n. 25, his decisions rarely phrased the inquiry in those terms. Originalism formally came under attack around the time of the Civil War and in the years that followed it, as the Court construed the Civil War Amendments and their affect on the balance between federal and state authority. See SYDNEY GEORGE FISHER, *THE TRIAL OF THE CONSTITUTION* 55 (photo reprint 1969) (1862); CHRISTOPHER G. TIEDEMAN, *THE UNWRITTEN CONSTITUTION OF THE UNITED STATES* 150 (1890). Originalism and the notion that the Constitution's meaning could evolve competed for the Court's devotion during the period between Reconstruction and the New Deal. Compare *Hammer v. Dagenhart*, 247 U.S. 251 (1918); *United States v. Butler*, 297 U.S. 1 (1936), and *Carter v. Carter Coal*, 298 U.S. 238 (1936) (originalist), with *Home Building & Loan Ass'n v. Blaisdell*, 290 U.S. 398 (1934), and *Lochner v. New York*, 198 U.S. 45 (1905) (nonoriginalist). After the New Deal, critics alternately accused the Warren Court of ignoring the original meaning of the Constitution, see, e.g., William H. Rehnquist, *The Notion of a Living Constitution*, 54 TEX. L. REV. 693, 703 (1976), and of relying on it but misapplying it, see, e.g., Kelly, *supra* note 36, at 136–37, and the Warren Court's perceived excesses led to the rise of the modern originalists.

268. Indeed, originalists have relied on Madison's theory of liquidation to reconcile originalism with the reality of the Constitution's indeterminacy. See *supra* notes 43–44 and accompanying text; Nelson, *supra* note 6, at 523–39. The account offered here of the original understanding of how constitutional ambiguities would be resolved also helps to explain why stare decisis is not inconsistent with originalism. In any event, prominent originalists accept the doctrine of stare decisis as an established, and perhaps necessary, feature of Anglo-American jurisprudence. See, e.g., Scalia, *Response*, *supra* note 108, at 138–39; Scalia, *Originalism*, *supra* note 16, at 861 (“[A]lmost every originalist would adulterate [originalism] with the doctrine of stare decisis . . .”).

269. See *supra* Part II.B.2.

dissenters to ignore federalism decisions of the Marshall Court or to discount their more aggressively nationalistic implications. Among those Justices are the members of the Court who were the most ardent proponents of originalism as a methodology of constitutional interpretation, including Justice Scalia,²⁷⁰ Justice Rehnquist,²⁷¹ and Justice Thomas.²⁷² For these originalists, the decisions of the Marshall Court apparently posed a dilemma: either discount the significance of Marshall Court opinions in order to declare an original understanding that is more solicitous of the views of framing-era opponents of the Constitution, or accept the nationalist implications of Marshall Court decisions, thus remaining faithful to the original understanding of how constitutional ambiguities would be resolved. The former choice risks infidelity to the original understanding of how constitutional ambiguities would be resolved, while the latter risks undervaluing the views of Anti-Federalists in the quest to define the original understanding. The results of the study presented here suggest that these Justices chose the former path.

It would be too strong to suggest that these Justices in effect were unfaithful to originalism—specifically, to the original understanding of how constitutional ambiguities would be resolved—by declining to accord dispositive weight to decisions of the Marshall Court. After all, all of the Justices of the federalism majority appeared to accept the core holdings of most Marshall decisions. Arguably, the Madisonian theory of how constitutional ambiguities would be resolved requires adherence only to holdings, which, according to the Anglo-American tradition, are the only judicial determinations that have binding force—and thus “fix” meaning. Dicta has never been binding, either as a matter of stare decisis or according to Madison’s theory of how constitutional ambiguities would be resolved. If it were, instrumentalist judges would regularly reach out to decide issues that are not necessary to the resolution of the cases before them. Because many of Marshall’s most expansive constructions of federal power were dicta, the modern originalist can

270. See, e.g., Scalia, *Common-Law Courts*, *supra* note 17; Scalia, *Originalism*, *supra* note 16.

271. See, e.g., Rehnquist, *supra* note 267.

272. See, e.g., *Printz v. United States*, 521 U.S. 898, 937 (1997) (Thomas, J., concurring) (urging a “return to an interpretation [of the Commerce Clause] better rooted in the Clause’s original understanding”); *Camps Newfound/Owatonna, Inc. v. Town of Harrison*, 520 U.S. 564, 610 (1997) (Thomas, J., dissenting) (urging abandonment of dormant Commerce Clause doctrine and fidelity to original understanding).

contend that those constructions may be safely ignored—if in fact they otherwise seem inconsistent with the original understanding, constitutional structure, or some other source of constitutional meaning—while maintaining fidelity to the original understanding of how constitutional ambiguities would be resolved.

Yet this account of the federalism majority's treatment of decisions of the Marshall Court is unsatisfying, for several reasons. First, as explained above, the distinction between holdings and dicta is notoriously indeterminate.²⁷³ Permitting judges to ignore, based on this distinction, important pronouncements about constitutional meaning by a Court with a historically close vantage point on the original understanding invites the very type of instrumentalist decision making that proponents of originalism claim the methodology is likely to prevent. As Professor Dorf explained, “a too-narrow view of holdings often serves as a means by which judges evade precedents that cannot fairly be distinguished.”²⁷⁴ A judge who disagrees with the substantive implications of a relevant statement in a Marshall Court decision can easily insist that the statement is mere dicta and decline to follow it purely on instrumentalist grounds.

Second, this account ignores the role that Marshall Court decisions played in the early Republic. Marshall may well have “seldom missed the opportunity to rest a decision on two or three grounds when one would have sufficed, . . . to pick the more difficult ground for decision, . . . or to pass on issues not necessarily presented . . .”²⁷⁵ But given the political and legal context in which he operated, as well as his uncanny ability to gauge in advance the limits of what would be politically acceptable, his decisions effectively answered many more questions than simply those narrowly presented. The political and legal culture generally responded by treating those questions as having been answered. Indeed, as Neal Katyal has argued, dicta often serves the role of “advicegiving” to political branches;²⁷⁶ although they need not follow it, it can be influential in setting expectations about what is constitutionally acceptable. This was particularly true during Marshall's tenure on the Court

273. See *supra* notes 111–19 and accompanying text.

274. Dorf, *supra* note 112, at 1999.

275. CURRIE, SUPREME COURT, *supra* note 7, at 197.

276. Neal Kumar Katyal, *Judges as Advicegivers*, 50 STAN. L. REV. 109, 1801 (1998).

because so many fundamental questions about the separation of powers—both horizontal and vertical—were still unresolved or disputed, and even Marshall's contemporaneous detractors often recognized that his dicta had special force.

After the decision in *Cohens*, for example, Jefferson wrote a letter to Justice William Johnson and James Madison complaining about Marshall's view of federalism and of the power of the Court.²⁷⁷ Jefferson suggested that disputes between a State and the federal government should be resolved by an appeal to an "ultimate arbiter [of] the people of the Union, assembled by their deputies in convention, at the call of Congress, or of two-thirds of the States."²⁷⁸ Madison, who had been sympathetic to Jefferson's views since at least the Virginia and Kentucky resolutions,²⁷⁹ made clear in his response that he agreed with Jefferson's view of Marshall's tenure.²⁸⁰ He complained that the "Judiciary career has not corresponded with what was anticipated," particularly in light of the Marshall Court's "propensity to enlarge the general authority in derogation of the local, and to amplify its own jurisdiction" through "extrajudicial reasons [and] dicta."²⁸¹ Madison disagreed with Jefferson's proposed solution, however, suggesting instead that if any remedy were necessary, a constitutional amendment would make more sense.²⁸² Madison, in other words, was prepared to accept that Marshall's expansive constructions of the Constitution—even those announced "extrajudicial[ly]" or via dicta—effectively fixed the meaning of the Constitution, and were correctable only through the amendment process.²⁸³

277. Letter from Thomas Jefferson to Justice William Johnson (June 12, 1823), reprinted in THOMAS JEFFERSON: WRITINGS 1469, 1472–77 (Merrill D. Peterson ed., 1984).

278. *Id.* at 1476.

279. See *supra* note 127.

280. Letter from James Madison to Thomas Jefferson (June 27, 1823), reprinted in JAMES MADISON: WRITINGS 798, 798–802 (Jack N. Rakove ed., 1999).

281. *Id.* at 802; see also THE MIND OF THE FOUNDER: SOURCES OF THE POLITICAL THOUGHT OF JAMES MADISON 358 (Marvin Meyers ed., 1981) (noting that Madison bemoaned Marshall's "latitudinary mode of expounding the Constitution" in *McCulloch v. Maryland*).

282. Letter from James Madison to Thomas Jefferson, *supra* note 280, at 802.

283. See NEWMYER, *supra* note 128, at 325 (stating that Madison had come to believe that "disputed constitutional interpretation on major issues should be settled by constitutional amendment, not judicial decisions").

Similarly, the decision in *McCulloch* did much more than simply hold that Congress had power to create a national bank, that Congress's incidental powers under the Necessary and Proper Clause are broad, and that the States lack power to tax an instrumentality of the federal government, although these three holdings alone had explosive implications for federal-state relations. Marshall's decision in *McCulloch* also embraced a conception of national popular sovereignty,²⁸⁴ and in the process validated the conception of federal power that Hamilton had offered over Jefferson's objection two decades earlier.²⁸⁵

This is not to suggest that all of John Marshall's pronouncements immediately fixed the Constitution's meaning. Marshall himself did not always feel bound by his prior pronouncements,²⁸⁶ and he offered the classic statement of why dicta should not bind future courts.²⁸⁷ But it is to suggest that the Marshall Court's decisions are entitled to substantial deference. The Marshall Court had the occasion to address thorny questions of first impression about the respective powers of the federal and state governments—and, unlike on later Courts, “the Justices’ own memories bridged the temporal distance between the Founding and the case at hand.”²⁸⁸ Indeed, outside of the federalism context, the Court has long treated Marshall dicta as authoritative. For example, *Marbury* stands today for much more than its holdings about the constitutionality of the Judiciary Act, the scope of Article III's original jurisdiction provision, and the Court's power of judicial review. The Court has repeatedly cited it for the proposition that where there is a right there is a remedy,²⁸⁹ even though the Court's statement—the government will “cease to deserve” the “high appellation” of a “government of laws, and not of men,” if “the laws furnish no

284. See, e.g., *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 429 (1819) (“Those powers are not given by the people of a single state. They are given by the people of the United States, to a government whose laws, made in pursuance of the [C]onstitution, are declared to be supreme. Consequently, the people of a single state cannot confer a sovereignty which will extend over them.”).

285. See *supra* notes 123–27 and accompanying text.

286. See *CURRIE, SUPREME COURT*, *supra* note 7, at 196 (“His disdain for precedent in general was extraordinary, even when it squarely supported him . . .”).

287. See *supra* note 111 and accompanying text.

288. Friedman & Smith, *supra* note 29, at 11.

289. See, e.g., *Franklin v. Gwinnett County Pub. Sch.*, 503 U.S. 60, 66 (1992); *Bell v. Hood*, 327 U.S. 678, 684 (1946).

remedy for the violation of a vested legal right"²⁹⁰—was dicta under any definition of the term.²⁹¹

Third, contending that the Justices in the majority justifiably ignored only dicta rings hollow when one considers that they occasionally gave substantial deference to dicta from Marshall Court federalism decisions. Such deference was applied when the dicta tended to buttress the account of the original understanding that the Justices otherwise sought to defend. For example, in *United States v. Morrison*, in asserting that Congress largely lacks power to regulate and punish "interstate violence," Chief Justice Rehnquist's opinion for the Court relied on Marshall's statement in *Cohens v. Virginia* that Congress has "no general right to punish murder committed within any of the States" or to "punish felonies generally."²⁹² The Justices in the federalism majority declined to rely on *Cohens's* pronouncements about the scope of the States' sovereign immunity, however, on the ground that they are "dicta."²⁹³ Similarly, the majority regularly cited Marshall's statements in *Gibbons v. Ogden* and *McCulloch v. Maryland* that Congress's powers are limited by the enumeration,²⁹⁴ even though the majority declined to rely on Marshall's broader statements in those decisions about the scope of federal authority.²⁹⁵ The majority also

290. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163 (1803).

291. Marshall's statements about the rule of law were not necessary to the decision in *Marbury* in light of the Court's conclusion that it lacked jurisdiction over the suit. *Id.* at 173, 180. The statements also were not part of the rationale of the holding about the Court's jurisdiction. See Dorf, *supra* note 112, at 2005–09, 2040–48 (discussing different definitions of dicta, including the facts-and-outcomes definition and the rationale-based definition).

292. *United States v. Morrison*, 529 U.S. 598, 618 (2000) (quoting *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 426, 428 (1821)). These statements are dicta both under the facts-and-outcomes approach and the rationale-focused approach. See *supra* notes 110–19 and accompanying text. The Court held that it had jurisdiction because an Act of Congress authorizing the government in the District of Columbia was a "law[] of the United States" within the meaning of the Judiciary Act of 1789. *Cohens*, 19 U.S. at 436. The Court made its comments about Congress's power in the course of addressing the hypothetical question whether Congress had authority to pass laws that operate outside of the District of Columbia; although the Court suggested that Congress has such authority if it is "necessary to complete and effectuate execution," it did not have to resolve the question, in light of its conclusion that Congress had not in fact attempted to authorize the sale of lottery tickets in Virginia. *Id.* at 423–30, 440–48.

293. *Welch v. Tex. Dep't of Highways and Pub. Transp.*, 483 U.S. 468, 482 n.11 (1987); see *supra* notes 199–201 and accompanying text.

294. See, e.g., *United States v. Lopez*, 514 U.S. 549, 553, 566 (1995).

295. See *supra* notes 225–31 and accompanying text.

cited, with much greater frequency than the dissent, dicta from decisions of the Taney and Chase Courts, which were more solicitous of claims of States' rights, to support an originalist account favoring state autonomy.²⁹⁶

Fourth, in discerning the original understanding, the Court gave deference to acts (or inaction) of the earliest Congresses, both according to the theory of liquidation of constitutional ambiguities and because many of the members of the early Congresses were Framers themselves. As Justice Scalia explained, not only do "early congressional enactments 'provid[e] contemporaneous and weighty evidence of the Constitution's meaning,'"²⁹⁷ but "such contemporaneous legislative exposition of the Constitution . . . , acquiesced in for a long term of years, fixes the construction to be given its provisions."²⁹⁸ Although Marshall was not the first Chief Justice and not all of his colleagues during his long tenure on the Court had participated directly in the framing and ratification of the Constitution, Marshall was a central figure at the Virginia ratification convention, and his Court's decisions, like those of the early Congresses, reflect the accumulated wisdom of the framing era. Accordingly, dicta in Marshall Court decisions are perhaps entitled to greater weight than dicta from other courts.

2. Originalism's Judicial-Constraint Defense

The majority's and the dissent's differential treatment of decisions of the Marshall Court together undermine one of the principal justifications for originalism. Proponents argue that originalism is the most effective interpretive methodology at constraining the discretion of judges to impose their own views in the course of decision making.²⁹⁹ According to the judicial-constraint defense, because originalism, unlike other approaches that treat constitutional meaning as subject to evolving, extra-textual norms, fixes the meaning of a constitutional provision according to the original understanding of that provi-

296. My data shows that the Justices in the federalism majority are about four times more likely than the dissenting Justices to cite cases—and particularly pro-states' rights dicta in cases—such as *Beers v. Arkansas*, 61 U.S. (20 How.) 527 (1858), *Texas v. White*, 74 U.S. (7 Wall.) 700 (1868), *Lane County v. Oregon*, 74 U.S. (7 Wall.) 71 (1868), and *Collector v. Day*, 78 U.S. (11 Wall.) 113 (1870).

297. *Printz v. United States*, 521 U.S. 898, 905 (1997) (quoting *Bowsher v. Synar*, 478 U.S. 714, 723–24 (1986) (alteration in original)).

298. *Id.* (quoting *Myers v. United States*, 272 U.S. 52, 175 (1926)).

299. See *supra* notes 32–36 and accompanying text.

sion, judges cannot impose their own views under the guise of constitutional interpretation. The substantial difference between the majority's and the dissent's treatment of decisions of the Marshall Court suggests, however, either that the theory of how constitutional ambiguities would be resolved is inherently malleable or that originalism in fact has not constrained the ability of the Justices to decide federalism cases based on their own (albeit genuinely held) normative views of the appropriate balance of federal and state authority.

As explained above, the originalist can justify the decision to discount decisions of the Marshall Court by relying on the distinction between holdings and dicta. But this justification not only casts doubt on whether the Court is being faithful to the Framers' understanding of how ambiguous constitutional provisions would attain fixed meaning, but also suggests that the judicial-constraint defense of originalism is overstated. The study demonstrates that there is a substantial risk that a Justice will decide whether to follow pronouncements of the Marshall Court according to how well they correspond to the Justice's own conception of the original understanding or to the Justice's own instrumentalist goals.

I do not mean to suggest that the Justices in the majority or the dissent did *in fact* decide whether to ignore, discount, or embrace pronouncements of the Marshall Court as part of an instrumentalist attempt to advance their personal views of the appropriate balance between federal and state power.³⁰⁰ But the results of the study need only be *consistent* with such an account to undermine the judicial constraint defense of originalism. The Justices' differential treatment of decisions of the Marshall Court demonstrates that judges have vast discretion in choosing which sources to rely on when reconstructing the

300. Others, however, have leveled a similar charge, at least against the majority. See Daniel A. Farber, *The Constitution's Forgotten Cover Letter: An Essay on the New Federalism and the Original Understanding*, 94 MICH. L. REV. 615, 645 (1995) ("In essence, the New Federalists seem to view the Constitution almost as if it was a compromise between those who drafted it and their opponents."); Jackson, *supra* note 205, at 318–24 (wondering "whether the early 19th century vision of the Marshall Court does not commend itself more to the world of today than does the vision of federal judicial power recently advanced in the Rehnquist Court"); H. Jefferson Powell, *The Oldest Question of Constitutional Law*, 79 VA. L. REV. 633, 675–81 (1993) (arguing that Justice O'Connor's view of federalism in *New York v. United States*, 505 U.S. 144 (1992), parallels the decision of the Virginia Court of Appeals in *Hunter v. Martin*, 18 Va. (4 Munf.) 1 (1815), which was reversed by *Martin v. Hunter's Lessee*).

original understanding, and thus suggests that originalism's advantage over other approaches to constitutional interpretation in its ability to constrain judicial discretion is marginal.

To be sure, it may be the case that a theoretically principled application of originalism not only permits but requires that the court be free from the constraint of precedent at least to some degree. That is, even if one does not accept Lawson's view that a court always *must* prefer the original understanding to a prior judicial decision inconsistent with that understanding,³⁰¹ one might argue that fidelity to the original understanding at least *permits* a court to depart from precedent that lacks a foundation in the original understanding. This view might justify the federalism majority's choice to ignore Marshall Court decisions construing the extent of the States' constitutional immunity from suit. But even on this view, it is far from clear that originalism would be particularly effective at curbing instrumentalism, let alone at promoting the values of consistency and stability in the law. Permitting judges to ignore precedents that they deem sufficiently inconsistent with their understanding of the original understanding would appear, if anything, to invite judicial instrumentalism, not to limit it.

This is also not to suggest that other methodologies for interpreting the Constitution are *more* effective than originalism at constraining judicial instrumentalism. But neither is originalism the panacea for instrumentalism that its proponents often claim, and the study presented here suggests that those claims should not, alone, stand in the way of the development of other defensible interpretive methodologies.

CONCLUSION

On the 200th anniversary of the appointment of John Marshall as Chief Justice of the Supreme Court, Chief Justice Rehnquist gave a speech in which he praised Marshall as a "splendid gift" to the American people.³⁰² Rehnquist praised Marshall's success, which he achieved even though he "faced a built-in headwind against his views for the first twenty-four years of his tenure as Chief Justice" because Presidents Jefferson, Madison, and Monroe "had quite a different view of the re-

301. See *supra* notes 102–03 and accompanying text.

302. See William H. Rehnquist, Remarks (May 8, 2001), http://www.supremecourtus.gov/publicinfo/speeches/sp_05-08-01.html.

lationship between the federal and state governments than Marshall did.”³⁰³ Chief Justice Rehnquist’s federalism decisions—and those of the voting bloc he led—do not, however, demonstrate quite the same level of fondness for decisions of the Marshall Court.

John Marshall may often have gotten it wrong, and he is certainly not above the charge that he was an instrumentalist Justice, taking every opportunity to fix constitutional meaning according to his view of the appropriate balance between federal and authority. But the modern originalist—even the originalist who does not generally share Marshall’s view of the original understanding—ought to take the bitter with the sweet. If the original understanding was that constitutional ambiguities would attain fixed meaning in judicial decisions, then the modern originalist appears bound by originalism to accept some range of decisions of the Marshall Court, however much they may have demonstrated a preference for federal supremacy over state autonomy. That many modern originalists do not feel so bound—and that they may choose not to feel so bound—suggests that originalism’s promise as a constraint on judicial instrumentalism remains unfulfilled.

303. *Id.*