

Reassessing the Constitutional Past: Judicial Alteration of Rights and Powers Through Interpretation of the Unaltered Text

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* Professor, John Jay College of Criminal Justice, City University of New York. Many friends have engaged me in lengthy conversations about the ideas proposed in this Article. Although none have agreed with everything said here, I know I could not have thought through my own position without their willingness to hear me out. I am thus grateful to Marc Bernstein, Rogers Brubaker, Mike Cullina, Denise Heffernan, John Laffey, Bob Schmiederer, and Steve Wasserman not only for their companionship but for the spirited exchanges they have had with me as I have mulled over the issues discussed here. I have also benefited from the insightful editorial suggestions of Rebecca Payton and Devon Spriddle as this Article has been prepared for publication. Many thanks to them, as well.

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I. INTRODUCTION

During the course of oral argument in *Hollingsworth v. Perry*, the 2013 case concerned with the constitutionality of California's ban on same-sex marriage, Justice Scalia posed a *when* question of

inescapable importance in constitutional litigation.¹ “I’m curious, when—when did—when did it become unconstitutional to exclude homosexual couples from marriage?” Scalia asked. “1791? 1868, when the Fourteenth Amendment was adopted?”² The dates Scalia mentioned are those in which the Bill of Rights³ and the Fourteenth Amendment⁴ respectively were added to the Constitution. The implication of his question was unmistakable: either a constitutional right to same-sex marriage was added *then*—or else none can be said to exist.

Grasping the significance of Scalia’s *when*, Theodore Olson, the respondents’ lawyer, breached protocol by posing a question of his own.⁵ “When—may I answer this in the form of a rhetorical question?” Olson asked. “When did it become unconstitutional to prohibit interracial marriages? When did it become unconstitutional to assign children to separate schools?”⁶ In posing this counter-question, Olson was challenging Scalia’s assumption that there must be a clearly identifiable moment in time when rights or powers come into existence. Even though the framers and ratifiers may not have anticipated that the Fourteenth Amendment would invalidate public school segregation and anti-miscegenation legislation, Olson was suggesting, it had this effect—indeed, it *legitimately* had this effect. In taking this position, Olson was intimating more generally that the scope of government authority can be reassessed in the absence of Article V.⁷ The amendment process is not the only possible route to the legitimate alteration of rights and powers, he was suggesting. Rather, the Court may properly reassess the constitutional past, thereby modifying the contours of rights and powers even when no amendment is adopted to bring this about.

Scalia would have none of this. Insisting on his crisp turning-point thesis, he responded directly to Olson’s challenge: “It’s an easy

1. 570 U.S. 693 (2013).

2. Transcript of Oral Argument at 38, *Hollingsworth v. Perry* 570 U.S. 693 (2013) (No. 12-144), 2013 WL 6908183, at *38 [hereinafter Oral Argument Transcript].

3. U.S. CONST. amends. I–X.

4. U.S. CONST. amend. XIV.

5. See Oral Argument Transcript, *supra* note 2, at 38.

6. See *id.*

7. U.S. CONST. art. V.

question, I think, for that one. At—at the time that the—Equal Protection Clause was adopted. That’s absolutely true.”⁸

Absolutely true? There is a possible—perhaps even a plausible, though hardly conclusive, and certainly not absolutely true—argument that might be made in support of this position. Once the Fourteenth Amendment was adopted, it might be contended, that provision’s general terms (perhaps the Privileges or Immunities Clause,⁹ perhaps the Equal Protection Clause)¹⁰ mandated immediate invalidation of public-school segregation¹¹ and anti-miscegenation legislation.¹² But if this is

8. Oral Argument Transcript, *supra* note 2, at 39. Many commentators have remarked on the Scalia-Olson exchange. See, e.g., Mitchell N. Berman, *The Tragedy of Justice Scalia*, 115 MICH. L. REV. 783, 795–96 (2017); Daniel O. Conkle, Essay, *Evolving Values, Animus, and Same-Sex Marriage*, 89 IND. L.J. 27, 27–28 (2014); Jamal Greene, Essay, *The Age of Scalia*, 130 HARV. L. REV. 144, 158–59 (2016); Nan D. Hunter, Commentary, *A Deer in the Headlights: The Supreme Court, LGBT Rights, and Equal Protection*, 52 HOUS. L. REV. 1121, 1138–39 (2015); Michael J. Klarman, *Windsor and Brown: Marriage Equality and Racial Equality*, 127 HARV. L. REV. 127, 140 n.105 (2013); Dawn Johnsen, Essay, *Windsor, Shelby County, and the Demise of Originalism: A Personal Account*, 89 IND. L.J. 3, 5–7 (2014); Marc R. Poirier, “Whiffs of Federalism” in *United States v. Windsor: Power, Localism, and Kulturkampf*, 85 U. COLO. L. REV. 935, 947–48 (2014). Helpful as these articles are in situating *Hollingsworth’s* oral argument in the context of Fourteenth Amendment doctrinal development, they do not comment on the general issue addressed here—i.e., whether the judiciary may legitimately use its *Marbury* power to reassess the constitutional past.

9. “No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States . . .” U.S. CONST. amend. XIV, § 1.

10. “No state shall . . . deny to any person within its jurisdiction the equal protection of the laws.” U.S. CONST. amend. XIV, § 1.

11. See Michael W. McConnell, *Originalism and the Desegregation Decisions*, 81 VA. L. REV. 947 (1995), for an argument along these lines. Justice Scalia appears to have found McConnell’s analysis convincing, for he cites the McConnell article approvingly in a book on legal interpretation written jointly with Bryan A. Garner. See ANTONIN SCALIA & BRYAN A. GARNER, *READING LAW: THE INTERPRETATION OF LEGAL TEXTS* 88 (2012); see also Steven G. Calabresi & Michael W. Perl, *Originalism and Brown v. Board of Education*, 2014 MICH. ST. L. REV. 429 (arguing that *Brown* is supported by the original public meaning of Section 1 of the Fourteenth Amendment).

12. See Steven G. Calabresi & Andrea Matthews, *Originalism and Loving v. Virginia*, 2012 BYU L. REV. 1393, for an argument that, in light of its original public meaning, the Fourteenth Amendment required invalidation of anti-miscegenation legislation. See also David R. Upham, *Interracial Marriage and the Original Understanding of the Privileges or Immunities Clause*, 42 HASTINGS CONST. L.Q. 213

so, did the Fourteenth Amendment's adoption also mandate immediate invalidation of legal disabilities confronting women—their exclusion from the professions, for instance?¹³ And given the amendment's terms, were laws limiting marriage to opposite-sex couples unconstitutional the moment the text was ratified?¹⁴ Olson's retort was concerned with this specific issue, but his remarks were pertinent to the others just mentioned, for it might be contended that, given the original public meaning of the text, these facets of the American legal order became unconstitutional with the Fourteenth Amendment's adoption—that is, it might be argued that the social (as well as legal) landscape was transformed in one fell swoop.¹⁵

If so, few people seem to have grasped this at the time. Even Congress seems not to have understood, for despite having forwarded the Fourteenth Amendment to the states, it did not adopt legislation

(2015), for an argument that, as a matter of original understandings, it required this same result.

13. See Steven G. Calabresi & Julia T. Rickert, *Originalism and Sex Discrimination*, 90 TEX. L. REV. 1 (2011), for an argument that, in light of its original public meaning, Section 1 of the Fourteenth Amendment mandated invalidation of state rules imposing employment disabilities on women.

14. See Steven G. Calabresi & Hannah M. Begley, *Originalism and Same-Sex Marriage*, 70 U. MIA. L. REV. 648 (2016), for an argument to this effect.

15. Thus, the significance of Professor Calabresi's claim: "Section 1 of the Fourteenth Amendment completely transforms American constitutionalism and federalism." Calabresi & Matthews, *supra* note 12, at 1413. "It is impossible to overstate the import[ance] of this broad language." *Id.* at 1414. In a similar vein, Professor Calabresi also asserts that "the Fourteenth Amendment forbade racial segregation in public schools from the moment it was adopted." Calabresi & Perl, *supra* note 11, at 437.

Justice Scalia's *Hollingsworth* exchange with Theodore Olson relies on this Calabresi/Perl premise—i.e., that individual rights are either established at the moment of ratification or else do not exist. Scalia asked, "Has it always been unconstitutional [to prohibit same-sex marriage]?" Olson responded by pointing to a decision by the California Supreme Court. Scalia answered: "That—that's not when it became unconstitutional. That's when they [the Court] acted in a constitutional matter—in an unconstitutional manner. When did it become unconstitutional to prohibit gays from marrying?" Oral Argument Transcript, *supra* note 2, at 39. Implicit in this remark is the premise that courts do not have the power to alter individual constitutional rights. Article V assigns the task of "deciding . . . new rights" to "the people," not the courts. *McDonald v. City of Chicago*, 561 U.S. 742, 793–94 (2010) (Scalia, J., concurring).

requiring desegregation of the District of Columbia's schools.¹⁶ Moreover, only a few northern states took steps to desegregate their public schools during the course of the late-nineteenth-century,¹⁷ and the Court appears to have accepted the constitutionality of school segregation in *Plessy v. Ferguson* and the many cases decided in its wake.¹⁸ As far as anti-miscegenation statutes are concerned, there was modest movement toward their repeal in the immediate aftermath of the Fourteenth Amendment's adoption,¹⁹ but the Court unanimously upheld the constitutionality of such legislation in 1883, only fifteen years after ratification.²⁰ Indeed, this kind of legislation not only remained in effect but was actively enforced throughout the first half of the twentieth-

16. "The same Congress that wrote the Fourteenth Amendment segregated schools in the District of Columbia . . ." MICHAEL J. KLARMAN, FROM JIM CROW TO CIVIL RIGHTS: THE SUPREME COURT AND THE STRUGGLE FOR RACIAL EQUALITY 19 (2004).

17. *See id.* at 25.

18. In *Plessy v. Ferguson*, the Court commented approvingly on "the establishment of separate schools for white and colored children" by noting that this "has been held to be a valid exercise of the legislative power even by courts of States where the political rights of the colored race have been longest and most earnestly enforced." 163 U.S. 537, 544 (1896). It added: "[W]e cannot say that a law which authorizes or even requires the separation of the two races . . . is unreasonable, or more obnoxious to the Fourteenth Amendment than the acts of Congress requiring separate schools for colored children in the District of Columbia, the constitutionality of which does not seem to have been questioned, or the corresponding acts of state legislatures." *Id.* at 550–51; *see also* *Cumming v. Richmond Cnty. Bd. of Educ.*, 175 U.S. 528, 544–45 (1899) (upholding, against a Fourteenth Amendment challenge, a scheme that offered high school education to White but not Black students in a given county); *Berea College v. Kentucky*, 211 U.S. 45, 57–58 (1908) (upholding, against a Fourteenth Amendment challenge, a Kentucky law that prohibited instruction of White and Black students in the same private institution); *Gong Lum v. Rice*, 275 U.S. 78, 85 (1927) (holding that the Fourteenth Amendment is not violated when a student of Chinese descent is placed in "class[es] among the colored races and furnished facilities . . . equal to that offered to all, whether white, brown, yellow, or black.").

19. *See* discussion *infra* notes 404, 410–13, 431–34, and accompanying text; PEGGY PASCOE, WHAT COMES NATURALLY: MISCEGENATION LAW AND THE MAKING OF RACE IN AMERICA 30–40 (2009); *see also* PETER WALLENSTEIN, TELL THE COURT I LOVE MY WIFE: RACE, MARRIAGE, AND LAW—AN AMERICAN HISTORY 69–84 (2002).

20. *Pace v. Alabama*, 106 U.S. 583 (1883); *see* discussion *infra* notes 415–18 and accompanying text.

century.²¹ Legal disabilities on women were also upheld as constitutional under the Fourteenth Amendment.²² And, of course, same-sex marriage—ultimately held to be a Fourteenth Amendment right in *Obergefell v. Hodges*²³—was a constitutional pipe-dream throughout the entire twentieth-century.²⁴

Scalia dissented vehemently from the Court’s holding in *Obergefell*.²⁵ In doing so, he emphasized not the socially transformative potential of the broad language contained in Section 1 of the Fourteenth Amendment but instead the socially conservative understandings entertained by its ratifiers. “When the Fourteenth Amendment was ratified in 1868, every State limited marriage to one man and one woman, and no one doubted the constitutionality of doing so,” Scalia wrote:

That resolves these cases. When it comes to determining the meaning of a vague constitutional provision—such as “due process of law” or “equal protection of the laws”—it is unquestionable that the People who ratified that provision did not understand it to prohibit a practice that remained both universal and uncontroversial in the years after ratification.²⁶

On this reckoning, even if the original public meaning of the Fourteenth Amendment is compatible with a right to same-sex marriage, this cannot resolve a question about the constitutional status of such a right. Given the vagueness of phrases such as *due process* and *equal protection*, someone taking Scalia’s position would argue, original understandings of their scope must be consulted to determine their scope today. These understandings tame the text’s public meaning: they limit its reach, for original meaning standing alone has a socially

21. See PASCOE, *supra* note 19, at 131–59.

22. See, e.g., *Bradwell v. State*, 83 U.S. 130, 138 (1873) (upholding, as against a Fourteenth Amendment challenge, an Illinois rule barring an otherwise qualified woman from practicing law).

23. 576 U.S. 644, 675–76 (2015).

24. See, e.g., *Baker v. Nelson*, 409 U.S. 810, 810 (1972) (dismissing, for want of a substantial federal question, an appeal of the holding by the Minnesota Supreme Court that there is no right under the Fourteenth Amendment for a same-sex couple to secure a marriage license), *overruled by Obergefell*, 576 U.S. at 675–76.

25. See *Obergefell*, 576 U.S. at 713–19 (Scalia, J., dissenting).

26. *Id.* at 715–16.

transformative potential—a potential so explosive it can justify judicial repudiation of a practice as deeply entrenched in social life as the norm limiting marriage to one man and one woman²⁷—whereas original understandings offer a way to constrain the application of vague language by emphasizing the ratifiers’ conception of the text.

During the course of his career, Scalia endorsed both versions of originalism.²⁸ Indeed, it seems reasonable to say that he endorsed

27. Chief Justice Roberts recognized this potential when he commented in his *Obergefell* dissent on the possibility of a Fourteenth Amendment challenge to a statute banning plural marriage. He asked, “If a same-sex couple has the constitutional right to marry because their children would otherwise ‘suffer the stigma of knowing their families are somehow lesser,’ why would the same reasoning not apply to a family of three or more persons raising children?” *Id.* at 704 (Roberts, C.J., dissenting) (citing *id.* at 688 (majority opinion)).

28. Justice Scalia endorsed original public meaning originalism and rejected intentionalist versions of originalism in a 1986 address sponsored by the Justice Department. Justice Antonin Scalia, Address Before the Attorney General’s Conference in Washington, D.C. (June 14, 1986), in OFF. OF LEGAL POL’Y, ORIGINAL MEANING JURISPRUDENCE: A SOURCEBOOK 101–06 (Mar. 12, 1987), <https://www.ojp.gov/pdffiles1/Digitization/115083NCJRS.pdf>. Three years later, Scalia urged interpreters to turn to original understandings in order to apply the text’s abstract terms. He stated that “it is often exceedingly difficult to plumb the original *understanding[s]* of an ancient text” and so recommended that interpreters “immers[e]” themselves “in the political and intellectual atmosphere of the time” to determine how the text should be applied. Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849, 856 (1989) (emphasis added). Scalia’s emphasis on immersive retrieval goes beyond originalism as it has typically been practiced. Earlier versions of originalism focused on word-meaning while nonetheless emphasizing that it was necessary for a later generation interpreting the text to place itself in the position of the one that ratified it. *See, e.g., Ex Parte Bain*, 121 U.S. 1, 12 (1887) (claiming “that in the construction of the language of the [C]onstitution . . . as, indeed, in all other instances where construction becomes necessary, we are to place ourselves as nearly as possible in the condition of the men who framed that instrument.”) The Scalia remarks just quoted are compatible with this emphasis on recreating an earlier mental framework. However, they point as well to the importance of retrieving the attitudinal and emotional framework of the framing generation.

It is worth adding that Neil Gorsuch, who succeeded to Justice Scalia’s seat in 2017, treats original understandings as a key part of originalist interpretation. “Originalism,” he writes, “is simply the idea that when interpreting the Constitution, we should look to the text and history and how the document was understood at the time of its ratification.” NEIL M. GORSUCH, A REPUBLIC, IF YOU CAN KEEP IT 25 (2019). Gorsuch has not, however, advocated immersive retrieval of the evaluative outlook that accompanied the text’s adoption.

both versions in commenting on the Fourteenth Amendment. That is, there is only modest evidence that the amendment was understood by its ratifiers to mandate school desegregation and extremely scant evidence that it was understood to require invalidation of anti-miscegenation statutes (thus making it essential to appeal to the original public meaning of the text's abstract language and to downplay comments on its appropriate application). In contrast, it is at least plausible to say that the text's abstract language requires the same treatment for same-sex couples as is granted to opposite-sex couples (thus making it essential to appeal to original understandings when arguing that a right of same-sex marriage did not achieve constitutional standing on the day the amendment was incorporated into the text).²⁹ Each conclusion can march under the capacious banner of originalism.³⁰ But the conclusions are incompatible. To note this is not to discredit originalism. The tension between different types of originalism does, however, suggest

For examples of Justice Gorsuch's use of original understandings in resolving *Bucklew v. Precythe*, 139 S.Ct. 1112 (2019), an Eighth Amendment case concerned with a mode-of-execution issue, see *infra* note 297.

29. The tension between these two types of originalism is discernible in Justice Scalia's different conclusions about the constitutional status of anti-miscegenation statutes and prohibitions of same-sex marriage. His response to Theodore Olson during *Hollingsworth* overlooked original understandings as to the constitutionality of such legislation. See *supra* note 8 and accompanying text. In contrast, his response to arguments that a prohibition on same-sex marriage violates the Fourteenth Amendment relied on an original understandings version of originalism—specifically, on the claim that no one understood that provision would lead to invalidating such a prohibition on same-sex marriage. See *supra* note 26 and accompanying text.

30. Professor Solum's definition of originalism is helpful here. "Originalism is a family of constitutional theories united by two core ideas," he writes. Lawrence B. Solum, *Originalism and Constitutional Construction*, 82 *FORDHAM L. REV.* 453, 456 (2012). "The first . . . is that the original meaning ('communicative content') of the constitutional text is fixed at the time each provision is framed and ratified. *Id.* "The second idea (the 'Constraint Principle') is that constitutional actors (e.g. judges, officials, and citizens) ought to be constrained by the original meaning when they engage in constitutional practice (paradigmatically, deciding constitutional cases, but also including constitutional decisionmaking outside the courts by officials and citizens)." *Id.* This definition leaves room, as Professor Solum acknowledges, for many different types of originalism. In the course of this Article, attention will be given in particular to two different versions, one that aims at retrieving original public meaning *without* reference to the understandings that accompanied the text's adoption and another that treats original understandings as a necessary constraint on the application of textual language that was acknowledged to be indefinite by those ratifying it.

that difficulties lurk behind any appeal to it as a framework of constitutional interpretation.

This Article relies on the claim, implicit in Olson's reply to Scalia, that the law has properly changed over time.³¹ It does so, however, by treating original public meaning as an indispensable component of constitutional interpretation and also by treating original understandings as a further, but time-limited, guide to the text's application. Public school segregation was indeed constitutional in the period following the Fourteenth Amendment's adoption, and, the Article suggests, so too were anti-miscegenation statutes.³² To argue otherwise is to imply that virtually every member of the federal bench plus most of the proponents of the Fourteenth Amendment failed to apply it properly. Similarly, to claim that legal disabilities on women became unconstitutional *ab initio*—i.e., in 1868—is to charge virtually every nineteenth-century federal judge with exegetical incompetence. And of course, to hold that same-sex marriage bans became unconstitutional in 1868 is to suggest that more than a century's worth of constitutional law was mistaken.

The merit of Olson's retort is that it avoids far-fetched claims such as these. It does so by sidestepping Article V, however. That is, it suggests that practices widely understood to be constitutionally acceptable at the time of the text's ratification *became* unconstitutional over time (in the absence of the ratification procedures prescribed by the text). This is surely a troubling claim. It captures a critical fact about American history (i.e., that the Court has used its *Marbury* power to "say what the law is"³³) in order to reassess the scope of rights and powers mentioned in the text, but it provides no justification for the legitimacy of judicial review when it is employed in this way. If this challenge is left unanswered, it leaves open the possibility (widely and properly feared by originalists and non-originalists alike)³⁴ that judicial

31. See *supra* notes 6–7 and accompanying text.

32. See *infra* Section V.A.

33. *Marbury v. Madison*, 5 U.S. 137, 177 (1803) ("It is emphatically the province and duty of the judicial department to say what the law is.").

34. Alexander Hamilton expressed concern about the danger of judicial imposition of personal preference in his defense of judicial review. He wrote, "The courts must declare the sense of the law; and if they should be disposed to exercise WILL instead of JUDGMENT, the consequence would equally be the substitution of their

review can (and will) be employed to impose the justices' personal preferences on the nation.

The answer to this challenge, I suggest during the course of the Article, depends on two considerations. One has to do with the text's reliance on indefinite language. Inserted in the text at two points in the nation's history (the late-eighteenth and the mid-nineteenth centuries), the indefinite terms contained in both the power-granting and rights-affirming portions of the Constitution appear to leave interpreters largely unconstrained in determining the scope of government authority.³⁵ Critics of these provisions commented on this low-constraint problem during ratification debates.³⁶ Interpretive disagreements in contemporary constitutional law center on the same risk today.³⁷ To focus only on this, however, is to disregard the benefit to posterity provided by textual vagueness, for this feature of language in a written Constitution makes possible interpretive recalibration of government authority *while remaining faithful to the language it contains*. Semantic elasticity, in other words, allows for reassessment of rights and powers within the terms set by the text's original public meaning.

That meaning is what alarmed critics during the course of ratification debates, though, for it was obvious that phrases such as *cruel and unusual* or *equal protection of the laws* could be interpreted to invalidate dominant social practices of the day—and thus there was good

pleasure to that of the legislative body.” THE FEDERALIST NO. 78, at 469 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

35. For ratification-era discussion of the low-constraint feature of indefinite textual language, see *infra* Section II.A.

36. See *infra* Sections II.A, III.A, IV.A, and V.A for ratifier remarks that expressed alarm about the low-constraint features of indefinite textual language.

37. Justice Scalia's *Obergefell v. Hodges* comment on the vagueness of the Fourteenth Amendment's Equal Protection Clause illustrates how contemporary interpretive disagreement centers on open-ended provisions, for the majority and the dissenters in *Obergefell* reached different conclusions about the proper application of the clause. Indeed, Chief Justice Roberts's *Obergefell* dissent accuses the majority of Lochnerizing the case. “Ultimately, only one precedent offers support for the majority's methodology: *Lochner v. New York*, 198 U.S. 45 [1905]” *Obergefell v. Hodges*, 576 U.S. 644, 703 (2015) (Roberts, C.J., dissenting). Chief Justice Roberts states that “[t]he truth is that today's decision rests on nothing more than the majority's own conviction that same-sex couples should be allowed to marry because they want to, and that ‘it would disparage their choices and diminish their personhood to deny them this right.’” *Id.* (quoting *id.* at 672 (majority opinion)).

reason to fear vesting judges with the power to rely on such language in resolving issues of constitutionality.³⁸ Contemporary proponents of original understandings have responded to this point by offering a way to tame textual indefiniteness—by insisting on adherence to the specific conceptions of constitutionality entertained by the ratifiers. During the course of the Article, I endorse a time-limited version of this. Original understandings properly served as a guide to application of the text's vague language in the immediate aftermath of that language's adoption, I suggest. They should continue to serve as the default guide today, I further contend, unless and until there is evidence of a long-standing, superseding consensus compatible with the text's underlying commitments but incompatible with the way in which it was originally applied. This superseding-understanding thesis complements the one about semantic elasticity, for it too offers a way to tame indefiniteness. In relying on it, someone can account for the tension between the constitutional past and present. That is, one can explain why certain rights and powers are *now* legitimately part of constitutional doctrine even if they were not part of it *then*.

In drawing on these two theses—the semantic-elasticity and superseding-understanding theses—someone can make sense of American constitutional law as the historically mediated enterprise it is. In particular, the two theses offer a way to respond cogently to the questions Justice Scalia posed in his exchange with Theodore Olson.³⁹ Racial segregation in public education and anti-miscegenation statutes were indeed constitutional in the immediate aftermath of the Fourteenth Amendment's adoption. They were widely understood as such by the text's ratifiers and, in the case of anti-miscegenation legislation, their constitutionality was affirmed by a unanimous Court.⁴⁰ But they became unconstitutional over time—and a justification for this conclusion does not hinge on an appeal to altered judicial preferences but instead on changes in national understandings of the values mentioned in the text. With these two theses as a guide, we can say that the Court properly altered the law despite the absence of Article V deliberations pertinent to the issues under consideration. Given the text's semantic

38. For analysis of ratification-era discussion of the significance of indefinite textual language, see *infra* Sections IV.A and V.A.

39. See *supra* notes 2–8 and accompanying text.

40. *Pace v. Alabama*, 106 U.S. 583, 584–85 (1883).

elasticity, the Court was able to change course while continuing to reason within a continuously existing framework. And given the superseding-understanding thesis, a justification can be offered for the conclusions reached, one that relies on the interplay of past and present and that therefore establishes the text's ongoing legitimacy as the organizing document that sets the terms for government authority.

But if this explains *why* the mid-twentieth-century equal protection cases were properly decided, what answer does it provide to Scalia's *when* question—i.e., his question as to when a constitutional right to engage in interracial marriage came to exist? A historically informed response to this will disappoint those who want certitude in constitutional law, for if we say that rights and powers can properly change over time we have to allow for the absence of a bell-ringing moment as to when the change occurs. It might of course be contended that the moment comes on the day the Court reverses a prior decision. To take this position, however, is to disregard the adverb *properly* in the superseding-understanding thesis, for it is the criterion essential to that adverb (i.e., the formation of a post-ratification national consensus compatible with the text's underlying commitments) that provides a warrant for the Court's conclusions, not the fact that a majority of the justices resolved a dispute one way or another. Once American constitutionalism is approached as a historically mediated activity, one has to settle for this blurred, rather than bright-line, framework of constitutional law when thinking about the legitimate alteration of rights and powers.

The Article that follows examines not only Fourteenth Amendment issues but also examines others related to individual rights and still others that address government powers. This breadth of coverage is essential to demonstrate that judicial reassessment of the constitutional past is not merely a phenomenon peculiar to the Fourteenth Amendment. By casting a wide net, the Article establishes that this is a well-entrenched feature of American constitutional law. The founders and the immediate post-Civil War generation adopted the text's key provisions.⁴¹ American constitutionalism today is best understood in terms of what we make of our eighteenth- and nineteenth-century heritage.

41. For discussion, see AKHIL REED AMAR, *AMERICA'S CONSTITUTION: A BIOGRAPHY* (2005).

The Article is divided into five sections—an initial one that examines the ratifiers’ recognition of the indefiniteness of the provisions they adopted in the late-eighteenth and mid-nineteenth centuries, three subsequent sections that examine examples of judicial reinterpretation of indefinite provisions, and a concluding section that considers the possibility of improving on the constitutional past. Rather than comment on the details of these sections, it will be helpful to note here their relationship to recent originalist scholarship concerning many of the cases examined in the course of the Article. The impetus for that scholarship can be traced to Robert Bork’s comment that “*Brown* [*v. Board of Education*] has become the high ground of constitutional theory. Theorists of all persuasions seek to capture it, because any theory that seeks acceptance must, as a matter of psychological fact, if not logical necessity, account for the result in *Brown*.”⁴² During the decades that

42. ROBERT H. BORK, *THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW* 77 (1990); see also McConnell, *supra* note 11, at 952 (“Such is the moral authority of *Brown* that if any particular theory does not produce the conclusion that *Brown* was correctly decided, the theory is seriously discredited.”).

The Bork and McConnell comments should be considered in the context of criticism that was directed at the original intentions version of originalism espoused by Raoul Berger. In focusing on the intentions of the framers of the Fourteenth Amendment, Berger contended that the provision does not support the conclusion reached in *Brown*. See RAOUL BERGER, *Segregated Schools, in GOVERNMENT BY JUDICIARY: THE TRANSFORMATION OF THE FOURTEENTH AMENDMENT* 117–33 (1977). Bork and McConnell were among the many originalists who recognized that an argument along these lines is more likely to discredit originalism than *Brown*—and, by extension, to discredit twentieth-century decisions invalidating anti-miscegenation legislation as well as decisions of the same era that rely on the Fourteenth Amendment to remove legal disabilities for women. The Scalia/Olson exchange quoted at the beginning of this article makes clear why originalists continue to be concerned about the ramifications of their theory. Over the last quarter century or so, originalists such as Scalia, Bork, and McConnell have been engaged in a sustained campaign of self-exoneration, one designed to remove the stigma associated with rejection of modern opinions that have reversed earlier conclusions about the scope of the text’s open-ended provisions.

This Article is centrally concerned with the plausibility of the originalists’ effort to exonerate themselves. It is by no means the first to question the soundness of the originalist campaign along these lines. Other scholars have questioned the soundness of the project. See, e.g., ADRIAN VERMEULE, *JUDGING UNDER UNCERTAINTY: AN INSTITUTIONAL THEORY OF LEGAL INTERPRETATION* 280 (2006) (“Some have claimed that any respectable account of constitutional adjudication must be able to justify *Brown*. In view of such claims, theorists have gone to implausible

have passed since Bork wrote this, originalist commentators have extended the range of his remarks—and so have tried to show not only that *Brown* can be justified on originalist grounds but also that other decisions rendered in the nineteenth-century (decisions upholding anti-miscegenation legislation, for instance, and upholding state laws imposing legal disabilities on women) were mistaken as a matter of originalist theory.⁴³ The constitutional past requires reassessment, these articles contend, but not the *original* constitutional past—rather, that past is to be vindicated against the misapplication of the text by judges charged with its enforcement.⁴⁴ If the justices had applied the text properly, these commentators imply, rights and powers would never have had to be reassessed at a later date.⁴⁵ Instead, there would be a straight line of unmodified doctrine connecting past and present.

The argument that informs each of the Article's five sections is that this straight-line thesis is mistaken. In advancing this claim and in contending further that modern decisions reassessing the past have improved on earlier ones, I do not claim that a defense of, say, the Court's invalidation of anti-miscegenation legislation is incompatible with the text's original public meaning. Rather, I argue that the original meaning of key terms was always vague—and I thus argue that it was sufficiently elastic to accommodate applications that would have been semantically reasonable at the time of ratification but that have secured supermajority support only at a later time. In taking this approach, I avoid the awkward argument that almost all ratifiers misunderstood the meaning of the words they were adopting. I argue instead that contemporary rights have emerged—legitimately emerged—over time, and that they are understandable in terms of an arc of national development. In doing so, I propose a time-sensitive account of the way in which specific conclusions about the law can change through interpretation of general provisions contained in the text.

lengths to square their accounts with *Brown*.”). The Article is distinctive, however, in that it offers a framework for justifying the alteration of rights and powers while honoring the indefinite original meaning of key provisions.

43. See, e.g., *supra* notes 11–15 and accompanying text for pertinent articles and discussion of their theses.

44. For articles that advance an argument along these lines, see McConnell, *supra* note 11; Calabresi & Matthews, *supra* note 12; Calabresi & Perl, *supra* note 11; Upham, *supra* note 12; and Calabresi & Rickert, *supra* note 13.

45. See sources cited *supra* note 44.

II. ORIGINAL INDEFINITENESS

“It has been often observed (and it cannot too often be observed) that liberty ought not to be given up without knowing the terms,” John Tyler remarked in June 1788 at the Virginia Ratifying Convention.⁴⁶ The Constitution proposed by the Philadelphia Convention relied on “indefinite terms,” Tyler asserted; therefore, it should be rejected.⁴⁷ Indeed, because “the gentlemen themselves” who participated in drafting the text were unable to “agree in the construction of the various clauses of it,” Tyler contended, liberty itself would be “in danger” if it were adopted.⁴⁸

The “gentlemen themselves” to whom Tyler referred included James Madison, John Marshall, and Edmund Randolph—each present on the day he spoke, each an advocate of ratification, and each a proponent of different theories about the proper application of the text’s power-granting provisions.⁴⁹ This last point was essential to Tyler’s comments. Liberty, Tyler argued—both personal freedom and also the leeway states enjoyed under the Articles of Confederation—should not be relinquished when the terms for yielding it are uncertain.⁵⁰

Two generations years later, as Congress debated ratification of Section 1 of the Fourteenth Amendment, similar concerns were voiced about the indefiniteness of its provisions.⁵¹ Congressman Benjamin Boyer, a Pennsylvania Democrat, stated that he found Section 1 “objectionable . . . in its phraseology, being open to ambiguity and

46. John Tyler, Speech at the Virginia Ratifying Convention (June 25, 1788) (transcript available at https://archive.csac.history.wisc.edu/john_tyler_speech6.25.pdf).

47. *Id.*

48. *Id.*

49. On the contribution each made in securing ratification of the Philadelphia proposals at the Virginia Ratifying Convention, see generally KEVIN R. C. GUTZMAN, *JAMES MADISON AND THE MAKING OF AMERICA* (2012). Unlike Madison, it should be noted, Randolph refused to sign the Philadelphia proposals, though he participated in drafting them. Randolph did, however, advocate their ratification while participating in the Virginia convention. For discussion of Randolph’s about-face, see CAROL BERKIN, *A BRILLIANT SOLUTION: INVENTING THE AMERICAN CONSTITUTION* 245–46 (2003).

50. Tyler, *supra* note 46 and accompanying text.

51. See *infra* text accompanying notes 55–56 and Section II.A.

admitting of conflicting constructions.”⁵² Andrew Jackson Rogers, a New Jersey congressman, declared that the first section was “the most dangerous to liberty” of the five contained in the amendment since it could be construed to “annihilate[] all the rights which lie at the foundation of the Union of the States”⁵³ And Reverdy Johnson, a Maryland Democrat, objected particularly to the Privileges or Immunities Clause, declaring: “I do not understand what will be the effect of that.”⁵⁴

Each of the objections just noted is grounded in concern about the original public meaning of the constitutional text. In lodging the objections, critics did not appeal to ratifier understandings that limit applications of the text’s terms. Rather, the critics emphasized the transformative potential of the vague words proposed for ratification. In particular, they noted how indefinite language might be deployed by ex post interpreters to invalidate practices and institutions cherished in the ex ante. Critics (Antifederalists during eighteenth-century debates and opponents of the Fourteenth Amendment during the nineteenth-century) treated indefiniteness as sufficient reason to reject the language under consideration. Proponents, on the other hand, treated it as a virtue. In other words, both sides in eighteenth- and nineteenth-century ratification debates converged on a diagnostic proposition (*key portions of the text are indefinite*).⁵⁵ Their disagreement centered on an evaluative question (*should this matter?*), with opponents objecting on the ground that post-ratification interpretation might undermine familiar practices and institutions, and with proponents urging ratification given the benefits they believed the provisions under consideration would generate either for the nation as a whole (in the case of the Philadelphia proposals) or for those who had previously been oppressed (in the case of the Fourteenth Amendment).⁵⁶

This section considers both points: first, the extent to which critics and proponents converged on a diagnosis of textual indefiniteness and second, their evaluative divergence on the question of how much this should matter. Later portions of the section turn to the

52. CONG. GLOBE, 39th Cong., 1st Sess. 2467 (1866).

53. *Id.* at 2538.

54. *Id.* at 3041.

55. For discussion, see *infra* Section II.A.

56. For discussion, see *infra* Section II.A.

ramifications of original indefiniteness, in particular the significance of definite and indefinite language in cases where the Court engages in judicial review.

A. *Ex Ante Discussion of Textual Indefiniteness*

John Tyler's critique of the Philadelphia Proposals was unusual only because of the breadth of its focus. Throughout the ratification debates of late 1787 and the early half of the following year, Antifederalists concentrated on the risks posed by the indefinite language used in the text's power-granting provisions.⁵⁷ Unlike Tyler, however, most Antifederalists focused on the dangers raised by specific provisions, not on the more general issue posed by indefiniteness in the entire text.⁵⁸ An October 1787 comment by a pamphleteer writing under the pen name *An Old Whig* is typical of this narrower, provision-specific concern.⁵⁹ "My object," the pamphleteer wrote,

is to consider that *undefined, unbounded and immense power* which is comprised in the following clause;—
"And, to make all laws which shall be necessary and proper for carrying into execution the *foregoing powers* and all other powers vested by this constitution in the government of the United States; or in any department or offices thereof." Under such a clause as this can anything be said to be reserved and kept back from Congress?⁶⁰

An Old Whig's object of concern was the necessary and proper clause,⁶¹ but other clauses were subjected to similar criticism. "The power to borrow money is general and unlimited," *Brutus* remarked in

57. For examples of this, see *infra* notes 62–68 and accompanying text.

58. See *infra* notes 62–68 and accompanying text.

59. See AN OLD WHIG NO. 2 (Oct. 17, 1787) (available at <https://teachingamericanhistory.org/library/document/an-old-whig-ii/>).

60. *Id.*

61. "The Congress shall have Power . . . To make all Laws which shall be necessary and proper for carrying into Execution the foregoing powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof." U.S. CONST. art. I, § 8, cls. 1–18 (the Necessary and Proper Clause).

a pamphlet published in January 1788.⁶² “The [C]onstitution should therefore have so restricted, the exercise of this power as to have rendered it very difficult for the government to practi[c]e it.”⁶³ *Brutus* also criticized the taxing power.⁶⁴ The Constitution “should have marked the line in which the general government should have raised money, and set bounds over which they should not pass, leaving to the separate states other means to raise supplies for the support of their governments, and to discharge their respective debts.”⁶⁵ Even the text’s grant of judicial power was subject to Antifederalist critique. “[T]he judges under this constitution will control the legislature,” *Brutus* contended in a March 1788 pamphlet, “for the [S]upreme [C]ourt are authorized in the last resort, to determine what is the extent of the powers of the Congress”⁶⁶

Unbounded, unlimited, absence of a line, discretion to determine the extent of power—these terms are concerned with linguistic indefiniteness.⁶⁷ In taking them seriously, post-founding generations can readily understand why Antifederalists were wary of the Philadelphia proposals. Critics such as *Brutus* and *An Old Whig* did not forecast wildly implausible applications of the proposed text.⁶⁸ Rather, they emphasized the uncertainties occasioned by general language such as *necessary and proper* when entrusted to post-ratification interpreters.⁶⁹ Given terms such as these, the Antifederalists suggested, ratifiers

62. BRUTUS NO. 8 (Jan. 10, 1788) (available at <https://teachingamericanhistory.org/library/document/brutus-viii>) (discussing U.S. CONST. art. I, § 8, cls. 1–2 (“The Congress shall have Power . . . To borrow Money on the credit of the United States”)).

63. *Id.*

64. BRUTUS NO. 5 (Dec. 13, 1787) (available at <https://teachingamericanhistory.org/library/document/brutus-v/>) (discussing U.S. CONST. art. I, § 8, cl. 1 (“The Congress shall have Power To lay and collect Taxes”)).

65. *Id.*

66. BRUTUS NO. 15 (Mar. 20, 1788) (available at <https://teachingamericanhistory.org/library/document/brutus-xv/>) (discussing U.S. CONST. art. III, § 2, cl. 1 (“The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority”)).

67. Facets of linguistic indefiniteness—including indeterminacy and underdeterminacy—are discussed *infra* notes 81–82 and accompanying text.

68. For their predictions, see sources cited *supra* notes 67–70.

69. *See, e.g.*, text accompanying *supra* notes 108–10.

would not serve as the primary authors of the new government. Rather, ex post interpreters would be able to exploit the elasticity of the text's language to determine the scope of federal power.⁷⁰

The Antifederalist critique of the Constitution is significant not merely for its emphasis on the uncertainty occasioned by the Philadelphia proposals but also for its use of spatial images as metaphors to evaluate the terms employed in a written constitution.⁷¹ Commentators on political liberty relied on spatial metaphors long before the Philadelphia draft was prepared.⁷² In discussing the scope of legitimate power, for example, John Locke spoke of the *extent* of the magistrate's authority,⁷³ referred to *limits* on legislative power,⁷⁴ and warned against the *boundless will of tyranny*.⁷⁵ Locke, however, did not think in terms of boundaries discernible (if only metaphorically) in a written social contract. Antifederalist criticism of the Philadelphia proposals built on

70. See text accompanying *supra* notes 108–10.

71. For discussion of the use of spatial imagery in liberal political theory, see *infra* notes 71–78 and accompanying text. See also Section III.A.

72. For discussion, see *infra* notes 73–75 and accompanying text.

73. See JOHN LOCKE, TWO TREATISES OF GOVERNMENT 384 (Peter Laslett ed., 1988) (1690) (“He, that shall consider the distinct rise and extent, and the different ends of these several powers, will plainly see, that paternal Power comes as far short of that of the Magistrate, as Despotical exceeds it . . .”). Also, note the significance of Locke’s use of “extent” in the title.

74. *Id.* at 427–28 (“But if they [the individuals who are governed] have set Limits to the Duration of their Legislative, and made this Supreme Power in any Person, or Assembly, only temporary: Or else when, by the Miscarriages of those in Authority, it is forfeited; upon the Forfeiture of their Rulers, or at the Determination of the Time set, it reverts to the Society, and the People have a Right to act as Supreme, and continue the Legislative in themselves, or erect a new Form, or under the old form place it in new hands, as they think good.”).

75. *Id.* at 417 (“[W]hich is best for Mankind, that the People should be always expos’d [sic] to the boundless will of Tyranny, or that the Rulers should be sometimes liable to be oppos’d [sic], when they grow exorbitant in the use of their Power, and imploy [sic] it for the destruction, and not the preservation of the Properties of their People?”).

It is worth noting that Locke’s spatial imagery continues to influence modern commentary on the nature of rights. In his Locke-inspired comments on the subject, Robert Nozick states: “A line (or hyper-plane) circumscribes an area in moral space around an individual. Locke holds that this line is determined by an individual’s natural rights, which limit the action of others. Non-Lockeans view other considerations as setting the position and contour of the line.” ROBERT NOZICK, ANARCHY, STATE, AND UTOPIA 57 (1974).

Locke, then, but extended his reach by characterizing the Constitution as a social contract *that has been reduced to writing*.⁷⁶

This point is discernible in Tyler's comments at the Virginia ratification convention. Liberty should not be relinquished without knowing the terms for doing so, Tyler remarks, thus invoking the Lockean premise that the social contract is agreed to as parties give up freedom in exchange for government protection *while adding to that premise* the further one that a sound written constitution will rely on precise language to discipline the government's exercise of power.⁷⁷ Because other Antifederalists (such as *Brutus* and *An Old Whig*) appropriated Locke's spatial imagery and used it to criticize the language employed in the Philadelphia proposals, the Antifederalists can be said to have identified the challenge that inevitably arises in establishing a government committed to the protection of individual liberty through the use of written text.⁷⁸ Locke did not have to confront this challenge in his political writings, but the challenge cannot be evaded once an effort is made to identify the terms of government in a written Constitution.

In the modern era, a preoccupation with indefiniteness has been a central focus of philosophical inquiry.⁷⁹ Few members of the founding generation commented on the characteristics of language *per se*.⁸⁰ This point cannot be overlooked, for analytic philosophy's linguistic turn has meant that a sharp distinction needs to be drawn between the framers' conception of language and the perspective brought to it today.⁸¹ This said, though, it is clear that the Antifederalist critique of the Philadelphia proposals depended on what they called "indefiniteness" and on what today is called *underdeterminacy* (a term that is

76. Locke did not reason in terms of a written social contract.

77. For discussion of Tyler's remarks, see *supra* notes 46–50 and accompanying text.

78. For discussion, see *supra* note 75 and accompanying text.

79. See, e.g., TERENCE PARSONS, *INDETERMINATE IDENTITY: METAPHYSICS AND SEMANTICS* (2000).

80. James Madison was among the few members of the founding generation who commented on textual language. For discussion of his analysis of language in general and constitutional language in particular, see *supra* notes 98–102 and accompanying text.

81. For analysis of "the linguistic turn" in modern philosophy, see *THE LINGUISTIC TURN: ESSAYS ON ANALYTIC METHOD* (Richard Rorty ed., 1967).

complemented by its more potent cousin, *indeterminacy*).⁸² If we continue to use the eighteenth-century term *indefinite* (while recognizing that it embraces a range of possibilities stretching from the underdetermined to the indeterminate),⁸³ we can say that the Antifederalists realized that the Philadelphia proposals rely on definite provisions (precisely limited terms of office,⁸⁴ for instance) as well as indefinite ones (those already mentioned and others as well)—but that they focused

82. For analysis of the indeterminacy/underdeterminacy distinction, see Lawrence B. Solum, *On the Indeterminacy Crisis: Critiquing Critical Dogma*, 54 U. CHI. L. REV. 462 (1987).

83. Noah Webster's entry for *indefinite* in the 1828 edition of his dictionary is: "adjective . . . 1. Not limited or defined: not precise or certain, as in an *indefinite* time. An *indefinite* proposition, term or phrase, is one which has not a precise meaning or limited signification. 2. That has no certain limits, or to which the human mind can affix none, as *indefinite* space. A space may be *indefinite* though not finite." *Indefinite*, WEBSTER'S DICTIONARY (1828), <http://Webstersdictionary1828.com/Dictionary/indefinite> (last visited Mar. 14, 2021).

Webster's dictionary also includes an entry for *indeterminate*: "adjective . . . 1. Not determinate; not settled or fixed; not definite; uncertain; as an *indeterminate* number of years. 2. Not certain; not precise." *Indeterminate*, WEBSTER'S DICTIONARY (1828), <http://Webstersdictionary1828.com/Dictionary/indefinite> (last visited Mar. 14, 2021).

It is possible to read the term *underdetermined* into either of these definitions. To do so, however, is to overlook the binary quality of Webster's entries and the scalar possibilities associated with the modern term *underdetermined*.

84. The "President of the United States . . . shall hold his Office during the term of four Years . . ." U.S. CONST. art. II, § 1. "The Senate of the United States shall be composed of two Senators from each State, chosen by the Legislature thereof, for six Years; and each Senator shall have one Vote." U.S. CONST. art I, § 3, cl. 1. "The House of Representatives shall be composed of Members chosen every second Year by the People of the several States . . ." U.S. CONST. art. I, § 2.

It is worth noting that the distinction between definite/indefinite language was deployed for a different purpose by opponents of the Constitution when the terms-of-office provisions were considered by participants in ratification debates. In the Massachusetts Ratifying Convention of January 1788, for instance, a Dr. Taylor stated: "I am opposed to *biennial*, and am in favor of *annual* elections." Another participant stated that "he thought the security of the people lay in frequent elections; for his part, he would rather they should for six months than for two years;—and concluded by saying he was in favor of annual elections." *Debate in Massachusetts Ratifying Convention* (Jan. 14–15, 1788), in 2 THE FOUNDERS' CONSTITUTION 52–53 (Philip B. Kurland & Ralph Lerner eds., 1987). These comments indicate that the text's critics had no doubt about its legal effect in the ex post; they simply believed that a different rule would be preferable.

their criticisms on the latter rather than the former. Indeed, because the text relies on indefinite language to add an enabling provision (the power to adopt necessary and proper legislation) to functions already identified in indefinite language, and because it (perhaps) vests power in the judiciary to examine the extent of legitimate federal power, the Constitution, on the Antifederalists' reckoning, piles indefiniteness on indefiniteness.⁸⁵ It creates latent possibilities of constitutional development, thereby undermining the prospect of determining (at any time, not only in the *ex ante*) whether the government is exercising its power properly.

Critics of the Fourteenth Amendment raised the same kind of objections during ratification debates conducted in 1866.⁸⁶ The proposed amendment, Alabama Governor Robert Patton argued in a message to that state's legislature, "would enlarge the judicial powers of the General Government to such gigantic dimensions as would . . . reduce [the states] to a complete nullity."⁸⁷ Lockean spatial imagery lives on here, as is evident in Patton's use of *enlarge* and *gigantic*.⁸⁸ The notion of a sphere of freedom is also discernible in a New Hampshire critique of Section 1 of the Fourteenth Amendment, for that provision's adoption, critics contended, would lead to "a dangerous infringement upon the rights and independence of the States, north as well as south"⁸⁹ These critical comments do not try to define the central government's legitimate power. Rather, they appeal, as did those of the Antifederalists, to an intuition that there is a *domain* of personal freedom, one that can be *infringed* through *enlargement* of federal power. The exact *boundaries* of this domain did not have to be defined, for critics of the Fourteenth Amendment, like critics of the Philadelphia proposals, were appealing to the widely-held premise that novel

85. Criticism of the text quoted in *supra* notes 37, 42–45, and accompanying text.

86. For discussion, see *infra* notes 87–89 and accompanying text.

87. WILLIAM E. NELSON, *THE FOURTEENTH AMENDMENT: FROM POLITICAL PRINCIPLE TO JUDICIAL DOCTRINE* 105 (1988) (quoting *S. JOURNAL*, 1866–7 Sess. 32) (Ala. Nov. 12, 1866) (statement of Sen. Patton)).

88. For discussion of the significance of Lockean spatial imagery, see *supra* notes 71–78 and accompanying text.

89. NELSON, *supra* note 87, at 104 (quoting *S. JOURNAL*, June Sess. 71 (N.H. July 2, 1866) (statement of Sen. Vaughan on behalf of the ratifying committee minority)).

constitutional arrangements would *encroach* on familiar *spheres of liberty*.⁹⁰ It was in this way that Locke's use of spatial imagery was harnessed to assess, and criticize, constitutional language.

Perhaps the most intriguing feature of eighteenth- and nineteenth-century arguments *in favor of* ratification is that they conceded that many of the provisions under consideration were indeed indefinite. In *The Federalist*, *Publius* challenges commentators like *Brutus* by emphasizing the importance of energetic government.⁹¹ On this point, *Publius* genuinely differed from his Antifederalist critics, for *Brutus* et al. were by no means partisans of a robust central government.⁹² In addressing charges of indefiniteness, however, *Publius* did not challenge Antifederalists directly but instead adopted a strategy of confession and avoidance. Consider, for instance, Alexander Hamilton's refusal in *The Federalist* 34 to be pinned down as to the scope of government authority.⁹³ The Constitution was framed in anticipation of "the probable exigencies of ages," Hamilton asserts. "Nothing, therefore, can be more fallacious than to infer the extent of any power, proper to be lodged in the national government, from an estimate of its immediate necessities."⁹⁴ On the contrary, "[t]here ought to be a CAPACITY to provide for future contingencies as they may happen; and as these are illimitable in their nature, it is impossible safely to limit that capacity."⁹⁵ Antifederalist concerns with limiting the extent of government power unmistakably inform this passage. But the concern with *limits* and *boundaries* is turned against the Antifederalists. If the

90. See *supra* notes 71–78 for discussion of spatial imagery in the context of liberal political theory.

91. For analysis of the Antifederalist/Federalist divide over the value of a strong central government, see MAX M. EDLING, *A REVOLUTION IN FAVOR OF GOVERNMENT: ORIGINS OF THE U.S. CONSTITUTION AND THE MAKING OF THE AMERICAN STATE* (2008).

92. See *id.*

93. THE FEDERALIST NO. 34 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

94. *Id.* at 207.

95. *Id.* Hamilton further urges that no limitations should be placed on the federal government's exercise of powers of self-defense. "These powers ought to exist without limitation," he writes, "because it is impossible to foresee or to define the extent and variety of national emergencies, and the correspondent extent and variety of means which may be necessary to satisfy them." THE FEDERALIST NO. 23, at 153 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

aim is to produce an enduring Constitution,⁹⁶ Hamilton contends, ratifiers should welcome the elasticity of the text's language, for this will enable the federal government to respond vigorously to unforeseen exigencies.⁹⁷ Hamilton champions indefiniteness, in other words; he does not scorn it.

Madison's strategy of confession and avoidance pointed in the same direction, though it relied on a different rationale.⁹⁸ Writing in *The Federalist* 37, Madison concedes that the text is vague in delineating the scope of state and federal power and also vague when identifying the boundaries of the different branches of the central government.⁹⁹ Its defects should not cause alarm, however, for everyday language is incapable of resolving definitively the issues posed by the Constitution. "When the Almighty himself condescends to address mankind in their own language," Madison writes, "his message, luminous as it must be, is rendered dim and doubtful by the cloudy medium through which it is communicated."¹⁰⁰

But while obscurity is inescapable in a constitutional text, Madison contends, it can be resolved over time.¹⁰¹ "All new laws," he adds, "though penned with the greatest technical skill and passed on the fullest and most mature deliberation are considered more or less obscure and equivocal, until their meaning be liquidated and ascertained by a series of particular discussions and adjudications."¹⁰² *Ratify now and discover later the contours of federal power*, Madison can be understood to say here. Moreover, because Madison does not suggest in *The Federalist* 37 that the amendment process should be used to "liquidate" textual obscurity (he proposes instead that this will occur through

96. Antifederalists conceded that, if ratified, the framework established by the Philadelphia proposals would probably last for a substantial period of time. Writing in fall 1787 under the pen name *An Old Whig*, a pamphleteer stated that "it is a matter of some consequence, in establishing a government which is to last for ages, and which if it be suffered to depart from the principles of liberty at the beginning, will in all probability, never revert to them . . ." AN OLD WHIG NO. 1 (Oct. 12, 1787) (available at <http://teachingamericanhistory.org/library/document/an-old-whig-i/>).

97. See THE FEDERALIST NO. 34, *supra* note 93, at 207 (Alexander Hamilton).

98. THE FEDERALIST NO. 37, at 229 (James Madison) (Clinton Rossiter ed., 1961).

99. *Id.*

100. *Id.*

101. *Id.*

102. *Id.*

“particular discussions and adjudications”), it is clear he supposes that the normal course of political and social development can serve as a bridge that links the *ex ante* to the *ex post*.

A similar version of *ratify now and find out later* can be found in the speech Jacob Howard delivered to the Senate proposing adoption of the Fourteenth Amendment.¹⁰³ Because Howard, a Michigan Republican, served as floor manager for the amendment, his Madisonian concession is particularly significant. The privileges or immunities referred to in the text could not “be fully defined in their entire context and precise nature,” Howard stated; he thus declined “to go at length into that question at this time.”¹⁰⁴ The full range of protected rights would have to be “discussed and adjudicated” through legal disputes “when they happen practically to arise,” he added.¹⁰⁵ It is unclear whether Howard was aware of Madison’s *Federalist 37* appeal to “particular discussions and adjudications” to resolve uncertainty about the proper application of the text’s power-granting provisions. What is clear, though, is that Howard, like Madison, did not deny critics’ claims that proposed language might be interpreted in ways not anticipated by proponents of the provision.¹⁰⁶

It is undeniable, then, that proponents of the eighteenth- and nineteenth-century Constitution *and also* its opponents agreed that the language under consideration was indefinite in key respects. It is undeniable that they would have agreed that a competent speaker of the language would have been unable to determine *prior to* ratification how numerous provisions would be applied *after* ratification.¹⁰⁷ There was, in other words, a ratification-era consensus about phrases such as *necessary and proper*, a consensus that did not treat general language as sheer nonsense but that also recognized its modest power to constrain

103. See CONG. GLOBE, 39th Cong., 1st Sess. 2765 (1866).

104. *Id.*

105. *Id.*

106. *Id.*

107. This criterion tracks, at least in part, the one employed by proponents of original public meaning originalism. See, e.g., Vasana Kasavan & Michael Stokes Paulsen, *Is West Virginia Unconstitutional?*, 90 CALIF. L. REV. 291, 398 (2002) (asking about “the meaning the language [of the constitutional text] would have had (both its words and its grammar) to an average, informed speaker of that language at the time of its enactment into law”).

interpreters in the *ex post*.¹⁰⁸ But this acknowledgement of original indefiniteness was not accompanied by comments on the way in which understandings entertained by ratifiers would tame the indefiniteness of the language being adopted. Later interpreters have appealed to ratifier understandings to restrict applications of the text's abstract terms.¹⁰⁹ At the outset, though, indefiniteness was discussed without reference to narrowing understandings.¹¹⁰

Given the eighteenth-century consensus that prevailed about indefiniteness, someone might ask, in what sense was it plausible for the Federalists to characterize the Constitution as a plan of government? And in what sense was it plausible for proponents of the Fourteenth Amendment to suggest that it would not fundamentally alter the contours of federal/state power? Constitution-writing is an exercise in planning, but plans are definite. Indeed, it is because they are that terms such as *compliance*, *adherence*, and *fidelity* are appropriate for thinking about their execution. After all, if the instructions contained in an authoritative document are indefinite, the very notion of compliance is problematic.

In what sense, then, can the Constitution be viewed as a *reliable* plan for constraining the exercise of government power? The Antifederalists viewed a question such as this as fatal to the Philadelphia proposals.¹¹¹ Critics of the Fourteenth Amendment also viewed similar questions as fatal. Proponents quite clearly did not. Indeed, each author of *The Federalist* used the term *plan* to characterize the Constitution¹¹² while also conceding the Antifederalist critique that the text

108. For discussion, see *supra* notes 61, 95–96, and accompanying text.

109. See, for example, Justice Scalia's remarks on the significance of ratifier understandings at *supra* notes 28–29 and accompanying text.

110. No eighteenth-century ratifier appears to have claimed that understandings of vague language would be binding on later interpreters of the text.

111. This is the significance of remarks quoted at *supra* Section III.A.

112. See, e.g., THE FEDERALIST NO. 2, at 41 (John Jay) (Clinton Rossiter ed., 1961) (“They who promote the idea of substituting a number of distinct confederacies in the room of the plan of the convention seem clearly to foresee that the rejection of it would put the continuance of the Union in the utmost jeopardy.”); THE FEDERALIST NO. 39, at 240 (James Madison) (Clinton Rossiter ed., 1961) (“The last paper having concluded the observations which were meant to introduce a candid survey of the plan of the convention, we now proceed to the execution of that part of our undertaking.”); THE FEDERALIST NO. 69, at 415 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (“I

vaguely specified many of the new government's possible uncertainties.¹¹³ And proponents of the Fourteenth Amendment granted that some of the rights it guarantees would be identified through post-ratification adjudication¹¹⁴ *while still contending* that the provision would not lead to a fundamental subversion of state authority.¹¹⁵

How, then, did the text's proponents deal with these competing points? How, in other words, were they able to reconcile their concession as to original indefiniteness with their conception of the Constitution as a plan of government? No answer to this question can be found in either *The Federalist* or in defenses of the Fourteenth Amendment.¹¹⁶ A plausible answer can, however, be found in a source published at the mid-point between the eighteenth-century ratification debates and those over the Fourteenth Amendment—in the 1828 edition of Noah Webster's *American Dictionary of the English Language*.¹¹⁷ Webster's *Dictionary* proposes two definitions of the noun *plan*.¹¹⁸ The first emphasizes something that requires exacting compliance with stated terms:

proceed now to trace the real characters of the proposed executive, as they are marked out in the plan of the Convention.”).

113. For Madison's concessions as to the vagueness of the text's language, see *supra* notes 98–102 and accompanying text. See also his further remarks in THE FEDERALIST 37: “Here, then, are three sources of vague and incorrect definitions: indistinctness of the object, imperfection of the organ of conception, inadequateness of the vehicle of ideas. Any one of them must produce a certain degree of obscurity. The convention, in delineating the boundary between the federal and State jurisdictions, must have experienced the full effect of them all.” THE FEDERALIST NO. 37, *supra* note 98, at 229 (James Madison).

114. See, for example, Jacob Howard's remark, *supra* note 103 and accompanying text.

115. See, for example, the comment by John Bingham, the Ohio Congressman who drafted Section 1 of the Fourteenth Amendment: that section, Bingham asserted, takes “from no State any right that ever pertained to it.” CONG. GLOBE, 39th Cong., 1st Sess. 2542 (1866).

116. The significance of this point is to be found in the fact that all three authors of THE FEDERALIST nonetheless characterized the Constitution as a plan proposed by the Convention. See *supra* note 112 and accompanying text.

117. See WEBSTER'S DICTIONARY (1828), <http://Webstersdictionary1828.com/Dictionary/indefinite> (last visited Mar. 14, 2021).

118. See *infra* note 119 and accompanying text.

A draught or form; properly, the representation drawn on a plane, as a map or chart But the word is applied particularly to the model of a building, showing the form, extent and divisions in miniature, and it may be applied to the draught or representation of any projected work on paper or on a plain surface; as the *plan* of a town or city, or of a harbor or fort.

Webster then contrasts this restrictive conception of a plan with a looser one, a conception of planning that, he states, embraces constitution-writing:

A scheme devised, a project, the form of something to be done existing in the mind, with the several parts adjusted in idea, expressed in words or committed to writing; as the plan of a constitution or government; the plan of a treaty; the plan of an expedition.¹¹⁹

The Constitution as a scheme, but not necessarily a blueprint, of government? Surely the proposals adopted by the Philadelphia Convention contain both elements. Surely the Fourteenth Amendment does as well. Each is draft-like in some respects, as when the original text provides a formula for apportioning representation in the House of Representatives, a formula significantly revised (but draft-like nonetheless) in Section 2 of the Fourteenth Amendment.¹²⁰ But they are also scheme-like in other respects. A fair characterization of the text produced in the late eighteenth-century and profoundly modified in the mid-nineteenth should embrace both terms (while also allowing for the possibility of in-between categorizations).

It might thus be said that Webster goes too far in classifying constitution-writing as an exercise in scheme-creation. There's another sense, though, in which his characterization is sound, for in his day, the

119. *Plan*, WEBSTER'S DICTIONARY (1828), <http://Webstersdictionary1828.com/Dictionary/indefinite> (last visited Mar. 14, 2021).

120. *Compare* U.S. CONST. art. I, § 2, cl. 3 (stating that “three fifths of all other Persons” (i.e. slaves) are to be counted for purposes of determining a state’s representation in the House of Representatives) *with* U.S. CONST. amend. XIV, § 2 (stating that “[r]epresentatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State . . .”—but excluding from the calculation those who have participated in rebellion).

scheme-like features of the Constitution, not its blueprint-like features, provoked the greatest interest—and they continue to do so today. A blueprint/draft requires unquestioning adherence to its terms, after all. Assuming faithful execution of the instructions it contains, there is little left to the imagination before a blueprint is put into effect. A scheme is different: It identifies the object to be achieved—a destination, for instance, when a trip is contemplated—but it does not identify the steps to be taken in pursuing the object. A scheme is suggestive, in other words: It launches an activity, but it also allows for deliberation and, indeed, reassessment of its terms, once execution is underway. Because a scheme does not purport to offer an exhaustive set of instructions, one can say that implementers are *complying* with it in the sense that they are *honoring* it, but one cannot say that they are *complying* with it by *obeying* its terms.

Webster's distinction between plan-as-draft and plan-as-scheme serves as the conceptual key to understanding American constitutionalism as a historically mediated enterprise. If we consider his distinction in conjunction with both Hamilton's comments on semantic elasticity and Madison's and Howard's remarks on the need for discussion and adjudication following ratification, we can see that proponents of the text's key provisions thought of major portions of the Constitution as incomplete at the time of ratification and further believed that these features of government would not necessarily be identified by means of amendment.¹²¹ Does this mean that they *authorized* the non-Article V process of interpretive reassessment that has been a hallmark of American constitutional development? Of course not: Even framers as important as Hamilton, Madison, and Howard were in no position to issue a permission slip to later generations to rethink initial applications of open-ended provisions, for no individual involved in the adoption of a collectively created text can authorize later readers to apply it in his/her favored way. We can, however, settle for a more modest claim—that members of the two framing generations were fully aware that textual indefiniteness would delegate decision-making power to post-ratification interpreters. The eighteenth-century founders could not anticipate the evolution of judicial review, and the nineteenth-

121. Thus, Madison suggests in THE FEDERALIST NO. 37 that the text's obscure language will be "liquidated" by means of "discussions and adjudications." See THE FEDERALIST NO. 37, *supra* note 98, at 229 (James Madison). He does not suggest that the amendment process will be needed to resolve obscurity. See *id.*

century renovators could only dimly anticipate its possibilities. Nonetheless, both grasped that indefinite language delegates authority to later interpreters.

B. Ex Post Application of Determinate Textual Language: The Significance of Marbury's Hypotheticals

Because the text relies heavily on indefinite language, ex post constitutional debates have centered on an exegetical issue (how to make the indefinite more definite) and also an institutional one (the role courts should play in taming indefiniteness).¹²² *Marbury v. Madison* might be cited as authority for addressing both issues simultaneously¹²³—for contending, in other words, that courts have the ultimate hermeneutic authority within the American constitutional scheme to determine how the text's indefinite provisions are to be applied.¹²⁴ But while this claim is compatible with modern conceptions of judicial review, it goes well beyond the conclusions reached in *Marbury* itself. *Marbury* is important not because it outlined exegetical principles for taming indefiniteness (it did not¹²⁵). Nor is it important because it established that other branches of the federal government and the states

122. The convergence of these two issues is considered at length in *infra* Sections IV and V.

123. 5 U.S. 137 (1803).

124. The modern Court has characterized *Marbury* in the following way: "This decision declared the basic principle that the federal judiciary is supreme in the exposition of the law of the Constitution, and that principle has ever since been respected by the Court and the Country as a permanent and indispensable feature of our constitutional system." *Cooper v. Aaron*, 358 U.S. 1, 18 (1958). This claim relies on a questionable version of history, for the Court's authority to determine the proper application of the Constitution was frequently challenged during the nineteenth-century by heads of other branches of the federal government. A particularly straightforward challenge to this claim of exegetical supremacy can be found in Andrew Jackson's veto message of legislation passed in 1832 rechartering the national bank: "The opinion of the judges has no more authority over Congress than the opinion of Congress has over the judges, and on that point the President is independent of both." 2 MESSAGES AND PAPERS OF THE PRESIDENTS 582 (James D. Richardson ed., 1900).

125. Chief Justice Marshall's comments in *Marbury* do not address issues about textual indefiniteness. He turns to these in a later case, remarking that "the question respecting the extent of the powers actually granted [by the Constitution], is perpetually arising, and will probably continue to arise, as long as our system shall exist." *McCulloch v. Maryland*, 17 U.S. 316, 405 (1819).

must honor the Court's conclusions concerning the proper application of indefinite language (it also did not establish these points¹²⁶). Rather, it is important because it provides a plausible, though less than wholly satisfactory, justification for treating the text as a justiciable instrument—i.e., for treating it as properly subject to interpretation in the same way that, say, a statute, contract, or will can be. Indeed, because *Marbury* relies on hypotheticals concerned with the justiciability of determinate textual language, a further step is needed to establish that the power of judicial review claimed for the Court in *Marbury* extends as well to indefinite textual language. This subsection examines Chief Justice Marshall's argument for the Court's authority to invalidate statutes at odds with definite language.¹²⁷ The next subsection considers the possibility of bringing indefinite language within the purview of judicial review.

In *Marbury*, Marshall offers a four-stage justification for judicial review: (1) The first step posits that the people have the sovereign authority to establish a constitution.¹²⁸ (2) This axiom about American constitutionalism is followed by the further claim that legislation must be adopted in conformity with the Constitution.¹²⁹ (3) The third premise is that the judiciary is obligated to inquire into legislation's compatibility with the Constitution.¹³⁰ (4) And the fourth is that if an allegation

126. As pointed out in *supra* note 124 and accompanying text, the question of whether other branches of the federal government are obligated to adhere to the Court's interpretation of it was hotly contested throughout the nineteenth-century. The question of whether states are obligated to adhere to Court interpretations of the Constitution was also hotly contested during the early decades of the republic's existence. In *Martin v. Hunter's Lessee*, 14 U.S. 304 (1816), the Court asserted its power of judicial review in this context.

127. See *infra* notes 130–57 and accompanying text.

128. “That the people have an original right to establish, for their future government, such principles as, in their opinion, shall most conduce to their happiness, is the basis, on which the whole American fabric has been erected.” *Marbury*, 5 U.S. at 176.

129. “Certainly all those who have framed written constitutions contemplate them as forming the fundamental and paramount law of the nation, and consequently the theory of every such government must be, that an act of the legislature, repugnant to the constitution, is void.” *Id.* at 177.

130. “If an act of the legislature, repugnant to the constitution, is void, does it, notwithstanding its invalidity, bind the courts, and oblige them to give it effect? Or, in other words, though it be not law, does it constitute a rule as operative as if it was law? This would be to overthrow in fact what was established in theory; and would seem, at first view, an absurdity too gross to be insisted on.” *Id.*

of incompatibility is sound, it “is the very essence of judicial duty” to vindicate the Constitution’s standing as “paramount law” by invalidating the legislation in the course of “say[ing] what the law is.”¹³¹

The soundness of Marshall’s first claim must be evaluated in terms of his conception of *the people*. If it is contended that “We the People” was properly limited to adult White males, it might also be contended that this portion of the population possessed the sovereign authority to set the terms of government for everyone else.¹³² But of course a contention along these lines is deeply problematic, for it can readily be granted that slaves and Native Americans would not have agreed to the terms of the Constitution, thus undermining a consent-theory claim to the legitimacy of the act of ratification. Moreover, an argument on behalf of the text’s normative authority also has to be rejected from the point of natural rights theory, for a constitution that privileges White males over others violates these rights—and a mid-course constitutional correction that failed to compensate those harmed by the rights-violations that had already occurred also has to be deemed inadequate when assessed from a natural rights perspective.¹³³

Because some forms of originalism overlook these points (and so accord binding normative significance to the Constitution on the ground that it secured the collective consent of the entire population), the bald form of Marshall’s first *Marbury* claim cannot be taken as the starting point for reasoning about the text’s authority.¹³⁴ A more

131. “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. If two laws conflict with each other, the courts must decide on the operation of each.” *Id.*

132. It was not until the Fifteenth and Nineteenth Amendments were adopted (in 1870 and 1919, respectively) that the constitutional text was revised to reject the possibility of rule by white males. See U.S. CONST. amends. XV, XIX.

133. For discussion of the failure to provide compensation to newly freed slaves (and the possibility, ultimately rejected, of compensating former slaveowners), see ERIC FONER, *FOREVER FREE: THE STORY OF EMANCIPATION AND RECONSTRUCTION* (2005).

134. It might be argued that Michael McConnell employs this problematic version of consent theory to justify originalism. “The words of the Constitution are not authoritative for fetishistic reasons,” he writes, “but because they are the verbal embodiment of certain collective decisions made by the people.” Michael W. McConnell, *The Importance of Humility in Judicial Review: A Comment on Ronald Dworkin’s “Moral Reading” of the Constitution*, 65 *FORDHAM L. REV.* 1269, 1278

modest version of originalism is defensible, however. In adopting this less ambitious version, someone would argue that because the Constitution is recognized as the supreme law of the land, the original public meaning of its terms must serve as the starting point for identifying the scope of government power. Semantic originalism continues to matter, in other words, even if a justification based on a claim of initial collective consent is untenable, for in the United States there is no other ground for legal deliberation about the scope of governmental power apart from the Constitution's words. To put the point differently, the text states *our* law, thus making it essential to grasp how its words were used at the moment of ratification.¹³⁵ Needless to say, because the words employed were recognized as indefinite by the ratifiers themselves, it is essential to add that their elasticity provides post-ratification interpreters with considerable leeway when deciding how to apply them. As should be clear, this point is critical to an argument about the legitimacy of judicial reassessment of the constitutional past. It can be set aside at present, though, for Marshall's *Marbury* examples are concerned with definite, not indefinite, textual language.¹³⁶

n.45 (1997). "If the Framers' words have authority for us today, this is because, in Chief Justice Marshall's words, 'the people have an original right to establish, for their future government, such principles as, in their opinion, shall most conduce to happiness.' This, he said, 'is the basis on which the whole fabric has been erected.' It would seem to follow that it is the principles to which the people assented, understood as nearly as possible as they understood them, which should guide us today." *Id.* at 1278–79 (citing *Marbury*, 5 U.S. 137 at 176).

135. Thomas B. Colby cogently notes that "[s]emantic linguistic theory is a thin reed upon which to place the weight of a demand to the American people that they must be constrained by the potentially stunted conception of liberty and equality that prevailed a century or two ago." *Originalism and the Ratification of the Fourteenth Amendment*, 107 Nw. U. L. REV. 1627, 1687–88 (2013). A thin reed—yes, but surely this is preferable to nothing at all. That is, the text provides the common ground for the conduct of American political life, and because it is a text that does so semantic originalism is indispensable to making sense of the terms for conducting political life. This clear-eyed, minimalist approach to constitutional interpretation dispenses with the notion of morally legitimate original consent while recognizing that the text is accepted today as an indispensable coordinating component of collective life.

136. Each of the three hypotheticals he discusses in *Marbury* is concerned with definite textual language. For analysis, see *infra* notes 144–55.

Fortunately, Marshall's second claim does not require sustained examination, for once the Supremacy Clause¹³⁷ is examined, it can readily be granted that legislation adopted pursuant to it must conform to the text's grant of authority. His third and fourth claims cannot be supported by straightforward textual citations, however, thus making it essential to scrutinize carefully the rationale for each. Marshall's justification for (3) (i.e., that the judiciary is obligated to inquire into the constitutionality of legislation) hinges on the grant of judicial power contained in Article III.¹³⁸ "[T]he judicial power of the United States is extended to all cases arising under the Constitution," Marshall writes, thus obligating judges to consider legislation's compatibility with the text.¹³⁹ To establish the soundness of this claim, Marshall poses a rhetorical question: "Could it be the intention of those who gave this power . . . [t]hat a case arising under the constitution should be decided without examining the instrument under which it arises?"¹⁴⁰ Marshall's question hinges on the significance of the phrase *arising under*. If this phrase is said to grant power to Article III courts to examine the compatibility of a statute with the text, then the Constitution is justiciable in the same way a statute is. It might, however, be said that *arising under* is merely a jurisdictional grant to the courts to adjudicate cases involving legislation, in which case *arising under* does not require courts to accord the Constitution "precedence over other laws."¹⁴¹ Even step three is open to challenge, then, for the text does not unmistakably grant courts the authority to examine the constitutionality of statutes.¹⁴²

137. "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." U.S. CONST. art. VI, § 2.

138. U.S. CONST. art. III.

139. *Marbury*, 5 U.S. at 178.

140. *Id.* at 178–79.

141. This argument concerning step three is based on David Currie's analysis of *Marbury*. See David P. Currie, *Constitution in the Supreme Court: The Powers of the Federal Courts, 1801–1835*, 49 U. CHI. L. REV. 646, 660 (1982).

142. See *id.* for further development of this argument.

It is step four,¹⁴³ though, that is critical to the distinction between judicial review of definite and indefinite constitutional language. Marshall moves from three to four with the following: “In some cases, then, the constitution must be looked into by judges. And if they can open it at all, what part of it are they forbidden to read, or to obey?”¹⁴⁴ Marshall might have qualified *in some cases* by limiting the judiciary’s invalidation power to those instances where there is an unmistakable tension between definite constitutional language and congressional legislation. Indeed, one of his justifications for step four in *Marbury* relies on just the kind of spatial imagery the Antifederalists had deployed to oppose the Constitution’s adoption. “To what purpose are powers *limited*,” Marshall asks, “and to what purpose is that limitation committed to writing, if these limits may, at any time, be *passed* by those intended to restrained?”¹⁴⁵ This is the kind of spatial imagery typically employed by liberal theorists. Unlike the Antifederalists, however, Marshall resorts to it to assert judicial power to deal with even the blurriest lines. He proposes hypotheticals with bright lines, in other words, but does so in a decision that implies the judiciary has the authority to identify lines even when the text is unclear.

Marshall first imagines that legislation adopted by Congress violates Article I, Section 9 by placing a tax on the export of goods beyond a state’s borders.¹⁴⁶ “Suppose a duty on the export of cotton, of tobacco, or of flour,” he asks, “and a suit instituted to recover it.” He answers his question with a rhetorical one: “Ought judgment to be rendered in such a case? ought the judges to close their eyes on the constitution, and only see the law?”¹⁴⁷

Marshall next imagines legislation that imposes a bill of attainder or ex post facto law.¹⁴⁸ Article I, Section 9 prohibits these. Marshall asks: “If, however, such a bill should be passed and a person should be prosecuted under it; must the court condemn to death those victims whom the constitution endeavors to preserve?”¹⁴⁹

143. See McConnell, *supra* note 134 and accompanying text.

144. *Marbury*, 5 U.S. at 179.

145. *Id.* (emphasis added).

146. *Id.* at 179 (referring by implication to U.S. CONST. art. I, § 9, cl. 5 (“No Tax or Duty shall be laid on Articles exported from any State.”)).

147. *Id.*

148. *Id.*

149. *Id.*

Finally, Marshall imagines a conviction for treason in which only one witness testifies to a defendant's overt act or in which a defendant's out of court confession is treated as sufficient to establish guilt.¹⁵⁰ Article III, Section 3 requires "Testimony of two Witnesses to the same overt Act, or on Confession in open Court."¹⁵¹ Marshall thus poses the following rhetorical question: "If the legislature should change that rule, and declare *one* witness, or a confession *out* of court, sufficient for conviction, must the constitutional principle yield to the legislative act?"¹⁵²

Each of these rhetorical questions presupposes the soundness of steps one through three and then aims at clinching the argument for the legitimacy of judicial review by imagining a fourth step in which the text's words are definite. *Marbury's* comment on the Court's duty "to say what the law is" is understandable in terms of this hierarchical model of authority.¹⁵³ That is, the conception of judicial obligation defended in *Marbury* relies on a top-down model of constitutional reasoning, one in which definite language contained in the text serves as the major premise of a syllogism, legislation flagrantly at odds with the text's minor premise, and the result following apodictically from the first two premises.

On this reckoning, the *Marbury* hypotheticals presuppose the possibility of permanently valid conclusions of law. Legislation permitting a treason conviction on the testimony of one witness will never be constitutionally valid given a textual requirement of two witnesses for this.¹⁵⁴ Similarly, legislation permitting such a conviction on the basis of an out-of-court confession will never be valid given the text's requirement of an in-court confession to treason.¹⁵⁵ Because these claims are timelessly sound, Marshall's examples make it seem as if all conclusions reached during the course of judicial review will be immune from reassessment. They state what the law *permanently* is—or at least they state what the law permanently is as long as the text under consideration remains unchanged. Just as workers implementing an architectural blueprint reach permanently valid conclusions about its

150. *Id.*

151. U.S. CONST. art. III, § 3, cl. 1.

152. *Marbury*, 5 U.S. at 179.

153. *Id.* at 177.

154. U.S. CONST. art. III, § 3, cl. 1.

155. *Id.*

application in furtherance of its instructions, so too a court dealing with definite language can reasonably claim that its conclusions are impervious to change as long as the text under consideration remains unchanged.

C. *Ex Post Application of Indefinite Language: Beyond the Marbury Hypotheticals*

But what if the language under consideration in a constitutional case is indefinite—not gibberish, but sufficiently *underdetermined* as to be compatible with two or more conflicting, and reasonable, applications? With *Marbury* having established the Court’s claim to authority to assess the application of definite language, it might be contended that the line should be drawn here: The judiciary should defer to other branches of government—or to state governments someone might argue—whenever interpreters can reasonably disagree about the application of textual language.¹⁵⁶ While a possible approach to constitutional adjudication, this framework has attracted few judicial adherents.¹⁵⁷ Instead, the opportunity provided by textual indefiniteness has opened the door to an extension of the *Marbury* power, one in which the Court has claimed for itself the ultimate hermeneutic authority to determine the proper application of the text’s open-textured provisions *while also* claiming the institutional authority to require other branches of government to adhere to its conclusions.¹⁵⁸ It is in this context that the possibility of judicial reassessment of the constitutional past looms large, for someone might grant that even though it is descriptively accurate to say

156. According to James Bradley Thayer, a court “can only disregard [an act of Congress] when those who have the right to make laws have not merely made a mistake, but have made a very *clear* one—so clear that it is not open to rational question.” James B. Thayer, *The Origins and Scope of the American Doctrine of Constitutional Law*, 7 HARV. L. REV. 129, 144 (1893) (emphasis added).

157. For analysis of the decline in support for Thayer’s clear mistake rule, see Evan H. Caminker, *Thayerian Deference to Congress and Supreme Court Majority Rule: Lessons from the Past*, 78 IND. L.J. 73, 84–85 (2003).

158. Drawing on *Marbury* to justify its interpretation of the Fourteenth Amendment in *Brown v. Board of Education*, 347 U.S. 483 (1954), the Court asserted that “the interpretation of the Fourteenth Amendment . . . in the *Brown* case is the supreme law of the land, and Art. VI of the Constitution makes it of binding effect on the States ‘any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.’” *Cooper v. Aaron*, 358 U.S. 1, 18 (1958) (citing U.S. CONST. art. VI, § 2).

that the judiciary employs *Marbury* to engage in a dialogue with the past, that critic might further argue that the dialogue is one-sided, with contemporary justices wielding power to re-evaluate beliefs entertained by founding generations that can speak only faintly for themselves.

The answer to this cogent challenge is that, in using its *Marbury* power, (i) the judiciary is bound by the original public meaning of the text and also (ii) original understandings of its scope unless and until there is unmistakable evidence of a superseding national consensus supportive of a specific reassessment of the past. This second, stringent criterion is essential to guard against abuse of judicial authority. As the history of constitutional interpretation has made clear, there is a genuine risk that interpreters will project their own policy preferences onto the text's indefinite clauses.¹⁵⁹ Because Article III judges are electorally unaccountable, a constraint such as (ii) is needed to protect against a reassessment of the constitutional past that may seem wise to the judges undertaking it but that has secured no more than modest support in the nation at large. Only when the superseding-consensus requirement is satisfied, then, can the Court be said to speak for the nation at large. On the occasions when it actually can lay claim to this, the Court ensures ongoing legitimacy for the Constitution—and it does so by identifying norms compatible with the original meaning of the text's words.

This last point is an essential feature of reassessment. This is because reassessment of the past rejects original understandings of the text's proper application but does not alter the text's meaning. Critics of judicial exercises of reassessment sometimes claim that they have precisely this effect.¹⁶⁰ They assume that, say, the word *cruel*, as it

159. Even justices anxious to extend the power of the courts have gone out of their way to claim that they are not acting on their preferences. This is the significance of Justice Douglas's statement in his opinion for the *Griswold* Court that "[w]e do not sit as super-legislature to determine the wisdom, need, and propriety of laws that touch economic problems, business affairs, or social conditions." *Griswold v. Connecticut*, 381 U.S. 479, 482 (1965).

160. Thus, the significance of Justice Black's comment in his *Griswold* dissent: "I like my privacy as well as the next one, but I am nevertheless compelled to admit that government has a right to invade it unless prohibited by some specific constitutional provision." *Id.* at 510 (Black, J., dissenting).

appears in the Eighth Amendment,¹⁶¹ means not only *disposed to give pain, inhuman, and barbarous*—to cite definitions of the term Noah Webster offers in his 1828 dictionary¹⁶²—but also the practices to which it was believed to apply at the time of the amendment’s adoption.¹⁶³ In taking this position, some would say that the meaning of *cruel* changes when the Court alters the Eighth Amendment’s application. Justice Scalia adopted this approach in his *Roper v. Simmons* dissent¹⁶⁴ in claiming that “the meaning of our Constitution has changed”¹⁶⁵ when the Court abrogated *Stanford v. Kentucky*’s conclusion that the Eighth Amendment permits the execution of offenders who commit their crimes while seventeen.¹⁶⁶

In countering this, we can say that *Roper* reassessed the application of *cruel* but did not alter its meaning. The *Roper* Court took advantage of the opportunity provided by the indefiniteness of the word *cruel* to rethink the scope of the Punishments Clause in light of post-ratification trends in the trajectory of adolescent development.¹⁶⁷ The original understanding was that adolescents who committed homicidal acts while as young as fourteen are eligible for execution.¹⁶⁸ The Court

161. The Eighth Amendment provides: “Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.” U.S. CONST. amend. VIII.

162. The full definition is: “*adjective* 1. Disposed to give pain to others, in body or mind; willing or pleased to torment, vex or afflict; inhuman; destitute of pity, compassion or kindness; fierce; ferocious; savage; barbarous; hardhearted; applied to persons or their dispositions. ‘They are *cruel* and have no mercy.’ *Jeremiah* 6:23. 2. Inhuman; barbarous; savage, causing pain, grief or distress; exerted in tormenting, vexing or afflicting. ‘Cursed be their wrath, for it was *cruel*.’ *Genesis* 44:1.” *Cruel*, WEBSTER’S DICTIONARY (1828), <http://Webstersdictionary1828.com/Dictionary/indefinite> (last visited Mar. 14, 2021).

163. For example, in assessing the constitutionality of modes of execution, the Court has considered the mode of imposing it at the time the Eighth Amendment was adopted. *Bucklew v. Precythe*, 139 S. Ct. 1112, 1123 (2019).

164. 543 U.S. 551, 608 (2005) (Scalia, J., dissenting).

165. *Id.*

166. 492 U.S. 361 (1989), *overruled in part by Roper v. Simmons*, 543 U.S. 551 (2005).

167. *Roper* did so by citing trends in the execution of adolescents. See 543 U.S. at 564–67 (majority opinion).

168. *Stanford*, 492 U.S. at 368 (As of the mid-eighteenth-century, “the common law set the rebuttable presumption of incapacity to commit any felony at the age of

rejected this understanding in *Thompson v. Oklahoma* when it held that the Eighth Amendment prohibits the execution of offenders who commit their crimes while sixteen or younger.¹⁶⁹ In *Stanford*, it declined to raise the constitutional threshold to seventeen.¹⁷⁰ In turn, *Roper* overruled *Stanford*.¹⁷¹ However, *Thompson* and *Roper* did not alter the meaning of *cruel*. Rather, they recalibrated the word's application: They rethought its referential possibilities by considering the prolongation of adolescence typical of modern society.¹⁷²

Needless to say, the result of each case's reassessment of the constitutional past was an alteration of rights. It is misleading, though, to assert that the Constitution's *meaning* changed as a result of *Thompson* and *Roper*. That meaning—the sense of the word *cruel*, we can say—was identified in Noah Webster's entry for the word, and *cruel* continues to have the same sense today.¹⁷³ Rather, the word's scope—the referential range a competent speaker of the language would attribute to it—changed over time, for a consensus (discernible in patterns of national practice) developed over the course of two centuries that executing mid-adolescents amounts to barbarous treatment. This consensus has emerged in a way that honors the blurry boundaries of the word *cruel*: that is, someone can remain faithful to the word's meaning (i.e., its sense) while also honoring alterations in usage as to its referential scope.

This distinction between *sense* and *referential scope* makes it possible to understand the exegetical options open to contemporary

14, and theoretically permitted capital punishment to be imposed on anyone over the age of 7.”).

169. 487 U.S. 815 (1987).

170. *Stanford*, 492 U.S. at 370–73 (finding there is no national consensus against execution of individuals who are seventeen at the time they commit a capital offense).

171. *Roper*, 543 U.S. at 564–67 (finding that a national consensus emerged in the sixteen years after *Stanford*).

172. After citing national trends concerning the execution of adolescents, *Roper* cites modern social science studies on adolescent development, *see id.* at 569–70, and thereby the Court indicates its willingness to reassess founding-era conclusions about adolescent criminal responsibility.

173. For Webster's definition of *cruel*, *see supra* note 162 and accompanying text.

interpreters of the text.¹⁷⁴ In adopting the sense/reference distinction, we can say that interpreters must adhere to the original sense of all the text's terms: They must adhere to the sense of precise terms such as *four years* and *two-thirds* and also to the sense of vague ones such as *cruel and unusual* and *necessary and proper*.¹⁷⁵ Needless to say, precise terms leave judges with virtually no discretion to determine their proper application (a point that was implicit in each of the *Marbury* hypotheticals¹⁷⁶) whereas vague terms have a wide and contestable scope. But the text's vague terms are not wholly indeterminate, so interpreters must attend to their sense even though they are not obligated to adhere to the referential scope originally accorded them. This distinction can be restated by attending to what the text contains and what it does not. The Eighth Amendment speaks of cruelty, but because it does not contain a clause directing interpreters to follow the ratifiers' conception of the term, it does not mandate adherence to ratification-era applications of the term.¹⁷⁷

174. The relevance of the sense/reference distinction to constitutional interpretation generally and originalism in particular is developed in Christopher R. Green, *Originalism and the Sense-Reference Distinction*, 50 ST. LOUIS U. L.J. 555 (2006). Green's argument hinges on the distinction Gottlob Frege proposed in *Sense and Reference*, 57 PHIL. REV. 209 (1948). Green calls his Frege-inspired framework "the Theory of Original Sinn." He applies it to many cases, among them *Roper*, 543 U.S. at 551. This article's discussion of the adolescent death penalty cases, examined at *supra* notes 164–72 and accompanying text, tracks his argument.

175. In applying his framework, Green remarks that "the Theory of Original Sinn . . . divides authority between the Framers and later interpreters: the Framers are in charge of setting the sense; later interpreters are in charge of assessing the reference-yielding facts." Green, *supra* note 174, at 564.

176. See *supra* notes 122–55 and accompanying text.

177. Professor Solum employs the terms *interpretation* and *construction* to analyze many of the issues discussed here. "We can use the term 'interpretation' to refer to the linguistic meaning or communicative content of the constitutional text," he writes. "The term 'construction' then can be used to refer to the activity of determining the legal effect given to the text." See Solum, *supra* note 30, at 468. Although not identical to the sense/reference distinction, the Solum distinction complements it in that interpretation can be said to aim at capturing the sense of a term while construction determines its legal scope. While helpful, Solum's distinction does not offer a promising way to understand the possibility of altering the scope of the text's vague terms. Instead, it appears to suggest that possibility of a static framework for the application of indefinite language. This is because Solum speaks of a "construction zone," one whose range can be identified at the moment of ratification. "The construction zone consists of constitutional cases or issues that cannot be resolved by the

In relying on the sense/reference distinction, we can grasp how legitimate change unfolds while interpreters remain faithful to the meaning of the abstract language contained in the text. Vague language allows for scalar possibilities—for applications of *cruel and unusual*, for instance, or *necessary and proper* that are faithful to the original sense of these terms but that set aside the framers' determination of their referential scope in favor of notions compatible with dominant modern conceptions of their appropriate application. It is in this way that original understandings can properly be superseded by later ones: the original public meaning of the text remains unchanged, but interpreters attend to alterations in its referential scope by noting modified versions of political morality that have emerged over time.

In drawing on this distinction, we can make sense of two different approaches to original meaning. Each version focuses on *historically situated* usage and thus on the need for contemporary interpreters to retrieve the semantic past. The two versions differ, however, as to how much needs to be retrieved. Someone who focuses only on original public meaning treats word-sense as the appropriate subject for retrieval. Only a modest exercise in retrieval is needed here: Original word-sense must be recovered and honored, but original applications, while viewed as pertinent, are not viewed as binding on post-founding generations. In adopting this approach to the word *cruel*, for example, someone compares dictionary entries for the eighteenth-century and

direct translation of the constitutional text into rules of constitutional law that determine their outcome," he writes. *Id.* at 472. Solum states that this zone may be "large and pervasive" but even this concession suggests that the "zone" has the same boundaries at the time of ratification as it has today. *Id.*

To take this static-boundaries approach, though, is to fail to come to terms with the dynamic character of many applications of the text. If the term *boundaries* is to be used at all, it must be with the proviso that the context of reasonable contestability has changed over time. The preferable metaphor, I suggest, is that of *core* and *penumbra*. "There must be a core of settled meaning, but there will be as well a penumbra of debatable cases in which words are neither obviously applicable or obviously ruled out." H.L.A. Hart, *Positivism and the Separation of Law and Morals*, 71 HARV. L. REV. 593, 607 (1958). Using this Hart-inspired distinction, one can say that the referential core of the constitutional term *cruel* was settled at the outset but that the referential penumbra was contestable from the outset—and thus that it was not part of a "zone" with readily identifiable outer boundaries but instead was a component of a semantic penumbra in that it trailed off into contestability even in the late-eighteenth-century, with the further possibility of a different range of contestation over time.

today to establish that contemporary word-sense is no different from that of the past.¹⁷⁸

On the other hand, it might be argued that because original public meaning is so thin, modern judges *also* must follow original understandings. In taking this approach, someone says that a judge must (i) adhere to original word sense, (ii) retrieve ratification-era associations prompted by the text's abstract terms, and then (iii) treat them as decisive for contemporary applications of the text unless an amendment is adopted that alters the relevant text.

An exercise in retrieval of this kind is more onerous than one that focuses solely on original public meaning. Given the superseding-understanding thesis proposed here, this latter exercise in retrieval is pertinent to constitutional interpretation, for analysis of the text always requires consideration of its historicity. But also, according to the argument presented in the Article, the more demanding exercise in retrieving understandings need not be outcome-determinative for today's law. This is because original public meaning can often be preserved even when superseding understandings justify a different outcome than the one founding-era interpreters adopted, as is demonstrated with the *cruel* here.

Later sections of the Article consider a three-stage pattern characteristic of legitimate judicial reassessment of original understandings. In the first stage, participants in ratification debates comment (often with alarm) on the elasticity of the words proposed for adoption.¹⁷⁹ In the second stage, immediate post-ratification interpreters spurn the opportunity to reassess the past; instead, they continue to rely on original understandings of indefinite language.¹⁸⁰ In the third stage, though, interpreters living many generations afterwards rely on

178. As the Webster definition of *cruel*, cited at *supra* note 162, makes clear, linguistic drift is probably not a major problem for constitutional interpretation provided attention is limited to word-sense.

179. We have already had occasion to review ratification-era expressions of alarm about the text's elasticity. See *supra* notes 57–70 and accompanying text for Antifederalist objections to the Philadelphia proposals on this score. See also *supra* notes 86–90 and accompanying text for objections to the Fourteenth Amendment on the same ground. Further ratification-era expressions of alarm will be reviewed in *infra* Section IV.C. (as to the Eighth Amendment's Punishments Clause).

180. See *infra* Sections IV.B and V.B.

superseding understandings to engage in reassessment.¹⁸¹ On the argument presented here, post-founding exercises in reassessment *legitimately* rely on superseding understandings as long as there is evidence of a supermajority consensus compatible with the text's original public meaning. The sections that follow examine specific examples of this cycle of change.

It is at this point that Madison's bridge from the *ex ante* to the *ex post* becomes important, for "discussions and adjudications" conducted in the *ex post* can lead to conclusions not anticipated in the *ex ante*—indeed, directly at odds with understandings entertained in the *ex ante*—but nonetheless compatible with the text's language.¹⁸² As will be seen, Madison himself accepted this transformational possibility. That is, once he was president, Madison granted that applications of the text which he had initially opposed had become constitutional by virtue of "a construction [placed] on the Constitution by the Nation" itself.¹⁸³

For present purposes, it is sufficient to note that the *Thompson/Roper* sequence offers a straightforward example of the bridge from the *ex ante* to the *ex post*, a transition that can be charted numerically by monitoring the consensus among states as to the appropriate age-threshold of eligibility for capital punishment.¹⁸⁴ The sections that follow examine other transitions: Madison's transformation from opponent to supporter of a national bank, judicial conclusions about the constitutionality of whipping, and the Court's reversal of its earlier holding concerning state regulation of interracial sex. Alterations of national practice serve as preconditions for each of the exercises in reassessment that will be discussed, for in the examples that will be discussed the *Marbury* power is deployed not by means of imaginative judicial rereading of the text but by reconsideration of the referential scope of the original meaning of the text's abstract language. This is surely the soundest way to link *ex ante* uncertainty about the text's general terms to *ex post* resolution of interpretive doubt.

181. See *infra* Sections IV.C and V.B.

182. For discussion of the Madisonian bridge, see *infra* notes 185–90 and accompanying text.

183. Letter from James Madison to the Marquis de Lafayette (Nov. 1826) (available at <https://rotunda.upress.virginia.edu/founders/default.xqy?keys=FOEA-print-02-02-02-0778>).

184. See *supra* notes 98–102 for discussion of this point.

III. ECONOMIC REGULATION

It was in *The Federalist* 37 that Madison anticipated the possibility of an interpretive bridge from the ex ante to the ex post.¹⁸⁵ Writing to Spencer Roane in 1819, Madison drew on the terminology he had introduced in that essay to account for the course of post-ratification debates about the constitutionality of a national bank. “It could not but happen, and was foreseen at the birth of the Constitution,” Madison remarked,

that difficulties and differences of opinion might occasionally arise in expounding terms & phrases necessarily used in such a Charter [i.e., the Constitution]; more especially those which divide legislation between the General and the local Governments; and that it might require a regular course of practice to liquidate and settle the meaning of some of them.¹⁸⁶

Because Madison himself was an active participant in the bank debates, his remarks not only summarized the ex ante to ex post framework he had anticipated prior to ratification, they also situated him within it. Indeed, Madison could view himself as not just an exponent of the appropriate way to move from one period to another but also as someone who had labored tirelessly to ensure a smooth transition, for what Madison did not add in his comment to Roane was that he had reassessed his own position on the bank’s constitutionality, thereby soothing the friction produced by the “difficulties and differences of opinion” that had divided the first Congress as to the proper application of the text. Madison accomplished this feat of reconciliation by taking a stand in 1816 directly at odds with the one he had taken in 1791.¹⁸⁷ In that earlier year, he had argued, while serving as a member of the House of Representatives from Virginia, that Congress lacks the power to charter a bank.¹⁸⁸ A quarter century later, while serving as president,

185. Letter from James Madison to Spencer Roane (Sept. 2, 1819) (available at <https://founders.archives.gov/documents/Madison/04-01-02-0455>).

186. *Id.*

187. For Madison’s remarks justifying his 1816 about-face, see Letter from James Madison to the Marquis de Lafayette, *supra* note 183.

188. See *infra* discussion in text accompanying notes 198–201.

Madison signed legislation renewing the bank's charter.¹⁸⁹ A "regular course of [national] practice" had convinced him, in other words, that he should relinquish his earlier position as to the proper application of indefinite textual language in favor of a contrary one that had become dominant over time.¹⁹⁰

This section examines Madison's arc of interpretive reassessment. It then draws on Madison's ideas to account for the judiciary's reassessment of the constitutional past in the Legal Tender Cases (i.e., decisions in which the Court concluded, despite original understandings to the contrary, that Congress has the power to require creditors to accept paper money in satisfaction of debt). Because later sections of the Article discuss judicial reassessment of rights, this section concentrates on a reassessment of the scope of federal power. Moreover, because later sections discuss twentieth- and twenty-first-century exercises in judicial reassessment, this section stands out because it underscores the extent to which this has been a recurrent feature of American constitutional law. Reassessment of original understandings is not a modern phenomenon. On the contrary, as the Legal Tender Cases make clear, it has been a feature of constitutional decision-making for more than a century.

*A. Reading the Text in Light of a Course of Consistent
Legislative Practice: Madison's Justification for His About-Face*

In reversing himself on the question of whether the federal government has the power to charter a national bank, Madison noted the problems of degree that arise when trying to apply the "obscure and equivocal" language (terms he used in *The Federalist* 37) contained in the text.¹⁹¹ The phrase *necessary and proper*, he realized, cannot be applied solely by considering the word-sense of each term.¹⁹² In 1791,

189. See *infra* notes 221–22 and accompanying text.

190. See *infra* note 225 and accompanying text.

191. "All 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." THE FEDERALIST NO. 37, *supra* note 98, at 229 (James Madison).

192. To use Madison's terms, the phrase *necessary and proper* is "obscure and equivocal." See *id.*

Madison decided on his own how to apply the phrase.¹⁹³ A quarter century later, he executed an about-face by accepting the public's contrary judgment as to the proper call.¹⁹⁴ It is by considering this contrast between his solitary interpretation in the first years of the republic's existence and his revised response once the course of national development was clear that we can grasp how "discussions and adjudications" (again, his language in *The Federalist* 37¹⁹⁵) can produce a developmentally sound application of vague textual language.

1. 1791

Throughout the 1787–1788 debates over the Philadelphia proposals, Madison defended the possibility of deriving implied powers from those expressly granted.¹⁹⁶ In his 1791 address to the House, however, Madison took a different tack.¹⁹⁷ He did not reject his earlier remarks; rather he placed particular emphasis on the need for caution when considering whether to venture beyond the text.¹⁹⁸ In particular, Madison claimed that because the text does not expressly grant Congress the power to charter corporations, no implied power to establish a bank can properly be derived from those expressly mentioned.¹⁹⁹ "The doctrine of implication is always a tender one," Madison remarked.²⁰⁰ In speaking of powers *remote* from those mentioned in the text, Madison drew on the spatial imagery Antifederalists used to assess the Constitution:

193. See *infra* notes 201–05 and accompanying text.

194. See *infra* note 196 and accompanying text.

195. See *infra* note 196 and accompanying text.

196. See Madison's response to Rep. Thomas Tudor Tucker's motion, during the August 18, 1789, debate over what is now the Tenth Amendment, to insert the word *expressly* into the text, with the result that it would read "[t]he powers not [*expressly*] delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively or to the people." U.S. CONST. amend. X. In arguing successfully against Tucker's motion, Madison stated that "it was impossible to confine a Government to the exercise of express powers [and that] there must necessarily be admitted powers by implication." 1 ANNALS OF CONG. 790 (1789) (addressing the House of Representatives).

197. See 2 ANNALS OF CONG., 1948–49 (1791).

198. *Id.*

199. *Id.*

200. *Id.*

Mark the reasoning on which the validity of the bill depends. To borrow money is made the *end*, and the accumulation of capitals *implied* as the means. The accumulation of capitals is the *end*, and a Bank implied as the *means*. The Bank is then the *end*, and a charter of incorporation, a monopoly, capital punishments, & *implied* as the *means*.

If implications, thus remote and thus multiplied, can be linked together, a chain may be formed that will reach every object of legislation, every object within the whole compass of political economy.²⁰¹

201. See *id.* (emphasis added). Madison's 1791 remarks do not touch on the significance of *and* in the Necessary and Proper Clause. Members of the Court have treated the clause as establishing two independent conditions for adopting valid legislation. Writing for himself and three colleagues, for instance, Chief Justice Roberts stated that the individual mandate contained in the Patient Protection and Affordable Care Act of 2010, 124 Stat. 119, may have been "'necessary' to the Act's insurance reforms" but that it was "not a 'proper' means for making those reforms effective." *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 560 (2012) (Roberts, C.J.) (plurality opinion).

This is not, however, the only possible way to read the Necessary and Proper Clause, for one might argue that the phrase *necessary and proper* should be treated as unitary—i.e., as one that requires legislation which is "appropriately necessary" rather than legislation which is (i) necessary *and also* (ii) proper. See Samuel L. Bray, "*Necessary and Proper*" and "*Cruel and Unusual*": *Hendiadys in the Constitution*, 102 VA. L. REV. 687, 691 (2016). On this analysis, the text's original public meaning relies on a hendiadys—on a phrase that consists of multiple terms that are "not fully synonymous [but] that together work as a single unit of meaning." *Id.* at 689. This line of interpretation, if accepted, would require reconsideration of the scope of numerous pairings in the text, in particular the scope of the two clauses mentioned in the title of Professor Bray's article.

There are sound reasons, however, to view this (intriguing) proposal skeptically. One is that no participant in the ratification debates appears to have used the term *hendiadys* or to have commented on the effect of paired terms when commenting on exegetical issues. Shakespeare often relied on hendiadic pairings; Hamlet speaks of "sense and secrecy" and of a "tyrannous and damned light." WILLIAM SHAKESPEARE, *THE TRAGEDY OF HAMLET, PRINCE OF DENMARK* act 3, sc. 4; act 2, sc. 2. Macbeth speaks of "sound and fury." WILLIAM SHAKESPEARE, *MACBETH* act 5, sc. 5; see also George T. Wright, *Hendiadys and Hamlet*, 96 PMLA 168, 186–87 (1981). One would have expected at least one commentator to have remarked on the significance of the text's pairings had they also been employed in the way they appear in

In speaking of powers *remote* from those mentioned in the text, Madison draws here on the spatial imagery Antifederalists used to assess the Constitution.²⁰² He does not, however, rely on the kind of imagery typically employed in debates about indefiniteness, for Madison's pre-ratification remarks focused on line-drawing *within* conceptual boundaries whereas his 1791 comments are concerned with the steps that can legitimately be taken to identify powers *beyond* those mentioned in the text.²⁰³ It has to be granted, of course, that all spatial

Shakespeare. Another ground for skepticism has to do with the distinction between the conjunctive *and* and the disjunctive *or*. That is, because hendiadic expressions rely on *and*, it is surprising to find late-eighteenth-century comments that use *or* in discussing the very terms contained in Bray's title. In THE FEDERALIST 41, for instance, Madison asks "[w]hether any part of the powers transferred to the general government be necessary *or* improper," a question that makes sense only if Madison thought of its two components as severable. THE FEDERALIST NO. 41, at 255 (James Madison) (Clinton Rossiter ed. 1961) (emphasis added). Similarly, Art. XXXIII of the New Hampshire Constitution of June 2, 1784 prohibits magistrates from imposing "cruel *or* unusual punishments." N.H. CONST. pt. 1, art. 33rd (emphasis added). Not only would it be unreasonable to use the term *hendiadys* when discussing each of these disjunctive pairings, it also seems reasonable to grant that eighteenth-century draftsmen thought of each component as having independent force. In any event, Madison's 1791 comments and his remarks on the about-face he executed a quarter century later place no emphasis on the conjunctive *and*.

Finally, and most importantly, the hendiadys hypothesis should be rejected given the audience for which the constitutional text was written, an audience composed of lay readers who cannot be presumed to have read the text in light of the work of great poets. Constitutions "are instruments of a practical nature, founded on the common business of human life, designed for common use, and fitted for common understandings," Joseph Story wrote. "The people make them, the people adopt them, the people must be supposed to read them, with the help of common sense, and cannot be presumed to admit in them any recondite meaning or any extraordinary gloss." JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES Sect. 451 (1833). Intriguing as it is, then, Bray's hendiadys hypothesis introduces an "extraordinary gloss" into discussion of a text that performs a more mundane function than *Hamlet* or *Macbeth*—and so should be set aside.

202. For discussion of the significance of spatial imagery in debates over the Philadelphia proposals, see *supra* notes 71–78 and accompanying text.

203. Compare his remarks, *supra* note 121 and accompanying text about remote powers, with his remarks about line-drawing as to the scope of the different branches of the federal government: "Experience has instructed us that no skill in the science of government has yet been able to discriminate and define with sufficient certainty, its three great provinces—the legislative, executive, and judiciary; or even the

imagery—whether it relies on what is *within* or *beyond* the text—is concerned with *boundaries*, and because conceptual boundaries are often *fuzzy*, it is not always clear where an interpretation lies within a textual *map*. Indeed, given the heavy reliance on metaphor essential to all such discussions, it seems likely that participants in interpretive debates about indeterminate language will often employ different *maps*, and because the maps are of their own making, the possibility of accurate comparison of their markings will be open to challenge.

This said, though, it is clear that the notion of remoteness is concerned with what is beyond—concerned, in other words, with efforts to extend the text’s inventory of concepts from what is mentioned to what is not. It is in this sense that remoteness figures importantly in all exercises involving reasoning by implication, for it is always pertinent to ask *how far* an interpreter has moved beyond the text and always impossible to resolve conclusively determinations of *how far* is *too far* (in part because the semantic cartography at stake is profoundly contestable).

This point is particularly significant given the opportunity for reasoning by implication provided by the Necessary and Proper Clause.²⁰⁴ In his 1791 speech, Madison contended that even this clause does not support a claim that Congress possesses implied power to charter a bank, for “the proposed bank could not be called necessary to the government; at most it could be called convenient.”²⁰⁵ Madison’s critics in Congress challenged him on this point, claiming that the clause permits interpreters substantial leeway when venturing from the mentioned to the unmentioned. Because the clause not only vests Congress with the authority to “carry[] into Execution the foregoing Powers” enumerated in Article I, Section 8 *but also* “all other Powers vested by this Constitution in the Government of the United States,”²⁰⁶ his

privileges and powers of the different legislative branches.” THE FEDERALIST NO. 37, at 228 (James Madison) (Clinton Rossiter ed. 1961).

204. Madison consistently granted that the clause makes possible reasoning by implication. His contention was simply that the “doctrine of implication is always a tender one.” See *supra* note 201 and accompanying text.

205. See *supra* note 197, at 1950.

206. The full text of the clause reads: “To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.” U.S. CONST. art. I, § 8, cl. 18.

critics contended that the text's reference to *other* powers means that Congress possesses an unenumerated power to act for the general good.²⁰⁷ For example, Fisher Ames, a congressman from Massachusetts, countered Madison by arguing that a "construction [of the Necessary and Proper Clause] may be maintained to be a safe one which promotes the general good of society, and the ends for which government was adopted, without impairing the rights of any man, or the powers of any State."²⁰⁸

Alexander Hamilton also focused on the text's reference to other powers in the memorandum he prepared for President Washington arguing for the constitutionality of a national bank. "The expressions [contained in the Necessary and Proper Clause] have a peculiar comprehensiveness," Hamilton wrote.²⁰⁹ They include that authority to "*carry[] into execution . . . all other powers* vested by the constitution in the *government* of the United States, or in any *department* or *officer* thereof."²¹⁰ The words Hamilton italicized indicate that he was concerned not only with implied powers that can be derived from Congress's expressly granted powers but also with unenumerated powers (i.e., "all other powers") that can be derived from the federal government's status as a sovereign entity. Given his conclusion that the text grants authority premised merely on the government's status as a sovereign, Hamilton commented scornfully on challenges to the bank that

207. See, e.g., 2 ANNALS OF CONG., *supra* note 197, at 1955–56 (Fisher Ames, addressing the House of Representatives).

208. *Id.* For a contemporary defense of this position, see John Mikhail, *The Constitution and the Philosophy of Language*, 101 VA. L. REV. 1063, 1067 (2015) ("Reasonably construed, the Constitution protects fundamental human rights and vests the government of the United States with all the legitimate authority it needs for the common defense, to promote the general welfare, and to fulfill the other ends for which that government was established.").

It is important to note that Ames was not the only participant in the House's February 1791 to challenge Madison's restrictive reading of the Necessary and Proper Clause. For a survey of the different interpretations of the clause offered by members of the House in support of the bank's constitutionality, see Richard Primus, "*The Essential Characteristic*": *Enumerated Powers and the Bank of the United States*, 117 MICH. L. REV. 415, 462–65 (2018).

209. Alexander Hamilton, *Opinion on the Constitutionality of the Bank* (Feb. 23, 1791), in 3 THE FOUNDERS' CONSTITUTION 249 (1987) (quoting U.S. CONST. art. I, § 8, cl. 18).

210. *Id.*

emphasized its remoteness from Congress's express powers. "The *degree* to which a measure is necessary, can never be a test of the *legal* right to adopt it," Hamilton asserted.²¹¹ Rather, "[i]f the end be clearly comprehended within any of the specified powers, and if the measure have an obvious relation to that end, and is not forbidden by any particular provision of the constitution—it may safely be deemed to come within the compass of the national authority."²¹²

2. 1816

Madison never accepted this capacious version of federal power. He did, however, reverse course on the specific question of degree associated with the bank's constitutionality.²¹³ What he had viewed as too remote in 1791 he determined to be sufficiently close a quarter century later—that is, Madison accepted in 1816 the public's conclusion about the bank's constitutionality while continuing to adhere to his earlier, private belief about the proper application of the text.²¹⁴ In doing so, he adhered to his *Federalist* 37 remarks as to the proper way to move from the *ex ante* to the *ex post*.²¹⁵ Put differently, Madison read the text in 1791 in light of his own convictions; in 1816, he read it in the context of a course of national development.²¹⁶ Because he did so, Madison reasoned in terms of a power that, by his own reckoning, had not existed *ab initio*. On his account, there had been no power at the moment of ratification—at least, no unequivocally clear power—to charter a bank.²¹⁷ As Madison saw it, such a power could be established only by linking a textual possibility to the arc of political change.²¹⁸

211. *Id.*

212. *Id.*

213. For discussion of Madison's about-face, see *infra* notes 221–25 and accompanying text.

214. For Madison's comments on the contrast between his public position and private beliefs concerning this issue, see *infra* note 219 and accompanying text.

215. For analysis of Madison's comments in THE FEDERALIST 37 on the transition from the *ex ante* to the *ex post*, see *supra* notes 98–102 and accompanying text.

216. This follows from the contrast between his remarks cited *supra* notes 201–02 and *infra* note 226 and accompanying text.

217. See *supra* notes 202–03 and accompanying text.

218. Thus, the significance of his references to altered opinions in the letter to Lafayette, quoted in text accompanying *infra* note 224.

Madison first intimated that he had altered his position when, as president, he vetoed an 1815 bill that renewed the bank's charter.²¹⁹ He did so on technical grounds, but he emphasized in his veto message that he believed the bank had become an integral part of national life given "repeated recognition under varied circumstances of the validity of such an institution in acts of the legislative, executive, and judicial branches of the Government, accompanied by indications, in different modes of concurrence, of the general will of the Nation."²²⁰ A year later, once Congress again renewed the bank's charter, Madison signed the legislation, thereby extending the bank's life by twenty years.²²¹

Because Madison's 1815 comments were contained in a veto message, it is not surprising that the lion's share of attention was given to his decision to sign the legislation passed a year later.²²² The fullest explanation Madison offered for his about-face can be found in an 1826 letter he wrote to the Marquis de Lafayette.²²³ "As I have been charged with inconsistency, in not putting a veto on the last act of Congress establishing a Bank," Madison wrote,

[A] word of explanation may not be improper. My construction of the Constitution on this point is not changed. But I regard the reiterated sanctions given to the power by the exercise of it, thro' a long period of time, in every variety of form, and in some form or other, under every administration preceding mine, with the general concurrence of . . . the people at large, and without a glimpse of

219. James Madison, Veto Message on the National Bank (Jan. 30, 1815) (available at <https://millercenter.org/the-presidency/presidential-speeches/january-30-1815-veto-message-national-bank>).

220. *Id.*

221. The second bank's charter expired in 1836. In 1832, President Jackson vetoed legislation granting it a further renewal. For discussion, see BRAY HAMMOND, *BANKS AND POLITICS IN AMERICA, FROM THE REVOLUTION TO THE CIVIL WAR*, chs. 13 & 14 (1957).

222. Madison himself appears not to have remarked in his later career on the fact that he vetoed the bank bill of 1815. Instead, as is indicated in the 1826 letter quoted in text accompanying *infra* note 224, he devoted a good deal of time in his post-presidential career to explaining why he took a different position in 1816 than the one he took in 1791.

223. See Letter from James Madison to the Marquis de Lafayette, *supra* note 183.

change in public opinion, but evidently with a growing confirmation of it; all this I regarded as a construction put on the Constitution by the Nation, which having made it had the supreme right to declare its meaning²²⁴

Once the first and last sentences of this passage are considered together, one can readily see that Madison's remarks are couched in his *Federalist* 37 framework. His 1791 speech was an opening contribution to the post-ratification discussions he anticipated prior to ratification for resolving uncertainties occasioned by the text's indefinite language.²²⁵ In declaring that "[m]y construction of the Constitution has not changed," Madison made it clear that he had not altered his own position as to the best way to apply the text.²²⁶ The power to charter a national bank is indeed too remote from the expressly mentioned powers, he continued to believe—and the Necessary and Proper Clause does not save arguments for a bank from excessive remoteness. By 1816, however, Madison had concluded that the cumulative effect of public debate about the bank made this position untenable as a matter of constitutional interpretation.²²⁷ If the argument for the bank's constitutionality had been patently unreasonable, Madison might have held out against it, but implicit in his letter to Lafayette is a concession that a reasonable interpretation could have been advanced at the outset in favor of the bank—and that such an interpretation was properly treated as authoritative by 1816 given the course of post-founding national development.²²⁸

So, *when* did the bank secure its standing in constitutional law? Madison's position is that its constitutionality *became* clear through the

224. *Id.*

225. That is, Madison's speech to the House in February 1791, discussed at *supra* notes 219–20 and accompanying text, was the first step in "the discussions and adjudications" he had anticipated for indefinite textual language.

226. For Madison's "[m]y construction of the Constitution has not changed," see *supra* note 224 and accompanying text.

227. This point follows from his comment in the letter to Lafayette on the significance of altered public opinion. See Letter from James Madison to the Marquis de Lafayette, *supra* note 183, and text accompanying *supra* note 224.

228. Admittedly, this point is merely implicit. But would Madison have yielded to an interpretation of the text backed by public opinion if he had believed that interpretation to be *unreasonable*?

“reiterated sanctions” of different branches of government.²²⁹ On this reckoning, there was an opportunity ab initio to charter a bank given the Necessary and Proper Clause. However, a firm claim as to the existence of an actual power was possible only after many legislative acts. Given this developmental framework, the bank’s status in constitutional law is understandable in terms of contingent historical factors. Establishment of a national bank was only one of textual possibilities. The ultimate determinant of the bank’s constitutional legitimacy hinged on the interplay of textual elasticity and a course of national practice that might have unfolded differently. Because that course of practice could not have been foreseen at the outset, “the plan of government reported by the convention” to which Madison referred in *The Federalist* 39 was indeed a scheme, many of whose essential components became more definite only in the aftermath of ratification.²³⁰

On this reckoning, Madison’s letter to Lafayette endorses a conventionalist version of constitutional interpretation.²³¹ The debates of 1791 whittled down the range of indefiniteness. But the vagueness of the phrase *necessary and proper* makes it impossible to reach a correct conclusion, based on the text alone, as to their proper application. Correctness—i.e., permanently valid applications of the text—may indeed be possible in some instances. The *Marbury* hypotheticals meet this standard, for instance.²³² But because Madison’s concern here was textual language that resists determinate application, a top-down approach to legal reasoning (one that claims a conclusion is sound because it is reached pursuant to a text or perhaps pursuant to a text *plus* supplementary legal materials such as canons of construction) has to be set aside in favor of a bottoms-up approach (one that relies on a pattern of national practice) to resolve doubt about the text’s appropriate

229. This follows from his remarks in the letter to Lafayette. See Letter from James Madison to the Marquis de Lafayette, *supra* note 183.

230. THE FEDERALIST NO. 39, *supra* note 112, at 240 (James Madison) (characterizing the Constitution as “the plan of government proposed by the convention.”).

231. That is, the proper application of the text’s vague language is determined by a course of national practice that emerges over time. See text accompanying *supra* note 224.

232. For discussion of the *Marbury* hypotheticals, see *supra* notes 144–55 and accompanying text.

application.²³³ Put differently, the plan-as-scheme unfolds over time: Post-ratification practice resolves doubts about the application of originally indeterminate language. The text exerts authority by identifying guidelines for deliberation, but those guidelines are properly applied by reference to a course of national practice that could not have been foreseen at the outset.²³⁴

Generalizing on this, we can say that Madison's letter to Lafayette, when considered in conjunction with his remarks in *The Federalist*, outlines a framework for identifying constitutional powers through consideration of the interplay of textual categories and the course of national change. A qualification is needed, however, before extending this framework to the transitions from the *ex ante* to the *ex post* that will be considered in the remaining portions of the Article, for Madison refers in *The Federalist* 37 to the *liquidation* of obscure textual language through public debate²³⁵—and the concept of liquidation cannot be reconciled with the conventionalist approach he employs in the letter to Lafayette. This is because there is an element of finality to any act of liquidation,²³⁶ particularly when the noun *liquidation* is

233. For analysis of this contrast, see Richard A. Posner, *Legal Reasoning from the Top Down and the Bottom Up: The Question of Unenumerated Constitutional Rights*, 59 U. CHI. L. REV. 433 (1992).

234. In this respect, the plan to which Madison refers in THE FEDERALIST 39, *supra* note 112, at 240, is a plan-as-scheme in the sense that Noah Webster defined the word *plan*. See *supra* note 119 and accompanying text.

235. THE FEDERALIST NO. 37, *supra* note 98, at 229 (James Madison) (“All 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.”).

236. Noah Webster's definition of *liquidate* presupposes finality: “verb transitive[.] 1. To clear from all obscurity—Time only can *liquidate* the meaning of all parts of a compound system. 2. To settle; to adjust; to ascertain or reduce to precision in amount—Which method of liquidating the amercement to a precise sum was usually performed in the superior courts. The clerk of the commons' house of assembly in 1774, gave certificates to the public creditors that their demands were liquidated, and should be provided for in the next tax bill. The domestic debt may be subdivided into liquidated and unliquidated. 3. To pay; to settle, adjust and satisfy; as a debt—Kyburgh was ceded to Zurich by Sigismund, to *liquidate* a debt of a thousand florins.” *Liquidate*, WEBSTER'S DICTIONARY (1828), <http://Webstersdictionary1828.com/Dictionary/indefinite> (last visited Mar. 14, 2021).

linked to the adjectives *obscure* and *equivocal* (as Madison did in *The Federalist* 37),²³⁷ for given this linkage, a writer can be said to suggest that the process of liquidation banishes obscurity and so conclusively reveals to observers what had previously been hidden from view. As far as textual indefiniteness is concerned, *liquidation* suggests the possibility of a final and correct revelation of applications that had previously not been discerned.²³⁸

Webster defines *liquidation* as a noun understandable in terms of the verb *liquidate*: “noun[.] The act of settling and adjusting debts, or ascertaining their amount or balance due.” *Liquidation*, WEBSTER’S DICTIONARY (1828), <http://Webstersdictionary1828.com/Dictionary/indefinite> (last visited Mar. 14, 2021).

237. See *supra* notes 235–38 and accompanying text for the discussion of liquidation of obscure and equivocal language.

238. This is the sense in which Justice Thomas uses the term *liquidation* when commenting on Madison’s remarks in THE FEDERALIST 37. “At the time of the founding,” Thomas remarks, “‘to liquidate’ meant ‘to make clear or plain’; ‘to render unambiguous; to settle (differences, disputes).’” *Gamble v. United States*, 139 S. Ct. 1960, 1982 (2019) (Thomas, J., concurring) (citing Caleb Nelson, *Stare Decisis and Demonstrably Erroneous Precedent*, 87 VA. L. REV. 1, 13 & n.35 (2001) (quoting *Liquidate*, OXFORD ENGLISH DICTIONARY 1012 (2d ed. 1991))). He continued, “Therefore, judicial discretion is not the power to ‘alter’ the law; it is the duty to correctly ‘expound’ it.” *Id.* (quoting Letter from James Madison to Nicholas Trist (Dec. 1, 1831), in 9 THE WRITINGS OF JAMES MADISON 477 (G. Hunt ed., 1910)). It should be noted that Madison did not use the terms *liquidation* and *liquidate* in the letter to Trist; nor did Madison comment on THE FEDERALIST 37 in that letter. Indeed, Madison introduced the distinction between expounding and altering the Constitution to assert, consistently with his remarks in the 1826 letter to Lafayette, that “a course of authoritative, deliberate and continued decisions, such as the Bank could plead, was an evidence of the public judgment [of the Constitution’s proper application], necessarily superseding individual opinions.” Letter from James Madison to Nicholas Trist (Dec. 1, 1831) (available at <https://rotunda.upress.virginia.edu/founders/default.xqy?keys=FOEA-print-02-02-02-2483>). Needless to say, this is an approach to constitutional interpretation that is incompatible with the one employed by Justice Thomas—and Thomas does not quote this portion of the letter to Trist.

This said, Justice Thomas is surely on sound ground in treating the process of liquidation as something that banishes obscurity once and for all. His conclusion is preferable to the alternative proposed by Professor Baude, which allows for unliquidation and re-liquidation of obscure constitutional language. See William Baude, *Constitutional Liquidation*, 71 STAN. L. REV. 1, 56 (2019) (“[I]n practice, liquidated provisions can be unliquidated or reliquidated.”); accord Michael W. McConnell, *Time, Institutions, and Interpretation*, 95 B.U. L. REV. 1745, 1774 (2015) (“Presumably, this ‘fixing’ is not irrevocable . . .”). However, the soundness of Justice Thomas’s *Gamble* comments does not mean that Madison’s approach to the bank-

If this was Madison's position, then there can be one, *and only one*, post-ratification resolution of each indefinite textual provision, a resolution that may have been unclear in the *ex ante* but whose correctness (through liquidation) is indisputable in the *ex post*. Ongoing reassessment is unacceptable on this analysis, nor is the conventionalist approach to interpretation that informs the letter to Lafayette, for liquidation, when understood as the discovery of what was hidden from view, must trump whatever "construction of the Constitution" that is placed on it by the nation. Given the fact that Madison used the liquidation metaphor in *The Federalist* 37²³⁹ and also in letters he wrote following ratification,²⁴⁰ it is possible that he would have endorsed this *one-time, permanently correct resolution* approach to *ex post* interpretation. To adopt this position, however, is to disregard the different account of interpretation Madison employed in the letter to Lafayette.²⁴¹ Indeed, it is also to disregard his willingness to set aside his 1791 application of the text in favor of the one he accepted in 1816, for if Madison believed his 1791 conclusion accurately captured "what

constitutionality question should be rejected. This is because the term *liquidation* presupposes a process of discovering what was "there" all along but obscured from view.

In contrast, Madison employed a conventionalist framework to justify signing the bank legislation. Because Madison continued to believe his 1791 conclusion about the text's application was sounder than the one he adopted in 1816, he could not have been adopting the "what's there" approach. He must instead have adhered to a conventionalist approach, one that makes no effort to identify a permanently valid application of obscure language and that instead allows for multiple reasonable applications of the text, with the nod given to the one that is consistent with a national consensus which has emerged over time. This interpretation of Madison's position is of course compatible with his remark to Trist explaining why "public judgment" (as reflected in the post-ratification consensus discernible in a pattern of legislation) should "supersede individual opinions." Letter from James Madison to Nicholas Trist, *supra*.

239. See, e.g., THE FEDERALIST NO. 37, *supra* note 98, at 229 (James Madison) ("All 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.").

240. See, e.g., Letter from James Madison to Nicholas Trist, *supra* note 238.

241. See Letter from James Madison to the Marquis de Lafayette, *supra* note 183.

was there all along” (though hidden from view), he could not as a matter of principle have yielded to the conclusions that emerged over time.

How should this tension be resolved? Two complementary solutions suggest themselves. First, we can reasonably say that Madison was unaware of the incompatibility just noted. His *ex ante* and *ex post* comments on textual indeterminacy sometimes employ visual imagery (which suggests the possibility of a final clarification of what had previously been obscure), but they sometimes employ spatial imagery (which suggests the possibility of recalibration along a scale, and thus ongoing reassessment, as interpreters rethink the question of *how much* remoteness is acceptable). This distinction seems clear, and vitally important, today, but it is understandable that Madison, who was consumed by the press of daily business as a public servant, did not grasp its significance when commenting on the Constitution.²⁴²

Nonetheless, it is essential to decide in the context of the twenty-first-century *ex post* what to make of the distinction now that it is clear. On this point we can comfortably say that Madison’s letter to Lafayette, when considered in conjunction with his frequent use of spatial imagery, makes it reasonable to think in terms of a qualified Madisonian framework for reassessing the constitutional past, one that does not presuppose a conclusive elimination of semantic uncertainty (a *liquidation of obscurity*, in other words) but instead allows for a recalibration of federal authority through reassessment of the appropriate application of vague textual language. The adjective *qualified* is needed here since Madison’s use of *liquidation* cannot be reconciled with the possibility of ongoing recalibration of rights and powers. But because Madison himself can be said to have reassessed his own position as to the bank’s constitutionality, it is certainly permissible to speak of a Madisonian framework that permits reinterpretation of the scope of government authority in light of post-ratification national change. On this reckoning,

242. Madison employs spatial and visual imagery throughout the paragraph on liquidation in THE FEDERALIST 37. As for the former, he speaks of uncertainty about “the precise extent of the common law” and of “the indeterminate limits” of the courts of Great Britain. As for the latter, he comments twice in the paragraph on the obscurity of the text’s language and concludes the paragraph by suggesting that God’s message, “luminous as it must be, is rendered dim and doubtful by the cloudy medium through which it is communicated.” THE FEDERALIST NO. 37, *supra* note 98, at 228–29 (James Madison). He appears never to have considered the different uses that can be made of these two metaphors about language.

the soundness of an effort to apply vague language is to be evaluated not by means of a search for steps that permanently banish textual obscurity but instead by means of a historically informed examination of the interplay of the text's vague language with the course of national development. This is the approach that will be employed throughout the remainder of the Article.

*B. A Judicial About-Face: The Text in the Context
of the Civil War*

We have just examined Madison's reassessment of his own position on the constitutionality of a national bank. We turn now to Congress's reassessment of the constitutional past—specifically, to legislation enacted in the 1860s and 70s mandating the acceptance of paper money in satisfaction of debts.²⁴³ There is little doubt that the framing generation would have been troubled by this legislation. Many of the ratifiers were alarmed by the inflationary spiral of the 1770s and 80s, a pattern of currency depreciation set off by the use of paper money to pay war debts.²⁴⁴ Not surprisingly, the Constitution's framers were anxious to prevent something similar in the new federal government. Thomas Jefferson's comments on the subject underscore the lingering effect of their fears. Writing in 1799, more than a decade after the Constitution's ratification, Jefferson advocated adoption of an amendment that would prohibit the government from borrowing money. He then added that, even in the absence of an amendment, the government was barred from using paper money. "I now deny," he stated, "their [i.e., the federal government's] power of making paper money or anything else a legal tender."²⁴⁵

243. See *infra* notes 257–58 and accompanying text.

244. For a survey of the inflationary spiral of the revolutionary era and an explanation of the significance of the saying "not worth a continental," see KEITH S. ROSENN, *LAW AND INFLATION* 5 (1982).

245. 2 HENRY S. RANDALL, *THE LIFE OF THOMAS JEFFERSON* 453 (1858) (quoting Letter from Thomas Jefferson to John Taylor of Caroline (Nov. 26, 1799) (available at <https://founders.archives.gov/documents/Jefferson/01-31-02-0212>) ("I wish it were possible to obtain a single amendment to our Constitution. I would be willing to depend on that alone for the reduction of the administration of our [g]overnment to the genuine principles of its Constitution; I mean an additional article, taking from the federal [g]overnment the power of borrowing. I now deny their power of making paper or anything else of legal tender.")).

The Supreme Court initially honored this original understanding of the constitutional status of paper money. It quickly executed an about-face, however, thereby upholding “the construction [placed] on the Constitution” by the mid-century Congress.²⁴⁶ On the analysis proposed here, the Court acted properly: in reversing itself, it played its appropriate role within the qualified Madisonian framework of developmental constitutionalism. That Madison himself was opposed to the use of paper money as legal currency simply underscores the importance of this conclusion, for we are concerned here not with a specific understanding he shared with his fellow framers but with the framework he proposed for making the transition from the *ex ante* to the *ex post*.

1. A Claim of Immunity from Legislative Reassessment of the Constitutional Past

Article I, Section 10 provides that “[n]o State shall ... coin Money; emit Bills of Credit; [or] make any Thing but gold and silver Coin a Tender in Payment of Debts”²⁴⁷ Article I, Section 8 does not contain a similar prohibition with respect to the federal government. It authorizes Congress “[t]o coin Money, regulate the Value thereof, and of foreign Coin, and fix the Standard of Weights and Measures.”²⁴⁸ Because this provision says nothing about a federal power to issue paper money as legal tender, one might argue that the text denies this power to the states but allows Congress to decide in favor of it at the federal level.²⁴⁹ Given the Necessary and Proper Clause, someone might thus say, the text grants the federal government a latent, though not an express, power along these lines.²⁵⁰

246. The words are Madison’s. See Letter from James Madison to the Marquis de Lafayette, *supra* note 183. For discussion of the Court’s about-face, see *infra* notes 262–65.

247. U.S. CONST. art. I, § 10, cl. 1.

248. U.S. CONST. art. I, § 8, cl. 5.

249. During the course of the Philadelphia Convention, Nathaniel Gorham of Massachusetts took this position. Congress possesses the power to issue paper money, he asserted, even though it was not granted an enumerated power to do so. See 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 309 (Max Farrand ed. 1911).

250. Ajit Pai reaches this conclusion: “Thus, the Framers, who believed express power would inspire unwise issuances of bills of credit, were content to remain silent and let other constraints—namely, necessity—limit future Congresses.” Ajit V. Pai,

To take this position, however, is to go beyond the understandings entertained at the outset. Jefferson's comment is instructive in this regard, for it relies not only on the premise that paper-money-as-legal-tender is inadvisable but that it is also constitutionally impermissible. Madison also believed that paper-money-as-legal-tender is inadvisable. In *The Federalist 44*, for example, he commented on "the pestilent effects of paper money on the necessary confidence between man and man," a remark that was unmistakably aimed at state issuance of this (the subject of the Article I, Section 10) but that has ramifications for a determination of federal power in that he added that paper money undermines "the character of republican government."²⁵¹ Moreover, Madison appears to have believed that paper-money-as-legal-tender is not simply inadvisable but also constitutionally impermissible, for the notes kept at the Philadelphia Convention record his aim of "cut[ting] off the pretext for a *paper currency*, and particularly for making the bills a *tender*, either for public or private debts."²⁵²

Because so many members of the founding generation rejected paper-money-as-legal-tender not merely on grounds of financial expediency but also as a matter of constitutional principle, we can speak of a dominant, explicit understanding as to the issue. Subsequent sections of the Article deal with implicit understandings as to the text's proper application—with background understandings that appear never to have been articulated as to the Constitution's reach but that nonetheless guided officials charged with applying the text. Here, we address unequivocal, widely voiced statements that expressed the framers' hostility to the use of paper money as legal currency. Other statements besides those of Jefferson and Madison might be cited here.²⁵³ In this context,

Congress and the Constitution: The Legal Tender Act of 1862, 77 OR. L. REV. 535, 576 (1998).

251. THE FEDERALIST NO. 44, at 281–82 (James Madison) (Clinton Rossiter ed., 1961).

252. See 5 JAMES MADISON, DEBATES ON THE FEDERAL CONSTITUTION IN THE CONVENTION HELD AT PHILADELPHIA IN 1787 WITH A DIARY OF THE DEBATES OF THE CONGRESS OF THE CONFEDERATION 435 (Jonathan Elliot, rev. 1861).

253. For example, during the Philadelphia debate in which Madison commented favorably on the possibility of cutting off the pretext for paper money, Oliver Ellsworth of Connecticut stated that he "thought this a favorable moment to shut and bar the door against paper money." *Id.* James Wilson of Pennsylvania contended that removing the possibility of paper money would "have a most salutary influence on the credit of the United States." *Id.* And Pierce Butler of South Carolina reminded his

however, it is helpful to note that initial understandings were shared by the successor generation—i.e., that the founders’ heirs also opposed this kind of currency on constitutional grounds. A statement by Daniel Webster illustrates the continuity of conviction in this context. “Most unquestionably,” Webster asserted,

there is no legal tender, and there can be no legal tender, in this country, under the authority of the Government, or any other, but gold and silver This is a constitutional principle, perfectly plain, and of the very highest importance. . . . [A]s Congress has no power granted to it, in this respect, but to coin money and to regulate the value of foreign coins, it clearly has no power to substitute paper, or any thing [sic] else, for coin, as a tender in payment of debts and in discharge of contracts.²⁵⁴

On this analysis, the original understanding concerning paper money is immune from interpretive reassessment by later generations. But what is to be made of the fact that the text does not prohibit the issuance of paper money? And what is to be made of the Necessary and Proper Clause? Mid-nineteenth-century opponents of paper money did not consider these sufficient to overcome the original understanding. The overwhelming consensus that prevailed in the *ex ante* precluded reconsideration of the issue of paper money in the *ex post*, they believed. As Justice Field put it, there was “an entire uniformity of opinion” concerning the issue.²⁵⁵ “Every one [in the founding generation] appears to have understood that the power of making paper issues a legal tender, by Congress or by the States, was absolutely and forever prohibited.”²⁵⁶ Field’s use of the word *understood*, it is helpful to note,

colleagues that paper money was not legal tender in any European country. *Id.* Why, one wonders, did the framers not include in the text a prohibition of paper-money-as-legal-tender? Their failure to do so serves as a particularly interesting example of an incompletely theorized agreement in which understandings that could have been reduced to writing (but were not) can, but do not have to, influence interpretation of the written text. See Cass Sunstein, *Incompletely Theorized Agreements*, 108 HARV. L. REV. 1733 (1995).

254. 1 GEORGE TICKNOR CURTIS, LIFE OF DANIEL WEBSTER 541 n.1 (1870) (quoting Daniel Webster, Address to the Senate (Dec. 21, 1836)).

255. *Knox v. Lee*, 79 U.S. 457, 656 (1871) (Field, J., dissenting).

256. *Id.*

demonstrates that appeals to a ratifier consensus (framed by references to *understandings*) were made in the nineteenth-century as well as the modern era. On Field's reckoning, statements made by the founders and their immediate successors create binding law for later interpreters. They definitively constrain the exercise of federal power even in the absence of an express prohibition concerning an issue.

Field's remarks are not only historically significant, in that they capture a founding-era consensus, they are also significant as far as constitutional interpretation is concerned, for they pose a direct challenge to interpretive theories that treat understandings as binding on post-ratification generations. The Civil War generation rejected this position as far as paper money is concerned. During the course of that war, Congress, confronted with the funding problems that inevitably arise when raising an army, passed legislation authorizing the issuance of paper-money-as-legal-tender.²⁵⁷ A decade and a half later, in 1878, this war-related legislative expedient was made permanent.²⁵⁸ Congress twice disregarded original understandings, in other words. In doing so, it followed the trajectory of change outlined earlier when discussing the opportunity for reassessment provided by indeterminate textual language. The distinctive feature of the Legal Tender Cases is that the pressures of funding the Civil War brought about an abrupt change. But the change that occurred in wartime turned out to be surprisingly satisfactory—and so was adopted as a permanent measure.

2. Justifying Congress's Reassessment of the Past

In *Hepburn v. Griswold*, the 1870 case that was the first to address the legal tender issue, the Court agreed with the immunity-from-reassessment argument essential to an original understandings framework—and so invalidated the Civil War legislation.²⁵⁹ Chief Justice Chase's *Hepburn* opinion relies on familiar spatial imagery. Paper-money-as-legal-tender would “confuse the boundaries” between the different branches of government, Chase states.²⁶⁰ It would also take the federal government “very far beyond any extent hitherto given to

257. See Act of Feb. 25, 1862, ch. 33, 12 Stat. 345. This was supplemented by further legislation. See Act of July 11, 1862, ch. 144, 12 Stat. 535.

258. See Act of May 31, 1878, ch. 146, 20 Stat. 87.

259. 75 U.S. 603, 625 (1870).

260. *Id.* at 618.

it.”²⁶¹ This is *preservationist* spatial reasoning: It appeals to the framers’ understanding of constitutional space (a metaphor not found in *Hepburn*, it has to be granted, but one that is apt in the context) and relies on this image to safeguard the *boundaries* the framers understood the text to establish. Original understandings define the constitutional *map* (another image not used by the Court): Chase seeks to preserve the map in its unaltered form.

The two Legal Tender Cases that followed *Hepburn* endorse legislative reassessment of the past. In drawing on the spatial imagery employed in *Hepburn*, we can say that each case accepts Congress’s authority to venture beyond the boundaries established by the text’s explicit grant of monetary power. In *Knox v. Lee*, decided only a year after *Hepburn* (this time, with Chase dissenting), the opinion by Justice Strong concludes that the Civil War legislation authorizing paper money was a valid exercise of Congress’s authority under the Necessary and Proper Clause.²⁶² Justice Gray’s opinion in *Juilliard v. Greenman*, decided in 1884, upholds the 1878 legislation authorizing paper-money-as-legal-tender as a regular mode of peacetime exchange.²⁶³ Because they were decided less than a century after the founding, *Knox* and *Juilliard* are the most prominent early judicial opinions to set aside an original understanding in favor of a superseding one.

Unfortunately, neither opinion directly confronts the burden of the past. Strong’s reasoning in *Knox* is particularly open to criticism on this score, for Strong contends that the power to treat paper-money-as-legal-tender “may be deduced fairly from more than one of the substantive powers expressly defined [in the text], or from them all combined.”²⁶⁴ The difficulty with this claim should be obvious, for if the power to treat paper-money-as-legal-tender can be *deduced* from one or more of the express power-granting provisions, the framers would surely have realized this and, given their opposition to the practice, would have adopted language to the contrary. Indeed, it is because the soundness of claims about implied powers cannot be established by means of a logical derivation from explicit provisions that questions about their scope matter so much in constitutional law, for if someone

261. *Id.* at 617.

262. 79 U.S. 457, 633 (1871).

263. 110 U.S. 421, 450 (1884).

264. *Knox*, 79 U.S. at 534.

can uncontestedly assert that *X* entails *Y*, no reasonable debate is possible as to *Y*'s soundness. But reasoning about implied powers does not rely on deduction. Rather, it relies on analogies—on consideration of the extent to which *Y* resembles *X*—and analogies raise deeply contestable questions about the *degree* of resemblance between one concept and another.²⁶⁵

Once the flaws in the deduction claim are recognized, one can readily see how *Knox* and *Juilliard* are best analyzed as decisions that rely on the opportunity provided by the Necessary and Proper Clause to recalibrate federal power. That opportunity was always there: It existed once the text was adopted. Antifederalist commentators did not remark on the clause's ramifications for issuing paper-money-as-legal-tender. They did, however, realize that the clause could lead to a vast enlargement of government power—thus the significance of *An Old Whig*'s comment, quoted earlier, that the clause confers “undefined, unbounded, and immense power” on the government.²⁶⁶ Moreover, because Hamilton implicitly conceded (as we have also seen) the merits of *An Old Whig*'s argument when he asserted in *The Federalist* 34 that “[t]here ought to be a CAPACITY to provide for future contingencies as they may happen; and as these are illimitable in their nature, it is impossible safely to limit that capacity,” one can say with confidence that the possibility of an extension of federal authority beyond the grants of power contained in express provisions was recognized at the

265. Unlike Justice Strong, Chief Justice Marshall recognized the contestability of claims about the scope of implied powers. In doing so, he avoided the kind of deduction argument advanced in *Knox*. “This government is acknowledged by all to be one of enumerated powers,” Marshall wrote. *McCulloch v. Maryland*, 17 U.S. 316, 405 (1819). “The principle[] that it can exercise only the powers granted to it . . . is now universally admitted. But the question respecting the extent of the powers actually granted, is perpetually arising, and will probably continue to arise, as long as our system shall exist.” *Id.* This concession as to the contestability of claims about the scope of federal power under the Necessary and Proper Clause stands in contrast with Marshall's claims about the definite scope of the powers analyzed in *Marbury v. Madison*, 5 U.S. 137 (1803), discussed *supra* notes 139–46 and accompanying text. Both the *Marbury* and *McCulloch* claims are compatible with original public meaning—the *Marbury* claim with original definiteness and the *McCulloch* claim with original indefiniteness. In contrast, Justice Strong's *Knox* claim concerning the possibility of deducing a power to treat paper money from the powers granted the federal government is semantically implausible.

266. See AN OLD WHIG NO. 2, *supra* note 60, and accompanying text.

outset.²⁶⁷ But this point establishes only that semantic elasticity created the opportunity for some kind of venture beyond the text at the moment of ratification; it does not establish that the actual power existed at that time. On the contrary, as suggested by Hamilton's evocative term *capacity*, the power to issue paper money emerged developmentally—initially in the crucible of war and later as a peacetime measure as the nation reacted favorably to the use of paper-money-as-legal-tender.

This developmental account offers a way to make sense of the course of constitutional change. There was indeed a constitutional norm that prevailed throughout the life of the early republic which strongly disfavored issuance of paper money. That norm existed within the shadows of the Necessary and Proper Clause, however. It never existed as a permanent prohibition on congressional authority. The *when* question about the power to issue paper money can easily be answered, then, for this power moved from hypothetical possibility to actuality on February 25, 1862, when Congress passed its wartime statute authorizing paper money. It then became a permanent government power on May 31, 1878, when Congress adopted this as a peacetime measure. As will be noted in the next two sections, more difficult *when* questions arise in settings where the Court invalidates state or federal legislation in the course of altering rights. Here, though, all that needs to be said is that the Court properly deferred to Congress's reassessment of the past by upholding the 1862 and 1878 statutes.

3. Bypassing Article V

If reassessment of earlier understandings is interpretively sound, what need is there to turn to Article V? That is, if reassessment is undertaken in a way that honors the qualified Madisonian framework for moving from the *ex ante* to the *ex post*,²⁶⁸ why should original understandings bar post-ratification reconsideration of the scope of government authority by means of legislative enactment as confirmed by judicial review? The answer to this is simple: There is no reason to consider an amendment when the Madisonian conditions are satisfied.

267. THE FEDERALIST NO. 34, *supra* note 95, at 207 (Alexander Hamilton).

268. For discussion of the qualified Madisonian framework for moving from the *ex ante* to the *ex post*, see *supra* notes 223–42 and accompanying text. See also Letter from James Madison to the Marquis de Lafayette, *supra* note 183.

Article V is needed to revise the precise rules contained in the text—to revise the criteria for Electoral College selection of a president and vice-president,²⁶⁹ to alter the means of selecting senators,²⁷⁰ to change the assembly date for Congress,²⁷¹ and so on. It can also be used to set aside judicial applications of the text that depart from the qualified Madisonian framework. There is no need to turn to it otherwise, though. On the contrary, original indefiniteness provides interpreters with the opportunity to recalibrate the scope of government authority over time. *Marbury* was not decided for this purpose, but *Knox* and *Juilliard* illustrate how it can properly be used as an engine for reassessing the constitutional past.

Only a passing acquaintance with American constitutional history is needed to realize that powers (and rights) have typically been altered consistently with this framework. Once he became President, Thomas Jefferson never sought an amendment that would prohibit the federal government from borrowing money.²⁷² Indeed, he also did not seek an amendment to authorize the Louisiana Purchase—this, despite the fact that he remarked, during the course of deliberations about his treaty with France, that the Constitution would be made into “a blank paper by construction” if none were secured.²⁷³ Similarly, Madison

269. Compare U.S. CONST. art. II, § 1, cl. 3, with U.S. CONST. amend. XII (revising Electoral College procedures for selecting the President and Vice-President).

270. Compare U.S. CONST. art. I, § 3, cl. 1, with U.S. CONST. amend. XVII (revising the procedures for electing Senators).

271. Compare U.S. CONST. art. I, § 4, cl. 2, with U.S. CONST. amend. XX, § 2 (altering the date at which the Congress is to assemble each year).

272. For Jefferson’s 1799 statement that there should be such an amendment, see RANDALL, *supra* note 245, at 453.

273. “I cannot help believing the intention was to permit Congress to admit [pursuant to U.S. CONST. art. IV, § 3, cl. 1] into the union new states which should be formed out of the territory for which & under whose authority alone they were then acting. I do not believe it was meant that they might receive England, Ireland, Holland &c into it, which would be the case on your construction. . . . I had rather ask an enlargement of power from the nation where it is found necessary, than to assume it by a construction which would make our powers boundless. [O]ur peculiar security is in the possession of a written constitution. [L]et us not make it a blank paper by construction.” Letter from Thomas Jefferson to Wilson Cary Nicholas (Sept. 7, 1803) (available at <https://founders.archives.gov/documents/Jefferson/01-41-02-0255>). For discussion of Jefferson’s decision not to seek an amendment to justify the purchase, see EVERETT SOMERVILLE BROWN, *THE CONSTITUTIONAL HISTORY OF THE LOUISIANA PURCHASE* (1920).

overcame his exegetical scruples about a national bank without insisting on an amendment.²⁷⁴ And, of course, in the wake of the Legal Tender Cases, powers and rights have routinely been altered through reassessment of original understandings of the text. Most importantly, the New Deal enlargement of government powers occurred through reassessment of the constitutional past, not through amendment of the text.²⁷⁵

It is because reassessment of the past has become the characteristic way of altering the scope of government authority in the years since adoption of the Civil War amendments that it is helpful to note that the qualified Madisonian framework proposed here not only promotes legitimate constitutional change but can also be defended on the ground that it is compatible with political prudence. Once again, Madison's *ex ante* comments are pertinent. Remarking on the amendment option provided by Article V, Madison argued in *The Federalist* 49 that "reverence for the laws" is best preserved through infrequent modifications of the text.²⁷⁶ "[M]aintaining the constitutional equilibrium of the government" can be ensured by avoiding routine "recurrence to the people," he wrote, for "the prejudices of the community" are honored by leaving the text undisturbed.²⁷⁷

274. NOAH FELDMAN, *THE THREE LIVES OF JAMES MADISON: GENIUS, PARTISAN, PRESIDENT* 611 (2017) (explaining Madison's willingness while president to sign into law the bank legislation of 1816 indicated "recognition that the Constitution could evolve When a bill to charter the second bank came before him, Madison signed it, no longer deeming an amendment necessary.").

275. 2 BRUCE ACKERMAN, *The Missing Amendments, in WE THE PEOPLE: TRANSFORMATIONS* 312–44 (1998) (discussing President Roosevelt's decision to bypass the amendment process while implementing the New Deal).

276. THE FEDERALIST NO. 49, at 314 (James Madison) (Clinton Rossiter ed., 1961).

277. *Id.* The term *Article V bypass* is used here because it captures in a neutral, non-pejorative way a pattern of interpretive reassessment of the past that has prevailed throughout the Constitution's history. Scholars favorable to this pattern of reassessment have used the terms "structural amendment" and "informal amendment" to discuss the same phenomenon; see, e.g., Bruce Ackerman, *The Storrs Lectures: Discovering the Constitution*, 93 YALE L.J. 1013, 1069 (1984) (commenting on the process of "structural amendment [that originated in the mid-nineteenth-century] that culminated in the 1930s."); see also Heather Gerken, *The Hydraulics of Constitutional Reform: A Skeptical Response to Our Undemocratic Constitution*, 55 DRAKE L. REV. 925, 929 (commenting favorably on "the process of informal constitutional amendment . . ."). Scholars skeptical of the merits of bypassing Article V have used the

As the words *reverence* and *prejudice* make clear, Madison's argument here is grounded in considerations of prudence, not principle. He states a preference for maintaining the constitutional equilibrium.²⁷⁸ He does not, however, preclude the possibility of turning to Article V if steps are taken that upset this equilibrium. If it is granted that considerations of prudence should matter as long as the equilibrium is maintained, can it also be said that the qualified Madisonian framework defended in this Article succeeds in doing so? The answer is that it of course succeeds at this. Indeed, we can now see how Madison's *Federalist* 37 bridge from the *ex ante* to the *ex post* is complemented by his *Federalist* 49 admonition against frequent resort to Article V once the *ex post* is reached. Madison was in no position while contributing to *The Federalist* to anticipate judicial review's role in reassessing original understandings. Nonetheless, the fact that he was willing to reassess his own position on the bank's constitutionality indicates that the qualified Madisonian framework draws heavily on both his approach to interpretation *and* his prudential admonition in favor of political stability. On this reckoning, Article V has to be invoked to modify the precise rules of government outlined in the text. However, it can be bypassed—and *should be* bypassed as a matter of political prudence—when original indefiniteness is at stake provided judicial interpretation of the text relies on a “construction [placed] on the Constitution by the Nation” itself.²⁷⁹

pejorative term *judicial updating*. See, e.g., JOHN O. MCGINNIS & MICHAEL B. RAPPAPORT, ORIGINALISM AND THE GOOD CONSTITUTION 88 (“Judicial updating also undermines the constitutional amendment process.”). McGinnis and Rappaport do not discuss Jefferson's and Madison's Article V bypass decisions but they might well treat these as instances of political updating. See MCGINNIS & RAPPAPORT, *supra*. Because the question of the constitutional legitimacy of this process is too important to settle by resort to one label or another, the neutral term *Article V bypass* is used here. Needless to say, the argument advanced here defends the legitimacy of Article V bypass, though only under limited circumstances. See *supra* text accompanying note 224. Madison identified generally the appropriate circumstances for bypassing Article V. The examples discussed in this section plus the two following it expand on Madison's argument. The final section of the Article offers a qualified endorsement of the argument that judicial reassessment of the unaltered text has improved on the constitutional past.

278. THE FEDERALIST NO. 49, *supra* note 276, at 312 (James Madison).

279. See Letter from James Madison to the Marquis de Lafayette, *supra* note 183.

IV. PUNISHMENTS

We have just examined cases in which the judiciary has deferred to Congress's reassessment of original understandings. However, we have yet to consider cases in which the Court has exercised its authority to reassess the constitutional past by challenging conclusions reached by electorally accountable officials. This kind of reassessment implicates the counter-majoritarian difficulty, a term Alexander Bickel introduced to discuss judges' exercise of the *Marbury* power to overrule conclusions reached by democratically accountable bodies.²⁸⁰ Bickel did not link his term to the phenomenon discussed here—i.e., to judicial reassessment of the constitutional past. It is clear, though, that the counter-majoritarian difficulty becomes particularly acute when the *Marbury* power is deployed to set aside legislation compatible with original understandings, for even if it is agreed in principle that such an exercise in reassessment is justified, it has to be conceded that there is a danger judges will use it to impose their preferences on the law.

Wariness is in order here, for judicial reassessment of the constitutional past is warranted only when it is clear that the Court is relying on a transformation of values pertinent to the text. This section considers two cases in which a plausible claim along these lines can be advanced. It begins by reviewing pre-ratification comments on the vagueness of the Punishments Clause. It then turns to exercises in judicial reassessment of the past, one concerned with whipping, the other with capital punishment.

*A. Ex Ante Anxiety about Ex Post Application
of the Punishment Clause*

Once the Philadelphia proposals were ratified, Federalists came to the fore as critics of indefinite textual language (though this time concerning terms to be included in the Bill of Rights).²⁸¹ There is an

280. ALEXANDER BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* 16, 18 (1962) (“The root difficulty is that judicial review is a counter-majoritarian force in our democracy. When the Supreme Court declares unconstitutional a legislative act or the action of an elected executive, it thwarts the will of representatives of the actual people of the here and now; it exercises control, not on behalf of the prevailing majority, but against it.”).

281. See *infra* notes 285–86 and accompanying text.

obvious symmetry to this: Antifederalists were concerned that indefinite language in the power-granting provisions would allow for expansion of central government authority while Federalists were concerned that indefinite language in the Bill of Rights would unduly limit the new government's exercise of power. A telling example of the latter concern can be found in the criticism of the Punishments Clause two Federalist congressmen voiced during an August 1789 debate over it in the House of Representatives.²⁸² According to the reporter for the *Annals of Congress*, William Loughton Smith of South Carolina "objected to the words 'nor cruel and unusual punishments,' the import of them being too indefinite."²⁸³ Samuel Livermore, a New Hampshire representative, spoke next. "The clause seems to express a great deal of humanity," Livermore remarked,

on which account I have no objection to it; but as it seems to have no meaning in it. I do not think it necessary . . . No cruel and unusual punishment is to be inflicted; it is sometimes necessary to hang a man, villains often deserve a whipping, and perhaps having their ears cut off; but are we in future to be prevented from inflicting these punishments because they are cruel? If a more lenient mode of correcting vice and deterring others from the commission of it could be invented, it would be very prudent in the Legislature to adopt it; but until we have some security that this will be done, we ought not to be restrained from making necessary laws by any declaration of this kind.²⁸⁴

Indefinite? Meaningless? The Eighth Amendment prohibition of cruel and unusual punishments was derived from the English Bill of

282. See *infra* notes 285–86 and accompanying text.

283. 1 ANNALS OF CONG. 782 (1789) ("Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."); U.S. CONST. amend. VIII. The symmetry between Smith's criticism of the Punishments Clause as indefinite and John Tyler's criticism of the Power-Granting Clauses as also indefinite is obvious, for Smith was wary of limitations on the power of the federal government and Tyler was wary of federal power. See *supra* note 46 and accompanying text.

284. 1 ANNALS OF CONG. 782–83 (1789).

Rights,²⁸⁵ which was adopted in 1689, so there was an obvious retort to the Smith/Livermore critique. The phrase *cruel and unusual punishments* is indeed indefinite, someone might have said, but because the appropriate scope of its application had been established during the preceding century, the modes of punishment Livermore mentioned (hanging, flogging, and ear-cropping) would of course be deemed permissible by any competent judge working within the common law tradition.²⁸⁶ In adopting this position, a ratifier could have relied on something like the sense/scope of reference distinction introduced earlier. The sense of *cruel* is indefinite, as is the sense of *unusual*, a ratifier might have agreed, but the scope of these terms had been well-established by the time the first Congress convened.²⁸⁷ Thus, although the original public meaning of the Punishments Clause opens up an extraordinary range of referential possibilities, that range can be narrowed by considering how the phrase was actually used by those who adopted it.

A response to Livermore along these lines would have relied on original-understandings originalism, i.e., an interpretive method that relies on ratifier understandings to determine the proper application of originally indefinite textual language. There is an important sense in

285. The Bill of Rights 1689, 1 W. & M., 2d Sess, c.2 (“That excessive bail ought not to be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.”). As a comparison with the Eighth Amendment makes clear—*see supra* note 161—only the Punishments Clause of that amendment is taken verbatim from Section 10 of the English Bill of Rights.

286. 4 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND *369 (1769) (commenting on punishments that had come to be deemed unacceptable, Blackstone remarked: “[T]he humanity of the English nation has authorized, by a tacit consent, an almost general mitigation of such part of those judgments as saviour of torture or cruelty: a sledge or hurdle usually being allowed to such traitors as are condemned to be drawn; and there being very instances (and those accidental or by negligence) of any person’s being embowelled or burned, till previously deprived of sensation by strangling.”). It is reasonable to assume that many members of Livermore’s audience were aware of Blackstone’s remarks and that they thus would not have deemed the sanctions mentioned in his address to be incompatible with the common law.

287. MYRA C. GLENN, CAMPAIGNS AGAINST CORPORAL PUNISHMENT: PRISONERS, SAILORS, WOMEN, AND CHILDREN IN ANTEBELLUM AMERICA 9 (1984) (“All of the American colonies prescribed flogging, branding, and other forms of mutilation for various crimes, ranging from Sabbath breaking and petty larceny to sedition and rape.”).

which Livermore discarded these understandings when he asked whether flogging and ear-cropping might be deemed cruel. Because these punishments were widely used at the time, Livermore had to step outside the context of his day to imagine how an interpreter might set aside conventional applications of the term while nonetheless attending to the sense of *cruel*. Original-understandings originalism involves the converse: It aims at retrieving the mental and moral horizon of those ratifying the text and so offers a way to apply abstract textual terms by identifying the accepted referential scope of those terms at the time of adoption.

Justice Scalia has provided a particularly helpful set of guidelines for interpreters who try to retrieve original understandings.²⁸⁸ The method that should be followed here, he writes, “requires immersing oneself in the political and intellectual atmosphere of the time—somehow placing out of mind knowledge that we have which an earlier age did not, and putting on beliefs, attitudes, philosophies, prejudices and loyalties that are not those of our day.”²⁸⁹ Put differently, Scalia’s guidelines can be said to urge interpreters to identify the *background* understandings ratifiers brought to the text, not merely the understandings made explicit during debates about its adoption (*foreground* understandings, such as those articulated during the Philadelphia Convention concerning paper money as legal currency),²⁹⁰ but also those that were embedded in the mental and moral horizon of the day, though not articulated during ratification debates.

Scalia’s comments offer a useful way to make sense of Livermore’s remarks, for the statement that *villains deserve a whipping* invokes the “beliefs, attitudes, etc.” of the day (though it of course has to be emphasized once again that Livermore stepped outside those beliefs

288. For discussion, see *infra* note 289 and accompanying text.

289. Scalia, *supra* note 28, at 856–57. This immersive method might be characterized as an exercise in retrospective cultural anthropology to use a term introduced by a professional historian in discussing the work of Marc Bloch and Lucien Febvre. See H. STUART HUGHES, HISTORY AS ART AND AS SCIENCE: TWIN VISTAS ON THE PAST 24–27 (Univ. of Chicago 1975) (1964). Put differently, we can say that original understandings originalism, as proposed by Scalia, is properly conducted by retrieving the mental horizon (the *mentalite*, to use Bloch/Febvre terminology) of those who ratified the text.

290. For discussion of these foreground understandings of the use of paper money as legal tender, see *supra* notes 245, 253–54, and accompanying text.

by anticipating the possibility that post-ratification interpreters might use the text's language to invalidate the very practices he mentioned). In referring to villains, Livermore relied on the presupposition of social hierarchy essential to eighteenth-century penology.²⁹¹ Convicts were social outcasts: They were not merely condemned for their crimes, they also were compelled to undergo rituals of degradation that communicated to others their debased status. Because flogging was often conducted in public places, convicts were eligible for communal shaming; indeed, the shame involved in having one's body disfigured by flogging involved emotional distress that complemented the pain of being whipped.²⁹² Public shaming was also a component of hanging²⁹³

291. Noah Webster offered the following definition of *villainous*: “adjective (from *villain*)[.] 1. Base; very vile. 2. Wicked; extremely depraved; as a villainous person or wretch. 3. Proceeding from extreme depravity; as a villainous action. 4. Sorry; vile; mischievous; in a familiar sense as a villainous trick of the eye.” *Villainous*, WEBSTER'S DICTIONARY (1828), <http://Webstersdictionary1828.com/Dictionary/indefinite> (last visited Mar. 14, 2021). The first of these definitions has a class connotation that can be added to a moral one. The latter three are class-neutral. A villain might be from the upper classes, in other words, though someone using the term was more likely to be suggesting that that a malefactor was from the lower social orders. This point is confirmed by Webster's definition of *base*: “adjective[.] 1. Low in place, *obsolete*. 2. Mean; vile; worthless; that is, low in value or estimation; used of things. 3. Of low station; of mean account; without rank, dignity or estimation among men; used of persons. ‘The base shall behave proudly against the honorable.’ *Isaiah* 3:5.” *Base*, WEBSTER'S DICTIONARY (1828), <http://Webstersdictionary1828.com/Dictionary/indefinite> (last visited Mar. 14, 2021).

292. JOHN GARDNER, AN APPEAL TO THE BRITISH PUBLIC, ON THE INHUMAN AND DISGRACEFUL PUNISHMENT OF FLOGGING, IN THE ARMY AND NAVY, WITH OUTLINES OF A PLAN, AS A SUBSTITUTE FOR THE TOTAL ABOLITION OF THAT SYSTEM, ALL OVER THE WORLD 11 (1828) (A nineteenth-century pamphleteer who argued for the abolition of flogging emphasized its function as a shaming ritual: “[A]fter a wretched individual had received so public and indelible a disgrace, as that of flogging; it was quite clear, that no decent person would associate with him, and that no respectable person would employ him.”).

293. STUART BANNER, THE DEATH PENALTY: AN AMERICAN HISTORY 31–32 (2002) (“In the seventeenth- and eighteenth-centuries, hangings were genuinely popular. All kinds of people came to watch—old and young, rich and poor, white and black, male and female—in numbers that were enormous for the era . . . Watching a hanging allowed spectators to signify, in the strongest possible way, their disapproval of crime and the criminal.”).

and ear-cropping,²⁹⁴ the former because it was conducted for all to see, the latter because it left a mark of disfigurement that degraded a convict for the rest of his life. At stake, in other words, was an approach to punishment substantially different from that of today. Given Livermore's remarks, we can thus say that he underscored the temporal reach of the word *cruel*, for it can be read as a timeless constraint on state-imposed punishment *and also* as a time-dated constraint whose significance is to be grasped in light of the era in which it was adopted.

Livermore's comments would perhaps be merely a matter of historical curiosity were it not for the counterfactual implicit on which they rely—i.e., that the ratifiers would not have approved a prohibition of cruel and unusual punishments had they believed it might be used to invalidate practices such as flogging and ear-cropping. There are two reasons to take this counterfactual seriously. One has to do with the silence that greeted Livermore's remarks: The reporter for *The Annals of Congress* states that no one responded to him²⁹⁵—a strong indication that no one else was alarmed by his warning. Another reason has to do with legislation adopted by the First Congress, for the very representatives who voted to forward the Eighth Amendment to the states also adopted a penal code that prescribed whipping (plus a fine) as the punishment for larceny.²⁹⁶

B. *Ex Post Constitutional Development: Flogging's Fate*

It is reasonable to conclude, then, that Livermore's fears were discounted when he warned that standard practices of the day might come to be viewed as cruel. Indeed, because Congress adopted whipping as a sanction, we can say with confidence that there was a background understanding as to its constitutional permissibility (and thus that members of Congress saw no need to respond to his comments). In expressing this point more generally, we can say that a contemporary

294. ROBERT JUTTE, POVERTY AND DEVIANCE IN EARLY MODERN EUROPE 164–65 (1994) (“[C]orporal punishment for deviant paupers included hair-pulling, the pillory, and ear-cropping. Each of these rituals implied various degrees of public disgrace.”).

295. 1 ANNALS OF CONG. 782–83 (1789).

296. Crimes Act, §16, 1 Stat. 112 (1790). The Court views legislation adopted by the first Congress as evidence of original understanding of the text's vague terms. *See, e.g., Marsh v. Chambers*, 463 U.S. 783, 788–90 (1983).

interpreter adopting an original understandings approach (i) considers the original sense of the text's indefinite terms (in this case, *cruel and unusual punishments*), (ii) grants that the phrase is insufficient by itself to produce a definitive conclusion as to the permissibility of practice, and so (iii) retrieves "principles, prejudices," etc. of the era (foreground *and* background understandings) in which a provision was adopted to narrow (if not to eliminate entirely) doubts about its application. Step (iii) is undertaken in order to identify what the modern Court calls "widespread preratification understandings" of the text's referential scope²⁹⁷—and it is this scope that guides contemporary interpreters. The discussion of paper money relied on this framework.²⁹⁸ Now that it has been clarified, we will use it to consider punishments and, in the following section, anti-miscegenation legislation.

297. See *Franchise Tax Bd. of California v. Hyatt*, 139 S. Ct. 1485, 1497 (2019) (overruling *Nevada v. Hall*, 440 U.S. 410 (1979), on the ground that it "is irreconcilable with our constitutional structure and with the historical evidence showing a widespread preratification understanding that States retained immunity from private suits, both in their own courts and other courts").

The contemporary Court, it should also be noted, relies on original understandings to implement the Eighth Amendment. Justice Gorsuch's opinion for the *Bucklew* majority, for instance, employs original understandings originalism to determine the constitutionality of different modes of execution. The Gorsuch opinion states that it will turn to "the original and historical understanding of the Eighth Amendment" to determine that provision's bearing on the options available to the government in putting defendants to death. *Bucklew v. Precythe*, 139 S. Ct. 1112, 1124 (2019). It notes that, "[c]onsistent with the Constitution's original understanding," execution by firing squad was believed to be compatible with the Eighth Amendment. *Id.* at 1125 (citing *Wilkerson v. Utah*, 99 U.S. 130 (1879)). In generalizing on different modes of execution, it states: "What unites the punishments the Eighth Amendment was understood to forbid, and distinguishes them from those it was understood to allow, is that the former were long disused (unusual) forms of punishment that intensified the sentence of death . . ." *Id.* at 1126. And in a specific reference to the appellant's argument, the Court returns to its earlier criterion by characterizing that argument as "inconsistent with the original and historical understanding of the Eighth Amendment . . ." *Id.* at 1127.

As should be clear, this understanding-based version of originalism narrows the application of the text's broad language by focusing attention on practices the ratifiers deemed acceptable. It is because this is so that original public meaning allows for a broader universe of constitutional possibilities than does an appeal to original understandings.

298. See *supra* notes 249–54 and accompanying text.

As far as flogging is concerned, there is only modest room for doubt as to background understandings of the text's scope. Quaker reformers waged a campaign against whipping, but even they moved cautiously on this front.²⁹⁹ The Pennsylvania Constitution of 1776 did not abolish flogging altogether, for instance.³⁰⁰ Instead, it stated only that "punishments made in some cases [should be] less sanguinary, and in general more proportionate to the crimes."³⁰¹ Background understandings of flogging's permissibility were relatively strong, in other words. Flogging was a legitimate sanction, although doubts about its propriety had already appeared by the time the Eighth Amendment was adopted.

Challenges to the constitutionality of flogging were entertained by the judiciary at various times in the early years of the republic, but no court actually invalidated the practice. *Commonwealth v. Wyatt*, an 1828 case decided by Virginia's highest court, illustrates the judiciary's reluctance to do so.³⁰² At stake in *Wyatt* was a challenge to the constitutionality of a statute authorizing the imposition of thirty-nine stripes per day for a prisoner serving a six-month sentence.³⁰³ Section 9 of the Virginia Declaration of Rights prohibited cruel and unusual punishments, so the court recognized that it might set aside the sentence on constitutional grounds.³⁰⁴ It declined to do so, however, stating that "[t]he punishment by stripes is certainly odious, but cannot be said to

299. See *infra* note 301 and accompanying text.

300. For discussion, see *infra* note 304 and accompanying text.

301. PA. CONST. of 1776, § 38; see also VT. CONST. of 1777, art. XXXV ("To deter more effectually from the commission of crimes, by continued visible punishment of long duration, and to make sanguinary punishments less necessary, houses ought to be provided for punishing, by hard labor, those who shall be convicted of crimes not capital, wherein the criminal shall be employed for the benefit of the public, or for reparation of injuries done to private persons, and all persons, at proper times, shall be admitted to see the prisoners at their labor.").

302. For discussion, see *infra* note 306 and accompanying text.

303. For discussion of the statute, see *infra* note 306 and accompanying text.

304. Virginia Declaration of Rights, June 12, 1776, Sect. 9 ("That excessive bail ought not to be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."). Unlike the Eighth Amendment, the Virginia provision tracks verbatim the language of Section 10 of the English Bill of Rights. See *supra* note 174 and accompanying text for the terms of Section 10. The Eighth Amendment, in contrast, adopts the structure of Section 10, but it follows verbatim that section only with when addressing punishment.

be *unusual*.”³⁰⁵ Does this mean the court classified whipping as cruel? *Odious* indicates misgivings; it is not synonymous with *cruel*, however, and it is significant that the court avoided one term contained in the text while employing the other. Settled practice was decisive, in other words. Whipping *might be* cruel—but because it was common, a court interpreting the text could not classify it as cruel *and* unusual.³⁰⁶

Reliance on whipping as a sanction declined throughout the late nineteenth- and early twentieth-centuries.³⁰⁷ There was little commentary on this trend: Here, as in many other cases, change unfolded so gradually that its course was infrequently noted at the time. By the mid-twentieth-century, only two states continued to authorize whipping.³⁰⁸ One of those states, Arkansas, was the target of a 1968 lawsuit, as inmates sought to enjoin officials of the state correctional system

305. Commonwealth v. Wyatt, 27 Va. 694, 700 (1828).

306. The *Wyatt* court, it should be noted, attended to the significance of the copulative conjunction *and*. In doing so, it accorded independent weight to a prohibition of cruel *and* unusual punishments and so honored the original public meaning of the text. Because it did so, the court adopted an approach to the phrase *cruel and unusual punishments* directly at odds with the one endorsed by Samuel Bray, who suggests that “it is straightforward to read ‘cruel and unusual’ as a hendiadys meaning ‘innovatively cruel.’” See *supra* note 201, at 714. However straightforward this may be, it is clear that the Virginia court did *not* read the phrase in this way—and thus clear that, at least in this instance, the judiciary did not treat the phrase as a hendiadys.

As also pointed out in the same note, the framers of the New Hampshire Constitution treated *cruel* and *unusual* as separable conditions for imposing punishment. N.H. CONST. of 1784, Art. XXXIII (prohibiting magistrates from “inflicting cruel or unusual punishments”).

Needless to say, it remains possible that some well-educated members of the founding generation, particularly those well-versed in Shakespeare’s plays, read a term such as *cruel and unusual* as a hendiadys. This does not mean, though, that the phrase’s original public meaning should be treated as one, for the text was written not to satisfy the literary proclivities of the educated elite but instead to secure the assent of the less-educated, but still literate, ratifying public. As pointed out in *supra* note 120, Joseph Story provides a conclusive reason for rejecting a hendiadic reading of the text when he remarks that, given the practical function of the text, it should not be accorded a “recondite meaning or any extraordinary gloss.” The *Wyatt* court’s reading of the text is consistent with Story’s approach.

307. See MARGARET ABRUZZO, *POLEMICAL PAIN: SLAVERY, CRUELTY, AND THE RISE OF HUMANITARIANISM* (2011) for a discussion of this trend.

308. “Counsel concede that only two states still permit the use of the strap.” *Jackson v. Bishop*, 404 F.2d 571, 580 (8th Cir. 1968).

from enforcing a policy of whipping prisoners for disciplinary infractions.³⁰⁹ In writing an opinion for a panel of the Eighth Circuit Court of Appeals, then-Judge Blackmun unhesitatingly reassessed the constitutional past. “[W]e have no difficulty in reaching the conclusion that use of the strap in the penitentiaries of Arkansas,” he stated, “is punishment which, in this last third of the 20th century, runs afoul of the Eighth Amendment”³¹⁰

Blackmun’s conclusion about whipping might have served as the final comment by a member of the federal judiciary on an archaic penal practice had it not been for a law review article, *Originalism: The Lesser Evil*, Justice Scalia published in 1989, three years after his appointment to the Supreme Court.³¹¹ In the course of the article, Scalia endorsed judicial efforts to retrieve original understandings and use them to tame textual indefiniteness,³¹² but he conceded as well that these efforts sometimes produce unpalatable results. Scalia illustrated this latter point by commenting on whipping. “I hasten to confess that in a crunch I may prove to be a faint-hearted originalist,” he wrote. “I cannot imagine myself, more than any other federal judge, upholding a statute that imposes the punishment of flogging.”³¹³ Elaborating on this, Scalia proposed examples that track closely those cited in Livermore’s remarks (though Scalia did not actually cite Livermore in the course of the article). “What if some state should enact a new law providing public lashing, or branding of the right hand, as punishment for certain criminal offenses,” Scalia asked.³¹⁴

Even if it could be demonstrated that these were not cruel and unusual measures in 1791, and even though no Supreme Court decision has specifically disapproved them,

309. *See id.*

310. *Id.* at 579.

311. *See* Scalia, *supra* note 28.

312. For his remarks on the appropriate method for retrieving original understandings, see *supra* note 289 and accompanying text.

313. Scalia, *supra* note 28, at 864. It should be noted that two decades after publishing this article, Scalia stated in an interview that he had come to think of himself as a stouthearted, not a fainthearted, originalist. “I described myself as [fainthearted] a long time ago,” he added. “I repudiate that.” *See* Jennifer Senior, *In Conversation: Antonin Scalia*, N.Y. MAG. (Oct. 6, 2013), <http://nymag.com/news/features/antonin-scalia-2013-10>.

314. Scalia, *supra* note 28, at 861.

I doubt whether any federal judge—even among the many who consider them originalists—would sustain them against an [E]ighth [A]mendment challenge.³¹⁵

Scalia thus imagined a scenario in which he would reject his own interpretive method. What justification did he offer for this (seemingly unprincipled) conclusion? The answer is that he had none. Instead, he cast himself as a legislator in disguise: He conceded, in other words, that he would do exactly what he denounced non-originalist judges for doing.

It might be argued that no other option was open to Scalia (and that no other option is open to any other originalist judge) if a contemporary whipping statute is to be invalidated. On further reflection, though, someone might be able to identify two different routes to invalidation, each of which relies on original public meaning but not on original understandings. Essential to both routes is the original meaning of *unusual*, a word whose sense was *not common* or *rare* in the late-eighteenth-century³¹⁶ and whose sense remains the same today.³¹⁷ Whipping, once a routine sanction, became uncommon, a proponent of original public meaning would point out.³¹⁸ So, even if it was sound for a court to uphold the practice because it was regularly employed during the years of the early republic (recall that the *Wyatt* court took this position),³¹⁹ it would be sound for a court to invalidate it today.³²⁰

315. Scalia, *supra* note 28, at 861.

316. Noah Webster's entry for *unusual* was: "adjective[.] Not usual, not common, rare: as an *unusual* season; a person of *unusual* graces or erudition." *Unusual*, WEBSTER'S DICTIONARY (1828), <http://Webstersdictionary1828.com/Dictionary/indefinite> (last visited Mar. 14, 2021).

317. The modern *Webster's* entry is: "adjective, not usual, uncommon, rare." *Unusual*, MERRIAM-WEBSTER, <https://merriam-webster.com/dictionary/unusual> (last visited Mar. 14, 2021). Lest it be supposed that the editors of today's *Webster's* simply copied the original, the entry in the *Oxford English Dictionary* is: "Not usual; uncommon; exceptional." *Unusual*, OXFORD ENGLISH DICTIONARY, <https://www.oed.com/view/Entry/219255?redirectedFrom=unusual&> (last visited Mar. 5, 2021).

318. See *supra* notes 306–07 and accompanying text.

319. See *supra* note 306 and accompanying text.

320. Because this argument based on original public meaning relies on dictionary definitions of *unusual*, it is inconsistent with a definition of the word that treats it as a term of art. The argument advanced here thus does not rely on the proposal recently advanced by Professor Stinneford, who has contended: "As used in the Eighth

But of course, this says nothing about *cruel*. If a contemporary judge were to rely on background understandings of the proper application of this term, there might be no way to invalidate a contemporary whipping statute. This is exactly what stymied Scalia, for he relied on “the existing society’s assessment of what is cruel,” as he once put it,³²¹ not on contemporary society’s application of the term. If, however, a modern interpreter were to rely on the original public meaning of *cruel* (Webster’s definition was *disposed to give pain, inhuman, barbarous*)³²² and not eighteenth-century applications of the word, the interpreter might assert that whipping was *always* cruel and that the original understanding was therefore mistaken. As should be clear, this turn to original public meaning *without* recourse to original background understandings has ramifications for claims that school segregation and anti-miscegenation statutes were rendered unconstitutional the moment the Fourteenth Amendment was adopted—and also for arguments that

Amendment, the word ‘unusual’ was a term of art that referred to government practices that are contrary to ‘long usage’ or ‘immemorial usage.’” John F. Stinneford, *The Original Meaning of “Unusual”: The Eighth Amendment as a Bar to Cruel Innovation*, 102 NW. U. L. REV. 1739, 1745 (2008).

There are two reasons that justify rejection of this term-of-art hypothesis. The first is that textual language which does not clearly have an origin in technical terminology not part of everyday eighteenth discourse (Congress’s power to grant letters of marque and reprisal is an example, see U.S. CONST. art. I, § 8, cl. 11) is properly read in terms of its everyday usage. This everyday usage approach is consistent with Joseph Story’s remarks on the proper way to interpret the text. See *supra* note 201 for Story’s comments on the interpretive significance of the text’s language. The second reason for rejecting the term-of-art hypothesis is that it would create an interpretive anomaly, one in which *cruel* is read in terms of its everyday sense while *unusual* is not. This anomaly might, of course, be avoided by also treating *cruel* as a term of art, but to take this approach would be to hold that even the most straightforward terms of everyday speech were inaccessible to the ratifiers when assessing the text. Each of these reasons is sufficient in itself to justify rejecting the term-of-art hypothesis. Taken together, they provide conclusive grounds for its rejection.

321. “I, no less than Professor Dworkin, believe that the Eighth Amendment is no mere ‘concrete and dated rule’ but rather an abstract principle. If I did not hold this belief, I would not be able to apply the Eighth Amendment (as I assuredly do) to all sorts of tortures quite unknown at the time the Eighth Amendment was adopted. What it abstracts, however, is not a moral principle of ‘cruelty’ that philosophers can play with in the future, but rather the existing society’s assessment of what is cruel. . . . It is, in other words, rooted in the moral perceptions *of the time*.” ANTONIN SCALIA, *A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW* 145 (1997).

322. For the full definition, see *supra* note 162 and accompanying text.

legal disabilities for women and even prohibitions on same-sex marriage immediately became invalid.³²³ In this instance, an interpreter would simply say that earlier conclusions about the effect of the text's abstract principles were mistaken. The original public meaning interpreter would say that the framers failed to understand the cruelty of their own practices—and that whipping thus became eligible for constitutional invalidation once it ceased to be used frequently.

An argument along these lines rebukes the framing generation for its moral obtuseness: it affirms the soundness of the evaluative term (*cruel*) they included in the text but faults them for failing to recognize its pertinence to the punishments they imposed. Alternatively, someone might defend a reassessment-of-background-understandings thesis, one that allows for the possibility of a transformation of collective values over the course of the nation's history. This option also relies on original public meaning. As with the first, it insists on the sense of *unusual* as *uncommon*. It also treats *disposed to give pain* as the sense of *cruel*. In doing so, however, it concedes that multiple reasonable applications of *cruel* are possible, that one such application upholds whipping and another rejects it, and that while it may have been reasonable for eighteenth-century interpreters to have taken the former position it is not reasonable for an interpreter to take it today given the forty-eight to two consensus reached among the states concerning the practice. The text's semantic elasticity makes it legitimate for an interpreter to rely on the superseding understanding of *cruel* that has emerged over time, a proponent of the reassessment thesis would say. As with the previous example, someone can credibly claim fidelity to original public meaning. Unlike it, though, an interpreter would not presume to rebuke the past for moral blindness. Instead, a proponent of this position emphasizes the potential for interpretive recalibration of rights provided by the Eighth Amendment's language.

Neither option is incoherent. The first is both presumptuous and implausible, however—presumptuous in that it corrects the past (on a matter where reasonable difference is possible) and implausible because the correction it offers insists that current conceptions of cruelty should have been operative at the outset. The second might also be accused of presumption (since it too prefers a present-day conception

323. For an argument concerning these issues, see *infra* note 388 and accompanying text.

of cruelty to one held earlier). On the other hand, it cannot be charged with implausibility, for it makes sense of a course of interpretive practice that tracks a trajectory of national change traceable to eighteenth-century admonitions against sanguinary punishments,³²⁴ admonitions that have culminated in the general opposition to this in the contemporary world. The next sub-section defends the reassessment framework with respect to another Punishments Clause issue. The section after that defends it with respect to anti-miscegenation legislation.

C. *Saying What the Law Is, While Noting What It Was, and also
Remarking on What It Might Be: The Penry/Atkins Sequence
of Cases*

Judge Blackmun's exercise in reassessment was announced in a ruling by a lower court.³²⁵ A further example establishes that the qualified Madisonian framework accounts (largely, though not entirely) for a result reached by the Supreme Court. The example draws on two death penalty cases—*Penry v. Lynagh*,³²⁶ decided in 1989, and *Atkins v. Virginia*,³²⁷ decided thirteen years later—that were concerned with the eligibility of offenders with intellectual disabilities for capital punishment. Because *Atkins* overrules *Penry*, we can of course draw a contrast between what the law was and what it is now.³²⁸ Such a contrast is not particularly interesting when presented merely as a description of Supreme Court decision making. What makes the *Penry/Atkins* sequence intriguing is that the contrast can be and was drawn from the inside. That is, in writing for the *Penry* Court, Justice O'Connor took the standard *Marbury* step of "saying what the law is,"³²⁹ but she did so by emphasizing that even though what the law currently is hinges on what it was, it might nonetheless be altered in the future (without resort to Article V).³³⁰ O'Connor reasoned in terms of a developmental

324. See *supra* note 301 and accompanying text.

325. See *supra* notes 308–10 and accompanying text.

326. 492 U.S. 302 (1989).

327. 536 U.S. 304 (2002).

328. In *Penry*, the Court held it to be constitutionally permissible to execute the mildly retarded. In *Atkins*, it held that this is constitutionally impermissible.

329. *Penry*, 492 U.S. at 328. See *Marbury v. Madison*, 5 U.S. 137, 177 (1803), discussed *supra*, at notes 144–53 and accompanying text.

330. See *supra* note 297 and accompanying text.

account of constitutional rights, in other words, one that allows for their alteration in the absence of an alteration of the text.

At stake in *Penry* was a claim that the Eighth Amendment shields offenders with intellectual disabilities from capital punishment.³³¹ O'Connor's *Penry* opinion rejects this claim.³³² It does so, however, not through reliance on the premise that original understandings permanently define the Eighth Amendment's scope but instead through reliance on the developmentalist premise that patterns of dominant practice can displace original understandings of its scope. Indeed, because O'Connor later joined the opinion of the *Atkins* Court that there *is* an Eighth Amendment right to this effect, we can say that she reasoned in terms of an era-specific right, one that was not recognized at the time of the Eighth Amendment's ratification but that could legitimately become a component of constitutional law over the course of the nation's history.

1. What the Law Was

No participant in late eighteenth-century debates over the Punishments Clause commented on its possible application to offenders with intellectual disabilities. If we go beyond those debates, however, and consider remarks by common-law commentators of the day, we can identify widespread preratification understandings, to use a phrase the Court has employed in a different context,³³³ as to the appropriateness of punishing this type of offender. That is, if we adopt the following chain of reasoning, we can move from the eighteenth-century to the present in applying the words *cruel and unusual punishments*. First, we can assume that the ratifiers understood those words in light of remarks contained in pre- and immediate post-ratification treatises and legal opinions bearing on offenders' eligibility for the death penalty. And second, we can assume that these treatise and legal-opinion comments define (unless and until the Punishments Clause is modified pursuant to Article V) the Eighth Amendment's scope. We can, in other words, appeal to a background understanding of the text somewhat different in provenance from the one pertinent to whipping, an

331. Specifically, *Penry* contended that it would be unconstitutional to execute someone with the reasoning capacity of a seven-year-old. *See* 492 U.S. at 328.

332. *See id.* at 340.

333. *See supra* note 296 and accompanying text.

understanding affirmed in learned treatises and judicial opinions of the day but never articulated during ratification debates.

Or, to add another factor, we can adopt this chain of reasoning provided we translate eighteenth-century categories into those used today.³³⁴ The need for translation is inescapable, for no one in the founding generation used the term *intellectual disabilities*. Rather, common-law judges and treatise writers employed two different categories pertinent to the modern concept—*idiots* and *imbeciles*.³³⁵ In retrieving this earlier view of human functioning, one has to say (while imposing contemporary terminology on the past) that the framers thought in terms of a continuum of intellectual disability, one in which the capacity of standard-intelligence adults may either be severely impaired (in which case one would speak of *idiots*) or moderately impaired (thus making it appropriate to speak of *imbeciles*).

Remarks by eighteenth-century commentators made it clear that idiots, but not imbeciles, were ineligible for execution.³³⁶ In translating these categories, a proponent of original understandings originalism would contend, then, that founding-era commentary on eligibility for capital punishment provides a guide for determining which offenders with intellectual disabilities may be executed and would contend

334. See generally Lawrence Lessig, *Fidelity in Translation*, 71 TEX. L. REV. 1165 (1993).

335. In a treatise whose ninth edition was published in 1794, an idiot was defined as “a person who cannot account or number twenty pence, nor can tell who was his father or mother, nor how old he is, etc., so it may appear that he hath no understanding of reason which shall be for his profit, or what for his loss.” 2 A. FITZ-HERBERT, *NATURA BREVIVM* 233B (9th ed. 1794). Blackstone added that idiots are “excuse[d] from the guilt, and of course from the punishment, of any criminal action committed under such deprivation of the senses.” 4 WILLIAM BLACKSTONE, *COMMENTARIES ON THE LAWS OF ENGLAND* *25 (1769).

Imbeciles, in contrast, were held responsible for their acts. Anthony Highmore, author of an early nineteenth-century treatise on the subject, acknowledged the difficult line-drawing problem that arises in distinguishing idiots from imbeciles but nonetheless insisted on the practical significance of the category. “The great difficulty in all these cases,” Highmore remarked, “is to determine where a person shall be said to be so far deprived of his sense and memory as not to have any of his actions imputed to him: or where notwithstanding some defects of this kind he still appears to have so much reason and understanding as will make him accountable for his actions.” ANTHONY HIGHMORE, *A TREATISE ON THE LAW OF IDIOCY AND LUNACY* 200 (1807).

336. This is the position taken in Highmore’s treatise. HIGHMORE, *supra* note 335.

further that the *idiot/imbecile* scale exempts the severely but not the moderately intellectually disabled from execution.³³⁷

2. What the Law Is

O'Connor's *Penry* opinion does not treat common law understandings as a permanently binding source of law. Rather, these understandings are treated as provisional, as benchmarks that can be set aside in the event of a change in dominant national practice. In taking this approach, the O'Connor opinion relies on the formula, first outlined in *Trop v. Dulles*, that the prohibition of cruel and unusual punishments is grounded in "the evolving standards of decency that mark the progress of a maturing society."³³⁸ The premise that there can be progress in constitutional law *in the absence of* an alteration of the text is essential to the *Trop* formula (indeed, this premise informs the entire article).³³⁹ The possibility of progress through interpretation of the unaltered text will be examined at length in the final section.³⁴⁰ All that needs to be noted here is that O'Connor's *Penry* opinion operationalizes the *Trop* framework by asking whether national practice (as discerned primarily in legislation adopted by the states and jury verdicts) has produced a result at odds with original understandings of the Eighth Amendment.³⁴¹

The answer to this was straightforward as far as *Penry*'s claim was concerned. O'Connor noted that polling data indicated that the public might be open to an exemption from capital punishment for the

337. Justice Scalia took this position in his *Atkins* dissent. In doing so, he relied on the commentary cited *supra* in note 335. See *Atkins v. Virginia*, 536 U.S., 304, 340–41 (2002) (Scalia, J., dissenting).

338. *Penry*, 492 U.S., at 330–31 (citing *Trop v. Dulles*, 356 U.S. 86, 101 (1958) (plurality opinion)).

339. For elaboration of the premise, see *infra* Part VI.

340. See *infra* Part VI.

341. It should be emphasized that her opinion does not assert directly that the *Trop* test's emphasis on modern trends provides the judiciary with the authority to set aside original understandings of the Eighth Amendment's scope. Nonetheless, given her inquiry into founding-era commentary on the eligibility of imbeciles for execution and her further remark on what the law might someday become (see *Penry*, 492 U.S. at 334–35), it is clear she was willing to set original understandings for contemporary ones.

intellectually disabled.³⁴² She also noted that the American Psychological Association had adopted a resolution favoring this.³⁴³ And she noted that two death penalty states (Georgia and Maryland) exempted the intellectually disabled.³⁴⁴ But this fell far short of a supermajority, even when considered along with the twelve states that banned the death penalty altogether.³⁴⁵ O'Connor's opinion thus rejected Penry's claim. He had, after all, been classified as someone of subnormal intelligence (his IQ was in either the 50s or 60s, psychologists had testified), but not as someone of profoundly low intelligence.³⁴⁶ The common law understanding continued to govern the case.

3. What the Law Might Be

O'Connor's opinion anticipated the possibility of change. "The public sentiment expressed in [the] polls and resolutions," she wrote,

may ultimately find expression in legislation, which is an objective indicator of contemporary values on which we can rely. But at present, there is insufficient evidence of a national consensus against executing [intellectually disabled] people convicted of capital offenses for us to conclude that it is categorically prohibited.³⁴⁷

Penry thus allows for emergent constitutional rights. It does not suggest that the original public meaning of the Eighth Amendment *always* exempted those with less severe intellectual disabilities from execution. That is, O'Connor's *Penry* remarks do not imply that judges of the early republic made an exegetical error and so misapplied the phrase *cruel and unusual*. Rather, O'Connor's analysis allows for the conventionalist reasoning essential to the qualified Madisonian framework.³⁴⁸ A post-ratification consensus can supersede the one

342. *Penry*, 492 U.S. at 334–35.

343. *Id.* at 335.

344. *Id.* at 334.

345. *Id.* 337–38.

346. While differing as to a precise score, psychologists agreed that his IQ was between 50 and 63. *Id.* at 307–08.

347. *Id.* at 335.

348. For discussion of this framework, see *supra* notes 223–38 and accompanying text.

entertained at the outset, in other words, as long as the new consensus is compatible with the commitments discernible in the text.

Once this point is taken into account, one can see that the approach to reassessment examined here not only is incompatible with original-understandings originalism *but also* with those versions of living constitutionalism that authorize judges to reject original understandings even in the absence of supermajority national change. The reassessment framework disciplines interpreters of the text's indeterminate language in a way that living constitutionalism, as usually presented, does not. It does so by requiring them to attend to patterns of national practice pertinent to the values mentioned in the text. Only when there is objective evidence that these values are expressed in decisions by authoritative institutions such as state legislatures and juries is it permissible for individual rights to be altered.³⁴⁹

Thirteen years after *Penry*, the *Atkins* Court concluded that a new national consensus had indeed formed concerning execution of offenders with intellectual disabilities.³⁵⁰ During that time, sixteen more death penalty states adopted exempting legislation.³⁵¹ When added to the two pre-*Penry* states and the twelve that continued to prohibit the death penalty altogether, which meant a supermajority of states exempted the intellectually disabled one way or another. Writing for the *Atkins* majority, Justice Stevens pronounced this sufficient to satisfy the evolving standards of decency test.³⁵² He added that the existence of a supermajority is not enough to justify an alteration of rights, for he stated that “the Constitution contemplates that in the end our own judgment will be brought to bear on the question of the acceptability of the

349. “The clearest and most reliable objective evidence of contemporary values is the legislation enacted by the country’s legislatures. We have also looked to data concerning the actions of sentencing juries.” *Penry*, 492 U.S. at 331.

350. *Atkins v. Virginia*, 536 U.S. 304, 314–15 (2002).

351. *Id.* (identifying the states that, in the wake of *Penry*, adopted legislation exempting the mentally retarded from execution).

352. “The practice [of executing the mentally retarded], therefore, has become truly unusual, and it is fair to say that a national consensus has developed against it.” *Id.* at 316. In his *Atkins* dissent, Justice Scalia challenged the majority’s criterion for determining a national consensus, remarking that it “miraculously extracts a ‘national consensus’ forbidding execution of the mentally retarded from the fact that 18 States—less than half (47%) of the 38 States that permit capital punishment (for whom the issue exists)—have very recently enacted legislation barring execution of the mentally retarded.” *Id.* at 342 (Scalia, J., dissenting).

death penalty under the Eighth Amendment.”³⁵³ In deploying the evolving standards test, then, Stevens’s *Atkins* opinion uses a nose-counting method (is there now a supermajority of states opposed to a given practice at one time deemed constitutionally acceptable?) *and also* a criterion for altering rights (is the new pattern of practice compatible with constitutional values?). Put differently, it asks whether a practice has become *unusual*, and it further asks whether the practice is *cruel*.³⁵⁴ There is less to this point than meets the eye, however, for in *Atkins* and subsequent cases,³⁵⁵ satisfaction of the nose-counting criterion has been met with the conclusion that a practice is unconstitutional.

O’Connor seems to have accepted this framework, for she joined Stevens’s opinion without comment.³⁵⁶ Even if the overall approach is sound, though, it is essential to ask whether the threshold it employs is too low. Article V sets a higher standard: a two-thirds vote in each branch of Congress plus three-quarters of state legislatures.³⁵⁷ Blackmun’s opinion invalidating whipping meets an even higher standard: a forty-eight to two lineup of states, with that lopsided majority having been achieved over the course of 175 years. In contrast, the *Atkins* majority could cite only a thirty to twenty lineup (including twelve states that exempted the intellectually disabled because they had completely abolished the death penalty³⁵⁸)—and *Atkins* could rely on a

353. *Id.* at 312 (quoting *Coker v. Georgia*, 433 U.S. 584, 597 (1977)).

354. For a defense of this twin-conditions approach to the Eighth Amendment, (i.e., one that considers whether a practice has become unusual and independently considers whether it is cruel), see *supra* note 306 and accompanying text.

355. See, e.g., *Roper v. Simmons*, 543 U.S. 551 (2005) (overruling *Stanford v. Kentucky*, 492 U.S. 361 (1989), in part because a supermajority of states banned execution of offenders who committed their crimes while seventeen or younger, as well as *Kennedy v. Louisiana*, 554 U.S. 407 (2008), holding that execution of those who rape children is impermissible under the Eighth Amendment in part because an overwhelming majority of states do not allow this).

356. *Atkins*, 536 U.S. at 304.

357. “The Congress, whenever two-thirds of both Houses shall deem it necessary, shall propose Amendments to the Constitution . . . which . . . shall be valid, to all Intents and Purposes, as part of this Constitution, when ratified by the Legislatures of three-quarters of the several States . . .” U.S. CONST. art. V.

358. For Justice Scalia’s criticism of the Court’s inclusion of these states in its calculation of a national consensus, see *supra* note 352.

course of change that had unfolded over a mere thirteen years.³⁵⁹ In commenting on this, a sympathetic critic might argue that judicial reassessment of the past is indeed an essential component of constitutional law but that courts should insist on a higher threshold for determining whether a consensus has been reached. The judiciary should of course play a role in altering rights, this critic would say, but it should do so only when confronted with a pattern of enduring national change that, on any reasonable analysis, can be said to involve an irreversible modification of original understandings of the text.³⁶⁰

359. That is, *Atkins* was decided in 2002 and *Penry* in 1989.

360. It is because the reassessment thesis proposed here places substantial constraints on judicial interpretation of the unaltered text that it can be said to differ substantially from the living originalism approach to constitutional interpretation propounded by Professor Balkin. The Balkin approach relies on two core claims, one having to do with the framework for governance established by the text (*framework originalism*, to use Balkin's term), the other having to do with interpretive options provided by the original public meaning of the text's indefinite language (options to engage in constitutional construction, or *living originalism*). "Framework originalism requires that we interpret the Constitution according to its original meaning," Balkin writes. "Living constitutionalism concerns the process of constitutional construction." JACK M. BALKIN, *LIVING ORIGINALISM* 282 (2011).

What Balkin calls *framework originalism* is compatible with the semantic elasticity thesis proposed here (see *supra* note 37 and accompanying text). The semantic elasticity thesis allows for the development of constitutional norms compatible with the text's originally indefinite language and so can be reconciled with Balkin's claim that "[f]ramework originalism leaves space for future generations to build out and construct the Constitution-in-practice." *Id.* (It should be noted, though, that Balkin does not discuss ratification-era awareness of original indefiniteness in the systematic way this is examined *supra* Section II.) On the other hand, Balkin's approach to constitutional construction does not discipline judicial interpreters in the way that is proposed here. It does not treat original understandings as a legitimate source of law at the time of the text's adoption. Furthermore, it offers no clear criterion for evaluating the soundness of contemporary judicial construction of the text's indefinite provisions. In contrast, the approach taken here not only is clear, it also places substantial constraint on judges as they reassess the constitutional past. The remarks in this section underscore this point. They affirm the soundness of a decision invalidating whipping reached after a 175-year evolution of sentiment on the subject whipping and based on a 48-2 current lineup of states. However, they cast doubt on the soundness of a decision exempting the mildly retarded from execution, noting both the modest passage of time that has passed concerning national evaluation of the subject and the less than overwhelming lineup of states that oppose the practice.

There is much to be said for this criticism of the *Atkins* conclusion. On the one hand, the criticism relies on the developmentalist premise that applications of indefinite textual language should depend on what we have become as a country, not on what we once were. On the other hand, the criticism limits judicial reassessment to an exacting standard given the courts' special role under the separation of powers.

Sound as it is, though, does this criticism lead to the conclusion that a specific threshold should be mandated for altering rights? Only a moment's thought is needed to see that a strict numerical criterion should not be adopted. This is because two variables are at work, one having to do with the breadth of a practice, the other with the passage of time. Each variable was relatively weak in *Atkins*, so it is reasonable to fault the Court for having acted prematurely in resolving the question it confronted concerning intellectual disabilities.³⁶¹ In contrast, each variable was strong in the whipping case *Blackmun* decided in 1968, for whipping was patently a vestige of the past, a practice that had been repudiated by virtually every state over the course of 150 years.³⁶² We will have occasion to consider these points further in the section that follows. All that needs to be noted here is that the enlargement of rights effectuated in *Atkins* is problematic, in part because the supermajority margin was thin, in part because the passage of time was brief.

V. ANTI-MISCEGENATION LEGISLATION

It might be argued that the framework just proposed should be limited to the Eighth Amendment. Because that provision prohibits punishments that are not merely cruel but also unusual, someone might contend that the Eighth Amendment—and the Eighth Amendment alone—authorizes judicial alteration of rights in light of patterns of national change. The word *unusual* appears only in the Eighth Amendment, a proponent of this position would note, so the Constitution does not otherwise authorize interpreters to alter rights with an eye to the course of history.³⁶³

361. This criticism is outlined *supra* note 360 and accompanying text.

362. See *supra* notes 308–10 and accompanying text (this defense of Jackson's conclusion concerning whipping is outlined).

363. Scalia, *supra* note 28, at 862 (Justice Scalia commenting on this possibility) ("Perhaps the mere words 'cruel and unusual' suggest an evolutionary intent more

But to take this position is to disregard the extent to which other rights have been revised in response to post-ratification developments at odds with original understandings of the text. This section examines a rights-claim that does not depend on a provision containing the word *unusual*: the claim that there is a Fourteenth Amendment right to engage in interracial marriage. As noted earlier, there is substantial evidence the amendment was originally understood to uphold state prohibitions of this.³⁶⁴ In examining statutes that criminalized interracial marriage, we will thus have another opportunity to consider judicial reassessment of the past. In this instance, though, we will be able to consider a counterfactual that could not have been examined when discussing the Punishments Clause: the possibility that, given mid-nineteenth-century anti-miscegenation statutes, the amendment would not have been adopted or would have been adopted in different form had it not been for its sponsors' assurances that those statutes would be upheld. To argue that the modern judiciary was nonetheless justified in reassessing the nineteenth-century past is to take on the counter-majoritarian difficulty at its most challenging, then. This section's aim is to meet that challenge. It does so first by examining the route to reassessment of interracial sex and then by considering a claim about the soundness of the framework of judicial reassessment proposed here.

A. Anti-Miscegenation Legislation and the Cycle of Judicial Reassessment of the Constitutional Past

We have already identified three stages in the cycle of judicial reassessment of the past.³⁶⁵ Each is pertinent to the constitutional fate of anti-miscegenation legislation. First, participants in Fourteenth Amendment ratification debates noted how the text's language might be used by post-ratification judges to invalidate this legislation.³⁶⁶ Second, their fears were not borne out in the short run, for the Supreme Court unanimously upheld the constitutionality of an anti-

than other provisions of the Constitution, but that is far from clear; and I know of no historical evidence for that meaning.”).

364. *See id.*

365. *See supra* notes 107–08 and accompanying text.

366. *See infra* notes 377–78 and accompanying text.

miscegenation criminal prohibition.³⁶⁷ But third, their worries were eventually confirmed, for the Court ultimately invalidated anti-miscegenation legislation, invoking the text's open-ended language to reject what had previously been deemed constitutionally acceptable.³⁶⁸

To this familiar pattern, we can add a factor unique to the miscegenation issue: the inducement to vote in favor of the amendment offered by those who claimed its adoption would not lead to the statutes' invalidation. Assurances on this score may not have been decisive in securing waverers' support of the Fourteenth Amendment. Many objections unrelated to interracial sex were voiced during ratification debates, and because these were answered by the amendments' sponsors, there is no way to know what was decisive.³⁶⁹ This said, though, there was a specificity to miscegenation objections that was lacking in other criticisms, a specificity that makes it reasonable to assume that assurances answering objections to the amendment's effect on bans on interracial marriage played an important role in securing the provision's passage. At a minimum, these assurances establish that the Fourteenth Amendment's adoption relied on foreground understandings of its proper application, as distinguished from the background understandings concerning punishment that were discussed in the previous section.³⁷⁰

To understand how these foreground understandings influenced the Fourteenth Amendment's ratification, it is essential to consider that provision's relation to the Civil Rights Act of 1866. The preamble to that act declares that "all persons born in the United States . . . shall have the same right . . . to make and enforce contracts . . . as is enjoyed by White citizens, and shall be subject to like punishments, pains, and penalties, and to none other, any law, statute, ordinance, regulation, or custom to the contrary notwithstanding."³⁷¹ The Act's critics contended that it unconstitutionally interfered with the authority of the

367. See *infra* note 418 and accompanying text.

368. See *infra* notes 423–32 and accompanying text.

369. NELSON, *supra* note 87 (summarizing the different objections advanced against the Fourteenth Amendment).

370. See *supra* notes 289–90 and accompanying text (discussing the background and foreground distinction as it applies to original understandings of the Eighth Amendment).

371. 28 U.S.C. § 1982.

states, and President Johnson cited this objection in vetoing it,³⁷² though his veto was overridden.³⁷³ Because the Fourteenth Amendment was drafted, at least in part, to ensure the constitutionality of the Civil Rights Act,³⁷⁴ it is essential to consider objections not only to the amendment but also to the legislation, for the equality considerations that informed the legislation were also embodied in the amendment itself.

Think first about objections to the legislation's effect on criminal prohibitions of interracial marriage. During Senate debate over the Act, a colloquy took place between Reverdy Johnson, a Democrat from Maryland widely respected for his legal expertise (he had previously served as advocate in the Supreme Court for the winning side in *Dred Scott v. Sandford*);³⁷⁵ William Fessenden, a Maine Republican; and Lyman Trumbull, an Illinois Republican who was ultimately to serve as Senate sponsor of the Fourteenth Amendment.³⁷⁶ "There is not a State [in the former confederacy] which does not make it criminal for a Black man to marry a White woman," Johnson observed, "or for a White man to marry a Black woman; and they do it not for the purpose of denying any right to the Black man or to the White man, but for the purpose of preserving the harmony and peace of society."³⁷⁷ Johnson followed this observation with a skeptical question:

372. See Andrew Johnson, *Veto of the Civil Rights Bill*, TEACHING AMERICAN HISTORY (Mar. 27, 1866), teachingamericanhistory.org/library/document/veto-of-the-civil-rights-bill.

373. See ERIC FONER, RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION 243–51 (1988).

374. NELSON, *supra* note 87, at 115 ("At the very least, Section 1 [of the Fourteenth Amendment] was understood to remove all doubts about the constitutionality of the 1866 Civil Rights Act and thus to give Congress legislative power with respect to basic rights of contract, property, and personal security.").

375. *Scott v. Sanford*, 60 U.S. 393 (1857), *superseded by constitutional amendment*, U.S. CONST. amend. XIV. For commentary on Johnson's role in representing the respondent in *Dred Scott* in the Supreme Court, see KENNETH M. STAMPP, AMERICA IN 1857: A NATION ON THE BRINK 86–88 (1992).

376. See NELSON, *supra* note 87, at 42, 48, 66, 82, 107, 115–16, 125, 133 (discussing the participation of Johnson, Fessenden, and Trumbull in Fourteenth Amendment ratification debates).

377. CONG. GLOBE, 39th Cong., 1st Sess. 505 (1866).

Do you not repeal all that legislation by this bill [i.e., the Civil Rights Act]? I do not know that you intend to repeal it; but is it not clear that that all such legislation will be repealed, and that consequently there may be a contract of marriage entered into as between persons of these different races, a White man with a Black woman, or a Black man with a White woman?

To this, Fessenden replied: “Where is the distinction against color in the law to which the Senator refers?” The exchange continued:

Johnson: There is none; that is what I say; that is the very thing I am finding fault with.

Trumbull: This bill would not repeal the law to which the Senator refers, if there is no discrimination made by it.

Johnson: Would it not? We shall see directly. Standing upon this section, it will be admitted that the Black man has the same right to enter into a contract of marriage, it will be admitted that the Black man has the same right to enter into a contract of marriage with a White woman as a White man has, that is clear, because marriage is a contract³⁷⁸

None of the Antifederalist expressions of anxiety about the likely effect of a provision proposed by the Philadelphia Convention had as much specificity as Johnson’s.³⁷⁹ It has to be granted that Livermore’s comment on the Eighth Amendment’s effect of whipping was equally specific.³⁸⁰ However, no defender of the Punishments Clause tried to prove that Livermore was mistaken; indeed, no one even bothered to answer him.³⁸¹ In contrast, Fessenden and Trumbull offered a clear-cut rejoinder to Johnson. Their response was repeated time and

378. *Id.*

379. *See supra* notes 46–64 and accompanying text (discussing Antifederalist objections to the Philadelphia Convention’s proposal).

380. *See supra* note 284 and accompanying text for Livermore’s comment.

381. *See supra* note 295 and accompanying text for discussion of debate in the House of Representatives concerning adoption of the Eighth Amendment.

again during the course of the 39th Congress debates,³⁸² thus making it reasonable to speak here of foreground rather than background understandings of the text's scope, understandings on which ratifiers in state legislators may well have relied when deciding how to vote. Here is Trumbull, on this occasion commenting on the Freedmen's Bureau Act,³⁸³ responding to a charge by Garrett Davis, a Kentucky Democrat, that his state's anti-miscegenation laws would be declared invalid:

The Senator says the laws of Kentucky forbid a White man or woman marrying a [Black person] [I]t is a misrepresentation of this bill to say that it interferes with those laws The bill provides for dealing out the same punishment to people of every color and every race; and if the law of Kentucky forbids the White man to marry the Black woman I presume it equally forbids the Black woman to marry the White, and the punishment is alike for each. All this bill provides for is that there shall be no discrimination in punishments on account of color; and unless the Senator from Kentucky wants to punish the [Black person] more severely for marrying a White person than a White for marrying a [Black person], the bill will not interfere with his law.³⁸⁴

In these remarks, Trumbull proposes a *racial symmetry* framework for implementing the law's equality guarantee.³⁸⁵ In adopting this framework, someone insists on similarity of treatment *as between* different groups; this person does not, however, insist on classifications that dispense with references to groups. The racial-symmetry framework is compatible with separate-but-equal constitutional rules: it was repudiated in *Brown v. Board of Education*³⁸⁶ as well as the anti-

382. See *supra* note 377 (surveying anti-miscegenation remarks delivered during the 1866 Congressional debates).

383. Freedmen's Bureau Act, ch. 200, 14 Stat. 173 (1866).

384. CONG. GLOBE, 39th Cong., 1st Sess. 420 (1866).

385. For an analysis of the relevance of the concept of racial symmetry to race-based rules, see John Harrison, *Equality, Race Discrimination, and the Fourteenth Amendment*, 13 CONST. COMMENT. 243, 251 (1996).

386. 347 U.S. 483 (1954).

miscegenation decisions of the 1960s.³⁸⁷ The possibility of group-based symmetry as a principle of equal treatment has not disappeared entirely, however, for it continues to be employed in gender-based rules, particularly with respect to the allocation of scholarship funds for college sports.³⁸⁸ Furthermore, as far as race relations are concerned, the symmetry framework cannot be dismissed as a distortion of the concept of equality. Given the comments just quoted, it is clear the Fourteenth Amendment's sponsors defended the measure on symmetry grounds: they were prepared to tolerate racial distinctions as long as government treated each racial bloc similarly.

As will be seen, the Court unanimously adopted this racial-symmetry understanding of the Fourteenth Amendment in a decision reached only fifteen years after that provision's adoption.³⁸⁹ It is because of the similarity between the Trumbull/Fessenden comments just quoted and the conclusion reached only a short time later by the Court that commentators have concluded that, on an originalist analysis, the Fourteenth Amendment permits states to adopt anti-miscegenation prohibitions.³⁹⁰ Two recent articles, however, have challenged this scholarly consensus. It is helpful to examine their arguments carefully, not because their claims are convincing, but because they illuminate the pitfalls in originalist reasoning when dealing with an issue where the past and present are in severe tension with one another.

The first article by Steven Calabresi and Andrea Matthews focuses on the original public meaning of the Civil Rights Act and the Fourteenth Amendment, not on original understandings of its proper application.³⁹¹ Calabresi and Matthews contend that "[t]he Reconstruction legislators passed laws that were far more sweeping than many

387. See *infra* notes 418–29 and accompanying text for discussion of these decisions.

388. See *Cohen v. Brown Univ.*, 991 F.2d 888 (1st Cir. 1993) (holding that, under 20 U.S.C. § 1681, the university must provide scholarships to undergraduate female athletes that are proportionate to undergraduate female enrollment). In a settlement reached in 1998, the university agreed “to maintain the percentage of women athletes within 2.25 points of the percentage of women undergraduate students.” B. Glenn George, *Title IX and the Scholarship Dilemma*, 9 MARQ. SPORTS L.J. 273, 277 n.24 (1999).

389. See *infra* notes 416–18 and accompanying text.

390. See *supra* note 29 for commentary on this issue.

391. See Calabresi and Matthews, *supra* note 12.

members of Congress may have realized at the time.”³⁹² In advancing this claim, the authors turn not to comments on the text made during ratification debates (i.e., foreground understandings of its proper application) but instead to the original public meaning of the text’s words, as this is discovered by consulting dictionaries of the day and evidence of its reception by the public.

Relying solely on this, the authors disregard comments such as those of Trumbull and Fessenden quoted earlier,³⁹³ for the text *requires* invalidation of anti-miscegenation legislation, they contend. Indeed, Calabresi and Matthews argue that if the provisions’ proponents actually did grasp the ramifications of the statutory and constitutional language they adopted, their public statements to the contrary were disingenuous.³⁹⁴ The authors write “[m]embers of Congress often vote for a bill and then deny that it means what it says because that way they can curry favor both with the bill’s proponents and opponents.” This is essentially what happened during Reconstruction. Congress voted to give African Americans equal civil rights with White Americans while denying that this meant an end to laws against racial intermarriage and school segregation.³⁹⁵

On this *sola scriptura* approach to constitutional reasoning, abstract principles contained in the text (when linked to equally abstract principles contained in an accompanying statute) are sufficient by themselves to require a result—and proponents’ comments suggesting that the principles mentioned can lead to a contrary result should be rejected as exercises in public deception. But do the Fourteenth Amendment and the Civil Rights Act, when read together, *mandate* invalidation of anti-miscegenation legislation? To defend this claim, one would have to show that only one reasonable application of the provisions is possible. No such conclusion is warranted, though. In granting that the Fourteenth Amendment guarantees the “same right to make and enforce contracts . . . as is enjoyed by White citizens,”³⁹⁶ one can agree that, taken together, these protect legal equality for Black people by comparison with White people but still decline to grant that the equality

392. *Id.* at 1433.

393. *See supra* notes 377 and 384 and accompanying text.

394. *See* Calabresi and Matthews, *supra* note 12, at 1396–98.

395. *Id.* at 1398.

396. *See* U.S. CONST. amend. XIV.

they mandate includes a right of interracial marriage, for the two texts can be said to ensure only the symmetrical version of equality outlined earlier.

This separate-but-equal framework is abhorrent today, though as noted earlier,³⁹⁷ it continues to be used in some gender-based contexts. But however distasteful it may now be, the framework is manifestly compatible with the text under consideration. In other words, Trumbull and Fessenden were not the hypocrites Calabresi and Matthews make them out to be. Rather, they invoked the standard, symmetry-based framework of equal treatment of the day. As noted, that conception was endorsed during ratification debates—thus, the appropriateness of saying that it was based on a foreground understanding of the text.

Indeed, separate-but-equal is also pertinent to questions about the constitutionality of same-sex marriage, for one can defend statutes limiting marriage to one man and one woman on the ground that they provide equal opportunities to members of both sexes to find marriage partners among the opposite sex. In this instance, though, one should speak of *background understandings* of the text's application, for Justice Scalia's dissenting argument in *Obergefell v. Hodges* that "the People who ratified the Amendment did not understand" it to invalidate statutes limiting marriage to opposite sex partners is surely sound as a matter of historical fact.³⁹⁸ In advancing this claim, Scalia relied on unstated (but widely held) understandings based on the theological and moral premises of the ratifiers to argue for the constitutionality of opposite-sex marriage limitations.³⁹⁹ He discounted a possible application of the text that went far beyond the mental horizon of its ratifiers and relied instead on their understandings of how it should be applied.

Might it be argued, though, that original-understandings originalism actually does support an argument for invalidating anti-miscegenation statutes while denying support for an argument in favor of the Court's conclusion in *Obergefell*? As already noted, scholars have relied on comments such as those of Trumbull and Fessenden to argue that the text was *not* understood to require invalidation. In

397. See *supra* note 388 and accompanying text.

398. 576 U.S. 644, 713 (2015) (Scalia, J., dissenting).

399. For an analysis of these traditional understandings, see ADRIAN THATCHER, *GOD, SEX, AND GENDER: AN INTRODUCTION*, 159–60 (2011).

challenging their conclusion, David Upham provides evidence from the post-ratification era showing that some states repealed their anti-miscegenation statutes in the wake of the Fourteenth Amendment and that some state courts invalidated these statutes.⁴⁰⁰

This is significant. However, it does not establish that there were “widespread pre-ratification understandings” (to use the contemporary Court’s criterion for originalist decision-making)⁴⁰¹ as to the invalidity of anti-miscegenation statutes. To see why this is so, it is essential to consider the lineup of statutes bearing on interracial marriage in the immediate aftermath of the Civil War.⁴⁰² As of 1865, the year before Congress adopted the Civil Rights Act and forwarded the Fourteenth Amendment to the states, twenty-five of the thirty-seven states banned interracial marriage.⁴⁰³ Given this pattern, explicit statements by the amendment’s proponents would have been necessary to say that it should be understood to lead to the invalidation of anti-miscegenation statutes, as opposed to accommodating them, as per the Trumbull and Fessenden racial-symmetry framework for dealing with them, for the effect Upham is attributing to the two provisions would have transformed the legal and social landscape. Upham cites no such statement as to the provisions’ transformative effect. He cites isolated, post-ratification acts that indicate some of the amendment’s proponents thought it invalidated anti-miscegenation legislation,⁴⁰⁴ but he cites no statements uttered prior to ratification. This is surely inadequate. To assert that the amendment was *understood* (indeed, *widely understood prior to* ratification) to require invalidation of legislation in place in a majority of the states, one would have to show that the amendment’s advocates took affirmative steps to alert the public to this result—and it is here that Upham turns out to have nothing on offer.

400. Upham, *supra* note 12, at 259–64.

401. *See supra* note 297 and accompanying text.

402. This lineup can be found in PASCOE, *supra* note 19, at 42.

403. *Id.*

404. Upham, for example, cites the conclusion a Nebraska probate judge reached in 1873 that “such intermarriages are now valid” in the District of Columbia and eighteen states. Upham, *supra* note 12, at 260. This indicates that some people thought of the Fourteenth Amendment as invalidating anti-miscegenation legislation in the wake of that provision’s adoption. It does not, however, establish that the provision was understood to have this effect *by those adopting it*.

In stepping back, we can see why no statements were made in favor of invalidation and why many were made, during the course of debate over the Civil Rights Act, in favor of the racial symmetry framework of equal treatment. Although the Thirteenth Amendment ended slavery, it did no more than this. Indeed, racial separation was viewed not merely as a social norm but also a divinely ordained command. Dicta contained in an 1867 opinion issued by the Pennsylvania Supreme Court makes this clear. The court remarked:

[T]he fact of a distribution of men by race and color is as visible in the providential arrangement of the earth as that of heat and cold. The natural separation of the races is therefore an undeniable fact, and all social organizations which lead to their amalgamation repugnant to the law of nature. From social amalgamation it is but a step to illicit intercourse, and but another to intermarriage.⁴⁰⁵

Remarks such as these serve as reminders of the foreignness of the past,⁴⁰⁶ a past defined not simply by different mental horizons (supported by scientific racism, for instance)⁴⁰⁷ but also by different moral horizons (supported by theological argument as well).⁴⁰⁸ No contemporary judicial opinion would reason in terms of a law of nature that requires racial separation; none would use the term *amalgamation* when discussing interracial contact. Just as Livermore revealed a collective mentality profoundly different from that of the present when he asserted that “villains deserve a whipping,” the Pennsylvania remarks quoted in the previous paragraph reveal a worldview wholly unfamiliar

405. West Chester & P.R. Co. v. Miles, 55 Pa. 209, 213 (1867).

406. This comment draws on L.P. Hartley’s “The past is foreign country; they do things differently there.” L.P. HARTLEY, *THE GO-BETWEEN* 17 (N.Y. Rev. of Books 2002) (1953). For discussion of the ramifications of Hartley’s remark, see *infra* note 515 and accompanying text.

407. For a study of nineteenth-century scientific racism, see STEPHEN JAY GOULD, *THE MISMEASURE OF MAN* (rev. ed. 2006).

408. For a study of nineteenth-century theological arguments that justified racial separation (and slavery), see DAVID M. GOLDENBERG, *THE CURSE OF HAM: RACE AND SLAVERY IN EARLY JUDAISM, CHRISTIANITY, AND ISLAM* (2003).

to modern constitutional discourse.⁴⁰⁹ That judges thought in terms of a slippery slope stretching from mundane social contact to intermarriage speaks to a mental and moral framework in which the Trumbull/Fessenden conception of symmetrical equality would seem sensible.

If properly practiced, original-understandings originalism makes manifest the foreignness of the past.⁴¹⁰ In excavating the past, a researcher cannot help but reveal understandings at odds with those of the modern era. In the case of anti-miscegenation legislation, though, the originalists reviewed here have resorted to a troubling presentism that has abolished the distance between past and present. There is no reason to be alarmed by this distance provided one allows for the legitimacy of judicial reassessment of original understandings. On the other hand, if one rejects this (while nonetheless wanting to preserve the Constitution's honor), awkward arguments of the kind just examined must be advanced as face-saving measures for the text.

Although a state court actually invalidated an anti-miscegenation statute in the immediate aftermath of the Fourteenth Amendment's adoption,⁴¹¹ others did not.⁴¹² The Alabama Supreme Court was among those that affirmed the constitutionality of such statutes.⁴¹³ In *Pace v. State*, it upheld a statutory scheme that penalized interracial extramarital sex more severely than its intraracial analogue.⁴¹⁴ "The evil tendency of the crime of living in adultery or fornication is greater when

409. That is, even if some judges may believe privately that separations of the races is required as a matter of law, there is no argument to this effect in a contemporary judicial opinion interpreting the text.

410. That is, someone prepared to retrieve original understandings abhorrent to the present but widely shared by the generation that ratified the relevant portion of the text must engage in the kind of retrospective cultural anthropology discussed *supra* at note 289.

411. *Burns v. State*, 48 Ala. 195 (1872).

412. For a survey of cases, see PASCOE, *supra* note 19, at 30–40.

413. It did so with respect to marriage contracts in *Green v. State*, 58 Ala. 190 (1877), thus overruling *Burns*, discussed *supra* in note 411 and accompanying text.

414. Under Alabama Code section 4184, a man and woman who lived together in adultery or fornication were eligible to be fined not more than \$100. Under Alabama Code section 4189, a White and Black of the opposite sex who lived together in adultery or fornication "must, on conviction, be imprisoned in the penitentiary or sentenced to hard labor for not less than two or more than seven years." Each offense is discussed in *Pace v. Alabama*, 106 U.S. 583 (1883).

it is committed between persons of the two races, than between persons of the same race,” the Alabama court remarked. “Its result may be the amalgamation of the races, producing a mongrel population and a degraded civilization, the prevention of which is dictated by a sound public policy affecting the highest interests of society and government.”⁴¹⁵

In 1883, the Supreme Court unanimously affirmed the convictions in *Pace*, though it did so without using the charged term *amalgamation*.⁴¹⁶ Rather, the Court relied on the racial symmetry framework Trumbull and Fessenden had employed in congressional debates a decade and a half earlier. The statute at issue in the case “applies the same punishment to both offenders, Black and White,” Justice Field stated in his opinion for a unanimous Court.⁴¹⁷ “Whatever discrimination is made in the punishment prescribed . . . is directed against the offence designated, not against the person of any particular color or race. The punishment of each offending person, whether Black or White, is the same.”⁴¹⁸

Pace’s framework is of course pertinent to racial segregation in public spaces, for only a modest step is needed to move from Justice Field’s reasoning to the separate-but-equal conception of racial equality affirmed in *Plessy v. Ferguson* thirteen years later.⁴¹⁹ Our concern

415. *Pace*, 69 Ala. at 232.

416. *Pace*, 106 U.S. at 583.

417. *Id.* at 585.

418. *Id.* *Pace*, it is important to emphasize, was concerned with interracial *extramarital* sex, not with sexual activity protected by a marriage. Whatever the merits of an argument that Section 1 of the Fourteenth Amendment protects interracial sex when undertaken pursuant to a marriage contract (given the right of freedom of contract protected by the Civil Rights Act of 1866, a right accorded constitutional standing by virtue of the amendment’s adoption), this argument has no bearing on extramarital sex. The Court’s conclusion in *Pace* should thus be unproblematic given the racial symmetry framework widely accepted at the time plus the absence of a marriage contract in the case. It is surprising, then, to find that Professor Calabresi and Ms. Matthews characterize Justice Field’s *Pace* opinion as a “thoroughly disgraceful performance.” Calabresi & Matthews, *supra* note 12, at 1470. On the contrary, it was a thoroughly acceptable statement of the law as it was understood in the *late-nineteenth-century*. The fact that it spoke for a unanimous Court underscores this point.

419. Justice Harlan joined without comment the Court’s majority opinion in *Pace*. Thirteen years later, he dissented in *Plessy*, arguing that the Constitution is color-blind. See 163 U.S. 537, 559 (1896). Harlan’s assertion in *Plessy* is manifestly incompatible with the conclusion reached in *Pace*, for the racial-symmetry principle essential to *Pace* can be implemented only by taking skin color into account. It seems,

here is anti-miscegenation legislation, however, for this serves as the clearest example available of the cycle of judicial reassessment of the constitutional past when individual rights are at stake. The third stage of the cycle was inaugurated as state miscegenation prohibitions began to be repealed during the twentieth-century. Twenty-five of the thirty-seven states had miscegenation laws when the Civil War came to an end.⁴²⁰ A century later, sixteen (all those that had belonged to the old Confederacy plus five others from border regions) of the fifty states retained them.⁴²¹ As was true of whipping, the course of change was gradual. It seemed clear as well that the change was irreversible. Few remarked on it, though, given the slow pace at which it was occurring.

It was in this context that the Court resolved *McLaughlin v. Florida*, the 1964 case that responded directly to *Pace*. At issue in *McLaughlin* was a statutory scheme that, like Alabama's, imposed higher penalties on interracial than intraracial cohabitation.⁴²² Writing for a unanimous Court, Justice White rejected the reasoning in *Pace*, stating that it had relied on a "narrow view of the Equal Protection Clause."⁴²³ A statute that treats equally members of different races is constitutionally inadequate, White stated, if the basis for this is "an arbitrary or invidious discrimination" between those races.⁴²⁴ "That question is what *Pace* ignored," White continued, "and [that question is] what must be faced here." Racial classifications are "constitutionally suspect" and "subject to the 'most rigid scrutiny,'" he wrote.

then, that Harlan changed his mind in the time separating *Pace* and *Plessy*. He appears to have changed his mind again, for in *Cumming v. Board of Education*, 175 U.S. 528 (1899), he wrote for a unanimous Court upholding a Georgia school board decision to close a high school for Black students while one for White students remained open. This conclusion, like the one in *Pace*, can be defended only by saying that the Constitution allows for consciousness of color.

420. See PASCOE, *supra* note 19, at 42.

421. *Id.* at 243.

422. It was different from Alabama's in other respects, however. Under section 798.01 of the Florida code, a man and woman of any race who were not married and living together were eligible for punishment of up to two years in prison on proof of intercourse. Under section 798.05, no proof of intercourse was needed to secure a conviction on proof (a) of habitual occupancy of a room at night, (b) by an opposite-sex couple, one Black and the other White, and (c) was unmarried. See *McLaughlin v. Florida*, 379 U.S. 184, 190 (1964).

423. *Id.*

424. *Id.* at 191.

Because the racial classification at stake in *McLaughlin* was contained in a criminal statute, it was particularly suspect and so could not be upheld, White concluded.⁴²⁵

But of course, the statute at stake in *Pace* also relied on a racial classification contained in a criminal statute, so why was it that the invidiousness of that classification eluded every member of the Court in 1883 but was clear to all members of the Court in 1964? In posing this question, we ask about the social preconditions for judicial reassessment of the past. The text remained unchanged. Nonetheless, every member of an earlier Court approached the text differently than every member of the later Court. Given the altered social context separating the cases, it is relatively easy to account for the constitutional reevaluation that had occurred, for the invidiousness the *McLaughlin* Court discerned in the Florida statute was attributable to a reassessment that had occurred on a national scale as to the civic worth of Black Americans.⁴²⁶ *Pace* accepted understandings that accorded Black Americans second-tier status. In contrast, *McLaughlin* adopted the twentieth-century's superseding understanding.

Three years later, the Court openly repudiated the specific assurances offered by the amendment's congressional sponsors, holding in *Loving v. Virginia* that a state may not prohibit interracial marriage.⁴²⁷ Chief Justice Warren's opinion for a unanimous Court noted that Virginia argued "that statements in the Thirty-ninth Congress about the time of the passage of the Fourteenth Amendment indicate that the Framers did not intend the Amendment to make unconstitutional state miscegenation laws."⁴²⁸ Warren refused to treat these statements as decisive, however: "We have rejected the proposition that the debates in the Thirty-ninth Congress or in the state legislatures which ratified the Fourteenth Amendment support[]" the racial symmetry framework.⁴²⁹ Original understandings (foreground understandings—i.e., those openly avowed on the floor of Congress) are open to judicial reassessment, in other words, and they are open to this despite the fact

425. *Id.* 191–92.

426. In his survey of the course of egalitarian reform, Robert W. Fogel calls this America's "fourth great awakening." See *THE FOURTH GREAT AWAKENING & THE FUTURE OF EGALITARIANISM passim* (2000).

427. 388 U.S. 1, 12 (1967).

428. *Id.* at 9.

429. *Id.* at 10.

that a contemporary statute has been adopted and is enforced by democratically accountable officials. Because these arguments are indispensable to Warren's *Loving* opinion, his resolution of the case serves as a paradigmatic example of counter-majoritarian decision-making carried out as reassessment of the past.⁴³⁰

McLaughlin and *Loving* complete a cycle of judicial reassessment of the past—with two unanimous mid-twentieth-century decisions arrayed against a unanimous late-nineteenth-century decision that, in turn, relied on original understandings of the text. To note this, though, is to focus on an observational point—an important one, of course, since it complements others made earlier in this Article. It is essential now to consider a question of justification, for it remains possible that a cycle of reassessment occurs only because it is an expression of the personal preferences of the justices responsible for it, not as part of a process of national re-evaluation of the past.

The *Loving* Court was careful to emphasize that it was not acting on its own.⁴³¹ By 1967, it pointed out, there were only sixteen states that still had miscegenation legislation. Moreover, the trend ran against the Virginia legislation. “Over the past 15 years,” it remarked, “14 States have repealed laws outlawing interracial marriage”⁴³² This thirty-four to sixteen lineup still does not meet Article V's requirement of two-thirds of the state legislatures,⁴³³ so if we were to treat that provision as setting a threshold for legitimate judicial reassessment of the past, *Loving* would have to be rejected as unacceptable. Another factor matters here, though: not just the number of states that have rejected an original understanding but the durability of the movement away from one. Fourteen states had repealed their statutes in the period following World War II, but during the first half of the twentieth-century, other states rebuffed efforts to adopt miscegenation restrictions within their borders, thus making it reasonable to conclude that change was

430. For discussion of the counter-majoritarian difficulty, see *supra* note 280 and accompanying text.

431. See, e.g., *Loving*, 388 U.S. at 6 n.5 (commenting on trends within the states).

432. *Id.*

433. See *supra* note 357 for the specific requirements established by Article V. See also U.S. CONST. art. V.

unfolding exclusively in one direction.⁴³⁴ With more than eighty years of history to survey, the Court could reason in terms of a profound, and irreversible, reevaluation of human dignity that had occurred since the Fourteenth Amendment's adoption.⁴³⁵ A framework of symmetrical treatment had been constitutionally sufficient for both the amendment's ratifiers and for judicial interpreters in the immediate aftermath of adoption. Three generations later, the invidiousness of separating the races had become clear given the "construction [placed] on the Constitution by the nation" itself.⁴³⁶ Put differently, in both *McLaughlin* and *Loving* the Court read the text in the context of a course of national change: although the justices may have acted on their personal beliefs in the two cases, it is clear that they also were speaking for an understanding that superseded the original one.

B. The Possibility of a Permanently Correct Conclusion about the Proper Application of Indeterminate Textual Language

If we return now to the Scalia comments quoted at the outset,⁴³⁷ we can appreciate better the premise about permanent interpretive validity on which they relied. Judges applying the Fourteenth Amendment to the issue of interracial marriage are obligated to invalidate them, his comments imply, because it is "absolutely true" that anti-miscegenation laws became invalid the moment the Fourteenth Amendment was adopted.⁴³⁸ The preceding section has established that that provision's abstract language, though recognized at the time as possibly having this effect, was understood not to have it—and that an alternative version of equality (also compatible with the provision's open-textured phrasing) was widely understood to be the proper application

434. For maps that establish this point, see PASCOE, *supra* note 19, at 42 (miscegenation laws in effect in 1865), 43 (miscegenation laws in effect in 1875), 63 (miscegenation laws in effect in 1900), and 243 (miscegenation laws repealed between 1951 and 1965).

435. In the years following World War II, the trend was entirely one-way: toward repeal. See PASCOE, *Interracial Marriage as a Civil Right, in WHAT COMES NATURALLY*, *supra* note 19.

436. See Letter from James Madison to the Marquis de Lafayette, *supra* note 183.

437. See *supra* notes 1–12 and accompanying text.

438. See *supra* note 8 and accompanying text.

of the text. With Scalia's claim denied us, what then is to be made of his assumption that the judiciary issues permanently valid declarations of what the law is? Was the Court right in *Pace*? Or was it right in *McLaughlin* and *Loving*? Each question implies that it was right at one time and so had to be wrong at the other. Each, in other words, draws on the premise of permanent interpretive validity essential to Scalia's comment, with the result that one era has to "win" while the other has to "lose."

The reassessment thesis advanced in the preceding sections has suggested a different possibility, i.e., that neither era has to "lose" since courts may legitimately turn to a superseding understanding provided this new one can be justified as compatible with the general principles contained in the text. This alternative calls for rejection of original-understandings originalism, but it has ramifications beyond this, for it also spurns the premise of permanent interpretive validity on which that framework relies. We should first examine different versions of that framework, i.e., the version that holds past understandings must be honored in the present and also the version that holds the present can rebuke the past for its erroneous understandings of the text. After noting the difficulties with each version, we will be able to appreciate the soundness of the argument, implicit in each of the preceding sections, in favor of temporally variable application of indefinite language.

1. Ramifications of the Premise of Permanent Interpretive Validity

When Chief Justice Marshall stated in *Marbury* that it "is emphatically the province and duty of the judicial department to say what the law is,"⁴³⁹ he embraced by implication the premise that judges announce permanently valid applications of the text. The *is* in Marshall's *Marbury* assertion would be undermined if it were accompanied by the adverb *currently*, for although Marshall does not explain how a judge should determine what the law is, he clearly is not suggesting that a conclusion about this is to be reached as a matter of fiat—instead, he is implying that a judge's identification of the what the law is cannot (and will not) change as the long as the text remains unchanged and as long

439. *Marbury v. Madison*, 5 U.S. 137, 177 (1803).

the judge approaches the text properly.⁴⁴⁰ It is because the premise of permanent interpretive validity is critical to *Marbury* that Justice O'Connor's *Penry* remarks are significant, for in *Penry* O'Connor also used the Court's *Marbury* power to declare what the law is, but she did so while acknowledging the possibility of phases of the law—the possibility, in other words, of distinguishing between *was*, *is*, and *might be* while nonetheless interpreting the text properly.⁴⁴¹

As noted in the section on *Marbury*, the claim to have produced a permanently valid application of the text is unproblematic when associated with the hypotheticals discussed in that case.⁴⁴² If, for example, two witnesses to an overt act of treason are needed to secure a conviction for this crime, there is good reason to suppose the rule mentioned in the text will be applied in the same way as long as the text is unchanged. A similar point can be made about the text's prohibition on out of court confessions to prove treason, for this too relies on language whose application is free from contestation by later generations.⁴⁴³ The same point cannot be made about the application of indefinite language, however. The application of *cruel* has always been contestable, so the possibility of variable conclusions about the term's proper use cannot be deemed notional but must instead be deemed real.

Original-understandings originalism offers a way to ward off the possibility of variable applications over time. Its aim is preservationist: it requires contemporary judges to retrieve the understandings entertained by a provision's ratifiers, follow them unquestioningly in the settings the ratifiers envisioned, and reason faithfully within the ratifiers' conceptual scheme when encountering settings they did not envision.⁴⁴⁴ This preservationist framework is sometimes supplemented by

440. The *Marbury* hypotheticals—in particular, the final one concerning the number of in-court witnesses required to secure a conviction of treason—are understandable in terms of this point. For discussion of the third hypothetical, see *supra* notes 150–52 and accompanying text.

441. See *supra* notes 329–60 and accompanying text for discussion of these temporal distinctions.

442. See *supra* Section II.B.

443. For more detailed analysis, see *supra* notes 148–57 and accompanying text.

444. Justice Scalia defended without qualification a preservationist approach to constitutional interpretation. Dissenting from the Court's invalidation, on equal protection grounds, of an admissions policy excluding women from entering Virginia Military Institute, he remarked: “[I]n my view the function of this Court is to *preserve*

one that aims at restoration.⁴⁴⁵ That is, because many modern decisions have departed from original understandings, originalists face the difficult question of whether they should overrule these deviations from the past and so restore doctrine to the position it would have been in had judges adhered to what they believe their framework to require.⁴⁴⁶ In other words, restorationism relies on a paradox: it accepts the possibility of doctrinal flux in order to ensure permanent interpretive validity. It allows for instability in statements about modern law so as to return to what the law would be if judges had honored original understandings. For our purposes, there is no need to examine further the distinction between preservationism and restorationism, for the latter is simply a variation on the former. Both take it as axiomatic that

our society's values regarding (among other things) equal protection, not to revise them; to prevent backsliding from the degree of restriction the Constitution imposed upon our democratic government, not to prescribe, on our own authority, progressively higher degrees." *United States v. Virginia*, 518 U.S. 515, 568 (1996) (Scalia, J., dissenting). Scalia was certainly right in insisting that the Fourteenth Amendment, as originally understood, was not thought to protect against gender discrimination. See *Bradwell v. Illinois*, 83 U.S. 130 (1873); Ward Farnsworth, *Women Under Reconstruction: The Congressional Understanding*, 94 *Nw. U. L. Rev.* 1229 (2000). Scalia's argument is open to challenge, however, on the question of whether the Court was prescribing on its own authority an admissions standard for V.M.I. Given the overwhelming national consensus that had formed by the late-twentieth-century in favor of coeducation, even in military academies, the Court's conclusion can instead be said to have relied on a superseding understanding that replaced the one which accompanied the Fourteenth Amendment's adoption.

445. Restorationism is a branch of originalism that is distinguishable from preservationism in that the latter serves as an interpretive framework on issues that have not previously been addressed while the former is a framework open to originalists in settings where current interpretations depart from those an originalist believes to be compatible with the text. Justice Thomas offered a rationale for restorationist repudiation of non-originalist precedent in his *Gamble* concurrence. For discussion of Thomas's remarks in that case, see *supra* note 238.

446. On this point, Justices Scalia and Thomas, while both classifying themselves as originalists, have taken a different approach to their framework. Scalia has accorded substantial precedential weight to many conclusions he believes not to be justified on originalist grounds. Scalia himself drew a contrast between his position and that of Justice Thomas, remarking that Thomas "does not believe in stare decisis, period." See Adam Liptak, *Precedent, Meet Clarence Thomas. You May Not Get Along*, *N.Y. TIMES* (Mar. 4, 2019), [nytimes.com/2019/03/04/us/politics/Clarence-thomas-supreme-court-precedent.html](https://www.nytimes.com/2019/03/04/us/politics/Clarence-thomas-supreme-court-precedent.html) (citing non-originalist precedent Thomas has proposed for reconsideration on restorationist grounds).

originalism provides the criterion for permanently valid applications of the text. They differ only about the degree of doctrinal instability that is tolerable to restore the law to the condition they believe it should be in.

The preceding sections have examined the practical difficulties associated with an original understandings approach, whether preservationist or restorationist, to interpretive validity. One difficulty has to do with the illusion that the text was originally understood in a way that is consistent with modern conclusions about its application. The other difficulty has to do with the ramifications of renouncing this illusion. Justice Scalia's comments on whipping illustrate the importance of this latter point.⁴⁴⁷ No Article III judge, he grants—not even one “among the many who consider themselves originalists”—would uphold a flogging statute.⁴⁴⁸ On some occasions, Scalia implies, original understandings of the text's proper application are wholly unacceptable in the present.⁴⁴⁹

This analysis of whipping relies on a clear-eyed view of the constitutional past. Because it does, an unavoidably important question can be posed for proponents of original-understandings originalism: Whether the text's authority as the legitimate charter of contemporary government can be sustained through reliance on initial conceptions of its scope. In adopting the premise of permanent interpretive validity which Scalia embraced in most of his decisions (though, admittedly, not in his remarks on whipping), one would have to say, among other things, that anti-miscegenation legislation is constitutional and that paper money as legal tender is unconstitutional.

It is possible of course that judicial rulings in favor of original understandings in these and other settings might be overturned by means of Article V. But what if they were not? What if debates conducted pursuant to Article V were to provoke the kind of anxiety voiced by eighteenth- and nineteenth-century critics of the text, but this time with the critics having the upper hand given the hurdles essential to success under that provision? The reassessment framework proposed here offers a way to circumvent this problem. The argument advanced in the previous sections holds that judicial reassessment, when

447. See *supra* note 28 and accompanying text.

448. See *supra* note 28 and accompanying text.

449. See *supra* note 28 and accompanying text.

conducted under the supermajority conditions noted earlier, offers a way to alter rights and powers legitimately without having to rely on Article V.⁴⁵⁰ To this, we can now add, in a Madisonian vein, that reassessment offers a path to prudent alteration of the terms of government, one that preserves the “veneration which time bestows on everything, and without which perhaps the wisest and freest of governments would not possess the requisite stability.”⁴⁵¹ In other words, the argument on behalf of reassessment explains why it is interpretively legitimate to set aside original understandings if the conditions already specified are met—and the Madisonian comment just quoted supplements this argument by explaining why it would be imprudent to rely frequently on Article V as the vehicle for altering rights and powers when the language under consideration is indefinite.

What about a different claim to permanent interpretive validity, then? What if it were argued that *Pace* was wrongly decided or that whipping became unconstitutional the moment the Eighth Amendment was adopted? An advocate of this position also overcomes the chasm separating past and present, this time by insisting not only that the conclusion favored today is the one that should have been reached in the past but also that earlier interpreters can be faulted for having failed to realize this. Some commentators who focus only on original public meaning take this approach. As we have seen, Steven Calabresi employs it.⁴⁵² He dispenses with appeals to original understandings but contends that the route from the statements of abstract textual principle to concrete conclusions congenial to the present is sufficiently well-marked to justify censuring earlier interpreters for having failed to reach these conclusions.⁴⁵³ On this analysis, doctrine was corrupted by judges of the immediate post-ratification era. The aim of interpretive retrieval is to champion the original meaning (and appropriate application) of the text’s provisions.

There are two difficulties with this approach. One has to do with the nature of indefiniteness. As we have seen, ratifiers noted the indefiniteness of terms contained in the eighteenth- and nineteenth-century

450. See *supra* note 224 and accompanying text.

451. THE FEDERALIST NO. 49, *supra* note 276, at 311 (James Madison).

452. See *supra* notes 396–97 and accompanying text.

453. See *supra* notes 396–97 and accompanying text.

provisions discussed here.⁴⁵⁴ To argue that there is only one road from the text to one of the many conclusions compatible with it, someone has to explain how vague terms produce indisputably clear applications. They do not: vagueness defies precision; it is concerned with more-or-less, not yes-or-no, possibilities. Because this is the case, the notion of a correct application of originally indefinite language is profoundly implausible. The better way to approach this issue is to say that certain applications of vague terms are *proper* or *sound*. It is possible of course to draw on non-semantic resources to narrow application options—to draw on original understandings (to say, for example, that the Punishments Clause was understood to permit thirty-nine stripes per day, no more or less, for falsifying public documents) or judicial canons of construction.⁴⁵⁵ Standing alone, though, it has to be granted that the original public meaning of many portions of the text is irreducibly indefinite. Because it is, claims that earlier interpreters were mistaken are misleading, for the very notion of a mistake (or of its converse, correctness) is out of place here.

The second difficulty with arguments about permanent interpretive validity has to do with the way in which these conflate law and morality. As a matter of moral principle, it might be argued, prohibitions on interracial marriage have *always* been wrong because they deny the equal worth of autonomous adults. To advance this argument, though, is to appeal to a conception of permanent moral truth, one that can properly be “backdated” to rebuke entire generations for their opposition to interracial marriage (and, of course, to numerous other issues now viewed as components of sound morality).

It is possible to import backdating into constitutional discourse. The notion of doctrinal backdating offers a helpful way to make sense of the Court’s characterization of earlier, currently reviled decisions as “wrong the day they were decided.”⁴⁵⁶ But given the archival sources available for thinking about the text’s origins, no one acquainted with

454. See *supra* Section II.A.

455. The Crimes Act of 1790 prescribed 39 lashes per day for certain offenses. For discussion, see *supra* note 296 and accompanying text.

456. See, e.g., *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 863 (1992) (joint opinion of Justices Kennedy, O’Connor, and Souter) (“[W]e think *Plessy* [*v. Ferguson*] was wrong the day it was decided.”); *Lawrence v. Texas*, 539 U.S. 558, 578 (2003) (“*Bowers* was not correct when it was decided, and it is not correct today.”).

the historical evidence can seriously engage in this kind of reasoning. It is a mistake to say that Fessenden and Trumbull made a conceptual error when talking about application of the words they proposed for adoption. Rather, it must be conceded that a symmetrical treatment framework of the Fourteenth Amendment equality principle is internally coherent, though it also has to be added that an individualistic conception is coherent as well. Similarly, it is a mistake to say that the *Pace* Court reasoned incoherently, and a further mistake to say that it misapplied ratifier understandings. Thus, if the Constitution is not to be confused with the dominant morality of the present—if, instead, it is conceived as a document that sets the terms of government for each generation living under it—it has to be granted that *Pace* reached the only sound conclusion for its time.

2. Ramifications of the Premise of Legitimate Interpretive Variability

This does not mean, though, that *Pace*'s conclusion was sound for all time, for the reassessment thesis allows for legitimate judicial alteration of applications of indefinite textual language. To understand its ramifications, we should note first the significance of the substitution of the cautious adjectives *proper* and *sound* (they have been used interchangeably throughout the Article) for the bolder ones *correct* and *right*.⁴⁵⁷ The latter are appropriate for applications that are not reasonably contestable *at any time* (the *Marbury* hypotheticals, for instance).⁴⁵⁸ On the other hand, the former should be used when thinking about the application of indefinite language. As noted earlier, participants in ratification debates were acutely aware of the application issues posed by indefinite language.⁴⁵⁹ With two centuries of hindsight, we can now appreciate the soundness of their concerns—and can now say that applications are provisional and thus *sound for their time*, not *correct for all time*.

457. It is important to note that ambitious adjectives such as *wrong* and *correct* have been employed not merely by originalist justices but also by justices prepared to set aside original understandings. See, e.g., the comments quoted in *supra* note 456. The modesty proposed here is pertinent to non-originalism as well, then.

458. For analysis of the *Marbury* hypotheticals, see *supra* Section II.B.

459. See *supra* Section II.A.

It is because this conclusion so readily yields to judicial manipulation of the text that the reassessment framework proposed here is subject to the stringent limitation proposed throughout the preceding sections: the existence of evidence of a long-enduring, superseding post-ratification understanding compatible with the overall commitments discernible in the Constitution. Given this constraint, legitimate modifications of rights and powers will be infrequent; they will also not be attributable to disguised exercises of judicial will. This said, though, it has to be added that the very possibility of legitimate reassessment calls for reconsideration of what it means to determine the constitutionality of a statute or an executive initiative. On standard conceptions of this, determinations rely on top-down reasoning: either on a claim that definite language in the text calls for *X* or on a claim that indefinite textual language when considered in conjunction with original understandings of its appropriate application call for *Y*. The reassessment thesis introduces a bottoms-up alternative. It treats a post-ratification consensus as a source of constitutional law and so allows for judicial reconsideration of original understandings in light of superseding understandings that have emerged over time. The impetus for this approach is to be found in Madison's comment, quoted earlier, about a "construction [placed] on the Constitution by the Nation."⁴⁶⁰ The Article has offered a way to extend Madison's comment in two ways: to judicial deference to legislative alterations of powers and to judicial reassessment of the scope of individual rights.

A final, and particularly important, ramification of the reassessment thesis has to do with the fate of litigants whose claims were denied only to have later decisions involving different parties uphold such claims. This consideration is of only notional importance for litigants who have died. For example, because the criminal defendants in *Pace* are long gone, the appropriate remedy is to note, perhaps in a footnote to a judicial opinion, the dishonor they suffered at the hands of earlier generations. For litigants who are still alive, however, the retroactivity issue is intensely important. The Court's cases on retroactivity of rights deal only somewhat adequately with this issue: They require retroactive application of new rules to all cases currently on direct review, but they do not require this for cases that have been already been resolved

460. Letter from James Madison to the Marquis de Lafayette, *supra* note 183.

at the appellate level.⁴⁶¹ Defendants whose convictions have become final are often denied an opportunity to secure a reversal of the judgments against them—even though the law has been reassessed in a way that now favors their interests.⁴⁶² This is surely an inadequate response to the alteration of rights. Only if courts take into account any claim by a convicted defendant (still alive) whose case is affected by a judicial conclusion that reassesses the past will a full measure of fairness be afforded those who did not benefit initially from the judiciary's interpretation of the text.

VI. INTERPRETIVE REASSESSMENT AND THE POSSIBILITY OF PROGRESS IN CONSTITUTIONAL LAW

Has interpretive reassessment improved on the past? Has it produced better results than those generated by earlier applications of the text? The assumption that it has had this effect is discernible in the framework introduced in Chief Justice Warren's opinion for the plurality in *Trop v. Dulles*,⁴⁶³ i.e., that the Eighth Amendment is not to be construed in light of the applications understood to be sound by the ratifying generation but rather in light of "the evolving standards of decency that mark the progress of a maturing society."⁴⁶⁴

461. See *Teague v. Lane*, 489 U.S. 288, 306–08 (1989) (plurality opinion).

462. The *Teague* plurality reasoned in terms of a "watershed doctrine" in constitutional law—i.e., a doctrine that severely limits the possibility of retrial for defendants whose convictions have become final. See *id.* at 311 (referring to decisions that announce "watershed rules of criminal procedure."). Having established this limitation, the plurality opinion nonetheless allows two exceptions to its otherwise severe approach to retroactive relief. First, it states that "a new rule should be applied retroactively if it places 'certain kinds of primary, private individual conduct beyond the criminal law-making authority to proscribe.'" *Id.* (citing *Mackey v. United States*, 401 U.S. 675, 692 (1971) (Harlan, J., concurring)). Second, according to the *Teague* plurality, a new rule should be applied retroactively if it requires the observance of "those procedures that . . . are implicit in the concept of ordered liberty." *Id.* (citing *Palko v. Connecticut*, 302 U.S. 319, 325 (1937)).

Important as these conditions are for extending relief beyond cases on direct review, they still leave major categories uncovered. For discussion of cases not covered by the *Teague* exception, see Dov Fox & Alex Stein, *Constitutional Retroactivity in Criminal Procedure*, 91 WASH. L. REV. 463 (2016).

463. 356 U.S. 86 (1958) (plurality opinion).

464. *Id.* at 99–100.

The *Trop* formula has been adopted in numerous majority opinions concerning the Punishments Clause.⁴⁶⁵ It is significant beyond the Eighth Amendment, however. Indeed, even *Trop*'s critics⁴⁶⁶ assume it captures the animating principle essential to modern judicial alteration of rights and powers, for it holds out the promise of legitimate reassessment of the past without resort to Article V. At its core, the *Trop* formula relies on two premises: (1) unplanned change beyond the baseline defined by ratification-era understandings of the text can properly influence judicial application of indefinite language (the evolution-of-standards premise) and (2) that this change can be constitutionally salutary (the decency premise).⁴⁶⁷ Taken together, these two premises converge on a third—that the present can properly reassess the past given the experience post-founding generations have had in implementing the text (the maturity premise).

Does the *Trop* formula rely on a naïve conception of history, one in which the present inexorably improves on the past? Does it undermine the notion of the Constitution as a plan of government, substituting unplanned change for the systematic planning undertaken at the time of ratification? Does it have the unintended effect of increasing constitutional retrogression (while purporting to promote progress in constitutional law)? Each of these criticisms might be leveled at *Trop*: that is, even if it is granted that original indefiniteness creates the opportunity for legitimate judicial reassessment of the past, each of the objections just noted might be advanced in challenging the premise of benign, unplanned change essential to *Trop*. The section that follows answers these objections. It does so first by outlining, and defending, the cautious conception of progress essential to the *Trop* formula. After

465. See, e.g., *Rhodes v. Chapman*, 452 U.S. 337, 346 (1981) (prison conditions); *Atkins v. Virginia*, 536 U.S. 304, 322 (2002) (execution of the mentally retarded); *Roper v. Simmons*, 543 U.S. 551, 561 (2005) (execution of adolescent murderers); *Kennedy v. Louisiana*, 554 U.S. 407, 419 (2008) (execution of rapists).

466. Justice Scalia is among the most prominent critics. His analysis of *Trop*'s ramifications beyond the Eighth Amendment is discussed at *supra* notes 499–514 and accompanying text.

467. Judicial decisions concerning the death penalty have relied on both premises. They have canvassed trends and, in doing so, have limited the scope of the death penalty. For an illustration of this, see *supra* notes 328–55 and accompanying text discussing the *Penry/Atkins* transition.

that, it rebuts the charge that the formula inadvertently promotes retrogression while attempting to promote progress.

A. Conceptual Coherence over Time

The most ambitious claims of progress rely on a metric of improvement, one in which a perfect outcome provides the standard for assessing changes that have occurred. This is the *gradus ad parnasum* version of progress,⁴⁶⁸ with Parnassus serving as the measure by which to evaluate the present and movement towards it indicating evidence of improvement. An athletic team that wins half its games in one season, three-quarters in the next, and all its games in a third has reached competitive Parnassus. There is unmistakable evidence of change, with everyone agreeing in both the *ex ante* and the *ex post* that the change is to be positively valued—and, therefore, that the team has made progress.

What if there is no Parnassus to imagine—nothing that can be invoked as a standard of perfection? This is typically the case when progress is discussed: no end-point of perfection informs such discussions, though there is still intertemporal agreement as to what constitutes *more* and, further, agreement that more is better. When this is the case, it is possible to reason statistically about alterations between time *A* and time *B*, and provided there is consensus in both the *ex ante* and the *ex post* about the value to be assigned to the change that has occurred, one can speak confidently about progress. Economic growth is a case in point. There is no end-point (no Parnassus) of gross domestic product (“GDP”). Nonetheless, it is reasonable to say that when a country has doubled its GDP in less than 20 years, this amounts to economic progress. Disagreement is common about whether GDP growth amounts to *genuine* progress.⁴⁶⁹ It is undeniable that this kind of growth amounts to economic progress.

But what if there is no intertemporal consensus about the value of the change that has occurred? This is the case as far as our previous

468. See JOHANN JOSEPH FUX, *GRADUS AD PARNASUM ODER ANFUHRING ZUR REGEIMASSIGEN* (1725), a counterpoint textbook widely used by eighteenth-century composers, discussed in *OXFORD COMPOSER COMPANIONS: HAYDN* 112–13 (David Wyn Jones ed., 2002).

469. For discussion, see BENJAMIN M. FRIEDMAN, *THE MORAL CONSEQUENCES OF ECONOMIC GROWTH* (2010).

examples are concerned, so it might seem that the concept of progress is inapposite here. To settle for this conclusion, though, is to disregard the following possibility: that the present can be sufficiently confident about its value judgments that it rejects earlier understandings and endorses a pattern of change in which that earlier practices have been rethought in ways that honor abstract commitments adopted in the past. This is what has happened in constitutional law. Terms such as *cruel and unusual* and *equal protection* are differently applied today than they were at the time of their adoption.⁴⁷⁰ But the new applications, while incompatible with original understandings, are consistent with original (indefinite) meaning and also with a trajectory that links the conceptual past (considered at a higher level than expected application) to the present. In taking this approach, someone reasons in terms of a narrative of progress for each of the exercises in reassessment examined here: *less imposition of pain* as far as punishment is concerned, *a wider circle of individuals entitled to equal consideration and respect* as far as anti-miscegenation legislation is concerned, and *a more effective system of financial exchange* as far as paper money is concerned.

We can better understand the soundness of this modest claim to progress by revisiting ratification-era objections to the text's provisions. Think first about Livermore's skeptical remarks when assessing the Punishments Clause.⁴⁷¹ Livermore reasoned in terms of a now-unfamiliar offender category—the *villain* who deserves a whipping.⁴⁷² Moreover, he also defended modes of punishment (not only whipping but also hanging and ear-cropping) that have fallen out of use.⁴⁷³ Because Livermore articulated widely-held ratifier understandings of the proper application of *cruel*, it is clear his remarks capture an evaluative divide sufficiently severe as to make it impossible to speak of intertemporal consensus as to the legitimacy of whipping. Moreover, because Livermore believed that villains *deserve* a whipping, he might well hold that today's law is an instance of constitutional regression, not progress.

In adopting the *Trop* formula, someone contends that the perspective of the present should be preferred to that of the past—and that

470. For examples, see *supra* Sections IV and V.

471. See *supra* notes 284–85 and accompanying text.

472. See 1 ANNALS OF CONG. 782–83 (1789). See also definitions *supra* note 291 and accompanying text for Livermore's use of this term.

473. See 1 ANNALS OF CONG. 782–83 (1789).

a narrative focusing on *less pain* in the imposition of constitutionally prescribed punishment amounts to a narrative of progress. The modern world uses different measures of social control, measures that can deter crime without the degree of pain associated with the sanctions Livermore endorsed.⁴⁷⁴ Moreover, while the notion of deserved punishment continues to be widely accepted,⁴⁷⁵ the notion of a deserved whipping has come to seem problematic,⁴⁷⁶ perhaps because other devices of social control are now available, and perhaps as well because a change in sensibilities has led to a lessened toleration of the deliberate infliction of pain, sanguinary sanctions in particular.

Whatever the exact explanation, it is reasonable to say that the present can lay claim to a more mature perspective than the one Livermore employed in his address. Given this claim, the modern recalibration of earlier applications of the phrase *cruel and unusual* cannot be characterized as merely one of many equally plausible conclusions concerning the Eighth Amendment. It should instead be viewed as a sounder conclusion given the collective experience of the nation over the course of the Constitution's existence. Put differently, the *less pain* narrative captures a notion of constitutional progress compatible with "evolving standards of decency" even though ratifiers might persist, even after confronting the modern world, in defending Livermore's position.⁴⁷⁷

A similar analysis is in order for the miscegenation cases. Many participants in Fourteenth Amendment ratification debates may well have assumed that there is a natural, perhaps even divinely inspired, order that requires sexual separation of the races. Someone holding this view might stake his or her claim not on empirical propositions

474. In particular, it relies far less on sanguinary punishments; the only sanguinary punishment now in use is the death penalty. As noted earlier, disapproval of state reliance on sanguinary punishments was reflected in some of the state constitutions adopted in the late-eighteenth-century. See *supra* note 301 and accompanying text. For a study of the nineteenth-century turn to incarceration as an alternative to sanguinary punishments, see DAVID J. ROTHMAN, *THE DISCOVERY OF THE ASYLUM: SOCIAL ORDER AND DISORDER IN THE NEW REPUBLIC* (1971).

475. See, e.g., JOEL FEINBERG, *DOING & DESERVING: ESSAYS IN THE THEORY OF RESPONSIBILITY* (1970).

476. But see PETER MOSKOS, *IN DEFENSE OF FLOGGING* (2011).

477. See discussion *supra* Section IV.A. Livermore's comments appear to suggest that the pain from sanguinary punishments is a social good, so he would perhaps have viewed less painful punishments as a sign of social decline.

subject to scientific refutation but instead on moral or theological claims impervious to scientific scrutiny.⁴⁷⁸ But while a person taking this position would reject claims about constitutional progress, it is nonetheless reasonable to set aside non-scientific reasoning and to insist on the soundness of current dominant perspectives on the issue—and thus to contend that the *widening circle* narrative makes a compelling case for progress in this body of law. Whatever original understandings may have been, modern commentators can properly maintain that our perspectives are preferable (provided, of course, they are compatible with the text’s commitments).

When suitably modified, this framework is pertinent to economic regulation as well. One cannot speak in this context of evolving standards of decency, but one can speak of evolving conceptions of efficient fiscal administration. In doing so, someone emphasizes here, as in the other settings, the importance of the very change that was viewed with trepidation at the time of the founding. In this instance, the change was precipitated by the outbreak of the Civil War, and it was affirmed after the war when the nation concluded that paper money is less harmful to creditor/debtor relations than was believed at the outset. Would Madison (who, it will be recalled, remarked in *The Federalist* 44 on “the pestilent effects of paper money on the necessary confidence between man and man”)⁴⁷⁹ have changed his mind on this issue? Perhaps. We have already noted his willingness to alter his interpretive conclusion concerning establishment of a national bank in light of a “construction [placed] on the Constitution” by the nation itself.⁴⁸⁰ However, we have also noted that members of the mid-nineteenth-century Court continued to insist on adherence to original

478. Even if it could be conclusively demonstrated that scientific arguments that justify racial subordination should be discarded, one would still have to show that members of the ratifying generation would be prepared to repudiate their theological commitment in favor of racial segregation. This is because a large portion of the ratifying generation believed that the Bible itself requires racial separation. As recently as the mid-twentieth-century, for instance, advocates of racial segregation argued that *Genesis* 9:20–27 (the source for the story of Ham) is evidence of a divine mandate requiring separation of the races. See, e.g., HUMPHREY K. EZELL, *THE CHRISTIAN PROBLEM OF RACIAL SEGREGATION* (1959), discussed in STEPHEN R. HAYNES, *NOAH’S CURSE: THE BIBLICAL JUSTIFICATION OF AMERICAN SLAVERY* 103 (2002).

479. For discussion of Madison’s “pestilent effects” remark, see *THE FEDERALIST* NO. 44, *supra* note 251 (James Madison), and accompanying text.

480. Letter from James Madison to the Marquis de Lafayette, *supra* note 183.

understandings concerning the issuance of paper money as legal tender even after it had been introduced during the Civil War to facilitate government access to credit.⁴⁸¹ There is good reason to suppose, then, that many of those who entertained an original understanding against paper money (Madison excepted, of course) would have persisted in their beliefs even on becoming acquainted with the nation's later experience. Here, as in the other instances, it is necessary to rely on the perspective of post-founding generations in reassessing the constitutional past.

It is because each of the specific exercises in reassessment analyzed here involves an interpretive rupture with the past that one cannot make a case for intertemporal consensus as to progress in constitutional law. Rather, the case for this relies on a narrative that openly favors the present over the past, and because it does, claims about progress must be limited to cases in which the present can confidently assert that its understandings are superior to those of the ratifiers. The qualifications proposed here—objective evidence of a supermajority consensus that has developed over a substantial period of time (the qualified Madisonian framework, as I have called it)⁴⁸²—are sufficient to guard against abuse of invocations of progress. These qualifications are certainly sufficient to prevent claims of progress that extrapolate from current trends *without compelling evidence of national change*; for when judges invoke the *Trop* formula in the absence of this kind of evidence, it can readily be granted that they impose their preferences on the law.⁴⁸³ Put differently, the framework proposed here does not allow

481. For discussion of some justices' insistence that original understandings require invalidation of legislation making paper into legal tender, see discussion *supra* Sections III.B.1–2 and accompanying text.

482. For Madison's criterion for rereading the text, see Madison, *supra* note 223, and accompanying text.

483. In *Thompson v. Oklahoma*, Justice O'Connor noted that "[t]he history of the death penalty instructs that there is danger in inferring a settled societal consensus from statistics [about earlier trends] . . . In 1972, when this Court heard arguments on the constitutionality of the death penalty, such statistics might have suggested that the practice had become a relic, implicitly rejected by a new societal consensus. . . . We now know that any inference of a societal consensus rejecting the death penalty would have been mistaken. But had this Court then declared the existence of such a consensus, and outlawed capital punishment, legislatures would very likely not have been able to revive it. The mistaken premise of the decision would have been frozen into constitutional law, making it difficult to refute and even more difficult to reject." 487 U.S. 815, 854–55 (1988) (O'Connor, J., concurring).

judges to appeal to the future. Instead, it limits them to ratification of supermajority departures from original understandings when these are clearly compatible with the general commitments contained in the text.

In adopting this approach, an interpreter reaches a compromise between the present and the past. Because the present's standards can be applied consistently with the text's indefinite language, it is possible to speak of constitutional progress *while also* speaking of fidelity to original public meaning. Participants in ratification debates such as Livermore and Johnson anticipated the possibility of altered applications of the text's language, but their comments indicated that they were unprepared to accept any alterations incompatible with their evaluative commitments concerning the text's proper application. Indeed, their comments establish that they opposed language that was ultimately included precisely because it did not foreclose interpretive reassessment of the existing legal order. They did not, however, persuade their colleagues against adopting the language under consideration. In following *Trop*, one can say that the present has properly acted on a possibility that was not foreclosed at the outset.⁴⁸⁴

B. *A Response to Critiques of the Trop Framework*

The *Trop* framework offers an optimistic account of the way in which post-ratification generations can make the text their own. But its optimism is misplaced, a critic might argue—misplaced because it relies on a Pollyanna-ish conception of history, because it undermines the notion of planning essential to constitutional law, and because it inadvertently brings about retrogression while claiming to promote constitutional progress. Each of these criticisms can stand on its own. They also complement each other, though, in that they all challenge on prudential grounds the reassessment framework proposed here. In the

484. This conclusion does not depend on the claim that there is a permanently valid version of a concept, one that can arbitrate between applications of, say, *cruel* or *equality* entertained by earlier generations and the present. It does not, in other words, suggest that “the ideals of previous ages have their most satisfactory realization in later ages” GORDON GRAHAM, *THE SHAPE OF THE PAST: A PHILOSOPHICAL APPROACH TO HISTORY* 77 (1997). Instead, it endorses the more limited claim that the present, which may make intertemporal comparisons that could not have been made by earlier ages, can reasonably prefer its applications to those entertained by previous generations. Thus, it grants the historical situatedness of any evaluative judgment. *Id.* at 77–78.

subsection that follows, each of the criticisms will be considered separately. However, each will be examined with an eye to an overarching claim common to all, i.e., that exercises in judicial reassessment, while perhaps interpretively permissible given the elastic language employed in the text, are nonetheless unsound in that they imperil the terms of constitutional self-government.

1. The Inexorable-Progress Criticism

Because *Trop* speaks of “the progress of a maturing society,” a critic might dismiss it for offering a naïve, Pollyanna-ish conception of history.⁴⁸⁵ “Is it true that our society is inexorably evolving in the direction of greater and greater decency?” Justice Alito asks in the course of his *Miller v. Alabama* dissent.⁴⁸⁶ “Who says so, and how did this particular philosophy of history find its way into our fundamental law? And in any event, are not elected representatives more likely than unelected judges to reflect changing societal standards?”⁴⁸⁷ There are at least four different questions—three asides, plus a direct challenge to *Trop* optimism—packed into this skeptical comment. Because the asides have already been addressed, we need not linger for long over each. As for *who says so* the answer is that numerous Court opinions have relied on *Trop* as an interpretive framework.⁴⁸⁸ As for *how this philosophy of history found its way into constitutional law*, the answer is that misgivings about the chasm separating the constitutional past and present have long been entertained by proponents and opponents of *Trop*’s formula (with Scalia’s comments on whipping serving as an example of a *Trop* skeptic’s awareness of this chasm).⁴⁸⁹ And as for the question of why *unelected judges* should identify modern standards when *elected representatives* can do so, we have seen that the exercises in legitimate reassessment reviewed here can be justified by reference to a supermajority national consensus which judges accept—and that

485. See, e.g., discussion in text accompanying *infra* notes 488–92; *Miller v. Alabama*, 567 U.S. 460, 510 (2012) (Alito, J., dissenting).

486. *Miller*, 567 U.S. at 510.

487. *Id.*

488. See, e.g., *Kennedy v. Louisiana*, 554 U.S. 407, 419 (2008); *Roper v. Simmons*, 543 U.S. 551, 561 (2005); *Atkins v. Virginia*, 536 U.S. 304, 311–12 (2002).

489. For Scalia’s remarks emphasizing the chasm separating past and present, see Scalia, *supra* note 289 and accompanying text.

reassessment cannot be justified if based on a judicial initiative based on what the nation might become.⁴⁹⁰ To put the point differently, the judicial decisions examined in the preceding sections have rounded up the legislative strays; they have not initiated new trends in national life.

And what about Alito's charge of naivete?⁴⁹¹ As noted, the *Trop* framework relies on an optimistic view of history. It does not, however, suggest that social change invariably improves upon the past, so it of course does not suggest that change *inexorably* produces better standards. To attribute this to *Trop* is to caricature its formula. *Trop* calls on interpreters to draw on post-ratification trends that are (a) compatible with the text's commitments to abstract principles and (b) supported by evidence of supermajority support.⁴⁹² Even if a trend satisfies the second condition, it may not satisfy the first, with the result that numerous alterations in national practice will never serve as catalysts for judicial alterations of rights under the *Trop* formula. Might post-ratification change make matters worse? Of course. There might even be intertemporal consensus that they have this effect. For example, it is reasonable to posit *ex ante/ex post* agreement that increases in crime, alcoholism, and family break-ups (to cite some obvious examples) are indications that things are getting worse, not better. Because it seems overwhelmingly likely that ratifiers in the *ex ante* would agree with observers in the *ex post* that these are *not* examples of evolving standards of decency, it is risible to charge that *Trop* relies on a Pollyannaish notion of inexorable improvement over time. The *Trop* framework admonishes judges to focus on trends that further the text's terms. It does not admonish them to make constitutional law into a mirror of the entire course of national change.

490. This is the core feature of the qualified Madisonian framework. See *supra* notes 230–42 and accompanying text.

491. See *Miller*, 567 U.S. at 510 (Alito, J., dissenting).

492. For discussion, see *supra* notes 465–69. The *Trop* test is optimistic but not Pollyannaish, in other words. It is not to be confused with the position Theodore Parker took when remarking on what he called the arc of justice: “Look at the facts of the world. You see a continual and progressive triumph of the right. I do not pretend to understand the moral universe: the arc is a long one, my eye reaches but little ways. I cannot calculate the curve and complete the figure by the experience of sight; I can divine it by conscience. And from what I can see I am sure it bends toward justice.” THEODORE PARKER, TEN SERMONS OF RELIGION 78 (1853).

2. The Subversion-of-the-Plan Criticism

The foregoing criticism can be reframed by focusing on the risk posed by judicial decisions that alter rights and powers. Someone taking this risk seriously would not necessarily reject reassessment in all circumstances—and so would not necessarily insist on invariable adherence to original understandings. A proponent of this position would, however, caution interpreters in a Burkean vein about the danger of abandoning original understandings when these have been followed for generations.⁴⁹³ Each of the exercises in reassessment discussed in the previous section fits this description. Each implicitly subverts the plan-as-scheme, it could be argued. Although the framers did not convert their understandings into explicit prohibitions (*do not declare whipping unconstitutional, do not invalidate anti-miscegenation statutes, do not require acceptance of paper money as payment for debts*), the principles they adopted were thoroughly infused by those understandings, thus making it unwise for judges to jettison them over time, a critic might contend.⁴⁹⁴

An argument of this kind is based on more-or-less, not yes-and-no, reasoning. It cannot be challenged as logically unsound. Rather, a challenge must depend on considerations of prudence—on estimates of the relative costs and benefits of departures from original understandings. As is obvious, information pertinent to this kind of calculation is likely to become more plentiful with the passage of time. A practice may seem essential to the social order when assessed within a decade or so of ratification. Its value can be estimated more clearly as time passes, however, particularly if practices begin to trend in a different direction. The passage of time, in other words, may make possible a natural experiment, one in which deviations from a practice that at one time was widely followed make it possible to determine its contribution

493. “[P]rudence,” Edmund Burke remarked, is “the god of this lower world” EDMUND BURKE & ANDREW JACKSON GEORGE, *SPEECHES ON THE AMERICAN WAR, AND LETTER TO THE SHERIFFS OF BRISTOL* 203 (1972). In adopting prudence as a guide, a Burkean would warn interpreters of the danger associated with repudiation of understandings entertained by founding generations while taking no stand on the claim, essential to original understandings originalism, that ratifier understandings of the proper application of indefinite language are immune from judicial reassessment.

494. This is the prudence-based argument for originalism. It should be distinguished from a claim that it is impermissible for judges to depart from original understandings of the scope of the text’s vague words.

to the social order.⁴⁹⁵ This is exactly what happened as far as whipping and anti-miscegenation statutes are concerned. The fate of paper money was different. Once the Civil War broke out, the benefit it offered the federal government in facilitating access to credit suddenly came to be viewed as greater than the social costs it imposed, but even here gradualism played an important role, for paper money came to be viewed as, on balance, beneficial in the decade following the end of hostilities as it facilitated peacetime transactions between private parties.⁴⁹⁶ In all three of the exercises in reassessment we have considered, then, someone might reasonably challenge the claim of imprudence by arguing that the present's perspective should be preferred to that of the past given the course of the nation's experience. In each instance, rejection of original understandings has not subverted the plan-as-scheme. Rather, this has promoted the possibility of public acceptance of the plan's continued role in national life.

We can best appreciate this point by considering an example in which reassessment occurred in the absence of a substantial passage of time. As noted in the section on the Punishments Clause, *Atkins* reversed *Penry* after only thirteen years and on the basis of a slim supermajority of thirty states.⁴⁹⁷ Each factor should have induced judicial caution. This is not to say that the *Trop* framework is unsound: O'Connor's *Penry* opinion astutely identifies the process by which latent possibilities can become rights.⁴⁹⁸ Rather, it is to say that the *Atkins* Court acted hastily—and thus imprudently—in reassessing the constitutional past. It can readily be granted, then, that the *Trop* framework can be abused. This does not mean, though, that it is unsound in principle. On the contrary, the other exercises in reassessment examined here demonstrate that the judiciary acts with appropriate caution in reassessing the past provided it does so from a substantial distance and with strong evidence of a superseding national consensus.

495. For discussion of the ways in which retrospective analysis of the effect of the passage of time can be used as part of a natural-experiment framework for investigations in biology, medical research, and social research, see generally *NATURAL EXPERIMENTS OF HISTORY* (Jared Diamond & James A. Robinson eds., 2011).

496. For discussion of the growth of pro-greenback sentiment following the Civil War, see generally HEATHER COX RICHARDSON, *WEST FROM APPOMATTOX: THE RECONSTRUCTION OF AMERICA AFTER THE CIVIL WAR* (2007).

497. See *supra* notes 324–25 and accompanying text.

498. See *supra* note 324 and accompanying text.

3. The Article-V-Bypass Criticism

The preceding criticisms suggest another: that it is best to deny the judiciary the temptation to bypass Article V since that provision promotes informed national deliberation while the judicial reassessment framework endorsed here offers a pale substitute of this. A proponent of this position does not argue that judges are obligated to honor original understandings. None of the objections to the *Trop* framework considered in this section presupposes a judicial obligation to adhere to original understandings. Although someone entertaining these objections might *also* contend that interpreters must adhere to originalism, the central contention advanced here is that it is imprudent to stray from originalism. Article V is invariably preferable to judicial reassessment of original understandings, a proponent of this position might contend, since it offers a way to alter rights and powers with unmistakable public support whereas the bypass route is ultimately dependent on decisions made by unelected judges.

Justice Scalia advanced a prudential argument along these lines in *A Matter of Interpretation: Federal Courts and the Law*.⁴⁹⁹ As will be seen, the example at the core of Scalia's argument is open to challenge. It is possible to amend his position, though—and, once amended, his comments can be read as a comprehensive objection to *Trop*-inspired efforts to bypass Article V. “[I]f the people come to believe that the Constitution is *not* a text like other texts,” Scalia wrote:

[I]t means, not what it says or what it was understood to mean, but what it *should* mean, in light of the “evolving standards of decency that mark the progress of a maturing society”—well, then they will look for qualifications other than impartiality, judgment, and lawyerly acumen in those whom they select to interpret it. More specifically, they will look for judges who agree with *them* as to what the evolving standards have evolved to; who agree with *them* as to what the Constitution *ought* to be.⁵⁰⁰

499. See *supra* note 321.

500. *Id.* at 46.

These remarks do not rely on the premise that judges are obligated to honor original understandings of the text's application. They are instead based on the premise that the constitutional order is imperiled if the *Trop* approach is deployed generally. Scalia builds on this point by emphasizing the importance of Article V. "Seventy-five years ago, we believed firmly enough in a rock-solid, unchanging Constitution," he continued,

[W]e felt it necessary to adopt the Nineteenth Amendment to give women the vote. The battle was not fought in the courts, and few thought that it could be, despite the constitutional guarantee of Equal Protection of the Laws; that provision did not, when it was adopted, and hence did not in 1920, guarantee equal access to the ballot in 1920, guarantee equal access to the ballot but permitted distinctions on the basis of not only of age but of property and sex. Who can doubt that if the issue had been deferred until today, the Constitution would be (formally) unamended, and the courts would be the chosen instrumentality of change?⁵⁰¹

Scalia takes three steps here. He classifies *Trop* as a guide to judicial alteration of rights and powers, argues that the modern Court has relied on a generalized version of *Trop* in bypassing Article V, and cites the Nineteenth Amendment as a salutary example of rights-alteration *without* resort to judicial reassessment of the past.⁵⁰² *Trop* thus stands as a symbol of (and perhaps even a guide to) constitutional corruption. Scalia makes this clear in his concluding remarks:

This, of course, is the end of the Bill of Rights, whose meaning will be committed to the very body it was meant to protect against: the majority. By trying to make the Constitution do everything that needs doing from age to age, we shall have caused it to do nothing at all.⁵⁰³

Scalia traffics in irony in this final passage, for he warns that the "end of the Bill of Rights" will be effectuated by judicial decisions that

501. *Id.* at 47.

502. *Id.*

503. *Id.*

purport to strengthen it.⁵⁰⁴ The downfall of rights will be brought about by disregarding the “rock-solid” procedure for altering the structure of government authority.

In assessing Scalia’s argument, we should begin with the counterfactual on which it is based: his premise that the Equal Protection Clause might have been judicially deployed to extend the franchise to women had the Nineteenth Amendment not been adopted. This hypothesis is open to an obvious challenge, for Section 2 of the Fourteenth Amendment quite clearly accepts the legitimacy of a state limitation of the franchise to males.⁵⁰⁵ The Court relied on this portion of the text when concluding in *Minor v. Happersett*, decided in 1875, that no constitutional violation occurs under the Fourteenth Amendment when women are denied the right to vote.⁵⁰⁶

Scalia himself was of course aware of this point. The text unmistakably contemplates a male-only franchise, he notes, so he emphasizes that his remarks are concerned only with a hypothetical possibility—not with application of the Fourteenth Amendment in its entirety but instead with “application of the Equal Protection Clause *generally*,”⁵⁰⁷ as he puts it (that is, with application of that clause *while disregarding the Section 2 language that presupposes a male-only franchise*).

For purposes of discussion, it is best to accept Scalia’s qualification and so to read his remarks as proposing a thought-experiment about bypassing Article V, one in which a Court decision relies solely on the words *equal protection of the laws* to (i) invalidate state legislation limiting the franchise to males by (ii) relying on a modern supermajority consensus which has developed in favor of female

504. *Id.*

505. “[W]hen the right to vote at any election for the choice of electors for President or Vice-President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, . . . the basis of representation therein shall be reduced in proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.” U.S. CONST. amend. XIV, § 2.

506. “[I]f suffrage was necessarily one of the absolute rights of citizenship [under the Privileges or Immunities Clause], why confine the operation of the limitation to male inhabitants? Women and children are, as we have seen, ‘persons.’” 88 U.S. 162, 174 (1875).

507. Scalia, *supra* note 321, at 148 (noting Section 2’s reference to male voting).

participation in public life, thus (iii) setting aside original understandings that placed legal disabilities on women's role in public life. This alternative route to the constitutional present is well worth imagining, for it helpfully identifies the cycle of judicial reassessment of the past that has been examined throughout the Article.

Nonetheless, if Scalia's thought-experiment occasions unease given Section 2's unmistakable indication of the legitimacy of state laws limiting the franchise to men, one can readily imagine a different thought-experiment. The conclusion reached in *Gideon v. Wainwright*,⁵⁰⁸ for instance, is compatible with conditions (i) to (iii) above (provided these are modified to address issues pertaining to the representation of indigent criminal defendants) and suffers from none of the textual limitations⁵⁰⁹ associated with the Scalia thought-experiment. So, his challenge might be read as a claim that the Court acted improperly in *Gideon* when it reassessed the constitutional past.⁵¹⁰ In other words, a proponent of Scalia's position might argue that, in the absence of an amendment to this effect, the Court erred in holding that the government is obligated to provide indigent defendants with counsel when charged with a felony. Given this alternative, we can say that a

508. 372 U.S. 335, 351–52 (1963).

509. The Sixth Amendment provides: "In all criminal prosecutions, the accused shall . . . have the Assistance of Counsel for his defence." U.S. CONST. amend. VI. The *have* in this provision could refer to a right of each criminal defendant to *retain* a lawyer (at his/her expense) or to be represented by a lawyer paid for by the government. Standing alone, the text does not resolve the question of which application is to be preferred.

510. At one point, this was described as a matter about which the historical record was unclear. "There is considerable doubt," then-Justice Rehnquist noted in an opinion for the Court, "that the Sixth Amendment itself, as originally drafted by the Framers of the Bill of Rights, contemplated any guarantee other than the right of an accused in a criminal prosecution in federal court to employ a lawyer to assist in his defense." *Scott v. Illinois*, 440 U.S. 367, 370 (1979). Comments in later cases have claimed certainty on the subject. The Sixth Amendment, "as originally understood and ratified meant only that a defendant had a right to employ counsel, or to use volunteered services of counsel," Justice Scalia remarked. *Padilla v. Kentucky*, 559 U.S. 356, 389 (2010) (Scalia, J., dissenting). Writing in a similar vein, Justice Thomas has emphasized that the "understanding . . . that the Sixth Amendment did not require appointed counsel for defendants . . . persisted in the Court's jurisprudence for nearly 150 years," only to be set aside in modern cases concerned with indigent criminal defendants. *Garza v. Idaho*, 139 S. Ct. 738, 757 (2019) (Thomas, J., dissenting).

reassessment cycle also unfolded in the assistance of counsel cases,⁵¹¹ as it did in matters pertaining to legal tender, whipping, and anti-miscegenation legislation. There is thus no need to belabor the significance of Section 2 of the Fourteenth Amendment. We can instead focus on the legitimacy of the cycle itself.

Thus, our core question is as follows: Why should reassessment in the absence of Article V be taken as a sign of constitutional retrogression? Scalia's key claim is that public faith in the legitimacy of judicial review will be undermined if a superseding consensus about the terms of national life is translated into a concrete right. The opposite seems more likely, though. That is, if most people come to believe that the text, while not requiring adherence to founding-era understandings, nonetheless must be interpreted in light of these understandings, they will cease to revere the text itself. Indeed, they will come to view the Constitution as an instrument of injustice.

Needless to say, the public is displeased when judges act on their own predilections in applying indefinite language. But the *Trop* framework guards against this (or at least it does to a certain extent, as evidenced by the Court's unwillingness to alter the rights of the intellectually disabled absent evidence of a supermajority consensus on this issue), and the strengthened version of the framework advocated here (evidence of a substantial supermajority consensus that has emerged over a substantial period of time) guards against the imposition of judicial predilections in the name of neutral interpretation of the text. Given this durable safeguard, it is reasonable to ask why, as a matter of prudence, the Bill of Rights is endangered by judicial alteration of rights.

A defender of the Article-V-bypass criticism might reply that there is no guarantee judges will exercise the restraint advocated here. This is a sensible rejoinder, but it should be considered in light of two countervailing arguments. One is that originalist judges also may fail to exercise restraint: Evidence for original understandings is often faint, after all, so interpreters may impose their predilections on the historical record while claiming to speak for the past. The second

511. That is, (i) the original understanding of the Sixth Amendment assistance of counsel was, as noted by Chief Justice Rehnquist and Justices Scalia and Thomas, that a criminal defendant could hire counsel for his/her defense, (ii) this understanding was initially affirmed in *Betts v. Brady*, 316 U.S. 455, 472–73 (1942), and (iii) it was set aside in *Gideon v. Wainwright*, 372 U.S. 335, 351–52 (1963).

countervailing point is that, when the evidence is clear-cut, the disjunction between past and present is often obvious, making it necessary to choose between the two. Our focus throughout the Article has been on this latter factor. Both need to be borne in mind, though, given a prudential argument such as Scalia's. Once they are considered together, Madison's admonition against routine reliance on Article V comes to the fore, i.e., his claim in *The Federalist 49* that "frequent appeals to the people would, in great measure, deprive the government of that veneration which time bestows on everything, and without which perhaps the wisest and freest government would not possess the requisite stability."⁵¹²

In building on the previous section's analysis of this passage, we can say that the *in great measure* qualification Madison inserts here underscores the prudential character of the issue under consideration. This is because the Article-V-bypass criticism does not hinge on the claim that interpreters are obligated to adopt one application of the text's indefinite words over another but instead on the claim that the integrity of constitutionalism is ensured only if judges decline to reassess the past *even when the text can reasonably be said to permit this*. Madison's own willingness to rethink the text's application, when examined in light of his *Federalist 49* comments, suggests that the sounder prudential option is to avoid frequent reliance on Article V: His remarks suggest, in other words, that the "requisite stability" in government is undermined by "frequent appeals to the people."⁵¹³ It has to be granted, then, that the *Trop* framework is subject to abuse, but this possibility should be balanced against the risk that originalist interpreters will distort the historical record to enhance claims for their ideologically preferred outcome—and it has to be balanced as well against the tradition, anticipated in Madison's *Federalist* remarks, of *not* resorting to Article V. On this prudential (and thus consequentialist) analysis, insistence on frequent deployment of Article V is a greater threat to constitutional stability than judicial reassessment of earlier applications of the text.⁵¹⁴

512. THE FEDERALIST NO. 49, *supra* note 276, at 314 (James Madison).

513. *Id.* at 312–14.

514. Scalia's criticism of a *Trop*-inspired framework for bypassing Article V does not appeal directly to consequentialist reasoning, though it can readily be reconciled with consequentialism. A recent originalist argument relies explicitly on consequentialism. John O. McGinnis and Michael B. Rappaport contend that "constitutions

VII. CONCLUSION

“The past is a foreign country: they do things differently there,” the narrator announces in the first sentence of Leslie Hartley’s *The Go-Between*.⁵¹⁵ In drawing on this remark, someone might say that American constitutionalism offers a particularly bracing introduction to the foreignness of the past. Because many of the text’s provisions were adopted one and a half to two centuries ago, it is possible to read them as placeholders for the understandings ratifiers brought to them. For example, it is possible to think of the Eighth Amendment’s prohibition on cruel and unusual punishments as authorizing standard penal practices of the founding era (whipping and ear-cropping, for instance) and the Fourteenth Amendment’s guarantee of equal protection of the laws as authorizing standard late-nineteenth-century measures regulating race relations (miscegenation prohibitions, for instance). On the other hand, because the text states principles in ahistorical form, it is possible to read key provisions without regard to the understandings that accompanied its adoption—and so possible to disregard entirely the historicity of the Constitution by approaching its open-ended terms without considering the nation’s past.

This Article has proposed a framework for mediating between these extremes: a framework for judicial reassessment of the constitutional past. Indefinite constitutional language allows for multiple, conflicting applications of the text, the Article points out. Because it does,

and interpretive methods should be assessed based on their consequences for the welfare of the people and the nation.” MCGINNIS & RAPPAPORT, *supra* note 277, at 19. Relying on this general principle, McGinnis and Rappaport argue that “[j]udicial updating [of the kind employed in *Trop*] . . . undermines the constitutional amendment process. Consequently, one cannot, to a significant degree, employ both judicial updating and constitutional amendments. One has to choose between them.” MCGINNIS & RAPPAPORT, *supra* note 277, at 88. McGinnis and Rappaport cite the failure to secure ratification of the Equal Rights Amendment as evidence of the deleterious effect of judicial updating. “[H]ad the Court not already updated the Constitution and had it been clear that the amendment would not be creatively interpreted,” they write, “it is likely that the Equal Rights Amendment would have been enacted.” MCGINNIS & RAPPAPORT, *supra* note 277, at 93–94. The *likely* in this sentence speaks to the risk the authors are prepared to take: even if the Constitution comes to be viewed as a symbol of injustice (because Article V updating fails), they are prepared to accept this in order to avoid judicial updating. The *likely* also speaks to their rejection of the Madisonian framework of prudential avoidance of Article V.

515. HARTLEY, *supra* note 406.

the Constitution should be classified as a scheme, not a blueprint, of government, a scheme that allows for altered applications of its principles and standards over time. In focusing on three different judicial exercises in reassessment of the constitutional past, the Article has shown how it is possible for judges to remain faithful to indefinite language contained in the text while attending to fundamental alterations in national values. The reassessment framework proposed here calls for the alteration of rights and powers over time through reinterpretation of the unaltered text. It thus accounts for the legitimacy of constitutional change in a system that has barely changed the terms of its charter of government.
