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Expounding the Constitution

ABSTRACT. Judges and statesmen of the early Republic had heated exchanges over the importance of hewing to the text in constitutional interpretation, and they advanced dueling interpretive prescriptions. That is why contemporary theorists of all persuasions can find support for their positions in the Founding era. But no side of the Founders' debate over constitutional interpretation maps perfectly onto a modern school of thought. Modern scholarship has misunderstood the terms of the Founders' debate because it sits on an unfamiliar axis. Instead of arguing over whether the Constitution was, for instance, living or static, this Article demonstrates that early American lawyers debated whether the Constitution should be interpreted according to the methodologies applicable to public or private legislation.

This distinction among different types of legislation has faded from view because modern legislatures almost never pass private laws—statutes that apply only to one person, group, or corporation. But in early America, private legislation was the majority of legislatures' business. Generally applicable laws, like those Congress busies itself with today, were the minority. What's more, American courts had fixed, predictable, and familiar rules of interpretation for each type of law. Private acts received stricter, more text-oriented interpretations, while public acts were interpreted broadly and pragmatically to effectuate their purposes, taking into account new circumstances that the drafters may not have foreseen.

After ratification, critical policy differences emerged among American statesmen in the First Congress. Hamilton and Madison, once united as authors of the *Federalist Papers*, found themselves on different sides of this debate. Each insisted that the Constitution must be interpreted to vindicate his views, and in the process, they opened a debate about interpretation that would characterize the nation's constitutional jurisprudence until the 1820s. The Federal Constitution was a novelty. But lawyers don't tend to make new rules to suit new situations; we prefer to rely on precedent. And that is what these lawyers did, using legal tools devised for interpreting legislation—a form of written law with consistent interpretive rules that were part of the bread-and-butter practice of every American lawyer.

We cannot understand the major cases of the Marshall Court, including *Marbury*, *Martin*, and *McCulloch* without this context. In these cases, litigants argued over, and the Court wrestled with, whether public or private legislation provided the best analogy for the Federal Constitution. The answer dictated whether restrictive or pragmatic rules would govern its interpretation. The terms of these arguments would have been obvious to the legal thinkers of that generation. Yet, in spite of all the attention we have lavished on Alexander Hamilton, Thomas Jefferson, James Madison, John Marshall, Joseph Story, and their world, this central dynamic of their legal culture has remained unexplored.



This Article argues that, during framing and ratification, many of the Founders thought the Constitution would be interpreted according to the rules applicable to public legislation, although statesmen like Jefferson and Madison later took a different view. Chief Justice Marshall's enduring commitment to the public-act analogy explains his embrace of "implied powers" in *McCulloch* and underpins the broad, nationalist vision in his other major decisions. These insights are not only critical to understanding those decisions on their own terms, they are also highly relevant to modern constitutional theorists who rely on early American precedent. If the Founders intended that the Constitution would be interpreted according to the rules of public legislation, then the "original" Constitution is a flexible and pragmatic charter, not a fixed and immutable artifact.

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ARTICLE CONTENTS

INTRODUCTION	6
I. EARLY AMERICAN STATUTES AND TWO PARADIGMS OF FOUNDING-ERA INTERPRETATION	14
A. Private Acts Received Strict Interpretations; Public Acts Received Broad and Purpose-Oriented Interpretations.	16
B. Courts Interpreting Private Acts Looked to the Subjective Intentions of the Actual Legislators; Courts Interpreting Public Acts Looked to the Intentions of an Idealized Legislature.	23
C. Legislative History Was Never Relevant to the Interpretation of a Public Act but Could Sometimes Be Helpful when Interpreting a Private Act.	25
D. Beneficiaries of Private Acts Had to Apply to the Legislature to Cure Any Defects; when a Public Act Required Amendment, Courts Sometimes Supplied One Themselves.	26
E. These Rules Describe Two Paradigms of Interpretation with Broader Applications in Founding-Era Jurisprudence.	29
II. THE INVENTION OF STRICT CONSTRUCTION	31
A. By the People or by the States: Choosing Between Public and Private Framing	32
B. The Bank of the United States and the Emergence of the Private-Act Analogy	36
C. The Alien and Sedition Acts and Compact Theory	40
III. DOCTRINAL IMPLICATIONS: THE MARSHALL COURT AND CONSTITUTIONAL INTERPRETATION	46
A. Drawing the Lines of Battle: <i>Marbury v. Madison</i>	47
B. The Issue Joined: <i>Martin v. Hunter's Lessee</i>	51
C. The Public-Act Analogy Ascendant: <i>McCulloch v. Maryland</i>	56
D. The Court in Retreat: <i>Cohens v. Virginia</i>	68



IV. SCHOLARLY AND PRACTICAL IMPLICATIONS	73
A. Statutory Interpretation	73
B. Constitutional Interpretation	78
CONCLUSION	83

INTRODUCTION

Every modern school of constitutional interpretation delights in finding precedent for its method in the Founding era and in the jurisprudence of Chief Justice Marshall. Of course, originalists make history central and have cited the Founders as support for a range of opinions on interpretation.¹ But those opposed to originalism also find precedent for their positions in early America.² Both states' rights advocates and those who believe in strong federal government have relied on history for support.³ This habit of relying on texts from the Founding generation to validate modern views has led to significant historical oversights, however. It has made history's important legal thinkers appear shallow, unsophisticated, and intellectually disorganized, if not incoherent. Today's scholarship makes Chief Justice Marshall at once a modern textualist—that is, a jurist who believes in reading text strictly and literally—and a modern purposivist—that is, a jurist who believes in pragmatic interpretation to accomplish a law's purposes.

This Article begins from the premise that we have failed to take full account of the Founding era as a period with a mature and developed legal system of its own—one with interpretive debates and schools of thought unique to that era. The Article then argues that considering early Americans and their methodological debates on their own terms, rather than as progenitors of today's interpretive schools, yields a key and overlooked insight: the centrality of the distinction between interpretive conventions applicable to *public* and *private* laws.

Judges and statesmen of the early Republic had heated exchanges over the importance of hewing to the text in constitutional interpretation, and they advanced dueling interpretive prescriptions. But in spite of all of the attention we

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1. See, e.g., John F. Manning, Response, *Deriving Rules of Statutory Interpretation from the Constitution*, 101 COLUM. L. REV. 1648, 1651 (2001) (reasserting a “historical claim that the best reading of the constitutional structure supports the . . . faithful agent theory” of interpretation—that is, textualism).
 2. See, e.g., Brannon P. Denning & Glenn Harlan Reynolds, *Comfortably Penumbral*, 77 B.U. L. REV. 1089, 1092–93 (1997) (arguing that *McCulloch v. Maryland* is “the quintessential example of penumbral reasoning”); William Michael Treanor, *Against Textualism*, 103 NW. U. L. REV. 983, 1006 (2009) (“[T]he Founding generation . . . looked beyond text to determine constitutional meaning.”).
 3. See, e.g., *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 846 (1995) (Thomas, J., dissenting) (looking to the Founding era to support a limited-powers, compact-theory view of the Federal Constitution); cf. Sanford Levinson, *Preface to the Sixth Edition*, in ROBERT G. MCCLOSKEY, *THE AMERICAN SUPREME COURT*, at ix, x (Sanford Levinson ed., rev. 6th ed. 2016) (describing the author's view that, in pushing for the New Deal, “Roosevelt simply wanted to return to Marshall's broad and capacious nationalist vision”).

have lavished on Hamilton, Jefferson, Madison, Marshall, Story, and their world, this central interpretive debate has remained unexplored. Modern scholarship has misunderstood the terms of the Founders' debate because it sits on an unfamiliar axis. Instead of arguing over whether the Constitution was, for instance, living or static, these early American conversations were part of a decades-long debate over which of two preexisting, well-established paradigms of interpretation was most appropriate for the new Constitution. Without this context, we cannot understand some of the most important and most cited constitutional law precedents from this period. And of course, the Founders' own debate about whether the Constitution should be pragmatically or narrowly construed is highly relevant to any contemporary theorist relying on Founding-era views.

The clearest examples of the two methodologies the Founders saw as their options for how the Constitution should be interpreted can be found in the different rules then applicable to the interpretation of private and public legislation. Although this distinction has now largely fallen by the wayside, federal and state legislatures in the age of Jefferson and Marshall engaged in two different kinds of legislative work. Some of that work involved what they would have called public acts. These were the kinds of laws that make up the bulk of what our legislatures pass today: statutes that enact generally applicable rules. Public acts addressed social ills, set standards for industry, regulated behavior, pursued remedial policies, or committed resources to public projects.⁴ The legislative process for such acts was much like the process that we know today: a member might propose a measure, which the assembly would debate before referring it to a special committee that would draft proposed language. After further debate and perhaps an opportunity to consult with constituents or experts, the legislature would pass some version of the bill into law.⁵

But public acts were the exception in early American legislation. As Chief Justice Smith of New Hampshire put it in 1806, the number of statutes "which prescribe rules of civil conduct to the citizens, rules for making and expounding contracts, principles of decision on the questions daily agitated in our

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4. See WILLIAM J. NOVAK, *THE PEOPLE'S WELFARE: LAW AND REGULATION IN NINETEENTH-CENTURY AMERICA* 1-2 (1996). Novak writes against the idea that early American governments were laissez-faire, setting out in great detail the range of issues about which there existed pervasive and granular regulation at the state and especially the city level. These types of rules and regulations, in which the government responds to concerns of a public nature, would have all been designated "public" acts.
 5. See Maeva Marcus & Natalie Wexler, *The Judiciary Act of 1789: Political Compromise or Constitutional Interpretation?*, in *ORIGINS OF THE FEDERAL JUDICIARY: ESSAYS ON THE JUDICIARY ACT OF 1789*, at 13, 14-15 (Maeva Marcus ed., 1992) (discussing the process Congress pursued while crafting the first Judiciary Act, including sending drafts to experts in senators' states).

courts of justice,” was quite “small.”⁶ Instead, much of the legislative business in Congress and state legislatures of the period was devoted to so-called private acts – also called private bills or private legislation – which fixed or determined the legal rights of particular parties. In fact, it was not unusual for the number of private acts to vastly outstrip the number of public acts in a given state-legislative session.⁷

The central characteristic of private bills was their *specific* character – they determined the legal rights of particular parties in response to particular requests, rather than enacting rules of general applicability.⁸ While public acts changed the laws applicable to everybody, private acts usually addressed more targeted concerns. Individuals or groups might petition asking for a special favor – an exemption from some generally applicable law, spot relief for a temporary problem, or the grant of a parcel of state-owned land. The award of a corporate charter or a divorce, for example, would have been granted in an individually debated private act.⁹ Many private acts resolved issues that would

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6. Jeremiah Smith, Book Review, MONTHLY ANTHOLOGY & BOS. REV., Mar. 1806, at 138, 138, *quoted in* JOHN PHILLIP REID, CONTROLLING THE LAW: LEGAL POLITICS IN EARLY NATIONAL NEW HAMPSHIRE 160 (2004).
 7. See, e.g., Contents, 1813 N.C. Sess. Laws 42 (listing nineteen public laws and ninety-five private laws enacted). Legislatures still pass a very limited number of private laws today. In Congress, however, this amounts to only one or two per year. See, e.g., *Private Laws: 111th Congress*, CONGRESS, <https://www.congress.gov/private-laws/111th-congress> [<https://perma.cc/P8EV-SAKY>].
 8. In some states, published statute books indicated with labels or separate placement in the volume which bills were public and which were private. But legislation was not always so designated, for reasons ranging from impoverished record-keeping practices to the simple belief that the content of the legislation disclosed for itself whether it was a public or private act. Moreover, the status of some legislation was contested. Much more historical work remains to be done on those fascinating borderline cases, which involved, in some states, important corporations and banks. For that matter, historians of the city have noted a transformation over time in the way cities and towns were considered, from private to public, and this transformation is also likely reflected in the methods judges applied when interpreting cities' incorporating legislation. See HENDRIK HARTOG, PUBLIC PROPERTY AND PRIVATE POWER: THE CORPORATION OF THE CITY OF NEW YORK IN AMERICAN LAW, 1730-1870, at 179-239 (1983); Gerald E. Frug, *Property and Power: Hartog on the Legal History of New York City*, 1984 AM. B. FOUND. RES. J. 673, 677 (reviewing HARTOG, *supra*). What matters for purposes of this Article is that the thinkers I discuss understood the general distinction between public and private legislation and the statutory canons of construction that were applied to the typical bills in each category.
 9. See, e.g., Act of Feb. 3, 1787, 1786-1787 Del. Laws 26 (awarding John Fitch a monopoly for the construction and operation of the steamboat); Act of Feb. 14, 1799, 1799 Ga. Laws 78 (incorporating the Savannah Navigation Company to improve navigation along the Savannah River); Ch. 22, 1770 Md. Laws 4 (confirming a contract between Nehemiah Tilghman and Solomon Townsend); Ch. 1, 1769 Md. Laws 1 (naturalizing Peter Haldimand); Act of

today be handled by an agency or court. Early American states and the federal government also used private acts to secure private investment in projects that a government today would simply undertake itself. For example, a petitioner might offer to build and maintain a needed road in exchange for the exclusive right to collect tolls, or he might invest in new technology like steam-powered ferries in exchange for the exclusive right to all ferryboat traffic on the Hudson River.¹⁰ In an era of low institutional and bureaucratic capacity, governments used the private-act process to induce private parties to perform needed public services.¹¹

In keeping with the highly specific character of these laws, the process for adopting private acts often differed from that used for adopting public legislation. A petitioner would often include affidavits in his or her request, and legislatures would sometimes hear evidence and even cross-examine witnesses before voting on a bill.¹² Private legislation could embody a bargain between the

Sept. 20, 1793, ch. 4, 1793 Mass. Acts 22 (authorizing James Osgood, guardian of Jane Osgood, to sell land belonging to her deceased father for Jane's benefit); Act of Nov. 29, 1794, ch. 504, 1794 N.J. Laws 959 (authorizing John Perry to make conveyances to George Budd and Adam Inger from the estates of William and Jonathan Sleeper); Act of Mar. 17, 1797, 1797 N.Y. Laws 48 (paying Nicholas Aldridge to release his claim to lands conveyed to him by the state); Act of Mar. 19, 1774, ch. 51, 1774-1775 N.Y. Laws 82 (enabling Lewis Morris and John Sickles to build a bridge across the Harlem River); Act of Sept. 11, 1761, ch. 1154, 1761 N.Y. Laws 395 (naturalizing 150 people); 1813 N.C. Sess. Laws 42 (listing a range of private acts); Act of Nov. 18, 1782, ch. 41, 1782-1783 Pa. Laws 81 (providing relief to a jailed debtor); Act of Feb. 20, 1768, ch. 576, 1759-1776 Pa. Laws 279 (incorporating an insurance company); Act of Dec. 7, 1791, ch. 41, 1791 Va. Acts 18 (authorizing Francis Thornton to build a toll bridge across the Rappahannock River).

10. Act of Mar. 27, 1798, ch. 55, 1798 N.Y. Laws 215, 216.

11. Scholars have made fascinating discoveries about early America by attending to this type of early American lawmaking. See Maggie McKinley, *Petitioning and the Making of the Administrative State*, 127 YALE L.J. 1538, 1538 (2018) (arguing that “[m]uch of what we now call the modern ‘administrative state’ grew out of the petition process” and its resulting private bills “in Congress”). See generally Christine A. Desan, *Remaking Constitutional Tradition at the Margin of the Empire: The Creation of Legislative Adjudication in Colonial New York*, 16 LAW & HIST. REV. 257 (1998) (discussing the colonial New York legislature's use of the petition process and resulting private lawmaking to siphon substantive areas of law away from the courts).

12. See, e.g., Act of May 10, 1770, 1770 Conn. Pub. Acts 352 (establishing procedures for the consideration of petitions, prayers, and memorials to the general assembly); Act of Feb. 21, 1778, ch. 14, 1778 N.J. Laws 29 (granting Mr. Stiles's petition to divorce Abigail, on account of his “being no longer able to endure the Misconduct, Extravagance, Drunkenness, Lewdness and Adultery” for which his wife had become infamous, after an “examination of witnesses” established her guilt); JOURNAL OF THE PROCEEDINGS OF THE LEGIS.-COUNCIL OF THE STATE OF N.J. 18 (11th Sess. 1786) (“The House resumed the Consideration of the Bill, intituled ‘An Act to repeal an Act, intituled, An Act for remedying certain Defects in the Testa-

legislature and a private party—selling government land in exchange for payment, for instance—but it did not always take a bargained-for form. It could also be simply a matter of sovereign grace.

The Founding generation understood different types of legislation to entail different methods of interpretation. In brief, public laws received broad, purpose-directed interpretations while private acts received strict, literal interpretations. The Federal Constitution of 1787 was a novel legal instrument, but American lawyers did not make up new principles of interpretation out of whole cloth. They made use of conventions of interpretation already in common use. Disagreements over how to interpret the Constitution were, therefore, also disagreements about which form of written law provided the *best analogy*. This is the critical context for some of the most famous and formative moments in early American legal history. The debate over whether the Constitution was a compact among the states or whether it sprang from the assembled people was, at bottom, a debate over whether it was more like a legislative bargain memorialized in a private act or whether it was more like a public act announcing the law of the land. The principles of interpretation that flowed from this distinction supplied the doctrinal heritage for the opposing sides in the first arguments about constitutional interpretation, including those concerning the Bank of the United States, the Alien and Sedition Acts, and internal improvements.

Understanding this essential framework brings the most important precedents of the era into sharper view.¹³ It allows us to fully appreciate Marshall's

ment and Last Will of Thomas Shreve, late of the County of Salem, deceased, and to establish and confirm the said Testament and Last Will;' and proceeded to the Hearing of the Parties: The Parties not having gone through their Evidence, the further Consideration of the said Bill was postponed until To-morrow Morning ten o'Clock." The next day, Wednesday, November 15, 1786, the Journal states that the House resumed consideration of the Bill, the parties went through their evidence, and the "Bill was ordered a third reading.").

13. The central goal of this Article is to uncover an intellectual history that allows us to better understand the most important precedents of early America. But understanding how the Founding generation thought about constitutional interpretation has significance for other ongoing debates as well. For instance, a new group of originalist scholars says that we should not just focus on the Framers' intent or original public meaning but rather should follow the interpretive methodology of the Framers themselves. See John O. McGinnis & Michael B. Rappaport, *The Constitution and the Language of the Law*, 59 WM. & MARY L. REV. 1321, 1411 (2018) (arguing that "original-methods originalism offers the best understanding of originalism" because the Founders used legalisms and referred to legal interpretive principles during drafting and ratification); John O. McGinnis & Michael B. Rappaport, *Original Methods Originalism: A New Theory of Interpretation and the Case Against Construction*, 103 NW. U. L. REV. 751 (2009); see also Stephen E. Sachs, *Originalism as a Theory of Legal Change*, 38 HARV. J.L. & PUB. POL'Y 817, 821 (2015) (arguing for "original-law originalism": the view that the Constitution should be read according to its *original legal content*, whatever that

statesmanship in *Marbury v. Madison*,¹⁴ to understand the stakes of *Martin v. Hunter's Lessee*,¹⁵ and to get Marshall right in *McCulloch v. Maryland*.¹⁶ What did Marshall mean when he declared that “it is a *constitution* we are expounding”?¹⁷ To whom was he speaking? This statement, coming at the end of a paragraph advocating broad principles of interpretation, committed the Court to one side of an ongoing debate over how the Constitution must be characterized.¹⁸ As this Article explains, Marshall meant that he saw the Constitution as the ultimate public law. The interpretive principles he applied followed directly from that premise.¹⁹

Part I outlines the distinctions early Americans drew between private and public statutes and the rules of statutory interpretation applicable to each category. These insights contribute to conversations in the field of statutory interpretation.²⁰ Part I shows how the Founders understood their own law of statu-

might have been” by “read[ing] the document’s text . . . according to the rules of the time, legal and otherwise, for turning enacted text into law”).

14. 5 U.S. (1 Cranch) 137 (1803).

15. 14 U.S. (1 Wheat.) 304 (1816).

16. 17 U.S. (4 Wheat.) 316 (1819).

17. *Id.* at 407.

18. See *id.* Marshall took office as Chief Justice in the midst of this ongoing argument. If it were a physical brawl, we would picture him entering a room in which chairs were flying, with inkpots and other missiles strewn on the floor, picking up a chair as a shield, and finding a weapon of his own. Well, now it’s 2020, and the room has been emptied and turned into a museum exhibit—and Marshall’s footprints remain imprinted on the carpet. Much legal scholarship involves standing in that room and wondering, why did the great John Marshall take such a circuitous path? Was he pirouetting, because he was such a special genius? Or did men in the olden days just “walk funny”? One of the projects of legal history is to refuse to take legal opinions as though they announce a context-free gospel, and to instead recover the furniture that littered the room. Legal history makes visible all of the obstacles that explain a chosen path. Quite simply, the debate over whether the Constitution was more like public or private legislation was one of those big obstacles that the Marshall Court could not pass through. The Court worked around it or confronted it. It was always there.

19. This Article is in conversation with one of the most influential articles of the 1980s, H. Jefferson Powell, *The Original Understanding of Original Intent*, 98 HARV. L. REV. 885, 894–902 (1985), which also argued that the Founders applied different interpretive conventions to different types of law. See generally Caleb Nelson, *Originalism and Interpretive Conventions*, 70 U. CHI. L. REV. 519, 571–76 (2003) (grappling with the implications of Powell’s article for originalism). But Powell did not seem to appreciate the differences, central to this Article, between the principles of interpretation applied to private and public acts. Instead, he argued that the Federalists sought to apply an undifferentiated set of statutory-interpretation principles to the Constitution, while Jeffersonian Republicans sought to apply the interpretive methodology used for private contracts.

20. The only other major work on these early American methods has been in the context of a debate between John Manning and Bill Eskridge over whether early American judges prac-

tory interpretation and why different rules applied to different types of laws. As that Part explains, the motivations for these rules were tied to characteristics of the laws themselves and far divorced from the modern obsession with the metes and bounds of the judicial role.

As Part I explains, however, these two paradigms of interpretation were not limited to the statutory-interpretation context. The rationale justifying strict interpretation of private acts applied to other legal instruments, like treaties. And, many thought, the rationale behind broad, equitable construction of public acts applied to the new Federal Constitution. The purpose of Part I is not to suggest that the Founders thought the new Constitution *was* legislation. The point is to highlight the two paradigms of interpretation in the Founding era's legal vocabulary using statutory interpretation, a common application of those paradigms. When deciding which paradigm of interpretation should apply to the new Constitution, they were deciding which other legal instruments provided the best analogies.

Part II explains the relevance of these paradigms to the Founding generation's debates over constitutional interpretation. It argues that proponents of the view that the Constitution was a "compact"—whether they used the language of treaty, contract, or legislative bargain—were arguing that the Constitution was subject to the rules of interpretation applicable to private legislation. Scholars have mostly treated the connection between the compact theory and strict construction as self-evident, failing to demonstrate why the designation as a compact, on its own, necessitated a narrow interpretive lens. I argue that the "compact" term signaled that the same quality justifying strict construction in the private act or treaty context—namely, the limited delegation of power by a sovereign—obtained with the new constitution. That is why the term entailed strict construction. And that is why the term also imported the rest of the suite of rules applicable to private acts, including attention to legislative history (known now as "original intent") and a preference for amendment to fix defects.²¹

ticed textualist or pragmatic interpretation of legislation. See William N. Eskridge, Jr., *All About Words: Early Understandings of the "Judicial Power" in Statutory Interpretation*, 1776-1806, 101 COLUM. L. REV. 990, 995-96 (2001); John F. Manning, *Textualism and the Equity of the Statute*, 101 COLUM. L. REV. 1, 91 (2001). But see Farah Peterson, *Interpretation as Statecraft: Chancellor Kent and the Collaborative Era of American Statutory Interpretation*, 77 MD. L. REV. 712, 715 (2018) (suggesting that neither scholar fully accounted for how the judicial role has changed).

21. Along the way, I raise a methodological point: to understand a word like "compact," it is not enough to understand its dictionary definition, or even its linguistic context. A scholar must also understand its intellectual history. Cf. DANIEL T. RODGERS, *CONTESTED TRUTHS: KEY-WORDS IN AMERICAN POLITICS SINCE INDEPENDENCE* (1987) (demonstrating brilliantly that

Part III uses this framework to reevaluate cases on every Constitutional Law syllabus, including *Marbury v. Madison*, *Martin v. Hunter's Lessee*, *McCulloch v. Maryland*, and *Cohens v. Virginia*.²² This Article demonstrates that an early American debate over whether the written Constitution should be interpreted according to the rules applicable to public or private legislation underlies each of these major moments in early American legal history. The insights of Part III should change how these cases are taught, because they reveal a key intellectual thread connecting these cases to each other and help to place them in the context of the broader legal culture of their time.

Part IV connects these insights to contemporary theoretical debates. As this Article explains, the public-act analogy was a leading view during the Founding era. Those who believed that the Constitution should be construed using the rules commonly applied to public legislation assumed that courts would read its provisions to respond to new problems and conditions that its drafters and ratifiers could not have foreseen.²³ The historical pedigree of this dynamic, flexible approach should challenge those who claim that a narrow, restrictive reading of the Constitution is more faithful to the Framers' intent.

Part IV also presses a methodological point too often overlooked in contemporary debates over how early American lawyers and judges approached

words have their own intellectual history). And because we are talking about an era in which lawyers trained in apprenticeships, and not in schools, the intellectual context found in learned texts is not enough. It is also important to know a word's *practice* context. We must ask, what would a lawyer in practice at this time have understood this word to mean? What were the litigation strategies, the precedential connotations, the arguments and counterarguments, that a word or phrase would have suggested to a late eighteenth-century or early nineteenth-century lawyer? This Article explores the word "compact" in these terms. In the process, it demonstrates that these types of questions cannot be answered out of a dictionary, whatever its vintage.

22. 19 U.S. (6 Wheat.) 264 (1821).

23. This insight will be relevant to law-and-literature and living-constitutionalism theorists. See, e.g., Sanford Levinson, *Law as Literature*, 60 TEX. L. REV. 373, 390-91 (1982) (arguing that the Constitution admits many readings which could transform the political order); see also James Boyd White, *Law as Language: Reading Law and Reading Literature*, 60 TEX. L. REV. 415, 416-18 (1982) [hereinafter White, *Law as Language*] (arguing that it is "absurd to speak as if the meaning of a text were always simply there to be observed and demonstrated in some quasi-scientific way"). See generally BRUCE ACKERMAN, *WE THE PEOPLE: FOUNDATIONS* 39-44 (1991) (concluding that constitutional law is "a relatively autonomous part of our culture," but that periods of extraordinary mobilization have led to "acts of constitutional creation that rivaled the Founding Federalists' in their scope and depth"); JAMES BOYD WHITE, *THE LEGAL IMAGINATION* (1973) [hereinafter WHITE, *LEGAL IMAGINATION*] (arguing that legal language can shift and reconstitute legal practice); Bruce Ackerman, *Interpreting the Women's Movement*, 94 CALIF. L. REV. 1421, 1421, 1425-27 (2006) (contending that social movements can shift culture and, over time, change constitutional interpretation).

problems of interpretation. It argues that an anachronistic focus on early federal courts has limited scholarship in this area. Because only the state courts had a broad range of jurisdiction and because of their relative prestige and importance, state courts collected the greatest legal talent. The influence of some state-court judges during the nineteenth century rivaled that of any Supreme Court Justice.²⁴ State-level sources are therefore critical to understanding the mainstream of American legal thought of this era.

Like the unwarranted focus on federal courts, a preoccupation with contemporary interpretive debates risks distorting our reading of the historical record. If our purpose is to discover what the Framers really thought, we must take early American jurists seriously as sophisticated legal thinkers with their own culturally and historically specific views.

I. EARLY AMERICAN STATUTES AND TWO PARADIGMS OF FOUNDING-ERA INTERPRETATION

“On the abstract principles which govern courts in construing legislative acts, no difference of opinion can exist,” Chief Justice Marshall wrote in 1805.²⁵ “It is only in the application of those principles that the difference discovers itself.”²⁶ As divided as judges and scholars now are on theories of statutory interpretation, this statement could not be made in seriousness today. Yet the same basic interpretive methods existed in the early Republic. A scholar looking to support the claim that the Founders were textualists will find plenty of evidence in the record; a scholar countering that claim will find plenty of interpretation that looks purposive and pragmatic as well.²⁷ But if the same methodologies existed then, how could Marshall have thought there were “no difference[s] of opinion” on the principles of statutory interpretation? The answer is that judges consistently applied these different methods to different categories of legislation. The difference of opinion, if there was one, often concerned not which method should apply, but what kind of statute was at issue.

24. See, e.g., Peterson, *supra* note 20, at 717 (“In his own time and for the generation that followed, James Kent’s jurisdiction was more important to American law than John Marshall’s.”).

25. *United States v. Fisher*, 6 U.S. (2 Cranch) 358, 386 (1805).

26. *Id.*

27. Compare Manning, *supra* note 20, at 8-9 (arguing that evidence from the Founding era cannot be read in support of purposivism), with Eskridge, *supra* note 20, at 995-98 (arguing that it can).

Lawyers and judges of the late-eighteenth and early-nineteenth centuries distinguished between “private acts” and “public acts.”²⁸ “Special or private acts are rather exceptions than rules, being those which only operate upon particular persons, and private concerns,” Blackstone explained.²⁹ A law “to prevent spiritual persons from making leases for longer terms than twenty one years, or three lives, is a public act; it being a rule prescribed to the whole body of spiritual persons in the nation.”³⁰ On the other hand, “an act to enable the bishop of Chester to make a lease to A. B. for sixty years . . . concerns only the parties and the bishop’s successors; and is therefore a private act.”³¹ Fortunatus Dwarris gave a similar explanation in his 1835 treatise on statutes: “[p]ublic acts relate to the kingdom at large” whereas “private acts” “concern only a particular species, thing, or person” or relate only “to certain individuals or to particular classes of men.”³²

The rules for interpreting each type of legislation were so different that a decision about categorization could easily determine the outcome of a case. Most laws were easy to classify as one type or the other. But there were instances, as when a statute concerned a large but discrete group of people, it became “difficult to draw the line between a public and private act . . .”³³ Litigation involving statutes like these often included lengthy, learned, and clever arguments from counsel over the statute’s taxonomy.³⁴ Alexander Hamilton made a throwaway argument to this effect in *Rutgers v. Waddington*, a case in which he represented a loyalist property owner seeking compensation for confiscations during the Revolutionary War.³⁵ The argument that the statute was a private act because it targeted a discrete class of people was a long shot, but a sophisticated lawyer like Hamilton thought it was worth making.

28. See, e.g., *Jones v. Maffet*, 5 Serg. & Rawle 523, 533 (Pa. 1820) (“The distinction between public and private acts is great.”).

29. 1 WILLIAM BLACKSTONE, COMMENTARIES *86.

30. *Id.*

31. *Id.*; see also RICHARD BURN, BURN’S ABRIDGMENT, OR THE AMERICAN JUSTICE 129 (Dover, N.H., Eliphalet Ladd 2d ed. 1792) (describing the distinction between “general acts of parliament” on the one hand, and “private acts of parliament” on the other).

32. FORTUNATUS DWARRIS, A GENERAL TREATISE ON STATUTES; AND THEIR RULES OF CONSTRUCTION 3 (Phila., John S. Littell 1835).

33. 1 JAMES KENT, COMMENTARIES ON AMERICAN LAW 429 (N.Y.C., O. Halsted 1826).

34. See, e.g., ARGUMENTS AND JUDGMENT OF THE MAYOR’S COURT OF THE CITY OF NEW-YORK IN A CAUSE BETWEEN ELIZABETH RUTGERS AND JOSHUA WADDINGTON 14-15 (N.Y.C., Samuel Loudon 1784) [hereinafter ARGUMENTS AND JUDGEMENT OF THE MAYOR’S COURT].

35. Alexander Hamilton, Brief No. 6, in 1 THE LAW PRACTICE OF ALEXANDER HAMILTON: DOCUMENTS AND COMMENTARY 362, 387 (Julius Goebel, Jr. ed., 1964).

Private statutes, which often involved grants of land or the award of a monopoly or other thing of value, committed the state's property or power and created vested rights.³⁶ Courts interpreting this type of statute focused on discerning the subjective understanding and intentions of the legislative grantors and petitioning grantees. Public acts, by contrast, were the law of the land, forward-looking guidelines construed to address both the mischief that inspired them and whatever circumstances might arise in the same vein.

A. Private Acts Received Strict Interpretations; Public Acts Received Broad and Purpose-Oriented Interpretations.

If the style of interpretation applicable to private acts had a theme, it was the comparison of private legislation to contracts and other private-law transactions. Indeed, some courts resisted treating private acts as laws at all. Only “[c]onfusion” would “arise[]” “from considering these acts of the legislature as

36. When I presented an earlier draft of this Article, I was asked whether this provides any insights for scholarship on vested-rights doctrine. In brief, what scholars call the vested-rights doctrine arose shortly after the Founding in reaction to the rapidly expanding power of state legislatures. See Gordon S. Wood, *The Origins of Vested Rights in the Early Republic*, 85 VA. L. REV. 1421, 1434-35 (1999); see also GORDON S. WOOD, *THE CREATION OF THE AMERICAN REPUBLIC 1776-1787*, at 403-13 (1998) (describing early American anxieties about legislative power); Edward S. Corwin, *Basic Doctrine of American Constitutional Law*, 12 MICH. L. REV. 247, 255-56 (1914) (discussing the vested-rights doctrine as a protection against the legislature). Recent scholarship on the meaning of the Due Process Clause has fueled a new interest in the doctrine. See Nathan S. Chapman & Michael W. McConnell, *Due Process as Separation of Powers*, 121 YALE L.J. 1672, 1737-38 (2012); Ryan C. Williams, *The One and Only Substantive Due Process Clause*, 120 YALE L.J. 408, 423-24 (2010). Rooted in natural-law concepts, the doctrine was initially concerned with retroactive legislation affecting rights that had “vested,” and, some argue, it expanded over the course of the nineteenth century to take on broader connotations. See Edward S. Corwin, *Doctrine of Due Process of Law Before the Civil War*, 24 HARV. L. REV. 366, 383-85 (1911). This Part adds important context. In the context of early American legislation, the concept of “vested rights” would have been relevant to the kind of rights created under private, rather than public, legislation. The core case in which a right could be said to have “vested” would be a property grant under a private statute, and rights created by public legislation would require increasingly tricky legal reasoning. An interesting project would be to explore how, when, and why this core of easy cases expanded over time. On a related note, a good starting point for thinking about the difficult but meaningful distinction early Americans drew between the type of legislation that trenchanted on private property, triggering a duty to compensate the owner, and the type of law that, as a public act, merely regulated private property in the public interest, is Bill Novak's interpretation of *Commonwealth v. Alger* in *The People's Welfare*. See NOVAK, *supra* note 4, at 19-20.

laws; whereas they are grants,” a Massachusetts court explained in the 1820s.³⁷ A private bill, the court counseled, was like a “contract” and should be construed that way.³⁸ New York’s highest court reminded litigants in 1811 that “a law thus made . . . is yet looked upon more as a private conveyance, than as the solemn act of the legislature.”³⁹ Pennsylvania’s Supreme Court said the same in a 1822 case.⁴⁰ A private act, that court summarized, is “a compact, the parties to which” are the beneficiaries “and the state.”⁴¹

Like a party to a private contract or conveyance, a legislature that passed a private act conferred rights on its beneficiaries that could not simply be revoked or cast aside by future legislatures.⁴² Chief Justice Marshall underscored the point in *Fletcher v. Peck*, a suit that centered on the Georgia legislature’s effort to repeal a previous legislature’s grant of territory to several private companies. Georgia asserted that “one legislature is competent to repeal any act which a former legislature was competent to pass; and that one legislature cannot abridge the powers of a succeeding legislature.”⁴³ Chief Justice Marshall disagreed. This “principle” is “correct[]” “so far as it respects general [or public] legislation,” he explained.⁴⁴ But a private act was different: “[I]f an act be done under a law, a succeeding legislature cannot undo it. The past cannot be re-

37. *Proprietors of Charles River Bridge v. Proprietors of Warren Bridge*, 24 Mass. (7 Pick.) 344, 445 (1829), *aff’d*, 36 U.S. (11 Pet.) 420 (1837).

38. *Id.* at 443. In fact, private acts were to be even more narrowly construed than contracts between individuals. As the court explained, “in governmental grants nothing passes by implication,” while a private subject’s grant by private contract might include more than what is explicitly expressed if necessary for the operation of the grant. *Id.* at 469. Because private acts often created vested rights, for instance by granting a monopoly or conveying land, they tended to diminish the resources and discretion available to future legislators. Because they amounted to a limitation on the people’s future power, courts held that “[n]o restraint upon this authority can be raised by implication.” *Id.* at 471; *see also* *Whetcroft v. Dorsey*, 3 H. & McH. 357, 388 (Md. 1795) (“[A]s the act under which the proceedings were had is a *private* act, the authority delegated by it must be strictly pursued . . .”).

39. *Catlin v. Jackson ex dem. Gratz*, 8 Johns. 520, 556 (N.Y. 1811) (quoting 2 BLACKSTONE, *supra* note 29, at *346); *see also* *Donnelly v. Vandenberg*, 3 Johns. 27, 40 (N.Y. 1808) (opinion of Spencer, J.) (stating that private laws should be interpreted similarly to contracts).

40. *In re St. Mary’s Church*, 7 Serg. & Rawle 517, 559–60 (Pa. 1822) (“[I]t is rather a private conveyance than a solemn act of legislation.”).

41. *Id.* at 560.

42. *See, e.g.,* *Trs. of Dartmouth Coll. v. Woodward*, 17 U.S. (4 Wheat.) 518, 650 (1819) (holding that the private charter of Dartmouth College “is a contract, the obligation of which cannot be impaired, without violating the constitution of the United States”).

43. *Fletcher v. Peck*, 10 U.S. (6 Cranch) 87, 135 (1810).

44. *Id.*

called by the most absolute power.”⁴⁵ Once a legislature granted away title to state lands, it was out of the people’s hands forever.

Private acts could also constrain sovereign authority in another way. Many private acts were public-private bargains that granted public rights for private consideration. Thus, in 1798, New York’s legislature granted Robert Livingston a monopoly over the business of ferrying passengers across the Hudson “to the end that [he] may be induced to proceed in an experiment which if successful promises important advantages to this State.”⁴⁶ That choice took certain options off the table for the people of New York. If another inventor came along with a faster, safer steamboat, the state would have had nothing left to offer. Nor could New York establish its own public steamboat shuttle to compete with Livingston’s monopoly.

The fact that they relinquished or constrained the sovereign people’s power is one reason private acts were subject to narrowing rules of construction. While private contracts were usually construed against the grantor, the opposite was true of private statutes.⁴⁷ In the *Charles River Bridge* case, Justice Baldwin traced this principle to the common-law rule that royal grants should be construed against the grantee. It would be “difficult to assign a good reason,” he contended, “why a grant by a colony or state, should be so construed as to impair the right of the people to their common property, to a greater extent in Massachusetts, than a grant by the king would in England.”⁴⁸ The states, no less than the king, were entitled to the benefit of that prerogative to protect the people from disadvantageous bargains. Chief Justice Taney built on this point in his opinion: “The continued existence of a government would be of no great value,” he contended, “if, by implications and presumptions, it was disarmed of the powers necessary to accomplish the ends of its creation; and the functions it was designed to perform, transferred to [private] hands.”⁴⁹ The “abandonment” of public authority “ought not to be presumed,” therefore, where “the deliberate purpose of the state to abandon it does not appear.”⁵⁰

45. *Id.*

46. Act of Mar. 27, 1798, ch. 55, 1798 N.Y. Laws 215, 216.

47. See *Proprietors of Charles River Bridge v. Proprietors of Warren Bridge*, 24 Mass. (7 Pick.) 344, 469 (1829) (opinion of Morton, J.), *aff’d*, 36 U.S. (11 Pet.) 420 (1837) (stating that “the king’s grant shall not enure to any other intent than that which is precisely expressed in the grant” (quoting 2 BLACKSTONE, *supra* note 29, at *248)).

48. *Charles River Bridge*, 36 U.S. (11 Pet.) at 650 (Baldwin, J., concurring).

49. *Id.* at 548.

50. *Id.*; see also *Jackson ex dem. Clark v. Reeves*, 3 Cai. 293, 303 (N.Y. Sup. Ct. 1805) (“[I]t is a general rule of law, that in the exposition of governmental grants, that construction, when the terms are inexplicit, shall be adopted which is least favourable to the grantee.”); City of

These guiding principles were echoed in state courts across the young Republic. As Chancellor Kent explained in a New York case, when an act did not “concern[] the public,” but was a matter of “mere private convenience and profit,” it “ought to be strictly construed, and not carried beyond the plain letter of the act.”⁵¹ Private statutes “ought to receive a strict and limited construction,” agreed a member of the Massachusetts high court, and “ought not to be extended by implication,” but instead must be “construed . . . strictly.”⁵² In all these cases, “a sound and wholesome rule of construction” was that private acts “are not to be enlarged by doubtful implications” or “extended by construction beyond [the] clear and obvious meaning.”⁵³ In these laws, “nothing passes by implication” and the legislature is “not to be presumed” to have “granted farther than the express words of the grant will warrant.”⁵⁴ A court in Maine agreed that a “private act or grant . . . must be construed by a careful examination of its language.”⁵⁵ When a private act granted certain privileges or powers, the act “should be literally pursued,” said a Maryland advocate in a case he won for his client in 1795, “otherwise all acts done in virtue thereof are deemed void.”⁵⁶

In fact, so tied were courts to the precise language of private acts that many American jurisdictions followed the British rule requiring that a private act be set forth in its entirety in the pleadings. This was an era before statutes were

New-York v. Scott, 1 Cai. 543, 548 (N.Y. 1804) (“No implied grant is contained in the act of the legislature.”).

51. *Belknap v. Belknap*, 2 Johns. Ch. 463, 471 (N.Y. Ch. 1817).

52. *Charles River Bridge*, 24 Mass. at 469-70 (opinion of Morton, J.).

53. *Id.* at 476-77 (opinion of Wilde, J.).

54. *Id.* at 469-70 (opinion of Morton, J.); *see also* *People ex rel. Att’y Gen. v. Utica Ins.*, 15 Johns. 358, 383 (N.Y. Sup. Ct. 1818) (“[A]n incorporated company have no rights except such as are specially granted, and those that are necessary to carry into effect the powers so granted. Many powers and capacities are tacitly annexed to a corporation duly created; but they are such only as are necessary to carry into effect the purposes for which it was established. The specification of certain powers operates as a restraint to such objects only, and is an implied prohibition of the exercise of other and distinct powers.”).

55. *Thomas v. Mahan*, 4 Me. 513, 517 (1827).

56. *Whetcroft v. Dorsey*, 3 H. & McH. 357, 368 (Md. 1795); *see also* *Wilcox v. Sherwin*, 1 D. Chip. 72, 83 (Vt. 1797) (“[T]he corporate acts of any town, are to all but the inhabitants, who are members of the corporation, private acts—they are unknown to others. Courts can know nothing of them but by proof. . . . The power of a town, as a corporation, is not general; it is limited both as to the subject matter and the mode of exercising it. For instance, should the inhabitants presume to vote a tax to raise a sum of money, for the purpose of setting up a manufactory, the subject not being within the powers given by law to towns, the vote would be illegal and void.”), *overruling recognized by* *Blood v. Sayre*, 17 Vt. 609, 613 (1843).

reliably published and disseminated, and even where they were, publications often left out private acts. As Pennsylvania's Supreme Court explained, when the laws under consideration were "private acts," those "contain[ing] grants, privileges and immunities to an individual," then it is "his interest and his duty, as they are the muniments of his private rights, to have the strongest possible evidence of their existence."⁵⁷ Some courts refused to take cognizance of the private act if it had not been adequately pleaded.⁵⁸

Courts faced with public acts approached the business of interpretation differently. Rather than hewing to the text, they sought to effectuate the *purpose* of those laws, even if that required going against their literal meaning. That approach flowed from the contemporary understanding of the role of public acts. All nonpenal public statutes were thought of as "remedial" — that is, they were intended to address some defect in the common law.⁵⁹ "There are three points to be considered in the construction of all remedial statutes," Blackstone explained in a passage often cited by American jurists: "the old law, the mischief, and the remedy . . . and it is the business of the judges so to construe the act, as to suppress the mischief, and advance the remedy."⁶⁰ In other words, a Pennsylvania court explained, "the reason which induced the Legislature to make such acts as take away the common law," provides "the rule by which the acts ought to be construed."⁶¹ When construing this kind of statute, explained Chancellor Kent of New York, it was appropriate for judges to take into account "the immense pressure of the public interest."⁶² All such "acts

57. *Jones v. Maffet*, 5 Serg. & Rawle 523, 534 (Pa. 1820).

58. See, e.g., *Whetcroft*, 3 H. & McH. at 364, 384 (counsel arguing that if the legislature's private act is not properly entered into the record, the defendant "might as well have referred to a decree of the national convention of *France*, or a mandate of the empress of *Russia*" and the court agreeing that "[i]f the defendant pleads a private act of the legislature, it must appear on the record"); *Bank of Utica v. Smedes*, 3 Cow. 662, 682-83 (N.Y. 1824) (stating that "the rule is inflexible, that a private statute must be set forth at large in pleading," and citing cases to that effect); *Jenkins v. Union Tpk. Rd.*, 1 Cai. Cas. 86, 92-93 (N.Y. Sup. Ct. 1804) ("The first point to be determined, is, the class to which the act of the legislature, on which this action has been brought, is to be assigned; if a public act, every part of it is, in legal intendment, in the knowledge of the court, as the *general law of the land*. If a private act, it can only be so far attended to, as the parties, by their pleadings, have made it an object of judicial conusance."); see also *Maffet*, 5 Serg. & Rawle at 534 (explaining that officially printed statutes are *prima facie* evidence of the law).

59. 13 CHARLES PETERSDORFF, A PRACTICAL AND ELEMENTARY ABRIDGEMENT OF THE CASES 193 n.* (N.Y.C., W.R.H. Treadway 1831).

60. 1 BLACKSTONE, *supra* note 29, at *87. For jurists quoting this passage, see, for example, *Lloyd v. Urison*, 2 N.J.L. 212, 217-18 (Sup. Ct. 1807).

61. *Levinz v. Will*, 1 U.S. (1 Dall.) 430, 434 (Pa. 1789).

62. *Jerome v. Ross*, 7 Johns. Ch. 315, 342 (N.Y. Ch. 1823).

made *pro bono publico*,” that is, in service of the public welfare, “are to have a liberal construction,” said the New Jersey Supreme Court.⁶³

Indeed, when interpreting public acts, “courts of law” “almost invariably pursu[ed] the spirit and meaning of law, in preference to the strict letter.”⁶⁴ As New York’s highest court explained, it would be a mistake to rely on the words of the statute without regard to “the cause or necessity of making the statute” and sometimes “other circumstances” that gave the statute context.⁶⁵ Only through examining this context could a court find the statute’s true “intention” which “ought to be followed, . . . although such construction seem contrary to the letter of the statute.”⁶⁶ Using a typical formulation applicable to the interpretation of public acts, and public acts only, the court summarized: “A thing which is within the intention of the makers of a statute is as much within the statute as if it were within the letter,” whereas “a thing which is within the letter

63. *State v. Helmes*, 3 N.J.L. 1050, 1061 (1813). This rule sometimes even extended to “highly penal statutes” which were “often taken by intendment,” that is, interpreted beyond the express language in order to effectuate their intention. *Id.* While the canon that penal statutes should be strictly construed was often cited, New Jersey’s court was correct to point out that penal statutes were also on occasion broadened to effectuate their purpose. See *Pierce v. Hopper* (1720) 93 Eng. Rep. 503, 504-09; 1 *Strange* 249, 250-58 (stating arguments of counsel and citations to such an effect); see also *Fox v. Hills*, 1 Conn. 295, 299-300 (1815) (expanding a statute punishing fraudulent conveyance to prohibit a conveyance that would defeat the claims of a *judgment* creditor even though the statute’s text only protected the claims of contract creditors); *State v. Walker*, 4 N.C. (Taylor) 661 (1817) (holding that even though the indictment for forgery under the forgery statute was insufficiently proven, no appeal would be taken, because the defendant was still guilty of forgery as defined under the common law); *Stewart v. Keemle*, 4 Serg. & Rawle 72, 73-74 (Pa. 1818) (“Even in the construction of penal statutes, the expression has been departed from in order to comply with the manifest spirit and interest of the law. . . . Even tenderness to criminals does not require such a construction of words, perhaps not absolutely clear, as would tend to destroy and evade the very end and intention of the statute.”); ARGUMENTS AND JUDGMENT OF THE MAYOR’S COURT, *supra* note 34, at 15 (“That even in the construction of a penal statute the *intention* [of the legislature] is to be regarded . . . [and] [t]hat a court ought so to construe a statute as not to suffer it to be eluded.”).

64. *Lloyd*, 2 N.J.L. at 218.

65. *People ex rel. Att’y Gen. v. Utica Ins.*, 15 Johns. 358, 380 (N.Y. 1818); cf. *Dorsey’s Lessee v. Hammond*, 1 H. & J. 190, 192 (Md. Gen. Ct. 1801) (concerning a *private* act, and holding that “the court cannot resort to, or draw any aid from circumstances or facts extrinsic the grant, unless there is some ambiguity or uncertainty in the description of the person who is to take or the thing which is to pass” (emphasis omitted)), *rev’d*, 1 H. & J. 201 (Md. 1803).

66. *Utica Ins.*, 15 Johns. at 380-81; see also *Marshall v. Lovelass*, 1 N.C. (Cam. & Nor.) 412, 435 (Super. Ct. Law & Eq. 1801) (stating that when the makers’ “intent” may be “discovered from the cause or necessity of making an act,” that intent “must be followed with reason and discretion in the construction of an act, although against the letter of it”).

of the statute, is not within the statute, unless it be within the intention of the makers.”⁶⁷

Once judges identified the legislators’ purposes, they often resorted to equitable interpretation to effectuate those purposes. That meant that they felt free to depart from the language of the statute if it did not fit their understanding of the statute’s spirit or, “[i]n doubtful cases,” to “enlarge the construction of an act of Assembly” so as to complete the legislature’s remedial work.⁶⁸ Judges did not hesitate to extend statutory language to cover circumstances they thought to be “within” the scope of “the mischief” the legislature had meant to address, “even should its letter not explicitly authorize it.”⁶⁹ It seemed only natural, ex-

67. *Utica Ins.*, 15 Johns. at 381. H. Jefferson Powell argued that the Founders believed that the “intent’ of any legal document is the product of the interpretive process and not some fixed meaning that the author locks into the document’s text at the outset.” Powell, *supra* note 19, at 910. Cases dealing with public-act interpretation likely drove this conclusion. Responsive articles, including Caleb Nelson’s *Originalism and Interpretive Conventions*, have chronicled just how much conversation, both critical and admiring, Powell’s thesis provoked. See, e.g., Nelson, *supra* note 19 at 524-25 (citing, among other work, HARRY H. WELLINGTON, INTERPRETING THE CONSTITUTION: THE SUPREME COURT AND THE PROCESS OF ADJUDICATION 50-51 (1990); Barry Friedman & Scott B. Smith, *The Sedimentary Constitution*, 147 U. PA. L. REV. 1, 29 (1998); Laura Kalman, *Border Patrol: Reflections on the Turn to History in Legal Scholarship*, 66 FORDHAM L. REV. 87, 94 & n.48 (1997); Richard S. Kay, *Adherence to the Original Intentions in Constitutional Adjudication: Three Objections and Responses*, 82 NW. U. L. REV. 226, 281 (1988); Charles A. Lofgren, *The Original Understanding of Original Intent?*, 5 CONST. COMMENT. 77, 79 (1988)); see also Robert G. Natelson, *The Founders’ Hermeneutic: The Real Original Understanding of Original Intent*, 68 OHIO ST. L.J. 1239, 1242-43 (2007) (participating in the conversation chronicled by Nelson, *supra* note 19); Logan E. Sawyer III, *Principle and Politics in the New History of Originalism*, 57 AM. J. LEGAL HIST. 198, 207 n.76 (2017) (explaining the place of Powell’s article in the intellectual history of modern originalism). In fact, there is evidence on both sides of the question because the thesis was too broadly stated. It is true that the Founders would have expected judges to apply an idealized intent to a public law and that, at the time of framing and ratification, many Americans thought a written Constitution was more like a public law. It is not true, however, that Americans would have expected judges to treat “any legal document” that way. Private acts, treaties, and contracts were subject to stricter rules of interpretation.

68. *Levinz v. Will*, 1 U.S. (1 Dall.) 430, 434 (Pa. 1789); see also *Stewart v. Foster*, 2 Binn. 110, 121 (Pa. 1809) (stating that courts must “carry into execution the true intention of the lawgivers, and . . . in some instances, to attain this end, the words of the law have been enlarged, and in other instances, restricted”).

69. *Ex parte Leland*, 10 S.C.L. (1 Nott & McC.) 460, 466 (S.C. Const. Ct. App. 1819); see also *Moore’s Ex’rs v. Gwathmey*, 5 Ky. (2 Bibb) 334, 334 (1811) (“It would be a rigid construction of this act to confine its provisions to those who sue or are sued in their own right. The act is a remedial one, and ought to receive a liberal construction. The mischief intended to be remedied, was the delay in the administration of justice. Claims against executors or administrators, being within the mischief, ought to be embraced by the remedy.”); *Hersha v. Brenneman*, 6 Serg. & Rawle 2, 4 (Pa. 1820) (“[I]f . . . rigidity of construction were to pre-

plained Vermont's eminent jurist Nathaniel Chipman, that judges should play a role that in effect contributed to the legislative process, as "judges, from the nature of their official employment, are informed of the difficulties, which arise in the interpretation of the laws, and of those cases, in which they prove deficient, unequal, or unjust in their operation."⁷⁰

Judges also took it upon themselves to weave smoothly together legislative innovations and common law norms. In doing so, they refused to "impute[] to the Legislature" meanings that were "pregnant with . . . absurdity and inconveniency."⁷¹ Instead, although "[t]he words of the Act" would "seem to warrant" one result, a court might hold that "the absurdities of that construction incline us to a different one."⁷² When the words of a statute suggested an unjust result, a judge might explain that "[r]espect for the legislature forbids me to entertain an opinion that such was their real intention."⁷³

B. Courts Interpreting Private Acts Looked to the Subjective Intentions of the Actual Legislators; Courts Interpreting Public Acts Looked to the Intentions of an Idealized Legislature.

Courts sought to discover the legislature's intent in all statutory-interpretation cases. But "intent" meant very different things depending on

vail, it would prevent grandchildren from petitioning the Court," a potential class of beneficiaries of the law under consideration that, "[a]lthough not within the words, . . . are so entirely within the equity of the act."); *Dilliard v. Tomlinson*, 15 Va. (1 Munf.) 183, 211 (1810) (opinion of Roane, J.) ("I will not bottom myself upon the mere letter of the statute . . . and obstinately contend for a construction which is reprobated by the actual nature of the subject."); *Browne v. Turberville*, 6 Va. (2 Call) 390, 403 (1800) (opinion of Lyons, J.) ("It is a rule in the construction of statutes, that the intention, when it can be discovered, must be followed with reason and discretion, although the interpretation may seem contrary to the letter of the statute."). Public-act cases often cited Heydon's Case (1584) EWHC Exch. J 36, [3]; 76 Eng. Rep. 637, 638-9; 3 Co. Rep. 7 a, 7 b-8 a ("[T]he office of all the Judges is always to make such [] construction as shall suppress the mischief, and advance the remedy, and to suppress subtle inventions and evasions for continuance of the mischief, and *pro privato commodo*, and to add force and life to the cure and remedy, according to the true intent of the makers of the Act, *pro bono publico*.").

70. NATHANIEL CHIPMAN, *SKETCHES OF THE PRINCIPLES OF GOVERNMENT* 126 (Rutland, Vt., J. Lyon 1793). For more on this tendency, see generally Peterson, *supra* note 20.

71. *Lewis v. Maris*, 1 U.S. (1 Dall.) 278, 288 (Pa. Ct. Err. & App. 1788).

72. *Laws v. Davis*, 1 Del. Cas. 256, 259 (Ct. Com. Pl. 1800).

73. *Stewart v. Keemle*, 4 Serg. & Rawle 72, 74 (Pa. 1818); see also *Waln v. Shearman*, 8 Serg. & Rawle 357, 360 (Pa. 1822) ("[G]eneral expressions are sometimes to be modified where they are inconsistent with other parts of the same law, or of other laws on the same subject; or where they would produce a degree of injustice not to be attributed to the legislature.").

whether the act in question was public or private. When interpreting a private act, judges looked for the particular motives of the legislators who had passed the bill. Just as in a case involving a “contract[] of individuals,” courts considering such acts sought “to effectuate” “the intention of parties.”⁷⁴ And because, like a private contract, a private statute involved the “assent of two or more minds,” “a private act,” like a private contract, “must be construed by a careful examination of its language, and by no other mode.”⁷⁵

This had important consequences beyond whether a court would read the text broadly or narrowly. Whereas a judge would construe a public act to align with and incorporate other laws on the same topic, the *in pari materia* rule could not aid the interpretation of a private act. That is because the meaning of a private act was no more than whatever the original petitioner and the legislature acting on his petition would have understood it to be, a court explained. It made little sense to require an “individual” to “look into and carefully examine the language of other grants and private acts, in order to ascertain the true meaning of the” one “made for his own benefit.”⁷⁶ Instead, courts must restrict themselves to ascertaining “the fair and honest intention of the parties,” “by resorting to the provisions of the act itself,” and “without affixing to words or expressions any other than the meaning which they ordinarily bear.”⁷⁷

When interpreting public acts, by contrast, courts reasoned from the presumed intent of an idealized legislator. Their method was “to suppose the law maker present, and . . . ask[] him the question—did you intend to comprehend this case? Then you must give yourself such answer as you imagine, he being an upright and reasonable man, would have given.”⁷⁸ Read enough of these cases and one gets to know this imagined “reasonable legislator” very well: he was respectful of common-law norms and also learned enough in the law to avoid creating costly inconsistencies, unexplained windfalls, and senseless hardships. The resulting interpretation might go well beyond the text of the act. But if this “imagin[ary],” “upright and reasonable” “law maker” would have meant the words “to comprehend this [interpretation],” the court could “safely hold the case to be within the equity of the statute; for while you do no more than he would have done, you do not act contrary to but in conformity with the statute.”⁷⁹

74. *Donnelly v. Vandenbergh*, 3 Johns. 27, 40 (N.Y. 1808).

75. *Thomas v. Mahan*, 4 Me. 513, 516-17 (1827).

76. *Id.* (emphasis omitted).

77. *Id.* at 517.

78. ARGUMENTS AND JUDGMENT OF THE MAYOR’S COURT, *supra* note 34, at 16.

79. *Id.*

Sometimes fealty to this idealized intent required broadening narrow statutory language; other times it required making exceptions to statutes that had none on their face. As Justice Wilson explained, “[i]n making laws, it is impossible to specify or to foresee every case,” and so judges “interpreting them” should construe an exception to a law in “those cases . . . which the legislator himself, had he foreseen them, would have specified and excepted.”⁸⁰ Only this method led to the “true and sound construction” of a public act, because it grounded interpretation in “the spirit of the law, or the motive which prevailed on the legislature to make it.”⁸¹

C. Legislative History Was Never Relevant to the Interpretation of a Public Act but Could Sometimes Be Helpful when Interpreting a Private Act.

No matter the type of law at issue, the ordinary rule of statutory interpretation was that “[t]he meaning of the legislature must be eviscerated from the act itself” with no regard to “the declaration of individual members.”⁸² Legislative history was “unallowable,” Attorney General William Wirt affirmed, “in the construction of a legislative act of a general and public nature.”⁸³ But because a private act was “in truth, rather of the nature of a contract . . . than an act of legislation,” Wirt said, the rule could bend.⁸⁴ Just as an ambiguous term in a contract might be explained with parol evidence, the legislative record could sometimes cast light on a difficult word in a private act. In other words, it should be “allowable to look into the circumstances which led to that contract and formed its basis.”⁸⁵ In an appropriate case, materials such as “the petition and report of the committee, on which the act is founded, may throw some light on its construction.”⁸⁶

“To determine the nature and effect” of private acts, Connecticut’s Supreme Court explained in 1816, “we must consider the object of the party, and the intent of the legislature,” in part through an examination of the legislative record.⁸⁷ “Though some words may be used which might be proper in the grant

80. 2 JAMES WILSON, *THE WORKS OF THE HONOURABLE JAMES WILSON*, L.L.D. 260 (Bird Wilson ed., Phila., Bronson & Chauncey 1804).

81. *Id.*

82. *People ex rel. Att’y Gen. v. Utica Ins.*, 15 Johns. 358, 371 (N.Y. 1818) (argument of counsel).

83. *Claim of the Representative of Henry Willis*, 5 Op. Att’y Gen. 752, 753 (1823).

84. *Id.*

85. *Id.*

86. *Id.*

87. *Chalker v. Dickinson*, 1 Conn. 510, 514 (1816).

of exclusive rights, yet these may be explained by the allegation in the memorial that is, in the petition or affidavit the citizen had submitted to the legislature, “and we must take into view all that is said to ascertain the intent.”⁸⁸ Legislative materials also played a role in the rarer cases alleging that the beneficiary of a private act had taken advantage of the legislature. In these cases, litigants tried to void a private act by proving that a petitioner had “obtained” the act “upon fraudulent suggestions.”⁸⁹ Courts were open to these arguments. Given the tendency of legislatures to “pass[] such acts . . . on the bare suggestion of the applicants,” explained a New York court, it only made sense to hew to the practice of granting relief whenever “the suggestions on which the act is passed are proved fraudulent.”⁹⁰

D. Beneficiaries of Private Acts Had to Apply to the Legislature to Cure Any Defects; when a Public Act Required Amendment, Courts Sometimes Supplied One Themselves.

Another important distinction between public and private statutes was the attitude courts took toward the possibility of amendment. Courts required private citizens, corporations, and even towns and cities, to apply to the legislature for amendments to their private acts if they required an iota of power or privilege that extended beyond the terms of their original grant.⁹¹ By contrast, when a public statute needed updating, judges sometimes did that work through equitable interpretation instead of referring the law back to the legislature. As Justice Wilson’s guidance on interpretation highlighted, courts interpreting public acts would add or subtract language to account for problems or

88. *Id.* at 514; *see also id.* at 518 (“In construing the resolve, we have, doubtless, a right to recur to the recital, which precedes it, and the memorial, upon which it is founded, precisely as we might, in any case, consult the preamble of a statute.”).

89. *Jackson v. Nestles*, 3 Johns. 115, 132 (N.Y. Sup. Ct. 1808).

90. *Catlin v. Jackson*, 8 Johns. 520, 557 (N.Y. 1811).

91. *See, e.g., Goszler v. Corp. of Georgetown*, 19 U.S. (6 Wheat.) 593, 597 (1821) (noting that “[a] Corporation,” such as the town of Georgetown, “can make such contracts only as are allowed by the acts of incorporation”); *Johnson v. Hills*, 1 Root 504, 504 (Conn. Super. Ct. 1793) (recognizing that “if” the beneficiary of a private act believes his act is poorly drawn, “the legislature will correct it”). While such rules were consistent over this period, the distinction between what was thought of as public and private legislation did evolve. The evolution in how Americans thought about cities and towns, and whether they were private enterprises or entities of public obligation and trust, has been the subject of a fascinating book. HARTOG, *supra* note 8, at 179–239; *see also* Frug, *supra* note 8, at 677. The methods judges applied to interpret the relevant statutes are another way to measure the evolution of the public/private distinction in the history of the city and in other contexts.

opportunities that the enacting legislature may not have “foreseen.”⁹² New York’s Chancellor Kent decided, more than once, to interpret the statutes authorizing the construction of the Erie Canal to extend the powers state surveyors and other officers needed, or to afford compensation to citizens disrupted by the work, in ways that went beyond what the text of those statutes set out.⁹³

To summarize, lawyers and jurists of the late-eighteenth and early-nineteenth centuries drew a meaningful legal distinction between two different types of statutes. Justice Wilson observed that “acts of very different kinds are drawn and promulgated under the same form.”⁹⁴ Private acts, such as a “law to vest or confirm an estate in an individual” and “a law to incorporate a congregation or other society,” were “passed in the same manner” as any “law respecting the rights and properties of all the citizens of the state.”⁹⁵ But although these were “clothed in the same dress of legislative formality; and are all equally acts of the representatives of the freemen of the commonwealth,” it should not “be pretended” that the same legal rules applied to the two types of legislation.⁹⁶ The rules applying to each were so distinct that, in cases involving statutory interpretation, categorization often determined the outcome.⁹⁷

92. 2 WILSON, *supra* note 80, at 260.

93. See, e.g., *Rogers v. Bradshaw*, 20 Johns. 735, 740 (N.Y. 1823) (“We must take expressions in the most extensive sense . . . the sense most suitable to the subject, and best adapted to the facility and success of a great and generous scheme of public policy.”); *Jerome v. Ross*, 7 Johns. Ch. 315, 342 (N.Y. Ch. 1823) (“Statutes made for the public good, and for general and beneficent national purposes, are to receive a very liberal construction, and to be expounded in such a manner, as that they may, as far as possible, attain the end.”). See generally Peterson, *supra* note 20 (discussing Chancellor Kent’s method of interpretation).

94. 3 JAMES WILSON, *THE WORKS OF THE HONORABLE JAMES WILSON* 414 (Bird Wilson ed., Phila., Bronson & Chauncey 1804).

95. *Id.*

96. *Id.*

97. See, e.g., *Ellis v. Marshall*, 2 Mass. 269, 276 (1807) (“The determination of the first point requires that we should ascertain the true nature and character of this legislative proceeding. If it were a public act, predicated upon a view to the general good, the question would be more difficult. If it be a private act, obtained at the solicitation of individuals, for their private emolument, or for the improvement of their estates, it must be construed, as to its effect and operation, like a grant.”); see also *Threadneedle v. Lynam* (1675) 86 Eng. Rep. 939, 939; 2 Mod. 57, 57 (holding, in a seriatim opinion, that “this being a private Act is to be taken literally,” but “North, Chief Justice, agreed that private Acts which go to one particular thing are to be interpreted literally; but this statute extends to all bishops, and so may be taken according to equity; and therefore he, and Wyndham and Atkins, Justices, held the lease to be good,” and a further note adding: “[b]ut this case was argued when Vaughan was Chief Justice; and he, and Ellis, Justice, were of another opinion”).

The jurisprudential rules I have just described were not invariable—nothing is. For one thing, there was some blurring at the edges between the public and private categories, and some kinds of statutes (like those establishing towns and cities) transitioned over time from one category to the other.⁹⁸ And there was always the possibility that a lawyer or judge might argue that a particular private act, like one establishing an important bank or accommodation, was so important to the public that it should get public-act treatment.⁹⁹ For another, not all judges felt it was their place to alter the language of statutes in the courtroom. In a South Carolina case in 1804, the court split 2-2, with half of the judges eager to apply equitable interpretation to a public act to broaden its terms, and the other half of the judges uncomfortable with broad, atextual interpretation where the words of the statute were unambiguous.¹⁰⁰

But courts in every American jurisdiction did recognize the distinction between public and private acts.¹⁰¹ And these rules describe the consistent jurisprudence of the nation's most important jurisdictions, including Massachusetts, Pennsylvania, New York, and Virginia.¹⁰² In other words, Marshall's state-court peers—the nation's leading judges—followed these rules, including the judges of the Supreme Court in Marshall's home state.¹⁰³

98. HARTOG, *supra* note 8, at 179-239; see Frug, *supra* note 8, at 677.

99. See, e.g., *Rogers v. Bradshaw*, 20 Johns. 735, 742 (N.Y. 1823) ("Turnpike roads are, in point of fact, the most public roads or highways that are known to exist, and, in point of law, they are made entirely for public use . . .").

100. *Marane v. Carroll*, 2 S.C.L. (2 Bay) 525, 527 (1804); see also *Nichols v. Wells*, 2 Ky. (Sneed) 255, 259 (1803) ("[I]n their judicial capacity [judges] are bound by settled rules of construction, and it is their duty to declare what the law is and not what it should have been.").

101. See Peterson, *supra* note 20, at 717.

102. *Id.* at 748-60.

103. See, e.g., *Dilliard v. Tomlinson*, 15 Va. (1 Munf.) 183, 211 (1810) (opinion of Roane, J.); *Browne v. Turberville*, 6 Va. (2 Call) 390, 403 (1800) (opinion of Lyons, J.). Although John Marshall's style of statutory interpretation is beyond the scope of this paper, I believe he developed an idiosyncratic statutory-interpretation jurisprudence. See Manning, *supra* note 20 at 87, 89 (admitting that "the pre-Marshall Court jurisprudence is largely inconclusive," but finding that "[d]uring the Marshall Court, a more definite interpretive approach began to emerge in relation to the rules of statutory interpretation"); John Choon Yoo, Note, *Marshall's Plan: The Early Supreme Court and Statutory Interpretation*, 101 YALE L.J. 1607, 1615-16 (1992) (arguing that Chief Justice Marshall took disparate strains in the eighteenth-century jurisprudence of statutory interpretation and crafted a new, text-focused method designed to shield the Court from politics). His divergence from his peers is likely due to the superior institutional competence of Congress as compared to the state legislatures, and to the political risks of an atextual statutory interpretation in plain view of his legally savvy political adversaries in successive Republican congressional majorities. That he nevertheless understood the distinctions between public and private acts and their interpretive consequences is obvious from his handling of the private acts at issue in *Fletcher v. Peck* and *Dartmouth College*

E. These Rules Describe Two Paradigms of Interpretation with Broader Applications in Founding-Era Jurisprudence.

These distinct paradigms of interpretation applied more broadly than the statutory-interpretation context. I refer throughout this Article to the “private-act analogy” and the “public-act analogy,” but this is shorthand. It makes sense to explain paradigms of interpretation using the distinction between public and private legislation because arguments over a statute’s categorization were standard in any early American lawyer’s practice. Lawyers arguing over the interpretive principles applicable to the Constitution must have relied on their experience making similar arguments in run-of-the-mill domestic litigation. But these paradigms also explain the Founders’ approaches to interpretation in other contexts. And in these other contexts, the choice between broad and strict interpretative methodologies was often based on a judgment about whether the legal instrument in question represented an *exercise* of sovereign authority, which courts should make as effective and as rational as possible, or a *delegation* or “abandonment” of sovereign authority, the extent and details of which “ought not to be presumed.”¹⁰⁴

In treaties, sovereigns delegate or limit their own sovereignty in certain ways. The Founders therefore fit treaties into the category of legal instruments requiring what I am calling private-act interpretation. In *Ware v. Hylton*, an important early treaty case, the first Supreme Court urged that the “intention of the framers of the treaty, must be collected from a view of the whole instrument, and from the words made use of by them to express their intention, or from probable or rational conjectures.”¹⁰⁵ And, “[i]f the words express the meaning of the parties plainly, distinctly, and perfectly, there ought to be no other means of interpretation.”¹⁰⁶ Strict-construction advocates like St. George Tucker compared the Constitution to a treaty to justify this paradigm of interpretation, what I am calling the “private-act analogy.” Tucker made this comparison while citing Vattel’s *Law of Nations* for the rule that sovereigns are presumed to have retained all sovereign powers not expressly delegated away.¹⁰⁷

and from his reliance on public-act interpretive principles in other contexts. See *infra* Part III.

104. *Proprietors of Charles River Bridge v. Proprietors of Warren Bridge*, 36 U.S. (11 Pet.) 420, 584, 650 (1837).

105. 3 U.S. (3 Dall.) 199, 239 (1796).

106. *Id.*

107. See EMMERICH DE VATTTEL, *THE LAW OF NATIONS* bk. I ch. 2 § 16 (Charles G. Fenwick trans., Carnegie Inst. of Wash. 1916) (1758); 1 ST. GEORGE TUCKER, *BLACKSTONE’S COMMENTARIES: WITH NOTES OF REFERENCE TO THE CONSTITUTION AND LAWS, OF THE FEDERAL*

Note that this presumption against the derogation of sovereign power is the same principle the Taney Court cited in the *Charles River Bridge* case to explain why a private act must be narrowly construed.¹⁰⁸ The overlap between the rules of interpretation applicable to legal instruments in this broad category could be explicit: a case interpreting a treaty might refer to rules of construction for “a law, treaty, or contract” in one breath.¹⁰⁹

This Article uses “private-act analogy” as its shorthand even though, in some ways, “treaty” might seem a closer fit for the compact theorist’s preferred interpretive methodology, especially considering their argument that the Constitution was an agreement that appointed no neutral arbiter among its sovereign parties. “Treaty” also has the attractive quality that it was terminology these theorists themselves used.¹¹⁰ This Article nevertheless uses “private act” as its shorthand for the paradigm of interpretation Jefferson advocated because the goal here is to uncover and explain interpretive conventions that formed building blocks of Founding-era jurisprudence. The rules of statutory interpretation are a better tool for this task, because they were better developed and provide a clear view of what each side in the early American debate over constitutional interpretation was trying to accomplish. Courts had applied a uniform and coherent methodology to private-act interpretation through decades of uncontroversial litigation, while facing no urgent political pressure to produce particular outcomes.¹¹¹

A long, consistent practice of statutory interpretation meant that the conventions applicable to types of legislation were on the tip of the tongue for a lawyer of this era. Furthermore, because of its details, the private-act analogy is more helpful for discerning the metes and bounds of the broader paradigm than a focus on treaty interpretation would be. It is less clear how the law of treaty interpretation would value the recollections of treaty negotiators, in con-

GOVERNMENT OF THE UNITED STATES, AND OF THE COMMONWEALTH OF VIRGINIA app. 151 (The Lawbook Exch. 1996) (1803) (citing DE VATTEL, *supra*, at bk. II, ch. 17, §§ 305, 308 (describing the need to narrowly construe “objectionable” delegations of sovereign power)).

108. 36 U.S. (11 Pet.) at 584, 650.

109. See *Green v. Biddle*, 21 U.S. (8 Wheat.) 1, 89–90 (1823); see also Akhil Reed Amar, *Of Sovereignty and Federalism*, 96 YALE L.J. 1425, 1446–51 (1987) (quoting authorities using the term “treaty”).

110. See Amar, *supra* note 109, at 1453 (asserting that Jefferson’s “interpretive strategy” was to suggest that the Constitution, as a compact, must be “strictly construed, in accordance with the traditional rule that treaties generally be interpreted narrowly”).

111. Like private acts, treaties were usually strictly construed. Still, facing a difficult situation in *Schooner Peggy*, Chief Justice Marshall analogized a treaty to public legislation and interpreted the text practicably. See *United States v. Schooner Peggy*, 5 U.S. (1 Cranch) 103, 108–110 (1801).

trast to the treatment of legislative history in the methodology applicable to private legislation. Nor would it make as much sense to use the treaty analogy to suggest, as some of the compact theorists did, that Federalist arguments amounted to a fraud of the type that risked voiding the law.¹¹²

That said, I would not like my reader to be distracted by the choice of nomenclature here.¹¹³ This Article contrasts two broad categories of legal instruments and applicable interpretive paradigms, of which public and private legislation are two examples. The question, always, was not whether the Constitution was a public or private act, but which kind of law provided the best *analogy*, and therefore which paradigm of interpretation was most appropriate. A distinction between these two paradigms of interpretation—between interpretation appropriate for “the general law of the land”¹¹⁴ or interpretation appropriate for a “compact,”¹¹⁵ a word they sometimes used to describe private acts—would become relevant for the Founding generation’s interpretation of the Federal Constitution. Just as in litigation over the characterization of statutes, those with different views of federal power devoted their energies to a battle over how the Federal Constitution ought to be characterized. That is because under the jurisprudence of their time, the categorization of written law dictated a suite of case-determinative interpretive tools and choices.

II. THE INVENTION OF STRICT CONSTRUCTION

Hagiographies of the great Chief Justice Marshall assume that he took office before any major interpretations of the Constitution had been offered, and suggest that part of his greatness was that he wrote in clean lines on a blank slate. In fact, Marshall did not have that luxury. Familiar as it was to the Founding generation, it should come as no surprise that the distinction between public and private legislation with its attendant methodological ramifications underlay the formative debates over the Constitution.

112. See, e.g., *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 366 (1819) (the State’s advocate contending that an expansive interpretation would perpetrate a fraud on “the people, who were lulled into confidence, by the assurances of its advocates, that [the Constitution] contained no latent ambiguity”). Of course, the secessionist impulse seems very in line with the behavior of the jilted party in a breached treaty, but serious talk of secession came only after the period under discussion.

113. To a hammer, everything looks like a nail. It may very well be that to a statutory-interpretation expert, everything begins to look like a statute.

114. *Jenkins v. President of Union Tpk. Rd.*, 1 Cai. Cas. 86, 93 (N.Y. Sup. Ct. 1804).

115. *In re St. Mary’s Church*, 7 Serg. & Rawle 517, 559–60 (Pa. 1822).

During the Convention, James Madison worried that a mere compact among states would leave the union fragile and the federal government weak. He advocated for something that could claim the mantle of the “law of the land” and, after the Convention, the Constitution’s Anti-Federalist opponents attacked it on those terms. Both Madison and the Anti-Federalists seemed to understand that the conventions of interpretation applicable to public legislation would apply to the new Constitution. But Madison soon came to regret the public-act analogy he had helped to encourage. As the first Congress debated the Bank of the United States in the shadow of petitions to abolish slavery, he feared that a broad construction of the Constitution could produce a schism between the Northern and Southern states that could threaten the young Republic in its infancy.

In his opposition to the bank proposal, Madison started to describe the Constitution as a grant of limited authority and to reject the use of public-act interpretive conventions. Madison committed to this position after Congress passed the Alien and Sedition Acts. As the federal government began to display the vices of a monarchical system, Madison and Jefferson would argue that the Constitution was a compact to which states had consented on specific terms and from which they could withdraw. The description of the Constitution as a compact among preexisting states made it more like private legislation, that is, a limited delegation of power from a set of sovereigns. Proponents of compact theory sometimes used the language of “treaty,” “federation,” or “contract,” but the consistent legal ramification of their argument was that the strict, text-based interpretive methodology of private-act statutory interpretation must apply. It was this compact theory that would provide the counterpoint for Marshall’s nation-building jurisprudence.

A. By the People or by the States: Choosing Between Public and Private Framing

During the Constitutional Convention, James Madison rejected ratification procedures that would have made the new federal government into a mere league or treaty. He explained that he “considered the difference between a system founded on the Legislatures only, and one founded on the people, to be the true difference between a league or treaty, and a Constitution.”¹¹⁶ And Madison saw two important benefits to making a “Constitution” rather than what Ellsworth called a “compact” “to which the States, by their Legislatures, make

116. 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 93 (Max Farrand ed., 1911) (emphasis omitted).

themselves parties.”¹¹⁷ The first was that a compact made the union too contingent. “The doctrine laid down by the law of Nations in the case of treaties,” Madison explained, “is that a breach of any one article by any of the parties frees the other parties from their engagements.”¹¹⁸ If the Constitution were more like a treaty among the states, a violation by any one of them would throw the entire project into peril. “In the case of a union of people under one constitution,” by contrast, an isolated breach would not undermine the fundamental law.¹¹⁹

The second, related advantage was that a true constitution would bind legislatures as a mere compact could not. While “a law violating a treaty ratified by a preexisting law, might be respected by the Judges as a law, though an unwise or perfidious one,” Madison explained, “[a] law violating a constitution established by the people themselves, would be considered by the Judges as null & void.”¹²⁰ Only a general law of this kind could support judicial review.

The Constitution’s Anti-Federalist opponents warned that these supposed advantages contained the seeds of tyranny. The Constitution’s plan made courts the final arbiters of its meaning, and if the Constitution were interpreted “according to the rules laid down for construing a law,”¹²¹ its text would be subject to broad “equitable construction.”¹²² Article III, they worried, empowered judges “to explain the constitution according to the reasoning spirit of it, without being confined to the words or letter.”¹²³ “The constitution itself strongly countenances such a mode of construction,” Brutus warned.¹²⁴ The expansive wording of the preamble would encourage courts “to give such a meaning to the various parts, as will best promote the accomplishment of the end.”¹²⁵ Because only a wide “latitude of interpretation” would “most effectually promote the ends the constitution had in view,” it was anyone’s guess “how

117. JAMES MADISON, JOURNAL OF THE FEDERAL CONVENTION 413 (n.p., E.H. Scott ed., 1893) (1840) (quoting Oliver Ellsworth).

118. *Id.* at 416.

119. *Id.*

120. 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 116, at 93.

121. Essays of Brutus, No. XI, N.Y. J. (Jan. 31, 1788), reprinted in 2 THE COMPLETE ANTI-FEDERALIST 417, 419 (Herbert J. Storing ed., 1981).

122. *Id.* at 421.

123. *Id.* at 419. Brutus’s arguments and the Federalists’ response are discussed in detail in Eskridge, *supra* note 20, at 1047-57.

124. Essays of Brutus, No. XI, *supra* note 121, at 420-21.

125. *Id.* at 421.

this manner of explaining the constitution will operate in practice.”¹²⁶ As Anti-Federalists argued in the state-ratification conventions, phrases like “necessary and proper” and “general welfare” were so vague that they provided no practical limits to judicial or congressional construction.¹²⁷

The Federalist response was not exactly a denial. The federal courts would have no “greater latitude in this respect than may be claimed by the courts of every State,” said Hamilton—cold comfort for the critics, given the latitude we have seen those courts possessed.¹²⁸ And while Hamilton urged that “there is not a syllable in the plan under consideration which DIRECTLY empowers the national courts to construe the laws according to the spirit of the Constitution,” he admitted “that the Constitution ought to be the standard of construction for the laws.”¹²⁹

During the first session of the first term of Congress, Madison also assumed that the Constitution would be subject to broad construction. Madison agreed with the Anti-Federalist view that the enumeration of Congress’s powers could not, by itself, impose any meaningful restraints. When he explained the utility of a Bill of Rights in June 1789, he said that while “it is true” that the powers of the federal government “are directed to particular objects,” the Constitution had still created a government of very broad power.¹³⁰ “[E]ven if Government keeps within those limits, it has certain discretionary powers with respect to the means, which may admit of abuse,” because the “Necessary and

126. *Id.*

127. See, e.g., *Essays of Brutus, No. I*, N.Y. J. (Oct. 18, 1787), reprinted in 2 THE COMPLETE ANTI-FEDERALIST, *supra* note 121, at 363, 367 (“The powers given by” the Necessary and Proper Clause “are very general and comprehensive, and it may receive a construction to justify the passing almost any law”); see also GEORGE MASON, OBJECTIONS TO THE CONSTITUTION OF GOVERNMENT FORMED BY THE CONVENTION (1787), reprinted in 2 THE COMPLETE ANTI-FEDERALIST, *supra* note 121, at 11, 13 (detailing Mason’s objections to the Constitution); 4 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 55–56 (Jonathan Elliot ed., Washington, D.C. Jonathan Elliot 1836) (quoting Timothy Bloodworth’s objections to Congress’s power over elections) [hereinafter ELLIOT’S DEBATES]; ELLIOT’S DEBATES, *supra*, at 136–39 (quoting Samuel Spencer’s objections to the broad jurisdiction of the federal courts); ELLIOT’S DEBATES, *supra*, at 71 (quoting John Steele’s objections).

128. THE FEDERALIST No. 81 (Alexander Hamilton) (Avalon Project ed., 2008), AVALON PROJECT, https://avalon.law.yale.edu/18th_century/fed81.asp [<https://perma.cc/T5MH-9L6T>].

129. *Id.*

130. 1 ANNALS OF CONG. 455 (1789) (Joseph Gales ed., perm. ed. 1834) (statement of Rep. Madison).

Proper” Clause “enables” Congress “to fulfil every purpose for which the Government was established.”¹³¹

Madison’s 1789 belief that the Constitution imposed no limits on the means Congress could employ to pursue the ends enumerated in Article I is the very opposite of the position he would take during discussion of the First Bank Bill two years later, and indeed, his position on constitutional interpretation during his presidency. In comments on the Bill of Rights in 1789, he explained that because the decision as to what was necessary and proper was “for them to judge,” Congress had the power to decide that “general warrants,” or some other abusive course of action, were “necessary to collect the revenue.”¹³² A Bill of Rights, he explained, would place some outer limits on Congress’s choice of the means it might use to effectuate its enumerated powers, limits that Madison seems to have then believed were not already intrinsic to the plan of government.

But some of the concerns of the Constitution’s critics would begin to trouble Madison. William Smith, a delegate to South Carolina’s ratification convention, urged that the Tenth Amendment be revised to say that “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.”¹³³ Including the word “expressly,” he hoped, would rein in Congress’s “powers not delegated by [the] Const[itutio]n,” and “go a great way in preventing Congress from interfering with our negroes.”¹³⁴ “[O]therwise” Congress “may even within the 20 years by a strained construction of some power embarrass us very much.”¹³⁵ The word “expressly” did not make it into the final draft. And it soon became clear that Smith had been right to worry.¹³⁶ The first Congress received a petition from Benjamin Franklin, as president of the Pennsylvania Society for the Abolition of Slavery, that advanced a broad, purpose-directed interpretation of the Constitution. The abolitionists read the Constitution’s preamble to vest Congress with “many important & salutary Powers” for “promoting the Wel-

131. *Id.*

132. *Id.*

133. Letter from William L. Smith to Edward Rutledge (Aug. 10, 1789) (emphasis added), in *CREATING THE BILL OF RIGHTS: THE DOCUMENTARY RECORD FROM THE FIRST FEDERAL CONGRESS* 273, 273 (Helen E. Veit, Kenneth R. Bowling & Charlene Bangs Bickford eds., 1991).

134. *Id.*

135. *Id.*

136. See generally SEAN WILENTZ, *NO PROPERTY IN MAN: SLAVERY AND ANTISLAVERY AT THE NATION’S FOUNDING* (2018) (arguing the Constitution created a governmental structure that enabled antislavery forces to defeat slave interests).

fare & securing the blessings of liberty to the People of the United States.”¹³⁷ The petition urged “that these blessings ought rightfully to be administered, without distinction of Colour, to all descriptions of People,” and that therefore Congress ought to “[s]tep to the very verge of [its] Powers” to stop “every Species of Traffick in the Persons of our fellow Men.”¹³⁸

While some Congressmen objected to reading this petition on the grounds that it urged an unconstitutional measure, others were in favor. One congressman mused that “[p]erhaps in our Legislative capacity, we can go no further than to impose a duty of ten dollars”¹³⁹ on the importation of slaves, so as to make it less profitable. But he believed that Article III courts were not as limited as Congress. “I do not know how far I might go, if I was one of the Judges of the United States, and those people were to come before me and claim their emancipation”¹⁴⁰ He added, “I am sure I would go as far as I could.”¹⁴¹ A Southern congressman growled in response that he “believe[d] his judgement would be of short duration in Georgia,” and that “perhaps even the existence of such a Judge might be in danger.”¹⁴²

B. The Bank of the United States and the Emergence of the Private-Act Analogy

It was in this context that the first arguments over the Constitution’s categorization emerged. In early 1791, in the third session of that same term, Congress considered the constitutionality of a bill to establish the First Bank of the United States. It was there that James Madison debuted what would be an enduring set of arguments for strict construction. Between the first and the third sessions of that term, the transformation of Madison’s views on how the Constitution should be interpreted could hardly have been more dramatic. Alexander Hamilton would counter with an eloquent defense of purpose-directed interpretation.

The abolitionist petitions had established the true stakes of the Bank Bill. To admit that Congress had the power to establish a bank was to admit that the Constitution invited broad interpretation—broad enough, perhaps, to threaten

137. Petition from the Pennsylvania Abolition Society, February 3, 1790, in 2 *A NECESSARY EVIL? SLAVERY AND THE DEBATE OVER THE CONSTITUTION* 212, 212 (John P. Kaminski ed., 1995) (emphasis omitted).

138. *Id.* (emphasis omitted).

139. 2 *ANNALS OF CONG.* 1242 (1790) (statement of Rep. Scott).

140. *Id.*

141. *Id.*

142. *Id.* (statement of Rep. Jackson).

Southern slavery. That is why the question of interpretive methodology was at least as important to the combatants in the bank debate as their substantive dispute over the bill. And it may be why voting on the bill split along sectional lines, with nineteen of the twenty House votes against the bank from Southern states.¹⁴³

Madison began his attack on the Bank Bill with the textual arguments advanced by its supporters. These readings, he contended, “destroy[ed]” what he called “the essential characteristic of the government, as composed of limited and enumerated powers.”¹⁴⁴ The General Welfare Clause was meant for raising taxes and could not justify establishing a bank. Nor could the Necessary and Proper Clause “give an unlimited discretion to Congress.”¹⁴⁵ And “the preamble to the Constitution,” in setting out broad purposes, seemed to have “produced a new mine of power” in contravention of rules discouraging the use of prefatory language “for such a purpose.”¹⁴⁶

But Madison’s arguments went beyond the Constitution’s words. He pressed a theory of constitutional interpretation that closely tracked the framework used for private legislation. Madison described the Constitution as “a grant of particular powers only” that entailed certain “rules” for its “right interpretation.”¹⁴⁷ Like a lawyer in a case over a private act, he urged that the “meaning of the parties to the instrument, if to be collected by reasonable evidence, is a proper guide.”¹⁴⁸ Accordingly, he read selections from the ratification debates to show that the state conventions had expected the Constitution to grant limited and well-defined powers. And just as though he were arguing over a private act, he referred to its legislative history, recalling “that a power to grant charters of incorporation had been proposed to the general convention and rejected.”¹⁴⁹ Congress’s incorporation of the Northwest Territory, he said, uncomfortably, should not weigh against this perspective because it “was a case *sui generis*, and therefore cannot be cited with propriety.”¹⁵⁰

143. This insight is from John Mikhail, *Fixing Implied Powers in the Founding Era*, 34 CONST. COMMENT. 507, 515 (2019) (reviewing JONATHAN GIENAPP, *THE SECOND CREATION: FIXING THE AMERICAN CONSTITUTION IN THE FOUNDING ERA* (2018)).

144. 2 ANNALS OF CONG. 1947 (1791) (statement of Rep. Madison, Feb. 2, 1791).

145. *Id.* at 1946.

146. *Id.* at 2009 (statement of Rep. Madison, Feb. 8, 1791).

147. *Id.* at 1945 (statement of Rep. Madison, Feb. 2, 1791).

148. *Id.* at 1946.

149. *Id.* at 1945.

150. *Id.* at 2011 (statement of Rep. Madison, Feb. 8, 1791).

Madison pressed his theme, warning that incorporating a bank required an unacceptable “latitude of interpretation.”¹⁵¹ “[T]he doctrine of implication is always a tender one,”¹⁵² he argued, and something as fundamental as congressional authority could not be “deduced by implication.”¹⁵³ Madison did not shrink from the consequences of his theory: “Had the power of making treaties . . . been omitted, however necessary it might have been,” he argued, “the defect could only have been lamented, or supplied by an amendment of the Constitution.”¹⁵⁴ If this bill were possible, he said, Congress’s power could “reach every object of legislation, every object within the whole compass of political economy.”¹⁵⁵ No one listening could have failed to think of slavery when he warned that the Bank Bill “establishes a precedent of interpretation, levelling all the barriers which limit the powers of the General Government, and protect those of the State Governments.”¹⁵⁶

Secretary of State Thomas Jefferson attached a copy of Madison’s speech to his formal opinion of counsel recommending that President Washington veto the Bank Bill after it passed in Congress. In that opinion, Jefferson warned Washington that a principle was at stake that went beyond the bank issue: “To take a single step beyond the boundaries thus specially drawn around the powers of Congress, is to take possession of a boundless field of power, no longer susceptible of any definition.”¹⁵⁷ Jefferson argued that “the Constitution allows only the means which are ‘*necessary*,’ not those which are merely ‘*convenient*,’” and that “[i]f such a latitude of construction be allowed to this phrase as to give any non-enumerated power, it will go to every one, for there is not one which ingenuity may not torture into a *convenience* in some instance or *other*.”¹⁵⁸

In his reply, Secretary of the Treasury Alexander Hamilton opposed what amounted to a private-act analogy with arguments that clearly envisioned the Constitution as a public act, subject to expansive principles of interpretation. It was here that Hamilton developed the interpretation of the Necessary and Proper Clause that Marshall would invoke in *McCulloch*. A bank, Hamilton contended, was merely the means of achieving some end. “If the end be clearly

151. *Id.* at 1949 (statement of Rep. Madison, Feb. 2, 1791).

152. *Id.* at 1948.

153. *Id.* at 1950.

154. *Id.*

155. *Id.* at 1949.

156. *Id.* at 1951.

157. Thomas Jefferson, *Opinion on the Constitutionality of the Bill for Establishing a National Bank* (Feb. 15, 1791), in 19 THE PAPERS OF THOMAS JEFFERSON 275, 276 (Julian P. Boyd ed., 1974).

158. *Id.* at 278.

comprehended within any of the specified powers, & 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.”¹⁵⁹ Hamilton’s “chief solicitude,” he said, arose “from a firm persuasion, that principles of construction like those espoused by” Jefferson “would be fatal to the just & indispensable authority of the United States.”¹⁶⁰ Instead, like any act written in service of the public welfare, it must be given a broad interpretation. The “sound[er]” principle was “that the powers contained in a constitution of government, especially those which concern the general administration of the affairs of a country, its finances, trade, defence & ought to be construed liberally, in advancement of the public good.”¹⁶¹

Hamilton saw nothing in the nature of the federal government to render the *pro bono publico* principle inapplicable. To say that this was a government of enumerated powers, he argued “is nothing more than a consequence of this republican maxim, that all government is a delegation of power.”¹⁶² The degree of that delegation “is a question . . . to be made out by fair reasoning & construction, upon the particular provisions of the constitution—taking as guides the general principles and general ends of government.”¹⁶³ Of course, “[t]he moment the literal meaning is departed from, there is a chance of error and abuse. And yet an adherence to the letter of its powers would at once arrest the motions of the government.”¹⁶⁴ That liberal constructions left greater room for error “may be a prudential reason for caution in practice,” he said, “but it cannot” dictate a “rule of restrictive interpretation.”¹⁶⁵

Hamilton also rejected Jefferson’s legislative-history claim that the power to grant corporate charters had been considered and dropped by the Constitutional Convention. “[W]hatever may have been the intention of the framers of a constitution, or of a law, that intention is to be sought for in the instrument itself, according to the usual & established rules of construction.”¹⁶⁶ After all,

159. Alexander Hamilton, *Final Version of an Opinion on the Constitutionality of an Act to Establish a Bank* (Feb. 23, 1791), in 8 THE PAPERS OF ALEXANDER HAMILTON 97, 107 (Harold C. Syrett, Jacob E. Cooke, Jean G. Cooke, Cara-Louise Miller, Dorothy Twohig & Patricia Syrett eds., 1965).

160. *Id.* at 97.

161. *Id.* at 105.

162. *Id.* at 100.

163. *Id.*

164. *Id.* at 106.

165. *Id.* at 105.

166. *Id.* at 111.

“[n]othing is more common than for laws to *express* and *effect*, more or less than, what was intended.”¹⁶⁷ The meaning was “deducible by fair inference from the whole or any part of the numerous provisions of the constitution of the United States,” and “arguments drawn from extrinsic circumstances, regarding the intention of the convention, must be rejected.”¹⁶⁸ In Hamilton’s view, just as in a dispute over the meaning of a public act, the meaning of the Constitution’s Framers did not matter.

C. *The Alien and Sedition Acts and Compact Theory*

Madison and Jefferson’s argument for strict construction took on new urgency with the Alien and Sedition Acts. These statutes, Republicans asserted, undermined the basic ethic of republican government, replacing freedom of the press, state-based authority, and friendliness to the immigrant with monarchical authoritarianism. To make matters worse, members of the federal judiciary behaved as though they were a part of the executive branch, seeking out “sedition” even where local district attorneys failed to find indictable offenses.¹⁶⁹ Their resort to private-act rules of construction was no longer just a clever stratagem to avoid conflict over slavery; the compact theory now offered a rationale for state authority to interpret and enforce the Constitution at a time when the federal government seemed out of control.

Madison and Jefferson wrote the Virginia and Kentucky Resolutions, statements by each of those state legislatures rejecting the Alien and Sedition Acts as a dangerous overreach. The Resolutions asserted that states, as parties to a compact, had the right to interpret what the Constitution said and, if necessary, to repudiate what they saw as violations of that compact. Madison’s Virginia Resolutions began by urging that Virginia “views the powers of the federal government, as resulting from the compact to which the states are parties.”¹⁷⁰ Jefferson’s Kentucky Resolutions likewise explained that the Consti-

167. *Id.*

168. *Id.*

169. See JAMES MORTON SMITH, *FREEDOM’S FETTERS: THE ALIEN AND SEDITION LAWS AND AMERICAN CIVIL LIBERTIES* 342-44 (1956) (discussing Justice Chase’s pursuit of Republican printers in Baltimore).

170. James Madison, *Virginia Resolutions of 1798*, reprinted in 17 THE PAPERS OF JAMES MADISON 185, 189 (David B. Mattern, J.C.A. Stagg, Jeanne K. Cross & Susan Holbrook Purdue eds., 1991).

tution was a “compact” made “for special purposes” and of “definite powers,” to which “each state acceded as a state, and is an integral party.”¹⁷¹

By casting the Constitution as a delegation of authority from existing sovereigns, the Resolutions suggested the fitness of private-act rules of construction. Like powers conferred by legislative bargain, the federal government’s powers were “limited by the plain sense and intention of the instrument constituting that compact,” and its actions were “no further valid than they are authorized by the grants enumerated in that compact.”¹⁷² The Virginia Resolutions deprecated the tendency of the federal government “to enlarge its powers by forced constructions of the constitutional charter which defines them,” particularly its “design to expound certain general phrases” broadly.¹⁷³ The “construction applied by the General Government” to the “General Welfare” and “Necessary and Proper” Clauses, agreed the Kentucky Resolutions, “goes to the destruction of all the limits prescribed to their power by the Constitution.”¹⁷⁴ The language of the Constitution should be read narrowly, Jefferson argued. Its “words” were “meant . . . to be subsidiary only to the execution of the limited powers,” and “ought not to be so construed as themselves to give unlimited powers.”¹⁷⁵ The Constitution should instead be understood, Jefferson wrote, “according to the plain intent and meaning in which it was understood and acceded to by the several parties.”¹⁷⁶

Interpreting the Constitution this way also meant that states were not bound to accept acts they determined were unconstitutional. This point was implicit in Madison’s statement for the State of Virginia, which denied the constitutionality of a Congressional statute and insisted that it was the state’s duty to oppose it. The Kentucky Resolutions made this point explicit, arguing that the federal “[g]overnment created by this compact was not made the exclusive or final judge of the powers delegated to itself; since that would have made its discretion, and not the constitution, the measure of its powers.”¹⁷⁷ Neither Congress, nor the federal judiciary had final say on what the law is. Instead, “as in all other cases of compact among parties having no common Judge, *each party has an equal right to judge for itself*” both whether there had been any “*infrac-*

171. Thomas Jefferson, *Kentucky Resolutions of 1798*, reprinted in 30 THE PAPERS OF THOMAS JEFFERSON 550, 550 (Barbara B. Oberg ed., 2003).

172. Madison, *supra* note 170, at 189.

173. *Id.*

174. Jefferson, *supra* note 171, at 552–53.

175. *Id.* at 553.

176. *Id.*

177. *Id.* at 550 (emphasis omitted).

tions” of the Constitution and also the appropriate “*mode and measure of redress*.”¹⁷⁸

The Resolutions’ embrace of compact theory completed the emergence of a strict-constructionist alternative to Federalist jurisprudence. It also represented a dramatic about-face for Madison. Madison had understood the practical differences between creating a Constitution subject to public-act interpretation and creating a “compact.” He had helped choose a mode of ratification that he believed would lead to a public-act Constitution in order to opt into certain benefits, like judicial review, and in order to avoid the weaknesses of a “compact,” including the possibility of state nullification. But what Madison must have believed, if not during the debate over the Bank of the United States, then certainly by the time he wrote the Virginia Resolutions in 1798, was that the Convention had left him the leeway to change his position. He came to the view that the choice he, along with the majority of the Convention, made to ratify the Constitution through popular conventions, had not been written back into the text of the Constitution itself. Therefore, the text remained open to interpretation as either generally applicable law serving the public welfare or a compact of enumerated powers.

In the Virginia Resolutions, Madison committed to the compact characterization and he derived a rule of strict construction from that premise. He proffered the view that just as in a private act or treaty, the states had given up a small, well-defined portion of their sovereignty for certain expected benefits. Accordingly, the extent of the states’ grant must be construed against the grantee. Republicans saw the election of 1800 as a ratification of the position that the Virginia and Kentucky Resolutions articulated. For the next two decades and more, the Resolutions would stand as the orthodox Republican position on constitutional interpretation.

Into the 1810s, public debate over the government’s powers under the Federal Constitution continued to demonstrate the centrality of the distinction between these public-act and private-act paradigms of interpretation. Because members of Congress, as well as presidents, believed that it was their duty “in the first instance” to judge the constitutionality of the laws they debated before voting,¹⁷⁹ arguments about interpretive principles cropped up in every important political controversy, whether or not the controversy made it into court for resolution. Disputes over whether Congress could fund internal improvements turned on this, for example. An advocate of an internal-improvements bill, urging a broad construction, rejected “refined arguments on the Constitu-

178. *Id.* (emphasis added).

179. 36 ANNALS OF CONG. 1297 (1820) (statement of Rep. Cushman).

tion,” an “instrument” that was “not intended as a thesis for the logician to exercise his ingenuity on.”¹⁸⁰ The Constitution should instead be “construed with plain, good sense.”¹⁸¹ Congress must have “constructive powers” under the Constitution, said Henry Clay, the bill’s architect, as “[m]an and his language are both imperfect.”¹⁸² The Constitution was written for broad public purposes and “we cannot foresee and provide specifically for all contingencies.”¹⁸³

James Pindall, one of a minority of Federalists from Virginia, explained that men on each side of the question viewed the Constitution “in different and very dissimilar aspects.”¹⁸⁴ “Whilst those” like himself “who affirm our power to construct roads consider the Constitution as a modification of the social compact, defining and conferring legislative powers,” he thought that “gentlemen on the other side, who deny the power in question, seem to be out of humor whenever the instrument is viewed in any other than its federative character, or, as . . . a treaty between independent Powers.”¹⁸⁵ The “rules of interpretation, as applied” to each of these “are different as to their latitude of operation” in that “a treaty shall receive a more restrained construction, with regard to granted powers.”¹⁸⁶

When he vetoed the bill authorizing internal improvements, President Madison also rejected the broad construction of the Constitution it relied upon. The power to fund improvements, Madison said, could not be derived from the “General Welfare” clause.¹⁸⁷ Doing so “would have the effect of giving to Congress a general power of legislation, instead of the defined and limited one hitherto understood to belong to them.”¹⁸⁸ Admitting this power, he believed, required “an inadmissible latitude of construction.”¹⁸⁹ “[T]he permanent success of the Constitution depends on the definite partition of powers between the General and State Governments,” and “no adequate landmarks would be left by the constructive extension of the powers of Congress, as proposed in the

180. 30 ANNALS OF CONG. 855 (1817) (statement of Rep. Calhoun).

181. *Id.*

182. 32 ANNALS OF CONG. 1362 (1818) (statement of Rep. Clay).

183. *Id.*

184. *Id.* at 1340 (statement of Rep. Pindall).

185. *Id.*

186. *Id.*

187. 30 ANNALS OF CONG. 212 (1817) (quoting U.S. CONST. art. I, § 8, cl. 1) (veto message of President Madison).

188. *Id.*

189. *Id.*

bill.”¹⁹⁰ Madison’s successor, James Monroe, echoed this argument when he took office shortly thereafter. And just as a judge would advise a party attempting a power beyond the scope of the limited grant in a private act, Monroe suggested “the adoption of an amendment to the Constitution.”¹⁹¹ Only by amendment would Congress achieve “the right in question.”¹⁹²

As in the controversy over the Bank Bill, slavery protectionism remained a motivating force for those opponents of internal improvements who urged the private-act analogy. North Carolina Senator Nathaniel Macon asked a fellow North Carolinian to reconsider his support for internal improvements in these terms: “I must ask you to examine the constitution of the U.S. . . . and then tell me if Congress can establish banks, make roads and canals, whether they cannot free all the Slaves in the U.S.”¹⁹³ He asked his colleague to moderate his “love of improvement” and “thirst for glory” with “sober discretion and sound sense.”¹⁹⁴ Because legislation for internal improvements would only be possible under the public-act analogy, there was no safe way to pursue it. “If Congress can make canals, they can with more propriety emancipate.”¹⁹⁵

In the 1819 Missouri crisis as well, these familiar arguments about constitutional construction reemerged in the dispute over whether Congress had the power to condition the admission of Missouri on an antislavery restriction. Of course Congress could, said advocates of the restriction. They inferred Congress’s power to do so from “the language used in the preamble,” in which the people “declare[d]” that they had “establish[ed] the Constitution” to “promote the general welfare.”¹⁹⁶ This language clearly indicated that equitable-interpretation principles applied. Congress must construe the people’s “written instructions, in the exercise of a sound discretion, applying general expressions of [their] will to particular cases, and in adapting to exigencies, as they arise, such measures as best comport with the known character of [their] Government.”¹⁹⁷ Only when Congress was “guided by [its] own judgement and discretion, enlightened and assisted” not only by the “letter” but by the “spir-

190. *Id.*

191. 31 ANNALS OF CONG. 18 (1817) (first annual message of President Monroe).

192. *Id.*; see also *supra* Section I.D (discussing the differing attitudes toward the possibility of legislative amendment in the private- and public-act interpretive paradigms).

193. Noble E. Cunningham, Jr., *Nathaniel Macon and the Southern Protest Against National Consolidation*, 32 N.C. HIST. REV. 376, 380 (1955) (quoting Macon’s letters to Bartlett Yancey).

194. *Id.*

195. *Id.*

196. 36 ANNALS OF CONG. 1294 (1820) (statement of Rep. Cushman).

197. *Id.* at 1295.

it . . . of the Constitution,” along with “the wisdom of the ages and the jurisprudence of nations,” could the Constitution remain “competent not only to ordinary, but to extraordinary exigencies.”¹⁹⁸ Instead of the stricter private-act rule that would favor state power, therefore, “[i]n doubtful cases the construction ought to be in favor of the *grantee*.”¹⁹⁹ Only such broad constructions were “adapted to give permanency and strength to the system.”²⁰⁰

On the other side of the Missouri question, arguments for strict construction mingled with the broader conversation over the policy, economics, and even the morality of slavery. Senator William Smith of South Carolina scoffed at the idea that slavery was un-Christian, pointing out that the Old Testament positively endorsed slavery and that Jesus Christ countenanced it. He accused the antislavery contingent of “giv[ing] the Scriptures an implied construction, as different from its literal sense, as they had that of the Constitution of the United States.”²⁰¹ And he rejected the claim that “slavery is against the spirit of the Christian religion,” asking, “[w]hen, and by what authority, were we taught to separate the positive laws of God from the Christian religion?”²⁰² The antislavery position amounted to “select[ing] such laws for our obedience as we find suited to our inclinations and our policy only, and abrogat[ing] the others.”²⁰³ He expressed a fervent hope that no priests “had given in to this ungodly opinion, that they could pare down the Old and New Testaments, so as to make a *convenient* religion of them instead of an unerring one.”²⁰⁴ With the word “convenient,” he echoed Jefferson’s and Madison’s critiques of Hamilton’s position on the First Bank of the United States. Jefferson had complained that the Federalist interpretation of the Constitution transformed the “necessary and proper” restriction on congressional power into a grant of any power that is “merely ‘convenient.’”²⁰⁵ This wording could not have been a coincidence in 1820, just after Marshall reasserted Hamilton’s original position in *McCulloch v. Maryland*, and just after Marshall’s opinion suffered incisive criticism on this point in the national press.²⁰⁶

198. *Id.* at 1296.

199. *Id.* at 1297.

200. *Id.* (emphasis added).

201. 35 ANNALS OF CONG. 270 (1820) (statement of Sen. Smith).

202. *Id.*

203. *Id.*

204. *Id.* (emphasis added).

205. Jefferson, *supra* note 157, at 278.

206. See *infra* Section III.C.

As a lawyerly maneuver, these arguments about construction worked because they drew on a familiar distinction among categories of law that, in the statutory-interpretation context, contained detailed, well-defined sets of rules for interpretation. Jefferson and Madison knew what they were doing when they urged that the Constitution must be categorized as a “compact.” Hamilton had made this move in his private practice and would have understood its implications.²⁰⁷ Indeed, so would any other lawyer of this era. The Virginia and Kentucky Resolutions represented an intellectually compelling interpretation of the Federal Constitution, one against which Marshall would spend his whole career writing. Marshall’s jurisprudence, asserting a public-act interpretation of the Constitution, must be read in the context of this forceful private-act alternative.

III. DOCTRINAL IMPLICATIONS: THE MARSHALL COURT AND CONSTITUTIONAL INTERPRETATION

John Marshall took office in 1801 in the midst of this heated debate, and it would shape the leading constitutional decisions of his long tenure. As we have seen, the question of how to characterize the Constitution was not only about the scope of federal authority, but specifically about the role of federal courts in national governance. If the Constitution were subject to private-act interpretive rules, then judges applying it would be “mere machine[s]” totally lacking in interpretive discretion.²⁰⁸ But if the Federal Constitution were the “law of the land” — that is, something akin to a public act, then judges would have a role to play in molding federal authority to achieve its broad objectives.

One cannot understand the Marshall Court’s jurisprudence, or Marshall’s efforts to establish the Court as a co-equal branch of a powerful national government, without this context. In its major cases, the Marshall Court committed to the position that the Constitution should be interpreted as though it were public legislation. That is not to say that Marshall’s position emerged fully formed with *Marbury*. The Court and Marshall himself evolved in response to a changing political environment from a cautious beginning to a period of imperial expansion, followed ultimately by a notable retrenchment. This periodization of the Marshall Court, reflecting the ebb and flow of the Court’s relationship to other powerful institutions, helps explain all of Marshall’s jurisprudence. But it is particularly crucial to an account of his constitutional

207. See *supra* notes 34–35 and accompanying text.

208. Letter from Thomas Jefferson to Edmund Pendleton (Aug. 26, 1776), in 1 THE PAPERS OF THOMAS JEFFERSON 503, 505 (Julian P. Boyd ed., 1950).

decisions because the Supreme Court's main detractors and institutional competitors were committed to the private-act analogy.

A. *Drawing the Lines of Battle: Marbury v. Madison*

The Marshall Court would make its first foray into the interpretive debate I have described in *Marbury v. Madison*.²⁰⁹ Coming as it did just after the Republican ascendancy in the executive and legislative branches, the *Marbury* case posed more of a risk to the Court's power than an opportunity. Yet in a case about judicial authority under the Constitution, the Court could not altogether avoid the question of how the Constitution should be characterized. In a peerless work of institutional diplomacy, Marshall acknowledged and answered Jefferson's anxieties about the public-law interpretation of the Constitution while leaving room for the muscular public-law conception of the Constitution the Court would embrace when more hospitable political conditions emerged a decade later.

The conventional black-letter interpretation of *Marbury* as the work of an imperial court establishing the power of judicial review ignores its historical context.²¹⁰ The basic facts are familiar to any law student: the Judiciary Act of 1801 gave John Adams the opportunity to appoint a slew of judicial officers and judges on the eve of Jefferson's inauguration. These "midnight appointments" were made with such haste that some of the commissions remained undelivered when Jefferson took office. Jefferson instructed his Secretary of State, James Madison, not to deliver them, effectively depriving the appointees of their jobs. *Marbury*, one of the midnight appointees, petitioned the Supreme Court for a writ of mandamus directing the administration to deliver his commission.²¹¹ But that is not all.

Marbury arose at a time when the Court found itself under attack from the executive and legislative branches. Jefferson, who only a few years earlier had written the Kentucky Resolutions with their strict private-act reading of the Constitution, joined hostility to Marshall's politics with personal dislike. A new Republican majority in Congress began a campaign to purge Adams's Federalist judicial appointees. Amid heated debates over efforts to repeal the 1801 Judi-

209. 5 U.S. (1 Cranch) 137 (1803).

210. See, e.g., BRUCE ACKERMAN, *THE FAILURE OF THE FOUNDING FATHERS: JEFFERSON, MARSHALL, AND THE RISE OF PRESIDENTIAL DEMOCRACY* 189 (2005); Akhil Reed Amar, *Marbury, Section 13, and the Original Jurisdiction of the Supreme Court*, 56 U. CHI. L. REV. 443, 445 (1989); William W. Van Alstyne, *A Critical Guide to Marbury v. Madison*, 18 DUKE L.J. 1, 1 (1969).

211. See Van Alstyne, *supra* note 210, at 3-6.

ciary Act, Federalists warned Republicans that the Supreme Court could strike down their proposed legislation. Republicans responded by threatening to impeach any judge who tried. Some Republicans went so far as to advocate a constitutional amendment to limit federal judges' tenure and provide for their appointment and removal by the legislature.²¹² When the repeal legislation passed, it included a provision canceling the next two Supreme Court sittings in an effort to deny Marshall's Court the opportunity to review the bill before it went into effect.²¹³

Unsurprisingly, when the Court finally met to consider *Marbury*, Marshall was eager to *avoid* confrontation with Congress and the executive branch. Indeed, the most-remembered words of his opinion, that it is "emphatically the province and duty of the judicial department to say what the law is," was not the bold declaration of interpretive supremacy we read into it today.²¹⁴ Rather, it explained why Marshall could not simply exercise the mandamus authority set out in the Judiciary Act of 1789 to give Marbury his commission. He meant to establish no more than that the "courts, *as well as other departments*," are bound to consider and respect the limits of the Constitution notwithstanding contrary legislation.²¹⁵ And Marshall concluded that the Act's grant of mandamus authority was unconstitutional.

Marbury was a balancing act—more a piece of political advocacy than a legal ruling. Its major accomplishment was that it shielded the federal judiciary from the political fallout of the election of 1800. Along the way, Marshall was careful to pay tribute to each of America's warring factions: he soothed the Federalists by castigating President Jefferson's actions as illegal and unjust, while also reassuring Jefferson that the Court was powerless to stop him. This was the jurisprudence of self-preservation. Jefferson may not have liked the opinion—he would, a few years later, irascibly instruct his Attorney General to "stop citing that case as authority."²¹⁶ But as the opinion did not actually command or enjoin any action—as it failed to *do* anything—Jefferson was able to ignore it.

212. See RICHARD E. ELLIS, *THE JEFFERSONIAN CRISIS: COURTS AND POLITICS IN THE YOUNG REPUBLIC* 41-45 (1971).

213. Compare Judiciary Act of 1802, ch. 31, § 1, 2 Stat. 156, 156 (repealed 1826), with Judiciary Act of 1801, ch. 4, § 1, 2 Stat. 89, 89 (repealed 1802).

214. *Marbury*, 5 U.S. (1 Cranch) at 177.

215. *Id.* at 180 (emphasis added).

216. See R. KENT NEWMYER, *THE TREASON TRIAL OF AARON BURR: LAW, POLITICS, AND THE CHARACTER WARS OF THE NEW NATION* 41 (2012).

The opinion also showed Marshall walking the line between the public-act and private-act interpretations of the Constitution that Jefferson and Hamilton had so ably asserted. Jefferson's early view of the Constitution imposed extreme limits on federal government. In 1798, Jefferson explained that the Alien and Sedition Acts were unconstitutional in part because he thought Congress could not define crimes not expressly listed in the Constitution without an amendment.²¹⁷ His view of the Constitution as a "compact" dictated this stringency, in line with well-established rules for interpreting private legislation. These views also accorded with his long-held mistrust of judicial discretion even in the context of public-act interpretation. He once said that to "relieve the judges from the rigour of the text, and permit them, with pretorian discretion, to wander into its equity," risked making "the whole legal system . . . incertain."²¹⁸ And he particularly deprecated Lord Mansfield, whose "seducing eloquence" had managed "to persuade the [English] courts of Common law to revive the practice of construing their text equitably."²¹⁹ While Jefferson moderated his position after winning the presidency, these earlier views maintained their adherents, particularly among politically powerful Republicans from Virginia.

These views on the role of courts and the nature of the Constitution could not place Jeffersonians further from the arch-Federalist Hamilton's position that the Constitution, as the "law of the land," must be interpreted like other public acts. Where Jefferson deprecated Mansfield, Hamilton profoundly admired his brand of equitable interpretation.²²⁰ In Hamilton's view, judges must interpret the Constitution to effectuate their understanding of the "general principles and general ends of governments," restricted only by their own "pruden[ce]" and "caution."²²¹ Stripped of its throat-clearing caveats and subtlety, equitable interpretation of public statutes often amounted to an opportunity for judges to play a role in governance. Applied to the Constitution, it

217. Jefferson, *supra* note 171, at 550-51.

218. Letter from Thomas Jefferson to Philip Mazzei (Nov. 28, 1785), *reprinted in* 9 THE PAPERS OF THOMAS JEFFERSON 67, 71 (Julian P. Boyd ed., 1954).

219. *Id.*

220. 3 THE LAW PRACTICE OF ALEXANDER HAMILTON: DOCUMENTS AND COMMENTARY 92-93 (Julius Goebel, Jr. & Joseph H. Smith eds., 1980). Hamilton thought of Lord Mansfield as a man of "profound learning, clear intellect, and admirable judgement," as well as "wisdom and purity," who, having "adorned the jurisprudence of England," deserved "the reverence of his own age" and "the admiration of posterity." *Id.*

221. Hamilton, *supra* note 159, at 100. Additionally, for an example of a contemporaneous use of equitable interpretation in the interpretation of public statutes, see Peterson, *supra* note 20, at 714-15.

would allow judges to avoid difficulties or seize opportunities the Constitutional Convention had failed to anticipate.

Part of the genius of Marshall's *Marbury* opinion was that it reassured Jeffersonians on this score. While praising Lord Mansfield as a "very able judge," Marshall explained that American judges did not enjoy the same latitude as their British counterparts. The writ of mandamus, as Mansfield defined it, was a tool to be deployed "upon reasons of justice[,] . . . upon reasons of public policy, to preserve peace, order and good government," and "upon all occasions where the law has established no specific remedy, and where in justice and good government there ought to be one."²²² It belonged to a style of judicial governance and latitude of discretion that Hamilton admired and Jeffersonians feared. When Marshall quoted Lord Mansfield's description of the writ and then explained how the Constitution barred him from exercising the same powers, he signaled to Jefferson that his Court was safe. He signaled that he would read the Constitution as a text that constrained discretion, rather than inviting it, even where justice appeared to require a different result. In doing so, Marshall suggested—without making any promises—that there was something to distinguish his view of the Constitution from Hamilton's.

Marbury showed Marshall's skill as a conciliator, a role he learned to play during his formative experiences as a leading Federalist in Virginia. He tended to argue about politics by seeking to assuage his opponents' concerns rather than questioning their premises.²²³ This is what he was doing when he reassured Jeffersonians that he could not exercise the powers of a Lord Mansfield. This is what he was up to when he said that as a textual matter, as a matter of constitutional restriction, he must decline the power to issue writs of mandamus that an earlier Congress had conferred on the Court. But *Marbury* did not commit the Court to the position that the Constitution must be interpreted strictly. And it stopped well short of rejecting equitable interpretation or Hamilton's doctrine of implied powers.

222. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 169 (1803) (quoting *R v. Barker* (1762) 97 Eng. Rep. 823, 824-25; 3 Burr. 1265, 1266-67).

223. See, e.g., 3 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 551-562 (Jonathan Elliot ed., Washington, D.C., Jonathan Elliot 1836) (reproducing John Marshall's speech in the Virginia ratifying convention arguing that Anti-Federalists' fears about federal judges were overblown because the judges would not have undue power over the states). *Chisolm v. Georgia* would immediately refute one of the points Marshall made in this speech. See 2 U.S. (2 Dall.) 419, 450-51, 466, 467, 479, 480 (1793), *superseded by constitutional amendment*, U.S. CONST. amend. XI (restricting the ability of nonresident individuals to sue a state in federal court).

Marbury's diffidence in the face of extraordinary political pressure contrasts sharply with the full-throated endorsement of Hamilton's public-law conception of the Constitution that the Marshall Court later offered in *Martin* and *McCulloch*. The comparative boldness of the Court's opinions of the 1810s reflected its partial rapprochement with more moderate Republicans in Congress and the White House. It was a decade in which the Republican Party was broad enough to contain opposites. In the 1810s, "Republican" still described states' rights advocates like John Taylor of Caroline and John Randolph of Roanoke, who could justly be called "more Jeffersonian than Jefferson."²²⁴ But it also described men like Albert Gallatin, the Bank of the United States's biggest booster; Henry Clay, the advocate of internal improvements; and even a Hamiltonian nationalist like Justice Story. This new climate gave the Marshall Court more leeway to assert its authority.

B. *The Issue Joined: Martin v. Hunter's Lessee*

The Marshall Court would make its first explicit commitment to the Hamiltonian public-law interpretation of the Constitution in *Martin v. Hunter's Lessee*.²²⁵ The case arose when the Virginia Supreme Court refused to follow a Supreme Court decision overturning its interpretation of a federal treaty. The Virginia court issued seriatim opinions rejecting as unconstitutional the Supreme Court's appellate review of state-court judgments.²²⁶ In *Martin*, the Marshall Court responded, reviewing and reversing the Virginia court once again.

The political climate for a muscular defense of federal supremacy would never be more favorable. The Court decided *Martin* in a period of increased patriotic fervor following the War of 1812, as nationalists began to dominate the leadership of the Republican Party in Congress, and just after New England Federalists had earned national opprobrium for the states' rights stance of their Hartford Convention. But the Court's strong opinion, taking advantage of a temporary high-water mark in nationalistic sentiment at the federal level, masked an enduring institutional vulnerability.

The nominal question in *Martin*—whether Virginia's Supreme Court was subject to the Federal Supreme Court's authority—belied the political reality of

224. C. PETER MAGRATH, *YAZOO: LAW AND POLITICS IN THE NEW REPUBLIC—THE CASE OF FLETCHER V. PECK* 40 (1966).

225. 14 U.S. (1 Wheat.) 304 (1816).

226. *Hunter v. Martin*, 18 Va. (4 Munf.) 1, 11, 31 (1815), *rev'd sub nom. Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304 (1816).

the time. The fact was that during this era, Virginia was a competitor, not an inferior, jurisdiction. Virginia's law, and especially the legal opinion its legislature issued in the Virginia Resolutions of 1798, competed with the Supreme Court's for adherents. Justice Story's opinion for the Court reflected that reality. Story did not answer Virginia's defiance in a tone of exasperation; he answered it carefully and in detail, knowing he was speaking to an audience that might be swayed to either side. While Story's opinion is today taught as though it established the principles he contended for,²²⁷ as a historical matter, the institutional winner of *Martin v. Hunter's Lessee* is a closer call.

Justice Story's opinion is familiar because it is often taught in constitutional-law courses, and because much of it remains good law. The Virginia opinion Justice Story reversed is not, of course, on the modern law-school syllabus and it is tempting to dismiss the Virginia court's refusal to abide by the Supreme Court's mandate as states' rights defiance. But this casts the Virginia Supreme Court's position as political rather than legal. In fact, Virginia's interpretation of the Constitution was dangerous to the Marshall Court precisely because it was well reasoned and persuasive. Indeed, in terms of legal merit, it would be difficult to choose between the two readings of the Constitution's text and structure. What *Martin* made clear, therefore, was that the text of the Constitution alone did not resolve whether it should be interpreted as though it were public or private legislation.

The strength of Virginia's legal reasoning is worth elaborating upon in some detail. Virginia started with the undisputed premise that federal and state governments had been established by different gatherings of "the people."²²⁸ As a result, they existed as separate sovereigns, drawing on separate sources of legitimacy. The connections between these sovereigns, both positive and restrictive, were set out in detail in the Constitution's text. That text, moreover, had been capped with an interpretive instruction: the Tenth Amendment's injunction that "powers not delegated to the United States by the constitution, nor prohibited by it to the states, are reserved."²²⁹

The Virginia court read Article III with these principles in mind. It held that Section 2, setting out the Supreme Court's subject-matter jurisdiction and its appellate authority, could not be read in isolation from Section 1, which au-

227. See, e.g., PAUL BREST, SANFORD LEVINSON, JACK M. BALKIN, AKHIL REED AMAR & REVA B. SIEGEL, *PROCESSES OF CONSTITUTIONAL DECISIONMAKING* 128 (5th ed. 2006) ("[T]he power of the federal courts to review the judgments of state courts and the constitutionality of state legislation has not been seriously questioned since *Martin v. Hunter's Lessee* . . .").

228. *Martin*, 18 Va. (4 Munf.) at 14.

229. *Id.* at 21 (opinion of Roane, J.) (quoting U.S. CONST. amend. X).

thorized creation of lower federal courts. The appellate-jurisdiction provision in Section 2, Virginia explained, conferred a power to review only the judgments of those courts in which Section 1 had vested the entire judicial power of the United States. That meant that the Supreme Court's appellate jurisdiction extended only to cases that *both* concerned the subject matter listed *and* arose in whatever lower federal courts Congress might choose to establish. Any alternative interpretation created an absurdity: the court of one sovereign commanding compliance of the courts of another sovereign.²³⁰

Justice Story would counter in *Martin* that Article III, Section 2 committed "all cases" involving federal law to the Supreme Court's appellate authority, without regard to the originating court.²³¹ But Virginia argued that this took the words out of their context and, besides, proved too much. The courts of France and Spain might have to interpret a federal statute to settle a contract dispute between their own citizens over a federal land grant, for example. In a case like that one, Story's reading would justify appellate jurisdiction over the courts of France or Spain. And while the states were not as separate from the federal government as France and Spain, their connection to the federal government was defined by the Constitution, which nowhere said that the Supreme Court could review the judgments of state courts. This was a document, Virginia reasoned, whose framers were explicit when they wanted to abrogate state power—for example, in the long list of specific limitations on states' sovereignty in Article I, Section 10. It would be a violation of their oath to uphold the Federal Constitution for Virginia's judges to accept such a dramatic and unnecessary extension of federal power by implication.²³²

Nor did the Virginians see any support for Justice Story's reliance on the Supremacy Clause. Virginia's judges read the Clause to establish a rule of decision that required them to apply the Federal Constitution *as they understood it*. They could not abdicate that duty by following a judgment which they thought to be wrong. The Virginians agreed that their position risked inconsistent interpretations of federal law across the states. But this was a consequence of the Framers' design. The Framers, they reasoned, must have preferred the evil of

230. In his seriatim opinion, Judge Cabell was sure that entering a judgment on remand from the Supreme Court was no mere ministerial task. But if the Supreme Court could commandeer state judges and direct them to perform judicial duties, it must be because, for those purposes, the state courts served as lower federal courts. This was something the Constitution clearly did not contemplate. If nothing else, state-court judges could not carry out the duties of federal judicial officers because they lacked the salary and tenure protections required by Article III, Section 1. *Id.* at 15 (opinion of Cabell, J.).

231. *Martin*, 14 U.S. (1 Wheat.) at 314 (quoting U.S. CONST. art. III, § 2).

232. *Martin*, 18 Va. (4 Munf.) 1, at 24-25 (1814) (opinion of Roane, J.).

inconsistent interpretations of federal law to the evils of centralized control. And if that judgment proved unsound, the answer was a constitutional amendment—not judicial interpretation that stripped power from the states in violation of the text.²³³

With *Martin*, the Supreme Court could no longer avoid taking a definitive stance on the nature of the Constitution. The Virginia Supreme Court made it clear that the debate over whether the Constitution was a private or public act had important consequences for the Supreme Court's institutional viability. The Virginia court's vision of the Constitution did not just limit the power of Congress to legislate and the power of the President to enforce federal law. As Virginia explained it, the theory also denied the Supreme Court's authority to interpret conclusively the only body of law within its purview. Instead, as when a compact had pointed out "no common umpire," the states themselves would decide what the Constitution meant and whether its terms had been satisfied.²³⁴

The very strength of Virginia's legal reasoning compelled the Supreme Court to issue a forceful response. Virginia's opinion made it clear that in terms of legal merit, the broad and narrow visions of federal power were in equipoise. Because each was supported by persuasive readings of the Constitution's text, a choice between the two depended upon *characterization*. This characterization might be drawn from the Constitution's history, from the process of ratification, or from prudential or philosophical considerations. But the case for the ideal to which Marshall had committed his life—a strong and flexible central government supported by an authoritative Supreme Court—could not stand on text and structure alone.

This is why each court's opinion began with statements about whether the Constitution was more like public or private law. Judge Spencer Roane of Virginia began by stating that the "powers of the federal government result from the compact to which the *states* are parties," and as such, "are no farther valid, than as they are authorised by the grants enumerated in the compact."²³⁵ It was true that the Supreme Court had reviewed state-court decisions a number of times over the previous decade. But this precedent proved nothing. Roane recalled the man in Aesop's fable who, as evidence of his superiority to a lion, points to the statue of a lion being subdued by a man. If lions could sculpt, the lion retorts, they would show themselves as the victors.²³⁶ The Court's jurisdic-

²³³. *Id.* at 14 (opinion of Cabell, J.).

²³⁴. *Id.*, at 29 (opinion of Roane, J.).

²³⁵. *Id.* (emphasis added).

²³⁶. *Id.* at 29.

tion over state-court judgments had “never received the solemn and deliberate discussion and decision of that tribunal.”²³⁷ It had instead been adopted “piecemeal,” “under a latitude of construction and discretion in the Court, which is at war with the idea of limited and specified powers, in the general government.”²³⁸

Writing for the Supreme Court, Justice Story rejected the idea that the Constitution was an agreement among the states. He countered with his own origin story: “The constitution of the United States was ordained and established, not by the states in their sovereign capacities,” Story said, “but emphatically, as the preamble of the constitution declares, by ‘the people of the United States.’”²³⁹ The Constitution was “the voice of the whole American people solemnly declared” — in other words, the law of the land.²⁴⁰

From this characterization, Story derived rules of construction. Like a public act, “[t]he constitution unavoidably deals in general language.”²⁴¹ “It did not suit the purposes of the people, in framing this great charter of our liberties, to provide for minute specifications of its powers, or to declare the means by which those powers should be carried into execution.”²⁴² Instead, like other public legislation, the Constitution was written with the expectation that judges would mold it as circumstances required. After all, “[i]t could not be foreseen what new changes and modifications of power might be indispensable to effectuate” its “general objects.”²⁴³ “The instrument,” Story insisted, “was not intended to provide merely for the exigencies of a few years, but was to endure through a long lapse of ages, the events of which were locked up in the inscrutable purposes of Providence.”²⁴⁴ That is to say, it was a law designed for equitable interpretation. It was only “[w]ith these principles in view, principles in respect to which no difference of opinion ought to be indulged,” that Story could “proceed to the interpretation of the constitution, so far as regards the great points in controversy.”²⁴⁵

So eager was Justice Story to assert this point about principles of interpretation, he risked muddling his main argument. The specific question presented

237. *Id.*

238. *Id.*

239. *Martin v. Hunter’s Lessee*, 14 U.S. (1 Wheat.) 304, 324 (1816).

240. *Id.* at 326.

241. *Id.*

242. *Id.*

243. *Id.*

244. *Id.*

245. *Id.* at 327.

was whether section 25 of the Judiciary Act of 1789, the section that said the Supreme Court could review and reverse state-court decisions, was a constitutional exercise of Congress's power. In his introduction setting out the nature of the Constitution and the interpretive principles that should apply, Story suggested that section 25 was constitutional because the Constitution had been broadly framed, "leaving to the legislature, from time to time, to adopt its own means to effectuate legitimate objects, and to mould and model the exercise of its powers, as its own wisdom, and the public interests, should require."²⁴⁶ This argument, that section 25 was constitutional because the Constitution should be interpreted equitably, was somewhat in tension with the body of his opinion. There, he urged that Supreme Court review of state-court decisions was *required* by specific words in the Constitution, including Article III's instruction that judicial power "shall be vested in one supreme court" and "shall extend to all cases."²⁴⁷

C. The Public-Act Analogy Ascendant: McCulloch v. Maryland

Marshall, who had recused himself in *Martin*,²⁴⁸ was eager to assert the Court's position on the characterization of the Constitution himself. He would get his chance in 1819 in *McCulloch v. Maryland*, a case that arose from an agreement between the Bank of the United States and Maryland, a state relatively friendly toward the bank.²⁴⁹ The question the parties wanted tested was whether Maryland's relatively mild tax on bank notes was constitutional.

At least one historian has suggested that Marshall colluded with the parties to get the case speedily before the Court, and may have intervened to "sharply limit and skew the discussion of the constitutional issue."²⁵⁰ Before the argument, one of the government's counsel wrote to another saying that he had intended to collaborate on a strategy for the argument but, "I now suppose it will not be necessary, since it is said that little else than the thread bare topics connected with the constitutionality of the Bank will be introduced in to the argu-

²⁴⁶. *Id.* at 326-27.

²⁴⁷. *Id.* at 327 (quoting U.S. CONST. art. III, §§ 1-2).

²⁴⁸. G. Edward White, *Reassessing John Marshall*, 58 WM. & MARY Q. 673, 685 (2001) (book review).

²⁴⁹. RICHARD E. ELLIS, *AGGRESSIVE NATIONALISM: MCCULLOCH V. MARYLAND AND THE FOUNDATION OF FEDERAL AUTHORITY IN THE YOUNG REPUBLIC* 72, 74 (2007).

²⁵⁰. *Id.* at 75. *But see generally* Mark R. Killenbeck, *M'Culloch in Context*, 72 ARK. L. REV. 35, 36 (2019) (arguing that this account is due for revision).

ment.”²⁵¹ The historian Richard Ellis believes that no one except Marshall could have sent them that signal.²⁵² On the Maryland side, no doubt was raised about the Court’s authority to hear the appeal from a state court. Not only did Maryland’s lawyers fail to mention the issue so hotly contested in *Martin*, the state had already signaled its readiness to comply with whatever the Court decided.²⁵³ Whether or not Marshall actually helped to construct this case, it is clear that *McCulloch* would provide an unusually clean opportunity for him to intervene into the debate over how the Constitution must be characterized.

Counsel on each side cued up the question. Maryland’s counsel “insisted[] that the constitution was formed and adopted, not by the people of the United States at large, but by the people of the respective states.”²⁵⁴ The Constitution was, “therefore, a compact between the states.”²⁵⁵ As such, the Convention crafted the Constitution with “the utmost precision and accuracy,” and it was only ratified on the assurance “that it contained no latent ambiguity, but was to be limited to the literal terms of the grant.”²⁵⁶ The appropriate rule of construction, “the only safe rule,” as with all private legislation, “is, the plain letter of the constitution; the rule which the constitutional legislators themselves have prescribed in the 10th amendment.”²⁵⁷ Following that rule, counsel for Maryland found that “[t]he power of establishing corporations is not delegated to the United States, nor prohibited to the individual states. It is, therefore, reserved to the states, or to the people.”²⁵⁸ And as with any private act, a court could not construe a remedy if the plain text proved inadequate. If there was an “anomaly” or “imperfection,” “neither congress, nor this court, can correct it.”²⁵⁹ The Constitution was like a legislative bargain, a “system . . . established by reciprocal concessions and compromises” that could only be remedied through the amendment process.²⁶⁰

For their part, the lawyers for the Bank dutifully made the case that the Constitution was more like a public law by insisting that it “acts . . . by means

251. ELLIS, *supra* note 249, at 76.

252. *Id.*

253. *Id.* at 72, 74.

254. *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 363 (1819) (argument of Mr. Jones).

255. *Id.*

256. *Id.* at 366.

257. *Id.* at 374 (argument of Mr. Martin).

258. *Id.*

259. *Id.* at 371 (argument of Mr. Jones).

260. *Id.*

of powers communicated directly from the people.”²⁶¹ It could not be a compact, they maintained, as “[n]o state, in its corporate capacity, ratified it,” and “[t]he state sovereignties” were not its “authors.”²⁶² Indeed, that was the point: the central “vice” of the Articles of Confederation, “which the new constitution was intended to reform,” was that it dealt with “sovereign states in their corporate capacity.”²⁶³ And if this was the mischief the Constitution was intended to redress, it must be interpreted to have fixed that problem, not to have prolonged it. Because the Constitution was meant as an expression of the superior sovereignty of the people themselves, the powers it conferred on the federal government should be construed to include all of “the means of giving [them] efficacy,” so long as the means were “fitted to promote . . . the objects of that government.”²⁶⁴

This analogy to public legislation, with its express appeal to the purpose-driven latitude of equitable interpretation, underlay all of the Bank’s arguments. Equitable interpretation allowed judges to sometimes ignore, contradict, or go beyond the text in order to effectuate the “spirit” of a public law. Likewise, many of the government’s points were not so much arguments *from* the text as they were arguments *about* the irrelevance of the text. “These words, ‘necessary and proper,’ in such an instrument, are probably to be considered as synonymous,” said Daniel Webster.²⁶⁵ Not only was it surplusage to have used both words, he implied that it was gratuitous to have included either. “Even without the aid” of that clause, “the grant of powers itself necessarily implies the grant of all usual and suitable means for the[ir] execution.”²⁶⁶ Webster’s co-counsel William Pinkney made a similar argument about the Supremacy Clause. Although the Constitution had declared both Congress’s powers and “the means of executing them” “to be the supreme law of the land,” an explicit statement of federal supremacy was unnecessary because it was already dictated by logic, by history, and by the nature of the instrument.²⁶⁷ The powers of the federal government “must be supreme, or they would be nothing,” and so “they would have been such, without the insertion of this declaratory clause.”²⁶⁸

^{261.} *Id.* at 377 (argument of Mr. Pinkney).

^{262.} *Id.*

^{263.} *Id.*

^{264.} *Id.* at 378.

^{265.} *Id.* at 324 (argument of Mr. Webster).

^{266.} *Id.* at 323–24.

^{267.} *Id.* at 378 (argument of Mr. Pinkney).

^{268.} *Id.*

The lawyers also made arguments that relied on the Constitution's silence. Given the broad interpretive principles applicable to a law like the Constitution, Pinkney explained:

[A]n express authority to erect corporations generally, would have been perilous; since it might have been constructively extended to the creation of corporations entirely unnecessary to carry into effect the other powers granted The grant of an authority to erect certain corporations, might have been equally dangerous, by omitting to provide for others, which time and experience might show to be equally, and even more necessary.²⁶⁹

By instead avoiding *any* reference to corporations altogether, the Convention made clear that Congress could charter whatever corporations were necessary to effectuate its broad enumerated powers.

The Attorney General made an argument in this same genre. Establishing a banking corporation is only a means to an end, and “an enumeration of this particular class of means, omitting all others, would have been a useless anomaly in the constitution,” an instrument whose “whole plan” was marked by “simplicity.”²⁷⁰ The breadth of the Constitution's purposes required a simple text with few details. And a simply written law with broad public purposes must be interpreted as all public law, that is, equitably and flexibly to effectuate those purposes. And so the Constitution's omission of such details as a national bank only added to the proof that Congress had the right to go into banking, if it so chose.

To the modern reader expecting a case about a tax on bank notes, these arguments about the nature of the Constitution may seem disorienting. We enter the scene like a third party entering the kitchen just as a quarrelling couple is trying to decide on breakfast. What will be clear, to even the most hapless houseguest, is that eggs are not the only thing under discussion. Why wasn't *McCulloch* just a dispute over the degree of fit required between the ends enumerated in the Constitution and the means the government can use to reach them? Why was it necessary to go all the way back to the framing of the Constitution and ask whether the states preceded or followed the Union? It was necessary because the debate over whether the Constitution was more like public or private law was latent in every case involving constitutional interpretation.

²⁶⁹. *Id.* at 379.

²⁷⁰. *Id.* at 357–58 (argument of Mr. Wirt).

This is the critical context for *McCulloch v. Maryland*. Without it, and without understanding the interpretive principles derived from each position, the opinion and arguments of counsel make for odd reading. Although the Bank provided the occasion, any argument about the relative power of the federal and state governments necessarily brought in all of the themes and anxieties of the ongoing debate over characterization. And because that debate proposed incompatible rules of construction, the Court could not discuss the meaning of a single word in the Constitution without exhuming and reanimating the entire argument.

Chief Justice Marshall's opinion in *McCulloch* shows signs of haste. Its best arguments were borrowed from Hamilton, who had devised the "[l]et the end be legitimate" formulation;²⁷¹ and from Daniel Webster, who came up with the hyperbolic but catchy aphorism that the "power to tax [is] the power to destroy."²⁷² Chief Justice Marshall's best textual point—that the Framers had used the phrase "*absolutely* necessary" in Article I, Section 10 to indicate a stricter rule and that therefore the word "necessary" in "necessary and proper" should be construed more loosely—also came from counsel.²⁷³ Even poetic language, like the lovely turn of phrase in his warning that a constitution too strictly construed would be reduced to "a splendid bauble," was, at the time, a cliché.²⁷⁴

The *McCulloch* opinion also passed by some of Maryland's best points without acknowledgment. Chief Justice Marshall never said why it was "necessary" to establish branches of the national Bank in states that didn't want

271. See Hamilton, *supra* note 159, at 107 ("If the end be clearly comprehended within any of the specified powers, & 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.").

272. See *McCulloch*, 17 U.S. (4 Wheat.) at 421 (Marshall, C.J.); *id.* at 327 (argument of Mr. Webster).

273. *Id.* at 413–14 (Marshall, C.J.) (borrowing language from Mr. Wirt, *see id.* at 354–55).

274. *Id.* at 421. The word "bauble" was often called into action to describe the trappings of monarchy. See, e.g., *Lines Occasioned by Reading Mr. Paine's Rights of Man*, DAILY ADVERTISER (N.Y.), May 27, 1791, at 2 ("With what contempt must every eye look down, / On that base childish bauble, call'd a crown."); *On Our Interior Relations*, ALB. GAZETTE & DAILY ADVERTISER, Nov. 3, 1817, at 2 ("A crown is but a glittering bauble; it is the tyranny which it so often covers, that renders it opprobrious."). But the word was also used to dismiss other objects or honors as all flash, no substance. See, e.g., AEDANUS BURKE, CONSIDERATIONS ON THE SOCIETY OR ORDER OF CINCINNATI (1783), reprinted in INDEP. CHRON. & UNIVERSAL ADVERTISER (Bos.), Feb. 5, 1784, at 1 ("But in support of the order [of the Cincinnati], it will be alledged, that the states cannot pay the army, the officers will be contented with this *bauble* . . . 'Tis like throwing a tub to a whale; say they.").

them.²⁷⁵ He never answered the observation that, if the power to establish a bank was implicit in the text, then many of Congress's enumerated powers could also have been left to implication. For instance, the power to levy war must include the power to raise an army, and to levy taxes and borrow money for that purpose. Yet the Constitution spelled out each of these powers. "If, then, the convention has specified some powers, which being only *means* to accomplish the *ends* of government, might have been taken by implication; by what just rule of construction, are other sovereign powers, equally vast and important, to be assumed by implication?"²⁷⁶ Marshall didn't say. For some of Maryland's other arguments, the Chief Justice vanquished only a paper-tiger version, leaving the harder question unanswered.²⁷⁷

Marshall answered other arguments directly, but badly. For instance, Maryland's strongest argument may have been that Article I, Section 10 explicitly restricts states from taxing imports or exports or laying duties on tonnage. That, Maryland insisted, was "the whole restriction, or limitation, attempted to be imposed by the constitution, on the power of the states to raise revenue."²⁷⁸ This explicit prohibition, combined with the Tenth Amendment's instruction that powers not "prohibited . . . to the States, are reserved to the States," meant that states' "power of taxation is absolutely unlimited in every other respect."²⁷⁹ Furthermore, records from the ratification debates showed that the issue of state taxation was much debated and that "the states would not have adopted the constitution, upon any other understanding."²⁸⁰ To this very good argument, Marshall made the rather lame reply that Article I, Section 10's limited abrogation of states' authority to tax *proved* that the federal power created by the Constitution could diminish states' authority to tax in other cases as well.²⁸¹

275. Maryland argued that while a national bank might be necessary, a single branch in Washington, D.C., could coin money and lend it to the government in times of need, and that the government could establish other branches in states that welcomed those branches. *McCulloch*, 17 U.S. (4 Wheat.) at 350 (argument of Mr. Hopkinson).

276. *Id.* at 373-74 (argument of Mr. Martin).

277. Chief Justice Marshall caricatured the strict-construction argument by saying that Maryland's reading of the word "necessary" would prevent the government from deriving an implied power to carry the mail or prosecute mail theft from the enumerated power to establish post offices. *Id.* at 417 (Marshall, C.J.). In fact, the argument was much less extreme.

278. *Id.* at 343 (argument of Mr. Hopkinson).

279. *Id.* at 366, 369 (argument of Mr. Jones) (quoting U.S. CONST. amend. X).

280. *Id.* at 376 (argument of Mr. Martin).

281. *Id.* at 425 (Marshall, C.J.).

The carelessness of these responses seems to underscore that Marshall's priority was not the Bank or Maryland's tax, but rather the overarching character of the Constitution. What Marshall set out to accomplish in *McCulloch v. Maryland* was a strong defense of a public-law interpretation of the Constitution. He began by rejecting the view that the union had been formed by agreement among the states. During the ratification process, he said, "the instrument was submitted to the *people*" and "[f]rom these Conventions the constitution derives its whole authority."²⁸² At the Conventions, "the people were at perfect liberty to accept or reject" the Constitution, and "their act was final."²⁸³ The Constitution therefore "required not the affirmance, and could not be negated, by the State governments."²⁸⁴ From this origin story, he described the government's essential "nature": "It is the government of all; its powers are delegated by all; it represents all, and acts for all."²⁸⁵ The "necessar[y]" "result" of this essential nature was that this government "is supreme within its sphere of action."²⁸⁶

Here, Marshall signaled that his argument, like those of the government's attorneys, did not rely on the Constitution's text. Instead, the supremacy of the federal government flowed directly from its origin and "nature." That is why his next move was to overread and modify Article VI. Article VI demonstrated the supremacy of the federal government, he said, "by requiring that the members of the State legislatures, and the officers of the executive and judicial departments of the States, shall take the oath of fidelity" to the Constitution.²⁸⁷ He then paraphrased the Supremacy Clause to provide that "[t]he government of the United States . . . though limited in its powers, is supreme; and its laws, when made in pursuance of the constitution, form the supreme law of the land, 'any thing in the constitution or laws of any State to the contrary notwithstanding.'"²⁸⁸ This is, of course, not what the Constitution says. Only the laws made pursuant to the Constitution are supreme, not the government that makes them. And the required oath proves nothing, as Article VI requires both federal and state officials to swear allegiance to the Constitution.²⁸⁹ It is a subtle point,

²⁸². *Id.* at 403 (emphasis added).

²⁸³. *Id.* at 404.

²⁸⁴. *Id.*

²⁸⁵. *Id.* at 405.

²⁸⁶. *Id.*

²⁸⁷. *Id.* at 406.

²⁸⁸. *Id.*

²⁸⁹. U.S. CONST. art. VI., cl. 3.

but absolutely critical in *McCulloch*, where the issue was which of two rights arguably derived from the Constitution should take priority.

Taking the specific limitations on the state taxing power in Article I, Section 10 together with the reservation of all other powers in the Tenth Amendment, Maryland's right to tax had better grounding in the Constitution's text. Marshall's modification of the Supremacy Clause to invent a hierarchy of governments with the federal government on top was therefore critical to his resolution of the case. In this way, Marshall used the Constitution's origin story to derive a priority principle that was not in the text—indeed, one that the Tenth Amendment arguably refuted.

Marshall could make this kind of argument—a judgment *in spite of* the text—because his account of the Constitution's origin and nature prescribed an equitable interpretation. This characterization transformed the federal government from one that held no powers except those enumerated into a colossus that held all powers except those forbidden. Because the Tenth Amendment did not include the word “expressly,” Marshall reasoned that it left “the question, whether the particular power which may become the subject of contest has been delegated to the one government, or prohibited to the other, to depend on a fair construction of the whole instrument.”²⁹⁰ He insisted that the Framers intentionally “omitted to use any restrictive term which might prevent its receiving a fair and just interpretation.”²⁹¹ “[T]here is no phrase in the instrument,” Marshall argued, which “excludes incidental or implied powers; and which requires that every thing granted shall be expressly and minutely described.”²⁹² Marshall's reading created a strange effect: it made the absence of some words more meaningful than the presence of others.

The Constitution's “subject,” Marshall said, was “the execution of those great powers on which the welfare of a nation essentially depends.”²⁹³ And because such a law could only be a public act, its legislative history was immaterial.²⁹⁴ Chief Justice Marshall could therefore brush aside arguments that cited state-ratification debates on the issue of taxation and the *Federalist Papers* on the same subject. He did not need to mention the difficult fact that the Constitutional Convention debated and decided *against* giving Congress the power to establish corporations. As with any public act, the actual intent of the legislators was irrelevant; idealized intent was all that mattered. For a law with public

290. *McCulloch*, 17 U.S. (4 Wheat.) at 406.

291. *Id.* at 407.

292. *Id.* at 406.

293. *Id.* at 415.

294. See *supra* Section I.C.

welfare as its object, that “intention” “must have been,” Marshall argued, “to insure, as far as human prudence could insure, [its] beneficial execution.”²⁹⁵ And like other public acts, it should therefore be read flexibly, to “accommodate” unforeseen “circumstances.”²⁹⁶ The Constitution was “intended to endure for ages to come, and, consequently, to be adapted to the various *crises* of human affairs.”²⁹⁷ It must authorize implied as well as enumerated powers, he argued, because “[t]o have prescribed the means by which government should, in all future time, execute its powers, would have been to change, entirely, the character of the instrument.”²⁹⁸

When Marshall urged that “we must never forget, that it is a *constitution* we are expounding,” he was defending his choice of methodology in terms that would have been unmistakable to his contemporary audience. As the ultimate public law, a constitution demanded a broad, purpose-directed interpretation. Unlike civil-law jurisdictions, which might promulgate their public laws in a “prolix[]” “legal code,” American legislatures relied on courts to interpret a smaller body of public legislation equitably and with the benefit of a vast fund of common-law precedent.²⁹⁹ That is why the Constitution was (he argued) framed in such general terms. The Constitution’s character as public-law meant that the text itself was less important to interpretation than its general purposes. It also meant that words could be added or discounted if the text seemed out of step with the law’s purposes. To be sure, Marshall had other arguments for his position on the bank controversy. But none was as central. And all of his

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

296. *Id.* at 415–16.

297. *Id.* at 415.

298. *Id.*

299. *Id.* at 407. Chief Justice Marshall here references a nice turn of phrase from one of the arguments of counsel, who had urged that the Constitution was not designed to be as detailed as a “code of private jurisprudence.” *Id.* at 357 (argument of Mr. Wirt). An 1885 treatise defined “private jurisprudence” as the law pertaining to persons, places, or actions, including rights of “*dominium*” and “*obligationes*.” JOHN NORTON POMEROY, AN INTRODUCTION TO THE CONSTITUTIONAL LAW OF THE UNITED STATES: ESPECIALLY DESIGNED FOR STUDENTS, GENERAL AND PROFESSIONAL 383 (n.p., 8th ed. 1885). A source closer to Marshall’s time suggested “the common law” as a synonym for the “private jurisprudence” of a nation. *Writers on the Conflict of Laws, or Private International Law*, 6 LAW REV. & Q.J. BRIT. & FOREIGN JURIS. 56, 73 (1847). So, “a code of private jurisprudence” would have meant the codification of common law rules, along the lines of what France attempted with the *Code Napoléon*. What Marshall meant by distinguishing the Constitution from a “code” was not, therefore, the distinction I am drawing in this Article between public and private legislation. “Private jurisprudence” seems to have been a term of art, and its codification was something that no British or British-derived common law jurisdiction had yet attempted.

arguments on the constitutionality of the Bank ultimately depended on the premise that the Constitution must be read as if it were a public law.

Marshall's commitment to public-law principles of interpretation is underappreciated in part because of the disproportionate importance now assigned to a quote of his that seems in line with modern textualism. In *Sturges v. Crowninshield*, a case decided in that same blockbuster 1819 term, the Court considered whether the Contract Clause restricted state-insolvency laws.³⁰⁰ Marshall rejected the state's appeals to the "spirit" of the Constitution, arguing that "[i]t would be dangerous in the extreme to infer from extrinsic circumstances, that a case for which the words of an instrument expressly provide, shall be exempted from its operation."³⁰¹ Only in extraordinary situations, he said, should the "plain meaning of a provision, not contradicted by any other provision in the same instrument . . . be disregarded, because we believe the framers of that instrument could not intend what they say."³⁰² All this proves, however, is that Marshall was not immune to the charms of using his states' rights adversaries' own logic to defeat them.

Sturges's broad reading of the Contract Clause must be placed alongside Marshall's reading of the same text in *Dartmouth College*, decided that same term. There, he used the tools of public-law interpretation to reject another states' rights interpretation of the Contract Clause. He refused to accept a narrowing interpretation just because "this particular case was not in the mind of the Convention, when the article was framed, nor of the American people, when it was adopted."³⁰³ The expectations of the actual legislators were unimportant, he urged. Instead, "[i]t is necessary to go farther, and to say that, had this particular case been suggested, the language would have been so varied, as to exclude it, or it would have been made a special exception."³⁰⁴ In other words, he imagined an idealized legislature and then supplied the answers that legislature would have given. The *Dartmouth College* ruling is not as incompatible with modern textualism as some of his other jurisprudence. But it is also in line with the principles of public-act interpretation, and consistent with the other cases of that term, including *McCulloch*. What is inconsistent with modern textualism is that Marshall almost always reached for these text-oriented tools to broaden the Constitution's meaning. When did Marshall ever find that the text of the Constitution *constrained* his discretion?

300. 17 U.S. (4 Wheat.) 122, 202 (1819).

301. *Id.* at 202.

302. *Id.* at 202-03.

303. *Trs. of Dartmouth Coll. v. Woodward*, 17 U.S. (4 Wheat.) 518, 644 (1819).

304. *Id.*

Marshall failed to convince his critics. His *McCulloch* opinion came under furious attack in essays published anonymously in a major Republican newspaper. Again, the issue was not the Bank. One of Marshall's anonymous critics, Virginia's Judge William Brockenbrough, said he was "willing to acquiesce in" the existence of the Bank itself. He objected to "the *principles* which brought it into life in the year 1791, and those by which it is supported now by the supreme court."³⁰⁵

The first of these "dangerous" principles was the denial "that the powers of the federal government [were] . . . delegated by the states."³⁰⁶ Brockenbrough gave a point-by-point counterargument marshalling evidence of the states' involvement in the ratification of the Constitution. Even had an overwhelming majority of the whole people assented to the Constitution, he said, it still would not have bound the people of tiny Rhode Island had they not voted, as a state, to ratify it. And he pointed out that the Constitution could be amended only by recourse to state legislatures. "[T]his doctrine, which denies that the states are parties to the federal compact, was pressed with great zeal" during the Adams administration, when "the Congress . . . by the force of implication passed a sedition law, and vested the President with arbitrary and despotic powers."³⁰⁷ But the Virginia and Kentucky Resolutions had "exposed and refuted" that "doctrine" and he "did not expect that it would be brought forward at this day under the supposed sanction of the highest judicial authority."³⁰⁸

Brockenbrough also renewed Virginia's objection to the idea that the Constitution had made the Supreme Court the arbiter of contests between state and federal power. Because Maryland's lawyers in *McCulloch* had not questioned the Court's jurisdiction, Marshall could begin his *McCulloch* opinion with a grandiose, unsupported statement of his own jurisdiction. Marshall's first paragraph affirmed that a "decision" assigning "the conflicting powers of the Government of the Union and of its members" could "be made" "by this tribunal alone," because "[o]n the Supreme Court of the United States has the Constitution of our country devolved this important duty."³⁰⁹ Judge Brockenbrough found this idea laughable. He cited state-court decisions refuting the position,

305. Amphictyon, Letter to the Editor, *On the Opinion of the Supreme Court . . . No. 2*, RICH. ENQUIRER, Apr. 2, 1819, at 3 [hereinafter Amphictyon, No. 2]; see Eric Tscheschlock, *Mistaken Identity: Spencer Roane and the "Amphictyon" Letters of 1819*, 106 VA. MAG. HIST. & BIOGRAPHY 201, 211 (1998) (identifying Brockenbrough as likely Amphictyon).

306. Amphictyon, Letter to the Editor, *On the Opinion of the Supreme Court . . . No. 1*, RICH. ENQUIRER, Mar. 30, 1819, at 3 [hereinafter Amphictyon, No. 1].

307. *Id.*

308. *Id.*

309. *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 400-01 (1819).

including Virginia's *Hunter v. Martin* and a Pennsylvania case, *Respublica v. Cobbett*.³¹⁰ He also "humbly" pointed out what he saw as its basic illogic: "[T]he states never could have committed an act of such egregious folly as to agree that their umpire should be altogether appointed and paid by the other party."³¹¹ In his own series of anonymous essays attacking *McCulloch*, Virginia's Judge Spencer Roane agreed. He urged that the "court had no power to adjudicate away the *reserved* rights of a sovereign member of the confederacy, and vest them in the general government."³¹² While "[t]he power of the supreme court is indeed great . . . it does not extend to every thing; it is not great enough to *change* the constitution."³¹³

The essays also took on what they saw as a "second" dangerous "principle": "that the grant of powers to [the federal] government . . . ought to be construed in a liberal, rather than a restricted sense."³¹⁴ Roane dismissed Marshall's carefully constructed distinction between ends specifically enumerated in the Constitution and the implied means used to effectuate them. "That man must be a deplorable idiot, who does not see that there is no earthly difference between an *unlimited* grant of power, and a grant limited in its terms, but accompanied with *unlimited* means of carrying it into execution."³¹⁵ Marshall's reading of the words "necessary and proper" as "appropriate, conducive to," or "convenient," had "in effect, expunged those words from the constitution" because there was "no essential difference between" erasing the words "and reading them in a sense entirely arbitrary."³¹⁶ This was unacceptable, said Judge Roane. "Great as is the confidence of the nation in all its tribunals, they are not at liberty to change the meaning of our language."³¹⁷ And the alarming consequence of this liberal construction was to extend a "general power of attorney to congress."³¹⁸

310. *Amphictyon*, No. 1, *supra* note 306, at 3 (first citing *Hunter v. Martin*, 18 Va. (4 Munf.) 1 (1814), *rev'd sub nom.* *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304 (1816); and then citing *Respublica v. Cobbett*, 3 U.S. (3 Dall.) 467 (Pa. 1798)).

311. *Id.*

312. Hampden, Letter to the Editor, *Rights of "The States," and of "The People," No. 1*, RICH. ENQUIRER, June 11, 1819, at 3; see Tscheschlock, *supra* note 305, at 211 (identifying Hampden as Roane).

313. Hampden, *supra* note 312, at 3.

314. *Amphictyon*, No. 1, *supra* note 306, at 3.

315. Hampden, *supra* note 312, at 3.

316. *Id.*

317. *Id.*

318. *Id.* (emphasis omitted).

The essayists also argued that these dangerous principles were pure dicta: neither a decision about the nation's origin nor one about the principles of construction applicable to the Constitution had been necessary to the resolution of the case. Therefore, the opinion was "extra-judicial" and "not more binding or obligatory than the opinion of any other six intelligent members of the community."³¹⁹ Given all of *McCulloch*'s flaws, the essayists "trust[ed] that neither the Congress, nor the President, will consider themselves bound by that decision in any *future* case, but will pursue the true meaning of the constitution, and not usurp powers never granted to them."³²⁰

Marshall confided in Story that he feared the impact of this criticism. If successful, the private-law analogy would "convert[]" "the constitution . . . into the old confederation."³²¹ That anxiety prompted Marshall to write his own responsive essays and to publish them under a pseudonym in the newspapers. These anonymous essays in defense of *McCulloch* said little that was new, but they said it in a furious tone. At points, Marshall even descended to ad hominem attacks on his critics.³²² This was not the reaction of a Chief Justice who had, in the words of the typical modern constitutional law casebook, *established* the principles asserted in the Court's *Martin v. Hunter's Lessee* and *McCulloch v. Maryland* opinions. It more closely resembles the flailing of a person who sees his philosophy in decline.

D. *The Court in Retreat: Cohens v. Virginia*

The assertiveness of *Martin* and *McCulloch* was short lived. By the 1820s, the debate over federal authority began its long shift from legalistic wrangling

319. Amphictyon, No. 1, *supra* note 306, at 3.

320. Amphictyon, No. 2, *supra* note 305, at 2.

321. Letter from John Marshall to Joseph Story (May 27, 1819), in 8 THE PAPERS OF JOHN MARSHALL 313, 314 (Charles F. Hobson ed., 1995).

322. Marshall accused Amphictyon of trying to impose his views on a gullible and excitable public for political gain: "The decision of the Supreme Court . . . has been seized as a fair occasion for once more agitating the publick mind, and reviving those unfounded jealousies by whose blind aid ambition climbs the ladder of power." John Marshall, *A Friend to the Union*, PHILA. UNION (Apr. 24-28, 1819), reprinted in JOHN MARSHALL'S DEFENSE OF *MCCULLOCH V. MARYLAND* 78, 78 (Gerald Gunther ed., 1969). He made the same accusation when responding to Hampden's criticisms, which he also smeared as a "ranting declamation," saying, "[w]hy has Hampden attempted thus plainly to pervert this opinion, and to ascribe to it doctrines which it clearly rejects? He knows well that prejudices once impressed on the public mind, are not easily removed; and that the progress of truth and reason is slow." John Marshall, *A Friend of the Constitution*, ALEXANDRIA GAZETTE (June 30-July 15, 1819), reprinted in JOHN MARSHALL'S DEFENSE OF *MCCULLOCH V. MARYLAND*, *supra*, at 155, 157, 186.

to the bitter political dispute that would eventually ignite the Civil War. Marshall's deep concern, and the real vulnerability of his position, was on display in his opinion in *Cohens v. Virginia*. The case should have been straightforward: Congress authorized the Cohen brothers to operate a lottery in Washington, D.C. When they sold tickets in Virginia, they were arrested and convicted of violating state law. Under the rule established in *McCulloch v. Maryland*, the defendants should have won. It was undisputed that Congress had the right to "exercise exclusive Legislation in all Cases whatsoever"³²³ in Washington, D.C., and this included the power to create a lottery. To restrict the sales of lottery tickets to D.C. would render Congress's power less effective. Under *McCulloch*, therefore, Congress's power to legislate for D.C. implied a power to protect that legislation from state interference, and Virginia could not restrict the sale of tickets. But Virginia refused even to engage with the *McCulloch* precedent or the merits of the case. The state sent its lawyers to the Supreme Court with instructions to restrict their arguments to the issue ostensibly settled five years earlier in *Martin*: they insisted that the Court lacked jurisdiction to hear appeals from state-court decisions. "[I]f the jurisdiction of the Court should be sustained," they were instructed to "consider their duties as at an end."³²⁴

Virginia's audacity put Marshall on the defensive. He keenly felt just how precarious his position had become. In a prescient passage, Marshall lamented how the Virginians "maintain that the nation does not possess a department capable of restraining peaceably, and by authority of law, any attempts which may be made, by a part, against the legitimate powers of the whole."³²⁵ This meant "that the government is reduced to the alternative of submitting to such attempts, or of resisting them by force."³²⁶ Not daring to lecture Virginia on its obligation to follow *Martin* and *McCulloch*, he tried an appeal to reason. Was the Supreme Court's appellate jurisdiction over state courts "unreasonable"? Marshall "th[ought] not":

We think that in a government acknowledgedly supreme, with respect to objects of vital interest to the nation, there is nothing inconsistent with sound reason, nothing incompatible with the nature of government, in making all its departments supreme, so far as respects those objects, and so far as is necessary to their attainment.³²⁷

323. U.S. CONST. art. I, § 8, cl. 17.

324. *Constitutional Question*, 19 NILES' WKLY. REG., Feb. 24, 1821, at 417.

325. *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 377 (1821).

326. *Id.*

327. *Id.* at 414-15.

Marshall felt less confident in asserting a broad, purpose-directed reading of the text. He did not bother to repeat the trick of reading the supremacy of the federal government into the Supremacy Clause, as he had in *McCulloch*, instead relying on the support of the feeble adverb “acknowledgedly.” And in a sign that the attack on his public-act analogy had gotten under his skin, Marshall turned the tables on his critics. He insisted that it was the Virginians who were interpreting the Constitution according to their view of its “spirit” while Marshall hewed to its “words.”³²⁸ Marshall then strained to find a reading of the state and federal statutes that would allow him to avoid either striking down Virginia’s statute or reversing the decision of a Virginia court. As in *Marbury*, Marshall stated his principles while practicing a form of realpolitik to avoid acknowledging that the Court was powerless to impose its ruling.³²⁹

Marshall did not win the battle over the Constitution’s characterization, at least not during his lifetime or for the generation that followed. Recalcitrant states saw the Court’s weakness and exploited it. Marshall’s “great” opinions came to stand as evidence of the weakness of Marshall’s position, the incapacity of the Court, and the validity of alternative interpretations of the Constitution. After the Court handed down *McCulloch*, the State of Ohio refused to repeal the punitive tax law it had enacted to drive the Bank of the United States out of the state. A committee of Ohio’s legislature published a legal opinion defending the decision, explaining that it was “not . . . either in theory or in practice, the necessary consequence of a decision of the Supreme Court, that all who claim rights of the same nature with those decided by the court are required to acquiesce.”³³⁰ As proof, the committee cited “cases in which the decisions of that tribunal have been followed by no effective consequence.”³³¹ These included *Marbury v. Madison*, in which the Court had decided that Marbury was entitled to his commission. But “Mr. Marbury never did obtain his commission; the person appointed in his place continued to act; his acts were admitted to be valid; and President Jefferson retained his standing in the estimation of the American people.”³³² In that case, “[t]he decision of the Supreme Court proved to be to-

328. *Id.* at 422.

329. See Mark A. Graber, *The Passive-Aggressive Virtues: Cohens v. Virginia and the Problematic Establishment of Judicial Power*, 12 CONST. COMMENT. 67 (1995) (interpreting *Cohens* along these lines).

330. *Right of a State to Tax a Branch of the United States Bank*, 37 ANNALS OF CONG. 1684, 1697 (1821).

331. *Id.*

332. *Id.*

tally impotent and unavailing.”³³³ The same was true of the Court’s decision in *Fletcher v. Peck*, where the decision “availed” the winners “nothing, unless as a make-weight in effecting a compromise.”³³⁴

The State of Ohio took these cases as “evidence that, in great questions of political rights and political powers, a decision of the Supreme Court of the United States is not conclusive of the rights decided by it.”³³⁵ The bottom line was, “[i]f the United States stand justified in withholding a commission when the court adjudged it to be the party’s right,” and if, in other cases, the Supreme Court’s decision was merely one step along the way to an eventual political resolution, “surely the State of Ohio ought not to be condemned because she did not abandon her solemn legislative acts as a dead letter upon the promulgation of an opinion of that tribunal.”³³⁶

Over time, some of the principles Virginia had championed gained adherents. In 1832, Andrew Jackson vetoed a bill reauthorizing the Bank of the United States. His veto message repudiated Marshall’s grandiose claim, set out in the first paragraph of his *McCulloch* opinion, that the Constitution made the Supreme Court the final authority on constitutional questions. Jackson insisted to the contrary that “[e]ach public officer who takes an oath to support the Constitution swears that he will support it as he understands it, and not as it is understood by others.”³³⁷ Nothing the Court had said could convince Jackson that the bank was constitutional or alter his understanding of his resulting duty. This view of his oath aligned Jackson with Virginia’s explanation of the Supremacy Clause in *Hunter v. Martin*. Jackson was no advocate of state nullification—he subscribed to no principle that undermined his own power—but his understanding of the Constitution brought him closer to Virginia than to Marshall.

If Marshall’s public-act analogy failed, however, it is not because the private-act analogy triumphed. By the end of the 1820s, the position articulated by Thomas Jefferson in 1798 and Spencer Roane in 1814 had become antique. The conversation about federal authority had shifted away from principles of construction and taken on new, more dangerous terms. All along the way, lawyers and judges had hinted at the possibility that disagreements over the Constitu-

333. *Id.*

334. *Id.*

335. *Id.*

336. *Id.*

337. Andrew Jackson, Veto Message (July 10, 1832), in 2 A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS, 1789-1897, at 576, 582 (Washington, D.C., Gov’t Printing Office 1896).

tion might result in a serious political break. These cases risked “a conflict between the national and state authorities that may ultimately involve both in one common ruin,” said one of the lawyers in *Martin v. Hunter’s Lessee*.³³⁸ “The taper of judicial discord may become the torch of civil war, and though the breath of a judge can extinguish the first, the wisdom of the statesman may not quench the latter.”³³⁹ Marshall made the same point in *McCulloch*, warning that the questions presented “must be decided *peacefully*, or remain a source of hostile legislation,” and “perhaps of hostility of a still more serious nature.”³⁴⁰ *McCulloch*’s critics in Virginia responded with the meager reassurance that Virginia would never use “force to support her doctrines, till other measures have entirely failed.”³⁴¹

By 1829, some believed that moment had come. After Congress imposed tariffs that particularly hurt Southern economic interests, South Carolina denied the law’s validity in an essay and series of resolutions that looked back to the Virginia and Kentucky Resolutions for precedent. This “Exposition and Protest,” written by John C. Calhoun, reasserted the compact theory of the nation’s origins. But instead of continuing on to make the familiar argument for private-act principles of interpretation, the essay took another turn. Calhoun urged that the fight over principles of construction was over. The attempt to promote “a rigid rule of construction,” while laudable, had failed.³⁴² Instead, the “decisive proof of our own short experience” had been that “[i]f the minority has a right to select its rule of construction, a majority will exercise the same, but with this striking difference, that the power of the former will be a mere nullity, against that of the latter.”³⁴³ Calhoun admitted the “importance” of “a proper system of construction.”³⁴⁴ But he thought it had become “perfectly clear that no system of the kind, however perfect, can prescribe bounds to the encroachment of power.”³⁴⁵ The arena of conflict, he insisted, must shift, and the friends of state prerogative must now admit the truth: “that power can only be met with power.”³⁴⁶

338. 14 U.S. (1 Wheat.) 304, 320 (1816).

339. *Id.*

340. *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 400-01 (1819).

341. *Amphictyon*, No. 2, *supra* note 305, at 3.

342. Special Comm. of House of Representatives of S.C., *Exposition and Protest on the Tariff* 29 (Columbia, S.C., D.W. Sims 1829).

343. *Id.*

344. *Id.*

345. *Id.*

346. *Id.*

IV. SCHOLARLY AND PRACTICAL IMPLICATIONS

A. *Statutory Interpretation*

When legal scholars have attended to the fascinating history of statutory interpretation, an overemphasis on current jurisprudential and political debates has sometimes clouded their vision. In a previous generation, legal-process scholars rediscovered the early American tradition of equitable interpretation and promoted it as an example of how purpose-driven interpretation could work within the American constitutional framework.³⁴⁷ As I have explored in some detail elsewhere, these scholars missed important practical and constitutional differences between the America of the early-nineteenth century and the America of the twentieth.³⁴⁸ That said, the lessons the legal-process scholars drew were much more direct, and their analysis of early America much more dexterous, than the efforts of those scholars and judges who now try to ally originalism with textualism in statutory interpretation.

Professor William N. Eskridge broke this ground first, when he rediscovered the use of equitable interpretation in the post-ratification decades and held it up as a challenge to Justice Scalia's dual legacy of originalism and textualism.³⁴⁹ Professor John Manning, a leading disciple of that legacy, took up the challenge. Manning argued that the Founders were indeed textualists and that equitable interpretation was merely "a doctrinal artifact of an ancient English governmental structure, one that had blended governmental powers," and one that had not "translate[d] well into a U.S. Constitution marked by separated powers."³⁵⁰ After examining the "relatively few federal statutory cases . . . [in] the early volumes of case reports," he thought it "safe to say that the equity of the statute never gained a secure foothold."³⁵¹ Eskridge then published a rejoinder, which read a wider range of early American legal sources, including the ratification debates and Chief Justice Marshall's jurisprudence, to argue that

347. See, e.g., James McCauley Landis, *Statutes and the Sources of Law*, in *HARVARD LEGAL ESSAYS* 213, 214-18 (1934).

348. See Peterson, *supra* note 20, at 715.

349. William N. Eskridge, Jr., *Textualism, the Unknown Ideal?*, 96 *MICH. L. REV.* 1509, 1523-25 (1998).

350. Manning, *supra* note 20, at 8.

351. *Id.* at 9.

Founding-era interpretive methods were more diverse than textualists would like to admit.³⁵²

Eskridge was right to call textualism's historical bona fides into question, and he would have been right even if he had found no evidence of equitable interpretation in the federal courts. One problem, not limited to investigations of early methods of statutory interpretation, is that scholars often look for their evidence of early American legal practice in the wrong places. The federal courts were specialty institutions, like a court of claims or an admiralty court would be today. Scholars who think of the federal courts as a sort of archetypal court might be misled into trying to use them to learn about early American jurisprudence. But federal courts had very limited jurisdiction, and what jurisdiction they had was so freighted with nonlegal pressure that their decisions cannot properly be understood without reference to their political context.

Under the first Judiciary Act, federal courts could hear only cases in admiralty and cases dealing with citizens of different states, penalties and forfeitures under the laws of the United States, and the small number of federal crimes.³⁵³ There was no "federal question" jurisdiction. An 1801 act both increased the number of federal judges and expanded their jurisdiction,³⁵⁴ but outgoing Federalists used that act to pack the courts with their own appointees. The federal courts were thereby thrust into party politics and confirmed as dangerous havens for a partisan philosophy that quickly waned in influence. The Jeffersonians repealed the 1801 Act in 1802, and the federal courts' jurisdiction shrank again.³⁵⁵ Federal courts subsequently gained jurisdiction only to play highly unpopular and politically dangerous roles. For example, they received jurisdiction under a temporary provision after the War of 1812 so that federal customs

352. Eskridge, *supra* note 20, at 995-98; see also Jonathan T. Molot, *Reexamining Marbury in the Administrative State: A Structural and Institutional Defense of Judicial Power Over Statutory Interpretation*, 96 NW. U. L. REV. 1239, 1253 (2002) ("It is not surprising that Professors Manning and Eskridge would examine the founding materials for evidence of whether the Founders expected judges to serve as subordinates to the legislature or as members of a coordinate branch of government."); Cass R. Sunstein & Adrian Vermeule, *Interpretation and Institutions*, 101 MICH. L. REV. 885, 910 (2003) (describing the debate between Manning and Eskridge as "a fight that can end only in stalemate"). But see Victoria F. Nourse, *The Constitution and Legislative History*, 17 U. PA. J. CONST. L. 313, 317 n.21 (2014) (writing of the Manning and Eskridge debate: "The most prominent constitutional debate in statutory interpretation has centered around the nature of the 'judicial power,' an approach which I reject here, as incapable of either resolving the question or of asking the correct question.").

353. Judiciary Act of 1789, ch. 20, §§ 9, 11, 13, 1 Stat. 73, 76-81.

354. Judiciary Act of 1801, ch. 4, §§ 7, 11, 2 Stat. 89, 90-92 (providing for circuit judgeships and defining circuit-court jurisdiction) (repealed 1802).

355. Act of Mar. 8, 1802, ch. 8, §§ 1-2, 2 Stat. 132, 132.

collectors could remove their enforcement actions from state courts.³⁵⁶ They also gained jurisdiction under the 1832 Force Bill in order to allow for suits to enforce tariffs on secessionists in South Carolina.³⁵⁷ Again, they received jurisdiction under the 1850 Fugitive Slave Act to enforce slave owners' property rights in the North.³⁵⁸ In other words, lower federal courts often served as outposts of the federal government, which was frequently resented as a foreign and unwelcome intruder in state affairs. At other times, they served as mediators for states with opposing interests. These roles often made Article III courts fora for something better described as diplomacy than law.

Therefore, a scholar trying to learn about historical legal practice using only the federal reporter has given himself an unduly narrowed and idiosyncratic focus. If we want to find out about *jurisprudence* in early America, we have to study the states. Only there can we see the interpretive conventions of this period applied in ordinary cases and by courts of general jurisdiction, and begin to draw conclusions about trends and traditions in early American law. State-court jurisprudence provides the best evidence of the legal principles judges and lawyers brought into debates over federal law.

An anachronistic focus on the federal courts has also meant that scholars tend to look at the wrong people. A conceit of some originalist methods, including corpus linguistics and other investigations of public meaning, is a charming but misplaced *democratic* style of engagement with the materials. Some scholars seem to view the legal world of the past, because it is old, as though it were flat, and as though any explanation or argument one can glean from that past has equal value. But to men of the time, it was very obvious that legal talents were not equally distributed. Certain men, including Kent of New York, Ruffin of North Carolina, DeSaussure of South Carolina, Roane of Virginia, Parker of Massachusetts, Smith of New Hampshire, Swift of Connecticut, and Brackenridge of Pennsylvania, along with a handful of others, distinguished themselves and had a disproportionate influence over their peers and over the direction of the law.³⁵⁹

356. Act of Mar. 3, 1815, ch. 94, §§ 6, 8, 3 Stat. 231, 233-35 (providing for the Act to last for a year); Act of Feb. 4, 1815, ch. 31, §§ 8, 13, 3 Stat. 195, 198-99 (providing for the Act to last until the end of the War).

357. Act of Mar. 2, 1833, ch. 57, §§ 1-3, 4 Stat. 632, 632-34.

358. Act of Sept. 18, 1850, ch. 60, §§ 1, 5-7, 9 Stat. 462, 462-64 (repealed 1864).

359. See Peterson, *supra* note 20, at 719-20. I obviously disagree with Willard Hurst's assertion that "on the bench, Marshall alone" exerted "individual influence" over the direction of legal change. JAMES WILLARD HURST, *THE GROWTH OF AMERICAN LAW: THE LAW MAKERS* 17-18 (1950).

These men were not Article III judges and they were not on the Supreme Court. The Supreme Court's obscurity and its initial lack of influence is one of the reasons it was so hard to get qualified men to stay in the job.³⁶⁰ It is why the Court had to staff up with abrasive and mockable characters like Samuel Chase.³⁶¹ And it is also the only reason that John Marshall, Adams's second choice and a controversial pick for the job even within his own party, was able to secure the nomination for Chief Justice.³⁶² As Chief Justice, Marshall battled for influence over the direction of American law. This Article has argued—and more work could be done on this issue—that the Supreme Court of Virginia in the early nineteenth century must be understood as a competitor jurisdiction to the Supreme Court of Chief Justice Marshall, not a subordinate. If we want to describe the jurisprudence of early America in terms that early American judges and lawyers would recognize as accurate, we have to cite the men that they would have seen as the relevant thought leaders—the men they would have cited. Those are state-court judges.

Finally, it is critical that those who would ally textualism with originalism appreciate that jurisprudence, along with American theories on government, changed. Professor Manning was confident he had found proof of textualism at the Founding even though the pre-nineteenth-century evidence was inconclusive because he found that *after* 1800, *John Marshall* used methods of statutory interpretation that look like textualism.³⁶³ But Marshall's jurisprudence was idiosyncratic. Marshall the lawyer was a product of the Founding era, certainly. That is why he reached for the familiar interpretive paradigms this Article has described to address the novel challenge of a written Federal Constitution. But Marshall's work can hardly tell us *what* "the Founders" thought about how

360. President Adams nominated John Marshall only after "Chief Justice Oliver Ellsworth had resigned from the Supreme Court, and John Jay, the former chief justice, had declined a new appointment." *John Marshall: Appointment as Chief Justice in 1801*, in 1 THE DOCUMENTARY HISTORY OF THE SUPREME COURT OF THE UNITED STATES, 1789-1800, pt. 1, at 148, 151 (Maeva Marcus, James R. Perry, James M. Buchanan, Christine R. Jordan, Stephen L. Tull, Sandra F. VanBurkleo, Sarah E. Blank, Nancy L. Matthews & Marc Pachter eds., 1985).

361. President Washington was "wary about nominating" Chase and offered him the seat only after he "had trouble filling a vacancy on the Supreme Court." This "was an unpopular choice, even with the Federalists, and the Senate, uneasy about Chase's cantankerous nature, only reluctantly confirmed his appointment." Another federal judge later admitted that he "never sat with [Chase] without pain, as he was forever getting into some intemperate and unnecessary squabble." See ELLIS, *supra* note 212, at 76-77, 82.

362. See THE DOCUMENTARY HISTORY OF THE SUPREME COURT OF THE UNITED STATES, 1789-1800 *supra* note 360, pt. 2, at 918-28 (relaying letters discussing the appointment of John Marshall, rather than William Paterson, for the Chief Justice position after John Jay rejected it).

363. See Manning, *supra* note 20, at 89-91.

statutes or the Constitution should be read. Rather, Marshall is important because, as a prolific member of that lawyerly generation, he helps us to understand *how* they thought about those questions.

Marshall took office just as some Founding-era expectations were upended in ways that forced influential men to change their ideas about constitutional government. Among other developments, the Founders failed to anticipate the politics that brought Jefferson into the presidency. John Marshall was a savvy political actor who was able to build his Court's stature because he was adaptive, not because he hewed to the ideas of ten, twenty, and thirty years earlier. His sensitivity when dealing with federal statutes was his way of managing the relationship between his Court and a hostile Congress. And that is why looking primarily to the federal courts and the Marshall Court to find out how statutes were interpreted in early America has tended to obscure distinctions like the one outlined in Part I of this Article.

In fact, early Americans were neither textualists nor always purposivists—they were both, as the situation demanded. One key insight of this Article is that it is not helpful to look for *ideologies* of statutory interpretation in early America. That is so even though it is possible to find differences in approach and arguments among judges about how statutes should be interpreted in individual cases. Marshall asserted that “no difference of opinion can exist” on principles of interpretation even as he forged a new, idiosyncratic interpretive style of statutory interpretation.³⁶⁴ We can understand all of these facts together only when we understand that for judges of the time, the watchword of statutory interpretation was function, not dogma.

And the function of statutory interpretation in early America was to help the legislature govern in the public welfare. Judges saw themselves as their legislatures' helpmeet.³⁶⁵ Marshall's jurisprudence of interpretation looks strange for his time in part because his partner legislature was an unusually vigilant institution for the era, and it did not welcome as much assistance. The same was not true of most state legislatures, which were generally, if not invariably, low-capacity institutions.³⁶⁶

Judges' general approach to interpretation, as Part I outlined, was first to discern the degree of intervention in the background law the statute had intended to effectuate. The question about whether a law was public or private was also a question about whether it was meant to add power to or take power out of the public weal; to regulate for the public or distribute a special privi-

364. *United States v. Fisher*, 6 U.S. (2 Cranch.) 358, 386 (1805).

365. See Peterson, *supra* note 20, at 723–24.

366. See *id.* (describing judicial impressions of legislative incompetence).

lege; to expend a renewable public resource or to bargain a finite property or power away. Early American jurisprudence of interpretation aimed to interpret laws in the manner that most benefited, and least harmed, public welfare. Judges saw themselves as part of the government and cases involving interpretation as part of the work of governance.³⁶⁷ To see their work as they did requires a substantial shift in perspective. Their approach is a far cry from the arm's-length relationship between judiciary and legislature one finds today in statutory-interpretation cases, in which judges see their role as either the legislature's faithful agent or reluctant disciplinarian.³⁶⁸

A modern judge who wants to pattern her jurisprudence on the past might well come away from this Article with the simple insight that the Founders would have interpreted today's generally applicable legislation broadly and flexibly to effectuate its purposes.³⁶⁹ When dealing with public laws, the leading judges of early America would have eschewed a narrow focus on the text and would have felt free to read in new words or subtract erroneous ones when necessary to make a statute work. And they believed that part of their role was to help determine what it meant for a statute to "work," relying on their expertise in the background law and their sense of what public needs the statute might answer.³⁷⁰

The modern judge could, however, glean a more fundamental and perhaps more valuable lesson from this heritage, if she took as a model early American judges' practical and constructive approach to statutory interpretation. Early American judges embraced their inevitable role in legislative statecraft and seriously set about the business of advancing the public good.³⁷¹

B. Constitutional Interpretation

I did not embark on this project to probe the historical bona fides of modern interpretive approaches—still less to prescribe one of my own. But this Article's findings have at least two potentially important implications for those who think judges should bear Founding-era practices in mind.

The first carries forward the methodological point just discussed in the context of statutory interpretation. The findings in this Article support the conclusions of other historians and scholars whose investigations of this same

367. *Id.* at 717.

368. *See id.* at 713.

369. *See supra* Section I.A.

370. Peterson, *supra* note 20, at 713.

371. *See id.* at 735-36.

period have challenged the idea that strict textualist constitutional interpretation predominated in the Founding era. They are in line with Jonathan Molot's observation that "[t]he Constitution's proponents . . . did not view linguistic indeterminacy or judicial leeway as a serious threat to popular rule or state sovereignty."³⁷² And this Article builds on Saul Cornell's work pointing out that the ambiguity of language was a main concern for the *opponents* of the 1787 Constitution.³⁷³ The Federal Constitution was not ratified because it was explicit on all points or because its text could answer all the questions it was meant to address. It was ratified because enough of its supporters trusted that judges could elaborate on its text when necessary, just as they did with public legislation.

Sanford Levinson and other contemporary scholars have argued that modern interpretations of the Constitution are inevitable in part because the inherent ambiguity of language means that a document can almost never have a determinate meaning. Because "all language is read against a background of . . . shared understandings, purposes, and assumptions," he argues, it is impossible for contemporary interpreters to avoid injecting their own values into the text.³⁷⁴ The Framers were alive to this conundrum. At least some of those who voted to ratify the Constitution did so anyway because they trusted that the principles applicable to public laws would provide courts the flexibility to resolve ambiguities and adapt as new circumstances arose.³⁷⁵ Admitting that

372. Jonathan T. Molot, *The Judicial Perspective in the Administrative State: Reconciling Modern Doctrines of Deference with the Judiciary's Structural Role*, 53 STAN. L. REV. 1, 28 (2000); see also Jonathan T. Molot, *The Rise and Fall of Textualism*, 106 COLUM. L. REV. 1, 8 (2006) ("[T]he Founders' conflicting statements on the judicial role have helped to fuel the contemporary debate over modern textualism."). But see John F. Manning, *What Divides Textualists from Purposivists*, 106 COLUM. L. REV. 70, 75 (2006) (describing Molot's article as "thoughtful and reflective," but citing the Marshall era to push back on Molot's arguments about the Founding era). As I discuss above the line, I would argue that Marshall's jurisprudence is not good evidence of "Founding-era" practice.

373. Saul Cornell, *The People's Constitution vs. the Lawyer's Constitution: Popular Constitutionalism and the Original Debate over Originalism*, 23 YALE J.L. & HUMAN. 295, 307-10 (2011).

374. Sanford Levinson, *What Do Lawyers Know (and What Do They Do with Their Knowledge)? Comments on Schauer and Moore*, S. CAL. L. REV. 441, 449 (1985); see also White, *Law as Language*, *supra* note 23, at 417 ("[It is] absurd to speak as if the meaning of a text were always simply there to be observed and demonstrated in some quasi-scientific way."). See generally WHITE, *LEGAL IMAGINATION*, *supra* note 23 (describing how legal rhetoric helps constitute legal meaning).

375. But not all, of course. The ratification statements of several state conventions specified that the state had ratified on the understanding that "clauses are to be construed" narrowly. See, e.g., New York Declaration of Rights, Form of Ratification, and Recommendatory Amendments to the Constitution, 26 July 1788, *reprinted in* 23 THE DOCUMENTARY HISTORY OF THE

language was imperfect and admitting that their vision was limited, these Founders had confidence in the Constitution's durability not because they assumed that future generations would or could derive a fixed and timeless meaning from its words, but because they expected that judges would interpolate the text to govern the "unforeseen." That is what public-act interpretation was all about.

The second implication is institutional. The Supreme Court, through its jurisprudence, increasingly characterizes itself as the constrained minister of the government, rather than a coequal participant in governance. In our time, the alliance of originalism and textualism has grounded a limited view of the Court's obligation, or indeed its capacity, to guarantee the rights-conveying provisions of the Federal Constitution. This Article suggests that historical practice does not support such a cramped view of judicial power.

Consider the Court's evolving approach to *Bivens* case law. To review: in the complaint that initiated *Bivens v. Six Unknown Named Agents*, Webster Bivens alleged that federal agents had entered his home, searched it, and arrested him in front of his family without a warrant and without probable cause.³⁷⁶ Arguing that his Fourth Amendment rights were violated, he sued the officers for damages. The district court dismissed his suit in part because he failed to state a federal cause of action, as there was no federal statute creating a damages remedy for violations of the Fourth Amendment.³⁷⁷ The Court of Appeals affirmed on that ground.³⁷⁸ The Supreme Court granted certiorari to decide whether a federal officer's violation of a person's constitutional rights gives rise to a cause of action for damages, with or without a federal statute authorizing suit.³⁷⁹

In *Bivens*, the Supreme Court decided that federal courts do not have to wait for Congress to act to fashion remedies for constitutional violations. This holding was based on an analogy to the statutory-interpretation context. The Court pointed out that it was "well settled that where legal rights have been invaded, and a federal statute provides for a general right to sue for such invasion, federal courts may use any available remedy to make good the wrong

RATIFICATION OF THE CONSTITUTION 2326, 2327 (John P. Kaminski, Gaspare J. Saladino, Richard Leffler, Charles H. Schoenleber, Margaret A. Hogan & Jonathan M. Reid eds., 2009). Fascinatingly, these signing statements seem to have had little impact on the subsequent debate over proper interpretation.

376. 403 U.S. 388, 389 (1971).

377. *Id.* at 389–90.

378. *Id.* at 390.

379. *See id.*

done.”³⁸⁰ If courts could do this when federal statutes had been violated, the majority implied, then they could also recognize an action to vindicate constitutional rights.

The majority then saw the Court as an institution capable of policy judgment and creativity in defense of constitutional rights. Chief Justice Burger’s dissent argued that a “judicially create[d] . . . damage[s] remedy” did not serve “the important values of the doctrine of separation of powers,” and he chided the majority that “[l]egislation is the business of the Congress.”³⁸¹ But Justice Harlan’s concurrence pushed back, making more explicit the connection between the Court’s statutory-interpretation powers and its conclusion about its own constitutional powers. He argued that it didn’t make sense to say that “the decision to grant compensatory relief involves a resolution of policy considerations not susceptible of judicial discernment,” when the Court felt free to read damages remedies into statutes “where, in its view, damages are necessary to effectuate the congressional policy underpinning the substantive provisions of the statute.”³⁸² And if the Court could add in a damages provision to vindicate a legal interest created by statute, then “the fact that the interest is protected by the Constitution rather than statute or common law” could not “justif[y] the assertion that federal courts are powerless to grant damages in the absence of explicit congressional action authorizing the remedy.”³⁸³ In deciding which remedy, monetary or equitable, was appropriate, Harlan urged that “the range of policy considerations we may take into account is at least as broad as the range . . . a legislature would consider.”³⁸⁴ And he saw the sensible exercise of this judicial authority as “important,” writing that in a “civilized society,” the “judicial branch of the Nation’s government [must] stand ready to afford a remedy” for “the most flagrant and patently unjustified sorts of police conduct.”³⁸⁵

Fifty years later, while *Bivens* has not been overruled, the logic of the *Bivens* dissent is now the majority position. It may be not too much to say that as a result, our society is appreciably less “civilized.” In *Hernandez v. Mesa*, the Court

380. *Id.* at 396 (quoting *Bell v. Hood*, 327 U.S. 678, 684 (1946)).

381. *Id.* at 411-12 (Burger, C.J., dissenting).

382. *Id.* at 402 (Harlan, J., concurring in the judgment) (first citing *J.I. Case Co. v. Borak*, 377 U.S. 426 (1964); then citing *Tunstall v. Bhd. of Locomotive Firemen & Enginemen*, 323 U.S. 210, 213 (1944); and then comparing *Wyandotte Transp. Co. v. United States*, 389 U.S. 191, 201-04 (1967)).

383. *Id.* at 403.

384. *Id.* at 407.

385. *Id.* at 411.

refused to allow parents to sue a border-police officer responsible for aiming across the U.S. border into Mexico and shooting their child, who had been either playing a game that involved running up to touch the border wall (the account of Mexican eyewitnesses who filmed the incident on their cell phones), or throwing rocks (the officer's account).³⁸⁶

The *Mesa* Court explained that *Bivens* and the cases that expanded its holding to other official misconduct “were the products of an era when the Court routinely inferred ‘causes of action’ that were ‘not explicit’ in the text of the provision that was allegedly violated.”³⁸⁷ They came from a time in which “the Court assumed it to be a proper judicial function to provide such remedies as are necessary to make effective a statute’s purpose,” and when, “as a routine matter with respect to statutes, the Court would imply causes of action not explicit in the statutory text itself.”³⁸⁸ The majority in *Mesa* explained, however, that “[i]n later years, we came to appreciate more fully the tension between this practice and the Constitution’s separation of legislative and judicial power.”³⁸⁹ The Court’s view now is that “when a court recognizes an implied claim for damages on the ground that doing so furthers the ‘purpose’ of a law, the court risks arrogating legislative power.”³⁹⁰ The Court made clear that a shift in thought about how to interpret statutes has accompanied a shift in law about constitutional interpretation. Now, said Justice Alito, writing for the majority, “[i]n both statutory and constitutional cases, our watchword is caution.”³⁹¹ Further expansions of the *Bivens* holding are “disfavored.”³⁹² As Justice Thomas put it in his concurrence, it was a “misguided approach to implied causes of action in the statutory context” that “formed the backdrop of the Court’s decision in *Bivens*.”³⁹³

For Justices Alito Thomas, early American views on these issues are important. And what this Article suggests is that the *Bivens* majority was more in line with early American practice than was the dissent. There is more work to be done on this issue, but there is evidence that the great judges of early America felt free to fashion remedies for public legislation when legislatures had

386. 140 S. Ct. 735, 740-41 (2020).

387. *Id.* at 741 (quoting *Ziglar v. Abbasi*, 137 S. Ct. 1843, 1855 (2017)).

388. *Id.* (quoting *Abbasi*, 137 S. Ct. at 1855 (internal quotation marks omitted)).

389. *Id.*

390. *Id.*

391. *Id.* at 742.

392. *Id.* (quoting *Abbasi*, 137 S. Ct. at 1857).

393. *Id.* at 751 (Thomas, J., concurring).

failed to provide them.³⁹⁴ Gap-filling to make statutes work, to help statutes fulfill their purposes, was the essence of equitable interpretation. And if we care about how the great Chief Justice Marshall believed the Constitution should be interpreted, as Justices Alito and Thomas frequently do, then it is hardly inappropriate to use a jurisprudence of purposive and gap-filling statutory interpretation as an analogy for judicial power to interpret the Constitution.

There may be reasons to seek out the original meaning of the Constitution's text or to proceed with caution when fashioning new remedies to effectuate its purposes. But the Founding-era record cannot justify those choices on its own.³⁹⁵ Textualism and originalism are normative policy positions—or philosophical commitments—that must be seen for what they are and stand or fall on their own terms. History cannot dictate textualism, when we know that leading early American jurists routinely applied another method. Nor is it enough to gesture at Founding-era practices to discern the substantive content of the Bill of Rights, when we know that some proportion of the ratifiers and a historically significant cohort of the Constitution's first generation of interpreters thought the Constitution was a document whose meaning would be elaborated by judges as they encountered new circumstances that the Framers had failed to anticipate. This was, as Chief Justice Marshall put it in *McCulloch*,

a constitution, intended to endure for ages to come, and, consequently, to be adapted to the various crises of human affairs. To have prescribed the means by which government should, in all future time, execute its powers, would have been . . . an unwise attempt to provide . . . for exigencies which, if foreseen at all, must have been seen dimly, and which can be best provided for as they occur.³⁹⁶

CONCLUSION

There has been some interesting scholarship on modern “laws of interpretation”—both on the fact that they exist, and on the need to define them.³⁹⁷

394. See Peterson, *supra* note 20, at 744 (describing Chancellor Kent's articulation of a remedy for plaintiffs in Erie Canal-related cases).

395. I should note that at least some people think that there is an originalist argument for *Bivens*. See, e.g., Brief of Amicus Curiae The Institute for Justice in Support of Petitioners at 2, *Hernandez v. Mesa*, 140 S. Ct. 735 (2020) (No. 17-1678).

396. *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 415 (1819) (emphasis omitted).

397. See, e.g., William Baude & Stephen E. Sachs, *The Law of Interpretation*, 130 HARV. L. REV. 1079, 1084 (2017); Abbe R. Gluck, *Intersystemic Statutory Interpretation: Methodology as “Law” and the Erie Doctrine*, 120 YALE L.J. 1898, 1907-24 (2011); Helen Silver, *A Plea for a Law of*

What this Article reveals is that Americans of the late-eighteenth century *had* a law of interpretation and that its rules were widely understood. One of the unanticipated consequences of the decision to make the American Constitution written law was that these well-understood and uncontroversial preratification rules of interpretation became freighted with politics.

The first Americans experienced the shift to writtenness as a shift to lawyerly argumentation over hermeneutics. They also witnessed the first self-conscious selection of interpretive methodologies to suit the range of outcomes the interpreter preferred. Far from a symptom of modern politics or contemporary jurisprudence, disputes over interpretation have been a consistent feature of the American system almost from the beginning.

Interpretation, 98 U. PA. L. REV. 499, 501 (1950); cf. Charles L. Barzun, *Constructing Originalism or: Why Professors Baude and Sachs Should Learn to Stop Worrying and Love Ronald Dworkin*, 105 VA. L. REV. ONLINE 128, 131-32 (2019) (criticizing the “original-law originalism” law of interpretation advanced by Baude and Sachs).