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The Two-Foundings Thesis: The Puzzle of Constitutional Interpretation

Sonu Bedi & Elvin Lim

ABSTRACT

What explains the fact that justices, scholars, and practitioners have come to radically different views about the U.S. Constitution? What explains the fact that some focus on the Constitution as a nationalistic document while others see it as a text to proscribe federal powers? Why do originalists generally look to the past whereas moral readers look to the present in deciding the scope and existence of rights? Why do originalists privilege a limited role for U.S. Congress whereas moral readers privilege a more expansive view? These questions inform what we consider as the puzzle of constitutional interpretation, a puzzle that has gone largely unnoticed by legal scholars who have addressed the originalism/living constitutionalism debate, but not the foundational debate that generated it. Legal scholars may analyze the nature of these debates from various perspectives, often seeking to explain why their particular account of interpretation is better or more justifiable. An underlying assumption of these works is that these divergent theories about powers and rights cannot both be correct under the Constitution. If anything, legal scholars sometimes seek to downplay this type of disagreement.

This Essay, in contrast, seeks to provide an explanation for these interpretive debates over powers and rights that is essentially connected to the Constitution. It aims to explain how opposing viewpoints about power/rights and moral reading/originalism could both accurately reflect the theories on which the nation was founded. In doing so, this Essay proposes that the Constitution itself is a bifurcated text created by the existence of America's two foundings. The first founding established state governments (between 1776 and 1781) and the second founding established the federal or national government (in 1787). We argue that the Constitution simultaneously affirms both these foundings. In doing so, the meaning of the Constitution has been perpetually trapped within these two foundational and divergent frameworks.

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TABLE OF CONTENTS

INTRODUCTION.....	112
I. THE PUZZLE OF CONSTITUTIONAL INTERPRETATION.....	115
A. The Debate Over Powers	115
B. The Debate Over Rights.....	117
C. How to Explain These Debates?	119
II. THE ATTITUDINAL MODEL	120
A. Ideology Not Law	121
B. A Political, not Legal, Debate	122
III. EXPLAINING THE PUZZLE.....	123
A. First Founding (1776–81) and Second Founding (1787–89)	124
B. The Constitution as a Clash of Foundings.....	125
C. Anti-Federalists Versus Federalists	128
D. A Legal Debate About Two Views of the Constitution.....	131
CONCLUSION.....	135

INTRODUCTION

Constitutional interpretation generates intense debates over rights and powers. Countless U.S. Supreme Court decisions, articles, and books discuss these debates. With regard to powers, these debates often center around a nationalistic view of the U.S. Constitution, where the U.S. Congress has broad and expansive powers, or a states' rights view of the document, where Congress has narrow and limited powers.¹ With regards to rights, these debates often center around an emphasis on a moral reading of various clauses² versus an emphasis on originalism.³

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1. As Jesse Choper aptly stated:

Constitutional issues of federalism, on the other hand, are a distinguishable species. When the contention is made that the national government has engaged in activity beyond its delegated authority, or when it is alleged that an attempted state regulation intrudes into an area of exclusively national concern, the constitutional issue is wholly different from that posed by an assertion that certain government action abridges a personal liberty secured by the Constitution. The essence of the individual rights claim is that no organ of government, national or state, may undertake the challenged activity. In contrast, an alleged constitutional violation of the federalism principle concedes that one of the two levels of government has power to engage in the questioned conduct; the issue is simply whether the particular level that has acted is the constitutionally proper one.

Jesse H. Choper, *The Scope of National Power Vis-a-Vis the States: The Dispensability of Judicial Review*, 86 YALE L.J. 1552, 1555 (1977).

2. See generally SOTIRIOS A. BARBER & JAMES E. FLEMING, CONSTITUTIONAL INTERPRETATION: THE BASIC QUESTIONS 155–70 (2007) (arguing that constitutional interpretation invariably entails a philosophical approach); RONALD DWORIN, FREEDOM'S LAW: THE MORAL READING OF THE AMERICAN CONSTITUTION 2 (1996) (“The moral reading proposes that we all—judges, lawyers, citizens—interpret and apply [abstract clauses in the Constitution] on the understanding that they invoke moral principles about political decency and justice.”); DAVID A. STRAUSS, THE LIVING CONSTITUTION (2010) (defending a living constitutionalism that advocates for a common law approach to interpreting the U.S. Constitution).
3. See generally ROBERT H. BORK, THE TEMPTING OF AMERICA 143–45 (1990) (“In truth, only the approach of original understanding meets the criteria that any theory of constitutional adjudication must meet in order to possess democratic legitimacy.”); JOHN O. MCGINNIS & MICHAEL B. RAPPAPORT, ORIGINALISM AND THE GOOD CONSTITUTION (2013) (arguing that the Constitution should be interpreted according to its meaning at that time); ANTONIN SCALIA, A MATTER OF INTERPRETATION 16–18, 37–38 (1997) (rejecting a common law approach to interpreting the Constitution); Keith E. Whittington, *The New Originalism*, 2 GEO. J.L. & PUB. POL’Y 599, 609 (2004) (“[T]he new originalism is focused less on the concrete intentions of individual drafters of constitutional text than on the public meaning of the text that was adopted.”).

These interpretive frameworks generate diametrically opposite conclusions. A states' right approach may invalidate a congressional law under the Commerce Clause while its nationalistic counterpart may uphold it. A moral reading may entail that discrimination on the basis of sexual orientation violates the Equal Protection Clause of the Fourteenth Amendment. An originalist approach may reject that. Moreover, different interpretations of powers and rights also overlap in tellingly predictable ways. Those who are originalists generally treat Congress as having limited powers under the Constitution. Those who are moral readers generally treat Congress as having expansive powers under the document.

What explains the fact that justices, scholars, and practitioners have come to radically different views about the Constitution? What explains the fact that some focus on the Constitution as a nationalistic document while others see it as a text to proscribe federal powers? Why do originalists generally look to the past whereas moral readers look to the present in deciding the scope and existence of rights? Why do originalists generally privilege a limited role for Congress whereas moral readers privilege a more expansive view? These questions inform what we consider as the puzzle of constitutional interpretation, a puzzle that has gone largely unnoticed by legal scholars who have addressed the originalism/living constitutionalism debate, but not the foundational debate that generated it. Legal scholars may analyze the nature of these debates from various perspectives, often seeking to explain why their particular account of interpretation is better or more justifiable. An underlying assumption of these works is that these divergent theories about powers and rights cannot both be correct under the Constitution.⁴ If anything, legal scholars sometimes seek to downplay this type of disagreement, arguing, for instance, that everyone is really an originalist.⁵

4. Consider here Randy Barnett's argument that the Constitution entails divergent views of popular sovereignty. RANDY BARNETT, *OUR REPUBLICAN CONSTITUTION: SECURING THE LIBERTY AND SOVEREIGNTY OF WE THE PEOPLE* (2016). On one hand, "[t]hose who favor the Democratic Constitution view We the People as a group, as a body, as a collective entity." *Id.* at 19. On the other hand, "[t]hose who favor the Republican Constitution view We the People as individuals." *Id.* Although his argument has some affinity with ours, he argues that we must reclaim the Republican Constitution as the historically correct view, with its emphasis on originalism rather than a living constitutionalism. In contrast, as we outline in Part III, both theories of constitutional interpretation are historically justified.

5. James Fleming makes this very point in responding to Lawrence Solum's argument about the meaning of originalism.

If we define originalism inclusively enough, we might say that we evidently are all originalists now. Indeed, we might just define originalism so broadly that even I would no longer hope that we are not all originalists now! Applying Solum's

This Essay, in contrast, seeks to provide an explanation for these interpretive debates over powers and rights that is essentially connected to the Constitution. It aims to explain how opposing viewpoints about power/rights and moral reading/originalism could both accurately reflect the theories on which the nation was founded. In doing so, this Essay proposes that the Constitution itself is a bifurcated text created by the existence of America's two foundings. The first founding established state governments (between 1776 and 1781), and the second founding established the federal or national government (in 1787).⁶ We argue that the Constitution simultaneously affirms both these foundings. In doing so, the meaning of the Constitution has been perpetually trapped within these two foundational and divergent frameworks.

This Essay proceeds in three parts. Part I outlines the nature of legal debates over powers and rights, demonstrating that justices often reach contrary conclusions in these cases. This establishes the motivating puzzle of the Essay. Part II discusses the way in which political scientists seek to explain the existence of such debates. Political scientists, drawing on the attitudinal model, use political ideology to account for disagreement over interpretation. Because this account does not discuss the Constitution, it does not genuinely explain the puzzle posed by this Essay. Part III seeks to explain this puzzle with the two-foundings thesis. This thesis connects debates over powers and rights to the way in which the Constitution itself affirms two distinct but

framework, we would conclude that Jack Balkin, with his self-described living originalist method of text and principle, definitely is an originalist. Ronald Dworkin, with his moral reading of the Constitution, surely also is. Sotirios A. Barber and I, with our philosophic approach to constitutional interpretation (and my own "Constitution-perfecting theory"), are as well.

James E. Fleming, *Are We All Originalists Now? I Hope Not!*, 91 TEX. L. REV. 1785, 1787 (2013) (footnotes omitted).

Solum's framework appears in several notable texts. See, e.g., JACK M. BALKIN, *LIVING ORIGINALISM* 3 (2011). ("Is our Constitution a living document that adapts to changing circumstances, or must we interpret it according to its original meaning? For many years people have debated constitutional interpretation in these terms. But the choice is a false one. Properly understood, these two views of the Constitution are compatible rather than opposed."); ROBERT W. BENNETT & LAWRENCE B. SOLUM, *CONSTITUTIONAL ORIGINALISM: A DEBATE* 4 (2011) (outlining originalism as a framework for constitutional interpretation and defining the public meaning thesis as: "Constitutional meaning is fixed by the understanding of the words and phrases and the grammar and syntax that characterized the linguistic practices of the public and not by the intentions of the framers.").

6. See ELVIN T. LIM, *THE LOVERS' QUARREL: THE TWO FOUNDINGS & AMERICAN POLITICAL DEVELOPMENT* (2014) (explaining how the "Two Foundings" relate to scholarly debates in the field of American political development).

conflicting foundings. This thesis both explains the contradictory positions over powers and rights and grounds this explanation in the Constitution itself.

I. THE PUZZLE OF CONSTITUTIONAL INTERPRETATION

Scholars routinely disagree over how to interpret the Constitution. These debates generally fall into two categories: debates over powers and debates over rights. The former category is about the nature and limits of state and congressional power, and the latter is about how to interpret the scope of rights. Because this Essay is about explaining why these underlying disagreements exist (without advocating for any particular position), Part I is an admittedly brief and cursory exposition of these familiar debates.

A. The Debate Over Powers

The legal debate over power is about the scope of congressional power and, relatedly, the scope of state power. There are two camps in this debate: the nationalists, who view Congress as having broad and expansive powers, and those committed to states' rights, who view Congress as having narrow and limited powers. This debate often plays out in interpretations of the Commerce Clause. In cases such as *United States v. Darby*⁷ and *Wickard v. Filburn*,⁸ the U.S. Supreme Court upheld a nationalistic view of this clause, holding that Congress has the power to pass laws regulating activity that “substantially affect” interstate commerce.⁹ Although this interpretive view is still good law, subsequent cases, particularly during the Rehnquist Court, have rejected congressional commerce power in regulating the possession of guns¹⁰ or gender-motivated violence.¹¹ Commerce clause cases are often the most noted in the Court’s jurisprudence over federalism.

The most recent case concerning congressional power *National Federation of International Business v. Sebelius*¹² reveals the way in which

7. 312 U.S. 100 (1941).

8. 317 U.S. 111 (1942).

9. See, e.g., *Wickard*, 317 U.S. at 120 (stating that federal commerce clause power is “embracing and penetrating” and that “effective restraints on its exercise must proceed from political rather than from judicial processes”); *Darby*, 312 U.S. at 124 (stating that the Tenth Amendment is a “truism” and does not alter the idea that there are no substantive limits on congressional commerce clause power).

10. *United States v. Lopez*, 514 U.S. 549 (1995).

11. *United States v. Morrison*, 529 U.S. 598 (2000).

12. 567 U.S. 519 (2012).

justices disagree about the scope of this power. In *Sebelius*, Chief Justice Roberts upheld the individual mandate in the Patient Protection and Affordable Care Act as a part of Congress's taxing and spending power. But along with the other conservative justices, he made clear that the mandate was not a permissible exercise of the commerce clause power, because "Congress has never attempted to rely on that power to compel individuals not engaged in commerce to purchase an unwanted product."¹³ Justice Thomas, in dissent, takes an even narrower view of Congress's power under this clause. Justice Thomas reasons that "the very notion of a 'substantial effects' test under the Commerce Clause is inconsistent with the original understanding of Congress's powers and with this Court's early Commerce Clause cases."¹⁴ Justice Thomas would roll back the earlier cases of *Darby* and *Wickard* that had expanded congressional power.

This debate over the scope of Congress's power is a longstanding one, going at least as far back as *M'Culloch v. Maryland*,¹⁵ where Chief Justice Marshall held that Congress had the implied power to charter a bank. In *Sebelius*, Chief Justice Roberts references *M'Culloch* saying: "Nearly two centuries ago, Chief Justice Marshall observed that 'the question respecting the extent of the powers actually granted' to the Federal Government 'is perpetually arising, and will probably continue to arise, as long as our system shall exist.'"¹⁶ This debate about powers will persist as justices align themselves either with nationalists or those committed to states' rights, like, as we shall see, the statesmen who were debating the Constitution at the Philadelphia Convention.

In addition to the scope of federal power, debates in this area are often about the nature of state power as well. Consider *U.S. Term Limits, Inc. v. Thornton*¹⁷ where the Court held that states do not have the power to add to the standing qualifications of members of Congress. The majority and dissent in that case both looked to the text of the Tenth Amendment, the historical record of the Constitutional Convention, and the structure of the Constitution in deciding whether Arkansas had the power, in effect, to impose term limits on its own federal representatives and senators.

13. *Id.* at 549.

14. *Id.* at 708 (Thomas, J., dissenting) (quoting *Morrison*, 529 U.S. at 627 (Thomas, J., concurring)).

15. 17 U.S. (4 Wheat.) 316 (1819).

16. *Sebelius*, 567 U.S. at 533–34 (quoting *M'Culloch*, 17 U.S. at 405).

17. 514 U.S. 779 (1995).

Writing for the liberal justices, Justice Stevens argued that the people of the United States, not individual states, have the power to add to the standing qualification for that state's congressional members. Justice Stevens limited the power of states, by making clear "that the right to choose representatives belongs not to the States, but to the people."¹⁸ Hence Justice Stevens adopted a nationalistic view of the Constitution.

In contrast, writing for the conservative justices, Justice Thomas argued: "The ultimate source of the Constitution's authority is the consent of the people of each individual State, not the consent of the undifferentiated people of the Nation as a whole."¹⁹ He interpreted the Constitution as contemplating an expansive view of state power in the area of qualifications. Justice Thomas highlights a state-centered view of the Constitution.

This debate between nationalists and those committed to states' rights reveals contradictory visions of the Constitution. The former camp is often sympathetic to an expansive notion of congressional power and a limited role for states whereas the latter favors a limited notion of this power and a more expansive role for states.

B. The Debate Over Rights

In addition to the constitutional debate over powers, there is a parallel debate over rights. Here, the debate is often framed as one between originalism and a moral or philosophic reading. In focusing on these two types of interpretive frameworks, we recognize that there are, of course, others including textualism, pragmatism, and doctrinalism. Even between originalism and a moral reading, scholars sometimes argue that in one sense, everyone is an originalist and simply disagrees about what the constitutional text publicly meant at the time it was framed and ratified.²⁰ Because this Essay is not about deciding which interpretive theory is the best or more correct one (the more familiar focus of scholarly work), we operate on the assumption that there are crucial differences in how judges, scholars, and practitioners understand what the Constitution means with regards to rights.²¹ This is why we focus specially on originalism and a moral reading, because these two

18. *Id.* at 820–21.

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

20. See Fleming, *supra* note 5.

21. We agree with Fleming that downplaying this disagreement "may obscure our differences more than elucidate common ground." Fleming, *supra* note 5, at 1788.

frameworks typically generate the most contrary conclusions in any given case.

These frameworks, understood as ideal types, give very different answers to what the Constitution means. Originalists generally look to the past whereas moral readers look to the present in deciding the scope and existence of rights. What did “cruel and unusual punishments” mean in the eighteenth century? What did “equal protection” mean in the nineteenth century? These questions, which look to the past, are the bread and butter of an originalist methodology. This methodology holds that the death penalty does not violate a right to be free from cruel and unusual punishment, because the historical, public meaning of that phrase did not consider such a penalty to be cruel or unusual.²² Similarly, this methodology holds that sex or sexual orientation discrimination is not a violation of equal protection, because the meaning of “equal protection” in the nineteenth century only concerned race, not these other classifications.²³ This framework considers the Constitution as a static document. The Constitution’s value for originalists is that the Constitution does not change—unless formally amended by the people.²⁴

Justices who adhere to originalism, such as Justices Scalia, Rehnquist, and Roberts, often affirm, in turn, a historically grounded test for determining substantive due process rights. For instance, in *Obergefell v. Hodges*,²⁵ Justice Roberts argues, in dissent, that in deciding whether bans on gay marriage violate an implied right to marry, the Court must ensure that, at the very least, such a right is “objectively, deeply rooted in this Nation’s history and tradition.”²⁶

If originalists understand the meaning of constitutional rights by looking to the past, moral readers, in contrast, argue judges should look not

22. See generally Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L REV. 849, 853 (1989) (“At an even more general theoretical level, originalism seems to me more compatible with the nature and purpose of a Constitution in a democratic system.”).

23. Antonin Scalia, U.S. Supreme Court Justice, Address at the Woodrow Wilson International Center for Scholars in Washington, D.C. (Mar. 14, 2005), http://www.cfif.org/htdocs/freedomline/current/guest_commentary/scalia-constitutional-speech.htm [<http://perma.cc/WT8Q-C4TN>].

24. See generally KEITH WHITTINGTON, CONSTITUTIONAL INTERPRETATION: TEXTUAL MEANING, ORIGINAL INTENT, AND JUDICIAL REVIEW 3 (1999) (“I intend to demonstrate that originalism is the method most consistent with the judicial effort to interpret the written constitutional text and that an originalist jurisprudence facilitates the realization of a political system grounded on popular sovereignty.”).

25. 135 S. Ct. 2584 (2015).

26. *Id.* at 2618 (Roberts, J., dissenting) (quoting *Washington v. Glucksberg*, 52 U.S. 702, 720–21 (1997)).

just to history but to moral principles that place the Constitution in its best light. Justice Brennan describes this approach as interpreting the document's "majestic generalities," such as "cruel and unusual" and "equal protection," in a way that "account[s] for the existence of these substantive value choices, and . . . accept[s] the ambiguity inherent in the effort to apply them to modern circumstances."²⁷ Justice Brennan, in turn, would read the Cruel and Unusual Punishments Clause to forbid the death penalty, because it violates a basic commitment to "human dignity."²⁸ For the moral or philosophic reader, we have those rights that the phrases and words of the Constitution affirm in principle. This understanding of principle is not grounded in a historical practice or what the words meant some hundred or so years ago. This approach is grounded in the best understanding of the Constitution given the present state of affairs. Whereas for originalism the truth of what the Constitution means is a backwards-looking question, for the moral reader who advocates for a more living Constitution, it is a forward or present-day inquiry.

Exemplifying this approach, the majority opinion in *Obergefell* written by Justice Kennedy points out that "[t]he nature of injustice is that we may not always see it in our own times."²⁹ Like Justice Brennan, Justice Kennedy views the majestic generalities of the Constitution to mean that the Framers "did not presume to know the extent of freedom in all of its dimensions, and so they entrusted to future generations a charter protecting the right of all persons to enjoy liberty as we learn its meaning."³⁰ Moral readers, then, endorse a dynamic view of interpretation, one that is not hamstrung by the past but informed by the present.

C. How to Explain These Debates?

This cursory description of debates over powers and rights reveals that these interpretive frameworks do not merely emphasize different perspectives

27. William J. Brennan, U.S. Supreme Court Justice, Constitutional Interpretation, Address to the Test and Teaching Symposium at Georgetown University (Oct. 12, 1985), <http://teachingamericanhistory.org/library/document/constitutional-interpretation> [<http://perma.cc/ECW2-CJ5L>]. See generally STEPHEN BREYER, ACTIVE LIBERTY: INTERPRETING OUR DEMOCRATIC CONSTITUTION 11–12 (2005) ("I shall link use of the theme [of active liberty] to a broader interpretive approach that places considerable importance upon consequences; and I shall contrast that approach with others that place greater weight upon language, history and tradition.").

28. Brennan, *supra* note 27.

29. *Obergefell*, 135 S. Ct. at 2598.

30. *Id.*

on the meaning of the Constitution—they present diametrically opposite ones. The nationalistic framework seeks an expansive view of congressional power; its states' right counterpart a restrictive view. While an originalist reading of the Constitution interprets rights by looking to the past, a moral reading does so by looking to the present. Moreover, nationalists believe they have the correct view of the Constitution, and proponents of states' rights believe they have the correct view. The same goes for moral readers and originalists.

Simultaneously, those who are originalists generally treat Congress as having limited powers under the Constitution. Those who are moral readers generally treat Congress as having expansive powers under the document. That is, those who view the document as a nationalistic charter will often interpret constitutional rights in a dynamic way, whereas those who view the document as more state-focused will usually interpret such rights in a fixed or static way. This may be an obvious point but one that legal scholars have not explained.

II. THE ATTITUDINAL MODEL

The foregoing summary, then, poses the motivating puzzle of this Essay. Contradictory views and understanding of the Constitution exist. How do we explain the fact that the Constitution means such contradictory things? How do we explain the coincident dichotomy between a nationalist view/moral reading on one hand and a state-centered view/originalism on the other? Legal scholars do not spend much, if any, time answering these questions. Political scientists, on the other hand, do provide an explanation for this disagreement: Drawing primarily on empirical assessments, they argue that disagreement arises because of political ideology.³¹ A conservative justice, generally appointed by a Republican president, will take a state-centered view of the Constitution while also endorsing originalism. A liberal justice, generally appointed by a Democratic president, will take a nationalistic view and endorse a moral

31. See, e.g., MICHAEL A. BAILEY & FORREST MALTZMAN, *THE CONSTRAINED COURT: LAW, POLITICS, AND THE DECISIONS JUSTICES MAKE* (2011); LEE EPSTEIN & JACK KNIGHT, *THE CHOICES JUSTICES MAKE* (1998); Brandon L. Bartels, *The Constraining Capacity of Legal Doctrine on the U.S. Supreme Court*, 103 *AM. POL. SCI. REV.* 474 (2009); Andrew D. Martin, *Statutory Battles and Constitutional Wars: Congress and the Supreme Court*, in *INSTITUTIONAL GAMES AND THE U.S. SUPREME COURT 3* (James R. Rogers et al. eds., 2006); Andrew D. Martin & Kevin M. Quinn, *Dynamic Ideal Point Estimation via Markov Chain Monte Carlo for the U.S. Supreme Court, 1953–1999*, 10 *POL. ANALYSIS* 134 (2002); Christopher Zorn & Jennifer Barnes Bowie, *Ideological Influences on Decision Making in the Federal Judicial Hierarchy: An Empirical Assessment*, 72 *J. POL.* 1212 (2010).

reading. This explanation is noteworthy for generally ignoring the law and even, more glaringly, the Constitution itself, in favor of a primarily political explanation.³²

A. Ideology Not Law

In their classic work on judicial decisionmaking, Jeffrey A. Segal and Harold J. Spaeth contend that the Supreme Court justices “have such virtually untrammelled policymaking authority.”³³ This attitudinal model of the Court views justices as miniature policymakers, deciding cases on the basis of their own preferred ideology and politics, generally unconstrained by legal considerations.³⁴ Scholars have shown that this ideological discretion is, unsurprisingly, most prominent at the Supreme Court.³⁵

In fact, political scientists who study judicial behavior have plotted the ideological bent of individual justices over time from 1937 to 2016.³⁶ They show, for instance, that from 1985 onwards, Justice Thomas is one of the most conservative justices on the modern court, and Justices Brennan and Marshall have been some of the most liberal.³⁷ This does not mean that ideology explains every decision a justice may make. Justice Scalia, for instance, sometimes decides criminal due process cases in a way that is ideologically liberal.³⁸ But this does not detract from the fact that after Justice Thomas,

32. According to Jeffrey A. Segal and Harold J. Spaeth, the legal model for adjudicating cases holds that “the decisions of the Court are substantially influenced by the facts of the case in light of the plain meaning of statutes and the Constitution, the intent of the Framers, and/or precedence.” JEFFREY A. SEGAL & HAROLD J. SPAETH, *THE SUPREME COURT AND THE ATTITUDINAL MODEL REVISITED* 48 (2002). And as we outline in Part I, jurists, scholars, and practitioners disagree about what various clauses in the Constitution mean. In contrast, according to Segal and Spaeth the attitudinal model for adjudicating cases holds that “the Supreme Court decides disputes in light of the facts of the case vis-à-vis the ideological attitudes and values of the justices.” *Id.* at 86.

33. *Id.* at 12.

34. See, e.g., EPSTEIN & KNIGHT, *supra* note 31; GLENDON SCHUBERT, *THE JUDICIAL MIND REVISITED: PSYCHOMETRIC ANALYSIS OF SUPREME COURT IDEOLOGY* (1974); Martin, *supra* note 31.

35. LEE EPSTEIN, WILLIAM M. LANDES & RICHARD A. POSNER, *THE BEHAVIOR OF FEDERAL JUDGES: A THEORETICAL AND EMPIRICAL STUDY OF RATIONAL CHOICE* (2013); Zorn & Bowie, *supra* note 31.

36. *Measures*, MARTIN-QUINN SCORES, <http://mqscores.wustl.edu/measures.php> [<http://perma.cc/JJ85-SE9J>].

37. Andrew D. Martin & Kevin M. Quinn, *Dynamic Ideal Point Estimation via Markov Chain Monte Carlo for the U.S. Supreme Court, 1953–1999*, 10 *POL. ANALYSIS* 134, 146 (2002).

38. See, e.g., *Florida v. Jardines*, 133 S. Ct. 1409 (2013) (holding that use of a trained narcotics dog at the front of a suspect’s door constitutes a search under the Fourth

Justice Scalia is, according to political scientists, the most conservative of modern justices.³⁹

B. A Political, not Legal, Debate

In one sense, this ideological account is not surprising. As a general matter, we expect Republican presidents to nominate conservative jurists and Democratic presidents to nominate those who are liberal. As political scientists Lee Epstein, Andrew Martin, and Kevin Quinn argue, the recent confirmation of Justice Gorsuch by the current Republican administration reveals the explanatory force of the attitudinal model.⁴⁰

The attitudinal model reduces debates over constitutional powers and rights to be about politics. According to this model, the reason that those justices who are nationalists are also moral readers is based on political ideology. Just as liberals (current Democrats) favor expansive congressional power and social rights regarding sexuality and reproduction, so too do justices who ascribe to a nationalistic view of the Constitution and who deploy a moral or philosophic reading of the text. Likewise, under this model, political ideology explains why justices who are advocates of states' rights are also originalists. Just as conservatives (current Republicans) favor limited congressional power and limited social rights regarding sexuality and reproduction, so too do justices who ascribe to a states' rights view of the Constitution and who deploy an originalist reading of the text.

More than connecting these divergent interpretations of the Constitution to political ideology, the attitudinal model places politics before the law. For instance, the work by Epstein, Martin, and Quinn mentioned above regarding Justice Gorsuch makes no mention of originalism, a moral reading, or even the Constitution.⁴¹ This explanatory model reduces legal debates over powers and rights discussed above to mere politics.

It is hard to deny the force of this model, because it provides an explanation for why these divergent theories of what the Constitution means

Amendment, requiring probable cause). Justice Scalia wrote the majority opinion joined by Justices Thomas, Ginsburg, Sotomayor, and Kagan. Justice Alito wrote the dissent joined by Justices Roberts, Kennedy, and Breyer. *See id.*

39. *Id.*

40. *See* LEE EPSTEIN, ANDREW D. MARTIN & KEVIN QUINN, PRESIDENT-ELECT TRUMP AND HIS POSSIBLE JUSTICES app., 8 fig.2 (2016), <http://pdfserver.amlaw.com/nlj/PresNominees2.pdf> [<http://perma.cc/MA7J-GQR4>] (showing that Gorsuch is ideologically conservative).

41. *See id.*

actually exist. Although this is beneficial for the discipline of political science (and empirical work in American politics in particular), it poses an acute challenge to legal scholars. If the underlying disagreement is genuinely one that is based on politics, this delegitimizes the explanatory force of the Constitution. Unsurprisingly, law schools do not teach the attitudinal model. (Law schools simply teach students the legal model for adjudicating cases with its varying theories of constitutional interpretation, without attention to why such variance exists.) Rather than fully explaining the puzzle of constitutional interpretation, the attitudinal model, in a certain way, exacerbates it. This model entails that the debates outlined above have nothing to do with the Constitution. What, then, is the connection between the Constitution and what legal scholars, judges, and practitioners who constantly engage in these interpretive debates are doing? If the debates over interpretation are reducible only to political differences, as the attitudinal model suggests, the very idea that these debates are about the Constitution makes little sense.

III. EXPLAINING THE PUZZLE

We offer here an endogenous, legal explanation of the power/rights and moral reading/originalism debate based on the two-foundings thesis. This thesis contends that the Constitution itself is a bifurcated text, one that affirms the establishment of two distinct and conflicting governments.

The first founding started in 1776, when the thirteen original colonies declared themselves in the Declaration of Independence to be “Free and Independent”⁴² and came together, each with their sovereignties fully intact, to adopt and ratify the first constitution of the United States, the Articles of Confederation and Perpetual Union (the Articles of Confederation or the Articles), in 1781. The first founding created a league of nations that assiduously guarded the sovereignty of states. The first founding, in turn, embraced a decided bias for states’ rights, and correspondingly, an understanding of the union as a charter of ancient rights.

The second founding in 1789 radically overhauled this older conception of union as merely a compact among thirteen sovereign states. The second founding created a new charter or compact, what we know as the Constitution. This document created a nationalized “We the People”⁴³

42. THE DECLARATION OF INDEPENDENCE para. 31 (U.S. 1776).

43. U.S. CONST. pmb1.

aggregated across state lines with a federal government that would represent Americans collectively at the national level. With the second founding and the ratification of the Constitution, the United States became much more than a league of nations. As the Preamble of the Constitution promised, it was, “a more perfect Union” committed to a more centralized federalism than what was spawned at the first founding. Crucially, however, elements of the first founding, such as the commitment to states’ rights in the composition of the U.S. Senate and the Tenth Amendment, were incorporated in the text of the Constitution. This is why we argue that the two-foundings thesis points to two divergent ways of understanding the Constitution—ways that align with extant debates over powers and rights, moral reading and originalism.

A. First Founding (1776–81) and Second Founding (1787–89)

When the Constitution was ratified, states had already been established.⁴⁴ The Constitution did not create or set up state governments. With regard to the Constitution, states are pre-political. Their existence and the nature of their legitimacy is assumed in the structure, text, and theory of the Constitution. These governments arose when the Declaration of Independence declared, in part, that the thirteen states were “Free and Independent States.”⁴⁵ These states, in turn, set up the Articles of Confederation. This confederation preserved the autonomy of states, making clear, in fact, that each “state retains its sovereignty, freedom, and independence.”⁴⁶ What were once colonies of the Crown became free and independent states. The first founding explains the existence and legitimacy of state governments as preexisting units that had to be incorporated in the second founding.

The Constitution, which was the culmination of the second founding, established the federal or national government. Before the Constitution, no such government existed. The government during the first founding was

44. As former colonies of England, the states declared their independence in 1776. THE DECLARATION OF INDEPENDENCE para. 31 (“That these united Colonies are, and of Right ought to be Free and Independent States.”); *see also* U.S. CONST. art. I, § 2, cl. 3 (“The Number of Representatives shall not exceed one for every thirty Thousand, but each State shall have at Least one Representative; and until such enumeration shall be made, the State of New Hampshire shall be entitled to chuse three, Massachusetts eight, Rhode-Island and Providence Plantations one, Connecticut five, New-York six, New Jersey four, Pennsylvania eight, Delaware one, Maryland six, Virginia ten, North Carolina five, South Carolina five, and Georgia three.”). In listing the original thirteen states, the Constitution assumes that these states were already established.

45. THE DECLARATION OF INDEPENDENCE para. 31.

46. ARTICLES OF CONFEDERATION OF 1781 art. II.

always styled “the United States, in Congress assembled,”⁴⁷ and there was no people in the national sense, but only “the people of the different States in this Union.”⁴⁸ At the second founding, “We the People” ordained and established “this Constitution of the United States.”⁴⁹ The United States as a unit came into existence when New Hampshire became the ninth state to ratify the Constitution.⁵⁰ The second founding established a union rather than a confederation. Unlike the Articles, which required unanimous consent of the state legislatures in order to amend that document,⁵¹ the Constitution required consent of the conventions in at least nine states.⁵² What this critically indicates is that absolute state sovereignty, a doctrine from the first founding, had become attenuated in the second founding.

B. The Constitution as a Clash of Foundings

But attenuation is not the same as displacement, hence the explanatory power of the two-foundings thesis in explaining both sides in the debates about powers and rights. Although the Constitution established the national government, it also reaffirmed core tenets of the first founding, drawing on states to establish the federal government while also guaranteeing their sovereignty.

The view that there was a single, monolithic founding treats the Constitution as “split[ting] the atom of sovereignty.”⁵³ In *U.S. Term Limits, Inc. v. Thornton*,⁵⁴ Justice Kennedy expounds upon this view in the following way:

The resulting Constitution created a legal system unprecedented in form and design, establishing two orders of government, each with its own direct relationship, its own privity, its own set of mutual rights and obligations to the people who sustain it and are governed by it. It is appropriate to recall these origins, which

47. *Id.* art. II.

48. *Id.* art. IV.

49. U.S. CONST. pmb.

50. *Id.* art. VII (“The Ratification of the Conventions of nine States shall be sufficient for the Establishment of this Constitution between the States so ratifying the same.”).

51. ARTICLES OF CONFEDERATION OF 1781 art. XIII (requiring that any alteration “be agreed to in a Congress of the United States, and be afterwards confirmed by the legislature of every State”).

52. U.S. CONST. art. VII (“The Ratification of the Conventions of nine States shall be sufficient for the Establishment of this Constitution between the States so ratifying the same.”).

53. *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 838 (1995) (Kennedy, J., concurring).

54. 514 U.S. 779.

instruct us as to the nature of the two different governments created and confirmed by the Constitution.⁵⁵

This view posits that the Constitution created two different governments, the state government and the federal government, and that all of this was enacted in a single moment in 1787. The conventional view thus treats the Constitution as a result of a single founding.

Even if this view is not stated explicitly, it is often assumed. For example, Gordon Wood's classic book *The Creation of the American Republic, 1776–1787* analyzes this time frame as establishing a single American government (the “American Republic”).⁵⁶ Akhil Amar views the American founding as a single event: “It started with a bang.”⁵⁷ This entails that there was only one “it,” one government that was created or established by the Constitution. If scholars do discuss a second founding, it is often in the context of the Civil War and Reconstruction, where the civil rights amendments of the nineteenth century refounded the nature and scope of the United States.⁵⁸

This Essay argues that sovereignty was already split before the second founding. There was a beginning before what we typically take to be the beginning. When the Constitution took effect, it was affirming two distinct foundings. The two-founding thesis challenges the splitting metaphor. Rather than splitting sovereignty, the Constitution importantly overlapped one sovereignty or government (the United States) over another (the preexisting sovereignty of the states). It layered one government upon another. This is obvious once one appreciates the role of states in the Constitution. It is not just that the Constitution required ratification by conventions in states.⁵⁹ When it comes to democratic representation at the national level, such representation must first go through states. Both houses of Congress are composed of members that are selected within each state. Moreover, according to the Constitution, only those who are qualified to vote for “the most numerous Branch of the State Legislature” may vote in federal elections for their Senator or Representative in the House.⁶⁰ This is why there is no explicit right to vote in

55. *Id.* at 838–39 (Kennedy, J., concurring).

56. GORDON S. WOOD, *THE CREATION OF THE AMERICAN REPUBLIC, 1776–1787* (1998).

57. AKHIL REED AMAR, *AMERICA'S CONSTITUTION: A BIOGRAPHY* 5 (2005).

58. *See generally* 2 BRUCE ACKERMAN, *WE THE PEOPLE: TRANSFORMATIONS* 351 (2000).

59. U.S. CONST. art. VII; *id.* art. I, § 2, cl. 1 (“[T]he Electors in each State shall have the Qualifications requisite for Electors of the most numerous Branch of the State Legislature.”).

60. *Id.* art. I, § 2, cl. 1 (“The House of Representatives shall be composed of Members chosen every second Year by the People of the several States, and the Electors in each State shall have the Qualifications requisite for Electors of the most numerous Branch of the State Legislature.”); U.S. CONST. amend. XVII (“The Senate of the United States shall be

the Constitution. In fact, how the president is selected, whether by popular vote (as is the current procedure) or some other procedure, is also determined by states.⁶¹ And any constitutional act that amends the document requires assent by states.⁶² The spirit of the Articles of Confederation lives on.

Tellingly, the Constitution does not define what a state is. Although the document lists the original thirteen in Article I, and outlines how new states are admitted, there is no discussion about the nature or sovereign status of states. This is because the Constitution assumes the existence and legitimacy of states. This is because the Federalists⁶³ were not working with tabula rasa at the Philadelphia Convention. By playing such a crucial role in establishing and maintaining the federal or national government (which did not exist before), the Constitution overlays this new government onto an older arrangement. This is the distinctive way in which the two foundings are present in the Constitution. Alexis de Tocqueville famously said that the Constitution was an “incomplete national government.”⁶⁴ This fact distinguishes “the Federal Constitution of the United States of America from All Other Federal Constitutions.”⁶⁵ James Madison himself acknowledged this in *The Federalist Papers*, Number 39, when he deftly noted that the Constitution was “partly federal and partly national.”⁶⁶

Scholars often consider federalism along with separation of powers as a structural aspect of the U.S. government. Just as the Constitution divides power horizontally—among the legislative, executive, and judicial

composed of two Senators from each State, elected by the people thereof, for six years; and each Senator shall have one vote. The electors in each State shall have the qualifications requisite for electors of the most numerous branch of the State legislatures.”). Amendments XV, XIX, and XXVI limit this power by prohibiting states from discriminating on the basis of race, sex, or age (over eighteen) in voting. The Equal Protection Clause of the Fourteenth Amendment also provides a more general limitation on state action.

61. *Id.* art. II, § 1, cl. 2 (“Each State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors, equal to the whole Number of Senators and Representatives to which the State may be entitled in the Congress . . .”).

62. *Id.* art. V.

63. The Federalists were the proponents of the new Constitution, the most ardent of whom were the men who helped to formulate and voted in favor of the Constitution drafted at the Philadelphia Convention. They included among their ranks Alexander Hamilton, their leader; George Washington, president of the Convention; Benjamin Franklin; Edmund Randolph; and of course Hamilton’s coauthors of *The Federalist Papers*, James Madison and John Jay.

64. ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 146 (Henry Reeve trans., Bantam Books 2000) (1835).

65. *Id.* at 149.

66. THE FEDERALIST NO. 39 (James Madison).

branches—it also divides power vertically between the federal and state government. The two-foundings thesis challenges this neat view. It proposes that federalism is not just the simple division of power between the federal and state governments. It is, in essence, a clash of the principles of two foundings. The Constitution both creates a new, national government, with its attendant powers, and affirms the legitimacy of state governments—governments whose existence preceded the Constitution. This clash of sovereignties represents the central feature and tension within the Constitution, one that as we shall see, offers justificatory fodder for both sides of the powers/rights and moral reading/originalism debates.

C. Anti-Federalists Versus Federalists

This tension between a moral reading and originalism or between a nationalistic view of the Constitution and a more state-centered view is no more evident than in the debates between the Federalists and Anti-Federalists over the Constitution's ratification. The debates over powers and rights we are having today then, are but the modern incarnation of an ancient lovers' quarrel. The Federalists sought to create a new, national government—one that would be more powerful, as outlined in *The Federalist Papers*, because the Articles of Confederation were insufficient to ensure the "preservation of the Union."⁶⁷ The Anti-Federalists⁶⁸ sought to preserve the status quo, to constrain this national government's power. This is why, for instance, the Anti-Federalists ultimately succeeded in passing the Bill of Rights, the first ten amendments to the Constitution that sought to limit the power of Congress. They also ensured, as outlined above, that states would be the only conduit by which "We the People" could exercise its national powers.

This Essay does not seek to provide a comprehensive account of these ratification debates (this is well-chartered scholarly territory). Rather, we seek to make a conceptual point that these debates map onto our two-foundings thesis. Whereas the Anti-Federalists privileged the first founding and its principles, their Federalist contemporaries privileged the second founding.

67. THE FEDERALIST NO. 15 (Alexander Hamilton).

68. For accounts of Anti-Federalist political thought, see 1–7 THE COMPLETE ANTI-FEDERALIST (Herbert J. Storing & Murray Dry eds., 1981); SAUL CORNELL, THE OTHER FOUNDERS: ANTI-FEDERALISM AND THE DISSENTING TRADITION IN AMERICA, 1788–1828 (1999); JACKSON TURNER MAIN, THE ANTI-FEDERALISTS: CRITICS OF THE CONSTITUTION (1961); and DAVID J. SIEMERS, THE ANTIFEDERALISTS: MEN OF GREAT FAITH AND FORBEARANCE (2003).

The Federalists and Anti-Federalists had different visions of political philosophy. The Federalists were not as confident about human nature as the Anti-Federalists were, at least in the small republic.⁶⁹ This was, in part, because cultural homogeneity, the checking influence of friends and neighbors, and the limited ambit of sympathies that *would have sufficed* in the Anti-Federalists' model would simply not apply to a large area that would become the United States.⁷⁰

Whereas the Federalists turned to a complex Newtonian machine to find a modern republican virtue out of contesting ambitions, the Anti-Federalists were traditionalists committed to classical republican virtue.⁷¹ These traditionalists were principled philosophers who sought a virtuous republic, one that was only possible in a small, homogenous sphere.⁷²

The Federalists focused on heterogeneity and a larger republic. They preferred a trusteeship rather than a mirroring model of representation, which prescribed that representatives ought not simply to mimic their constituents' preferences (as the Anti-Federalists suggested) but should distill the will of the people from the turbulent passions often found in a democracy.⁷³ According to Wood, the Federalists were pragmatists who adopted a "more modern and more realistic sense of political behavior."⁷⁴ For the Federalists, man-made institutions, a new "science of politics,"⁷⁵ now had to do the work when virtue was sufficient before. Ambition counteracting ambition⁷⁶

69. As Madison observed in Federalist Number 10: "[A] Society, consisting of a small number of citizens . . . can admit of no cure for the mischiefs of faction . . . [T]here is nothing to check the inducements to sacrifice the weaker party." THE FEDERALIST NO. 10, at 46 (James Madison) (Bantam Books 1982).

70. As Melancton Smith had argued in favor of the Anti-Federalist model, representatives ought to be "a true picture of the people; possess the knowledge of their circumstances and their wants; sympathize in all their distresses, and be disposed to seek their true interests." Melancton Smith, Address at the New York Ratification Convention (June 21, 1788), *reprinted in* 6 THE COMPLETE ANTI-FEDERALIST, *supra* note 68, at 157.

71. MICHAEL KAMMEN, A MACHINE THAT WOULD GO OF ITSELF: THE CONSTITUTION IN AMERICAN CULTURE (1986).

72. LIM, *supra* note 6, at 11 (outlining the way in which there exists a Federalist and Anti-Federalist philosophy of union, liberty, truth, and republicanism).

73. See for example, Madison's reminder, in Federalist Number 49, about the "danger of disturbing the public tranquility by interesting too strongly the public passions" and his argument against "a frequent reference of constitutional questions, to the decision of the whole society." THE FEDERALIST NO. 49, at 256 (James Madison) (Bantam Books 1982).

74. WOOD, *supra* note 56, at 606.

75. THE FEDERALIST NO. 9 (Alexander Hamilton).

76. THE FEDERALIST NO. 51 (James Madison).

sought to replace the older, homogenous idea of virtue advocated by the Anti-Federalists.⁷⁷

The Anti-Federalists were defenders of the “league of friendship” codified in the Articles of Confederation, where the sovereignty of the states remained mostly intact, like the nations that constitute today’s European Union.⁷⁸ They understood the new or centralized federalism that the Federalists proposed as one of consolidation, anathema to the sovereignty of the states. As one Anti-Federalist put it, “the good opinion I have of the frame and composition as well of the Confederation as the several state Constitutions: and that they are, if administered upon republican principles, the greatest blessings we enjoy; and the danger I apprehend of the one proposed is, that it will become the greatest curse.”⁷⁹

These dueling visions of politics map onto the first and second foundings. The first founders—the Anti-Federalists—who held on to the older conception of a confederated union based on the relatively unfettered sovereignty of the states included Patrick Henry,⁸⁰ Richard Henry Lee,⁸¹ and George Clinton.⁸² They harkened back to the status quo of states-centered government, homogeneity, the politics of the past, and a limited role for the national government.⁸³ The second founders, including Alexander

77. We realize that many people, including slaves, the poor, and women, were governed less by virtue and more by oppression or hierarchy at this time in history. Our singular focus on the *founders*’ perspective is simply to tease out the resulting legal frameworks for governance which now form the bases of the two principal methods of constitutional interpretation. This Essay, then, does not attempt to explore the important socio-economic, political, and material conditions that motivated the founders in their opposing viewpoints of the government.

78. ARTICLES OF CONFEDERATION OF 1781, art. III.

79. Sidney Essay II (Feb. 21, 1788), *reprinted in* 6 THE COMPLETE ANTI-FEDERALIST, *supra* note 68, at 97.

80. Patrick Henry refused his appointment as a delegate to the Philadelphia Convention because “he smelt a rat.” Don Higgenbotham, *Virginia’s Trinity of Immortals: Washington, Jefferson, and Henry, and the Story of Their Fractured Relationships*, 23 J. EARLY REPUBLIC 521, 527 (2003).

81. Most historians agree that Richard Henry Lee was the author of a major series of Anti-Federalist writings using the pseudonym Federal Farmer. Gordon S. Wood, *The Authorship of The Letters of the Federal Farmer*, 31 WM. & MARY Q. 299, 299 (1974).

82. George Clinton was the Governor of New York who feared “the undue and extensive powers vested in the central government.” JOHN P. KAMINSKI, *GEORGE CLINTON: YEOMAN POLITICIAN OF THE NEW REPUBLIC* 158 (1993).

83. The Anti-Federalists were men like Robert Yates and John Lansing who, when it became apparent that the delegates at the Philadelphia were attempting to overhaul rather than amend the Articles of Confederation, “left in disgust.” SIEMERS, *supra* note 68, at 22. Using the pseudonym, Brutus, Cecelia Kenyon tells us that “the Anti-Federalists had no publicist more able than Robert Yates.” CECELIA M. KENYON, *THE ANTIFEDERALISTS* 323 (1966).

Hamilton, John Adams, George Washington, and James Madison, emphasized a forward-looking politics, a strong national government, and a heterogeneous, large republic.⁸⁴

D. A Legal Debate About Two Views of the Constitution

Once we realize that the Constitution itself is an affirmation of two distinct foundings, the existence of debates over powers and rights and moral reading and originalism is no longer a puzzle. Each founding speaks to a different, even contradictory, way of understanding or viewing the Constitution. This is easiest to see in the debate over powers. Nationalists emphasize the second founding whereas those who care about states' rights emphasize the first founding.

The second founders sought to create a federal or national government that would, as the instructions given to the Philadelphia Convention that drafted the Constitution specify, "render the federal constitution adequate to the exigencies of Government [and] the preservation of the Union."⁸⁵ The second founders were deliberate about expanding the powers of the federal government. The Articles of Confederation did not create a separate national government. For instance, the "Congress assembled" had no distinct power to tax or to raise an army, no distinct, unitary executive branch that would be "Commander in Chief" of the military, or no separate judicial branch.⁸⁶ The Constitution, in contrast, established a distinct national government with a legislative branch that has the power to tax and raise an Army⁸⁷, a unitary executive who is Commander in Chief,⁸⁸ and a separate judicial branch.⁸⁹ If

Another prominent Anti-Federalist was George Mason, who refused to sign the proposed Constitution at Philadelphia. He lamented the absence of a bill of rights and also warned against the dangers of a standing army. See George Mason, *Objections to This Constitution of Government*, in *THE ANTI-FEDERALIST PAPERS AND THE CONSTITUTIONAL CONVENTION DEBATE 173-75* (Ralph Ketcham ed., Signet Classics 2003) (1986).

84. The Federalists promulgated a vision of "independence, growth in national power, and prosperity, all within a federal system of government retaining the states and deriving its authority from the people, but also competent to all the needs and exigencies of respectable, energetic nationhood." *THE ANTI-FEDERALIST PAPERS AND THE CONSTITUTIONAL CONVENTION DEBATES*, *supra* note 83, at 20.
85. REPORT OF PROCEEDINGS IN CONGRESS, FEBRUARY 21, 1787, *reprinted in* H.R. DOC. NO. 389, 69th Cong., 1st Sess. 46 (1926).
86. See *THE ARTICLES OF CONFEDERATION OF 1781*.
87. U.S. CONST. art. I, § 8.
88. *Id.* art. II.
89. *Id.* art. III. The Federalists had come to Philadelphia because the Articles of Confederation had failed, in their minds, to supply a robust national government to address the needs of their time. Indeed, what was created, a "Congress assembled," was

the second founding was in some regard a conscious repudiation of the first, this, in turn, points to an interpretation of the Constitution that privileges the national or federal government and an expansive reading of its powers. Liberal justices who interpret the Commerce Clause broadly, for instance, are modern day harbingers of the second founding. They come from a long line of descendants of Publius, from John Marshall, to Salmon P. Chase, to Louis Brandeis. They emphasize the powers of the federal government and the importance of a strong national government to address problems that arise in a large republic.

The first founders, in contrast, sought to limit the power of the federal government. They were skeptical of this power, seeking to ensure that states retained their sovereignty and security.⁹⁰ Again, consider the way in which states are necessary conduits for citizens to act as “We the People.” The first founders saw the national behemoth, or “the heterogeneous phantom,”⁹¹ as a problem, locating the true commitment to republican government in the states. This is why the first founders sought a Bill of Rights. Such a Bill was meant to curtail the power of a powerful national congress: “Congress shall make no law”⁹² The Tenth Amendment, in particular, makes clear that powers not delegated to the federal government are “reserved to the States respectively, or to the people.”⁹³ Modern conservative justices who interpret the Commerce Clause narrowly or privilege states over the federal government are disciples of the first founding. They prioritize the power of states and emphasize the limits on what the national government may do. They too come from a long line of dissenters echoing the spirit of ‘76, from William Johnson, to Roger Taney, to Pierce Butler.

Both interpretive frameworks, the nationalists and those committed to states’ rights, then, are historically justified ways of understanding the

barely a permanent government: it had no distinct power to tax or to raise an army, no distinct, unitary executive branch that would be “Commander in Chief” of the military, and no separate judicial branch. As John Jay woefully observed in Federalist Number 4: “Leave America divided into thirteen, or if you please into three or four independent Governments—what armies could they raise and pay—what fleets could they ever hope to have?” THE FEDERALIST NO. 4, at 14 (John Jay) (Bantam Books 1982).

90. “The anti-federalists looked to the Classical idealization of the small, pastoral republic where virtuous, self-reliant citizens managed their own affairs and shunned the power and glory of empire.” THE ANTI-FEDERALIST PAPERS AND THE CONSTITUTIONAL CONVENTION DEBATES, *supra* note 83, at 17.
91. MERCY OTIS WARREN, OBSERVATIONS ON THE NEW CONSTITUTION, AND ON THE FEDERAL AND STATE CONVENTIONS (1788), *reprinted in* 4 THE COMPLETE ANTI-FEDERALIST, *supra* note 67, at 276.
92. U.S. CONST. amend. I.
93. U.S. CONST. amend. X.

Constitution. Neither is groundless or mistaken. Debates over powers clearly reflect two distinct arguments that can be squarely traced back to the two foundings. The debate persists up to this day as the Constitution itself is bifurcated. Most clearly, the Constitution is a text which begins with the creation of national powers, and, in the Bill of Rights culminating in the Tenth Amendment, resolutely affirms restraints on these powers in defense of states' rights.

The two-foundings thesis also explains the interpretive debates over the moral reading of rights versus originalism. The second founders deliberately sought to break from the past by creating a national government that would not be held hostage by the states. These founders sought to create a forward-looking government that would be strong enough to meet new challenges. They did conceive of their creation, after all, as "a more perfect Union." Moral readers invoke the second founders by interpreting the Constitution in this dynamic way, privileging the present rather than the past, just as the second founders understood their project to be an unfolding experiment responding to the vicissitudes of modernity.

Although they do not explicitly connect their argument to the second founding, moral readers James Fleming and Sotirios Barber actually look to *The Federalist Papers* and the Preamble to inform their view of the Constitution. They call this view "positive constitutionalism" which, in effect, draws on the second founders to explain the legitimacy of a moral reading.⁹⁴ According to Fleming, the moral reader interprets the Constitution in a way that "tries to vindicate its expressed claim to be an instrument of justice, the general welfare, and the other goods listed in the Preamble."⁹⁵ Dynamism and a focus on the present are defining characteristics of the second founding, and in turn, a moral reading. A commitment to justice and to the general welfare, is predicated on an understanding of the Union as a unit and not just a league of distinct nations.

In contrast, originalists are defenders of the first founding. Originalists seek to look to the past and treat the Constitution as a static document that cannot change until formally amended. Indeed, the original meaning they seek to affirm precedes the second founding. The first founders were conservative, committed to principles derived from custom and experience; from the state of affairs that preceded the Federalists' intervention. They favored the smaller, homogenous state-centered communities of the past

94. BARBER & FLEMING, *supra* note 2, at 35.

95. JAMES E. FLEMING, FIDELITY TO OUR IMPERFECT CONSTITUTION: FOR MORAL READINGS AND AGAINST ORIGINALISMS 75 (2015).

rather than a new science of politics. Similarly, originalists seek to interpret the Constitution in a way that preserves the past, treating the original public meaning as more important than any present-day concern. This view of the Constitution is backward-looking in the same way that Anti-Federalists sought to preserve the past and its focus on a small (states) rather than a large (national government) republic.⁹⁶

Emphasizing the first founding, and in turn Anti-Federalist thought, is to emphasize a conservative ideology, one that seeks to preserve small republics over a centralized one.⁹⁷ This is why the Anti-Federalists were partial to what John Kincaid has called a “community of communities” which harken back to a United States after the first founding.⁹⁸ The Anti-Federalists advocated for a small rather than a new and expansive republic. In lamenting this focus on the past James Madison in Federalist Number 14 retorts:

But why is the experiment of an extended republic to be rejected, merely because it may comprise what is new? Is it not the glory of the people of America, that, whilst they have paid a decent regard to the opinions of former times and other nations, they have not suffered a blind veneration for antiquity, for custom, or for names, to overrule the suggestions of their own good sense, the knowledge of their own situation, and the lessons of their own experience?⁹⁹

Originalism seeks to enforce the Constitution in exactly this kind of traditional way. The meaning of the relevant clause or text comes out of the historical community that first ratified it. Originalism venerates the past, in line with Anti-Federalist thought and the first founding. The focus on custom and what came before is precisely why those who deploy originalism view this theory of interpretation as legitimate and correct.

96. As Jonathan Marshall said: “[I]f America was to be a city upon a hill, the Antifederalists seemed to say, then let it be a city renowned for liberty and virtue rather than might and extent.” Jonathan Marshall, *Empire or Liberty: The Antifederalists and Foreign Policy, 1787–1788*, 4 J. LIBERTARIAN STUD. 233, 252 (1980).

97. William Riker has argued that what changed from the first to the second Constitution was “peripheralized federalism” to “centralized federalism.” WILLIAM H. RIKER, *FEDERALISM: ORIGIN, OPERATION, SIGNIFICANCE* 5 (1964).

98. John Kincaid, *Federalism and Community in the American Context*, 20 *PUBLIUS* 69, 71 (1990). Kincaid’s account of federalism stands closer to the Anti-Federalist, confederal archetype than the Federalist one. After all, the idea of *communitas communitatum*, though a medieval idea, has, since the early modern era, been almost exclusively used to characterize a single state. On this, see J.N. FIGGIS, *STUDIES OF POLITICAL THOUGHT FROM GERSON TO GROTIUS, 1414–1625*, at 51 (1907).

99. *THE FEDERALIST NO. 14*, at 66–67 (James Madison) (Bantam Books 1982).

The two-founding thesis, then, also explains why originalists often view the Constitution as state-centered and their moral reader counterparts view it as nationalistic. Each set of interpretive frameworks corresponds to the first and second foundings respectively. The first founders looked to the past (originalism) and thereby sought to limit the power of the national government (state-centered). The second founders looked to solving the problems of the present (moral reading) and thereby sought to establish a powerful national government (nation-centered).

CONCLUSION

The two-foundings thesis connects the debates over powers and rights to the Constitution. These divergent frameworks for understanding the document were present from the very beginning. Whereas originalists and those committed to states' rights inherit the legacy of the first founding, nationalists and moral readers inherit the legacy of the second founding. No framework is the singularly correct one, because both foundings are central to the Constitution. The two sides in the debates over powers and rights are both legitimate when viewed through a historical lens. Both views speak to a partial and defensible truth about the Constitution.

Perhaps our veneration of a single founding and a monolithic set of founders has hidden this fact from us. To fully appreciate the way in which the Constitution overlapped one sovereign over another is to understand and thereby explain the puzzle of constitutional interpretation—in the sense that these debates cannot be resolved one way or the other. Just as the Constitution locked these two opposing foundings in place—forever in tension with the other—so too will justices, scholars, and practitioners invoke these divergent frameworks for understanding the Constitution. This explains why the Constitution means such contradictory things. At the very start of the United States, the first and second founders placed their imprimatur on the Constitution. The legacy of those dueling visions lives on in the way we interpret the document.

This, in turn, suggests a reversal of the attitudinal model. That model posits that politics comes first and then the law. The two-foundings thesis suggests that the law—that is, the Constitution with its two faces—comes first, and then politics. Rather than viewing the debates between originalists and moral readers as nothing other than debates between modern-day Republicans and Democrats, we should view the debates between these political parties as leitmotifs of the ancient quarrel between the first and

second founders. This reveals that our political debates are ultimately about the two forms of government that are memorialized in the Constitution, based on two types of societies the founders envisioned. After all, although modern-day Republicans typically are the ones to invoke the first founding, in our current political climate, modern-day liberals are appealing to the first founding and the emphasis on states' rights to contest the national government.¹⁰⁰ Heather Gerken calls this “progressive federalism,” one that individuals in Democratic-controlled states are using to resist President Trump.¹⁰¹

And so, we will continue to debate vociferously about powers, rights, nominations to the Court, and the right interpretive methodologies justices should use. Because the Constitution embodies two distinct and contradictory foundings—one looking forward (moral reading and a nationalistic view) and the other looking backwards (originalism and a state-centered view)—there will always be two ways of understanding it. This is the essence of our Constitution and the engine of our politics.

100. See, e.g., Heather Gerken, *We're About to See States' Rights Used Defensively Against Trump*, VOX (Jan. 20, 2017, 2:14 PM), <https://www.vox.com/the-big-idea/2016/12/12/13915990/federalism-trump-progressive-uncooperative> [<https://perma.cc/N2S2-NRXT>]; Danny Hakim & William K. Rashbaum, *New York's Attorney General in Battle With Trump*, N.Y. TIMES (Dec. 26, 2017), <https://www.nytimes.com/2017/12/26/nyregion/eric-schneiderman-attorney-general-new-york.html>; Ilya Somin, Opinion, *Federalism, the Constitution, and Sanctuary Cities*, WASH. POST: THE VOLOKH CONSPIRACY (Nov. 26, 2016), https://www.washingtonpost.com/news/volokh-conspiracy/wp/2016/11/26/federalism-the-constitution-and-sanctuary-cities/?utm_term=.b43f7edcb8eb [<https://perma.cc/2CZE-37W6>].

101. Heather K. Gerken, *A New Progressive Federalism*, DEMOCRACY J. (Spring 2012), <https://democracyjournal.org/magazine/24/a-new-progressive-federalism> [<http://perma.cc/V5YX-V2MG>].