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ORIGINALISM AND JAMES BRADLEY THAYER

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ABSTRACT—This Essay provides an originalist appraisal of Professor James Bradley Thayer’s famous book on *The Origin and Scope of the American Doctrine of Constitutional Law*. I critique Professor Thayer’s thesis on multiple levels, pointing out important aspects of the original understanding that the Framers would have had of the meaning and origins of the U.S. Constitution, as well as disputing Professor Thayer’s discussion of the history of American judicial review from 1790 to the publication of his book in 1893. I conclude that no person can be both an originalist and a Thayerian. The two theories contradict one another and cannot be jointly adhered to. I then explain why I prefer originalism to Thayerianism as a normative matter.

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INTRODUCTION

Modern constitutional law began in the United States with the publication, in 1893, of James Bradley Thayer's *The Origin and Scope of the American Doctrine of Constitutional Law*.¹ In this famous book, Professor Thayer argues for a rule of clear mistake in horizontal separation of powers cases, under which the Supreme Court ought to strike down an act of Congress or of the President only if it is so irrational that the political branch has made a clear mistake.² Professor Thayer allows slightly more vigorous judicial review of state laws and executive decisions, but even here he comes out strongly for judicial restraint and deference.³ The lesson he teaches is that judicial review is bad for democracy,⁴ is not clearly authorized by the Constitution,⁵ and should only be undertaken when a political action is irrational. Professor Thayer's position is enormously influential, and it was accepted as scripture by Justices Oliver Wendell Holmes,⁶ Felix Frankfurter,⁷ William H. Rehnquist,⁸ and Byron White.⁹ His views show up as well in the writings of Judge Robert H. Bork¹⁰ and Justice Antonin Scalia,¹¹ both of whom often confuse originalism with the analytically distinct concept of Thayerian judicial restraint.

¹ JAMES BRADLEY THAYER, *THE ORIGIN AND SCOPE OF THE AMERICAN DOCTRINE OF CONSTITUTIONAL LAW* (1893).

² *Id.* at 18.

³ *Id.* at 28–29.

⁴ *See id.* at 29–30.

⁵ *Id.* at 3–4. Professor Thayer argued that the original meaning of the Constitution should be ignored. *See id.* at 24.

⁶ *See, e.g.,* *Lochner v. New York*, 198 U.S. 45, 75 (1905) (Holmes, J., dissenting). Justice Holmes's lone dissent, unlike Justice Harlan's, rejected the idea of substantive due process altogether rather than merely disagreeing with the way in which the majority had applied that doctrine. *Id.*

⁷ *See, e.g.,* *Baker v. Carr*, 369 U.S. 186, 267–70 (1962) (Frankfurter, J., dissenting). Justice Frankfurter believed that malapportionment of electoral districts could only be fixed by the political branches of government, and he thus opposed the one-person, one-vote rule. *Id.*

⁸ *See, e.g.,* *Washington v. Glucksberg*, 521 U.S. 702, 720–21 (1997). Chief Justice Rehnquist's majority opinion tried to limit unenumerated rights to only those which are deeply rooted in history and tradition. *Id.*

⁹ *See, e.g.,* *Bowers v. Hardwick*, 478 U.S. 186, 194–95 (1986) (holding that unenumerated rights were limited to only those deeply rooted in history and tradition and that therefore the states could criminalize sexual relations between same sex couples).

¹⁰ *See* ROBERT H. BORK, *THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW* 1–5, 11 (1990) (“Either the Constitution and statutes are law, which means that their principles are known and control judges, or they are malleable texts that judges may rewrite to see that particular groups or political causes win.”).

¹¹ *See* ANTONIN SCALIA, *A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW* 41–47 (1997) (“[T]he ‘evolving’ Constitution has imposed a vast array of new constraints—new inflexibilities—upon administrative, judicial, and legislative action.”); Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849, 854 (1989) (“[T]he legislature would seem a much more appropriate expositor

I consider myself to be a committed originalist, which means that I believe the Supreme Court ought to decide constitutional cases in accord with the original public meaning of the relevant text as it applies to the circumstances of our modern world. I am both an originalist and a living constitutionalist in that I agree with Judge Bork, who once wrote that “[t]he world changes in which unchanging values find their application.”¹² I would tweak Judge Bork’s comment slightly to say, “The world changes in which unchanging texts find their application.” I consider it unconstitutional for the Supreme Court to make up new rights out of thin air—a power that Justice William O. Douglas apparently thought he had.¹³ But I consider it equally unconstitutional for the Supreme Court to erase constitutional rights that actually are in the Constitution, and that is what the adoption of Thayerian reasoning would lead to.¹⁴

I doubt that Professor Thayer understood how much harm his writing would do, and I hope that if he had understood it, he would have reconsidered. But it is necessary for us, as constitutional law scholars, to tell the history of Thayerian restraint in an unflattering yet true way if we are to properly assess the value of this approach to constitutional decision-making and to expose its opposition to originalism. This Essay, then, expresses my opposition to Thayerian constitutionalism and presents what I hope you will find to be an informative discussion of five topics having to do with the framing of our Constitution, which undermine Professor Thayer’s historical premises.

In so doing, this short Essay is designed to introduce you to some important ideas that were widely discussed at the time of the framing of the Constitution and that bear on the modern debate between originalism, living constitutionalism, and Thayerian restraint. My claim is that the worlds of the 1770s and 1780s, and of the 1860s, were actually a more normatively appealing time from which to draw constitutional principles than was the world between 1893 and 1945. I will suggest to you that in many ways we have returned or are returning to a time when most intellectuals believe that all men are born free and equal and have natural and inalienable rights, and we are leaving behind the progressive era of judicial passivity, rule by expert agencies, eugenics laws, the Holocaust, and Jim Crow segregation.

of social values, and *its* determination that a statute is compatible with the Constitution should, as in England, prevail.”).

¹² BORK, *supra* note 10, at 168.

¹³ *See, e.g.*, *Griswold v. Connecticut*, 381 U.S. 479, 484 (1965) (making up a so-called right to privacy, which had no discernible roots in American history and tradition).

¹⁴ *See, e.g.*, *Korematsu v. United States*, 323 U.S. 214, 219–20, 223 (1944). The six-Justice majority in this case was judicially restrained because they chose not to interfere with the actions of the political branches even though they ought to have done so.

In Part I, I will provide the necessary background information to understand Thayerian restraint, Professor Thayer's theory, and the contexts in which it was adopted. Part II then develops a historical record against which to analyze Thayerian restraint. In this Part, I will discuss (1) a concept that was alive and well in the 1780s and that is of direct relevance to originalism, called the idea of the Ancient Constitution; (2) a concept that was alive and well in the 1780s, and which was of direct relevance to originalism, called the Mixed Regime origins of our structural constitution; (3) the legacy of the British Empire for the American colonies' constitutional system, with some comments, where appropriate, about originalism; and (4) the normative case for having a written constitution backed up by judicial review that enforces the original public meaning of the constitutional text contra to the teaching of Professor Thayer. Finally, in Part III, I will discuss the Supreme Court's actual practice in exercising the power of judicial review from 1790 to 1893, when James Bradley Thayer wrote his famous book. I will show in this last Part that Professor Thayer misdescribes the Supreme Court's actual practice in exercising the power of judicial review between 1790 and 1893 and is therefore wrong to claim that his rule of clear mistake was deeply rooted in American history and tradition.¹⁵

I. THAYERIAN RESTRAINT

Before evaluating the relationship between Professor Thayer's theory of judicial restraint and originalism, one must understand Professor Thayer's argument and the way his theory has been adopted and utilized. This Part provides that necessary background.

A. *Thayer's Rule of Clear Mistake*

James Bradley Thayer's rule of clear mistake is a rule that provides that courts, when exercising their power of judicial review, should strike down an act of Congress or of the President only if it so clearly violates the Constitution that no rational person could conclude otherwise. Professor Thayer allows for somewhat more vigorous enforcement of the Constitution when state laws or state executive actions are under review, but even here Professor Thayer calls for radical deference to the social and economic decisions made by the political branches of the government. Professor Thayer's rule of clear mistake would, if adopted, eliminate most forms of judicial review of the constitutionality of legislation.

¹⁵ THAYER, *supra* note 1, at 17–26.

B. *Early Adoption of Thayerian Restraint and Tragic Consequences*

It is important, in evaluating Professor Thayer, to keep in mind that he was a Progressive Era intellectual who, like most Progressives in the 1890s, probably disfavored the Madisonian system of checks and balances, the original meaning of our written Constitution and Bill of Rights, and judicial review, and who probably favored responsible parliamentary government, which then prevailed in the United Kingdom and which Woodrow Wilson alleged to have been “shown” superior to the American system.¹⁶ Woodrow Wilson was an impractical intellectual who would go on to serve as President of Princeton University, Governor of New Jersey, and, for two terms, President of the United States. Like Wilson, Professor Thayer probably thought the Constitution, as originally designed, was a disguised structure for helping the rich to rob the poor.¹⁷

The Progressives, in general, were Social Darwinists who believed in the survival of the fittest, the compulsory sterilization of the feeble-minded,¹⁸ and Jim Crow segregation.¹⁹ The Progressives also believed in government by experts.²⁰ They did not believe in democracy. They favored parliamentary government with no checks and balances because it could get things done quickly.²¹ The Progressives disliked courts, judicial review, originalism, and

¹⁶ Walter Lippmann, *Introduction to WOODROW WILSON, CONGRESSIONAL GOVERNMENT: A STUDY IN AMERICAN POLITICS* 7, 13–14 (Meridian 1956) (1885).

¹⁷ This thesis is advanced in Chapters 2 through 6 of CHARLES A. BEARD, *AN ECONOMIC INTERPRETATION OF THE CONSTITUTION OF THE UNITED STATES* (1913).

¹⁸ EDWIN BLACK, *WAR AGAINST THE WEAK: EUGENICS AND AMERICA’S CAMPAIGN TO CREATE A MASTER RACE* 68–69, 320, 322 (2003) (Woodrow Wilson and the eugenics movement); DAVID M. KIDD, “HISTORY WRITTEN WITH LIGHTNING”: RELIGION, WHITE SUPREMACY, AND THE RISE AND FALL OF THOMAS DIXON, JR. 129 (2013), <https://scholarworks.wm.edu/cgi/viewcontent.cgi?article=3407&context=etd> [<https://perma.cc/Z879-42E3>]; CHRIS MEIER, *70 YEARS OF AMERICAN CAPTIVITY: THE POLITY OF GOD, THE BIRTH OF A NATION, AND THE BETRAYAL OF GOVERNMENT* (2016); JAMES Q. WHITMAN, *HITLER’S AMERICAN MODEL: THE UNITED STATES AND THE MAKING OF NAZI RACE LAW* 141 (2017) (Theodore Roosevelt and the eugenics movement).

¹⁹ President Wilson introduced Jim Crow segregation into the federal cabinet departments for the first time when he ordered them to be racially segregated. He had large screens put in rooms so that white employees could not see African-American employees, Chris Bodenner, *The Racist Legacy of Woodrow Wilson, Cont’d*, ATLANTIC (Nov. 30, 2015, 11:35 AM), <https://www.theatlantic.com/notes/2015/11/the-racist-legacy-of-woodrow-wilson-contd/417990> [<https://perma.cc/FA2S-UT8B>], and he had the first-ever White House screening of the movie *Birth of a Nation*, which was produced by the Ku Klux Klan to encourage the lynching of African-Americans. Most of the lynching of African-Americans that occurred in American history happened in the wake of the release of this movie. DAVID W. SOUTHERN, *THE PROGRESSIVE ERA AND RACE: REACTION AND REFORM, 1900–1917*, at 32, 47, 53, 128 (2005); see MEIER, *supra* note 18.

²⁰ Kevin A. Carson, *Taylorism, Progressivism, and Rule by Experts*, FOUND. FOR ECON. EDUC. (Aug. 24, 2011), <https://fee.org/articles/taylorism-progressivism-and-rule-by-experts> [<https://perma.cc/2YFE-VM4A>].

²¹ See Lippmann, *supra* note 16, at 13–14 (explaining that Woodrow Wilson preferred the United Kingdom’s system of parliamentary government to the U.S. system of checks and balances).

bills of rights, which they saw as tools of the rich.²² They thought courts should stay out of the way of their expert commissions led by eugenically bred men to produce a Brave New World with many classes of people.²³

I do not know how thoroughly Professor Thayer embraced the Progressive creed, but Progressive politicians certainly embraced Professor Thayer's theory of judicial review, including Theodore Roosevelt and Justice Oliver Wendell Holmes. We know some of the outcomes that Thayerian judges reached between 1927 and 1954, and their recounting is a very sorry story. Too often, Professor Thayer and Justice Holmes are praised for reaching the right outcome in *Lochner v. New York*.²⁴ It is time to look at the dark side of Justice Holmes's and Professor Thayer's approach.

Please consider now some outcomes, to which Thayerian restraint has clearly contributed. Three years after Professor Thayer published his clarion call for judicial restraint, the Supreme Court decided *Plessy v. Ferguson*²⁵ by a vote of seven to one, over the lone dissent of the first Justice Harlan. Justice Henry Billings Brown produced a very judicially restrained majority opinion that upheld the constitutionality of Jim Crow-era racial segregation on railway cars under the so-called doctrine of "separate but equal."²⁶ Justice Brown was utterly wrong, of course, but he did what Professor Thayer urged all judges to do, and upheld Louisiana's separate but equal law on judicial restraint grounds. Justice Brown could imagine a rational basis for Louisiana's law, and under Professor Thayer's view, that was enough to uphold the constitutionality of the challenged law. *Plessy* is an abomination both morally and doctrinally to originalists like me,²⁷ but it constitutes a paradigm example of Thayerian judicial restraint in action.

²² *Lochner*, in the words of President Theodore Roosevelt, "strained to the utmost (and, indeed, in [his] opinion, violated) the Constitution in order to sustain a do-nothing philosophy which ha[d] everywhere completely broken down when applied to the actual conditions of modern life." Theodore Roosevelt, *Judges and Progress*, OUTLOOK, Jan. 6, 1912, at 40, 44; Paul Kens, *Lochner v. New York: Tradition or Change in Constitutional Law?*, 1 N.Y.U. J.L. & LIBERTY 404, 411 (2005) (quoting *id.*).

²³ On the rise of the Progressive Movement and on its commitment to expert agencies, see PHILIP HAMBURGER, *IS ADMINISTRATIVE LAW UNLAWFUL?* (2014). Aldous Huxley developed this dystopian vision in his 1932 novel *Brave New World*. ALDOUS HUXLEY, *BRAVE NEW WORLD* (1932).

²⁴ 198 U.S. 45, 74–76 (1905) (Holmes, J., dissenting) (arguing for the constitutionality of a New York statute restricting the maximum hours bakery or confectionary establishment employees may work). The first Justice Harlan also reached this result, but his dissent was far better than Justice Holmes's. Justice Holmes argued that liberty of contract ought never to be protected, *id.*, whereas Justice Harlan argued wisely that New York's 60-hour work week for bakers was a reasonable regulation of liberty of contract, which was just and was enacted for the general good of the whole people, *id.* at 73 (Harlan, J., dissenting).

²⁵ 163 U.S. 537 (1896).

²⁶ *See id.* at 543.

²⁷ *See* Steven G. Calabresi & Michael W. Perl, *Originalism and Brown v. Board of Education*, 2014 MICH. ST. L. REV. 429, 432 (arguing that *Brown v. Board of Education* accurately reflected the

By ruling as it did in *Plessy*, the Supreme Court ushered in a fifty-eight-year period during which “separate but equal” was the supreme law of the land. This ran completely counter to the originalist history of a constitutional ban on governmental race discrimination.²⁸ The damage that Jim Crow segregation caused during these fifty-eight years is incalculable in the harm done both to African-Americans and to the nation as a whole, including its reputation throughout the world. The opinion in *Plessy* alone, coming as it did just three years after Professor Thayer published his path-breaking article, proves just how dangerous Thayerian restraint can be.

Thayerian restraint continued to demonstrate its harmful influence throughout the first half of the twentieth century. In *Debs v. United States*, for example, Justice Holmes’s opinion exhibited Thayerian restraint in unanimously upholding as constitutional a ten-year prison sentence for Eugene V. Debs, the head of the American Socialist Party, for allegedly urging workers to resist the draft in violation of the Espionage Act of 1917.²⁹ Debs’s speeches were obviously protected by the First Amendment, but Justice Holmes and his fellow Justices left the Wilson Administration free to jail Debs for ten years.

Similarly, in *Buck v. Bell*, Justice Holmes upheld the constitutionality of a Virginia law that mandated the compulsory sterilization of the feeble-minded, asserting that “[t]he [same] principle that sustains compulsory vaccination is broad enough to cover cutting the Fallopian tubes. Three generations of imbeciles are enough.”³⁰ This restrained opinion contributed to some 60,000 compulsory sterilizations performed in the United States, most of which occurred after the Court endorsed these laws.³¹ When Adolf Hitler came to power in Germany in 1933, one of the first things he did was to pass a eugenics law modeled on the American eugenics laws, afraid that

original meaning of the Fourteenth Amendment); Steven G. Calabresi & Andrea Matthews, *Originalism and Loving v. Virginia*, 2012 BYU L. REV. 1393, 1395 (arguing that *Loving v. Virginia* accurately reflected the original meaning of the Fourteenth Amendment).

²⁸ I explore this history in previous law review articles. See Calabresi & Perl, *supra* note 27; Calabresi & Matthews, *supra* note 27.

²⁹ 249 U.S. 211, 212–13, 216–17. Debs received more than 900,000 votes as the Socialist Party candidate in the election of 1912, *Debs’ Willingness to Speak Truth to Power Admirable*, THE REPUBLIC (Aug. 21, 2018, 9:00 AM), http://www.therepublic.com/2018/08/22/debs_willingness_to_speak_truth_to_power_admirable [https://perma.cc/C8V4-L4F9], and spoke about how the working class, who were being drafted to fight in World War I, were mere cannon fodder for a struggle between imperialist European powers in which the United States had nothing at stake. *Debs*, 249 U.S. at 213–14.

³⁰ 274 U.S. 200, 207 (1927) (internal citation omitted).

³¹ FACING HISTORY AND OURSELVES NATIONAL FOUNDATION, INC., RACE AND MEMBERSHIP IN AMERICAN HISTORY: THE EUGENICS MOVEMENT 198 (2002); see also VICTORIA F. NOURSE, IN RECKLESS HANDS: *SKINNER V. OKLAHOMA* AND THE NEAR TRIUMPH OF AMERICAN EUGENICS 31 (2008).

America was beating Germany at its own game.³² It took the Supreme Court's activist ruling in *Skinner v. Oklahoma*³³ and the publicizing of the Holocaust to put an end to the American eugenics movement,³⁴ which Justice Holmes had done so much to help.

Justice Holmes was not the only Justice to employ Thayerian restraint to uphold unconstitutional laws with detrimental effects. In *Minersville School District v. Gobitis*, the Supreme Court upheld a Pennsylvania law that required Jehovah's Witnesses to salute the flag and recite the pledge of allegiance³⁵ in violation of their right to the free exercise of their religion and in violation of their right not to be compelled to speak.³⁶ In his concurrence in *Adamson v. California*, Justice Frankfurter argued against the incorporation of the federal Bill of Rights on judicial restraint grounds.³⁷ In yet another pernicious example of Thayerian restraint, Justice Frankfurter argued against a constitutional rule requiring reapportioning electoral districts after the census in *Colegrove v. Green*,³⁸ a decision that remained good law for more than fifteen years. In *Korematsu v. United States*, Thayerian restraint led the Court to uphold, as an exercise of the wartime emergency power, the racial internment of Japanese-Americans in concentration camps.³⁹ This holding was just symbolically overturned in June of 2018 in *Trump v. Hawaii*.⁴⁰

In *Goesaert v. Cleary*, Justice Frankfurter wrote a six-to-three majority decision holding that classifications on the basis of sex deserve only rational basis scrutiny⁴¹—i.e., Thayerian review. This decision overlooked Justice Sutherland's statement in *Adkins v. Children's Hospital*, where the Supreme Court struck down a sex-discriminatory law that mandated women but not men be paid a minimum wage, that

³² BLACK, *supra* note 18, at 275–77; STEFAN KÜHL, THE NAZI CONNECTION: EUGENICS, AMERICAN RACISM, AND GERMAN NATIONAL SOCIALISM 15–20, 88, 95 (1994); WHITMAN, *supra* note 18, at 8–9, 33, 51–52.

³³ 316 U.S. 535, 541–43 (1942) (holding that American eugenics laws violate the Equal Protection Clause of the Fourteenth Amendment).

³⁴ BLACK, *supra* note 19, at 411–26.

³⁵ 310 U.S. 586, 599–600 (1940).

³⁶ Thankfully, this case was overruled three years later in *West Virginia State Board of Education v. Barnette*. 319 U.S. 624, 642 (1943).

³⁷ 332 U.S. 46, 59–68 (1947) (“The judicial judgment in applying the Due Process Clause must move within the limits of accepted notions of justice and is not to be based upon the idiosyncrasies of a merely personal judgment.”).

³⁸ 328 U.S. 549, 552–56 (1946).

³⁹ 323 U.S. 214, 225 (1944).

⁴⁰ 138 S. Ct. 2392, 2423 (2018).

⁴¹ 335 U.S. 464, 467 (1948).

[i]n view of the great—not to say revolutionary—changes which have taken place since [*Muller v. Oregon*], in the contractual, political and civil status of women, culminating in the Nineteenth Amendment, it is not unreasonable to say that [the differences between the sexes] have now come almost, if not quite, to the vanishing point.⁴²

Thayerian Justice Oliver Wendell Holmes quipped in dissent that “[i]t will need more than the Nineteenth Amendment to convince me that there are no differences between men and women, or that legislation cannot take those differences into account.”⁴³ There remained a rational basis test for sex classifications when the Supreme Court decided *Reed v. Reed*⁴⁴ due to Justices Holmes and Frankfurter’s common mania for Thayerian restraint.

Suffice it to say that Thayerian restraint has unquestionably led to some truly terrible case law. A question still remains, however, as to what the Framers’ original understanding was with respect to liberty, equality, and constitutional rights. Moreover, we must ask why the Framers admired our Constitution of checks and balances and thought it would benefit all of society, not only the rich.

II. ORIGINALISM’S JUDICIAL REVIEW

In contrast to Thayerian restraint and the Progressive approach of the early twentieth century, the Framers’ understanding of liberty, equality, and constitutional rights informed their approach to judicial review, which thus also informs originalism’s approach. In this Part, I outline this approach by discussing (1) the idea of the Ancient Constitution; (2) the Mixed Regime origins of our structural constitution; (3) the legacy of the British Empire for the American colonies’ constitutional system; and (4) the normative desirability of a written constitution.

A. *Originalism and the Ancient Constitution*

In the 1760s and 1770s, the North American colonists repeatedly affirmed their belief in Sir Edward Coke’s idea that England originally had an unwritten Ancient Constitution that predated Magna Carta of 1215, and the colonists asserted that they, as Englishmen, were entitled to the unenumerated rights affirmed in the Ancient Constitution.⁴⁵ The Theory of

⁴² 261 U.S. 525, 553 (1923).

⁴³ *Id.* at 569–70 (Holmes, J., dissenting).

⁴⁴ 404 U.S. 71 (1971) (striking down as a violation of the Equal Protection Clause a sex-discriminatory law using the rational basis test).

⁴⁵ JOHN PHILLIP REID, THE ANCIENT CONSTITUTION AND THE ORIGINS OF ANGLO-AMERICAN LIBERTY 3–16 (2005); Paul Christianson, *Ancient Constitutions in the Age of Sir Edward Coke and John*

the Ancient Constitution as England's original constitution was first articulated and developed by Sir Edward Coke between 1603 and 1634.⁴⁶

Coke developed his idea that England originally had an Ancient Constitution of liberty while fighting the living constitution claims of Kings James I and Charles I to absolute power under the theory of the so-called "Divine Right of Kings." Coke argued that England had been a constitutional, limited monarchy since the reign of the last Anglo-Saxon king, Edward the Confessor, from 1042 to his death in 1066.⁴⁷ Coke believed that Englishmen before the Norman Conquest had an Ancient Constitution, which was mostly unwritten, with a limited monarchy, that could make decisions only with the Witan, or Council of Elders. Coke thought the Anglo-Saxons had brought this constitution of freedom with them from Germany when they conquered England. Coke relied on the Roman writer Tacitus, who wrote a book called *Germania* setting out the idea of the Ancient Constitution and of an elective kingship, based on his observations of the Germans during his lifetime between 56 and 120 A.D.⁴⁸ Thomas Jefferson was so taken with Coke's reverence for Tacitus's book that he recommended to many people that they read it to see the origins of American liberty.

Coke believed that English history since the Norman Conquest had been a constant struggle between Englishmen, who never gave up their belief in the Ancient Constitution and its liberties, and English Norman kings, who sought to impose what Coke's followers called "the Yoke of the Norman Oppression" on Englishmen. When William the Conqueror conquered England in 1066, he went out of his way to claim that Edward the Confessor, who had died in 1066 of natural causes, had designated him—William—and not King Harold II, to be his legitimate successor. William the Conqueror's Norman soldiers won the Battle of Hastings in 1066 and killed Harold II, but William faced a huge practical problem in governing a nation of two million Englishmen with a Norman army of only about 15,000 soldiers. William the Conqueror sought to win over his new subjects' loyalty by agreeing to govern England according to the laws of Edward the Confessor, which were

Selden, in *THE ROOTS OF LIBERTY: MAGNA CARTA, ANCIENT CONSTITUTION, AND THE ANGLO-AMERICAN TRADITION OF RULE OF LAW* 89 (Ellis Sandoz ed., 1993).

⁴⁶ During this period Coke was Lord Chief Justice of England; he was fired as a judge by King James I; he was elected to the House of Commons; and he wrote, and forced King Charles I to sign, the Petition of Right in 1628, which affirmed that the King could not impose taxes without the prior approval of Parliament. CATHERINE DRINKER BOWEN, *THE LION AND THE THRONE: THE LIFE AND TIMES OF SIR EDWARD COKE (1552–1634)*, at 3–536 (1957); J. G. A. POCOCK, *THE ANCIENT CONSTITUTION AND THE FEUDAL LAW: A STUDY IN ENGLISH HISTORICAL THOUGHT IN THE SEVENTEENTH CENTURY* (1957) (arguing that Coke invented the idea of the Ancient Constitution out of whole cloth for political purposes).

⁴⁷ *Id.*

⁴⁸ See TACITUS, *GERMANIA* (J. B. Rives trans., 1999).

then called the *Leges Edwardii*. William the Conqueror made a point of having himself crowned in Westminster Abbey, a church built by Edward the Confessor and the place where Edward was buried, to emphasize the continuity of the Norman regime with Edward the Confessor's regime. William the Conqueror pledged in his coronation oath that he would retain the *Leges Edwardii*, and his son Henry I made the same pledge in his coronation oath in 1100 called the Charter of Liberties.

According to Coke, King John violated the *Leges Edwardii*, which led to the revolt of his barons and people, who forced King John to sign Magna Carta in 1215, which recommitted the English monarchy to the original *Leges Edwardii*. Coke was adamant that Magna Carta was "no new thing," but was simply an originalist restoration of England's ancient Anglo-Saxon constitution of liberty. King John died soon after signing Magna Carta, and his son King Henry III developed a cult around Edward the Confessor and lavishly rebuilt Westminster Abbey with Edward the Confessor's tomb in the central spot behind the altar, where it can still be seen today. Henry III named his son, King Edward I, after Edward the Confessor, and the cult of following the *Leges Edwardii* flourished. From 1215 to 1485, England had a constitutional, limited monarchy, according to Coke. During this period of time, five kings were removed from the throne by Parliament and executed: Edward II, Richard II, Henry VI, Edward V, and Richard III. In 1485, the Tudor dynasty came to power and the regicide stopped, but every Tudor monarch, including Henry VIII and Elizabeth I, took scrupulous care to get parliamentary backing for all that they did.

Coke charged King James I (1603–1625) and his son King Charles I (1625–1649) with violating the original Ancient Constitution and the *Leges Edwardii* by imposing a Yoke of Norman Oppression on the English people, in accord with the Stuart kings' belief in absolute monarchy and the divine right of kings. Coke developed the idea of the Ancient Constitution in part in *The Case of Monopolies*, which held that only Parliament and not the king acting alone could grant a monopoly,⁴⁹ and in part in *Dr. Bonham's Case*, where he said that even an act of Parliament could be set aside if it violated the common law, which reflected the Ancient Constitution.⁵⁰

The Whig historians all bought Coke's claims about the Ancient Constitution,⁵¹ as did the Puritans, both in England and in New England, for whom Coke was a hero because he had stood up against Stuart absolutism

⁴⁹ *Darcy v. Allein (The Case of Monopolies)* (1602) 77 Eng. Rep. 1260 (KB).

⁵⁰ *Bonham v. Coll. of Physicians (Dr. Bonham's Case)* (1610) 77 Eng. Rep. 646 (KB).

⁵¹ See generally 4 PAUL DE RAPIN THOYRAS, *THE HISTORY OF ENGLAND, AS WELL ECCLESIASTICAL AS CIVIL* (Nicolas Tindal trans., 1728) (a Whig history of England that acknowledges the reality of the Ancient Constitution).

and High Church Anglicanism. Coke's history of England arguing that Magna Carta was merely a reaffirmation of the Ancient Constitution has been challenged by J.G.A. Pocock.⁵² But, whether Coke is right or wrong in his claims about English legal history in the eyes of twentieth-century historians is irrelevant to a study of what the American colonists believed from 1620 to 1776. They all believed Coke was right and that they were the heirs of England's Ancient Constitution and of the *Leges Edwardii*.⁵³

The American colonists were ardent backers of Sir Edward Coke's historical claims, especially in Puritan New England. James Otis, during the controversy over the writs of assistance, repeatedly invoked Coke's claims about the Ancient Constitution, much to the annoyance of the royal governor of Massachusetts. The colonists' belief that "no taxation without representation" was an ancient constitutional right derived from the Petition of Right of 1628. This document, drafted by Coke and enacted by Parliament with Charles I's consent, codified the ancient constitutional right of "no taxation without representation." It outlawed Charles I's practice of imprisoning wealthy men on a whim and then releasing them only if they loaned Charles I money, which he never repaid. The American colonists at the time of the Declaration of Independence and the adoption of the Constitution and Bill of Rights believed that they were the heirs to a great tradition of unenumerated original English liberties.

The idea of the Ancient Constitution, which bound King George III and Parliament, was a precursor to the modern idea of originalism. Just as modern originalists believe there are ancient rights and liberties upon which the government cannot transgress, so, too, did Americans, between 1760 and the ratification of the Ninth Amendment in 1791, believe in vast unenumerated rights protected by the Ancient Constitution to which they were heir.⁵⁴ It is important to understand the modern constitutional debate over unenumerated rights and the Ninth Amendment to know about the belief of colonial Americans in the Ancient Constitution.

B. Originalism and Mixed Regimes

Most educated Americans between 1776 and 1791 believed that a good feature of the British Constitution, as it had existed since the Glorious Revolution of 1688, was that it was a balanced constitution, which embraced

⁵² See generally POCOCK, *supra* note 46.

⁵³ See REID, *supra* note 45, at 9; Christianson, *supra* note 45, at 89–146.

⁵⁴ The colonists, in resisting George III, thought they were resisting the Yoke of the Norman oppression. They further thought that the unenumerated rights protected by the Ancient Constitution were enforceable in court, in line with Coke's belief. H. TREVOR COLBOURN, *THE LAMP OF EXPERIENCE: WHIG HISTORY AND THE INTELLECTUAL ORIGINS OF THE AMERICAN REVOLUTION* 25–47, 71–99 (1965).

Aristotelian ideas about the normative appeal of a Mixed Regime.⁵⁵ The U.S. Constitution, in addition to the separation of powers, established a democratized form of the mixed regime and a system of checks and balances.⁵⁶ To understand what a mixed regime was requires a bit of a foray into political philosophy.

In *The Politics*, Aristotle describes three separate kinds of regimes: government by one person; government by a few people; and government by all the people. Aristotle argues that there are good and bad variations on each regime type.⁵⁷ When governments of one person are good, we call them monarchies, and when they are bad, we call them tyrannies. When governments of a few people are good, we call them aristocracies, and when they are bad, we call them oligarchies. When governments of all the people are good, we call them democracies, and when they are bad, we call them instances of mob rule.

Aristotle argues that government of one person has the advantage of offering energy in the execution of foreign policy, in winning wars, and in subduing powerful, oppressive domestic factions.⁵⁸ He further argues that governments of a few people may harness expert knowledge and wisdom.⁵⁹ And he argues that government of all the people has the advantage that it harnesses common knowledge and promotes liberty. He also thought that, in a Mixed Regime of the One, the Few, and the Many, each entity would check and balance the others, thereby diminishing the chance of a bad regime type emerging.⁶⁰ Because power corrupts, and absolute power corrupts absolutely,⁶¹ a Mixed Regime with shared powers is less likely to turn into a deviant form.

Aristotle implies that the ideal regime should be part monarchy, part aristocracy, and part democracy. He thinks such a regime of the One, the Few, and the Many will realize the benefits of each regime type. Aristotle's thoughts on the normative appeal of Mixed Regimes were greatly developed by the Greek philosopher Polybius, who argued in *The Histories* that Sparta had defeated Athens and the Roman Republic had conquered Greece because

⁵⁵ M. J. C. VILE, CONSTITUTIONALISM AND THE SEPARATION OF POWERS 52–82 (1967).

⁵⁶ Steven G. Calabresi, Mark E. Berghausen & Skylar Albertson, *The Rise and Fall of the Separation of Powers*, 106 NW. U. L. REV. 527, 535–36 (2012).

⁵⁷ See ARISTOTLE, THE POLITICS 82 (Stephen Everson ed., Cambridge University Press 1988).

⁵⁸ *Id.* at 75–76; 6 POLYBIUS, THE HISTORIES 7 (W. R. Paton trans., 1960).

⁵⁹ ARISTOTLE, *supra* note 57, at 76–77.

⁶⁰ *Id.* at 93.

⁶¹ Letter from Lord Acton to Mandell Creighton (Apr. 5, 1887), in LORD ACTON, ESSAYS ON FREEDOM AND POWER 329, 335 (Gertrude Himmelfarb ed., 1972).

Sparta and Rome had Mixed Regimes.⁶² Subsequently, Cicero,⁶³ St. Thomas Aquinas,⁶⁴ and Machiavelli⁶⁵ all argued in favor of Mixed Regimes.

The Glorious Revolution of 1688 in England confirmed that, from 1688 until American independence in 1776, Great Britain itself had a Mixed Regime of the One, the Few, and the Many. Britain in the 1760s and 1770s had a Mixed Regime with a constitutional monarch, George III, who had real but constitutionally limited powers.⁶⁶ Britain during this time was also a regime of the few aristocrats who were represented in the still powerful House of Lords and in the life-tenured upper class English judiciary. The British government also represented all the people to a degree in the House of Commons, which was becoming more and more important to English governance.⁶⁷ The important thing to realize here is that when the Constitution was written, England was still a Mixed Regime, in which the king and the House of Lords were not yet ciphers—as they are today.⁶⁸ Some Americans colonists, like Alexander Hamilton, believed that the English Constitution was the best constitution in the world, and that the United States ought to simply emulate the British model.⁶⁹

The idea of separate legislative, executive, and judicial powers does not appear in political philosophy until 1748 in Montesquieu's *The Spirit of the Laws*.⁷⁰ Montesquieu realized that in the post-feudal Enlightenment Era, hereditary monarchies and Houses of Lords would be done away with, but he identified the advantage that Mixed Regimes offered against the corrupting influence of power. Montesquieu thus came up with the brilliant and totally novel idea that perhaps the separation of legislative, executive, and judicial powers could substitute for the Mixed Regime. No country, however, tried to set up a functional separation of powers between 1748 and 1776, so it was left to the American colonies and to the Framers to figure out

⁶² POLYBIUS, *supra* note 58, at 7.

⁶³ See CICERO, DE RE PUBLICA, DE LEGIBUS bks. 2, 23 (T. E. Page et al. eds., Clinton Walker Keyes trans., 1928); ANDREW LINTOTT, THE CONSTITUTION OF THE ROMAN REPUBLIC 225–32 (1999) (describing the changes Cicero proposed in *De Legibus*).

⁶⁴ ST. THOMAS AQUINAS, DE REGIMINE PRINCIPUM, in THE POLITICAL IDEAS OF ST. THOMAS AQUINAS 181, bk. 1, ch. 6 (Dino Bigongiari ed., 1953); ST. THOMAS AQUINAS, THE SUMMA THEOLOGICA, in THE POLITICAL IDEAS OF ST. THOMAS AQUINAS 3, 86–91 (Dino Bigongiari ed., 1953).

⁶⁵ NICCOLO MACHIAVELLI, DISCOURSES ON THE FIRST TEN BOOKS OF TITUS LIVIUS, in 2 THE HISTORICAL, POLITICAL, AND DIPLOMATIC WRITINGS OF NICCOLO MACHIAVELLI 93, 109–14 (Christian E. Detmold trans., 1891). Machiavelli described the highly successful Republic of Venice (810 A.D. to 1797 A.D.) as one such regime. *Id.*

⁶⁶ VILE, *supra* note 55, at 52–82.

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ MAX FARRAND, THE FRAMING OF THE CONSTITUTION OF THE UNITED STATES (1913).

⁷⁰ MONTESQUIEU, THE SPIRIT OF THE LAWS (Anne M. Cohler et al. eds., trans., 1989) (1748).

if such a scheme could work. In particular, no one had a clear idea about which powers were “legislative,” “executive,” or “judicial,” because there was no prior precedent on point.⁷¹

State constitutions between 1776 and 1787 were the first to embrace Montesquieu’s separation of powers idea, but state legislatures were made too powerful, and state executives too weak, causing the Framers to look beyond mere separation of powers to ensure a regime of checks and balances.⁷² The Constitution of 1787 does create a separation of powers regime, but it also implements a subtly democratized form of the English Mixed Regime of the One, the Few, and the Many.⁷³ The One President, picked by an electoral college, was originally a tamed prince or democratic monarch. The Few senators, picked for six-year terms, as well as the life-tenured judges whom they confirmed, would be, it was hoped, a kind of natural aristocracy of talents. And the Many were originally represented in the House of Representatives, which they directly elected every two years. Today, the Many pick the One President in presidential elections, and the Many have directly elected the Few senators to their six-year terms since 1913. So, in 2018, the United States government is a government of the One President, the Few senators and federal judges, and the Many members of the House of Representatives; but the Many get to pick the One every four years and the Few every six years. Even the Few naturally talented aristocrats on the bench are picked by the President and the Senate in a way that follows national election results.⁷⁴

As a result, our government over the last 230 years has demonstrated all the structural advantages to its Constitution that led philosophers like Aristotle, Polybius, Cicero, Aquinas, and Machiavelli to praise Mixed Regimes. Our Presidents have led us to victory in the Civil War, World War I, World War II, and the Cold War, as well as in a host of other conflicts. The United States has been the dominant player in global foreign policy since at least 1945, and it remains so today. We have the largest military force on the planet, and yet we have never suffered a coup d’état. The original hope of the strength of the One has been fully realized. Moreover, the Senate and the Supreme Court today are aristocracies of natural talent, realizing the originalist hope of government by the wisest. Finally, our democracy is the

⁷¹ See Calabresi et al., *supra* note 56, at 533–34.

⁷² CHARLES C. THACH, JR., *THE CREATION OF THE PRESIDENCY 1775–1789: A STUDY IN CONSTITUTIONAL HISTORY* 25–54, 76–165 (1923); see also *THE FEDERALIST NOS. 47–51* (James Madison) (Clinton Rossiter ed., 1961).

⁷³ Calabresi et al., *supra* note 56, at 535–36.

⁷⁴ Robert A. Dahl, *Decision-Making in a Democracy: The Supreme Court as a National Policy-Maker*, 6 J. PUB. L. 279, 285 (1957).

oldest in the world and has become more perfect over time as a result of the adoption of the Reconstruction Amendments⁷⁵ and the Progressive Amendments.⁷⁶ The originalist hope that we would become ever more democratic has therefore been realized as well. Our unique Constitution is one that Aristotle and Machiavelli would both have recognized and loved. Unfortunately, most Americans today appreciate neither the excellence of the structural Constitution nor its origins in political thought and history.

C. Originalism and the Colonial Legacy Left to the United States

All thirteen of the original colonies were initially governed by a written corporate charter issued by the King of England at the time each colony was formed. These written charters limited and enumerated the powers of colonially elected assemblies, royal governors, governor's councils, and relations with the mother country. They were interpreted and enforced by the King's own Privy Council, an imperial Supreme Court.⁷⁷ The King selected the members of the Privy Council, and through them he exercised his prerogative powers over affairs in the thirteen colonies.⁷⁸ From 1607 until 1760, Parliament made no attempt to govern the colonies, which were totally governed by the King and his Privy Council.

Several consequences developed from the 169-year-long colonial-era governance structure that warrant comment. First, it is not surprising that when Parliament tried for the first time in 1765 to tax the American colonies directly by imposing a stamp act rather than indirectly by imposing tariffs, all hell broke loose.⁷⁹ From the American perspective, the colonists thought they shared a king with England but not a Parliament. This was a reasonable presumption for Americans to have had because (1) Parliament had not tried to tax the colonies for the first 158 years of their existence, and (2) the Petition of Right of 1628 had established that taxation without representation was a violation of the British Constitution.

Second, during the 169 years of colonial rule, the American colonists had become used to existing within the British imperial regime in which a central court—the Privy Council—could hear appeals of all cases from the highest court of a colony and could exercise the power of judicial review by

⁷⁵ See U.S. CONST. amends. XIII, XIV, XV.

⁷⁶ See *id.*, amends. XVI, XVII, XVIII, XIX.

⁷⁷ The Privy Council sometimes called a committee of itself the Board of Trade. MARY SARAH BILDER, *THE TRANSATLANTIC CONSTITUTION: COLONIAL LEGAL CULTURE AND THE EMPIRE* 57–69 (2004); JOSEPH HENRY SMITH, *APPEALS TO THE PRIVY COUNCIL FROM THE AMERICAN PLANTATIONS* 3–664 (1950).

⁷⁸ SMITH, *supra* note 77, at 3–62; see also P. A. HOWELL, *THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL 1833–1876: ITS ORIGINS, STRUCTURE AND DEVELOPMENT* 1–72 (1979).

⁷⁹ See generally EDMUND S. MORGAN, *THE BIRTH OF THE REPUBLIC* (4th ed. 2012).

interpreting the colony's limited and enumerated grants of powers and striking down colonial acts that were, as Professor Bilder writes, "repugnant to the laws of England."⁸⁰ The American colonists thus became intimately familiar with vertical judicial review.⁸¹

Third, the colonists also became habituated to being governed by a written document that divided and allocated power. Thus, when on July 4, 1776, the thirteen colonies declared their independence, it is not surprising that eleven of them wrote new state constitutions while, in those that did not—Connecticut and Rhode Island—the legislatures adopted the colonial charters to be their state constitutions with all references to the King excised.

Fourth, it is similarly unsurprising that when the colonists defeated the British and won the Revolutionary War, they chose to write a federal treaty, the Articles of Confederation, to set out the limited and enumerated powers of the new federal government and the responsibilities of each state to the others.

Finally, it is not surprising that when a new constitution was deemed necessary, it took the form of a written document including a bill of rights, nor that the Supreme Court of the new government picked up where the Privy Council left off in exercising the power of vertical judicial review by a federal court of state laws.⁸²

Moreover, it must be noted that when the sovereignty of the King-in-Parliament-with-the-House-of-Lords-and-the-House-of-Commons (the One, the Few, and the Many) fell, it was replaced with a new conception of sovereignty: "We the People of the United States."⁸³ Because the sovereign people delegated the legislative, executive, and judicial powers to separate entities, the courts necessarily acquired the duty, when deciding cases or controversies properly before them, to enforce the Constitution horizontally against Congress and the President as well as vertically against the states.

As Alexander Hamilton explained in *The Federalist* No. 78:

The complete independence of the courts of justice is peculiarly essential in a limited Constitution. By a limited Constitution, I understand one which contains certain specified exceptions to the legislative authority; such, for instance, as that it shall pass no bills of attainder, no *ex post facto* laws, and the like.

⁸⁰ See generally BILDER, *supra* note 77, at 1.

⁸¹ STEVEN G. CALABRESI & JASMINE OWENS, *THE ORIGINS AND GROWTH OF JUDICIAL REVIEW IN THE G-20 CONSTITUTIONAL DEMOCRACIES, VOLUME I: THE COMMON LAW COUNTRIES* (forthcoming) (identifying the need for a federalism umpire between nations and states as a principal cause of the emergence of judicial review in the G-20 constitutional democracies).

⁸² See generally BILDER, *supra* note 77, at 186–96.

⁸³ U.S. CONST. pmb1.

Limitations of this kind can be preserved in practice no other way than through the medium of courts of justice, whose duty it must be to declare all acts contrary to the manifest tenor of the Constitution void. Without this, all the reservations of particular rights or privileges would amount to nothing.

Some perplexity respecting the rights of the courts to pronounce legislative acts void, because contrary to the Constitution, has arisen from an imagination that the doctrine would imply a superiority of the judiciary to the legislative power. It is urged that the authority which can declare the acts of another void must necessarily be superior to the one whose acts may be declared void. As this doctrine is of great importance in all the American constitutions, a brief discussion of the grounds on which it rests cannot be unacceptable.

There is no position which depends on clearer principles than that every act of a delegated authority, contrary to the tenor of the commission under which it is exercised, is void. No legislative act, therefore, contrary to the Constitution, can be valid. To deny this would be to affirm that the deputy is greater than his principal; that the servant is above his master; that the representatives of the people are superior to the people themselves; that men acting by virtue of powers may do not only what their powers do not authorize, but what they forbid.

If it be said that the legislative body are themselves the constitutional judges of their own powers and that the construction they put upon them is conclusive upon the other departments it may be answered that this cannot be the natural presumption where it is not to be collected from any particular provisions in the Constitution. It is not otherwise to be supposed that the Constitution could intend to enable the representatives of the people to substitute their *will* to that of their constituents. It is far more rational to suppose that the courts were designed to be an intermediate body between the people and the legislature in order, among other things, to keep the latter within the limits assigned to their authority. The interpretation of the laws is the proper and peculiar province of the courts. A constitution is, in fact, and must be regarded by the judges as, a fundamental law. It therefore belongs to them to ascertain its meaning as well as the meaning of any particular act proceeding from the legislative body. If there should happen to be an irreconcilable variance between the two, that which has the superior obligation and validity ought, of course, to be preferred; or, in other words, the Constitution ought to be preferred to the statute, the intention of the people to the intention of their agents.

Nor does this conclusion by any means suppose a superiority of the judicial to the legislative power. It only supposes that the power of the people is superior to both, and that where the will of the legislature, declared in its statutes, stands in opposition to that of the people, declared in the Constitution, the judges ought to be governed by the latter rather than the former. They ought to regulate their decisions by the fundamental laws rather than by those which are not fundamental.

This exercise of judicial discretion in determining between two contradictory laws is exemplified in a familiar instance. It not uncommonly happens that there are two statutes existing at one time, clashing in whole or in part with each other and neither of them containing any repealing clause or expression. In such a case, it is the province of the courts to liquidate and fix their meaning and operation. So far as they can, by any fair construction, be reconciled to each other, reason and law conspire to dictate that this should be done; where this is impracticable, it becomes a matter of necessity to give effect to one in exclusion of the other. The rule which has obtained in the courts for determining their relative validity is that the last in order of time shall be preferred to the first. But this is a mere rule of construction, not derived from any positive law but from the nature and reason of the thing. It is a rule not enjoined upon the courts by legislative provision but adopted by themselves, as consonant to truth and propriety, for the direction of their conduct as interpreters of the law. They thought it reasonable, that between the interfering acts of an *equal* authority that which was the last indication of its will should have the preference.

But in regard to the interfering acts of a superior and subordinate authority of an original and derivative power, the nature and reason of the thing indicate the converse of that rule as proper to be followed. They teach us that the prior act of a superior ought to be preferred to the subsequent act of an inferior and subordinate authority; and that accordingly, whenever a particular statute contravenes the Constitution, it will be the duty of the judicial tribunals to adhere to the latter and disregard the former.

It can be of no weight to say that the courts, on the pretense of a repugnancy, may substitute their own pleasure to the constitutional intentions of the legislature. This might as well happen in the case of two contradictory statutes; or it might as well happen in every adjudication upon any single statute. The courts must declare the sense of the law; and if they should be disposed to exercise WILL instead of JUDGMENT, the consequence would equally be the substitution of their pleasure to that of the legislative body. The observation, if it proved anything, would prove that there ought to be no judges distinct from that body.

If, then, the courts of justice are to be considered as the bulwarks of a limited Constitution against legislative encroachments, this consideration will afford a strong argument for the permanent tenure of judicial offices, since nothing will contribute so much as this to that independent spirit in the judges which must be essential to the faithful performance of so arduous a duty.⁸⁴

Hamilton's essay in *The Federalist* No. 78 similarly gave notice that the new Constitution would vest the Supreme Court with the power of judicial review, horizontally against Congress and the President as well as vertically

⁸⁴ THE FEDERALIST NO. 78, at 466–69 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

between the federal government and the states.⁸⁵ Vigorous horizontal judicial review was thus contemplated by the Framers, contrary to what Professor Thayer asserted in *The Origin and Scope of American Doctrine of Constitutional Law*. Neither Alexander Hamilton nor his Antifederalist opponent Brutus, writing in *Essay 11*, contemplated a rule of clear mistake as a precondition for exercising the power of judicial review.

D. Originalism and the Normative Argument for Our Written Constitution with Judicial Review

With this important history in mind, the next question that arises is whether it is desirable to have a written constitution that establishes judicial review according to the original public meaning of the text as part of a Madisonian system of checks and balances to enforce the terms of the written text. Consider the following eight arguments.

First, the written Constitution of 1787 was necessary to “constitute,” or bring into being, (1) a stronger national government, (2) an executive branch of the national government headed up by the President, (3) an independent national life-tenured judiciary, and (4) a federal Bill of Rights to protect rights. An originalist construction of the constitutional text helps accomplish this goal.

Second, a written Constitution makes it easier to know what is constitutional and what is not. The Framers were tired of arguing for decades with the British as to what rights were and were not among the fundamental rights of Englishmen protected by the common law and the Ancient Constitution. Getting it down in writing, even if only partially, was a distinct improvement over the British unwritten constitution. We still have implied powers, which Congress may exercise under the Necessary and Proper Clause,⁸⁶ and we still have unenumerated rights against the national government under the Ninth Amendment.⁸⁷ But much of our Constitution is committed to writing, which makes it easier to find and enforce its content than its British counterpart. A focus on the original public meaning of constitutional powers and rights helps greatly in identifying what is in the text of the document.

⁸⁵ *See id.* at 467 (“If there should happen to be an irreconcilable variance between [the Constitution and an act of Congress], that which has the superior obligation and validity ought, of course, to be preferred . . .”).

⁸⁶ U.S. CONST. art. I, § 8 (“The Congress shall have Power . . . [t]o make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.”).

⁸⁷ *Id.* amend. IX (“The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.”).

Third, because sometimes in the heat of passion legislatures and groups of people do foolish things that they will later regret, the constitutional structure helps constrain the passions of the moment. The metaphor here is of Ulysses chaining himself to the mast of his sailboat so he could hear the songs of the sirens, but not jump overboard and seek to join them, thus leading to his death. With the written Constitution, enforced through judicial review according to the original public meaning of the text, we have chained ourselves to the mast of a written constitution. Living constitutionalism or Thayerian deference might give the passions of the moment too much sway, as happened in *Plessy*⁸⁸ and in *Korematsu*.⁸⁹

Fourth, the Constitution requires bicameralism and presentment to make national law, which in effect requires that national supermajorities favor a law before it can be made. This promotes certainty and predictability, which is great for authors and investors. Authors will only write books and articles and blog posts if they can be quite certain that they will not be criminally punished in twenty years for something they wrote. Similarly, investors want certainty and stability more than anything else when they invest. No one wants to build a factory or create something that will be taken away from them in twenty years without just compensation being paid. The certainty and predictability offered by the Constitution has made this country the wealthiest country on the planet with by far the highest gross domestic product (GDP) per capita of any of the G-20 constitutional democracies. Originalism in constitutional interpretation promotes the values of certainty and predictability.

Fifth, the Constitution serves as a gag rule because it takes certain hot-potato issues off the agenda of ordinary political discourse. We do not have fights in the United States as to what our national religion should be because the First Amendment precludes us from having a national religion.⁹⁰ We also do not have fights over what speech should be censored or castes of people should be preferred because the Constitution guarantees freedom of speech and of the press⁹¹ and it forbids a caste system.⁹² Following the original public meaning of the Constitution promotes this goal as well.

⁸⁸ 163 U.S. 537 (1896).

⁸⁹ 323 U.S. 214 (1944).

⁹⁰ U.S. CONST. amend. I (“Congress shall make no law respecting an establishment of religion . . .”).

⁹¹ *Id.* (“Congress shall make no law . . . abridging the freedom of speech, or of the press . . .”).

⁹² *Id.* amend. XIII, § 1 (“Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.”); *id.* amend. XIV, § 1 (“All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the

Sixth, the Constitution puts in place a system of intergenerational lawmaking because it recognizes that, just as some wars can only be fought—like World War II—by borrowing from our great-grandchildren, so, too, are some problems simply too big to solve with anything less than intergenerational lawmaking. This system allows us to legislate to bind our great-grandchildren in exchange for accepting the laws made by our great-grandparents.

Seventh, constitutional government is by definition limited government.⁹³ The Constitution of the United States limits and divides power in four ways: (1) horizontally, among the three branches of the national government; (2) vertically, between the national government and the states; (3) by protecting individual rights with the federal Bill of Rights and the Fourteenth Amendment from intrusion by the states; and (4) between We the People, who are sovereign and consist of two-thirds of both Houses of Congress and three-quarters of the states, and every other institution of government or personal right. Following the original public meaning of the Constitution furthers this goal as well.

Eighth, and finally, the Constitution is aspirational. Its aspirations are (1) to form a more perfect Union than existed under the Articles of Confederation; (2) to establish justice; (3) to insure domestic tranquility; (4) to provide for the common defense; (5) to promote the general welfare; and (6) to secure the blessings of liberty, to ourselves and our posterity.⁹⁴ These goals are all promoted by having a written Constitution that is enforced through judicial review.

When the Constitution originally went into effect, Thomas Jefferson wrote James Madison a letter in which he argued that the Constitution ought to sunset after twenty years. Jefferson reasoned that (1) the earth belongs to the living and not to the dead; (2) that every twenty years or so a new generation of people will come of age; and (3) that each new generation ought to be able to write a constitution as it sees fit.⁹⁵

United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.”)

⁹³ Thus, England since the Glorious Revolution of 1688 has been accurately described as being a constitutional monarchy. STEVEN GOW CALABRESI, BRADLEY G. SILVERMAN & JOSHUA BRAVER, *THE U.S. CONSTITUTION AND COMPARATIVE CONSTITUTIONAL LAW: TEXTS, CASES, AND MATERIALS* 227 (2016).

⁹⁴ U.S. CONST. pmb1.

⁹⁵ Letter from Thomas Jefferson to James Madison (Sept. 6, 1789), *in* 15 *THE PAPERS OF THOMAS JEFFERSON* 392–98 (Julian P. Boyd ed., 1958).

Madison wrote Jefferson back to say that his twenty-year sunset clause was a terrible idea.⁹⁶ He said people need predictability and certainty to flourish, that intergenerational lawmaking was often needed, and that there would be a lot of strategic gamesmanship that would go on prior to every twenty-year spasm of constitution-making.

The last 230 years of American history have proven that Madison was right. The United States is the wealthiest nation in the world,⁹⁷ the most militarily powerful nation in the world, the third-most-populous nation in the world,⁹⁸ and the third-largest nation in the world by territory.⁹⁹ It is truly a democratic empire unlike anything else the world has ever known. Our written Constitution of the One, the Few, and the Many, all selected at fixed intervals by the Many, has protected for us the values of “Life, Liberty, and the pursuit of Happiness.”¹⁰⁰ To the extent that Professor Thayer wanted to water down our Constitution of 1787, like all the progressive intellectuals of

⁹⁶ Letter from James Madison to Thomas Jefferson (Feb. 4, 1790), in 5 THE WRITINGS OF JAMES MADISON 437–41 (Gaillard Hunt ed., 1904).

⁹⁷ The International Monetary Fund (IMF) concluded in 2017 that the G-20 nations have the following GDP-per-capita rankings:

1. United States 7th
2. Australia 10th
3. Canada 16th
4. Germany 17th
5. France 21st
6. United Kingdom 22nd
7. Japan 23rd
8. Italy 25th
9. South Korea 27th
10. Saudi Arabia 36th
11. Argentina 54th
12. Russia 62nd
13. Turkey 63rd
14. Brazil 65th
15. Mexico 69th
16. China 71st
17. India 139th

IMF DATA MAPPER, <https://www.imf.org/external/datamapper/NGDPDPC@WEO/OEMDC/ADVEC/WEOORLD> [<https://perma.cc/7C4W-VHHX>].

⁹⁸ The United States ranks third behind India and China in population. U.S. CENSUS BUREAU CURRENT POPULATION, <https://www.census.gov/popclock/print.php?component=counter> [<https://perma.cc/JEL8-F5JD>].

⁹⁹ Cent. Intelligence Agency, *Country Comparison :: Area*, THE WORLD FACTBOOK, <https://www.cia.gov/library/publications/the-world-factbook/fields/279rank.html> (last visited Apr. 2, 2019) [<https://perma.cc/A54L-ZZR2>] (ranking the top four countries by territory as follows: (1) Russia, (2) Antarctica, (3) Canada, and (4) The United States).

¹⁰⁰ THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

his day,¹⁰¹ he was badly mistaken. Our written Constitution, enforced vigorously by the Supreme Court since 1954, has made us the happiest and the safest country in the world.

III. ORIGINALISM, THAYER, AND HORIZONTAL JUDICIAL REVIEW PRIOR TO 1893

To read Professor Thayer's book today, one would think there was almost no horizontal judicial review besides the infamously wrong *Dred Scott* between 1790 and 1893. This is quite simply not true. Judicial review between 1789 and the 1890s, in my opinion, was an important element of the federal government's control over the states, and it was therefore supported by the Executive and Legislative Branches. This is entirely consistent with the theory of the Privy Council origins of American judicial review as a form of vertical federalism umpiring enforcement, as sketched out above.¹⁰²

Professor Thayer makes a historical argument, however, that federal judicial power was not sustained horizontally against the Executive and Legislative Branches prior to 1893. In his account, *Marbury's* formal assertion of the power of horizontal judicial review did not materialize until 1893, when vertical judicial review had come to be accepted as a legitimate form of federalism umpiring control over the states. Judicial enforcement of the Bill of Rights did not begin until much later, with the first major cases being decided after the New Deal Revolution of 1937. Judicial enforcement of the Bill of Rights against the states and the national government alike was not fully operational until the Warren Court era of the 1960s.

I agree with Professor Thayer that, as a realist matter, federal judicial power between 1789 and the 1890s was mostly asserted in vertical federalism cases, where the Supreme Court was acting as an agent of the central government in controlling the states. Nonetheless, the Supreme Court pronounced several important separation of powers decisions well before 1893, none of which applied Professor Thayer's rule of clear mistake. These cases demonstrate conclusively that horizontal judicial review arose much earlier than Professor Thayer acknowledges, and contradict his claim that by 1893 the Court had established a rule of clear mistake in such cases. Horizontal judicial review is thus legitimate and well-grounded in history, as is vertical judicial review.

In the early 1790s, well before *Marbury v. Madison*,¹⁰³ the Supreme Court twice asserted the power of horizontal judicial review defensively to

¹⁰¹ SOUTHERN, *supra* note 19, at 32, 47, 53, 128.

¹⁰² See *supra* notes 77–78 and accompanying text.

¹⁰³ 5 U.S. (1 Cranch) 137 (1803).

protect the federal courts from being assigned nonjudicial work by Congress and the President. First, in 1793, Secretary of State Thomas Jefferson sent a letter to the Justices of the Supreme Court asking for their legal advice on nearly thirty questions related to a treaty with France and to the law of nations. Chief Justice John Jay wrote back a short letter to President Washington in which the Justices formally refused to answer Jefferson's questions, asserting that they were not empowered under Article III to issue advisory opinions on abstract legal matters, but could only hear cases and controversies among legally adverse parties.¹⁰⁴ This episode, known as *The Correspondence of the Justices*, was an important exercise of horizontal judicial power.¹⁰⁵ No rule of clear mistake was cited.

A second exercise of horizontal judicial power occurred a year earlier, in what is now called *Hayburn's Case*.¹⁰⁶ In this case, five of the six Supreme Court Justices held, while riding circuit, that Congress's Invalid Pensions Act of 1792 was unconstitutional insofar as it gave judges power to set pensions for invalid Revolutionary War veterans, decisions which could then be completely revised by Executive Branch officials.¹⁰⁷ The Justices held in essence that judicial power could only be invoked when there was a substantial likelihood that its exercise would make a difference in the real world. This holding, too, was an important exercise of horizontal judicial power, well before the 1890s, by refusing to impose a duty on the federal courts to perform an act mandated by an act of Congress. No rule of clear mistake was cited.

The Correspondence of the Justices and *Hayburn's Case* both involve a defensive exercise of horizontal judicial power in which the Court refused to act, as in *Marbury*, lest it be unconstitutionally burdened with extra chores. Nonetheless, there are several famous instances of horizontal judicial review in which the Supreme Court asserted itself offensively against the President. In *Little v. Barreme*, the Supreme Court held that President Thomas Jefferson did not have the inherent executive power to go beyond congressional legislation and order the seizure of American ships sailing to and from French ports.¹⁰⁸ This case set an important limit on presidential power and foreshadows *Youngstown Sheet & Tube Co. v. Sawyer* (*The Steel Seizure*

¹⁰⁴ Letter from Supreme Court Justices to President George Washington (Aug. 8, 1793) (*The Correspondence of the Justices*), available at <https://founders.archives.gov/documents/Washington/05-13-02-0263> [<https://perma.cc/BNY7-RCDN>].

¹⁰⁵ See generally MICHAEL STOKES PAULSEN, STEVEN GOW CALABRESI, MICHAEL W. MCCONNELL, SAMUEL L. BRAY & WILLIAM BAUDE, *THE CONSTITUTION OF THE UNITED STATES* (3rd ed. 2017).

¹⁰⁶ 2 U.S. (2 Dall.) 409 (1792).

¹⁰⁷ *Id.* at 409.

¹⁰⁸ 6 U.S. (2 Cranch) 170, 175–76 (1804).

Case)¹⁰⁹ in rejecting claims of inherent presidential power to seize property. No rule of clear mistake was cited.

Three years later, in 1807, former Vice President Aaron Burr was indicted for treason on account of some shady dealings he had had in which he seemed to be trying to set up a regime he could govern on Mexican and Spanish land. President Thomas Jefferson took an obsessive interest in the Burr treason prosecution, which he micromanaged using his powers as law enforcement officer in chief.¹¹⁰ As luck would have it, Chief Justice John Marshall, while riding circuit, presided over Burr's treason trial where he insisted on the Constitution's requirement of two witnesses in open court for the proof of treason. The jury in Burr's case ended up with Chief Justice Marshall's guidance acquitting Burr, which infuriated Jefferson.¹¹¹ This, too, seems to us to be an important early exercise of horizontal judicial review by the federal courts—this time without the courts being in a wholly defensive posture. The Burr trial was a really big deal at the time it occurred, and Jefferson lost while John Marshall won.¹¹² It turned on the question of the constitutional definition of treason and was a major separation of powers case in which the federal courts successfully asserted judicial power against the executive branch in a highly charged political controversy. No rule of clear mistake was followed or cited.

Jumping ahead thirty years to 1838, we find the Supreme Court's landmark opinion in *Kendall v. Stokes*.¹¹³ In that case, Andrew Jackson's close personal friend and political ally Amos Kendall, who was the Postmaster General of the United States, and therefore a key figure in handing out patronage jobs, refused to pay a plaintiff by the name of Stokes an amount of money awarded to Stokes by an auditor as expressly commanded by an act of Congress.¹¹⁴ Stokes sought a writ of mandamus ordering Kendall to pay him all that he was owed, and the Supreme Court ruled for Stokes and issued the writ.¹¹⁵ *Kendall* is thus not only the cornerstone administrative law case, but also an important assertion of the Supreme Court's horizontal power of review. Once again, no rule of clear mistake was cited.

¹⁰⁹ 343 U.S. 579 (1952).

¹¹⁰ STEVEN G. CALABRESI & CHRISTOPHER S. YOO, *THE UNITARY EXECUTIVE: PRESIDENTIAL POWER FROM WASHINGTON TO BUSH* 68, 420 (2008).

¹¹¹ *Id.*

¹¹² *See id.*

¹¹³ 37 U.S. (12 Pet.) 524 (1838).

¹¹⁴ *Id.* at 527–28.

¹¹⁵ *Id.* at 626.

During the 1860s, the Supreme Court decided three notable horizontal judicial review cases. In *The Prize Cases*, the Court upheld the legality of President Lincoln's blockade of Confederate ports prior to his receiving congressional approval for that blockade in the summer of 1861.¹¹⁶ In *Ex parte Milligan*, the Supreme Court sharply limited the government's power to try civilians in military commissions.¹¹⁷ In *Ex parte Garland*, the Supreme Court invalidated Congress's Act of January 24th, 1865, requiring oaths of loyalty to the Union as a precondition to bar admission as a bill of attainder even at the same time as Congress was impeaching President Andrew Johnson.¹¹⁸ Neither the majority nor dissenting opinions in these cases cited a rule of clear mistake.

The Court retreated strategically in *Ex parte McCordle*, where it held that Congress could strip the Court of its jurisdiction under an 1867 federal Habeas Corpus Act.¹¹⁹ The very next year, however, the Court held in *Ex parte Yerger* that it retained jurisdiction to issue writs of habeas corpus in cases like Yerger's and McCordle's under the Judiciary Act of 1789.¹²⁰ *Ex parte Yerger* makes it crystal clear that where there are two avenues to habeas review in the Supreme Court, Congress can shut off one but not necessarily the other.¹²¹ This is hardly a foreswearing of the power of horizontal, separation of powers judicial review. And again, no rule of clear mistake was cited.

Professor Thayer's claim that horizontal judicial review did not get going prior to 1893 is thus unpersuasive. To the contrary, the Supreme Court decided important separation of powers cases between 1792 and 1895, none of which questioned the authority of the federal courts to engage in horizontal umpiring or cited a rule of clear mistake. Even in *Ex parte Merryman*, in which Chief Justice Taney issued a writ of habeas corpus directing the release of John Merryman,¹²² which President Abraham Lincoln ignored, President Lincoln did not question the legality of the Court's order but rather justified his disregard, in a July 4, 1861 address to a special session of Congress, on the ground that he had to violate this one small law to prevent the vast bulk of laws from being further violated in the eleven Confederate states rebelling against federal authority. Congress later ratified Lincoln's de facto suspension of the writ. No one thought this meant that federal courts

¹¹⁶ 67 U.S. (2 Black) 635, 671 (1863).

¹¹⁷ 71 U.S. (4 Wall.) 2, 122–31 (1866).

¹¹⁸ 71 U.S. (4 Wall.) 333, 381 (1866).

¹¹⁹ 74 U.S. (7 Wall.) 506, 514 (1869).

¹²⁰ 75 U.S. (8 Wall.) 85, 105–06 (1869).

¹²¹ *See id.* at 103.

¹²² 17 F. Cas. 144, 152 (Taney, Circuit Justice, C.C.D. Md. 1861).

lacked the power of horizontal judicial review. Instead, it was widely understood that Justice Taney had exercised that power improperly and that President Lincoln's response was appropriate given the dire circumstances of the spring of 1861, when Congress could not yet safely be called into special session.

So far, I have mentioned horizontal exercises of the power of judicial review between 1792 and 1895 in horizontal separation of powers cases but not in horizontal federalism cases. A horizontal federalism case is one in which a federal court reviews the constitutionality of an act of Congress against a claim that it exceeds Congress's enumerated powers. On this point, many, like Professor Thayer, fall back on a frequently made assertion that there were only two instances in which federal courts struck down an act of Congress on horizontal federalism grounds prior to the Civil War: *Marbury v. Madison*¹²³ and *Dred Scott v. Sandford*.¹²⁴ This statement is true so far as it goes, but it overlooks the fact that amongst all the controversy over those two cases, no one on either side ever contested the federal courts' power, as Alexander Hamilton explicitly asserted in *The Federalist* No. 78,¹²⁵ to engage in horizontal federalism judicial review.

Thomas Jefferson's complaint with *Marbury* was not with that case's assertion of the power of horizontal judicial review in federalism cases. He instead disagreed with its dicta to the effect that the executive actions of cabinet secretaries were judicially reviewable and thus not protected by sovereign immunity. Similarly, the dissenters in *Dred Scott* did not take issue with the majority's assertion of a horizontal power of judicial review in federalism cases generally. Instead, they argued quite correctly that (1) free African Americans could become citizens of the United States, and (2) Congress's power to make all needful rules and regulations respecting the territories of the United States allowed it to outlaw slavery in a federal territory as the Continental Congress had done in 1787 under the Articles of Confederation.

No one disputed that the power of horizontal judicial enforcement of enumerated federal powers was constitutional between 1803 and 1895. Even in *McCulloch v. Maryland*, Chief Justice John Marshall said quite explicitly that

[s]hould Congress, in the execution of its powers, adopt measures which are prohibited by the constitution; or should Congress, under the pretext of executing its powers, pass laws for the accomplishment of objects not entrusted

¹²³ 5 U.S. (1 Cranch) 137, 180 (1803).

¹²⁴ See generally 60 U.S. (19 How.) 393, 452 (1856).

¹²⁵ See generally *supra* note 84 and accompanying text.

to the government; it would become the painful duty of this tribunal, should a case requiring such a decision come before it, to say that such an act was not the law of the land.¹²⁶

The reason there were only two horizontal federalism cases decided by the Supreme Court prior to the Civil War was simply that Congress passed so few federal statutes during an era in which the Senate was evenly divided between slave states and free states.

In fact, Professor Gerard Magliocca argues that the Supreme Court under Chief Justice Taney would have overruled *McCulloch* in the 1840s had not President Tyler twice vetoed acts of Congress renewing the Bank of the United States in violation of the Whig Party platform on which William Henry Harrison and John Tyler were elected President and Vice President in 1840.¹²⁷ President Jackson's 1832 veto message regarding the renewal of the Bank of the United States explicitly disagreed with the reasoning of Chief Justice Marshall's opinion in *McCulloch*, and it is a fact that Presidents Jackson and Tyler killed the Bank of the United States for all time, notwithstanding Chief Justice Marshall's brilliant opinion in *McCulloch*.

Several cases in addition to *Marbury* and *Dred Scott* further support the power of horizontal federalism judicial review. In *Mayor of the City of New York v. Miln*, the Supreme Court held that the City of New York had the power to control immigration into New York and to impose a tax on any ship captain who brought a pauper to the City, notwithstanding the Commerce Clause of the Federal Constitution.¹²⁸ This decision of the Taney Court was technically a Dormant Commerce Clause case, but the Court's opinion suggests it would have struck down as unconstitutional a federal statute enacted under the Commerce Clause compelling the states to admit immigrants and paupers.¹²⁹

A majority of the Taney Court was well-prepared to strike down federal laws on enumerated powers grounds even prior to *Dred Scott*. The Taney Court sharply departed from the Marshall Court's construction of the Commerce Clause in *Gibbons v. Ogden*¹³⁰ and *Miln*, and it sharply departed from the Marshall Court's construction of the Contract Clause in *Dartmouth College v. Woodward*¹³¹ and *Charles River Bridge v. Warren Bridge*.¹³² There

¹²⁶ 17 U.S. (4 Wheat.) 316, 423 (1819).

¹²⁷ GERARD N. MAGLIOCCA, ANDREW JACKSON AND THE CONSTITUTION: THE RISE AND FALL OF GENERATIONAL REGIMES 113 (2007); see also CALABRESI & YOO, *supra* note 110, at 135–36.

¹²⁸ 36 U.S. (11 Pet.) 102, 143 (1837).

¹²⁹ See *id.* at 142–43.

¹³⁰ 22 U.S. (9 Wheat.) 1, 196 (1824).

¹³¹ 17 U.S. (4 Wheat.) 518, 641–42 (1819).

¹³² 36 U.S. (11 Pet.) 420, 572 (1837).

is every reason to think that the Taney Court might well have done the same thing as to *McCulloch* had President Tyler not twice vetoed the renewal by Congress of the Bank of the United States in the 1840s.

The Supreme Court did decide some very important horizontal federalism cases between 1803 and 1857 where it upheld the constitutionality of federal laws against enumerated powers challenges. Famous examples include *Martin v. Hunter's Lessee*,¹³³ *McCulloch*, *Cohens v. Virginia*,¹³⁴ and *Osborn v. Bank of the United States*.¹³⁵ It has thus been widely recognized that the Supreme Court played a major role in legitimating federal power during this period of time.¹³⁶ Professor Thayer overlooks the fact that the Supreme Court could not have legitimated the use of federal power in these cases, as Professor Bickel correctly argues it did, unless there was a very real possibility that the Supreme Court could have instead struck down claims of federal power rather than upholding them.

Professor Thayer also overlooks the fact that during the Jeffersonian and Jacksonian eras it was constitutional orthodoxy that the federal government lacked the enumerated power to do many things, as is particularly illustrated by their repeated vetoes of laws that would have made internal improvements. The constitutionality of such laws, however, never reached the Supreme Court because Presidents Jefferson and Jackson vetoed them out of existence. Professor Thayer thus misleadingly argues that because the Supreme Court only struck down two acts of Congress prior to the Civil War, judicial power to decide horizontal federalism cases did not exist. To the contrary, the constitutional culture of the Jeffersonian and Jacksonian eras was so committed to enumerated powers federalism that the Jacksonian Taney Court did not have many opportunities to strike down acts of Congress on enumerated powers grounds.

This point is illustrated by the controversy over the constitutionality of internal improvements.¹³⁷ This issue was very much on people's minds when *McCulloch* upheld the constitutionality of the Bank of the United States on grounds broad enough to support the Hamiltonian, rather than the

¹³³ 14 U.S. (1 Wheat.) 304, 379 (1816).

¹³⁴ 19 U.S. (6 Wheat.) 264, 447 (1821).

¹³⁵ 22 U.S. (9 Wheat.) 738, 861 (1824).

¹³⁶ See, e.g., ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* 1–34 (1962) (arguing that the Supreme Court plays a more important role by legitimating the many laws it upholds as constitutional than it plays by the few bad laws which it strikes down as unconstitutional).

¹³⁷ See, e.g., James Madison, President, Veto Message on the Internal Improvements Bill (Mar. 3, 1817), available at <https://millercenter.org/the-presidency/presidential-speeches/march-3-1817-veto-message-internal-improvements-bill> [<https://perma.cc/L5M9-EHHE>]; Carlton Jackson, *The Internal Improvement Vetoes of Andrew Jackson*, 25 TENN. HIST. Q. 261, 261–68 (1966).

Madisonian, reading of Congress's spending power. James Madison had argued for the ratification of the Constitution in *The Federalist*, and at the Virginia ratifying convention, based upon a very narrow construction of the federal power to spend money. Madison thought that federal spending must be at least tangentially tied to one of the other specifically enumerated powers, such as regulating interstate or foreign commerce, or providing for the military. Madison claimed that Article I's General Welfare Clause¹³⁸ was not a specific grant of power, but a statement of purpose qualifying the power to tax. Pursuant to this understanding, President Madison, on March 3, 1817, vetoed an act of Congress proposing to spend federal money on internal improvements and canals on enumerated powers grounds. Madison specifically observed in issuing his veto that this use of the spending power exceeded the Spending Clause's grant of legislative power.

McCulloch, decided two years after Madison's famous veto, is famous for its expansive, Hamiltonian conception of federal power under the Necessary and Proper Clause. *McCulloch* was controversial when it was decided not so much because it upheld the constitutionality of the Bank of the United States as because it implicitly repudiated President Madison's narrow interpretation of Congress's enumerated powers in vetoing the internal improvements and canals bill. It is striking in this regard that President Madison's successor, President Monroe, vetoed only one act of Congress during his eight years in office, and that was his veto of the Cumberland Road bill on May 4, 1822. Monroe's veto reiterated Madison's constitutional construction of the limits on the federal spending power.

The idea that Congress lacked power under the Spending Clause to spend federal money to make internal improvements and to build canals led President Jackson to issue the famous Maysville Road veto on May 27, 1830.¹³⁹ The bill in question would have built a road between two cities in Kentucky as part of John Quincy Adams and Henry Clay's American System program of Hamiltonian spending to build up a national infrastructure of roads, canals, and railroads. President Jackson vetoed at least six bills during his eight years as President on the ground that the federal government lacked the power to make internal improvements, including a bill to support the building of lighthouses and the placement of buoys.

Presidents Tyler, Polk, Pierce, and Buchanan all similarly vetoed internal improvements bills on enumerated powers grounds.¹⁴⁰ It was indeed a staple of Jacksonian orthodoxy that Madison was right and Chief Justice

¹³⁸ See U.S. CONST. art. I, § 8, cl. 1.

¹³⁹ GLYNDON G. VAN DEUSEN, *THE JACKSONIAN ERA: 1828–1848*, at 52 (1959).

¹⁴⁰ DAVID P. CURRIE, *THE CONSTITUTION IN CONGRESS: DEMOCRATS AND WHIGS 1829–1861*, at 13 n.20, 21 n.58, 23 n.71, 16–25, 33 (2005).

Marshall was wrong about the extent of the federal government's enumerated powers. President Jackson said as much when he killed the Bank of the United States by vetoing a bill that would have renewed the Bank's charter on July 10, 1832, making the scope of federal power a key issue in the 1832 presidential election, which Jackson then won in a landslide.¹⁴¹

The Supreme Court did strike down two major federal statutes prior to 1893, when Professor Thayer posits that horizontal judicial review could only be exercised when Congress had made a clear mistake and its statute was irrational. In *Hepburn v. Griswold*, the Supreme Court struck down the Legal Tender Act, which authorized paper money during the Civil War, in a four-to-three decision on enumerated powers grounds.¹⁴² Critics of this case did not disagree that the Court had the power to decide horizontal federalism cases; they argued instead that federal power was broad enough to allow for the printing of paper money. The decision in *Hepburn* led to the adoption of a court-packing bill that added two new, pro-paper money justices to the Supreme Court, which, in 1871, overturned its decision in *Hepburn*, again without questioning the federal courts' power to strike down acts of Congress that exceed its enumerated powers.¹⁴³

In 1883, the Supreme Court also struck down, on enumerated powers grounds, the Civil Rights Act of 1875 in the *Civil Rights Cases*,¹⁴⁴ by a vote of eight to one. Justice Harlan was the lone dissenter in those cases, and he did not claim that the majority lacked the power to enforce the limits of Congress's enumerated powers. Justice Harlan argued instead (quite correctly) that the majority egregiously misread both the Thirteenth Amendment and the state action requirement of the Fourteenth Amendment in striking down the Civil Rights Act of 1875 on enumerated powers grounds.¹⁴⁵ This seminal case established long before 1893 that the Supreme Court applied neither a rule of clear mistake nor a rational basis test in cases of horizontal judicial review. My point is only that I think Professor Thayer is wrong about the standard of review even though I despise the majority opinion in the *Civil Rights Cases*.

It is time to step back from the case law and from my quibbles with Professor Thayer, and look at the big picture of American judicial review, especially in light of the British imperial history discussed above. It seems clear to me that when Madison sought a federal veto power over state laws at the Philadelphia Constitutional Convention, he was asking for Congress

¹⁴¹ See generally CALABRESI & YOO, *supra* note 110, at 106–19.

¹⁴² 75 U.S. 603, 625 (8 Wall.) (1870).

¹⁴³ *Knox v. Lee*, 79 U.S. (12 Wall.) 457, 553 (1871).

¹⁴⁴ 109 U.S. 3, 25–26 (1883).

¹⁴⁵ See *id.* at 32–36, 58–60 (Harlan, J., dissenting).

to have the same power vis-à-vis the states as had been enjoyed by the King-in-Council, i.e., by the Privy Council from 1607 until 1776. The King-in-Council during the colonial period similarly vetoed colonial laws and heard judicial appeals from the thirteen colonies. Madison's request for federal power to veto state laws was thus much less radical than many might otherwise have supposed given that the King-in-Council had exercised such a veto power for 169 years!

The emergence of vertical judicial review in federalism cases in the United States, as chronicled by Professor Thayer, seems then to be a continuation and a deepening of the colonial practice. For obvious reasons, it was a lot easier to appeal to the Supreme Court of the United States sitting in Washington, D.C., or to the Justices riding circuit, than to the King-in-Council sitting in London. As a result, there were many more appeals heard, and the federal courts became, especially after 1875, a central tool by which the national government controlled the states. The Supreme Court undoubtedly acquired legitimacy as a result of its enforcement of judicial federalism in umpiring disputes, and this legitimacy undoubtedly emboldened the Court when it began applying horizontal federalism umpiring to limit Congress's enumerated powers. Madison thus got his federal veto over state laws after all in the form of vertical federal judicial review.

One additional point remains to be made about the origins of judicial review in the United States. As Professor Thayer notes, originally the power of constitutional review was understood as being departmental such that each Department of the federal government—Congress, the President, and the Supreme Court—had the power of constitutional review when it was performing its own distinctive functions. Thus Congress reviewed laws for constitutionality before it passed them, the President reviewed laws like the Defense of Marriage Act for constitutionality before he executed them,¹⁴⁶ and the courts reviewed acts of Congress for constitutionality when they were presented with cases or controversies concerning those laws. This system of departmental judicial review has substantially changed to a system that I would call one of judicial supremacy, in which the Supreme Court is the last and only arbiter of constitutional meaning. Just as presidents have by practice laid claim to “the foreign affairs power,” so, too, have the federal courts largely by practice laid claim to “the constitutional review power.” Members of Congress and Presidents no longer make a serious effort to engage in constitutional review when they exercise their power, and they largely leave such matters to the federal courts.

¹⁴⁶ Frank H. Easterbrook, *Presidential Review*, 40 CASE W. RES. L. REV. 905, 911–13 (1989).

But there are two very important respects not mentioned, in which federal courts are not absolutely supreme in the exposition of constitutional law. First, U.S. Supreme Court Justices do not themselves choose new members of the Supreme Court, as do some supreme court justices in India, the United Kingdom, and Israel. The U.S. Supreme Court instead follows the presidential and senatorial election returns. New Presidents and Senates get to pick new Supreme Court Justices and eventually a new political movement like the New Deal or the Nixon–Reagan–Trump popular social movement can challenge judicial supremacy and change constitutional law.

Efforts to challenge judicial supremacy can be fought off for a while by strategic retirement, which the Justices of the Supreme Court do engage in, but eventually the grim reaper takes his toll. Strategic retirement postpones efforts to make the Supreme Court follow the election returns but, ultimately, over fifty years, it is true that the Court will follow the election returns to some degree. The Supreme Court is always oligarchic and is always an elite group, as Professor Ran Hirschl might say.¹⁴⁷ But it is sometimes an elite liberal group and at other times an elite conservative group, depending on presidential and senatorial election returns.

Second, the United States does not have a system of absolute judicial supremacy because there is no tradition in our constitutional law of unconstitutional constitutional amendments, as there is in Germany, India, Brazil, and Turkey. Constitutional amendments have thus been successfully used on four occasions to overturn Supreme Court opinions, as with the Eleventh Amendment, the Fourteenth Amendment, the Sixteenth Amendment, and the Twenty-Sixth Amendment.

Aside from formal constitutional amendments, some constitutionalists have observed that there is often “dialogue” between the Supreme Court and legislative bodies. For example, in response to *Furman v. Georgia*’s suggestion that capital punishment might categorically violate the Eighth Amendment,¹⁴⁸ some thirty States disagreed between 1972 and 1976, leading the Supreme Court to back down and allow capital punishment with added procedural safeguards in *Gregg v. Georgia*.¹⁴⁹ It is thus an overstatement to say that the United States has a constitutional regime of absolute judicial supremacy.

¹⁴⁷ RAN HIRSCHL, TOWARDS JURISTOCRACY: THE ORIGINS AND CONSEQUENCES OF THE NEW CONSTITUTIONALISM 10–16 (2004).

¹⁴⁸ 408 U.S. 238, 239 (1972).

¹⁴⁹ 428 U.S. 153, 206–07 (1976). See generally DANIEL LACHANCE, EXECUTING FREEDOM: THE CULTURAL LIFE OF CAPITAL PUNISHMENT IN THE UNITED STATES (2016).

Finally, when the Supreme Court does something truly controversial as in *Dred Scott*, *Lochner*, or *Roe v. Wade*,¹⁵⁰ the political branches tend to “rediscover” the virtues of departmentalism, and they push back very hard against the Court. In a letter written in the 1830s, Madison argued that the judicial bench, “when happily filled,” is usually the surest and best expositor of constitutional meaning. Madison’s letter implies that when the judicial bench is “unhappily filled,” however, both Congress and the President have the constitutional power and duty to check and balance the Supreme Court.

What can we say, then, about the origins of judicial review in the United States? First, it owes a lot to the prior British colonial umpiring practice. Second, there has been vigorous vertical federalism umpiring since the beginning of the republic. Third, there were, between 1792 and 1895, several cases in which the Supreme Court enforced horizontal, separation of powers boundary lines against the political branches of the federal government. And fourth, the Supreme Court claimed the power to police horizontal enumerated powers in *Marbury*, *McCulloch*, and *Dred Scott*, and no one disputed this claim (although all three opinions were widely criticized on other grounds) until Professor Thayer came along. Between the Civil War and *United States v. E. C. Knight Co.*¹⁵¹ in 1895, the Supreme Court struck down major acts of Congress in *Hepburn v. Griswold* and in the *Civil Rights Cases*. No major Bill of Rights cases were decided until well into the twentieth century.

CONCLUSION

Professor Thayer and the Progressive Movement of which he was a key part failed to appreciate how wonderful the intellectual world of the 1780s was, especially as compared to the 1890s. In the 1780s most intellectuals believed that

[a]ll men are born free and equal, and have certain natural, essential, and unalienable rights; among which may be reckoned the right of enjoying and defending their lives and liberties; that of acquiring, possessing, and protecting property; in fine, that of seeking and obtaining their safety and happiness.¹⁵²

The 1780s were alive with reverence for England’s Ancient Constitution, which predated the Norman invasion of England in 1066. The 1780s was also alive with classicists who were interested in the Aristotelian theory of the Mixed Regime, a constitutional structure that has endured in the United States for 230 years. The 1780s produced the world’s first

¹⁵⁰ 410 U.S. 113 (1973).

¹⁵¹ 156 U.S. 1 (1895).

¹⁵² MASS. CONST. art. I (enacted in 1780).

constitutional democracy, the world's shortest constitution, and the world's oldest constitution. The regime that the 1780s set in motion was vitally perfected by Abraham Lincoln and our Second Founding during the 1860s, which was also a decade where people believed in human equality and liberty thanks to John Stuart Mill.¹⁵³ It is no accident that the Gettysburg Address begins with the words, "Four score and seven years ago our fathers brought forth on this continent, a new nation, conceived in Liberty and dedicated to the proposition that all men are created equal."¹⁵⁴

The British Empire bequeathed two valuable constitutional ideas to the United States, of which we made great use: first, the idea of a written constitution and Bill of Rights, and second, the idea of a system of judicial review to enforce our written constitution. I have tried briefly in this Essay to show why written constitutions and judicial review are a normatively desirable thing, and, in doing so, why I disagree with Professor Thayer's theory of radical judicial restraint. Finally, I have considered the Supreme Court's actual practice of judicial review from 1790 to 1893 to show that the Court did not follow a rule of clear mistake during this period of time, contrary to Professor Thayer's claim.

I will not say much about the world of the 1890s except that it was a time when most intellectuals did not believe that "all men are born free and equal." This ignorance led to European colonialism, Jim Crow segregation in the United States, the eugenics movement in the United States and in Germany, the rise of the expert, undemocratic agency, and, finally, the move from eugenics to the Holocaust in Nazi Germany. After 1945, however, the world was reborn, and Eleanor Roosevelt—the first Ambassador to the United Nations—secured the adoption of the Universal Declaration of Human Rights. It bears quoting the first Article of the Universal Declaration, in which one can hear the glory of the American Revolution:

All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood.¹⁵⁵

Finally, by 1948, the world had gotten back to its origins in the 1780s and 1860s, and repudiated Social Darwinism.

¹⁵³ See generally JOHN STUART MILL, ON LIBERTY (1859).

¹⁵⁴ Abraham Lincoln, Address Delivered at the Dedication of the Cemetery at Gettysburg (Nov. 19, 1863), in 7 THE COLLECTED WORKS OF ABRAHAM LINCOLN 17, 22–23 (Roy P. Basler et al. eds., 1953).

¹⁵⁵ Universal Declaration of Human Rights, art. I (Dec. 10, 1948).