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## DEBUNKING ANTINOVELTY

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### ABSTRACT

*This Article debunks the idea that a federal statute's novelty is an indication that the statute violates constitutional principles of federalism or the separation of powers. In the last six years, every Justice on the Supreme Court has signed onto the idea that legislative novelty signals that a statute is unconstitutional. Many courts of appeals have also latched onto antinovelty rhetoric, two doing so in the course of finding federal statutes unconstitutional. The Supreme Court's rhetoric about legislative novelty originated as an observation: the Court described a statute as novel when distinguishing that statute from other, constitutionally permissible ones. Since then, the Court has weaponized its rhetoric about legislative novelty such that a federal statute's novelty is now a "telling indication" that the statute is unconstitutional.*

*This Article urges the Court to abandon this rhetoric. The idea that legislative novelty is a sign that a statute is unconstitutional primarily rests on the mistaken Madisonian premise that Congress reliably exercises the full scope of its constitutional powers and that prior Congresses' failure to enact a statute shows that prior Congresses assumed that the statute was unconstitutional. But there are myriad reasons why Congress does not enact statutes: enacting federal laws is difficult—in part because of constitutional requirements—and*

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*Congress legislates in response to existing conditions, which change over time. There are also many reasons why Congress may not innovate and why Congress may not have enacted every constitutionally permissible means of regulation. This Article suggests that there may be a more limited role for legislative novelty to play in areas of underenforced constitutional norms where courts have struggled to articulate workable doctrinal rules. Even then, a statute's novelty should carry little weight in any determination about the statute's constitutionality. Finally, this Article reflects on whether rejecting the Court's rhetoric about legislative novelty necessarily calls into question the idea that a history of similar congressional statutes is evidence that a statute is constitutional.*

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*[S]ometimes “the most telling indication of [a] severe constitutional problem is the lack of historical precedent” for Congress’s action.*

—Chief Justice John Roberts<sup>1</sup>

*[A] doubtful question [regarding] the respective powers of those who are equally the representatives of the people, are to be adjusted if not put to rest by the practice of the government. An exposition of the constitution, deliberately established by legislative acts ought not to be lightly disregarded.*

—Chief Justice John Marshall<sup>2</sup>

## INTRODUCTION

Change undergirds many difficult questions in constitutional law. One persistent question is how the Constitution may change—through the formal amendment process, through social movements, or through judicial decisions.<sup>3</sup> Another is whether, and when, changed circumstances should alter how the Constitution is interpreted.<sup>4</sup>

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1. Nat’l Fed’n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566, 2586 (2012) (quoting Free Enter. Fund v. Pub. Co. Accounting Oversight Bd., 561 U.S. 477, 505 (2010)).

2. McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 401 (1819).

3. See generally Michael C. Dorf, *The Undead Constitution*, 125 HARV. L. REV. 2011 (2012) (book review) (describing popular and social movements that precipitate constitutional change); Reva B. Siegel, *She the People: The Nineteenth Amendment, Sex Equality, Federalism, and the Family*, 115 HARV. L. REV. 947 (2002) (same); David A. Strauss, *The Irrelevance of Constitutional Amendments*, 114 HARV. L. REV. 1457 (2001) (describing sources of change other than constitutional amendments).

4. See, e.g., Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 863 (1992) (plurality opinion) (posing the question of when a changing “understanding of the facts” merits

Still another question has begun to emerge recently—whether legislative change, meaning a federal statute’s novelty, speaks to whether that statute is constitutional. Three decades ago, the Supreme Court began to suggest that a federal statute’s novelty could be evidence that the statute exceeded the scope of Congress’s delegated powers or violated the Tenth Amendment. When the Court in *New York v. United States*<sup>5</sup> held that Congress could not require state legislatures to enact federal directives, it observed that the challenged federal statute was different from other statutes: “The . . . [challenged] provision appears to be unique. No other federal statute has been cited which offers a state government no option other than that of implementing legislation enacted by Congress.”<sup>6</sup> Five years later, *Printz v. United States*<sup>7</sup> turned *New York*’s observation into an affirmative reason for why a federal statute purporting to require state executives to enforce federal law was unconstitutional.<sup>8</sup> Writing for the majority, Justice Scalia maintained that if “earlier Congresses avoided use of this highly attractive power, we would have reason to believe that the power was thought not to exist.”<sup>9</sup>

Since *Printz*, the Court has, on several occasions, trotted out the idea that legislative novelty signals that a statute is unconstitutional in cases regarding federalism and separation of powers.<sup>10</sup> For example, when the Court held in *Free Enterprise Fund v. Public Company Accounting Oversight Board*<sup>11</sup> that the Public Company Accounting Oversight Board’s (PCAOB) removal structure violated the separation of powers, it maintained that “the most telling indication of the severe constitutional problem with the PCAOB is the lack of historical precedent for this entity.”<sup>12</sup> And all of the opinions that concluded that the Affordable Care Act’s (ACA) minimum-coverage requirement exceeded Congress’s power to regulate interstate commerce reasoned that the minimum-coverage requirement’s novelty

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constitutional change); DAVID A. STRAUSS, *THE LIVING CONSTITUTION* 5 (2010) (arguing that the Constitution’s meaning must change as time passes).

5. *New York v. United States*, 505 U.S. 144 (1992).

6. *Id.* at 177.

7. *Printz v. United States*, 521 U.S. 898 (1997).

8. *Id.* at 935.

9. *Id.* at 905.

10. Two years after *Printz*, *Alden v. Maine* relied on the same principle, without qualifying that the federal power must be highly attractive. *Alden v. Maine*, 527 U.S. 706, 744 (1999).

11. *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477 (2010) (Scalia, Kennedy, Thomas, and Alito, J.J., dissenting).

12. *Id.* at 505.

was a strong indication that it was unconstitutional—what this Article calls antinovely rhetoric.<sup>13</sup>

The Court’s rhetoric about legislative novelty is related to a more familiar issue in constitutional law: how congressional practice factors into constitutional interpretation and, specifically, whether a statute is more likely to be constitutional because it is part of a longstanding history of similar congressional enactments. This idea is sometimes associated with Chief Justice Marshall’s opinion in *McCulloch v. Maryland*.<sup>14</sup>

Professors Curtis Bradley and Trevor Morrison have since examined “the proper role of historical practice in” questions about “the distribution of authority between Congress and the executive branch.”<sup>15</sup> Like Chief Justice Marshall in *McCulloch*, Bradley and Morrison also addressed when a pattern of one branch’s acts can establish that branch’s legal authority.<sup>16</sup>

Bradley and Morrison, as well as Chief Justice Marshall, were concerned with the *inverse* of the idea that legislative novelty signals that a statute is unconstitutional—when the existence of similar congressional statutes or executive actions suggests that there is constitutional authority to enact a certain statute or take an executive action.<sup>17</sup> They did not address when congressional inaction may support the claim that Congress *lacks* constitutional authority.<sup>18</sup>

The use of antinovely rhetoric is now commonly employed by the federal courts. Every Justice on the Supreme Court has joined an

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13. Nat’l Fed’n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566, 2586 (2012); *id.* at 2649 (Scalia, Kennedy, Thomas, and Alito, J.J., dissenting).

14. *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 401 (1819); *see, e.g.*, Frank H. Easterbrook, *Textualism and the Dead Hand*, 66 GEO. WASH. L. REV. 1119, 1124 (1998) (linking *McCulloch* with the idea “that the Constitution allows the living legislature to govern”); Barry Friedman & Scott B. Smith, *The Sedimentary Constitution*, 147 U. PA. L. REV. 1, 11 n.25 (1998) (same).

15. Curtis A. Bradley & Trevor W. Morrison, *Historical Gloss and the Separation of Powers*, 126 HARV. L. REV. 412, 413 (2012); *see also id.* at 416 (“[O]ur consideration of the role of historical practice is limited to the constitutional separation of powers, and in particular to issues of executive and legislative power.”).

16. *Id.* at 432.

17. Bradley and Morrison explained the relevant principle as follows: a longstanding pattern of one branch’s actions justifies that branch’s legal authority when “the other branch can be deemed to have ‘acquiesced’ in the practice over time.” *Id.*

18. Some of the reasons Bradley and Morrison give for why “it is precarious to infer congressional acquiescence” from “the absence of legislation prohibiting the executive action in question,” *id.* at 448, also speak to whether congressional silence or inaction may signify a constitutional infirmity, *see id.* at 440–43. For a similar discussion, *see infra* Part II.A.

opinion promoting the idea that legislative novelty is evidence of a constitutional defect, and this rhetoric has appeared in at least one majority opinion in each of the last six terms.<sup>19</sup> In that same time, several panels of the U.S. Court of Appeals for the D.C. Circuit,<sup>20</sup> as well as panels on the U.S. Courts of Appeals for the Fifth<sup>21</sup> and Sixth Circuits,<sup>22</sup> have also relied on the idea that a statute's novelty is evidence that the statute is unconstitutional, two doing so in the course of holding a federal statute unconstitutional.

Still, there is a fair amount of uncertainty about how significant legislative novelty is to a court's ultimate conclusion that a statute is unconstitutional. Accordingly, now is the time to critically assess and debunk the idea that legislative novelty is a sign that a statute violates constitutional principles of federalism or the separation of powers. This Article has three aims.<sup>23</sup> First, it traces the evolution of the idea that legislative novelty is evidence of a constitutional infirmity, defines its contours, and spells out its justifications. Second, it critically assesses the Court's antinovely rhetoric. This Article maintains that legislative novelty is not evidence and should not be used as evidence that a statute is unconstitutional on federalism or separation-of-powers grounds. In those contexts, novelty should only be used to assure a judge that a ruling invalidating a federal statute (for reasons unrelated to the statute's novelty) will not have disastrous practical consequences. Third, it compares the rhetoric about legislative novelty with the inverse idea that a longstanding pattern of congressional statutes is evidence of those statutes' constitutionality. This Article does not reach a conclusion on whether that inverse principle is

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19. See *supra* text accompanying notes 10–12; cf. *Va. Office for Prot. & Advocacy v. Stewart*, 563 U.S. 247, 260 (2011) (“Novelty, however, is often the consequence of past constitutional doubts . . .”).

20. *Ass’n of Am. R.R.s v. U.S. Dep’t of Transp.*, 721 F.3d 666, 669 (D.C. Cir. 2013); *Seven-Sky v. Holder*, 661 F.3d 1, 18 (D.C. Cir. 2011); see *Zivotofsky v. Sec’y of State*, 725 F.3d 197, 221–22 (D.C. Cir. 2013) (Tatel, J., concurring); *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 537 F.3d 667, 699 (D.C. Cir. 2008) (Kavanaugh, J., dissenting).

21. *United States v. Kebodeaux*, 687 F.3d 232, 237–38 (5th Cir. 2012).

22. *Thomas More Law Ctr. v. Obama*, 651 F.3d 529, 556, 559 (6th Cir. 2011) (Sutton, J., concurring), *abrogated by Nat’l Fed’n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2586 (2012).

23. Neal Katyal and Thomas Schmidt maintain that *NFIB* “yielded an important constitutional innovation,” which they call the “antinovelty doctrine: a law without historical precedent is constitutionally suspect.” Neal Kumar Katyal & Thomas P. Schmidt, *Active Avoidance: The Modern Supreme Court and Legal Change*, 128 HARV. L. REV. 2109, 2139 (2015). But Katyal and Schmidt foreswear any kind of critical examination or assessment of the antinovely doctrine, explaining that their “purpose is not to debunk the antinovely doctrine on the merits.” *Id.* at 2149.

justified. But it shows that the reasons for rejecting the Court's antinovely rhetoric do not require the inverse principle to be rejected, and there may be independently sufficient justifications for the inverse principle.

Before proceeding further, one caveat is in order: this Article's accounting of antinovely rhetoric is limited to issues of constitutional federalism and the separation of powers, not individual rights. Antinovely rhetoric has been invoked, albeit in a different form, in two cases concerning individual rights, *Romer v. Evans*<sup>24</sup> and *United States v. Windsor*.<sup>25</sup> *Romer* held unconstitutional a Colorado state amendment that repealed municipal legislation—and barred future municipal legislation—that extended nondiscrimination protections to persons based on their sexual orientation.<sup>26</sup> *Romer* maintained that the amendment was “exceptional”<sup>27</sup> and “unprecedented in our jurisprudence.”<sup>28</sup> *Romer* then reasoned that “[t]he absence of precedent . . . is itself instructive” because “[d]iscriminations of an unusual character especially suggest careful consideration to determine whether they are obnoxious to the constitutional provision” guaranteeing equal protection of the laws.<sup>29</sup> *Windsor* subsequently quoted this language when it held the federal Defense of Marriage Act (DOMA) unconstitutional.<sup>30</sup>

There are, however, several differences between controversies regarding individual rights and controversies regarding constitutional structure that may be relevant to whether the Court's antinovely rhetoric is justified in the two contexts. First, part of this Article's critique of antinovely rhetoric in cases regarding constitutional structure depends on how Congress functions, which has less significance in cases involving individual rights because individual-rights cases concern not only Congress, but also state and local governments. When a court invokes antinovely rhetoric in cases

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24. *Romer v. Evans*, 517 U.S. 620 (1996).

25. *Windsor v. United States*, 133 S. Ct. 2675 (2013).

26. *Romer*, 517 U.S. at 635–36.

27. *Id.* at 632.

28. *Id.* at 633.

29. *Id.* (quoting *Louisville Gas & Elec. Co. v. Coleman*, 277 U.S. 32, 37–38 (1928)). The Court in *Romer* then declared, “It is not within our constitutional tradition to enact laws of this sort.” *Id.*

30. *Windsor*, 133 S. Ct. at 2692. For a countering view that DOMA's regulation of marriage is not novel, see Judith Resnik, “*Naturally*” *Without Gender: Women, Jurisdiction, and the Federal Courts*, 66 N.Y.U. L. REV. 1682, 1721 (1991).

involving federalism or the separation of powers, it will only search for similar congressional statutes. State statutes are not relevant because states are not subject to the constitutional federalism and separation-of-powers limitations that apply to Congress. But the Bill of Rights and other individual-rights amendments are largely incorporated against the states. Therefore, when a court asks whether there are similar statutes—or a lack thereof—in cases involving individual rights, the court may survey statutes enacted by state governments and their instrumentalities. Because state and local legislatures are not subject to the same restrictions as Congress, several of the critiques of antinovely rhetoric may not apply with as much force in cases involving individual rights. Second, there are potentially different justifications for antinovely rhetoric in cases of individual rights, such as the potential for oppression of disfavored minorities,<sup>31</sup> and these other justifications require separate treatment. Third, the relevant constitutional text and structure—which this Article uses to critique antinovely rhetoric—treat constitutional federalism and the separation of powers differently than individual rights. Finally, in both doctrine and scholarship, practice-based arguments are treated differently in cases of individual rights versus cases of constitutional structure. Chief Justice Marshall, for example, cabined his statement in *McCulloch* to apply only where “the great principles of liberty are not concerned,”<sup>32</sup> and Bradley and Morrison similarly walled off “individual rights controversies” from their analysis.<sup>33</sup> These differences between the two kinds of cases “are sufficient . . . to focus exclusively” on one set of them—those involving questions of constitutional structure.<sup>34</sup>

This Article proceeds in four parts. Part I identifies the Court’s increasing reliance on antinovely rhetoric. Part II then examines the primary justification for the idea that legislative novelty is evidence of a constitutional defect, which turns on the mistaken assumption that Congress reliably exercises the full scope of its powers. Part III

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31. See Bradley & Morrison, *supra* note 15, at 416 (contending that federalism and separation-of-powers challenges “do[] not typically raise concerns about the oppression of minorities or other disadvantaged groups” that arise “in some individual rights areas”).

32. *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 401 (1819). *Romer*—and also *Windsor*—similarly defined the relevant principle as applicable to “[d]iscriminations of an unusual character.” *Windsor*, 133 S. Ct. at 2692 (quoting *Coleman*, 277 U.S. at 37–38); *Romer*, 517 U.S. at 633 (same).

33. Bradley & Morrison, *supra* note 15, at 416.

34. *Id.* at 417.



considers and rejects the idea that Congress's inaction—through not enacting statutes—somehow makes a statute *unconstitutional* and the claim that legislative novelty should be used as evidence that a statute is unconstitutional. Part IV concludes that, at most, judges should consider a statute's novelty to ensure that invalidating an otherwise unconstitutional federal statute would not call into question too many other federal statutes whose invalidation would require a dramatic restructuring of how government functions day to day.

## I. LEGISLATIVE NOVELTY AND CONSTITUTIONAL INTERPRETATION

Legislative novelty has factored into several recent controversies regarding constitutional structure. In the early 1990s, the Supreme Court observed that a federal statute purporting to require state legislatures to comply with federal directives was a fundamentally new form of legislation in the course of holding it unconstitutional. Since then, the Court has turned its observation about legislative novelty into a reason why a federal statute may violate constitutional principles of separation of powers or federalism. Part I.A describes the antinovely rhetoric which has been used in several recent controversies. Part I.B explains the role that antinovely has played in these rulings.

### A. *Antinovely Rhetoric in Constitutional Argument*

Several recent Supreme Court decisions have promoted the idea that legislative novelty is a mark against a law's constitutionality. The idea began as something of an observation in *New York*, which addressed whether Congress could require state legislatures to regulate low-level radioactive waste according to federal directives.<sup>35</sup> The Court concluded that Congress did not possess this authority.<sup>36</sup> Recognizing that the Tenth Amendment did not speak to the precise question,<sup>37</sup> the Court explained that “the Framers explicitly chose a Constitution that confers upon Congress the power to regulate individuals, not States,”<sup>38</sup> and maintained that requiring state legislatures to enact federal directives is inconsistent with several values that federalism

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35. *New York v. United States*, 505 U.S. 144, 175–76 (1992). The majority in *New York* included Justice O'Connor (the opinion's author), Chief Justice Rehnquist, Justice Scalia, Justice Kennedy, Justice Souter, and Justice Thomas.

36. *Id.* at 176–77.

37. *Id.* at 156–57 (“The Tenth Amendment[’s] . . . limit is not derived from the text of the Tenth Amendment . . . which . . . is essentially a tautology.”).

38. *Id.* at 166.

purportedly serves.<sup>39</sup> But *New York* also noted the apparent novelty of the take title provision. It surmised that “[t]he take title provision is of a different character” from other kinds of federal regulations,<sup>40</sup> and it observed that the “provision appears to be unique. No other federal statute has been cited which offers a state government no option other than that of implementing legislation enacted by Congress.”<sup>41</sup>

Five years later, in *Printz v. United States*, the Court held that Congress could not require state law enforcement officers to enforce federal law.<sup>42</sup> Although *New York* had closed with an observation about the challenged statute’s novelty, the Court in *Printz* explicitly framed its analysis around the idea that legislative novelty signifies a constitutional infirmity. Again conceding that “no constitutional text sp[oke] to this precise question,”<sup>43</sup> Justice Scalia framed the issue this way:

The Government contends . . . that “the earliest Congresses enacted statutes that required the participation of state officials in the implementation of federal laws.” . . . [E]arly congressional enactments “provid[e] contemporaneous and weighty evidence of the Constitution’s meaning.” Indeed, such “contemporaneous legislative exposition of the Constitution . . . , acquiesced in for a long term of years, fixes the construction to be given its provisions.” *Conversely if, as petitioners contend, earlier Congresses avoided use of this highly attractive power, we would have reason to believe that the power was thought not to exist.*<sup>44</sup>

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39. *Id.* at 168–69.

40. *Id.* at 174–75.

41. *Id.* at 177. Similar to *New York*, the Court in *Plaut v. Spendthrift Farm, Inc.* also observed that a statute was novel in the course of finding that statute unconstitutional. *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 230 (1995). The *Plaut* Court also suggested the statute’s novelty was relevant to the constitutional analysis, but in less forceful terms than *Printz* and other cases later adopted: “Apart from the statute we review today, we know of no instance in which Congress has attempted to set aside the final judgment of an Article III court by retroactive legislation. That prolonged reticence would be amazing if such interference were not understood to be constitutionally proscribed.” *Id.*

42. *Printz v. United States*, 521 U.S. 898, 935 (1997). The majority in *Printz* included Justice Scalia (the opinion’s author), Chief Justice Rehnquist, Justice O’Connor, Justice Kennedy, and Justice Thomas.

43. *Id.* at 905.

44. *Id.* (second alteration in original) (third omission in original) (emphasis added) (citations omitted) (first quoting Brief for the United States at 28, *Printz v. United States*, 521 U.S. 898 (1997) (Nos. 95-1478, 95-1503), 1996 WL 595005, at \*28; then quoting *Bowsher v. Synar*, 748 U.S. 714, 723–24 (1986); and then quoting *Myers v. United States*, 272 U.S. 52, 175 (1926)). This statement is also technically the inverse of the preceding one.

Moreover, after noting that early statutes imposed federal duties on state courts or state judges, but not state executives,<sup>45</sup> the Court explained: “[T]he numerousness of these statutes, contrasted with the utter lack of statutes imposing obligations on the States’ executive (notwithstanding the attractiveness of that course to Congress), suggests an assumed absence of such power.”<sup>46</sup> Based on the “absence of executive-commandeering statutes in the early Congresses” as well as the “absence of them in our later history as well, at least until very recent years,”<sup>47</sup> the Court surmised, “The constitutional practice we have examined above tends to negate the existence of the congressional power asserted here.”<sup>48</sup>

Shortly after *Printz*, the Court relied on legislative novelty in *Alden v. Maine*<sup>49</sup> to justify the rule that Article I does not provide Congress with the power to subject unconsenting states to suits for damages in state court.<sup>50</sup> Examining “early congressional practice,”<sup>51</sup> it concluded that it had “discovered no instance in which [early Congresses] purported to authorize suits against nonconsenting States in” state court.<sup>52</sup> Quoting *Printz*,<sup>53</sup> the Court then surmised that “early Congresses did not believe they had the power to authorize private suits against the States in their own courts.”<sup>54</sup>

*New York*, *Alden*, and *Printz* each contained antinovelty rhetoric that was used to identify federalism-based constraints about how Congress may regulate the states when Congress regulates in spheres that concededly fall within its Article I powers. The Court has subsequently invoked similar antinovelty rhetoric in cases that identify separation-of-powers constraints on how Congress may structure

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45. *Id.* at 907. The *Printz* Court said that a late nineteenth-century statute did not state a command and that a draft statute was not coercive. *Id.* at 916–17. It offered some reasons for distinguishing between state judicial and executive officers. *See id.* at 907 (relying on the Supremacy Clause, Congress’s ability to not create federal courts, and the tradition of courts applying foreign law). For a critique of the Court’s reasoning, see Evan H. Caminker, *Printz, State Sovereignty, and the Limits of Formalism*, 1997 SUP. CT. REV. 199, 213–14.

46. *Printz*, 521 U.S. at 907–08.

47. *Id.* at 916.

48. *Id.* at 918.

49. *Alden v. Maine*, 527 U.S. 706 (1999). The majority in *Alden* was the same majority as in *Printz*. Justice Kennedy, rather than Justice Scalia, wrote that opinion.

50. *Id.* at 745.

51. *Id.* at 743.

52. *Id.*; *see also id.* at 744 (“[S]tatutes purporting to authorize private suits against nonconsenting States in state courts . . . are all but absent from our historical experience.”).

53. *Id.* at 744.

54. *Id.*

federal agencies. For example, *Free Enterprise Fund* examined the constitutionality of the PCAOB, which, by statute, consisted of five members removable only for cause by the SEC.<sup>55</sup> Additionally, the SEC consisted of members who were removable only for cause by the President. The Court concluded that the PCAOB's double layer of for-cause removal protection violated "the Constitution's separation of powers,"<sup>56</sup> which requires the President to have some control over officers executing federal law.<sup>57</sup> "Perhaps the most telling indication of the severe constitutional problem with the PCAOB," the Court maintained, "is the lack of historical precedent for this entity."<sup>58</sup> The Court then stressed the PCAOB's novelty throughout its analysis.<sup>59</sup>

Two years later, the Court invoked *Free Enterprise Fund's* antinovely rhetoric in *National Federation of Independent Business v. Sebelius (NFIB)*,<sup>60</sup> the case in which five Justices stated that Congress lacked authority under the Commerce Clause and the Necessary and Proper Clause to require individuals to purchase health insurance.<sup>61</sup> The Chief Justice's opinion, which stated that the minimum-coverage requirement exceeded Congress's powers, began with the observation that "Congress ha[d] never attempted to rely on [its] power[s] to compel individuals not engaged in commerce to purchase an unwanted product."<sup>62</sup> The opinion quoted *Free Enterprise Fund's* antinovely rhetoric,<sup>63</sup> but it also framed antinovely rhetoric in slightly softer terms, suggesting that "[a]t the very least, we should 'pause to consider the implications of the Government's arguments' when confronted with such new conceptions of federal power."<sup>64</sup> The joint dissent—

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55. *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477, 484, 486–87 (2010). The *Free Enterprise Fund* majority included Chief Justice Roberts (the opinion's author), Justice Scalia, Justice Kennedy, Justice Thomas, and Justice Alito.

56. *Id.* at 492.

57. *Id.* at 492, 497–98.

58. *Id.* at 506. *Free Enterprise Fund's* forceful account of antinovely rhetoric directly quotes Judge Kavanaugh's dissent to the opinion of the U.S. Court of Appeals for the D.C. Circuit. See *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 537 F.3d 667, 699 (D.C. Cir. 2008) (Kavanaugh, J., dissenting).

59. See *Free Enter. Fund*, 561 U.S. at 514 (calling the double layer of protection a "new type of restriction"); *id.* at 496 (calling it a "novel structure"); *id.* at 505 (calling it "highly unusual"); *id.* at 505 (noting that "[t]he parties [had] identified only a handful of isolated positions" that might be similar).

60. *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566 (2012).

61. *Id.* at 2591.

62. *Id.* at 2586.

63. *Id.*

64. *Id.* (quoting *United States v. Lopez*, 514 U.S. 549, 564 (1995)).

authored by Justices Scalia, Kennedy, Thomas, and Alito—agreed with the conclusion that the minimum-coverage requirement exceeded the scope of Congress’s powers.<sup>65</sup> It similarly emphasized the minimum-coverage requirement’s novelty,<sup>66</sup> and at oral argument, Justice Kennedy explained the implications of the minimum-coverage requirement’s novelty: “Assume for the moment that this is unprecedented . . . . If that is so, do you not have a heavy burden of justification?”<sup>67</sup>

The Court has also relied on a statute’s apparent novelty to find that it unconstitutionally infringed on the President’s power to recognize foreign states. In *Zivotofsky v. Kerry*,<sup>68</sup> while discussing the pertinent history, the Court observed, “[T]he most striking thing’ about the history of recognition ‘is what is absent from it: a situation like this one,’ where Congress has enacted a statute contrary to the President’s formal and considered statement concerning recognition.”<sup>69</sup> Based in part on the lack of analogous congressional statutes, *Zivotofsky* inferred that Congress did not have the power to recognize foreign states and held that the statute was unconstitutional.

Some antinovely rhetoric has also appeared in cases that address the scope of executive power under Article II, independent of Congress enacting legislation that infringes on the President’s powers. Although these cases are related to *Zivotofsky*, they differ for purposes of this Article’s argument because they do not involve the constitutionality of a federal statute.<sup>70</sup> For example, the Court relied on

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65. *Id.* at 2642 (Scalia, Kennedy, Thomas, and Alito, J.J., dissenting).

66. *Id.* at 2647, 2649 (describing the minimum-coverage requirement as “unprecedented” and explaining that “the relevant history is . . . that [Congress] has never before used the Commerce Clause to compel entry into commerce”).

67. Transcript of Oral Argument at 11–12, *Dep’t of Health & Human Servs. v. Florida*, 132 S. Ct. 2566 (2012) (No. 11-398), [https://www.supremecourt.gov/oral\\_arguments/argument\\_transcripts/2011/11-398-Tuesday.pdf](https://www.supremecourt.gov/oral_arguments/argument_transcripts/2011/11-398-Tuesday.pdf) [<https://perma.cc/NW6U-J5E6>].

68. *Zivotofsky v. Kerry*, 135 S. Ct. 2076 (2015). The statute directed the U.S. Department of State to identify “Israel” as an applicant’s birthplace on her passport when the applicant was born in Jerusalem and requested such identification. *See id.* at 2082. The *Zivotofsky* majority included Justice Kennedy (the opinion’s author), Justice Ginsburg, Justice Breyer, Justice Sotomayor, and Justice Kagan.

69. *Id.* at 2091 (quoting *Zivotofsky v. Sec’y of State*, 725 F.3d 197, 221–22 (D.C. Cir. 2013) (Tatel, J., concurring)). The *Zivotofsky* Court’s invocation of antinovely rhetoric was borrowed from Judge Tatel’s concurrence to the opinion by the U.S. Court of Appeals for the D.C. Circuit.

70. *See, e.g., Medellin v. Texas*, 552 U.S. 491, 532 (2008) (finding that a presidential memorandum had no legal effect on states in part because it “is not supported by a ‘particularly longstanding practice’ of congressional acquiescence, but rather is what the United States itself has described as ‘unprecedented action’” (citations omitted) (first quoting *Am. Ins. Ass’n v.*

executive novelty in *NLRB v. Noel Canning*<sup>71</sup> when deciding that the President's actions went beyond his "Power to fill up all Vacancies that may happen during the Recess of the Senate."<sup>72</sup>

The Court's skepticism of legislative novelty also appears in cases that do not explicitly use the same kind of antinovely rhetoric, as well as those that ultimately reject a constitutional challenge to a federal statute. One example of the former is *Shelby County v. Holder*,<sup>73</sup> which invalidated a part of the Voting Rights Act (VRA).<sup>74</sup> The Court repeatedly emphasized the novelty of the VRA provision it struck down, describing it as "extraordinary" no less than nine times.<sup>75</sup> An example of a case where the statute's constitutionality was ultimately upheld notwithstanding antinovely rhetoric is *Virginia Office for Protection and Advocacy v. Stewart (VOPA)*,<sup>76</sup> where sovereign immunity was deemed to pose no bar to federal courts hearing suits for prospective injunctive relief brought by independent state agencies vested with federal rights.<sup>77</sup> The *VOPA* Court quoted *Free Enterprise Fund*'s language that a "telling indication of [a] severe constitutional problem . . . is [a] lack of historical precedent"<sup>78</sup> and also noted that the "weightie[st] [constitutional] objection" to the suits was their "relative novelty."<sup>79</sup>

The federal courts of appeals have also latched onto the Court's antinovely rhetoric, including in cases that invalidate federal statutes.<sup>80</sup> The Fifth Circuit relied on legislative novelty when it held en

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Garamendi, 539 U.S. 396, 415 (2003); then quoting Brief for the United States as Amicus Curiae at 29–30, *Sanchez-Llamas v. Oregon*, 548 U.S. 331 (2006) (No. 04-10566)).

71. *NLRB v. Noel Canning*, 134 S. Ct. 2550 (2014).

72. U.S. CONST. art. II, § 2, cl. 3; *Noel Canning*, 134 S. Ct. at 2566–67.

73. *Shelby Cty. v. Holder*, 133 S. Ct. 2612 (2013).

74. *Id.* at 2631. For more information on the VRA and the Court's decision, see *infra* notes 159–63, 405–06.

75. *Id.* at 2618.

76. *Va. Office for Prot. & Advocacy v. Stewart*, 563 U.S. 247 (2011).

77. *Id.* at 260–61.

78. *Id.* at 270 (first alteration in original) (quoting *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477, 505 (2010)).

79. *Id.* at 260; see also *id.* (explaining that "[l]ack of historical precedent can indicate a constitutional infirmity" and that "[n]ovelty . . . is often the consequence of past constitutional doubts").

80. Other cases address antinovely rhetoric but uphold the federal statute. See, e.g., *Thomas More Law Ctr. v. Obama*, 651 F.3d 529, 556, 559 (6th Cir. 2011) (Sutton, J., concurring) (explaining that "[l]egislative novelty typically is not a constitutional virtue" and that this fact "dignifie[d] the plaintiffs' argument"); *Seven-Sky v. Holder*, 661 F.3d 1, 18 (D.C. Cir. 2011) ("The novelty . . . is not irrelevant. The Supreme Court occasionally has treated a particular legislative

banc that a provision of the Sex Offender Registration and Notification Act exceeded Congress's power to regulate interstate commerce.<sup>81</sup> (The Supreme Court later reversed that decision in *United States v. Kebodeaux*,<sup>82</sup> without saying anything about the statute's novelty.<sup>83</sup>) The Fifth Circuit framed its analysis by saying that *Printz* had indicated that "a longstanding history of related federal action . . . expands the deference afforded to a statute. Conversely, the absence of an historical analog reduces that deference."<sup>84</sup> The D.C. Circuit also relied on the Court's antinovely rhetoric in finding a provision of the Passenger Rail Investment and Improvement Act of 2008 unconstitutional.<sup>85</sup> The court maintained that "novelty . . . signal[s] unconstitutionality"<sup>86</sup> and that the lack of an "antecedent" is a "reason to suspect" that a law is unconstitutional.<sup>87</sup> (The Supreme Court vacated this decision on other grounds.<sup>88</sup>) Finally, and most recently, the D.C. Circuit relied on the Court's antinovely rhetoric when holding a statutory provision establishing the structure of the Consumer Financial Protection Bureau (CFPB) to be unconstitutional.<sup>89</sup> The opinion is littered with references to the statute's purported novelty and how the statute's novelty mattered to the court's analysis and conclusion.<sup>90</sup>

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device's lack of historical pedigree as evidence that the device may exceed Congress's constitutional bounds.").

81. *United States v. Kebodeaux*, 687 F.3d 232, 234 (5th Cir. 2012) (en banc), *rev'd*, *United States v. Kebodeaux*, 133 S. Ct. 2496 (2013).

82. *United States v. Kebodeaux*, 133 S. Ct. 2496 (2013).

83. *See id.* at 2501.

84. *Kebodeaux*, 687 F.3d at 237–38.

85. *Ass'n of Am. R.R.s v. U.S. Dep't of Transp.*, 721 F.3d 666, 669 (D.C. Cir. 2013), *vacated*, *U.S. Dep't of Transp. v. Ass'n of Am. R.R.s*, 135 S. Ct. 1225 (2015).

86. *Id.* at 673.

87. *Id.*

88. *U.S. Dep't of Transp. v. Ass'n of Am. R.R.s*, 135 S. Ct. 1225, 1228 (2015).

89. *See PHH Corp. v. Consumer Fin. Prot. Bureau*, 839 F.3d 1, 21–22 (D.C. Cir. 2016), *vacated and reh'g en banc granted*, No. 15-1177 (D.C. Cir. Feb. 16, 2017). Indeed, the President may have more power over agencies headed by a single person, rather than a multimember commission. A President would only have to convince, fire, or replace one person in the former case, but he would have to convince, fire, or replace several people in the latter.

90. *See, e.g., id.* at 6 ("[N]o independent agency exercising substantial executive authority has ever been headed by a *single person*. Until now."); *id.* at 8 (describing this structure as a "gross departure" and "never before" used); *id.* at 21 (noting that the CFPB is "exceptional" and "unprecedented").

*B. What Is Antinovelty Rhetoric?*

Reliance on legislative novelty is not a consistent theme in judicial decisions—far from it.<sup>91</sup> The Supreme Court has upheld statutes that are novel without so much as mentioning the statutes' novelty.<sup>92</sup> And it has included antinovelty rhetoric in decisions upholding statutes without any explanation for why the statute's novelty did not make the statute unconstitutional.<sup>93</sup> Part I.A shows only that antinovelty rhetoric exists and that it has been invoked repeatedly in recent times. This Part tries to parse what exactly antinovelty rhetoric is by posing two questions. First, when do courts invoke antinovelty rhetoric? Second, what is the effect of the antinovelty rhetoric? Does it help resolve the cases in which it is invoked? Does it further other projects in constitutional law? Does it shape the outcomes in future cases?

It is difficult to say when exactly legislative novelty affects the resolution of a question concerning principles of federalism or separation of powers, or even when the Court will employ antinovelty rhetoric. Legislative novelty might matter in a case if the Court adopts antinovelty rhetoric and determines that a federal statute is unconstitutional. These cases have often divided along ideological lines, at least in recent times (meaning that Justice Kennedy is in the majority with either the four more liberal Justices or the four more conservative Justices).<sup>94</sup> They have also tended to be higher-profile

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91. See *Mistretta v. United States*, 488 U.S. 361, 385 (1989) (“Our constitutional principles of separated powers are not violated, however, by mere anomaly or innovation.”).

92. See, e.g., *United States v. Kebodeaux*, 133 S. Ct. 2496, 2501 (2013) (reversing the Fifth Circuit's holding that a provision of the Sex Offender Registration and Notification Act exceeded Congress's power without noting the statute's novelty). The Chief Justice invoked the antinovelty principle in his dissent in *Bank Markazi v. Peterson*, which Justice Sotomayor also joined. *Bank Markazi v. Peterson*, 136 S. Ct. 1310, 1329 (2016) (Roberts, C.J., dissenting). The dissent maintained:

There has never been anything like § 8772 before. Neither the majority nor respondents have identified another statute that changed the law for a pending case in an outcome-determinative way and explicitly limited its effect to particular judicial proceedings. That fact alone is “[p]erhaps the most telling indication of the severe constitutional problem” with the law.

*Id.* at 1333 (quoting *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477, 505 (2010)).

93. In *VOPA*, for example, the Court explained that “the apparently novelty” of the suit did “not at all suggest its unconstitutionality” as opposed to the fact that the “conditions” for such a suit “rarely coincide.” *Va. Office for Prot. & Advocacy v. Stewart*, 563 U.S. 247, 260–61 (2011).

94. That describes *NFIB*, *Free Enterprise Fund*, and *Zivotofsky*, which were decided when Justice Scalia was still on the Court. *Alden*, *Printz*, and *New York* were similarly divided along ideological lines, but they were decided when Justice O'Connor and Chief Justice Rehnquist were



cases—for example, *NFIB* and *Zivotofsky*—rather than those where legislative novelty apparently did not matter—for example, when the Court invoked antinovelty rhetoric but held that the statute was constitutional (*VOPA*) or when the majority did not mention legislative novelty but the dissenters or the lower court did (*Bank Markazi v. Peterson*<sup>95</sup> or *Kebodeaux*). But the cases where legislative novelty has “mattered” have not necessarily been high-profile cases to a general public audience (such as *New York* or *Alden*), even if they were significant federalism and separation-of-powers cases to the community of lawyers who care about such issues.

The Court’s antinovelty rhetoric, moreover, implies that legislative novelty matters in its analysis.<sup>96</sup> But it is unclear whether the Court uses novelty as a “factor” in its analysis or as an on–off switch that adjusts whether a statute is presumed constitutional or presumed unconstitutional. Sometimes legislative novelty appears to be a factor that is weighed together with other factors, such as the constitutional text or doctrine: a novelty score factors into the Court’s overall assessment of whether a law is constitutional or not.<sup>97</sup> The Court in *Alden*, for example, used an analysis that appeared to be shaped by a combined assessment of text, structure, nonoriginalist and originalist history, and precedent. The Court conceded that “the sovereign immunity of the States neither derives from, nor is limited by, the terms of the Eleventh Amendment,”<sup>98</sup> but it maintained that the “Constitution’s structure, its history, and the authoritative interpretations by this Court make clear” that states are immune from suits for damages.<sup>99</sup> In other words, *Alden* suggested that these

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on the Court instead of Justice Alito and Chief Justice Roberts, and when Justice Souter and Justice Stevens were on the Court instead of Justice Sotomayor and Justice Kagan.

95. *Bank Markazi v. Peterson*, 136 S. Ct. 1310 (2016).

96. *E.g.*, *Nat’l Fed’n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2586 (2012) (“[T]he lack of historical precedent” is a “telling indication of [a] severe constitutional problem.”).

97. Professor Richard Fallon has observed that different forms of argument cannot be weighed against one another because they are not commensurable. *See generally* Richard H. Fallon, Jr., *A Constructivist Coherence Theory of Constitutional Interpretation*, 100 HARV. L. REV. 1189 (1987) (considering how to weigh structure and doctrine when they point in different directions). Others have challenged whether “incommensurability” is a true impediment to reasoned constitutional decisionmaking. *See* Michael C. Dorf, *Create Your Own Constitutional Theory*, 87 CALIF. L. REV. 593, 607–08 (1999).

98. *Alden v. Maine*, 527 U.S. 706, 713 (1998).

99. *Id.*

arguments *in combination* generate a constitutional rule. *Zivotofsky* is similar to *Alden* in this respect.<sup>100</sup>

But other times—including in these same cases<sup>101</sup>—legislative novelty appears to function more like an on–off switch that adjusts whether a statute is presumed constitutional (if the statute is not novel) or presumed unconstitutional (if it is). The entire analysis in *Printz* about whether federal commandeering of state executive officers was consistent with federalism was structured under the framework of antinovely—if “earlier Congresses avoided use of this highly attractive power, we would have reason to believe that the power was thought not to exist.”<sup>102</sup> The Chief Justice’s opinion in *NFIB* was similar: the opinion deployed antinovely rhetoric before proceeding to refute the government’s explanations for why the minimum-coverage requirement was constitutional.<sup>103</sup> Professor Neal Katyal and Thomas Schmidt have argued that “the basic structure of the Chief Justice’s opinion” in *NFIB* reveals an especially high level of scrutiny of the government’s arguments for why the individual mandate was constitutional.<sup>104</sup> The Chief Justice began his analysis by stating the Government’s theories for why the mandate was constitutional before refuting them, thus putting the “burden of establishing the constitutionality of the law” on the Government.<sup>105</sup> Therefore, at a minimum, courts may be relying on antinovely rhetoric to excuse themselves from the kind of reasoning or evidence of unconstitutionality one might expect in cases declaring federal statutes unconstitutional.

But are courts deploying antinovely rhetoric in service of a conclusion that they have already reached? That antinovely rhetoric appears in ideologically divided, higher-profile cases arguably suggests that legislative novelty itself might not factor significantly in the resolution of cases. Courts may instead deploy antinovely rhetoric in

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100. *Zivotofsky v. Kerry*, 135 S. Ct. 2076, 2084 (2015).

101. *Alden* also contained analysis that suggested novelty was more like an on–off switch. Like *NFIB*, *Alden* appears to have put the burden on the government to demonstrate that a particular statute was viewed as constitutional at the time the Constitution was ratified. Responding to the dissent’s argument that nothing in the historical materials addressed the validity of *congressional statutes* purporting to subject the states to suits for damages, the Court replied, “The dissent has provided no persuasive evidence that the founding generation regarded the States sovereign immunity as defeasible by federal statute.” *Alden*, 527 U.S. at 733.

102. *Printz v. United States*, 521 U.S. 898, 905 (1997).

103. *Nat’l Fed’n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2586 (2012).

104. Katyal & Schmidt, *supra* note 23, at 2141.

105. *Id.*

service of another project, and there are at least two theories that antinovelty rhetoric might further—originalism and antiprogressivism. Although it is difficult to identify one definition of originalism,<sup>106</sup> antinovelty may be related to originalism in that both ideas place a premium on the past, specifically what the Framers thought the Constitution meant. But the Court’s general antinovelty rhetoric is not a particularly good indicator of assumptions about the Constitution’s original meaning.<sup>107</sup> Antinovelty rhetoric is also concerned with congressional practice during a period of time that extends well beyond the period during which the Constitution was drafted and ratified. What Congress did several decades after the Constitution was ratified is relevant to antinovelty rhetoric but less relevant to ascertaining the Constitution’s original meaning. Additionally, what Congress did by enacting statutes—that is, governing—may be qualitatively different than enacting the Constitution—that is, creating the government.

The Court’s antinovelty rhetoric is probably more related to an agenda of scaling back the federal government’s authority. When the Court has used antinovelty rhetoric to invalidate a statute, it has frequently discounted recently enacted statutes as “not relevant,” instead focusing on whether the statute is similar to statutes enacted in the early 1800s.<sup>108</sup> In addition, the challenge to the ACA’s minimum-coverage requirement in *NFIB* looked, to some scholars, like a renewed challenge to the scope of federal legislative power—specifically, one that sought to roll back the expansion of congressional power that occurred during the New Deal.<sup>109</sup> Other scholars have observed a similar trend in recent administrative law cases—a libertarian-infused skepticism of federal administrative regulation that rejects the twentieth-century expansion of the administrative state.<sup>110</sup>

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106. Cf. Richard H. Fallon, Jr., *The Many and Varied Roles of History in Constitutional Adjudication*, 90 NOTRE DAME L. REV. 1753, 1755 (2015) (describing originalism as “underdefined”); Pamela S. Karlan, *The Supreme Court, 2011 Term—Foreword: Democracy and Disdain*, 126 HARV. L. REV. 1, 28–29 (2012) (“With the possible exception of ‘originalism,’ there is no word in constitutional law whose meaning means less than ‘activism.’”).

107. See *infra* Part II.

108. See, e.g., *Printz v. United States*, 521 U.S. 898, 918 (1997) (“[T]hey are of such recent vintage that they are no more probative than the statute before us of a constitutional tradition.”).

109. See Gillian E. Metzger, *To Tax, to Spend, to Regulate*, 126 HARV. L. REV. 83, 83–84 (2012) (showing how arguments against the ACA “challenged th[e] basic constitutional consensus” of the post-New Deal framework).

110. See Cass R. Sunstein & Adrian Vermeule, *The New Coke: On the Plural Aims of Administrative Law*, 2015 SUP. CT. REV. 41, 41–42 (“[T]he New Coke is a living-constitutionalist movement, a product of thoroughly contemporary values and fears—clearly prompted by continuing rejection, in some quarters, of the New Deal itself.”).

Here too antinovely rhetoric is a way to challenge federal regulation because it raises questions about the proper authority of the administrative state, which expanded significantly in the 1930s.<sup>111</sup> So antinovely rhetoric might be a way to retreat from the kind of federal social and economic regulation that became common after the 1930s by only sanctioning already-enacted statutes and regulations. One defender of the Court's antinovely rhetoric, Professor Randy Barnett, has formulated it in these terms.<sup>112</sup>

Not all of the Justices who have signed opinions with antinovely rhetoric have wanted to roll back the expansion of federal power that occurred during the New Deal or make constitutional interpretation align more closely with the Constitution's original meaning.<sup>113</sup> Knowing that antinovely rhetoric might be a means to further those projects—particularly a challenge to much of federal social and economic regulation—may and should give them pause.

Ultimately, however, whether one sees antinovely rhetoric as an independent principle of constitutional interpretation or as a tool of another project in constitutional law is less relevant to this Article than the mere existence of antinovely rhetoric. The Court's repeated invocations of antinovely rhetoric—coupled with its suggestion that legislative novelty matters—will continue to generate litigation and sometimes result in the invalidation of statutes, assuming the rhetoric is not rejected. A comparison of the briefs in *Printz* and *NFIB* is instructive: only one of the two principal opening briefs in *Printz* mentioned the statute's purported novelty and it did so only once,<sup>114</sup> whereas the opening brief for the state respondents in *NFIB* used the word “unprecedented” twenty-one times.<sup>115</sup> Recently, in *PHH Corp. v.*

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111. See Mariano-Florentio Cuéllar, *Administrative War*, 82 GEO. WASH. L. REV. 1343, 1362 (2014) (“[T]he federal bureaucracy had expanded considerably in the 1930s.”).

112. See Randy E. Barnett, *No Small Feat: Who Won the Health Care Case (And Why Did So Many Law Professors Miss the Boat)?*, 65 FLA. L. REV. 1331, 1347–49 (2013).

113. See Richard A. Primus, *When Should Original Meanings Matter?*, 107 MICH. L. REV. 165, 167 & n.8 (2008) (citing STEPHEN BREYER, *ACTIVE LIBERTY* 7–8 (2005)). They may be joining opinions with the novelty language out of necessity to secure votes, they may not notice it, or they may not associate antinovely rhetoric with these larger projects or the other cases in which it has been invoked.

114. Brief for Petitioner, *Printz v. United States*, 521 U.S. 898 (1997) (No. 95-1478), 1996 WL 464182 (no mention); Brief for Petitioner at 37, *Mack v. United States*, No. 95-1603, 1996 WL 470962, at \*37 (“Only in 1975 did an arm of the national government assert authority to command State officials to regulate interstate commerce.”).

115. Brief for Respondents, *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566 *passim* (2012) (Nos. 11-393, 11-398, 11-400) (using the word “unprecedented” throughout).

*Consumer Financial Protection Bureau*,<sup>116</sup> the D.C. Circuit relied on the Supreme Court’s antinovelty rhetoric, while adding its own variations, to find the statute establishing the structure of the CFPB unconstitutional.<sup>117</sup>

## II. THE (IN)SIGNIFICANCE OF LEGISLATIVE NOVELTY

Part II analyzes whether legislative novelty should serve as evidence that a federal statute violates constitutional principles of federalism or separation of powers. It does so by unpacking and assessing the primary justification that has been offered for antinovelty rhetoric, which is that legislative novelty suggests that previous Congresses assumed similar legislation was unconstitutional.<sup>118</sup> Some more recent cases, such as *Free Enterprise Fund*, have offered what may be a slightly different formulation. That formulation is examined Parts III.C.

The idea that legislative novelty suggests that prior Congresses believed that similar legislation was unconstitutional is premised on the notion that if Congress possessed a particular power, it would have exercised it. The assumption that the legislature exercises the full scope of its powers is related to a conception of government that James Madison articulated in *Federalist 51*. According to Madison, the officials in each branch of government would aggressively exercise the full set of constitutional powers they possessed such that each branch would check the other—“[a]mbition must be made to counteract ambition.”<sup>119</sup> Professor Daryl Levinson has illustrated how this account of government pervades both theory and doctrine regarding federalism

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116. *PHH Corp. v. Consumer Fin. Prot. Bureau*, 839 F.3d 1 (D.C. Cir. 2016), *vacated and reh’g en banc granted*, No. 15-1177 (D.C. Cir. Feb. 16, 2017).

117. *Id.* at 6–8, 22–23.

118. See *Alden v. Maine*, 520 U.S. 706, 744 (1999). Some cases avoided identifying *who* thinks that a congressional power did not exist by framing the antinovelty principle in the passive voice. The Court in *Printz*, for example, said that “if . . . earlier Congresses avoided use of this highly attractive power, we would have reason to believe that *the power was thought not to exist*,” but it does not identify *who* thought the power did not exist. *Printz v. United States*, 521 U.S. 898, 905 (1997) (emphasis added). And *Printz* and *Alden* reasoned that “the utter lack of [similar] statutes . . . ‘suggests an assumed absence of such power.’” *Alden*, 527 U.S. at 744 (quoting *Printz*, 521 U.S. at 907–08). *Plaut* reasoned similarly. See *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 230 (1995). These cases, however, must be primarily talking about *Congress’s* beliefs. *Alden* made this clear: “It thus appears *early Congresses* did not believe they had the power to authorize private suits against the States in their own courts.” *Alden*, 520 U.S. at 744 (emphasis added).

119. THE FEDERALIST NO. 51, at 349 (James Madison) (Jacob E. Cooke ed., 1961).

and the separation of powers.<sup>120</sup> He has also shown how the assumptions underlying this account of government are seriously “flawed with respect to . . . Congress.”<sup>121</sup>

Drawing from Levinson’s and others’ critiques, this Part explains why legislative novelty will rarely reflect prior Congresses’ assumption that a statute was unconstitutional. As Part II.A explains, enacting federal laws is difficult, and the nature of the legislative process requires Congress to select from among many different priorities and make compromises. Moreover, as Part II.B explains, congressional inaction and legislative novelty may arise for other reasons as well. Judicial decisions may make some legislative choices more attractive than others, different areas of federal regulation may be better suited to different forms of regulation, and new factual or legal developments may change reasonable people’s assessments about how to accommodate the pertinent constitutional values. Part II.C then rejects potential limitations on the Court’s antinoveltly rhetoric that may promise to better identify those statutes that prior Congresses assumed were unconstitutional.

Antinoveltly rhetoric relies on legislative novelty to infer that Congress assumed that a statute was unconstitutional. But this inference is misguided. Each year, thousands of bills are introduced in the House and Senate, but only a small fraction pass.<sup>122</sup> And for the last thirty years, Congress has passed between 1 and 7 percent of all bills introduced.<sup>123</sup> In the 113th Congress, for example, there were over

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120. Levinson states that, with respect to federalism, “[a]ll of the variations on the political safeguards argument . . . share the basic assumptions that the federal government, left to its own devices, will inexorably expand its power.” Daryl J. Levinson, *Empire-Building Government in Constitutional Law*, 118 HARV. L. REV. 915, 940 (2005). And that account “finds a close analogy in the way courts and theorists think about the constitutional separation of powers.” *Id.* at 950. Further, “[c]ourts and theorists continue to embrace Madison’s understanding of competition among empire-building branches.” *Id.*

121. Bradley & Morrison, *supra* note 15, at 439; *see also* Neal Kumar Katyal, *Internal Separation of Powers: Checking Today’s Most Dangerous Branch from Within*, 115 YALE L.J. 2314, 2316 (2006) (“Publius’s view of separation of powers presumes three branches with equivalent ambitions of maximizing their powers, yet legislative abdication is the reigning modus operandi.”); Levinson, *supra* note 120, at 951–60 (critiquing the assumption with respect to separation of powers); *id.* at 942–43 (critiquing the assumption with respect to federalism).

122. Bradford R. Clark, *Separation of Powers as a Safeguard of Federalism*, 79 TEX. L. REV. 1321, 1341 (2001).

123. *See Statistics and Historical Comparison*, GOVTRACK, <https://www.govtrack.us/congress/bills/statistics> [<https://perma.cc/JX5F-36AR>].

5,500 bills introduced in the House and over 3,000 in the Senate.<sup>124</sup> Yet only eighty-six bills became law.<sup>125</sup> It seems strange to assume that Congress had serious constitutional doubts about all of the bills that never became law (over five thousand). The same goes for the bills that were never even introduced—Congress probably did not assume that all of those bills were unconstitutional either. Yet the Court has shown no regard for whether Congress even *considered* a statute, much less whether it was constitutional. In *Alden*, for example, the Court held that Congress lacked the power to subject unconsenting states to suits for damages in state court, relying in part on historical materials that did not mention bills Congress had introduced that would have done exactly that.<sup>126</sup>

### A. *Enacting Federal Laws Is Difficult*

Numerous institutional forces make enacting federal laws difficult and reduce Congress's incentives and ability to innovate, including the Constitution's requirements for Congress to make law, congressional procedures, and the nature of the legislative function.

1. *Constitutionally Prescribed Lawmaking Procedures.* The Constitution requires a set of cumbersome procedures to enact federal law.<sup>127</sup> Article I, Section 7 requires that all federal legislation go through the process of bicameralism and presentment.<sup>128</sup> To become law, a bill must pass both houses of Congress; be presented to the President for her approval; and, if vetoed, have the consent of two-thirds of both the House and the Senate.

Inherent to this process are three features, all of which make it hard to enact federal law. First, the Senate, the House, and the President are three different institutions. A majority of persons in any one of those institutions—potentially a minority of lawmakers—could

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124. CONGRESS.GOV, <https://www.congress.gov/search?q={%22congress%22:%22113%22,%22chamber%22:%22House%22,%22type%22:%22bills%22}&pageSort=documentNumber:desc> [<https://perma.cc/86N2-HNT9>] (House); CONGRESS.GOV, <https://www.congress.gov/search?q={%22congress%22:%22113%22,%22chamber%22:%22Senate%22,%22type%22:%22bills%22}&pageSort=documentNumber:desc> [<https://perma.cc/Z8EV-RBNV>] (Senate).

125. *Public Laws*, CONGRESS.GOV, <https://www.congress.gov/public-laws/113th-congress> [<https://perma.cc/AUN9-3TZR>].

126. *Alden v. Maine*, 527 U.S. 706, 744 (1999).

127. See John F. Manning, *Continuity and the Legislative Design*, 79 NOTRE DAME L. REV. 1863, 1868 (2004).

128. U.S. CONST. art. I, § 7.

prohibit a bill from becoming a law.<sup>129</sup> The process of “[b]icameralism and presentment . . . disclose[s] an unmistakable emphasis—to give minorities, in general . . . exceptional power to block legislation as a means of defense against self-interested majorities.”<sup>130</sup> Second, the Senate, the House, and the President answer to different constituencies, further increasing the possibility that these institutions will disagree with one another with respect to any given federal law.<sup>131</sup> Third, both the Senate and the House are collective bodies composed of individuals. The Senate has 100 members, and the House has 435. The sheer size and diversity of the House and the Senate thus make coordinated action difficult.<sup>132</sup> “Congress is a plural body” and “faces substantial collective action problems.”<sup>133</sup>

The cumbersome nature of the lawmaking process was recognized by the men who drafted the Constitution.<sup>134</sup> Madison described bicameralism and presentment as a “complicated check on legislation” that “may in some instances be injurious as well as beneficial.”<sup>135</sup> Indeed, Madison objected to giving all states equal representation in the Senate precisely because it would enable “the minority [to] negative the will of the majority.”<sup>136</sup> Hamilton too explained that

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129. John F. Manning, *Textualism and the Equity of the Statute*, 101 COLUM. L. REV. 1, 74–75 (2001) (“[B]icameralism effectively adopts a supermajority requirement.”); Michael B. Rappaport, *Amending the Constitution to Establish Fiscal Supermajority Rules*, 13 J.L. & POL. 705, 712 (1997) (“It is well known that bicameralism functions like a supermajority requirement.”).

130. Manning, *supra* note 129, at 76; *see also* Clark, *supra* note 122, at 1340 (identifying Senate structure as a source of the supermajority requirement).

131. *See* U.S. CONST. art. I; *see also* William T. Mayton, *The Possibilities of Collective Choice: Arrow’s Theorem, Article I, and the Delegation of Legislative Power to Administrative Agencies*, 1986 DUKE L.J. 948, 956 (“Given that members of the House and Senate represent different constituencies and given that these bodies must concur on a proposed law, a supermajority . . . is in effect required for much of the legislation approved by Congress.”).

132. Terry M. Moe & William G. Howell, *The Presidential Power of Unilateral Action*, 15 J.L. ECON. & ORG. 132, 144 (1999) (“Congress is made up of hundreds of members . . . . Although all have a common stake in the institutional power of Congress, this is a collective good that, for well-known reasons, can only weakly motivate their behavior.”).

133. Bradley & Morrison, *supra* note 15, at 440.

134. *See* Frank H. Easterbrook, *The Role of Original Intent in Statutory Interpretation*, 11 HARV. J.L. & PUB. POL’Y 59, 64–65 (1988) (“As Madison said in Federalist No. 10, the cumbersome process of legislation is the best safeguard against error.”).

135. THE FEDERALIST NO. 62, at 418 (James Madison) (James E. Cooke ed., 1961). Madison also said, “[A] senate, as a second branch of the legislative assembly, distinct from and dividing the power with a first, must be in all cases a salutary check on the government. It doubles the security to the people by requiring the concurrence of two distinct bodies . . . .” *Id.*

136. James Madison, Notes on the Constitutional Convention (July 14, 1787), in 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 9 (Max Farrand ed., 1911).



bicameralism and presentment “include[d] [the power] of preventing good [laws].”<sup>137</sup>

2. *Congressional Procedures*. Under Article I, Section 5, Congress also has the power to prescribe internal rules governing the lawmaking process.<sup>138</sup> The rules that Congress has made add another set of encumbrances to the lawmaking process. A series of “veto gates”—opportunities for a minority of legislators to veto legislation—make it more difficult to enact federal law.<sup>139</sup> For example:

In each house of Congress, a subcommittee and a full committee have “gatekeeping” rights in that a bill normally cannot be considered by the entire legislative body until it has been approved in committee. Then, legislation must be given a position on the legislative calendar and often must secure a special rule restricting debate or amendments (or both) from the Rules Committee . . . .<sup>140</sup>

The committee process in particular means that a committee chair has the power to schedule hearings, votes, and markup sessions, such that “if the chair opposes the bill, believes more study is needed . . . or is pessimistic . . . that the bill has sufficient political support . . . the bill will die in committee.”<sup>141</sup> “This is the fate of ninety percent of the bills introduced in each session of Congress.”<sup>142</sup> Senators can also use filibusters or holds to block bills.<sup>143</sup> “[A] maze of obstacles stands in the way of each congressional decision,” and “[e]very single veto point must be overcome if Congress is to act.”<sup>144</sup>

137. THE FEDERALIST NO. 72, at 496 (Alexander Hamilton) (James E. Cooke ed., 1961).

138. U.S. CONST. art. I, § 5, cl. 2 (“Each House may determine the Rules of its Proceedings.”).

139. McNollgast, *Positive Canons: The Role of Legislative Bargains in Statutory Interpretation*, 80 GEO. L.J. 705, 707 & n.5 (1992); see Moe & Howell, *supra* note 132, at 146.

140. McNollgast, *supra* note 139, at 720–21; see also Easterbrook, *supra* note 134, at 64–65 (“They must run the gamut of the process—and process is the essence of legislation.”); William N. Eskridge, Jr., *Vetogates*, Chevron, *Preemption*, 83 NOTRE DAME L. REV. 1441, 1442–43 (2008) (discussing how complicated the federal legislative process is).

141. Eskridge, *supra* note 140, at 1444.

142. *Id.*

143. *Id.*

144. Moe & Howell, *supra* note 132, at 146. Professors Kenneth A. Shepsle and Barry R. Weingast also explain:

The Rules Committee in the House may refuse to grant a rule for a committee bill, thereby scuttling it. The Speaker may use his power to schedule legislation and to control debate in ways detrimental to the prospects of a committee bill. A small group of senators in the U.S. Senate may engage in filibuster and other forms of obstruction. Any individual senator may refuse unanimous consent to procedures that would expedite passage of a committee bill. In short, veto groups are pervasive in legislatures . . . .

3. *The Legislative Function.* Various features inherent to the legislative process also make enacting federal laws difficult. First, legislatures have a finite amount of time and resources to address a vast number of subjects.<sup>145</sup> Congress is not always in session, and when it is, it has a limited set of resources—committee staff, research services, political capital, and others—to invest in the many steps it takes for a bill to become law. “Often proposals with wide support fail . . . because the legislature [simply] lacks the time to enact them.”<sup>146</sup> Some measures may “have a stronger claim on the limited time and energy of the [legislative] body.”<sup>147</sup>

Second, beyond a lack of time and resources, there are many other reasons for legislators not to enact a law, including ordinary politics.<sup>148</sup> Legislators may believe that a “bill is sound in principle but politically inexpedient to be connected with.”<sup>149</sup> Or legislators may believe that “action should be withheld until the problem can be attacked on a broader front.”<sup>150</sup> Political science scholarship has identified reelection as a significant motivation for many members of Congress,<sup>151</sup> and legislators motivated by reelection have incentives to follow the wishes of their constituents, “who are concerned more with specific policy outcomes [rather] than congressional power.”<sup>152</sup>

Political scientists have offered other explanations for why regulatory legislation may fail to pass at any given time. As Professors Jody Freeman and David Spence explain, “Rational choice models . . . conceive of the legislative process as the product of pressure exerted by interest groups” who “may be able to use their advantages to kill or forestall regulatory legislation,” whereas “organization theorists conceive of the policy process as far more

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Kenneth A. Shepsle & Barry R. Weingast, *The Institutional Foundations of Committee Power*, 81 AM. POL. SCI. REV. 85, 89 (1987).

145. Frank H. Easterbrook, *Statutes' Domains*, 50 U. CHI. L. REV. 533, 548 (1983) (explaining that “[t]he foremost of . . . checks” on a legislative body’s power “is time”).

146. *Id.* at 539.

147. Lawrence C. Marshall, “*Let Congress Do It*”: *The Case for an Absolute Rule of Statutory Stare Decisis*, 88 MICH. L. REV. 177, 190 (1989).

148. Amy Coney Barrett, *Statutory Stare Decisis in the Courts of Appeals*, 73 GEO. WASH. L. REV. 317, 335–36 (2005).

149. Marshall, *supra* note 147, at 190.

150. *Id.*

151. R. DOUGLAS ARNOLD, *THE LOGIC OF CONGRESSIONAL ACTION* 5 (1990) (“Although [members of Congress] are not single-minded seekers of reelection, reelection is their dominant goal.”).

152. Bradley & Morrison, *supra* note 15, at 442.

anarchic—the product of inertia, luck, and other forces.”<sup>153</sup> Although any one of these theories cannot model congressional behavior all of the time, the theories probably explain Congress’s behavior at least some of the time. And they provide reasons why Congress sometimes may not enact a bill even if it does not assume that bill is unconstitutional.

Third, the compromises that go into lawmaking may sometimes minimize the number and scope of federal laws that are enacted. Textualists have emphasized “behind-the-scenes legislative compromise[s]” that are part of lawmaking.<sup>154</sup> Sometimes, the brokered compromise may be to not enact any federal law. Lawmakers make deals to support one piece of legislation at the expense of another: “Often proposals with wide support fail . . . because . . . agreed-on bills become pawns in larger struggles.”<sup>155</sup> Other times, a compromise may affect the shape that a federal statute takes, which may result in a federal law that is more limited in scope than the Constitution permits.<sup>156</sup>

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The Court’s antinovely rhetoric assumes that Congress will always seek to exercise the full scope of its constitutional powers. But that assumption does not properly consider how Congress is structured or how it actually works. Congress’s inaction is, at best, a weak proxy for Congress’s assumption that a federal statute is unconstitutional. As Justice Scalia wrote:

[O]ne must ignore rudimentary principles of political science to draw any conclusions regarding [congressional] intent from the failure to enact legislation. The “complicated check on legislation” erected by our Constitution creates an inertia that makes it impossible to assert with any degree of assurance that congressional failure to act

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153. Jody Freeman & David B. Spence, *Old Statutes, New Problems*, 163 U. PA. L. REV. 1, 11–12 (2014).

154. John F. Manning, *Justice Scalia and the Legislative Process*, 62 N.Y.U. ANN. SURV. AM. L. 33, 38 (2006) (emphasis omitted).

155. Easterbrook, *supra* note 145, at 539.

156. See Manning, *supra* note 129, at 77. Professor John Manning also stated:

The minority’s power to veto legislation carries with it the lesser power to insist, as the price of assent, upon less than what the bill’s proponents ideally would desire—and, perhaps, less than what a reasonable person would view as a fully coherent approach to the mischief sought to be remedied.

*Id.*

represents (1) approval of the status quo, as opposed to (2) inability to agree upon how to alter the status quo, (3) unawareness of the status quo, (4) indifference to the status quo, or even (5) political cowardice.<sup>157</sup>

### B. *Noncongressional Sources of Novelty*

The previous section described how legislative novelty sometimes results from reasons inherent to the federal legislative process. This section outlines noncongressional sources of novelty—additional

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157. *Johnson v. Transp. Agency*, 480 U.S. 616, 671–72 (1987) (Scalia, J., dissenting) (emphasis omitted) (citation omitted). Justice Scalia was criticizing the Court for concluding that Congress’s failure to amend a statute was evidence that Congress agreed with a Supreme Court decision interpreting that statute. If legislative inaction is a weak proxy for Congress’s assumptions about the meaning of the Constitution, legislative inaction should also be a weak proxy for Congress’s assumptions about the meaning of a statute. In both cases, many different reasons might explain legislative inaction. Three doctrines—the acquiescence doctrine, the reenactment doctrine, and the rejected-proposal doctrine—infer something about Congress’s assumptions regarding a statute from Congress’s inaction. Under the acquiescence doctrine, if “Congress is aware of an authoritative agency or judicial interpretation of a statute and does not amend the statute, the Court has sometimes presumed that Congress has ‘acquiesced’ in the interpretation’s correctness.” WILLIAM N. ESKRIDGE, JR., PHILIP FRICKEY, ELIZABETH GARRETT & JAMES BRUDNEY, *CASES AND MATERIALS ON LEGISLATION AND REGULATION* 854 (5th ed. 2014). Under the reenactment rule, “[i]f Congress reenacts a statute without making any material changes in its wording, the Court will often presume that Congress intends to incorporate authoritative agency and judicial interpretations of that language.” *Id.* And under the rejected-proposal rule, “[i]f Congress (in conference committee) or one chamber (on the floor) considers and rejects specific statutory language, the Court has often been reluctant to interpret the statute along lines of the rejected language.” *Id.*; see, e.g., *Koons Buick Pontiac GMC, Inc. v. Night*, 543 U.S. 50, 63 (2004) (drawing an “analogy to Sir Arthur Conan Doyle’s ‘dog that didn’t bark’”); *id.* at 73 (calling it the “Canon of Canine Silence”).

Whether these doctrines make too much of legislative inaction is beyond the scope of this Article; statutory interpretation may reasonably differ from constitutional interpretation. See William N. Eskridge, Jr., *Interpreting Legislative Inaction*, 87 MICH. L. REV. 67, 108–22 (1988) (discussing a defense of some iterations of these doctrines). The reenactment and rejected-proposal rules may be different in that they draw an inference from legislative action (enacting a statute) that also happens to include some inaction (not amending language, either through responding to judicial and agency decisions or other representatives’ proposals), rather than an inference simply from inaction (not enacting a statute). Only the acquiescence rule makes something solely of legislative inaction. Perhaps for this reason, Justice Scalia was particularly critical of it while on the Court. See *infra* note 255; see also BRYAN A. GARNER & ANTONIN SCALIA, *READING LAW* 326 (2012) (disavowing the acquiescence rule in cases of nonexistent legislative amendments, but agreeing that “statutes adopted after” certain kinds of “prior judicial or administrative interpretations” may acquiesce in those interpretations). But even with the acquiescence rule, there is some precipitating event that purportedly, and somewhat plausibly, generates Congress’s attention—namely, a sufficiently important judicial or agency interpretation of a congressional statute. That may not be the case for the Court’s antinoveltly rhetoric because there may be no precipitating event that might plausibly catch Congress’s attention.

reasons why Congress may not enact statutes aside from thinking that those statutes are unconstitutional.

1. *Judicial Decisions.* Judicial interpretations of the Constitution may affect how Congress legislates. Given the amount of resources and time required to enact a federal statute, Congress may attempt to enact statutes that are likely to be upheld. Accordingly, judicial decisions—specifically, what federal judges have said about what statutes might be unconstitutional—may incentivize Congress to avoid enacting federal statutes that test the limits of its constitutional powers.<sup>158</sup>

Consider, for example, the legislative history of the 2006 reauthorization of the VRA. Originally enacted in 1965, the VRA required nine states to preclear any changes to their voting laws.<sup>159</sup> Between 1965 and 2006, the VRA had been upheld on three occasions.<sup>160</sup> Since those decisions, however, the Court announced a more rigorous form of scrutiny applicable to legislation that was enacted under the Fourteenth Amendment.<sup>161</sup> Congress, in deciding how to reauthorize the VRA, elected to stick with a version of the preclearance regime that had previously been upheld. Testimony in congressional hearings and congressional debates reflected the focus on reauthorizing a version of the VRA that would be upheld in court.<sup>162</sup>

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158. In *Alden v. Maine*, 527 U.S. 706 (1999), the Court reasoned that Congress legislates in response to judicial decisions:

To the extent recent practice . . . departs from longstanding tradition, it reflects not so much an understanding that the States have surrendered their immunity from suit in their own courts as the erroneous view, perhaps inspired by [the Supreme Court's decisions in] *Parden* and *Union Gas*, that Congress may subject nonconsenting States to private suits in any forum.

*Id.* at 745.

159. For a summary, see Leah M. Litman, *Inventing Equal Sovereignty*, 114 MICH. L. REV. 1207, 1208–09 (2016).

160. *Lopez v. Monterey Cty.*, 525 U.S. 266, 283–85 (1999); *City of Rome v. United States*, 446 U.S. 159, 178–83 (1980); *South Carolina v. Katzenbach*, 383 U.S. 301, 334–35 (1966).

161. *E.g.*, *City of Boerne v. Flores*, 521 U.S. 507 (1997). For an explanation of the intervening legal challenges to the VRA, see generally Richard L. Hasen, *Congressional Power to Renew the Preclearance Provisions of the Voting Rights Act After Tennessee v. Lane*, 66 OHIO ST. L.J. 177 (2005).

162. See *An Introduction to the Expiring Provisions of the Voting Rights Act and Legal Issues Relating to Reauthorization: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 8 (2006) (statement of Richard L. Hasen, Professor, Loyola Law School) (focusing on the necessity of passing a bill that “will . . . pass constitutional muster in the Supreme Court”). The first question that Senate Judiciary Committee Chairman Arlen Specter asked Professor Richard Pildes to answer at length was, “Is there anything that Congress can do to ensure that the reauthorization of the Voting Rights Act is upheld by the Supreme Court under the ‘congruence and proportionality’ test articulated in *City of Boerne v. Flores*?” *The Continuing Need for Section 5*

As Professor Nathaniel Persily explained, “Even though the shortcomings . . . were widely recognized, tinkering with its basic architecture was . . . constitutionally risky. Better to stick with a law that the Court had previously upheld . . . rather than gamble on a regime without stare decisis.”<sup>163</sup>

Commandeering may be another example of how statutes sometimes reflect Congress’s reticence to test judges’ interpretations of the Constitution, rather than reflecting Congress’s own assumptions about the Constitution. In *Printz*, the Court reasoned that Congress’s history of not requiring states to enforce federal laws signaled Congress’s assumption that it lacked the power to do so.<sup>164</sup> But the lack of analogous statutes instead might have reflected Congress’s concern that the Court would invalidate a statute requiring states to enforce federal law. In an 1842 decision, *Prigg v. Pennsylvania*,<sup>165</sup> the Court held that the Fugitive Slave Act was a constitutional exercise of Congress’s powers under the Fugitive Slave Clause.<sup>166</sup> *Prigg*, however, suggested the statute would have exceeded Congress’s powers if it had pressed state executives into implementing federal law: “The states cannot . . . be compelled to enforce” federal law, “and it might well be deemed an unconstitutional exercise . . . to insist that the states are bound to provide means to carry into effect the duties of the national government.”<sup>167</sup> During this time period, the Supreme Court also considered the possibility that Congress could not impress state judicial officers into service,<sup>168</sup> but it rejected that idea in the early 1900s.<sup>169</sup> The

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*Pre-clearance: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 105 (2006) (statement of Richard H. Pildes, Professor, New York University School of Law) (emphasis omitted); see H.R. Rep. 109-478, at 93 (2006), reprinted in 2006 U.S.C.C.A.N. 618, 678 (focusing on the VRA’s constitutionality and noting that the VRA was previously upheld).

163. Nathaniel Persily, *The Promise and Pitfalls of the New Voting Rights Act (VRA)*, 117 YALE L.J. POCKET PART 139, 140 (2007), <http://www.yalelawjournal.org/forum/the-promise-and-pitfalls-of-the-new-voting-rights-act-vra> [<http://perma.cc/B7E3-FVZU>]; see Nathaniel Persily, *The Promise and Pitfalls of the New Voting Rights Act*, 117 YALE L.J. 174, 211 (2007) (“Whatever its drawbacks, the current coverage formula had the virtue of already having been upheld by the Supreme Court.”).

164. *Printz v. United States*, 521 U.S. 898, 902 (1997).

165. *Prigg v. Pennsylvania*, 41 U.S. 539 (1842).

166. *Id.* at 624.

167. *Id.* at 615–16.

168. Evan H. Caminker, *State Sovereignty and Subordinacy*, 95 COLUM. L. REV. 1001, 1046 (1995); Charles Warren, *Federal Criminal Laws and the State Courts*, 38 HARV. L. REV. 545, 581–84 (1925) (describing Supreme Court cases intimating that Congress could not impress state judicial officers into service).

169. *Second Employers’ Liab. Cases*, 223 U.S. 1, 57 (1912); Caminker, *supra* note 168, at 1023–28.

Court's suggestion that Congress could not commandeer state executive officers—a suggestion that went unchallenged in Supreme Court opinions for over a century—may partially explain the greater number of federal statutes commandeering state judges than state executive officers.

The Reconstruction Amendments are another example of how judicial decisions may limit Congress's incentives to test the limits of its constitutional powers, especially when there are other, judicially sanctioned means of pursuing Congress's desired goal. In 1883, in *The Civil Rights Cases*,<sup>170</sup> the Court held that the Reconstruction Amendments did not provide Congress with the power to prohibit racial discrimination in private establishments.<sup>171</sup> Congress did not attempt to reenact any laws prohibiting racial discrimination by private entities for several decades,<sup>172</sup> but when the civil rights movement gained traction in the 1960s, *The Civil Rights Cases* remained on the books. But in a series of 1940s decisions, the Supreme Court held that Congress could pass laws under its Commerce Clause authority regulating even purely intrastate commerce and that the Court would not inquire into Congress's "motives" in enacting such legislation.<sup>173</sup> Relying on these decisions, the Supreme Court upheld congressional legislation prohibiting racial discrimination by private entities under the Commerce Clause.<sup>174</sup> It would be strange to think that these cases did not affect the way in which federal antidiscrimination legislation was enacted. The doctrine has evolved in such a way that Congress has little incentive to challenge the proposition that it cannot prohibit racial discrimination by private entities under the Reconstruction Amendments, because it can enact such legislation under the Commerce Clause.

2. *Precipitating Changes.* Congress also enacts new statutes because of changing conditions that did not previously exist. Congress enacts laws in response to existing conditions, and Congress now regulates in more domains than it did one hundred or two hundred

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170. *The Civil Rights Cases*, 109 U.S. 3 (1883).

171. *Id.* at 15, 25.

172. ERIC FONER, RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION 512–28 (1988) (describing how political moderates lost the will to police southern states).

173. *See, e.g., United States v. Darby*, 312 U.S. 100, 114–15 (1941).

174. *See Katzenbach v. McClung*, 379 U.S. 294, 305 (1964) (upholding Title II of the Civil Rights Act of 1964); *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 261 (1964) (same).

years ago. Various facts about the world have changed, such as the interconnectedness of the economy and the formation of political parties, and the federal bureaucracy is now more substantial in size and authority. In light of these changes, the absence of a federal statute may reflect nothing more than Congress's belief that a particular kind of law was not needed or even its members' lack of imagination.

*a. New or Changed Facts.* One reason why Congress may not have previously enacted similar statutes is that new or changed facts have brought a new issue to Congress's attention or changed the need for legislation. *Garcia v. San Antonio Metropolitan Transit Authority*<sup>175</sup> addressed whether Congress may apply the federal minimum-wage requirement to state and local government employees.<sup>176</sup> In the late 1980s and early 1990s, when the Court decided *Garcia*, state and local government employees constituted around 12 to 13 percent of the civilian workforce.<sup>177</sup> A century earlier, however, government employees—local, state, and federal—constituted less than 1 percent of the national workforce.<sup>178</sup> Even in 1900, these government employees constituted only 4 percent of the national workforce, and in 1930, state and local employees constituted less than 6 percent of the national workforce.<sup>179</sup> As state and local employees became an increasingly significant portion of the workforce, federal employee regulation began to cover state and local employees. State and local employees were no longer “small pockets of isolated workers whose conditions d[id] not affect interstate commerce.”<sup>180</sup>

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175. *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528 (1985).

176. *Id.* at 554.

177. Douglas Laycock, *Notes on the Role of Judicial Review, the Expansion of Federal Power, and the Structure of Constitutional Rights*, 99 YALE L.J. 1711, 1733–34 (1990) (book review) (citing STATISTICAL ABSTRACT OF THE UNITED STATES 293, 380 (109th ed. 1989) (noting there were 13,913,000 state and local government workers among the 109,597,000 persons employed in the civilian noninstitutional population ages 16 and over)).

178. BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, HISTORICAL STATISTICS OF THE UNITED STATES, 1789–1945, at 64 ser. D. 47-61 (1949), <http://www2.census.gov/prod2/statcomp/documents/HistoricalStatisticsoftheUnitedStates1789-1945.pdf> [<https://perma.cc/3WTZ-5NUN>] (showing that there were 12,920,000 gainful workers in 1870, with all governmental employees amounting to only 100,000).

179. BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, HISTORICAL STATISTICS OF THE UNITED STATES: COLONIAL TIMES TO 1970, BICENTENNIAL EDITION, pt. 5, at 137 ser. D 127-141 (1975), <http://www2.census.gov/prod2/statcomp/documents/CT1970p1-05.pdf> [<https://perma.cc/BK2P-T22S>] (showing that nonagricultural governmental employees totaled 1,094,000 in 1900 and 2,371,000 in 1920); *id.* at 128 ser. D 11-25, at 128 (showing that the civilian labor force totaled 51,251,000 in 1900 and 87,981,000 in 1930).

180. Laycock, *supra* note 177, at 1733–34.



*b. Changed Assessment of Facts.* Apart from whether the underlying facts have actually changed, Congress's assessment of the facts may have changed. Take federal commandeering of state executive officers. The Court in *Printz* relied on the lack of historical evidence to conclude that Congress assumed it lacked the power to impress state officers into federal service. But “[v]arious Framers (including Hamilton) commented that the coercion of states would likely prove impractical or ineffective at best and dangerous because divisive at worst.”<sup>181</sup> Hamilton, for example, worried that state administration of federal law “w[ould] in a great measure fail in the execution.”<sup>182</sup> Decisionmakers two hundred years ago may not have required states to execute federal law because they did not believe the states could adequately execute it.

*c. New Areas for Regulation.* Some novel statutes may also arise because Congress controls more regulatory spheres today than it did one hundred or two hundred years ago. New industries have emerged, and some older industries were not always regulated at the federal level. To take just a few examples, nuclear weapons, the Internet, telephones, genetically modified food, and driverless cars (or even just cars) did not exist in the first fifty years of the United States. Before these technologies and their associated industries existed, Congress could not regulate them. Congress also now regulates in industries or domains that have long existed but have not always been regulated at the federal level. Before the 1900s, Congress did not regulate much intrastate economic activity under the Commerce Clause.<sup>183</sup> But today Congress regulates home-grown drugs,<sup>184</sup> small places of public

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181. Caminker, *supra* note 168, at 1048; *see also* THE FEDERALIST NO. 15, at 97 (Alexander Hamilton) (James E. Cooke ed., 1961) (“If, therefore, the measures of the Confederacy cannot be executed without the intervention of the particular administrations, there will be little prospect of their being executed at all.”); Madison, *supra* note 136, at 9 (“The practicability of making laws, with coercive sanctions, for the States as political bodies, had been exploded on all hands.”).

182. LINDA GRANT DE PAUW, THE ELEVENTH PILLAR: NEW YORK STATE AND THE FEDERAL CONSTITUTION 33–34 (1966).

183. *See* Richard Primus, *The Limits of Enumeration*, 124 YALE L.J. 576, 601–02 (2014) (discussing the direct–indirect distinction in Commerce Clause jurisprudence).

184. *Gonzales v. Raich*, 545 U.S. 1, 17 (2005).

accommodations,<sup>185</sup> loan sharking,<sup>186</sup> and insurance.<sup>187</sup> Indeed, some maintain there is now no sphere of authority in which Congress may not reach under its commerce power or another one of its delegated powers.<sup>188</sup>

Changed facts present a clear example of why antinovelty rhetoric should not apply when the novel legislation deals with a new *area* of regulation. If particular areas of regulation—the Internet, nuclear weapons, or certain pollutants—did not exist, then of course the fact that Congress did not regulate those areas before their existence should not mean that Congress lacks the power to regulate. Changed facts arguably pose less of an issue for the antinovelty principle in cases involving new *forms* of congressional legislation. New facts may not support the claim that Congress can now exercise its powers in ways it previously did not, even if new facts may support the claim that Congress can exercise its powers in previously unregulated areas.

But changed facts cause Congress to exercise its powers in new ways, in part because new facts generate new areas of regulation, and new areas of regulation may require new forms of regulation. The industries and activities that Congress regulates today differ in important ways, so they present different regulatory issues than those that Congress faced in 1800. And new regulatory forms may not have been suited to the areas in which Congress previously regulated. For example, in the late 1700s and early 1800s, Congress regulated the production and consumption of salt<sup>189</sup> and “snuff and refined sugar” through import duties.<sup>190</sup> That may have been the best regulatory tool for salt and sugar, but the regulation of salt and sugar poses different issues than the regulation of driverless cars, telephones, loan sharking, and the provision of public accommodations.

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185. *Katzenbach v. McClung*, 379 U.S. 294, 304 (1964); *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 249–50 (1964).

186. *Perez v. United States*, 402 U.S. 146, 154 (1971).

187. *United States v. Se. Underwriters Ass’n*, 322 U.S. 533, 542–45 (1944) (holding that Congress may regulate the insurance industry despite stating in prior cases that insurance was not interstate commerce), *superseded by statute*, 15 U.S.C. §§ 1011–1015 (1970).

188. RANDY E. BARNETT, *RESTORING THE LOST CONSTITUTION: THE PRESUMPTION OF LIBERTY* 318 (rev. ed. 2014); *cf.* Primus, *supra* note 183, at 579 (“[F]or much of the twentieth century, many people suspected that internal limits had lost all practical significance.”).

189. Act of May 7, 1800, ch. 43, 2 Stat. 60 (repealed 1807) (continuing “[a]n act laying an additional duty on Salt imported into the United States, and for other purposes”).

190. Act of Feb. 25, 1801, ch. 11, 2 Stat. 102 (repealed 1802) (continuing “the act laying certain duties on snuff and refined sugar”).

*d. New Policy Goal.* Within any given area of regulation, there are potentially infinite policy goals to pursue, and different policies may call for different regulatory tools. That a regulation is new, therefore, may reflect that Congress has not elected to pursue a particular policy goal within an area in which it has long regulated. Take, for example, federal housing law, which addresses myriad regulatory goals. Some federal laws attempt to remedy unsafe housing conditions.<sup>191</sup> Others try to expand the number of homes available to Native American families,<sup>192</sup> and still others prohibit discrimination in the sale, rental, or provision of housing related services.<sup>193</sup> And Congress has elected to pursue these different goals using different means. For example, as part of an effort to reduce lead-based paint, Congress directed the Environmental Protection Agency (EPA) to incorporate the need to reduce lead-based paint hazards into underwriting, insurance, and mortgage appraisals.<sup>194</sup> The program providing housing assistance for Native Americans, by contrast, requires consultation with Native American tribes before granting funds and approving plans created by eligible housing authorities.<sup>195</sup> As part of its policy to ban housing discrimination, Congress funded an education initiative as well as private programs to investigate and test compliance with the law.<sup>196</sup> As these examples indicate, different regulatory tools are appropriate for different policies. The mere fact that Congress has regulated a particular area, such as housing, does not mean that it has exhausted the full set of regulatory options available within that sphere. As Congress's regulatory priorities and goals change, so too will its choice of regulatory tools. And given the sheer number of policies that it could conceivably pursue, Congress may not have tried out all forms of constitutionally permissible regulation.

*e. New Forms of Regulation.* New forms of congressional regulation may themselves result in additional kinds of statutory novelty. A new form of regulation may lead to a new kind of enforcement proceeding becoming available by statute. Consider federal regulation of state governments: federal regulations began to impose obligations on states as employers and created opportunities

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191. 42 U.S.C. § 1437(a)(1)(A) (2012); *id.* § 1441b.

192. 25 U.S.C. § 4101 (2012).

193. 42 U.S.C. §§ 3601–06.

194. *Id.* § 4852a(c)(1), (c)(5).

195. 25 U.S.C. §§ 4112–13.

196. 42 U.S.C. §§ 3616a(b)(2), (d).

for individuals to enforce federal statutory obligations against states. A new kind of federal regulation thus generated a different kind of federal enforcement proceeding: suits for damages for violations of federal law against the states.

Cooperative-federalism programs, in which Congress works with states in some fashion, provide another example of how new kinds of federal regulations may generate new kinds of enforcement proceedings.<sup>197</sup> Cooperative-federalism programs differ from one another in several ways. They impose myriad conditions on state and local governments for accepting federal funds, and they use a variety of incentives and mechanisms to encourage states to regulate in accordance with federal goals.<sup>198</sup> The sheer variety of conditions in these programs generates many different possible federal enforcement mechanisms. The Court in *VOPA* acknowledged this when it held that an independent state agency vested with federal rights could sue other state officials for prospective injunctive relief. Dismissing the idea that the suit's novelty indicated that the suit was not constitutionally permissible, the Court explained the requirements for such a suit to arise:

[A] state agency needs two things: first, a federal right that it possesses against its parent state; and second, authority to sue other state officials to enforce that right . . . . These conditions will rarely coincide . . . . Thus, the apparent novelty of this sort of suit does not at all suggest its unconstitutionality.<sup>199</sup>

New forms of regulation may also generate new kinds of ancillary regulations. Sometimes Congress enacts a regulatory scheme with mutually reinforcing provisions or provisions designed to address effects caused by other statutory provisions. In *United States v. Comstock*,<sup>200</sup> for example, the Court explained that federal criminal prohibitions may generate other, ancillary regulations, including establishing federal prisons and regulating those prisons to ensure “the

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197. Abbe R. Gluck, *Intrastatutory Interpretation: State Implementation of Federal Law in Health Reform and Beyond*, 121 YALE L.J. 534, 584–88 (2011) (describing different variations on cooperative-federalism programs).

198. See, e.g., Eloise Pasachoff, *Agency Enforcement of Spending Clause Statutes: A Defense of the Funding Cut-Off*, 124 YALE L.J. 248, 259 (2014) (explaining federal grant conditions and mechanisms for enforcing compliance).

199. *Va. Office for Prot. & Advocacy v. Stewart*, 563 U.S. 247, 260–61 (2011).

200. *United States v. Comstock*, 560 U.S. 126 (2010).

safety of the prisoners, prison workers and visitors, and those in surrounding communities.”<sup>201</sup>

*f. Changed Accommodation of Constitutional Values.* Novelty may also be the result of Congress’s changed assessment of the relevant constitutional values. Congress may accommodate constitutional values like state autonomy in different ways.<sup>202</sup> Congress may promote state autonomy by not legislating at all: if Congress does not enact federal law, the states can make policy and realize the goals of state autonomy, such as better-informed local decisionmakers, regulatory diversity, and opportunity for local political engagement.<sup>203</sup> But Congress may also preserve state autonomy by allowing states to implement federal law, by partnering federal agencies with state counterparts to administer federal law, or by offering states money to achieve regulatory goals.<sup>204</sup>

Relatedly, the contours of state autonomy and the separation of powers are susceptible to change because there are competing constitutional values for Congress to reconcile with state autonomy and the separation of powers. State autonomy is one constitutional value, but so is national supremacy.<sup>205</sup> Similarly, the separation of powers is one constitutional value, but so is the idea of checks and balances among the different branches of government.<sup>206</sup> Congress may, therefore, strike the balance between these cross-cutting values in different places at different points in time. When it has struck the balance at any particular point in the past thus may not reveal every possible permissible balancing of those constitutional values.

Finally, new or changed features of government may also offer new ways of realizing constitutional values. For example, the advent of political parties has provided a new vehicle for realizing state

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201. *Id.* at 136–37, 142.

202. *See generally* Ernest A. Young, *Making Federalism Doctrine: Fidelity, Institutional Competence, and Compensating Adjustments*, 46 WM. & MARY L. REV. 1733 (2005) (explaining how judges could compensate for anti-federalist developments by developing pro-federalist doctrines).

203. *See Primus, supra* note 183, at 587–91 (explaining this argument).

204. Abbe R. Gluck, *Federalism from Federal Statutes: Health Reform, Medicaid, and the Old-Fashioned Federalists’ Gamble*, 81 FORDHAM L. REV. 1749, 1751–52 (2013).

205. John F. Manning, *Federalism and the Generality Problem in Constitutional Interpretation*, 122 HARV. L. REV. 2003, 2055 (2009).

206. Leah M. Litman, *Taking Care of Federal Law*, 101 VA. L. REV. 1289, 1352–53 (2015); John F. Manning, *Separation of Powers as Ordinary Interpretation*, 124 HARV. L. REV. 1939, 1971–77 (2011).

autonomy as well as the separation of powers. “Today’s polarized parties furnish” an additional means for how and “why states would check the federal government.”<sup>207</sup> And although the advent of political parties may have eliminated some means for realizing the separation of powers, it has offered other ways of doing so.<sup>208</sup>

*g. Lawmaking Processes.* The participants in the lawmaking process have also changed. Congress is accountable to more groups today than it was 150 or 200 years ago—the electorate now includes different age groups,<sup>209</sup> women,<sup>210</sup> African Americans,<sup>211</sup> and other groups who did not previously vote in federal elections. Congress also now enacts statutes to regulate alongside administrative agencies that exercise delegated lawmaking authority from Congress.<sup>212</sup> There are also increasingly polarized political parties.<sup>213</sup> “[U]northodox drafters outside of government” may generate new ideas for federal laws.<sup>214</sup> New participants in the lawmaking process may also provide new possibilities for whom Congress may select to implement federal law, leading to new kinds or forms of regulation as new entities are charged with implementing federal law.

Another aspect of the lawmaking process that has changed is the ways in which laws are made. It was initially expected that the Senate would spend significant amounts of time in recess and that Congress might not meet every year.<sup>215</sup> The first ten Senate sessions lasted approximately seven or eight months.<sup>216</sup> It was not until the late 1880s

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207. Jessica Bulman-Pozen, *Partisan Federalism*, 127 HARV. L. REV. 1077, 1090 (2014).

208. See Daryl J. Levinson & Richard H. Pildes, *Separation of Parties, Not Powers*, 119 HARV. L. REV. 2311, 2315 (2006).

209. U.S. CONST. amend. XXVI.

210. *Id.* amend. XIX.

211. *Id.* amend. XV.

212. Edward L. Rubin, *Law and Legislation in the Administrative State*, 89 COLUM. L. REV. 369, 369 (1989).

213. Michael J. Klarman, *Antifidelity*, 70 S. CAL. L. REV. 381, 386 (1997).

214. Abbe R. Gluck, Anne Joseph O’Connell & Rosa Po, *Unorthodox Lawmaking, Unorthodox Rulemaking*, 115 COLUM. L. REV. 1789, 1823 (2015); see generally Christopher J. Walker, *Legislating in the Shadows*, 165 U. PA. L. REV. (forthcoming 2017) (describing agencies’ role in the legislative process).

215. See, e.g., *Barnes v. Kline*, 759 F.2d 21, 39 (D.C. Cir. 1985), *vacated as moot sub nom. Barnes v. Barnes*, 479 U.S. 361 (1987). Compare U.S. CONST. art. I (“The Congress shall assemble at least once in every year . . . .”), with ARTICLES OF CONFEDERATION of 1777, art. IX, para. 7 (requiring no period of adjournment be longer than six months).

216. JOINT COMM. ON PRINTING, 113TH CONG., 2013–2014 OFFICIAL CONGRESSIONAL DIRECTORY 524 (Comm. Print 2013).

that Congress had a session that exceeded three hundred days.<sup>217</sup> The Senate’s “first serious controvers[y] over ‘obstructive’ uses of debate”—precursors to the filibuster—“occurred . . . [in] the 1820s.”<sup>218</sup> The Senate did not “establish a right of unlimited debate until 1856,”<sup>219</sup> and Congress did not develop a system of committees specialized in subject matter until the mid-1800s. Before that, there were two Committees of the Whole.<sup>220</sup>

In part because of political polarization, the lawmaking process—at least when it results in the enactment of federal laws—has begun to move away from the labyrinth of committees that were once thought of as hallmarks of the legislative process. “[I]n the first year of the 112th Congress, fewer than 10% of enacted laws proceeded through the ‘textbook’ legislative process.”<sup>221</sup> Indeed, the lawmaking process has changed so much that some scholars have observed “that the *Schoolhouse Rock!* cartoon version of the conventional legislative process is dead.”<sup>222</sup> For example, “legislative bundling through omnibus vehicles has increased dramatically . . . omnibus packages have made up about 12% of major legislation.”<sup>223</sup>

The recent uptick in political polarization, coupled with these new lawmaking procedures, has generated new forms of legislation. Political polarization sometimes means that parties are unable to come to any agreement and enact federal law.<sup>224</sup> But political polarization also results in different kinds of laws than ones that were produced in less polarized times. “In the rare political moments where Congress produces legislation, the legislation tends to be sprawling and, at least according to some, ill-conceived or even ‘incoherent’—a trend toward what one recent article calls ‘hyper-legislation.’”<sup>225</sup> Different kinds of agency authority may be appealing to Congress in times of gridlock, such as “administrative forbearance authority—by which Congress

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217. *Id.* at 528.

218. Catherine Fisk & Erwin Chemerinsky, *The Filibuster*, 49 STAN. L. REV. 181, 189–90 (1997).

219. *Id.* at 190.

220. Gerald B.H. Solomon & Donald R. Wolfensberger, *The Decline of Deliberative Democracy in the House and Proposals for Reform*, 31 HARV. J. ON LEGIS. 321, 327–28 (1994).

221. Gluck, O’Connell & Po, *supra* note 214, at 1800.

222. *Id.* at 1794. See generally BARBARA SINCLAIR, UNORTHODOX LAWMAKING (1997) (arguing that the conventional model no longer adequately captures the legislative process).

223. Gluck, O’Connell & Po, *supra* note 214, at 1800 (emphasis omitted).

224. See, e.g., Freeman & Spence, *supra* note 153, at 15–16.

225. Daniel T. Deacon, *Administrative Forbearance*, 125 YALE L.J. 1548, 1557 (2016).

grants agencies the express power to deprive the laws it passes of legal force and effect.”<sup>226</sup> Polarization may also lead Congress to make new or additional delegations to states: “Particularly in times of divided government, some members of Congress might trust their home-state counterparts more than the administrative appointees of the President to fill in the interstices of new federal programs.”<sup>227</sup>

*h. Areas Versus Means?* Perhaps antinovelty rhetoric is more appealing when invoked in cases addressing new forms of regulation, rather than new areas of regulation. It may seem obvious to infer that if new facts develop, then Congress’s failure to regulate in that area does not and should not mean that Congress lacks the constitutional authority to regulate. Similarly, perhaps new facts do not support the claim that Congress can now exercise its powers in new ways. Even then, the other reasons why lack of constitutional authority does not follow from Congress not enacting a statute may also suggest that Congress’s failure to enact a statute does not reflect its assumption that it lacks the constitutional power to enact that kind of regulation. Bicameralism and presentment, together with Congress’s own rules about its procedures, make enacting federal law difficult and increase Congress’s incentive to enact minimal, low-risk statutes that do not risk other lawmakers’ opposition, such as enacting statutes that resemble prior statutes. Enacting federal statutes that use the same form or means of regulation is a way of trying to ensure that those statutes are upheld by judges.

There are other reasons why it is unlikely that Congress has enacted all of the constitutionally permissible forms of regulation. A new policy goal may call for a new form of regulation, and because there are so many potential policy goals for Congress to pursue in a given area, Congress may exercise its power within a given area in a new way. Moreover, within any given regulatory sphere there are myriad forms that federal regulation could take,<sup>228</sup> and when Congress chooses to address a particular issue, Congress will not enact every possible law it could have enacted to address that issue. If, for example, Congress wants to decrease the number of firearms near schools, it may

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226. *Id.* at 1558.

227. Abbe R. Gluck, *supra* note 197, at 573.

228. In the constitutional convention itself, for example, one delegate explained: “We all agree in the necessity of new regulations; but we differ widely in our opinions of what are the safest and most effectual.” 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 161 (Max Farrand ed., 1911).



choose to enact criminal penalties for possessing a firearm near a school. Additional ways it could accomplish this same goal would be to offer money to the states to enact criminal penalties for possessing firearms near schools, tax those who possess firearms near schools, delegate rulemaking authority to an agency to determine whether to prohibit firearms near schools, or conditionally preempt state firearms laws if the states did not enact criminal penalties for possessing firearms near schools. But Congress usually does not throw every possible regulatory solution at a problem, and therefore does not enact many constitutionally permissible means of regulation.

Moreover, it is not always clear when a statute presents a new *form* of regulation as opposed to a new *area* of regulation. Consider the example of *NFIB*. Perhaps *NFIB* involved a new form of regulation—requiring individuals to purchase a particular item. But *NFIB* could equally be thought of as involving a new *area* of regulation—the regulation of individuals not engaged in any commerce—splicing the antinovelty principle. Indeed, parts of the opinion invalidating the minimum-coverage requirement appear to reflect this understanding.<sup>229</sup> The same could be said of *Zivotofsky*, which invalidated a statute on the ground that it infringed the President’s recognition power.<sup>230</sup> Did that statute intrude on an *area* of regulation reserved to the executive—the recognition of foreign states—or was the statute particularly suspect because of its *form* of regulation?

Finally, the premise that new facts do not lead to new forms of regulation is wrong. Sometimes changed facts themselves generate a new form of regulation. Take the emergence of state and local governments as significant employers in the national workforce. Historically, federal regulation of the workforce did not require the direct imposition of obligations on state governments or generate suits to enforce federal obligations against states. But the emergence of new facts—the expansion of state and local government workforces—generated those new forms of federal regulation. And even if new facts only led to new industries and new areas of regulation, new areas of regulation may cause new forms of regulation because the kinds of

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229. See Nat’l Fed’n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566, 2586–87 (2012) (opinion of Roberts, C.J.) (“The power to *regulate* commerce presupposes the existence of commercial activity to be regulated. . . . The individual mandate, however, does not regulate existing commercial activity.”); *id.* at 2644 (“If this provision ‘regulates’ anything, it is the *failure* to maintain minimum essential coverage. . . . [T]hat failure—that abstention from commerce—is not ‘Commerce.’”).

230. *Zivotofsky v. Kerry*, 135 S. Ct. 2076, 2096 (2015).

regulation Congress used to regulate other areas may not be well suited to address whatever risks or problems a newer area poses.

C. *Possible Refinements: Actual Constitutional Consensus or Attractive Constitutional Powers?*

Parts II.A and II.B outlined reasons why legislative novelty is a poor proxy for Congress's assumption that it lacks the constitutional power to enact a particular statute. Instead of maintaining that all novel statutes are constitutionally suspect, another possible approach could be for the Court to limit the use of antinovely rhetoric to cases involving statutes that prior Congresses doubted they could enact. But adoption of this approach would have far-reaching practical consequences, may not identify the Constitution's original meaning, and would likely prove inadministrable. Alternatively, the Court could potentially use *Printz*'s formulation, which suggested that legislative novelty is evidence of Congress's assumption that a statute is unconstitutional when the statute exercises "highly attractive" powers. But adoption of this formulation would similarly prove inadministrable.

1. *Actual Constitutional Consensus*. What if the Court only used antinovely rhetoric in cases involving statutes that prior Congresses did not enact because they harbored doubts about the statutes' constitutionality? Justice Scalia arguably embraced this kind of antinovely principle in his dissent in *McIntyre v. Ohio Elections Commission*.<sup>231</sup> The Justice framed the question as whether "the government conduct at issue was *not* engaged in at the time of adoption, and [whether] there [was] ample evidence that the *reason* it was not engaged in [was] that it was thought to violate the [Constitution]."<sup>232</sup> This approach to antinovely supports the implementation of an original understanding of the Constitution. But if the Court relies on later Congresses' views about a statute's constitutionality—in particular, Congresses in session after the first twenty or fifty years of the United States, as the cases often do—then it is no longer clearly about original understandings so much as the

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231. *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334 (1995).

232. *Id.* at 372 (Scalia, J., dissenting).

understanding during the nation's first quarter to half century.<sup>233</sup> This subsection rejects an antinovelty principle that would call into question all federal statutes that prior Congresses assumed were unconstitutional. That principle would be too dissonant with much of constitutional law; would likely reveal only the expected applications of the text, as opposed to its meaning; and would likely prove inadministrable.

First, an approach to the antinovelty principle that calls into question the constitutionality of all statutes that the first twenty or so Congresses assumed were unconstitutional would have too far-reaching consequences on much of constitutional law and constitutional practice. Several constitutional rules are considered settled by virtue of doctrine or congressional practice,<sup>234</sup> including the government's ability to distribute paper money<sup>235</sup> and to provide Social Security.<sup>236</sup> If constitutional disputes were to be resolved according to the Constitution's original meaning, there would also be questions about various settled rules involving individual rights, such as the prohibition on segregation in public schools,<sup>237</sup> the prohibition on the establishment of state churches,<sup>238</sup> and the protections of free speech that extend beyond a prohibition on prior restraints.<sup>239</sup> As a matter of original or historical understandings, these constitutional rules are hard to justify, so the antinovelty principle would jeopardize rule-of-law values, such as predictability and stability, as well as undermine the

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233. Unless the original understanding was to delegate a decision to a subsequent Congress. See Caleb Nelson, *Originalism and Interpretive Conventions*, 70 U. CHI. L. REV. 519, 527–39 (2003) (explaining the concept of liquidation).

234. Primus, *supra* note 113, at 177 & n.49 (“Many doctrines that are central to modern constitutional law are not reconcilable with original constitutional meanings.”).

235. Kenneth W. Dam, *The Legal Tender Cases*, 1981 SUP. CT. REV. 367, 374, 389 (1982).

236. Henry Paul Monaghan, *Stare Decisis and Constitutional Adjudication*, 88 COLUM. L. REV. 723, 733–34 (1988); see Fallon, *supra* note 106, at 1810 (“Full-blooded exclusive originalism would be a nutty view.”).

237. See, e.g., Dorf, *supra* note 3, at 2027–30 (explaining that public-school segregation would be constitutional under a “consistent and honest application of expected-application originalism”); Michael J. Klarman, Brown, *Originalism, and Constitutional Theory: A Response to Professor McConnell*, 81 VA. L. REV. 1881, 1881 (1995) (“[T]he overwhelming consensus among legal academics has been that *Brown* cannot be defended on originalist grounds.”).

238. See, e.g., David A. Strauss, *The Supreme Court, 2014 Term—Foreword: Does the Constitution Mean What It Says?*, 129 HARV. L. REV. 1, 3 (2015).

239. See, e.g., Ronald Dworkin, *Comment*, in ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 115, 124–25 (1997); Leonard W. Levy, LEGACY OF SUPPRESSION 173 (1960); Jack M. Balkin, *Nine Perspectives on Living Originalism*, 2012 U. ILL. L. REV. 815, 835; Dorf, *supra* note 3, at 2027–30.

substantive justice that the constitutional system delivers.<sup>240</sup> A system of adjudication in which judges discarded a significant amount of doctrine and congressional practice may also be too far removed from our own to be a viable interpretive approach to constitutional law.<sup>241</sup>

Second, the antinovely principle may only reveal prior Congresses' expectations about how the text would be applied, which most contemporary proponents of originalism reject as the lodestar for constitutional decisionmaking. Recent scholarship on originalism has sought to refocus originalism away from the original intent of the Constitution's drafters (the expected applications of the constitutional text) to whatever principle is embodied in the Constitution's text (the original public or semantic meaning of the constitutional text).<sup>242</sup> An account of antinovely that focuses on whether "the government conduct . . . was thought to violate . . . the [C]onstitution"<sup>243</sup> may reveal only the expected applications of the text, as opposed to its fixed meaning. Consider the cases that identify constraints on Congress's powers based on the structure of the Constitution or the principle of federalism it embodies. The idea that Congress may not commandeer state officials is probably an expected application of some piece of

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240. Professor Michael Dorf has explained how undoing these decisions may undermine individuals' abilities to identify subjectively with the constitutional scheme. *See* Dorf, *supra* note 3, at 2030 ("Although sacrificing *Sullivan* and *Brown* would not have immediate tangible legal consequences, these and other cases have come to stand for more than the legal doctrines they announced. They symbolize the association in the public imagination of the Constitution with core ideals of liberty and equality.").

241. Michael C. Dorf, *Integrating Normative and Descriptive Constitutional Theory: The Case of Original Meaning*, 15 GEO. L.J. 1765, 1791–92 (1997) (explaining that a theory of constitutional law that "depart[s] so far from what the relevant audience understands that subject to be . . . cannot meaningfully be called theories of constitutional law"). Philip Bobbitt maintains that constitutional arguments and theory should conform—in some general way—to how constitutional law is practiced because lawyers' reliance on the different modalities of constitutional argument is what makes the arguments legitimate. PHILIP BOBBITT, *CONSTITUTIONAL FATE* 170–86 (1982). But Bobbitt's explanation for why that should be the case is not the only one. "It is one thing to argue that a practice is slightly askew, such that getting it right requires certain reforms. But it is quite another to argue that an entire community of practitioners is radically mistaken about the nature of its enterprise." Primus, *supra* note 113, at 178.

242. *See* Dorf, *supra* note 3, at 2020 (describing new originalists as "reject[ing] original intent in favor of original meaning"). But there is substantial variety even among new originalists. *See id.* at 2019 ("The simple dichotomy between old originalism and new originalism does not begin to capture the many variations of originalism now on offer."). There are also different kinds of "meaning" other than original or semantic meaning. *See* Richard H. Fallon Jr., *The Meaning of Legal "Meaning" and Its Implications for Theories of Legal Interpretation*, 82 U. CHI. L. REV. 1235, 1290 (2015) (identifying other kinds of meaning).

243. *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 372 (1995) (Scalia, J., dissenting).

constitutional text—for instance, the Tenth Amendment or the Necessary and Proper Clause—or the Constitution’s general structure. It cannot be the core semantic meaning of those provisions, which say nothing about the specific question (in the case of the Tenth Amendment) or nothing at all (in the case of the Constitution’s structure).

There are also reasons why it is difficult to divine the meaning of the text from Congress’s expectations or assumptions about how the text should be applied. An account of antinovelty that focuses on whether “the government conduct . . . was thought to violate . . . the [C]onstitution” may risk conflating the text’s semantic meaning with its expected applications because attempting to disaggregate the two can prove difficult.<sup>244</sup> This difficulty is only exacerbated when there is arguably no provision of the text, or very little text, that is relevant to whatever question the judge is deciding, which is often the case for questions of federalism or the separation of powers.<sup>245</sup> And there may be no epistemic reason why aggregating Congress’s expectations about how the text should be applied would reveal the public meaning of the text. Because Congress is a collective body, it may not be possible to attribute a singular constitutional view to its members. Even when a majority of Congress chooses not to enact a statute because they assume that the statute would be unconstitutional, those members may have different reasons for why that is. Different Justices of the Supreme Court articulate different reasons for reaching the same result.<sup>246</sup> There is little reason to think that members of Congress are meaningfully different in this respect.

Third, operationalizing a principle concerned with identifying congressional consensus that a statute is unconstitutional would likely prove inadministrable. It is not always clear what constitutional decisionmakers, particularly members of Congress, mean when they

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244. Dorf, *supra* note 3, at 2031–34 (explaining how the two can be grouped together even by original-public-meaning originalists).

245. See Gillian E. Metzger, *The Constitutional Legitimacy of Freestanding Federalism*, 122 HARV. L. REV. 98, 101 (2009).

246. Compare, e.g., *Graham v. Florida*, 560 U.S. 48, 48 (2010) (explaining that the Eighth Amendment prohibits imposing life without parole on juveniles convicted of nonhomicide offenses), *with id.* at 86 (Roberts, C.J., concurring) (contending that the Eighth Amendment prohibits imposing life without parole on the *particular* juvenile); compare *E. Enters. v. Apfel*, 524 U.S. 498, 522–23 (1998) (finding that the Coal Industry Retiree Health Benefit Act effected an unconstitutional taking), *with id.* at 539 (Kennedy, J., concurring) (finding that the Act violated due process but did not amount to a taking).

express the belief that a statute is unconstitutional.<sup>247</sup> Thus, even a highly idealized congressional record that contains statements regarding a statute's constitutionality will be an imperfect proxy for either the public meaning of the text or its expected applications. Some constitutional arguments will be opportunistic—the reasoning will mask political claims in the language of constitutional reasoning. Even good-faith constitutional arguments may reflect what Professor Richard Primus has called “constitutional expectations”—expectations about how the constitutional system should operate, rather than a judgment about the requirements of the constitutional text.<sup>248</sup> That is, rather than revealing Congress's understanding about the requirements of the constitutional text, some constitutional claims may instead reflect how participants in the system expected things to work, given the underlying conditions at the time as well as their common experiences and socialization. And extrapolating what members of earlier Congresses thought in light of current conditions, experience, and socialization is, essentially, asking how individuals would resolve the matter in those moments.<sup>249</sup>

2. *Attractive Powers*. Writing for the majority in *Printz*, Justice Scalia maintained that if “earlier Congresses avoided use of this highly attractive power, we would have reason to believe that the power was thought not to exist.”<sup>250</sup> No case after *Printz* even included this possible limit on the Court's approach to legislative novelty. But what if the Court stuck with this approach and inferred that the absence of similar statutes reflected Congress's assumption that a statute was unconstitutional only if that statute exercised “highly attractive” powers—that is, powers Congress would have *wanted* to exercise?

The problem with an “attractive powers” limit may be in its administration. The Supreme Court's own application of this version of antinoveltly rhetoric provides reason to be skeptical of judges' abilities to discern when a statute was “highly attractive” to

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247. See Richard Primus, *Unbundling Constitutionality*, 80 U. CHI. L. REV. 1079, 1104–28 (2013) (suggesting that a label of constitutionality traffics in different ideas).

248. See *id.* at 1107 (“[O]ur constitutional expectations have the power to divert our attention from the words in the text.”).

249. Klarman, *supra* note 213, at 395–96 (explaining that those who try to “translate” constitutional texts to modern times “adjust the Framers' constitutional commitments to reflect changed circumstances, but fail to ask whether the Framers would have remained committed to the same concepts had they been aware of future circumstances”).

250. *Printz v. United States*, 521 U.S. 898, 905 (1997).

contemporary Congresses and when Congress has not enacted a statute because it assumed that the statute was unconstitutional. In *Printz*, Justice Scalia reasoned that “the utter lack of statutes imposing obligations on the states’ executive (*notwithstanding the attractiveness of that course to Congress*), suggests an assumed *absence* of such power.”<sup>251</sup> But the idea that impressing state officers into service was “attractive” to Congress is doubtful if not plainly wrong—proponents of federal power did not want to rely on state officers to enforce federal law in part because of concerns about the state officers’ competence. Moreover, there are still too many reasons why Congress might not enact laws exercising “attractive” powers to infer that Congress assumed such statutes were unconstitutional.

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This Part has focused on debunking the first step in the Court’s antinovelty rhetoric—namely, the claim that legislative novelty suggests that prior Congresses believed that a statute was unconstitutional. But the antinovelty rhetoric includes another questionable assumption: that prior Congresses’ assumptions about a statute’s constitutionality do or should affect whether a statute is unconstitutional. The Court has never explained why prior Congresses’ assumptions matter to whether a statute is unconstitutional. Antinovelty rhetoric might also be rejected on the basis of an explanation about why Congresses’ assumptions about a statute’s constitutionality purportedly matter to a statute’s ultimate constitutionality. For example, one might argue that a prior Congress’s assumption that a statute is unconstitutional means that the statute is unconstitutional because, if Congress assumes something to be true, then it is true. That does not seem right, however, because Congress makes mistakes. It makes drafting errors,<sup>252</sup> and it enacts statutes that are plainly inconsistent with current doctrine<sup>253</sup> or the original meaning of the Constitution’s text.<sup>254</sup>

Perhaps Congress’s belief that a statute is unconstitutional is some evidence that a statute is unconstitutional. But either way, these

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251. *Id.* at 907–08 (first emphasis added).

252. See John F. Manning, *The Absurdity Doctrine*, 116 HARV. L. REV. 2387, 2459 n.265 (2003) (citing examples of likely scrivener’s errors).

253. See, e.g., *United States v. Stevens*, 559 U.S. 460, 460 (2010) (invalidating a statute that criminalized certain depictions of animal cruelty).

254. See *supra* text accompanying notes 231–41.

formulations are arguably inconsistent with some Justices' refusal to consider Congress's assumptions in statutory interpretation cases. These Justices maintain that Congress's purpose is not relevant to the meaning of a statute, and yet antinovelty rhetoric maintains that Congress's assumptions about the meaning of the constitutional text are in fact relevant to the meaning of that text.<sup>255</sup>

### III. ACTUAL CONSTITUTIONALITY, VIEWS OF BRANCHES, AND CONDUCT OF BRANCHES: A NEW JUSTIFICATION?

The previous Part primarily focused on why legislative novelty does not suggest that prior Congresses assumed that a statute was unconstitutional. Perhaps because legislative novelty does not reliably signal Congress's assumptions about the Constitution, more recent cases have adopted slightly different antinovelty rhetoric. *NFIB* and *Free Enterprise Fund* framed the issue as follows: "Sometimes 'the most telling indication of [a] severe constitutional problem . . . is the lack of historical precedent' for Congress's action."<sup>256</sup> This formulation suggests that legislative novelty is evidence of a constitutional defect, full stop. It omits the Court's earlier explanation for why legislative novelty is a sign of a constitutional defect, namely because legislative novelty suggests that prior Congresses assumed that a statute was unconstitutional. And it does not include any other explanation for why legislative novelty might be a sign of a constitutional defect.

But why might legislative novelty be evidence that a statute is unconstitutional? In the best of circumstances, it could only signal that prior Congresses' view was that a statute was unconstitutional. How could legislative novelty reveal something about a statute's actual constitutionality, as opposed to Congress's views about the statute's constitutionality? Part III.A argues that there is nothing in conventional sources of constitutional law that suggests that legislative

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255. See *Samantar v. Yousuf*, 560 U.S. 305, 326 (2010) (Thomas, J., concurring in part and concurring in the judgment) (joining "the Court's opinion except for those parts relying on the legislative history"); *Milavetz, Gallop & Milavetz, P.A. v. United States*, 559 U.S. 229, 253 (2010) (Scalia, J., concurring) (joining the Court's opinion except for a footnote mentioning "that the legislative history supports what the statute unambiguously says"); *Wyeth v. Levine*, 555 U.S. 555, 594 (2009) (Thomas, J., concurring in the judgment) ("The cases improperly rely on legislative history, broad atextual notions of congressional purpose, and even congressional inaction in order to preempt state law."); *Conroy v. Aniskoff*, 507 U.S. 511, 519 (1992) (Scalia, J., concurring) ("We are governed by laws, not by the intentions of legislators.").

256. *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2586 (2012) (quoting *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477, 505 (2009)).



novelty is, or should be used as, evidence that a statute is unconstitutional.

Whether legislative novelty itself could make a statute unconstitutional turns on broader questions about the proper relationship between the conduct of the branches and actual constitutionality, specifically when one branch's actions can make something true as a constitutional matter. For example, Congress's enactment of statutes may make those statutes constitutional if the existence of similar congressional statutes—or a longstanding pattern of them—is evidence, or should be used as evidence, of those statutes' constitutionality. Part III.B explains why, even if such a pattern is the case for legislative action, it is not the case for legislative novelty—that is, why Congress's previous inaction does not make a statute unconstitutional.

Part III.C then discusses a recent justification that has been offered for why legislative novelty should be used as evidence that a statute is unconstitutional. Some scholars and judges have argued that legislative novelty should be used as evidence of unconstitutionality to limit Congress's powers, which purportedly extend well beyond the understandings of those powers as they existed when the Constitution was ratified. Part III.C rejects the argument that legislative novelty should be used as a means to limit Congress's powers.

#### *A. The Constitution on Novelty and Actual Unconstitutionality*

Conventional sources of constitutional law do not suggest that legislative novelty matters, or should matter, when determining whether a statute is constitutional. Rather, many of the conventional sources of constitutional law—such as the text, structure, precedent, and the values that the Constitution serves—suggest that legislative novelty should not matter when determining a statute's constitutionality.

1. *Text.* There is no antinovelt provision in the constitutional text.<sup>257</sup> There are instead a host of power-granting provisions that are at odds with a presumption that novel statutes are unconstitutional. In particular, the Necessary and Proper Clause provides, “The Congress shall have Power . . . To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other

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257. See *Mistretta v. United States*, 488 U.S. 361, 385 (1989) (“Our constitutional principles of separated powers are not violated, however, by mere anomaly or innovation.”).

Powers vested by this Constitution in the Government of the United States.”<sup>258</sup> Professor John Manning has explained how the clause delegates to Congress the power to design innovative governmental structures and regulatory programs: the Necessary and Proper Clause creates an “open-ended delegation.”<sup>259</sup> The clause allows Congress to pass laws that effectuate powers delegated to any branch of the federal government, and it, unlike other clauses, specifically “identifies *Congress* as the recipient of” its delegation of power.<sup>260</sup> A default rule against novel statutes is therefore “at odds with the constitutional allocation of implementation authority to Congress.”<sup>261</sup>

Other provisions are similarly at odds with a default presumption that novel federal statutes are unconstitutional. The Tenth Amendment, for example, refers to “powers not *delegated* to the United States by the Constitution” rather than powers that are enumerated by the Constitution.<sup>262</sup> The phrase “not delegated” implies the existence of some powers not specifically enumerated by the constitutional text,<sup>263</sup> and the Court has implied some congressional powers that are not specifically enumerated in the constitutional text.<sup>264</sup>

2. *Structure.* The Constitution’s structure also undermines the idea that antinovely is a constitutional value. The Constitution partially reflects a design to empower Congress and provide it with authority to respond to pressing national issues. The Constitution enumerates an expansive list of powers and contemplates that the federal government has powers other than those that are specifically enumerated. From these and other sources, the Court has inferred that the structure of the Constitution implicitly delegates powers to the federal government that enable the federal government to serve national ends, such as

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258. U.S. CONST. art. I, § 8.

259. John F. Manning, *The Supreme Court, 2013 Term—Foreword: The Means of Constitutional Power*, 128 HARV. L. REV. 1, 62 (2014).

260. *Id.* For a discussion of Hamilton’s similar views, see Daniel A. Farber, *The Story of McCulloch: Banking on National Power*, 20 CONST. COMMENT. 679, 687–88 (2004).

261. Gillian E. Metzger, *Appointments, Innovation, and the Judicial-Political Divide*, 64 DUKE L.J. 1607, 1639 (2015).

262. U.S. CONST. amend. X (emphasis added).

263. The Tenth Amendment was enacted together with the Ninth Amendment, which refers to “enumeration” rather than delegation. *See* U.S. CONST. amend. IX.

264. *See* Evan H. Caminker, “Appropriate” Means-Ends Constraints on Section 5 Powers, 53 STAN. L. REV. 1127, 1135 & n.35 (2001) (listing as examples the power to regulate immigration, the power over foreign affairs and diplomatic relations, and the power to protect the American flag as a national symbol, as well as others); Gil Seinfeld, *Article I, Article III, and the Limits of Enumeration*, 108 MICH. L. REV. 1389, 1394–1401 (2010) (listing examples).

effectively exercising those powers delegated to it, as well as advancing values of unity, cohesion, and coordination.<sup>265</sup> And a universal skepticism of novel federal statutes would be inconsistent with a structure that purports to empower the federal legislature to respond to national problems and promote national values.

Moreover, the Court's antinovely rhetoric does not just prevent Congress and the executive from adapting to changing problems. It also prevents states from adapting to changing problems, thereby undermining the values of federalism and state autonomy. The first case in which the Court floated the importance of legislative novelty was *New York*, a case that involved an agreement between the states and the federal government to address problems with the disposal of radioactive waste. The states had lobbied for the statute that the *New York* Court held to be unconstitutional, so the Court's opinion, based upon antinovely rhetoric, precluded both state and federal innovation.<sup>266</sup>

3. *Constitutionalism.* A universal skepticism of novel statutes would also be inconsistent with several of the Constitution's purposes. One purpose of the Constitution, and an important value it realizes, is to provide substantial room for democratic decisionmaking.<sup>267</sup> Another purpose is to provide a workable and enduring structure of

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265. Robert D. Cooter & Neil S. Siegel, *Collective Action Federalism: A General Theory of Article I, Section 8*, 63 STAN. L. REV. 115, 116 (2010) ("A federal constitution ideally gives the central and state governments the power to do what each does best."). The Court occasionally invokes this kind of reasoning. See, e.g., *United States v. Comstock*, 560 U.S. 126, 142–43 (2010) (construing federal custodial power based on the assumption that the federal government could prevent "an interstate epidemic"). Commentators have spelled out some of the ends of nationalism, such as having a federal government that is capable of effectively exercising those powers delegated to it, as well as unity, cohesion, and coordination. See Richard H. Fallon, Jr., *The Ideologies of Federal Courts Law*, 74 VA. L. REV. 1141, 1158–63 (1988) (describing nationalist premises of federal courts doctrines); Gil Seinfeld, *The Jurisprudence of Union*, 89 NOTRE DAME L. REV. 1085, 1085–86 (2014).

266. *New York v. United States*, 505 U.S. 144, 181 (1992).

267. See *Obergefell v. Hodges*, 135 S. Ct. 2584, 2605 (2015) ("[T]he Constitution contemplates that democracy is the appropriate process for change . . ."); Richard H. Fallon, Jr., *Legitimacy and the Constitution*, 118 HARV. L. REV. 1787, 1792–93 (2005). Primus has also noted:

Part of the Constitution's legitimacy derives from its ability to deliver tolerable levels of substantive justice; part from the fact that citizens identify subjectively with the system of constitutional government and claim it as their own; part from the fact that the Constitution leaves a relatively broad field of play for democratic decisionmaking, albeit subject to certain constraints.

Primus, *supra* note 113, at 200–01.

government.<sup>268</sup> The Constitution allows Congress to provide, by legislation, for “exigencies . . . as they occur.”<sup>269</sup> The antinovelty principle fails to appreciably accommodate these purposes because the principle would hamstring the legislature’s ability to respond to problems or resolve disagreements that did not materialize early in U.S. history.

4. *Precedent.* A universal skepticism of novel statutes is also at odds with other precedent, especially that which establishes a presumption of constitutionality for federal statutes.<sup>270</sup> “Proper respect for a co-ordinate branch of the government” requires that courts strike down an act of Congress only when “the lack of constitutional authority to pass [the] act in question is clearly demonstrated.”<sup>271</sup> Courts have accordingly afforded a “presumption of constitutionality” to federal statutes.<sup>272</sup> As the D.C. Circuit recognized when it applied that presumption to the ACA’s minimum-coverage requirement, courts “are obliged . . . to presume that acts of Congress are constitutional.”<sup>273</sup>

5. *History.* Historical sources do not say much about whether legislative novelty is evidence of unconstitutionality. The sources typically used by originalists—the Federalist Papers, Convention records, and other statements indicative of contemporary public opinion—are not principally concerned with how to determine whether federal statutes are unconstitutional, as opposed to what the Constitution does and does not permit. And Professor H. Jefferson Powell has argued that legal traditions contemporaneous with the

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268. *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 415 (1819) (describing the Constitution as a system of government that would “endure for ages to come” and “be adapted to the various crises of human affairs”).

269. *Id.*

270. Some justifications for a presumption of constitutionality turn on the assumption that a statute represents Congress’s belief that the statute is constitutional. These justifications may be called into question by this Article’s critique of the antinovelty principle, but other justifications are not.

271. *United States v. Harris*, 106 U.S. 629, 635 (1883); *see also Ogdens v. Saunders*, 25 U.S. (12 What.) 213, 270 (1827) (explaining that “respect” for “the wisdom, the integrity; and the patriotism of the legislative body” compels the Court to “presume in favour of [a law’s] validity, until its violation of the constitution is proved beyond all reasonable doubt”).

272. *United States v. Comstock*, 560 U.S. 126, 135 (2010) (quoting *McCulloch*, 17 U.S. (4 Wheat.) at 410); *see Katyal & Schmidt, supra* note 23, at 2139 (“The principle that the Court must presume laws constitutional is as old as judicial review.”).

273. *Seven-Sky v. Holder*, 661 F.3d 1, 18 (D.C. Cir. 2011).

ratification of the Constitution do not suggest that the Constitution should be interpreted only in accordance with its original meaning.<sup>274</sup>

6. *Congressional Practice*. Another way of thinking about whether legislative novelty might indicate that a statute is unconstitutional is to ask what other kinds of federal laws might have been constitutionally suspect given their novelty. One measure of any constitutional theory is whether it “achieve[s] descriptive accuracy.”<sup>275</sup> On this metric, the idea that legislative novelty indicates a constitutional infirmity does not fare well. Everything is new the first time it is enacted, and many different kinds of laws are not similar to laws that were enacted in the first several sessions of Congress. Here are some examples of new areas of regulation:

- *Antidiscrimination*.<sup>276</sup> The first federal prohibition on private entities discriminating on the basis of race was the Civil Rights Act of 1875.<sup>277</sup> Today, federal law prohibits private entities from discriminating on the basis of race, sex, religion, ethnicity, and national origin, among other traits.<sup>278</sup>
- *Maternal Health*. The 1921 Maternity Act<sup>279</sup> was likely the first federal regulation of maternal health.<sup>280</sup> Today, the Maternal and

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274. See generally H. Jefferson Powell, *The Original Understanding of Original Intent*, 98 HARV. L. REV. 885 (1985) (arguing that the Framers’ expectation of constitutional interpretation does not support an interpretive strategy based on the Framers’ intent).

275. Fallon, *supra* note 97, at 1203; David A. Strauss, *What Is Constitutional Theory?*, 87 CALIF. L. REV. 581, 582 (1999) (explaining why a constitutional theory “cannot call for a wholesale departure from existing practices”).

276. 42 U.S.C. §§ 2000e-1–17 (2012).

277. See Samuel R. Bagenstos, *The Unrelenting Libertarian Challenge to Public Accommodations Law*, 66 STAN. L. REV. 1205, 1211 (2014) (describing how the Civil Rights Act of 1875 treated race discrimination in public accommodations as a violation of civil, rather than merely social, rights). That legislation was enacted pursuant to Congress’s powers under the Reconstruction Amendments, which the Court invalidated. *The Civil Rights Cases*, 109 U.S. 3 (1883). Civil rights legislation is now enacted pursuant to Congress’s powers under the Commerce Clause. *Heart of Atlanta Motel Inc. v. United States*, 379 U.S. 241, 261 (1964).

278. Congress has not yet enacted one of the bills that would explicitly prohibit discrimination on the basis of sexual orientation and gender identity. See, e.g., Equality Act, H.R. 3185, 114th Cong. (2015), <https://www.congress.gov/bill/114th-congress/house-bill/3185> [<https://perma.cc/LF2Q-6FVJ>].

279. *Massachusetts v. Mellon*, 262 U.S. 447, 480 (1923) (declining to hear a challenge to the Maternity Act).

280. See Kate E. Ryan, *Mandating Coverage for Maternity Length of Stays: Certain Problems with the Good Idea*, 11 J.L. & HEALTH 271, 295 (1996) (identifying the Maternity Act as the first federal regulation of maternal health). Although Congress had provided cash or pension benefits to war widows, these measures were not designed to establish or affect standards for maternal

Child Health division of the Department of Health and Human Services (DHHS) conducts a variety of programs and initiatives “to improve maternal and child health.”<sup>281</sup>

- *Vaccines.* It was not until 1813 that Congress established a National Vaccine Agency, and the agency, at the time, had power only to make vaccines available postage free.<sup>282</sup> It was not until 1944 that Congress established a federal preclearance regime for vaccination, the first federal regulation of vaccine standards.<sup>283</sup> Today, vaccines are regulated by the Food and Drug Administration (FDA) as well as other federal agencies, such as the Centers for Disease Control and Prevention.<sup>284</sup> Federal law also establishes a remedy for individuals injured by vaccines.<sup>285</sup>
- *Animal Health.* The Animal Welfare Act,<sup>286</sup> a federal law “that regulates the treatment of animals in research, exhibition, transport, and by dealers,”<sup>287</sup> was not enacted until 1966. Today, the Center for Animal Welfare Section of the U.S. Department of Agriculture<sup>288</sup> and the Animal and Veterinary Section of the FDA work together toward animal health.<sup>289</sup>
- *Insurance.* Enacted in 1890, the Sherman Antitrust Act was the first federal statute that outlawed monopolistic business

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health care. Kristin A. Collins, *Federalism’s Fallacy: The Early Tradition of Federal Family Law and the Invention of States’ Rights*, 26 CARDOZO L. REV. 1761, 1782–1802 (2005) (describing pension allotments).

281. U.S. Dep’t of Health & Human Servs., Health Res. & Servs. Admin., *Programs & Initiatives*, HRSA MATERNAL & CHILD HEALTH, <http://mchb.hrsa.gov/programs/index.html> [<https://perma.cc/8ALB-M6NZ>].

282. Law of Feb. 27, 1813, ch. 37 (repealed 1822), [http://biotech.law.lsu.edu/cases/vaccines/vac\\_act\\_1813.pdf](http://biotech.law.lsu.edu/cases/vaccines/vac_act_1813.pdf) [<https://perma.cc/87YZ-659M>].

283. Public Health Services Act, Pub. L. No. 78-410, ch. 373, 58 Stat. 702 (1944), <http://uscode.house.gov/statviewer.htm?volume=58&page=702> [<https://perma.cc/LV6U-RCWZ>].

284. *Vaccines*, VACCINES, BLOOD & BIOLOGICS, <http://www.fda.gov/BiologicsBloodVaccines/Vaccines/> [<https://perma.cc/GJL9-MG5F>].

285. See National Childhood Vaccine Injury Act of 1986, 42 U.S.C. §§ 300aa1–34 (2012); *National Childhood Vaccine Injury Act of 1986*, NAT’L VACCINE INFO. CTR., <http://www.nvic.org/Vaccine-Laws/1986-Vaccine-Injury-Law.aspx> [<https://perma.cc/5HFF-TE37>].

286. Animal Welfare Act, 7 U.S.C. § 54 (2013).

287. U.S. Dep’t of Agric., *Animal Welfare Act*, U.S. DEP’T AGRIC. NAT’L AGRIC. LIBR., <https://awic.nal.usda.gov/government-and-professional-resources/federal-laws/animal-welfare-act> [<https://perma.cc/A6DS-DMNZ>].

288. U.S. Dep’t of Agric., *Animal Welfare*, ANIMAL & PLANT HEALTH INSPECTION SERV., <https://www.aphis.usda.gov/wps/portal/aphis/ourfocus/animalwelfare> [<https://perma.cc/P6TC-SJRJ>].

289. *About FDA*, ABOUT THE CTR. FOR VETERINARY MED., <http://www.fda.gov/aboutfda/centersoffices/officeoffoods/cvm/default.htm> [<https://perma.cc/VYC4-F5BM>].

practices.<sup>290</sup> It was not until the 1940s that the Court concluded that Congress could regulate insurance under that statute.<sup>291</sup> Before that, the Court had suggested that insurance was an area of regulation reserved to the states.<sup>292</sup> Today, federal law regulates many different kinds of insurance—unemployment insurance, health insurance, crop insurance, and livestock insurance, among others.<sup>293</sup>

There are similarly many examples of new forms of regulation that span myriad areas of regulation:

- *Conditional Spending.* When Congress initially started providing federal money to states, it merely designated that money for use in particular areas—to support public schools, for example, or to build roads.<sup>294</sup> Not until the late 1800s did Congress start adding conditions to federal grants that required states to comply with certain regulatory directives in addition to requiring the states to use the federal money toward a general project.<sup>295</sup> Since then, Congress has enacted different kinds of conditions. Some conditions require states to enact laws that conform to certain regulatory directives.<sup>296</sup> Other conditions are more procedural—they require states to institute a means for preventing fraud with federal monies<sup>297</sup> or require states to create an enforcement bureau independent from the regulatory arm that implements the program.<sup>298</sup> There is a huge variety among the different conditions that are imposed on states in programs such as Medicaid, Temporary Assistance to Needy Families, civil rights programs under the Individual with Disabilities in Education Act,

290. *The Antitrust Laws*, GUIDE TO ANTITRUST LAWS, <https://www.ftc.gov/tips-advice/competition-guidance/guide-antitrust-laws/antitrust-laws> [<https://perma.cc/TC4G-R2T9>].

291. *United States v. Se. Underwriters Ass'n*, 322 U.S. 533, 553 (1944), *superseded by statute* 15 U.S.C. §§ 1011–1015 (1970).

292. *Paul v. Virginia*, 75 U.S. 168, 182–83 (1868).

293. *E.g.*, Federal Crop Insurance Act, 7 U.S.C. § 1505 (1994); 26 U.S.C. ch. 23; Employee Retirement Income Security Act of 1974 (ERISA), Pub. L. No. 93-406, 80 Stat. 829 (codified as amended in scattered sections of 26 and 29 U.S.C.).

294. Lewis B. Kaden, *Politics, Money, and State Sovereignty: The Judicial Role*, 79 COLUM. L. REV. 847, 871 (1979).

295. *Id.*

296. *See* Pasachoff, *supra* note 198, at 259, 271–73 (noting such conditions). *New York* confirmed that conditional spending is a constitutional means of regulating the states. *New York v. United States*, 505 U.S. 144, 167 (1992).

297. *See* Pasachoff, *supra* note 198, at 271–73 (discussing conditions on federal grants).

298. *Va. Office for Prot. & Advocacy v. Stewart*, 563 U.S. 247, 251–52 (2011) (involving such a condition).

Social Security, and environmental programs under the Clean Water Act and the Clean Air Act (CAA).<sup>299</sup>

- *Conditional Preemption (and Other Varieties)*. Conditional preemption occurs when federal statutes preclude all state laws in a particular area unless state law conforms to federal directives. Early preemptive statutes did not conditionally preempt state laws;<sup>300</sup> conditional preemption is routinely described as a twentieth century innovation.<sup>301</sup> Some examples of conditional preemption include provisions in the Energy Policy Act of 2005,<sup>302</sup> the CAA,<sup>303</sup> and the ACA.<sup>304</sup> Some federal statutes also “completely” preempt state laws.<sup>305</sup> These statutes turn what would otherwise be state law claims into federal ones.<sup>306</sup> The only statutes that completely preempt state laws, however, are of fairly recent vintage, including section 301 of the Labor Management Relations Act (1947),<sup>307</sup> the National Bank Act (1863),<sup>308</sup> and the Employee Retirement Income Security Act (1974).<sup>309</sup>
- *Delegations to Federal Agencies*. The precise historical analogs to the administrative state are subject to debate. But it is safe to say

299. See Jessica Bulman-Pozen & Heather K. Gerken, *Uncooperative Federalism*, 118 YALE L.J. 1256, 1271–83 (2009) (discussing conditions in some of these statutes); Pasachoff, *supra* note 198, at 267–69 (same).

300. See, e.g., Copyright Act of 1790, 1 Stat. 124; Patent Act of 1790, 1 Stat. 109; An Act to Regulate Collection of Duties and Tonnage of 1799, 1 Stat. 627.

301. See, e.g., U.S. ADVISORY COMM’N ON INTERGOVERNMENTAL RELATIONS, FEDERAL STATUTORY PREEMPTION OF STATE AND LOCAL AUTHORITY 6–7 (1992), <http://www.library.unt.edu/gpo/acir/reports/policy/a-121.pdf> [<https://perma.cc/D6G4-QEE2>]

302. See R. Seth Davis, Note, *Conditional Preemption, Commandeering, and the Values of Cooperative Federalism: An Analysis of Section 216 of EPACT*, 108 COLUM. L. REV. 404, 406 (2008) (referencing the Energy Policy Act as an example of conditional preemption).

303. See Jessica Bulman-Pozen, *Federalism as a Safeguard of the Separation of Powers*, 112 COLUM. L. REV. 459, 474, 480 (2012) (using the Clean Air Act as an example of conditional preemption).

304. See Gluck, *supra* note 197, at 585–86 (“[S]tates are the default and preferred implementers of the new federal program, but there is a federal ‘fallback’: the federal government must operate these programs should states prove unable to do so or if they opt out.”).

305. See Gil Seinfeld, *The Puzzle of Complete Preemption*, 155 U. PA. L. REV. 537, 549–50 (2004) (listing examples).

306. *Beneficial Nat’l Bank v. Anderson*, 539 U.S. 1, 9 n.5 (2003) (explaining that the question is “whether Congress intended the federal cause of action to be exclusive rather than . . . whether Congress intended that the cause of action be removable”).

307. *Avco Corp. v. Aero Lodge No. 735, Int’l Ass’n of Machinists*, 390 U.S. 557, 559–60 (1968).

308. *Beneficial Nat’l Bank*, 539 U.S. at 5.

309. *Metro Life Ins. Co. v. Taylor*, 581 U.S. 58, 66 (1987) (holding that Congress intended ERISA to completely preempt state law in this area).



that early analogs to the federal bureaucracy did not affirmatively delegate the kind of far-reaching authority that agencies exercise today to prescribe binding regulations. The delegation to the Interstate Commerce Commission (ICC) in 1887 is generally seen as the first delegation of rulemaking authority significant enough to resemble modern agencies.<sup>310</sup> Today, many agencies exercise broad grants of power: the EPA,<sup>311</sup> the Securities and Exchange Commission (SEC),<sup>312</sup> the DHHS,<sup>313</sup> the Department of Labor,<sup>314</sup> and the Federal Trade Commission (FTC),<sup>315</sup> among others. Congress also sometimes provides agencies with new kinds of powers. For example, it allows agencies to render statutory provisions without force or legal effect.<sup>316</sup>

- *Agency Structure.* Congress also regulates the structure of newly created agencies in new ways: it insulates some agency heads from presidential removal, it establishes a period of tenure for agency heads, it establishes multiperson bodies to oversee an agency or area within an agency, and it requires multimember agency bodies to include equal numbers of Republican and Democratic members.<sup>317</sup> Many different agencies have different structures, which could not exist before the delegation of authority to the ICC. Only in the late 1800s did Congress begin insulating agencies from presidential removal.<sup>318</sup> Today, these agencies include the Federal Communications Commission

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310. See Kirti Datla & Richard L. Revesz, *Deconstructing Independent Agencies (and Executive Agencies)*, 98 CORNELL L. REV. 769, 776 (2013); Robert L. Rabin, *Federal Regulation in Historical Perspective*, 38 STAN. L. REV. 1189, 1189, 1206 (1986).

311. See, e.g., *Whitman v. Am. Trucking Ass'ns, Inc.* 531 U.S. 457, 472 (2001) (explaining the delegation of authority to the EPA “to protect the public health” (quoting 42 U.S.C. § 7409(b)(1) (2012))).

312. See, e.g., *United States v. O'Hagan*, 521 U.S. 642, 650 (1997) (explaining that the delegation of authority should be used “as necessary or appropriate in the public interest or for the protection of investors” (quoting 15 U.S.C. § 78j(b) (2012))).

313. See, e.g., *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 209–12 (1988) (listing several delegations of rulemaking authority).

314. See, e.g., *Perez v. Mortg. Bankers Ass'n*, 135 S. Ct. 1199, 1204 (2015) (describing delegation).

315. See, e.g., *United States v. Morton Salt Co.*, 338 U.S. 632, 632 n.1 (1950) (describing delegation).

316. Deacon, *supra* note 225, at 1551, 1561–64 (describing this authority and noting the discussion of historical analogs in *Clinton v. City of New York*, 524 U.S. 417 (1998)).

317. Datla & Revesz, *supra* note 310, at 786–99 (surveying these restrictions).

318. See *PHH Corp. v. Consumer Fin. Prot. Bureau*, 839 F.3d 1, 12–13 (D.C. Cir. 2016), *vacated and reh'g en banc granted*, No. 15-1177 (D.C. Cir. Feb. 16, 2017).

(FCC), the Federal Election Commission, the FTC, the SEC, and the CFPB.<sup>319</sup>

- *All Federal Agency Actions.* Because federal agencies exercise powers delegated to them by Congress,<sup>320</sup> agencies may exercise only those powers that Congress has under the Constitution. Under the Court’s antinovely rhetoric, any field in which an agency is regulating and any form that an agency regulation takes presumably needs to have some historical analog from the first twenty to fifty years of the United States. Yet agencies today regulate in many areas and in many forms that did not exist then. Consider these examples:
  - *EPA’s Greenhouse Gas Rule.* To regulate greenhouse gases, the EPA embarked on “the single largest expansion in the scope of the [CAA] in its history,” requiring entities that release more than a certain amount of greenhouse gasses to obtain a permit for constructions and modifications, subject to certain exceptions.<sup>321</sup>
  - *EPA’s Clean Power Plan.* The EPA established CO<sub>2</sub> emission standards for new, modified, and reconstructed power plants and requirements for states to follow in developing plans to limit CO<sub>2</sub> from existing plants.<sup>322</sup> The former involved improving heat rates at coal-fired plants, substituting natural-gas plants for steam plants, and substituting renewable-energy generating capacity for generation from fossil-fuel-fired plants.<sup>323</sup> The latter entailed state-specific emission goals tied to both the mass and rate of emissions.<sup>324</sup>

319. *See id.* at 12–18; *see, e.g.*, 12 U.S.C. § 5491(b)–(c) (2012) (establishing the position of Director of the CFPB as removable only for cause).

320. *Whitman v. Am. Trucking Ass’ns, Inc.* 531 U.S. 457, 472 (2001) (centering on a delegation of authority “to protect the public health” (quoting 42 U.S.C. § 7409(b)(1) (2012))).

321. *Util. Air Regulatory Grp. v. EPA*, 134 S. Ct. 2427, 2436–38 (2014) (describing the history of this regulation).

322. Standards of Performance for Greenhouse Gas Emissions, 80 Fed. Reg. 64,510 (Oct. 23, 2015) (to be codified at 40 C.F.R. pts. 60, 70, 71, and 98); Carbon Pollution Emission Guidelines for Existing Stationary Sources, 80 Fed. Reg. 64,662 (Oct. 23, 2015) (to be codified at 40 C.F.R. pt. 60).

323. Carbon Pollution Emission Guidelines for Existing Stationary Sources, 80 Fed. Reg. at 64,666–67.

324. *Id.* at 64,820.

- *FCC's Net Neutrality Rule.* The FCC recently classified the Internet as a telecommunication service and then prohibited broadband providers from “blocking ‘lawful content, applications, services, or non-harmful devices’ or throttling (degrading or impairing) access to the same”; from “favor[ing] some traffic over other traffic . . . in exchange for consideration . . . or to benefit an affiliated entity”; or from “unreasonably interfering with or unreasonably disadvantaging” users’ ability to use broadband Internet access service or content providers’ ability to make content or items available to users.<sup>325</sup>
- *The Commodity Futures Trading Commission Credit Swaps Rule.* The 2010 Dodd–Frank Act directed the Commodity Futures Trading Commission (CFTC) to oversee the United States “swaps” market, which had previously been largely unregulated.<sup>326</sup> The CFTC then imposed a host of regulations on swap transactions, including a requirement that they be performed on certain markets subject to certain monitoring and requirements of the CFTC.<sup>327</sup>

The Congresses that enacted these statutes did not operate under the assumption that they could only enact statutes that were sufficiently analogous to laws enacted in the first twenty to fifty years of the United States. Moreover, the fact that the Court’s antinovelty rhetoric would have called into question many different kinds of federal laws suggests that an antinovelty principle would fail to reflect too much of constitutional law to be a viable interpretive theory. At a minimum, the antinovelty rhetoric’s potentially far-reaching implications suggest the rhetoric’s application is, at best, selective, which is another reason to doubt the validity of antinovelty rhetoric as a canon of constitutional interpretation.<sup>328</sup>

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325. U.S. Telecomm. Ass’n v. FCC, 825 F.3d 674, 696 (D.C. Cir. 2016).

326. Commodity Futures Modernization Act of 2000, Pub. L. No. 106-554, 114 Stat. 2763 (codified as amended in scattered sections of 7, 11, 12, and 15 U.S.C.).

327. Swap Execution Facilities, 17 C.F.R. § 37 (2016).

328. See *supra* Part I.B.

*B. Conduct and Actual Constitutionality: Comparing Congressional Action and Inaction*

The idea that the absence of similar federal statutes is evidence that a statute is unconstitutional is the inverse of an idea associated with Chief Justice Marshall’s opinion in *McCulloch v. Maryland*—namely, that the existence of many, similar federal statutes is evidence that a statute *is* constitutional.<sup>329</sup> Several critiques of the Supreme Court’s antinovelty rhetoric apply equally to the *McCulloch* principle: Congress’s enactment of a statute may not reflect Congress’s assumption that a statute is constitutional. And although longstanding statutes may exist, perhaps the facts or our values have changed to a point where the statute’s historical presence should not matter.

That being said, there are other reasons—besides the idea that legislative enactments reflect Congress’s view that a statute is constitutional—why the existence of similar statutes may and should be used as evidence of a statute’s constitutionality. The *McCulloch* principle may illustrate how Congress’s conduct sometimes affects the “actual constitutionality” of a statute for reasons unrelated to Congress’s assumptions about a statute’s constitutionality. Though this Part does not defend the *McCulloch* principle, it highlights how some of the potential justifications for it do not apply to the idea that legislative novelty is evidence that a statute is unconstitutional. The contrast between the Court’s antinovelty rhetoric and the *McCulloch* principle, therefore, illustrates why legislative novelty should not be used as evidence that a statute is unconstitutional.

1. *Congressional Action as a Sign of Congress’s Views.* Some explanations for incorporating congressional practice into constitutional interpretation maintain that congressional practice

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329. For ease of reference, this Part refers to this idea as the “*McCulloch* principle,” although it differs slightly from Chief Justice Marshall’s framing. In *McCulloch v. Maryland*, Chief Justice Marshall wrote:

[A] doubtful question . . . [regarding] the respective powers of those who are equally the representatives of the people, are to be adjusted; if not put to rest by the practice of the government . . . . An exposition of the constitution, deliberately established by legislative acts . . . ought not to be lightly disregarded.

*McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 401 (1819). Judge Kavanaugh’s recent opinion holding the CFPB’s structure to be unconstitutional explicitly framed the Supreme Court’s antinovelty rhetoric together with the *McCulloch* principle because both reflected the same idea “that history and tradition are important guides.” *PHH Corp. v. Consumer Fin. Prot. Bureau*, 839 F.3d 1, 21–23 (D.C. Cir. 2016), *vacated and reh’g en banc granted*, No. 15-1177 (D.C. Cir. Feb. 16, 2017).

embodies Congress's assumptions about the Constitution. Congress is "interpreting" or "constructing" the Constitution in the course of passing statutes, the argument goes, and statutes therefore represent Congress's views about the constitutional text.<sup>330</sup> Chief Justice Marshall described "legislative acts" as "exposition[s] of the constitution" in the course of explaining why constitutional interpretation should consider congressional practice.<sup>331</sup> The idea that Congress, in the course of enacting statutes, also interprets the Constitution is related to the concept of liquidation. In the *Federalist Papers*, Madison observed that "[a]ll new laws, though penned with the greatest technical skill, and passed on the fullest and most mature deliberation, are considered as more or less obscure and equivocal, until their meaning be liquidated and ascertained by a series of particular discussions and adjudications."<sup>332</sup> Professor Caleb Nelson has suggested that "the founding generation[] . . . expected subsequent practice to liquidate the indeterminacy [of the constitutional text] and to produce a fixed meaning for the future."<sup>333</sup> And Madison and others believed that those subsequent practices could include congressional statutes, or at least statutes that were the product of some deliberation.<sup>334</sup>

But Part II's critique of the Court's antinovelty rhetoric casts doubt on these justifications. Just as in the case of congressional inaction, where Congress's conduct (not enacting a kind of statute) does not reflect Congress's assumptions about a statute's constitutionality (that such statutes are unconstitutional), the same is true in many cases for congressional action. That is, Congress's enactment of a statute may not reflect Congress's assumption that the statute is constitutional, at least in the sense that the statute is constitutional because it is consistent with the constitutional text. It is

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330. See generally LARRY D. KRAMER, *THE PEOPLE THEMSELVES* (2004) (advancing this argument); MARK TUSHNET, *TAKING THE CONSTITUTION AWAY FROM THE COURTS* (1999) (same); Curtis A. Bradley & Neil S. Siegel, *After Recess: Historical Practice, Textual Ambiguity, and Constitutional Adverse Possession*, 2014 SUP. CT. REV. 1, 27 (describing how incorporating congressional practice into constitutional interpretation is related to the idea that nonjudicial acts may constitute precedent).

331. *McCulloch*, 17 U.S. (4 Wheat.) at 401.

332. THE FEDERALIST NO. 37, at 1236 (James Madison) (James E. Cooke ed., 1961); see also Letter from James Madison to Judge Spencer Roane (Sept. 2, 1819), in 3 LETTERS AND OTHER WRITINGS OF JAMES MADISON 143, 145 (Philadelphia, J.B. Lippincott ed., 1867) ("It could not but happen, and was foreseen at the birth of the Constitution, that difficulties and differences of opinion might occasionally arise in expounding terms and phrases . . . and that it might require a regular course of practice to liquidate [and] settle the meaning of some of them.").

333. Nelson, *supra* note 233, at 547.

334. *Id.* at 526–29.

fairly easy to see why: in the course of enacting a statute, there is no guarantee that Congress has actually considered the extent of its constitutional powers or whether a statute is consistent with the requirements of the constitutional text.<sup>335</sup> Many members of Congress may not be lawyers or well-versed in constitutional law, and quickly enacted legislation may not be subject to any rigorous constitutional scrutiny. Congress also has a limited amount of time and resources, which it might not devote to abstract questions of constitutional law,<sup>336</sup> and the myriad reasons why Congress does not enact statutes—constituent preferences and political expediency, among others—also explain why Congress enacts statutes that do not embody or reflect any consideration of whether the statute is constitutional. Congressional representatives concerned with reelection will focus on their constituents' wishes and concerns, which may not include questions of constitutional power.

2. *Congressional Action as Congressional Conduct.* Even though Congress's enactment of a statute may not reliably signal Congress's assumption that the statute is constitutional, there may still be reasons to treat Congress's enactment of a statute as evidence of a statute's constitutionality. This subsection does not purport to offer a complete defense of that idea, but it outlines some possible justifications for treating the enactment of a statute as evidence of the statute's constitutionality that are not called into question by the critiques of the Court's antinovelty rhetoric. These justifications include acquiescence, choices to prefer legislative value choices over judicial ones, broader understandings of constitutional interpretation, and advancement of other constitutional values, such as providing room for democratic decisionmaking or promoting the rule of law.

a. *Acquiescence.* One reason judges may assume that a longstanding pattern of congressional statutes is constitutional is because the political branches have "acquiesced" to the arrangement

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335. See Mark Tushnet, *Is Congress Capable of Conscientious, Responsible Constitutional Interpretation? Some Notes on Congressional Capacity to Interpret the Constitution*, 89 B.U. L. REV. 499, 502 (2009) ("When enacting a statute Congress has no obligation to address constitutional questions directly, and, as noted below, may not even notice the presence of such questions.").

336. See Elizabeth Garrett & Adrian Vermeule, *Institutional Design of a Thayerian Congress*, 50 DUKE L.J. 1277, 1283 (2001) (explaining why Congress may not consider constitutional questions).

provided for by those statutes.<sup>337</sup> To the extent a law alters the division of power between Congress and the executive, both entities have acquiesced, or consented, to that arrangement, and the statute might be viewed as legitimate for that reason,<sup>338</sup> whether or not the branches are acquiescing to any claim that the statute is consistent with the constitutional text's requirements.<sup>339</sup> Moreover, even if acquiescence might suffice as a justification for separation-of-powers questions, it might not suffice as a justification for federalism questions. Although a federal law may reflect Congress's views about the meaning of constitutional federalism, it may not reflect the states' views. There are differing views on the extent to which Congress—in particular the Senate—represents the states' views,<sup>340</sup> especially in light of the Seventeenth Amendment, which made Senators directly elected by the people.<sup>341</sup>

*b. Legislative Value Choices.* One might also incorporate congressional practice into constitutional interpretation to prioritize Congress's legislative value choices when the text is ambiguous or when it permits more than one reasonable interpretation.<sup>342</sup> The text can only say so much, and it often speaks in vague generalities. Bradley and Morrison, for example, argue that interpreters rely on historical practice to determine the scope of the President's powers under Article II because little constitutional text speaks to those questions.<sup>343</sup> Something similar could be said for questions about the proper scope of Congress's delegated powers vis-à-vis the states. The enumerated list of congressional powers contains several ambiguously worded provisions. The Necessary and Proper Clause, for example, provides Congress with the power to make "all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers,"<sup>344</sup> and the phrase "necessary and proper" is, as John Manning has observed,

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337. See Bradley & Morrison, *supra* note 15, at 418.

338. *Id.*

339. There are also both theoretical and practical difficulties with acquiescence. See generally Shalev Roisman, *Constitutional Acquiescence*, 84 GEO. WASH. L. REV. 668 (2016) (describing these difficulties).

340. See, e.g., Larry D. Kramer, *Putting the Politics Back into the Political Safeguards of Federalism*, 100 COLUM. L. REV. 215, 224–25 (2000) (summarizing different positions).

341. U.S. CONST. amend. XVII.

342. Evan H. Caminker, *Thayerian Deference to Congress and Supreme Court Supermajority from the Past*, 78 IND. L.J. 73, 83 (2003).

343. Bradley & Morrison, *supra* note 15, at 417–18.

344. U.S. CONST. art. I, § 8.

an “open-ended term[.]”<sup>345</sup> Elsewhere, Article I, Section 8 authorizes Congress to “provide for . . . the general welfare of the United States.”<sup>346</sup> The phrase “general welfare” does little to resolve questions like whether Congress may amend the terms on which states receive federal money<sup>347</sup> or whether Congress may condition a state’s receipt of funds on the state’s acceptance of terms that are unrelated to the funds’ purpose.<sup>348</sup> The Supreme Court has also held that Congress has some powers because of the Constitution’s structure, rather than because of any particular grant of express authority.<sup>349</sup> If the text permissibly allows for multiple interpretations or does not reach a particular issue, decisionmakers might have reasons to select legislative value choices over judicial ones.

*c. Interpretation of Nontextual Sources.* Relatedly, it might be the case that congressional statutes represent constitutional determinations even if Congress never considers whether a statute is consistent with the constitutional text. James Bradley Thayer’s original argument for judicial deference maintained that many constitutional questions involve more than technical legal issues like the precise meaning of the constitutional text.<sup>350</sup> Rather, Thayer argued, constitutional questions also turn on broader issues of constitutional policy and politics.<sup>351</sup> In this light, Congress’s assessment of how to best serve the national interest or how to realize particular constitutional values, such as liberty or equality, is just as much a constitutional determination as whether the text of the Commerce Clause authorizes Congress to enact a particular law. Congressional statutes, therefore, may serve epistemic ends in resolving constitutional questions because

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345. Manning, *supra* note 259, at 53.

346. U.S. CONST. art. I, § 8. Those who ratified the Constitution disagreed about whether that provision permitted Congress to spend only in areas within its other delegated powers. *See United States v. Butler*, 297 U.S. 1, 65 (1936) (“Since the foundation of the Nation sharp differences of opinion have persisted as to the true interpretation of the phrase [‘for the general welfare’].”).

347. *See Nat’l Fed’n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2601–02 (2012).

348. *See South Dakota v. Dole*, 483 U.S. 203, 207–08 (1987).

349. *See Primus, supra* note 183, at 588.

350. James Bradley Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 HARV. L. REV. 129, 156 (1893).

351. *See Garrett & Vermeule, supra* note 336, at 1279–80; *see also* Karlan, *supra* 106, at 67 (“[M]any of the constitutional cases before the Supreme Court are there precisely because they raise hard questions that cannot be answered simply by bringing technical acumen to bear.”).



they embody judgments about our political priorities and how they should be effectuated.<sup>352</sup>

Another way of getting at the point is to ask whether a statute's constitutionality turns only on whether that statute conforms to the text's requirements. Many constitutional issues are not resolved this way.<sup>353</sup> Consider, for example, different uses of historical arguments in constitutional law. Occasionally historical analysis incorporates history as a way of "teach[ing] lessons."<sup>354</sup> Historical reflection can ground principles in experience, but the significance of that experience requires some normative evaluation. For example, Professor Michael Dorf has argued that one example of how "[h]istory teaches lessons" in constitutional law is the way in which the Great Depression and the period leading up to the New Deal factored into the Supreme Court's post-New Deal Commerce Clause cases. According to Dorf, these cases incorporated "laissez-faire's inability to revive industrial activity during a depression."<sup>355</sup> This lesson turns on a judgment about the inadequacy of laissez-faire economics, which entails both a descriptive assessment of facts as they existed in the world and a normative evaluation of the perceived adequacy (or inadequacy) of that state of affairs. And congressional statutes may reflect descriptive and normative assessments about facts as they exist or have existed in the world even if they do not reliably reflect interpretations of the constitutional text, to the extent that interpretations of the text and assessments about the facts in the world are independent.

Statutes may also embody other kinds of judgments relevant to constitutional interpretation. For example, some have argued that public opinion may sometimes properly factor into constitutional analysis<sup>356</sup> and congressional statutes may incorporate some assessment—or at least an educated guess—about how the public feels about a statute, including whether it is constitutional in some broad sense. Sometimes, political and social movements—and their ability to persuade others of their causes—help to establish certain

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352. See Karlan, *supra* note 106, at 24–25 (urging deference on these grounds).

353. See, e.g., Strauss, *supra* note 238, at 4 (claiming that "constitutional 'interpretation' usually has little to do with the words of the text").

354. Dorf, *supra* note 241, at 1815.

355. *Id.*

356. See Richard Primus, *Public Consensus as Constitutional Authority*, 78 GEO. WASH. L. REV. 1207, 1209–10 (2010) ("Just as the text of a constitutional clause or the requirements of a precedential doctrine can guide good-faith constitutional adjudication, so can the fact that public consensus supports a particular view.").

constitutional rules and determine the content or meaning of previously established ones.<sup>357</sup> And statutes, like judicial opinions, may reflect assessments about political and social movements and their causes. Congress may also have constitutional doctrine in mind as it enacts statutes, even if it does not have in mind the constitutional text or the original meaning of that text.

*d. Constitutional Values: Democracy and the Rule of Law.* Another justification for presuming that statutes are constitutional is that judicial review—at least the act of striking down statutes—is always inherently antidemocratic.<sup>358</sup> Congress is accountable to the people via elections, and federal judges are not. Although any form of constitutional democracy will be antidemocratic in some respects, ensuring a wide space for democratic politics is one important value served by a constitution.<sup>359</sup>

Incorporating congressional practice into constitutional interpretation may also bolster constitutional legitimacy in other ways. Under the familiar dead-hand critique of constitutionalism, it is a problem that the people are governed and limited by constitutional rules which they played no role in adopting.<sup>360</sup> Relying on congressional practice to inform constitutional interpretation minimizes the gap between the past and the present, and with it, the dead-hand problem. When congressional practices inform constitutional interpretation, people in the present can affect the shape of constitutional rules by having their elected representatives enact statutes. Incorporating

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357. See Dorf, *supra* note 3, at 2038–42.

358. See F. Andrew Hessick, *Rethinking the Presumption of Constitutionality*, 85 NOTRE DAME L. REV. 1447, 1450 (2010).

359. See Richard H. Fallon, Jr., *How to Choose a Constitutional Theory*, 87 CALIF. L. REV. 535, 549–50 (1999) (endeavoring to “provide a framework within which readers can determine how various constitutional theories should be assessed”). Democracy and the rule of law are not the only values that judges should consider and will occasionally conflict with other values. See Erwin Chemerinsky, *The Supreme Court, 1988 Term—Foreword: The Vanishing Constitution*, 103 HARV. L. REV. 43, 75–76 (1989). Democracy also does not necessarily mean that courts should mechanically defer to all decisions made by the elected branches of government. See *id.* at 76 (proposing that the term “democracy . . . include both substantive constitutional values as well as the procedural norm of majority rule,” which “accords with the analysis of most political science theorists”); see also Richard A. Primus, *When Democracy Is Not Self-Government: Toward a Defense of the Unanimity Rule for Criminal Juries*, 18 CARDOZO L. REV. 1417, 1425–26 (1997) (noting two conceptions of democracy).

360. See David A. Strauss, *Common Law, Common Ground, and Jefferson’s Principle*, 112 YALE L.J. 1717, 1718 (2003) (citing Thomas Jefferson at the time of the Founding as stating that “the earth belongs to the living, and not to the dead”).

congressional practice into constitutional interpretation, however, may do more than mitigate concerns with constitutional legitimacy. Some have suggested that the Constitution “owes its status as supreme law to contemporary practices of acceptance.”<sup>361</sup> Under this view, the Constitution is legitimate because individuals implicitly consent to it. But people implicitly consent only to existing practices, so the Constitution, to be legitimate, must closely conform to those practices.<sup>362</sup> Congressional statutes may provide some evidence of the practices to which the relevant people consent.

There are also rule-of-law reasons to incorporate congressional practice into constitutional interpretation.<sup>363</sup> An interpretive practice that suddenly invalidates a large number of federal statutes may result in a sudden change in how the government works, thereby undermining rule-of-law values of stability and predictability.<sup>364</sup> These rule-of-law justifications do not turn on whether statutes reflect Congress’s analysis of the text, but instead on the fact that many statutes exist and cannot suddenly cease to exist without jarring consequences. Moreover, judicial decisions purport to contain generally applicable principles and reasons why a statute is unconstitutional. Therefore, a decision which declares a statute that is similar to many other statutes to be unconstitutional will likely create challenges to similar statutes. Those challenges will succeed even if the Supreme Court does not decide to hear those other cases, because the lower courts will use the Supreme Court’s exposition of the Constitution to find those other statutes unconstitutional.

*e. Burkean Values.* Some have also offered Burkean justifications for incorporating congressional practice into constitutional interpretation. Burkean justifications speak to the importance of longstanding traditions and how such traditions may represent the collective wisdom of many generations.<sup>365</sup> Traditions may speak to the

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361. Richard H. Fallon, Jr., *Constitutional Precedent Viewed Through the Lens of Hartian Positive Jurisprudence*, 86 N.C. L. REV. 1107, 1117 (2008).

362. See Primus, *supra* note 113, at 190.

363. See *id.* at 173 (“Probably all players in contemporary American constitutional law agree that . . . the rule of law . . . [is a] constitutional value[.]”).

364. See *id.* at 211–13, 217–21; see also Bradley & Morrison, *supra* note 15, at 427 (“[R]eliance interests . . . can presumably arise as a result of governmental practices as well as judicial decisions.”). There may be certain kinds of federal laws that, if invalidated, would uniquely implicate concerns about reliance, settled expectations, and stability.

365. See, e.g., Bradley & Siegel, *supra* note 330, at 11 (outlining Burkean approaches to constitutional interpretation).

practicability and durability of constitutional rules,<sup>366</sup> and longstanding congressional statutes may be evidence that such statutes are workable and durable.

*f. Raw Power.* In Thomas Hobbes' words, "Reputation of power, is Power."<sup>367</sup> If Congress and the executive want to push forward, judges may be limited in their capacity to stem the tide because of their limited ability to stop a committed Congress and executive.<sup>368</sup> Professor Lawrence Lessig has explained how, in the context of the Commerce Clause, the Court was able to enforce limited federal power at a time when Congress did not attempt to exercise much of it. But that ceased to be true once Congress had reason to enact multiple laws that exceeded prior understandings about the scope of Congress's commerce power.<sup>369</sup> Even rumblings that Congress and the executive are not inclined to enforce judicial decisions may be cause for concern,<sup>370</sup> given the dangers of a system in which federal judicial rulings are openly ignored by other branches of government.<sup>371</sup>

But there are serious realpolitick concerns even if Congress and the executive do not intend to openly defy judicial rulings. Judges issue decisions that provide purportedly generally applicable principles that explain why a case is decided in a particular way. If the reasons a judge gives for invalidating a particular federal statute apply to many different federal statutes, a decision invalidating a federal statute could invalidate all of those similar statutes. And there is no guarantee that Congress and the executive would replace those statutes if judges invalidate them. Thus, even the possibility of a lazy, gridlocked, or overburdened Congress may be reason for judges to be concerned about invalidating a statute that is similar to many other longstanding

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366. See David A. Strauss, *Common Law Constitutional Interpretation*, 63 U. CHI. L. REV. 877, 892 (1996).

367. THOMAS HOBBS, *LEVIATHAN* 62 (Richard Tuck ed., Cambridge Univ. Press 1991) (1651) (emphasis added).

368. Cf. THE FEDERALIST NO. 78, at 522–23 (Alexander Hamilton) (James E. Cooke ed., 1961) (maintaining that the judiciary would be the "least dangerous" and "weakest" of the branches because it has "no influence over either the sword or the purse").

369. Lawrence Lessig, *Translating Federalism: United States v. Lopez*, 1995 SUP. CT. REV. 125, 161.

370. See, e.g., Richard H. Fallon, Jr., *Constitutional Constraints*, 97 CALIF. L. REV. 975, 1015–24 (2009) (identifying "external constraints" on judicial authority, including inefficacy or nullity of rulings because of resistance by political branches).

371. E.g., *id.* at 1027 ("Nearly everyone agrees that officials should regard themselves as normatively bound by judicial determinations in cases to which they are parties, at least outside the scope of patently ultra vires rulings.").

ones. Even a motivated Congress might not be able to replace all of the statutes that could be invalidated. And even highly motivated judges cannot enact statutes, pass regulations, or set up a substitute for the administrative state. Thus, judges' limited capacity to provide replacements may be why judges choose not to invalidate a statute that is similar to many other statutes that function as the backbone of the government's day-to-day workings.

*g. Objective Versus Subjective Purposes.* There may also be reasons to attribute to Congress the assumption that the statutes it has enacted are constitutional. Doctrine frequently distinguishes between objective versus subjective purposes. Whereas subjective purpose refers to the *actual* views and motives held by enacting legislators, objective purpose refers to something else.<sup>372</sup> That something else has been defined in different ways, but it encompasses something like “the interests, values, objectives, policy, and functions that the law should realize in a democracy”<sup>373</sup> or “the intent that a reasonable person would gather from the text of the law, placed alongside the remainder of the corpus juris.”<sup>374</sup> Others have equated a law's objective purpose with its “expressive character,”<sup>375</sup> that is, what a law objectively communicates.

The precise meaning of “objective purpose” matters less than the concept of objective purpose. Objective purpose recognizes the possibility that a law may reflect a purpose that is not actually or subjectively held by the enacting legislature. And one “objective purpose” of a law might be for Congress to say that the statute is constitutional. An enacted statute might objectively communicate that Congress assumes the statute to be constitutional; at least, reasonable observers might infer as much from Congress's enactment of a statute. Therefore, judges may elect to ascribe to Congress the view that an enacted statute is constitutional even if Congress did not actually hold that view.

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372. See, e.g., *Edwards v. Aguillard*, 482 U.S. 578, 636 (1987) (Scalia, J., dissenting) (“[W]hile it is possible to discern the objective ‘purpose’ of a statute . . . discerning the subjective motivation of those enacting the statute is, to be honest, almost always an impossible task.”); Mitchell N. Berman, *Coercion Without Baselines: Unconstitutional Conditions in Three Dimensions*, 90 GEO. L.J. 1, 26–27 (2001) (noting the difference between subjective and objective views).

373. Aharon Barak, *The Supreme Court, 2001 Term—Foreword: A Judge on Judging: The Role of a Supreme Court in a Democracy*, 116 HARV. L. REV. 19, 75 (2002).

374. John F. Manning, *What Divides Textualists from Purposivists?*, 106 COLUM. L. REV. 70, 79 (2006).

375. Deborah Hellman, *The Expressive Dimension of Equal Protection*, 85 MINN. L. REV. 1, 56–57 (2000).

3. *Congress's Conduct: Legislative Novelty.* As the previous subsection detailed, there may be reasons why Congress's conduct—acting as if statutes are constitutional—actually makes those statutes constitutional. Even if these reasons do not ultimately justify the presumption that a pattern of longstanding statutes is more likely to be constitutional, they certainly do not justify the Court's antinovelty rhetoric. That is, they do not justify why Congress's failure to enact a statute should make that statute unconstitutional.

For example, treating congressional statutes as evidence of statutes' constitutionality furthers rule-of-law values of predictability and consistency, and respects reliance interests that may build up around statutes. Enacting a statute begins a federal program with all of its accompanying administration, including personnel, buildings, dispensation of government benefits, and adjustments made by other federal and state agencies. A regulatory web and private parties' expectations build up around a federal statute that is harder to change than the kinds of reliance interests or expectations that may build up around the absence of one.

Even if there are some cases where reliance interests build up around the absence of a federal statute, it is unclear how often that might occur and whether doctrine should protect those reliance interests. Take the cases in which courts have invoked antinovelty rhetoric—regulated entities probably did not construct their businesses around whether a regulating agency had one layer or two layers of for-cause removal<sup>376</sup> or were headed by single- or multimember bodies.<sup>377</sup> And the many states that actively lobbied for the federal government to require state legislatures to enact federal directives did not rely on the federal government's inability to do so.<sup>378</sup> Moreover, whatever reliance interests may build up around the absence of a federal statute may not be reliance interests that the doctrine protects. For example, states may have set their budgets on an assumption that the federal government would not require the state legislature to enact certain laws or require state executives to enforce federal law. But that is not meaningfully different than if the state had set its budget on an assumption that state courts would not be required to enforce a new

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376. See *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477, 484 (2009).

377. See *PHH Corp. v. Consumer Fin. Prot. Bureau*, 839 F.3d 1, 6 (D.C. Cir. 2016), *vacated and reh'g en banc granted*, No. 15-1177 (D.C. Cir. Feb. 16, 2017).

378. See *New York v. United States*, 505 U.S. 144, 180 (1992) (“The sited state respondents focus their attention on the process by which the Act was formulated.”).

federal statute. Yet Congress may constitutionally require state courts to enforce federal law.<sup>379</sup> States may also have set their budgets on an assumption that the state government would not be subject to a generally applicable regulatory obligation, such as a minimum-wage requirement. But Congress may constitutionally impose that obligation on the states.<sup>380</sup> With respect to private entities, a private entity's desire or expectation that it would not be subject to future regulation is typically not sufficient to immunize the entity from future regulation.

Nor do the realpolitick justifications apply in the context of legislative novelty. Upholding statutes that prior Congresses thought to be unconstitutional might upset those earlier Congresses, but they are not around to do anything. Whereas invalidating a statute raises concerns about upsetting the day-to-day workings of the government, upholding statutes typically does not.

The democracy-based explanation for why congressional statutes are treated as evidence of actual constitutionality also does not apply to the Court's antinovelty rhetoric. Treating statutes as evidence of their constitutionality provides more room for democratic decisionmaking; treating Congress's failure to enact a statute as evidence that Congress lacks constitutional power does not. Similarly, drawing a negative inference about a statute's constitutionality from legislative novelty does not minimize the dead-hand problem. If anything, overruling the statute exacerbates it. Antinovelty rhetoric increases the extent to which the people are governed and limited by constitutional rules that they had no role in enacting by fixing constitutional meaning according to what the first several Congresses (or whatever set of previous Congresses) did not do.<sup>381</sup>

The Burkean justification—the idea that longstanding traditions represent the collective wisdom of many generations and establish the workability of those traditions—may apply to the Supreme Court's antinovelty rhetoric, but it does not justify it. Under the *McCulloch*

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379. See, e.g., *Testa v. Katt*, 330 U.S. 386, 394 (1947) (holding that state courts are required to entertain FELA claims).

380. See *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 554 (1985) (upholding the minimum-wage requirement as applied to the states).

381. This fixing, by itself, is not a sufficient reason to reject antinovelty rhetoric. Many forms of constitutionalism will have some type of dead-hand problem. See Stephen E. Sachs, *The "Constitution in Exile" as a Problem for Legal Theory*, 89 NOTRE DAME L. REV. 2253, 2256 (2014) ("[A]ny constitution worth its salt may spend a good bit of time in exile."). But some bases of constitutional legitimacy are not undermined by the dead-hand problem. See Primus, *supra* note 113, at 199–202 (explaining that presentist, subjective identification with the preexisting regime resolves some of the dead-hand problem).

principle, the relevant tradition is a pattern of congressional statutes. It is reasonable to think that the congressional representatives who voted for a statute had some reason to do so and perhaps even that their vote indicates that they did not assume that the statute was a bad idea or disastrous. Moreover, if a statute has been around for a long time, it is possible to assess whether a statute or its analogues have resulted in a parade of horrors. So judges might be able to infer from the existence of similar statutes some kind of collective wisdom that is relevant to constitutional determinations, as well as the workability of a statute.

That is less true when the relevant tradition is the absence of similar statutes. There is no clear “collective wisdom” generated by Congress not enacting a statute: Congress may not have enacted a statute because it did not think of it. Perhaps it did not enact a statute because the pertinent facts had not yet existed or because it could not get the statute through both houses of Congress. At the very least, it is a stretch to infer from legislative novelty that every, or even many, representatives thought that a statute was a bad idea or even unnecessary. Representatives likely had different reasons—if they had any at all—for not enacting a statute.<sup>382</sup> And the absence of a statute does not mean that it would have been workable or durable.

Moreover, in the case of the *McCulloch* principle, Burkean traditions are being used as a shield—Burkeanism insulates a federal statute from a constitutional challenge. But in the case of legislative novelty, Burkean traditions are being used as a sword—Burkeanism drives a constitutional challenge to a federal statute.<sup>383</sup> When Burkean traditions function as a shield, they work together with other constitutional values, such as providing space for democratic decisionmaking. But when Burkean traditions function as a sword, they work against those constitutional values. And whatever the virtues of Burkeanism, it is not the only constitutional value.

Finally, the Court’s antinovelt rhetoric is more than just Burkeanism. Burkeanism emphasizes the value of continuity, and foreclosing change—or attempting to—is different than ensuring continuity, which would modulate any change that occurs. Congress

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382. See Adrian Vermeule, *Common Law Constitutionalism and the Limits of Reason*, 107 COLUM. L. REV. 1482, 1493–94, 1506–07 (2007) (explaining that the number of individuals in agreement matters to Burkeanism and that individuals must answer the same question).

383. See, e.g., Cass R. Sunstein, *Burkean Minimalism*, 105 MICH. L. REV. 353, 374–76 (2006) (explaining the difference between sword and shield Burkeanism).



rarely enacts legislation that upends the status quo entirely. “[I]n a society in which revolution is not the order of the day, and in which all legislation occurs against a background of customs and understandings of the way things are done,” Congress is unlikely to frequently enact statutes that upend the entire system.<sup>384</sup> Legislators use past statutes as guides. They rely on the accumulation of precedent, and they rely on whatever wisdom society has accumulated collectively.<sup>385</sup> And if change occurs through any branch of government, the legislature and executive should be used rather than the courts. Congress has certain advantages in making changes, such as acquiring the requisite information.<sup>386</sup>

*C. Second-Best Solution: The Antinovelty Principle as a Limiting Principle*

The Supreme Court has never explained why legislative novelty is evidence of a constitutional problem aside from its earlier claim that legislative novelty means that prior Congresses assumed a statute was unconstitutional. But some scholars and court of appeals judges have justified the Court’s antinovelty rhetoric as a kind of second-best solution. Their justification says that it is unrealistic to expect courts to “undo” all of the existing statutes that are inconsistent with the original understandings of constitutional federalism or the separation of powers (at least, under their account of the relevant original understandings). But a principle that called into question all *new* federal statutes could be a means to ensure that Congress does not continue to transgress constitutional limits on its powers in new ways. Take the example of *PCAOB*. For purposes of *PCAOB*, the baseline constitutional principle is that the President has control over people who administer federal law. Congressional practice and doctrine have departed from this principle, but preventing Congress from enacting “new” restrictions on presidential control is a way to ensure that Congress does not stray even further.

Judge Kavanaugh’s dissent in *PCAOB* hinted at this justification for the antinovelty principle. Judge Kavanaugh wrote, “The lack of

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384. David L. Shapiro, *Continuity and Change in Statutory Interpretation*, 67 N.Y.U. L. REV. 921, 942 (1992).

385. See Vermeule, *supra* note 382, at 1511–13 (explaining how legislators rely on accumulated wisdom).

386. See *id.* at 1508–11 (explaining how the legislature has advantages in acquiring information).

precedent for the PCAOB counsels great restraint by the Judiciary before approving this *additional* incursion on the President's Article II powers."<sup>387</sup> He also reiterated this justification for the Court's antinovelty rhetoric in a subsequent decision invalidating the CFPB's structure.<sup>388</sup> Barnett offered a similar account of why legislative novelty should matter in a lecture about *NFIB*. He argued that "all of the powers that were approved by the New Deal and Warren Courts are now to be taken as constitutional."<sup>389</sup> And because congressional power expanded significantly in the mid-20th century, "[g]oing any higher . . . requires special justification."<sup>390</sup> He concluded: "[constitutional] gestalt can be summarized as 'this far and no further'—provided 'no further' is not taken as an absolute, but merely as establishing a baseline beyond which serious justification is needed."<sup>391</sup>

This account of the Court's antinovelty rhetoric—the limiting-principle approach—does not justify a far-reaching antinovelty principle, only one that would apply when Congress has departed from—and the Court has allowed Congress to depart from—the "correct" constitutional principle. This fact makes identifying the "correct" constitutional baseline important, and it is far from clear that *PCAOB* and *NFIB* were right on this score. It is unclear whether the Constitution requires any kind of presidential execution of federal law<sup>392</sup> or whether the Constitution forbids a construction of Congress's delegated powers that would effectively amount to a police power.<sup>393</sup> Even putting that concern aside, legislative novelty should not be used as a means to limit Congress's powers by presumptively rendering unconstitutional all new federal statutes structuring agencies or presumptively rendering unconstitutional all new federal statutes on the ground that they likely exceed the scope of Congress's delegated

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387. *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 537 F.3d 667, 699 (D.C. Cir. 2008) (Kavanaugh, J., dissenting) (emphasis added). Katyal and Schmidt gestured in this direction as well. Katyal & Schmidt, *supra* note 23, at 2149 n.193.

388. *See PHH Corp. v. Consumer Fin. Prot. Bureau*, 839 F.3d 1, 7 (D.C. Cir. 2016), *vacated and reh'g en banc granted*, No. 15-1177 (D.C. Cir. Feb. 16, 2017) ("The question before us is whether we may extend the Supreme Court's *Humphrey's Executor* precedent to cover this novel . . . agency structure . . .").

389. Barnett, *supra* note 112, at 1348.

390. *Id.*

391. *Id.*

392. *See* Lawrence Lessig & Cass R. Sunstein, *The President and the Administration*, 94 COLUM. L. REV. 1, 2 (1994) (arguing, on historical grounds, that it does not).

393. *See* Primus, *supra* note 183, at 576 (positing that the principle that Congress's powers cannot add up to a police power is unsound).

powers. That approach to legislative novelty is arbitrary and difficult to administer, and it does not account for canonical precedents.

1. *Arbitrary.* Judge Kavanaugh and Barnett’s limiting-principle approach to the Court’s antinovelty rhetoric is arbitrary. Assume the correct constitutional rule is that executive officers must be removable by the President. A limiting-principle account acknowledges that the current structure of government no longer conforms to this principle and allows Congress to continue to depart from this principle, but only in ways that it has already done. That results in fairly arbitrary limits on Congress’s powers that make little sense of the constitutional principles that are purportedly at stake in these cases. For example, the D.C. Circuit maintained that the CFPB’s novelty meant that the CFPB’s structure was unconstitutional because it interfered with the President’s authority to execute federal law, “even if it does not occasion any *additional* diminishment of presidential power beyond the significant diminishment already caused by” the Supreme Court’s prior cases.<sup>394</sup>

Additionally, permitting Congress to depart from the “correct” constitutional principle implicitly recognizes that other considerations may, at times, be sufficiently important to outweigh whatever value there is in holding Congress to the “correct” constitutional rule. But that may also be the case when Congress enacts a federal statute that differs from previous statutes. Perhaps a new area of regulation calls for different treatment, or perhaps there were unintended consequences or effects from previously existing regulations. Depending on the circumstances, any of these reasons may be similarly weighty to the reliance and rule-of-law interests that require federal judges not to strike down every single federal statute that purportedly violates the original understandings of constitutional federalism or the separation of powers.

Moreover, the idea of grandfathering federal statutes without acknowledging their constitutionality is a little strange. Grandfathering is not a recognized way of deciding constitutional cases. If challenged, statutes are either upheld as constitutional, invalidated as unconstitutional, or remain as is without an assessment of their constitutionality because of various justiciability doctrines. Grandfathering in a litany of federal statutes means those statutes

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394. PHH Corp. v. Consumer Fin. Prot. Bureau, 839 F.3d 1, 34 (D.C. Cir. 2016), *vacated and reh’g en banc granted*, No. 15-1177 (D.C. Cir. Feb. 16, 2017).

would be upheld against a constitutional challenge, which implicitly recognizes that those statutes are, in some sense, constitutional. The reason they are constitutional may be because some constitutional change has occurred outside of the formal amendment process.<sup>395</sup> But the fact that there has been constitutional change should cause us to revisit what the relevant constitutional baseline is and potentially determine new statutes' constitutionality on that basis (that is, the currently existing constitutional baseline). The constitutional changes that occurred are so important and so entrenched that judges cannot roll them back, and the statutes that reflect those changes are accepted as part of the constitutional order. Instead of asking how to judicially enforce federalism given the increasing scope of congressional power, the question could instead be what the scope of federalism is in light of our constitutional practices.<sup>396</sup> And judged under this conception of constitutional federalism, a new statute may not seem out of bounds.

2. *Administrability.* Any antinovelty rhetoric raises administrability concerns because there does not appear to be a way to coherently define novelty. Using antinovelty rhetoric as a limiting principle raises additional administrability concerns because it would be difficult for judges to determine whether a statute is constitutional once they have determined that the statute is a new kind of statute.

Whether a statute is “novel” turns on whether it is similar to previous ones. Accordingly, properly identifying the scope of that past practice is an important part of determining whether the antinovelty principle even applies, that is, determining whether a statute is new.<sup>397</sup> But historical traditions—specifically, whether current statutes are similar to preexisting ones—can be defined at different levels of

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395. Various scholars have explained how constitutional change occurs outside the Article V amendment process. *See, e.g.*, WILLIAM N. ESKRIDGE, JR. & JOHN FERREJOHN, *A REPUBLIC OF STATUTES: THE NEW AMERICAN CONSTITUTION* 12–13 (2010); Bruce A. Ackerman, *The Storrs Lectures: Discovering the Constitution*, 93 *YALE L.J.* 1013, 1056–57 (1984); Strauss, *supra* note 366, at 905–06, 911–16.

396. Some may resist this claim on the ground that the “meaning” of a constitutional norm can never change. *See, e.g.*, Lawrence B. Solum, *The Fixation Thesis: The Role of Historical Fact in Original Meaning*, 91 *NOTRE DAME L. REV.* 1, 1 (2015) (explaining that the original meaning of the Constitution is fixed in time and carries forward today). Although that may be true of a provision's semantic meaning, constitutional norms may be interpreted according to their contextual meaning, intended meaning, or reasonable meaning, as well as their interpreted meaning. *See, e.g.*, Fallon, *supra* note 242, at 1252–63.

397. *E.g.*, Laurence H. Tribe & Michael C. Dorf, *Levels of Generality in the Definition of Rights*, 57 *U. CHI. L. REV.* 1057, 1088 (1990) (“Moreover, historical traditions, like rights themselves, exist at various levels of generality.”).

generality. And there does not seem to be a good—or at least consistent—way to select a level of generality at which to describe the past practices and a current statute. For example, a significant point of disagreement between the majority and the dissent in *Printz* concerned how to characterize prior practices. The dissent maintained that the statute impressing state executives into federal service fell within the historical tradition of Congress pressing state officers into federal service. The majority, however, defined the relevant historical tradition more narrowly, such that the statute fell outside of it. It maintained that Congress only impressed state judges into federal service. The opinions in *NFIB* also disagreed about how to characterize the relevant statute and the ones that came before it. They parted ways over whether Congress’s regulation of individuals who were not part of the interstate market for health care fell within the historical tradition of Congress regulating individuals who were not part of interstate markets in drugs (as in *Gonzales v. Raich*<sup>398</sup>) or wheat (as in *Wickard v. Filburn*<sup>399</sup>). Some of the opinions maintained that the statute was different because the statute directly compelled individuals to purchase an unwanted good. The same difficulty arose in *Free Enterprise Fund*: Was the relevant tradition “single for-cause removal” such that a double layer of for-cause removal fell outside of the tradition, as the majority maintained? Or was the relevant tradition “insulation” from presidential control such that the statute fell within the historical tradition, as the dissent maintained?

Under the limiting-principle approach to the Court’s antinovelty rhetoric, these determinations can change the outcome of a case. Determining whether a statute is new affects whether a statute is presumed constitutional. If the statute is “new,” judges would then determine whether the statute is constitutional based on the Constitution’s original meaning. If the statute is not new, judges would determine that existing doctrine already establishes that the statute is constitutional. The determination about how to characterize the relevant past practice involves a fair amount of choice. It is unlikely that any past practice or statute would resemble a new statute at its most specific level of abstraction; otherwise, that exact same statute would already exist. Therefore, judges will need to specify a tradition,

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398. *Gonzales v. Raich*, 545 U.S. 1 (2005).

399. *Wickard v. Filburn*, 317 U.S. 111 (1942).

beyond the one contained in the new statute, that fairly represents the statutes that have come before it.<sup>400</sup>

Courts adopting antinovely rhetoric also must choose the relevant time period to assess whether a statute is new. The cases differ about which time period includes potentially relevant congressional practice. The Court in *Printz* and *Alden* claimed that statutes enacted in the last fifty years “[were] of little relevance . . . . [T]hey [were] of such recent vintage that they [were] no more probative than the statute before [them] of a constitutional tradition that lends meaning to the text.”<sup>401</sup> The Court in *Noel Canning*, by contrast, represented that it has previously “treated practice as an important interpretive factor even when the nature or longevity of that practice [was] subject to dispute, and even when that practice began after the founding era.”<sup>402</sup> Moreover, before the Court adopted antinovely rhetoric, prior Justices had suggested in *INS v. Chadha*<sup>403</sup> that Congress’s recent enactment of many, similar statutes made it *more* likely that those statutes were *unconstitutional*: “[O]ur inquiry is sharpened rather than blunted by the fact that Congressional veto provisions are appearing with increasing frequency in statutes which delegate authority to executive and independent agencies.”<sup>404</sup>

Defining novelty is arbitrary in other ways as well. The principle appears to be concerned with the *number* of similar federal statutes—that is, has Congress, in a certain time period, enacted several similar

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400. The same difficulty of selecting a level of generality at which to define past practices also arises in the Court’s fundamental rights jurisprudence. When adjudicating a case that purportedly involves a fundamental right, judges must define what fundamental right is at issue before asking whether that fundamental right is protected by the Constitution, which in turn depends in part on whether that right has been “traditionally protected by our society.” *Michael H. v. Gerald D.*, 491 U.S. 110, 122 (1989) (plurality opinion). Two scholars who have defended the Court’s fundamental rights doctrine against charges of arbitrariness have suggested one way to save the fundamental rights doctrine is for judges to identify guiding principles and significant lines of reasoning from prior cases. *Tribe & Dorf*, *supra* note 397, at 1103–05. But the limiting-principle approach disavows as incorrect many—if not most—prior cases that might guide and constrain judges’ decisions.

401. *Printz v. United States*, 521 U.S. 898, 918 (1997).

402. *NLRB v. Noel Canning*, 134 S. Ct. 2550, 2560 (2014); *see also id.* at 2564 (“[T]hree quarters of a century of settled practice is long enough to entitle a practice to great weight in a proper interpretation of the constitutional provision.”) (citation omitted). *Noel Canning* also defined the minimum duration of an intrasession recess under the Recess Appointments Clause based on practice up until the time the case was decided. *See id.* at 2657 (“We therefore conclude, in light of historical practice, that a recess of more than 3 days but less than 10 days is presumptively too short to fall within the Clause.”).

403. *INS v. Chadha*, 462 U.S. 919 (1983).

404. *Id.* at 944.

federal statutes? But why should it not be enough that there is one longstanding one? For example, *Shelby County* suggested that the VRA preclearance regime was novel and extraordinary.<sup>405</sup> But by 2013, a voting preclearance regime had been on the books for over four decades.<sup>406</sup> Finally, who is to say what number of federal statutes might be relevant? In *PHH Corp.*, the D.C. Circuit had to distinguish three other independent agencies led by single individuals, as well as the many executive agencies that are led by single individuals.<sup>407</sup>

The limiting-principles approach to antinovelty raises additional administrability concerns because it is not clear how judges would determine whether a statute is constitutional once they have concluded that it is novel. Once a judge determines that a statute is not on all fours with previous ones, the judge is to determine whether the statute is constitutional by consulting only the original public meaning of the text without the aid of the last two hundred years of doctrine and practice. The limiting-principle approach effectively renders a large subset of the U.S. Reports nonprecedential outside of the case's specific facts because those cases are purportedly inconsistent with the Constitution's original meaning. Judges, therefore, could not rely on those cases in the ways that judges ordinarily do, by identifying their essential facts and reasoning from them. The D.C. Circuit's treatment of *Humphrey's Executor* in the *PHH Corp.* decision invalidating the CFPB's structure is instructive. The court framed the question as whether it should "extend the Supreme Court's *Humphrey's Executor* precedent,"<sup>408</sup> a decision the court of appeals implied was inconsistent with "Article II and the decision in *Myers [v. United States]*."<sup>409</sup> And instead of identifying and applying the reasons why Congress had the constitutional authority to structure federal agencies,<sup>410</sup> the court instead dismissively observed that "*Humphrey's Executor* does not mean that anything goes."<sup>411</sup>

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405. *Shelby Cty. v. Holder*, 133 S. Ct. 2612, 2624–25 (2013).

406. *Id.* at 2625 (noting that in the fifty years since adopting the preclearance requirement "things ha[d] changed dramatically").

407. *PHH Corp. v. Consumer Fin. Prot. Bureau*, 839 F.3d 1, 18–21 (D.C. Cir. 2016), *vacated and reh'g en banc granted*, No. 15-1177 (D.C. Cir. Feb. 16, 2017). On February 16, 2017, the D.C. Circuit vacated its order in *PHH Corp.* and scheduled the case to be reheard en banc on May 24, 2017.

408. *PHH Corp.*, 839 F.3d at 7.

409. *Id.* at 14.

410. Instead, the court focused on characteristics of the FTC that were noted in the opinion in *Humphrey's Executor*. *See id.* at 14–15.

411. *Id.* at 33.

That is a problem if one believes that the system of precedent under which judges reason from prior cases protects several important systemic values.<sup>412</sup> Walling off existing precedent results in considerable transition costs, such as the costs associated with developing entirely new rules. It would also undermine the rule of law—specifically, the values of uniformity and consistency—for judges to announce that, going forward, the reasoning in all previous separation-of-powers and federalism cases do not guide their decisions. There is much constitutional precedent compared to very little text, and because that judicial precedent has driven constitutional decisionmaking for decades, it would be difficult to suddenly change course.

Adopting this way of deciding cases would also preclude decisionmakers from relying on modern case law, which is one of the most easily findable and decipherable sources of constitutional law. Foreclosing reliance on precedent may be especially problematic for other constitutional decisionmakers, such as legislative and executive officials.<sup>413</sup> Federal officials, including agency staffers and congressional staffers, need to have some sense about whether the statute or regulation they are enacting is constitutional. But in a world that operates under the limiting-principle approach to legislative novelty, there will almost always be a risk that a judge will determine that a statute is new.<sup>414</sup> And if a judge determines that the statute or regulation is new, the judge will assess its constitutionality by consulting the original meaning of the enacted constitutional text. Accordingly, to try and ascertain whether a regulation or statute is constitutional, agency and congressional staffers would have to do the same. But how are they to do so? Should they conduct an archival search and immerse themselves in public thinking at the time? Federal officials are probably not well equipped to perform that inquiry, nor should they have to be. Yet the limiting-principle approach to antinovely would have the entire federal administrative branch and

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412. See generally Jeremy Waldron, *Stare Decisis and the Rule of Law: A Layered Approach*, 111 MICH. L. REV. 1 (2012) (arguing that the doctrine of stare decisis protects the principles of constancy, generality, institutional responsibility, and fidelity).

413. Randy J. Kozel, *Precedent and Reliance*, 62 EMORY L.J. 1459, 1491–92 (2013) (“Legislative and executive officials . . . necessarily operate against the backdrop of judicial precedent.”).

414. This risk is in part because operationalizing the principle is difficult, see *supra* notes 396–401 and accompanying text, and because most statutes will be new in some sense or there would be little reason to enact them.



legislative officials interpreting historical materials not readily available, or perhaps even understandable, to determine whether a federal statute or regulation is constitutional.

3. *Viability*. The limiting-principle account of antinovelty represents that many significant constitutional decisions are incorrect under its preferred approach to constitutional interpretation. It maintains that so many federal statutes are unconstitutional today that judges cannot plausibly strike them all down. The limiting-principle account of antinovelty then urges judges, going forward, to invalidate any new statute that is inconsistent with the Constitution's original meaning, and it would probably include many new statutes, given that countless existing statutes are purportedly inconsistent with the Constitution's original meaning.

It is generally considered a serious mark against a constitutional theory if it cannot account for decisions that are celebrated as key parts of our constitutional tradition. Consider these decisions that upheld “new” statutes:

- *South Carolina v. Katzenbach*<sup>415</sup> upheld the VRA, the statute that first put some southern states' election procedures under federal supervision.<sup>416</sup> In part because of that statute, “the number of African–Americans who are registered and who turn out to cast ballots has increased significantly over the last 40 years . . . . The Act has proved immensely successful at redressing racial discrimination and integrating the voting process.”<sup>417</sup>
- *Heart of Atlanta Motel v. United States*<sup>418</sup> upheld the Civil Rights Act of 1964, which banned private entities from discriminating on the basis of race.<sup>419</sup>

The limiting-principle approach to antinovelty does not require judges to invalidate these statutes if they were challenged today.<sup>420</sup> But it asks judges to apply an approach to constitutional interpretation that may have invalidated all of those statutes if it had been used to assess the constitutionality of those statutes when they were initially

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415. *South Carolina v. Katzenbach*, 383 U.S. 301 (1965).

416. *Id.* at 337.

417. *Shelby County v. Holder*, 133 S. Ct. 2612, 2625–26 (2013) (citation omitted).

418. *Heart of Atlanta Motel v. United States*, 379 U.S. 241 (1964).

419. *Id.* at 261.

420. But the Supreme Court already invalidated the VRA reauthorization. See *Shelby County*, 133 S. Ct. at 2631.

upheld.<sup>421</sup> That is a problem—constitutional theories are judged, in part, by the results they deliver, and this theory cannot get us to decisions that, on many accounts, must be justified.<sup>422</sup> Moreover, we do not know what the next *Katzenbach*, *McCulloch*, or *Heart of Atlanta* will be. There may be another federal civil rights statute, and there may be another federal statute that addresses a national economic problem. Whatever those new statutes are, the method of constitutional interpretation that judges will use seems likely to invalidate them.

#### IV. RETHINKING NOVELTY

Most of what remains of novelty is the idea that if Congress has not done something thus far, perhaps it should never be able to do so. The idea that legislative novelty is evidence of a constitutional problem accordingly suffers from some version of the is-ought fallacy—the mere fact that something has not been done thus far does not establish that it should never be done.<sup>423</sup> The Court’s antinovely rhetoric relies on a descriptive statement about what Congress has done to yield a normative conclusion about what Congress should have the authority to do for all time. To be sure, there are ways of bridging this gap and explaining why descriptive statements about congressional practice yield normative answers about the scope of Congress’s constitutional authority. But the Supreme Court has yet to attempt to bridge this gap for the antinovely principle.

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421. See, e.g., Randy E. Barnett, *Necessary and Proper*, 44 UCLA L. REV. 745, 762–63 (1999) (“Marshall’s opinion in *McCulloch* was lambasted at the time as a usurpation . . . . [T]he enumeration of powers has largely been vitiated as a limitation on the scope of the national government, due in no small measure to the influence of Justice Marshall’s opinion in *McCulloch*.”); *id.* at 751–55 (describing other original meanings of the clause); Randy E. Barnett, *Commandeering the People: Why the Individual Health Insurance Mandate Is Unconstitutional*, 5 N.Y.U. J.L. & LIBERTY 581, 594 (2010) (noting how *Heart of Atlanta* relied on an even broader construction than *McCulloch*). The Voting Rights Act was certainly new, but whether it was consistent with the Constitution’s “original meaning” is less clear. See generally Michael W. McConnell, Comment, *Institutions and Interpretation: A Critique of City of Boerne v. Flores*, 111 HARV. L. REV. 153 (1997) (arguing that Congress has broader enforcement powers under the Reconstruction Amendments than Supreme Court doctrine recognizes).

422. See Dorf, *supra* note 3, at 2030. (“More generally, it counts as a serious strike against an interpretive philosophy that it requires courts to overturn precedents that are not only part of our national culture but also celebrated as such.”).

423. See generally DAVID HUME, A TREATISE OF HUMAN NATURE 293–306 (David Fate Norton & Mary J. Norton eds., 2000) (introducing the is-ought fallacy); Eugene Volokh, *The Mechanisms of the Slippery Slope*, 116 HARV. L. REV. 1026, 1077–82 (2003) (explaining is-ought as a “heuristic,” though not necessarily a fallacy).

This Part suggests that there may still be a role for legislative novelty, but not in determining whether a statute is constitutional. Once a federal judge has determined that a statute is unconstitutional without reference to the statute's novelty, the judge could then consider the statute's novelty in deciding whether to actually invalidate the statute and ultimately hold it unconstitutional.

This approach to legislative novelty may be particularly useful in areas of underenforced constitutional norms. Professor Larry Sager initially described underenforced constitutional norms as ideals that are embodied in the Constitution but that judges, for various reasons, cannot fashion into judicially enforceable standards.<sup>424</sup> One of Sager's examples of an underenforced constitutional norm was the Equal Protection Clause: "Under th[e] federal judicial construct of the equal protection clause"<sup>425</sup> that is the "permissive strand"<sup>426</sup> of rational basis review, "only a small part of the universe of plausible claims of unequal and unjust treatment by government is seriously considered by the federal courts; the vast majority of such claims are dismissed out of hand."<sup>427</sup> When faced with a constitutional claim premised on an underenforced constitutional norm, judges may encounter a statute that offends the constitutional norm—say "unequal and unjust treatment by government"—but that is not identified as such by the doctrine designed to enforce the norm. In such a case, the court may seek to draw limited, rule-like lines that identify specific things that Congress cannot do. Used in this context, the antinovelty principle may provide some assurances that the judicially crafted rule will not have disastrous practical consequences.

There are, however, two caveats about how this kind of reliance on legislative novelty might work. The first is that the statute's novelty is not being used to determine whether a statute is unconstitutional.

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424. Lawrence Gene Sager, *Fair Measure: The Legal Status of Underenforced Constitutional Norms*, 91 HARV. L. REV. 1212, 1212–13 (1978). In Fallon's terminology, "a gap frequently, often necessarily, exists between the meaning of constitutional norms and the tests by which those norms are implemented." Richard H. Fallon, Jr., *The Supreme Court, 1996 Term—Foreword: Implementing the Constitution*, 111 HARV. L. REV. 56, 60 (1997). Another way of thinking about the relationship between doctrine and the Constitution is the distinction between interpretation and construction. See Lawrence B. Solum, *The Interpretation-Construction Distinction*, 27 CONST. COMMENT. 95, 95–96 (2010) (explaining that interpretation refers to the act of discerning constitutional meaning, whereas construction refers to how that meaning is implemented into legally enforceable rules).

425. Sager, *supra* note 424, at 1216.

426. *Id.* at 1215.

427. *Id.* at 1216.

Novelty instead enters into the analysis only once a judge has determined that a statute violates some constitutional norm based on other considerations. Those other considerations include: precedent and the reasons animating the results in prior cases (including modern cases); congressional practice, meaning whether a new statute is meaningfully different from other statutes (including recently enacted ones); constitutional text (including glosses on the text provided by doctrine and practice); historical materials not limited to particular periods in time; and considerations of substantive and moral justice.

The second caveat is that whatever rule the court fashions to explain why the statute is unconstitutional must itself be coherent. The line between what is prohibited and what is permissible must make some sense of the relevant constitutional norm—whether it be the scope of Congress’s delegated powers vis-à-vis the states or the scope of Congress’s powers vis-à-vis the other branches of the federal government. Whatever line a court draws must be able to coherently explain how an unconstitutional statute is meaningfully different from permissible ones. Used in this way, novelty could conceivably play a secondary role when judges are attempting to adjudicate vague constitutional norms. When judges want to identify a statute as unconstitutional on the basis of an underenforced constitutional norm, the fact that Congress has never passed a similar statute may provide some assurances that finding the statute unconstitutional will not result in many other statutes also being held unconstitutional.

In some ways, this account of legislative novelty is similar to how the decision in *New York* was originally premised on legislative novelty. The *New York* Court identified government practices that had, by the time of the decision, become firmly rooted and quite common, such as conditions attached to states when they received federal money. But the Court assured that the practice of ordering state legislatures to enact federal law was not similarly firmly rooted or common. The rule announced in *New York*, however, may fail the two “caveats” to relying on legislative novelty: there are strong arguments that the text, original meaning, doctrine, and other constitutional metrics aside from the statute’s novelty did not suggest that the Constitution forbids Congress from requiring state legislatures to enact federal directives.<sup>428</sup> Strong arguments could also be made to show that,

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428. See, e.g., Caminker, *supra* note 168, at 1030–60. Caminker notes, “The text does not, either explicitly or implicitly, clearly generate the Court’s sharp distinction between judicial and

with respect to the values federalism purportedly serves, federal directives are not meaningfully different from conditions attached to federal funds or conditions attached to preemption schemes, both of which are constitutionally permissible.<sup>429</sup>

### CONCLUSION

The Court's antinovely rhetoric should be abandoned. Congress's failure to enact a statute rarely reflects prior Congresses' assumption that it lacks the constitutional power to do so. Antinovely rhetoric, accordingly, should not serve as a means of incorporating Congress's constitutional assumptions into judicial constitutional interpretations. Legislative novelty is not a sign that a law is actually unconstitutional, nor should legislative novelty be used as evidence indicating that a statute is unconstitutional. Nothing in the conventional sources of constitutional law suggests that a federal statute's novelty is evidence that the statute is unconstitutional, and a presumption that novel federal statutes are unconstitutional would be difficult to operationalize in a defensible, coherent way. Using legislative novelty as evidence that a statute is unconstitutional serves little purpose, and it could prevent ordinary and legitimate congressional innovation.

Constitutional law will always, in some sense, be about change. "[I]n almost every instance of the exercise of . . . power differences are asserted from previous exercises of it and made a ground of attack."<sup>430</sup> Although novelty may precipitate constitutional challenges, it should not be used to resolve them.

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nonjudicial commandeering, and other evidence of the Framers' original intent actually counters" this distinction. *Id.* at 1059.

429. See, e.g., Neil S. Siegel, *Commandeering and Its Alternatives: A Federalism Perspective*, 59 VAND. L. REV. 1629, 1634, 1657 (2006).

430. *Hoke v. United States*, 227 U.S. 308, 320 (1913). In a dissenting opinion to *NFIB*, Justice Ginsburg cites briefs from the losing side of three landmark cases that expanded federal power, including the Brief for Petitioner in *Perez v. United States* (claiming an "unprecedented exercise of power"), the Supplemental Brief for Appellees in *Katzenbach v. McClung* (referencing a "novel assertion of federal power"), and the Brief for Appellee in *Wickard v. Filburn* (describing a "complete departure"). *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2625 (2012) (Ginsburg, J., dissenting) (first quoting Brief for Petitioner at 5, *Perez v. United States*, 402 U.S. 146 (1971) (No. 600); then quoting Supplemental Brief for Appellees at 40, *Katzenbach v. McClung*, 379 U.S. 294 (1964) (No. 543); and then quoting Brief for Appellee at 6, *Wickard v. Filburn*, 317 U.S. 111 (1942) (No. 543)).