THE ORIGINAL FUNCTIONAL CONSTITUTION:
DEMOCRATIC MEANS IN THE SERVICE OF SUBSTANTIVE ENDS

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Abstract

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In this dissertation, I propose a reconsideration within contemporary constitutional theory of the original functional character of the United States Constitution. The Founders designed the Constitution as a functional instrument of complex democratic procedures oriented toward substantive constitutional norms. It established procedural means that would function to achieve moral ends.

Constitutional theorists too often analyze only one half of this functional equation. Moral constitutionalists understand the Constitution in light of its substantive ends, diminishing the importance of constitutional procedures. And contemporary originalists too often elevate constitutional procedures at the expense of the Constitution’s moral principles. Yet, the Founders believed that the Constitution’s carefully calibrated procedures would in fact operate to secure substantive constitutional ends. An evaluation of the Constitution’s full functional character will improve our understanding of American political thought, our political and constitutional development, and the requirements of contemporary constitutional design.
The current failure to capture the Constitution’s functional operation is not unique to our own age. I begin in the first chapter by considering the pre-Civil War debates over the nature of the Constitution. I argue that those debates reflect an effort by Abraham Lincoln to salvage the original functional Constitution from those who prioritized either constitutional substance or constitutional process at the expense of the other. In defending the Union, Lincoln understood that maintenance of the original Constitution was a prerequisite for guaranteeing and extending individual rights.

I follow with two chapters that critique contemporary originalism, specifically its elaboration of the “Madisonian System” and its normative defense of democratic procedures. My own approach is an effort to recover the original Constitution, but contemporary originalist accounts are often an obstacle to this recovery.

I conclude by putting the original functional Constitution back together again. Drawing from sources rejected by both originalists and their critics—specifically James Madison’s analysis of the deficiencies of the Articles of Confederation and his recommendations for constitutional reform—I demonstrate that the original Constitution, is a functional document designed to achieve substantive results through democratic procedures, including democratic procedures in the states.
For Lee, who got me across the finish line.
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INTRODUCTION

By 1787 the architects of the United States Constitution had before them numerous examples of constitution-making. That constitutionalism rested on a shared commitment to achieving certain constitutional ends. Yet with the looming collapse of the Articles of Confederation and the demonstrated shortcomings of state constitutions, the continued guarantee of liberal constitutional norms was in doubt. The Founders boldly proposed a reformed constitutional design that would properly function in the service of constitutional ends.

James Madison summarized the difficulty of this endeavor in *Federalist* 62. According to Madison:

> A good government implies two things: first, fidelity to the object of government, which is the happiness of the people; secondly, a knowledge of the means by which that object can be best attained. Some governments are deficient in both these qualities: most governments are deficient in the first. I scruple not to assert, that, in the American governments, too little attention has been paid to the last. The federal constitution avoids this error: and what merits particular notice, it provides for the last in a mode which increases the security for the first.

In other words, just government requires a fidelity to constitutional means and a constitutional design that will secure those ends. Yet her constitutional experience demonstrated a lack of due care in designing institutions to achieve those ends.

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I believe that contemporary constitutional theory exhibits a similar lack of consideration for the institutional design of the Constitution. My hope is to recover the original functional Constitution, a Constitution established to achieve real moral ends largely through political means. To do so will require a reconsideration of the prevailing approaches, including originalist approaches, within constitutional theory.

The theoretical framework established by the debate between moral constitutionalists and originalists remains a significant impediment to a full accounting of the Constitution’s intended functional operation. Originalism is a judiciary-centric theory of constitutionalism. Its proponents argue that judges should limit the practice of interpretation to the application of the Constitution’s original meaning. This interpretive theory is the Rasputin of the legal academic world. Critics have left originalism for dead on moral, epistemological, behavioral, and historical grounds. Yet today, originalism

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4 See Sotirios Barber, *On What the Constitution Means*, Baltimore: Johns Hopkins University Press, 1984 (arguing that the ongoing supremacy of the Constitution demands that “its ways must continually be affirmed as descriptive of our best current conception of an ideal state of affairs”).


6 See Walter Murphy, *Congress and the Court*, Chicago: University of Chicago Press, 1962 (contending that while the desire to promote value preferences may coincide with a temporary and strategic commitment to judicial self-restraint, one should not expect Supreme Court justices to sublimate their value preferences to restraintist philosophy); and Jeffrey Segal and Harold Spaeth, *The Supreme Court and the Attitudinal Model*, New York: Cambridge University Press, 1993 (dismissing the prevailing “legal model” of judicial decisionmaking and replacing it with an “attitudinal model” that purports to show the generally unobstructed efforts of Supreme Court justices to instantiate their own policy preferences as law).

not only survives, but its proponents argue from a position of strength. A near majority of Supreme Court justices use it as a jurisprudential guide. And even among its judicial detractors, Justice Stephen Breyer has replaced the aggressive substantivism of Justice William Brennan with a pragmatism that accepts core originalist arguments for textual fidelity and judicial restraint.⁸ Even some within the legal academy have diminished judicial power in elaborating constitutional norms, elevating the role of citizens and their political representatives in constitutional interpretation.⁹

Today, this originalist methodology provides support for the Constitution’s federal structures and limits the power of the national government. Judges must refrain from advancing constitutional norms beyond those authorized by the Constitution’s text, and enforce constitutional limits on legislative action exceeding constitutionally authorized power. In other words, in limiting judicial enforcement of individual rights against the states and the expansion of rights through national legislation, originalists emphasize the fundamentally federal character of the Constitution and maintain the broad authority of the states to regulate the activities of their citizens.

Despite the positive reception of originalist challenges to aggressive judicial enforcement of extratextual fundamental rights, skepticism remains about the political process that would replace a substantively aggressive judiciary. Originalist critics of an activist judiciary have not proposed a fully convincing account of the role of democratic intentionalism.

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institutions, particularly state democratic institutions, in securing justice. To borrow from President Ronald Reagan, we may trust that the judiciary is not supreme, but we have yet to verify the ability of our democratic institutions to secure the moral outcomes demanded by a liberal political community.\(^\text{10}\)

The recent controversy involving the recitation of the Pledge of Allegiance in public schools highlights both the successes of those who criticize judicial activism and the failure to replace this judiciary-centered constitutionalism with a substantive faith in our political institutions. On June 26, 2002, a three judge panel of the Ninth Circuit Court of Appeals held in Newdow v. U.S. Congress that teacher-led recitation of the Pledge was an unconstitutional endorsement of religion.\(^\text{11}\) That same day, defiant members of the House of Representatives gathered outside the Capitol and protested this decision by reciting the Pledge. The Senate Majority Leader, Tom Daschle, offered his concise legal analysis—the decision was “nuts.”\(^\text{12}\) He then led a unanimous Senate in affirming support for the Pledge and instructing the Senate’s legal counsel to intervene in the case.\(^\text{13}\) The following day, the House passed its own resolution by a vote of 416 to 3, expressing the sense of the House that Newdow was wrongly decided.\(^\text{14}\)

Members of Congress appeared to understand what political scientists have confirmed. Judges do behave strategically, and a court majority is unlikely to diverge

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\(^{11}\) Newdow v. United States Congress, 292 F.3d 597 (9th Cir. 2002).


from the strongly held views of a broad national majority.\textsuperscript{15} The actions of Congress in the wake of \textit{Newdow} signaled to the Supreme Court the danger of affirming the Ninth Circuit’s decision. And the signal appears to have worked. Even though the Ninth Circuit’s decision was arguably a reasonable application of the Supreme Court’s own jurisprudence on religious endorsement,\textsuperscript{16} when the opportunity came for review, the Supreme Court punted.\textsuperscript{17} The depth of bipartisan opposition to the Ninth Circuit’s decision contributed to an unusual public focus on judicial decisionmaking. Perhaps determining that its institutional authority would be jeopardized by an unpopular decision, the Supreme Court utilized its discretionary power over its own caseload to avoid a decision on the merits.\textsuperscript{18}

Republicans and Democrats alike were comfortable applying political pressure on the federal judiciary to reject any outcome that would undermine the tradition of Pledge recitation. Yet this bipartisan criticism of the Ninth Circuit’s decision did not translate into an agreement to place constitutionally authorized institutional limits on the courts. While politicians agreed in this instance that the courts should refrain from promoting extratextual rights at the expense of democratic sensibilities, their aversion to political supervision of personal liberties remained intact.


\textsuperscript{17} Elk Grove United School District v. Newdow, 542 U.S. 1 (2004) (reversing the Court of Appeals on the ground that Newdow lacked standing to challenge the school district’s policy).

\textsuperscript{18} See Alexander Bickel, \textit{The Least Dangerous Branch: The Supreme Court at the Bar of Politics}, Indianapolis: Bobbs-Merrill, 1962.
The Pledge Protection Act\(^{19}\)—legislation that removed all lower federal court, and Supreme Court appellate, jurisdiction over the constitutionality of the Pledge of Allegiance—split Congress and provoked the following criticism by House Judiciary Committee member Congressman Jerome Nadler of New York:

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\text{[R]emember the Soviet Constitution of 1936; freedom of speech, freedom of the press, freedom of assembly, freedom to petition government, freedom of religion and antireligious propaganda, as they quaintly put it, all right there. Of course, you couldn’t enforce it because there were no courts to enforce it. It wasn’t worth the paper it was written on.}
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\text{Bills like this will make the Bill of Rights as worthless as the Soviet Constitution, and this bill is intended to do just that.}^{20}
\]

This is an unusual argument. In essence, Congressman Nadler suggests that if only the Soviets had an independent judiciary to enforce the lengthy declaration of rights included in the Soviet Constitution, the Gulag might have been avoided. As Harry Jaffa has noted, in the 1960s both the East and the West experienced political movements promoting the expansion of civil and political rights. But where the result in the West was political progress, the result in the East was brutal repression.\(^{21}\) It is hard to believe that these divergent results were owing to the presence or absence of judicial review. Still, Congressman Nadler’s assumption that the judiciary—a countermajoritarian institution—is the principal guarantor of constitutional rights, remains widely held. Political institutions are not to be trusted with matters of principle.

In my view, originalists have not adequately challenged this understanding of the judiciary, as a countermajoritarian institution and the most reliable institutional guarantor of individual rights. On the one hand, they remain committed to an understanding of the

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judiciary as a forum of principle, only challenging its tendency to guarantee rights not established within the Constitution’s text. On the other hand, their promotion of states’ rights, given the historical association of local democratic actions with hostility to civil rights, solidifies the commitment of their opponents to judicial resolution of matters involving constitutional principle.

In large part, this inability of originalism to defend the role of democratic institutions in rights protection exists because originalists share with their critics a methodology committed primarily to interpreting constitutional meaning. Contemporary originalism developed as a response to the mid-century revival of substantive due process. Seeking to limit an increasingly expansive view of the meaning of substantive constitutional principles, originalists sought to place methodological limits on the interpretation of those principles. In doing so, they too attempted to explain what the Constitution means. As a result, their commitment to democracy and judicial restraint fails to explain the Constitution’s intended operation as a complex political mechanism for securing rights. It fails to explain the Constitution’s original functional character.

I attempt to offer that explanation here, arguing that the Constitution was originally, and remains, a functionalist instrument with complex democratic procedures designed to realize particular moral ends. This functionalist account reemphasizes the political over the legal Constitution, but absent the substantive neutrality of pragmatism. It is generally assumed that federal judges, because of their life tenure and guaranteed salary, are uniquely situated within our constitutional scheme to guarantee rights.

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23 U.S. CONST. art. III, § 1.
Originalists, who otherwise challenge the contention that these attributes qualify federal judges to expand constitutional principle, do not argue with the understanding of the judiciary as a primarily countermajoritarian institution. This project is an attempt to recover the functional Constitution, explaining how the Founders structured the original Constitution to secure rights through political institutions—including democratic institutions in the states.

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Recovering this functional Constitution will require a shift in analytical focus. Constitutional functionalism builds on, but departs from, prevailing approaches to constitutional interpretation that obscure the intended mechanics of the functional Constitution. Specifically, it will shift from an analysis of the meaning of certain constitutional principles to an evaluation of constitutional purposes and the institutional mechanisms designed to secure them.

The dominant pursuit in constitutional theory remains the attempt to identify the objective meaning of the Constitution’s core substantive principles, in particular those located within the first eight amendments of the Bill of Rights and the Fourteenth Amendment. In order to legitimize enforcement of those principles by a democratically unaccountable judiciary, both liberal\(^{24}\) and conservative\(^{25}\) scholars accept that


identification of these principles demands some measure of fidelity to their original meaning.

When interpreting the Constitution’s specific provisions, historical and cultural commitments to constitutional principles of democracy and self-government,\textsuperscript{26} dignity,\textsuperscript{27} autonomy,\textsuperscript{28} equality,\textsuperscript{29} personal welfare,\textsuperscript{30} “active liberty,”\textsuperscript{31} or federalism inform the identification of constitutional meaning. The resulting evaluations of constitutional meaning do possess the luster of authority. As one example, Justice Anthony Kennedy has found that the Constitution’s Religion Clauses “mean that religious beliefs and religious expression are too precious to be either proscribed or prescribed by the State.” For him, “the design of the Constitution” suggests that the “preservation and transmission of religious beliefs and worship is a responsibility and a choice committed to the private sphere, which itself is promised the freedom to pursue that mission.”\textsuperscript{32} On the subject of

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\textsuperscript{27} \textit{See Walter Murphy, “An Ordering of Constitutional Values,” 53 Southern California Law Review 703 (1979-80).}
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\textsuperscript{28} \textit{See James Fleming, Securing Constitutional Democracy: The Case of Autonomy, Chicago: University of Chicago Press, 2006.}
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\textsuperscript{31} \textit{See Breyer, Active Liberty.}
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\textsuperscript{32} \textit{Lee v. Weisman, 505 U.S. 577, 589 (1992).}
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free speech, Justice John Paul Stevens argues that “the Constitution presumes that attempts to regulate speech are more dangerous than attempts to regulate conduct.”

For these judges, and for most constitutional theorists, the challenge of interpretation is one of properly identifying the meaning of constitutional principles prior to their application to the present case. Yet, as I believe is clear in cases involving religious liberty and speech, the historical foundations for these interpretations are often assumed rather than proven.

The often irreconcilable interpretations of the application of the same constitutional provision suggest that historical fidelity to constitutional principle is in practice a weak restraint on interpretation. A historical commitment to the constitutional principles of republicanism, liberty, the public good, or federalism in truth provides little objective guidance. It is not surprising, therefore, that moral constitutionalists, in the name of dignity or welfare, continue to recommend substantial departures from the original Constitution’s structural restraints in the name of enforcing constitutional principles, while originalists, in the name of democracy, promote a strong version of states rights with very weak roots in the original Constitution.


Recognizing the deficiencies of this approach, a growing number of scholars are sidestepping this traditional effort to advance a historically faithful interpretation of the Constitution’s substantive guarantees. Studies focused on particular constitutional provisions, as well as on American constitutionalism more broadly, demonstrate the temporal development of popular and legal interpretations of constitutional meaning. Judicial declarations notwithstanding, these scholars show that at different political moments Americans have attached varied meaning and significance to constitutional principles. In short, America’s constitutional history demonstrates the development of constitutional meaning through both legal and political practice.

This shift in constitutional scholarship is largely an outgrowth of the new institutionalist movement within political science. Those who focus on constitutional development depart from the linguistic and philosophic enterprise of traditional interpretive scholarship in favor of the political and historical considerations characteristic of new institutionalism. They reject the behavioralist suggestion that nothing stands between institutional actors and their desire and ability to promote their own policy preferences. Instead, they argue that those actors are limited by competition among institutions, as well as by the social, political, and cultural constraints within institutions. They focus, therefore, on the historical impact these exogenous and

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endogenous institutional variables have on judicial decisionmaking and constitutional development.\textsuperscript{39}

This renewed attention to the historical and institutional considerations of constitutional democracy creates a foundation, and point of departure, for my project. New institutionalists appropriately consider the role of political institutions and popular action in constitutional maintenance and development. Substantively, however, they appear to support their arguments with a political theory of pragmatism\textsuperscript{40} that is at odds with the deeply substantive commitments of the American Founding\textsuperscript{41} and the constitutional aspirations of the American people.\textsuperscript{42} And procedurally, these institutionalists give short shrift to historically reasonable concerns of constitutional regression\textsuperscript{43} and to the original constitutional framework, the meta-institution that

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actually set the parameters for the constitutional debate and development that they attempt to explain.  

A functionalist approach to the Constitution proposes to reunify the substantive ends and democratic processes of the American Constitution. Existing accounts tell only half the story. Those who promote fidelity to constitutional principles, especially moral constitutionalists, shortchange the institutions and procedures by which the Constitution sought to achieve those principles. Students of constitutional development, meanwhile, use history to explain the evolution of constitutional concepts, but diminish the enduring substantive commitments of American constitutionalism. In short, each of these approaches cleaves the substantive ends of American constitutionalism from the procedural means by which they would be realized. This functionalist account attempts to put the Constitution back together again, explaining the originally intended

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44 See Stephen Skowronek, The Politics Presidents Make, Cambridge: Harvard University Press, 1993 (analyzing America’s political development from a perspective of institutional competition, but beginning with post-ratification debates about the meaning of the Constitution, rather than with the Constitution itself. I am indebted to David Nichols for this insight about Skowronek’s work).


relationship between democratic commitments, institutional competition, and substantive ends.

A functionalist account considers how the Constitution’s institutional arrangements have worked over time to achieve moral ends, thereby linking the Constitution’s substantive commitments with America’s political and constitutional development. Contrary to the views of many students of constitutional meaning, our political institutions, not the courts, are also genuine ‘forums of principle.’ And unlike students of constitutional development, functionalism accounts for our reliance on these political institutions to secure the critical moral ends of American constitutionalism.

Functionalism ultimately diverges from efforts to identify the origins and development of constitutional meaning. Rather than ask what the Constitution means, I ask what the Founders intended the Constitution to do. Contemporary constitutional theory views constitutionalism primarily as a vehicle for transmitting certain socially important values. I challenge this assessment. The Constitution’s value comes largely from its operation. My argument that existing interpretive theories focus too closely on values embedded within the constitutional text does not deny the existence of substantive constitutional commitments, or suggest that rights are merely positive. Nor is a functionalist argument a brief against incorporation or substantive due process. Rather,


it is a modest observation that the Constitution is not primarily a vehicle for embodying values. The Constitution is a mechanism designed to secure certain values and channel political discussion about those values. Contemporary constitutional studies would benefit from greater attention to this intended operation.

* * * * *

In large measure, this project is a critique of originalist approaches to constitutional interpretation. My criticism of originalism diverges from the routine methodological and substantive challenges to this interpretive approach. Unlike those who promote moral readings of the Constitution, and pragmatic or developmental approaches to constitutional interpretation, I neither deny the possibility of discovering, nor the legitimacy of applying, the Constitution’s original meaning. Rather, I contend that the methodological focus of originalist interpretation, one actually shared by its deepest critics, leads to a chronic misidentification of the Constitution’s original purposes by contemporary originalists.

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51 This project shares much with the “Princeton School” of constitutional studies, which evaluates the ability of constitutionalism to form and maintain political communities.


These challenges to originalism do not rest, therefore, on its supposed illegitimacy as a theoretical approach. Recent advances in the historiography and political science of the American Founding show that the Constitution’s original purposes are, in fact, identifiable and that sound reasons exist for that meaning to bind us today. Yet originalist accounts, like the most advanced alternatives to those accounts, fail to do justice to that original Constitution. While I largely agree with the originalist commitment to judicial restraint and protection of democratic authority in the states, it does not describe these features as elements of a functional Constitution.

Therefore, while often critical of contemporary originalism, my excavation of the Constitution’s functional character is itself an originalist project. It is an effort to recover what James Madison described as “a system without a precedent”—a federal democratic system designed to secure and extend substantive liberties largely through political action. It is an attempt to reorient constitutional interpretation toward the original Constitution’s purposes and structure. Existing originalist accounts do not adequately identify this Madisonian system.

This functionalist account actually goes beyond originalism and is an attempt to uncover and defend original intent. Even originalists reject intentionalist interpretation for methodological reasons. Because the constitutional text alone is binding on the American people, the particular intentions of the Founders only matter insofar as they

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inform an understanding of original textual meaning. And as critics of originalism are quick to note, the disagreement over constitutional meaning among the Founders suggests the limits of intentionalism.

The power of these objections diminishes when evaluating the Constitution’s functional character—the political scientific means by which constitutional ends would be realized. Determining the intended operation of the Constitution is both possible and valuable. First, an investigation into the Constitution’s functional intent does not succumb to the principal criticisms of efforts to uncover the original intent of the Constitution’s substantive norms. Critics of intentionalism contend that recovery of original meaning falters due to a multiplicity of Founding views on the meaning of, for example, disestablishment, the freedom of speech, or personal liberty. Identifying a founding intent regarding constitutional values is, therefore, a methodological impossibility. The record pertaining to the means by which the Constitution would achieve those values provides greater clarity, however. Little disagreement existed between the Federalists and the Anti-Federalists on the substantive goals of constitutionalism. And the ratification debates actually rested on a certain agreement about the operation of the new Constitution. Disagreement emerged over the likelihood that the Constitution’s institutions would function to realize already agreed upon ends.56

And second, while individual Founders’ particular interpretations of the Constitution’s substantive principles might not bind contemporary interpreters, private analyses of the Constitution’s intended functions might provide the clearest insight into its actual operation. While The Federalist is universally recognized as an authority on

constitutional meaning, as a brief on behalf of ratification, its authors no doubt understated certain functional characteristics of the Constitution. A full understanding of its actual operation might require consideration of private beliefs and arguments of Madison, Hamilton, and others.

Neglect of the Constitution’s intended functional character distorts our understanding of the relationship between individual rights and federalism. Interpreters miscast the Madisonian Constitution as a consolidated nation solicitous of personal liberty, or as a weak union maintaining state sovereignty. They transform the Madisonian Constitution into either the unitary nation recommended by Alexander Hamilton but rejected by the convention, or a bare improvement on the Articles of Confederation. For Madison, however, the Constitution’s innovative federal arrangements maintained the states as the primary guarantors of personal liberty, while establishing a popularly responsible national government to take the helm when the states fail.

Federalism remained a necessary component of a Constitution committed to preserving personal liberty. For the Founders, the end of all legitimate governments was security for the real moral rights of persons. Those rights, and the civil rights and privileges derived from them, depended on artifice, the mechanics of constitutional institutions and procedures, including state institutions. Yet, existing accounts of constitutional federalism fail to capture the relationship of state democratic procedures to personal liberty.

Originalist proponents of a constitutionally limited national government often speak first of the rights of the states, rather than the rights of individuals. The negative
right to be left alone by the national government is grounded in a positive right of the states to do as they please vis-à-vis the individual. At the extreme, this commitment to the rights of states is explicitly juxtaposed with a philosophy of natural individual rights.\(^{57}\)

The non-functionalism of the most vocal and visible advocates of federal boundaries prevents them from challenging the dominant historical narrative of the American Founding—that the Madisonian Constitution inclines toward consolidated nationalism. Recent scholarship in the political science of the American Founding substantially amends this view.\(^{58}\) The Constitution was not a consolidationist effort. Its principal architect was not primarily concerned with expanding the powers of the national government or with correcting the deficiencies of democratic government in the states. Madison’s focus was in correcting the inherent problems with the federal form, designing the Constitution so that the general government could properly exercise the powers it already possessed.

Yet proponents of federalism do not draw on this work in history and political science. And as a result, they overstate the federal elements in the original Constitution, while presenting little analysis that would disrupt the prevailing historical consensus in favor of consolidation. Absent a functionalist account of Madison’s original


constitutionalism, originalists who advocate judicial restraint with respect to personal liberty, and judicial activism with respect to the boundaries between state and national governments, are vulnerable to the charge that the resuscitation of federalism is little more than a conservative value preference.\textsuperscript{59}

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An account of our functionalist Constitution will demonstrate that substantive rights and the constitutionally limited institutions designed to secure them stood together in the original Constitution. As Abraham Lincoln would later explain, the ends of government, expressed in the Declaration of Independence, would be achieved through the concise formulations of the Constitution. According to Lincoln, the Declaration of Independence expressed the “principle” of “‘[l]iberty to all’.” He believed that:

The assertion of that principle …was the word ‘fitly spoken’ which has proved an ‘apple of gold’ to us. The Union, and the Constitution, are the picture of silver, subsequently framed around it. The picture was made, not to conceal or destroy the apple; but to adorn, and preserve it. The picture was made for the apple—not the apple for the picture. So let us act, that neither picture, or apple, shall ever be blurred, or broken.\textsuperscript{60}


The new science of politics employed and developed within the Constitution was represented an improvement on previous human constitutional constructions, and would more reliably guarantee those rights.

A recovery of the Constitution’s functionalist political science promises both methodological and normative improvements over the existing interpretive framework. It is of greater historical accuracy than competing theories, including those of self-identified originalists. Moreover, by providing greater insight into the process of our constitutional development, it possesses an explanatory power that will allow us to evaluate the Constitution for domestic and comparative purposes.

To develop this functionalist account, I begin in my first chapter with the historical example of Abraham Lincoln. In the ante-bellum political debate over the future of slavery, Lincoln and his political contemporaries engaged in constitutional interpretation resembling our own interpretive approaches. Lincoln’s approach stands out as a functional alternative to the constitutional views of Frederick Douglass, Stephen Douglas, and Roger Taney. In contrast with their positions, and in spite of its deficiencies, Lincoln defended the original functional Constitution as the institutional means by which the Founders sought to secure substantive liberties.

I follow this historical defense of the functional character of the original Madisonian Constitution with a consideration of Robert Bork’s methodology of originalism and its relationship to the Madisonian Constitution he identifies. Bork’s influential methodology of original meaning has been subject to penetrating attention and critique. Still, embedded in his work is a political science that has not received sufficient
attention. I propose that what Bork describes as the Madisonian Constitution is, in fact, an undoing of Madison’s functional Constitution.

In my third chapter, I discuss the attempt by neo-originalists to defend constitutional restraint through an appreciation of the original constitutional value of “democracy.” I believe that this effort ultimately falls short, privileging local over national democracy without adequate historical or normative justification.

I conclude with a description of the functional Madisonian Constitution. The Founders intended that our Constitution do something. It exists to secure and maintain personal liberty, and the properly functioning democratic apparatus of the Constitution should work to secure genuinely moral constitutional ends. To uncover this functional Constitution, I look primarily to Madison’s analyses of the deficiencies of the Confederacy and determine that the accountability of republican government, including state government, remains the first institutional safeguard for individual rights. And Madison’s modification of the Confederacy and augmenting of national power did not require a supplanting of this first line of defense.

This dissertation is the first segment of what will eventually become a three-part study. I begin here by developing an independent argument for the functional purposes of the United States Constitution. Later, I will supplement this initial theoretical and historical argument with a study of America’s political and constitutional development, using several case studies to show how the Constitution has succeeded and failed to achieve articulated constitutional ends through the democratic procedures that form the heart of the document. I will conclude with a comparative study that evaluates the
expansion of experimentation with constitutionalism in light of America’s functional constitutional experience.

Though an originalist project, this should not be confused with an exercise in simple historical recovery. It is more than a history of institutions or political philosophy. It should speak to the political scientists and statesmen engaged in the project of constitutional design and development. In my view, contemporary constitutional theory often criticizes a document that it does not fully understand. The Founders intended that our Constitution secure personal liberty. In the end, theorists and citizens might, consistent with constitutional principles, determine to dismiss the Constitution as outdated or to reject it as immoral. But prior to a decision to maintain or reject the Constitution, it only seems right that we understand it and appreciate the alternatives. My hope is that this account of the functional Constitution will provide that understanding.
A theory of constitutional functionalism promises historical and substantive improvements over existing interpretive approaches. As history, it coincides with the Constitution’s original purposes and structure. As normative theory, it might encourage outcomes more consistent with liberal conceptions of justice than alternative interpretive methods that either diminish the importance of constitutional ends or ignore the institutional means necessary to achieve those ends.

Existing interpretive approaches diminish the Constitution’s functional character by separating the Constitution’s substantive from its institutional features. This theoretical division of constitutional ends and means has a precedent in American history. In the years preceding the Civil War, the Constitution’s functional origins were in similar need of restoration. Prompted by a dominant political coalition unwilling to resolve the escalating controversy over the constitutional status of slavery, Chief Justice Roger Taney attempted his own resolution of the matter through his opinion in *Dred Scott v. Sanford*. Taney claimed that his conclusions affirmed the Constitution’s moral and

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2 60 U.S. 393 (1857).
institutional treatment of slavery. In fact, however, it undermined the original
Constitution’s moral purposes, as well as its intended political operation.

Taney’s ante-bellum contemporaries responded with theories of America’s
consitutional commitments emphasizing both moral rights and democratic process, but
lacking a developed consideration of the manner by which each would serve the other.
Affirming their fidelity to the principles of natural right and self-government in the
Declaration of Independence and Constitution, these constitutionalists advocated either
the unbounded development of the Constitution’s moral concepts or a haphazard
evolution of constitutional principle through democratic choice and institutional
competition. Stephen Douglas defended a morally neutral democratic process as the
mechanism for identifying and securing personal rights. Alternatively, Frederick
Douglass promoted an aspirational approach to the Constitution’s moral commitments,
justifying his subordination of constitutional forms and procedures in the name of
securing justice and perfecting the union.

Between these poles, Abraham Lincoln attempted to restore the original
functional relationship between democratic institutions and moral principle. Scholarship
has appropriately focused on Lincoln’s argument for the philosophic relationship between
self-government and personal liberty—his challenge to Douglas that a logically
consistent theory of self-government could not countenance slavery. Yet, Lincoln’s
appreciation of the functional relationship between self-government and natural right has
received comparatively little attention.

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3 See Jaffa, Crisis of the House Divided at 302-62.

4 See Abraham Lincoln, “The Repeal of the Missouri Compromise and the Propriety of Its
Lincoln understood that Madison’s original functional Constitution established revolutionary democratic procedures in order to secure genuine moral ends, and he defended the Constitution’s institutions and procedures as the constitutional means by which justice would be most likely secured. Like his Whig predecessor Daniel Webster, who promoted “liberty and union, now and forever, one and inseparable,” Lincoln defended the Constitution’s original functionalist formula with a faith that the constitutional form of the union, its democratic institutional arrangements, would work to secure the constitutional end of justice and rights.

Using these ante-bellum constitutional debates as a point of departure, this chapter reflects on the challenges to a proper understanding of the functional Constitution in both Lincoln’s time and our own. Lincoln’s contemporaries preferred alternatives to functionalism that upset the original Constitution’s careful balance between substance and process. And today, constitutional theorists who look to Lincoln for guidance generally overlook the fundamental inseparability of constitutional principle and form in his constitutionalism. This chapter begins with an excavation of Lincoln’s functionalist defense of the original Constitution. It concludes by reconsidering a thoughtful debate between a contemporary moral constitutionalist and his originalist critic, in which each party deploys Lincoln for support, but in a manner that obscures his functionalism.

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I. Lincoln and his constitutional contemporaries

The constitutional debate generated by America’s experience with slavery elicited interpretive responses bearing a remarkable resemblance to today’s dominant frameworks for constitutional analysis. Chief Justice Taney’s opinion in Dred Scott, asserting fidelity to the original Constitution and affirming a constitutional right in slave property, inspired several competing constitutional accounts. Stephen Douglas developed his argument that our constitutional system was neutral on the question of slavery, prioritizing the Constitution’s democratic features in the evolution of constitutional meaning. That argument focused on the history and structure of American constitutionalism. Frederick Douglass, meanwhile, determined that slavery was not only immoral but unconstitutional. In arriving at this conclusion, he employed a methodology similar to that of today’s moral readers, rejecting fidelity to the particular intentions of the Founders as both historically suspect and normatively dubious.

Lincoln’s approach shared certain features with these diverse approaches, while at the same time diverging from them. Like Taney, he believed that the original Constitution commanded our respect, but he substantially rejected Taney’s analysis of the original Constitution. Like Stephen Douglas, he recognized the centrality of democratic self-government in American constitutionalism, but he denied the positivism and moral neutrality of those democratic procedures. And like Frederick Douglass, he believed that the Constitution existed to secure moral ends, but he rejected the temptation to abandon formal constitutional limitations in the pursuit of justice. Unlike his contemporaries, who severed constitutional norms from democratic processes, Lincoln trusted that in spite of certain deficiencies in the original Constitution, its institutional features were generally
capable of securing the moral ends announced in the Declaration of Independence and the Constitution’s Preamble.

The unique character of Lincoln’s functionalist constitutionalism becomes evident through the varied responses to Dred Scott. Responding to Taney, Stephen Douglas reaffirmed his commitment to popular sovereignty and Frederick Douglass suggested that original constitutional constraints deserved rejection if they maintained a fundamentally unjust institution. By contrast, Lincoln took this opportunity to embrace both aspects of the original functional Constitution, its democratic institutions and its moral commitments.

**Taney’s originalist attack on the Constitution**

Today, Dred Scott has become a symbol in the interpretive debate over the legitimacy of substantive due process analysis. Supreme Court Justice Ruth Bader Ginsburg’s exchange with Senator Orrin Hatch (R-UT) at her confirmation hearings is indicative of this now-standard approach to Taney’s opinion. Justice Ginsburg attacked the decision for its outcome. She argued that “the notion that one person could hold another person as his or her property is so—just beyond the pale.” She did not indicate, however, whether Taney’s holding was a faithful construction of the original Constitution. Rather, she relied on her own moral intuition and appeared to suggest the propriety of judges extending rights beyond those authorized in the constitutional text. Senator Hatch agreed with Ginsburg on the evil of Dred Scott, but he suggested that Taney’s sin was the judicial elaboration of a previously unrecognized constitutional right.

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to protection of slave property—America’s first example of substantive due process, with predictably destabilizing results.\textsuperscript{7}

Ginsburg’s answer suggests that a judge’s moral views might mitigate an original constitutional injustice. Hatch’s response, meanwhile, suggests that Taney’s activist assertion of his own principles, at the expense of the original Constitution, generated an immoral outcome and undermined a political resolution of the slavery debate. Moral constitutionalists blame the injustice of \textit{Dred Scott} on Taney’s originalism,\textsuperscript{8} while proponents of the Constitution’s democratic resolution of moral controversies blame Taney’s unauthorized constitutionalizing of slave property.\textsuperscript{9}

Mark Graber has convincingly challenged this use of \textit{Dred Scott}. For him, the treatment of the case by contemporary theorists demonstrates how the interpretive obsession with coming to the right answer on matters of constitutional principle precludes a richer, institutional understanding of America’s constitutional development. While he is right to question the prevailing approach to \textit{Dred Scott}, Graber also concludes that ante-bellum politics demonstrates the limits of the American Constitution to resolve deep political division and to address, what he describes as, “constitutional evils.”\textsuperscript{10} I disagree with this assessment. Like the originalists and moral constitutionalists he criticizes, Graber views \textit{Dred Scott} largely through the prism of the debate over the morality of

\begin{itemize}
\item\textsuperscript{7} Hearings Before the Committee on the Judiciary of the United States Senate, “Nomination of Ruth Bader Ginsburg to be an Associate Justice of the Supreme Court of the United States.” 103\textsuperscript{rd} Cong. S. Hrg. 103-482. July 20-23, 1993.
\item\textsuperscript{8} See Christopher Eisgruber, “Dred Again.”
\item\textsuperscript{10} Graber, \textit{Dred Scott and the Problem of Constitutional Evil}.
\end{itemize}
slavery. Yet he pays less attention to the core considerations of constitutional structure that were central to ante-bellum politics and to Taney’s own conclusions.\(^\text{11}\) Restoring these institutional considerations to their rightful place in Taney’s account, highlights the persistent challenges to the functional Constitution and the possibility of that functional Constitution to promote individual rights.

Taney believed that his fidelity to original constitutional meaning required both of the holdings in *Dred Scott*—first, slaves or their descendants could not be citizens of the United States, and second, the Missouri Compromise was unconstitutional. In fact, these rulings eviscerated the original Constitution’s moral commitments and the structural mechanisms designed to achieve those constitutional ends. Taney’s moral conclusions depended on an interpretation of constitutional structure that fundamentally altered the relation of the states to the national government. He couched his revolutionary opinion in the language of constitutional fidelity and maintenance, but in reality it commanded a revolutionary reordering of the relationship of the states to the Union.

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*Dred Scott* was explosive not merely because of its holdings. Like the gold medal basketball game at the 1972 Olympics, *Dred Scott* appeared to allow the losing team a second chance after time had expired. The Constitution appeared to authorize, and constitutional practice confirmed, the power of the national government to regulate

slavery at the margins. As a result, the union was moving slowly in the direction of freedom. Dred Scott reversed this longstanding practice.

Both the Northwest Ordinance, which flatly prohibited slavery in the Northwest Territory,12 and the Missouri Compromise, which prohibited slavery in many of the new states that would be created from the territory acquired through the Louisiana Purchase,13 suggested that the federal government had discretion over the treatment of slavery in the territories. Even as the Kansas-Nebraska Act partially repealed the Missouri Compromise,14 the transition to popular sovereignty remained a federal resolution of the status of slavery in the territories. Residents in the territories might determine the fate of slavery, but the national government delegated that power. Prior to Dred Scott, the states may have controlled slavery within their borders, but national representatives, or their delegates, would still determine the fate of slavery on federal lands.

The result, by mid-century, was an accelerating marginalization of slavery. Population growth in the North and West, accelerated by European immigration in the wake of the abortive mid-century revolutions and the Irish famine, was shifting economic and political power to the North and West.15 At the same time, the acquisition of lands from Mexico, which were not conducive to a slave economy, led to a further marginalization of slave interests. A national free-soil majority was emerging, and this majority was reflected not only in the House of Representatives but increasingly in the

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12 Northwest Territory Ordinance of 1787, 1 Stat. 51 (1787).


14 Kansas-Nebraska Act, 10 Stat. 277 (1854). See Jaffa, Crisis of the House Divided at 104-180 (discussing the intended impact of the Kansas-Nebraska Act on the Missouri Compromise).

15 Jaffa, Crisis of the House Divided at 54-7.
Senate as well. The defeat of the Lecompton Constitution in Congress and the results of the 1856 presidential election only confirmed this shift in the balance of power.16 As George Anastaplo has explained:

The more prescient leaders, South as well as North, recognized that if slavery could not grow, it would likely be suffocated as an institution. It was obvious, in any event, that the North was growing much faster than the South, both in population and industrial strength, and that it would not be long before the South would have to submit to Northern control over the Union.17

Lincoln seemed correct that the nation could not remain a “house divided.”18 Social and economic developments were generating an anti-slavery majority in the federal government, slowly but steadily bleeding the South of its political power. Taney’s opinion changed the rules of the game and jeopardized this trajectory.

The Democratic South understood the problem well enough. The Kansas-Nebraska Act, and its commitment of the slavery question to popular sovereignty, provided inadequate protection for the institution of slavery. Preservation of slavery would require Taney’s conclusions that slave property was a constitutional right and that the union’s character as a compact between the states precluded the national regulation of slavery. Of even greater consequence for partisans of slavery, Taney’s opinion suggested that decisions by states to prohibit slavery even within their borders might be unconstitutional.19 After Dred Scott the Constitution not only prohibited national regulation of slavery, it might even have prohibited state prohibition of slavery.

16 Id. at 59.


19 See Lincoln, “Address at Cooper Institute, New York, February 27, 1860,” Basler at 535. See also Don Fehrenbacher, The Dred Scott Case: Its Significance in American Law and Politics, New York:
Taney asserted that his opinion was consistent with the original Constitution’s meaning. He defended his method of reasoning as consistent with the proper judicial role in a democracy, relying on text, history and tradition for exposition of the Constitution’s meaning. Notwithstanding this assertion, Taney’s opinion misrepresented both the substantive and institutional features of the original Constitution.

Prior to considering the merits of Dred Scott’s case, the Taney Court encountered a procedural question—did Dred Scott have standing to sue in federal court? One of the privileges of U.S. citizenship is the ability to sue in federal court. The question of Dred Scott’s standing turned, therefore, on whether the descendants of slaves were citizens of the United States.20 Taney concluded that the Founders did not intend for the descendants of slaves to be included as members of the sovereign American people.21 He looked to whether they were embraced as such “at that time” when the Constitution was adopted.22 His analysis of the Constitution’s original meaning considered “the legislation and histories of the times,” including pre-Independence attitudes, state legislation in the North and South, the Declaration of Independence, the Constitution, and post-ratification administration.23

Taney began with the public attitudes that presumably informed legislation and America’s constitutional documents. Looking to the “public history of every European

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20 Dred Scott, 60 U.S. at 403.
21 Id. at 404-5.
22 Id. at 406.
23 Id. at 407.
nation,” he concluded that the inferior character of blacks was an unquestioned assumption among the Founders and their contemporaries. This opinion was “fixed and universal,” an “axiom in morals as well as in politics, which no one thought of disputing.” In other words, it was the commonsense of the matter that blacks were outside the political community not only as a matter of political necessity but as a matter of natural equality. According to Taney, this attitude was nowhere “more firmly fixed” than in England, which then transmitted these opinions to the American colonies. 24

Taney buttressed this finding with legislative history. Colonial legislation addressing the races confirmed that the attitudes of the Founding generation assumed the natural inferiority of blacks. 25 So too did the Declaration of Independence, 26 which did not include blacks “in the general words used in that instrument.” 27 Turning to the Constitution, he argued that the provision addressing the slave trade 28 and the Fugitive Slave Clause 29 “point directly and specifically to the negro race as a separate class of persons, and show clearly that they were not regarded as a portion of the people or citizens of the Government then formed.” 30 Admitting that some states emancipated slaves during the Founding era, he suggested that these developments stemmed from a

24 Id. at 407-8.
25 Id. at 408-9.
26 Id. at 409-10.
27 Id. at 407.
28 U.S. CONST. art. I, § 9, cl. 1.
29 U.S. CONST. art. IV, § 2, cl. 3.
determination that slavery lacked economic viability, not from “any change of opinion in relation to this race.”

Again, Taney’s holding that the Founders purposefully excluded descendants of African slaves from the political community was purportedly originalist. He relied on text, history, and tradition in determining constitutional meaning. Furthermore, he affirmed a principle of judicial restraint, denying himself the power to depart from that original meaning, even when an unassisted analysis of the text, or contemporary moral and political developments, justified an expansive interpretation of constitutional principle.

Taney suggested that the post-Founding experience had been one of positive developments in public attitudes toward African slaves and their descendants. He explained that for contemporary political communities it was difficult to comprehend:

> The state of public opinion in relation to that unfortunate race, which prevailed in the civilized and enlightened portion of the world at the time of the Declaration of Independence, and when the Constitution of the United States was framed and adopted.

According to Taney, he and his contemporaries had adopted progressive attitudes on race. They increasingly recognized the moral views embedded in the original Constitution as retrograde.

Still, Taney rejected any assertion that subsequent moral and attitudinal developments authorize judicial departure from the views embodied in the Constitution. This restraint was necessary in part because the constitutional text admitted of a more

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31 Dred Scott, 60 U.S. at 412-16.
32 Id. at 407.
33 Compare Abraham Lincoln, “The Dred Scott Decision: Speech at Springfield, Illinois, June 26, 1857,” Basler at 358 (arguing that the opinion of blacks had regressed over time and that the Founders had comparatively progressive views on race).
liberal interpretation. Taney acknowledged that “the general words” of the Declaration of Independence “would seem to embrace the whole human family, and if they were used in a similar instrument at this day would be so understood.” Nonetheless, he did not have the authority to depart from the meaning of that text, as understood by its creators.

As a judge claimed it was illegitimate to supplant his own moral views for those established within the Constitution.

Taney explained:

No one, we presume, supposes that any change in public opinion or feeling, in relation to this unfortunate race, in the civilized nations of Europe or in this country, should induce the court to give to the words of the Constitution a more liberal construction in their favor than they were intended to bear when the instrument was framed and adopted. Such an argument would be altogether inadmissible in any tribunal called on to interpret it. If any of its provisions are deemed unjust, there is a mode prescribed in the instrument itself by which it may be amended; but while it remains unaltered, it must be construed now as it was understood at the time of its adoption.

This understanding of the limits of judicial power shares much with the contemporary originalist argument that a judge acts illegitimately and extra-constitutionally when he makes law rather than interprets and applies existing law.

For Taney, the Constitution charges democratically accountable institutions with making new law and correcting existing law. The proper method for constitutional change, an alteration of the supreme law, is the super-majoritarian amendment process. Judges, by contrast, engage in an interpretive enterprise, and their duty is to apply the law as understood by those who crafted it. “Any other rule of construction,” Taney maintained, “would abrogate the judicial character of this court, and make it the mere reflex of the popular opinion or passion of the day.” Judges have an institutional

34 *Dred Scott*, 60 U.S. at 410.
35 *Id.* at 426.
obligation to apply the law to particular cases, and as guardians of the law they must resist temptations to replace the intended meaning of legal texts with their own policy preferences. Taney’s originalist bent coincided with a commitment to judicial power. For him, judges must not simply reflect popular opinion. “Higher and graver trusts have been confided” to judges, and they “must not falter in the path of duty.”

Taney’s commitment to apply the law as originally understood extended to his treatment of the Constitution’s institutional operation as well. And like his interpretation of the constitutional status of blacks, his structural analysis is deficient. Yet, his treatment of the Missouri Compromise ran against both text and tradition, both of which appeared to authorize federal regulation of slavery in the territories. He suggested that his holding on the Missouri Compromise was a restoration of the Constitution’s original meaning. In fact, however, this part of his opinion constitutionalized an interpretation of the federal union that was at odds with the original Constitution’s functional character, and that would later justify secession.

The Missouri Compromise, by prohibiting slavery in the remaining unorganized federal territory, relied on an apparent constitutional authorization of plenary legislative authority over the territories. The longevity of acquiescence in this view of the constitutional warrant “to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States” lent it considerable legitimacy. Taney concluded, however, that the Constitution limited federal regulation of the territories to those territories owned at the time of ratification.

36 Id.

37 U.S. CONST, art. IV, § 3, cl. 2.
Reviewing both “the careful and measured terms in which the article is framed,” and “the history of the times,”38 he found that the language and history of the congressional power linked it specifically to the organization of Western lands ceded to the national government by the states.

According to Taney, the individual sovereigns of the confederacy ceded their Western lands to the general government. Prior to the Constitution, he explained, those lands belonged to the states as common property. Ratification of the Constitution dissolved the Confederacy, and the states “surrender[ed] a portion of their individual sovereignty to the new Government, which, for certain purposes, would make the people of the several States one people.”39 Among the limited powers given to the new national government was the power to dispose of these ceded lands.

The Constitution, therefore, did not provide Congress with plenary authority over slavery in the territories. Instead, the scope of the congressional power to regulate the territories depended on the timing of the government’s acquisition of the territories.

Taney elaborated:

This league of States would, upon the adoption of the new Government, cease to have any power over the territory, and the ordinance they had agreed upon be incapable of execution, and a mere nullity, it was obvious that some provision was necessary to give the new Government sufficient powers to enable it to carry into effect the objects for which it was ceded, and the compacts and agreements which the States had made with each other in the exercise of their powers of sovereignty.40

The scope of this power must be understood in light of the circumstances that required it.

Taney continued:

38 Dred Scott, 60 U.S. at 432.
39 Id. at 435.
40 Id.
It was intended for a specific purpose, to provide for the things we have mentioned. It was to transfer to the new Government the property then held in common by the States, and to give to that Government powers to apply it to the objects for which it had been destined by mutual agreement among the States before this league was dissolved. It applied only to the property which the States held in common at that time, and has no reference whatever to any territory or other property which the new sovereign might afterwards itself acquire.  

The text itself is open to a broader interpretation of congressional power, but “whatever construction may now be given to those words,” an analysis of the provision’s historical purposes limits its scope. In the case of the ceded Western lands, the national government would act as a representative of one American people. In all future cases, however, the federal government would be the caretaker of the diverse state communities.

Though Taney tried to support his institutional analysis with text and history, it is clear that the critical holding in the decision depends on a characterization of the federal union for which Taney provides no evidence. According to Taney, the Constitution was “formed by the people of the United States, that is to say, by those who were members of the different political communities in the several states.” His analysis of the scope of Congressional authority over the territories suggests that the states reserved to themselves core attributes of sovereignty even after the Constitution’s ratification.

This interpretation severely undercut the authority of the national government and undermined the functional character of the Constitution. Taney argued that the national government’s power to enlarge territory existed solely for the purpose of admitting new states. And in admitting those states, the national government did not act on behalf of an undifferentiated sovereign people. Instead, it acted as a “trustee” for the states:

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41 *Id.* at 436.

42 *Id.* at 436-37.

43 *Id.* at 411.
Whatever it acquires, it acquires for the benefit of the people of the several States who created it. It is their trustee acting for them, and charged with the duty of promoting the interests of the whole people of the Union in the exercise of the powers specifically granted.\textsuperscript{44}

Taney appears to conclude that state participation in the ratification of the Constitution confirmed the constitutional sovereignty of the states, a sovereignty that serves as a supervening limit on the otherwise appropriate exercise of national power.

Taney’s “trustee” theory is an indirect challenge to the liberal ends of American constitutionalism and to the enforcement of federal law. It undermines the liberal foundations of the Constitution by suggesting that the powers of the national government are those delegated by the states. This theory of the Constitution’s origins follows from a view of sovereignty in which the states possess a general police power over their citizens, delegating only a portion of it to the national government. The residual sovereignty in the states remains complete, allowing no external restraints on state regulations. Taney’s understanding of state power is more consistent with the pre-liberal constitutionalism of Thomas Hobbes, than with the liberal constitutionalism promoted by John Locke and absorbed by the Founders.

Furthermore, Taney’s theory unjustifiably restrains national power, limiting the powers of the national government to those “specifically” granted by the states. And even when Congress exercises its properly delegated powers, the states continue to possess an external check over national institutions.\textsuperscript{45} Taney’s understanding of state checks on national power is a close cousin to nullification. It does not arm the states with

\textsuperscript{44} \textit{Id.} at 448.

the power of a veto over national law or a power of secession. Instead, the power of the national government ebbs and flows according to the impact of regulations on the sovereignty of the states.

Taney does not support this vision of the federal relationship with historical evidence. Rather, his reasoning is deductive. Because the states are the parties to the constitutional contract, the powers of the national government should not be interpreted in a manner that would diminish the power of any one state. After all, the slaveholding states in their collective capacity would not have “consented to a Constitution” that would compel recognition of a citizen from another state.\(^46\) The fact that a federal judge, rather than a state legislature, affirmed this theory of the Constitution cloaks its destabilizing character. Yet, it is not too difficult to identify the relationship between Taney’s theory and a theory of nullification that was the forerunner of constitutional arguments for secession.\(^47\) If the states are the parties to the constitutional compact, and the federal government acts as their trustee, a breach of that trust might justify a severing of constitutional allegiance.

Taney’s opinion, therefore, was problematic not only for its conclusions about the moral and legal status of slaves and their descendants, but also for its institutional implications. The historical claim that the Constitution was a compact not simply between states, but between Northern states hostile or ambivalent to slavery and Southern states protective of slavery was central to his holding. And this theory of the union

\(^46\) *Dred Scott*, 60 U.S. at 416-17.

\(^47\) *See* John Calhoun, “South Carolina Exposition and Protest, December 19, 1828,” Lence at 311-66.
would later justify secession on the grounds that the North failed to uphold its part of the constitutional agreement.  

Taney’s argument fully disintegrated the functional relationship between substance and process in the Constitution. His political theory undercut the Constitution’s moral norms, and his political science buttressed the proponents of secession. In response, thoughtful constitutionalists attempted to put the original Constitution back together again. The approaches of Stephen Douglas and Frederick Douglass were partially successful. Similar to contemporary originalists, Stephen Douglas emphasized the constitutional value of democratic self-government in the states and territories, and a national resolution of the moral controversy over slavery. Frederick Douglass, meanwhile, prioritized constitutional commitments to liberty and equality in arguing that slavery was in fact unconstitutional. Each of these accounts failed to fully apprehend the Constitution’s functional character. Stephen Douglas promoted the Constitution’s democratic process, and Frederick Douglass promoted the Constitution’s moral foundations. Neither adequately considered, however, the relationship between the democratic means and moral ends of American constitutionalism.

The democratic constitutionalism of Stephen Douglas

*Dred Scott* contributed significantly to the demise of Stephen Douglas’ national political career. Through *Dred Scott*, Taney had attempted a national resolution of the

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48 Reviewing the place of religion in American constitutionalism, Charles Colson has developed a structurally similar argument. He contends that the original Constitution was a compact between religious believers and secular rationalists, with each side agreeing to tolerate the other. According to Colson, the political and judicial culture has become so hostile to religious persons that the agreement is nullified, and he suggests that religious persons no longer owe continued allegiance to the constitutional compact. See Charles Colson, “Kingdoms in Conflict,” in Mitchell Muncy, ed. *The End of Democracy?*, Dallas: Spence, 1997.
increasingly destabilizing debate over slavery. His conclusion that the Fifth Amendment guaranteed a constitutional right in slave property, suggested to many that advocates of slavery were transforming the Constitution into a pro-slavery instrument. After Dred Scott, many came to agree with Lincoln that the Union would not likely remain half-slave and half-free.

The political resolution proposed by Dred Scott was a direct challenge to Douglas’ own attempted navigation of the slavery controversy through the theory of popular sovereignty. Against Republicans and Democrats who believed that national institutions should resolve the controversy over slavery, Stephen Douglas attempted to stabilize national politics through decentralization of the slavery debate. He urged national neutrality on the issue, commending its resolution to popular decisionmaking in the states and territories. Even as it was increasingly clear that it was politically untenable, Douglas offered his most comprehensive defense of his position in his Harper’s article, “The Dividing Line Between Federal and Local Authority.” His argument in that essay highlights his commitment to recapturing a constitutionalism of limited national power from the illiberal and secessionist implications of Taney’s approach.

49 Dred Scott, 60 U.S. at 449-452.


As a result of Justice Taney’s decision in Dred Scott and Lincoln’s positioning during the 1858 contest in Illinois, Douglas’ promotion of popular sovereignty had become a burdensome political position. In 1858, and in the wake of Dred Scott, Douglas found himself on the wrong side of both Republicans and Democrats. The anti-slavery Douglas believed that the institutions of the federal government would be unable to sustain the accelerating nationalization of the slavery controversy. He intended for the Kansas-Nebraska act to release some of this pressure, allowing national institutions the ability to function by decentralizing the controversy and relocating it in the territories and states. His proposal of popular sovereignty and national neutrality would, in Douglas’ view, contribute to the expansion of free territory, while establishing him as a national Democratic leader with cross-sectional appeal.53

First the Lecompton Constitution, and then Dred Scott, jeopardized Douglas’ strategy. Douglas’ principle of popular sovereignty had its first test in the Kansas Territory. The result was chaotic and failed to relieve Congress of its decisionmaking responsibilities over slavery in the territories. Kansas approved by referenda, and referred to Congress, both pro-slavery and free-soil constitutions. The delegate selection for the convention that produced the pro-slavery Lecompton Constitution was marked by fraud. Moreover, the referendum on Lecompton was not on the Constitution as a whole, but rather on the slave issue alone. In spite of these procedural deficiencies, President

53 See Jaffa, Crisis of the House Divided at 41-62.
James Buchanan and Southern Democrats supported the Lecompton Constitution. Douglas, however, rejected the fraud-ridden Lecompton Constitution as inconsistent with the principle of popular sovereignty. Douglas’ hoped-for national neutrality on slavery remained elusive.

Dred Scott further undermined the promise of popular sovereignty. Lincoln claimed that the decision’s affirmation of a constitutional right to slave property eviscerated Douglas’ principle of popular sovereignty. If slave property received constitutional protection, neither Congress nor the people in the states and territories could deprive persons of it. Lincoln pressed this point relentlessly in their debates, asking Douglas whether the territories could continue to prohibit slavery following Dred Scott.

On August 27, 1858, at their debate in Freeport, Illinois, Douglas responded. He claimed that even after Dred Scott the territories could choose to protect slavery. In the short-run, the “Freeport Doctrine” worked, as the Illinois state legislature elected Douglas to the United States Senate. It was a long-term failure, however, because it further marginalized Douglas within the national Democratic Party. Douglas’ political demise ensured that the 1860 presidential election would be a sectional contest that the Democratic South could not win. In short, Douglas’ consistent reaffirmation of popular sovereignty helped to secure Lincoln’s 1860 victory. Nevertheless, Douglas remained a proponent of popular sovereignty, even as it undermined his political viability. A consideration of Douglas’ position in his Harper’s article reveals important differences

54 Id. at 349-57.

55 Compare Graber, Dred Scott and the Problem of Constitutional Evil (diminishing the impact of Dred Scott on the bisectional appeal of the Democratic Party) with Jaffa, Crisis of the House Divided.
between his and Taney’s understanding of the relationship between the states and the union.

For Douglas, the overarching commitment of American constitutionalism was to democratic liberty, particularly the rights of states and territories to decide important moral questions on their own. He explained that

The principle, under our political system, is *that every distinct political Community, loyal to the Constitution and the Union, is entitled to all the rights, privileges, and immunities of self-government in respect of their local concerns and internal policy, subject only to the Constitution of the United States.*

This is how Harry Jaffa summarized Douglas’ position. According to Jaffa:

The principle of popular sovereignty meant the principle whereby each distinct political community, whether state or territory, determined for itself the institutions by which its daily life was lived, subject only to those general rules, embodied in the Constitution, which guaranteed to each its equal right to pursue its own way.

Jaffa’s explanation does seem to overstate the power of the states within the theory of popular sovereignty. Jaffa indicates that the constitutional restraints on the states are no restraints at all. Constitutional procedures exist to guarantee state liberty. In Jaffa’s telling, Douglas’ understanding of the Constitution’s federal features is a close cousin of Calhoun’s and Taney’s compact theory. Douglas’ statement, however, suggests that the states are free to act but for instances where constitutional rules restrain the states. Furthermore, he suggests that states might lose the privilege of self-government if they withdrew from the union. The states are not simply free to do as they please. In fact, Douglas indicates that disobedience would jeopardize state liberty. Whereas for Calhoun, disloyalty to the Constitution is the most important right of the states, for Douglas, disloyalty to the Constitution would deprive the states of rights. Where Taney’s

56 Douglas, “Dividing Line Between Federal and Local Authority,” at 537.

view of the states worked to establish an external check on the national government, Douglas seemed to affirm the limits on state power established by the Constitution.

For Douglas the critical question for statesmen was the process by which the slavery controversy would be resolved. To answer it, he turned to the first principles of American constitutionalism. The paramount question of constitutional law, according to Douglas, is the division of power between the national and state governments. The “first duty of American statesmen” is to “mark distinctly the dividing line between Federal and Local Authority.” Douglas drew this line only after a historical analysis informed by his understanding of the constitutional principle of self-government.

Douglas did not deny that the states maintained considerable powers following ratification. As he asserted at his debate with Lincoln at Ottawa, Illinois, “each and every State of this Union is a sovereign power.” He claimed that “this doctrine of Mr. Lincoln, of uniformity among the institutions of the different States, is a new doctrine, never dreamed of by Washington, Madison, or the framers of this Government.” Lincoln and the Republican Party, “set themselves up as wiser than these men who made this Government, which has flourished for 70 years under the principle of popular sovereignty, recognizing the right of each state to do as it pleased.” Douglas proposed to restore this constitutionalism against challenges posed by both Taney and Lincoln.

For Douglas, the experience of the conflict between the colonies and Great Britain confirmed the importance of the principle of self-government and its relationship to a

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national government of limited authority. In Douglas’ account, the decision of the American colonists to declare independence was a last, not a first, step. “For a long series of years,” he wrote, the colonists “remonstrated against the violation of their inalienable rights of self-government under the British Constitution, and humbly petitioned for the redress of their grievances.” Only after determining that the central government “had violated this inalienable right of local self-government by a long series of acts on a great variety of subjects did they revolt.”

The genesis of the American Revolution was a breakdown in communication between Britain and her colonies. The practical consideration of distance led Great Britain to accord the colonies a substantial degree of autonomy, without ever renouncing a residual authority to govern the colonies from Britain. The colonists, however, had come to understand this effective autonomy as a right, not a privilege, and when King and Parliament attempted to reassert control over the colonies beginning in the middle part of the eighteenth century, they were unprepared for the colonists’ reaction. The colonists understanding of constitutionalism had evolved in a direction that took the British by surprise. They had anticipated the theory of the Empire as a dominion—the King remained sovereign, but local representative assemblies, not the British parliament, would have the authority to govern within the dominion states.

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61 Id.
62 Id.
Douglas had a rich understanding of the constitutional origins of the Revolution. In the eyes of the colonists, the British violation of colonial rights to self-government was a violation of the British constitution itself. It was only after the British government altered the terms of its arrangement allowing the colonies govern themselves that the colonists slowly turned toward independence. The colonists cherished the British constitution. Their argument to reestablish colonial self-government was “clearly defined and distinctly marked on every page of history which records the great events of that immortal struggle.” Only when the colonists concluded that the King and Parliament had permanently altered the constitutional arrangement of colonial self-government, threatening their rights, did they become revolutionaries.\(^{65}\)

Douglas then analogized the threat to colonial self-government by Britain to the threat posed by the regulation of slavery by the national government. The British constitution and the colonial charters guaranteed to the colonies “the rights and privileges of self-government, in the management of their internal affairs and domestic concerns.”\(^{66}\)

For Douglas, the Revolution demanded:

> The inestimable right of Local Self-Government under the British Constitution, the right of every distinct political community—dependent Colonies, Territories, and Provinces, as well as sovereign States—to make their own local laws, form their own domestic institutions, and manage their own internal affairs in their own way, subject only to the Constitution of Great Britain as the paramount law of the Empire.\(^{67}\)

Though the empire had power over external affairs, and commercial and monetary regulations, the power to govern in purely intra-colonial affairs resided with the people in the colonies.

\(^{65}\) Douglas, “Dividing Line Between Federal and Local Authority,” at 521.

\(^{66}\) Id.

\(^{67}\) Id. at 521.
The analogy is clear. As the empire was to the colonies under the British Constitution, so the federal government was to the territories under the U.S. Constitution. The powers of both general governments were limited to activities that could benefit from economies of scale and that would prevent unproductive competition between federation members. The component political communities retained the “inalienable right of local self-government” in all other respects. The experience of the colonies demonstrated that this was the right that they sought to protect through their revolution and subsequent constitution-making.\textsuperscript{68} The fact that the first territories ceded to the national government had their right to self-government protected by the Continental Congress confirmed the centrality of this democratic principle to the Revolution.\textsuperscript{69}

The experience with Great Britain informed the creation of the Constitution and its treatment of the national territories. The “dividing line between Federal and Local authority was familiar to the framers of the Constitution.”\textsuperscript{70} Douglas concluded that the Constitution similarly limited the powers of the new national government. The power of Congress to exercise authority over the territories was not an authorization to exceed that delegated authority. Congress’ powers remained limited to those enumerated for the purpose of securing the general welfare, or truly national aims. The mere existence of a constitutional power to regulate the territories did not give Congress \textit{carte blanche} to exercise powers over purely domestic matters that it did not otherwise possess.

In other words, for Douglas Congress had two powers with respect to the territories. First, it had the power to organize the territories for self-government. And

\begin{itemize}
  \item \textsuperscript{68} Id. at 522-24.
  \item \textsuperscript{69} Id. at 524-26.
  \item \textsuperscript{70} Id. at 521.
\end{itemize}
second, it had the power to confer on those self-governing entities, powers of governance that Congress did not itself possess. Douglas explained:

Congress may...confer upon the legislative departments of the Territories certain legislative powers which it can not itself exercise, and only such as Congress can not exercise under the Constitution. The powers which Congress may thus confer but can not exercise, are such as relate to the domestic affairs and internal polity of the Territory, and do not affect the general welfare of the Republic.\(^71\)

Congress cannot delegate its own powers to the territories, but it may “invest [those territories] with powers which [it] does not possess and can not exercise under the Constitution.”\(^72\)

Douglas buttressed these historically grounded conclusions with two structural arguments, comparing the power over the territories with the Congressional power over the judiciary and over the District of Columbia.\(^73\) He explained that the existence of a power to establish the judiciary does not give Congress the constitutional authority to judge cases. Similarly, the power to organize the territories should not give Congress the power to govern them. He then compared the power over the territories with the power to govern the federal district. Congress’ power to govern the district is located within Article I,\(^74\) therefore establishing Congress’ complete regulatory authority over the District. By contrast, the Constitution locates the power to regulate the territories in Article IV.\(^75\) From these structural analyses, he inferred something less than a plenary authority for Congress over the territories.

\(^71\) Id..

\(^72\) Id. at 520.

\(^73\) Id. at 528.

\(^74\) U.S. CONST. art. I, § 8.

\(^75\) U.S. CONST. art. IV, § 3, cl. 2.
Douglas’ arguments suggest several subtle, but important, differences with Taney’s view of the Constitution. Where Taney’s federalism established the states as an external check on otherwise appropriate congressional action, Douglas focused on the categorical limits that enumeration placed on the scope of Congress’ legislative power. This difference is most apparent in Douglas' comparison of regulation in the territories and in the District of Columbia. Taney’s “trustee” theory of the Union would appear to deprive the national government of plenary authority on any matter. Even where Congress appeared to possess plenary regulatory authority, as with the District of Columbia, the states maintained an external check on congressional action. Therefore, Taney’s theory would appear to deny to the national government the authority to regulate slavery in the District. Douglas did not go this far. While his understanding of American federalism included strong states, he did not deprive the national government of its rightful powers under the Constitution.

Particularly when compared with Taney’s constitutionalism, Douglas’ approach is an improvement from an originalist perspective. In particular, his commitment to democratic self-government in the states and territories was not a precursor to secession. At the same time, however, his commitment to popular sovereignty did not adequately defend the Constitution’s moral purposes. While neutrality on the issue of slavery was an improvement over Taney’s holding that the Constitution affirmatively protected slave property, it understated the Constitution’s substantive ends. By failing to link his principle of democratic self-government to the substantive moral guarantees of American constitutionalism, Douglas fell short of articulating the richness of the functional Constitution.
The moral reading of Frederick Douglass

Like Stephen Douglas, Frederick Douglass asserted his fidelity to original constitutional principles. But while Stephen Douglas argued for the primacy of the constitutional principle of democratic self-government, Frederick Douglass determined that the critical constitutional question was the morality of slavery. Frederick Douglass appropriately refocused attention on the original moral purposes of the Constitution, purposes undermined by Taney and Douglas. Yet, he devoted scant attention to the means by which the original Constitution would function to secure the substantive liberties so central to his moral reading.

Douglass was not always an advocate for constitutional fidelity. Only after severing his ties with William Garrison and other like-minded abolitionists did he commit himself to the moral authority of the Constitution. This abolitionist schism originated in a disputed interpretation of the Constitution.76 Garrisonian abolitionists essentially subscribed to Taney’s theory of the Constitution. The Constitution was a compact between Northern and Southern states designed to protect slavery. According to a resolution adopted by the Massachusetts Anti-Slavery Society, the constitutional union was a “covenant with death and an agreement with hell.” The resolution urged that the constitutional compact between North and South “be immediately annulled.”77 For these Garrisonians, there could be “no union with slaveholders.”78


Douglass agreed that the critical constitutional questions were whether the nation’s supreme law “guarantee[d] to any class or description of people…the right to enslave, or hold as property, any other class or description of people,” and whether “dissolution of the union between the slave and free States [was] required by fidelity to the slaves, or by the just demands of conscience.”

If, as suggested by Justice Taney in Dred Scott, the Constitution was a pro-slavery document, one that did not merely make prudential concessions to slavery, but rather guaranteed a fundamental right in slave property, then the moral obligation of citizens to support the Constitution collapsed.

Douglass, however, came to reject the Garrisonian interpretation of the Constitution on both prudential and interpretive grounds. As a prudential matter, Garrison’s determination to shatter the Constitution was counterproductive, as secession by North or South would undermine the moral ends sought by the abolitionists. While sympathetic to this practical argument, Douglass also rejected Garrison’s construction of the Constitution. Douglass argued that those who interpret the Constitution as a pro-slavery instrument corrupt its meaning. Adopting a reading of the plain language of the Constitution’s text, he rejected the Garrisonian interpretation of the Constitution, and concluded that the Constitution positively rejected chattel slavery.

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80 See Fehrenbacher, The Dred Scott Decision at 335-64. See also Douglass, “The Dred Scott Decision, May 11, 1857,” Foner at 407-424.

Douglass understood the Constitution as a charter for personal liberty, and he became its champion. In his break with Garrison, Douglass explained he:

Had arrived at the firm conviction that the Constitution, construed in the light of well established rules of legal interpretation, might be made consistent in its details with the noble purposes avowed in its preamble; and that hereafter we should insist upon the application of such rules to that instrument, and demand that it be wielded in behalf of emancipation.\(^\text{82}\)

Douglass rejected the pro-slavery interpretation of the Constitution as historically suspect and normatively dubious. Traditional methods of interpretation, evaluating law in light of the ends dictating its enactment, demonstrated that slavery was an unconstitutional deprivation of liberty.

Douglas delivered his most elaborate views on constitutional interpretation and the moral purposes of American constitutionalism in a speech in Glasgow, Scotland on March 26, 1860. The interpretive methodology he adopted was similar to the approach of today’s moral constitutionalists who promote contemporary elaborations of the Constitution’s deep moral concepts. Challenging what he perceived as an intentionalist methodology that undermined the Constitution’s moral purpose, he advocated instead a methodology similar to a plain-word, moral reading of the instrument.

Today the opponents of originalism frequently deploy two methodological critiques. Frederick Douglass’ criticism of the pro-slavery Constitution utilized both. First, original intent is impossible to capture. The existence of multiple Founders presents an obstacle for those who wish to locate the Constitution’s founding intent as though it were the product of a single law-giver.\(^\text{83}\) More radically, post-Founding


\(^{83}\) See Paul Brest, “Misconceived Quest for Original Understanding”; Walter Murphy, “Review: Constitutional Interpretation”; and Segal and Spaeth, The Supreme Court and the Attitudinal Model.
historical developments make recovery impossible as a hermeneutic enterprise. Second, supposing interpretation could reveal a Founding intent, it is not clear what obligation that meaning creates for post-Founding citizens. Constitutional communities are bound only by the Constitution itself. The Constitution owes its status as law to its popular ratification, and the people ratified only words, not any secret intentions. In fact, future constitutional actors might be morally obliged to supplant those intentions with richer definitions of constitutional principle. Interpretation requires an evaluation of the “concepts” embedded within the Constitution in order to arrive at richer “conceptions” of constitutional principle than were available to the generation that wrote and ratified the original document.

Douglass employed both of these criticisms when challenging the pro-slavery interpretation of the Constitution. He began by questioning the authenticity of the historical record, supposedly demonstrating a pro-slavery reading of the Constitution. He emphasized that:

The debates in the convention that formed the Constitution, and by means of which a pro-slavery interpretation is now attempted to be forced upon that instrument, were not published till more than a quarter of a century after the presentation and the adoption of the Constitution.

The Founders conducted the Convention in secret, depriving subsequent generations of a reliable contemporaneous account of the proceedings. Douglass even suggested that the record might have been altered in order to demonstrate the Founders’ pro-slavery

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84 See Daniel Farber and Suzanna Sherry, Beyond All Reason.

85 See Ronald Dworkin, Taking Rights Seriously.

sentiments. For Douglass, reliance on a reconstructed and edited record of secret
proceedings for the expounding of constitutional meaning was methodologically suspect.

Even were the historical record reliable, Douglass questioned the very possibility of
discovering original intent. He believed that the quest was “the wildest of absurdities,”
and would “lead to endless confusion and mischiefs” if constitutional “meaning” was
sought not in “the written paper itself” but “in the secret motives and dishonest
intentions” of its authors.\(^87\) Not only did the intentions of the Founders diverge, but even
among sophisticated statesmen such as the Founders, the stated intentions of a legislator
might not reveal the true motivation for action.

In addition to the hermeneutic obstacle to deciphering constitutional meaning
from personal intentions, Douglass suggested that reliance on these materials actually
betrayed the Founders’ own interpretive intent. Secrecy at the Convention demonstrated
the Founders’ hope for the Constitution’s meaning to stand independently of their own,
frequently conflicting, interpretations of its provisions.\(^88\)

Still, Douglass’ criticism of intentionalism and the search for original meaning
was not simply methodological. Ultimately, his challenge to intentionalism was a moral
one. The moral illegitimacy of importing intentions into interpretation derives from the
Constitution’s method of ratification. According to Douglass, the Constitution was a
“great national enactment done by the people.” It is a “plainly written document,” a
“written instrument full and complete in itself.” He explained that “the mere text, and
only the text, and not any commentaries or creeds written by those who wished to give

\(^87\) Douglass, “Constitution of the United States,” Foner at 469.

the text a meaning apart from its plain reading, was adopted as the Constitution of the United States.” Intentions, therefore, “are to be respected so far, and so far only, as we find those intentions plainly stated in the instrument.” The Constitution’s authority exists only because of its popular foundation. The debates and private beliefs of individuals who participated in the creation of the Constitution, “form no part of the original agreement.” Citizens are, therefore, not bound by the intentions of the founding generation, but only by the document enacted by the people.89

Instead of relying on particular intentions, Douglass used the Constitution’s moral purposes as an interpretive guide. Specifically, the moral purposes articulated in the Constitution’s Preamble must guide interpretation of the Constitution’s parts. Douglass believed that it is a “rule of law as well as of common sense,” to interpret a law in light of the ends for which it was created. The legal interpreter must “look at the ends for which a law is made, and […] construe its details in harmony with the ends sought.” He concluded that the ends of the Constitution are “announced by the instrument itself.” They are “in harmony with the Declaration of Independence” and are “the principles of human well-being.”90

For Douglass, the Constitution’s substantive ends also authorize political actions in pursuit of those ends. This interpretive approach led him to promote the national abolition of slavery through ordinary political action. First, Douglass refused to recognize any constitutional protections for slave property.91 For example, he saw no


91 See Douglass, “Constitution and Slavery.”
obligation on the part of the national government to suppress slave insurrections. Moreover, the political purposes announced in the Declaration and affirmed in the Constitution’s Preamble, properly understood, proscribe slavery.

According to Douglass a series of constitutional provisions authorized emancipation through federal legislation. The “Republican Guarantee Clause” permitted, and possibly commanded, the abolition of slavery through simple national legislation. The Fifth Amendment guarantee against deprivations of liberty without due process, the Fourth Amendment protection of security in person and property, and the prohibition on bills of attainder—“all strike at the root of slavery, and any one of them, but faithfully carried out, would put an end to slavery in every State in the American Union.”

Though similar in many respects, the ends-oriented constitutionalism of Douglass exhibited a fidelity to the original Constitution often missing among contemporary advocates of the Constitution’s moral purposes. Unlike those who embrace original constitutional principles, while rejecting the Founders’ understanding of those principles, Douglass’ constitutionalism remained committed to the moral vision of the American Founding. He promoted constitutional ends without cutting the historical lifeline that assists us in understanding their original meaning and their tradition of development.


93 Compare Douglass, “The Constitution and Slavery, March 16, 1849” with Douglass, “Is the U.S. Constitution For or Against Slavery, July 24, 1851.”

94 Douglass, “Dred Scott Decision,” Foner at 419.

Douglass’ approach maintains the Constitution as functionally oriented toward certain ends articulated within the document itself.

Still, like today’s moral constitutionalists, Douglass’ focus on substantive constitutional principle led him to stray from the functional means by which those principles would be achieved. He appropriately reaffirmed the Constitution’s instrumental character. The Constitution exists to achieve certain moral ends. Yet Douglass generally ignored the manner in which the Constitution’s institutional mechanisms would work to realize those ends. Frederick Douglass properly anchored his constitutionalism in the moral ends for which the Founders’ established constitutional structures. But he did not explain how those structures would work to achieve those ends. His friend Abraham Lincoln would.

Responding to the corruption of the original Constitution by those who would establish constitutional rights to slave property and the foundation for secession, Stephen Douglas reemphasized the Constitution’s democratic pedigree and Frederick Douglass its substantive goals. Lincoln would address American constitutionalism in full—both its moral and institutional dimensions. While defending the right of slaveholding states to maintain their institutions, he would reject secession and defend the union as a functional vehicle for securing justice.

*Liberty and union in Lincoln’s functional Constitution*

Abraham Lincoln attempted to restore the Constitution’s functional character in the wake of its *ante-bellum* dismemberment. Lincoln understood that the controversy over slavery had shattered the original Constitution. He believed that the institutions of the federal union would generally function over time to realize the constitutional end of
personal liberty. Yet, his most formidable constitutional adversaries, all expressing fidelity to the original Constitution, contended in turn that the Constitution guaranteed a property right in slavery, that the Constitution was neutral on the issue of slavery, and that the Constitution prohibited slavery. None of these positions captured adequately the original Constitution’s approach to the issue, and all of them ignored the original Constitution’s functional balance between moral rights and democratic process.

Lincoln defended both personal liberty and union, with the union providing the procedural apparatus for securing personal liberty. His constitutional theory would combine the democratic proceduralism of Steven Douglas with the moral analysis of Frederick Douglass into a genuinely functionalist account that maintained the original Constitution’s structure.

As I noted earlier, this functionalism is apparent in Lincoln’s memorable description of the relationship between constitutional principle and form as like that between an apple of gold and a frame of silver. This metaphor bears repeating. The principles articulated in the Declaration of Independence were like an “apple of gold,” while “the Union, and the Constitution” were “the picture of silver, subsequently framed around it.” There were no doubts as to the priority of constitutional principle in this relationship. Lincoln understood that “the picture was made, not to conceal or destroy the apple; but to adorn, and preserve it. The picture was made for the apple—not the apple for the picture.” Still, while the constitutional commitment to liberty is a necessary condition for America’s justice and prosperity, it is not sufficient. He understood the Constitution as the constitutional union, and he believed that “without the Constitution and the Union,” our constitutionalism would fall short of achieving justice. We must take
care that “neither picture, or apple, shall ever be blurred, or broken,” and to preserve both, Lincoln recommends “study” of the features of the functional Constitution and the obstacles to its maintenance.\textsuperscript{96}

Contemporary interpreters of Lincoln routinely overlook his functionalism and prioritize the substantive aspects of his constitutionalism. They see Lincoln’s commitment to constitutional process as merely prudential, defended only insofar as it helped him to achieve moral goals. I believe that this approach to Lincoln’s constitutionalism unduly minimizes his genuine commitment to the democratic procedures of the constitutional union. Though flawed, the union was for Lincoln the “last best hope of earth” for the preservation and extension of human liberty.\textsuperscript{97}

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Both admirers and critics of Lincoln continue to focus largely on his evaluation of the moral status of slavery and his actions with respect to the institution. This focus is understandable. Before and after \textit{Dred Scott}, many of Lincoln’s most significant public statements challenged the philosophical and historical arguments defending slavery or minimizing its significance.\textsuperscript{98} Lincoln’s arguments that slavery was philosophically inconsistent with natural right and democratic self-government did not diverge from

\textsuperscript{96} Lincoln, “Fragment: The Constitution and the Union,” Basler at 513.


\textsuperscript{98} \textit{See} Lincoln, “Repeal of the Missouri Compromise and the Propriety of Its Restoration,” and “Address at Cooper Institute.”
those of his friend Frederick Douglass. Like Douglass, he believed that slavery made a mockery of our Founding principles, and like Douglass, he believed that the Constitution designed to secure these principles was not neutral on the matter.\textsuperscript{99}

Yet Lincoln and Douglass diverged when it came to constitutional limits on enforcing this constitutional principle. Both rejected the corruption of constitutional principle, especially by Taney in \textit{Dred Scott}. Both believed that the Constitution should advance personal liberty. Yet while Douglass then proceeded to abandon the Constitution’s institutional arrangements in order to secure its moral ends, Lincoln remained comparatively committed to the Constitution’s forms.

Douglass’ ends-oriented approach to interpretation led him to deny any legal protections for slavery. For example, he not only denied any obligation on the part of the national government to enforce the “fugitive slave clause,” but even that the clause addressed slavery.\textsuperscript{100} Lincoln, by contrast, concluded that the Constitution obligated the national government to provide for the capture of fugitive slaves, and he assured the South that he would give it “any legislation for the reclaiming of their fugitives, which should not, in its shaping, be more likely to carry a free man into slavery, than our ordinary criminal laws are to hang an innocent one.”\textsuperscript{101}

Scholars who approach Lincoln today generally view his adherence to constitutional form as either a prudential deference to political reality or a cowardly betrayal of constitutional principle. According to these accounts, Lincoln abandoned his


\textsuperscript{100} See Douglass, “Constitution and Slavery,” Foner at 474-5.

\textsuperscript{101} Lincoln, “Speech on the Repeal of the Missouri Compromise,” Basler at 291-2.
commitments to a union of limited national purposes when those commitments were no longer necessary to achieve his aims, or when they were no longer politically expedient.\textsuperscript{102} Such accounts miss the mark by precluding any serious treatment of Lincoln’s joining of the constitutional end of liberty with the constitutional form of union.

Lincoln’s attachment to the Constitution’s forms was not merely prudential. He expressed his faith in the Union in a letter to Horace Greely, explaining:

If there be those who would not save the Union unless they could at the same time save slavery, I do not agree with them. If there be those who would not save the Union unless they could at the same time destroy slavery, I do not agree with them. My paramount object in this struggle is to save the Union, and is not either to save or destroy slavery. If I could save the Union without freeing any slave I would do it, and if I could save it by freeing all the slaves I would do it; and if I could save it by freeing some and leaving others alone I would also do that.\textsuperscript{103}

His commitment to the union—to constitutional forms and procedures—was real. He even claimed that he would formalize the protection of slavery in order to save the union, even endorsing a pre-war constitutional amendment that would have reaffirmed the limits of national power over slavery in the states.\textsuperscript{104} Yet he did so with faith that the constitutional union was the best available means for the extension of natural liberty.

Whether America would remain committed to the libertarian proposition central to its constitutionalism, was not Lincoln’s only concern. He devoted much energy to considering the particular and original powers of the Constitution to secure those

\textsuperscript{102} See Daniel Farber, \textit{Lincoln’s Constitution}, Chicago: University of Chicago Press, 2003; and Allen Guelzo, \textit{Lincoln’s Emancipation Proclamation: The End of Slavery in America}, New York: Simon & Schuster, 2006. \textit{See also} Jaffa, \textit{Crisis of the House Divided} (suggesting that Lincoln believed the Lockean principles of the Founding were deficient and that he used the Civil War to revise rather than reaffirm existing constitutional principles).

\textsuperscript{103} Lincoln, “Letter to Horace Greely, August 22, 1862,” Basler at 651-52. \textit{Compare} Brandon, \textit{Free in the World} at 130-31 (claiming this letter as evidence that Lincoln’s constitutionalism was little different than that of Stephen Douglas).

\textsuperscript{104} Lincoln, “First Inaugural Address, March 4, 1861” Basler at 579-589.
liberties. This led him to challenge interpretations of the Constitution that would prevent the national government from ultimately extinguishing this self-evidently immoral practice.

Lincoln devoted considerable energy toward addressing the institutional challenges to the Constitution generated by the slavery question. His effort to salvage the institutional Constitution—the means by which liberty would be secured—manifested itself fully in his address at Cooper Union, during which he criticized Dred Scott’s treatment of the Missouri Compromise. 105 Lincoln argued at Cooper Union that though the Constitution protected a right to slave property where it existed, it also permitted the national government to regulate the institution broadly, including its prohibition in territories possessed by the national government. His analysis is consistent with the original functional Constitution rejected by Taney in Dred Scott.

While acknowledging that the regulation of slavery in the territories was not a question immediately before the Constitutional Convention, his argument appealed to “facts” about the American Founding. He did not claim that his evaluation of the historical record was one interpretation among many valid ones. Nor did he appeal simply to the fundamental reasonableness of his interpretation. Rather, Lincoln’s conclusion derived from a factual, historical assertion about the shared understanding of the Constitution at the time of the Founding. For Lincoln, this evidence was conclusive. In short, the Founders’ Constitution was a functional one that advanced substantive ends through democratic procedures. And according to Lincoln, at the time of the Founding,

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105 Lincoln, “Cooper Union Address, February 27, 1860,” Basler at 517-38.
nobody, including the Constitution’s opponents, would have disagreed with this assessment.

For Lincoln, this original understanding of the Constitution was a “precise and agreed starting point” for a discussion about the status of slavery in the territories. He did not reject Douglas’ or Taney’s appeals to original meaning, as Frederick Douglass did. Rather, he rejected their interpretation of Founding intent as simply inconsistent with the factual record.

Lincoln’s Constitution was the “frame of government,” which “consists of the original, framed in 1787, (and under which the present government first went into operation,) and twelve subsequently framed amendments.” The Constitution’s “framers” were the “thirty-nine” who signed the instrument. He explained that “it is almost exactly true to say they framed it, and it is altogether true to say they fairly represented the opinion and sentiment of the whole nation at that time.” Lincoln looked to their actions as evidence of constitutional meaning about whether “the proper division of local from federal authority, or anything in the Constitution, forbid our Federal Government to control as to slavery in our Federal Territory?”\(^\text{106}\)

A proper understanding of the division of constitutional authority on this matter required a consideration of pre-constitutional history. Lincoln found that in 1784 several future participants in the constitutional convention voted, while members of the Confederation Congress, to prohibit slavery in the Northwest Territory. In 1787 that prohibition became law with the votes of two more who would later sign the Constitution. Therefore, “in their understanding, no line dividing local from federal authority, or anything in the Constitution, forbid our Federal Government to control as to slavery in our Federal Territory?”

\(^{106}\) *Id* at 518.
authority, nor anything else, properly forbids the Federal Government to control as to slavery in Federal territory.”

As Taney understood, this action, taken under the Articles, could not serve as a precedent for action taken under the Constitution ratified in 1789. Yet the First Congress did confirm this exclusion of slavery from those territories. With 16 of the Constitution’s 39 signatories present, that Congress unanimously passed legislation to enforce the Northwest Ordinance’s prohibition of slavery. For Lincoln, this vote showed that:

In their understanding, no line dividing local from federal authority, nor anything in the Constitution, properly forbade Congress to prohibit slavery in the federal territory; else both their fidelity to current principle, and their oath to support the Constitution, would have constrained them to oppose the prohibition.107

According to Lincoln, the Founders’ intentions were clear. Congress possessed authority over slavery in the territories.

Lincoln’s argument from original intent shifted, however, as he then rejected the arguments of Taney and Douglas on structural grounds. Lincoln noted that the First Congress was responsible for the reauthorization of the Northwest Ordinance (which excluded slavery in the territories), the Fifth Amendment (which according to Taney guaranteed a constitutional right to slave property), and the Tenth Amendment (which according to Douglas prohibited Congress from regulating slavery in the territories). He asked, “is it not a little presumptuous in any one at this day to affirm that the two things which that Congress deliberately framed, and carried to maturity at the same time, are absolutely inconsistent with each other?”108 The more reasonable conclusion for Lincoln was that the Founders understood Congress to have power over slavery in the territories.

107 Id at 519.

108 Id. at 524.
Lincoln relied on the Constitution’s original meaning, but as a functionalist, he ultimately denied that Founding intent necessarily binds subsequent generations. He hoped to “guard a little against being misunderstood,” and explained that he did not:

Mean to say we are bound to follow implicitly in whatever our fathers did. To do so, would be to discard all the lights of current experience—to reject all progress—all improvement. What I do say is, that if we would supplant the opinions and policy of our fathers in any case, we should do so upon evidence so conclusive, and argument so clear, that even their great authority, fairly considered and weighed, cannot stand; and most surely not in a case whereof we ourselves declare they understood the question better than we.\textsuperscript{109}

Lincoln’s, therefore, was a cautious exposition of the functional Constitution, consistent with the moral philosophy that inspired the Constitution. As a functional constitutionalist, Lincoln could not elevate original intent, or the Constitution, to an inviolable status. A functional government exists to protect substantive ends, and among those ends is a right to reject the existing government. The Founders’ confirmed the existence of this right, first when they declared independence from England and later with their extra-constitutional modification of the Articles. Yet precisely because the stakes are so high, and because the Constitution purports to provide the functions that will secure personal liberty, Lincoln was cautious about abandoning the intent of the Framers.

Lincoln’s constitutionalism did not blindly admire the Founders. He remained open to the possibility that their constitutionalism deserved rejection. Yet prior to advocating such revolutionary change, he understood that one could only responsibly reject the original Constitution by first understanding it. As it turns out, a simple moral reading might in fact be morally irresponsible.

\textsuperscript{109} Id. at 525.
As Lincoln obviously understood, the original Constitution was not a flawless vehicle. The existing union could not prevent the deprivations of individual liberty in the states, and a legitimate fear existed that those deprivations were becoming more routine. Unable to reconcile the practice of slavery with the principles of the Founding, political leaders in the South denied those principles.\textsuperscript{110}

Lincoln did not have an opportunity to urge constitutional improvements. Rather, like the authors of \textit{The Federalist} before him, he found a nation at risk of dissolution, and he defended the union as the best functional means available for the securing of justice. While the crisis that culminated in the Civil War demonstrated the need for institutional modifications, Lincoln did not recommend deviation from original constitutional ends. Nor would he diverge substantially from the institutional limitations on national power in the securing of those constitutional ends.

II. \textbf{Lincoln and contemporary constitutionalism}

Lincoln’s contemporaries fell short as functionalists. Yet, the enlistment of Lincoln for support in our own constitutional scuffles highlights the continued functionalist shortcomings of constitutional theory. As Lincoln becomes a partisan either of moral progress unconstrained by established institutions, or a simple advocate of democratic choice, scholars divide what was whole in Lincoln and blur the functionalist commitments of his constitutionalism.

\textsuperscript{110} See Alexander Stephens, “Cornerstone Address” in Jon Wakelyn, ed. \textit{Southern Pamphlets on Secession, November 1860-April 1861}, Chapel Hill: University of North Carolina Press, 1996; and Lincoln, “First Inaugural Address, March 4, 1861,” Basler at 586 (arguing that the South believed “slavery is right, and ought to be extended”).
The partial departure of existing theory from the original Constitution’s functionalist formula is evident in a still-compelling debate between Sotirios Barber and Michael McConnell about the constitutional status of the Ninth Amendment. 111 The immediate issue in that debate is the legitimacy of judicial extensions of unenumerated rights. Of interest here, however, both deploy Lincoln’s constitutionalism for support, and in a manner that obscures his functionalist constitutional approach. 112

Barber’s assumptions about the moral status of slavery in the Constitution lead him to discover in Lincoln a justification for a radical departure from both constitutional substance and form. Meanwhile, McConnell’s shared assumption about the Founders’ treatment of slavery leads him to emphasize Lincoln’s commitment to the democratic process, criticizing the aggressive protection of substantive rights not explicitly guaranteed by the Constitution. Neither of these positions captures Lincoln’s constitutionalism adequately. By cleaving process from substance, they neglect the constitutional relationship between moral ends and democratic means so crucial to Lincoln’s constitutionalism.

Barber’s explication of Lincoln’s approach to constitutionalism begins with Lincoln’s claim that principles specifically articulated in constitutional text should serve as a “standard maxim,” guiding citizens as they aspire to achieve richer understandings of justice and a more perfect political community. 113 According to Lincoln, the Declaration


113 Barber, “Ninth Amendment,” at 68-9, 77.
of Independence established a “standard maxim” that future citizens could use as a guide.

He explained that:

They did not mean to assert the obvious untruth, that all were then actually enjoying that equality, nor yet, that they were about to confer it immediately upon them. In fact they had no power to confer such a ban. They meant simply to declare the right, so that the enforcement of it might follow as fast as circumstances should permit. They meant to set up a standard maxim for free society, which should be familiar to all, and revered by all; constantly looked to, constantly labored for, and even though never perfectly attained, constantly approximated, and thereby constantly spreading and deepening its influence, and augmenting the happiness and value of life to all people of all colors everywhere.\textsuperscript{114}

For Barber, this explanation of the Declaration’s character reveals Lincoln as a proto-Dworkinian, who accepts a commitment to original constitutional concepts but authorizes contemporary departures from the particular conceptions of those responsible for the text.\textsuperscript{115} Those inherited principles should advise, but not bind, succeeding generations as they interpret their governing documents.\textsuperscript{116} This argument for constitutional activism applies not only to judges, but also to the actions of democratically responsible actors who assert the supremacy of constitutional norms.\textsuperscript{117}

Barber believes that Lincoln was a moral constitutionalist who left the Founding behind. Lincoln criticized Taney’s acknowledgement that the “language of the Declaration of Independence is broad enough to include the whole human family,” while


\textsuperscript{115} See Dworkin, \textit{Taking Rights Seriously}.

\textsuperscript{116} Id. at 77 (arguing that the Founders themselves understood constitutional text in these aspirational terms).

\textsuperscript{117} Compare Barber, “Ninth Amendment,” at 76, 80 (speaking of the Ninth amendment as empowering “courts” and creating “judicially enforceable” rights against democratic action) \textit{with} Barber, “Ninth Amendment,” at 71, 79 (explaining that judges “and others”—including “officials” and “politicians”—have a duty to transcend existing conceptions of justice). See also McConnell, “Moral Realist Defense,” at 89, 96 (stating that Barber’s aspirationalism applies to “judges and other officials,” and recognizing that “nothing in his theory is distinctive to judges”).
he nonetheless promoted a pinched understanding of that text.\textsuperscript{118} For Barber, this
criticism serves as evidence of Lincoln’s commitment to a moral reading of the
Constitution. Lincoln’s commitment to the “standard maxim” is an assertion that the
principles embedded within the American Founding require reevaluation by subsequent
generations. Presumably, if constitutional forms and procedures stand in the way of new
conceptions of those principles, those institutional restraints must be abandoned.

This view is generally consistent with arguments that Lincoln was a constitutional
revolutionary.\textsuperscript{119} First, Lincoln adopted a fundamentally different understanding of
“constitutionalism,” than that inherited from the Founders. Constitutions are not
contractual arrangements that establish the formal institutional parameters for political
action. They are not “the product of negotiation among distinct partners within ‘We the
People’ but a declaration of the people or the nation acting as a collective whole.” The
constitution “springs from the heart of the nation,” and the nation is “not just a
government” but an “organic entity, a source of authority.”\textsuperscript{120} In political philosophic
terms, this suggests a movement from a Lockean constitutionalism grounded on
individual rights toward a communitarian Rousseauean constitutionalism generated
through the general will.

Second, this fundamental change in the character of our constitutionalism
manifests itself in the form of Lincoln’s constitutional contributions. The poetic and

\textsuperscript{118} Lincoln, “The Dred Scott Decision,” Basler at 360.

\textsuperscript{119} See George Fletcher, \textit{Our Secret Constitution}, New York: Oxford University Press, 2001; and

\textsuperscript{120} See Fletcher, \textit{Our Secret Constitution} at 66, 136.
biblical references in his public statements supposedly demonstrate that he superseded the cold enlightenment rationalism of the Founding with a more historically textured understanding of political commitments. He thereby helped to bridge the separation between citizens arguably encouraged by social contract philosophy.

And third, in these accounts Lincoln’s constitutionalism replaced the enlightenment liberalism of the American Founding with a commitment to egalitarianism. As George Fletcher has argued the “constitutional order” promoted by Lincoln “stands in radical contrast to the Constitution drafted in Philadelphia.”\(^{121}\) According to Fletcher, Lincoln rooted his constitutionalism in a principle of equality rather than liberty. This principle of equality under the law supposedly justifies an “aggressive intervention” in the lives of citizens to achieve equality of outcome.\(^{122}\) The night-watchman state of classical liberalism becomes a state commitment to creating and maintaining a community of citizens. This constitutional revolution was a theoretic antecedent to the prohibition of slavery and the abolition of caste divisions within society. A community of real citizens demands security of meaningful equality and a stronger commitment to the value of democracy—values degraded by a counter-democratic, self-interest promoting, Constitution.\(^{123}\)

\(^{121}\) Id. at 29.

\(^{122}\) Id. at 25, 91-111.

Lincoln’s philosophic turn had institutional ramifications as well because it required that the United States become a real community, as opposed to an amalgam of disparate, self-interested parts. The freedom of the Founding was laissez-faire, even permitting the security of property in persons. Freedom from government was the guiding principle of the Founding. Political decisionmaking could only secure a majority of individual, disjointed interests, and the self-interested attempt to promote those interests required constant checks on power in order to prevent government intrusion on the negative liberties of citizens.\textsuperscript{124} Oddly, in this account, it is the secessionists who come across as the true heirs of the Revolution.\textsuperscript{125}

By contrast, the development of a constitutional respect for personal conscience, the deemphasis of property rights, and the securing of positive liberty—rights of citizens to certain goods—required a government capable of action.\textsuperscript{126} Therefore, Lincoln abandoned checks on government action, the forms of the original Constitution. As Fletcher explained “in light of the exigencies of war and the necessity of a new constitutional order, Lincoln did not take [the Constitution’s institutional] obligations particularly seriously.”\textsuperscript{127}

He promoted the end of egalitarian nationalism in a manner consistent with that end through his arguably extra-constitutional orders at the onset of hostilities\textsuperscript{128} and his


\textsuperscript{125} Fletcher, \textit{Our Secret Constitution} at 6.


\textsuperscript{127} Fletcher, \textit{Our Secret Constitution}, 80.

\textsuperscript{128} Lincoln, “Message to Congress in Special Session, July 4, 1861,” Basler at 594-609.
Emancipation Proclamation. By denying pre-existing state prerogatives and ignoring the separation of powers, Lincoln took national action in a national way, ignoring the vertical and horizontal divisions of power central to the Founders’ constitutionalism. The new nation must act as one, rather than maintaining a system of bargain and compromise between self-interested groups and regions.

Barber seems to share many of these views of Lincoln’s role in America’s constitutional development. For Barber, Lincoln initiated a fundamental deviation from the moral principles of the American Founding. He maintains that Lincoln’s “construction of the Declaration of Independence was oriented to a conception of equality as an end of government that was different from the Lockean conception that was shared by the signers of the Declaration.”

The Lockean understanding of liberty was, according to Barber, negative rather than positive, focusing on private contractual liberty and property rights that possibly condoned ownership of slave property. Barber and others supplant original moral conceptions with understandings of liberty and equality as positive guarantees to equal outcomes rather than freedoms from interference in personal, particularly economic, decisions.

Barber also believes that a progressive interpretation of constitutional ends justifies departures from institutional restraints and constitutional procedures. In short, it


would be irrational to adhere to constitutional procedures erected in the service of now outdated constitutional principles. He cites four specific incidents in Lincoln’s career as evidence that Lincoln concurred with this flexible understanding of constitutional constraints. \textsuperscript{133} First, he focuses on Lincoln’s claim in his “house divided”\textsuperscript{134} speech that the nation would become either all slave or all free. Second, he looks to Lincoln’s defense of his decision to suspend habeas corpus without congressional authorization, \textsuperscript{135} during which Barber concludes, “he all but claimed power under the ‘take care’ clause to disregard sections of the Constitution that stood in the way of securing the system’s essential objectives.”\textsuperscript{136} Third, the Emancipation Proclamation\textsuperscript{137} was apparently an unjustified exercise of executive power. Lincoln acted in pursuit of a revised understanding of constitutional ends, and he “rationalized” his action “as a necessary means to the successful prosecution of the war.”\textsuperscript{138} Finally, according to Barber, Lincoln’s belief that Congress could prohibit slavery in the territories supposedly “looked to justice, not to the concrete purposes of slaveholding framers.”\textsuperscript{139}

For Barber, the original conception of justice articulated at the Founding was inadequate—insufficiently egalitarian, and therefore, blind to the moral wrong of slavery. Lincoln recognized this shortcoming. He replaced a Lockean conception of liberty, one

\begin{footnotes}
\item[133] Barber, “Whither Moral Realism,” at 118.
\item[134] Abraham Lincoln, “House Divided,” Basler at 372-381.
\item[136] Barber, “Whither Moral Realism,” at 118.
\item[137] Abraham Lincoln, “Final Emancipation Proclamation,” Basler at 689-92.
\item[138] Barber, “Whither Moral Realism,” at 118.
\item[139] \textit{Id.}
\end{footnotes}
particularly attentive to the negative right to property—a freedom from others—with a national commitment to social equality. And to realize this developed theory of justice, Lincoln deployed a theory of union and constitutional operation that was an apparent innovation.

Yet, the text that Barber cites, and Lincoln’s own behavior, complicate these conclusions. As I explained in the previous section, on balance the evidence indicates a surprising adherence by Lincoln to institutional norms in the face of an unprecedented constitutional challenge. More importantly, it does not appear that Lincoln deviated from Founding principles as Barber suggests. In fact, Lincoln used the “standard maxim” to reaffirm the original meaning of Founding principles.

Lincoln’s embrace of the “standard maxim” was an attempt to defend a liberal interpretation of the purposes of the Declaration of Independence in light of Chief Justice Taney’s emasculation of those principles. Taney denied that the Founders intended the principles of the Declaration to apply to blacks and defended this conclusion as exonerating the Founders from the charge of hypocrisy. He explained that the “general words” in the Declaration “would seem to embrace the whole human family.” Yet it was “too clear for dispute” that enslaved blacks were not participants in this system of rights. Otherwise:

[T]he conduct of the distinguished men who framed the Declaration of Independence would have been utterly and flagrantly inconsistent with the principles they asserted; and instead of the sympathy of mankind, to which they so confidently appealed, they would have deserved and received universal rebuke and approbation.

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140 *Dred Scott*, 60 U.S. at 410.

141 *Id.*
In other words: the Founders were great men; great men act consistently with principle; the general language of the Declaration appears inconsistent with the practice of chattel slavery; and therefore, the Declaration could not have been intended to condemn slavery.

Lincoln found that Taney’s theory misconstrued the Declaration’s character. The purpose of the Declaration was not a historical account of the status of equality between the races in 1776. It was an account of natural equality, not an assessment of any current state of equality between the races. Lincoln’s commitment to the “standard maxim” did not authorize a deviation from constitutional principle. It was an explicit reaffirmation of Founding principles in the face of their repudiation by Taney.

Barber is correct to note Lincoln’s belief that the Declaration’s claims about human equality serve as a guidepost to future generations aspiring to greater equality between the races. Yet, it does not seem that Lincoln’s views diverged from the Founders’ own understanding of equality in the Declaration. For example, Lincoln explained that the Founders:

defined with tolerable distinctness, in what respects they did consider all men created equal—equal in ‘certain inalienable rights, among which are life, liberty, and the pursuit of happiness,’ This they said, and this they meant. They did not mean to assert the obvious untruth, that all were then actually enjoying that equality, nor yet, that they were about to confer it immediately upon them.\textsuperscript{142}

He concluded, “they meant simply to declare the right, so that the enforcement of it might follow as fast as circumstances should permit.”\textsuperscript{143} This appears to reinforce, rather than revise, the liberal principles of the Founding. The Founders declared that men were equal by nature in their possession of rights. In existing societies, however, that equality was not fully recognized, and the Declaration reminds us that this equality in rights must be

\textsuperscript{142} Lincoln, “Dred Scott Decision,” Basler at 360-1 (emphasis added).
\textsuperscript{143} Id. at 361.
“constantly labored for.” Lincoln did not need to urge a reevaluation of constitutional principle to attack the morality of slavery. Rather, prior to articulating the existence of the “standard maxim,” he argued that the Declaration’s principles as originally understood prohibited slavery.

Far from demanding a new conception of rights, Lincoln claimed that by “constantly spreading and deepening” the original promise of the Declaration, America will “augment[] the happiness and value of life to all people of all colors everywhere.” The danger that Lincoln’s public career addressed was not the failure of the original Constitution, but the corruption of original constitutional principles and procedures by secessionists who denied the liberal origins of the Founding and the perpetual nature of the union. He consistently affirmed, rather than rejected, the Founders’ understanding of liberty. Standing in Independence Hall, Lincoln declared, “all the political sentiments I entertain have been drawn…from the sentiments which originated, and were given to the world from this hall in which we stand.” He “never had a feeling politically that did not spring from the sentiments embodied in the Declaration of Independence.”

This reaffirmation of original constitutional principles and institutions predated Lincoln’s public career, and as President, whether it came through the timing of his

144 Id.
145 Id. at 360 (suggesting that the insistence on equality in the Declaration of Independence does not demand equality in all respects, but rather in the possession of natural rights).
146 Id.
addresses. Lincoln repeatedly turned the public’s attention toward the Declaration, urging a recommitment to its principles. The Civil War represented a test, whether a nation “conceived in liberty and dedicated to the proposition that all men are created equal,” can “endure.” Lincoln did not deviate from that original proposition. Instead, he committed himself to the maintenance of an original union designed to achieve those original principles.

Though Barber appears to underestimate Lincoln’s commitment to the liberal constitutionalism of the Founders, like Lincoln he understands the Constitution as a functionalist instrument. The Constitution is a means to an end. In Barber’s view the Constitution announces in its Preamble the end of “Justice.” And the Constitution proper is a “bundle of means.” He goes on to explain that “justice’ refers to justice, and our ‘justice’ would be a conception or a theory of justice, a theory that could be improved.” All citizens, therefore, must “do what one can feasibly do to achieve progressively better versions of justice.”

Yet Barber’s quasi-functionalist account appears to depart from the original Constitution in important ways. Like his moral constitutionalist predecessor, Frederick Douglass, Barber’s analysis does not fully consider the Constitution’s institutional design and operation. Yet these procedures are critical features of our ends-oriented

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149 See Lincoln, “Message to Congress in Special Session, July 4, 1861.”

150 See Lincoln, “Address Delivered at the Dedication of the Cemetery at Gettysburg, November 19, 1863,” Basler at 734-37; and Id., “Final Emancipation Proclamation.”

151 Lincoln, “Address Delivered at the Dedication of the Cemetery at Gettysburg.”

152 Barber, “Ninth Amendment,” at 78.

153 Id. at 79.

154 Id. at 79-80.
constitutionalism. Moreover, it is not clear that for Barber our constitutional rights are the end of constitutional government. Rather, they are “exceptions from the powers of government—limitations on the means government may employ in pursuit of its authorized ends.”

According to Barber, the rights of the Bill of Rights and Ninth Amendment protect against “injustices that occur within the scope of authorized governmental power.” The Ninth Amendment is an “express authorization” to “restrain the use of unjust but not expressly proscribed means to authorized governmental ends.”

In other words, First Amendment rights are not constitutional ends in themselves. Rather, they merely restrict the means available to constitutional actors in their pursuit of justice. Natural rights, popular sovereignty, and limits on government power are not essential features of Barber’s ends-oriented constitutionalism. They need not be. They were, however, for Lincoln.

Michael McConnell’s response to Barber begins from a fundamentally different understanding of constitutionalism. For Barber, it seems that constitutionalism is about the securing of a morally real concept of justice. McConnell, by contrast, understands constitutionalism largely as the setting of institutional boundaries and the delimiting of government power to achieve certain ends.

With this alternative understanding of constitutionalism, he attempts to rebalance the functionalist equilibrium upset by Barber. He recognizes the unequal treatment of constitutional forms in Barber’s account, explaining that “Barber directs his argument almost solely to the importance of natural rights, while giving little attention to the

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155 Id. at 71.
156 Id. at 80.
institutional question of how they can be identified and implemented.”

Alternatively, McConnell contends that the Founders designed a democratic constitutional structure to protect natural rights that transcend historical circumstance. While this commitment to the Constitution’s democratic forms is welcome, McConnell’s own quasi-functionalist account falls short, and as with Barber, those shortcomings are highlighted through his own treatment of Lincoln.

It is important to begin with McConnell’s understanding of the place of natural right in the American Constitution. McConnell seeks to distance himself from originalist arguments that some scholars have reasonably characterized as positivist. By contrast, McConnell puts himself in Barber’s camp, holding that principles of natural justice exist and that citizens should judge positive law against this natural standard.

Still, he denies Barber’s proposition that the mere existence of non-conventional moral standards authorizes judicial and democratic extension of constitutional concepts beyond those originally located in the text. The Declaration of Independence demonstrates the commitment of the Founders to natural rights, and as is evident from its Preamble, they framed the Constitution “in accordance with the people’s understanding of natural right.” Nonetheless, the Constitution remains positive law, “not merely a proclamation of natural right.” While McConnell does not deny an aspirationalist duty in constitutional officials to cultivate richer conceptions of the principles and concepts

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158 Id. at 90-1.


161 Id. at 99.
embedded within the Constitution, he argues that those improved conceptions only become constitutionally meaningful through the methodology of democratic choice established by the Constitution.

To address the potential disjunction between natural right and the positive law of the Constitution, McConnell turns, as Barber did, to Lincoln for guidance. He believes that Lincoln provided “the most profound answer to this urgent question.”¹⁶² For Sotirios Barber, Lincoln represents a liberation from constitutional restraints, instantiating his own conception of justice in spite of formal limits on institutional authority. For McConnell, Lincoln stands as an exemplar of institutional fidelity. In reviewing Lincoln’s claim about the “standard maxim”—the foundation of Barber’s claim for the development of constitutional ends at the expense of constitutionally authorized processes—McConnell reasonably concludes that Lincoln only meant that principles of natural law should serve as “a guide to future decision-making by the people through their representative institutions, and eventually to correction of the Constitution through constitutional amendment.”¹⁶³

Lincoln’s example is, therefore, one of moral restraint, deferring to existing process rather than circumventing it to establish his own vision of justice. Lincoln asserted the natural wrong of slavery, but maintained the legitimacy of a constitutionally protected right to slave property. Though an aspirationalist who supported eventual abolition, Lincoln acknowledged the positive claims of slaveholders and denied an ordinary authority to abolish slavery. McConnell concludes by associating Barber’s own

¹⁶² Id.
¹⁶³ Id. at 100.
interpretive method with that of Chief Justice Taney, who overturned the established institutionalism of the Missouri Compromise to promote an extra-textual constitutional right to slave property. In short, Taney’s opinion was a forerunner of the substantive due process analysis that constitutionalized unenumerated rights, against which contemporary originalism reacts.

Like Barber’s analysis, McConnell’s promotion of the democratic Constitution is quasi-functionalist. He promotes a Churchillian understanding of democracy, explaining:

proponents of constitutional democracy do not accede to the decisions of representative institutions because they are always right. We do so because the representative form of government seems more likely than the alternatives (including rule by judges) to reach right results over time in a wide variety of cases. He explains that “the constitutional amendment process exists as a continuing reminder that changes in our concepts of natural right can be incorporated into fundamental law without either revolution or breach of democratic principle.” But he does not provide an adequate explanation for how democracy will work to preserve legitimate, as opposed to retrograde conceptions of natural right, or even conceptions hostile to natural right.

Originalism falls short, however, absent this functionalist analysis. First, it is worth noting that McConnell’s own non-positivist understanding of the relationship between natural law and the positive law of our Constitution demands that it work. The Declaration of Independence, which McConnell acknowledges as the source of the Founders’ natural right thinking, denies any ultimate bindingness to positive law. The theory of personal rights critical to the American Founding permitted people to abolish

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166 Id. at 100.
the existing government. Individuals have natural rights. The duty of government is to protect those rights. And when government fails to protect those rights, individuals can withdraw their consent.167 This right to revolution is the right that gives operative effect to the Declaration of Independence. The very Constitution which McConnell upholds as an example of positive law, that commands our obedience, was created through procedures in explicit violation of existing positive law, and justified on the grounds that existing democratic institutions did not sufficiently secure rights.

McConnell makes an effort to justify judicial restraint and the power of democratic institutions to elaborate and protect natural rights. Yet his case is primarily against judicial elaboration of constitutional principle, rather than for the reliability of democratic institutions.168 First, the social and institutional isolation of judges leaves them ill-equipped to achieve sweeping social reforms and slow to correct errors. Moreover, the judiciary’s lack of political accountability makes it more likely that judges will impose, what are in fact their own social prejudices, in the name of natural right.

Second, as a prudential matter it would be better to have proposals for changing constitutional commitments considered in a public forum. Because “intelligent people” disagree over the precise meaning of “natural right and simple justice,” McConnell seeks strength in numbers when explicating constitutional meaning.169 Still, McConnell’s faith

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169 Id. at 108.
that republican institutions will work to secure justice is half-hearted. The best that he can muster is that democratic actors are “not obviously inferior” to judges.\textsuperscript{170}

Third, McConnell makes the normative claim that representative institutions work in the public interest and that communities have a right to self-determination.\textsuperscript{171} Yet, insofar as the public interest is a majoritarian interest, as Madison notes it can run quite contrary to natural right. The bottom line is that representative institutions do occasionally fall short. McConnell admits as much when he writes that judges are not “likely to be more reliable than representative bodies in discovering and enforcing natural right,”\textsuperscript{172} and he cites Madison’s argument in \textit{Federalist 10} as an authority for the normative shortcomings of democratic justice.\textsuperscript{173} Yet McConnell makes no positive case for the ability of democracy to secure right at all. Instead he offers a negative argument. The culture of representative institutions is less likely than is the judicial culture to expand rights outside of the democratic process.

McConnell’s use of \textit{Federalist 10} to explain the normative inadequacy of democratic action indicates further shortcomings in his analysis. Madison argued in \textit{Federalist 10} is one for the creation of large republican institutions, an innovation which would diminish the creation of permanent majority interests opposed to right and the general good. Yet \textit{Federalist 10} is also a critique of the ability of small state republics to secure liberty. The large republic was a Madisonian innovation created to secure liberty. The democratic institutions most prone to failure in their duty to secure individual rights

\begin{footnotes}
\item[170] \textit{Id.} at 107.
\item[171] \textit{Id.} at 108.
\item[172] \textit{Id.} at 105.
\item[173] \textit{Id.} at 106.
\end{footnotes}
are the states.\textsuperscript{174} The legislation emanating from Madison’s general government would help to secure substantive constitutional ends through positive government action.

According to McConnell, however, among the “essential elements” of the Constitution are “decentralized and divided governmental power.”\textsuperscript{175} McConnell neglects to explain how a limited national government could function over time to secure real moral rights. McConnell claims that natural rights do exist and that the Constitution exists to secure them. Implied by this is a right to reject the Constitution and its institutions if they fail to secure those rights. Given these admissions, McConnell and other originalists must do a better job explaining how democratic institutions, particularly democratic institutions in the states, can reliably secure rights. The dominant analysis of the Madisonian Constitution—one confirmed for many by the American experience with the Civil War, the Great Depression, and the civil rights movement—suggests that the preservation of justice emerges from consolidation of power in the national government. If rights do exist, McConnell’s theory must show how it is that constitutional processes will work to secure that right.

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At the conclusion of his book \textit{Constitutional Faith}, Sanford Levinson asks whether one should have supported the Constitution in 1787 given its implied protection


\textsuperscript{175} McConnell, “Moral Realist Defense” at 91.
of slavery and its failure to include a Bill of Rights. Conservative constitutionalists such as Stephen Calabresi echo this assumption of the centrality of constitutional principles in constitutional interpretation. Calabresi claims:

\[
\text{We protect First Amendment freedoms in our written Constitution because we rightly fear that without constitutional and judicial protection, we will not get enough protection of freedom of speech and the press.}
\]

For contemporary scholars, the protection of rights demands their location in constitutional text, and constitutional interpretation is about discovering the meaning of that text.

Levinson and his theoretical contemporaries seem to forget that the failure to include a Bill of Rights should not mean that those rights are insecure. The Constitution’s most thoughtful advocates rejected these statements as “parchment barriers,” and they did so not as legal positivists, but with the knowledge that such statements of principle are ultimately insufficient instruments in the project of securing personal liberties.

Yet today’s dominant constitutional theories are almost exclusively methodologies for interpreting these statements of principle or understanding their development over time. The few who focus on the Constitution’s institutional operation do so with the belief that the Constitution protects rights primarily through the structuring

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of institutional stalemate.\textsuperscript{179} Within constitutional theory, there is no consideration of the manner in which the democratic institutions created and preserved by the Constitution would operate in a positive way to guarantee substantive constitutional norms.\textsuperscript{180}

The Missouri Compromise was one example of this functional operation of the Constitution. Lincoln’s constitutionalism was an effort to recover this original constitutionalism from its theoretic and institutional corruption at the hands of Southern constitutionalists. And in his functional constitutionalism, one finds an alternative to the current obsession with the recovery of constitutional meaning, and a point of departure in an effort to explain how the Constitution’s complex institutions work to secure genuine moral rights through political action.

The example of Abraham Lincoln points toward an interpretive “third way”—a functionalism that promotes the original Constitution’s democratic institutions as a reliable means of securing real substantive ends. Because of their commitment to the democratic procedures of the original Constitution, contemporary originalists would seem to be a likely source of insight into the functionalist Constitution. Unlike, moral constitutionalists who assert constitutional fidelity, but whose depth of commitment to

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\textsuperscript{180} An exception to this rule is the treatment of the Executive Branch. See Steven Calabresi, “Some Normative Arguments for the Unitary Executive,” 48 Arkansas Law Review 635 (2005-06); Id., “The Virtues of Presidential Government: Why Professor Ackerman Is Wrong to Prefer the German to the U.S. Constitution,” 18 Constitutional Commentary 51 (2001); and Steven Calabresi and Saikrishna Prakash, “The President’s Power to Execute the Laws,” 104 Yale Law Journal 541 (1994-95).
the historical Constitution is questionable, originalists defend the Constitution’s authentic democratic character and institutional arrangements.

Originalists at least purport to defend the Constitution’s authentic meaning. Unlike recent converts to judicial restraint, who defend national majoritarian decisionmaking and limits on judicial power apparently in order to maintain the centralizing achievements of the New Deal and the substantive advancements of the Warren and Burger Courts, originalists defend democratic institutions and political action, including local democratic authority. Yet by consistently failing to link federal arrangements and the democratic process to the Constitution’s moral purposes, originalists overstate limits on national power. Moreover, they fail to provide a normatively appealing defense of federal arrangements. These accounts remain vulnerable given America’s experience with race and the association of federal arrangements with segregationists who similarly grounded their arguments in the Constitution’s federal features.

In the two chapters that follow, I critique the originalist approach to constitutional structure, particularly its federal features. Unlike those who would prefer to excise federal commitments from the Constitution, I agree with originalists that such elements

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182 See Ackerman, We the People, Vols. 1 and 2; Sunstein, One Case at a Time, Cambridge: Harvard University Press, 1999; and Tushnet, Taking the Constitution Away From the Courts.


remain essential to the Constitution’s core character. Still, existing originalist accounts overstate these characteristics, and thereby understate the Constitution’s functional purposes by undercutting its moral ends. Originalists too often are unable to explain how the Constitution’s federal features will operate to secure just or even politically palatable outcomes.
CHAPTER 2
THE DEMOCRATIC POLITICAL SCIENCE OF ORIGINALISM

Among the criticisms of originalism, one in particular has reached a fever-pitch in recent years. Scholars charge that the originalist commitment to federalism demonstrates the political character of a purportedly objective interpretive method. Originalism is political subjectivity masquerading as legal objectivity. It urges judicial restraint when interpreting the Constitution’s substantive guarantees, but it practices judicial activism when securing the Constitution’s federal features and limits on national authority.¹ Originalists are really only in favor of judicial restraint when it suits their policy interests.²

The revelation that originalist judges, who criticize judicial activism, are selectively restraintist, confirms for many that originalism is a politically motivated methodology. This view of originalism is unfortunate. It short-circuits a more elaborate evaluation of one of the central features of originalism—its open support for what some of its proponents describe as our “Madisonian System.” The originalist scholars I review here have explicitly claimed to defend that Madisonian Constitution. Their promotion of


² In some respects this criticism is fair. Originalists occasionally encourage those who believe they are only opportunistically supportive of the states. For example, several prominent originalists have abandoned their prior commitments to state sovereignty and now seek to restrict the power of state courts to interpret their own state constitutions in order to restrict a social policy with which they disagree. See Robert Bork, “The Necessary Amendment,” First Things, August/September 2004.
this system deserves attention. A serious review of this constitutionalism would provide a richer understanding of originalist methods, and reveal a sophisticated democratic political theory. Ultimately, however, I believe that this review would show originalism diverging substantially from Madison’s own functional constitutionalism.

To evaluate the characteristics of this system, it helps to take a step backward and begin again with an examination of Robert Bork’s interpretive method. Contrary to certain polemical accusations against him, Bork is not, and never was, an intentionalist. The largely hermeneutical critiques of traditional originalist accounts routinely overstate their intentionalist elements. Unfortunately, this highly methodological review of originalism prevents its critics from sufficiently appreciating the relationship of Bork’s method to his desire to maintain the political science of what he describes as the “Madisonian System.”

Following my reconstruction of Bork’s methodology of original meaning, I evaluate the work of Stephen Calabresi, who expands on Bork’s political scientific considerations and specifically argues for an aggressive judicial defense of federal structures as compatible with judicial restraint with respect to the Constitution’s substantive norms. I conclude by comparing these originalist accounts of the federal Madisonian System with a brief consideration of both Alexander Hamilton’s analysis of federalism and James Madison’s recommended response to a national government that overreaches and threatens the political integrity of the states. On the one hand, Hamilton and Madison are at odds, with Hamilton supportive of a much broader understanding of national power than Madison. At the same time, the institutional limits on Madison’s efforts to restrict national authority suggest that he and Hamilton are not so far distant in
their fundamental understanding of the Constitution’s operation. Ultimately, the arguments and actions of these Founders indicate that the originalist account might overstate the Constitution’s federal features, thereby understating its functional elements.

I. Identifying originalism’s “Madisonian System”

Critics continue to mischaracterize the originalist method of interpretation as intentionalist. It remains an unfair description, one that should have been conclusively put to rest by this point. Yet the larger problem with this continued mischaracterization is that it deflects attention from the purportedly Madisonian System originalism serves. By associating originalists with a discredited interpretive theory that even most originalists reject, these critics discourage a thorough consideration of the political scientific purposes and assumptions that underlie originalism. I will address the apparent political science of originalism here, but before doing so, it is helpful to retread briefly the distinctions between original meaning and intentionalism. Only by first establishing the methodological character of original meaning is it possible to discern the political science it serves. And only then can we compare the originalist “Madisonian System” to the original Madisonian Constitution.

An unfounded faith in the courts

Though reliance on historical meaning has always played a role in constitutional interpretation, originalism as a methodology developed as a response to the contention that the federal courts could and should act as an engine of social progress. These arguments for an active judiciary take a number of forms. Substantive constitutionalists

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See Keith Whittington, *Constitutional Interpretation*. 
argue that judicial insulation from interest group politics allows courts to act as objective forums of principle. The judiciary can, therefore, advance or accelerate norms denied, stifled, or ignored by the democratic process. Ideally, the courts are the conscience of democracy, guiding majorities toward substantive outcomes they might not have otherwise achieved. Legal training and insulation from democratic pressure make judges more objective decision-makers than elected officials. As such, they are more reliable interpreters and guarantors, than are elected officials, of our constitutional and statutory rights.


5 Opponents of such extensions of judicial power argue that a progressive judiciary is a one-way-ratchet. Conceding that over time judicial fashioning of constitutional principle requires public support, those who promote constitutional development through the judiciary seem to assume the fundamental dignity of citizens and the political process. Guided by the judiciary, the American people will affirm these judicial elaborations of constitutional principle. Yet, when the people reject these progressive redefinitions of constitutional principles, the courts do not backtrack. Rather, they simply reaffirm those decisions in spite of popular opinion. Compare Nelson Lund and John McGinnis, “Lawrence v. Texas and Judicial Hubris,” 102 Michigan Law Review 1555 (2003-04) with Robert Post, “Fashioning the Legal Constitution: Culture, Courts, and Law,” 117 Harvard Law Review 4 (2003-04).

Consider the argument of the joint opinion in Casey v. Planned Parenthood of Southeastern Pennsylvania, 505 U.S. 833 (1992). In explaining why they voted to uphold the core of Roe—the constitutional liberty to procure an abortion—the authors of the joint opinion noted other instances where the Court has “responded to national controversies.” The politically transformative moments identified in the joint opinion were the abandoning of economic substantive due process in West Coast Hotel Co. v. Parrish, 300 U.S. 379 (1937) and the challenge to segregation in Brown. Even the opinion’s authors seemed to understand that those decisions, abandoning long lines of precedent, were justifiable as reasonable affirmations of existing constitutional developments. “West Coast Hotel and Brown each rested on facts, or an understanding of facts, changed from those which furnished the claimed justifications for the earlier constitutional resolutions” (863). The plurality argued that “each case was comprehensible as the Court’s response to facts that the country could understand, or had come to understand already, but which the Court of an earlier day, as its own declarations disclosed, had not been able to perceive,” (863).

In other words, when the Court acted in those cases, it was not resolving a currently deadlocked debate. Instead, it was redefining constitutional principle in light of an existent or emerging public policy consensus. By contrast, Roe generated a controversy precisely because the Court short-circuited democratic development in the states and attempted to create a national consensus where none existed. As is true of their institutional counterparts in Congress, in retrospect it seems fair to conclude that the Court misjudged which way the wind was blowing. Yet, instead of recognizing the limits of its effort to solve this particular controversy, the plurality reaffirmed Roe “calling the contending sides of a national controversy to end their national division by accepting a common mandate rooted in the Constitution,” (867). Compare Casey, 505 U.S. at 995 (Scalia, J. concurring in part and dissenting in part).
In certain respects, this faith in judges resembles Tocqueville’s analysis of the lawyerly class in America. Tocqueville argued that lawyers are as near to an aristocratic class as can be tolerated by America’s democratic prejudices. Such a class is necessary to temper the passions and impulses of popular majorities.⁶ In his analysis, lawyers and judges are a conservative presence in a community prone to revolutionary egalitarianism. Some have followed Tocqueville’s lead, suggesting that this legal class can help to sustain richer conceptions of justice, denied or threatened by liberal politics.⁷ Most proponents of a substantively active judiciary stand Tocqueville on his head, however. They present judges as sober revolutionaries, pursuing egalitarian conceptions of justice otherwise hindered by the conservatisms of popular majorities.

Both constitutional structure and practice suggest that we should lower our expectations of the judiciary. As a historical matter, there is a dearth of evidence suggesting that the Founders established the judiciary to carry out this institutional

⁶ Alexis de Tocqueville, *Democracy in America*, Harvey Mansfield and Delba Winthrop, trans. Chicago: University of Chicago Press, 2002. “The special information that lawyers derive from their studies ensures them a separate rank in society, and they constitute a sort of privileged body in the scale of intellect. This notion of their superiority perpetually recurs to them in the practice of their profession: they are the masters of a science which is necessary, but which is not very generally known; they serve as arbiters between the citizens; and the habit of directing to their purpose the blind passions of parties in litigation inspires them with a certain contempt for the judgment of the multitude...Some of the tastes and habits of the aristocracy may consequently be discovered in the characters of lawyers. They participate in the same love of order and formalities; and they entertain the same repugnance to the actions of the multitude, and the same secret contempt of the government of the people,” Bk. I, ch. 16.


responsibility. If anything, the structure of the Constitution suggests that the courts exist primarily to umpire disputes between different sovereigns. Not surprisingly, those with loftier ambitions for the judiciary, including judges themselves, often see the diversity jurisdiction at the center of the judiciary’s constitutional authority is getting in the way of the important business of serving as the nation’s moral compass.

This understanding of the judiciary not only departs from the Constitution, however. It also fails to accord with constitutional experience. History suggests that the judiciary’s capacity to act successfully as a forum of principle is more modest than these optimistic accounts indicate. Reevaluations of the effectiveness of Brown v. Board of Education have been central to institutional analyses questioning the possibilities for progressive politics in judicial decisionmaking. Brown remains the central figure in the drama of a judiciary constitutionally responsible for the expansion and enforcement of constitutional norms. It has become a test case for any interpretation that seeks to limit judicial discretion in the elaboration of constitutional text, and it remains the foundation of contemporary faith in the courts. Any interpretive method that fails to account for the outcome in Brown is de facto illegitimate.

Yet as it turns out, the social impact of contemporary theory’s Brown is much more robust than the decision was in practice. Rather than a vanguard of social change,

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11 See Dworkin, Freedom’s Law at 268 (arguing that “[Brown] has by now become so firmly accepted, and so widely hailed as a paradigm of constitutional statesmanship, that it acts as an informal test of constitutional theories. No theory seems acceptable that condemns that decision as a mistake”).
the Supreme Court’s achievement in *Brown* depended largely on its affirmation of an already emerging national consensus. The realization of true desegregation would require the additional cultivation of a national political majority supportive of civil rights. Judicial efforts to extend those national majorities prematurely not only shattered the Court’s unanimity but perhaps contributed to national political backsliding on the issue of race.  

Later experiences with politically premature judicial efforts to extend constitutional guarantees of equal protection to women and homosexuals provide additional evidence of the modest capability of the judiciary to advance a progressive political agenda.  

Behavioral scholarship further deemphasizes the judiciary’s role in America’s constitutional development.  

The weight of evidence suggests that we should temper our hopes for judicial acceleration of America’s moral development. When not outright...

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In addition, recent judicial efforts to resolve political disputes over the extent of constitutional protections for homosexuals have similarly fallen short. The successful efforts of states, often through popular referenda and constitutional amendment processes, to maintain traditional marriage laws in the wake of *Goodridge v. Department of Public Health*, 790 N.E.2d 941 (Mass. 2003) suggest that substantial national majorities remain unswayed by the judicial commitment to resolving this national controversy. See Michael Klarman, “Brown and Lawrence (and Goodridge),” 104 *Michigan Law Review* 431 (2005-06).


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avoiding tough justice,\textsuperscript{15} the judiciary is prone to politically disastrous overreaching in its efforts at simulating statesmanship.\textsuperscript{16}

Originalists share this historical and empirical skepticism of the effectiveness of judicial power, but their argument for restraint is more than prudential. Restraint is a constitutional imperative, and the methodology of original meaning is a tool for securing it. The divergence between originalists and other advocates of judicial restraint becomes apparent when comparing the originalist argument for judicial modesty with Alexander Bickel’s presentation of the “countermajoritarian difficulty.”

Bickel did believe, like the substantive constitutionalists defending the Warren and Burger courts, that the federal courts, because of their undemocratic character, could be an engine of progress.\textsuperscript{17} At the same time, he diagnosed difficulties with this aspiration. Bickel saw that democratic citizens are not predisposed toward accepting the progressive decisionmaking of judges. He recommended, therefore, that judges develop the virtue of prudence—codified in certain self-imposed rules of decisionmaking—to keep these judges out of trouble and to maintain their precarious position within America’s democratic constitutional system.\textsuperscript{18}

Originalists believe that Bickel’s identification of the “countermajoritarian difficulty” aims wide of the mark. First, Bickel’s argument suggested that popular opposition to progressive action by the judiciary was something to be managed and

\textsuperscript{15} See Korematsu v. U.S., 323 U.S. 214 (1944); and Plessy v. Ferguson, 163 U.S. 537 (1896).

\textsuperscript{16} See Dred Scott v. Sanford, 60 U.S. 393 (1856).

\textsuperscript{17} See Alexander Bickel, Supreme Court and the Idea of Progress.

overcome. Bickel did not find that the judicial actions inspiring these uncharitable
reactions exceeded the judiciary’s constitutional mandate to decide cases and
controversies. His judiciary was akin to a common law court, and he attempted to
provide it with common law virtues. Originalists reject this institutional vision as
incompatible with America’s written constitutionalism and democratic commitments.

Second, originalists disagree with Bickel on the character of the judiciary’s
countermajoritarian problem. That problem is not that the judiciary occasionally faces
democratic intransigence on questions of fundamental justice, forcing it as an institution
to overcome this opposition. Rather, the problem is the judiciary’s tendency to believe
that it has an exalted role in the constitutional system. Originalists argue that judicial
independence encourages behavior far in excess of constitutional authorization. The
judiciary’s institutional isolation leads it to overestimate its place within the
constitutional system and to make decisions that the people properly reject. The true
countermajoritarian problem is that the judiciary sees itself primarily as a
countermajoritarian institution.¹⁹

Absence of political accountability tempts judges into instantiating their varying
policy preferences as laws. Unchecked, this temptation threatens the institutional
viability of the judiciary. According to originalists, the Constitution only charges courts
with the power to interpret the Constitution because judges’ presumed objectivity was
thought to make them the best guardians of personal rights against majoritarian excess.
The perception of the judiciary’s apolitical character is, therefore, integral to its public
authority. If its decisions come to be understood as willful, its institutional legitimacy

will be critically undermined. If the judges act legislatively rather than judicially, they run the risk of destroying the very foundation of their authority.  

Recent efforts to strip courts of their authority to adjudicate potential constitutional disputes suggest that aggressive judicial review has in fact created a popular backlash and a consequent effort to rebalance constitutional responsibility within the national government. Following her retirement, Justice Sandra Day O’Connor stated that “the apparent relationship today between some members of Congress, at least, and the federal courts is not good…In fact, it is more tense than at any time in my lifetime, in my memory.” This is perhaps the case, but originalists would suggest that she might consider her own contribution to this discord.

### Originalism and intentionalism

The conclusion that the very freedom necessary for judicial discretion encourages judicial violations of this democratic trust, demands an interpretive methodology that will restrain judicial evaluation of constitutional principle. The debate over the legitimacy of originalist interpretation focuses largely on the hermeneutics of the methodology. In that

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20 See Antonin Scalia, “Originalism: The Lesser Evil,” 57 University of Cincinnati Law Review 849 (1989). See also Casey, 505 U.S. at 1000 (Scalia J., concurring in part and dissenting in part) (arguing “as long as this Court thought (and the people thought) that we Justices were doing essentially lawyers' work up here—reading text and discerning our society's traditional understanding of that text— the public pretty much left us alone”).


22 In recent years, the traditional argument that judges are institutionally prone to the temptation of subjective decisionmaking has been supplanted with a more radical claim. For example, Robert Bork now contends that the elite legal training that supposedly cultivates analytic objectivity actually works in tandem with political isolation to promote political attitudes particular to the judicial class. The judiciary’s cultural insulation within communities where the secular and progressive politics of educated urbanites predominate predictably puts courts on one side of the political spectrum. See Bork, Slouching Towards Gomorrah; and Id., Coercing Virtue: The Worldwide Rule of Judges, Washington, DC: AEI Press, 2003.
debate critics routinely miscast originalism as an unsophisticated intentionalist methodology. A prominent originalist appropriately described this challenge as aimed at a “straw man,” but it remains commonplace nonetheless.

A true intentionalist is hard to find. Almost uniquely among sophisticated theorists, the constitutional historian Raoul Berger advocated an intentionalist interpretation of the Constitution’s provisions. He mined the historical record to uncover the intent of the Constitution, and then defended judicial enforcement only of that original intent. He made little effort, however, to defend continued obeisance to this original intent.

There are a number of legitimate, and well-worn, methodological challenges to intentionalism. First, the historical record does not yield intent as readily as Berger’s intentionalism requires because of disagreement among both the Founders’ own constitutional views and among the ratifiers, by whose authority the Constitution became law. In addition, it is not self-evident that post-Founding generations should remain bound by conceptions of constitutional principle they understand to be outdated or deficient. Both the moral supremacy of constitutional principle, and a commitment to

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democratic values,27 justify departures from original intent and the progressive redefinition of constitutional principle. Furthermore, it is not clear that post-Founding generations have remained faithful to original constitutional intentions,28 or that the Founders expected this fidelity.29

Originalists recognize the obvious deficiencies of intentionalism, and the so-called “new originalists” diverge from intentionalism sufficiently that the characterization should be put to rest.30 They have taken care to focus their methods on recovering the Constitution’s original “meaning,” not its original “intent.” This is not simply true of the new originalists, however. Rather, it is a distinction present in the earliest iterations of originalism.

For example, Robert Bork, intellectual mentor to many contemporary originalists, rejects a simple application of original intent. While he has spoken of a need for adherence to original intent, he understands that as a “shorthand formulation.” Ultimately, Bork rejects judicial enforcement of particular intentions on ground shared by his critics. While Bork argues that “all that counts is how the words used in the Constitution would have been understood at the time,” he also believes, like Frederick Douglass and Ronald Dworkin, that “law is a public act,” and therefore, “secret

27 See Eisgruber, Constitutional Self-Government; Ely, Democracy and Distrust; Sunstein, One Case at a Time; Tushnet, Taking the Constitution Away From the Courts; and Whittington, Constitutional Interpretation.

28 See Graber, Transforming Free Speech; and Whittington, Constitutional Construction.


reservations or intentions count for nothing.” 31 Particular intentions of the Framers cannot compel subsequent generations since citizens ratified only the publicly affirmed words of the Constitution.

A comparison of the originalist approach to interpretation with the approach used by the Court in Brown v. Board of Education, demonstrates originalism’s location within the mainstream of constitutional analysis. Though scholars continue to question whether Brown is justifiable on originalist grounds, 32 the interpretive approach recommended by originalists is actually quite similar to the approach taken by the Court in Brown. The Court ordered reargument in Brown specifically to consider the “circumstances surrounding the adoption of the Fourteenth Amendment.” 33 The Warren Court did not undertake an intentionalist analysis bound by history or a plain-word approach completely divorced from historical meaning. Rather, history had considerable bearing in the exposition of constitutional principle. Brown’s reargument “covered exhaustively consideration of the Amendment in Congress, ratification by the states, their existing practices in racial segregation, and the views of proponents and opponents of the Amendment.” 34 The justices would identify the historical meaning of the principle of equal protection and then apply it to contemporary segregatory practices.

31 Bork, Tempting at 144.


33 347 U.S. at 489.

34 Id.
Because of its legislative origins, identification of the Fourteenth Amendment’s core meaning was problematic. Still, the Brown majority concluded that the amendment established a guarantee of racial equality. A theory of constitutional intent did not provide much guidance about the application of that principle. The record pertaining to that principle’s reach to segregation in schools was “at best…inconclusive.” According to the justices, the amendment’s application to public schools was indeterminate because of the “status of public education at that time.”

Because public schooling as we know it today did not exist when Congress drafted and the people ratified the amendment, the Court suggested that any application of the original constitutional principle of racial equality to mid-century public schools required judicial discretion.

In fact, there was some evidence that the original intent of the Fourteenth Amendment was open to segregation. The same Congress responsible for the amendment also authorized the creation of segregated schools in the District of Columbia. Still, the Brown majority held that the amendment embodied a principle of racial equality. And because of the increasing social import of public schooling in a democracy, application of that constitutional principle warranted desegregation.

The similarities between the Warren Court’s approach and the methodology of original meaning are hard to avoid. Robert Bork, for example, concludes that in spite of the differences between its proponents, one can identify an original principle of equal treatment at the Fourteenth Amendment’s core. This was the amendment’s least common denominator, and for Bork, it does not breach originalist limits for a subsequent

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35 Id.

36 Id.

37 Bork, Tempting of America at 82
interpreter to apply that principle even to cases not contemplated by those who instantiated the concept within the Constitution. Bork, therefore, supports the outcome in *Brown* for its successful identification of the amendment’s original principle, and the reasonable application of that principle to ending segregation in the public schools, in spite of that particular outcome being at odds with original intent.

Still, Bork does not believe that the Constitution’s words are a *tabula rasa* onto which subsequent generations can attach any meaning. We remain bound by the intended meaning of constitutional principles, and in identifying those principles what the framers of the constitutional provisions understood themselves to be enacting “must be taken to be what the public of the time would have understood the words to mean.”  

And in interpreting the original meaning of constitutional text, he turns to the understanding of that text by those responsible for drafting it. Bork therefore rejects intentionalism at the same time that he believes “if the Constitution is law, then presumably its meaning, like that of all other law, is the meaning the lawmakers were understood to have intended.” The only original meaning that contemporary interpreters must affirm is the meaning of a particular constitutional principle, not the original scope of that principle’s application.

**Originalism and orderly development of constitutional meaning**

In theory originalism strictly cabins judicial decisionmaking, thereby maintaining the Constitution and its separation of powers. While John Marshall extrapolated the power of judicial review from the existence of a written Constitution in *Marbury v.*

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38 *Id.* at 144.

39 *Id.* at 145.
Robert Bork emphasizes that the written character of the Constitution also limits judicial power. He believes that fidelity to the Constitution’s original meaning is a “necessary implication” of the fact that our Constitution is a written one with prescribed amendment procedures.\textsuperscript{41}

Deviation from original meaning is an unjustified usurpation of power by the judiciary. There is no constitutional warrant for expansion of original constitutional commitments outside of the extraordinary procedures originally agreed to through Article V.\textsuperscript{42} The judiciary can only protect values already present within the four corners of the Constitution’s text. Otherwise, it intrudes on the prerogatives of other branches and jeopardizes the institutional integrity of the Constitution.

In practice, however, originalism appears more flexible. Contemporary judicial interpretation of the Constitution is a two-part process: identification of a constitutional principle and application of that principle to the circumstances of a particular case. Originalism is a methodology for regulating the interpretation and development of core constitutional concepts. It does appear, however, that originalism acknowledges constitutional development, not only in the application of concepts but in the concepts themselves.

There is now considerable methodological convergence between originalists and non-originalists about this interpretive process.\textsuperscript{43} In Dworkinian terms, originalists

\textsuperscript{40} \textit{Marbury v. Madison} 5 U.S. 137, 176-78 (1803).

\textsuperscript{41} Bork, \textit{Tempting of America} at 143.

\textsuperscript{42} U.S. CONST. art. V.

readily admit that application of constitutional principle extends beyond particular “political” intentions, while non-originalists acknowledge the need for “linguistic” or “semantic” fidelity to a constitutional principle with real historical integrity. For both camps, when applying a constitutional principle, the contemporary interpreter can deviate from the intended application of the principle.

Originalists draw their line in the sand with the identification of the actual constitutional principle. Constitutional principles, the “majestic generalities” of the Fourteenth Amendment and the Bill of Rights, must be defined with an appropriate level of generality. Bork concludes that the reasonableness of a principle’s extension depends on the “level of generality chosen” in defining it. The determination of that level comes not from a contemporary judge, nor even from those who constructed the amendment, but from those who ratified the amendment. “The judge,” Bork concludes, “must not state the principle with so much generality that he transforms it.” He seeks to prevent the illegitimate transformation of one constitutional concept into another through an overly pliant reading of the text.

This originalist distinction between the identification and application of constitutional principle is a longstanding feature of originalist methodology, dating even...
to Bork’s well-known critique of Herbert Weschler’s “neutral principles.”\(^4\) In response to what he saw as the results-oriented jurisprudence of *Brown*, Weschler argued that once the Court identifies a constitutional principle, it must apply that principle neutrally to all the relevant cases that come before it.\(^4\)

Bork appreciated Weschler’s desire for the Court to avoid the perception of politicization. As described by Bork, however, Weschler’s solution that the courts “choose principles which they are willing to apply neutrally, apply, that is, to all cases that may fairly be said to fall within them,” was not up to the task.\(^5\) The neutral application of principle is not adequate if the Court is to avoid becoming “a naked power organ.”\(^5\) It must also act apolitically when deriving the principle it intends to apply. If the Court remains free to choose the principle it then applies neutrally, it remains liberated to engage in political activity. For Bork this is unacceptable. The courts have the responsibility for maintaining the constitutional system, but this substantive temptation erodes that authority.

It is in this effort to draw an objective distinction between legitimate and illegitimate elaborations of constitutional principle that Bork’s methods deserve closest scrutiny. The strongest challenge to originalism arises because the method does seem, in


\(^4\) Bork, *Tempting of America* at 146.

\(^5\) *Id.* at 145-46.

spite of efforts to curtail judicial expansion of constitutional principle, to permit some deviation from the specific meaning of the Constitution’s original principles in light of historical developments.

To some, the line-drawing that originalism demands seems arbitrary. It allows some textual developments, expanding constitutional principles beyond the scope envisioned by those who drafted and ratified the Constitution and its subsequent amendments, while rejecting others. The proponents of this method are not absolutely clear about the means for distinguishing between these various extensions of original principles. An intelligible principle does seem to exist, however, guiding these originalist distinctions.

A consideration of the interpretive breadth of the equal protection clause demonstrates the challenge for originalists seeking to limit interpretation of constitutional principles. Consider the application of the principle of equal protection to case involving racial discrimination. This should be the easy case. The immediate target of the Fourteenth Amendment was not protection for racial minorities broadly, and not even black citizens, but more specifically, the civil rights of freed slaves. In practice, however, even with this easy case, identification and application of constitutional principle is more art than science. For example, even if a judge limited the Fourteenth Amendment’s constitutional principle to equality for freed slaves and an abolition of the incidents of slavery, it is not clear what interpretive limit could restrict the application of that


principle to tax policy,\textsuperscript{54} school district funding,\textsuperscript{55} affirmative action,\textsuperscript{56} or the remedying of purely \textit{de facto} segregation\textsuperscript{57} designed to remedy racial inequality.

The originalist treatment of affirmative action demonstrates the difficulty of separating legitimate from illegitimate constructions of constitutional text, and the potential even within originalism for the development of constitutional principle itself. Politicians initially conceived affirmative action programs as consistent with the original goals of the constitutional commitment to equal protection. As remedial programs, they would extend the promise of equality to the descendants of slaves and other racial minorities that suffered discriminatory conduct.\textsuperscript{58} Over time, however, the remedial purposes of affirmative action programs gave way\textsuperscript{59} as legislators and administrators began promoting a permanent commitment to diversity regardless of past discrimination.\textsuperscript{60}

\textsuperscript{58} See Robert Dallek, \textit{Flawed Giant: Lyndon Johnson and His Times, 1961-1973}, New York: Oxford University Press, 1998. See also University of California Regents v. Bakke, 438 U.S. 265 (1975) (Powell, J.) (determining that the eradication of “societal discrimination” is not a legitimate government purpose but that the state policy of providing non-discriminatory access to medical care can justify affirmative action programs at a state-run medical school).
\textsuperscript{59} See City of Richmond v. J.A. Crosson, 488 U.S. 469, 495, 506 (1989) (O’Connor J.) (noting first, that the City of Richmond was 50% black and that the city council that maintained this supposedly remedial affirmative action program was majority black, and second, that there was no evidence of any past discrimination in Richmond against Spanish-speaking, Oriental, Indian, Eskimo, or Aleut contractors, all of whom were preferred contractors under the city’s plan).
\textsuperscript{60} See Grutter v. Bollinger, 539 U.S. 306 (2003) (Thomas, J., concurring in part and dissenting in part) (denying that the maintenance of student-body diversity as one feature of an elite public law school is a compelling state interest).
The originalist rejection of affirmative action plans on equal protection grounds demonstrates the difficulty of identifying the original meaning of constitutional principle. Bork has noted that the “core idea” of the Fourteenth Amendment was to protect “black equality against governmental discrimination.”61 Yet, in the case of affirmative action originalists read the constitutional principle of equal protection at a higher level of abstraction, extending an original principle of non-discrimination against blacks to a principle of constitutional color-blindness.62

Originalism appears, therefore, to allow constitutional development not only through the application of original constitutional principles but in the principles themselves. While they do not agree that the Constitution requires contemporary ratification63 or anything so radical as translation,64 they do seem to authorize some evolution of constitutional principle.65

As Bork concludes, “the equal protection clause was adopted in order to protect the freed slaves, but its language, being general, applies to all persons.”66 The challenge is to find a meaningful interpretive rule that will guide a judge in determining whether to rely on the amendment’s broad language or its particular meaning. Without the discipline of originalism, interpretation threatens to go off the rails. The constitutional interpreter must rely on the “level of generality in equal protection analysis by finding the level of

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64 See Lawrence Lessig, “Fidelity as Translation.”
65 Compare Strauss, “Common Law Constitutional Interpretation.”
66 Bork, Tempting of America, at 149 (emphasis mine).
generality that interpretation of the words, structure, and history of the Constitution fairly supports." As applied, this methodology acknowledges modest historical evolutions of constitutional meaning.

The question for originalists is what authorizes contemporary judges to move beyond the intended meaning of a constitutional principle. How do originalists navigate between original intent and a rudderless application of the interpreter’s moral intuition? The answer is not entirely clear, and the polemical style of certain originalist accounts does unfortunately sacrifice argumentative clarity for political persuasiveness.

On balance, however, it appears that identification of an original constitutional principle and justification for its future development involves the existence of something like a Rawlsian overlapping consensus on constitutional meaning. When identifying the intended meaning of a constitutional principle, the boundaries of that meaning are no wider than the areas where all of the lawmaking participants agreed. The original meaning of the Fourteenth Amendment, for example, derives from the overlapping consensus among the amendment’s drafters on the issue of slavery. Constitutional meaning would seem to develop legitimately, therefore, only through the creation of a new overlapping consensus.

Efforts to extend the principle of equal protection to cases involving discrimination based on gender or sexual orientation casts some light on originalism’s

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67 Id. at 150.

68 See John Rawls, Political Liberalism, New York: Columbia University Press, 1996 (arguing that while comprehensive theories of justice exist, a politically enforceable conception of justice requires that an overlapping consensus of agreement emerge between these comprehensive theories).

role in the mechanics of constitutional development. Originalists recognize that women and homosexuals fall within the potential coverage of the Fourteenth Amendment’s language. Still, for originalists the majority of those who drafted and ratified the amendment did not understand the amendment’s principle of equal treatment to reach discrimination against those groups.

These originalists must explain why they allow extra-intentional extension of the Fourteenth Amendment’s principles to some cases of gender discrimination, but not, for example, to homosexuals. Bork fashions an argument that appears to rest on a distinction between broadly accepted norms and disputed value judgments. According to Bork, the enduring fact of gender differences “obviously” makes some legislative distinctions between men and women permissible. Yet because women are, in certain respects at least, categorically indistinguishable from men, some distinctions have “no apparent bases.” All legislative distinctions based on sexual orientation, however, because of their foundation in “moral perceptions” are to remain subject to legislative discretion.\footnote{See Bork, Tempting of America at 150. See also Gerard Bradley, “Probing Bork’s Judicial Philosophy: Review of The Tempting of America,” Review of Politics Vol. 52, No. 3 (Summer 1990), pp. 491-96, 495 (concluding that Bork’s argument supporting equal protection for women but not homosexuals is “disingenuous” given his purported commitment to originalism).}

For example, today it is generally considered unreasonable to prevent women from entering certain professions. The broader political community accepts that women are the equals of men in economic and intellectual pursuits, and the failure to treat them as such creates judicially resolvable equal protection claims. Yet, because the political community remains divided over the extent and significance of physical differences
between men and women,\textsuperscript{71} and over the character of homosexuality,\textsuperscript{72} the Court should refrain from extending the reach of the amendment beyond its existing overlapping consensus. Absent a new overlapping consensus on the meaning of constitutional principle, the Court should refrain from instantiating its own views.\textsuperscript{73}

Originalism is the means by which Bork and other judicial conservatives maintain the balance between a broad, and arguably pliable, text and its original meaning. Steven Calabresi explains it this way. The extension of the Fourteenth Amendment’s principles to women, while supported by the Constitution’s text, was not the intended meaning of

\textsuperscript{71} Compare \textit{U.S. v. Virginia}, 518 U.S. 515, 541-42 (1996) (arguing that absent evidence that women were physically incapable of participating in the Virginia Military Institute’s—VMI’s—unique adversative system, the state could not rely on outdated assumptions about women’s capabilities to deny the educational opportunities afforded by a VMI education); and \textit{Mississippi University for Women v. Hogan}, 458 U.S. 718, 725 (1982) (determining that a state run women’s nursing school violated equal protection in maintaining its single-sex character based on the “fixed notion” of women’s opportunities) with \textit{U.S. v. Virginia} at 588-89 (Scalia J., dissenting) (arguing that the majority ignored the findings of the trial court that the adversative system at VMI would need to be altered to accommodate the physical differences between male and female students).

In writing for the Court in \textit{U.S. v. Virginia}, Justice Ginsburg assumed that the ends of a VMI education were similar to those of other colleges and universities—future participation in a liberal economy. Neither the Court, nor even the Commonwealth of Virginia, acknowledged that the purpose of the VMI experience was in fact countercultural, bearing little resemblance to the ordinary purposes of a college degree.

\textsuperscript{72} See \textit{Romer v. Evans}, 517 U.S. 620, 632-33 (1996). The disagreement between Justices Kennedy and Scalia seems, in part, motivated by a different understanding of homosexuality. Justice Kennedy refers to homosexuality as a “trait,” suggesting that sexual orientation is an inheritable characteristic, like one’s race. Given this character of homosexuality, only an unreasonable “animus” could motivate discrimination against such a class (632-33). Justice Scalia, by contrast, understands the Colorado law as expressing disapproval of conduct rather than discrimination against a distinguishable class (644).

\textsuperscript{73} For originalists, this overlapping consensus does not rest on a distinction between facts and values. Rather, the interpreter must gauge the shared beliefs of the community. Consider the case of abortion rights. Contrary to the claims of Justice Blackmun, Ronald Dworkin, and John Rawls, technological advances now suggest that whether an unborn fetus is a unique person is a matter for science, not personal religious or philosophic beliefs. \textit{Compare Roe}, 410 U.S. at 159; Dworkin, \textit{Life’s Dominion: An Argument About Abortion, Euthanasia, and Individual Freedom}, New York: Knopf, 1993; and Rawls, \textit{Political Liberalism} with Debra Rosenberg. “Should a Fetus Have Rights? How Science is Changing the Debate,” \textit{Newsweek}, June 9, 2003. These technological developments could justify an expanded understanding of the commitments to liberty and equality within the Fourteenth Amendment. Yet, apparently due to the continued political conflict over the morality of abortion, Bork rejects a judicial resolution of the controversy. See Robert Bork and Nathan Schlueter, “Constitutional Persons: An Exchange on Abortion,” \textit{First Things}, January 2003.
the constitutional principle. Nonetheless, women are now assured of the Fourteenth Amendment’s protection because “society’s values had evolved” in that direction “without meaningful pressure from the Court.” In other words, the Fourteenth Amendment has some elasticity in its meaning and the Court can contribute to the enforcement of existing social norms. It cannot, however, pressure the development of those norms. At the most it can bring genuine outliers into line with an already developing national consensus.

In the ongoing debate over the legitimacy of originalist methods, originalists and their critics have devoted little attention to the political process by which this new national consensus develops. Originalists part ways with non-originalists in identifying the parties to a new consensus on the meaning of constitutional principle. For non-originalists, national political action appears to create the conditions for constitutional development. For Bork and other originalists, members of the national political community similarly determine the meaning of constitutional guarantees. But for them, those members appear to be the sovereign states that created and comprise the union. The people did not ratify the Constitution directly, but through the states. These representative bodies play a substantial role in the continued identification and peaceful development of constitutional principle, and so their integrity must be maintained.

Maintenance of the federal Madisonian System becomes essential, therefore, to the democratic resolution of divisive social issues.


75 See Breyer, Active Liberty.
Understanding this relationship helps to make sense of the comparatively aggressive stance of conservative jurists when protecting the Constitution’s federal elements. One should not dismiss the political sources of this shift. Changing public attitudes toward political centralization contributed to the election of public officials and the subsequent confirmation of judges, who then initiated and expanded a judicial recommitment to policing the structural Constitution. But this explanation alone does not explain the federal commitments of originalists.

For originalists, the federal structure is necessary for the development of constitutional principle. The focus on the methodological shortcomings of original meaning tends to foreclose efforts to understand the relationship between that method and the explicitly political challenge of maintaining what Bork and others describe as the “Madisonian System.” It is appropriate to question on methodological grounds the originalist effort to thread the needle—allowing some development of constitutional principle while establishing objective limits on that development. Yet those who ask this question miss the opportunity it presents—an opportunity to evaluate the relationship between originalist methods and the maintenance of what some originalists describe as the original Madisonian political system. The abstract focus on the methodological deficiencies of original meaning prevents a full consideration of the “system” in the service of which these originalists promote their interpretive method. This is unfortunate

because this system deviates substantially from the original functionalist political science actually developed and promoted by James Madison.

II. Maintaining originalism’s “Madisonian System”

The methodology of original meaning and the stable development of constitutional concepts require the maintenance of what some originalists have described as the Madisonian System. For this system to function properly, states must remain independent and strong. Only then can the meaning of the Constitution’s substantive guarantees develop peacefully and legitimately.

This relationship between original meaning and the federal Madisonian System is not immediately apparent. Because contemporary originalism developed in response to the substantive decisionmaking of the Warren and Burger courts, its early proponents argued primarily for judicial restraint. For example, even though the states would seem to be critical components of Bork’s Madisonian System, he devotes little attention to delineating the constitutional boundaries between state and national authority. In fact, when he addresses this division, he actually suggests that the judiciary is institutionally ill-equipped for the policing of such boundaries. Nonetheless, Bork’s system points

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77 See Bork, Tempting of America at 21, 27, 15-34. Bork’s inattention to the judicial role in maintaining the federal elements of the Madisonian system is evident in his treatment of John Marshall. Though Marshall’s landmark decisions in Marbury and McCulloch affirmed the federal power of judicial review and cemented the broad regulatory authority of the national government, Bork applauds Marshall for rejecting “the idea that legislative acts could be overturned on the grounds of natural justice or the nature of government and society.” In other words, Marshall’s importance lies in his rejection of substantive due process.
toward an aggressive use of judicial power on behalf of the Constitution’s federal features that he might not have initially contemplated.78

According to Bork the Madisonian “system” offers a solution to a “dilemma.” The dilemma results from a conflict of constitutional principles, neither of which are appropriately neglected. He explains:

The first principle is self-government, which means that in wide areas of life majorities are entitled to rule, if they wish, simply because they are majorities. The second is that there are nonetheless some things majorities must not do to minorities, some areas of life in which the individual must be free of majority rule.79

This constitutional dilemma then is a conflict between the rights of democratic communities and personal liberty. Put another way, the constitutional system exists to adjudicate the conflict between two different species of liberty—the liberty of the individual to be free from community regulation and the liberty of a community to do as it pleases.

For Bork, “the freedom of the majority to govern and the freedom of the individual not to be governed remain forever in tension,” and that tension is not adequately resolved through the normal channels of democratic decisionmaking. “The

78 *Id.* Bork’s inattention to interpretation of the Constitution’s federal characteristics is evident in his treatment of *Brown*. “The Supreme Court properly decided in *Brown* that the equal protection clause of the Fourteenth Amendment forbids racial segregation or discrimination by any arm of government, but, because the Constitution addresses only governmental action, the Court could not address the question of private discrimination. Congress did address it in the Civil Rights Act of 1964 and in subsequent legislation, enlarging minority freedoms beyond those mandated by the Constitution.

This claim raises an important question that Bork does not address. Was the 1964 Civil Rights Act constitutional? If the *Brown* Court properly understood that the Fourteenth Amendment did not reach to private discrimination, then the Act was only justifiable under the Commerce Clause. Yet to justify the act by means of the Commerce Clause is to deny any effective constitutional limits on national regulation of economic activity. Such interpretive license on the part of the legislature could lead to the gradual emasculation of the states and the unbalancing of the Madisonian System.

79 *Id.* at 139.
dilemma,” according to Bork, “is that neither majorities nor minorities can be trusted to define the proper spheres for democratic authority and individual liberty.”\textsuperscript{80}

Bork explains that the Madisonian Constitution maintains this balance through three innovations. First, by limiting the powers of the national government to certain easily identifiable and judicially enforceable categories, it maintains the self-governing capacities of the states. Second, by scattering elections within and among the institutions of the national government, the Constitution guarantees equilibrium at the national level between separate policy majorities divided by time and geography. Finally, the Bill of Rights exists to safeguard certain liberties from majoritarian manipulation. Bork assigns a substantial role to the judiciary in maintaining this system.\textsuperscript{81}

In certain respects, the Constitution Bork describes is quasi-functionalist. The judiciary maintains the system in which constitutional majorities operate and the development of constitutional principles occurs. Judicial participation in resolving categories one and three of the Madisonian dilemma appear to be in the service of the political institutions of category two. Active judicial supervision of federal boundaries, in particular, is necessary in order to allow constitutional majorities to operate. Failure by national actors, including the federal courts, to adhere to the constitutional limits on their authority threatens the principle of democratic self-government in the states, and thereby jeopardizes the means by which constitutional principle can develop safely.

\textsuperscript{80} While Bork challenges John Ely’s willingness to enhance minority rights in the service of representation enhancement, he does not actually disagree with the more general point of Carolene’s Footnote Four and Ely’s development of it—that it is the Supreme Court’s institutional responsibility to secure minority rights. Bork, \textit{Tempting of America} at 194-99 (emphasis mine).

\textsuperscript{81} Bork, \textit{Tempting of America} at 139.
Steven Calabresi has devoted great care in elaborating Bork’s understanding of the Madisonian Constitution. He justifies an originalist defense of federal structures, but on the grounds that state participation in the formation of constitutional majorities is necessary for the stable development of constitutional norms. By developing the judiciary’s role in defending part one of Bork’s Madisonian Constitution, the depth of the originalist departure from Madison’s functionalist Constitution begins to come into greater focus.

**Constructing the Madisonian System**

The originalist presentation of the Madisonian System highlights an important fact about originalism. Originalist interpretation is not originalist all the way down. In individual cases, reviewing particular constitutional provisions, originalists adhere to a methodology that takes great care in describing and applying the original meaning of the Constitution’s text. Yet, when it comes to discussion of the Constitution’s overall purposes and structure, originalists are often more likely to assume than demonstrate. In other words, originalists do not always provide original evidence and analysis for the original Constitution that demands originalist interpretation.

For example, Calabresi’s explanation of the Madisonian System shares much with approaches to constitutional interpretation that he otherwise rejects, notably, the interpretive approach advanced by Ronald Dworkin. Dworkin has compared judicial decision-making to participation in the creation of a chain novel. The interpreter’s decision must be made “according to his own judgment of how to make the developing
story as good as it can be” in terms of “political morality.” 82 Dworkin tempers this legal aspiration with his requirement that subsequent chapters “fit” with the legal interpretations that preceded them. Faith in the “integrity” of the law demands that contemporary interpretation of constitutional concepts fit “American history,” political “practice,” and “the rest of the Constitution.” 83

For Dworkin the overriding constitutional principle is one of equal concern and respect. He explains:

I believe that the principles set out in the Bill of Right, taken together, commit the United States to the following political and legal ideals: government must treat all those subject to its dominion as having equal moral and political status; it must attempt, in good faith, to treat them all with equal concern; and it must respect whatever individual freedoms are indispensable to those ends, including but not limited to the freedoms more specifically designated in the document, such as the freedom of speech and religion. 84

He mines this principle both from constitutional text, history, and a tradition of constitutional development.

Calabresi seems to follow a similar course in identifying the Madisonian System. Drawing from a variety of sources, he makes the best of the Constitution that he can. First, consider Calabresi’s description of the character of the Constitution. When describing the centralizing trajectory of the New Deal, he explains that these developments failed to cohere with constitutional “texts.” 85 For an originalist, the recognition of multiple constitutional texts is unusual. Originalism is about power. Specifically, it is about maintaining the proper distribution of powers within the constitutional system. When the people ratify supreme law, or their representatives enact

82 Ronald Dworkin, Law’s Empire at 239.
83 Dworkin, Freedom’s Law at 11.
84 Id. at 7-8.
laws, all that becomes law is the text. Deviation from that text is an illegitimate reallocation of powers within the constitutional system.

Yet, in describing the system itself, Calabresi refers to multiple “texts.” Ordinarily, those who identify multiple constitutional texts—documents such as Lincoln’s Gettysburg Address, Roosevelt’s Commonwealth Club Address, or King’s Letter from Birmingham Jail—do so in order to transcend the Constitution’s original meaning. Here Calabresi refers to multiple texts to discern the Constitution’s foundational meaning and character.

Second, Calabresi acknowledges that the very practice of judicial review, a key feature of the Madisonian System, is a constitutional development. He admits that the “Constitution, which of course contains no specific clause granting the courts the power of judicial review, is best understood as mandating aggressive judicial review in structural constitutional cases.” It was “assumed to exist by most of the Framers and was famously deduced” by Marshall. It is a tradition of American constitutionalism, but it is nonetheless a tradition without specific constitutional warrant.

Finally, Calabresi’s presentation of the Constitution that will be enforced by the judiciary seems to depend as much on our tradition of interpretation as on any originalist consideration of its core character. This is not to say that he fails to analyze constitutional text and structure. He explains that:

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87 Calabresi, “Textualism and the Countermajoritarian Difficulty,” at 1376.
The text of our written Constitution devotes only fifty-two words to the protection of individual liberty from the depredations of state government in the Fourteenth Amendment, while devoting several thousand words to the subject of allocating and dividing power among government institutions. No textualist can fail to be impressed by this brute fact. There is a lot more ‘text’ dealing with issues of governmental structure than there is ‘text’ dealing with issues of the protection of individual rights form state government.\textsuperscript{88}

The large percentage of the Constitution’s text devoted to structural concerns and institutional boundaries suggests to Calabresi that the maintenance of these procedural mechanisms must be the primary constitutional duty of the judiciary.

The primacy of these procedural elements does not derive from the text alone, however. Calabresi uses both founding materials and an understanding of political development to support his textual inferences. For example, he uses James Madison’s argument in \textit{Federalist 51} as an authority.\textsuperscript{89} There Madison outlined his case for a limited national government of separated powers. Calabresi explains that the essay, Madison’s authoritative statement on the separation of powers, enjoys a “canonical status.”\textsuperscript{90} In other words, we can rely on Madison’s analysis as a guide for our own because his interpretation has been treated as an authority over time. One might say, \textit{The Federalist} has become a part of our constitutionalism, one of the “texts” that supplement the actual constitutional text. Moreover, we continue to support the political science that is the centerpiece of the Madisonian System because it has “worked so well.”\textsuperscript{91} This discussion indicates that originalist textual analysis has as its point of departure an

\textsuperscript{88} Id. at 1376-7.

\textsuperscript{89} Id. at 1373-4.

\textsuperscript{90} Id. at 1374.

\textsuperscript{91} Id.
understanding of the Constitution’s purposes and structure that emerges as much from tradition and political practice as from the text itself.

That originalism does not reject traditions of constitutional development is clear in Calabresi’s claim that the judiciary, by enforcing constitutional structure prior to 1937, was in fact “perfecting the Madisonian system.” 92 According to Calabresi:

For the first 150 years of our constitutional history…the Supreme Court carved out for itself a role that was clearly inspired by our written Constitution’s overwhelming devotion to issues of federalism and separation of powers. 93

Traditionally, the courts safeguarded this procedurally-oriented Constitution. The mid-century shift by the federal courts to a role as the national guarantor of rights was:

in direct contradiction to the assumptions of the constitutional text and in direct contradiction to the judicial role that the Supreme Court had played from 1789 to 1937. 94

Calabresi emphasizes that the assumption of this role diverged from constitutional text and tradition, and that the people have since reaffirmed their commitment to the original understanding of the Constitution. The “value choice” in favor of a procedural Constitution was made “by the American people over a long period of time.” 95

Through originalist methods, Calabresi seeks to restore a proper role for the Court within the Madisonian System. Yet his language of an accepted canon of constitutional construction, our contingent acceptance of Madison’s political science, and the judiciary’s perfection of this system all suggest that originalism’s Madisonian System is a post-Founding construction that possibly diverges from the original Constitution itself.

92 Id. at 1376.
93 Id. at 1374.
94 Id. at 1378.
95 Id. at 1393.
Calabresi’s elevation of constitutional process comes at the expense of constitutional substance. He contends that the Constitution’s commitments are not “shifting social ideas,” but “really big ideas in the march of human history for which millions of people have gone to war and died, and to which the nation is literally dedicated.” Those values and ideas are the “principles of Democracy, Freedom, Individual Rights, and Limited Government.” Those principles “tower in importance” over social and cultural shifts that some scholars identify as the source of our need for constitutional adaptation.96

These values are in apparent conflict. If “individual freedom, economic liberty, the separation of powers, and federalism” are “founding values” present in the “great texts” of our “constitutional tradition,” how does one make sense of them?97 How is the interpreter to reconcile the inherent conflicts between individual rights and democratic liberties, the two values at the heart of the conflict within the Madisonian System.

Calabresi resolves the conflict decisively in favor of local democracy. He rejects aggressive efforts by national institutions—popular and judicial—to expand rights beyond those included in constitutional text and tradition. He argues against those who would “abolish federalism, the separation of powers, or even establish a national role in legislating new individual human rights.” And he claims that prior to 1937, “no one would have thought that it was the Supreme Court’s job to preserve liberty by creating


97 Id. at 1442.
new fundamental rights unrooted in text or history.”

Calabresi writes that “the genius of our written Constitution lies in its use of textually specified structural devices to promote the general welfare while preserving liberty.”

Yet the preservation of personal liberty is clearly secondary to the successful operation of constitutional majorities.

Calabresi’s language suggests a deep skepticism about the very existence of natural rights. Such rights exist by nature and according to reason. They exist prior to, and regardless of, government action. Calabresi speaks, however, of the “legislating” of “new human rights,” and he rejects a constitutionalism dependent on “what new natural rights” the Supreme Court decides to “create today.”

Natural rights are, by definition, not ‘created,’ and his suggestion that they are indicates at least some discomfort with the concept of natural rights.

Whether or not Calabresi believes in natural or human rights that exist outside of constitutional structure, he certainly does not believe that America’s constitutional structure exists primarily to secure them. It is clear that the priority in this system is state liberty. It is, according to Bork, the “first principle” of the Madisonian System.

Justice Scalia has affirmed its priority, remarking that:

> The whole theory of democracy…is that the majority rules. That is the whole theory of it. You protect minorities only because the majority determines that there are certain minorities or certain minority positions that deserve protection.

Scalia further argues that it is “incompatible with democratic theory that it’s good and right for the state to do something that the majority of the people do not want done.”

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98 Calabresi, “Textualism and the Countermajoritarian Difficulty,” at 1375.

99 Id. at 1393.

100 Id. at 1392.

101 Bork, Tempting of America at 139.
concludes, “once you adopt democratic theory, it seems to me you accept that position.”

This statement raises many questions about the originalist understanding of the Constitution. Have we in fact “adopted” democratic theory? Did we do so through our original constitutional arrangements? While it may be true that it is “incompatible” with democratic theory to contend that it is “good and right” to compel majorities against their will, is democratic theory itself “good and right”? If so, what is the good that is achieved through these democratic arrangements? For our immediate purposes, however, the most important point is this—Scalia and other originalists have adopted an understanding of the Constitution in which democratic rule is the governing principle. They may believe that the Madisonian System must balance democracy with individual rights, but originalists definitely have their fingers on the scale.

Democratic process, rather than the substantive guarantees of natural rights, is the core feature of American constitutionalism. It is impossible to balance a claim that certain rights are inviolable with the claim that all rights are violable. While the Madisonian System may protect certain rights, those rights are only guaranteed because democracies have determined to protect them.

The democratic operation of the Madisonian Constitution

The Madisonian Constitution assumes a significant role for the states in constitutional development. The manner in which Calabresi describes judicial

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maintenance of federal boundaries and the political operation of the federal Constitution suggests substantial limits on national power, as well as an active role for state interests within national institutions.

Calabresi understands that to maintain the system that Bork identifies, he must redirect judicial review toward the policing of the constitutional boundaries between the national and state governments. This requires a reorientation of attitudes toward the prudential exercise of judicial power. He abandons the post-\textit{Carolene Products} assumption that courts would refrain from adjudicating the boundaries of this constitutional authority. Where Jesse Choper urged the Supreme Court to abstain from the management of constitutional structure, Calabresi encourages the Court to utilize its political capital to enforce those long-neglected boundaries.

He rejects as “mistaken” the position taken by Justices Kennedy and O’Connor in \textit{U.S. v. Lopez} that the Court is institutionally under-equipped for providing solutions to these structural disputes. The Constitution’s substantive guarantees have fewer “clear and bright lines” to guide the interpreter than do the Constitution’s structural commitments, and the Court should not be bashful in maintaining constitutional limits

\begin{itemize}
  \item[104] \textit{United States v. Carolene Products Co.}, 304 U.S. 144 (1938).
  \item[107] Calabresi, “‘A Government of Limited and Enumerated Powers’,” at 753.
\end{itemize}
on national power. Furthermore, the active defense of the legal or structural Constitution is necessary to maintain the Madisonian balance between democracy and rights.

While Calabresi approves, therefore, of the Court’s recent efforts to restrict national regulation of intrastate activities, he finds fault with the Court’s approach. His principal concern is with the identification of meaningful limits on national power. Given the originalist commitment to legal, as opposed to political, decision-making, Calabresi believes that a judicially manageable standard must guide the Court. He rejects Lopez for not going far enough to provide such a standard. The current Court has carved out a middle, and according to Calabresi, unprincipled, path between a simply deferential approach to Congress’ employment of its commerce power and a more formal distinction between commerce and manufacturing. The Court will supervise congressional action, but only require that the regulation in question have some demonstrable impact on the national economy. It will not limit congressional regulation to the interstate transport of goods. Rather, it will allow for broad congressional regulation so long as it is reasonably related to the purpose of advancing the national economy in the interest of prosperity.

In spite of overwrought claims to the contrary, the opinions in Lopez and U.S. v. Morrison represent a moderate and unsustainable middle ground. The recent decision in Gonzales v. Raich—holding that federal law restricting the purely intrastate

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111 545 U.S. 1 (2005).
manufacture and sale of marijuana is a legitimate exercise of the power to regulate interstate commerce—demonstrates the limits of the Supreme Court’s federal revival.

The policy implications of Calabresi’s commitment to judicial supervision of the Constitution’s federal elements are significant. It appears that judicial enforcement of Calabresi’s structural limits would bring into doubt much of the post-New Deal administrative state. Though he begins with political reassurances, Calabresi’s evaluation of the Commerce Clause is revolutionary.

Calabresi agrees with Justice Clarence Thomas that the determination to allow regulation of activity with a substantial effect on the national economy fails to remove discretion from the judiciary. After all, one could demonstrate that the production of wheat for private consumption, or even that vices such as gambling or drinking, and illiberal faiths that prevent women from realizing their commercial potential, impact the economy. Thomas and Calabresi argue that the only standard that establishes a principled limit on the power of the national government is a return to the distinction between manufacturing and commerce.

The bright-line rule that Calabresi promotes is subject to many of the familiar criticisms or originalist methods. First, the historical support for his conclusions is not conclusive. In short, one can find Founders supporting and rejecting Calabresi’s position. The Court’s currently unprincipled position seems to be contrary to the broad interpretation of federal power articulated by Alexander Hamilton and John

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Marshall,\textsuperscript{115} neither of whom are justly denied the moniker of “Founder.” Calabresi instead follows the argument of James Madison, whose reading of the Constitution’s enumerated powers ultimately became so cramped that he would have required a constitutional amendment even to allow for internal improvements.\textsuperscript{116} The existence of an interpretive split among those arguing on behalf of the Constitution highlights the limits of originalism’s reliance on the historical record.

Second, even if the historical record clearly affirmed the limits that Calabresi defends, it is not clear why future democratic communities should remain bound by these original meanings. Assuming that a judicial commitment to original meaning demands Calabresi’s restraintist reading of the Commerce Clause, he does not explain why this particular historical understanding should bind the contemporary political community. In response to industrialization and the nationalizing of the economy, the American people seem to have rejected, at least in some respects, the constitutional solution that Calabresi seeks to enforce.\textsuperscript{117}

Yet these arguments do not undermine Calabresi’s larger point. Securing federal boundaries is not an end in itself for Calabresi. Rather, it is necessary to allow the Madisonian System’s majorities to operate effectively. Calabresi’s discussion of the federal judiciary’s role in maintaining this system highlights the importance of the states.


\textsuperscript{116} James Madison, “Veto of Bonus Bill.”

According to Bork, the judiciary plays a special role in supporting two legs of the Madisonian Constitution—preserving the states and protecting constitutional rights. According to Calabresi, however, the judiciary also poses a double threat to this system. Judicial restraint in the securing of constitutional boundaries and judicial activism in rights protection both undermine the second component of the Madisonian System—geographically and temporally unique majorities that operate to extend constitutional values.

For Calabresi, the existence of several layers of popular representation is critical to the Madisonian System’s successful operation. The Constitution is a “highly sophisticated and unusually complex act of textually specific rules for sampling the popular will.” The key to this system is the periodic election of federal and state officials. Elections are “never all at once.”

By spacing elections, the Constitution creates overlapping temporal and geographic majorities. The Constitution’s structures of separated powers and federalism secure, therefore, something like a deep and long-term national interest. As opposed to parliamentary systems, the Madisonian System tempers the impact of short-lived “popular movements” that have “little enduring impact.”

According to Calabresi, a substantively active judiciary risks becoming a voice for these fleeting majorities. Citing research by Robert Dahl and Gerald Rosenberg, he

118 Calabresi, “Textualism and the Countermajoritarian Difficulty,” at 1383.


agrees that the Supreme Court follows the election returns. His concern, therefore, is that the Court might act as a “vehicle for the improper imposition of national majority values on dissenting states and regions in the American federation.” He argues that

A powerful, unelected Supreme Court that faithfully imposed national majoritarian values on states and regions that disagreed with those values would be a very problematic institution given the premises of our Madisonian Constitution. Unless one believes that the national majority should always prevail and that regional pluralism of religious, cultural, and social values should always be stamped out, one must be troubled by the specter of an all-powerful national judiciary enforcing the national will.

The problem with the Court is not then that it acts contrary to the popular will. Rather, it is that it imposes, without consensus, national opinion on local democratic majorities that disagree with prevailing opinion. He rejects a “rights creation movement” and efforts to “impose social and cultural change” on states unready for these changes.

Oddly, the Supreme Court’s countermajoritarian problem then is that it is too majoritarian. By way of its “agenda-setting” power, the Court disrupts democratic development to the detriment of local majorities, accelerating the creation of a national consensus on social issues. The Court has the power to take hot-button issues and “catapult” them onto the agenda, and this power “can very well change outcomes in any democratic or majoritarian decision-making process.”

122 Id. at 1387.
123 Id. at 1388.
124 Id. at 1377, 1381. See Roper v. Simmons, 543 U.S. 551, 612-14 (2005) (Scalia, J. dissenting) (suggesting that even if a national policy consensus is discernible, the premature constitutionalizing of that consensus by a Court has the potential to undercut future democratic decisionmaking).
125 Calabresi, “Textualism and the Countermajoritarian Difficulty,” at 1388.
126 Id.
Substantive judicial activism does not privilege minorities over the majority, but an elite and national majority over local majorities. A theory of original meaning promotes state power within the constitutional system by supervising federal boundaries and requiring substantive minimalism from judges. It does so, however, for reasons greater than the protection of state sovereignty. Calabresi sees that aggressive judicial review has the potential not only to replace contemporary democratic judgments with their own, but with those of earlier majorities. He explains that:

The net result is that American judicial review today has the potential to disempower current majorities from ruling either in the name of a majority of white male property owners that died out more than 150 years ago or because a current majority of nine unelected elite lawyers do not agree with the popular will. Either way a countermajoritarian difficulty is created that makes judicial review hard to square with democratic theory.  

An active judiciary is necessary for “reconciling the practice of judicial review with democratic theory.” By protecting the states it allows for proper constitutional development. Majorities rule, but “only after the majority will has been sampled over a six year cycle and only after contending majorities elected in different ways have reached a consensus on what should be done.”

The ultimate question is whether the Madisonian System as presented by Bork and Calabresi in fact adequately represents the original constitutional system. The arguments of both Hamilton and Madison suggest that their system diverges substantially from the original Constitution. Specifically, Calabresi’s understanding of multiple constitutional majorities leads him to overstate the continued role of the states within national institutions.

127 Id. at 1385.
128 Id.
129 Id. at 1393-94.
III. The genuine Madisonian System

Both Calabresi’s description of the Madisonian System’s federal character, and its maintenance, diverge in important ways from the original Constitution. Calabresi’s constitutional theory can be characterized as one of strict dual federalism. It not only requires strict maintenance of constitutional limits on national authority, but it suggests that in policing those boundaries, the states have a formal role within the institutions of the national government. Whether the original Constitution did in fact institutionalize a system of dual federalism is a question I reserve for my concluding chapter. Here, however, I review some circumstantial evidence that the Founders’ Constitution did not embrace the dual federalism adopted by Calabresi and other originalists.

To demonstrate the possible divergence between Calabresi’s constitutionalism and the original Constitution, I begin by comparing Alexander Hamilton’s description of the challenges in constructing a government with federal features with the purposes of Calabresi’s federalism. I then consider James Madison’s recommendations for the maintenance of the new federal Constitution with Calabresi’s commitment to strong state sovereignty. In both of these cases, I believe that the examples of these Founders indicate a constitutionalism that diverges from that proposed by Calabresi.

Hamilton’s rejection of traditional federalism

For Calabresi, federal unions help to protect the diversity of their members. Calabresi asserts that the United States is a “federation.” He explains that:

Federations like the United States are typically characterized by a high degree of cultural, religious, racial, and even linguistic heterogeneity. Federal structures are thus ideally suited for liberal, tolerant societies that value and respect cultural pluralism. The national Supreme Court of such a federation must thus be something more than the agent
of a national majority coalition. It must also be willing to respect the constitutional lines that mark out the situations where state and local majorities are supposed to prevail. In other words, diverse political communities require federal arrangements that support the social pluralism of their members. Federations exist to provide their members with certain political goods that they could not realize as independent political communities. Among those goods is their continued existence as independent and diverse sovereignties. Calabresi suggests that absent institutional boundaries preserving these diverse social and political practices, federal organizations risk disunion.

Calabresi’s description of the benefits of federalism accords with some contemporary arguments for the protection of subnational institutions. As an account of America’s original constitutional system, however, it seems to depart from the immediate concerns of the Founders. While Calabresi identifies strong federal boundaries as an element that will help to maintain union, the Founders seemed to understand these state governments as the primary threat to disunion.

*The Federalist* begins with a series of essays arguing for the utility of the union and the threats to its maintenance. These dangers came from foreign influence and from conflict between the states. Hamilton went on to suggest, however, in *Federalist* 9 that it was the design of the confederacy—the existing union—that jeopardized its continued existence.

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130 Id. at 1389.
132 *Federalist* 2-5 at 5-20.
133 *Federalist* 6-8 at 20-36.
The new constitutional union defended in *The Federalist* differed substantially from traditional federal or confederal arrangements. Hamilton explained that the “utility” of confederacies is in their supposed ability “to suppress faction and to guard the internal tranquility of the states.” The preservation of the states in their diversity is the purpose of a confederation. Given this goal, the “essential characteristic” of a federation is “the restriction of its authority to the members in their collective capacities, without reaching to the individuals of whom they are composed.” There is to be an “exact equality of suffrage” among the members, and the new general government “ought to have no concern with any object of internal administration.”

The Articles of Confederation established just such a confederacy. The states were the parties to the constitutional arrangement, and their preservation was the principal end of the constitutional system. That preservation would be guaranteed by a representation of state sovereignty within the institutions of the national government and by sharply limiting the powers of the general government to those “expressly” defined within the constitutional text. The Articles conformed to the traditional understanding of federalism supported by Calabresi.

Yet predictably, the federation created by the Articles dissolved into discord and potential disunion. Federations existed to protect their members, and traditionally they had failed in their obligation. Hamilton explained:

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134 *Federalist* 9 at 38, 40.

135 *Articles of Confederation*, Art. V.

136 *Articles of Confederation*, Art. II.

It is impossible to read the history of the petty republics of Greece and Italy without feeling sensations of horror and disgust at the distractions with which they were continually agitated, and at the rapid succession of revolutions by which they were kept in a state of perpetual vibration between the extremes of tyranny and anarchy. If they exhibit occasional calms, these only serve as short-lived contrast to the furious storms that are to succeed. If now and then intervals of felicity open to view, we behold them with a mixture of regret, arising from the reflection that the pleasing scenes before us are soon to be overwhelmed by the tempestuous waves of sedition and party rage. If momentary rays of glory break forth from the gloom, while they dazzle us with a transient and fleeting brilliancy, they at the same time admonish us to lament that the vices of government should pervert the direction and tarnish the lustre of those bright talents and exalted endowments for which the favored soils that produced them have been so justly celebrated.138

These “petty republics” organized into confederations to compensate for their size. Yet, they failed to protect the constitutional values of civil peace, security, and personal liberty that were the purpose for their existence.

Federations designed to protect the member states organized according to a federal principle. The full sovereignty of the parties to the confederation was understood as a necessary attribute of federal arrangements. This presented the Founders with a puzzle. Small states organized to protect their political integrity. But as the American experience demonstrated, the principle of sovereignty essential to these arrangements encouraged discord and disunity. Hamilton responded to this challenge by arguing that the traditional character of these federal arrangements was “in the main, arbitrary” and “supported neither by principle nor precedent.”139

Without engaging in a wholesale consideration of Hamilton’s federal innovations, it is appropriate to note certain characteristics shared by Calabresi’s federalism and the federations criticized by Hamilton. Hamilton accepted the definition of a confederacy as an “assemblage of societies,” and claimed that the proposed

138 Federalist 9 at 37.
139 Id. at 40.
Constitution did not depart fundamentally from this form. In fact, however, it was clear that the Constitution had modified significantly the “assemblage of societies” established by the Articles. At times, Calabresi’s argument seems to share much with this pre-Constitutional federalism. Calabresi believes in the internal integrity of the states, free to govern their domestic affairs without interference from the national government. The political system he describes at times resembles the United Nations. The union exists to defend state integrity, and a breach of this trust by a general government that undermines state diversity is actually a threat to political stability. For Hamilton, however, it was existing state arrangements—arrangements that protected state diversity—that were the threat to political stability.

**Madison’s soft defense of federal boundaries**

In certain respects, James Madison’s commitment to a national government of limited powers resembles Calabresi’s restrictive reading of national legislative authority. As was the case with Hamilton, however, under closer inspection a more complicated picture comes into focus. In short, while Calabresi looks to institutions—the judiciary and state interests within the national government—as the primary guardians of the Constitution’s federal character, Madison remained focused on the role of the people in defending federal boundaries.

Scholarship on Madison’s constitutionalism often suggests that his beliefs about the primacy of the states within the constitutional system shifted over time. In short, the early Madison was a consolidationist, while the later Madison was supportive of states’
rights. This simplifies his constitutionalism.\footnote{See Lance Banning, *Sacred Fire of Liberty*.} Both in *The Federalist* and later in his Virginia Report, the high-water mark of his arguments on behalf of the states, Madison argued for popular enforcement of federalism. This suggests a more informal role for the states within the Constitution than recommended by Calabresi.

Madison’s belief in firm boundaries on constitutional power existed even at the time of the Convention. In *Federalist 45* he argued that, “the powers delegated by the proposed Constitution to the federal government are few and defined. Those which are to remain in the State governments are numerous and indefinite.” He went on to argue that with the exception of the power over interstate commerce, the powers of the national government were not different from those in the Articles. Rather, the Constitution intended the “invigoration of its ORIGINAL POWERS.”\footnote{*Federalist 45* at 241-42.}

In *The Federalist* Madison strongly supported the protection of the states and limits on national power. He understood that “the task of marking the proper line of partition between the authority of the general and that of the State governments” was among the most difficult facing the Convention, and that the definition arrived at was necessarily “vague and incorrect.” There was, therefore, a “certain degree of obscurity” in the proper location of the line between national and state authority under the new Constitution.\footnote{*Federalist 37* at 183-84.} That being said, it was important that a line be maintained. As he explained in *Federalist 51*:

> In the compound republic of America, the power surrendered by the people is first divided between two distinct governments, and then the portion allotted to each
subdivided among distinct and separate departments. Hence a double security arises to
the rights of the people. The different governments will control each other, at the same
time that each will be controlled by itself.  

In America’s constitutional scheme, the preservation of strong and independent
republican governments in the states was necessary for the preservation of personal
liberty.

Madison’s determination to allow a political resolution of federal disputes is well-
documented.  In that resolution, the states would play an indirect role. He identified
two separate political mechanisms for remedying these usurpations. First, the separation
of powers would diminish the likelihood of unwarranted aggrandizement of power by the
national legislature. As Madison explained, “the success of the usurpation will depend
on the executive and judiciary departments which are to expound and give effect to the
legislative acts.” Second, the political process itself can remedy any intrusion of the
national government on state authority. According to Madison, “in the last resort a
remedy must be obtained from the people, who can, by the election of more faithful
representatives, annul the acts of the usurpers.” Any expansion of national power,
Madison explains “will be an invasion of the rights of the latter,” and thus the states “will
be ever ready to mark the innovation, to sound the alarm to the people, and to exert their
local influence in effecting a change of federal representatives.” The primary
protection for the states, therefore, would come through the political process—the
competition between national institutions as well as the election and persuasion of locally

144 Federalist 51 at 270.


146 Federalist 44 at 235.
inclined national representatives who will maintain the states through a limited reading of national power.

The balance between the states and the national government will depend on the “sentiments and sanction” of the people, and for Madison it was “beyond doubt” that attachment to the states would preclude constitutional usurpations by the general government. If anything, local attachments have the potential to bias legislators unduly against a vigorous national authority.\(^\text{147}\)

What then would be the fate of an “unwarrantable” exercise of national power? The national government might be influenced indirectly by state governments. State participation in the selection of some national representatives would allow some influence over the national legislative process. Still, national representatives would be more or less free in their interpretation of constitutional limits on national power. Ultimately, it was the indirect pressure of state legislatures and popular opinion that would protect the states. Madison suggested that the states have a number of ways to protect themselves:

The disquietude of the people; their repugnance and, perhaps, refusal to co-operate with the officers of the Union; the frowns of the executive magistracy of the State; the embarrassments created by legislative devices, which would often be added on such occasions, would oppose, in any State, difficulties not to be despised; would form, in a large State, very serious impediments; and where the sentiments of several adjoining States happened to be in unison, would, present obstructions which the federal government would hardly be willing to encounter.\(^\text{148}\)

The role for the states in this process is quite informal. Madison concluded that “ambitious encroachments” by the national government on the powers reserved to the

\(^\text{147}\) *Federalist* 46 at 243.

\(^\text{148}\) *Id.* at 246.
states by the people “would be signals of general alarm.” Yet, his recommendation for action began with citizen outrage and ended with informal persuasion by the states.

Madison continued to support this modest role for the states in enforcing constitutional limits in his explanation of the Virginia Resolutions. It is a mistake to read the Virginia Resolutions as a proto-secessionist statement of states’ rights. A more careful consideration of Madison’s position, as articulated in his “Virginia Report of 1800,” reveals that Madison maintained his support for informal political pressure as the primary mechanism for the maintenance of federal boundaries.

The Virginia Resolutions were a response to the Alien and Sedition Acts. Today, those Acts are reasonably understood as inconsistent with the libertarian foundations of American constitutionalism and the text of the First Amendment. And Madison’s criticism of them is rightly understood as an important statement in the tradition of civil libertarianism. Yet Madison did not challenge the Acts solely on the grounds of fundamental rights. Rather, he attacked their origin in an exercise of power by the national government that exceeded its constitutional authorization and encroached on the constitutional division of authority between the state and general governments.

As in Federalist 46, Madison began by noting that the preservation of the states is necessary for the preservation of personal liberty. Nearing his conclusion, he emphasized that:

149 Id.


It cannot be forgotten that, among the arguments addressed to those who apprehended
danger to liberty from the establishment of the general government over so great a
country, the appeal was emphatically made to the intermediate existence of the state
governments between the people and that government, to the vigilance with which they
would descry the first symptoms of usurpation, and to the promptitude with which they
would sound the alarm to the public.”

For Madison, politically responsible and responsive government was the primary
mechanism by which personal liberty will be secured. He believed that “the right of
electing the members of the government constitutes more particularly the essence of a
free and responsible government.”

In Madison’s analysis, the Alien and Sedition Acts undercut responsible
government, the truest safeguard of personal liberty, in several respects. Their supporters
justified their constitutionality by an interpretive approach that would collapse the
boundaries between the nation and the states. Madison lamented the “late doctrine” of
broad constitutional construction promoted most notably by Hamilton and Marshall that
would undermine the character of a limited government of enumerated powers. In his
words, “if the powers granted be valid, it is solely because they are granted; and if the
granted powers are valid because granted, all other powers not granted must not be
valid.”

In his report, Madison identified and rejected several interpretive methods used to
construe the Constitution’s grant of powers to the national government broadly. He
claimed that the power to “lay and collect taxes” for the “general welfare” is not a
separate grant of power but the means by which the powers that follow are to be

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154 Id. at 266.
155 Id. at 233.
156 Id. at 244.
effected.\textsuperscript{157} He argued that the “necessary and proper” clause “is not a grant of new powers to Congress, but merely a declaration, or the removal of all uncertainty, that the means of carrying into execution those otherwise granted are included in the grant.”\textsuperscript{158} He rejected the argument of John Marshall and others, that the Acts were permissible as the enforcement of a national common law.\textsuperscript{159} Otherwise, Congressional power would extend to “every object of legislation,” since a judiciary engaged in common law legal development possesses a discretion “little short of a legislative power.”\textsuperscript{160} And finally, he rejected reference to the Constitution’s “Preamble” as a source of legislative authority, “it being contrary to every acknowledged rule of construction to set up this part of an instrument in opposition to the plain meaning expressed in the body of the instrument.” While the preamble might articulate “the general motives or reason for the particular regulations” that follow, those motives are “explained and limited” by the regulations.\textsuperscript{161}

Madison was clear. Failure to maintain these limits on national authority would lead to tyranny. Government on a continental scale cannot be truly responsible, and only responsible government is free government. He explained that “the obvious tendency, and inevitable result, of a consolidation of the states into one sovereignty, would be to transform the republican system of the United States into a monarchy.” National consolidation would result in an increase in both “prerogative and patronage” in the executive. Because of the difficulty in crafting regulations for such a vast area, a large

\begin{flushright}
\textsuperscript{157} Id. at 239-40. \\
\textsuperscript{158} Id. at 254-55. \\
\textsuperscript{159} Id. at 244-53. \\
\textsuperscript{160} Id. at 251-52. \\
\textsuperscript{161} Id. at 253.
\end{flushright}
amount of discretion in enforcement would have to be lodged in the executive, for he
“could best mould regulations of a general nature, so as to suit them to the diversity of
particular situations.” Moreover, the consequent increase in offices would make persons
dependent on the executive.162

If responsible government then is necessary for the preservation of liberty, and if
continental consolidation would undermine responsibility, then the states must be
maintained. With these conclusions in mind, it is possible to see Madison’s argument as
more than an early statement of civil libertarian philosophy that justifying contemporary
judicial supervision of fundamental rights. Rather, it is an argument for a limited national
government that will maintain the political institutions primarily responsible for the
protection of personal liberty.

Madison’s recommendation for protecting these institutions appears subtly
different from the approach of Calabresi. While Madison understood these boundaries as
essential to personal liberty, his recommendations for enforcing them continued to be
quite informal. The Constitution granted particular and delineated powers to the national
government. If that general government overstepped these constitutional bounds, the
states “have the right, and are in duty bound, to interpose, for arresting the progress of the
evil, and for maintaining, within their respective limits, the authorities, rights, and
liberties appertaining to them.”163

He described state interpositions against unconstitutional actions by the general
government as “expressions of opinion, unaccompanied with any other effect than what

162 Id. at 242-43.
163 Id. at 232.
they may produce on opinion, by exciting reflection.” The purpose of interposition is political change. It “may lead to a change in the legislative expression of the general will—possibly to a change in the opinion of the judiciary.”

The informal and political character of this operation was made more evident by his claim that there are “other means” available to the states for maintaining enumerated constitutional boundaries. He mentioned that the legislatures “might have made a direct representation” to the national legislature, communicating their desire to overturn the acts. They “might have represented” to their Senators a desire that they propose an “explanatory amendment to the Constitution.” Or finally, they might have used their own power to call for a “convention for the same object.” While some view Madison’s support for the Virginia Resolutions as a proto-secessionist commitment to state rights, his calls for repeal or amendment in fact draw attention to his consistent position that the states lack direct authority within the political institutions of the general government.

Madison argued finally that the boundary between the nation and states will be policed by the attachments of the people. He wrote:

If, therefore, as has been elsewhere remarked, the people should in future become more partial to the federal than to the State governments, the change can only result from such manifest and irresistible proofs of a better administration as will overcome all the antecedent propensities. And in that case, the people ought not surely to be precluded from giving most of their confidence where they may discover it to be most due; but even in that case the State governments could have little to apprehend, because it is only within a certain sphere that the federal power can, in the nature of things, be advantageously administered.

Madison believed that the propensity to favor state governments resulted from the administrative ineptitude of the national government under the Articles. Of course, his

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164 Id. at 270.

165 Id. at 272.

166 Federalist 46 at 244.
entire goal in securing constitutional reform was to create a national government that would work more effectively. The purpose of his constitutional reform would then likely form stronger attachments between the people and the national government.

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James Madison shared Robert Bork’s and Steven Calabresi’s desire to limit the reach of constitutional interpretation. He argued that there is an “important distinction” between constitutional government “established by the people and unalterable by the government,” and the unlimited power of parliamentary governments, “transcendent and uncontrollable as well with regard to the Constitution as the ordinary objects of legislative provision.” The writtenness of the Constitution presupposes that the “fundamental articles of the government” cannot be altered by simple legislative act.\(^\text{167}\) He explained that “there is certainly a reasonable medium between expounding the Constitution with the strictness of a penal law, or other ordinary statute, and expounding it with a laxity which may vary its essential character, and encroach on the local sovereignties with which it was meant to be reconcilable.”\(^\text{168}\)

At the same time, the Madisonian System promoted by Bork and Calabresi diverges in fundamental ways from Madison’s own constitutionalism. In short, while the Founders generally expected that the states would remain an important presence within America’s constitutional structure, the institutional role of the states seems elevated in

\(^{167}\) *Federalist 53* at 277.

\(^{168}\) See “James Madison James Madison to Spencer Roane, September 2, 1819,” in *Writings*, 8:447-53.
Calabresi’s account. In other words, the originalist argument for a primarily procedural Constitution overstates the role of the states in those constitutional processes, and this overstatement undercuts the fundamentally functional character of the original Constitution.
CHAPTER 3

THE DEMOCRATIC POLITICAL THEORY OF ORIGINALISM

In the 1950s the New Deal consensus on judicial behavior—one that rejected a politically active Court—was falling apart. Following a period of self-imposed judicial restraint, the Warren Court began, and the Burger Court continued, a judicial expansion of national power and substantive rights at the expense of state majorities. Originalism developed as an interpretive theory that would restrain this emergent pattern of aggressive judicial decisionmaking. It was largely a “reactive” theory, serving primarily as an alternative method for interpreting the substantive constitutional values embodied in the Bill of Rights and the Fourteenth Amendment.

In recent years, however, these originalists, generally associated with a commitment to judicial restraint, have switched gears. They now actively prioritize judicial protection for state and local majorities. A working majority of Supreme Court justices has asserted its authority to enforce the Constitution’s federal structure and protect local democracy by holding national majoritarian actions unconstitutional.

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2 Keith Whittington, “The New Originalism.”

3 Id. at 599-603.

their interpretation of the Commerce Clause, the Fourteenth Amendment, the Eleventh Amendment, and the Constitution’s general structure and operation, these justices have demonstrated a commitment to maintaining the Constitution’s federal design.

This originalist prioritizing of the Constitution’s federal structures demands a vigorous defense, and neo-originalism is well-positioned to provide it. As I explained in the previous chapter, critics routinely miscast originalism as an intentionalism offering little normative defense of original institutions and allowing for minimal constitutional development. In fact, however, even traditional originalist accounts are quasi-functionalist—linking the methodology of original meaning to the continued operation of the Madisonian System that encourages stable constitutional development. Still, the political rhetoric of originalism frequently relies on democratic theory without focusing on the particular utility of local democracy and federal arrangements.

By contrast, neo-originalists recognize that our continued obeisance to the Founders’ constitutionalism requires something more than an appeal to authority. They turn, therefore, to political science, economics, and moral philosophy to argue for the functional utility of original constitutional principles and procedures, and to history to demonstrate the ongoing commitment to this constitutionalism. By providing these defenses of their constitutional interpretations and constructions, these new originalist approaches provide richer explanations of the Constitution’s federal elements than traditional historical accounts. Still, even these accounts fall short of describing and defending the original functionalist Constitution and the purpose of its federal democratic elements.
To highlight the limits of these originalist inquiries, I begin with three non-originalist approaches to constitutional theory—those of Supreme Court Justice Stephen Breyer, Mark Tushnet, and John Ely. Like the neo-originalists, their arguments are heavily reliant on democratic theory and help to showcase the interpretive difficulties associated with prioritizing the value of democracy in a federal constitutional system. I follow by reviewing several originalist descriptions of the beneficent effects of federalism. As sophisticated as these analyses are, I determine that they diverge in important ways from the functionalism of the original Constitution. I conclude by considering the originalist commitment to federalism in light of three prominent historical approaches to the Constitution’s federal character—all of which assume the Constitution is primarily nationalist in orientation. In spite of the promise of neo-originalism, the strongest existing arguments for the Constitution’s federal character do not adequately capture the original purposes of the Constitution or the ongoing aspirations of the American people.

I. The shortcomings of democratic theory in constitutional law

As I noted in the previous chapter, the originalist commitment to judicial restraint links originalism to democratic theory. This originalist focus on the value of democracy is not unique, however. Non-originalist scholars continue to advance theories of constitutional interpretation that prioritize the constitutional value of democracy. A review of these non-originalist accounts highlights the shortcomings of a democracy-bound constitutionalism. Simply put, in our democratic and federal system, it is not enough to evaluate the constitutionality of a government action by invoking its
democratic pedigree. Ultimately, one must offer a functionalist defense of particular
democratic arrangements, whether federal, national, or some combination of the two.

Judicial enforcement of “Active Liberty”

Responding to originalist fidelity to the Constitution’s historical meaning, Justice
Stephen Breyer has developed an interpretive third-way between originalism and moral
constitutionalism. His theory of constitutional interpretation prioritizes the theme of
“active liberty.” Breyer does not dismiss the importance of either history or moral
principle in constitutional interpretation. He explains that judges do, and should,
consider “language, history, tradition, precedent, purpose, and consequence,” when
interpreting constitutional and statutory texts. But by focusing on the policy
implications of judicial decisions in hard cases, Breyer moderates the supposed excesses
of Justice Scalia’s history-bound originalism and the “moral-philosophical” approach of
Justices William Brennan and Thurgood Marshall. For Breyer, the central policy
consideration is the impact of a decision on active liberty, a morally weighty principle
with, according to Breyer, a foundation in our constitutional traditions.

Breyer believes that “the original Constitution’s primary objective” was the
creation of “a form of government in which all citizens share the government’s authority,
participating in the creation of public policy.” This “active and constant participation in

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5 Breyer, Active Liberty at 6.
6 Id. at 8.
7 See Michael McConnell, “Active Liberty: A Progressive Alternative to Textualism and
8 Breyer, Active Liberty at 33. See also Benjamin Barber, Strong Democracy: Participatory
Politics for a New Age, Berkeley: University of California Press, 1985; Amy Gutmann and Dennis
Thompson, Democracy and Disagreement, Cambridge: Belknap Press, 1996; Amy Gutmann and Dennis
collective power” is “active liberty.” He suggests, therefore, that this principle is the core feature of the Constitution’s meaning. For Breyer, this principle animates the Declaration of Independence and inspires the Constitution’s structure and rights.\(^9\)

Whether Breyer’s identification of this principle does reflect both original textual meaning and constitutional traditions is doubtful. His strongest argument for the Constitution’s devotion to active liberty is a post-Founding examination of the character of liberty by a Frenchman. And his understanding of America’s constitutional development overstates its republican features.

Breyer supports his theory of the American Constitution of 1787 with an 1819 essay by the French philosopher Benjamin Constant. Constant’s essay elaborates the differences between ancient and modern liberty.\(^10\) Following Constant, modern liberty is, according to Breyer, “freedom from government,” and consists of the “individual’s freedom to pursue his own interests and desires free of improper government interferences.”\(^11\) By contrast, the soul of America’s constitutional system in Breyer’s account is the ancient liberty of citizen participation.

Breyer attempts to buttress his analysis with evidence from America’s own historical development similarly fall short as originalist accounts. Relying on the work of Gordon Wood and Bernard Bailyn,\(^12\) he argues that the Constitution was “focused on

\(^9\) Breyer, *Active Liberty* at 132.


\(^11\) Breyer, *Active Liberty* at 5.

democratic self-government,”¹³ and that as a result “courts should take greater account of the Constitution’s democratic nature when they interpret constitutional and statutory texts.”¹⁴ Yet, recent accounts of the American Founding have successfully challenged and supplanted once prevailing claims that democratic self-government is the core element of American constitutionalism.¹⁵ In a friendly, but powerful, criticism of Breyer, Michael McConnell draws on these insights and suggests that America’s immediate pre-constitutional history, the arguments of the Founders, and the constitutional text itself undermine Breyer’s conclusion that the Constitution unreservedly embraced principles of direct democracy and citizen participation.

If anything, the weight of scholarship seems to suggest the democratic deficiencies of the original Constitution.¹⁶ Breyer acknowledges that the radically democratic pre-1787 state constitutions were failures. Still, he maintains that this

¹³ Id. at 32.
¹⁴ Id. at 5.


experience did not change the basic democratic posture of the American Founders.\textsuperscript{17} McConnell rightly concludes that Breyer underestimates the Founders’ hostility to direct democracy and immediate citizen participation in politics. He explains that the Constitution was “intentionally less democratic” than its state predecessors, and that “the Federalist defenders of the Constitution proclaimed these democratic deficits a virtue.”\textsuperscript{18}

Breyer’s democracy-oriented analysis suffers even more as he attempts to justify his diminution of the Constitution’s federal structure. Breyer’s principle of active liberty would seem to recommend greater care in preserving the Constitution’s federal elements, since state and local government provide greater opportunities for citizen participation. McConnell makes the compelling point that Breyer’s principle of “active liberty” more closely resembles the commitments of the Anti-Federalists, who favored protections for republican government in the states.\textsuperscript{19} Frequent and direct citizen participation in the formation of public policy would seem to recommend maintenance of the Constitution’s federal features.

Breyer admits the important role that states can play in promoting democratic participation. He claims that “by guaranteeing state and local governments broad decisionmaking authority federalist principles secure decisions that rest on knowledge of local circumstances, help to develop a sense of shared purposes and commitments among local citizens, and ultimately facilitate ‘novel social experiments.’” By connecting citizens to local democratic decisionmaking, federalism encourages accountability

\begin{itemize}
\item \textsuperscript{17} Breyer, \textit{Active Liberty}, at 24-5.
\item \textsuperscript{18} McConnell, “Active Liberty,” at 2392-93.
\item \textsuperscript{19} \textit{Id.}, “Active Liberty,” at 2394-5.
\end{itemize}
through “increased transparency” and by helping citizens to “maintain a sense of local community.”

Breyer’s commitment to active liberty and citizen participation does not translate, however, into formal protections for the state governments in which the opportunities for direct citizen participation seem greatest. He concludes that “it seems more rational” to view the federal structure in its entirety “as helping to secure more effective forms of active liberty, i.e., as facilitating meaningful citizen participation in government by preserving a more local decisionmaking process.” He even identifies with former Supreme Court Justice Sandra Day O’Connor’s theory of federalism, which he calls the “participation principle.” But unlike Justice O’Connor, Breyer has not voted with recent pro-federalist majorities to maintain the independent authority of these subnational entities against incursions by the national government.

Breyer indicates that this “participation principle” should yield in certain circumstances. As he explains, the principle “must be implemented against the backdrop of a highly complex set of technology-based social problems that defy decision purely at local or purely at federal levels.” It is not entirely clear what Breyer means by this statement. It seems that on certain policy questions involving scientific expertise, Breyer recommends removing these issues from ordinary democratic politics altogether. In these cases, he urges a cooperative federalism, where local experts work with national administrators to craft unique policy solutions.

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20 Breyer, *Active Liberty*, at 57.
21 Id. at 56-7.
22 Id. at 57.
23 Id.
Michael McConnell makes two compelling points about Breyer’s understanding of cooperative federalism. First, even if the complexity of certain policy issues might justify the national government’s commandeering of the states, as Breyer would have authorized in *New York v. United States*, by undermining local democracy, Breyer removes the incentives for the cooperative state participation he seeks. Second, Breyer’s judicial record demonstrates that he does not limit intrusions on state authority to these complex technical matters. His exception to the constitutional preference for active liberty and local democracy seems to encompass a variety of instances in which Congress determines that federal administration could achieve a policy goal with greater efficiency than the states.

Given Breyer’s stated preference for active liberty, his explanation for the diminished role of the states falls short. He writes that though federal boundaries “make[] it more difficult for the federal government to tell state and local governments what they must do…thereby free[ing] citizens from restraints that a more distant central government might otherwise impose,” federalism “leaves citizens subject to similar restraints imposed by the states themselves.” Though federalism might free individual businesses and state actors from national regulations, it frees the states to violate the guarantees of modern liberty. This is a *non sequitur*. Of course, the maintenance of federal boundaries leaves individuals subject to regulation in the states. The question for a proponent of active liberty is whether this participation in the creation and reform of those regulations is more meaningful at the local or the national level.

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Breyer concludes with the unusual assumption that the Court’s recent promotion of federal boundaries promotes *modern* liberty.\(^{26}\) He refers to the Court’s recent federalism decisions as “retrograde” with “respect to the furtherance of active liberty,” reading them as protecting the modern liberty of “individuals and businesses.”\(^{27}\) This is certainly an idiosyncratic interpretation given that the fiercest proponents of federalism in recent history were those who sought to maintain racial segregation, a practice that violated both the libertarian and egalitarian principles undergirding modern liberty. After locating democracy at the center of his constitutional theory, it is not surprising that Breyer offers a confusing analysis both of the Constitution’s federal elements and of its liberal features.

**Popular enforcement of the “Thin Constitution”**

Breyer’s commitment to democratic self-government leads him to promote judicial supervision of the principle of active liberty. By contrast, Mark Tushnet argues that the principle of democratic self-government diminishes the power of judicial review and justifies increased political supervision of the Constitution. Challenging the theory of judicial supremacy announced in *Cooper v. Aaron*\(^ {28}\) and confirmed by *Boerne v. Flores*,\(^ {29}\) he promotes the interpretive authority of political institutions and actors.\(^ {30}\)

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\(^{26}\) Breyer, *Active Liberty*, at 56.

\(^{27}\) *Id.* at 59.

\(^{28}\) 358 U.S. 1, 17 (1958) (arguing that *Marbury* established the “basic principle that the federal judiciary is supreme in the exposition of the law of the Constitution, and that principle has ever since been respected by this Court and the Country as a permanent and indispensable feature of our constitutional system).

\(^{29}\) 521 U.S. 507, 536 (1997).

\(^{30}\) See Tushnet, *Taking the Constitution Away from the Courts*. 
Tushnet’s theory is more reserved than similar theoretical and historical accounts of America’s popular constitutionalism.\(^{31}\) He limits the circumstances in which political maintenance of the Constitution is appropriate, thereby circumventing the challenge that popular constitutionalism encourages interpretive anarchy.\(^{32}\) Yet like Breyer’s, Tushnet’s commitment to democratic theory is inconsistent. Specifically, his reservation of popular constitutionalism to national political actors, and commitment to national over local majorities, require greater justification than he provides.

Popular constitutionalism is less formal and more radically democratic than departmentalist critiques of judicial power.\(^{33}\) This plebiscitary argument against exclusive judicial supervision of the Constitution does more than recognize a constitutional obligation among all constitutional actors to interpret the Constitution. Tushnet and other popular constitutionalists take the argument one step further. As a descriptive matter, they argue that not only popular institutions, but the people themselves, have participated in constitutional development. And as a normative matter, they argue that such popular participation in constitutional development is a positive attribute of American politics. Tushnet’s constitutionalism authorizes and encourages all

\(^{31}\) See Kramer, *The People Themselves*.


citizens to interpret the Constitution.\textsuperscript{34} He explains that this popular constitutionalism “rests on a commitment to democracy, a commitment itself embodied in the Declaration’s principles.”\textsuperscript{35}

This devolution of interpretive authority only applies in certain circumstances, however. Tushnet claims that there is a “thick” and a “thin” Constitution. Only the thin Constitution is subject to popular enforcement. Tushnet borrows Abraham Lincoln’s distinction between the principles of the Declaration of Independence and the structures of the Constitution as inspiration for his distinction between the thick and the thin Constitutions. As I noted earlier, Lincoln described “[t]he Union and the Constitution” as “the picture of silver” and the principles of the Declaration as an “apple of gold” framed by the Constitution. He concluded that “the picture was made for the apple—not the apple for the picture.”\textsuperscript{36}

Tushnet finds in Lincoln a distinction between what he describes as the thick and the thin Constitution.\textsuperscript{37} The thick Constitution consists of “a lot of detailed provisions describing how the government is to be organized.”\textsuperscript{38} By contrast, the thin constitution includes the “fundamental guarantees of equality, freedom of expression, and liberty.”\textsuperscript{39}

While a convenient analogy, it is an imperfect one. Tushnet and Lincoln have different things in mind with respect to constitutional principles and procedures. Tushnet

\textsuperscript{34} Tushnet, \textit{Taking the Constitution Away from the Courts}, at 6-32. See also Sanford Levinson, “Could Meese Be Right This Time,” 61 Tulane Law Review 1071 (1986-87).

\textsuperscript{35} Tushnet, \textit{Taking the Constitution Away from the Courts}, at 31.

\textsuperscript{36} \textit{Id.} at 11 (\textit{citing} Lincoln, “Fragment: The Constitution and the Union [1860?]”).

\textsuperscript{37} \textit{Id.} at 9-14.

\textsuperscript{38} \textit{Id.} at 9.

\textsuperscript{39} \textit{Id.} at 11.
argues that citizens should exercise control only over the meaning of the thin Constitution. Maintenance of the thick Constitution seems to occur via an ordinary, judiciary-centered process. On initial review, the thick Constitution does not appear to include the mechanisms of constitutional operation. Rather, they are the technical, and generally unlitigated, provisions in the Constitution. He explains that the Constitution’s thick provisions are characterized either by “judicial silence” or “judicial errors.” They are also met with “public indifference.” In other words, the public should participate in the interpretation of constitutional provisions in which the public happens to have an interest.

Adhering to this distinction between the thick and thin Constitution will prove difficult in practice. What happens in those cases that address the consequential, institutional features of the Constitution? Lincoln’s example actually demonstrates the difficulty of delineating the thick and thin Constitutions. For Tushnet, Lincoln’s political challenge to Dred Scott represents an instance of the popular enforcement of the thin Constitution. Yet Lincoln focused considerable attention on Taney’s misguided analysis of the Constitution’s thick, procedural commitments. And as is clear in Dred Scott, and in cases challenging the New Deal, more pedestrian constitutional questions of process and institutional operation are frequently the focus of public and political attention.

A consideration of the Constitution’s federal features illuminates the ambiguous application of Tushnet’s distinction between the thick and thin Constitution. On the one

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40 Id. at 10.

41 Id. at 9.
hand, the division between national and local authority is a formal feature of the Constitution. On the other hand, the Constitution’s federal commitments, embodied in the Tenth Amendment, arguably stand for the thin principle of state sovereignty and local self-government. Moreover, given Tushnet’s own measure of a thick constitutional provision—public indifference and judicial silence—it seems clear that federalism is a part of the thin Constitution. Tension between the states and the national government remains a hallmark of America’s political development. The New Deal realignment and the partial Reagan realignment depended in some measure on popular engagement with the proper constitutional relationship between the nation and the states. It would seem, therefore, that Tushnet would understand resistance within the states to federal encroachments. The political reaffirmation of federal boundaries at the national level is a legitimate extrapolation from the thin principle of popular sovereignty and local self-government.

The actions of Governor Oval Faubus are a test case for Tushnet’s effort to make a meaningful distinction between the thick and thin Constitution. In the name of local self-government, Faubus effectively attempted to nullify a Supreme Court decision and provoked the very assertion of judicial supremacy that Tushnet now challenges. Tushnet’s assault on Cooper in the name of popular interpretation of the Constitution would also seem to justify Faubus’ actions. Yet, Tushnet rejects Faubus’ actions. He asserts that Faubus “could not plausibly have claimed that his actions advanced the

42 See Ackerman, We the People, Vols. 1 and 2.

43 See Skowronek, The Politics Presidents Make; and Zuckert, “Reagan and that Unnamed Frenchman (DeTocqueville).”

Declaration’s project.” He claims that Faubus was acting only on behalf of states’ rights, which could only be connected to the Constitution’s thin purposes through the Preamble’s commitment ‘to form a more perfect union.’ Tushnet then admits that he “omitted that purpose from [his] earlier quotation of the Preamble because it does not resonate with the Declaration’s principles as the other purposes recited in the Preamble do.”

That might be a reasonable omission if Tushnet understood the Declaration of Independence and Preamble as stating a commitment to natural rights. But he does not. Instead, he understands both as committed to a principle of self-government. It is, therefore, somewhat disingenuous to claim that Faubus’ rejection of a judicial holding on behalf of his constituents is an action inconsistent with the thin Constitution.

Besides artificially and inconsistently limiting the content of the thin Constitution, local political actors who wish to challenge interpretation of the Constitution by federal actors have an additional hurdle to clear in Tushnet’s scheme. Again, Tushnet understands that constitutional law is not the same as the Constitution. This observation authorizes not only politicians but, according to Tushnet, even the dean of a state-run law school, to interpret the Constitution independently of judicial commands. It seems reasonable then that Governor Faubus, who was duty bound to uphold the Constitution, should be authorized to interpret it and to refuse to enforce what he believed to be an unconstitutional order.

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45 Tushnet, Taking the Constitution Away from the Courts at 14.

46 Id. at 11.

47 Id. at 20.
Yet Tushnet requires that only leaders capable of forging a consensus and speaking for the people are permitted to take these popular interpretive positions. So instances of popular constitutionalism are appropriate when one can gain some undefined level of support for the position. Tushnet understands his account as a theoretical justification for popular constitutionalism, as opposed to a simply historical account of constitutional development. In the end, however, his argument is that a proper exercise of popular constitutionalism is a successful one. As a theoretic account, this is not as thick as what Tushnet proposed.

And again, it is not clear how it would work in practice. For example, his requirements would seem to undercut an instance of popular constitutional interpretation that he cites as an apparent exercise of democratic constitutionalism. Tushnet approves of Lincoln’s action in response to *Ex parte Merryman*,49 defying Taney’s holding that his suspension of habeas corpus was unconstitutional. Yet, given that the suspension came on the heels of secession by half the nation, which had concluded most definitely that Lincoln did not speak for it, it seems unclear why Lincoln’s defiance is permissible while Faubus’ is not.

Tushnet’s descriptive and normative account of popular evaluation of constitutional meaning is an important contribution to efforts that emphasize the Constitution’s democratic character. It is particularly helpful to have a member of the legal community developing an argument for the deeply political character of American constitutionalism. Yet, as is clear in his uneven treatment of federalism, Tushnet

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48 *Id.* at 24.

49 17 F. Cass. 144 (1861).
ultimately highlights the difficulties associated with a constitutionalism grounded on
democratic theory.

The democratic commitments of the Supreme Court

In addition to these broadly theoretical accounts of constitutional interpretation,
some have attempted to locate the jurisprudence of individual judges and particular
“courts” within traditions of constitutional interpretation. These scholars describe both
the Warren Court and the Rehnquist Court as primarily concerned with issues of
democratic theory and enhancing democratic participation. Discussion of the
Constitution’s federal features in these accounts emphasizes the challenge of linking
constitutional theory to democratic theory.

The most influential statement of the Constitution’s democratic character, and the
Supreme Court’s unique role in maintaining it, remains John Ely’s in Democracy and
Distrust.50 There he explained that in spite of occasional references to fundamental
values, it was mistaken to view the Warren Court’s activism as similar to the substantive
activism of the Lochner Court.51 The Warren Court’s jurisprudence was best understood
as in the service of democratic participation.

According to Ely, the recommendation for judicial action contained in Carolene
Products52 served as a blueprint for the Warren Court. Its members understood, first “that
it is an apparent function of the Court to keep the machinery of democratic government

50 See Ely, Democracy and Distrust.


running as it should, to make sure the channels of political participation and communication are kept open,” and second, “that the Court should also concern itself with what majorities do to minorities.”\textsuperscript{53} In other words, the Court should remove barriers preventing democratic institutions from securing majoritarian outcomes, and it should challenge democratic institutions that persistently secure majority interests at the expense of certain minorities. Ely sought to diminish the moral-philosophic approach to constitutional interpretation. Instead he urged the Court to encourage the proper functioning of majoritarian institutions, while correcting their inherent deficiencies.

He concluded that the Constitution is primarily concerned with securing the democratic process.\textsuperscript{54} As he explained:

\begin{quote}
the document is overwhelmingly concerned, on the one hand, with procedural fairness in the resolution of individual disputes (process writ large), and on the other, with what might capaciously be designated process writ large—with ensuring broad participation in the processes and distributions of government.\textsuperscript{55}
\end{quote}

He therefore deemphasized judicial protection of the Bill of Rights and the Fourteenth Amendment, insofar as those amendments represent an overriding constitutional commitment to personal liberty.\textsuperscript{56} Rather, as becomes clear in his explanation of First Amendment jurisprudence, the protection of enumerated rights is important insofar as it facilitates better inputs for democracy.\textsuperscript{57}

Critics challenged that Ely’s process-based objectivity was an impossibility. Ultimately, interpretation involves hard policy choices, and those choices owe much to

\textsuperscript{53} Ely, \textit{Democracy and Distrust} at 76.

\textsuperscript{54} Ely, \textit{Democracy and Distrust} at 88-101.

\textsuperscript{55} \textit{Id.} at 87.

\textsuperscript{56} \textit{Id.} at 93-98.

\textsuperscript{57} \textit{Id.} at 105-34.
foundational assumptions about the nature of justice and the requirements of constitutionalism.\textsuperscript{58} This challenge applies to Ely’s failure to address the relationship between national and subnational democratic institutions. While Ely did rely on Madison’s argument in \textit{Federalist 10} that minorities are particularly prone to abuse from local democratic majorities, he did not develop an argument explaining the circumstances in which local democracy should be supplanted by a national majority. In this respect, it is a functionally deficient account, failing to provide a reason for prioritizing one democratic institution over another.\textsuperscript{59}

John McGinnis has attempted such a functionalist account in his effort to do for the Rehnquist Court what Ely did for the Warren Court. While Ely’s Warren Court promoted the use of national institutions to correct, and occasionally supplant, democracy at the local level, McGinnis explains that the Rehnquist Court changed course and protected existing democratic institutions and private associations in the states.\textsuperscript{60}

Distinguishing the Warren Court from the Rehnquist Court, McGinnis argues:

The lack of any particular solicitude for mediating institutions was quite consistent with a jurisprudence that sought to perfect centralized democracy. If national government could conduct reform rationally and scientifically with inputs from the public through the electoral process, there was less real need for civil associations to provide competing values.\textsuperscript{61}


\textsuperscript{59} Ely, \textit{Democracy and Distrust} at 80-1.


\textsuperscript{61} \textit{Id.} at 501-02.
His description suggests that Ely’s constitutionalism, and his particular democratic attachments, were a product of the age. His theory of national democratic governance viewed state and local democratic actions as impediments to political and social progress. While the experience of racial segregation in the states provided some evidence for this commitment to national democracy, Ely did not offer anything like a functionalist defense for the favored status of national institutions.

McGinnis provides a more functional account that considers the comparable worth of local and national democracy. Relying on public choice theory, he rejects the argument for democratic centralization for two reasons. First, proponents of centralization understate the role of organized interest groups in undermining the public interest. Developments in media accessibility and communications have only exacerbated the problem of interest groups promoting their own, at the expense of a general, interest. Second, as special interests have grown in power, the average citizen pays even less attention to public affairs. Rational actors, recognizing their limited access to politicians and the media, no longer devote spare resources to political life.

Interest group influence generates a participatory death spiral of declining public participation followed by even greater interest group influence. National democratic institutions and centralized administration promised the delivery of what Mancur Olson called an “encompassing interest.” McGinnis argues that national institutions have failed to deliver on this promise, and in its place he offers a functionalist account of the Constitution’s federal features.

62 Id. at 503.

Interestingly, both the proponents of national and local democracy suggest in their own ways that they will reliably capture an encompassing interest. Nonpartisan centralized administration and greater citizen participation in state democracy have the potential to achieve better policy outcomes. The divergent approaches and assumptions of theorists and judges committed to democracy indicate the need for a functionalist constitutional account. There is no single democratic principle. Democratic institutions can be structured to do different things and neo-originalist theorists have made significant contributions to our understanding of constitutional democracy. In the following section, I consider several of these functional arguments. While they improve on the unexamined commitment to national democracy, they ultimately depart from the political science of the original Constitution.

II. Neo-originalism and the functions of federalism

The neo-originalist approach to constitutional interpretation has inspired a number of compelling functionalist accounts of the Constitution’s federal features. Keith Whittington has provided a helpful description of this originalist approach. His “fairly basic definition” of originalism is that it “regards the discoverable meaning of the Constitution at the time of its initial adoption as authoritative for purposes of constitutional interpretation in the present.”

Neo-originalism subtly departs from this basic definition, however, justifying constructions of constitutional text that depart from a static understanding of original meaning.

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64 Whittington, “New Originalism,” at 599.
Originalism now seems to acknowledge a role for constitutional development when interpretation of the meaning of text and tradition are in dispute and interpretation fails. Neo-originalists supplant the historical meaning of constitutional text with functionalist accounts defending the original Constitution on normative, rather than simply historical, grounds. This neo-originalist shift has occurred in response to theoretical and political challenges to traditional originalist methods.

Originalism has been subject to a number of methodological critiques, all bringing into question its ability to uncover constitutional meaning reliably. The proponents of these theoretical challenges mean to undermine originalism’s association with judicial restraint. First, what Whittington calls the “summing problem”—a problem caused by the difficulty of determining who views should prevail as an authoritative account of the Constitution’s original meaning—requires an interpretive discretion that undermines the originalist demand for a historically verifiable constitutional meaning. Second, the ambiguity of many constitutional principles and the problem of identifying the proper level of generality at which to interpret them similarly harms originalism’s capacity for restraint. Third, critics allege that originalist arguments suffer from “circularity” because the interpretive theory promoted by the Founders was not in fact originalism. And finally, the originalist commitment to majoritarianism seemed at odds with the determination to remain bound by the “dead hand” of centuries’ old constitutional commitments.65

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65 Id. at 605-06.
In addition to these theoretical challenges, an evolving political landscape required originalists to adapt. A simple commitment to judicial restraint might have been sufficient for a minority attacking the interpretive activism underpinning Roe. But when, in many cases, originalists became a working majority on the Court, they needed to develop a positive constitutional method.

In response to these theoretical critiques and political developments, originalism has evolved. First, a more sophisticated review of historical sources has replaced the meta-theoretical disputes that previously preoccupied constitutional theory. Second, originalism is no longer principally an argument for judicial restraint, but an argument for judicial maintenance of the original Constitution. And most importantly, when constitutional interpretation fails, the new originalism authorizes constitutional construction. In other words, the new originalists acknowledge the limits of interpretation and authorize the construction of constitutional meaning not only through judicial action but through ordinary politics.

The neo-originalist approach is most fully on display in discussion of the Constitution’s federal elements. As originalists became advocates of an active judiciary, guarding the Constitution’s federal features, they have developed quasi-functionalist accounts of federalism. These originalists compellingly argue that federalism is an

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66 Id. at 603-04.
67 Id. at 607-08.
68 Id. at 606.
69 Id. at 609-10.
70 Id. at 611-12.
71 Compare Whittington, Constitutional Interpretation with Whittington, Constitutional Construction.
advantageous feature of American constitutionalism. Federal forms help to reflect popular sentiment. They promote political participation and social innovation. They provide coordinated benefits to political participants. And they contribute to social peace and diversity.

These benefits are in jeopardy, however. States are no longer vigorous defenders of federal boundaries, and they have fewer formal and informal protections within national institutions. While some signs point toward a revival of federalism, others suggest that the federal system is imploding toward the center.72 Supported by their understanding of the historical foundations and purposes of federal institutions, the ongoing benefit provided by those institutions, and their increasing vulnerability to centralization, neo-originalists defend the Constitution’s federal commitments on functionalist grounds. These accounts, however, seem to borrow more from the modern tradition of law and economics than the arguments of the Founders. The result is a defense of federalism that diverges from the federalism of the Founding, particularly with respect to the priority of individual rights.

*Federalism and the general interest*

Developments in political science, borrowing from public choice theory, suggest that centralized democracy does a poor job of measuring the public interest. The character of contemporary politics leads to an overrepresentation of particular and parochial interests at the expense of the general interest. Federalism, more so than

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national institutions, has the potential to nurture and expose a general will that can effectively challenge the primacy of these special interests.

The belief that federalism will help to secure a general interest stands against arguments for national democracy that prevailed for much of the Twentieth Century. As James Ceaser and other students of the presidency have developed most fully,\textsuperscript{73} the deep influence of Progressivism in America’s political development led many to advance centralization and national administration as the means for achieving a general interest.\textsuperscript{74} Justice Scalia has suggested that the turn toward a non-partisan judiciary to solve disputed social questions is one manifestation of the mid-century faith in non-partisan, scientific administration.\textsuperscript{75} And as John McGinniss explains, this faith in centralized administration helped to define the Warren Court. While lack of faith in democracy certainly extended to national institutions as well, the primary violators were state and local actors, whose particular interests prevented the capture of a general interest.\textsuperscript{76}

The actual experience of centralization indicated that it did not live up to its promise. William Schambra has convincingly argued that America’s political development cannot be understood outside of the partial rejection of the Progressive influence in American politics. He explains that while Progressivism established a “foothold” in American politics, it was only able to do so by compromising with


\textsuperscript{75} See Orin Kerr’s account of Justice Scalia’s September 20, 2004 address at the Ethics and Public Policy Center. \textit{Available at} http://volokh.com/archives/archive_2004_09_14.shtml#1095731152.

\textsuperscript{76} McGinniss, “Reviving Tocqueville’s America,” at 501-02.
America’s traditional moral commitments. As an example, the success of Social Security, a redistributive program for the elderly and handicapped, was only possible because of its characterization as social insurance. It is based on the “myth” that the individual only receives a return on his investment in the system and only “endures because it draws as much on self-interested individualism as on self-forgetting community mindedness.”  

The more explicitly Progressive Great Society of Lyndon Johnson, with its expert-driven efforts to end poverty by explicitly redistributing wealth, was much less successful than Roosevelt’s efforts. By the late 1960s, political entrepreneurs on both the left and the right were challenging the consensus supporting greater centralization.

Public choice theory seems to confirm these defects of centralized administration. These theorists argue that centralization increases the influence of organized interest groups on national politics and administration, and actually undermines the realization of a general interest. Small scale social and political organization is better suited to capturing a general interest.

The ability of large national interest groups to influence politics makes the need for stronger subnational institutions greater today than it was in the 1960s. The cost of “information transmission” has made organization easier, lowering the bar to entry and making interest group lobbying more effective. More responsive political institutions lead to greater benefits for members, overcoming the collective action problem and


78 Schambra, “Progressive Liberalism and American Community.”

79 McGinnis, “Reviving Tocqueville’s America,” at 503.
encouraging individuals to join these groups. And the supposedly non-partisan administrators of public programs, who should be acting in the public interest, become partners with special-interest groups.\(^80\)

At the same time, there are an expanding number of disincentives for participation by ordinary citizens. Citizens who are less able to exert pressure on political decisionmaking, and who seek general, as opposed to particular, goods reasonably refrain from political participation.\(^81\) The result is a national political system that is increasingly unresponsive to the “encompassing interest” of the electorate.\(^82\)

John McGinniss and Ilya Somin borrow from these insights in arguing for a strong judicial defense of federalism. Principal / Agent theory suggests that the larger the number of principals, the less incentive there is for any one of them to monitor the performance of his agent. According to them, this makes centralized government particularly vulnerable to the ‘tragedy of the commons.’ A vast citizenry charged with supervising a single national government is actually a deficient guardian of its personal interests. The lack of individual responsibility for the maintenance of a system of subnational institutions leads to their collective neglect.\(^83\) At the same time, the states, tempted by the largesse of federal programs, are no longer reliable guardians of their own interests, when enticed with the largesse of federal programs.


\(^{81}\) See Olson, Logic of Collective Action.


The result is a system of increasing centralization, where special-interests become the only groups incentivized to participate actively. The susceptibility of national institutions to particular interests has led some to promote smaller scale mediating institutions—political, religious, and civic—as an alternative mechanism for capturing majoritarian sentiment. John McGinnis argues that these organizations are “closer to their engaged participants and less driven by special interests” so they “can better take account of citizens’ sentiments.”

Whether the power of special interests actually does decrease in the states is another question. For our purposes, it is simply worth noting the functionalist argument advanced by neo-originalists on behalf of federalism.

**State laboratories for competitive policy innovation**

In *New State Ice Company v. Liebmann*, Justice Louis Brandeis offered what is today probably the most familiar rationale for preservation of the states as independent governing entities. According to Brandeis, policy innovation at the local level will produce a variety of unique solutions to common social problems. Policy experimentation in the states provides decisionmakers with helpful examples, allowing them to learn from the successes and errors of their contemporaries. Originalist proponents of federal boundaries, buttressed by research in economics and political science, share Brandeis’ belief that the states can act as policy innovators.

The motivation for state and local governments to innovate comes from their dependence on citizens. Proponents of decentralized policy innovation treat local governments as providers of certain benefits, with residents as the consumers. John

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84 McGinnis, “Reviving Tocqueville’s America,” at 505.

McGinnis dubs the states “discovery mechanisms” within our constitutional scheme—
institutions which, allowed to compete with one another for the affections of citizens, will
create innovative policies that appeal to as many citizens as possible.  

A system of centralized administration creates perverse incentives against policy
development. A monopolist has little incentive to improve his product, and the consumer
has no incentive to demand better services. National policy monopolies remove the
incentive from government actors to compete for citizen allegiance. And believing that
they have no ability to effect political change, the citizen-consumer of government
services becomes apathetic.

By contrast, decentralization leads to competition between state and local
governments, more responsive political institutions, and richer citizen participation.
First, subnational entities have a unique ability to respond to diverse citizen preferences.
Because differences in social and cultural tastes often correlate with geographic
differences, the states are well-positioned to maximize social utility by responding to
these local tastes. Uniform national legislation will not represent these preferences as
adequately as subnational policymaking entities. Second, it is in the interest of states to
innovate. According to this account, states acting rationally attempt to maximize the
number of taxpaying residents, and the freedom to assess divergent social and policy
preferences allows states to compete with one another to satisfy citizen desires, thereby

86 McGinnis, “Reviving Tocqueville’s America,” at 487.
87 Calabresi, “‘A Government of Limited and Enumerated Powers,’” at 775; and McConnell,
“Federalism: Evaluating the Founders’ Design.”
attracting new citizens. 89 Finally, competition between the states promises an increase in democratic participation in policy formation. 90 Decentralization allows a closer relationship between voters, representatives, and administrators. The possibility of improved communication of desires and expectations encourages governing by cooperation rather than coercion.

While not contradicting the Founders’ views of federalism, it is important to note differences in emphasis between these originalists and the Founders. For originalists, the benefits of federalism come primarily from horizontal competition between the states. This competition promises improved policy inputs and outputs. By citizens becoming more engaged, government becomes more responsive and innovative. Yet, the Founders’ discussion of federalism focused largely on the benefits of vertical competition between the states and the national government.

Madison’s discussion of the benefits of federalism emerged from a belief that constitutionalism exists to protect individual rights, and federalism is a critical component of the separation of powers designed to protect individual liberty. He reminded opponents of the Constitution, who believed that it illegitimately departed from principles of federalism and state sovereignty, that both the new national government and the state governments represented the people. In Federalist 46, he explained “the federal and State governments are in fact but different agents and trustees of the people, constituted with different powers, and designed for different purposes.” 91 While these political entities have different powers and responsibilities, both ultimately exist to

91 Federalist 46 at 243.
protect individual rights. That obligation will be compromised, however, insofar as the national or state governments successfully encroach on the powers of the other.

According to Madison, there is a tendency of separate institutions to attempt to encroach on the rights of one another. Absent an institutional device to keep these institutions separate, power will accumulate in a single hand, leading to tyranny. Federalism is one aspect of the separation of powers. Madison explained in Federalist 51:

In the compound republic of America, the power surrendered by the people, is first divided between two distinct governments, and then the portion allotted to each subdivided among distinct and separate departments. Hence a double security arises to the rights of the people. The different governments will control each other; at the same time that each will be controlled by itself.

While Madison sought to maintain the states, he did not do so in order that they could compete with one another. Rather, the continued existence of the states allowed them to compete with the national government. States in their individual and corporate capacity will challenge federal encroachments within national institutions and in the states themselves. The neo-originalists understand federalism as providing citizens with an ability to choose different policy packages being offered by the states. Madison, however, suggests that the ultimate policy choice is between a package of goods provided by an individual’s state and the national government.

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92 Federalist 47 at 249.
93 Federalist 51 at 270.
The benefits of coordination

Thus far, I have described some of the recurring arguments for a federal union. There are additional arguments, however, for a federal union. By allowing individual states to combine for particular purposes, federalism provides states with benefits unavailable to them as isolated government entities. A central government provides both positive and negative goods to its member states. It can provide certain services more efficiently, and it can prevent the member states from harming each other.

While certain public goods are best provided at the subnational level, economic efficiencies lead those units to combine for certain purposes. First, by ceding certain regulatory burdens to the national government, states reduce deadweight social costs. Government regulations facilitating interstate trade, such as transportation standards and currency regulations, are examples of these contributions. Second, certain goods, due to their cost, would not be adequately provided without cooperation. This is most apparent with national defense. It may be possible for an individual state to assemble a militia, but research, development, and deployment of a missile defense system requires combination.

A central government is also necessary to ensure that states will, in fact, contribute to these shared goods. As Steven Calabresi has appropriately noted, this collective action problem was precisely the problem faced by the thirteen member states.

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under the Articles of Confederation. While recognizing the need for certain public goods, states, unsure that their neighbors will provide tax revenues to pay for them, are reluctant to pay for these goods themselves. A coordinating national government can secure the state participation necessary for the required provision of these agreed upon goods.

In addition to providing an institutional framework that allows states to combine for the more effective distribution of government goods and services, a centralized government can prevent member states from harming one another. First, deemphasizing geographic and political boundaries will diminish interstate competition and friction, thereby undercutting the likelihood of strife and actually decreasing certain defense expenditures.

Second, a central government can regulate the externalities “whenever a state governmental policy, law, or activity imposes costs or confers benefits on residents of other states.” The classic example of a negative externality is the passing of costs for environmental protection, where downstream or downwind states might reap the detrimental environmental effects of industrial production in a neighbor state. Absent a centralized government that can monitor these externalities, there is no incentive for a polluting state to assume the cost of environmental protection for a neighbor state at the expense of its own economic growth.

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While this account does identify certain of the economic benefits of federalism, at points it seems to overstate the cooperative character of these arrangements. In particular, it understates the need for enforcement of this agreement to contribute for certain purposes by national authorities. The system that these neo-originalists describe is essentially that of the current United Nations and the pre-1787 United States. In both instances, the executive authority created for certain shared purposes of the member states has no effective ability to compel resources for collective security, whether in contemporary peacekeeping\textsuperscript{100} or in the fighting of the Revolutionary War.\textsuperscript{101}

\textit{Protecting diversity and promoting social peace}

The originalist account of the role of federalism in minority rights protection diverges substantially from the views of the Founders. One contemporary argument for federalism assumes that certain minorities are permanent features of the political landscape and a potential threat to political peace. The Constitution achieves protection for minority groups, not by discouraging majority faction but by maintaining institutions for these minorities, through which they can exert their will.

These federalists, like James Madison, identify majority faction as the greatest institutional shortcoming of democratic regimes. Majorities cannot be counted on to maintain the rights of minorities. Yet, Madison sought to protect politically vulnerable minorities from republican deficiencies, primarily through an institutionalism that


\textsuperscript{101} Rakove, \textit{Original Meanings}.  

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discouraged the creation of permanent majority factions. Contemporary federalists promote state institutions as an opportunity for local majorities, outnumbered on the national stage, to have their interests recognized. For originalists, federalism encourages social peace by providing an outlet for minority faction. By contrast, Madison hoped to use national democratic institutions to prevent the creation of permanent majority factions.

This originalist analysis of federalism is an institutional response to the existence of multicultural political communities. It suggests fundamental diversity on political values and first principles within the American political community. One proponent of this view argues that while diverse Americans may join together for certain specific purposes, “in important ways and as to questions that are foundational to their identity, they do not believe that they should be part of the same demos as their fellow countrymen.” Their “social autonomy” must be guaranteed in “iron-clad ways.” Federalism addresses this need for social autonomy “in a way that no other constitutional power-sharing mechanism can hope to do.” Federalism allows an aggregation of diverse peoples committed, presumably, to divergent conceptions of justice.

In a large, socially heterogeneous country, minority groups will at best fail to secure their preferred policies, and at worst suffer persecution. Persistent persecution creates a potential for social discord and political dissolution. Federalism helps to defuse the social tension that develops when racial, religious, and cultural minorities feel

102 Federalist 10.
politically hopeless. By providing these groups with an opportunity to shape policy, federalism relieves the political system of pressures that might otherwise lead to violence.\(^{105}\)

Federal unions, therefore, guarantee their continued existence by guaranteeing the preservation of diverse communities. Federalism becomes an antidote to secession and political violence. As Steven Calabresi explains, federalism:

> prevents violence and war. It prevents religious warfare, it prevents secessionist warfare, and it prevents racial warfare. It is part of the reason why democratic majoritarianism in the United States has not produced violence or secession for 130 years.

Ultimately, there is “nothing” in the United States Constitution more conducive to “peace, prosperity, and freedom” than strong federalism.\(^{106}\) Nation states that have failed to adopt federal structures face devolutionary and secessionist movements.\(^{107}\)

While perhaps a helpful theoretical analysis of federalism, in application it is a counterintuitive argument given America’s political development. First, it is not clear that the “American people” does consist of such radically diverse “peoples.” Second, it is even less clear that these national minorities are geographically concentrated within subnational institutions where they can satisfy their wants as majorities. And third, where in American history such foundational divisions did fall along geographic lines, it seems that a theory of strong federalism contributed to secession and civil war rather than peace.


\(^{106}\) Id. at 770.

\(^{107}\) Id. at 760.
As I have already indicated, the relationship between these functionalist defenses of federalism and the American Founding is not always apparent. At times, they seem removed from the central political problems that motivated the Founders to engage in the constitutional reform of 1787—the likelihood of the dissolution of the union and the failure of the existing constitutional arrangement to protect rights adequately. The identification of America’s federalist peers, the characterization of rights, and the expectations of citizens deprived of rights all indicate a considerable distance between the Founders’ federalism and the federalism promoted by originalists.

Some of the comparative reference points for understanding America’s federal constitutional framework, demonstrate the distance between these federal accounts and the concern of the Framers that federal unions were prone to discord and dissolution. Steven Calabresi uses the post-World War II experience of international constitution-making and confederation—not only federal systems such as Germany’s, but also transnational political organizations such as the United Nations, the European Union, and NATO, and trade arrangements such as GATT and NAFTA—as evidence of the positive benefits of federalism.108

By eliminating territorial boundaries between states, federal arrangements diminish the need for standing armies, reduce the possibility of armed conflict between member states, and encourage collective security arrangements.109 This “geostrategic

108 Id. at 771-72.

109 Id. at 771. See also Amar, “Some New World Lessons for the Old World.”
argument for federalist consolidation” was the initial motivation behind post-War multinational organizations. Calabresi sees similarities between this “international federalism”—providing for collective security while allowing states to maintain their unique identities—and “the motivation for the formation of the United States federation in 1787.”

Yet, both the experience of this federal model and its purpose suggest that it diverges considerably from America’s constitutionalism. The federalism that Calabresi describes—one concerned with external threats rather than the internal governance of the member states—has its origins in antiquity. This externally oriented federalism allowed communities as internally diverse as the Athenians and Spartans to federate for certain limited purposes.

The Founders understood, however, that these federations failed to achieve even these limited purposes. And they understood these shortcomings in light of the collapse of the Articles of Confederation. The core feature of the federal arrangements that Calabresi views as role models is that they act on member states rather than on persons. Yet, it is precisely this feature that continues to make such federations so ineffective. Equality among the member states and weak enforcement authority render these federations incapable of securing even their modest goals.

A comparison of America’s constitutional experience with that of these organizations should suggest differences rather than similarities. While the United States

\[\text{\textsuperscript{110}}\text{Calabresi, ““A Government of Limited and Enumerated Powers,”” at 771.}\]

\[\text{\textsuperscript{111}}\text{See Rahe, Republics: Ancient and Modern.}\]

\[\text{\textsuperscript{112}}\text{See Madison, “Lessons of History: Of Ancient and Modern Confederacies,” in Meyers, ed. at 47-56.}\]
has effectively guaranteed security for its citizens and projected force globally to do so, the federal institutions Calabresi applauds have a spotty track-record at best in providing even the limited goal of collective security. Far from being derivative of the American experience, these institutions seem to share more with the federalism of the Articles of Confederation abandoned by the Founders as unworkable.

In addition, this description of America’s federalism seems distant from the language and experience of America’s constitutional commitment to preserving and extending personal liberty. While Steven Calabresi concludes, and others agree, that America’s federal forms are “much more important to the liberty and well being of the American people than any other structural feature of our Constitution,” this liberty diverges from the Founders’ primary conception of liberty.

The liberty of contemporary federalists is the liberty of fruitful participation in the democratic process. America’s federal structure helps to maximize individual preferences. Centralization deprives minorities of outlets for the realization of their policy goals. A federal constitutional structure, coupled with exit rights, will create policy innovation and a migration of political minorities to communities where their policy goals can be realized.

Conflating individual rights with efficient public policies that maximize political happiness, John McGinnis explains that mediating institutions such as state governments are “independently valuable because they themselves generate potentially beneficial norms for society through their competition.” He continues, arguing that “the norms that survive this market-test must have some claim to being beneficial. Indeed, competing

private associations must reflect value changes or lose members.” This “market mechanism” works not only for a “low-quality bundle of public goods,” but even for “fundamental individual liberties.”

Federalism creates a free market in rights protection. The Constitution maintains the core authority of state sovereignty and strictly limits the national government, thereby setting the conditions for state competition for citizen affections. McGinnis explains that:

Although the states were repositories of enormous and potentially tyrannical powers, the free movement of goods and people among them restrained their ability to use their power at the behest of interest groups to oppress the liberty of or extract wealth from their citizens. If the states exercised their power unwisely, free citizens could take themselves or their capital elsewhere. Thus, the Constitution’s strictly enumerated powers restrained the federal government, which in turn restrained the states through the competition that the federal government maintained by keeping open the avenues of trade and investment.

This competition will guarantee individual rights.

Michael McConnell has provided a helpful example of this competitive federalism. He assumes two states, ‘A’ and ‘B,’ each with a population of 100. On the question of whether smoking should be banned in public buildings, 70% of those in state ‘A,’ but only 40% of those in ‘B’ favor the ban. If left to national action, the ban would prevail, but a majority of the voters in state ‘B’ would have their preference denied. A more normatively acceptable outcome could be secured through a federal solution in which state majorities could make unique policy decisions. The “level of satisfaction,” or maximization of citizen desires, would increase if non-smokers in state ‘B’ moved to

114 McGinnis, “Reviving Tocqueville’s America,” at 505.
116 McGinnis, “Reviving Tocqueville’s America,” at 507-08.
117 Id. at 508.
comparatively healthy political community in state ‘A.’ Calabresi, following McConnell, suggests that this example shows how federalism might solve the “problem of majority rule, the key problem generated by democratic government.”

Yet this correlation between rights and policy benefits is questionable from an originalist perspective. It is not clear that this free market of policy ideas will in fact lead to a reasonable commitment to personal liberty. John McGinnis believes that “infus[ing] more elements of spontaneous and decentralized ordering” into decisionmaking will contribute to better outcomes. He concludes that “norms can be discovered through competition” among the states. Yet these “norms” do not have great substantive depth. As Calabresi explains, the “net gain in social utility” demonstrates that “federalism sometimes can alleviate the problem of raw majority rule, the key problem generated by democratic government.” American constitutionalism, however, originated in a commitment to certain transcendent principles, not social utility.

The shortcomings of this approach become apparent with the obvious replacement of the policy of smoking with a policy of segregation. By the 1950s national majorities were becoming appalled and embarrassed by the segregationist policies of Southern states, but majorities within those states remained supportive of those policies. The interesting question is whether those majorities should prevail. On the model of...
competitive federalism, they should. The safety-valve of some originalists is both inadequate as a matter of justice, and inconsistent with our own traditions and constitutional development.

Calabresi argues that “if I dislike the laws of my home state enough and feel tyrannized by them enough, I always can preserve my freedom by moving to a state with less tyrannous laws.” It is inconsistent with America’s own constitutional development to conclude that a constitutional solution to a majority group systematically terrorizing a minority group is to have the minority group pack up and move. That they did so throughout the Jim Crow era offers no solace that this is a reasonable solution to the violation of personal rights.

This theory of competitive federalism highlights, but does not solve, the problem of majority tyranny. As Madison understood well, the problem of majority tyranny was most pronounced in small republics. National majorities would be less likely to tyrannize over minorities, as was evidenced in the slow but comparatively ameliorative racial policies of the national government from prior to World War II until the passage of the Civil Rights Acts. Competitive federalism may be compatible with Madison’s solution for majority tyranny, but it is not Madison’s solution. Like McGinnis, Madison saw that the states are potentially tyrannical, but his solution was not federal inaction and a guarantee of “spontaneous order” in the states.

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125 McGinnis, “Reviving Tocqueville’s America,” at 509-10.
Neo-originalists have taken an important step in constitutional interpretation, evaluating original constitutional principles in light of their functional utility. Yet, the power of these accounts depends in large measure on the accuracy with which they identify the constitutional principle. Ultimately, these functionalist arguments are too removed from the liberal purposes of the Constitution. By failing to describe the Constitution’s federal features as a functional component of rights protection, these accounts not only diverge from the original Constitution. They also abandon the moral and argumentative high ground to the prevailing view that federal institutions and individual rights are at odds and that America’s commitment to rights protection required national consolidation.

III. The national intent of the Founding

According to Whittington, neo-originalism turns its attention not only to the policy implications of constitutional principles, but also to the detailed historical review of the origins and development of those principles. In the previous section, I emphasized some of the shortcomings of neo-originalist analysis on the utility of constitutional principles. Here, I suggest that history poses an even larger difficulty for neo-originalists.

In short, the originalist defense of the federal Constitution swims against the stream of mainstream historical analysis. The weight of history seems to favor the centralizing features of America’s constitutionalism. According to still influential accounts of the Founding and America’s political development, the original Constitution, the original Constitution as modified by the Fourteenth Amendment, and the Constitution as it has developed in political time, all appear oriented toward a consolidated union and a centralized nation state. While I disagree with much in these analyses, they are
important and influential accounts which an originalism committed to the Constitution’s federal character must address.

**The complete nationalism of the original Constitution**

For many, the constitutional reform of 1787 was itself a centralizing event. The Founders consciously rejected the federalism of the Articles of Confederation, replacing state sovereignty with popular sovereignty and a consolidated nation-state. One American people created one American government. This view seemingly has a strong pedigree in Abraham Lincoln. It also remains prominent among contemporary historians and political scientists, and at times influences Supreme Court decisionmaking.

To some, Abraham Lincoln’s arguments about the Union’s origins provide support for interpretation of the Founding as a largely consolidationist event. His arguments about the character of the Union suggest support for a contemporary agenda of expanding the power of the national-government vis-à-vis the states.

While Lincoln defended the existence of the states and even their constitutional prerogatives over much of their internal governance, he firmly rejected a theory of state sovereignty. In his July 4, 1861 “Special Message to Congress,” he challenged the existence of “some omnipotent and sacred supremacy” of the states within the constitutional system. Proponents of states’ rights had turned to the Tenth Amendment as a source of constitutional limits on the scope of national power. They argued that the national government only possesses those powers that the states delegated and failed to reserve to themselves. Lincoln turned this formulation on its head, explaining that “our

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states have neither more nor less power than that reserved to them in the Union by the
Constitution.” The states do not reserve powers for themselves. Rather, the
Constitution was the creation of the people, and the states possess only those powers
reserved for them, through the Constitution.

Lincoln’s argument was radical. According to him, the states did not even
possess the full attributes of sovereignty prior to the constitutional reform of 1787. The
states could not be stripped of sovereignty by the Constitution, because they never were
individual sovereigns. Even those who argue today for the fundamentally national
character of the Constitution, will juxtapose that constitutionalism with a state-created
and state-dominated Articles of Confederation. The failed institutionalism reflecting this
sovereignty was the impetus behind the constitutional reforms of 1787.

Not so for Lincoln. The original states only became states as a result of the
national action of declaring independence, and new states only took the designation of
“state” after entering the union. States have no power, other than those the Constitution
assigned to them, “no one of them ever having been a State out of the Union.”

Lincoln recognized that the text of the Declaration of Independence and the
Articles of Confederation presented a challenge for this national interpretation of the
Constitution. Both suggested that the states were independent sovereigns that created the
union. Lincoln rejected this view. Even though the Declaration of Independence asserts
that the states were “free and independent,” Lincoln believed the purpose of the
Declaration “was not to declare their independence of one another, or of the Union, but

127 Lincoln, “Message to Congress in Special Session, July 4, 1861,” at 603.
128 Id.
directly the contrary, as their mutual pledge, and their mutual action, before, at the time, and afterwards abundantly show.” As for the Articles of Confederation, Lincoln diminished the import of the strong statements and constitutional structure suggesting the maintenance of existing state sovereignty by focusing on their proclamation that the union would be perpetual. The states never existed outside of the union, “either in substance or in name.”

The key for Lincoln’s diminution of state sovereignty was his recognition that the states could never have secured or maintained their independence separately. He concluded

By conquest, or purchase, the Union gave each of them whatever of independence and liberty it has. The Union is older than any of the States, and, in fact, it created them as States. Originally some dependent colonies made the Union, and, in turn, the Union threw off their old dependence for them, and made them States, such as they are. The states, therefore, have no legal status outside of the union.

This Lincolnian understanding of the Constitution’s fundamentally national origins is reflected in contemporary accounts as well. For example, the political theorist Samuel Beer developed an argument for American nationhood that accounted for the Constitution’s federal features, while emphasizing their national purpose. Any account that argues for the complete nationhood created by the original Constitution must acknowledge original federal institutions and a political development marred by conflict because of these divisions.

Beer used the constitutionalism of Herbert Croly as a point of departure for his analysis. Croly suggested that the American Founding was incompletely national, with

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129 Id.
130 Id. at 604.
Hamiltonian Federalists recommending centralization and Jeffersonian Republicans favoring small republican institutions. He challenged contemporary policymakers to use ‘Hamiltonian means for Jeffersonian ends.’ As mass industrialization and a firm commitment to individual economic and contractual rights undercut the social conditions necessary for local Jeffersonian democracy, Croly seemed to urge the use of national power to maintain the conditions for participatory democracy.

According to Beer, however, Croly’s formulation of the American Constitution’s operation was more complicated. Croly did not simply mean:

that the Hamiltonian means of a strong central government would be used to promote the Jeffersonian ends of self-government and equal rights. Croly’s emphasis was on the Hamiltonian purpose of nation building as a good different from, but complementary to, Jeffersonian democracy. Following this line of thought, he conceived the Constitution as made not only by but also for the democratic nation. Its authority comes not from a compact among the states but from being ordained by the sovereign people.

One should not overstate, therefore, the Constitution’s federal character. The states are not rival political communities with heterogeneous interests apart from those of the nation. Rather, “the people” of the United States chose to create a constitutional order of vertically divided government. These governments have an integrated purpose, however, of supporting the nation, and the Constitution empowers the national government to create a more unified nation. The Constitution exists to secure the “promise of nationhood.”

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133 Id. at 4, 20-5.
For Beer, national power serves a goal beyond that of securing additional power in the nation’s hands. National power is aspirational, encouraging a diverse people to overcome their own particular interests in favor of a sentiment of community and commitment to a general purpose. For Beer, the American union:

would not consist merely in a strong central government or a common framework of constitutional law. It would be rather a condition of the American people, uniting them by sympathy as well as interest in what Washington termed ‘an indissoluble community of interest as one nation.’

Federalism might be an institutional embodiment of the philosophic recognition that communities are necessarily imperfect and divided, but national authority exists to establish greater unity and a sense of common purpose.

The complete nationalism of the completed Constitution

Another prominent account of the Constitution’s horizontal separation of powers suggests that America’s political and constitutional developments have generated a consolidated nation. By maintaining traditional federal features, the original Constitution was procedurally and substantively deficient. At critical moments in American history, however, the people endorsed constitutional developments weakening federalism, strengthening nationhood, and furthering a progressive understanding of constitutional norms.

These accounts put considerable weight on informal constitutional developments. Simple democratic acts cannot change the Constitution. But certain longstanding democratic practices and particular democratic acts of political intensity and theoretical

\[^{134}\text{Id. at 5.}\]
importance are best understood as having fundamentally altered our constitutional commitments.

Scholars identify the Civil War and the Great Depression as America’s two most lasting moments of constitutional development. Formal constitutional changes take a back seat in these accounts. Rather, constitutional development occurs as a result of extraordinary political actions and shifting political coalitions. It was not the Civil War Amendments primarily, but the Civil War, which changed the nature of the union from a compact of states to a genuine nation.\footnote{See Wilfred McClay, \textit{The Masterless: Self and Society in Modern America}, Chapel Hill: University of North Carolina Press, 1994. See also Ackerman, \textit{We the People, Vol. 1} (arguing that insofar as the Civil War Amendments did play a role in constitutional development, the actual ratification of those amendments was contrary to expected constitutional processes).} Similarly, it was not any formal constitutional change, but the election of Franklin Roosevelt, and the affirmation of his agenda by Eisenhower, that established the constitutionality of the New Deal.\footnote{See V.O. Key, Jr. “A Theory of Critical Elections,” \textit{Journal of Politics}, Vol. 17, No. 1 (February 1955), pp. 3-18. See also Ackerman, \textit{We the People, Vol. 1}; and Steven Wagner, \textit{Eisenhower Republicanism: Pursuing the Middle Way}, DeKalb: Northern Illinois University Press, 2006 (Eisenhower explained in a letter to his brother, “Now it is true that I believe this country is following a dangerous trend when it permits too great a degree of centralization of governmental functions. I oppose this--in some instances the fight is a rather desperate one. But to attain any success it is quite clear that the Federal government cannot avoid or escape responsibilities which the mass of the people firmly believe should be undertaken by it. The political processes of our country are such that if a rule of reason is not applied in this effort, we will lose everything--even to a possible and drastic change in the Constitution. This is what I mean by my constant insistence upon ‘moderation’ in government. Should any political party attempt to abolish social security, unemployment insurance, and eliminate labor laws and farm programs, you would not hear of that party again in our political history,” Letter to Edgar Newton Eisenhower, November 8, 1954).} Here, I draw heavily on the argument of George Fletcher, who links the revolutionary constitutionalism of the Civil War with its reaffirmation in the constitutionalism emerging from the Great Depression.

For those who argue that the existence of an American nation is a post-Founding development, the Civil War represents a correction, rather than a fulfillment, of
constitutional promise. James McPherson argues that this correction, initiated by the Civil War, was profound. It “utterly transformed” our understanding of the nation’s character. The War itself “changed the United States as thoroughly as the French Revolution changed that country.”\(^{137}\)

Abraham Lincoln, who played a starring role in the argument for America’s originally complete nationhood, makes a repeat performance in this theory of constitutional development. As the Declaration of Independence was to the Constitution, so too the experience of the War and Lincoln’s egalitarian commitments were to the new Constitution affirmed by the Civil War Amendments. Lincoln did not make a progressive restatement of the Constitution’s substantive purposes, however. A shift in constitutional substance demanded a similar shift in the balance of power between the national government and the states. As James McPherson notes in his study, *Abraham Lincoln and the Second American Revolution*, America went to war to salvage a union of states, but concluded it by making a nation\(^{138}\).

The philosophic locus of Lincoln’s constitutional commitments appears to be the “Gettysburg Address.”\(^{139}\) There Lincoln explicitly reminded the listener of the Declaration of Independence (“four score and seven years ago”) and the promise of the first American Revolution, while offering a revolutionary redefinition of our national

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Jaffa’s second book on Lincoln, *A New Birth of Freedom*, appears to reverse course, maintaining a consistency between Lincoln’s thought and the original constitutional order.

\(^{139}\) George Fletcher, *Our Secret Constitution* at 4.
purposes (“a new birth of freedom”). According to this interpretation of the Address, Lincoln sought fundamental alterations to the aspirations of the constitutional community. This change in the character of freedom required a parallel shift in the character of American nationhood.

According to Fletcher, the changes initiated by the War, and promoted by Lincoln, are three-fold. First, the desire suggested in the Declaration and Federalist 1 to ground constitutionalism in reason and choice gave way to an organic constitutionalism bound by historical development and national sentiment. Under this view of the War, the legalism of the secessionist cause emerges as consistent with the original Constitution. The South relied on the “legislative formalities” of the old constitution. Secessionism was “an ideology that stressed authority and sovereignty regardless of content.” By contrast, in Lincoln’s constitutionalism substance would take precedence over legal formalities.140

Second, the principal philosophic commitment of the community shifted from liberty to equality. These two principles represent fundamentally divergent conceptions of the purpose of government. The freedom of the old Constitution was freedom from the national government, while equality was something to be secured by the reconstituted nation. The Civil War represented a shift from a night-watchman state in which individuals were left to fend for themselves, to a government that would take an active role in guaranteeing the equality of its citizens.

Finally, the War represented a movement away from political elitism and toward mass democracy. The democratic deficiencies of the original Constitution would be

140 Fletcher, Our Secret Constitution at 5.
supplanted by a broadening of the citizenry and an expectation of richer political participation. This expectation of meaningful participation was consistent with a constitutionalism grounded in a commitment to equality.

The promise of the Civil War was not immediately realized, however. Reconstruction, if not stillborn, met strong resistance.\footnote{Eric Foner, \textit{Reconstruction, 1863-1877: America’s Unfinished Revolution}, New York: Harper & Rowe, 1988.} By 1877, it had collapsed altogether.\footnote{McConnell, “The Forgotten Constitutional Moment.”} According to Fletcher, the Civil War’s revolution in constitutionalism would remain “secret” until it was rediscovered and fully realized through the constitutional development of the New Deal.

The Great Depression further exposed the inadequacy of the Founders constitutionalism. A mass industrial society generated considerable social inequality and an increasingly consolidated economy. A constitutionalism grounded in individual rights and strictly limited national authority was no longer sustainable in light of these developments. Franklin Roosevelt’s “Commonwealth Club Address and “Four Freedoms” speeches were the philosophical supports for a new wave of constitutional development,\footnote{Morton Frisch, \textit{Franklin D. Roosevelt: The Contribution of the New Deal to American Political Thought and Practice}, New York: Twayne Publishers, 1975; and Clinton Rossiter, “The Political Philosophy of F.D. Roosevelt: A Challenge to Scholarship,” \textit{Review of Politics}, Vol. 11, No. 1 (January 1949), pp. 87-95.} or in Fletcher’s view, a recovery and acceleration of the constitutional development initiated by the Civil War. Roosevelt’s election and reelection, New Deal legislation, and executive administration all helped to institutionalize constitutional developments that further deemphasized individual liberties (particularly property rights),
elevated the principle of equality, and centralized power in a national government equipped to advance constitutional principle.  

The moments for, and content of, these constitutional developments are not always clearly delineated. Nonetheless, these scholars make a strong argument that certain super-majoritarian acts have secured constitutional developments outside of Article V. And those constitutional developments are generally viewed as having centralized power in the national government in order to better secure the substantive purposes of constitutionalism.

**The decentralized nationhood of the original Constitution**

The theory of “complete nationhood” and that of “developing nationhood” both assume the American union is properly understood as a consolidated nation state. The one sees the Founding itself as a consolidationist event that would more likely secure the general will than a nation of separate and particular interests. The other believes that subsequent constitutional developments, particularly informal and politically driven developments, helped to secure the benefits of nationhood, benefits frustrated by an original Constitution that did not sufficiently depart from the federal principle.

By contrast, Martin Diamond articulated a theory I describe as “decentralized nationhood.” For him, the intent of the Founding was toward greater centralization, and constitutional development has affirmed that intent. But consolidation is not an

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unequivocally positive development. Diamond’s views on the character of the original union and its benefits appeared to change over time. In at least some of his writings, however, it appears that Diamond believed any shortcomings of centralization within the Constitution were opportunities that should be cultivated by the contemporary interpreter. While Diamond’s appreciation for the Constitution’s federal features shares much with the functionalist arguments of neo-originalists, Diamond understood these federal elements as aberrations within a generally consolidationist Constitution.

The Diamondian account fits between theories of complete nationhood and developing nationhood. He argued that the original Constitution was primarily (but incompletely) national, but America’s constitutional development has further consolidated power in national hands. Diamond, however, eventually concluded that these developments exposed shortcomings in the Constitution, and he urged that the Constitution’s remnant federal features be maintained for functionalist reasons. Diamond shares the view of those who see the American Founding as incompletely national. But he sees these shortcomings of centralization as opportunities that must be maintained rather than shortcomings that must be overcome.

Diamond’s attitude toward constitutional interpretation shares much with neo-originalism. While he focused on the historical foundations of American constitutionalism, he did not believe that what he uncovered should be binding simply by virtue of its historicity. He argued that in studying the political thought of the Founders the contemporary scholar must be open to one of four possibilities—Founding principles remain “inherently adequate” requiring only their application to contemporary events; they are partially adequate and in need of supplement in order to address contemporary
political disputes; Founding principles might have become obsolete over time; or those principles were inadequate even at the time of their articulation. Diamond’s commitment to understanding the original Constitution, coupled with his acknowledgement of constitutional change and willingness to challenge the beneficence and utility of the Founding, makes him a close cousin of contemporary originalists.

However, Diamond refused to put the cart before the horse, evaluating the adequacy of the original Constitution before understanding the original Constitution. He asserted:

Each of these four possible conclusions requires the same foundation: an understanding of the political thought of the Founding Fathers. To decide whether to apply their wisdom, or to add to their wisdom, or to reject it as irrelevant or as unwise, it is absolutely necessary to understand what they said, why they said it, and what they meant by it. At the same time, however, to understand their claim to wisdom is to evaluate it: to know wherein they were wise and wherein they were not, or wherein (and why) their wisdom is unavailing for our problems.

For Diamond, the evaluation of the original Constitution is not of mere historical interest. It helps one to better evaluate contemporary politics. And he appeared to understand that, consistent with prudential judgment, unworkable constitutional commitments should be abandoned. While Diamond sought to maintain federal principles, unlike contemporary originalists he did so because he saw original constitutional commitments to natural rights and institutional centralization as being in tension. In other words, after coming to understand the original Constitution, Diamond recommended decentralization because of the defects of the original Constitution.

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147 Id.
For Diamond, the Founders oriented the Constitution toward the modern liberal goals of extending commercial capitalism and protecting individual rights. Those ends would be achieved primarily through the rejection of federalism and the embrace of national consolidation. Theirs was a modest liberalism. The Lockean political philosophy present in the Declaration of Independence stated not that persons in political society are equal but that in the state of nature they are born into a state of equal liberty. Diamond concluded, “the Declaration does not mean by ‘equal’ anything at all like the general human equality which so many now make their political goal and standard.” In fact, “the equality of the Declaration, then, consists solely in the equal entitlement of all to the rights which comprise political liberty and nothing more.” 148

Diamond rightly cited Lincoln as a supporter of this modest liberal constitutionalism. 149 As Lincoln explained in his assault on Dred Scott, “in some respects,” the black person “is not my equal; but in her natural right to eat the bread she earns with her own hands without asking leave of any one else, she is my equal and the equal of all others.” 150 While men might be unequal in certain respects, those inequalities give no person the right to rule over any other.

Diamond noted that the Declaration of Independence did not presuppose any political forms. It gave no direct guidance on the proper construction of political institutions. 152 For the Founders, the particular form of government was but a means to

149 Id. at 245.
an end. To demonstrate the difference between contemporary egalitarians and the Founders, Diamond distinguished between the political conclusions of Thomas Paine and the Founders regarding George III. Paine declared George illegitimate simply by virtue of his being a king. The arguments advanced in the Declaration showed, by contrast, that allegiance to a particular monarch was no longer demanded of the colonists. Diamond identified the subordination of democratic forms to individual liberty as the sobriety of the American Founding, as opposed to the Jacobinism that Paine’s political theory would later inspire.

Security for these Lockean principles required institutional innovation, therefore, on the part of the Founders. They would conclude, at least implicitly, that to guarantee individual rights, the American Constitution must reject federalism in favor of a genuinely unitary national system.

Their solution was the large republic. Diamond saw Madison’s proposal for a large republic in *Federalist 10* as a “beforehand answer to Marx,” that helped to explain the failure of class politics in the United States. In a large commercial republic, class conflict can be replaced with a less volatile division of interests. The conflict between the Few and the Many cannot be alleviated “in a small democratic society,” where they “are divided into a few trades and callings.” In such a community, these slight divisions are not enough to keep them from seeing their “lot in common and uniting for oppression.” In other words, a permanent majority faction of the poor could unite to


\[154\] *Id* at 247.

deprive the few rich of their rights. In a large commercial society, however, the interest of the many is “fragmented,” and therefore, permanent alliances against the few are unlikely.

According to Diamond, “nothing is more important to an understanding of both the theoretical and practical issues in the founding of the American Republic than a full appreciation of Madison’s stand on behalf of the very large republic.”

Prior to Madison, free republican government was small republican government. Madison believed that his creation, the large continental republic, would better secure private liberty. As Diamond explained:

> Only a country as large as the whole 13 states and more could provide a safe dwelling place for republican liberty. Republicanism not only permits but requires taking away from the states responsibility for ‘the security of private rights, and the steady dispensation of Justice,’ else rights and justice will perish under the state governments.

For Diamond, Madisonian constitutionalism originated in a belief that the states were institutionally incapable of securing the libertarian goals of modern constitutionalism. Liberty and security would, therefore, be guaranteed through Madison’s innovation—the large republic.

For Diamond, there are six sources from the Founding that tell “nearly the whole story,” and that story is primarily about the turn away from traditional federal principles and toward unitary government. He looked to the Declaration, the Articles, the proceedings of the Philadelphia Convention, the Constitution itself, *The Federalist*, and the essays of the Anti-Federalist opposition. He found there that the Federalist architects of the Constitution understood themselves to be abandoning federalism with the

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156 Id. at 103.

157 Diamond, “Ends of Federalism,” at 146.
Though they adopted a name connecting them with traditional federal forms, and though they defended in *The Federalist* the Constitution as a partly national and partly federal Constitution, the Constitution’s proponents in fact advanced a consolidated commercial republic.

Diamond’s sources demonstrated to him that the constitutional reform of 1787 was intentionally consolidationist. While the constitutional system maintained some elements of traditional federalism, it is best understood as incompletely national rather than a system of divided sovereignty. The states would be maintained, but they would become mere administrative appendages of the national government rather than independent republics in their own right.

Diamond concluded that the pre-ratification constitutional interpretation proposed by the Federalists deliberately understated the fundamentally national character of the Constitution. Madison’s explanation that the Constitution established a “system without precedent” was eighteenth century “spin” by a politician who understood the politically unpalatable character of the nationalist constitutional reform he and his colleagues were promoting.

Diamond explained that for the Founders the “typical definitions” of political organization were confederal/federal or unitary/national.\(^\text{159}\) A federal system was what existed under the Articles of Confederation and today exists in the United Nations. In other words, a confederacy, or a truly federal system, does not create a government at all,

\(^{158}\) *Id* at 93-4.

\(^{159}\) *Id.* at 94-5.
but is instead, as Article III of the Articles affirmed, a mere “league of friendship.”\textsuperscript{160} A unitary government, by contrast, would be a modern nation state such as France. The Constitution, however, purportedly represented a third-way. As Diamond explained, the ratification rhetoric of the Constitution’s proponents suggested the creation of “neither a national nor a federal Constitution, but a composition of both.” The constitution divided sovereignty “between member states and a national government, each having the final say regarding matters belonging to its sphere.”\textsuperscript{161}

Diamond acknowledged that there are governing functions which the Constitution declined to locate in the national government, but which the people instead reserved to the states. And this division “was always understood, in principle at least, as having been settled by the Constitution.” But while the Tenth Amendment articulates the division, “the language of the amendment does not settle the substantive question of what was delegated, what was prohibited, and what was reserved.”\textsuperscript{162} In other words, the maintenance of any serious boundary between properly national and state authority would be exceedingly difficult.

For Diamond, evidence of the fundamentally national character of the original Constitution begins with the Constitutional Convention. In his reading, the Virginia Plan, which set the direction of all debate that would follow, was a thoroughgoing nationalist plan. The true constitutional debate was between unitary nationalists and the continued proponents of confederated government. The compromise document that resulted “was a compromise between the simple nationalists and half-hearted federalists, that is,

\begin{itemize}
  \item[\textsuperscript{160}] Id. at 96.
  \item[\textsuperscript{161}] Id. at 94-5.
  \item[\textsuperscript{162}] Diamond, “The Forgotten Doctrine of Enumerated Powers,” at 180-81.
\end{itemize}
federalists who were themselves moving toward the national principle.” Madison was the “defender of the national principle,” and he proposed consolidation not only for the purpose of external security, but for securing justice within the states.

Any claim that the Constitution inclines toward total consolidation must account for Madison’s and Hamilton’s arguments to the contrary in The Federalist. Diamond argued that a close reading reveals that both Madison and Hamilton purposefully obfuscated the national character of the Constitution in order to secure ratification.

For example, in Federalist 9 Hamilton took the charge of consolidation head-on. Critics alleged that the Constitution violated three core tenets of federalism. “The essential characteristic” of a confederacy is “the restriction of its authority to the members in their collective capacities.” Second, the national administration “ought to have no concern with any object of internal administration.” And third, there must be “an exact equality of suffrage” among the members in the national government. The Constitution violates all three principles by acting on persons rather than states, by restricting the activities of the states, and by denying the principle of equal suffrage throughout the institutions of the national government. Yet, Hamilton answered that “these positions are, in the main, arbitrary.”

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164 Id. at 100-01.

165 Diamond, “The Federalist’s View of Federalism,” at 111. See also Diamond, “The Ends of Federalism,” at 147.

166 Diamond, “The Federalist’s View of Federalism,” at 111. See also Diamond’s discussion on Madison’s argument in Federalist 39 at 119-26.
For Diamond, then, the Founders sought to create a genuinely consolidated nation state. As Tocqueville explained, they achieved only an “incomplete nation.” Still, the federal elements in the system are artifacts of a federal system, supplanted by a national system. They are not core features of a dually federal system.

Nonetheless, Diamond seized on these federal elements as an unforeseen source of America’s constitutional strength. Madisonian republicanism did not adequately account for the virtues necessary to the maintenance of a liberal regime. According to this analysis, Madison believed that he could solve the problem of republicanism—majority faction—by creating a commercial republic. Replacing the traditional conflict between classes with a more variable, and individualized, conflict of interests, would lead to a safe, peaceful, and prosperous constitutional order.

Diamond concluded, however, that Madison did not account for the change in the citizen that his commercial republicanism would inspire. In short, it would make them soft and susceptible to bureaucratic tyranny. This analysis of the American Constitution seems to have been heavily influenced by Diamond’s reading of Tocqueville. Diamond contended that “every age seems to have some dominating central idea,” and following Tocqueville he maintained that “equality is for us that central principle.” As such, it is “the political problem for mankind in the present age.” It is a problem in that modern American citizens are egalitarian ideologues, and yet everywhere they look

167 Id. at 126.


they find evidence of inequality. The Lockean individualism and commercialism presupposed by the Founders, and toward which they oriented the Constitution, is ultimately responsible for a leveling egalitarianism that rejects natural rights.

Diamond wrote at a time when scholars focused on the democratic deficiencies of the Constitution. For them, the Declaration of Independence articulated a radically egalitarian principle which presupposed democracy, while the Constitution, with its contra-democratic features, represented a retrenchment of aristocratic interests. Diamond rejected the consensus of his contemporaries and claimed that the challenge for contemporary constitutionalists was to resist the tide of radical egalitarianism and mass democracy.

The Founders’ view of liberty and equality created vastly unequal outcomes, and as a result, Americans came to reject classical liberalism and even self-government itself. Diamond calls this “the other side of Locke and the Declaration.” He elaborated:

> Locke and the Declaration, and the political thought of the Constitution, presupposed that an inequality of virtue was rooted in human nature and that this inequality would manifest itself and flourish in the private, voluntary operations of society…The American Founders understood this social flourishing to be the natural outcome of the combination of equal liberty and natural inequality. Because equal liberty meant that all had a roughly equal chance to exert themselves, unequal outcomes would inevitably result from the natural inequality of capacities.

In short, a philosophic commitment meant to raise up the individual, wound up generating a citizenry that feels increasingly small and insecure. Faced with this glaring inequality, but charged with a sentiment of egalitarianism seemingly drawn from the

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Declaration, Americans turn their backs on the Founders’ commitment to individual liberty. The constitutional promotion of individual rights and commercial activity actually isolates citizens—physically and psychologically—from one another. Citizens so formed embrace a soft despotism, looking to the administrators of a distant national government to care for them in their smallness.

Diamond, following Tocqueville, came to see decentralization as an opportunity for slowing, if not reversing, this trajectory. Yet this decentralization runs counter to the Constitution’s fundamentally consolidationist character. Diamond’s explanation of the Antifederalist commitment to federalism might be music to the ears of contemporary neo-originalists who argue for the utility of federal forms. He explained:

Large countries necessarily turn to despotic rule. For one thing, large countries need despotic rule; political authority breaks down if the central government does not govern more forcefully than the republican form admits. Further, large countries, usually wealthy and populous, are warlike by nature or are made warlike by envious neighbors; such belligerency nurtures despotic rule. Moreover, not even the best intentions suffice to preserve the republicanism of a large country. To preserve their rule, the people must be patriotic, vigilant, and informed. This requires that the people give loving attention to public things, and that the affairs of the country be on a scale commensurate with the people’s understanding. But in large countries the people, baffled and rendered apathetic by the complexity of public affairs, at last become absorbed in their own pursuits. Finally, even were the citizens of a large republic able to remain alert, they must allow a few men to conduct the public business. Far removed from the localities and possessed of the instruments of coercion, the necessarily trusted representatives would inevitably subvert the republican rule to their own passions and interests. Such was the traditional and strongly held view of the necessity that republics be small.

Diamond believed, however, that this Antifederalist position was largely rejected by the Constitution, and federalism swims against the tide of a consolidated nation state.

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promoted and anticipated by the Founders. His embrace of federalism, therefore, is ultimately a rejection of the original Constitution.

The federal elements of the Constitution then, which Madison viewed as a mistake, in fact become our salvation. While these Anti-Federalist elements did not encourage the thick virtues advocated within classical political theory, the possibility for genuine citizen participation at the local level would create the vigorous citizenry necessary for the preservation of the liberal order.

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Neo-originalism is an improvement on the strict textualism of its predecessor. It moves beyond efforts to defend judicial restraint on the grounds of democratic theory, toward an affirmation of judicial power to provide constitutional protections for subnational democratic institutions. These accounts fall short, however. Their articulation of the benefits of federalism is far removed from the Founders’ understanding of constitutional purposes. And this commitment to federalism runs against the still prevailing historical view about the nation’s origins. A truly functionalist account must provide an articulation of the Constitution’s federal features that is both consistent with the Constitution’s origins and our continuing commitment to substantive constitutional principles.

The prevailing opinion—that our constitutional system presupposed and encouraged the development of a centralized modern state—deserves criticism. Neither the Declaration of Independence nor the Constitution established or suggested a
consolidated nation. And neither constitutional nor political developments arising from the Civil War or Great Depression radically altered the original constitutional design. Contemporary federalists, however, do themselves no favors when defending these constitutional features in the name of state rights or sovereign dignity. Ultimately, they must challenge the widespread belief that the dignity of persons is best preserved through consolidated national institutions.
Where then do we go from here? Originalists and nonoriginalists substantially agree that constitutional interpretation involves the discovery and application of constitutional principles. These opponents primarily diverge in the rules they follow in the pursuit. Yet even there, one now finds a remarkable convergence of methodologies.

On the one hand, originalists have extracted a promise of constitutional fidelity from nonoriginalists. Interpretation of constitutional principle must bear more than a passing resemblance to the Constitution’s original meaning. A neo-Dworkinian commitment to the enduring principles of American constitutionalism—republicanism, liberty, the public good, and federalism—absent some fidelity to historical meaning, is hardly a meaningful interpretive restraint.  

On the other hand, originalists concede that the historical meaning of constitutional principle is often uncertain, and that meaning has developed over time.  

As should be clear from my earlier presentation, I believe that this debate has largely run its course. At the end of this road, both parties seem to recognize that a mere commitment to the meta-principles of the Constitution provides little guidance to the

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judicial interpreters originalists and nonoriginalists seek to inform. And both agree that historical analysis alone is at times an insufficient guide to constitutional meaning.

From this convergence comes a shared recognition of the Constitution’s interpretation and construction outside of the federal judiciary. For some, this justifies a full embrace of legal realism. Because no interpretation is neutral, the interpreter should feel empowered to advance constitutional principles as he sees fit. For others, it leads to recognition of the inherently political character of interpretation and a refocusing of interpretive authority in the people and their elected representatives.

Neither of these approaches is satisfactory. An interpretive theory that embraces the development of constitutional principle outside of the courts would benefit from some analysis of how the constitutional design zoned for this development. An originalist reappraisal of the Founders’ intentions would demonstrate the manner in which the Constitution’s mechanisms work to secure constitutional principle. A functionalist account of the original Constitution will help us to better understand the relationship between the Constitution’s substantive ends and its democratic procedures.

Here I discuss the character of the original functional Constitution. I begin by demonstrating the liberal ends of Madisonian constitutionalism. While the Founders disagreed on constitutional design, they largely shared a belief in the rights-oriented purposes of constitutionalism. To highlight the Constitution’s essentially libertarian character, I reconsider certain of the Founders’ arguments that might appear to diminish

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the normative goals of the Constitution. Even as Hamilton denigrated the need for a Bill of Rights and Madison rejected interpretation focused on broad constitutional principles, they did so within a tradition of rights-based constitutionalism. In short, it is clear that they were not simple proceduralists.

At the same time, however, an energetic and supreme national government in the service of individual rights did not demand national consolidation and a complete diminution of the states. I follow, therefore, with a consideration of Madison’s proposed constitutional design the procedural mechanisms by which these liberal goals would be achieved. Contemporary constitutional theorists ignore this proposal. Proponents of original meaning do so because it is not part of the original constitutional text, and therefore, illegitimate intentionalist evidence. Yet, a failure to consider this proposal fully exacerbates an incomplete understanding of the Constitution’s functional character, and in the case of originalists it leads them to overstate its federal elements.

I. The intended goals of the Madisonian Constitution

Although the Court’s federalist revival has altered the perspective of contemporary constitutional theory, scholars remain primarily concerned with defining and applying the normative principles within the Bill of Rights and the Fourteenth Amendment. Both the structure and history of American constitutionalism indicate that these theorists overstate the importance of these principles within our constitutional structure.

American constitutionalism has an unwarranted preoccupation with the Bill of Rights. Common sense indicates that amendments to the Constitution are less significant than the Constitution itself. And as a historical matter, scholarship has confirmed this
intuition. Whether or not these rights initially declared fundamental individual liberties, these declarations were not the central feature of our constitutionalism.

The textbook history of the Bill of Rights as a concession to Antifederalists in return for support of the Constitution’s ratification misses the mark. In some instances, most notably Virginia, the Antifederalists did condition ratification of the Constitution on a promise for prompt consideration of a bill of rights by the First Congress. In large measure, however, the Bill of Rights, as ratified, deviated substantially from the recommendations of the Antifederalists.

Ratification of the Bill of Rights represented a strategic coup by Federalists. The recommendations advanced by Federalists in the First Congress deviated substantially from the wishes of the Antifederalists who had conditioned ratification of the Constitution on inclusion of a bill of rights. As Donald Lutz has shown, there were 42 distinct rights included in Madison’s initial proposal of nine amendments. Those rights “bear only a modest relation to what was proposed by the ratifying conventions.” In his comprehensive analysis of the proposals in the debate over a bill of rights, Lutz places the proposals into three categories: those that check the new national government by withholding certain powers; those that altered the institutions of the new national government in a way that diminished their effectiveness; and those that established a list of constitutional norms and individual rights to be protected against the government. The state ratifying conventions proposed amendments primarily from the first two categories,

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5 Amar, *Bill of Rights* (arguing that the Bill of Rights initially conceived guaranteed rights of communities and that the Fourteenth Amendment transformed these guarantees into the individual liberties zealously guarded today).

but Congress passed, and the states ratified, a list of amendments drawn largely from the third.

Madison and other Federalists initially opposed the inclusion of a declaration of rights within the Constitution. They became the champions of amendments drawn from this third category, however, to distract from the more damaging amendments in the first two categories. Antifederalists had designed their proposals primarily to limit the power of the new national government. In short, they sought to undo through amendment the intended invigoration of the national government by the Constitution. Their proposals would have restored much of the character of the Articles deemed deficient by those who drafted the Constitution.

As detailed by Robert Goldwin, Madison and his Federalist colleagues proved excellent legislators, outflanking the Antifederalists. Drawing their proposals largely from the declarations of liberties located within the state bills of rights, they recognized that the individuals who would ratify the amendments in the states would be satisfied with similar provisions. In short, popular support for the rollback of national power promoted in the Antifederalist proposals was weak. A simple declaration of liberties, similar to those in state constitutions, would do the trick.

An honest appraisal of the history of the Bill of Rights should refocus our attention to the procedural character of the Constitution-proper. Still, it is important that one not drift too far in the other direction. At times, for example, originalists seeking to temper the substantive excesses of the Warren Court demonstrate an attitude of excessive

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7 *Id.* at 20-29.

8 *See* Goldwin, *From Parchment to Power.*
proceduralism. While originalists are correct to focus on the commitments of the original Constitution, a review of both Alexander Hamilton and James Madison shows that their similar faith in constitutional procedures remained linked to the liberal character of the Constitution.

**Hamilton, Federalist 84, and the Constitution’s positive goals**

Responding to the substantive excesses of so-called activist judges and constitutional theorists, originalists have deemphasized the role of the Bill of Rights in American constitutionalism. Former Attorney General Edwin Meese spoke for many originalists when he challenged the incorporation of the Bill of Rights. In a broadly distributed and influential address before the American Bar Association, Meese attempted to recover the original understanding of the Bill of Rights. He explained that, “[m]ost Americans forget that it was not until 1925…that any provision of the Bill of Rights was applied to the states.” Meese, following Chief Justice John Marshall in *Barron v. Baltimore*,9 argued that the Bill of Rights, “as debated, created and ratified was designed to apply only to the national government.”

Meese sought to remind the judiciary, the practicing bar, and the academic community of this original understanding of the Bill of Rights. He gave no indication that subsequent constitutional developments, such as the Civil War Amendments, were meant to alter this structure fundamentally.10 By announcing limits on national regulatory authority, the Bill of Rights reserved powers to the states. In other words, the

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9 32 U.S. 243 (1833).

10 Meese acknowledges the judicial use of the Fourteenth Amendment to achieve incorporation, but this passage indicates that Meese at least questions incorporation of the Bill of Rights through the Fourteenth Amendment.
entire Bill of Rights should be viewed through the lens of the Tenth Amendment. By emphasizing this original understanding, Meese sought to counter the “radical egalitarianism and expansive civic libertarianism of the Warren Court.”¹¹

The originalist Steven Calabresi has cited Hamilton’s argument in *Federalist* 84 as evidence of the essentially procedural character of American constitutionalism. He uses it as an authority in his effort to refocus interpretation on procedural maintenance—federalism and separation of powers—rather than rights protection.¹² Insofar as the Constitution guarantees certain norms, it does so in a negative fashion. Horizontal and vertical separation of powers protects liberty by checking government action. If the Constitution protects liberties, they are negative liberties, and their guarantee is the minimalist state.

This approach seems to understated both the liberal purposes of the Constitution and the positive role of government in securing rights. A close consideration of Hamilton’s arguments in *Federalist* 84 and their relationship to his broader arguments in *The Federalist* suggest that this originalist approach minimizes the role of rights within American constitutionalism.

For Alexander Hamilton, the Constitution, as reported by the 1787 Convention was both necessary and sufficient for the security of the constitutional end of personal liberty. Broad statements of moral principle, as found in the Bill of Rights, were not only inadequate guarantees for just government, they were evidence of a primitive political

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science found wanting by Hamilton and other members of the Founding generation. In short, Hamilton assumed that the Constitution was an enabling document, designed to guarantee personal liberty.

The argument in *Federalist* 84 supports this view. There Hamilton contested the inclusion of a bill of rights in the new Constitution. His objections were two-fold. In a constitutional order such as the one established in 1787, a statement of rights, “in the sense and to the extent they are contended for, are not only unnecessary…but would even be dangerous.”\(^{13}\) A bill of rights would not only be redundant in a liberal constitutional order, but it would threaten to corrupt American constitutionalism by misrepresenting the Constitution’s liberal character and its limits on national power. While originalists focus on the impact a bill of rights might pose to the maintenance of federalism, Hamilton focused on its impact on personal liberty.

Hamilton initially responded to Antifederalist criticisms of the Constitution by favorably comparing its explicit protection for rights with at least some state constitutions. In particular, this represented a challenge to his Antifederalist opponents in New York. The New York Constitution, like the proposed federal Constitution, had no bill of rights “prefixed to it.” The New York Constitution, however, contained “in the body of it, various provisions in favor of particular privileges and rights, which, in substance, amount to the same thing.”\(^{14}\) Hamilton’s opponents in New York criticized the federal Constitution for failing to include similar protections.

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\(^{13}\) *Federalist* 84 at 445.

\(^{14}\) *Id.* at 443.
Hamilton responded by citing a number of provisions guaranteeing rights within the proposed Constitution. Some, including the establishment of the writ of *habeas corpus* and the prohibition of ex post facto laws, were “perhaps greater security to liberty” than those provided in the New York Constitution. If specific textual commitments to rights were a critical component of liberal constitutionalism, Hamilton suggested that the Constitution met at least this minimal standard when compared with the states.

At the same time that Hamilton defended the adequacy of the Constitution’s guarantee for rights, he also suggested the superiority of the Constitution to these state constitutions that included broader declarations of right. He spoke derisively of these state constitutions, arguing that the federal Constitution would serve as a more reliable guardian of rights, “than volumes of those aphorisms which make the principal figure in several of our state bills of rights, and which sound much better in a treatise of ethics, than a Constitution of government.” The experience of the states demonstrated that these declarations of right did little to secure rights effectively.

Hamilton’s argument against a bill of rights diverged from those of originalists, however. On the one hand, they seem to agree that the focus on a bill of rights in American constitutionalism is misplaced. For originalists, the inclusion of the Bill of Rights has inspired judicial activism and contributed to the evaporation of the constitutional prerogatives of the states. On the other hand, for Hamilton the challenge to

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16 U.S. CONST, art. I, § 9, cl. 3.
17 *Federalist* 84 at 443-44.
18 *Id.* at 445.
a bill of rights is both an affirmation of the liberal purposes of the Constitution and an opportunity to again challenge the moral adequacy of the states. Not surprisingly, his argument that the Constitution is itself a bill of rights recommended little institutional protection for the states or any formal limits on the power of the national government.

*The Federalist* as a whole highlights Hamilton’s and Madison’s conclusions about the deficiencies of existing state constitutions. These first generation constitutions failed to secure liberty and justice for the citizens bound by them. In their external relations, they proved incapable of protecting citizens against foreign threats. Weakness inspired hostile actions and uninvited intervention by foreign powers,\(^{19}\) as well as aggression among the states themselves.\(^{20}\)

Internally, the history of republican government was one of discord and the deprivation of rights. As Hamilton explained in *Federalist* 9, an examination of these “petty republics” leaves ones with “sensations of horror and disgust” at their constant insecurity and revolution. They existed “in a state of perpetual vibration between the extremes of tyranny and anarchy.” Hamilton would have disagreed with those who believe today that commercial capitalism is not only a precondition of liberal democracy but the driving force for liberalization and rights protection. The small commercial republics of Athens, Carthage, Venice and Holland, as well as Great Britain, where “[c]ommerce has been for ages the predominant pursuit,” all engaged in aggressive illiberal warfare.\(^{21}\) The Constitution was necessary to establish “a firm union” to secure

\(^{19}\) See *Federalist* 3-5 at 9-20.

\(^{20}\) See *Federalist* 6-7 at 20-31.

\(^{21}\) *Federalist* 6 at 23-4.
the “peace and liberty of the states” while acting as a “barrier against domestic faction and insurrection.”

Hamilton excluded bills of rights from the modern constitutional developments that promised greater security for individual liberty. For Hamilton, developments in the “science of politics,” which like other sciences “ha[d] received great improvement” in “modern times,” enabled constitutional government to secure justice. He included among these constitutional innovations separation of powers, bicameralism, an independent judiciary, and popular representation, all of which were “wholly new discoveries” or recent advances. He and Madison concurred that the “ENLARGEMENT of the ORBIT,” of republican government promised to be the most significant constitutional achievement of the new science of politics. Bills of rights, however, were more appropriate to an earlier constitutionalism that created the seemingly intractable difficulties Publius’ republicanism sought to remedy.

For Hamilton, however, these declarations of right were more than unnecessary. Beginning with his discussion of the historical disjunction between these declarations and republican government, Hamilton suggested that they were actually a danger to liberty. Though they were necessary agreements between a monarch and his subjects, they were inappropriate to liberal regimes grounded on popular consent. Constitutional statements of rights evolved as concessions of common law privileges to classes of persons—as opposed to individuals—by a monarch who was a head of state—as opposed to a representative of the people.

22 Federalist 9 at 37.

23 Id. at 38. See also Federalist 10.
By contrast, the liberalism prevalent in America and central to the creation of the Constitution assumed that man was in possession of “certain inalienable rights,” and that government was a human creation meant “to secure these rights.”

The one right alienated by man was his right to enforce his rights—the “executive power” of the law of nature. Hamilton explicitly linked this modern political theory to the political science of the Constitution, explaining that the Constitution’s Preamble affirmed a theory of liberal, consent-based government. In liberal political communities, individuals or classes do not receive powers from the state. Rather, individuals grant powers to the state, which would not exist absent their consent. Hamilton explained that “in strictness” the ‘people’ of the Constitution’s preamble “surrender nothing” to the government. Bills of rights, a surrender of privileges by an otherwise absolute sovereign, were constitutional mechanisms suited to pre-liberal regimes.

These statements of privilege were, therefore, in fundamental philosophical tension with modern consent-based government. If constitutional statements of right work at all, they do so as qualifications on absolutist government. Hamilton concluded that they are “primitive,” pre-liberal attempts to restrain the power of princes. As such,

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24 Declaration of Independence. See Huyler, Locke in America; and Zuckert, Natural Rights Republic.


26 Federalist 84 at 445.
“they have no application to constitutions, professedly founded upon the power of the people and executed by their immediate representatives and servants.”

Hamilton’s suggestion of the inappropriateness of declarations of right in a liberal regime serves as a prelude to his contention that they are also a threat to liberal constitutionalism. Specifically, they might undermine the effect of other constitutional mechanisms designed to limit the regulatory authority of the national government.

The Constitution would achieve its limited liberal ends primarily through the powers granted to the national government in Article I, Section 8. Hamilton argued, then, that a bill of rights is “not only unnecessary” but also potentially “dangerous” because it would undermine limits on national power set by enumeration. Such a declaration “would contain various exceptions to powers not granted; and on this very account, would afford a colourable pretext to claim more than were granted.” Denying a power where none was granted might lead some to conclude that powers not denied to the national government were in fact granted.

In this otherwise well-known analysis, it is worth considering the ambiguous character of Hamilton’s commitment to constitutional limits on national power. Hamilton, like Madison, indicated that the ultimate check on the national government was not institutionalized state authority, but popular opinion.

He rejected a bill of rights in the same fashion that Madison answered the Antifederalist fear that the Constitution would fail to restrain the national government effectively. Responding to criticisms that the Constitution did not declare the “liberty of the press,” Hamilton explained that this

27 Federalist 84 at 445.
28 Id.
29 See Federalist 46 at 244.
liberty was incapable of “any definition which would not leave the utmost latitude for evasion.” He concluded that security for this and other fundamental rights, “whatever fine declarations may be inserted in any constitution…must altogether depend on public opinion, and on the general spirit of the people and of the government.”

In spite of any superficial similarities, Hamilton’s argument against a bill of rights diverges considerably from those who seek to diminish the importance of these amendments in constitutional theory today. First, for Hamilton government exists to secure rights. This understanding runs counter to the view that through the Constitution the states created a limited national government, while maintaining a comprehensive regulatory power over the lives of their citizens. Hamilton’s liberal constitutionalism suggested that neither the states nor the national government appropriately regulate “every species of personal and private concerns.”

Second, neither Hamilton’s arguments in The Federalist, nor additional evidence from his career, allow an interpretation of Federalist 84 that affirms some pre-existing sovereignty of the states. Elsewhere in The Federalist, he recognized existing republican government in the states as the principal cause of the political crisis that demanded the 1787 constitutional reform. Furthermore, both his proposal at the Constitutional Convention and his commitment to a broad reading of enumerated powers as Secretary of the Treasury confirm that he did not share the Antifederalist enthusiasm for formally restraining the powers of the national government. In short, the procedural and federal

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30 Federalist 84 at 446.

31 Id. at 445.
concerns of originalists who seek to diminish the priority of the Bill of Rights in constitutional theory bear little resemblance to the concerns of Hamilton.

**Madison, interpretation, and the Constitution’s aspirationalism**

Like Alexander Hamilton’s, certain of James Madison’s arguments against the priority of constitutional principle in constitutional interpretation might seem attractive to contemporary originalists. Like contemporary originalists, who object to similar use of the Ninth Amendment, Madison rejected interpretive methods that evaluated constitutional powers in light of constitutional principles. Yet, at the same time, and unlike today’s proceduralists, Madison consistently affirmed the primacy of liberal ends and individual rights in American constitutionalism. These liberal commitments emerged not only in his defense of limited government in his “Virginia Report,” but in his ultimate acceptance of a bill of rights.

Madison’s 1800 “Virginia Report” began as an extended justification of the Virginia Resolutions, and more broadly as a statement of the republican opposition to the Federalist construction of national power under the Constitution. As part of this report, he challenged a series of approaches to constitutional interpretation designed to generate considerable change in constitutional norms and expansion of constitutional powers outside of the amendment process.

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He began by noting that all of those who promoted the Constitution’s ratification urged that “the powers not given to the government were withheld from it.” And the states resolved any doubt on this matter when they ratified the Tenth Amendment. Unlike originalists, however, Madison did not transform a commitment to a limited government, judicial restraint, and the Tenth Amendment into an argument primarily about state sovereignty. Rather, he would explicitly rest his argument for interpretive restraint and the limits of national power on a theory of consent supported by a commitment to natural rights.

Having addressed the Constitution’s original meaning, Madison continued by setting boundaries for its subsequent interpretation. He rejected methods diverging from the Constitution’s original meaning. He began by challenging efforts to interpret the Constitution’s specifically enumerated powers in light of the broad aims associated with those powers. For Madison, the power to provide for the “common defense” and “general welfare” were not independent grants of legislative power. The Constitution reaffirmed those commitments of the Preamble in Article 1, but those statements merely confirmed the purpose of specifically enumerated powers.

Madison developed a series of arguments providing a restrained interpretation of these powers. First, he noted that those powers were identical to ones provided in the Articles of Confederation, and “it can never be supposed that, when copied into this Constitution, a different meaning ought to be attached to them.” Yet, in spite of this “remarkable security against misconstruction,” some would propose an expansive reading

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34 Id. at 233.
of these constitutional commitments, suggesting that they were powers independent of those more specifically enumerated.

Madison rejected this effort. He explained that “it is evident that there is not a single power whatever which may not have some reference to the common defence or the general welfare; nor a power of any magnitude which, in its essence, does not involve, or admit, an application of money.” In other words, reading the taxing and spending power independently of explicitly enumerated powers would illogically undermine the very purpose of enumeration.

For similar reasons Madison also rejected, on originalist grounds, the claim that the Constitution incorporated a national common law. He argued first that such an incorporation is impossible because there was no national common law, and second that even if there were, the incorporation of common law would undermine the restraints of enumeration.

Finally, Madison challenged those who interpret the Constitution’s specific grants of authority in light of the Preamble. He understood that theorists:

> Will waste but little time on the attempt to cover the act by the preamble to the Constitution, it being contrary to every acknowledged rule of construction to set up this part of an instrument in opposition to the plain meaning expressed in the body of the instrument. A preamble usually contains the general motives or reason for the particular regulations or measures which follow it, and is always understood to be explained and limited by them. In the present instance, a contrary interpretation would have the inadmissible effect of rendering nugatory or improper every part of the Constitution which succeeds the preamble.

Madison was, therefore, an emphatic opponent of reading constitutional means in light of constitutional ends because such an evaluative method undercuts the proper functioning

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37 *Id* at 240.

38 *Id* at 245-51. *Compare* Strauss, “Common Law Constitutional Interpretation.”

of the Constitution’s mechanisms—mechanisms that include limitations on the regulatory reach of the national authority.

Common experience demonstrates the difficulties with this ends-oriented approach to interpretation. Not only is it difficult to grasp the meaning of morally real normative concepts, but the particular application of those general concepts is subject to considerable discretion. For example, the former Soviet Union was no less committed to “justice” and the “general welfare” than was the United States, but those concepts meant something entirely different within that totalitarian political community. In the Soviet Union, justice required complete submission of the individual to the general will, while in the United States the maintenance of justice requires security for individual rights.

Even within our own political community, where citizens largely share a liberal theory of justice, the policy requirements demanded by normative constitutional principles are unclear. Consider the example of educational opportunity. Today, few deny the existence of a real personal right to at least some rudimentary education. In a contemporary commercial society, education is necessary for an individual to be secure in his rights. Yet, differences emerge over the scope of this education because the right to an education quickly interferes with rights to personal property. Some would argue that progressive taxation and provisions for roughly equal public educational facilities are necessary in a truly liberal community. Others would contend that the personal liberty to be secure in one’s property, and the relationship between public education and particular

40 See Walker, Moral Foundations of Constitutional Thought.

41 See Hartz, Liberal Tradition in America; Smith, Liberalism in American Constitutional Law; and Alan Wolfe, One Nation After All, New York: Viking, 1998.
communities, caution against widely redistributive educational schemes.\textsuperscript{42} Constitutional interpretation directed by the Preamble runs the risk of simply conforming to one’s own private identification of morally sound conceptions of justice.

For Madison, however, these limits were in the service of individual rights. He defended the Virginia Resolutions, stating that the powers of the federal government were “limited by the plain sense and intention of the instrument constituting the compact.”\textsuperscript{43} That compact does not protect state sovereignty, however, but the people. Earlier, Madison had appeared to diminish any misconception that the Virginia Resolutions rested on a principle of state sovereignty. He explained that in interpreting the section of the resolutions stating “that the states are parties to the Constitution,” one must understand the various meanings of the word “states.” Madison acknowledged that in some instances “states” refers to the particular political community, but it also, in his last definition, “means the people composing those political societies, in their highest sovereign capacity.”\textsuperscript{44} Without rejecting the sovereignty of the states outright, Madison coyly noted that “in the present instance, whatever different construction of the term ‘states,’ in the resolution, may have been entertained, all will at least concur in this last definition.”\textsuperscript{45}

Madison had emphasized these normative goals of the American Constitution in \textit{Federalist 45}, arguing that “the real welfare of the great body of the people,” is the


\textsuperscript{44} \textit{Id.} at 233.

\textsuperscript{45} \textit{Id.} at 234.
“supreme object” of government. Political institutions are but means to moral ends, and political scientists must take care that it does not unduly prioritize these means. The public welfare cannot be “sacrificed to the views of political institutions of a different form.” Madison concluded:

Were the plan of the convention adverse to the public happiness, my voice would be, Reject the plan. Were the Union itself inconsistent with the public happiness, it would be, Abolish the Union. In like manner, as far as the sovereignty of the States cannot be reconciled to the happiness of the people, the voice of every good citizen must be, Let the former be sacrificed to the latter.46

Following Hamilton, Madison understood that both the national and the state governments, as governments, existed to serve liberal ends. Insofar as either failed to achieve those ends, the people as rights-bearers, and the ultimate source of all political authority, must abandon these dysfunctional institutions.

Madison demonstrated real disdain for those who argued on behalf of state institutions, as state institutions. He asked:

Was then the American revolution effected, was the American confederacy formed, was the precious blood of thousands spilt, and the hard earned substance of millions lavished, not that the people of America should enjoy peace, liberty, and safety; but that the governments of the individual states, that particular municipal establishments, might enjoy a certain extent of power, and e arrayed with certain dignities and attributes of sovereignty?47

Like originalists, Madison might have argued for a limited construction of national power and for limits on constitutional construction. He might have believed that the Tenth Amendment confirmed these features of Constitution. Yet, he did not share any faith in the dignity of the states. It is important to understand that he did not believe in the inherent dignity of any constitutional forms, including national institutions. Constitutional forms were worthy insofar as they guaranteed individual rights.

46 Federalist 45 at 238.
47 Id.
Madison’s participation in the formation of a Bill of Rights similarly suggests differences with the views of today’s originalists. While he rejected methods of interpretation similar to those promoted later by Frederick Douglass and our own moral constitutionalists, the approach he developed with respect to a bill of rights resembled Lincoln’s analysis of the Declaration of Independence as a “standard maxim” of American political life. While not dismissing Madison’s argument that the judiciary would enforce the rights affirmed in a bill of rights, Madison’s central positive rationale for a bill of rights was that it would make the maintenance of rights through constitutional politics more effective.

The failure to include a bill of rights was among the more effective arguments in the Antifederalist campaign to defeat ratification. It actually contributed to the defeat of the Constitution in North Carolina. Beginning with Massachusetts, a number of states recommended conditional ratification of the Constitution. In essence, the Antifederalists

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Prior to the debate on a bill of rights in the First Congress, Jefferson wrote to Madison, recommending judicial enforcement of a bill of rights. Madison incorporated Jefferson’s recommendation in his argument before the House of Representatives. He believed that “independent tribunals of justice will consider themselves in a peculiar manner the guardians of those rights; they will be an impenetrable bulwark against every assumption of power in the legislative or executive” branches. See “Thomas Jefferson to James Madison, March 15, 1789,” reprinted in Lance Banning, Jefferson & Madison; and James Madison, “Speech in the House of Representatives, June 8, 1789,” reprinted in Meyers, ed. The Mind of the Founder at 161-75, 171-72.

Even here in his strongest statement for judicial supervision of individual rights, other of Madison’s arguments complicate this interpretation. Madison’s own experience with the bill of rights in Virginia suggested that they are least reliable at precisely those moments when they are most necessary. Madison wrote to Jefferson, “[r]epeated violations of these parchment barriers have been committed by overbearing majorities in every state.” In Virginia, the bill of rights was “violated in every instance where it has been opposed to a popular current.” He concluded, “[w]herever there is an interest and power to do wrong, wrong will generally be done.” “James Madison to Thomas Jefferson, October 17, 1788,” reprinted in Banning, Jefferson & Madison at 150-53, 151. It seems unlikely given Madison’s understanding of human nature, the ambition of politicians, and the structure of the Constitution that he would find in the comparatively weak judiciary an inclination to stand against national political majorities. His statement on behalf of judicial review must be read in light of Madison’s view that “the most valuable…on the whole list,” of his proposed amendments, was the one which provided security against state and local incursions on individual liberties. See Helen Veit, ed., Creating the Bill of Rights: The Documentary History from the First Federal Congress, Baltimore, 1991 at 188-89, cited in Banning, Jefferson & Madison at 18.
extracted a promise that Congress would send a bill of rights to the states for ratification following ratification of the Constitution. Thomas Jefferson recommended that four states withhold ratification of the Constitution until a bill of rights had been sent to the states, and Patrick Henry used this argument in the Virginia ratifying convention. It is easy, therefore, to conclude that Madison’s support for a Bill of Rights was simply strategic. In order to secure ratification of the Constitution and assist his own election to the House, he supported a number of parchment barriers in spite of their lack of effectiveness. While Madison certainly did not reverse course and determine that a bill of rights was essential to the American Constitution, he did conclude that such a declaration would prove a positive supplement to the institutions devised in 1787.49

Madison’s unique understanding of the Bill of Rights emerged with his suggestion for supplementing the Preamble. In the debate in the House of Representatives over the proposed bill of rights, he suggested:

That there be prefixed to the Constitution a declaration, that all power is originally vested in, and consequently derived from, the people. That government is instituted and ought to be exercised for the benefit of the people; which consists in the enjoyment of life and liberty, with the right of acquiring and using property, and generally of pursuing and obtaining happiness and safety. That the people have an indubitable, unalienable, and indefeasible right to reform or change their Government, whenever it be found adverse or inadequate to the purpose of its institution.50

In essence, Madison wanted to attach the second paragraph of the Declaration of Independence to the Constitution in order to emphasize the purposes of the new government.51

49 See Banning, Jefferson & Madison at 6-8.

50 Madison, “Speech in the House of Representatives, June 8 1789,” in Meyers at 164.

51 This proposal undermines the influential thesis that the Constitution severely compromised the truly revolutionary principles of the Declaration of Independence. See Richard Matthews, The Radical Politics of Thomas Jefferson, Lawrence: University Press of Kansas, 1984; Id., If Men Were Angels;
Madison, moreover, actually came to appreciate the utility of a Bill of Rights. He determined that a constitutional announcement of personal rights would not only attach people to the Constitution’s structures, securing a devotion to the document and its forms, but it would encourage a citizenry vigorous in its attachment to its rights. While the Constitution created a system of government necessary for the protection, preservation, and extension of rights, these forms were not, on their own, sufficient. A bill of rights would cultivate a constitutional culture in which citizens would assert their own rights, while respecting the rights of their neighbors.

Though he continued to believe that the failure to include a bill of rights was not a “material defect” in the Constitution, in the course of the ratification debates, Madison came to see two reasons for including a charter of liberties. While Madison did act strategically in formulating the list of rights he would recommend, his arguments on behalf of the bill of rights he recommended were not simply strategic. He believed that such a declaration would prove a useful supplement to the institutional design of the Constitution. First, “[t]he political truths declared,” in a bill of rights would “acquire by degrees the character of fundamental maxims of free government, and as they became incorporated with the national sentiment, counteract the impulses of interest and passion.” Second, in instances where a danger to liberty emerges from the government rather than from the people, “a bill of rights will be a good ground for an appeal to the sense of the community.”


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52 See generally Banning, *Jefferson & Madison* at 1-26, 125-58.

Madison seemed to have adopted at least part of the Antifederalist critique of the Constitution. The political institutions designed to protect rights would provide greater security if the inputs were reliable. In other words, citizens protective of their rights and respectful of the rights of others would do much to assist Madison’s institutions in the protection of liberty. And when government violated constitutional norms, the principles within the Bill of Rights would become a rallying point for those who opposed government action.

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Madison and Hamilton would not have a home within today’s interpretive taxonomies. While they reject a bill of rights and interpretation that would subvert the Constitution’s procedural limits, they defend these procedures for their ability to secure liberal ends. The question then becomes how the Constitution secures those ends. Does the Constitution maintain the states as essential institutions in liberal governments? Or does the Constitution authorize the national government to define the boundaries of the sphere in which it is supreme? As I suggested in the previous chapter, proponents of a rights-based constitutionalism often couple those substantive purposes with a broad understanding of national power. In the following sections, I argue first that those who argue for a national government with plenary power misconceive the Constitution’s original character, but second that originalists who limit that government also fail to describe the original Madisonian Constitution.
II. The intended operation of the Madisonian Constitution

It is clear from *The Federalist* that both Madison and Hamilton perceived the new Constitution as a functionalist instrument. As noted earlier, Madison subordinated his constitutional design completely to liberal ends. Appealing to the principles of the Revolution, he declared:

> It is too early for politicians to presume on our forgetting that the public good, the real welfare of the great body of the people, is the supreme object to be pursued; and that no form of government whatever, has any other value, than as it may be fitted for the attainment of this object.\(^{54}\)

He expressed a willingness to reject not only the plan of the convention, but even the union itself, if either was inconsistent with the normative purposes of constitutionalism.

Hamilton supplemented this rejection of a procedural attachment to state sovereignty with an expansive interpretation of national power. He provided some evidence for this inclination in *Federalist* 23, when he contended that it is self-evidently true that there can be no restriction on constitutional means in the service of constitutional ends. “This,” he wrote, “is one of those truths which, to a correct and unprejudiced mind, carries its own evidence along with it; and may be obscured, but cannot be made plainer by argument or reasoning.” He continued:

> It rests upon axioms, as simple as they are universal…the *means* ought to be proportioned to the *end*; the persons from whose agency the attainment of any *end* is expected, ought to possess the *means* by which it is to be attained.\(^ {55}\)

Hamilton’s own later arguments on behalf of the National Bank and John Marshall’s adoption of the theory in *McCulloch v. Maryland* indicate to many a Federalist commitment to a broad understanding of national power within the Constitution.

\(^{54}\) *Federalist* 45 at 238.

\(^{55}\) *Federalist* 23 at 113.
Still, a thoroughgoing nationalist interpretation of the Constitution does not necessarily follow from these arguments. While they clearly subordinate constitutional procedures to constitutional ends, Madison and Hamilton did believe that the Constitution had been structured to achieve those ends. For Madison in particular, the primary focus remained on constitutional design, reforming the mechanisms of government in order to realize constitutional ends. The failure to pay sufficient attention to that institutional design has had a corrupting influence on our own interpretation of the Constitution.

**Overstating the relationship between rights and national consolidation**

Within constitutional interpretation, a number of sophisticated theorists deny any meaningful restrictions on the scope of national power. Philosophical and historical accounts suggest that the Constitution consolidates power in the institutions of the national government. It is worth considering several of these arguments in relation to the original Constitution’s design.

Moral realists have developed the most sophisticated normative critiques of originalism. They argue that once one admits the substantive orientation of the Constitution, procedures cannot be rightly used to limit the attainment of justice.\(^{56}\) Assuming that one is not a metaphysical skeptic—denying the very existence of morally real constitutional norms—constitutionalism becomes a Socratic effort to discover those norms and more effectively instantiate them within a political community. During this quest, constitutional powers and institutional limits lose their authority.

Originalists have occasionally positioned themselves as metaphysical skeptics, \(^{57}\) but more often they subscribe to an epistemological skepticism. They do not deny the existence of genuine moral norms. Rather, they only question their own aptitude at grasping them, and their institutional authority to apply them. Insofar as originalists admit the existence of real moral norms, moral realists deny to them an authority to recuse themselves from the necessity of elaborating those norms.

Contrary to these moral accounts, I believe that sound theoretical reasons exist for an ends-oriented constitutionalism to maintain a firm commitment to constitutional procedures. First, considering the history of political philosophy, it is unclear whether the philosophical models for a constitutionalism of moral norms actually recommend the casual rejection of constitutional procedures. \(^{58}\) As one scholar has suggested, those who promote a constitutionalism of moral reality appear to miss the joke in Plato’s *Republic*—the argument may promote the unyielding pursuit of justice, but the action suggests the political dangers associated with that pursuit. \(^{59}\)

Furthermore, rejecting the Founders’ own arguments for procedural restraints in light of the ends-oriented character of their constitutionalism might make the realization of justice less, not more likely. As I have noted elsewhere, and as the Founders’ themselves believed, a liberal constitutionalism must be open to the possibility of its own rejection. Yet prior to rejecting the Constitution, it seems prudent to determine how it was intended to operate, and how it has operated, to secure justice.

\(^{57}\) See Jaffa, *Original Meaning*.


Madison’s own path to the Constitution led to his rejection of constitutional procedures in favor of moral ends. He did not argue that a change in his conceptual understanding of the ends of government caused him to abandon means previously structured to achieve more primitive understandings of constitutional norms. Rather, he claimed that the means of the Articles were not able to achieve appropriately delineated constitutional ends, and he therefore abandoned them in favor of a new constitutional arrangement.

Consistent with the Revolutionary principles for which the Founders structured our constitutions, the amendment of those institutional means occurred outside of the processes provided for within the existing legal arrangement. Madison defended this circumvention of the amendment procedures in the Articles by appealing to the “transcendent law of nature and of nature’s God, which declares that the safety and happiness of society, are the objects at which all political institutions aim, and to which all such institutions must be sacrificed.”\(^{60}\)  The Federalist is in essence a defense of the extra-constitutional decision to supplant the Articles of Confederation with a new constitutional design. The Articles failed to realize the ends that all governments must achieve to maintain legitimacy. Future generations, concluding that the constitutional apparatus was systematically ill-equipped to realize constitutional ends, could similarly abandon the Constitution and start fresh.

While the moral realist approach to constitutionalism appropriately challenges a proceduralism that occasionally denies the moral purposes of the Constitution, these advocates are too quick to jettison constitutional procedures. It seems that there are two

\(^{60}\) See Federalist 43 at 229.
instances when a rejection of process would be necessary—when the ends protected by
the Constitution’s procedures are themselves deficient or when the Constitution’s
procedures fail to guarantee original substantive ends. The burden, however, should be
on those who would reject constitutional procedures to demonstrate either the
shortcomings of the original Constitution’s ends or the failure of the Constitution’s
procedures to secure original ends. In practice, however, the treatment of liberalism and
its failings is often cursory, while the processes being rejected receive little focused
analysis.

In important ways, these proponents of moral realism in constitutional theory
understand that the constitutionalism they recommend diverges from that of the
Founders. As examples, John Marshall’s textually and structurally sound decisions in
Barron v. Baltimore and McCulloch come under scrutiny for maintaining constitutional
forms over constitutional substance. In these cases, the procedures protected by
Marshall limited the authority of the national government. Too often, contemporary
aspirational views of constitutional ends come to coexist with a view of national power
that is essentially limitless.

Even some who understand federalism as providing normative benefits to political
communities have argued that the Constitution is illogical in its treatment of federalism.
The Constitution maintains the states as independent governing entities at the same time
that it empowers the national government to absorb the states.62

61 See Barber, “National League of Cities v. Usery: New Meaning for the Tenth Amendment,”
1976 Supreme Court Review 161 (1976); and Id., On What the Constitution Means.

62 See Nagel, Implosion of American Federalism.
This assessment seems to blur an important distinction between ends and powers in the Founders’ thinking. David Epstein’s important arguments on The Federalist’s treatment of “energy” in government are among the most thoughtful examples of a broad conception of national power.\(^63\) Epstein promises to “consider how the necessity of energy can be reconciled with a federal system and indeed with any limits on government.”\(^64\) The results of his analysis are not very promising for those who would maintain limits on national power and preserve the states.

Epstein begins with Hamilton’s observation that constitutional means must exist to secure constitutional ends.\(^65\) As Epstein notes, this discussion of the logical breadth of national power occurs in Hamilton’s defense of the constitutional powers to raise armies and revenues. He cites Hamilton’s observation in Federalist 23 that the power to create, maintain and use military forces:

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\text{ought to exist without limitation; because it is impossible to foresee or to define the extent and variety of national exigencies, and the correspondent extent and variety of the means which may be necessary to satisfy them.}\(^66\)
\]

Similarly, the power to raise revenue must exist without limit.\(^67\)

Yet rather than simply focus on the Constitution’s desire to liberate national military authority from its previous dependence on the states, Epstein draws from Hamilton’s arguments a criticism of enumeration more generally. The logical relationship between constitutional powers and ends indicates “the imprudence not only


\(^{64}\) *Id.* at 36.

\(^{65}\) See *Federalist* 31 at 150. See also Epstein at 40-50.

\(^{66}\) *Federalist* 23 at 113.

\(^{67}\) See *Federalist* 31 at 151.
of the restrictions the Anti-Federalists propose, but also of the Constitution’s own project: a government of enumerated powers.”

In Epstein’s view, The Federalist quietly argued that enumeration is itself a “parchment barrier” that its authors “denigrated.” This view of the relationship between the ends of the Constitution and the powers given to the national government have grave implications for federalism. As Epstein concludes:

if the central government must as a matter of necessity possess the most important powers without limit and be able to exert those powers on individual citizens, the Anti-Federalist’s fears that the states will be submerged in a ‘consolidated’ national government seem well founded.

The argument of The Federalist subtly shifts in the direction of national power. In Federalist 17 Hamilton indicated that the states would be protected through the political affections of the people, affections that would remain with the states unless the federal government proved a better administrator. In Federalist 27, he then argued that the new federal government will prove a superior administrator, and finally in Federalist 27 and Federalist 29 the author “gently advise[s] the new government on what policies would best win confidence and obedience.”

While there is much to commend in Epstein’s account, he subtly overstates the intention of the Founders that the Constitution should incline toward consolidation. This is clear in Epstein’s treatment of Federalist 44. There Madison explained, “[n]o axiom is more clearly established in law, or in reason, than that wherever the end is required, the means are authorized; whereas a general power to do a thing is given, every particular

68 Epstein, Political Theory of The Federalist at 32.
69 Id. at 44-5.
70 Id. at 51.
71 Id. at 53.
power necessary for doing it is included." Epstein reads this account as treating the enumerated powers themselves as constitutional ends.

It seems important, however, to pay closer attention to the particular powers addressed in The Federalist’s discussion of the necessary availability of constitutional means. Hamilton began by noting that the principal ends that would be secured by the union are:

the common defence of the members; the preservation of the public peace, as well against internal convulsions as external attacks; the regulation of commerce with other nations, and between the states; the superintendence of our intercourse, political and commercial, with foreign countries.\(^\text{73}\)

In order to achieve these goals the general government would need the power to raise revenues that would allow it to field an army. Furthermore, it would need direct control over that army. Epstein sees the Articles’ shortcomings as involving a deficient grant of substantive power to the national government.

Yet, the failure of the Articles in restricting the powers to raise revenues and raise armies was related to the principal institutional shortcoming of the Articles—the principle of state sovereignty at the core of its traditional federal structure. The problem of constitutional design identified by the Founders was not that the subject-matter of constitutional powers was too tightly circumscribed, as Epstein suggests. Rather, the Articles fell short because the power of the states rendered the national government incapable of exercising its existing powers. The states continued to check the national government even as it attempted to exercise powers properly delegated to it. Energy in government did not require, therefore, an interpretation of constitutional powers so broad

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\(^{72}\) Federalist 44 at 235.

\(^{73}\) Federalist 23 at 113.
as to transform them into constitutional ends. It demanded a restructuring of federal relationships so that the national government would not be thwarted from exercising its discrete powers in the service of constitutional ends. Understanding Madison’s solution to the shortcomings of the existing constitutional framework will demonstrate how a limited government would function to secure individual rights.

_Madison’s proposed Constitution_

Too often, scholars locate the Constitution on one of two distant poles on the federalist continuum. Either it creates a fully consolidated system, undermining the states and creating a national government of plenary power, or it is solicitous of states’ rights. As one historian recently explained, the Constitution created:

>a genuine national government, but a government whose power was tightly limited both by the wide scope guaranteed to the states in the Constitution and by the persistent uncertainty over the question whether states that had joined the Union by their free action could withdraw from the Union by their free action.

In this account, the Civil War removed any uncertainty about the limits on national power. With the Union “decisively exerting national power over local authority and by decisively answering the presenting question about the states’ freedom of action,” the Civil War created a consolidated national government. This view seems to acknowledge only two federal options in American constitutionalism. The Constitution either maintains the states, contributing to secession, or it undermines them, paving the way for the Great Society.

This was not Madison’s view of the Constitution, and by failing to uncover his original understanding we lose sight of the Constitution’s functional possibilities. For

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74 Mark Noll, “America’s Two Foundings,” _First Things_ (December 2007), pp. 29-34, 30.
originalists, who support federalism and have claimed to represent the “Madisonian” Constitution, this is a missed opportunity to defend a limited Constitution. In Madison’s view, his revolutionary changes to the federal structure did not eliminate the states as independent governing entities within the union. They would remain partners in the rights-protection that was the purpose of the Founders’ constitutionalism. Yet for them to be effective partners, federalism had to be reconfigured such that they would no longer be institutional participants within the structures of the national government. While Madison did not achieve all of the reforms he recommended at the Convention, his proposals did form the backbone of the Constitution that the states would later ratify.

Recovery of this constitutionalism requires a methodological approach rejected by originalists and non-originalists alike. It requires that interpretation go beyond the text. And even worse than using legislative history and particular intent in the explication of constitutional meaning, it relies on Madison’s original constitutional proposal, parts of which failed even to become law. Yet only by understanding this original constitutional proposal, can one appreciate the functional Constitution we have inherited.

An additional hurdle exists to the recovery of Madison’s constitutionalism—the conventional account of Madison’s political career and intellectual development. The standard biographies of Madison assume that between the 1780s and 1790s a fundamental shift occurred in Madison’s thoughts on the union. Lance Banning determined that “nearly all” of these authorities find a “radical discontinuity” between a

75 See Scalia, Matter of Interpretation.

Madison supportive of national power in the Continental Congress and during the framing and ratification of the Constitution, and a Madison who later defended the states and set the grounds for nullification and secession as a leader of the Jeffersonian opposition.\textsuperscript{77}

Within constitutional theory, the impact of this standard account is to diminish the authority of Madison. In today’s political parlance, he becomes a “flip-flopper,” rather than an objective political scientist and statesman in search of a lasting solution to the challenge of republican government. Banning’s comprehensive account of Madison’s political life demonstrates the shortcomings of this standard account. Failing to recognize that Madison’s true lodestar was the preservation of the achievements of the Revolution, it is easy to overstate his early nationalism as well as his later commitment to the states.

The movement toward constitutional reform in 1787 did not originate in a conflict over constitutional principles. Rather, it developed from a belief that existing institutional schemes had failed to secure already agreed-upon constitutional principles.\textsuperscript{78}

The expressed purposes of the two American constitutions confirm this agreement. The Articles organized the states:

\begin{quote}
into a firm league of friendship…for their common defense, the security of their liberties, and their mutual and general welfare, binding themselves to assist each other, against all force offered to, or attacks made upon them, or any of them, on account of religion, sovereignty, trade, or any other pretense whatever (Article II).
\end{quote}

As announced in its Preamble, the Constitution exists “in order to form a more perfect union, establish justice, insure domestic tranquility, provide for the common defense,

\textsuperscript{77} Banning, \textit{The Sacred Fire of Liberty} at 2.

\textsuperscript{78} See Storing, \textit{What the Anti-Federalists Were For}.  

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promote the general welfare, and secure the blessings of liberty.” The Articles established a union of individual states to achieve certain goals. The Constitution reaffirmed those goals and added another—the formation of a union “more perfect” than the one that preceded it. It appears that through political reorganization, the new Constitution proposed a union more likely to secure the goals for which the federation existed.

Madison appreciated the need for institutional reorganization and came to understand that the continued success of the Revolution faced two threats. The first resulted from a failure of the Confederacy. The Confederation government was weak, and dismemberment of the Union was a real possibility. As documented in *The Federalist*, four distinct threats emerged due to the weaknesses of the Confederacy. First, because the national government had no power to control the member states or uniformly enforce international obligations, the union itself would be drawn into conflicts resulting from the actions of member states. The Confederacy’s failure to control the states and enforce the law would leave foreign powers with little choice but to go to war and enforce international law. Second, the inability of the national government to wield power effectively removed any deterrent effect a Confederation might have on foreign powers. American weakness would invite unjust and aggressive wars by foreign powers. Third, the lack of genuine union would lead states to invite intervention by foreign powers. The final indignity would be the states turning on themselves absent a

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79 U.S. CONST., Preamble.
80 *Federalist* 3 at 10-11.
81 *Federalist* 4 at 14-15.
82 *Federalist* 5 at 17-20.
national government that could act as an effective umpire at resolving disputes and enforcing the law.\textsuperscript{83}

As Jack Rakove has documented, by the mid-1780s many reasonably feared that large foreign powers, the illiberal forces recently overcome by the Revolution, would prey on the Confederacy out of avarice, or fill a vacuum as the states aligned themselves with governments capable of protecting their interests.\textsuperscript{84} The weakness of the Confederacy was the principal threat to the Revolution.

The second threat to the Revolution was internal. Republican government within the states was falling short of its liberal promise. The highly democratic governments established in the first wave of American constitutionmaking\textsuperscript{85} were prone to instability, and in some instances, were proving a genuine threat to individual rights.

The failures of republican government were certainly an important concern of the Founders. They were, however, a second-order concern. And yet this latter concern has received the lion’s share of attention within scholarship on America’s constitutional origins. In still influential accounts, Shay’s Rebellion in Massachusetts plays a powerful role in the explanation of the movement toward constitutional reform. The radicalization of democratic politics and danger to property rights required a constitutional reform that would squelch these radical impulses.\textsuperscript{86} Moreover, Madison’s apparent recommendation

\textsuperscript{83} \textit{Federalist} 6 at 20-26.

\textsuperscript{84} Rakove, \textit{Original Meanings}.


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for pluralist, interest-group government in *Federalist* 10 and *Federalist* 51 as a solution to this problem,\(^{87}\) drew the attention of mid-century political scientists.\(^{88}\)

No doubt, the problems and solutions identified by Madison in these analyses would be critical aspects of constitutional reform. Madison saw that too often:

> the public good is disregarded in the conflicts of rival parties; and that measures are too often decided, not according to the rules of justice, and the rights of the minor party, but by the superior force of an interested and overbearing majority.\(^{89}\)

And he would seek to reconcile republican institutions with liberal government. But by beginning with this problem, it is easy to overstate Madison’s commitment to consolidation and his distrust of democratic politics in the states.

Madison’s focus remained principally with the deficiencies of the Confederacy. Prior to the Constitutional Convention, Madison prepared extensively as he diagnosed the Confederacy’s shortcomings. First, he reviewed the organization and history of other federal arrangements. Banning helpfully described this effort, explaining that with each entry in Madison’s notes, he summarized “the authority confided to the general government of a confederacy or denied to its component states,” and then added “some remarks about the weaknesses or ‘vices’ of this distribution.”\(^{90}\) He then wrote a series of letters to fellow Virginians in which he indicated the deficiencies of the Confederacy and


\(^{89}\) *Federalist* 10 at 42.

\(^{90}\) Banning, *Sacred Fire of Liberty* at 115. See Madison, “Of Ancient and Modern Confederacies, (1786 [?]), reprinted in Meyers at 48-56.
recommended his solutions.\textsuperscript{91} He concluded with what Banning describes as a “formal memorandum.” Madison circulated that memo, the “Vices of the Political System of the United States,” and it was likely read by some in attendance at the Convention.\textsuperscript{92} The result of this preparation was that while Madison did not dominate the Convention, he was able to set the agenda. The Virginia Plan, which set the grounds for debate, largely represented his considered solution to the problems of confederacies and republican government.

The federal arrangements Madison discovered and challenged were the offspring of the American experience with the British Empire. For the Americans, the Empire seemed to operate as a confederacy for much of the eighteenth century. The Revolution could be understood as the result of a constitutional misunderstanding, as the Empire began to exert greater central control over colonies that had been largely self-governing. Michael Zuckert has described the confederal features of the empire, as it operated until the revolutionary crisis. The empire was:

\begin{quote}
a unit composed of separate and independent political entities, sharing a common king, but possessing separate legislative authorities. The imperial federation possessed an agent, Parliament, with very limited, consent-based legislative power for the confederacy as a whole. That authority at most extended to matters of genuine common concern to all the members, for example, regulation of the commerce of the whole.\textsuperscript{93}
\end{quote}

The Empire and the Confederacy that replaced it followed closely Montesquieu’s understanding of a federation as a “society of societies.”\textsuperscript{94}


\textsuperscript{92} Banning, \textit{Sacred Fire of Liberty} at 115.

\textsuperscript{93} Zuckert, “A System Without Precedent: Federalism in the American Constitution,” at 135.

\textsuperscript{94} Montesquieu, \textit{The Spirit of the Laws}, Book IX.
when individual political communities combined for certain limited purposes. The member states, however, remained sovereign and independent with respect to most matters.

The traditional federal arrangement described by Montesquieu was failing, however, in the United States. Specifically, the Articles’ commitment to the sovereignty of the member states prevented the successful operation of the national government they had created. The Preamble of the Articles suggested this sovereignty, and Article II confirmed it. Prior to declaring the purposes of the union in Article III—the equivalent of the Constitution’s Preamble—Article II operated as a rule of construction for the entire document, announcing that:

> each state retains its sovereignty, freedom, and independence, and every power, jurisdiction, and right, which is not by this Confederacy expressly delegated to the United States, in Congress assembled.

The Confederacy was a creation of the states, and it existed to protect the states. As Michael Zuckert has explained, this general government could not even rightly be described as a government. The members of Congress were delegates rather than representatives in a genuine legislature. Moreover, the principle of state sovereignty undermined the power of the government to enforce the laws that it did enact. Even though that government existed to carry out certain responsibilities delegated by the states, in practice the Articles more closely resembled a mutual defense organization with

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the states pledged “to assist each other, against all force offered to, or attacks made upon them” (Article III).

Standard accounts describe the Confederation’s principal shortcoming as a shortage of power. Hamilton in *Federalist* 15 described the problem generally identified as the reason for the looming collapse of the Confederation. The general government possessed the powers to raise money and armies:

but they have no authority to raise either by regulations extending to the individual citizens of America. The consequence of this is that though in theory their resolutions concerning those objects are laws constitutionally binding on the members of the Union, yet in practice they are mere recommendations which the States observe or disregard at their option.

The inability of the national government to execute its own laws was the Articles’ Achilles heel. That Constitution granted powers to achieve certain goals, but it did not provide the powers necessary to execute those plans. The Confederation lacked authority over individuals. For Hamilton:

The great and radical vice in the construction of the existing Confederation is in the principle of LEGISLATION for STATES or GOVERNMENTS, in their CORPORATE or COLLECTIVE CAPACITIES, and as contradistinguished from the INDIVIDUALS of whom they consist.

Constitutional reform demanded that the national government have the power to enforce its laws, and in order to do that it needed the power to act on persons rather than states.

As noted earlier, Epstein’s account of *The Federalist* subscribes to this view that a correction of the Articles required an expansion of national power. And as Zuckert has noted, there were those in Philadelphia who believed those deficiencies to be the central flaw of American constitutionalism. The New Jersey Plan, for example, was a modest

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98 *Federalist* 15 at 71.

99 Id.
amendment to the structure of the Articles, one that did not fundamentally alter the federal structure but merely created an enforcement power for the national government.

Madison had developed a more complex view of the problems of the existing constitutional design, however. He concluded that confederacies did not dissolve for want of power. They dissolved because the federal form itself prevented them from achieving federal ends. The impediment to government execution of its own laws was not the failure to enumerate a power to do so. The power to enforce the law was a necessary power of constitutional government, one that would be assumed unless something stood in its way. Madison understood that the states themselves, with their agency within the national government, were the real sources of inadequate enforcement inadequacy.

Following Madison’s pre-Convention diagnosis of the confederacy’s situation, Zuckert describes Madison as developing two novel approaches for realizing traditional federal ends. The ends of government did not require expansion according to Madison. He argued:

If the new Constitution be examined with accuracy and candor, it will be found that the change which it proposes consists much less in the addition of NEW Powers to the Union, than in the invigoration of ORIGINAL POWERS.\textsuperscript{100}

Madison would invigorate the powers of the national government by removing state power from its institutions. First, the institutions of the national government— institutions that exist to achieve limited federal ends—could harbor no state agency within them. The power to enforce the law is only useful if the agents charged with enforcing the law are willing to do so. The Confederacy suffered as much from

\textsuperscript{100} \textit{Federalist} 45 at 241-42.
supposedly national agents committed to state sovereignty as it did from a lack of formal power over the states.\textsuperscript{101}

Second, the newly constituted national government would be given a power specifically to address the problem of state encroachments. Madison’s study of confederacies, as well as the American experience, led him to appreciate that federations are prone to centrifugal forces. These forces lead the member states to attack one another or the central government itself. Madison’s solution for maintaining the confederacy was to arm the national government with a universal negative over state laws jeopardizing the integrity of member states or the supremacy of the national government.\textsuperscript{102}

Only after addressing these federal concerns, and in a manner that maintained limits on the substantive breadth of federal power, did Madison turn inward. In his most radical departure from the principles of federalism, Madison recommended that the national government possess the power to interfere in the internal governance of the states. In the wake of the Revolution, Madison’s contemporaries had hoped that representative government alone would protect the liberal goals that were central to America’s constitutionalism. Yet Madison had come to understand that representatives answerable to the people were not adequate for the maintenance of liberal government. His innovation of large republican government would reconcile republican government with the goals of the Revolution.\textsuperscript{103}

Even there, however, Madison’s understanding of national power remained limited in part because of a continued faith in the mechanics of republican government.

\textsuperscript{101} Zuckert, “A System Without Precedent,” at 139-42.

\textsuperscript{102} Id. at 142-45.

\textsuperscript{103} Zuckert, “A System Without Precedent,” at 145-49.
Madison did not recommend consolidation or a national government with plenary regulatory authority. Rather, he recommended a negative power over state laws. Contemporary critics of American democracy challenge the inputs and outputs of republican government, and many accounts of America’s constitutional development highlight its contra-democratic features. It is easy, therefore, to overlook the revolutionary character of representation and its operation as one of the gears in a liberal constitutionalism.

As Hamilton explained in *Federalist* 9, representation was among the significant innovations in political science that had helped to advance liberty. Americans, as they consumed Whig political theory, did not merely take away an animus toward political corruption. They also learned that highly democratic institutions, with representatives answerable to the people and bound by the same laws, would work to maintain personal liberty. Madison observed the occasional failings of small republican institutions, and his innovation of a large republican government would work to check those democratic actions that undermined liberty in the states. This remained, however, a checking function. The presumption remained that democratically responsible governments in the states would protect the rights of their citizens.

Though he fought to achieve these reforms throughout the Convention, Madison’s success was mixed. Again, Madison’s diagnosis of the Confederacy’s illness began with his finding:

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105 See Zuckert, “Federalism and the Founding.”
authorities, with a very ineffectual capacity in the latter to defend itself against the encroachments. 106

Yet as documented in Federalist 39, Madison was unable to exclude the states fully from the institutions of the national government, most notably in the Senate. Moreover, the Convention replaced the powerful veto over state laws that undermined national authority with a mere declaration of the supremacy of national law. 107 And finally, the Convention declined to provide the more reliable democratic institutions of the general government with a check against democratic abuses within the states.

Madison’s recommended Constitution is not the Constitution we have inherited. He understood well the depth of the rejection of his proposals, and he feared that absent these changes the federal Constitution would not last. On September 6, 1787, shortly after returning from the Convention, he wrote his friend Jefferson and predicted that “the plan should it be adopted will neither effectually answer its national object nor prevent the local mischiefs which everywhere excite disgusts agst the state governments.” 108

Madison proved prescient. His Constitution was not adopted, and it did not last. In little over a decade, the centrifugal forces associated with confederations would emerge and begin to threaten the union. And of course the constitutional crisis of nullification and later secession—extreme challenges to the supremacy of national law—occurred in large measure because the federal character of the Articles had not been adequately amended.

Fortunately, the national government was sufficiently energized by the Constitution to weather these storms. In the hands of Lincoln, the power to enforce

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106 Federalist 45 at 249.
national law was able to overcome even active state resistance. But in the wake of the Civil War Madison’s constitutionalism reemerged. Not all of his recommendations would be formally adopted. The states did maintain agency within national institutions, most notably in the Senate. And the national government was given no formal authority to assert its supremacy over state law through a veto. Yet, the Union victory had begun to establish the supremacy of national law and the illegitimacy of formal state resistance. And the Fourteenth Amendment would provide the Congress with a limited authority to protect rights in the states.  

Though Madison’s constitutionalism initially failed to find adherents, America’s constitutional development has been in part a subsequent adoption of that constitutionalism. The Madisonian Constitution established a national government of limited ends and one that primarily designed political institutions to discover and extend constitutional values. Originalists, however, even as they embrace the Madisonian Constitution, fail to portray this unique constitutionalism accurately. In part, this seems related to the originalist resistance to looking beyond the text. In part, it is because of their wariness at the misuse of the constitutional developments initiated by the Civil War by jurists engaged in substantive due process. This is unfortunate because a complete defense of the functional Madisonian Constitution would provide originalists with an effective argument for a substantively restrained and procedurally active judiciary that defends the ability of political institutions to secure and extend constitutional rights.

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CONCLUSION

Recovery of the original functional Constitution promises historical, descriptive, and normative benefits. Such an account would better capture the original structure and purpose of the Constitution. It would allow a richer description of our constitutional and political development. And by refocusing and properly channeling debates over the maintenance and extension of constitutional norms, it might create a healthier constitutional politics, one that respects the ability and obligation of states to protect their citizens, while acknowledging the power of the national government to act when those states fail.

Popular expressions of American constitutionalism highlight the need for a functionalist alternative. Consider the responses to the decision by the House of Representatives to strip the Supreme Court’s appellate jurisdiction over the Defense of Marriage Act. The conservative writer Patrick Buchanan applauded this action, since the constitution of marriage and the resolution of other social issues should not be determined “dictatorially by judges, but constitutionally by the 50 states and democratically by legislators.”¹ This argument for judicial restraint does not withstand scrutiny. Brown was a “social” decision. Should the Court have acted, or was

segregation a policy question for states and localities that best understood their peculiar situation?

At the same time, however, Chai Feldblum’s response to the House’s action—that “when legislators rail that ‘unelected judges’ are finding legislative acts unconstitutional, they are attacking the very structure of our democracy”—similarly misses the mark.\(^2\) The Founders did not anticipate, and subsequent constitutional developments have not confirmed, such a central role for the courts in our democratic life. Both originalist arguments for judicial restraint, and the suggestion that political challenges to the constitutional supremacy of the judiciary threaten the foundation of our democracy, are off the mark.

Buchanan’s and Feldblum’s arguments fit within an existing theoretical framework established by politicians, judges, and academics. Unfortunately, these existing lines of argument within constitutional theory seem to have a cascading effect that moves us ever further away from a full account of America’s functional constitutional experience. In conclusion, I will briefly address the arguments of two of the leading representatives of both substantive and neo-originalist, developmental constitutionalism, Sotirios Barber and Keith Whittington. While each of these approaches brings unique perspectives to our constitutional debate, each demonstrate the interpretive pitfalls for those who ignore the Constitution’s functional operation.

Among substantive constitutionalists, Sotirios Barber has undertaken the most thorough and thoughtful work challenging the epistemological and historical assumptions of originalism. He has criticized originalism on a number of grounds. First, he has

confronted originalists for their prioritizing of constitutional procedures. Originalists who challenge an active judiciary by promoting the Constitution’s democratic procedures elevate constitutional means above constitutional ends. Yet as Barber explains in detail, the Founders understood the Constitution as an ends-oriented instrument, and *The Federalist* repeatedly reminds its audience that when constitutional procedures fail to achieve constitutional ends, they abandon their claim to our allegiance.³ For Barber, the Constitution’s continued supremacy demands a constant reaffirmation of its instrumental adequacy.⁴ By abandoning constitutional substance to constitutional process, contemporary originalists reverse the priorities of the Constitution.

Second, Barber has rejected the originalist posture of moral skepticism. In order to undermine the case for a substantively active judiciary, originalists adhere either to a metaphysical skepticism that denies the existence of real moral norms or to an epistemological skepticism that soft-pedals the ability of persons to identify and apply these norms. At first glance, the latter position seems consistent with the skepticism of ancient and medieval political philosophy, a skepticism recognized by Christians through St. Paul’s reminder that “now we see through a glass, darkly, but then face to face: now I know in part; but then shall I know even as also I am known.”⁵ Barber, however, rejects the skepticism of originalists for abandoning the aspirational character of philosophy. In the hands of contemporary democrats, the skepticism promoted by originalists threatens to relieve citizens and statesmen of their obligations to pursue richer conceptions of justice. In our own pluralist and democratic constitutional community, an otherwise

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³ Barber, *Welfare & the Constitution* at 93-95.


healthy epistemological skepticism threaten to relegate justice to a mere aggregation of interests.\textsuperscript{6}

Third, Barber has reminded originalists who recommend procedural neutrality that the original Constitution was not in fact substantively neutral. There are several elements to this aspect of Barber’s critique. He begins by rejecting the “negative liberties” model of constitutionalism. He argues that once one accepts a duty of the state to protect private property and enforce private contracts, the Constitution becomes a charter of positive benefits.\textsuperscript{7} Because all government is necessarily redistributive, Barber contends that while certain welfare programs might be rejected due to scarce resources, they cannot be rejected for promoting positive rights to welfare. Following Michael Walzer, Barber believes that “every state” is a “welfare state.”\textsuperscript{8}

Next, Barber borrows two insights of Leo Strauss in arguing for the particular goods sought by American constitutionalism. Following Strauss’ interpretation of early modern political philosophy, Barber believes that the Founders, appropriating Locke, promoted commercial liberalism as the “low but solid ground”\textsuperscript{9} through which American constitutionalism would avoid the divisive conflicts ordinarily associated with political life.\textsuperscript{10} This liberalism is beneficial not only for its protection of the many, but for its

\textsuperscript{6} Barber, \textit{Welfare \& the Constitution} at 86-91.


accommodation of the few who wish to pursue a philosophic life. 11 Liberalism then, accommodates philosophers (and constitutional theorists such as Barber), who might actually challenge the ends associated with American constitutionalism. As he explains, “[t]he Constitution’s adequacy is thus wholly contingent on how the case for bourgeois liberalism continues to fare against evidence continually marshaled against it.” 12

Barber’s ends-oriented constitutionalism passes too quickly, however, to a rejection of constitutional procedures for failing to achieve the general welfare. This rejection is two-fold. First, he seems to suggest that constitutional politics has improperly elevated states’ rights at the expense of justice. Here, he follows Herbert Storing, who believed the Founding was only completed through the acquiescence of the Antifederalists, and American history is best understood as an ongoing dialectic between Federalist and Antifederalist political commitments. 13

Yet Barber’s critique of the Constitution’s adequacy as an instrument of justice runs deeper than this insight that its interpretation has been insufficiently nationalist. Citing an article by Suzette Hemberger, he contends that the Founding was essentially nationalist. 14 His review of McCulloch—our “most authoritative statement of state-federal relations” 15—and The Federalist leads Barber to conclude that the issue of

Barber eventually concedes that the explicit character of his welfarist Constitution might be at odds with a liberalism that sought to diffuse debate over first principles. See Barber, Welfare & the Constitution at 99-100; and Mansfield, “The Formal Constitution: A Comment on Sotirios A. Barber,” 42 American Journal of Jurisprudence 187 (1997).

11 Barber, Welfare & the Constitution at 108-09.
12 Id. at 126, 125-26.
13 Id. at 127 citing Storing, What the Anti-Federalists Were For.
14 Id. at 126-32.
15 Id. at 131.
congressional powers is “pivotal” for understanding the Constitution.\textsuperscript{16} And he determines that the Constitution’s ends-orientation logically requires that Congress possess all means to promote those ends. The Tenth Amendment and states’ rights cannot limit the ability of constitutional authorities to promote constitutional ends.

Even where this thoroughgoing nationalism has been achieved, however, Barber indicates that the Founders’ desire to secure justice through national interest-group politics has failed. He explains that the middle and upper classes are unwilling to support redistributionist programs that would benefit the general welfare of the entire community.\textsuperscript{17} Minorities, lacking political power, are unable to secure the promise of the Constitution.\textsuperscript{18} For Barber, “[t]his failure belies the framers’ conviction that the nation could pursue the common good not through cultivating civic virtue but through artfully arranged private incentives.”\textsuperscript{19} And this failure of democratic majoritarianism liberates constitutional actors (including judges) to promote constitutional ends outside of the majoritarian process.\textsuperscript{20}

I would suggest that Barber’s focus on constitutional ends would benefit from a richer consideration of constitutional procedures. Barber believes “the practical task of constitutional theory is to approximate abstract truths in concrete cultural situations.”\textsuperscript{21} Following the argument of Madison in \textit{Federalist} 62, with which I opened this

\begin{notes}
\textsuperscript{16} Id. at 120.
\textsuperscript{17} Id. at 118-19.
\textsuperscript{18} Id. at 96.
\textsuperscript{19} Id. at 119.
\textsuperscript{20} Id. at 155.
\textsuperscript{21} Id. at 99.
\end{notes}
dissertation, I believe constitutional theory should lower its sights, paying greater
attention to constitutional design. Yet James Madison makes only a minor appearance in
Barber’s account, even though his thoughts on constitutional design formed the essential
foundation of the Constitution’s structure.

I believe that inattention to the operation of the Constitution’s processes enables
Barber to overlook the obvious instances in which national majorities have in fact
provided redistributionist benefits to the poor. It is difficult to understand how Barber
looks at the development of national politics over the last century and concludes that the
Constitution’s faith in the ability of majoritarian government to secure justice for
minorities was misplaced. At the same time that the federal budget is being consumed by
Medicare, Medicaid, and Social Security—programs that provide services to the poor and
disabled and keep the elderly out of poverty—the libertarian candidacy of Dr. Ron Paul
demonstrates that little meaningful constituency exists for the constitutionalism of
negative rights that Barber finds so defective. Closer attention to constitutional design
might enable substantive constitutionalists to have a better appreciation of the
development and extension of constitutional rights.

Neo-originalists pay greater heed to America’s constitutional development than
do the substantive constitutionalists represented by Barber. At the same time, however,
they similarly diminish the original procedural framework within which these
developments have occurred. Keith Whittington’s analysis of the recent federalist revival
shows both the promise of neo-originalist developmental accounts and their functionalist
shortcomings.
For Whittington the Constitution is not primarily a legal mechanism. Rather, it is an instrument that channels political decisionmaking, and it is compatible with a variety of vertical institutional arrangements. The “shifting trends in federalism, between centralization and decentralization, suggest that the Constitution is best understood as a dynamic political instrument.” Centralization is not “inherent in the constitutional design but tolerated by it.” The same holds true for decentralization. The question for Whittington is what inspires these shifting allegiances.\(^{22}\) The answer does not seem to include the Constitution’s design.

In this account, constitutional developments have occurred largely to accommodate changing conceptions of property. The original Constitution protected “established systems of property,” including slave property. When our substantive constitutional commitments to property shifted following the Civil War and industrialization, the constitutional structure of dual federalism meant to secure these property rights shifted as well.\(^{23}\) Due to the changed cultural conditions initiated by political and economic centralization, originalists have to accept that ‘you can’t go home again.’ We are a people “differently constituted,” and therefore, it is simply impossible to return to the old system of dual federalism—“the idea that the state and national governments occupied ‘separate spheres’ and performed distinct governmental functions.” At the same time, however, recent reevaluations of centralization have contributed to a reappraisal of the utility of federalism.\(^{24}\)


\(^{23}\) *Id.* at 486.

\(^{24}\) *Id.* at 485.
Whittington explains the current reemphasis of federal forms and state democratic procedures—a reemphasis recognized and rejected by Barber—as resulting from changed public perceptions about the need for centralization. Again, Whittington does not understand this development simply as an exercise in historical recovery. He explains that:

constitutional meaning and structure is ultimately responsive to enduring shifts in political values and the socio-economic environment. Changes in federalism depend not on the recovery of previously lost constitutional meanings, but on a reconfiguration of the substantive foundations upon which constitutional structures depend.25

The ascendency of national power occurred in tandem with the development of an integrated economy and a public perception that government administration would benefit by breaking down arbitrary distinctions between government functions.

The constitutional challenge that encouraged the development of the modern centralized state was the impact of industrialization and the institutional inadequacy of state government in addressing this changed landscape. The growing political and economic interdependence of previously separate regions required the development of a centralized administrative class.

In particular, the changing character of corporations demonstrated the need for greater centralization of regulatory authority. Corporations were initially created to fulfill short term public needs. By the late nineteenth century, however, they were developing into permanent fixtures in the economy, structured for open-ended private gain. Permanency, along with their participation in interstate commerce, seemed to require greater centralized control. State regulatory schemes had to be preempted because meaningful regulation of corporate activity at the national level was impossible so long as

25 Id. at 487, 483-88.
there was competition among the states. Ultimately, the “public philosophy of activist liberalism”—regulation of the economy for the benefit of a national citizenry—was inconsistent with a system of dual federalism.26

A “public morality” emerged that understood the states as unable to, or incapable of, realizing the liberal ideas of the modern positive state. “Where party government called for the democratic administration of government in the interest of the electoral victors,” Whittington explains, “the administrative ethic insisted on impartial rule by experts in accord with objective principles of social order.”27 This Progressive morality saw the states as a source of political corruption and machine politics, rendering them incapable of addressing the social impact of industrialization. Yet, progressives focused not solely on the corruption of industry and political machines, “but also on the limitations of inherited political forms.”28 In other words, the states were simply institutionally ill-equipped for dealing with the problems associated with industrialization and an increasingly nationalized economy.

In place of the Constitution’s original “dual federalism” a “new model” emerged which “emphasized cooperation between the national and state governments in providing an undifferentiated set of common governmental services.”29 Progressives did not simply expand government power. They challenged the belief that governmental obligations could be easily divided in a politically and economically integrated nation.

26 Id. at 493, 493-500.
27 Id. at 492, 490-93.
28 Id. at 500-01.
29 Id. at 485.
America’s confrontation with civil rights only deepened the public presumption in favor of centralization. The “moral bankruptcy” of the states prejudiced national majorities against state governments, leading to further acquiescence in centralization. Moreover, since the opponents of civil rights utilized dual federalism and states’ rights arguments, a pro-civil rights position came to be equated with national power.\textsuperscript{30}

Over time, however, cultural and political developments have encouraged, if not a public morality of states’ rights, then a public morality of distrust for centralized government. One variable in this attitudinal change among citizens was the “end of liberalism”—a distrust in the capabilities of government due to a lack of fiscal restraint and the rise of special-interest politics.\textsuperscript{31} First, the national mood shifted. Just as the “defining feature” of the centralized state was a movement away from traditional liberal fears of government and toward a faith in progress through government, the “public mood,” captured well by Ronald Reagan, became skepticism toward government. Second, the rise of deficit politics and tax revolts deprived the national government of the resources necessary to the maintenance and expansion of the liberal state. And third, the perceived corruption of interest-groups, and the competition for funding those interests, has led to a relocation of authority in Congress. The delegation to centralized administrators in the executive branch was possible so long as citizens believed that their decisions were apolitical, administrative, and technocratic. As the political interests of groups and the bureaucracies they captured were exposed, Congress reasserted its

\textsuperscript{30} Id. at 500-03.
\textsuperscript{31} Id. at 503-11. See Lowi, \textit{End of Liberalism}. 
institutional authority, removing power from the engine of the centralized administrative state.

Finally, Whittington identifies the rise of the “entrepreneurial state” as critical to the rise of an ideology of decentralization. Just as corporate structures seemed to demand a centralized economy to govern these interstate actors, so too a changed economy has made centralized control less desirable. The creation of global markets policies the national economy at the same time that national administration has become less effective. Furthermore, post-industrial technologies and managerial practices exposed regulatory models based on railroads and oil conglomerates as archaic.32

While this account properly elevates the political features of the Constitution’s meaning and operation, this originalist posture raises a number of questions. In short, however, there is nothing particularly originalist about this presentation. While Whittington explains and defends federal outcomes that are perhaps consistent with the original Constitution, all he describes here is the historical development of public attitudes that are then reflected by constitutional actors.

It would seem that the changing public attitudes and social conditions Whittington describes occur within an institutional framework that directs our political and constitutional debates. Yet the Constitution Whittington describes, while supposedly not infinitely malleable, does seem capable of accommodating total consolidation, dual federalism, and what appears to be a conglomerate system of decentralized nationalism.

At the same time that he seems to ignore any essential constitutional design that would direct political and constitutional change, Whittington claims that the Constitution,

32 Id. at 514.
as originally understood by those who framed it, was a Constitution of dual federalism, which was ultimately supplanted by industrialization and centralization. While it is certainly appropriate to describe the changing landscape of public attitudes on constitutionalism, an account that begins with the institutional context within which those debates occur would seem to provide a richer descriptive account. By racing beyond the Founding, however, and describing the original Constitution as one of dual federalism, when this approach was rejected by all of the most important Founders, Whittington and other developmental constitutionalists seem to miss an opportunity.

An appreciation of the Constitution’s functional operation seems essential to these developmental accounts. Otherwise, they are subject to the challenge that they are simply pragmatic—historical analyses that naively assume justice will be secured over time. Whittington’s own description of the shifting attitudes that have inspired a renewed confidence in the states indicate the power of this criticism. Central to these developments were the successes of the civil rights movement, the purification of the democratic process and corrupt state politics, the redefinition of corporate structures through the rise of entrepreneurialism and the development of world markets, and the rise of deficit politics and low tax policies. None of these conditions just happened. Rather, they were the result of national political movements.

Civil rights is just the most obvious example where the national government, through its legislative and judicial decisionmaking, as well as the threat of executive force, established civil rights in recalcitrant states and created the conditions for the reviving of the moral legitimacy of state governments. Similarly, it is difficult to separate the creation of world markets—which in Whittington’s account set the stage for an
entrepreneurial corporate structure and a decreased confidence in the ability of the national government to control the economy—from the deployment of American force abroad by nationally responsible actors.

Throughout this dissertation, both through a review of original sources, and of contemporary theory’s misuse of those sources, I have attempted to demonstrate the original Constitution’s functional character and the normative and explanatory benefits its recovery promises today. Through the creation of carefully calibrated national institutions and the discovery of a method to maintain responsible state republics without emasculating the new national institutions, the Founders presented the Constitution to the world as an experiment in rights protection. The success of that constitutional project would stem from the Constitution’s forms, specifically its energized national government of separated powers, and its division of duties between responsible national and state institutions. The constitutional experiment would succeed or fail with these new arrangements.

I believe it has largely succeeded. As I develop this project, I hope to provide a fuller account of this success, and the deficiencies of the original Constitution that had to be overcome through the Civil War Amendments. While I will offer a friendly criticism of the originalist promotion of federalism, on display in their understanding of the Eleventh, Seventeenth, and Fourteenth Amendments, I hope to demonstrate the continued ability of state and local institutions to protect personal liberty and secure constitutional justice. At the same time, I will look to examples such as the Whiskey Rebellion, the prosecution of the Civil War, and the twentieth century civil rights movement as examples of how national political majorities can operate within the functional
Constitution to secure rights against the states. This balanced approach, one that maintains the states, while channeling political debates about justice through the Fourteenth Amendment would hopefully present an opportunity for healthier and more forthright political and constitutional developments in the future.
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