

A COMPARISON OF SCALIA AND THE FOUNDERS ON HOW TO INTERPRET THE CONSTITUTION

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Introduction

Antonin Scalia was a deeply influential Justice on the Supreme Court. At the time when he ascended to the highest court in the land, “‘originalism’ was a vaguely disreputable heresy.”¹ Conservative and progressive justices alike looked to modern ideas to interpret the Constitution. Yet today, originalism has become important enough that “justices often duel over original meaning.”² Much of the credit for that goes to Justice Scalia.

As an originalist, Scalia holds that a judge cannot consider the will of the current democratic majority to decide what the Constitution means. The judge also cannot consider what good policy ought to look like as doing so would infringe on the legislative powers. Under English common law, judges used to have that power. But in the democratic American system, unelected judges

are not empowered to make laws. The only way to avoid having judges make law, Scalia argues, is by using textualist methods of interpretation.

Textualism is a particular strand of originalist thought. As a textualist, Scalia wants interpretation to look strictly at the words of the law. The judge cannot consider the drafting history of the law or any other outside source to discover the intent of the legislator. A textualist interpretation requires interpreting the Constitution by its original public meaning. Words can change their meaning over time, yet the meaning of the law is not as fluid. To nail down the meaning of the words, they must be understood as they would have been generally understood at the time when they were adopted. Unamended parts of the Constitution mean the same thing today that they meant in 1787.

Originalist interpretation has been subject to severe criticism. Justice Brennan presented much of that criticism in his speech at the Text and Teaching Symposium, where he argued:

“All too often, sources of potential enlightenment such as records of the ratification debates provide sparse or ambiguous evidence of the original intention. Typically, all that can be gleaned is that the Framers themselves did not agree about the application or meaning of particular constitutional provisions.”³

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¹ Garret Epps, “Justice Scalia’s Outsized Legacy,” *The Atlantic*, February 13, 2016. <http://www.theatlantic.com/politics/archive/2016/02/justice-scalias-outsized-legacy/462756/>. Accessed 15 April 2016.

² Jonathan H. Adler, “The Passing of a Legal Giant – Antonin Scalia, R.I.P.” *The Washington Post*, February 13, 2016. https://www.washingtonpost.com/news/volokh-conspiracy/wp/2016/02/13/the-passing-of-a-legal-giant-antonin-scalia-rip/?tid=a_inl. Accessed 15 April 2016.

³ William J. Brennan, “Speech given at the Text and Teaching Symposium, Georgetown University,” October 12, 1985, <http://www.pbs.org/wnet/supremecourt/democracy/>

Brennan holds textualism to be unworkable. The meaning of the Constitution was hotly contested from its ratification onwards, casting doubt on any interpretation as being definitively originalist. The sources surrounding the Constitution do not elucidate every point in equal detail. Many constitutional powers or rights were either debated, meaning more than one view existed, or were not discussed enough to provide clarification. As such, Brennan does not believe that there is sufficient evidence to make any definitive textualist interpretation. Because he deems originalism impossible, Brennan would give the Constitution a flexible meaning that can be adapted to fit new circumstances. Any originalist must withstand this critique to maintain the legitimacy of their interpretive system.

Justices cannot examine the Constitution without considering their own role within it. Supreme Court judges draw their power from Article III, which states that “The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain establish.”⁴ Hence, Scalia’s method of interpretation must be consistent with what “the judicial power” was understood to be in 1787. Otherwise, textualists would be changing the meaning of the phrase “judicial power” and engage in the same legislating from the bench that they denounce. In fact, for their system of interpretation to be valid, it must have been the way the Constitution was interpreted in the founding era. If the Constitution was understood as a fluid document whose meaning was to be adjusted by judges, or if it was understood as being bound by the original intent of its drafters rather than by the original public meaning, then there would be no justification for using the original public meaning to interpret the document. Textual-

ism is only a valid system of interpretation if it was how the Constitution was expected to be interpreted at the time of its adoption.

This thesis takes up the question of whether textualism is supported by Founding-era constitutional interpretation. In doing so, it will address Brennan’s accusation that textualism is impracticable. More fundamentally, this thesis aims to determine whether Scalia’s textualism is consistent with the standard that it necessarily establishes for itself. It seeks to determine whether a “reasonable reader, fully competent in the language,”⁵ would have expected textualist judges when reading the freshly adopted Constitution. In order to do that, it must first define and explain textualism. Then, because the ratification debate informed the public’s decision of whether to ratify the Constitution, this thesis turns to the ratification debates to understand the role of a judge under the Constitution. Understanding the role of a judge should illuminate whether a textualist judge is fulfilling his constitutional responsibilities. Finally, it turns to arguments by leading statesmen concerning the earliest Constitutional controversies to show what modes of interpretation were prevalent at the time of the Founding, and it compares those modes of interpretation to textualism.

sources_document7.html. Accessed 25 March 2016.

⁴ U.S. Constitution, Article III, Section 1, Clause 1

⁵ Antonin G. Scalia and Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts*, (St. Paul: Thompson/West, 2012), 33.

CHAPTER ONE

Scalia's Textualism

Scalia's textualism is explained in *Reading Law: The Interpretation of Legal Texts*. Scalia and his co-author, lexicographer Bryan Garner, wrote *Reading Law* "[t]o prescribe the rules of sound interpretation."⁶ Those rules are grounded in the idea that "Textualism, in its purest form, begins and ends with what the text says and fairly implies."⁷ From that basis, they present 57 canons that show how to read a text. These rules are the full extent of what a textualist may do to make an interpretation. Examining those rules will explain how a textualist reads the Constitution.

The central pillar of Scalia's textualism is the "Fixed-Meaning Canon." This canon says that "Words must be given the meaning they had when the text was adopted."⁸ He contrasts this idea with evolving meaning, where a law can be interpreted differently over time. If a statute's meaning can evolve, then a judge might need to consider factors such as public opinion, current meaning of the words, the utility of the statute, or other outside factors. But if a meaning is fixed, then the job of the judge is to read the words in such a manner as reveals the meaning they had when written.

Scalia's first justification of originalism is its timelessness. He argues, "Properly understood, originalism is an age-old idea in our jurisprudence for private and public documents alike."⁹ The anti-originalist position – that "18th- and 19th-century drafters expected their meaning of their words to evolve over time" he calls "newfangled."¹⁰ He supports his position with sources ranging from the 15th-century Scottish Parliament to the renowned 18th-century English

legal scholar William Blackstone to a 1905 decision by the Supreme Court. Notably, his sources on this point include only one American founder: he cites a letter James Madison wrote in 1821. His argument is not based on textualism's prevalence during the American founding, but that it is a central pillar of statutory interpretation in the entire English-speaking family of judicial systems. It is not peculiar to America, but rather traces its roots to the evolution of the common-law tradition.

Scalia then introduces a second argument in support of originalism: it is democratic. He argues:

"Originalism is the *only* approach to text that is compatible with democracy. When government-adopted texts are given a new meaning, the law is changed; and changing written law, like adopting written law in the first place, is the function of the first two branches of government.... Allowing laws to be rewritten by judges is a radical departure from our democratic system."¹¹

The judicial branch is the only branch not led by democratically elected officials. Judges are appointed by the president with the advice and consent of the senate. They are appointed by people who themselves are only somewhat democratically chosen. Senators represent states, giving the 600,000 people of Wyoming proportionately greater representation than the 39 million people of California. The president is elected indirectly by an electoral college, which is not a purely democratic mode of election. The most democratic body of the federal government, the House of Representatives, has no say in their appointment. Moreover, judges hold their positions for life, which is undemocratic. If democracy is the source of

⁶ *Ibid.* at 29.

⁷ *Ibid.* at 16.

⁸ *Ibid.* at 78.

⁹ *Ibid.* at 78.

¹⁰ *Ibid.* at 79.

¹¹ *Ibid.* at 82-83.

legitimacy in creating rules for a democratic society, then judges have far less claim to exercise such power compared to the directly elected federal and state legislatures.

Democracy provides a justification because Scalia holds democracy to be the general principle of the American political system. He writes:

“[O]nce a nation has decided that democracy, with all its warts, is the best system of government, the crucial question becomes which theory of textual interpretation is compatible with democracy. ... When applied to the Constitution, non-originalism limits the democratic process itself, prohibiting (through imaginative interpretation of the Bill of Rights) acts of self-governance that ‘We the people’ never, ever, voted to outlaw.”¹²

Because the nation has chosen to be a democracy, judges must interpret by democratic means. The assertion that the American system is democratic is a common one. But it is noteworthy that Scalia provides no evidence to support the contention that America is a democracy. More specifically, he does not provide any legal evidence of that point. This principle that America is a democracy is a premise upon which textualism is built. Our democratic foundation might be difficult to prove by textualism as the Constitution never refers to America as a democracy. Although “[w]e the people... do ordain and establish this constitution,”¹³ the people could theoretically have created a constitutional monarchy, a judicial oligarchy, or any other form of government. By asserting that America is a democracy, Scalia places democracy as a principle superior to how the Constitution is read. Textualism is good because it is the best

method of interpretation to be compatible with democracy. He never asserts any other overarching principle under which textualism must be justified. Thus, Scalia holds democracy as the principle at the foundation of the American system of government.

Scalia finds no overarching “spirit of the law” beyond its text that could alter a judge’s interpretation of its meaning. He acknowledges that “The common view in the 18th and 19th centuries closely equated the spirit with the letter,” but separates that concept of the spirit of the law from its modern understanding, “the unhappy interpretive conception of a supposedly better policy than can be found in the words of an authoritative text.”¹⁴ Of the modern understanding, he writes:

“No one has ever set forth any principles for perceiving an at-large spirit that overcomes the letter. The concept is, in practice, a bald assertion of an unspecified and hence unbounded judicial power to ignore what the law says, leading to ‘completely unforeseeable and unreasonable results.’”¹⁵

Scalia contends that the spirit of the law must be tied closely to the text of the law. Once the judge leaves the confines of using established legal canons and the written text in favor of some external spirit, then the judge is making policy out of thin air. There is no overarching principle directing what government can or cannot do beyond what is written in the Constitution. It is worth noting, however, that Scalia cites only one example of a mistaken court ruling that was misguided by the spirit. That case is *Roe v. Wade*, where Scalia contends that the Court expanded the meaning of the Constitution’s restrictions on what states can do.¹⁶ While

¹² *Ibid.* at 88.

¹³ U.S. Constitution, Preamble.

¹⁴ Scalia and Garner, *Reading Law*, 344.

¹⁵ *Ibid.* at 343.

¹⁶ *Ibid.* at 345.

his arguments apply as readily if the Court limited the reach of a text by its spirit rather than expanding it, he gives no example of when the Court has done so wrongly.

Applying textualism, courts can create predictable rules for how they will give meaning to legal texts. This predictability means that lawmakers know ahead of time how they must word their laws to reach their desired ends. The canons of textualism minimize the policy preferences of judges in favor of the will of the people expressed through the Constitution and through Congress. Some canons follow the conventions of grammar and logic. The justification for these canons is straightforward: they directly expose the full extent of what the written text says. Other canons are based on tradition. These canons are equally necessary because long-standing rules of interpretation will influence how legislators write the laws, and changing them undermines the predictability of Court rulings. In doing so, it alters the expressed will of the legislature in laws that used language based on how it had been interpreted in previous Court decisions. As such, canons of grammar, logic, and tradition work together to produce a fixed system of interpretation. Scalia's canons produce a plain reading of legal text.

Canons which Scalia considers the "fundamental principles" are drawn from logic. The first canon, the "Interpretation Principle" holds that "[e]very application of a text to particular circumstances entails interpretation," which simply gets at the foundation of legal thinking.¹⁷ The words of a law cannot be applied to a situation without first figuring out what those words mean. Another fundamental canon is the "Principle of Interrelating Canons,"¹⁸ which is necessary because different canons can conflict. Scalia gives no straight answer to how to resolve such conflicts, and there is no canon that holds absolutely.

¹⁷ *Ibid.* at 53.

¹⁸ *Ibid.* at 59.

Two more fundamental canons deal with presuming that a text is neither invalid nor ineffective.¹⁹ These presumptions are grounded in the reasonable faith that a text is written to have some effect. They are expanded on by the later "Constitutional-Doubt Canon," which holds that "a statute should be interpreted in a way that avoids placing its constitutionality in doubt."²⁰ For example, the Supreme Court applied this canon in reading the Hepburn Act of 1906, reading a rule to apply only within the scope of the Commerce Clause because a broader reading would have rendered the act unconstitutional.²¹ The presumptions against invalidity and ineffectiveness are qualified by the "Unintelligibility Canon,"²² which allows unintelligible texts to be inoperable. For example, an Irish law once required that "the material of an existing prison should be used in building a new prison and that the prisoners should continue their confinement in the old prison until the new one was completed."²³ In that case, it was impossible for these directly contradictory clauses to be given effect, so both were rendered void. But where meaning exists, the judge is meant to find the text's meaning, not obscure it.

With these broad rules in place, Scalia uses three canons to lay the foundations of textualism. The "Supremacy-of-Text Principle"²⁴ holds that the words of the text are the first place that an interpreter looks. Only when there is an ambiguity in the text do the principles of interpretation come into play. And when interpretation must fall back on using the purpose of the text to decipher its meaning, it can only do so by defining purpose precisely and concretely. This definition must come from

¹⁹ *Ibid.* at 63 and 66.

²⁰ *Ibid.* at 247.

²¹ *Ibid.* at 247.

²² *Ibid.* at 134.

²³ *Ibid.* at 134.

²⁴ *Ibid.* at 56.

the text, and must not contradict it. The “Ordinary-Meaning” and “Fixed-Meaning” canons establish that when interpreting a text, words must be “understood in their ordinary, everyday meanings,”²⁵ and must be “given the meaning they had when the text was adopted.”²⁶ This is the primary characteristic of a textualist: he pursues the meaning of the text using above all else the words of the text itself as they were commonly understood when it was adopted.

Where there is no text, the law does not apply. Scalia explains in the “Omitted-Case Canon” that “a matter not covered is to be treated as not covered.”²⁷ The judge cannot add his own idea of what the legislature would have wanted to do in a given case if that case was not legislated upon. He must take the law that is given to him, rather than the law he would prefer to interpret.

Some canons deal with understanding how words are generally used in the English language. The “General-Terms Canon,” which holds that “[g]eneral terms are to be given their general meaning”²⁸ is a plain rule that contrasts with the General/Specific Canon whereby if that general term conflicts with “a specific provision, the specific provision prevails.”²⁹ These rules follow both logic and grammar. General terms are also narrowed by the “*Ejusdem Generis* Canon,” which holds that general words that “follow an enumeration of two or more things... apply only to... things of the same general kind.”³⁰ For example, “trays, glasses, dishes or other tableware” [was] held not to include paper napkins.³¹ This rule is justified by common usage. Meanwhile, the “Negative-Implication Canon” holds that the “expression of one thing

implies the exclusion of others,”³² such that judges may not add items to a list that are similar but not listed. Specific listed terms are used in place of a general term because the text is not meant to encompass the entire generality.

Other canons are based on the meanings of specific words or phrases. The “Mandatory/Permissive Canon”³³ delves into what words are used to provide an obligation or merely permission, explaining words as they are commonly used. The “Conjunctive/Disjunctive Canon”³⁴ explains the difference between “and” and “or” in various contexts, all grounded in the basics of formal logical reasoning. Similarly, the “Subordinating/Superordinating Canon”³⁵ explains how certain words let laws write in exceptions or qualifications in their rules. The “Gender/Number Canon”³⁶ explains how the use of masculine and feminine terms has changed over time and how the singular includes the plural in legal writing. A judge must follow how masculine and feminine terms were used at the time of writing, rather than impose his own understanding on how they ought to be used. The “Presumption of Nonexclusive ‘Include’”³⁷ canon follows from the definition of the word “include.” The “Proviso Canon”³⁸ holds that a proviso imposes conditions on that which it qualifies. These canons express no political tilt or ideological lean beyond a commitment to explaining the text as most directly fits the words in it.

Further rules are grounded in how the English language combines words. The “Last-Antecedent Canon”³⁹ holds that a pronoun generally refers to the nearest reasonable antecedent. The “Series-

²⁵ *Ibid.* at 69.

²⁶ *Ibid.* at 78.

²⁷ *Ibid.* at 93.

²⁸ *Ibid.* at 101.

²⁹ *Ibid.* at 183.

³⁰ *Ibid.* at 199.

³¹ *Ibid.* at 200.

³² *Ibid.* at 107.

³³ *Ibid.* at 112.

³⁴ *Ibid.* at 116.

³⁵ *Ibid.* at 126.

³⁶ *Ibid.* at 129.

³⁷ *Ibid.* at 132.

³⁸ *Ibid.* at 154.

³⁹ *Ibid.* at 144.

Qualifier”⁴⁰ and “Nearest-Reasonable-Referent”⁴¹ canons use the construction of a list to show whether a modifier applies to the whole series. The “Scope-of-Subparts Canon”⁴² explains convention for how indenting a subpart affects the scope which it affects. The “Grammar Canon”⁴³ simply calls for interpreting words based on proper grammar and usage, which the “Punctuation Canon”⁴⁴ holds to include punctuation. The “Distributive-Phrasing Canon” explains how to apply expressions to their appropriate referents.⁴⁵ All of these canons are grounded in providing a plain meaning to the text.

The Grammar Canon provides an interesting example of why Scalia must spell out rules that stem from simply from the rules of the English language. Scalia explains that “Courts sometimes say that rules of grammar govern unless they contradict legislative intent or purpose. This statement is entirely correct... if it refers to legislative intent or purpose manifested in the only manner in which a legislature can authoritatively do so: in the text of the enactment.”⁴⁶ Non-textualist judges may turn to other means to assess the purpose of the instrument. Having done so, they can use this outside concept of intent to override the plain meaning of the text by dismissing the grammar as a mistake by an illiterate lawmaker. Textualism must spell out rules that are grounded in grammar and the dictionary because otherwise, those rules are overlooked. Lawyers who would use other means to reach a decision are bound more closely to the text by elevating the rules of grammar to rules of legal interpretation.

Another set of canons deals with looking at a legal text as a whole coherent

piece of writing, as generally stated in the “Whole-Text Canon.”⁴⁷ The meaning of a word is presumed to be consistent throughout a text by the “Presumption of Consistent Usage,”⁴⁸ is presumed to be carefully tied to a definition section if one is provided by the “Interpretive-Direction Canon,”⁴⁹ and is presumed to be informed by related words under the “Associated-Words Canon.”⁵⁰ Looking across different phrases, the “Surplusage Canon”⁵¹ holds that they should be interpreted not to duplicate each other. By contrast, a change in wording in a later statute is entails a significant change in meaning under the “Reenactment Canon.”⁵² The “Harmonious-Reading Canon”⁵³ holds that provisions should be interpreted to be compatible, not contradictory, but if that is impossible, the “Irreconcilability Canon”⁵⁴ invalidates both provisions. When looking at laws passed at different times, the “Related-Statutes Canon”⁵⁵ holds that they should be interpreted as if they were one law. Similarly, The “Canon of Imputed Common-Law Meaning”⁵⁶ holds that common-law terms used in statutory law adopt the common-law meanings unless otherwise defined, thus extending the same consistency across statutory and common-law. The same sense of coherence and predictability underlies the “Prior-Construction Canon,” which holds that terms “that have already received authoritative construction,” before the law in question was passed, by an authoritative court or administrative agency “are to be understood according to that construction.”⁵⁷

⁴⁰ *Ibid.* at 147.

⁴¹ *Ibid.* at 152.

⁴² *Ibid.* at 156.

⁴³ *Ibid.* at 140.

⁴⁴ *Ibid.* at 161.

⁴⁵ *Ibid.* at 214.

⁴⁶ *Ibid.* at 140.

⁴⁷ *Ibid.* at 167.

⁴⁸ *Ibid.* at 170.

⁴⁹ *Ibid.* at 225.

⁵⁰ *Ibid.* at 195.

⁵¹ *Ibid.* at 174.

⁵² *Ibid.* at 256.

⁵³ *Ibid.* at 180.

⁵⁴ *Ibid.* at 189.

⁵⁵ *Ibid.* at 252.

⁵⁶ *Ibid.* at 320.

⁵⁷ *Ibid.* at 322.

The “Prefatory-Materials”⁵⁸ and “Title-and-Headings”⁵⁹ canons permit preambles, titles, and headings to be used to indicate meaning.

The “Presumption Against Implied Repeal”⁶⁰ strongly disfavors repeal by implication unless there is a clear contradiction of the earlier provision. This canon is a judicial convention that encourages reading the whole body of law as a coherent body. Lawmakers are aware of laws already on the books and can indicate when they make changes.

The “Presumption Against Federal Preemption” holds, “A federal statute is presumed to supplement rather than displace state law.”⁶¹ In some cases, this means that the state can impose stricter regulatory standards. Scalia supports the canon with Supreme Court precedent, but disagrees with part of that precedent. He writes that “the preemption canon ought not to be applied to the text of an explicit preemption provision. That is, the text ought to be given its fair meaning rather than a meaning narrowed by the presumption.”⁶² The presumption only represents the default position of a judge when no legislative will has been expressed. As such, he disagrees with the Court’s ruling in *Cipollone v. Liggett Group* that gave a narrow meaning to a preemption provision of law. Hence, the canon is supported by tradition, but Scalia limits that tradition to make it more democratic.

The “Absurdity Doctrine” canon allows for disregarding or correcting misprints and similar errors when they produce “a disposition that no reasonable person could approve.”⁶³ This doctrine allows for some mistake at some part of the government, but the hurdle is “a very high one”⁶⁴ in that it has to have been beyond the intent of

any reasonable person. The doctrine permits the court to correct purely clerical errors without impeding the other branches.

The “Predicate-Act Canon” holds that “Authorization of an act also authorizes a necessary predicate act,” justified by an appeal to common sense and to long-standing tradition.⁶⁵ One of the fundamental canons established that texts are to be presumed not to be ineffective, and this canon necessarily follows from that one. A textualist judge places enough faith in lawmakers to assume that their words mean something, and this canon calls for reading into the laws only as much as is necessary to give them effect.

The “Presumption Against Retroactivity”⁶⁶ holds that unless specified, laws do not apply retroactively. This goes beyond the scope of the constitutional imperative of the ex post facto clause in cases such as the reduction in criminal penalties. This canon is justified as “basic to our rule of law,”⁶⁷ and supported by early legal scholars such as James Kent and Joseph Story. The canon only applies to laws that do not specify retroactivity, so the canon merely makes the judge conform to a long-understood common standard of interpretation. The canon forms a convention that makes judicial rulings follow the same pattern. The lawmaker knows how to write the law to make a retroactive or non-retroactive law, so the meaning of the document is kept clear either way and the judge does not interfere with the legislature. This canon is further qualified by the “Pending-Action Canon,”⁶⁸ which breaks down when exactly the “Presumption Against Retroactivity” becomes relevant. Justified by tradition, these canons merely clarify what language is needed to have a certain effect.

⁵⁸ *Ibid.* at 217.

⁵⁹ *Ibid.* at 221.

⁶⁰ *Ibid.* at 327.

⁶¹ *Ibid.* at 290.

⁶² *Ibid.* at 293.

⁶³ *Ibid.* at 234.

⁶⁴ *Ibid.* at 237.

⁶⁵ *Ibid.* at 192.

⁶⁶ *Ibid.* at 261.

⁶⁷ *Ibid.* at 261.

⁶⁸ *Ibid.* at 266.

The “Extraterritoriality Canon” holds that “[a] statute presumptively has no extraterritorial application.”⁶⁹ Because of an “international consensus that a nation’s laws governs actions within its territorial jurisdiction,” “[i]t has long been assumed that legislatures enact their laws” only for their territories.⁷⁰ This canon follows from long-standing tradition and if Congress wants to have a law with extraterritorial application, it can write one to that effect. The canon merely keeps them from having to specify the lack of extraterritoriality in the overwhelming abundance of cases where it is unwanted.

The “Artificial-Person Canon”⁷¹ holds that corporations are people. Scalia justifies this canon by declaring that “this legal meaning is age-old.”⁷² A plethora of Supreme Court cases are cited, along with the federal Dictionary Act that defines the vocabulary of the federal code. Although the Citizens United ruling drew ridicule to this doctrine, this part of that decision should not have surprised legal scholars familiar with the long-standing rule. Like the preceding ones, this canon works to provide predictable results.

The “Repealability Canon” holds that a “legislature cannot derogate from its own authority or the authority of its successors,” which Scalia justifies by writing, “Resting as it does on sheer logic, the principle dates from time immemorial.”⁷³ He cites Cicero, Blackstone, and Marshall in support of the long-understood logical caveat to the legislative power. Hence, both logic and tradition justify the use of the canon by a textualist.

The “Presumption Against Waiver of Sovereign Immunity”⁷⁴ holds that the states

and the United States cannot be sued without their unequivocally clear consent. In introducing this canon, Scalia writes, “The American states were heirs to a system in which the sovereign, the king, was not amenable to suit.”⁷⁵ This amenability has changed over time, and Scalia traces how the waiver has become more common. Even so, it still needs to be expressed or implied. Scalia explains the existing Supreme Court doctrine on the point. This canon is grounded in tradition and only requires an expression of Congress to overcome the presumption.

The “Penalty/Illegality Canon”⁷⁶ holds that a penalized act is unlawful. On the surface, this seems meaningless, but it has applications such as rendering certain contracts void if they call for illegal actions. The canon distinguishes penalties from taxes, which can be imposed without criminalizing that which is taxed. As such, the canon provides predictable results for lawmakers by allowing them to distinguish between unlawful and lawful but taxed actions.

The “Rule of Lenity” is explained by Scalia as holding that if, “after all the reasonable tools of interpretation have been applied, ‘a reasonable doubt persists,’”⁷⁷ then “a statute defining a crime or imposing a penalty should be resolved in the defendant’s favor.”⁷⁸ He arrives at this test after discussing different interpretations of the rule by Chief Justice Marshall and the current court. He proposes his own version of the canon, one “more defendant friendly than most” by arguing that his test of ambiguity is “more comprehensible than others.”⁷⁹ More comprehensibility is good because “a fair system of laws requires precision in the definition of offenses and

⁶⁹ *Ibid.* at 268.

⁷⁰ *Ibid.* at 268.

⁷¹ *Ibid.* at 273.

⁷² *Ibid.* at 273.

⁷³ *Ibid.* at 278.

⁷⁴ *Ibid.* at 281.

⁷⁵ *Ibid.* at 281.

⁷⁶ *Ibid.* at 285.

⁷⁷ *Ibid.* at 299.

⁷⁸ *Ibid.* at 296.

⁷⁹ *Ibid.* at 299.

punishments. The less courts insist on precision, the less the legislatures will take the trouble to provide it.”⁸⁰ While this seems to impose some external moral standard upon the laws, Scalia invokes this standard in a case where the court has wandered from the traditional understanding of the canon. Scalia writes, “Treating it as a clear-statement rule would comport with the original basis for the canon and would provide considerable certainty. But that is not the approach the cases have taken.”⁸¹ A clear statement to convict requires something very close to Scalia’s own standard, which calls for acquittal if there is a reasonable doubt. Even if he supports his standard with other arguments, Scalia is proposing a standard in alignment with tradition. His traditional standard imposes higher standards of clarity on the legislature, but still allows it to accomplish its policy goals.

The “*Mens Rea* Canon” holds, “A statute creating a criminal offense whose elements are similar to those of a common-law crime will be presumed to require a culpable state of mind (*mens rea*) in its commission. All statutory offenses imposing substantial punishment will be presumed to require at least awareness of committing the act.”⁸² The canon is drawn from tradition explained by Blackstone and from Supreme Court precedent. Like other canons that create a presumption, it is overcome by express language from Congress.

The “Presumption Against Implied Right of Action” explains, “A statute’s mere prohibition of a certain act does not imply creation of a private right of action for its violation.”⁸³ That right must be found in the text. Scalia explains that some 19th century and 20th century courts would invent private claims to accompany statutory prohibitions because, quoting one such decision, it was

“necessary to make effective the congressional purpose.”⁸⁴ This is a broad understanding of the purpose of a law that Scalia generally disfavors. When the Court creates a private right of action that was not in the statute to begin with, it is adding to the language of the law. The canon is reinforced by “the existence of thousands of statutory prohibitions that *do* explicitly provide for private rights of action.”⁸⁵ Such provision would be redundant if a private right was automatically created anyway. Because this canon is a mere presumption, it is overridden if the statute simply implies a private right of action. Scalia gives the example of a hypothetical statute “that says: ‘In any private suit for violation of this statute, the victorious plaintiff will be entitled to attorney’s fees.’”⁸⁶ In such a statute, this language would be meaningless if there were no private right of action, so the Presumption Against Ineffectiveness requires that a private right of action exist. But some such language must exist. A private right cannot be invented by the Court.

The “Presumption Against Change in Common Law”⁸⁷ requires a clear disposition in order for a statute to be construed to alter the common law. Scalia contrasts his own understanding of the canon with an older standard that changes to common laws be strictly construed, which was “a relic of the courts’ historical hostility to the emergence of statutory law.”⁸⁸ Rather than a strict construction, Scalia merely requires that the law must “effect the change with clarity.”⁸⁹ This limitation is part of how Scalia’s doctrine recognizes that democratically made law is supplanting the older common law tradition. Where the common law still operates, legislative inaction shows that the people do not see a need to change the

⁸⁰ *Ibid.* at 299.

⁸¹ *Ibid.* at 298.

⁸² *Ibid.* at 303.

⁸³ *Ibid.* at 313.

⁸⁴ *Ibid.* at 313.

⁸⁵ *Ibid.* at 316-317.

⁸⁶ *Ibid.* at 316.

⁸⁷ *Ibid.* at 318.

⁸⁸ *Ibid.* at 318.

⁸⁹ *Ibid.* at 318.

common law. But where such changes are made, they are to be given the same fair reading as any other legal texts. This canon reinforces the supremacy of democracy.

The “Repeal-of-Repealer Canon”⁹⁰ holds that a statute that was repealed is not reinstated when the repealing statute expires or is repealed itself. While the opposite doctrine is supported by James Kent and Blackstone, modern courts favor Scalia’s understanding. This question is one where lawmakers above all need a clear judicial rule, but not either particular rule. By aligning with the modern court’s understanding, Scalia keeps the lawmaker’s mind clear as to how a court will react to a repealing statute and what other provisions must be made along with the repeal.

The “Desuetude Canon”⁹¹ holds that nonuse does not repeal a statute. This canon is more a negation of the contrary standard of interpretation than an active aid in reaching a conclusive understanding of a statute. Scalia finds the doctrine of repeal by nonuse to be improper because “only the legislature has the power both to enact and to disenact statutes.”⁹² It is not for the courts to repeal old laws that are disfavored, but only for the elected lawmakers.

Scalia’s canons are seen at work in his opinion in *DC v. Heller*. In this case, Scalia deciphers the meaning of the Second Amendment using textualist principles. Though he uses some arguments that are strange to textualism, these are merely a result of wanting both the belt and the suspenders. The textualist arguments are sufficient to decide the case for Scalia, but he offers other arguments to make a more persuasive case to the other justices and to the public. The core of the opinion is textualist, and Scalia has said, “I think *Heller* is... the best example of the technique of constitutional interpretation, which

I favor... I think it’s the most complete originalist opinion that I’ve ever written.”⁹³ Because Scalia himself considers it the best example, it is the one that is most worth looking at to see textualist principles in action.

DC v. Heller concerned whether Dick Heller, a resident of the District of Columbia, could acquire a gun to keep at his home. DC law prohibited the ownership of unregistered handguns, and it prohibited handguns from being registered. Heller filed suit in the Federal District Court for the District of Columbia on Second Amendment grounds to enjoin the enforcement on the bar on handgun registrations. The District Court dismissed the complaint, but on appeal, the Court of Appeals for the District of Columbia Circuit ruled in favor of Heller. The District of Columbia appealed, taking the case to the Supreme Court.

In a 5-4 decision, the Supreme Court sided with Heller, and Scalia was assigned to write the opinion. Justices Stevens and Breyer both wrote dissenting opinions. Justice Stevens argued that the Court’s decision in *United States v. Miller* did not interpret the Second Amendment as providing a right to keep and bear arms for nonmilitary purposes, that the prefatory clause limits the scope of the amendment to simply protect state militias, and that the history of the ratifying conventions and the drafting of the Second Amendment also favor such a limited scope for the amendment. Meanwhile, Justice Breyer argues that even if the Second Amendment protects an individual right, “the District’s regulation... represents a permissible legislative response to a serious, indeed life-threatening problem” that outweighs the constitutional right.⁹⁴ Scalia demonstrates how all of these

⁹⁰ *Ibid.* at 334.

⁹¹ *Ibid.* at 336.

⁹² *Ibid.* at 339.

⁹³ Bruce A. Murphy, *Scalia: A Court of One*, (New York: Simon & Schuster, 2014), 390.

⁹⁴ *DC v. Heller* (2008), Stephen G. Breyer, dissenting, 2.

arguments fall outside the proper scope of constitutional interpretation while laying forth his own understanding of the Second Amendment.

In his Opinion, Scalia starts with a brief description of the particular case, and then turns “first to the meaning of the Second Amendment.”⁹⁵ He starts with sections organized by looking at the operative clause and its parts, the prefatory clause, and the relationship between the two. He follows that discussion by looking at state constitutions from the founding era, then refuting the dissent’s use of drafting history, and then looking at post-ratification interpretations through the end of the 19th century, and finally looking at the Court’s precedents. This structure puts textual analysis as the primary component of Constitutional interpretation. Scalia turns to interpreting the words and phrases used, then builds from that an understanding of the amendment. He checks state constitutions, post-ratification interpretation, and the Court’s precedents to see if his interpretation is consistent with those approaches. These sources provide secondary support to his primary argument. The structure of Scalia’s opinion is distinctly textualist.

In deciphering the meaning of the Second Amendment, Scalia looks to other parts of the Constitution for clarification. When discussing the phrase “the right of the people” used in the Second Amendment, he observes that the “unamended Constitution and the Bill of Rights use the phrase... two other times, in the First Amendment’s Search-and-Seizure Clause. The Ninth Amendment uses very similar terminology ... All three of these instances unambiguously refer to individual rights.”⁹⁶ The three other cases where the phrase “the people” is used “arguably refer to ‘the people’ acting

collectively - but they deal with the exercise or reservation of powers, not rights. Nowhere else in the Constitution does a ‘right’ attributed to ‘the people’ refer to anything other than an individual right.”⁹⁷ Reading the Second Amendment’s phrase in this context, Scalia finds “a strong presumption that the Second Amendment right is exercised individually and belongs to all Americans.”⁹⁸ This is textualist reading because right away, Scalia is turning first to the text itself to decipher a part of the text. Doing so means that the text is considered coherent for a reader to understand as a whole. It does not require a special knowledge of the legislator’s mind to understand the meaning of what he has written.

In making this argument, Scalia is using the “Presumption of Consistent Usage” canon. This canon states, “A word or phrase is presumed to bear the same meaning throughout a text; a material variation in terms suggests a variation in meaning.”⁹⁹ Both parts of this canon are applied in Scalia’s reading of the “right of the people” phrase of the Second Amendment. He interprets the phrase to mean the same thing in each place that it is used in the Bill of Rights, meeting the first part of the canon. Furthermore, the variation in the use of the term “right of the people” in these cases and simply “the people” in cases involving powers allows that the word “people” could bear a different meaning in these cases. Scalia does not draw an absolute conclusion from this argument because the canon is merely a presumption. But a presumption is the first approach adopted to understanding the phrase. The first approach Scalia adopts is one grounded purely in the text itself.

In his interpretation of the phrase “keep arms,” Scalia relies on dictionaries and other sources from the Founding era.

<http://www.supremecourt.gov/opinions/07pdf/07-290.pdf>. Accessed 16 November 2015.

⁹⁵ *DC. v. Heller* (2008), Opinion, 2.

⁹⁶ *Ibid.* at 5.

⁹⁷ *Ibid.* at 6.

⁹⁸ *Ibid.* at 7.

⁹⁹ Scalia and Garner, *Reading Law*, 170.

His first source in this section is the 1773 edition of Samuel Johnson's dictionary, which he uses to define "arms."¹⁰⁰ Having defined the word, he then turns to how the word was used in both a 1771 legal dictionary and a 1797 Delaware law.¹⁰¹ He uses Johnson's dictionary again to define "keep" before combining the definitions to define the phrase "keep arms."¹⁰² He cites Blackstone's 1769 Commentaries to support his definition of the phrase as connoting an individual right.¹⁰³ Scalia defines the term "keep arms" using the Ordinary-Meaning Canon and the Fixed-Meaning Canon, finding how the phrase was normally understood at the time of the Second Amendment's adoption.

Scalia's interpretation of the phrase "bear arms" follows a slightly different process. He defines "bear" as "carry," using dictionaries from 1796 and 1989 to show that the word's meaning has remained unchanged.¹⁰⁴ In composing the whole phrase "bear arms," Scalia refers to a 1998 Supreme Court case. This case qualifies his composite definition and limits the phrase to mean the carrying of a weapon "for the purpose of 'offensive or defensive action.'"¹⁰⁵ Having proposed this definition, Scalia supports it with references from 18th century and 19th century state constitutional provisions that use the phrase and an interpretation of one such provision by Justice James Wilson.¹⁰⁶ While Scalia does not contradict the Ordinary-Meaning and Fixed-Meaning Canons, he is also adhering to precedent by giving the phrase the same meaning that it was given in a previous case before the Supreme Court.

Scalia next turns to countering the arguments of Justice Stevens concerning the phrase "bear arms." He first addresses the argument of linguists that the phrase only applied in military contexts, but the cases these linguists cite refer to the phrase "bear arms against," which Scalia sees as a distinct idiom.¹⁰⁷ Stevens also makes an argument based on the text of an original draft of the Second Amendment, to which Scalia remarks that "It is always perilous to derive the meaning of an adopted provision from another provision deleted in the drafting process."¹⁰⁸ The use of such material steps outside the realm of what could be publicly known to the people when the measure was adopted. Furthermore, changes in wording could happen for any number of reasons. Hence, Scalia does not consider legislative history to be a valid source of meaning.

Putting the provisions together, Scalia finds "that they guarantee the individual right to possess and carry weapons in case of confrontation. This meaning is strongly confirmed by the historical background of the Second Amendment."¹⁰⁹ Scalia explores the history of how this right came to be one of the fundamental rights of Englishmen. Because it was codified in English law and described by English lawyers as an individual right, it stands to reason that Americans in the Founding era understood the right in the same terms. This historical research supports the originalist aspect of textualism.

Scalia next turns to the prefatory clause. He cites numerous primary sources from the Founding era that refer to "the militia" as consisting of all able-bodied men, rather than the state-organized militias. He supports this distinction by pointing to the different wording used when dealing with the militia in Article I of the Constitution as opposed to other parts of the military.

¹⁰⁰ *DC. v. Heller* (2008), Opinion, 7.

¹⁰¹ *Ibid.* at 7-8.

¹⁰² *Ibid.* at 8.

¹⁰³ *Ibid.* at 9.

¹⁰⁴ *Ibid.* at 10.

¹⁰⁵ *Ibid.* at 10.

¹⁰⁶ *Ibid.* at 11-12.

¹⁰⁷ *Ibid.* at 12.

¹⁰⁸ *Ibid.* at 16.

¹⁰⁹ *Ibid.* at 19.

Congress can raise armies and provide a navy, but “the militia is assumed by Article I already to be *in existence*. Congress is given the power to ‘provide for calling forth the militia,’ and the power not to create but to ‘organize’ it.”¹¹⁰ This distinction is drawn using the Presumption of Consistent Usage as the negative side of that canon holds that “a material variation in terms suggests a variation in meaning.”¹¹¹ Congress has different powers with the militia and the army because the militia exists without government force while the army does not.

The phrase “security of a free state” is more problematic to decipher. The word “state” is used differently in different parts of the Constitution, referring to an individual state, to any state, or to foreign nations, which “shows that the word ‘state’ did not have a single meaning in the Constitution.”¹¹² As such, while consistent usage would be presumed, the text gives evidence to override that presumption. Instead, Scalia turns to the Federalist Papers and the constitutional treatise of Justice Joseph Story in order to define the phrase.

Scalia combines the prefatory and operative clauses by showing them not to contradict. Because the history of the right shows that its removal was associated with tyranny, the individual right to bear arms was deemed necessary to the security of a free state. Scalia is using the “Prefatory-Materials Canon,” which considers the preamble a permissible indicator of meaning. While describing the canon in *Reading Law*, Scalia limits it by saying that “an expression of specific purpose in the prologue will not limit a more general disposition that the operative text sustains.”¹¹³ Hence, so long as his interpretation of right to keep and bear arms achieves what the Founders would have understood as being necessary to a free

state, then the prefatory clause is satisfied. On the terms laid forth in the canons of textualism, these clauses are compatible.

Having used textualist principles to find the meaning of the Second Amendment, Scalia defends his interpretation by turning to a wider range of sources. Examining the turmoil in the post-Civil War south, Scalia cites a member of Congress and a joint congressional report as arguing that black citizens had an individual right to bear arms under the Second Amendment.¹¹⁴ He also refers to an 1868 treatise by a judge. As these sources are dated to “75 years after the ratification of the Second Amendment, they do not provide as much insight into its original meaning.”¹¹⁵ Scalia acknowledges their limitation, which is why he is only citing them to defend a conclusion already reached, not as evidence of the original meaning.

After finding the document’s meaning and showing how that meaning was found by others, Scalia turns to Supreme Court precedent. He argues that his interpretation is in line with the court’s limited history of interpreting the Second Amendment. He addresses *United States v. Cruikshank*, which he argues casts the Second Amendment as an individual right.¹¹⁶ *Presser v. Illinois*, Scalia argues, did not address the issue as it merely found that individuals did not have Second Amendment protection when organizing private armed groups.¹¹⁷ Scalia then enters into a longer discussion of *United States v. Miller*, which he argues only held “that the Second Amendment does not protect those weapons not typically possessed by law-abiding citizens for lawful purposes.”¹¹⁸ None of these cases contradict Scalia’s interpretation of the right to keep and bear arms.

¹¹⁰ *Ibid.* at 23.

¹¹¹ Scalia and Garner, *Reading Law*, 170.

¹¹² *DC. v. Heller* (2008), Opinion, 24.

¹¹³ Scalia and Garner, *Reading Law*, 219.

¹¹⁴ *DC. v. Heller* (2008), Opinion, 42.

¹¹⁵ *Ibid.* at 41-42.

¹¹⁶ *Ibid.* at 47.

¹¹⁷ *Ibid.* at 48.

¹¹⁸ *Ibid.* at 53.

Scalia referred to precedent earlier when he was defining the term “bear arms.” In that instance, he was still in the process of finding an interpretation of the Second Amendment. But in the later references, he is looking at precedent in a different light: it confirms his findings, rather than establishing them. It is likely that in both cases, Scalia is using precedent for rhetorical purposes, strengthening his argument even though textualist principles would lead to the same conclusion regardless of precedent. He would have reached the same definition of “bear arms” without referring to case law, so like his later references to the subject, it merely confirms what he finds by textualist means.

Scalia looks first and foremost to the written text. Through rules of grammar and logic, and through long-standing conventions, he finds the plain meaning of the language as it was understood when written. His system of interpretation imposes no outside values or preconceptions upon the text. Rather, it exposes the ideas held in the text itself.

CHAPTER TWO

The Federalists and Anti-Federalists

In order to understand whether textualism is consistent with the judicial power established by the Constitution, it is necessary to examine how the public understood the judicial power in the Constitution at the time of ratification. Arguments against ratification by Brutus and in favor of it by Hamilton helped shape the American people’s opinion of the Constitution, including their opinion of the judicial branch. Their arguments reveal that the judicial power was meant to be exercised in a restrained manner.

Brutus’ analysis starts with the specific wording of what cases the court may hear. Under the Constitution, the “judicial power shall extend to all cases, in law and equity, arising under this Constitution, the laws of the United States.”¹¹⁹ Brutus notes that cases under the Constitution and cases under the laws are mentioned as separate categories, writing that the latter set “conveys as much power to the general judicial as any of the state courts possess. The cases arising under the constitution must be different from those arising under the laws, or else the two clauses mean exactly the same thing.”¹²⁰ Hence, some greater power beyond that found in state courts must be vested by listing cases under the Constitution as a separate category. Brutus reads it as a direct authorization of judicial review, one that lets the court “resolve all questions that may arise on any case on the construction of the constitution, either in law or in equity.”¹²¹ The Supreme Court thus has four classes of cases with which Brutus is concerned. Two of them, those dealing with

¹¹⁹ U.S. Constitution, Article 3, Section 2.

¹²⁰ “Brutus XI,” *Teachingamericanhistory.org*, January 31, 1788, <http://teachingamericanhistory.org/library/document/brutus-xi/>. Accessed 1 September 2015.

¹²¹ “Brutus XI,” 1788.

the laws of the United States, he does not address further. Those are not novel powers, and he does not draw any dangers from them.

Even in the two classes dealing with the Constitution, Brutus speaks approvingly of one of them: cases in law under the Constitution. Of the power to resolve such cases, he says it lets the court:

“give such meaning to the constitution as comports best with the common, and generally received acceptance of the words in which it is expressed, regarding their ordinary and popular use, rather than their grammatical propriety. Where words are dubious, they will be explained by the context. The end of the clause will be attended to, and the words will be understood, as having a view to it; and the words will not be so understood as to bear no meaning or a very absurd one.”¹²²

The interpretation he is speaking of is one that is not prone to judicial activism. While there may be some ambiguity where judges might choose between different common understandings in truly ambiguous cases, a judge will struggle while using these principles to create an entirely novel meaning of a text. This mode of interpretation follows strict principles of explaining words in a plain and predictable manner. Brutus does not extrapolate any problems with this mode of interpretation. Given that this essay was written to criticize the Constitution, it is reasonable to conclude that he does not criticize this power because he does not find it problematic. If the Court remains closely tied to the plain meaning of the text, then Brutus believes that it is fulfilling a proper judicial function.

Where Brutus sees a problem is with the interpretation of cases of equity arising

under the Constitution. On that point, he says that by allowing judges to interpret the meaning of the constitution in equity, “they are empowered to explain the constitution according to the reasoning spirit of it, without being confined to the words or letter.”¹²³ Interpretation in accordance with the spirit would evade the strict rules of interpretation that Brutus seemed to favor. Under equity, instead, the court gets extensive latitude. To explain, Brutus cites Blackstone and Grotius, explaining that equity deals with “the correction of that, wherein the law, by reason of its universality, is deficient... when the decrees of the law cannot be applied to particular cases, there should some where be a power vested of defining those circumstances, which had they been foreseen the legislator would have expressed.”¹²⁴ In deciding matters of equity, a judge would thus be obligated to determine what the intent was behind the law, and to make a ruling based on that intent, even when it clearly contradicts the written rule. A judge with the option of interpreting by the spirit instead of being bound to the text has more options to reach a desired outcome. Interpreting constitutional cases as cases of equity expands the scope of judicial power and gives it more leeway.

In evaluating the spirit of the Constitution, Brutus argues that judges will be empowered to massively broaden the scope of federal power. Brutus writes, “To discover the spirit of the constitution, it is of the first importance to attend to the principal ends and designs it has in view. These are expressed in the preamble.”¹²⁵ The preamble is the statement of intent whereby the people of the United States form the Constitution. It serves no direct legal function, but simply states a set of aims. By giving expression to

¹²³ “Brutus XI,” 1788.

¹²⁴ “Brutus XI,” 1788.

¹²⁵ “Brutus XII (Part 1),”

Teachingamericanhistory.org, February 7, 1788, <http://teachingamericanhistory.org/library/document/brutus-xii-part-1/>. Accessed 1 September 2015.

¹²² “Brutus XI,” 1788.

the reasons for adopting the constitution, the preamble reveals the spirit of the Constitution.

The preamble establishes broad aims that could justify vast powers. It declares:

“We the People of the United States, in Order to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defence, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity, do ordain and establish this Constitution for the United States of America.”¹²⁶

Grammatically, the subject of the preamble is the people of the United States, and the action is that they are taking is ordaining and establishing the Constitution. Everything else is saying why they are doing that. The preamble is a clear statement of intent by the framers, setting up six goals they hope to promote. This suggests that every line of the Constitution can be traced to one or more of these goals. If some part of the Constitution contradicts each of these goals, then it would be outside the stated scope of the Constitution. However, given the vagueness of the goals, it is difficult to conceive of a power that could not be traced to any of them. Promotion of the general welfare, in particular, could be argued to justify any power in the Constitution. From the Preamble, we get a vague and expansive sense of the intent behind the Constitution.

Brutus argues the preamble and the power to interpret constitutional cases in equity together sow the seeds of tyranny. He writes:

“[T]he preservation of internal peace – the due administration of justice – and to provide for the defence of the

community, seems to include all the objects of government; but if they do not, they are certainly comprehended in the words, ‘to provide for the general welfare.’ ... [T]he great end of the constitution, if it is to be collected from the preamble, in which its end is declared, is to constitute a government which is to extend to every case for which any government is instituted, whether external or internal.”¹²⁷

Should the courts find themselves in a case of equity challenging the Constitutional powers of the federal government, Brutus’ argument suggests that the Court could justify virtually any extension of federal power. The document’s stated purposes are vague and all-encompassing. If the spirit of the constitution can be placed above the letter in a case of equity, these vague goals will let the court step well beyond the limits of the Constitution. For example, the court could expand its jurisdiction in the name of establishing justice. If federal judges believe state courts are making unjust rulings, they could use the spirit of the Constitution to step beyond the letter of the document and claim greater jurisdiction. Likewise, the promotion of the general welfare leaves plenty of room for legislative expansion. An argument could be made that a state is regulating its internal commerce in a way that harms the general welfare. The court could use the spirit of the Constitution to override the precise wording of the commerce clause to grant greater power to Congress. The vague language of the preamble could be used to justify expansive federal authority.

Brutus further criticizes the word “equity” because when interpreting in such a manner, the court lacks ties of precedent. Citing Blackstone, Brutus says of equity that

¹²⁶ U.S. Constitution, Preamble.

¹²⁷ “Brutus XII (Part 1),” 1788.

“there can be no established rules and fixed principles of equity laid down, without destroying its very essence.”¹²⁸ Cases of equity therefore grant great flexibility to the courts. This would give the court greater freedom with which to expand federal power. Normally, precedent serves as a check on judicial activism. If Brutus is right that hearing cases of equity lets the judge disregard precedent, then equity lets the court rule however it wishes in each case it hears. Once again, Brutus’ charge against the judiciary is that it is given greater discretion than it should.

Responding to Brutus, Hamilton finds that the use of the word equity was not only unproblematic, but it was in fact necessary. He writes:

“There is hardly a subject of litigation between individuals, which may not involve those ingredients of FRAUD, ACCIDENT, TRUST, or HARDSHIP, which would render the matter an object of equitable rather than of legal jurisdiction, as the distinction is known and established in several of the States. It is the peculiar province, for instance, of a court of equity to relieve against what are called hard bargains: these are contracts in which, though there may have been some undue and unconscionable advantage taken of the necessities or misfortunes of one of the parties, which a court of equity would not tolerate. In such cases, where foreigners were concerned on either side, it would be impossible for federal judicatories to do justice without an equitable as well as a legal jurisdiction. Agreements to convey lands claimed under the grants of the different States, may afford another example of the

necessity of an equitable jurisdiction in the federal courts.”¹²⁹

Had the Constitution only empowered the federal courts to hear cases under the laws of the United States, it would have excluded a large portion of normal court cases. Courts act in many areas where someone is harmed, not all of which touch on written law. When two states claim the same land, there still needs to be a settlement of some sort even if there is no federal law on the books for how to settle the case. To leave the federal government powerless to resolve such disputes would be to allow discord between the states to fester outside federal jurisdiction. While Congress could pass a law for how to handle such cases, they cannot always be applied to existing disputes without violating the ban on *ex post facto* laws. Congress cannot foresee every way in which states could come into conflict, yet there is a strong federal interest in resolving those conflicts. Hence, the federal courts must be empowered not only to hear cases in law, but also to hear those cases traditionally handled by courts of equity.

Even so, this does not explain what a case of equity arising under the Constitution would mean, as opposed to a case of equity arising under the other areas listed in Article III, Section 2. Hamilton’s example of hard bargains would only be under federal jurisdiction if they met some quality of making them federal rather than state-level cases. Those cases would never arise under the Constitution without arising under one of the listed items unless the case were arguing that some constitutional provision were itself a hard bargain, in which case the Court would be evaluating the fairness of the Constitution itself. Such a case would

¹²⁸ “Brutus XI,” 1788.

¹²⁹ Alexander Hamilton, “The Federalist No. 78: The Judiciary Department,” *The Library of Congress*, 1788, http://thomas.loc.gov/home/histdox/fed_78.html. Accessed 1 September 2015.

undoubtedly confirm Brutus' fears of a judiciary run amok. The other types of cases Hamilton lists are all related to items specified in the list in Article III, Section 2. Cases involving foreigners or disputes between states would fall under the specific provisions for federal jurisdiction in cases "between a State or the Citizens thereof, and foreign States, Citizens, or Subjects," and "Controversies between two or more States."¹³⁰ Hamilton's argument does not explain what meaning is added by including "cases in equity arising under the Constitution" in federal jurisdiction.

Directly addressing the matter of the spirit of the Constitution, Hamilton dismisses it as a concern. He writes:

"[T]here is not a syllable in the plan under consideration which DIRECTLY empowers the national courts to construe the laws according to the spirit of the Constitution, or which gives them any greater latitude in this respect than may be claimed by the courts of every state. I admit, however, that the Constitution ought to be the standard of construction for the laws, and that wherever there is an evident opposition, the laws ought to give place to the Constitution."¹³¹

Congress is authorized to make some kinds of laws by the Constitution. It is not authorized to make other kinds of laws. When a case comes before them, the courts must decide in which of those categories they fall. The courts are not instructed to use the spirit of the Constitution in doing so. However, they are not banned from doing so either, and Hamilton does not rule it out. He merely

says that they do not have any greater latitude to do so than do state courts. Given that state courts had generally been confined by greater checks on their power, including pay changes by the legislature and appeals to the legislature as the highest court, the same parchment latitude might be stretched further by a Supreme Court whose pay is constitutionally protected, whose judges have lifetime tenure, and from whom no appeal can be made. Hamilton's point about the lack of direct empowerment to interpret by the spirit of the Constitution is important because it means the Supreme Court would be on shakier ground than if it did have such direct authorization. Nevertheless, he implicitly allows that the Court is still capable of ruling by the spirit of the Constitution.

In considering judicial usurpations, there are two types of scenarios that must be considered: usurpations conflicting with the other branches, and usurpations supporting the other branches. When conflicting, the Federalist makes it clear that the courts will be ineffective. Hamilton explains:

"[T]he judiciary, from the nature of its functions, will always be the least dangerous to the political rights of the Constitution; because it will be least in a capacity to annoy or injure them... The judiciary... has no influence over either the sword or the purse; no direction either of the strength or of the wealth of the society; and can take no active resolution whatever. It may truly be said to have neither FORCE nor WILL, but merely judgment; and must ultimately depend upon the aid of the executive arm even for the efficacy of its judgments. ... [T]he judiciary is beyond comparison the weakest of the three departments of power."¹³²

¹³⁰ U.S. Constitution, Article 3, Section 2.

¹³¹ Alexander Hamilton, "The Federalist No. 80: The Powers of the Judiciary," *The Library of Congress*, 1788, http://thomas.loc.gov/home/histdox/fed_80.html. Accessed 1 September 2015.

¹³² Alexander Hamilton, "The Federalist No. 78: The Judiciary Department," 1788.

The executive has the sword, meaning it wields the force of the government. Unrestrained, the executive can turn that force against the rights of the people. The legislature directs how much the government shall spend and where. In directing the purse, the legislature imposes its will upon the government. The judicial branch has neither of these powerful tools. Its verdicts do not come tied to a federal employee's salary or to his continued employment. If the president orders him to disregard a court order, or Congress makes a law in contradiction to the court's verdict, the court order holds little weight. The Court must instead rely on the respect it is awarded. That respect will be difficult to match against hard power of the other branches. The Court must work to preserve its good name to ensure that the people and the other branches will respect its rulings. If the Court usurps the authority of state governments or other branches of the federal government, it can only bring its prestige to bear against the sword and the purse. Judicial usurpations against the other branches are unlikely to be effective.

The true danger that Brutus foresees is one of cooperating branches. This is part of what he sees as the overarching trend of the constitution. He writes, "The judicial power will operate to effect, in the most certain, but yet silent and imperceptible manner, what is evidently the tendency of the constitution: – I mean, an entire subversion of the legislative, executive, and judicial powers of the individual states."¹³³ To understand this, it is important to note that his greatest concern revolves around the expansion of legislative power. Brutus writes:

"Any person, who will peruse the 8th section with attention, in which most of the powers are enumerated, will perceive that they either expressly or

¹³³"Brutus XI," 1788.

by implication extend to almost every thing about which any legislative power may be employed. But if this equitable mode of construction is applied to this part of the constitution; nothing can stand before it."¹³⁴

Article I Section 8 enumerates the powers of Congress. Yet Brutus is making this point in an essay that primarily expresses his concerns about the Supreme Court. The problem Brutus sees with the judiciary and the problem he sees with the legislature are closely interrelated. The extensive powers in Article I Section 8 are bad enough, but they are compounded by the extensive discretion of the judiciary.

If the different branches work as the federalists expect, where "Ambition must be made to counteract ambition,"¹³⁵ then this would not be a problem. If their interests are to clash against each other, then the complementary powers that would expand federal authority are not dangerous. For Brutus' fears to be valid, the judiciary and the legislature would need to band together. If they do so, then the Supreme Court could use its discretion to expand the legislature's authority beyond the powers it is expressly granted.

The Supreme Court will have a vested interest in expanding its own power, and this interest will lead it to cooperate with the other branches. Brutus explains:

"Every body of men invested with office are tenacious of power... this of itself will operate strongly upon the courts to give such a meaning to

¹³⁴ "Brutus XII (Part 1)," 1788.

¹³⁵ Alexander Hamilton or James Madison, "The Federalist No. 51: The Structure of the Government Must Furnish the Proper Checks and Balances Between the Different Departments," *The Library of Congress*.
http://thomas.loc.gov/home/histdox/fed_51.html. Accessed 1 September 2015.

the constitution in all cases where it can possibly be done, as will enlarge the sphere of their own judicial powers, will increase the powers of the courts; and the dignity and importance of the judges, will be in proportion to the extent and magnitude of the powers they exercise. I add, it is highly probable the emoulement of the judges will be increased, with the increase of the business they will have to transact and its importance. ... [T]he judges will be interested to extend the powers of the courts, and to construe the constitution as much as possible, in such a way as to favour it; and that they will do it, appears probable.”¹³⁶

The Federalist’s arguments about the inherent weakness of the Supreme Court bear no weight here. When it is endorsing the actions of another branch of the federal government, not overruling it, the Supreme Court won’t have to worry about lack of executive compliance. Ruling in favor of extensive federal executive power empowers the federal government as a whole, including the judiciary. The judiciary gets more power because they will get to hear more cases and decide more questions that otherwise would be left to state courts. It could also justify higher wages as compensation for the increased workloads. Judges, even if chosen for their great wisdom, are still human beings subject to human weaknesses. By Brutus’ line of reasoning, they will see themselves as justified and interested in a greater scope for federal power. Meanwhile, the other branches get more power to regulate people’s lives in ways otherwise left to the states. Brutus pictures the Supreme Court as a co-conspirator to usurp the powers of the states. Its role would be to lend credence to the actions of the

other branches. Although it controls neither the purse strings nor the troops, the Court’s pronouncements act as independent validation for the other branches. Courts are respected as independent arbiters. Their endorsement will allay concerns when federal power expands. Brutus foresees the different branches of the federal government acting in unison to nationalize political power. Rather than ambition counteracting ambition, the federal branches will be a pack of wolves devouring the sovereignty of the states.

Brutus’ fears have not been fully confirmed. He overestimated the ambition of the Supreme Court, which is more concerned with its excessive workload than seeking to expand its own jurisdiction. Judges have hardly made reference to the power to decide constitutional questions on equitable grounds in announcing their decisions. Nevertheless, his fears about the use of the spirit of the Constitution instead of its text would be confirmed by modern interpretive methods that use the purpose of the law without strictly drawing it from the law’s letter. This fear is especially significant because Hamilton could not directly refute it. Hamilton could not make the argument that it would be good for the courts to have such latitude in interpreting the Constitution. Hence, when the American people ratified the Constitution, the highest levels of public debate showed a clear concern about the dangers of judicial activism. Hamilton also does not dispute that a close adherence to the written text is the best ward against such expansive interpretation. The Constitution was adopted to be a limited, grounded text not open to extensive judicial revision.

¹³⁶ “Brutus XI,” 1788

CHAPTER THREE

Madison's Understanding of the Constitution

The debate between the Federalist and Brutus still leaves vague the details of how to interpret the Constitution. It does not fully explain what a restrained interpretation looks like. To flesh that out, it is necessary to consider how the Constitution was interpreted in the earliest Constitutional controversies. A leading voice in these conflicts was James Madison, the so-called "Father of the Constitution." Madison revealed how he thought the Constitution should be interpreted in his speech on the power to remove officers, in the debate over the National Bank, and in the debate over the Neutrality Proclamation. These writings show Madison to be closely aligned with Scalia in how he understands the process of constitutional interpretation.

In a speech arguing that "the power of establishing an incorporated bank [is not] among the powers vested by the Constitution in the legislature of the United States," James Madison lays down four rules as "preliminaries to a right interpretation" of the Constitution.¹³⁷ Across the constitutional controversies of his time Madison adheres to these rules. These rules, as he applies them, show that Madison agrees with Scalia that the Constitution must be interpreted by the original public meaning of the document.

The first rule is: "An interpretation that destroys the very characteristic of government cannot be just."¹³⁸ Madison does not here explain what such an interpretation would be, and does not make use of it later in the speech. He also does not use the rule in any of his other arguments about

constitutionality. As such, its meaning must be found by looking to Madison's other writings.

In an essay titled, "Government," Madison delves into the characteristics of governments, discussing the differences between monarchies, aristocracies, and republics. He writes:

"A republic involves the idea of popular rights. A representative republic chuses the wisdom, of which hereditary aristocracy has the chance; whilst it excludes the oppression of that form. And a confederated republic attains the force of monarchy, whilst it avoids the ignorance of a good prince, and the oppression of a bad one."¹³⁹

Madison justifies a republic in terms of how it provides better governance than other forms. A confederated representative republic, like that of the United States, avoids oppression, wields sufficient force, and has wise leaders. As such, it will pursue the good, and it will do so wisely and effectively. That pursuit is the end, to which the popular rights of a republic are the means. Unlike Scalia, Madison does not contend that democracy is an end in and of itself. Popular rule is only good to the extent that it leads to good governance. The "very character of government" that Madison seeks to pursue cannot be simply the popular sovereignty that Scalia enshrines.

Madison further characterizes government in the essay "Property." There, he contends, "Government is instituted to protect property of every sort; as well that which lies in the various rights of individuals, as that which the term particularly expresses."¹⁴⁰ Here Madison provides the end of

¹³⁷ James Madison, "Speech on the Bank Bill," February 2, 1791. <http://oll.libertyfund.org/pages/1791-madison-speech-on-the-bank-bill>. Accessed 25 October 2015.

¹³⁸ *Ibid.*

¹³⁹ James Madison, "Government," National Gazette, January 2, 1792.

http://www.constitution.org/jm/17920102_govern.txt. Accessed 25 October 2015.

¹⁴⁰ James Madison, "Property," National Gazette, March 29, 1792.

government. At its core, it is created to protect the rights of its citizens. Man has property in “every thing to which a man may attach a value and have a right; and *which leaves to every one else the like advantage,*” which includes not just physical property, but also rights such as “free communication,” “his religious opinions,” and “the safety and liberty of his persons.”¹⁴¹ If this is the purpose of government, then it is reasonable to conclude that the “very character of government” refers to securing the rights of individuals.

Madison holds justice as the ultimate purpose of both government and constitutional interpretation. Having described government as a protector of property rights, Madison further explains, “This being the end of government, that alone is a *just* government, which impartially secures to every man, whatever is his.”¹⁴² Madison sees a just government as one that acts as a fair and impartial guardian protecting the rights of its citizens. An unjust government is one that goes against this purpose. It thus becomes clear that when Madison appeals to justice in his interpretive rule (“An interpretation that destroys the very characteristic of government cannot be just.”), he is arguing that constitutional interpretations must be judged against not merely on whether they are accurate, but also by whether they adhere to a higher standard of justice.

The second rule is: “Where a meaning is clear, the consequences, whatever they may be, are to be admitted – where doubtful, it is fairly triable by its consequences.”¹⁴³ If the second rule were to mean that bare measurements of utility should be admitted to decide constitutional questions, then Madison’s method of thinking would be far

removed from that of Scalia. However, where the meaning of the language is not in doubt, the consequences are irrelevant to Madison’s method of interpretation. In his arguments, Madison never resorts to arguing that a measure is constitutional because of its good consequences. As such, conventional tools of interpretation for resolving ambiguity must be applied before deciding that the meaning is in doubt.

Madison could also be referring to the same rules under which Scalia considers consequences. Consequences that are constitutionally relevant to Scalia include those that “cause a... governmental prescription to... be invalid... produce an absurd result ...have retroactive effect... eliminate sovereign immunity... [or] create a private right of action.”¹⁴⁴ In each of these cases, Scalia will consider the consequences because doing so is consistent with reading the law as a meaningful document passed with some intended effect that a rational being could think of, and which is created while knowing how courts generally read laws. None of them bias a certain policy outcome over another based on the judge’s preferred outcomes.

In his “Speech on Presidential Removal Power,” Madison provides an example of the use of consequences in interpretation. Here, he argues:

“[I]f the officer when once appointed, is not to depend upon the president for his official existence, but upon a distinct body (for when once appointed, is not to depend upon the president for his official existence, but upon a distinct body... I confess I do not see how the president can take care that the laws be faithfully executed.”¹⁴⁵

<http://teachingamericanhistory.org/library/document/property/>. Accessed 25 October 2015.

¹⁴¹ *Ibid.*

¹⁴² *Ibid.*

¹⁴³ James Madison, “Speech on the Bank Bill,” 1791.

¹⁴⁴ Scalia and Garner, *Reading Law*, 352.

¹⁴⁵ James Madison, “Speech in Congress on Presidential Removal Power,” June 16, 1789.

Were the Senate to have a say in the removal of officers, then the president would be unable to remove officers who were not doing their jobs. Without that power, the president could provide so little effective oversight that Madison sees no way for him to fulfill his constitutional responsibility to see that the laws are faithfully executed. The constitution would not have charged the president with ensuring faithful execution if the president were to lack the power essential to carrying out that task. This is an argument from consequence in that Madison is arguing against interpreting the removal power in such a way that it would render the faithful execution clause ineffective. In making this type of argument, Madison echoes Scalia's "Presumption Against Ineffectiveness" canon. This argument indicates that Madison may favor Scalia's understanding of how to weigh consequences in questions of interpretation.

The third rule is: "In controverted cases, the meaning of the parties of the instrument, if to be collected by reasonable evidence, is a proper guide."¹⁴⁶ The concept of having parties to an instrument casts the Constitution as a contract. The parties to the Constitution are defined in the preamble: "We the people of the United States."¹⁴⁷ Hence, Madison is calling for the Constitution to be interpreted based on how the people of the United States understand the document.

The fourth rule clarifies the third, stating, "Cotemporary and concurrent expositions are reasonable evidence of the meaning of the parties."¹⁴⁸ This rule reveals that Madison adheres to an originalist method of interpretation. By drawing the meaning of the parties from "cotemporary and concurrent expositions," Madison advocates for

a static Constitution that does not evolve over time. Combining this rule with the previous one reveals that Madison is arguing that the Constitution should be understood as it was understood by the people of the United States at the time when it was ratified. In terms of the broad rules of interpretation, Madison appears to share Scalia's understanding of how to interpret the Constitution.

Like Scalia, Madison respects precedence in his interpretation of the Constitution. Despite his earlier arguments against the constitutionality of the national bank, President Madison writes in his "Veto Message on the National Bank" in 1815:

"Waiving the question of the constitutional authority of the Legislature to establish an incorporated bank as being precluded in my judgment by repeated recognitions under varied circumstances of the validity of such an institution in acts of the legislative, executive, and judicial branches of the Government, accompanied by indications, in different modes, of a concurrence of the general will of the nation, the proposed bank does not appear to be calculated to answer the purposes of reviving the public credit."¹⁴⁹

Madison's veto shows that he opposes the bank as formulated in Congress' proposal on some grounds, but he limits his arguments to ones of policy, waiving the constitutional question. In doing so, he establishes a set of sufficient criteria for determining constitutionality by precedent: if each branch of government repeatedly affirms an action, and the people as a whole concur with the judgment, then the action must be deemed

http://www.constitution.org/jm/17890616_remove1.htm Accessed 25 October 2015.

¹⁴⁶ James Madison, "Speech on the Bank Bill," 1791.

¹⁴⁷ U.S. Constitution, Preamble.

¹⁴⁸ James Madison, "Speech on the Bank Bill," 1791.

¹⁴⁹ James Madison, "Veto Message on the National Bank," January 30, 1815. <http://millercenter.org/president/madison/speeches/speech-3626>. Accessed 20 October 2015.

constitutional regardless of earlier arguments over constitutionality. Madison's understands the Constitution as having a fixed meaning, so the arguments he made in 1791 would still apply in 1815. But his choice not to apply them shows that there is some other principle involved. Like Scalia, Madison believes that settled constitutional questions need not be overturned by an originalist.

Madison makes textualist arguments on the presidential removal power. His first argument is that the executive power is in the hands of the president unless limited by the Constitution. He writes:

“Are there exceptions to this proposition? Yes there are. The constitution says that, in appointing to office, the senate shall be associated with the president, unless in the case of inferior officers, when the law shall otherwise direct. Have we a right to extend this exception? I believe not.”¹⁵⁰

Madison's argument here applies the “General/Specific Canon,” which holds that a specific provision prevails over a general one. Hence, the general grant of the executive power is unperturbed in cases besides the specific case of appointment. The power otherwise remains effective. Because the executive power is constitutionally granted to the President, the Senate cannot regulate the definition of the executive power.

Madison makes another argument based on the principles underlying the Constitution. He points to how “most of the constitutions or bills of rights” in America and “the political writings of the most celebrated civilians” urge “That the three great departments of government be kept separate

and distinct.”¹⁵¹ Hence, “[W]e must suppose they were intended to be kept separate in all cases in which they are not blended, and ought consequently to expound the constitution so as to blend them as little as possible.”¹⁵² The documents to which Madison refers were all available to the public at the time of ratification. When there is such a general consensus among the available sources as to the nature of the relationship between the branches of government, it is reasonable to conclude that the American people believed that the same principles would be maintained in the new constitution. Hence, there should be some level of presumption in favor of keeping the departments of power distinct in those cases where they are not explicitly joined together. Scalia uses similar sources when he turns to state bills of rights to analyze the Second Amendment in *DC v. Heller*, affirming the document to uphold the same ideas at work in similar language at cotemporary constitutional documents. Madison argues that the original public meaning of the Constitution was informed by the principle of the separation of powers.

Madison makes further use of Scalia's canons of interpretation in his “Speech on the Bank Bill.” Responding to an argument that the taxing and spending clause grants Congress the power to form a bank “to provide for the common defence and general welfare,” Madison argues, “To understand these terms in any sense that would justify the power in question would give to Congress an unlimited power; would render nugatory the enumeration of particular powers.”¹⁵³ Instead, the taxing clause merely allows the government to collect taxes when taxes are needed to provide for the common defense and general welfare. This argument applies the “Surplusage Canon,” whereby an interpretation that ren-

¹⁵⁰ James Madison, “Speech in Congress on Presidential Removal Power,” 1789.

¹⁵¹ *Ibid.*

¹⁵² *Ibid.*

¹⁵³ James Madison, “Speech on the Bank Bill,” 1791.

ders another clause superfluous should be avoided. This argument could again be considered an argument regarding the consequences of an interpretation as the consequence of interpreting the law one way is to render other clauses null and void. Madison uses this same line of reasoning again to respond to the argument that the Necessary and Proper Clause justifies the national bank. Madison sees the text as a coherent whole where every part should be given some meaning.

Madison also makes an argument as to the need for staying true to the original meaning. Citing the debates at various state ratifying conventions, Madison argues, “[W]ill it not be said, if the bill should pass, that its adoption was brought about by one set of arguments and that it is now administered under the influence of another set.”¹⁵⁴ The ratifying conventions were the mode by which the people approved the Constitution. Arguments that were prevalent there shaped the public understanding of the document, making them an important element to consider in determining the original public meaning. Abandoning the interpretation that prevailed at the ratifying conventions would overturn the original meaning of the Constitution.

Twenty-eight years later, Madison carries this argument further in response to the *McCulloch v. Maryland* decision by the Supreme Court. Commenting on the reasoning used by the court to uphold the national bank, Madison argues:

“Those who recollect, and still more, those who shared in what passed in the State Conventions, thro’ which the people ratified the Constitution, with respect to the extent of the powers vested in Congress, can not easily be persuaded that the avowal

of such a rule would not have prevented its ratification.”¹⁵⁵

If foresight of the Court’s interpretation on this question would have been fatal to the efforts to ratify the Constitution, then the Court is stepping far beyond the power delegated to the federal government. It was necessary for the people to consent to the Constitution for them to believe that this sort of interpretation would not be permitted. For Madison to phrase the original public meaning argument in this way further reveals why he considers that understanding to be vital to constitutional interpretation: the Constitution is a contract that must be understood as such. The people only delegate that power that they choose to delegate to the government.

When Thomas Jefferson took up the same position in his opinion on the constitutionality of the Bank, he made an additional argument grounded in legislative history. He wrote:

“[T]he very power now proposed as *a means* was rejected as *an end* by the Convention which formed the Constitution. A proposition was made to them to authorize Congress to open canals, and an amendatory one to empower them to incorporate. But the whole was rejected, and one of the reasons for rejection urged in debate was, that then they would have a power to erect a bank, which would render the great cities, where there were prejudices and jealousies on the subject, adverse to the reception of the Constitution.”¹⁵⁶

¹⁵⁵ James Madison, “Letter to Spencer Roane,” September 2, 1819. <http://teachingamericanhistory.org/library/document/letter-to-spencer-roane/>. Accessed 24 August 2015.

¹⁵⁶ Thomas Jefferson, “Opinion on the Constitutionality of a National Bank,” February 15, 1791.

¹⁵⁴ *Ibid.*

An explicit grant of the power to incorporate would, by Jefferson's explanation, make that an end as an enumerated power. Jefferson is not arguing that because it was rejected in that context, the federal government can never incorporate. Rather, he is arguing that because the incorporation clause was rejected to avoid granting the power to erect a bank, that power could not have been granted. There is a strenuous link that might be made to textualism if Jefferson were arguing that if it had been known that the federal government could create a bank, then the Constitution would have been more difficult to ratify. But his point is that is that the Constitutional Convention rejected the power, not the ratifying conventions. This is an argument from legislative history. It delves into an argument that may or may not have been persuasive to the people writing the Constitution. The reasons for rejecting the power to incorporate were never officially stated. Jefferson makes a tenuous argument to support the bank that uses legislative history.

When Madison makes this argument, he does not make it a constitutional argument. On the same subject, Madison was recorded as saying:

“[H]e had reserved to himself, he said, the right to deny the authority of Congress to pass [the bank bill]. He had entertained this opinion from the date of the Constitution. His impression might perhaps be the stronger because he well recollected that a power to grant charters of incorporation had been proposed in the general convention and rejected. Is the power of establishing an *incorporated* bank among the powers vested by the Constitution in the

legislature of the United States? That is the question to be examined.”¹⁵⁷

In mentioning the legislative history in such personal terms, Madison subtly reminds his fellow Congressmen that he was a delegate to the Constitutional Convention. That reminder gives him greater authority to speak on the constitutional question. After all, because he has had an opinion on the question since the Constitution was first written, he has had more time to consider the question than other Congressmen. The reference to legislative history makes Madison's constitutional argument more authoritative. Yet Madison is careful not to make the legislative history a constitutional argument in itself. He follows the point on legislative history by saying that the constitutional question is the one to be examined, meaning that he has not yet started to explain whether it is constitutional. The legislative history argument also would not fall under any of his rules for interpretation. It does not concern “the very characteristic of the government,” nor does the legislative history speak to the consequences of allowing a bank to be incorporated. If “the parties to the instrument” referred to the delegates at the convention, then Madison could make a constitutional argument out of their debates at the Constitutional Convention. But because he does not do so, he does not consider them to be the parties to the instrument. Instead, “We the People” are the parties. Because “We the People” did not have access to the debates at the convention when they ratified the Constitution, those debates cannot be considered valid evidence for constitutional interpretation.

Madison uses textualist analysis to find that the power to declare war is a legislative power. The power is “expressly vested in the Congress, where every other legislative power is declared to be vested

<http://teachingamericanhistory.org/library/document/opinion-on-the-constitutionality-of-a-national-bank/>. Accessed 25 October 2015.

¹⁵⁷ James Madison, “Speech on the Bank Bill,” 1791.

and without any other qualification than what is common to every other legislative act.”¹⁵⁸ The power to declare war is one of many powers of Congress listed in Article I, Section 8. It appears in the middle of the list, with no distinguishing words. By Scalia’s “Distributive-Phrasing Canon,” the power could be read as “The Congress shall have the power to declare War,” just as the power to regulate commerce could be read as “The Congress shall have the power to regulate commerce with foreign nations, and among the several states, and with the Indian tribes.” The powers are thereby granted in a similar manner with similar wording in the same part of the Constitution. That suggests that they are indeed similar. Under the “Whole-Text Canon,” it must be remembered that the document is to be read as a whole. When these specific powers are listed, they are among the “Legislative powers herein granted” to Congress by Article I. Madison’s argument here is textualist.

Madison’s argument that treaty-making is a legislative power is also grounded in the text of the Constitution. Treaties are “emphatically declared by the constitution to be ‘the supreme law of the land.’”¹⁵⁹ Hence, treaties are a species of laws. Lawmaking is by definition a legislative act, so it follows that treaty-making is a legislative act. This is textualist in that it uses the generally accepted meaning that “legislative” is something related to the creation of laws.

Madison quotes the Federalist Papers in his arguments. He justifies using the Federalist Papers by calling it “a work which entered into a systematic explanation and defence of the constitution, and to which there has frequently been ascribed some influence in conciliating the public assent to

the government in the form proposed.”¹⁶⁰ Because the Federalist Papers were influential in building public support for the Constitution, they helped to inform the public’s understanding of the document. As such, examining the Federalist Papers contributes to finding the original public meaning of the document.

Scalia would later agree, writing, “I will consult... Hamilton’s and Madison’s writings in *The Federalist*, for example. I do so... because their writings, like those of other intelligent and well informed people of the time, display how the text of the Constitution was originally understood.”¹⁶¹ Like Madison, Scalia finds the Federalist Papers to be authoritative because they revealed how the document was understood when it was ratified.

Madison’s understanding of the Constitution is close to that of a textualist. He sees the Constitution as a contract to which the people are the parties. He looks first and foremost to the text of the Constitution itself. Where the text is ambiguous, he turns to sources that informed the ratification debates. Like Scalia, Madison interprets the Constitution by finding its original public meaning. However, Madison holds justice to be a higher standard above the Constitution. Government exists only to impartially protect the people’s individual rights, and if an interpretation of the Constitution would destroy that purpose, then it is unjust. Such interpretations must be considered invalid. Madison never uses this principle when making his constitutional argument, so it would seem that this rule only applies in the most extreme cases when government threatens to become tyrannical. In those cases, Madison would abandon textualist interpretive tools. But in all other cases, Madison is a textualist.

¹⁵⁸ James Madison, “Helvidius Number I,” August 24, 1793. <http://oll.libertyfund.org/titles/1910>. Accessed 6 December 2015.

¹⁵⁹ James Madison, “Helvidius Number I,” 1793.

¹⁶⁰ *Ibid.*

¹⁶¹ Antonin G. Scalia, *A Matter of Interpretation*, (Princeton: Princeton University Press, 1997), 38.

CHAPTER FOUR

Hamilton's Arguments from General Principles

As a delegate to the Constitutional Convention, the author of most of the Federalist Papers, and an influential figure in the early government, Hamilton was influential in the creation of the Constitution and how it was interpreted in the first controversies after its creation. Hamilton was the leading proponent of a national bank, which was approved by Congress and the president, reaffirmed twenty years later after only a short lapse, and upheld in a landmark Supreme Court decision, *McCulloch v. Maryland*. He also helped influence the Washington administration's foreign policy, and defended the constitutionality of the Neutrality Proclamation. In these controversies, Hamilton displays a different understanding of constitutional interpretation than Madison.

Hamilton's argument that the National Bank is constitutional arises from broad principles not found in the Constitution itself. Hamilton writes:

“[T]his general principle is inherent in the very definition of government, and essential to every step of progress to be made by that of the United States, namely: That every power vested in a government is in its nature sovereign, and includes, by force of the term, a right to employ all the means requisite and fairly applicable to the attainment of the ends of such power, and which are not precluded by restrictions and exceptions specified in the Constitution, or not immoral, or not contrary to the essential ends of political society.”¹⁶²

¹⁶² Alexander Hamilton, “Opinion on the Constitutionality of the Bank of the United

This argument bears some similarity to the “Presumption Against Ineffectiveness” canon, where Scalia argues that a text should be interpreted in such a way that its “purpose is furthered, not hindered.”¹⁶³ Yet that presumption still has to be tied to some text. An interpretation of text means that whatever power the government would be construed to have would have to be supported by a fair reading of the words of the document. What Hamilton proposes is far broader. Hamilton would allow anything related to a valid end to be permitted before even turning to the Constitution. This creates a presumption in favor of governmental power in any controversy. Such a presumption is contrary to the textualist goal of giving the text a fair reading, which only reads into it those powers that are stated or directly implied. Textualism is neutral as to whether it supports more government authority or less. Hamilton wants the burden to be to show that government lacks the power, rather than to show that it has the power.

Hamilton argues that the nature of the federal system does not limit the sovereignty of the federal government with regards to creating a national bank. He writes:

“The circumstance that the powers of sovereignty are in this country divided between the National and State governments, does not afford the distinction required.... It will only follow from it, that each has sovereign power as to certain things, and not as to other things.”¹⁶⁴

States,” February 23, 1791.

<http://teachingamericanhistory.org/library/document/opinion-on-the-constitutionality-of-the-bank-of-the-united-states/>. Accessed 25 October 2015.

¹⁶³ Scalia and Garner, *Reading Law*, 63.

¹⁶⁴ Alexander Hamilton, “Opinion on the Constitutionality of the Bank of the United States,” 1791.

Hamilton bases this observation on merely the fact that the national government is a government. Inherent in its condition as a government is the power of sovereignty, which is only restricted as to the ends on which the federal government operates. Hamilton does not need to turn to the written text of the Constitution to establish as much. His argument relies on the inherent nature of government, nothing else. His concept of the inherent nature of government shows it as one that is unlimited except where limits are imposed upon it. When the Constitution delegates specific powers, it would seem inconsistent with the text of the document to interpret government power to inherently be so broad. After all, why is a clause needed to grant it the powers “necessary and proper” to its enumerated powers if it already has this vast scope of power? Hamilton’s primary argument does not engage with the text of the Constitution at all.

Hamilton provides a secondary argument that does rely on the text of the Constitution. He argues, “If it would be necessary to bring proof to a proposition so clear... The power which can create the supreme law of the land in any case, is doubtless sovereign as to such case.”¹⁶⁵ This reference to the text establishes a fraction of Hamilton’s case, merely affirming that the federal government is sovereign as to its proper ends. It does not support his link from sovereignty to the power to use any reasonably related means. Furthermore, Hamilton’s reference to the text is a grudging one. He has already held the government to be sovereign based on broad observations, and only brings in the text as a secondary piece of evidence. Hamilton’s method of interpretation does not focus on the written words of the Constitution.

Hamilton deems this to be all that is needed to affirm the power to erect a bank, writing, “Here then... the affirmative of the constitutionality of the bill might be

permitted to rest.”¹⁶⁶ All that is needed to support the constitutionality of the national bank is to understand the nature of sovereignty without regard to the written text of the Constitution. While Hamilton does proceed to build a much longer case, he prefaces it by writing, “For a more complete elucidation of the point, nevertheless, the arguments which they had used against the power of the government to erect corporations... shall be particularly examined.”¹⁶⁷ The further arguments that he makes are foreign to his own understanding of the constitutional question. They are secondary arguments merely intended to refute those of his opponents on their terms. As such, they reveal less about Hamilton’s own understanding of constitutional interpretation than do the preceding arguments. Hamilton does not believe that the text of the Constitution even needs to be regarded to settle the question of the constitutionality of the bank.

When Hamilton ventures into his rebuttal, he makes textualist arguments. Responding to the argument that the word “necessary” in the necessary and proper clause permits the government only to do that which is absolutely essential to its ends, he writes, “To understand the word as the Secretary of State does, would be to depart from its obvious and popular sense, and to give it a restrictive operation, an idea never before entertained.”¹⁶⁸ This argument is grounded in a plain reading of the necessary and proper clause. By adhering to the popular sense of the word, Hamilton echoes Scalia’s “Ordinary Meaning Canon,” by which words are to be given their commonly used meaning whenever context does not suggest otherwise.

Hamilton also makes arguments grounded in consequentialism. He argues that the restrictive interpretation of the Necessary and Proper Clause “would beget

¹⁶⁵ *Ibid.*

¹⁶⁶ *Ibid.*

¹⁶⁷ *Ibid.*

¹⁶⁸ *Ibid.*

endless uncertainty and embarrassment,” and explains how it would make the operation of government more difficult.¹⁶⁹ This is not the same kind of consequence that Scalia allows as permissible. The restrictive interpretation does not contradict other parts of the document. Hamilton also does not push the point to argue that the restrictive interpretation is so absurd that it could not possibly be intended. He would be hard-pressed to do so when there is at least a somewhat rational argument for the other side, which is likely enough to overcome a charge of absurdity. Hamilton gives weight to a wider scope of consequences in considering a constitutional question.

Hamilton also introduces a maxim favoring liberal interpretation. He writes, “The restrictive interpretation of the word necessary is also contrary to this sound maxim of construction, namely, that the powers contained in a constitution of government... ought to be construed liberally in advancement of the public good.”¹⁷⁰ This type of interpretation is aimed at producing a particular type of result. It is a principle that seeks to minimize obstructions in the way of government doing what it deems beneficial to society. It is a principle contrary to the textualist concept of giving the text a fair reading. A textualist will interpret a Constitution without bias in favor or against a grant of government power. Hamilton entertains no such neutrality.

At another point, Hamilton uses a particularly textualist argument. Responding to Jefferson’s argument that the Constitutional Convention rejected a clause granting Congress the power to erect corporations, Hamilton argues:

“[W]hatever may have been the nature of the proposition, or the reasons for rejecting it, nothing is

included by it, that is the proposition, in respect to the real merits of the question. The Secretary of State will not deny, that, whatever may have been the intention of the framers of a constitution, or of a law, that intention is to be sought for in the instrument itself, according to the usual and established rules of construction.”¹⁷¹

Scalia denounces the use of legislative history as one of thirteen falsities in legal thinking that he debunks.¹⁷² Legislative history is used to uncover the intent of whoever made the law, rather than to show what the public could reasonably read the law to mean. If the law is merely a reflection of the intent of the legislator, then it is the legislator, not the people, who is sovereign as their will governs even beyond their written word. Although Hamilton adopts an expansive sense of sovereignty, he does not endorse the use of legislative history. Furthermore, Hamilton shows that it is unclear why the incorporation clause Jefferson brings up was rejected. Delegates at the convention could have had any number of reasons for rejecting a clause to grant the explicit power of incorporation. They might not have wanted Congress to have the power or they might have thought Congress that had the power already. Hamilton agrees with Scalia that legislative history is not a proper source of evidence when interpreting legal texts.

Hamilton also makes an argument that looks to the original public meaning of the Constitution. He writes:

“It is remarkable that the State conventions, who had proposed amendments in relation to this point, have most, if not all of them, expressed themselves nearly thus: Congress

¹⁶⁹ *Ibid.*

¹⁷⁰ *Ibid.*

¹⁷¹ *Ibid.*

¹⁷² Scalia and Garner, *Reading Law*, 369.

shall not grant monopolies, nor erect any company with exclusive advantages of commerce! Thus, at the same time, expressing their sense, that the power to erect trading companies or corporations was inherent in Congress, and objecting to it no further than as to the grant of exclusive privileges.”¹⁷³

If the state conventions proposed amendments to keep Congress from erecting companies with exclusive privileges, then the state conventions believed that without such an amendment, the Constitution could be read to grant Congress the power to erect such companies. This argument has legal force because the state conventions reflect how the public understood the Constitution at the time that it was adopted. Hamilton is in accord with Scalia’s textualism when he makes this argument.

In the *Pacificus-Helvidius Debates*, Hamilton argues that the executive must be the branch responsible for a declaration such as the Neutrality Proclamation. First of all, the power must reside somewhere within the government as it is not even controversial to assert that managing foreign relations is within the federal government’s powers. Within the federal government, he rules out the legislature as it “is not the *organ* of intercourse between the USates and foreign nations. It is charged neither with *making* or *interpreting* Treaties.”¹⁷⁴ Hence, there is no constitutional connection between the power in question and the legislature. The power also does not belong to the judiciary as that branch “is indeed charged with the interpretation of treaties; but it exercises this function only in the litigated cases.”¹⁷⁵

¹⁷³ *Ibid.*

¹⁷⁴ Alexander Hamilton, “*Pacificus Number I*,” June 29, 1793. <http://oll.libertyfund.org/titles/1910>. Accessed 6 December 2015.

¹⁷⁵ *Ibid.*

Hence, only the executive could possibly have a connection to the power in question.

With the other branches disposed of, Hamilton enters into a discussion of where the executive gets this power. Because the power is not found in the other branches, because the executive is the “*organ* of intercourse,” and “is charged with the Execution of the laws” and “the command and application of the public force,” Hamilton concludes that it is so “natural and obvious” that the executive has this power that it must be held that it is beyond doubt “unless such doubt can be deduced from the particular provisions of the Constitution.”¹⁷⁶ This approach is the opposite of a textualist approach. It starts with some general principles of government and then descends into the text of the Constitution only to double-check its work. Hamilton’s conclusions that executive interpretation of treaties follows from being the “*organ* of intercourse” (a phrase not used in the Constitution) leaps ahead logically. It would seem he is looking to defend a conclusion, not make a determination based on the text of the document.

When Hamilton does descend into the text of the Constitution, his interpretations are textualist in nature. He argues that the general grant of the executive power only has those limits imposed on it by the constitution, writing, “It would not consist with the rules of sound construction to consider this enumeration of particular authorities as derogating from the more comprehensive grant contained in the general clause, further than as it may be coupled with express restrictions of qualifications.”¹⁷⁷ Hamilton argues that the general grant of executive power extends to all instances except those where there is a specific limit established. If the interpretation of treaties is an executive power, it would therefore follow that the lack of

¹⁷⁶ *Ibid.*

¹⁷⁷ *Ibid.*

mention in the Constitution means that it is included in the general grant of executive power. This portion of Hamilton's reasoning is in accord with Scalia's textualism, as Scalia writes that "the general/specific canon does not mean that the existence of a contradictory provision voids the general provision. Only its application to cases covered by the specific provision is suspended; it continues to govern all other cases."¹⁷⁸ In the case of interpreting treaties, Hamilton argues that the general grant of executive power is suspended in regards to treaty-making and appointment by specific clauses, but the general grant of executive power still extends to all other cases. While Hamilton does not establish from the text that the interpretation of treaties is an executive power, the rest of this particular argument is textualist.

Hamilton's interpretation of the Constitution does not focus on the document itself. Hamilton puts into focus the ideas that informed a general understanding of the nature of government. He turns to the Constitution itself only as a secondary piece to support interpretations that originate outside its text. He presumes that power exists unless shown otherwise, despite the Constitution granting specific powers affirmatively. Hamilton's method of interpretation aims to expand the meaning of the Constitution beyond the bare meaning of the text.

CONCLUSION

It is difficult to reconcile Hamilton's understanding of constitutional interpretation in the Federalist Papers with his later writings. Hamilton did not present the same general principles of the nature of government in the Federalist that he later used when interpreting the Constitution. When Hamilton conceded that the Constitution's

letter should be followed rather than a vague idea of the spirit of the Constitution, it would have seemed to follow that the Constitution's letter should be read plainly without favor or disfavor to governmental authority. Instead, his later interpretations introduce overarching principles that preempt the Constitution itself. By turning to a general theory of government first and only looking to the Constitution to confirm his results, Hamilton favors interpreting the Constitution in a manner that expands the government's power. In doing so, he betrays the position he held to get the Constitution ratified in the first place.

Madison's theory of constitutional interpretation is much more consistent with the consensus that emerges from the ratification debates. Brutus called for words being understood by "their ordinary and popular use," and for their meaning to be explained by a fair reading of the letter of the law. Madison displays the same system when he interprets the Constitution. He looks for how the Constitution was understood by the people when it was ratified, hence finding the "ordinary and popular" meaning of its text. Hamilton did not dispute Brutus' system in the ratification debates, and gave the implication that such a system was the best one for understanding the Constitution. In so doing, he conceded to the position that Madison would later hold.

Madison shared Scalia's textualist understanding of the Constitution. Neither lets overarching principles found outside the document dictate its meaning. Neither favors a consequentialist approach to understanding the document. Both look for the plain meaning of the text as it was understood when it was ratified. Both maintain that its meaning is fixed. Madison and Scalia share a commitment to giving a fair reading to the fixed, original meaning of the text of the Constitution.

However, Scalia and Madison differ on a more fundamental level. To Scalia,

¹⁷⁸ Scalia and Garner, *Reading Law*, 175.

democracy is the end that textualism must uphold. He finds no higher good beyond what the people decide it should be. To him, the Constitution is merely an agreement about what the people have agreed to hold beyond the reach of a temporary bare majority. To Madison, the document is more than that. It is a means towards securing the rights of the people. Madison would not agree with an interpretation of the Constitution that, while textually correct, threatens to turn the government from a protector of the people's rights to an oppressor. That Madison never resorted to that argument is a testament to how well the Constitution is written: he did not need to resort to that argument. Nevertheless, in those rare cases, Madison and Scalia disagree.

Textualism meets the standard set up for itself: a judge who interprets the Constitution in a textualist manner is exercising his legitimate authority under Article III of the Constitution. Although Brennan and other non-originalists can point to Founding-era disputes over the meaning of the Constitution, only one set of principles of Constitutional interpretation held widespread legitimacy when the Constitution was ratified. Textualism is the method of interpretation most consistent with how the Constitution was understood at the time of the founding. Textualism correctly understands the Constitution, and Scalia errs only by not holding constitutionality to account to justice.

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