Rational Judicial Review: Constitutions as Power-sharing Agreements, Secession, and the Problem of Dred Scott

JOHN YOO[†]

Scholars have engaged in a sharp argument over whether the judiciary should follow the original understanding in interpreting the Constitution. Recent criticism has argued that originalism fails because it does not advance a substantive moral or political good. This paper responds to this criticism by advancing an instrumental justification for originalism. It argues that a nation may fail to make a constitution because regions with differing policy preferences may not trust each other to obey the agreement after ratification. Constitution-makers can overcome this obstacle by committing to future enforcement of the agreement by an independent judiciary. To maintain the founding bargain, the judiciary would interpret the constitution based on the original understanding of its makers. Using Dred Scott *as a case study of a failure in constitution making because of a flawed application of originalism, this Article argues that judicial review and originalism serve as valuable commitment mechanisms to enforce future compliance with a political bargain.*

[†] Emanuel S. Heller Professor of Law, University of California at Berkeley School of Law; Distinguished Visiting Professor, School of Civic Leadership and Senior Research Fellow, Civitas Institute, University of Texas at Austin; Nonresident Senior Fellow, American Enterprise Institute. I thank Tori Tinsley, Duane Yoo, and Milton Zerman for their excellent research assistance. This paper benefitted from comments received at a workshop at the University of California at Berkeley; a workshop at the School of Civic Leadership, University of Texas at Austin; and from a lecture at the Heritage Foundation.

TABLE OF CONTENTS

INTRODUCTION

Debates over judicial review continue apace. Once upon a time, conservatives attacked the authority of the federal courts to reject unconstitutional law. Supreme Court decisions striking down the Defense of Marriage Act[1] and state bans on gay marriage[2] prompted proposals to cabin judicial review. Republican candidates for the 2016 presidential nomination, for example, called for constitutional amendments limiting the terms of federal judges, requiring supermajority votes to strike down federal laws, or even subjecting judicial decisions to popular override.[3]

Now it is progressives who criticize the institutional independence of the Supreme Court. Even before *Dobbs v. Jackson Women's Health Organization*[4] reversed *Roe v. Wade*,[5] all but one of the Democratic candidates for the 2020 presidential nomination had declared their support to expand the size of the Court to change its ideological direction—the sole dissenter, however, happened to win the election.[6] Nevertheless, that candidate, Joseph Biden, as president, proposed term limits for the Justices because the Supreme Court "has overturned long-established legal precedents protecting fundamental rights[,] . . . gutted civil rights protections, taken away a woman's right to choose, and now granted presidents broad immunity from prosecution for crimes they commit in office."[7]

Attacks on judicial review are neither new nor reserved for a single political party or ideology. In the 1990s, leading constitutional scholars sharply disagreed with the Supreme Court's decisions limiting federal powers under the Commerce Clause and Section Five of the Fourteenth Amendment, reinvigorating state sovereignty, and expanding state sovereign immunity from federal lawsuits.[8] Some scholars went as far as claiming that judicial review had no historical roots and instead urged a "popular constitutionalism" that took the founding document away from the courts.[9] Other scholars have attacked the Roberts Court's turn to interpreting the Constitution based on its original

1. United States v. Windsor, 570 U.S. 744, 752 (2013).

2. Obergefell v. Hodges, 576 U.S. 644, 681 (2015).

3. *See* Sam Stein, *Republican Presidential Candidates Are Rallying Around Term Limits for Judges*, HUFFPOST (Mar. 6, 2015, 4:14 PM EST), https://www.huffpost.com/entry/judicial-term-limits_n_6818938.

4. 597 U.S. 215 (2022).

5. 410 U.S. 113 (1973).

6. *See* Barbara Sprunt, *Biden Says He's 'Not a Fan' of Expanding the Supreme Court*, NPR (Oct. 13, 2020, 11:02 AM ET), https://www.npr.org/2020/10/13/923213582/biden-says-hes-not-a-fan-of-expanding-the-supreme-court.

7. Press Release, White House, FACT SHEET: President Biden Announces Bold Plan to Reform the Supreme Court and Ensure No President Is Above the Law (July 29, 2024), https://bidenwhitehouse.archives.gov/briefing-room/statements-releases/2024/07/29/fact-sheet-president-biden-announces-bold-plan-to-reform-the-supreme-court-and-ensure-no-president-is-above-the-law.

8. *See, e.g.*, Erwin Chemerinsky, *The Values of Federalism*, 47 FLA. L. REV. 499, 520–22 (1995); *see also* Catharine A. MacKinnon, *Disputing Male Sovereignty: On* United States v. Morrison, 114 HARV. L. REV. 135, 137 (2000) (criticizing the Supreme Court's *Morrison* ruling, which limited the Violence Against Women Act on Commerce Clause grounds).

9. *See, e.g.*, LARRY D. KRAMER, THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW 7 (2004) (criticizing judicial review as counter-majoritarian).

understanding.[10] More recently, conservatives have engaged in a sharp argument over whether the judiciary should limit its review to enforcing the original understanding of the Constitution, or if it should expand its remit to advancing the "common good," as refracted through the natural law.[11]

These contemporary arguments echoed earlier periods of political controversy over the Court. In the struggle between President Franklin Roosevelt and the early New Deal Court, Roosevelt proposed increasing the Court's membership from nine to fifteen Justices, after considering proposals to limit the Court's appellate jurisdiction and amend the text of the Commerce Clause.[12] During the Progressive Era, both Republicans and Democrats, frustrated by the Court's commitment to the *Lochner* era's economic substantive due process,[13] first developed the ideas periodically resurrected by critics of the Court: narrowing the Court's jurisdiction, manipulating the number of Justices and their terms in office, or installing some path to reversing judicial decisions short of constitutional amendment.[14]

And even these periods were pale in comparison to the sharp disagreements over judicial review during the Early National Period and the Civil War. Upon Thomas Jefferson's election to the presidency in 1800, the losing Federalist Party controlled only a single branch of government—the judiciary.[15] Jefferson's Democratic Party embarked on a campaign against the judiciary, which included repealing the judgeships created by the Circuit Court Act of 1800, canceling a Term of the Supreme Court, and ultimately seeking the impeachment of Justice Samuel Chase.[16] At the outset of the Civil War,

10. *See, e.g.*, DAVID A. STRAUSS, THE LIVING CONSTITUTION 12–18, 33–49 (2010) (defending common law approach to constitutional interpretation).

11. *Compare* ADRIAN VERMEULE, COMMON GOOD CONSTITUTIONALISM: RECOVERING THE CLASSICAL LEGAL TRADITION 1 (2022) (criticizing originalism), *and* HADLEY ARKES, MERE NATURAL LAW: ORIGINALISM AND THE ANCHORING TRUTHS OF THE CONSTITUTION 12–15 (2023) (same), *with* J. Joel Alicea, *The Moral Authority of Original Meaning*, 98 NOTRE DAME L. REV. 1, 3–6 (2022) (claiming natural law authority for originalism), LEE J. STRANG, ORIGINALISM'S PROMISE: A NATURAL LAW ACCOUNT OF THE AMERICAN CONSTITUTION 5 (2019) (defending originalism), *and* Jeffrey A. Pojanowski & Kevin C. Walsh, *Enduring Originalism*, 105 GEO. L.J. 97, 101 (2016) (same).

12. William E. Leuchtenburg, *The Origins of Franklin D. Roosevelt's "Court Packing" Plan*, 1966 S. CT. REV. 347, 350; WILLIAM E. LEUCHTENBURG, THE SUPREME COURT REBORN: THE CONSTITUTIONAL REVOLUTION IN THE AGE OF ROOSEVELT 82 (1995).

13. Lochner v. New York, 198 U.S. 45, 53 (1905).

14. *See* RONALD J. PESTRITTO, WOODROW WILSON AND THE ROOTS OF MODERN LIBERALISM 2, 189–91 (2005).

15. Federalist Presidents had appointed all U.S. Supreme Court Justices until the election of Jefferson. *See Justices 1789 to Present*, SUP. CT. OF THE U.S., https://www.supremecourt.gov/about/members_text.aspx (last visited Apr. 6, 2025).

16. The story of Jefferson's battle with the Marshall Court is told in 4 DUMAS MALONE, JEFFERSON AND HIS TIME: JEFFERSON THE PRESIDENT: FIRST TERM, 1801–1805 (1970), FORREST MCDONALD, THE PRESIDENCY OF THOMAS JEFFERSON (1976), DAVID N. MAYER, THE CONSTITUTIONAL THOUGHT OF THOMAS JEFFERSON (1994), BRUCE ACKERMAN, THE FAILURE OF THE FOUNDING FATHERS: JEFFERSON, MARSHALL, AND THE RISE OF PRESIDENTIAL DEMOCRACY (2005), 2 GEORGE LEE HASKINS & HERBERT A. JOHNSON, HISTORY OF THE SUPREME COURT OF THE UNITED STATES: FOUNDATIONS OF POWER: JOHN MARSHALL, 1801–15 (1981), and 3–

President Abraham Lincoln refused to obey a writ of habeas corpus issued by Chief Justice Roger Taney regarding confederate sympathizer John Merryman.[17] As the war proceeded, the Lincoln administration continued to exclude the federal courts from review of wartime policies in the North and the reconquered areas of the Confederacy. During Reconstruction, Congress stripped the Supreme Court of jurisdiction to hear appeals that might challenge the constitutionality of the military government of the Southern states.

This Article will address this debate on judicial review approaches by applying our understanding of bargaining failure to defend a judicial review based on originalist methodology. This Article explains that judicial review and originalism, the interpretive approach which the Article takes, can encourage agreement at the constitution-making level. Beyond this level, judicial review and originalism also serve as a commitment mechanism to enforce future compliance with a political bargain.

Part I will review the academic scholarship and summarizes the textual, structural, and historical case for judicial review, but not judicial supremacy. It addresses the renewed debate over originalism, which has come to characterize the methodology of the Roberts Court. While liberal critics such as Robert Dworkin once attacked originalism as lacking moral foundations, today's most penetrating critics of originalism's amoralism are conservatives, with Professor Adrian Vermeule being most prominent amongst them.[18] Part II will respond to the criticisms of originalism by introducing a bargaining theory of politics borrowed from work on the settlement of litigation and the resolution of international crises. It will show that judicial review can play an important role in signaling a commitment to a constitution in an environment with weak enforcement institutions. Part III will test the thesis by applying it to the case of *Dred Scott v. Sandford*.[19] It will argue that even as *Dred Scott* got the original understanding of slavery terribly wrong, it also ruined the utility of the Court as an institution that could help the North and South overcome their differences through negotiation.

I. CURRENT CONTROVERSIES OVER JUDICIAL REVIEW

A. JUDICIAL REVIEW VS. JUDICIAL SUPREMACY

Academics might welcome political branch efforts to control judicial review. Scholars such as Michael Klarman, Richard Posner, Adrian Vermeule,

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4 G. EDWARD WHITE, HISTORY OF THE SUPREME COURT OF THE UNITED STATES: THE MARSHALL COURT AND CULTURAL CHANGE, 1815–35 (1988).

17. *See Ex parte* Merryman, 17 F. Cas. 144, 147–48 (C.C.D. Md. 1861) (No. 9,487); John Yoo, *Lincoln at War*, 38 VT. L. Rev. 3, 17–19 (2013).

18. *See* VERMEULE, *supra* note 11, at 2. For a response to Vermeule that defends originalism on natural law grounds, see Alicea, *supra* note 11, at 3–4.

19. 60 U.S. (19 How.) 393 (1857) (enslaved party), *superseded by constitutional amendment*, U.S. CONST. amend. XIV.

and Jeremy Waldron have criticized the legitimacy and function of judicial review.[20] A broader group of authors, including Larry Alexander, Neal Devins, Louis Fisher, Sanford Levinson, Michael McConnell, Robert Nagel, Michael Stokes Paulsen, and Frederick Schauer, among others, has been debating whether the federal judiciary's interpretation of the Constitution is supreme over the other branches.[21] The scholars draw on an earlier skepticism toward judicial review sparked by *Cooper v. Aaron*[22] and the decisions of the Warren Court in the 1960s,[23] or by the decisions of the Four Horsemen in the New Deal period.[24] These authors answer the counter-majoritarian problem posed by Alexander Bickel, Jesse Choper, John Hart Ely, Learned Hand, and Herbert Wechsler with the claim that judicial decisions are only one voice in the constitutional conversation.[25]

The constitutional text, structure, and history support judicial review but not judicial supremacy. At the level of the text, the Constitution does not give the Supreme Court any special, exclusive role in its interpretation. Article III does not directly discuss judicial review in its provisions creating the federal courts and defining their jurisdiction. Some, such as Chief Justice John Marshall in *Marbury v. Madison*, point to the Supremacy Clause: "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; . . . any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."[26] But the Supremacy Clause only establishes a hierarchy of law—the Constitution, statutes, and treaties—that has

20. *See* RICHARD A. POSNER, FRONTIERS OF LEGAL THEORY 15–27 (2001); JEREMY WALDRON, LAW AND DISAGREEMENT 5, 212–14 (1999); Michael J. Klarman, *What's So Great About Constitutionalism?*, 93 NW. U. L. REV. 145, 146–48 (1998); Adrian Vermeule, *Judicial Review and Institutional Choice*, 43 WM. & MARY L. REV. 1557, 1557–58 (2002).

21. *See, e.g.*, Larry Alexander & Frederick Schauer, *On Extrajudicial Constitutional Interpretation*, 110 HARV. L. REV. 1359, 1359–60 (1997); Neal Devins & Louis Fisher, Essay, *Judicial Exclusivity and Political Instability*, 84 VA. L. REV. 83, 84–85 (1998); Sanford Levinson, *Could Meese Be Right This Time?*, 61 TUL. L. REV. 1071, 1073, 1077 (1987); Michael W. McConnell, Comment, *Institutions and Interpretation: A Critique of* City of Boerne v. Flores, 111 HARV. L. REV. 153, 154 (1997); Robert F. Nagel, *Judicial Supremacy and the Settlement Function*, 39 WM. & MARY L. REV. 849, 850 (1998); Michael Stokes Paulsen, *The Most Dangerous Branch: Executive Power to Say What the Law Is*, 83 GEO. L.J. 217, 220–23 (1994).

22. 358 U.S. 1 (1958).

23. *See, e.g.*, ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS 84–85 (1st ed. 1962); Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 24, 30 (1959); CHARLES BLACK, JR., THE PEOPLE AND THE COURT 138–40 (1960).

24. *See, e.g.*, ROBERT H. JACKSON, THE STRUGGLE FOR JUDICIAL SUPREMACY: A STUDY OF A CRISIS IN AMERICAN POWER POLITICS, at v–vi, 102–03 (1941); DEAN ALFANGE, THE SUPREME COURT AND THE NATIONAL WILL 35–41, 232–36 (1937); LOUIS B. BOUDIN, 1 GOVERNMENT BY JUDICIARY, at v (1968) (showing skepticism of judicial review).

25. BICKEL, *supra* note 23, at 16–23; JESSE H. CHOPER, JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS 1–3 (1980); JOHN HART ELY, DEMOCRACY AND DISTRUST 181 (1980); LEARNED HAND, THE BILL OF RIGHTS: THE OLIVER WENDELL HOLMES LECTURES, 1958, at 1–8 (1958); Herbert Wechsler, *The Political Safeguards of Federalism: The Role of the States in the Composition and Selection and of the National Government*, 54 COLUM. L. REV. 543, 560 (1954).

26. U.S. CONST. art. VI, cl. 2; *see* Marbury v. Madison, 5 U.S. (1 Cranch) 137, 180 (1803).

supremacy over state law. The Supremacy Clause does not explicitly authorize the federal judiciary to enforce supremacy even as it obliges state judges to strike down state law that is inconsistent with federal law. The explicit mention only of state judicial review even implies that the Framers of the Constitution did not intend to authorize judicial review by federal courts over federal laws.[27] Although Chief Justice John Marshall relied on the Oaths Clause to find textual support for judicial review, that clause gives no special authority to federal judges either.[28] All federal and state officers take an oath to the Constitution.

Judicial review finds better grounding in the Constitution's structure than its text but without the need to invoke grand visions of the judicial role. Instead, review stems from the Constitution's vesting of unique roles in each of the three branches.[29] Article III places the sole responsibility on the Supreme Court and the lower federal courts created by Congress to decide cases and controversies arising under federal law.[30] Once the Constitution becomes law to be enforced in court, as the Supremacy Clause and Article III's Arising Under Clause recognize, judicial review emerges.[31] If a case arises where one party relies on the Constitution and the other on a federal statute, a court must choose one or the other. The Constitution must prevail because of its status as the fundamental, higher law.[32] Of the three branches of the federal government, only the federal courts can finally resolve cases or controversies arising under federal law.

Judicial review is only a species of constitutional review. In choosing the Constitution over an inconsistent statute, the federal judiciary is interpreting and applying only the former while performing its unique function. But judicial review does not compel the exclusion of the other branches from constitutional interpretation, too. Federal officers and members of Congress take the same oath to uphold the Constitution, and they have the same obligation to interpret it.[33] What makes their form of review different is the unique constitutional function of each branch. Congress makes the law; it must interpret the Constitution to know what laws it may and may not enact. Presidents have the constitutional responsibility to take care that the laws are faithfully executed. Because the Constitution is the higher law, the President must enforce it first above any inconsistent statute.[34] The President has the authority to veto laws, which he or she should use to block laws that violate the Constitution. Some of the nation's earliest constitutional controversies, such as those over the national bank or the

27. HAND, *supra* note 25, at 28; *see also* Wechsler, *supra* note 23, at 3–5.

28. *Marbury*, 5 U.S. at 180; U.S. CONST. art. VI, cl. 3.

29. *See* Saikrishna B. Prakash & John C. Yoo, *The Origins of Judicial Review*, 70 U. CHI. L. REV. 887, 921–24 (2003).

30. U.S. CONST. art. III, §§ 1–2.

31. *See id.* art. VI, cl. 2; *id.* art. III, § 2, cl. 1.

32. *Id.* art. VI, cl. 2.

33. Paulsen, *supra* note 21, at 257; Gary Lawson & Christopher D. Moore, *The Executive Power of Constitutional Interpretation*, 81 IOWA L. REV. 1267, 1277 (1996); Frank H. Easterbrook, *Presidential Review*, 40 CASE W. RES. L. REV. 905, 919–20 (1989).

34. Paulsen, *supra* note 21, at 267.

removal power, came to a head when presidents decided whether to sign legislation.[35] Just as with the judiciary, the other branches must interpret the Constitution while carrying out their unique responsibilities. As President Andrew Jackson declared upon vetoing the reauthorization of the Second Bank of the United States: "It is as much the duty of the House of Representatives, of the Senate, and of the President to decide upon the constitutionality of any bill or resolution which may be presented to them for passage or approval as it is of the supreme judges when it may be brought before them for judicial decision."[36]

Under this structural approach, no branch reigns supreme. Each branch reaches its own interpretation of the Constitution as it executes its duties, but one cannot force the others to adopt its views. The difficult question arises when the branches adopt conflicting readings. Today's conventional wisdom would find the final word in the hands of the judiciary. Professor Laurence Tribe argues that "the Executive Branch must enforce the law according to the Executive's view of what the Constitution requires . . . so long as the Executive does not thereby usurp the role of the Article III Judiciary as the ultimate expositor of the Constitution in actual cases or controversies."[37] Daniel Farber reads *Cooper v. Aaron* to support the authority of the federal courts to finally interpret the Constitution because of the threat of destabilized federal policy in the absence of a final interpreter, a point further expanded by Alexander and Schauer.[38]

Lincoln sought resolve this tension in his responses to *Dred Scott*. In the Lincoln-Douglas debates, Senator Stephen Douglas accused candidate Lincoln of threatening anarchy for disagreeing with *Dred Scott*.[39] Lincoln conceded that asserting that refusing to enforce decisions with which he or she disagrees went too far.[40] "We do not propose that when Dred Scott has been decided to be a slave by the court, we, as a mob, will decide him to be free," Lincoln responded.[41] "[B]ut we nevertheless do oppose that decision as a political rule which shall be binding on the voter, to vote for nobody who thinks it wrong."[42] Lincoln argued that the President would have to enforce the judgment of the Court in *Dred Scott*, but he or she would not have to accept the Court's reasoning. In his first inaugural address, Lincoln explained: "[I do not] deny that

35. *See* Andrew T. Hill, *The First Bank of the United States*, FED. RSRV. HIST. (Dec. 4, 2015), https://www.federalreservehistory.org/essays/first-bank-of-the-us; John Yoo, *George Washington and the Executive Power*, 5 U. ST. THOMAS J.L. & PUB. POL'Y 1, 4–7 (2010).

36. Andrew Jackson, Veto Message (July 10, 1832), *in* 2 MESSAGES AND PAPERS OF THE PRESIDENTS, 1789–1897, at 576, 582 (James D. Richardson ed., 1896).

37. 1 LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 726 (3d ed. 2000).

38. *See* Daniel A. Farber, *The Supreme Court and the Rule of Law:* Cooper v. Aaron *Revisited*, 1982 U. ILL. L. REV. 387, 411; Larry Alexander & Frederick Schauer, *On Extrajudicial Constitutional Interpretation*, 110 HARV. L. REV. 1359, 1362 (1997).

39. *See* Senator Stephen Douglas, Debate with Abraham Lincoln at Bloomington, Illinois (July 16, 1858), *in* 3 THE WRITINGS OF ABRAHAM LINCOLN 67, 88 (Arthur Brooks Lapsley ed., 1905).

40. Abraham Lincoln, Sixth Debate with Stephen A. Douglas (Oct. 13, 1858), *in* 3 THE COLLECTED WORKS OF ABRAHAM LINCOLN 245, 254–55 (Roy P. Basler ed., 1953).

41. *Id.* at 255.

42. *Id.*

such decisions must be binding in any case, upon the parties to a suit, as to the object of that suit . . . ."[43] Decisions of the Court should receive "very high respect and consideration, in all parallel cases, by all other departments of government."[44] It might even be worth accepting mistaken decisions because of the high costs of overturning stare decisis. But "if the policy of the government, upon vital questions, affecting the whole people, is to be irrevocably fixed by decisions of the Supreme Court," Lincoln maintained, "the people will have ceased, to be their own rulers, having, to that extent, practically resigned their government, into the hands of that eminent tribunal."[45]

The Lincoln position seems contradictory in its assertion that a president can disagree with the Court's opinion while simultaneously enforcing the judgment. Lincoln had to find a middle ground between Republican opposition toward slavery and *Dred Scott* without taking the radical position of rejecting judicial review and the legitimacy of the Supreme Court.[46] But it also accords the minimum respect for the unique function of each branch within its own sphere of constitutional responsibility. If the courts alone resolve cases or controversies under federal law, Congress and the President must treat their judgments as final. These judgments are the outcome of the federal courts' exercise of their unique constitutional power to decide cases or controversies.

On the other hand, the Court's opinion represents the explanation for its judgment. As such, it is not due any effect by the other branches. If the federal courts issued only judgments and not opinions, the other branches would still have a constitutional duty to implement those judgments as the final exercise of a coordinate branch's constitutional authority. Compare the treatment of judgments to the President's pardon power. A president may pardon someone on a misguided understanding of the Constitution. He or she might issue an opinion explaining why the pardon was necessary to right an unconstitutional wrong, even if the President directly contradicted the judiciary's reading of the same constitutional provision. Nonetheless, the pardon is final and binding on the other branches. Neither the executive nor the judiciary can strike down or ignore the pardon on the grounds that the previous President misread the Constitution. Just as the political branches must respect the final decision of the courts, the courts must also give respect to the final legal decisions of the other branches within their unique competences.

B. ORIGINALISM AND ITS CRITICS

A second challenge to judicial review arises not from questions over its existence but over the best means for its application. A majority of the current

43. Abraham Lincoln, First Inaugural Address (Mar. 4, 1861), *in* 4 THE COLLECTED WORKS OF ABRAHAM LINCOLN 262, 268 (Roy P. Basler ed., 1953) [hereinafter Lincoln, First Inaugural Address].

44. *Id.*

45. *Id.*

46. DAVID HERBERT DONALD, LINCOLN 199–202 (1995).

Supreme Court appears to have embraced originalism as its guiding methodology, though with different variants. Several of the Court's most controversial recent decisions, such as *Dobbs v. Jackson Women's Health Organization*,[47] which overruled *Roe v. Wade* and returned the question of abortion to the states,[48] or *New York State Rifle & Pistol Association., Inc. v. Bruen*,[49] which expanded the Second Amendment right to possess a firearm,[50] have relied on originalism as their starting point. Whereas the Court arguably followed a common law approach for much of the Rehnquist and Roberts Courts, the appointments made to the Court by President Donald Trump appear to have shifted the intellectual debate toward originalism. In *United States v. Rahimi*,[51] for example, Justices Clarence Thomas,[52] Neil Gorsuch,[53] Brett Kavanaugh,[54] and Amy Coney Barrett[55] engaged in a debate over the proper use of historical sources. The exchanges would have made little sense if originalism were not regnant.

In its first incarnation, originalism suffered criticism from both liberals and conservatives for its lack of moral foundations. Liberal scholars such as Ronald Dworkin argued that interpreting the vague phrases of the Constitution—words such as "speech," "liberty," and "due process"—required judges to make moral judgments.[56] "The moral reading [of the Constitution] proposes that we all—judges, lawyers, citizens—interpret and apply these abstract clauses on the understanding that they invoke moral principles about political decency and justice," Dworkin writes.[57] Rather than executing the positive law, as urged by H.L.A. Hart[58] or John Hart Ely,[59] Dworkin argued that conservative as well as liberal judges were "naturally interpret[ing] abstract constitutional principles" in a conservative or liberal way.[60] What becomes important for constitutional theory, then, is not the written text but choosing and applying the best moral values.[61]

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47. 597 U.S. 215 (2022).
48. *Id.* at 231–32 (overruling Roe v. Wade, 410 U.S. 113 (1973)).
49. 597 U.S. 1 (2022).
50. *Id.* at 70–71.
51. 602 U.S. 680 (2024).
52. *Id.* at 747 (Thomas, J., dissenting).
53. *Id.* at 708 (Gorsuch, J., concurring).
54. *Id.* at 714 (Kavanaugh, J., concurring).
55. *Id.* at 737 (Barrett, J., concurring).
56. RONALD DWORKIN, FREEDOM'S LAW: THE MORAL READING OF THE AMERICAN CONSTITUTION 7 (1996).
57. *Id.* at 2.
58. H.L.A. HART, THE CONCEPT OF LAW 207 (1st ed. 1961); *see also* JOSEPH RAZ, THE AUTHORITY OF LAW 40 (1979).
59. ELY, *supra* note 25.
60. DWORKIN, *supra* note 56, at 2–3.
61. For similar views, see LAURENCE H. TRIBE, GOD SAVE THIS HONORABLE COURT 45 (1st ed. 1985), Paul Brest, *The Misconceived Quest for the Original Understanding*, 60 B.U. L. REV. 204, 226 (1980), and Owen M. Fiss, *The Supreme Court 1978 Term—Forward: the Forms of Justice*, 93 HARV. L. REV. 1, 11 (1979).

Judge Robert Bork and Justice Antonin Scalia proposed originalism as a response to the problem of judicial decision making based on moral theory rather than neutral positivism. Justice Scalia argued that the Constitution did not vest federal judges with the power to insert their moral views into the text, and further observed that "nonoriginalists," as he called them, could not agree among themselves on the moral theory to be adopted.[62] "Are the 'fundamental values' that replace original meaning to be derived from the philosophy of Plato, or of Locke, or Mills, or Rawls, or perhaps from the latest Gallup poll?" Scalia asked.[63] Originalism, he concluded, is "more compatible with the nature and purpose of a [c]onstitution in a democratic system" because it reserves to elected legislatures and executives the job of expressing current values, while assigning to the courts the role of preventing change when it conflicts with original fundamental values.[64] Bork similarly defended originalism with the argument that judges who resorted to finding a "living Constitution" based on contemporary norms were usurping the rightful authority of the political branches, of the states, and ultimately of the people to engage in self-government.[65]

Conservative political theorists who traced their intellectual lineage to the teachings of Leo Strauss criticized the Bork-Scalia version of originalism for its claim of neutrality. In this respect, they made the same argument as Dworkin—that interpreting the Constitution according to moral values is inescapable—but argued that liberals were using the wrong philosophical system. Professor Harry Jaffa took Bork to task for devising an originalism that ignored the natural rights of the Declaration of Independence.[66] "That judges should be neutral interpreters of the law is one thing: but to say that the law itself is essentially neutral—that it is mere process without purpose—is another," Jaffa argues.[67] Honoring the original understanding means enforcing natural rights, whether they appear in the text of the Constitution or not. "This means—in flat opposition to the Bork of today—that the free exercise of religion is a constitutional right, whether or not it is written in the Constitution."[68] Professor Hadley Arkes criticized Bork—and positivism—by arguing that even the written text of the Constitution and the Bill of Rights could have meaning only when read in the context of "the structure of moral understanding that must lie behind the text of

62. Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849, 854–55 (1989).

63. *Id.* at 855.

64. *Id.* at 862.

65. ROBERT H. BORK, THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW 153 (1990).

66. HARRY V. JAFFA, STORM OVER THE CONSTITUTION 1–12 (1999).

67. *Id.* at 4.

68. *Id.* at 6. For an approach that grounds legal protection for natural rights through the Constitution's text, see VINCENT PHILLIP MUÑOZ, RELIGIOUS LIBERTY AND THE AMERICAN FOUNDING: NATURAL RIGHTS AND THE ORIGINAL MEANINGS OF THE FIRST AMENDMENT RELIGION CLAUSES 229–35 (2022).

the Constitution."[69] Both Jaffa and Arkes denied Bork and Scalia's basic claim that the majority could ultimately do as it pleased, limited only by the Constitution's structural provisions and negative rights as originally understood by the ratifiers. In the view of Jaffa and Arkes, natural rights, based on the equality of individual human beings, barred even the positive law from reaching certain prohibited results (such as slavery or abortion).

Originalism in its more recent version has come under renewed attack, again from both liberals and conservatives, but with upgrades. The Left has launched a renewed attack, through the lens of racial and gender identity on the Founding's commitment to the principles of the Declaration of Independence. This critique expands upon Justice Thurgood Marshall's bicentennial speech criticizing the Founding as "defective from the start" because of slavery.[70] According to Justice Marshall, the United States was only able "to attain the system of constitutional government, and its respect for the individual freedoms and human rights" with "several amendments, a civil, war, and momentous social transformation."[71] Justice Marshall himself could trace the roots of his thought to abolitionist William Lloyd Garrison, who famously denounced the Constitution as a "compact with the devil" and an "agreement with hell" for its acceptance of slavery.[72] Contemporary critics hold no love for a document that originally excluded racial minorities and women from the franchise, vests power in a Senate that ignores population, and creates a presidency that they believe can verge on dictatorship. In *The 1619 Project*, The New York Times put a capstone on this critique by claiming that "our democracy's founding ideals were false when they were written."[73] Instead of 1776 or 1789, according to this account, America's true founding occurred in 1619 with the arrival of the first African American slaves.[74] That event allegedly launched a nation that has oppressed racial minorities for more than four centuries.[75] These writers could rely on some historians of the Founding, who had argued that the Framers either did not understand the principle of equality in the Declaration of Independence or did not believe in it.[76] Regardless of the efforts of scholars to defend the

69. Hadley Arkes, Russell Hittinger, William Bentley Ball & Robert H. Bork, *Natural Law and the Law: An Exchange*, FIRST THINGS (May 1, 1992), https://www.firstthings.com/article/1992/05/natural-law-and-the-law-an-exchange. For a broader exposition of his views, see generally ARKES, *supra* note 11.

70. Thurgood Marshall, Essay, *The Constitution's Bicentennial: Commemorating the Wrong Document?*, 40 VAND. L. REV. 1337, 1338 (1987).

71. *Id.*

72. *"A Covenant with Death and an Agreement with Hell,"* MASS. HIST. SOC'Y (July 2005), https://www.masshist.org/object-of-the-month/objects/a-covenant-with-death-and-an-agreement-with-hell-2005-07-01.

73. Nikole Hannah-Jones, *Our Democracy's Founding Ideals Were False When They Were Written. Black Americans Have Fought to Make Them True*, N.Y. TIMES MAG. (Aug. 14, 2019), https://www.nytimes.com/interactive/2019/08/14/magazine/black-history-american-democracy.html.

74. *See* NIKOLE HANNAH-JONES, THE 1619 PROJECT: A NEW ORIGIN STORY 8–11 (2021).

75. *See 1619 Project*, N.Y. TIMES MAG., Aug. 18, 2019, at 81.

76. For example, see sources cited in THOMAS G. WEST, VINDICATING THE FOUNDERS: RACE, SEX, CLASS, AND JUSTICE IN THE ORIGINS OF AMERICA, at xi–xv, 1–2 (1997).

Framers from these accusations,[77] it seems logical that if the Constitution came from the unclean hands of Framers who followed an immoral political theory, contemporary interpreters should not honor their intentions. "I do not believe that the meaning of the Constitution was forever 'fixed' at the Philadelphia Convention," Justice Marshall said in 1987.[78] "Nor do I find the wisdom, foresight, and sense of justice exhibited by the Framers particularly profound."[79] Or as Professor Jack Beerman writes in an essay entitled *The Immorality of Originalism*: "[T]he injustices that have plagued American society are an independent reason for rejecting originalism as a morally justifiable method of constitutional interpretation."[80]

Fire on originalism from the opposite end of the intellectual spectrum claims even deeper historical roots. Prominently raised by Professor Vermeule, a school of thought that is coming to be known as "common good constitutionalism" argues that originalism has no moral content in itself.[81] Instead, he argues, interpreters should follow the approach of the classical legal tradition.[82] Professor Vermeule defines the classical legal tradition as the millennia-old western framework, stretching back to St. Thomas Aquinas's and the ancient philosophers', such as Aristotle's, understanding of law "as an ordinance of reason promulgated by political authorities for the common good."[83] He argues, in an Essay co-written by Professor Conor Casey, that a classical legal approach to constitutionalism would identify the "primacy of the common good and human flourishing as the justification for political authority" and would closely link legal interpretation "to principles of legal morality conducive to this end."[84] The common good, Vermeule and Casey observe, does not derive from the aggregation of individual private goods (as modern

77. *See id.* at xii; *see also* THE PRESIDENT'S ADVISORY 1776 COMMISSION, THE 1776 REPORT 1 (Jan. 2021), https://trumpwhitehouse.archives.gov/wp-content/uploads/2021/01/The-Presidents-Advisory-1776-Commission-Final-Report.pdf.

78. Marshall, *supra* note 70.

79. *Id.* For a positive evaluation of Marshall's criticism, see Michael S. Lewis, *Evil History: Protecting Our Constitution Through an Anti-Originalism Canon of Constitutional Interpretation*, 18 U.N.H. L. REV. 261, 266 (2020) ("[T]he founding generation was too morally compromised, too bereft of information we now have as a result of the existence and experiences of millions of Americans since the close of the 18th century, and too imperfect in its efforts to design a sustainable government, to justify the devotion to their perspective originalism demands.").

80. Jack M. Beerman, *The Immorality of Originalism*, 72 CATH. U. L. REV. 445, 459 (2023); *see also* ERWIN CHEMERINSKY, WORSE THAN NOTHING: THE DANGEROUS FALLACY OF ORIGINALISM 93 (2022) ("The Constitution was written in the late eighteenth century for a largely agrarian society where slavery existed in many states. The values of that time were in many ways tremendously different from ours. . . . It makes no sense to say that the Constitution is limited to the understandings at the time of its drafting or of those who adopted the amendments after the Civil War.").

81. VERMEULE, *supra* note 11.

82. *Id.* at 89–90.

83. Conor Casey & Adrian Vermeule, *Myths of Common Good Constitutionalism*, 45 HARV. J.L. & PUB. POL'Y 103, 108 (2022).

84. *Id.* at 107 (citing Conor Casey, *"Common Good Constitutionalism" and the New Battle Over Constitutional Interpretation in the United States*, 4 PUB. L. 765 (2021)).

liberalism would have it), but instead "is the happiness or flourishing of the community, the well-ordered life in the *polis*."[85] The common good, then, is "the structural political, economic and social conditions that allow communities to live in accordance with the precepts of justice," and is "unitary, capable of being shared without being diminished, and the highest good for individuals as such."[86]

The common good constitutionalist critique of originalism has two parts. First, it criticizes descriptive claims that originalism is already the governing approach to constitutional interpretation.[87] It argues that originalism is not followed in practice, rests on contested, perhaps even idiosyncratic, assumptions about positivism, and comes in inconsistent theoretical flavors.[88] Vermeule and Casey argue that originalists have failed to show that the U.S. constitutional system truly rejects unwritten background principles of law, such as natural law and the law of nations, without which the positive law would lack context and definition.[89] Most judges do not employ originalism, while originalist scholars manipulate the levels of generality in their analyses to "encompass any moral novelties the legal professoriate can dream up today."[90]

Second, common good constitutionalism criticizes originalism's claim that it is morally neutral.[91] At best, originalism advances legal stability and maintains political institutions. But originalist appeals to these second-order values, Vermeule and Casey observe, cannot supersede the first-order values of peace and justice.[92] Appeals to institutionalism and stability do not have purchase unless we know the higher values that the legal and political system serve.[93] "If the originalist regime yields 'stability' of a sort by producing a steady, predictable stream of deeply unjust first-order results, or merely fails to prevent such results," Vermeule and Casey write, "then the common good condemns rather than supports originalism."[94]

Originalists have struggled to respond to these challenges. In response to the critique of the Left, some theorists have argued that the Framers understood politics as governed by natural rights and natural law. "In the decades leading up to independence, the colonists had adopted a body of political ideas that justified and promoted the American drive toward self-rule," political scientists

85. *Id.* at 110.

86. *Id.* at 111, 113–14.

87. For an example of such arguments, see William Baude, Essay, *Is Originalism Our Law?*, 115 COLUM. L. REV. 2349 (2015) and William Baude & Stephen E. Sachs, *The Law of Interpretation*, 130 HARV. L. REV. 1079 (2017).

88. Adrian Vermeule, *Enriching Legal Theory*, 46 HARV. J.L. & PUB. POL'Y 1299, 1300–01 (2023).

89. Casey & Vermeule, *supra* note 83, at 124–26.

90. *Id.* at 129.

91. *Id.* at 127.

92. *Id.* at 126–27.

93. *Id.* at 127.

94. *Id.* at 126–27.

Thomas West writes.[95] "At the foundation of these ideas was the claim that all men are created equal."[96] Human equality and freedom dictated that all individuals enjoyed inalienable rights, beginning with those to life, liberty, and property.[97] As Harry Jaffa, Philip Hamburger, and Philip Munoz have argued, natural rights include freedom of speech and religion.[98] Natural rights, as understood by "[e]very leading Founder," West argues, led each to "acknowledge[] that slavery was wrong."[99] Rather than advancing racism, the Founders accepted a necessary compromise with slavery in the Southern states to achieve the greater good of the Union. That Union created a government that would eventually end slavery.[100] These scholars reject the criticism of *The 1619 Project* by defending the Constitution on the moral ground that it protects natural rights. As Arkes writes in *Mere Natural Law*, "the Natural Law supplied for the Founding an anchoring *moral truth* about the rightful and wrongful governance of human beings," and the core principle of the natural law was the equality of human beings and government by consent.[101]

A second set of scholars defend originalism on instrumental grounds. Professors John McGinnis and Michael Rappaport argue that originalism is desirable because the original Constitution itself establishes morally beneficial rules.[102] They build their theory on the fact that the Constitution adopts a supermajority rule for its own enactment and amendment.[103] These "supermajority rules tend to produce desirable entrenchments"[104] because they represent the consensus of a large portion of society, are less the product of partisanship, and establish norms that are designed to operate far into the future. McGinnis and Rappaport argue that supermajority rules "improve[] the quality of entrenchments by helping to create a limited veil of ignorance."[105] If the Constitution creates morally good rules, then originalism is justified instrumentally for rooting interpretation in its original meaning. "[O]riginalism advances the welfare of the present day citizens of the United States," McGinnis

95. THOMAS G. WEST, THE POLITICAL THEORY OF THE AMERICAN FOUNDING: NATURAL RIGHTS, PUBLIC POLICY, AND THE MORAL CONDITIONS OF FREEDOM 21 (2017).

96. *Id.*

97. U.S. CONST. amend. V.

98. *See* HARRY V. JAFFA, HOW TO THINK ABOUT THE AMERICAN REVOLUTION 111 (1978); Philip A. Hamburger, *Trivial Rights*, 70 NOTRE DAME L. REV. 1, 6 (1994); Philip A. Hamburger, *Natural Rights, Natural Law, and American Constitutions*, 102 YALE L.J. 907, 958 (1993); VINCENT PHILIP MUNOZ, GOD AND THE FOUNDERS: MADISON, WASHINGTON, AND JEFFERSON 1–2 (2009).

99. WEST, *supra* note 76, at xiii.

100. BERNARD BAILYN, FACES OF REVOLUTION: PERSONALITIES AND THEMES IN THE STRUGGLE FOR AMERICAN INDEPENDENCE 222–23 (1992).

101. ARKES, *supra* note 11, at 9.

102. John O. McGinnis & Michael B. Rappaport, *A Pragmatic Defense of Originalism*, 101 NW. U. L. REV. 383, 385 (2007) [hereinafter McGinnis & Rappaport, *A Pragmatic Defense*]. McGinnis and Rappaport expand on their argument in JOHN O. MCGINNIS & MICHAEL B. RAPPAPORT, ORIGINALISM AND THE GOOD CONSTITUTION (2013).

103. McGinnis & Rappaport, *A Pragmatic Defense*, *supra* note 102.

104. *Id.*

105. *Id.* at 388.

and Rappaport write, "because it promotes constitutional interpretations that are likely to have better consequences today than those of nonoriginalist theories."[106]

A third response claims authority for originalism from the nature of law itself. Professors William Baude and Stephen Sachs argue that the law of the Founders, such as the Constitution, remains the law today unless it is authoritatively changed.[107] "Officially, we treat the Constitution as a piece of enacted law that was adopted a long time ago," Baude and Sachs write, "[W]hatever law it made back then remains the law, subject to various de jure alterations or amendments made since."[108] Therefore, the proper means of interpreting the Constitution is to seek the meaning it held when adopted. "[W]e identify modern law by way of this past law . . . explaining how a legal rule enjoys [legitimate authority] today means explaining how it lawfully arose out of the government established at the Founding," they argue.[109] Baude and Sachs defend this "original-law originalism" with the claim that it describes much legal and judicial practice, helps solve many contentious legal disputes, and that challenges to its positive description of practice remain weak.[110] In the positivist terms of Hart, originalism is the rule of recognition that allows our system to identify authoritative legal rules; we know that originalism is itself the rule of recognition through observing legal and judicial practice.[111]

These defenses of originalism suffer from serious difficulties. These questions are more fundamental than the much-discussed questions of implementation: whether the Framers held any collective understanding of constitutional meanings, whether we can accurately recapture it with the historical sources available, and the proper level of generality for its application.[112] Efforts to defend originalism based on a claim that the Framers held superior moral views than critics believe nevertheless will not persuade those with different moral views. Arkes and West, for example, may convince readers that the Founders agreed on natural law as their governing political theory; indeed, there were few, if any, competing political philosophies at that time in Europe and the Americas.[113] But their argument depends wholly on acceptance of the idea that natural rights and natural law form the universal

106. John O. McGinnis & Michael B. Rappaport, *Originalism and the Good Constitution*, 98 GEO. L.J. 1693, 1695 (2010).

107. *See* William Baude & Stephen E. Sachs, *Grounding Originalism*, 113 NW. U. L. REV. 1455, 1457 (2019).

108. *Id.*

109. *Id.*

110. *Id.* at 1457, 1459–60.

111. *Id.* at 1464–65.

112. For examples of the extensive criticism of originalism on such implementation grounds, see Paul Brest, *The Misconceived Quest for the Original Understanding*, 60 B.U. L. REV. 204, 205 (1980); David A. Strauss, *Common Law Constitutional Interpretation*, 63 U. CHI. L. REV. 877, 877 (1996); Jack M. Balkin, *The Construction of Original Public Meaning*, 31 CONST. COMMENT. 71, 93 (2016); CHEMERINSKY, *supra* note 80, at 10–11.

113. *See* WEST, *supra* note 95, at 19–23.

moral framework for society. It is not clear, to say the least, that this is true. Many moral philosophers today appear to reject a system of natural rights that is based on an individual human equality created by God. Jeremy Bentham famously argued that natural rights amounted to "nonsense on stilts" because they had no true historical origins and they ignored the need for positive enactment and enforcement.[114] A defense of originalism based on natural law will not convince Rawlsians, Marxists, or those in between, for example.

A consequentialist defense of originalism runs into different challenges. Supermajority rules may yield beneficial outcomes, on average, because they require more coalition building and less partisanship. In *Federalist No. 10*, James Madison made a similar argument that the difficulty in enacting federal legislation in an "extensive republic[]" would reduce the influence of factions.[115] But supermajority rules may also prevent welfare-enhancing policies that cannot overcome a determined, self-interested minority. The Senate filibuster allowed the Southern states of the former confederacy to block civil rights legislation for eight decades.[116] Supermajority rules protect the status quo; their morality depends on the justice of the status quo at the time of their creation. Supermajority rules can protect an unjust legal system by rendering reform efforts difficult, as the Constitution did with regard to slavery. Indeed, McGinnis and Rappaport, the leading consequentialist defenders of originalism, admit that "the exclusion of most African-Americans from the constitutional enactment process was an enormous failure of the supermajoritarian process."[117] If African Americans could not participate in the adoption of the Constitution, and its subsequent operation deprived them of their natural rights, it is doubtful that consequentialism can justify the adoption of a rule of interpretation that honors the original bargain that excluded them. The Reconstruction Amendments—the Thirteenth, Fourteenth, and Fifteenth Amendments—restored the equality of rights for African Americans, though the nation did not live up to its constitutional obligations for another century. But even if the Reconstruction Amendments corrected the errors of the 1787 Constitution, consequentialists cannot explain why originalism should focus on the Founders' choices, which so badly harmed minorities.

The next Part of this Article develops a different consequentialist defense of originalism. It does not attempt to meet the common good constitutionalism challenge on the basis of moral theory. Common good constitutionalists will not persuade Rawlsians or Marxists about the superiority of their approach to justice,

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114. *See* JEREMY WALDRON, *Jeremy Bentham's Anarchical Fallacies*, *in* NONSENSE UPON STILTS: BENTHAM, BURKE AND MARX ON THE RIGHTS OF MAN 29, 42 (Routledge 2015) (1987).

115. THE FEDERALIST NO. 10, at 47 (James Madison) (George W. Carey & James McClellan eds., 2001).

116. *See* Sarah Binder, *Mitch McConnell Is Wrong. Here's the Filibuster's 'Racial History.'*, WASH. POST (Mar. 24, 2021), https://www.washingtonpost.com/politics/2021/03/24/mitch-mcconnell-is-wrong-heres-filibusters-racial-history ("Of the 30 measures [derailed by filibusters] we identified between 1917 and 1994, exactly half addressed civil rights . . . .").

117. McGinnis & Rappaport, *supra* note 106, at 1757.

and vice versa. Common good constitutionalists, such as Vermeule, and followers of Strauss, such as Arkes, may even share common ground on the primacy of natural law and natural rights yet still disagree over originalism. The next Part instead sets forth a theory of judicial review that explains why today's interpreters would seek to enforce the understanding of the Framers. I argue that because the Constitution codified a political bargain that made the establishment of the United States as a nation-state possible, judges should continue to enforce the original terms of the agreement. Without the availability of a judiciary following an originalist methodology, the North and South would have lost a significant device to enforce commitment to the deal that established the United States. Once the North and South established the Union, then the United States could bring forth consequences whose benefits outweighed their costs and established the means by which the moral goals of competing theories, such as common good constitutionalism, liberalism, Marxism, or natural rights, could achieve their fulfillment.

II. JUDICIAL REVIEW (AND ORIGINALISM) WITHOUT ROMANCE

This Part provides a different approach to the role of the Constitution, judicial review, and interpretation. It is not rooted in claims about its legitimacy in the text, structure, or history of the Constitution, but rather a rational choice explanation for vesting the authority to decide constitutional questions in the courts, and why they should generally follow originalism as the means of interpretation. It relies neither on romanticism about American history nor instrumental attachment to protecting individual rights from majorities. Instead, it employs bargaining theory to explain why rational lawmakers would call upon the judiciary to enforce a constitution consistent with its original understanding. Constitutions can perform many functions, including organizing the national government, defining its powers, creating rules for its selection and operation, and protecting the rights of individuals. This Article discusses the role of a constitution as a power-sharing agreement that allows different regions to live together as a single nation-state.

The U.S. Constitution created a nation-state by using federalism to allow interests to live under a common government. One way to think of federalism is as a way for different regions to reach a stable bargain over sharing power. Political economists have argued that the size of a nation is determined by the trade-off between the benefits of scale for larger nations versus the heterogeneity of preferences within the nation. The discussion that follows draws from Alberto Alesina and Enrico Spolaore's *The Size of Nations*,[118] and Daron Acemoglu and James Robinson's *Why Nations Fail: The Origins of Power, Prosperity, and*

118. *See* ALBERTO ALESINA & ENRICO SPOLAORE, THE SIZE OF NATIONS 1–3 (2005).

Poverty,[119] and is consistent with Robert Cooter's explanation of federalism as a competition between governments to provide public goods.[120]

Nations can benefit from larger population size because expansion reduces the cost of providing public goods, such as defense, common markets, law and order, and infrastructure. While the cost of some public goods may increase at a steady per capita rate, others may require initial high investments that can be more cheaply spread among a larger population. Purchasing weapon systems or building fixed defenses may generate high initial costs, but economies of scale can reduce the per capita cost of defending a nation with a larger population. Larger nations will benefit from the creation of larger markets. A larger nation can create a larger internal free trade area, while raising trade barriers to outsiders.

Nations, of course, cannot expand endlessly. The larger a country becomes, the more likely it may contain groups with conflicting cultures, ethnicities, religions, or histories. Greater geographical size will generate heterogeneous policy preferences between different regions. As a nation grows larger, it is less likely that the policy choices of the central government will satisfy all of these groups.[121] At some point, the deviation of central policy from the preferences of local groups will become so great that the local groups may attempt to secede. This may occur when the gap between the preferences of the majority and the preferences of minority groups outweighs the benefits from the additional public goods provided by the central government.

Nevertheless, groups will have an incentive to combine and form a larger nation when they achieve lower costs for the public goods of defense and free trade. This incentive will be stronger if the groups face external threats and can defend themselves by combining or if they compete with discriminatory trading partners. But groups will experience difficulties in combining because they will have to share enough power to provide public goods, but without creating a central government that may eliminate their freedom and suppress their divergent preferences. As Thomas Schelling observed, "conflict situations are essentially bargaining situations."[122] Nations will seek to acquire territory, population, goods, or resources. They will wish to stop harms, such as pollution, drugs, terrorism, disease, or excessive migration. Nations may come into conflict when these goals meet the agenda of other nations. They may want to add territory and population held by another or seek to stop pollution emitted by the factories of another country. A crisis will arise when the two sides cannot reach an agreement that peacefully divides the benefits at stake. James Fearon and Robert Powell advanced Schelling's insight to construct a sophisticated

119. DARON ACEMOGLU & JAMES A. ROBINSON, WHY NATIONS FAIL: THE ORIGINS OF POWER, PROSPERITY, AND POVERTY 3–4 (2010).

120. *See* ROBERT D. COOTER, THE STRATEGIC CONSTITUTION 140–48 (2000).

121. *Id.* at 18–23.

122. THOMAS C. SCHELLING, THE STRATEGY OF CONFLICT 5 (1st ed. 1960) (emphasis omitted).

model of the choice between war and peace.[123] Under their approach, rational nations with perfect information should favor a settlement over conflict to resolve a dispute.[124] The primary reason is that states can avoid the deadweight loss of war by reaching an agreement.[125]

With full information, two states in a dispute should reach a settlement rather than turn to armed hostilities. If both sides know the expected values of going to war, they can simply divide the resource based on the differences in their probability of winning. They will receive the expected benefit of any conflict but avoid the expected cost. One condition that might prevent a conflict, however, is if the two countries place greatly different values on the resource in question. War, in Powell's words, is an "inefficiency puzzle."[126]

The rational actor model of war provides a means to understand how nations can overcome this bargaining failure.[127] Because war is so devastating, rational actors with complete information should always prefer a negotiated settlement to armed conflict. Wars, for example, often conclude with bargains—in the form of treaties—that both sides prefer to conflict. Both sides are better off by simply agreeing to a settlement and avoiding the deadweight costs of war. Nevertheless, wars continue to break out, in particular—since the end of World War II—civil wars, which now far outpace interstate wars in their level of casualties and destructiveness.[128]

Suppose a majority government and a smaller, minority group dispute the control of territory. The smaller group issues a threat that it is willing to use force unless the government withdraws. The government must decide whether to accede to the demand or to resist with force. Both the government and the minority group have an expected value of going to war, which is a function of the probability that each will win the conflict and the value of controlling the territory, minus the expected cost of fighting. If the government knows that the expected value of controlling the territory is lower for the minority group than the likely cost of any conflict, it will not back down because it knows that a rational opponent would not wage war. Likewise, if the government knows that the expected value of controlling the territory is higher for the minority group than the likely cost of war, it will not go to war because it knows that the benefits

123. James D. Fearon, *Rationalist Explanations for War*, 49 INT'L ORG. 379, 380–81(1995); Robert Powell, *War as a Commitment Problem*, 60 INT'L ORG. 169, 179 (2006).

124. Fearon, *supra* note 123; Powell, *supra* note 123.

125. Powell, *supra* note 123.

126. *Id.* at 169.

127. *See* Fearon, *supra* note 123, at 379–81; Robert Powell, *Bargaining Theory and International Conflict*, 5 ANN. REV. POL. SCI. 1, 4 (2002); Kenneth A. Schultz, *Do Democratic Institutions Constrain or Inform?: Contrasting Two Institutional Perspectives on Democracy and War*, 53 INT'L ORG. 233, 236 (1999). I have sought to apply this strain of rational choice theory and bargaining to international law issues in JOHN YOO, POINT OF ATTACK: PREVENTIVE WAR, INTERNATIONAL LAW, AND GLOBAL WELFARE 107–58 (2014).

128. *See Understanding Intrastate Conflict*, COUNCIL ON FOREIGN RELS. (May 16, 2023), https://education.cfr.org/learn/reading/understanding-intrastate-conflict; *see also What Is Interstate Conflict?*, COUNCIL ON FOREIGN RELS. (May 16, 2023), https://education.cfr.org/learn/reading/what-interstate-conflict (showing a sharp decrease in deaths from interstate conflicts in the second half of the 20th century).

outweigh the costs for the minority. In both cases, the government and the minority group should reach a bargain. A settlement codifies the probable outcome of any conflict while avoiding the deadweight loss of warfare. The only change will be whether the territory remains within the control of the minority group or the government.[129]

Even though both groups act rationally and should want a settlement rather than war, a conflict can still break out. Incomplete information can cause the groups to make errors in estimating important variables. The government may misjudge its opponent's expected value of war. It may understand the value of the territory to the minority, but it may lack valuable information on the probability that the minority will prevail in a conflict. That probability will depend on several factors, such as military capabilities and skill, economic resources, and popular support. Much of this information is likely to be private and hard to discover. The government might lack intelligence, for example, on its opponent's military units, armament, or fighting effectiveness. Conversely, the minority may have little information on the popular support for government forces or its abilities to redeploy troops to the disputed area.

If the two groups could reveal private information in a credible way, they could overcome these information asymmetries. But problems stand in the way. First, they might provide false information on their probability of winning to their opponent. Overstating the expected benefit from a war would allow a player to negotiate a better deal.[130] Bluffing could produce a more favorable settlement than the facts would support. Second, to reveal private information credibly, the player must send a costly signal. One way that the government, for example, can send a credible signal is to take action that will incur internal political costs in the case of a bluff.[131] If political leaders make public threats to use force, for example, they could experience a loss of public support if they back down during negotiations. A party can also send a signal by undertaking a course of action that requires significant ex ante investments or produces high ex post costs, such as building bases or local infrastructure in a disputed region. Regional, ethnic, and religious tensions, however, may make different groups particularly distrustful of each other. Groups could try to send credible signals through a third party. Both sides must trust the third party to provide accurate, reliable information that is not biased toward either party.

Commitment problems pose an even greater obstacle to an agreement than imperfect information. Full information allows each party to understand the

129. Several assumptions underlie this model. Neither group is risk-seeking and would not gamble on a low-probability victory. The territory in dispute is divisible or can be transferred as a whole with compensating side payments, linked deals, or different spheres of influence. Neither group can prevail by completely eliminating the other, so that any conflict may result in the loss of the territory, but not the end of the conflict.

130. *See* Sebastian Rosato, *The Flawed Logic of Democratic Peace Theory*, 97 AM. POL. SCI. REV. 585, 599 (2003); James D. Fearon, *Domestic Political Audiences and the Escalation of International Disputes*, 88 AM. POL. SCI. REV. 577, 578 (1994).

131. *See* Schultz, *supra* note 127, at 241.

other side's expected benefits and costs, and therefore to identify the bargaining range. Both parties can reach a resolution and can agree on a division of the territory. But even if groups have full information about the other's probability of prevailing in conflict and the value they place on the territory, they may still be unable to reach a bargain because they may not trust each other to keep their promises.[132] In domestic affairs, this obstacle does not pose as serious a problem because parties ultimately can rely on the courts or the government to enforce their contracts. But in an environment characterized by weak institutions, the parties cannot turn to a greater power to force compliance with an agreement. Parties to a treaty may otherwise have little reason to trust each other to keep their commitments. In the field of international relations, James Fearon and Robert Powell have argued that the lack of supranational institutions with real enforcement power makes it more difficult for states, even with perfect information, to reach international agreements.[133]

This model illuminates the challenges to constitution-making. Groups may wish to negotiate to form a larger union to take advantage of the collective provision of public goods or to settle a dispute, but they will lack credible mechanisms to enforce power-sharing agreements. No third party is likely to exist that is powerful enough to enforce an agreement between the groups. Struggles involving territory or natural resources can compound this problem. The division of an asset in dispute could give one side an advantage in the future. Suppose, for example, that a government and a rebel group could settle a territorial problem by agreeing to a division of the land in question. Assume that the division would give the minority a distinct advantage in any future dispute by providing it with additional resources and reducing advantages for the government. The government cannot count on the minority to uphold the agreement in the future; instead, the minority may take advantage of the relative shift in resources to seek even further gains. The same would be true if the division of territory favored the government; the minority could not trust the government to seize its advantage and renege on the agreement for more favorable terms. The lack of an enforcement mechanism can discourage the two groups from reaching a settlement, even though they might have complete information about the other side's expected value for the dispute.

A constitution embodies an agreement that can settle a dispute and, more broadly, allows groups to realize the benefits of cooperation. The analysis, however, should not differ much between avoiding a conflict and engaging in cooperation. Avoiding the deadweight costs of war and realizing the benefits of cooperation are both improvements in welfare in different directions, but on the same scale. Divisions between groups could run along several different fault

132. *See, e.g.*, Powell, *supra* note 123, at 181; Robert Powell, *The Inefficient Use of Power: Costly Conflict with Complete Information*, 98 AM. POL. SCI. REV. 231, 237 (2004).

133. Fearon, *supra* note 123, at 384; ROBERT POWELL, IN THE SHADOW OF POWER: STATES AND STRATEGIES IN INTERNATIONAL POLITICS 9 (1999).

lines, such as geography, economic system, religion, or ethnicity. The Framers, for example, had to reach compromises between several competing groups, such as North and South, free states and slave states, large and small states, creditors and debtors, and commercial and agricultural economies. These groups expressed their deals at the constitutional level. The Framers bridged the divide that threatened the very future of the Nation—between large states and small states—by creating a Congress with a House of Representatives elected by the population and a Senate representing the states.[134] They solved another crisis by allowing state law to decide on slavery but gave Congress the authority to regulate the territories and to end the slave trade by 1808.[135]

Obstacles challenged the ability of these groups to agree upon the compromises necessary to create a new form of national government. For simplicity, assume that the North and the South could agree to a union that would provide greater public goods of national defense and a common market across a larger space. The North and South could also choose to do it alone, which could eventually have led to a conflict. Rational leaders of both sides should reach an agreement when the gains from cooperation outweigh the benefits of separation or conflict. Situations that pose the possibility of conflict should produce high incentives to settle disputes peacefully, because nations can avoid the deadweight losses from going to war.[136] North and South could divide resources, redraw borders, or end a struggle that gives each side some benefit and forgoes the costs of failing to cooperate or coming into conflict. Based on the rational actor model above, North and South should divide the benefits of unification based on the ratio of their expected gains if they had gone forward with their dispute, which would depend on their political, economic, and military strength and their probability of prevailing.

This approach bears a close similarity to the law and economics analysis of litigation, where parties acting rationally and with full information should always prefer settlement to going to court, which will consume time and money.[137] Parties will face difficulties in reaching the agreement in asymmetric information over the range of the settlement and in the financial resources available for litigation. The modern discovery system, however, forces parties to provide information to each other, with courts supervising the process to guarantee truthfulness. Full information allows parties to reach a settlement that avoids the deadweight loss of litigation costs, while the courts and police provide a credible mechanism for enforcement of the deal.

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134. *See, e.g.*, JACK N. RAKOVE, ORIGINAL MEANINGS: POLITICS AND IDEAS IN THE MAKING OF THE CONSTITUTION 161–202 (1996).

135. *Id.* at 88.

136. *See, e.g.*, Fearon, *supra* note 123, at 380; Powell, *supra* note 132; Powell, *supra* note 123.

137. *See, e.g.*, Robert D. Cooter & Daniel L. Rubinfeld, *Economic Analysis of Legal Disputes and Their Resolution*, 27 J. ECON. LITERATURE 1067, 1082 (1989); Robert D. Cooter & Daniel L. Rubinfeld, *An Economic Model of Legal Discovery*, 23 J. LEGAL STUD. 435, 447 (1994).

This is not the case, however, with bargaining between the North and South. Leading scholars of international relations begin with the fundamental observation that the international system is characterized by anarchy.[138] The world does not enjoy a unified government that has a monopoly on violence and can maintain law and order. Anarchy does not necessarily produce a philosopher's state of nature with a war of all against all. Problems extending beyond a state's borders will produce opportunities for cooperation.[139] Even with security, nations have an incentive to form alliances that pool resources to defend against potential threats. They can cooperate to take advantage of free trade, environmental protection, and the coordination of transportation and communication networks. States can enjoy mutual gains if they can commit to reciprocal actions, such as lowering trade barriers to capitalize on a comparative advantage. The Constitution, for example, effectively committed the states to reduce trade barriers and create the largest free trade area in the world at that time.[140]

Anarchy, however, impedes the ability of states to enforce those agreements, despite their benefits to all parties. Without effective supranational courts or police to compel compliance, parties can renege on an agreement—here, a constitution—without consequence, other than retaliation from the other states. This produces a classic prisoner's dilemma: two suspects could receive the lowest sentences if they could only cooperate on their stories, but they cannot because of a lack of trust. Similarly, states might not enter into agreements because they do not trust their partners to live up to their promises. This problem will be particularly acute where one party must take a first step that bears high costs before the other party must act. For example, a state that has strong offensive military capabilities, but weak defensive systems, may be reluctant to hand over territory to a national government, and lose its tactical advantages, without a firm guarantee that the other states will withdraw too. Without institutional mechanisms for enforcement, the first state cannot be sure that the second state will not exploit its vulnerabilities during its first step.

Suppose, for example, that when the North and South are considering whether to unify, the North held 55 percent of the nation's economic and military power and the South held 45 percent. They decide to establish institutions that give the North a 55 to 45 percent advantage in political power to mirror the existing balance. But suppose that the North's 55 percent advantage in power

138. HANS J. MORGENTHAU, POLITICS AMONG NATIONS: THE STRUGGLE FOR POWER AND PEACE 3 (Kenneth W. Thompson & W. David Clinton eds., 7th ed. 2006); KENNETH N. WALTZ, THEORY OF INTERNATIONAL POLITICS 102–28 (1979); John J. Mearsheimer, *The False Promise of International Institutions*, 19 INT'L SEC. 5, 10 (1994).

139. *See* ROBERT O. KEOHANE, AFTER HEGEMONY: COOPERATION AND DISCORD IN THE WORLD POLITICAL ECONOMY 8 (1984).

140. *See* MICHELLE P. EGAN, SINGLE MARKETS: ECONOMIC INTEGRATION IN EUROPE AND THE UNITED STATES 28 (2015); ROBERT D. COOTER, THE STRATEGIC CONSTITUTION 261 (2000); DENNIS C. MUELLER, CONSTITUTIONAL DEMOCRACY 234 (1996).

will grow over time to 65 percent because the North's population and the economy are expected to grow faster. There will be a strong incentive for the North to renege on its deal in the future and pursue a revision of the initial terms of unification. It will be difficult for the South to expect the North to keep its original commitment to a 55 percent to 45 percent division of power. The South's leaders reasonably might fear that the North instead will take advantage of the relative shift in resources in the future to seek greater gains in political power. No higher political power can force the North to keep to its original promise, even when both North and South have complete information at the time of the agreement.

A constitution may present a means for the North and South to send costly signals that demonstrate their credibility to keep their unifying agreement. As scholars of bargaining theory have argued, a costly signal can help reveal that a party will keep its commitment.[141] In international politics, for example, a nation can send a costly signal that it will defend an ally by stationing large military assets in its ally's territory. A party to a private contract can send a costly signal by investing in equipment that has value only if it completes the deal. In the context of national unification, one group can send a costly signal that it intends to keep its promises by agreeing to a constitution that erects institutional barriers to changing the balance of power. In the U.S. Constitution, for example, the North agreed to a structure of government that gave smaller states greater sway than a pure majoritarian democracy would permit.[142] Agreeing to the Senate and the Electoral College could have sent a costly signal to the South that the North would keep its promises about the issues that would fall within the jurisdiction of the federal government.

Agreeing to an originalist approach to constitutional interpretation would also send a costly signal that could enhance bargaining. It represents another way for the North, in our example, to show its commitment to keeping its promises. While the Constitution embodies an agreement to share political power, the weaker parties may not enter the Union until they are confident that the more powerful parties will keep their original promise to share power. Smaller states may worry that the more populous states will seek to reopen the deal in their favor once they become more powerful under the Union. Uncertainty over the rules of interpretation could discourage smaller states from agreeing to a constitution because they may worry that the larger states, which may come to control national institutions, might exploit constitutional ambiguities in the years to come. Future ambiguity might even create the opportunity for the more powerful states to break their commitments. Agreeing

141. James D. Fearon, *Signaling Foreign Policy Interests: Tying Hands Versus Sinking Costs*, 41 J. CONFLICT RESOL. 68, 69 (1997); Fearon, *supra* note 130, at 581.

142. U.S. CONST. art. I, § 3, cl. 1 (providing that each State shall have two representatives in the Senate); *see also* INS v. Chadha, 462 U.S. 919, 950 (1983) (explaining the concerns and fears of the smaller States that led to the Great Compromise).

on rules of interpretation can signal commitment to the original terms of the deal; their very purpose is to follow the original agreement. It can help reassure smaller states that interpretation will not serve as a covert means to break the original agreement for union.

Second, rules of interpretation can serve as a costly signal in themselves. They not only reassure that the parties to the Constitution will commit to the political deal of the Union. They also are an expensive means to prevent the more populous states from having their way through majority rule. If rules of interpretation can prevent significant changes in the original constitutional bargain, they will work to the disadvantage of the growing states, which would otherwise be able to alter future arrangements to their advantage through simple majority rule. Strict rules may not be the optimal means, from a normative perspective, to interpret the Constitution. As the common good constitutionalism challenge reminds us, rules of interpretation ideally should flow from a society's normative principles.[143] But an interpretive method rooted in original meaning can serve a preceding critical purpose by persuading states that they can trust each other to keep their promises and form a union. An agreement on interpretation will help in the adoption of the Constitution itself.

Agreement on interpretation need not apply only to the structural, power-sharing features of the Constitution. Agreement on the rules might also apply to the individual rights portions of the Constitution, such as the Reconstruction Amendments. We can regard the Reconstruction Amendments as part of the peace that settled the Civil War. The North would allow the South to reenter the Union as long as it respected the equal political rights of the freedmen. Under this Article's bargaining analysis, the North and South might have good information on the benefits to each of ending the occupation of the South and restoring the Union. But an obstacle to the bargain would still arise. The North might lack confidence that the South would keep its promise to respect the rights of the freedmen. After all, the South had just fought and lost a war to defend slavery. One way for the South to show its commitment to the restored Union was to ratify the Reconstruction Amendments, which would give the promise of equal rights the force of law. Agreeing to rules of interpretation, which would look to the understandings of the Reconstruction Congress, would send another costly signal about the South's commitment to obey the bargain over its reentry into the Union. In this case, the rules would not embody a power-sharing agreement, but instead would work to expand individual rights. After the controversy over the 1876 elections,[144] multiple and successive presidential administrations and Congresses reneged on the Reconstruction Amendments' political agreement, and one of the many tragedies of *Plessy v. Ferguson*[145] was

143. *See supra* text accompanying notes 91–94.

144. *See* Robert J. Delahunty & John Yoo, *Who Counts?: The Twelfth Amendment, the Vice President, and the Electoral Count*, 73 CASE W. RES. L. REV. 27, 109–16 (2022).

145. 163 U.S. 537 (1896), *overruled by* Brown v. Bd. of Educ., 347 U.S. 483 (1954).

that it ignored the clear, original understanding of the Fourteenth Amendment's text in favor of contemporary, unwritten norms of racism.

III. JUDICIAL REVIEW AND *DRED SCOTT*

This Article allows a deeper understanding of the failure of judicial review in the events leading to the Civil War. It argues that the Supreme Court not only misinterpreted the Constitution in *Dred Scott*, but their decision led to a larger institutional failure. It does not rehearse the arguments over Chief Justice Roger Taney's grievous errors,[146] nor does it evaluate recent scholarship seeking to understand his opinion within its historical context.[147] The decision deserves its place as among the worst decisions—if not *the* worst decision—in the history of the Supreme Court for its endorsement of white supremacy.[148] This Article, however, seeks to understand *Dred Scott* as not just "a ghastly error,"[149] but as a broader failure in the institutional role of the Supreme Court.

The North and the South reaped great benefits from combining into a union. But each also had interests that could outweigh the public goods provided by an expansive nation-state. The two sections wanted to agree to a union but not one that would cause them to lose their relative power position over time. At the time of the Founding, the North and South reached an agreement that would maintain a balance of power between them. But the threats existed that one of the two sections would benefit unequally in the future and that it would seek to reopen the constitutional balance of power. Including judicial review in the Constitution could show commitment to obeying the original agreement's division of power. But the exercise of that review, if exercised improperly, might undermine the agreement.

Seen in this light, the Constitution codified a power-sharing agreement between two regions. Slavery defined the economy and society of the South, while the North prohibited slavery and embraced a more industrial, commercial economy.[150] Their economic differences produced different policy preferences.

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146. *See, e.g.*, Daniel A. Farber, *A Fatal Loss of Balance:* Dred Scott *Revisited*, 39 PEPP. L. REV. 13, 15 (2011); Jack M. Balkin & Sanford Levinson, *Thirteen Ways of Looking at* Dred Scott, 82 CHI.-KENT L. REV. 49, 71 (2007); DAVID P. CURRIE, THE CONSTITUTION IN THE SUPREME COURT: THE FIRST HUNDRED YEARS, 1789–1888, at 263–72 (1985).

147. *See, e.g.*, Lea VanderVelde, *The* Dred Scott *Case in Context*, 40 J. SUP. CT. HIST. 263, 276 (2015); Gerald Leonard, *Law and Politics Reconsidered: A New Constitutional History of* Dred Scott, 34 LAW & SOC. INQUIRY 747, 782 (2009); Paul Finkelman, *Was* Dred Scott *Correctly Decided? An "Expert Report" for the Defendant*, 12 LEWIS & CLARK L. REV. 1219, 1234 (2008); MARK A. GRABER, *DRED SCOTT* AND THE PROBLEM OF CONSTITUTIONAL EVIL 17 (2006). For criticism of Graber's thesis, see Louise Weinberg, Dred Scott *and the Crisis of 1860*, 82 CHI.-KENT L. REV. 97, 120 (2007).

148. *See, e.g.*, CHARLES EVANS HUGHES, THE SUPREME COURT OF THE UNITED STATES 50, 52–54 (1928); ALEXANDER M. BICKEL, THE SUPREME COURT AND THE IDEA OF PROGRESS 41 (1st ed. 1970).

149. BICKEL, *supra* note 148.

150. For a description of the diverging economic paths of the North and South, see GORDON S. WOOD, EMPIRE OF LIBERTY: A HISTORY OF THE EARLY REPUBLIC, 1789–1815, at 508–42 (2009); DANIEL WALKER HOWE, WHAT HATH GOD WROUGHT: THE TRANSFORMATION OF AMERICA, 1815–1848, at 125–63 (2007);

Based on a slave economy, the South supported more open trade to support its agricultural exports and to reduce the costs of importing finished products from Europe.[151] The North possessed a larger commercial and manufacturing sector, which led it to support higher protective tariffs to support domestic industry.[152]

Even though the colonies fought together to throw off the British Empire, sectional differences between the North and South had already threatened to pull the nation apart. Under the Articles of Confederation, the North and South had pursued very different policies.[153] Some in the North sought to restore the commercial links with Great Britain and the access to European capital interrupted by the Revolution.[154] The South supported expansion to the west to spread slavery and sought access to the Mississippi River to export of agricultural products to European markets.[155] These tensions came out into the open during the 1785 to 1786 Jay-Gardoqui negotiations.[156] Congress sent John Jay, the Secretary for Foreign Affairs, to negotiate an agreement with Spain to reopen the Mississippi River to American traffic.[157] Spain refused and instead proposed a commercial treaty that would benefit the northeastern port cities of Boston, New York, and Philadelphia.[158] When Congress considered whether to continue trade negotiations, Northern states voted as a bloc and defeated Southern efforts to terminate Jay's mission by an eight to five vote.[159] Even though the Southern states had enough votes to block any treaty, Southern states left the controversy worried that the North might use its advantage in numbers to give away matters dear to the South.[160]

At the same time, the benefits of the Union were palpable. The former colonies were surrounded by potential enemies.[161] Great Britain shared a long border along the northern border with Canada and refused to hand over forts

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DON E. FEHRENBACHER, THE SLAVEHOLDING REPUBLIC: AN ACCOUNT OF THE UNITED STATES GOVERNMENT'S RELATIONS TO SLAVERY 15–47 (2001).

151. FEHRENBACHER, *supra* note 150, at 45.

152. *See* Douglas A. Irwin, *Antebellum Tariff Politics: Regional Coalitions and Shifting Economic Interests*, 51 J.L. & ECON. 715, 716 (2008); 1 WILLIAM W. FREEHLING, THE ROAD TO DISUNION: SECESSIONISTS AT BAY, 1776–1854, at 304–05 (1990); 2 WILLIAM W. FREEHLING, THE ROAD TO DISUNION: SECESSIONISTS TRIUMPHANT, 1854–1861, at 531 (2007).

153. *See* WOOD, *supra* note 150, at 519–31.

154. 1 DAVID E. MCNABB, A COMPARATIVE HISTORY OF COMMERCE AND INDUSTRY 215–227 (2016).

155. *See* SAMUEL FLAGG BEMIS, PINCKNEY'S TREATY: A STUDY OF AMERICA'S ADVANTAGE FROM EUROPE'S DISTRESS, 1783–1800, at 53–55 (1960).

156. *Id.* at 164; JACK N. RAKOVE, THE BEGINNINGS OF NATIONAL POLITICS: AN INTERPRETIVE HISTORY OF THE CONTINENTAL CONGRESS 349–50 (1979).

157. *See* John C. Yoo, *Globalism and the Constitution: Treaties, Non-Self-Execution, and the Original Understanding*, 99 COLUM. L. REV. 1955, 2011–12 (1999); *see also* BEMIS, *supra* note 155, at 25–29 (explaining the instructions given to John Jay to negotiate with Spain).

158. *See* Yoo, *supra* note 157, at 2012.

159. *Id.*

160. The issue's importance for the drafting of the Treaty Clause is reviewed in Yoo. *Id.* at 2012–14.

161. *See* FREDERICK W. MARKS III, INDEPENDENCE ON TRIAL: FOREIGN AFFAIRS AND THE MAKING OF THE CONSTITUTION 52–95 (1973); 1 BRADFORD PERKINS, THE CAMBRIDGE HISTORY OF AMERICAN FOREIGN RELATIONS: THE CREATION OF A REPUBLICAN EMPIRE, 1776–1865, at 217–24 (Warren I. Cohen ed., 1993).

along the northwestern border as promised in the 1783 peace treaty.[162] Spain wanted to block America's western expansion by closing the Mississippi.[163] European powers intended to hem the new nation in along the eastern seaboard to prevent American growth into a major power.[164] Meanwhile, European nations sought to divide and conquer the United States by reaching separate trade agreements with individual states.[165] A stronger union could allow the new nation to better defend itself against its European rivals on the North American continent and to create a vast free trade area from New England to Georgia. In *Federalist No. 4*, John Jay wrote: "[W]hatever may be our situation, whether firmly united under one national government, or split into a number of confederacies, certain it is, that foreign nations will know and view it exactly as it is, and they will act toward us accordingly."[166] On the one hand, "[if] they see that our national government is efficient and well administered . . . our trade prudently regulated . . . our militia properly organized and disciplined . . . our resources and finances discreetly managed . . . our credit re-established . . . our people free, contented, and united," Jay predicted, "they will be much more disposed to cultivate our friendship than provoke our resentment."[167] On the other hand, "if . . . they find us either destitute of an effectual government . . . or split into three or four independent and probably discordant republics or confederacies, one inclining to Britain, another to France, and a third to Spain, and perhaps played off against each other by the three," he further commented, "what a poor pitiful figure will America make in their eyes!"[168] Jay predicted that without a vigorous union, war with the great powers and discriminatory trade policies toward the states would follow.

Both North and South had reasons to hope that a union might allow their region to grow into the dominant side. The North had more populous states, though the South hoped that western expansion plus the counting of slaves might give it the advantage.[169] The American population's rapid ascent, however, made estimates difficult. In the 1790 census, the U.S. population was 3.93 million, almost evenly split between North and South.[170] A mere ten years later, the national population hit 5.3 million—a gain of 35 percent.[171] The U.S. population would grow by more than 30 percent every ten years until the 1870

162. *See* Yoo, *supra* note 157, at 2015.

163. *See id.* at 2012.

164. *See id.* at 2012–15; *see also* Joel R. Paul, *The Geopolitical Constitution: Executive Expediency and Executive Agreements*, 86 CALIF. L. REV. 671, 730–31 (1998) (explaining the actions taken by Britain, Spain, and France).

165. *See* Scott Sullivan, *The Future of the Foreign Commerce Clause*, 83 FORDHAM L. REV. 1955, 1962–64 (2015).

166. THE FEDERALIST NO. 4, at 16 (John Jay) (George W. Carey & James McClellan eds., 2001).

167. *Id.* at 16.

168. *Id.* at 16–17.

169. *See* Yoo, *supra* note 157, at 2061–62.

170. 1 U.S. DEP'T OF COM., BUREAU OF THE CENSUS, HISTORICAL STATISTICS OF THE UNITED STATES: COLONIAL TIMES TO 1970, at 22 (Bicentennial ed. 1975).

171. *Id.* at 8.

census.[172] For the next few decades under the Constitution, the populations of the North and South remained in balance, with much of the growth occurring in the new northwestern and western territories.[173] If these states entered as free, the balance of a national government based on majoritarian elections would tilt against slavery. Southerners, at the time of the Constitutional Convention, worried that the rate of northern population growth would eventually exceed their own and give the North an advantage in any national government.[174]

This problem resembles the challenge to the settlement of internal conflicts. The North and South could reach an agreement sharing power in the national government in a way that mirrored their relative positions. But they could not be sure that the other might gain disproportionately in power once the new Constitution went into effect. If either the North or the South grew faster in population and economy, the winner could reopen the bargain to gain even more power. There would be no third party to enforce the agreement to prevent a reopening of the deal. Unable to trust the other to keep its promise two or three decades hence, either the North or the South might walk away rather than enter into an agreement that would lead to their marginalization in the future.

The Framers sought to address these concerns in part through the structure of the national government. While the House of Representatives would represent the people, the Senate would represent the states.[175] As long as the number of Southern and Northern states remained in equal balance, each region could block any legislation—including laws dividing the territories and adding new states. The Senate allowed the North or South, if each region acted together, an effective veto over any significant shift in the balance of power. Almost every significant decision of the federal government required Senate consent: legislation, treaties, appointments, impeachment, and constitutional amendment.[176] The importance of the Senate to the constitutional deal between North and South is confirmed by its immutable character—it is the only provision of the Constitution that cannot be amended.[177]

Another means whereby the North and South could signal commitment would be judicial review. The sections could not create a truly independent third party to enforce the agreement, which would require recognizing a sovereign that existed superior to the federal government itself. But it could create a relatively neutral federal institution to keep them honest. The federal courts could exercise judicial review to make sure that the political branches created

172. *Id.*

173. *Id.* at 21–22.

174. MICHAEL F. CONLIN, THE CONSTITUTIONAL ORIGINS OF THE AMERICAN CIVIL WAR 82–133 (2019).

175. U.S. CONST. art. I, §§ 2–3.

176. *See id.* art. I, § 7 (governing congressional bills); *id.* art. II, § 2, cl. 2 (advice and consent clause); *id.* art. I, § 6 (governing impeachments); *id.* art. V (governing constitutional amendments).

177. On the critical constitutional role of the Senate, see Bradford R. Clark, *Federal Common Law: A Structural Reinterpretation*, 144 U. PA. L. REV. 1245, 1328 (1996), and John C. Yoo, *The Judicial Safeguards of Federalism*, 70 S. CAL. L. REV. 1311, 1368 (1997).

by the Constitution did not themselves violate the Constitution. They could supervise the compromises wrought by the regions—acting through their representatives in the national government—to solve the crisis of the House Divided.[178] Accepting judicial review would allow the North and South, at the time of the framing, to signal commitment to obeying the terms of the Constitution. Adopting originalism would further indicate that neither side would use constitutional ambiguities in the future to reopen the agreement.

Dred Scott[179] removed this crucial commitment device. For decades, historians have argued over *Dred Scott*'s role in precipitating the Civil War, but until recently, few doubted its errors as a matter of constitutional law. *Dred Scott* involved an African American slave whose owner had brought him into the free states of Illinois and the Wisconsin Territory.[180] He sued on the ground that the Northwest Ordinance and the Missouri Compromise made his status as a slave unlawful.[181] But writing for a seven to two majority (in a case where every Justice wrote a separate opinion), Chief Justice Taney found that Dred Scott could not sue because the Constitution forbade African Americans from ever becoming citizens, even if they were born in the United States or even born in a free state.[182] As a result, African Americans, whether slaves, freed slaves, or born free, could not be "citizens of a State" for purposes of diversity jurisdiction.[183] The Fourteenth Amendment's declaration of birthright citizenship—"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside"—would overrule this part of *Dred Scott*.[184]

Even if jurisdiction existed, Chief Justice Taney declared, Dred Scott's presence in Wisconsin still could not make him a free man because the Missouri Compromise violated the Constitution.[185] In the Missouri Compromise, Congress had agreed to prohibit slavery in the territories north of thirty-six degrees, thirty minutes latitude, except for Missouri itself.[186] The Missouri Compromise allowed Congress to admit Missouri as a slave state, which

178. Abraham Lincoln, A House Divided, Speech at Springfield, Illinois (June 16, 1858), *in* 2 THE COLLECTED WORKS OF ABRAHAM LINCOLN 461, 461–62 (Roy P. Basler ed., 1953) [hereinafter Lincoln, A House Divided].

179. Dred Scott v. Sandford, 60 U.S. (19 How.) 393 (1857) (enslaved party), *superseded by constitutional amendment*, U.S. CONST. amend. XIV.

180. *Id.* at 493 (Campbell, J., concurring).

181. *Id.* at 452–53 (majority opinion).

182. *Id.* at 404–26.

183. *Id.* at 423, 454.

184. U.S. CONST. amend. XIV; *see also* United States v. Wong Kim Ark, 169 U.S. 649, 688 (1898). *But see* PETER H. SCHUCK & ROGERS M. SMITH, CITIZENSHIP WITHOUT CONSENT: ILLEGAL ALIENS IN THE AMERICAN POLITY 42–43 (1985); EDWARD J. ERLER, *American Citizenship and Postmodern* Challenges, *in* THE FOUNDERS ON CITIZENSHIP AND IMMIGRATION: PRINCIPLES AND CHALLENGES IN AMERICA 25, 45–46 (Edward J. Erler, Thomas G. West & John Marini eds., 2007).

185. *Dred Scott*, 60 U.S. at 452.

186. 1 ALAN BRINKLEY, THE UNFINISHED NATION: A CONCISE HISTORY OF THE AMERICAN PEOPLE 230–32 (3d ed. 2000).

maintained the critical equal balance between slave and free states (Maine had been admitted shortly before).[187] Congress assumed its authority to regulate slavery in the territories under Article IV, Section 3, Clause 2 of the Constitution—the Property Clause: "Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property of the United States."[188] Chief Justice Taney, however, held that the Property Clause did not mean what it appeared to mean.[189] Instead of a broad power to dispose of federal property, the Court read the Constitution more narrowly to allow congressional regulation of slavery only in the territory that existed at the time of the ratification of the Constitution.[190] Chief Justice Taney's strained reading of the Property Clause strangely resembled Jefferson's similarly weak claim that the United States could not even add to its territory without a constitutional amendment.[191]

Chief Justice Taney held that even if Congress could dispose of and regulate the territories, as the natural reading of the Property Clause demanded, it still could not use that power to free any slaves.[192] Under the Fifth Amendment's Due Process Clause, Chief Justice Taney claimed, slaves constituted property.[193] The federal government had no more power to free the slaves who entered the territories protected by the Missouri Compromise than it did to seize the personal possessions of the owners.[194] "Now, as we have already said[,] . . . the right of property in a slave is distinctly and expressly affirmed in the Constitution," Taney wrote.[195] "And no word can be found in the Constitution which gives Congress a greater power over slave property . . . than property of any other description."[196]

Scholars in favor of judicial minimalism, such as Cass Sunstein, bemoan that the Court reached this question, as well as the issue of congressional power to regulate the territories.[197] Once the Court had decided it lacked diversity jurisdiction, Sunstein argues, the Court should have dismissed the case and allowed the political branches to continue to debate the slavery issue.[198] Sunstein concludes that:

> [T]he large issues in the case would have been left alone, and the *Dred Scott* decision would have been an unimportant episode in American law. Notably,

187. *Id.*
188. U.S. CONST. art. IV, § 3, cl. 2.
189. *Dred Scott*, 60 U.S. at 440–42.
190. *Id.*
191. *See, e.g.*, John Yoo, *Jefferson and Executive Power*, 88 B.U. L. REV. 421, 437–38 (2008).
192. *Dred Scott*, 60 U.S. at 449–50.
193. *Id.* at 450–52.
194. *Id.*
195. *Id.* at 451.
196. *Id.* at 452.
197. *See, e.g.*, Cass R. Sunstein, *Foreword: Leaving Things Undecided*, 110 HARV. L. REV. 4, 49 (1996).
198. *Id.*

> the Court itself rejected its initial minimalist approach because it wanted to take the slavery issue out of politics and to resolve it once and for all time.[199]

In a related vein, Dan Farber finds that *Dred Scott*'s grasp of these issues showed that Chief Justice Taney had fundamentally lost his balance, to the detriment of the Court and the nation's ability to resolve the slavery issue.[200]

Dred Scott has recently enjoyed a revisionist reappraisal. Mark Graber, for example, argues that the Court sought a centrist position in the midst of the sectional divide engulfing the political branches.[201] He argues that the Supreme Court enjoyed a unique capacity to promote nationwide political compromise and that *Dred Scott* itself contained a number of bargains intended to preserve the Union.[202] Under this view, the President and Congress handed over authority to the Court because they could not reach a compromise on the slavery issue. Jaffa, who has done more than anyone to recover Abraham Lincoln's thinking on *Dred Scott*, agrees that Congress had delegated the decision to the Court—even though he argues that the Court fundamentally misapplied originalism and reversed the Framers' views on slavery in the territories.[203] Austin Allen maintains that the Taney Court sought a basis consistent with its principles and doctrine that would justify both the expansive federal power necessary to promote a uniform federal law of commerce and its declarations of impotence to review local decisions concerning slavery.[204] Allen understands *Dred Scott*'s holding that Congress was powerless to bar slavery in the territories as eliminating this anomaly by pushing the issue of slavery in the territories into local courts.[205] Legal historian Paul Finkelman argues that *Dred Scott* may not have caused the Civil War, but helped make it inevitable.[206] "The decision sparked enormous political reaction, particularly in the North. It destroyed any chance of agreement between the North and the South over slavery in the territories."[207] Nevertheless, Finkelman concedes that *Dred Scott* may have been constitutionally correct under the doctrine as it existed at the time.[208] "[G]iven the history of the writing of the Constitution, the importance of slavery to the American economy, the specific protections for slavery found in the Constitution, and the politics of the era," Finkelman writes, the "decision upholding Dred Scott's status as a slave was surely inevitable."[209]

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199. *Id.*

200. Farber, *supra* note 146, at 47.

201. Mark A. Graber, Dred Scott *as a Centrist Decision*, 83 N.C. L. REV. 1229, 1232 (2005).

202. *Id.* at 1241.

203. Harry V. Jaffa, Dred Scott *Revisited*, 31 HARV. J.L. & PUB. POL'Y 197, 200 (2008).

204. AUSTIN ALLEN, ORIGINS OF THE DRED SCOTT CASE: JACKSONIAN JURISPRUDENCE AND THE SUPREME COURT, 1837–1857, at 166 (2006).

205. *Id.* at 147–48.

206. Paul Finkelman, Essay, *The* Dred Scott *Case, Slavery and the Politics of Law*, 20 HAMLINE L. REV. 1, 5–6 (1996).

207. *Id.* at 5.

208. Finkelman, *supra* note 147, at 1243.

209. *Id.* at 1252.

Despite these arguments, *Dred Scott* remains fundamentally flawed on the substance of constitutional law. An originalist interpretive approach, which Chief Justice Taney claimed to adopt, could not have reached the result in *Dred Scott*. Taney's "originalism" relied on a flawed methodology. Rather than relying on the original public meaning to interpret the text of the Constitution, Taney relied on what he believed was the original intent of the Framers. Justice Scalia made it clear that "[o]riginalism does not aggravate the principal weakness of the system [of judicial review],"[210] "for it establishes a historical criterion that is conceptually quite separate from the preferences of the judge himself."[211] Taney, however, did not properly apply originalism. Instead, he misrepresented the historical record and ignored important textual, structural, and historical evidence in favor of plenary congressional power over the territories. His flawed originalism was not based on an objective reading of the text and ratification history, but on a subjective impression of eighteenth century attitudes toward African Americans.

Contrary to Taney's presuppositions, the Framers had repeatedly recognized that free Black people had rights, including the right to own property, marry, sue and be sued, and make contracts. As historian Don Fehrenbacher has observed, free Black people in the late eighteenth century enjoyed more rights in some states than married white women did at the time.[212] Further, there is little indication that framing materials support the conclusion that Congress did not have the power to regulate slavery in the territories. Indeed, the Northwest Ordinance of 1787, which set up the process for the eventual statehood of the lands from Ohio to Minnesota, forbade slavery.[213] Congress's power over the territories was understood to be plenary; most of the concern over the provision in the early years of the Republic focused on whether the Constitution permitted the creation of states from new territory acquired after 1789.[214] Additionally, if the Framers understood that states would determine whether to permit or forbid slavery, the Fifth Amendment Due Process Clause could not have created the property right that Chief Justice Taney supposed.[215] Otherwise, as Lincoln and other Republicans feared, slaveowners would have the right to take their slaves into even free states.[216] During his debates with Senator Douglas, Lincoln pressed the point that *Dred Scott*'s logic implied that free states would have to allow slaves too: "I defy any man to make an argument that will justify unfriendly legislation to deprive a slaveholder of his right to hold his slave in a

210. *See* Scalia, *supra* note 62, at 864.

211. *Id.*

212. DON E. FEHRENBACHER, THE DRED SCOTT CASE: ITS SIGNIFICANCE IN AMERICAN LAW AND POLITICS 349 (1978).

213. *See* PETER S. ONUF, STATEHOOD AND UNION: A HISTORY OF THE NORTHWEST ORDINANCE 109 (Univ. of Notre Dame Press 2018) (1987).

214. *Id.* at xviii.

215. *See* U.S. CONST. amend. V.

216. *See supra* text accompanying notes 41–46.

Territory, that will not equally, in all its length, breadth and thickness furnish an argument for nullifying the fugitive slave law."[217]

Lincoln and the Republican Party attacked *Dred Scott* as a serious misreading of the Constitution. Radical Republicans in the Reconstruction Congress would overrule it in the Thirteenth, Fourteenth, and Fifteenth Amendments. Scholars have long shared their criticism of the substance of Chief Justice Taney's opinion. Fehrenbacher expresses the widely-shared view in concluding that *Dred Scott* was "a work of unmitigated partisanship," and that the Court's intervention into the sectional crisis was an "unusually bold venture in a desperate struggle for power, rather than . . . an evenhanded effort to resolve that struggle."[218] Fehrenbacher argued that Chief Justice Taney pressed for a broad ruling that would short-circuit the Republican Party's efforts to change the law of slavery.[219] But Chief Justice Taney's arguments, most scholars believe, suffer from "distorted logic, fabricated history, unsound doctrine, and, because of their racism, moral bankruptcy."[220] *Dred Scott* pursued a partisan agenda that only enflamed the sectional divide, making the Civil War more certain.

Dred Scott's substance did more than distort the original understanding of the slavery question. It also removed the Court as a commitment device to enforce the Constitution's original bargain. Chief Justice Taney's decision weakened the institution of judicial review as a mechanism of commitment to obey the original bargain expressed in the Constitution. We can understand the basic constitutional agreement between the North and South to allow each state to decide whether to be a free state or a slave state for itself; to give Congress the power to determine the issue for the territories; and, at the outset, to divide control of Congress evenly between the two sections. As we observed earlier, the possibility that future demographic and economic growth might affect the regions differently might have prevented North and South from reaching an agreement in 1787 to 1788. Neither could trust the other to resist the temptation to renege on the Constitution when its resources gave them an advantage. The parties could overcome these difficulties in showing commitment to the agreement, however, by supporting enforcement of the bargain by a neutral party—here, the federal courts employing the interpretive methodology of originalism.

Dred Scott demonstrated that the North could no longer trust the federal courts to perform this enforcement function. At the time of the ratification of the Constitution, both the North and South agreed to Supreme Court enforcement of the basic bargain, which included future congressional regulation of the

217. Abraham Lincoln, Seventh Debate, Alton, Illinois: Lincoln's Reply (Oct. 15, 1858), *in* ABRAHAM LINCOLN, SPEECHES AND WRITINGS 1832–1858, at 790, 814 (Don E. Fehrenbacher ed., 1989).

218. *See* FEHRENBACHER, *supra* note 212, at 3.

219. *Id.*

220. Austin Allen, *Rethinking* Dred Scott*: New Context for an Old Case*, 82 CHI.-KENT L. REV. 141, 146 (2007).

territories.[221] Instead of enforcing the deal, as reflected in the Missouri Compromise, the Court rewrote constitutional law to accord with the view of the weaker region. As historians have observed, Chief Justice Taney sought to halt the steady movement toward the North of political power and, hence, national policy.[222] But that required him to overturn the basics of the original deal between the sections. The North could no longer rely on the Court to keep the South to its promises in the settlement of 1788 to 1789.

Hostility to the Court post-*Dred Scott* was swift and overwhelming. Northern newspapers criticized the Court's "dirty job"[223] and "deliberate falsification of the Constitution and of history"[224] in *Dred Scott*, while others lambasted the Court for issuing a "hand-book of tyranny"[225] and violating the "rights of Human Nature," as declared during the first Continental Congress.[226] Some newspapers challenged the supremacy of the Court's decision by calling for outright disobedience.[227] Some Republicans criticized the judges themselves, saying that "the Judges who decided it don't know what law means," and others even accused the Court's justices of being a part of a political conspiracy.[228]

Northerners not only criticized the judges and their decision but also challenged the legitimacy of the Court as an institution. The *New York Tribune* ("the *Tribune*") argued that the Supreme Court's partisanship in *Dred Scott* exposed a flaw in the Founders' theory of judicial independence.[229] The *Tribune* claimed that even though the Founders' theory included life tenure in the Constitution to protect the impartiality and independence of the judiciary, the Justices in *Dred Scott* still succumbed to a "spirit of political intrigue and that

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221. *See* U.S. CONST. art. IV, § 3, cl. 2.

222. *See* FEHRENBACHER, *supra* note 212, at 559.

223. *Id.* at 417.

224. PAUL FINKELMAN, DRED SCOTT V. SANDFORD: A BRIEF HISTORY WITH DOCUMENTS 146 (2d ed. 2017).

225. *Id.* at 145.

226. *Id.* at 158.

227. *See* FEHRENBACHER, *supra* note 212, at 423.

228. *See* FINKELMAN, *supra* note 224, at 134. According to Finkelman, The New York *Evening Post* wrote:

> A conspiracy has been entered into of the most treasonable character; the justices of the Supreme Court and the leading members of the new administration are parties to it. . . . Of course the moment this conviction takes possession of the public mind, there is an end of the Supreme Court; for a judicial tribunal, which is not rooted in the confidence of the people, will soon either be disregarded as an authority or overturned . . . .

Id. at 145.

229. The *Tribune* critiqued the Framers' precautions:

> It is absurd to tell us about the appointment of Judges for life, for the express purpose of securing their independence and placing them beyond the reach of temptation, when the very course of reasoning to which they resort, and the basis of deliberate and studied misrepresentation on which . . . they have rested their decision, show these precautions to have entirely failed, and the Judges to be just as much the exponents of the popular passions of those sections of the country from a majority of them came, as if liable to be turned out of office at any time by a popular vote.

Id. at 158.

insanity of party passion."[230] The *Tribune* concluded that the Justices' failure to be impartial in *Dred Scott* signified a failure in the Founding.[231]

Several Northern state legislatures rebelled against the Supreme Court by refusing to abide by its ruling. Fehrenbacher notes that "the general pattern [of state action] included resolutions protesting the *Dred Scott* decision and legislation that was not only antislavery (denial of sojourners' rights) but also in some degree pro-Negro (protection against wrongful capture under the Fugitive Slave Act; express conferral or confirmation of Negro citizenship)."[232] For instance, the state of Maine "passed resolutions asserting that the decision was 'not binding in law or conscience' and that the Supreme Court should be 'reconstituted.'"[233] Connecticut's legislature retaliated against the Court by instituting "bills declaring free any slave brought into the state and defining state citizenship in such a way as to include Negroes."[234] Several states followed suit, including New York, Pennsylvania, and Ohio.[235] Some Ohioans sought to rally fellow state citizens to resist the Court's decision.[236] In an 1856 pamphlet addressed to the "free voters of Ohio," an anonymous writer classifies some points in the *Dred Scott* decision as "palpable falsifications of history" and "outrageous perversions of well settled and long recognized law."[237] The Ohio Republican state convention also "denounced *Dred Scott* as 'anti-constitutional, anti-republican, anti-democratic, incompatible with State rights and destructive of personal security."[238]

Some lower court judges also resisted the Supreme Court's decision. For instance, "[i]n May 1857, according to newspaper reports, [Judge John] McLean and his associate, Judge Thomas Drummond, refused to apply the Dred Scott decision in a suit at Chicago, even though the plaintiff was admittedly black" and they "reasserted the definition of citizenship . . . overruled by Taney—namely, free status and domicile in a state."[239] Justice Benjamin Curtis, one of

230. *Id.*

231. According to Finkelman, the *Tribune* wrote:

> Whatever precautions the framers of the Constitution may have taken, or may have thought they were taking, in the nature of office and otherwise, to invest the Judges with titles to public confidence and respect, unfortunately the sort of persons selected to fill those positions and the sort of grounds upon which those appointments have been made have by no means correspond thereto.

Id.

232. FEHRENBACHER, *supra* note 212, at 432–33.

233. *Id.* at 432.

234. *Id.*

235. *Id.*

236. *Id.* at 434–35.

237. LIB. OF CONGRESS, THE SLAVERY QUESTION. DRED SCOTT DECISION: TO THE FREE VOTERS OF OHIO 13 (1860), https://tile.loc.gov/storage-services/service/rbc/rbaapc/26400/26400.pdf.

238. FEHRENBACHER, *supra* note 212, at 435.

239. *Id.* at 445.

the two dissenting Supreme Court justices in *Dred Scott*, resigned from the Court due to his lack of confidence in the institution.[240]

The states and courts were not alone in their resistance. Abolitionists focused their fire not just on the Court, but the Constitution as well. The most radical abolitionists advocated for disunion. William Lloyd Garrison, the famous abolitionist and author of *The Liberator*, advanced the view that the Constitution was a pro-slavery document.[241] Giving up on the Constitution, he advocated for "[d]isunion with liberty and a good conscience, rather than Union with slavery and moral degradation."[242] Another Northern abolitionist, Lysander Spooner, argued that "because nobody alive . . . was even given any opportunity to consent to it, the Constitution had no validity as a contract."[243] He promoted "civil disobedience" and "violent emancipation," arguing that the Constitution "'was gotten up by swindlers . . . who said a great many good things, which they did not mean, and meant a great many bad things, which they dared not say.'"[244] The great Frederick Douglass did not go as far. Douglass, for instance, advanced an interpretation of "We, the People" in the Declaration of Independence, which illuminated the all-inclusive nature of "the people."[245] He was able to construct "an argument that preserved the theory of the Constitution while rejecting its present practice" and "allowed him to reject 'the people' as constituted by the Court by reconstituting them under the Constitution."[246] But even Douglass rejected the Supreme Court, if not the Constitution.

The Framers could not have foreseen that the Supreme Court would deviate so far from the original agreement. Both North and South committed to the Constitution in 1788, not 1857. But Chief Justice Taney's decision had a secondary effect that could have helped bring on the Civil War beyond the substantive response provoked from Lincoln and the new Republican Party. By showing that the Court would not enforce the original terms of the Constitution, Chief Justice Taney had unintentionally revealed that the Court could not be trusted to enforce any future deals to settle the secession crisis. Lincoln and the Republican Party could not expect the Taney Court to uphold any renewed bargain between North and South over the territories. As we have seen, Lincoln even believed that the Court would go farther and force the Northern states to

240. Frank J. Williams & William D. Bader, *Benjamin R. Curtis: Maverick Lawyer and Independent Jurist*, 17 ROGER WILLIAMS U. L. REV. 378, 379 (2012).

241. William Lloyd Garrison, *Dred Scott and Disunion*, TEACHING AM. HIST. (Mar. 12, 1858), https://teachingamericanhistory.org/document/dred-scott-and-disunion.

242. *Id.*

243. Christopher Calton, *From Abolitionist to Anarchist: Lysander Spooner's Radical Transition Through the Civil War*, 9 LIBERTARIAN PAPERS 38, 51 (2017).

244. *Id.* at 52–53.

245. Frederick Douglass, The Constitution of the United States: Is It Pro-Slavery or Anti-Slavery? Speech Delivered in Glasgow, Scotland (Mar. 26, 1860), *in* 2 THE LIFE AND WRITINGS OF FREDERICK DOUGLASS: PRE-CIVIL WAR DECADE 1850–1860, at 467, 477 (Philip S. Foner ed., 1975).

246. Todd F. McDorman, *Challenging Constitutional Authority: African American Responses to* Scott v. Sandford, 83 Q. J. SPEECH 192, 203 (1997).

accept slaves within their borders.[247] Ironically, the same might be true of the South. Considering their harsh criticism of *Dred Scott*, Chief Justice Taney, and the role of the Supreme Court, Republicans could scarcely be believed if they claimed they would comply with judicial enforcement of any future deal.

Even moderate Southerners, who favored a negotiated settlement of the slavery dispute, realized that the Court had destabilized politics. Some Southern moderates saw the Union as "a contract as important as the U.S. Constitution itself in preserving republican government,"[248] and thus "many [S]outhern moderates continued to protest the repeal of the Missouri Compromise,"[249] which violated the contract between the North and the South. One senator from Tennessee, John Bell, remarked that the "judiciary had 'plunged into the vortex of political and sectional' strife."[250] In fact, the "Unionist cohort [of Southern moderates] consistently blamed the repeal of the Missouri Compromise as the cause of disunionist sentiment and secession."[251]

Dred Scott removed the Court as a credible commitment device in the bargaining between North and South as the crisis reached its climax in the three years after the decision. Southerners could have promised to remain in the Union in exchange for guarantees that the new Republican government would leave slavery untouched in the South and respect its choice by any new states, consistent with the Kansas-Nebraska Act of 1854. But Republicans could not rely on Southern promises to live up to the deal. They believed that the South had already cheated on the Constitution and the Missouri Compromise by drawing the Supreme Court into the great slave conspiracy.[252] Without commitment to an originalist interpretive approach, the Supreme Court could not be trusted to keep the constitutional bargain as understood by the North and South in 1788 to 1789. What would prevent the South from cheating even further now that the Supreme Court was on its side? Without the Court to guarantee the terms of a deal based on the understanding of the parties at the time of inception, no institution would have the lack of self-interest to enforce any settlement neutrally.

Ironically, *Dred Scott* also removed a credible signal from Lincoln's arsenal too. Southerners simply did not believe Lincoln's promise, restated in his first inaugural address, that he would obey the Constitution's guarantee of a state's choice of slavery.[253] "I have no purpose, directly or indirectly, to interfere

247. *See supra* text accompanying notes 41–45.

248. Rachel A. Shelden, *Obey and Yet Disbelieve: Unionism, the Missouri Compromise, and the Southern Response to the Dred Scott Decision Revisited*, 13 OHIO VALLEY HISTORY 25, 29 (2013).

249. *Id.* at 28.

250. *Id.* at 33.

251. *Id.* at 40.

252. *See* Gerhard Peters & John T. Woolley, *Republican Party Platform of 1860*, THE AM. PRESIDENCY PROJECT (May 17, 1860), https://www.presidency.ucsb.edu/documents/republican-party-platform-1860.

253. *See Confederate States of America—Declaration of the Immediate Causes Which Induce and Justify the Secession of South Carolina from the Federal Union*, THE AVALON PROJECT (Dec. 24, 1860), https://avalon.law.yale.edu/19th_century/csa_scarsec.asp.

with the institution of slavery in the States where it exists. I believe I have no lawful right to do so, and I have no inclination to do so."[254] Lincoln also declared his belief that slavery was morally wrong. For example, in 1859, Lincoln stated: "I think [s]lavery is wrong, morally, and politically. I desire that it should be no further spread in these United States, and I should not object if it should gradually terminate in the whole Union."[255] Southerners could not believe that Lincoln would uphold any deal between them to head off the secession crisis, even if he committed to Supreme Court oversight. Lincoln spent the years after *Dred Scott* challenging the Supreme Court's ability to bind the other branches.[256] As Justin Dyer argued, Lincoln's opposition to *Dred Scott* was not just a matter of politics or even constitutional statesmanship, but was deeply moral.[257] In his first inaugural address, Lincoln repeated his claim that only the judgment between the parties, and not the Court's opinion, demanded enforcement by the executive branch.[258] Lincoln could have offered a new deal to stave off secession, but the South could not have expected the North—steadily growing in population and wealth—to obey it as the balance of power shifted even further in its favor.[259] Committing to enforcement of the deal by promising acceptance of the Supreme Court no longer sent a credible signal for either South or North.

Dred Scott did not directly cause the Civil War. The North and South were headed on a collision course over a fundamental moral, political, and constitutional dispute embedded in the fabric of the nation from its very beginnings.[260] No matter what constitutional logic and doctrine Chief Justice Taney employed, slavery's ongoing existence would have continued to press toward a political climax. "A house divided against itself cannot stand. I believe this government cannot endure permanently half-slave and half-free," Lincoln famously observed. "I do not expect the Union to be dissolved—I do not expect the house to fall—but I do expect it will cease to be divided. It will become all one thing or all the other."[261] But *Dred Scott* removed a critical commitment device that could have produced a settlement of the issue, either for the shorter or longer term. Perhaps an agreement could have extended the Union long enough to make Northern victory much quicker, or at least certain enough that

254. Lincoln, First Inaugural Address, *supra* note 43, at 263.

255. Abraham Lincoln, Speech at Cincinnati, Ohio (Sept. 17, 1859), *in* 3 THE COLLECTED WORKS OF ABRAHAM LINCOLN, *supra* note 40, at 438, 440.

256. *See supra* text accompanying notes 42–46.

257. *See* Justin Buckley Dyer, *Revisiting* Dred Scott*: Prudence, Providence, and the Limits of Constitutional Statesmanship*, 39 PERSPS. ON POL. SCI. 166, 169 (2010).

258. Lincoln, First Inaugural Address, *supra* note 43.

259. DAVID M. POTTER, THE IMPENDING CRISIS: AMERICA BEFORE THE CIVIL WAR 1848–1861, at 33 (Don Fehrenbacher ed., 1976).

260. For the classic work on intellectual history on this conflict, see generally HARRY V. JAFFA, CRISIS OF THE HOUSE DIVIDED: AN INTERPRETATION OF THE ISSUES IN THE LINCOLN-DOUGLAS DEBATES (50th anniversary ed. 2009), and HARRY V. JAFFA, A NEW BIRTH OF FREEDOM: ABRAHAM LINCOLN AND THE COMING OF THE CIVIL WAR (2000).

261. Lincoln, A House Divided, *supra* note 178, at 491.

the South would have conceded without the six hundred thousand deaths of the Civil War (still the highest number of casualties suffered by the United States in war by absolute numbers and by proportion, at a time when the U.S. population numbered only 31.4 million).[262] It is one of the tragedies of American history that the North and South could not reach a settlement of their differences, and that is in part the fault of the Supreme Court and *Dred Scott*.

CONCLUSION

Instrumental approaches to judicial review have taken a number of different forms. Some, such as Robert Cooter, have examined the way that judicial review allows the federal courts to advance their own policy preferences.[263] The higher the procedural barriers for congressional action, the more freedom that the courts will enjoy, free from the fear of legislative override. Others, such as Matthew Stephenson, see judicial review as a means by which a legislative majority can lock in policy gains for the longer term.[264] By empowering courts to review decisions in the future, a majority can prepare for the day when it will become the minority.[265] Earlier, William Landes and Posner argued that independent judicial review could enhance the value of legislation to interest groups by guaranteeing its enforcement in the future.[266]

This Article takes a different tack. It examines how judicial review and an originalist interpretive methodology can encourage agreement at the level of constitution-making. It can play this function by serving as a commitment mechanism to enforce future compliance with a political bargain. Judicial review signals to parties of a constitution that the groups that will gain from the agreement will not use their new power to renege and seek a renewed deal on better terms. Originalism then sends an amplified signal that parties will comport to the original terms of the political bargain.

On this point, this Article begins to outline a response to the challenge of common good constitutionalism to originalism. Common good theorists criticize originalism for lacking any attachment to a moral system; indeed, originalism attracted early figures such as Bork and Scalia precisely because it disavowed any higher good.[267] Vermeule makes a compelling case that we should judge any interpretive theory against a moral system and that neutrality itself may prove a myth.[268] He argues that our legal system should adopt an interpretive

262. JAMES M. MCPHERSON, BATTLE CRY OF FREEDOM: THE CIVIL WAR ERA 854 (C. Vann Woodward ed., 1988).

263. *See* COOTER, *supra* note 120, at 199.

264. Matthew C. Stephenson, *The Strategic Substitution Effect: Textual Plausibility, Procedural Formality, and Judicial Review of Agency Statutory Interpretations*, 120 HARV. L. REV. 528, 530–32 (2006).

265. *Id.* at 544.

266. William M. Landes & Richard A. Posner, *The Independent Judiciary in an Interest-Group Perspective*, 18 J.L. & ECON. 875, 877 (1975).

267. *See* Scalia, *supra* note 62, at 854; BORK, *supra* note 65, at 4.

268. *See* Casey & Vermeule, *supra* note 83, at 125–26.

approach that advances justice, peace, and other values that have informed the classical legal tradition stretching back to the ancients.[269] Other political philosophers like Ronald Dworkin would agree, but would instead substitute Rawlsian political theory, Marxist socialism, utilitarianism, social justice, or their preferred morality instead.[270] This Article does not contest the critique that interpretation must serve the best moral theory, if we could indeed determine which one was best.

This Article, however, shows that before our constitutional system can adopt such an interpretive theory, it must construct a nation-state first. Without a nation, there is no Constitution, no courts, no interpretation, and no advancement of any morality. Individuals cannot form a society that can provide security or a unified market that can support an economy. Originalism can serve an important role in helping groups to form a nation and construct national institutions. We should overstate originalism's role. The primary mechanism that founds a nation is a power-sharing agreement set out in a constitution. But because of the obstacles to reaching a bargain, parties can send a costly signal of good faith by committing to an enforcement mechanism such as judicial review.

But once the parties draft a constitution and adopt an enforcement mechanism, originalism can perform a critical function in persuading the parties to adopt the agreement. The purpose of judicial review is to assure the parties to the constitution that each will observe the original bargain in the future. They commit not to reopen their power-sharing agreement even if they should grow sufficiently powerful under the new nation to do so. Originalism ensures that the courts—and, in fact, the other institutions of government—will also interpret the Constitution in line with the original terms of the deal, rather than exploiting constitutional ambiguities as a surreptitious means of reneging. Originalism helps reassure states, for example, that they can agree to a constitution where the new institutions of the national government will not allow the other parties to reopen the terms in the future.

Therefore, originalism and judicial review must have precedence over other theories of interpretation because a nation-state must exist first before we can decide whether it should pursue the common good or Rawlsianism, for example. Lincoln put forth this argument when critics accused him of acting unconstitutionally when he refused to obey a writ of habeas corpus, issued by Chief Justice Taney of all judges, to release Confederate sympathizers.[271] In his July 4, 1861 message to the special session of Congress, Lincoln responded to Taney by arguing that his first duty was to secure the Union.[272] "The whole of

269. *Id.* at 108.

270. *See* DWORKIN, *supra* note 56, at 34.

271. *See* Yoo, *supra* note 17, at 19.

272. Abraham Lincoln, Message to Congress in Special Session (July 4, 1861), *in* 4 THE COLLECTED WORKS OF ABRAHAM LINCOLN, *supra* note 43, at 421, 423 (Roy P. Basler ed., 1959).

the laws which were required to be faithfully executed, were being resisted, and failing of execution, in nearly one-third of the States."[273] Saving the Union, Lincoln suggested, justified any failure to observe any singular constitutional provision:

> Must they be allowed to finally fail of execution, even had it been perfectly clear, that by the use of the means necessary to their execution, some single law, made in such extreme tenderness of the citizen's liberty, that practically, it relieves more of the guilty, than of the innocent, should, to a very limited extent, be violated?[274]

Lincoln then famously asked, "are all the laws, *but one*, to go unexecuted, and the government itself go to pieces, lest that one be violated?"[275] Lincoln suggested that he could not enforce the habeas corpus provision if it required the end of the Union. "Even in such a case, would not the official oath be broken, if the government should be overthrown, when it was believed that disregarding the single law, would tend to preserve it?"[276] It is important to recognize that Lincoln carefully justified his unprecedented wartime actions on the Constitution, but at the same time, he made clear that his higher commitment was to preserving the Union.[277]

Dred Scott shows the perils when judicial review fails to adopt a proper originalist methodology. Judicial review without originalism cannot provide the same measure of reliability as judicial review with it. Without originalism, judicial review would not create an institution committed to enforcing the original political bargain on the terms understood by the parties at the time of its formation. Chief Justice Taney's flawed originalist methodology upended the principles of liberty and equality that were ingrained in the original contract of the Declaration of Independence and the Constitution. *Dred Scott* reveals that when the Court abandons its function in keeping the parties to the original terms of the constitutional settlement, it not only undermines enforcement of the Constitution, but it also removes the value of judicial review as a commitment device for future efforts to resolve a political crisis. While *Dred Scott* alone was not a direct precipitating cause of the Civil War, it handicapped the Court as an institutional guarantor of a bargain that could have headed the conflict off. Originalism, rather than appealing to contemporary norms, might have saved the Court from itself.

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273. *Id.* at 430.

274. *Id.*

275. *Id.*

276. Abraham Lincoln, Message to Congress in Special Session (July 4, 1861), *in* ABRAHAM LINCOLN, SPEECHES AND WRITINGS, 1859–1865, *supra* note 217, at 246, 253.

277. JOHN YOO, CRISIS AND COMMAND 201 (2009).

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