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## The Empirical Judiciary

A. Christopher Bryant

*University of Cincinnati College of Law*, [chris.bryant@UC.Edu](mailto:chris.bryant@UC.Edu)

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## Book Reviews

### THE EMPIRICAL JUDICIARY

**CONSTITUTIONAL FICTIONS: A UNIFIED THEORY OF CONSTITUTIONAL FACTS.** By David L. Faigman.<sup>1</sup> Oxford University Press. 2008. Pp. xiii + 230. \$65.00.

*A. Christopher Bryant*<sup>2</sup>

#### INTRODUCTION

In *Gonzales v. Carhart*, the Supreme Court sustained the constitutionality of the federal Partial-Birth Abortion Ban Act without overruling its decision seven years earlier invalidating a nearly identical Nebraska law.<sup>3</sup> In doing so, the Court sided with, though conspicuously did not defer to, Congress's factual finding that the banned procedure was virtually never medically necessary, rejecting the contrary conclusion of all six lower federal courts confronted with challenges to the federal law. The ruling shone a spotlight on the methods, or lack thereof, that the Court employs in receiving evidence and resolving disagreements about questions of legislative facts in constitutional cases.

The ruling was merely the most recent of numerous cases in which the result turned on disputed questions of legislative fact. Examples from the Supreme Court's last decade can be found in

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1. John F. Digardi Distinguished Professor of Law, University of California, Hastings College of Law.

2. Professor, University of Cincinnati College of Law. I am grateful to Lou Bilionis, Paul Caron, David Faigman, Emily Houh, Betsy Malloy, Bill Marshall, Tom McAfee, Darrell Miller, Michael Solimine, Verna Williams, and Ingrid Wuerth for helpful comments; Anna Dailey, Brennan Grayson, and Kane Kayser for excellent research assistance; and the Harold C. Schott Foundation for financial support.

3. Compare *Gonzales v. Carhart*, 550 U.S. 124 (2007) with *Stenberg v. Carhart*, 530 U.S. 914 (2000).

nearly every substantive area of constitutional law, including the dormant commerce clause, the scope of congressional power to regulate interstate commerce and enforce the Fourteenth Amendment, the requirements of the due process and the equal protection clauses thereof, as well the freedoms of religion and expression. Moreover, the centrality of legislative facts to constitutional litigation is nothing new. To some extent their significance is an inevitable corollary to judicial review, which makes all the more astounding the judiciary's failure to establish a consistent or coherent approach to resolving questions of legislative fact. Over the course of the last century, few issues have more persistently or profoundly perplexed judges than how they should address questions of legislative fact when reviewing the constitutionality of a challenged statute.

Nor has the subject received the kind of sustained scholarly investigation its import clearly merits. Though the problem is a ubiquitous and recurring one, scholarly efforts to solve it tend to come in waves, several scholars addressing the question during a brief span of time (often in response to one or two salient decisions) and then ignoring the matter for years. But an issue that implicates the very legitimacy of judicial review ought not be ignored. So David Faigman's *Constitutional Fictions: A Unified Theory of Constitutional Facts* merits celebration for taking up such an important and too-often neglected subject.

His book should be celebrated for more than its topic, however. *Constitutional Fictions* does the legal profession an invaluable service by identifying and articulating the many frequently unspoken questions that arise in the context of judicial consideration and resolution of facts, especially legislative facts, in constitutional cases. The book also documents the largely unremarked ubiquity of these questions, the wide variety of circumstances in which they occur, and the depth of the theoretical issues they implicate. These are not mean achievements, as they outstrip the occasional efforts of some of the most distinguished legal scholars of the past century. Professor Faigman accomplishes all this in crisp, lucid, and admirably concise prose. Nor could Professor Faigman's book be more timely. Several of the Roberts Court's most salient and controversial constitutional decisions have turned on questions of legislative fact.

*Constitutional Fictions* treats an important topic with impressive insight and grace. But it will not be the last word on the subject. Professor Faigman may have planned an exhaustive study, but instead the subject appears to have exhausted him.

When *Constitutional Fictions* finally comes round to normative and prescriptive analysis of the status quo, Faigman shies away from the broader implications of his critique. As he acknowledges, the Supreme Court has been unapardonably opaque and inconsistent in its treatment of questions of legislative fact in constitutional cases. These are not venial judicial sins.

But Faigman proves too tolerant of the Court's disarray and the resulting judicial freedom from constraint. Ultimately he concludes that meaningful judicial review makes much of this indeterminacy inevitable. Implicit in this reasoning is an excessively muscular conception of judicial supremacy, or even exclusivity, in the implementation of the Constitution. After briefly reviewing Faigman's arguments, this essay explores how other models of the roles different institutions properly play in constitutional practice might compel more sweeping changes than he suggests.

Part I of this essay situates *Constitutional Fictions* within the pre-existing scholarly framework. The second Part then summarizes the book's substantial contributions towards greater recognition and understanding of the present doctrinal disorder concerning legislative facts in constitutional cases. Part III identifies issues with, and alternatives to, present judicial practices not addressed in *Constitutional Fictions*, in the hopes of compiling a catalog of questions for future research.

## I. PRIOR EFFORTS

To appreciate fully Faigman's distinctive contribution, it must be assessed in the context of the pre-existing treatments of the subject; hence this Part briefly canvases those efforts. The implications of judicial determination of legislative facts<sup>4</sup> in constitutional cases first garnered scholarly attention in the wake of the Supreme Court's decision in *Lochner v. New York*.<sup>5</sup> *Lochner* of course served as precedent for judicial disapproval of numer-

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4. As used herein, "legislative facts" are facts of general applicability that do (or do not) support the public policy judgment leading to the enactment of legislation. At least since the early 1940s, commentators and jurists have distinguished legislative from adjudicative facts, which concern the application of a general rule to the unique, concrete circumstances of a particular dispute. See, e.g., Kenneth L. Karst, *Legislative Facts in Constitutional Litigation*, 1960 S. CT. REV. 75, 77 (noting that the "phrase virtually belongs to Professor Kenneth C. Davis") (citing KENNETH C. DAVIS, ADMINISTRATIVE LAW TREATISE § 15.03 (1958)).

5. 198 U.S. 45 (1905).

ous Progressive Era efforts to regulate wages, hours, and working conditions in an increasingly industrialized American economy.<sup>6</sup>

In 1916 then-Harvard law professor Felix Frankfurter published a survey of judicial rulings on the validity of laws limiting working hours.<sup>7</sup> He concluded that “study of these opinions indicates a change not only in the decisions but in the groundwork of the decisions,” adding that the “turning point comes in 1908 with *Muller v. Oregon*.”<sup>8</sup> The future New Dealer and Supreme Court Justice wrote in his typically self-assured fashion. Nevertheless he failed to hide his fundamental ambivalence about the judicial determination of legislative facts in constitutional decisions. Describing a trend towards greater judicial receptivity to maximum hours laws, which he ardently applauded, he came close to endorsing a minimalist and highly deferential judicial role in addressing such matters. He noted that a chief virtue of the more recent rulings was that they recognized that questions concerning the propriety of limits on hours of labor were matters of degree “solely for the legislator.”<sup>9</sup>

But elsewhere in the essay, Frankfurter assiduously preserved a substantial role for courts in re-examining the factual basis for such legislation. He stressed the value and necessity of Brandeis briefs such as those Louis Brandeis himself famously filed in *Muller*. Ultimately, he explicitly declined to choose between judicial abdication and judicial reinvestigation characterized by what he described as attention to “scientific” principles: “either the legislative judgment should be sustained if there is no means of judicial determination that the legislature is indisputably wrong, or the Court should demand that the legislative judgment be supported by available proof.”<sup>10</sup> Frankfurter concluded his survey with an optimistic prophecy that once the factual nature of these kinds of controversies became apparent, the legal profession would bring to bear its formidable resources and resolve the conundrum in some way not yet apparent to him. Ninety-three years later, Frankfurter’s hopes have not been fulfilled.

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6. See generally David A. Strauss, *Why Was Lochner Wrong?*, 70 U. CHI. L. REV. 373, 373–74 (2003).

7. Felix Frankfurter, *Hours of Labor and Realism in Constitutional Law*, 29 HARV. L. REV. 353 (1916).

8. *Id.* at 362 (citing *Muller v. Oregon*, 208 U.S. 412 (1908)) (footnote omitted).

9. Frankfurter, *supra* note 7, at 367.

10. *Id.* at 372.

To be sure, others have tried. Writing in the *Harvard Law Review* nine years deeper into the *Lochner* Era, Henry Wolf Biklé focused on cases in which the constitutionality of legislation depended upon the courts' assessment of "some question of fact which the statute postulates or with reference to which it is to be applied."<sup>11</sup> Professor Biklé acknowledged that judges' legal expertise did not accord them any inherently greater aptitude to determine such questions than that enjoyed by the proverbial man in the street.<sup>12</sup> He postulated further, perhaps with Frankfurter's earlier commentary in mind, that "a substantial part of the criticism which has been leveled against [judicial review was] due to the fact that decisions have been made which turn on the resolution of these underlying questions of fact."<sup>13</sup>

After listing the various ways, ranging from *a priori* reasoning to reliance on findings made by state supreme courts, that the U.S. Supreme Court had resolved such questions, Biklé urged the Court to uphold statutes unless the formal record of judicial proceedings included proof of facts showing the law to be unconstitutional.<sup>14</sup> Recognizing that scrupulous adherence to such requirements could swamp the federal courts, Biklé suggested that some "machinery" be established whereby such questions could be explored and pertinent factual records could be compiled before the matters found their way to federal court. Biklé pointed to the proceedings before the Interstate Commerce Commission as a possible model. Of course, as to many economic, industrial, commercial, and environmental activities, Biklé's proposal has proven prophetic, insofar as the Administrative Procedure Act<sup>15</sup> provides for judicial oversight of the massive federal bureaucracy currently regulating such matters. Far from all constitutional litigation flows through these channels, however. And the Court has never bound itself to the kind of "on the record" requirement Biklé proposed.

So the issue Frankfurter and Biklé addressed not only outlived them but was fueled by the rise of the administrative state. Accordingly, after a period of neglect, the issue was again taken up, albeit sporadically, by some of the foremost constitutional

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11. Henry Wolf Biklé, *Judicial Determination of Facts Affecting the Constitutional Validity of Legislative Action*, 38 HARV. L. REV. 6, 6 (1924).

12. *See id.* at 6–7.

13. *See id.* at 7.

14. *Id.* at 21–22.

15. 5 U.S.C. §§ 551–59, 701–06 (2000).

scholars of the second half of the twentieth century.<sup>16</sup> A thorough exploration of their work exceeds the narrow confines of a book review. Nonetheless, the particularly noteworthy contributions of Archibald Cox merit mention. The Harvard law professor and former U.S. Solicitor General published two articles in which he examined the relative capacities of Congress and the Supreme Court to determine legislative facts in human rights cases.

Cox celebrated the Court's Voting Rights Act rulings handed down in the October 1965 Term of the Court. In particular, he lauded the Justices' decision to borrow from commerce-clause case law, and extend to the enforcement clauses of the Reconstruction Amendments, a "presumption that facts exist which sustain [congressional] legislation and . . . [judicial] deference to congressional judgment upon questions of degree and proportion."<sup>17</sup> Cox also approved the Court's recognition of Congress's relative institutional strengths, among them a superior ability to determine questions of legislative fact, in devising means for the protection of core constitutional values.<sup>18</sup> Just five years later, however, Cox conceded that his earlier synthesis of the Court's cases had been overly optimistic. Upon reflection he found it "hard to divine whether the Justices have developed a philosophy concerning the weight to be given legislative determinations of fact, characterization, or degree in civil liberties cases,"<sup>19</sup> a judgment as accurate today as when first spoken. So while the controversy surrounding judicial determination of legislative facts in constitutional cases is an ancient one, the legal profession's understanding of it remains inadequate.

## II. JUST THE FACTS

Faigman opens his book by discussing illustrative examples of judicial incoherence in the reception of constitutional facts. He makes a case study of the Supreme Court's efforts to deal

16. See, e.g., Dean Alfange, *The Relevance of Legislative Facts in Constitutional Law*, 114 U. PA. L. REV. 637 (1966); Henry J. Friendly, *The Courts and Social Policy: Substance and Procedure*, 33 U. MIAMI L. REV. 21 (1978); Karst, *supra* note 4; Henry P. Monaghan, *Constitutional Fact Review*, 85 COLUM. L. REV. 229 (1985); Arthur S. Miller & Jerome A. Barron, *The Supreme Court, the Adversary System, and the Flow of Information to the Justices: A Preliminary Inquiry*, 61 VA. L. REV. 1187 (1975).

17. Archibald Cox, *The Supreme Court 1965 Term—Foreword: Constitutional Adjudication and the Promotion of Human Rights*, 80 HARV. L. REV. 91, 107 (1966).

18. *Id.* at 118–21.

19. Archibald Cox, *The Role of Congress in Constitutional Determinations*, 40 U. CIN. L. REV. 199, 213 (1971).

with the related questions of when, for constitutional purposes, human life begins and ends. He adeptly demonstrates that the relevant cases are utterly inconsistent in their treatment of questions of constitutional fact and reflect a more universal confusion about the way in which such questions should be resolved.

Faigman follows this introduction with an examination of his subject's philosophical foundations. Specifically, he surveys the debate between scientific realists<sup>20</sup> and their more skeptical critics. In doing so, Faigman both reveals his own (quite modest) starting assumptions and situates his project within a broader debate about the nature of human knowledge. As he explains, antirealists insist that facts and values are inextricably intertwined, whereas Faigman, like other scientific realists, maintains that "facts can exist independent of biasing influences" (p. 24). This makes possible the distinction between constitutional law and constitutional fact upon which his book is based. The consequence of these assumptions is that lawyers and judges can and should "take facts seriously" (p. 24), even (especially?) when relevant to constitutional litigation. Put another way, Faigman argues that, because facts exist independent of the values of their beholders, courts have a duty to discover them, rather than just employ them "rhetorically, as premises that can be manipulated or massaged in the service of one or another legal outcome" (p. 25). Throughout the book Faigman exposes the Supreme Court's relentless tendency to do the latter.

The next four chapters constitute the heart of the book, wherein Faigman explains how and why the Court has dealt so carelessly with constitutional facts. This effort starts with a taxonomy of constitutional facts that improves upon the well-worn but highly influential distinction Kenneth Culp Davis made between adjudicative and legislative facts.<sup>21</sup> Insofar as the former class matters to constitutional rulings, Faigman denominates them "constitutional case-specific facts." He divides the latter class into two subcategories based on the function the facts perform in the court's constitutional analysis. "Constitutional doctrinal facts" concern or even determine the content of legal rules that become tenets of constitutional law. "Constitutional reviewable facts," in contrast, relate to the application of legal rules to

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20. Scientific realists, discussed in the text, ought not be confused with legal realists. On the latter, see, for example, LAURA KALMAN, *LEGAL REALISM AT YALE: 1927-1960* (1986).

21. See *supra* note 4.



particular circumstances, though such facts still transcend the parties presently before the court. Faigman acknowledges that these categories, while distinct in theory, are not always easy to distinguish in practice (pp. 46–49).

A single area of First Amendment jurisprudence illustrates these distinctions. In explaining its decision to exclude “obscenity” from First Amendment protection, the Court has asserted that exposure to obscene material degrades the moral sensibilities of the community<sup>22</sup> and may even increase the incidence of antisocial behavior.<sup>23</sup> These claims concern matters of legislative fact, because they extend beyond the parties to any particular obscenity prosecution. Within Faigman’s taxonomy, they are constitutional *doctrinal* facts, because the Court asserts them in support of its choice of a legal rule, namely a free speech doctrine with an exception for obscene material. The Court has defined obscenity to exclude material having “serious literary, artistic, political, or scientific value.”<sup>24</sup> Whether a specific work is of sufficient value to exempt its authors, publishers, or distributors from liability, however, is a question of constitutional *reviewable* fact. It is legislative rather than adjudicative in nature because the Supreme Court has made it clear that the value of a work does not “vary from community to community.”<sup>25</sup> Thus, such a determination transcends any single obscenity prosecution. But because this factual issue concerns the application of an established legal standard rather than the announcement of a new one, it is, to use Faigman’s terminology, a constitutional reviewable (rather than a doctrinal) fact.<sup>26</sup>

Faigman’s decision to classify different types of legislative facts according to the function they serve in constitutional analysis is a sound one. As I argue below, however, this insight might profitably be taken even further.

The next chapter, on the “Constitution’s Frames of Reference,” explores the ways in which the Supreme Court has manipulated the distinction between facial and as-applied challenges to statutes in order to frame constitutional questions so as to fo-

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22. See *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 59, 63 (1973).

23. See *id.* at 60.

24. *Miller v. California*, 413 U.S. 15, 24 (1973).

25. *Pope v. Illinois*, 481 U.S. 497, 500 (1987).

26. The question, however, of the work’s offensiveness, another requirement of the legal test for obscenity, is limited to the specific geographical context of that particular prosecution. See *id.* Accordingly, such an issue concerns a constitutional case-specific fact (p. 57).

reordain their answers. These frames of reference matter for present purposes because they dictate the form issues of legislative fact take in constitutional cases. Case specific facts are most likely to be relevant to constitutional questions posed at a highly specific level of generality, whereas reviewable or even doctrinal facts are more likely to be pertinent to those asked and answered at a more abstract level.<sup>27</sup> In *United States v. Salerno*, the Supreme Court insisted that a facial challenge to a statute may succeed only where “no set of circumstances exists under which the act would be valid.”<sup>28</sup> Faigman joins the majority of commentators in dismissing *Salerno*’s dictum as the product of “romantic notions of a restrained judiciary” and “timeworn banalities of judicial restraint” (pp. 65–66). In Part III, I argue that these banalities deserve more of a hearing than *Constitutional Fictions* accords them.

In any event, Faigman insists that his critique “does not depend upon a belief in expansive judicial authority” (p. 66). And he is surely correct to chastise the Court for its selective and incoherent application of the *Salerno* rule. Faigman argues that this confusion is merely one manifestation of the Court’s more general inattention to the essential (but often implicit) selection of the appropriate level of generality for resolving constitutional controversies. He calls upon judges (especially Justices) and lawyers to be more self-aware in making these choices. As he demonstrates (pp. 73–78), their neglect has made possible much mischief, at times allowing courts to play a constitutional shell game.

Assuming the constitutional fact issues have been properly framed, questions remain about the correct approach to their initial resolution by trial judges and subsequent reevaluation by appellate courts. These problems are the ones most in need of fixing, for as Faigman acknowledges the judiciary’s practices in receiving and evaluating proof of legislative facts in constitutional cases are “chaotic,” and “procedural guidelines and evaluative guideposts” are nonexistent (p. 98). At the trial-court level, testimony offered as proof of legislative facts must satisfy the demanding standards of evidentiary rules, frequently including the

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27. As Faigman colorfully puts it, “the question of what frame of reference to employ . . . largely involves choosing between reviewable facts or case-specific facts as the denomination of constitutional currency” (p. 97).

28. 481 U.S. 739, 745 (1986).

rigorous scrutiny applicable to expert witnesses.<sup>29</sup> On appeal, however, *amici*, who are under no obligation to demonstrate relevant expertise, file briefs packed with assertions of legislative fact, which may then be relied upon to justify reversal. Nor is the Court guided by any “overriding theory of when it should be deferential to other bodies —judicial and nonjudicial—that have made findings of constitutional fact” (p. 114). This disorder has consequences. As Faigman rightly observes, the indeterminacy of modern constitutional law can to a significant extent be traced to the Court’s refusal to recognize, let alone rationalize, the role legislative facts play in constitutional adjudication. The status quo maximizes the discretionary authority of the Justices to the detriment of fundamental rule of law values.

But Faigman offers only the most modest and precatory solutions, largely because he deems the present state of affairs to be inevitable. For example, he dismisses as “unrealistic and unhelpful” pleas that assertions of legislative fact be subjected to the rigors of the adversarial process. His explanation is that because such assertions concern facts that “transcend any single litigation, and thus have precedential import, the development of a factual record cannot be left to the parties” (p. 100).<sup>30</sup>

Similarly, Faigman defends *de novo* judicial review of a legislature’s factual findings, at least where important constitutional rights are implicated.<sup>31</sup> He goes so far as to dismiss as essentially irrelevant considerations of comparative institutional competence. Though he nowhere explicitly says as much, these conclusions apparently rest at least in part on an inchoate assumption of absolute judicial supremacy. Earlier in the book he demonstrates that disputes about legislative facts ultimately concern the meaning of the Constitution (pp. 88–90). The implicit syllogism seems to be that (1) with a few exceptions, it is for the Court to tell the country what the Constitution means, (2) resolving issues of constitutional fact is a component of constitutional interpretation, and therefore (3) the Justices must enjoy the same freedom in deciding questions of constitutional fact that they enjoy in deciding questions of law. Were the major premise relaxed to acknowledge that other institutions also properly put flesh on the

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29. See *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993).

30. The possibility, however, deserves more discussion than he gives it. See *infra* Part IIIA.

31. *But cf.* Note, *Judicial Review of Congressional Factfinding*, 122 HARV. L. REV. 767, 767 (2008) (concluding that the “Court’s lack of solicitousness to congressional fact-finding is indefensible on both constitutional and prudential grounds”).

Constitution's bare bones, the conclusion would be to that extent merit reconsideration. Faigman also stresses the ultimate need for uniform resolution of constitutional questions, which, he reasons, precludes Supreme Court deference to what often amounts to a multiplicity of fact-finders (p. 116).<sup>32</sup> Here again, however, there is more to constitutional facts than is dreamt of in Professor Faigman's philosophy.

### III. QUESTIONS NOT ASKED

As the preceding synopsis shows, *Constitutional Fictions* vastly improves upon the pre-existing legal literature. By recognizing the subject as one demanding trans-substantive examination, Faigman highlights for scholarly scrutiny a fundamental element of the actual practice of judicial review too often ignored by judges and their critics.

The book's most significant and original contribution is its insight that disputes about legislative facts in constitutional cases are really disputes about the meaning of the Constitution itself. Resolution of those disputes cannot be separated from the task of constitutional interpretation. Put more concretely, "[p]art of the exposition of any constitutional rule should include a statement of which party—the challenger or the State—has the burden of proof [as to pertinent legislative facts] and at what level of proof that burden must be met" (p. 101). While this injunction may seem elementary, it connects issues of legislative fact to the work of constitutional interpretation in a clear, concise, and practical manner that significantly exceeds prior efforts. Moreover, were the injunction to be honored, it would effect dramatic change in the way constitutional cases are litigated and decided. Thus, the revelation of the relationship between constitutional facts and constitutional meaning was in itself a major achievement.

Unfortunately, Faigman fails to explore the full ramifications of that observation. At several points in his analysis he in

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32. The emphasis here on the need for finality and uniformity echoes one of the academic literature's more prominent arguments for a strong version of judicial supremacy in constitutional interpretation, namely that such a role for the Court provides a means for settlement of otherwise persistent and divisive controversies. See, e.g., Larry Alexander & Frederick Schauer, *On Extrajudicial Constitutional Interpretation*, 110 HARV. L. REV. 1359, 1371 (1997) (arguing that a strong version of judicial supremacy is necessary to fulfill the "settlement function of law").

effect treats this insight as the end, when in reality it is just the beginning, of analysis. Faigman tacitly assumes that the Supreme Court must have the pre-eminent role in assessing legislative facts in constitutional cases. He even rejects some efforts to regularize or channel this function, apparently on the ground that judges, and especially Supreme Court Justices, must remain free to pursue these questions however they choose to do so. He reasons that “[j]ust as no court would defer to the parties to say what the law is, no court should rely on the parties exclusively to say what the reviewable facts are” (p. 100).

But the analogy goes only so far. Whereas judges are professional referees of legal reasoning, they can lay no similar claim to expertise about the wide array of empirical questions that come before them. Those questions run the gamut of social and scientific knowledge. To rely upon judges, especially appellate judges limited by the record created below, to know or discover the answers to these questions is at least as problematic as relying upon the parties to do so. There must be better answers to this problem.

#### A. THE REMAND OPTION

On occasion the Supreme Court has, when confronted with a dispositive but disputed question of legislative fact, remanded the constitutional case to the trial court with directions to supplement the formal evidentiary record. The Court’s 1994 and 1997 *Turner Broadcasting* decisions<sup>33</sup> illustrate this approach. At issue there was the constitutionality of the “must-carry” provisions of the Cable Television Consumer Protection and Competition Act of 1992, which required cable television providers to dedicate a portion of their channels to carrying local broadcast television stations.<sup>34</sup> Congress imposed this requirement to protect local broadcasters from cable companies, which, Congress had concluded, increasingly enjoyed monopoly status in most markets.<sup>35</sup>

Shortly after the Act became law, numerous cable operators and programmers filed suit in federal court claiming that the must-carry provisions violated the Free Speech and Press Claus-

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33. *Turner Broadcasting Sys., Inc. v. FCC (Turner II)*, 520 U.S. 180 (1997); *Turner Broadcasting Sys., Inc. v. FCC (Turner I)*, 512 U.S. 622 (1994).

34. *Turner I* at 626.

35. *Id.* at 623; see also Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385 § 2(a)(16), 106 Stat. 1460, 1461 (1992).

es of the First Amendment.<sup>36</sup> After a three-judge district court rejected the plaintiffs' constitutional challenge and upheld the Act,<sup>37</sup> the plaintiffs appealed directly to the Supreme Court. Even though the Court affirmed the district court's decision to apply the more deferential "intermediate level of scrutiny applicable to content-neutral restrictions,"<sup>38</sup> the Court nevertheless vacated the district court's decision granting summary judgment in favor of the government.<sup>39</sup> The Court "ha[d] no difficulty concluding" that Congress's asserted interests in preserving free, over-the-air local broadcast television and promoting fair competition in the television industry constituted "important governmental interest[s]" for the purposes of intermediate scrutiny when "viewed in the abstract."<sup>40</sup> Nevertheless the Court remanded because "[o]n the state of the record developed thus far," it could neither confirm nor reject Congress's prediction that the economic viability of local broadcast television would be threatened absent the Act's must-carry requirements.<sup>41</sup>

On remand, after the parties put "reams of paper"<sup>42</sup> before the district court, the judges again ruled for the government.<sup>43</sup> The plaintiffs appealed, and the Supreme Court affirmed.<sup>44</sup> Writing for the majority, Justice Kennedy found that the "expanded record"<sup>45</sup> assuaged the Court's prior doubts about the reasonableness of Congress's perception that broadcast television faced a serious threat and Congress's judgment that must-carry rules constituted a measured response.

A remand for development of the record relating to an issue of legislative fact in a constitutional case is unusual, at least outside of the administrative-agency context. But the two *Turner* decisions show that it can be and relatively recently has been done. This procedure is, of course, time consuming as well as burdensome on the parties and the courts. Still, to the extent

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36. *Turner I*, 512 U.S. at 634.

37. Pursuant to the Act's command, a three-judge district court was convened in response to the constitutional challenge to the must-carry provisions. See § 23, 106 Stat. at 1500.

38. *Turner I*, 512 U.S. at 662.

39. *Id.* at 668.

40. *Id.* at 663.

41. *Id.* at 665.

42. *Turner Broadcasting v. FCC*, 910 F. Supp. 734, 739 (D.D.C. 1995).

43. *Id.*

44. Justice Breyer, who had replaced Justice Blackmun in the interim, voted to affirm. *Turner II*, 520 U.S. at 225 (Breyer, J., concurring in part).

45. *Id.* at 195.

that it promotes a more empirically rigorous constitutional jurisprudence, it might be well worth the cost.<sup>46</sup> The possibility that this method should be employed more frequently at least deserves careful consideration in a book dedicated to presenting a “procedural blueprint for constitutional fact-finding” (p. 159). Faigman, however, accords the issue no more than a passing reference, and implicitly rejects the approach without elaboration. More needs to be said before a process combining the virtues of the adversarial system with the judicial hierarchy necessary to a uniform interpretation of the Constitution is put out of mind.

### B. FACTS’ FUNCTIONS

Faigman properly divides legislative facts into the subcategories “doctrinal” and “reviewable,” depending upon the function the facts play in judicial analysis (pp. 46–47). A functional taxonomy, however, could profitably be developed further. Just as not all legislative facts are alike, neither are all doctrinal or reviewable facts.

As to the former, which a court employs in formulating a governing legal rule, Faigman gives as illustrative examples historical questions relevant to an originalist approach to constitutional interpretation and social-science questions relevant to interpretative claims based on constitutional structure. As he correctly notes, determining doctrinal facts is a component part of judicial lawmaking. From this Faigman argues that judges must remain free to discover such facts unfettered by the limits of the adversarial process. To be sure, it is hard to quarrel with the notion that “[j]ust as a judge might retire to the library to research a line of cases, a judge might consult ‘The Federalist’ when considering what foundational principles underlie the Supremacy Clause.” Nor would many argue that a “judge who reads a biography of Alexander Hamilton or a history of the New Deal Court” ought not “apply this newfound knowledge to his or her constitutional cases,” (p. 89) though there is something slightly discomfiting about the idea that results in constitutional cases might turn on the content of a judge’s summer reading list.<sup>47</sup> Faigman ultimately concludes that “traditional notions sur-

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46. See John O. McGinnis & Charles W. Mulaney, *Judging Facts Like Law*, 25 CONST. COMMENT. 69, 126 (2008) (arguing that an appellate court should “remand [a] case to the lower court for consideration of a dispositive factual issue that the appellate court believes was missed or for reconsideration of an issue which, in the view of the appellate court, needs further evidentiary vetting”).

47. Cf. LINDA GREENHOUSE, BECOMING JUSTICE BLACKMUN: HARRY

rounding evidence and burdens of proof are largely inapposite in the case of constitutional doctrinal facts” (p. 88). In the contexts he highlights—matters of history or political science—this conclusion seems largely unobjectionable.

But, as Faigman notes, doctrinal facts take other forms as well. In *Washington v. Glucksberg*,<sup>48</sup> for example, Justice Souter concurred in the Court’s judgment rejecting a claimed right to physician-assisted suicide for the terminally ill. Souter emphasized, however, that the Court might reconsider the issue were it subsequently presented with evidence that such a right would not create an intolerable risk of euthanasia or coerced suicide.<sup>49</sup> Pointing to the legality of physician-assisted suicide in the Netherlands, Souter took notice of a considerable debate as to the lessons of the Dutch experience.<sup>50</sup> For him that debate counseled caution for the time being. He stressed, however, that “[t]he day may come when we can say with some assurance which side is right,”<sup>51</sup> and thus he did not reject respondents’ constitutional claim “for all time.”<sup>52</sup> In the meantime, though, he was content to leave the issue with state legislatures, which he noted enjoyed significant institutional advantages in exploring such questions.<sup>53</sup>

Souter’s opinion raises issues Faigman might have examined—namely, whether, and, if so, when it is appropriate for a court to defer a constitutional ruling in a justiciable case because of the sort of factual uncertainty that proved dispositive to Souter in *Glucksberg*. Of course, this question then raises a corollary one about the procedural and decisional rules appropriate in such circumstances.<sup>54</sup> While it might be tempting to dis-

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BLACKMUN’S SUPREME COURT JOURNEY 83, 90–91 (2005) (describing Justice Blackmun’s summer visit to the Mayo Clinic library and dinner-table discussion with his daughters about abortion while drafting the Court’s opinion in *Roe v. Wade*).

48. 521 U.S. 702 (1997).

49. *Id.* at 782 (Souter, J., concurring in the judgment).

50. *Id.* at 786.

51. *Id.* For contrasting views as to the lessons to be drawn from the first decade under Oregon’s assisted-suicide statute, compare Kathryn L. Tucker, *In the Laboratory of the States: The Progress of Glucksberg’s Invitation to States to Address End-of-Life Choice*, 106 MICH. L. REV. 1593, 1603 (2008) (concluding that the “experience in Oregon has demonstrated that a carefully drafted law does not put patients at risk”), with Herbert Hendin & Kathleen Foley, *Physician-Assisted Suicide in Oregon: A Medical Perspective*, 106 MICH. L. REV. 1613, 1614 (2008) (finding that “the implementation of the law has had unintended, harmful consequences for patients”).

52. *Glucksberg*, 521 U.S. at 789 (Souter, J., concurring in the judgment).

53. *Id.*

54. *Roper v. Simmons* is another recent case wherein a disputable social-science conclusion apparently affected the Court’s choice among potential doctrinal rules. 543



miss Souter's musings as eccentric, the Court's modern constitutional jurisprudence suggests that the only eccentric aspect of Souter's opinion was its candor.<sup>55</sup> In any event, this example illustrates that not all doctrinal facts present the same challenges to the legal system. The undisciplined approach to legislative facts that seems unobjectionable in the context of interpreting *The Federalist Papers* becomes more suspect when applied to more deeply empirical questions, such as the ones with which Souter wrestled in *Glucksberg*.

Reviewable facts could likewise be usefully divided into subcategories. Distinguishing among types of reviewable facts based on the various functions they serve in judicial analysis might suggest reasons courts should approach different categories of fact differently. As Faigman notes, issues of reviewable fact are ubiquitous in modern constitutional law (p. 98). In some cases, the result turns on the existence of (or the rationality of congressional belief in) facts necessary to trigger federal authority.<sup>56</sup> In others, courts question whether intrusions upon recognized individual rights are justifiable as an effective solution<sup>57</sup> to a real and sufficiently serious social problem.<sup>58</sup> Sometimes judicial discussion of reviewable facts in truth has less to do with empirical assertions than with judgments about constitutional values.<sup>59</sup> Elsewhere, concerns about reviewable facts take the form of judicial imposition of procedural hurdles for legislatures,

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U.S. 551 (2005). See Deborah W. Denno, *The Scientific Shortcomings of Roper v. Simmons*, 3 OHIO ST. J. CRIM. L. 379, 379 (2006) (contending "that some of the case law and social science research that form the basis for the United States Supreme Court's decision in *Roper v. Simmons* are insufficient and outdated").

55. Cf. *Atwater v. City of Lago Vista*, 532 U.S. 318, 353 n.25 (2001) (Souter, J.) (declining invitation to impose Fourth Amendment limit on the power of a police officer to arrest for non-violent misdemeanors in part because "there simply is no evidence of widespread abuse of minor-offense arrest authority").

56. See, e.g., *Gonzales v. Raich*, 545 U.S. 1 (2005); *United States v. Morrison*, 529 U.S. 598 (2000); *Florida Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank*, 527 U.S. 627 (1999); *City of Boerne v. Flores*, 521 U.S. 507 (1997); *United States v. Lopez*, 514 U.S. 549 (1995).

57. See, e.g., *Ashcroft v. Am. Civil Liberties Union*, 542 U.S. 656 (2003); *Reno v. Am. Civil Liberties Union*, 521 U.S. 844 (1997).

58. See *supra* notes 33–45 and accompanying text.

59. Arguably the infamous footnote 11 in Chief Justice Warren's opinion for the Court in *Brown v. Board of Education* belongs in this category. 347 U.S. 483 (1954). See, e.g., David L. Faigman, *Fact-Finding in Constitutional Cases*, in HOW LAW KNOWS 166 n.52 (Austin Sarat et al. ed., 2007) (noting that the "question whether the social science cited in *Brown* was truly relied upon by the Court has been debated ever since the opinion was announced" and that "[m]ost commentators have concluded that the studies were a makeweight for a conclusion reached on other grounds").

the apparent aim of which is to ensure legislative deliberation about the constitutional question.<sup>60</sup>

The wide variety of functions reviewable facts serve in constitutional cases at least invites consideration of the possibility that different procedural rules and standards of proof, as well as different standards for appellate review, might be most appropriate in these different contexts. No scholar has of yet accepted that invitation.

### C. JUDICIAL GOVERNMENT

Greater attention should be paid to alternative procedures for appellate judicial decision of debatable questions of legislative facts in constitutional cases. But judicial resolution of such questions, whatever form it may take, still raises fundamental issues about the role of judicial review in our constitutional order.

Most modern constitutional scholars probably take as a given a pre-eminent role for the judiciary in constitutional interpretation, but not all do.<sup>61</sup> The first decade of the twenty-first century has witnessed the reinvigoration of the age-old debate between judicial supremacists and their critics.<sup>62</sup> The former presume that judicial review provides both an indispensable checking function on the political branches<sup>63</sup> and a necessary means for settlement of discord between them,<sup>64</sup> in effect producing

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60. See generally A. Christopher Bryant & Timothy J. Simeone, *Remanding to Congress: The Supreme Court's New "On the Record" Constitutional Review of Federal Statutes*, 86 CORNELL L. REV. 328 (2001).

61. Michael Stokes Paulsen, *The Irrepressible Myth of Marbury*, 101 MICH. L. REV. 2706, 2706–07 (2003) (describing prevalent assumption of judicial supremacy in constitutional interpretation).

62. See Dawn E. Johnsen, *Functional Departmentalism and Nonjudicial Interpretation: Who Determines Constitutional Meaning?*, 67 LAW & CONTEMP. PROBS. 105, 105 (2004) (“One of the vibrant constitutional debates at the turn of the twenty-first century concerns enduring questions about the appropriate role of nonjudicial entities—especially Congress and the President—in the development of constitutional meaning.”). See, e.g., LARRY D. KRAMER, *THE PEOPLE THEMSELVES* (2004); Larry D. Kramer, *The Supreme Court 2000 Term Foreword: We The Court*, 115 HARV. L. REV. 4 (2001); Symposium, *Theories of Taking the Constitution Seriously Outside the Courts*, 73 FORDHAM L. REV. 1341 (2005); Symposium, *The People Themselves: Popular Constitutionalism and Judicial Review*, 81 CHI.-KENT L. REV. 809 (2006).

63. See GEOFFREY R. STONE, ET AL., *CONSTITUTIONAL LAW* 86 (5th ed. 2005) (noting argument that judicial review “rest[s] on the broader ground that the Supreme Court was accorded a distinctive role as the guarantor of the supremacy of the Constitution as against the states and the federal legislature”).

64. See Alexander & Schauer, *supra* note 32, at 1371.

what might more aptly be termed judicial exclusivity<sup>65</sup> or judicial sovereignty.<sup>66</sup>

A book review is no place to resolve this debate. The point here, rather, is that the dilemma posed by constitutional cases turning on issues of legislative fact cannot be considered apart from the on-going debate about the extent of the authority judicial review legitimately confers upon the courts. Even more importantly, the prevalence and significance of legislative facts in constitutional adjudication might have important lessons for the debate over judicial supremacy, at least with respect to some categories of constitutional questions. The problematic nature of judicial determination of legislative facts, reflected in the failure of the Justices to develop principles to guide appellate courts in their reception and decision, should be a major consideration in that debate. To the poverty of judicial procedures should be added concerns about the severe constraints on judicial competence to resolve issues of legislative fact. Faigman reasons that, because appellate courts cannot with confidence rely on the parties to provide sufficient evidence of legislative facts, they must be allowed the submissions of *amici*, who admittedly may lack any claim to relevant expertise and largely escape the rigors of the adversarial process. He also asserts that, because the submissions of *amici* will not always suffice, judges must be free to conduct their own investigations (p. 100).

Of course one could as easily stand this reasoning on its head. That existing litigation procedures at best awkwardly allow for inquiry into legislative facts provides a reason for judges to shy away from deciding such questions. How might this be done? An exhaustive discussion lies outside the scope of a book review. Thus for present purposes it must suffice to list some of the possible means *not* considered in *Constitutional Fictions*.

The Court might eschew standards and balancing tests in favor of more rules-based approaches that would depend less on the kinds of empirical judgments that strain the judiciary's capacity. The Court might more assiduously avoid facial challenges to statutes, thereby limiting (though to be sure not eliminating)

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65. See Neal Devins & Louis Fisher, *Judicial Exclusivity and Political Instability*, 84 VA. L. REV. 83 (1998) (discussing, and resisting, the arguments for judicial exclusivity in interpretation of the Constitution).

66. See Kramer, *supra* note 62, at 13 ("There is . . . a world of difference between having the last word and having the only word: between judicial supremacy and judicial sovereignty.").

the significance of a ruling for parties not before the Court.<sup>67</sup> Stricter adherence to “case or controversy” requirements such as standing, ripeness, mootness, and the political question doctrine might defer or avoid confrontation with constitutional issues that turn on legislative facts.<sup>68</sup> A greater appreciation for the roles that other governmental institutions play in the creation of constitutional law might justify reliance on those institutions to investigate questions of legislative fact relevant to at least some categories of constitutional issues.<sup>69</sup> With respect to such issues, the Court might give greater deference to the even implicit determinations of legislative facts that underlie, and support the constitutionality of, the actions of co-ordinate branches of the federal government or of the States. At a minimum, the Court’s limited capacity to find complex legislative facts counsels in favor of greater efforts to rationalize the method by which they are proven in litigation.

The point is not that all, or even any, of these options would come without costs, which in some cases might prove prohibitive, but just that they deserve much more consideration than they have hitherto been given. Such consideration might even supply an area of mediation between the contending sides of the otherwise stale and stalled debate setting judicial restraint against activism. In any event, some approaches might prove more sound in some categories of constitutional cases than in others. For example, Faigman appropriately stresses that with respect to individual rights guarantees the judiciary serves as a bulwark against majoritarian tyranny (p. 124). In cases concern-

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67. To be sure, Faigman explicitly rejects this notion as the product of unduly “romantic notions of a restrained judiciary” (p. 65), though my point here is that he may be too swift to reach that conclusion.

68. See generally ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* 115–16 (2nd ed. 1962) (discussing functions served by non-justiciability doctrines). But cf. Heather Elliot, *The Functions of Standing*, 61 STAN. L. REV. 459, 464 (2008) (urging, as an alternative to standing analysis, a “vibrant abstention doctrine that permits [the Court] to pursue its separation-of-powers goals”).

69. For example, Archibald Cox urged the Court to recognize and defer to the unique capacity of Congress to effectuate the promises of the Reconstruction Amendments, which not coincidentally expressly authorized their enforcement by Congress. See *supra* notes 17–19 and accompanying text; see also David Cole, *The Value of Seeing Things Differently: Boerne v. Flores and Congressional Enforcement of the Bill of Rights*, 1997 SUP. CT. REV. 31, 34 (1997); Michael W. McConnell, *Institutions and Interpretations: A Critique of Boerne v. Flores*, 111 HARV. L. REV. 153 (1997). But see Jay S. Bybee, *Taking Liberties with the First Amendment: Congress, Section 5, and the Religious Freedom Restoration Act*, 48 VAND. L. REV. 1539, 1624 (1995).

ing these rights, the courts may find it difficult to carry out their counter-majoritarian function without independently evaluating evidence concerning relevant legislative facts.

But not all constitutional cases require the courts to protect minorities by checking majorities. In important categories of cases, it is at the least not obvious that counter-majoritarian concerns play any significant role. As Madison famously argued,<sup>70</sup> and as the enforcement clauses of the Reconstruction Amendments<sup>71</sup> apparently assumed, national majorities may prove singularly effective in checking abusive majorities at the state or local level. Where Congress acts in just such an effort, independent judicial reconsideration of predicate legislative facts may be less appropriate than in the paradigmatic individual rights case.<sup>72</sup> Recognition of this distinction might do more than divide the Constitution into rights and powers provisions, as some have urged the Court to do,<sup>73</sup> though to be sure a focus on the dilemma legislative facts pose for the courts may provide added support for such arguments. The Court would not necessarily have to abdicate all efforts to safeguard the separation of powers and federalism were it to acknowledge that it should avoid doing so by rejecting Congress's judgment about matters of legislative fact, especially where the Constitution's framers arguably expected Congress to take the lead. That legislative facts are especially likely to be imbued with value judgments may in these kinds of cases make deference to Congress even more appropriate, if as some have argued,<sup>74</sup> the most compelling interpretation of the Reconstruction Amendments grants Congress a lead role in fashioning appropriate remedies.

Lines might also be drawn based on the role issues of legislative fact play in the constitutional analysis. As noted above,<sup>75</sup> legislative facts have been made to serve a wide range of func-

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70. THE FEDERALIST NO. 10 (James Madison).

71. U.S. CONST. amend. XIII, § 2; U.S. CONST. amend. XIV, § 5; U.S. CONST. amend. XV, § 2.

72. *But cf. Flores*, 521 U.S. 507 (1997); *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200 (1995).

73. *See Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 551 n.11 (1985); *see also* JESSIE H. CHOPER, *JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS* 175-184 (1980); D. Bruce La Pierre, *The Political Safeguards of Federalism Redux: Intergovernmental Immunity and the States as Agents of the Nation*, 60 WASH. U. L.Q. 779 (1982); Herbert Wechsler, *The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government*, 54 COLUM. L. REV. 543 (1954).

74. *See supra* note 69 and accompanying text.

75. *See supra* notes 47-60 and accompanying text.

tions in constitutional cases. Judicial dependence upon a legislature's, or a lower court's, evidentiary record might be acceptable in cases turning on the existence of facts triggering federal legislative authority. But that dependence might be unacceptable in cases concerning core individual rights. In any event, these possibilities deserve study in any effort to provide a comprehensive treatment of constitutional facts.

### CONCLUSION

These criticisms should not obscure the significant contribution *Constitutional Fictions* makes to our understanding of the role legislative facts play in constitutional cases. Prior efforts were for the most part limited to discrete doctrinal categories. By devoting a monograph to a sustained and trans-substantive consideration of the issue, Faigman in effect identifies a fundamentally different problem than the ones most prior studies have examined. The few instances of previous scholarly attention to the issue as Faigman framed it treated all legislative facts alike. By distinguishing doctrinal from reviewable facts, Faigman not only assists analysis of appropriate procedures but also clarifies the relationship between lawmaking and fact-finding. Others can now build on that distinction to construct a theory even more reflective of the full range of nuance implicated by judicial determination of legislative facts.

Faigman drills beneath the surface to disclose that the dispute concerning judicial reception of legislative facts is but a part of the debate between scientific realists and their skeptics. *Constitutional Fictions* also demonstrates that judicial manipulation of frames of reference and paths of proof create both confusion and opportunities for mischief. Finally, by exposing the inconsistency between the Court's pronouncements and its practice concerning deference to legislatures' findings of legislative facts, *Constitutional Fictions* invites efforts to understand this longstanding tension. Indeed, the book's most substantial contribution may be to reveal how much analytical work remains to be done.



# THE SOMETIMES UNITARY EXECUTIVE: PRESIDENTIAL PRACTICE THROUGHOUT HISTORY

**THE UNITARY EXECUTIVE: PRESIDENTIAL POWER FROM WASHINGTON TO BUSH.** Steven G. Calabresi<sup>1</sup> and Christopher S. Yoo.<sup>2</sup> New Haven: Yale University Press. 2008. Pp. xiii +544. \$60.00.

*Harold J. Krent*<sup>3</sup>

Steven Calabresi and Christopher Yoo's book *The Unitary Executive* presents an excellent inquiry into the concept of a centralized executive throughout our history. The authors' goal is to persuade the reader that all presidents have viewed the power to supervise and remove subordinates as central to the very meaning of "executive power" in Article II of the Constitution. Without such an ability, presidents would be unable to execute the law effectively and place their stamp on the administration. The authors succeed in attaining that goal, for the record they portray reveals a long tradition of forceful assertion of presidential rights to control policy through close supervision of officers within the executive branch.

In assessing the history, the authors focus on "the president's constitutional power to remove and direct subordinates, including those in entities like the Treasury Department, the Post Office, federal prosecutors, and the independent agencies that some have said are beyond presidential powers of control" (p. 418). All forty-three presidents (prior to the current Administration) have embraced a conception of the unitary executive that at least encompasses the powers to remove and supervise their subordinates' exercise of delegated authority so as to create one centralized executive branch. Moreover, an unbroken his-

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1. Professor of Law, Northwestern University.  
2. Professor of Law and Communication, University of Pennsylvania Law School.  
3. Dean and Professor, IIT Chicago-Kent College of Law. I thank Tom Merrill and Mark Rosen for commenting on an earlier draft.



torical practice, in their view, lends considerable force to the contemporary question of whether the unitary executive ideal is grounded in the Constitution.<sup>4</sup> Their normative view embraces the unitary executive concept, and they accordingly critique current doctrine, in particular, the Supreme Court's decision in *Morrison v. Olson*,<sup>5</sup> for permitting Congress to limit the executive's removal authority over agency officials (pp. 377–78). To them, the existence of independent agencies cannot be squared with the historical recognition of the importance of the president's removal authority.<sup>6</sup>

Had the authors only addressed the removal authority,<sup>7</sup> their argument would have been convincing. But the authors claim to be addressing the entire panoply of authorities that can be traced to the unitary executive. The authors never delineate which powers—other than the appointment and removal authorities—are critical to the unitary executive ideal.<sup>8</sup> Thus, it is difficult, at times, to ascertain whether the authors present a historical incident to further their thesis that presidents have consistently asserted a particular power, like the removal authority, or rather merely to applaud a president's actions.

For example, the authors write of President Lincoln's unilateral efforts to prepare the Union for war (pp. 165–69), but it is not clear why. A presidential power to act outside of congressional will, which they at times criticize (pp. 174–78), seems far from falling within a unitary ideal. Moreover, they describe at length the Supreme Court decision in *In re Neagle*,<sup>9</sup> which af-

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4. P. 4 (“[A] foundational principle of law is that to some degree what the law is on the books is determined by what it actually is in practice.”). Similarly, to the extent that Congress or the courts consistently claim a particular view, that evidence should be relevant as well to the ultimate meaning of a constitutional provision, whether in Article I, II, or III. The authors suggest that the views of the coordinate branches have not been as consistent as those of the executive branch. (pp. 16, 28).

5. 487 U.S. 654 (1988).

6. In making their case, the authors only touch tangentially on a wide panoply of other presidential powers, whether the pardon power or the power to serve as Commander-in-Chief. Their book, therefore, does not explore some of the most controversial exercises of presidential power during President George W. Bush's Administration—the sanction of torture, the spying on U.S. citizens, and the incarceration of enemy combatants at Guantanamo Bay.

7. The authors largely rely only on the removal authority. Longstanding criticism by presidents as to congressional efforts to limit the appointment authority would have bolstered their thesis. See HAROLD J. KRENT, *PRESIDENTIAL POWERS* 24–36 (2005).

8. In the conclusion, the authors summarize their findings by category such as “independent counsels,” “the civil service,” “independent agencies,” and so forth (pp. 417–28). They do not specify, however, which attributes of the unitary executive have been consistently adhered to by presidents throughout history.

9. 135 U.S. 1 (1890).

firmed a realm of inherent presidential power in sustaining an executive branch decision—in the absence of congressional authorization—to detail a marshal to protect the life of a threatened Supreme Court Justice (pp. 221–24).<sup>10</sup> There is a conceivable but by no means ineluctable connection between that decision and the unilateral executive.<sup>11</sup> Similarly, the authors commend presidents who have asserted the power to construe the constitution for themselves, but do not explain why that authority fits within their conception of the unitary executive (pp. 69–71, 80, 98).<sup>12</sup> The exercise of the veto power, which the authors discuss at several points, seems even more tangential (pp. 95, 99, 135–36, 153, 385). The book suffers from lack of a taxonomy of powers linked to the unitary executive conception: a strong executive is not necessarily a unitary one.

The unitary executive ideal as traditionally understood focuses not on the relationship between the president and the coordinate branches but more narrowly on the relationship between the president and subordinates within the executive branch. That is why the appointment and removal authorities are so key under this “superintendence” theory. In the absence of such authorities, Congress could delegate key functions to independent presidential subordinates so as to preclude effective centralized control of executive authority by a president. The power of a president to disagree with the Supreme Court’s constitutional interpretations or to act in the absence of congressional authorization is beside the point. The historical evidence

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10. They add that “[i]t is inconceivable that an administration that endorsed [Attorney General] Miller’s Lincolnian interpretation of Article II would not also believe that the president had the authority to control subordinate executive officials in their execution of federal law” (p. 223). The authors simply do not make the case that all who believe that the president has inherent authority to act to protect the nation, in the absence of a statute to the contrary, must believe in the power to dismiss subordinates at will, much less to nullify any actions taken pursuant to congressional direction.

11. Presumably, if presidents can act in the absence of legislation to pursue measures protecting the public welfare, they can ignore congressional limits on the presidential removal authority or congressional specification that particular executive branch officials (as opposed to the president) are to make certain decisions. But, the connection is indirect. In any event, the authors dismiss Supreme Court decisions with which they disagree, such as *Humphrey’s Executor v. United States*, 295 U.S. 602 (1935), so the relevance of celebrating *In re Neagle* is unclear.

12. In addition, the authors laud President Wilson for vetoing legislation that sought to vest in congressional committees a continuing say over executive policymaking (p. 256). They do not connect how opposition to congressional meddling can be equated to preservation of the unitary executive ideal. See also p. 155 (addressing Pierce’s opposition to a type of congressional veto); p. 282 (addressing FDR’s vetoes of similar congressional efforts).

presented in the book is thus overinclusive, confusing the reader as to the scope of the authors' claims.

Moreover, the evidence addressed is underinclusive as well. For while the material presented to demonstrate longstanding executive views with respect to the removal authority is impressive, no comparable evidence is presented with respect to other potential attributes of the unitary executive ideal. For instance, the unitary executive principle should prompt presidents to centralize authority through executive orders (pp. 12–13) and through efforts to reorganize the executive branch irrespective of Congress's initial assignment of authority. The authors include mention of these attributes,<sup>13</sup> but do not treat them in the same depth or with the same consistency as the removal authority.

The authors stress another possible attribute of the unitary executive principle, namely that the president must have the power not merely to supervise subordinates, but to supplant their authority directly. They state that “[a]ll subordinate nonlegislative and nonjudicial officials exercise executive power . . . only by implicit or explicit delegation from the president” (p. 4). With that statement, they suggest that Congress plays only an attenuated role in designating the officer to exercise particular executive functions given that the president retains authority to exercise all delegated authority directly. No matter what powers Congress assigns to particular officeholders, the president can make the final decision. Later, the authors repeat that there has been a consistent view that the president exercises the “power to nullify or veto subordinate executive officials’ exercise of discretionary executive authority” (p. 14). Indeed, President George W. Bush’s administration recently advanced a similar view that only presidents exercise the “executive” power, and that therefore presidents may nullify anything performed by a subordinate.<sup>14</sup>

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13. The authors address President Taft’s reorganization efforts in some depth (p. 250), as well as those of President Wilson (p. 257), but do not analyze presidential views towards reorganization across administrations. Interestingly, President Reagan’s own Office of Legal Counsel disclaimed that there had been any consistent presidential practice with respect to reorganizing the executive branch in the absence of authorization from Congress: “This understanding has also generally been reflected in the Executive Branch’s acquiescence in the need for reorganization legislation in order to restructure or consolidate agencies within the Executive Branch.” *Limitations on Presidential Power to Create a New Executive Branch Entity to Receive and Administer Funds Under Foreign Aid Legislation*, 9 OP. OFF. LEGAL COUNSEL 76, 78 (1985).

14. See *infra* text accompanying notes 27–51.

As a matter of history, there is no longstanding agreement among presidents as to a “nullification” power. The book itself provides scant evidence of any presidential power to nullify acts of subordinates.<sup>15</sup> The authors elide concepts of control and nullification, persuasively arguing only as to the former. Thus, although the depth and breadth of the evidence they marshal to support a robust presidential removal power are impressive, their further argument as to historical grounding for a nullification power is wholly unpersuasive.

Moreover, the authors overlook a corollary to their unitary executive conception: given that subordinates speak in the president’s name, presidents should stand accountable for subordinates’ actions. The closer the control claimed by a president over subordinates—as reflected most clearly in the authors’ nullification thesis—the more a president should stand accountable for all actions within the executive branch. In litigation against the federal government, however, presidents have argued that the executive branch is comprised of independent governmental entities, and that each must be sued before relief can be accorded. Presidents thereby have reinforced the notion that executive branch agencies possess distinct legal personalities, undermining the authors’ thesis of a consistent presidential assertion of a power to supplant the decisionmaking of subordinates. The authors—and to my knowledge, nearly all other commentators—have overlooked that questions concerning the unitary executive have surfaced in routine litigation initiated by private parties against the federal government. In short, although Professors Calabresi and Yoo’s book is wonderfully informative about presidential views concerning the unitary executive as a control mechanism, it slights the salience of the same theory in litigation against the federal government. At the end, examining these related contexts should not render the authors’ historical examination superfluous, but it does suggest that the presidential practice outside of the removal authority context has not been as uniform as the authors suggest.

In Part I, I review the book, and highlight the authors’ stress on the importance of the removal power to understand the unitary executive ideal. The authors present a cornucopia of exam-

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15. For normative defenses of a nullification power, indeed from one of the authors, see Steven G. Calabresi & Gary Lawson, *The Unitary Executive, Jurisdiction Stripping, and the Hamdan Opinions: A Textualist Response to Justice Scalia*, 107 COLUM. L. REV. 1002 (2007); Steven G. Calabresi & Saikrishna B. Prakash, *The President’s Power to Execute the Laws*, 104 YALE L.J. 541 (1994).

ples to demonstrate how presidents have viewed the removal power as sacrosanct. The very accumulation of the historical materials discussed strongly supports their view of the centrality of the appointment and removal powers in providing presidents with unitary control over the executive branch.

In Part II, however, I suggest that the authors' more limited focus on a presidential power to nullify acts of subordinates is misguided. Some administrations, most notably that of George W. Bush, have asserted that the Constitution vests presidents with plenary control over all authority delegated to the executive branch. To President Bush and others, a unitary presidency demands not only the power to hire and fire, but also the prerogative to exercise personally all authority delegated by Congress. Irrespective of one's normative reaction to such an assertion—and I have critiqued it in the past<sup>16</sup>—the authors' excellent history on the removal power is not repeated here. They simply have not made the historical case for any such nullification power.

Finally, in Part III, I sketch in a more tentative fashion the previously unexplored implications of the unitary executive in the litigation context—when the executive branch is defending itself in litigation against suit filed by private entities and individuals. Presidents in a wide variety of cases have not hesitated to rely on a fragmented executive branch to dismiss claims. They have argued that cases should be dismissed because the wrong federal governmental entity was named and due to the fact that insufficient governmental entities were before the court to permit effective redress. They have recognized that federal agencies have distinct legal personalities. The litigation stances do not comport with the authors' insistence on a consistent executive belief in the ability to supplant agency determinations. The historical evidence, in other words, provides a more cabined understanding of the unitary executive than the authors and President Bush's administration would have us believe.

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16. Harold J. Krent, *From a Unitary to a Unilateral Presidency*, 88 B.U. L. REV. 523 (2008).

## I. THE IMPORTANCE OF THE REMOVAL AND APPOINTMENT AUTHORITY

### A. THE UNITARY EXECUTIVE IDEAL

The idea of a unitary executive is neither new nor radical. The Framers rejected several proposals to split the executive, and there have been adherents of a strong centralized executive ever since.<sup>17</sup> The language of Article II seemingly embraces some form of unitary executive by vesting “the executive power” in a president; assigning the president the responsibility to “take care that the laws be faithfully executed;” directing the president to appoint all principal officers of the United States, and empowering the president to “require the Opinion, in writing, of the principal Officer in each of the executive Departments upon any Subject relating to the Duties of their respective Offices.”<sup>18</sup>

To most commentators, arguments for greater centralized control based on the unitary executive ideal have coalesced around two virtues: accountability and effective leadership. The constitutional structure stresses accountability in order to secure individual liberty. Articles I, II, and III delineate powers that the branches are to exercise so as to clarify the lines of constitutional authority. The president stands responsible for all discharge of policy, and is judged by his or her performance on election day. To be sure, voters cannot always call the president to account for one particular issue given that they vote for a candidate based upon that candidate’s entire record. Nor may the president be able to stand for reelection. Nonetheless, the political process remains open to air misgivings about presidential leadership and, as those concerns mount in importance, they may become determinative at election time if not for the president, then for his party. As the authors put it, the question of control “is not a liberal or a conservative issue, but rather one of good government” (p. 7). Indeed, Alexander Hamilton noted in the *Federalist Papers* that:

it often becomes impossible, amidst mutual accusations, to determine on whom the blame or the punishment of a pernicious measure . . . ought really to fall . . . . The circumstances which may have led to any national miscarriage or misfortune are sometimes so complicated that where there are a number of actors who may have had

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17. See KRENT, *supra* note 7, at 12–16.

18. U.S. CONST. Art. II, § 2.

different degrees and kind of agency . . . it may be impracticable to pronounce to whose account the evil which may have been incurred is truly chargeable.<sup>19</sup>

Liberty is gained to the extent that one electorally accountable official stands responsible for such law implementation efforts. With a plural executive, responsibility may be shrouded, and the costs of determining who was responsible for what increase.

### B. EXECUTIVE PRACTICE

To demonstrate the historical importance of this governing principle, the authors trace each president's views and actions reflecting on the unitary executive theory. They focus on a number of administrations in particular during which controversy over the president's removal authority arose. Throughout our history, presidents zealously have safeguarded the power to appoint and remove federal officials, despite pressure from Congress. The following is a sampling drawn from the book.

President Washington's administration was critical, for the first debates over the removal authority arose shortly after he assumed office. The authors argue that Congress's ultimate decision to vest in the president the removal authority over newly minted federal governmental positions demonstrates the importance placed on such centralized control. The so-called Decision of 1789 has been widely studied in the past, under which Congress provided that the president be able to remove the Secretary of Foreign Affairs and the Secretary of Treasury from office at will (pp. 35–36). The authors assert that the congressional decision to vest a plenary removal authority in the president reflected a constitutional view as opposed to a policy preference. The fact that the debate was closely contested with respect to the Secretary of the Treasury has suggested to others that Congress was far from convinced that the Constitution mandated that the president be empowered to remove executive officials at will. The authors, however, focus rather on the fact that President Washington exercised the same control over the Treasury Secretary as he did over the Secretary of Foreign Affairs, and that he did not hesitate to remove a number of executive branch officials with whom he was not pleased (pp. 44–45). The authors subsequently endeavor to show that the president exercised supervi-

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19. THE FEDERALIST NO. 70, at 428 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

sory control over criminal law enforcement of federal laws (pp. 47–52). The fact that private relators, grand juries, and state prosecutors played a far greater role than today does not undermine their thesis,<sup>20</sup> but does raise questions as to how close the control over law enforcement in fact was.

The authors also argue that the Washington administration exercised close control, or at least could have, over the executive commissions created during his tenure in office. The authors point out that the apparent independence of the Patent Office and a federal commission to inspect the mint did not cut to the contrary and that the president for all intents and purposes retained significant control (pp. 52–53). Only the structure of the Bank of the United States gives the authors pause, and that structure, they argue, may have stemmed from a view, since repudiated, that monetary policy was separate from governmental policy (pp. 53–54).

The authors also focus on President Jackson's administration, both for his assertive leadership and for his claims of expansive executive power. In terms of the removal authority, Jackson was not shy in dismissing officeholders upon assuming the reins of power (p. 100). Moreover, President Jackson demonstrated a personal interest in law enforcement, ordering termination of condemnation proceedings against the jewels owned by the Princess of Orange (p. 103).

In the battle over the Second Bank of the United States, President Jackson's views of the scope of the unitary executive became more manifest. He ordered Secretary of State Duane to remove deposits held in the Bank but Duane, who had been an ally, refused (p. 108). Jackson dismissed Duane, the deposits were removed, and the Senate counteracted with a censure. Jackson then responded that, because Article II made him "responsible for the entire action of the executive department, it was but reasonable that the power of appointing, overseeing, and controlling those who execute the laws—a power in its nature executive—should remain in his hands" (p. 111). He continued that "it is a necessary consequence that he should have a right to employ agents of his own choice to aid him in the per-

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20. The authors argue that the president, as a theoretical matter, could have ordered private relators or state law enforcement officials to drop or alter a prosecution. Even if true, which is by no means clear, it remains incontrovertible that the president lacked control over the *initiation* of law enforcement. See Harold J. Krent, *Executive Control Over Criminal Law Enforcement: Some Lessons from History*, 38 AM. U. L. REV. 275 (1989).



formance of his duties, and to discharge them when he is no longer willing to be responsible for their acts” (pp. 111–12). The House, too, debated the issue, but President Jackson stood his ground (p. 117), and ultimately prevailed. Jackson relied on the removal authority to unify execution of the law.

Challenges of the Civil War and Reconstruction bring to light Presidents Lincoln and Johnson’s convictions that strong centralized control was indispensable to effective presidential governance. President Lincoln’s decisive acts during the Civil War manifested a strong unitarian conception of the presidency. Indeed, any other view during that tumultuous period may have stymied his efforts to combat the crisis.

As noted before, however, the authors relate a number of measures that cannot be ascribed to any unitarian conception of the executive branch. For instance, they relate that, at the outset of the war, President Lincoln mobilized troops and supplies without congressional authorization (p. 166), ordered a naval blockade of southern ports, and unilaterally suspended the writ of habeas corpus (pp. 166–67). Many of his actions left Congress scrambling to keep up.

With respect to supervision of the executive branch, Lincoln removed his first Secretary of War, Simon Cameron, for insubordination in arming fugitive slaves for the Union Army (p. 171). He also removed from office almost the entire group of presidential appointees who held office under his predecessor. Although President Lincoln justly is remembered for his unilateralism and energy in responding to secession, the authors stress that he also understood the critical importance of the removal power in coordinating the executive branch.

President Andrew Johnson pursued his own views of Reconstruction unilaterally, but without Lincoln’s skill. President Johnson refused to implement the congressional design to punish leaders of the secession, protect the newly freed slaves, and integrate the South back into the Union on Congress’s terms. Although impeachment efforts might have resulted from his continued efforts to thwart Reconstruction (pp. 176–78), the first impeachment of a president in our nation’s history stemmed instead from a deep conflict between Congress and the President over the removal authority.

Congress passed the Tenure of Office Act<sup>21</sup> to provide that all civil officers appointed with the advice and consent of the Senate would hold office until their successors were confirmed by the Senate. Cabinet members were treated slightly differently and made subject to the president's removal authority but only if the Senate consented. President Johnson vetoed the bill, arguing in his message "[t]hat the power of removal is constitutionally vested in the President of the United States is a principle which has been not more distinctly declared by judicial authority and judicial commentators than it has been uniformly practiced upon by the legislative and executive departments of the government" (p. 180). He defended the removal authority not only upon historical grounds but also on the separation of powers structure in the Constitution: the executive branch must be "capable . . . of executing the laws and, within the sphere of executive action, of preserving, protecting, and defending the Constitution of the United States" (p. 181). Congress overrode the veto.

President Johnson subsequently attempted to remove from office War Secretary Edwin Stanton, a holdover from the Lincoln administration who remained on good terms with the radicals in Congress. Initially, Johnson complied with the Act and submitted the reasons for the removal to the Senate, although he accompanied the message with a call for repeal of the Act on the grounds of its unconstitutionality: "The President is the responsible head of the Administration, and when the opinions of a head of Department are irreconcilably opposed to those of the President in grave matters of policy and administration there is but one result which can solve the difficulty, and that is a severance of the official relation" (p. 182). The Senate refused to approve Stanton's ouster.

President Johnson a month later ordered that Stanton leave office. Stanton refused, precipitating the constitutional challenge. The Senate passed a resolution condemning the ouster as a violation of the Act, and Johnson responded that "[t]he uniform practice from the beginning of the Government, as established by every President who has exercised the office, and the decisions of the Supreme Court of the United States have settled the question in favor of the power of the President to remove all officers excepting a class holding appointments of a judicial character" (p. 185).

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21. Act of Mar. 2, 1867, ch. 154, 14 Stat. 430. Congress repealed the Act in 1887. Act of March 3, 1887, ch. 353, 24 Stat. 500.

The House thereupon commenced impeachment proceedings, the primary charge consisting of the violation of the Tenure of Office offense. The House overwhelmingly voted to impeach the President. The Senate ultimately failed by a single vote to convict on impeachment articles related to the removal of Stanton. Thus, although the impeachment reflects a congressional determination that Congress enjoyed the power to limit the president's removal authority, President Johnson's steadfast refusal to cave in followed a long line of presidents who viewed the removal authority as a key determinant of presidential power.

President Franklin Roosevelt assumed great centralized power, both to combat the threat within caused by the Depression, and the threat of German domination from without. Upon entering office he issued an executive order transferring all legal authority to the Justice Department, and he shifted the Bureau of the Budget from the Treasury to the Executive Office of the President (p. 280). FDR, as would his successors, utilized the executive order as a means of asserting tighter control over subordinates on a wide variety of issues.

FDR also jealously guarded his removal power, objecting when Congress attempted to force him to remove subordinates because of their allegedly radical views (p. 283). Moreover, FDR dismissed the Chairman of the FTC, William Humphrey, because of his right wing views (pp. 283–84). That dismissal prompted a lawsuit, and the FDR Justice Department argued to the Supreme Court that the restrictions in the FTC Act constitute “a substantial interference with the constitutional duty of the President to ‘take care that the laws be faithfully executed.’” The brief further argued that the type of duties exercised by the FTC in no way undermined the need for executive branch control through the removal authority (pp. 283–84). In its decision in *Humphrey's Executor v. United States*,<sup>22</sup> the Supreme Court embraced a limitation on dismissals for all executive officials exercising quasi-judicial and quasi-legislative functions, thus protecting the independence of certain agencies from direct presidential control. Congress reacted by inserting for the first time limitations on removal in a number of statutes (p. 287).

Moreover, FDR sought to reorganize the executive branch substantially, convening what was to be called later the Brownlow Commission to enhance the effectiveness of presidential leadership. The Commission recommended that the independent

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22. 295 U.S. 602 (1935).

agencies be integrated into executive departments so as to prevent their centripetal pull. Indeed, if the agencies proliferated, the Commission warned that the president's "stature is bound to diminish. He will no longer in reality be *the Executive*, but only one of many executives, threading his way around obstacles which he has no power to overcome" (p. 293). The Commission also recommended centralizing budget authority further, and vesting in the president continuing authority to reorganize the executive branch as conditions changed. FDR embraced the Commission's recommendations, but Congress resisted, and ultimately handed FDR a stinging setback.

Upon reviewing the first fifty years after the launch of the modern independent administrative agencies, the authors conclude that presidents consistently asserted the constitutional prerogative to rein in that independence. Both through efforts to reorganize the executive branch and through deployment of the removal authority, presidents acted congruent with the unitary executive ideal.

With respect to our most recent president, the authors note President George W. Bush's assertion of the right to fire any official with whom he disagreed in the newly formed Department of Homeland Security (p. 408). In the face of serious allegations about wrongdoing within his administration, Bush appointed not an independent special prosecutor but a United States Attorney (Patrick Fitzgerald) to investigate whether executive branch officials had illegally disclosed the identity of a CIA operative, Valerie Plame (p. 410). President Bush expanded the regulatory review program and, in so doing, directed that regulatory review officers within each agency report not to the agency head but to the president himself (p. 413).<sup>23</sup>

The focus on the administrations above, however, should not obscure that the authors evaluate each presidency with reference to the executive's power to remove subordinates. All viewed the removal authority as critical to the effective exercise of executive power. Even the creation of administrative agencies and the civil service system did not erode presidential assertions of a robust removal authority, both before and after the *Humphrey's Executor* decision.

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23. See Exec. Order No. 13,422, 72 Fed. Reg. 2763 (Jan. 18, 2007). President Obama has since reversed that Order. See Exec. Order No. 13,497, 74 Fed. Reg. 6113 (Jan. 30, 2009).

Indeed, the authors take pains to track presidential reactions to the independent agencies. They write that Presidents McKinley, Roosevelt, Wilson, Harding, and Coolidge all believed that they controlled the independent agencies and in fact at times directed their actions, as might be expected before the *Humphrey's Executor* precedent (e.g., pp. 234–35, 242, 257–59, 265–66). Presidents Roosevelt and Harding proposed consolidating independent agencies into new executive departments (pp. 241, 262), and it was President Wilson's discharge of postmaster first class Frank Myers that ultimately led to the Supreme Court's broad defense of the president's removal authority in *Myers v. United States*,<sup>24</sup> a case which was briefed under the supervision of President Coolidge.

Frustration with the expansion of independent agencies continued after *Humphrey's Executor* during the administrations of every successive president. Presidents from Truman to Johnson railed against the notion that the independent agencies were outside the executive's orbit, and the first President Bush threatened at the end of his administration to remove all nine members of the independent Postal Service Board of Governors for failing to comply with a directive to abandon a position maintained in a postal rate fight (p. 389).<sup>25</sup> (The courts came to the rescue of the Service and protected the Governors' tenure in office.<sup>26</sup>) And, it was President Clinton who first imposed formal regulatory oversight over the independent agencies, requiring them to share proposed rules with the Office of Management and Budget prior to final issuance (pp. 393–95). In many respects, therefore, presidents even after *Humphrey's Executor* and *Morrison v. Olson* have attempted to limit the ambit of independent agencies so as to preserve greater authority for the unitary executive.

Based on this wealth of information, the authors conclude that presidents historically have believed that they could remove from office all executive branch officials, whether "independent" or not, for reasons of policy. They do not clarify further whether such removals can be reviewed by judges to ensure that the removals stem from policy differences, as opposed to reasons of spite or bias, and there are few relevant presidential announcements on that score. Nonetheless, the authors make a strong case

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24. 272 U.S. 52 (1926).

25. The courts rebuffed President Bush's effort, enjoining removal of the Governors. See *Mail Order Ass'n of Am. v. U. S. Postal Serv.*, 986 F.2d 509 (D.C. Cir. 1993).

26. KRENT, *supra* note 7, at 67–68.

that, without the removal authority, presidents cannot attain centralized control of executive branch implementation of the law.

## II. ADDITIONAL CLAIMS OF THE UNITARY EXECUTIVE

Although the book is styled as a history of the unitary executive, the authors rigorously analyze only the removal authority. The unitary executive ideal should also include, at a minimum, efforts to reorganize the executive branch and to funnel delegated authority through the White House, such as through executive orders. The authors note the development of executive orders and efforts to reorganize the executive branch, but do not trace each president's actions with respect to these attributes.

The authors assert an additional presidential prerogative that they claim has been consistently adhered to by presidents. They argue that presidents should be able to nullify any act by a subordinate with which they disagree. In other words, presidents cannot only remove officers with whom they disagree, they can directly supplant their authority and change their decisions. Although they do not flesh out their theory, they apparently are of the view that congressional delegations of authority to particular officeholders are only provisional—the president can personally exercise that power if he so chooses, and perhaps even reassign that power to someone else. Without the power to nullify acts of executive officials, presidents could not be fully accountable for executive branch administration of the law.

The authors relate some incidents in which presidents countermanded the orders of subordinates. For instance, they report that Presidents Grant and Cleveland overruled decisions by their secretaries of the interior, but do not amplify (pp. 192–93, 210).<sup>27</sup> They also recount an incident in which President Jefferson's efforts to direct a customs collector to take a particular action were rebuffed by a reviewing court, much to President Jefferson's displeasure (pp. 73–74). Attorney General Caleb Cushing during the Pierce administration voiced support for a nullification power (p. 155). The first President Bush issued a number of signing statements protesting Congress's decision to impose ob-

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27. See also p. 147 (recounting that President Taylor's administration asserted the power to direct accounting officials).

ligations on agents of the executive branch without permitting his supervision (p. 386).

Yet, those few instances are contradicted by others that the authors cover. For instance, they relate that the comptroller exercised final decisionmaking authority over certain disbursements in President Washington's administration (p. 57). They recount that Attorneys General William Wirt, Roger Taney, and John Young Mason all argued that the president lacked the power to correct "the errors of judgment of incompetent or unfaithful subordinates" (pp. 142–43). The authors state, as well, that the Fillmore administration asserted that the president lacked authority to direct accounting officers in their settlement of accounts (p. 151). They also note that presidents such as Truman specifically disclaimed the power to direct their subordinates' actions (p. 310).

More tellingly, they omit any discussion of presidential views as to whether presidents enjoy the power to direct agency heads to reach particular positions in rulemakings or adjudications. The authors are clear that presidents should be able to discharge agency heads for policy differences, presumably whether in fashioning rules or adjudicating cases. That position is controversial in itself.<sup>28</sup> But the authors fail to document historically or justify normatively the further position that presidents should be able to nullify or supplant agency head determinations when issuing rules or adjudicating disputes.

Indeed, with relatively minor exceptions, the nullification theory only flowered with the administration of George W. Bush. President George W. Bush's signing statements and other initiatives portray a unitary executive that would permit the president to countermand a subordinate's decision. In President Bush's view, Congress evidently cannot delegate authority to a subordinate executive branch official without formally allowing the president to substitute his own views for those of the officer. In a sense, the identity of the delegate chosen by Congress would become largely irrelevant. Congress might as well choose to delegate to the Secretary of Labor as opposed to the Secretary of Defense: they are just stand-ins for the president himself.

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28. See, e.g., A. Michael Froomkin, *The Imperial Presidency's New Vestments*, 88 NW. U. L. REV. 1346 (1994); Robert V. Percival, *Presidential Management of the Administrative State: The Not-so-Unitary Executive*, 51 DUKE L.J. 963 (2001); Peter Shane, *Conventionalism in Constitutional Interpretation and the Place of Administrative Agencies*, 36 AM. U. L. REV. 573 (1987); Charles Tiefer, *The Constitutionality of Independent Officers as Checks on Abuses of Executive Power*, 63 B.U. L. REV. 59 (1983).

In the signing statements, President Bush objected to a number of congressional directives that delegate “final” authority to a subordinate official. Although President Bush did not expound on his views, he seemingly determined that Congress, consistent with the theory of a unitary executive, can delegate such final authority only to the president.

For instance, Congress in a 2002 DOJ Appropriations Authorization Act delegated “final authority” to a subordinate of the Attorney General over certain prosecutorial training grants abroad.<sup>29</sup> President Bush responded that such delegation had to be construed “in a manner consistent with the President’s constitutional authorities to supervise the unitary executive and to conduct the Nation’s foreign affairs.”<sup>30</sup> President Bush believed that vesting final authority in a subordinate officer risked undermining his own ability to administer the law. In the same Act, Congress vested in United States Attorneys, in the context of particular civil settlements, “the exclusive authority to select an annuity broker from the list of such brokers established by the Attorney General.”<sup>31</sup> President Bush wrote that “the executive branch shall construe the section in a manner consistent with the President’s constitutional authority to supervise the unitary executive branch.”<sup>32</sup> In this most routine or even trivial of administrative settings, the statement asserts that Congress cannot vest “exclusive” authority in any executive branch official other than the president—officials subordinate to the president do not enjoy independent legal status.

President Bush’s objections to legislation directing that he act through a specific officer reinforces that view of a highly centralized unitary executive. For instance, in crafting an emergency preparedness plan, Congress provided that:

If the President, acting through the Secretary of Health and Human Services, determines that 1 or more substances of concern are being, or have been released in an area declared to be a disaster area . . . the President, acting through the Secretary of Health and Human Services, may carry out a program for the coordination, assessment, monitoring, and study

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29. 21st Century Department of Justice Appropriations Act, Pub. L. No. 107-273, §§ 2002, 2004, 116 Stat. 1758, 1789-1790.

30. Statement on Signing the 21st Century Department of Justice Appropriations Act, 2 PUB. PAPERS 2010, 2011 (Nov. 2, 2002).

31. § 11015(b), 116 Stat. at 1824.

32. Statement of Nov. 2, 2002, *supra* note 30.



of the health and safety of individuals with high exposure levels . . . .”<sup>33</sup>

To President Bush, the congressional direction that the president was to act through a specified individual, even though a cabinet-level official subject to his plenary removal authority, violated the unitary executive. He stated that: “The executive branch shall construe Section 709 of the Act, which purports to direct the President to perform the President’s duties ‘acting through’ a particular officer, in a manner consistent with the constitutional authority of the President to supervise the unitary executive branch.”<sup>34</sup> Moreover, in the Foreign Relations Authorization Act of 2003, President Bush asserted the unconstitutionality of the provision that “[t]he President, acting through the Director General of the United States and Foreign Commercial Service of the Department of Commerce, is authorized to establish Technology American Centers.”<sup>35</sup> Even though President Bush exerted supervisory authority over the Director General, the congressional specification, in President Bush’s view, sapped presidential authority. As with the earlier set of statements, Congress may not purport to permit an agency official to bind the president: presidents must be permitted the opportunity to change subordinates’ determinations.

The scope of President Bush’s theory of the unitary executive also is illustrated in his many signing statements asserting the unconstitutionality of requiring agency heads to recommend to Congress proposals for legislative revisions. In objecting to over one hundred provisions requiring agency officials to recommend legislation to Congress,<sup>36</sup> President Bush seemingly has embraced the view that Congress cannot compel presidential subordinates to make recommendations to Congress.

For instance, in signing the Maritime Transportation Security Act of 2002<sup>37</sup> President Bush objected to a numbers of provisions which

33. Security and Accountability for Every Port Act of 2006, Pub. L. No. 109-347, § 709(b)(1), 120 Stat. 1884, 1948.

34. Statement on Signing the SAFE Port Act, 42 WEEKLY COMP. PRES. DOC. 1817 (Oct. 13, 2006).

35. Foreign Relations Authorization Act, Fiscal Year 2003, Pub. L. No. 107-228, § 645, 116 Stat. 1350, 1403 (2002).

36. Curtis A. Bradley & Eric A. Posner, *Presidential Signing Statements and Executive Power*, 23 CONST. COMMENT. 307 (2006) (arguing, however, that President Bush’s signing statements did not stake out new ground).

37. Maritime Transportation Security Act of 2002, Pub. L. No. 107-295, 116 Stat. 2064.

purport to require an executive branch official to submit recommendations to the Congress. The executive branch should construe such provisions in a manner consistent with the President's constitutional authority to supervise the unitary executive branch. Moreover, to the extent such provisions of the Act would require submission of legislative recommendations, they would impermissibly impinge upon the President's constitutional authority to submit only those legislative recommendations that he judges to be necessary and expedient. Accordingly, the executive branch shall construe such provisions as requiring submission of legislative recommendations only where the President judges them necessary and expedient.<sup>38</sup>

Section 110(c)(4) requires the head of the Coast Guard to "make[] a recommendation with respect to whether the program, or any procedure, system or technology should be incorporated in a nationwide system for preclearance of imports of waterborne goods."<sup>39</sup> Section 112(4) similarly requires a recommendation "for legislative or other actions needed to improve security of United States ports against potential threats posed by flag vessels of [certain] nations."<sup>40</sup> Congress did not bar presidential review of the proposed safety measures. Yet, to President Bush, these legislative provisions undermined the unitary executive, apparently by intruding into the president's constitutional prerogative to be the sole executive branch official to make all recommendations to Congress.

For another example, in the Department of Justice Appropriations Act discussed previously,<sup>41</sup> Congress directed the Attorney General to "submit a report and a recommendation . . . whether there should be established, within the Department of Justice, a separate office of the Inspector General for the Federal Bureau of Investigation."<sup>42</sup> Again, Congress did not bar the Attorney General from conferring with the President before the recommendations were made, yet President Bush objected.<sup>43</sup> Even officers of the United States had no role under the Bush conception to make proposals for legislative change. In the same Act, Congress required the Office of Personnel Management to "submit a report to Congress assessing the effectiveness of ex-

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38. Statement on Signing the Maritime Transportation Security Act of 2002, 2 PUB. PAPERS 2132 (Nov. 25, 2002).

39. § 110(c)(4), 116 Stat. at 2092.

40. § 112(4), 116 Stat. at 2093.

41. See *supra* note 29.

42. § 309(c), 116 Stat. at 1784.

43. Statement of Nov. 2, 2002, *supra* note 30.

tended assignment incentive authority as a human resources management tool and making recommendations for any changes necessary to improve the effectiveness of the incentive authority.”<sup>44</sup> To President Bush, that directive crossed constitutional lines because it “purport[ed] to require executive branch officials to submit to the Congress plans for internal executive branch activities or recommendations relating to legislation.”<sup>45</sup> The mandatory nature of the provision clashed with his understanding of the unitary executive ideal. Therefore, he continued, “[t]he executive branch should construe such provisions in a manner consistent with the President’s constitutional authority to supervise the unitary executive and recommend for the consideration of the Congress such measures as the President judges necessary and expedient.”<sup>46</sup> All recommendations to Congress apparently must be funneled through the Office of the President.

As relayed by the authors,<sup>47</sup> President Bush also changed the reporting relationship within each agency so that regulatory policy officers would report not to the agency head but to the president directly. President Bush evidently believed that he could brush aside the reporting relationship established by Congress. Indeed, a Congressional Research Service Report asserted that:

[W]ith the submission of the President’s FY2003 budget, the Bush Administration appears to be attempting to transfer programs from agencies through funding consolidations. For example, the programs and \$234.5 million budget of the Office of Domestic Preparedness, Department of Justice, would be transferred to the Federal Emergency Management Agency. . . . [T]he propriety of moving program responsibilities and related funds without statutory authority appears to be highly questionable.<sup>48</sup>

President Bush apparently claimed the authority to rearrange both funding and responsibilities among executive branch agencies.

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44. § 207(d), 116 Stat. at 1780.

45. Statement of Nov. 2, 2002, *supra* note 30.

46. *Id.*

47. See *supra* text accompanying note 23.

48. HAROLD C. RELYEA, EXECUTIVE BRANCH REORGANIZATION AND MANAGEMENT INITIATIVES 8 (CRS June 12, 2002). In addition, President Bush announced in early 2008 that he intended to transfer the functions of the Office of Government Information Services from the National Archives to the Department of Justice. See *White House Plan to Put New FOIA Office in Justice Department Draws Lawmakers’ Ire*, 76 U.S.L.W. 2441 (Jan. 29, 2008).

President Bush's Administration, however, did not consistently assert a presidential power to supplant the decisions of subordinates. Consider an Opinion of the Office of Legal Counsel, not discussed in the book, which explored whether the president could centralize border control policy to a greater extent than Congress had authorized:

Congress may prescribe that a particular executive function may be performed only by a designated official within the Executive Branch, and not by the President. The executive power confers upon the President the authority to supervise and control that official in the performance of those duties, but the President is not constitutionally entitled to perform those tasks himself.<sup>49</sup>

The Opinion flatly contradicts the nullification thesis forwarded by the authors.

Furthermore, President Bush never claimed the power to substitute his views for those of an agency head in formal rule-making or adjudication under the Administrative Procedure Act.<sup>50</sup> Congressional directives that particular officers exercise administrative power are routine. The Secretary of Health and Human Services, for instance, issues rules and adjudicates cases that bind the executive branch. In common parlance, these rules, decisions, and orders are "final." The president can remove the Secretary from office if he disagrees with the rules promulgated or the cases adjudicated. If presidents could exercise final authority over rulemaking or adjudication, the very premise of on-the-record administration action would be compromised. To my knowledge, not one president has opposed the Administrative Procedure Act as a derogation of his authority.

My point here is not to engage the authors as to whether, as a normative matter, presidents should be able to supplant the decisions of subordinates,<sup>51</sup> but rather to highlight how little historical support exists for such a conception. The book's careful assessment of longstanding presidential support for a robust removal authority does not extend to other potential attributes of a unitary executive theory, including the power to nullify acts of subordinates. The authors fail to present evidence of continuous

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49. *Centralizing Border Control Policy Under the Supervision of the Attorney General*, 26 OP. OFF. LEGAL COUNSEL, slip op. 2 (2002).

50. 5 U.S.C. §§ 500-596 (1966).

51. For criticism of their theory, see Peter L. Strauss, *Overseer, or "the Decider"?: The President in Administrative Law*, 75 GEO. WASH. L. REV. 696 (2007); Percival, *supra* note 28.

presidential opposition to congressional determinations to vest particular responsibilities in particular agency officials. Congress long has viewed agency heads as distinct legal personalities.

### III. THE UNITARY EXECUTIVE AS A SHIELD

In this last section, I investigate, as a preliminary matter, the possible salience of litigation against the federal government to the unitary executive theory. Litigation provides an illustrative context with which to assess the depth of presidents' commitment to the unitary executive ideal in general and, in particular, to the nullification version espoused by the authors. One can discern presidential views towards executive power as much through stances in litigation as through removals, signing statements, and executive orders. Although litigation patterns among presidents are not uniform, presidential administrations, in a wide variety of contexts, have asserted defenses in litigation that compromise the unity of the executive branch. They have acknowledged the separate legal personalities of executive branch entities, arguing that the wrong government agency was named or that additional agencies needed to be named before relief could be granted. Presidents have not assumed responsibility for acts of subordinates. My goal is not to examine the probity of such defenses but rather to point out how problematic these litigation stances are when examining the authors' sweeping claims for consistent presidential assertions of the nullification version of the unitary executive. No president, to my knowledge, has ever significantly eased the path of adverse litigants for the sake of burnishing the image of a unitary executive in the public's eye.

#### A. INTRABRANCH LAWSUITS

In many litigations, the executive branch itself has not treated the federal government as one indivisible entity. One such instance has been remarked upon before—presidential administrations have permitted, if not encouraged, one agency to sue another in seeking judicial resolution of a dispute.<sup>52</sup> Such lawsuits undercut the conception of a unitary executive under which each official's decision represents that of the president. A brief inquiry into intrabran­ch lawsuits serves as an introduction

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52. See generally Michael Herz, *United States v. United States: When Can the Federal Government Sue Itself?*, 32 WM. & MARY L. REV. 893 (1991).

to presidential positions in relatively routine litigation that reflect upon the unitary executive ideal.

Consider the Federal Labor Relations Authority, which Congress created in 1978 to resolve disputes between agencies and their unionized employees.<sup>53</sup> The FLRA can rule against agencies, and it subsequently can petition the appellate court to enforce an order. So far, six presidents have served since passage of the FLRA, and none, to my knowledge, has protested that only he can resolve such intrabran­ch disputes. Indeed, the Supreme Court has resolved a number of disputes between the FLRA and another executive branch agency.<sup>54</sup> If the president can supplant the decisionmaking of all executive branch subordinates, how can lawsuits be permitted to proceed without making a mockery of the nullification version of the unitary executive that the authors advance?

The FLRA cases, as well as those involving the Merit Systems Protection Board,<sup>55</sup> perhaps can be rationalized on the ground that one federal agency stands in the shoes of government employees and thus its position with respect to the employing agencies is sufficiently adverse to permit suit. The reasoning may be persuasive as a matter of standing doctrine, but does not explain why presidents permit agencies to sue one another if they can nullify the decisions of subordinates. At a minimum, presidents have acquiesced in congressional schemes that pit one agency against the other.

The history of intrabran­ch disputes extends more broadly. Most famously, President Nixon engaged the courts to contest a subpoena issued by the special prosecutor.<sup>56</sup> In cases of lesser notoriety, executive branch agencies have initiated suit against each other. For instance, prior to *United States v. Nixon*, the United States sued the ICC when it disagreed with its railroad rate determinations,<sup>57</sup> and it later sued the FCC in a dispute over telephone rates.<sup>58</sup> Moreover, the executive branch has sued to

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53. Civil Service Reform Act of 1978, Pub. L. No. 95-454, 92 Stat. 1111 (codified as amended in scattered sections of 5 U.S.C.).

54. See, e.g., *NASA v. FLRA*, 527 U.S. 229 (1999); *Dep't of Defense v. FLRA*, 510 U.S. 487 (1994); *Dep't of Treasury v. FLRA*, 494 U.S. 922 (1990).

55. *U.S. Postal Serv. v. Gregory*, 534 U.S. 1 (2001); *Lachance v. Erickson*, 522 U.S. 262 (1998).

56. *United States v. Nixon*, 418 U.S. 683 (1974).

57. *United States v. ICC*, 337 U.S. 426 (1949); see also *Ford Motor Co. v. ICC*, 714 F.2d 1157 (D.C. Cir. 1983) (Department of Defense challenged the ICC's refusal to award reparations for overcharges).

58. *United States v. FCC*, 707 F.2d 610 (D.C. Cir. 1983).

contest mergers and rate agreements that one of its agencies approved.<sup>59</sup> More recently, two federal agencies overseeing personnel matters lined up on opposing sides in litigation over qualifications critical for the corps of administrative law judges.<sup>60</sup>

Perhaps some of the litigation can be understood as a nod to the reality that, under prevailing doctrine, presidents cannot in fact control independent agencies but must use whatever means, including litigation, to ensure control.<sup>61</sup> Yet, by permitting its own agencies to sue others within the executive branch, presidents have perpetuated the idea of a divided executive branch.

In any event, some litigation has been launched between executive branch agencies that are not considered “independent.” The Secretary of Agriculture, for instance, sued the EPA for suspending the registration of pesticides.<sup>62</sup>

Presidents have, at times, endeavored to keep intrabran­ch lawsuits out of the courts, instructing agencies to bring any disputes to the Attorney General for resolution.<sup>63</sup> Moreover, they have *defended* against suit by independent agencies on the ground that intrabran­ch disputes are not consistent with the unitary executive.<sup>64</sup> But, the fact that presidents have permitted and even launched litigation against agencies presupposes separate legal personalities of agencies and undermines the authors’ thesis that presidents have acted consistently with the nullification power.<sup>65</sup>

The authors might retort that, until the president chooses to nullify a subordinate’s acts, the subordinate maintains legal independence. They could continue that, although agencies can sue each other, the president has the means to halt such litiga-

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59. *United States v. Marine Bancorp.*, 418 U.S. 602 (1974) (challenge to merger that had been approved by Comptroller of the Currency); *United States v. Fed. Mar. Comm’n*, 694 F.2d 793 (D.C. Cir. 1982) (challenge to agency approval of rate-fixing agreement). For a more complete discussion, see Herz, *supra* note 52.

60. *Meecker v. MSPB*, 319 F.3d 1368 (Fed. Cir. 2003) (pitting OPM against MSPB).

61. Even then, the Solicitor General represents most independent agencies in court, at least at the Supreme Court level. Neal Devins, *Unitariness and Independence: Solicitor General Control Over Independent Agency Litigation*, 82 CAL. L. REV. 255 (1994).

62. *Env’tl. Def. Fund, Inc. v. EPA*, 548 F.2d 998 (D.C. Cir. 1977).

63. Herz, *supra* note 52. *Executive Order No. 12,146*, 3 C.F.R. 409 (1979). Even then, the Order does not prohibit resort to courts, but rather only imposes a preliminary hurdle.

64. For relatively recent examples, see *Tenn. Valley Auth. v. EPA*, 278 F.3d 1184 (11th Cir. 2002); *Dean v. Herrington*, 668 F. Supp. 646 (E.D. Tenn. 1987) (exercising jurisdiction over the TVA’s contract claims against the DOE).

65. Intrabran­ch litigation is an affront to the theory that presidents can supplant the determinations of subordinates. Such cases conflict as well with the superintendence theory, but not as sharply.

tion. Yet, in the public eye, intrabran­ch litigation undercuts the notion of any nullification power and, in any event, the book is bereft of examples in which presidents attempted to halt intra-branch litigation in its tracks.<sup>66</sup>

### B. STANDING AND REDRESSABILITY

In addition to presidential acquiescence in the intrabran­ch litigation, presidents proactively have asserted the independent legal personalities of agencies as a shield to protect the executive branch from lawsuits filed by private entities. They have argued that, if plaintiffs cannot show that their injury is redressable by the *particular* governmental entity sued, then their case should be dismissed. They have refused to be accountable for injuries suffered due to the combined actions of subordinate government­al agencies.

The Supreme Court first elaborated on the redressability component of standing in *Lujan v. Defenders of Wildlife*.<sup>67</sup> The case arose out of a challenge to governmental aid for hydroelec­tric projects in Egypt that allegedly harmed the environment. Plaintiffs challenged the Department of Interior's decision under the Endangered Species Act,<sup>68</sup> which limited the duty of federal agencies to consult with the Secretary over federally funded projects affecting endangered species. Under the regulation, federal agencies must consult with the Secretary over projects in the United States or on the high seas, but not over projects over­seas supported by the agencies, such as one for the Aswan Dam in Egypt.

For the Court, Justice Scalia held that plaintiffs had failed to demonstrate redressability: "instead of attacking the separate decisions to fund particular projects allegedly causing them harm, [plaintiffs] chose to challenge a more generalized level of Government action (rules regarding consultation)."<sup>69</sup> By that, he meant that "[s]ince the agencies funding the projects were not parties to the case, the District Court could accord relief only against the Secretary."<sup>70</sup> The executive branch itself had argued against standing, reasoning that courts should not view the executive branch as one "generalized" entity, but rather composed

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66. The prominent exception is President George H.W. Bush's efforts in the postal service dispute. See *supra* text accompanying note 25.

67. 504 U.S. 555 (1992).

68. 16 U.S.C. § 1536 (1988).

69. *Lujan*, 504 U.S. at 568.

70. *Id.*



of component parts. In its reply brief, the government stressed that “only the Secretary [of the Interior] is a party,” and “an injunctive order must specify the federal officers who are responsible for compliance.”<sup>71</sup> The case was not redressable because the absent agencies would not necessarily change their conduct.<sup>72</sup> Plaintiffs’ claims were unsuccessful in part due to the executive branch’s refusal to take responsibility for actions within its control.<sup>73</sup>

The executive branch argued to similar effect in *Bennett v. Spear*.<sup>74</sup> There, ranchers and water irrigation districts challenged a biological opinion issued by the U.S. Fish and Wildlife Service analyzing the effects of a planned Bureau of Reclamation project on two species of endangered fish. Under the regulatory scheme, agencies such as the Bureau must determine whether to abide by the biological opinions of the Service, a separate agency, before proceeding with planned projects. Accordingly, the executive branch argued that the suit should be dismissed because any injury suffered by plaintiffs could not be redressable by the U.S. Fish and Wildlife Service, but rather only by the agency that in fact proceeded on the project, the Bureau of Reclamation, which was not before the Court.<sup>75</sup> As the executive branch argued in opposing certiorari, “Because petitioners’ alleged injury results from the ‘independent action of some third party not before the court,’ they have failed to satisfy the constitutional requirements for standing.”<sup>76</sup>

To the executive branch, it was immaterial that both agency heads were subject to close presidential control and presumably reflected the president’s views. Rather, the government argued that no standing existed in the case because all agencies had to be subject to the jurisdiction of the court before relief could be accorded the plaintiff. The agencies had separate legal personalities. Although the government was not successful in urging this

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71. Reply Brief for the Petitioner at 16 n.6, *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992) (No. 90-1424), 1990 U.S. Briefs 1424.

72. See also *Wilderness Soc’y v. Norton*, 434 F.3d 584 (D.C. Cir. 2006) (holding non-redressable Wilderness Society’s action to compel the National Park Service to seek the President to recommend creation of additional wilderness areas).

73. Ironically, Justice Scalia’s redressability holding in *Lujan* undercuts the very unitary executive ideal that he previously embraced in cases such as *Morrison v. Olson*, 487 U.S. 654, 698 (1988) (Scalia, J., dissenting).

74. 520 U.S. 154 (1997).

75. Brief for the Respondents at 15-20, *Bennett v. Spear*, 520 U.S. 154 (1997) (No. 95-813), 1996 WL 396714.

76. Brief for the Respondent in Opposition at 6, *Bennett*, 520 U.S. 154 (No. 95-813), 1996 WL 33413297 (citations omitted).

particular argument,<sup>77</sup> its reasoning is telling: in litigation, the executive branch has disclaimed at least one version of the unitary executive theory for, if all agencies are subject to the immediate control of the president—and, indeed, are mere stand-ins for the president himself—then plaintiffs could have received redress.

### C. FAILURE TO NAME PROPER EXECUTIVE BRANCH PARTY

Indeed, in settings far more mundane than the standing cases, the executive branch has supported distinctions drawn by Congress as to which agency is a proper defendant by urging that suits be dismissed or resubmitted when the wrong agency is on the caption, or when the wrong governmental official has been named. For example, in *Williams v. Army and Air Force Exchange Service*<sup>78</sup> plaintiff had filed an employment discrimination claim arising out of her job as department supervisor for the Army and Air Force Exchange Service. As the court of appeals described, “instead of suing the Secretary of Defense or the head of AAFES, [she] named AAFES as the sole defendant.”<sup>79</sup> Counsel followed that up by mailing a summons and copy of the complaint to the AAFES, the U.S. Attorney General, and the U.S. Attorney for the relevant district. Despite the notice, the executive branch moved to dismiss the case on the ground that plaintiff had named the wrong governmental entity, and the court agreed.<sup>80</sup> The executive branch did not avail itself of the opportunity to demonstrate its unitariness by accepting responsibility for actions of subordinates and defending suit on the merits. Many comparable cases exist.<sup>81</sup>

Similarly, the government has often moved to dismiss cases for lack of venue, arguing that the congressional differentiation with respect to which official is the proper respondent be strictly followed. To illustrate with but one example, consider the controversial case involving Jose Padilla, who was apprehended on

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77. The Court rejected the executive branch's argument in this respect, finding a close enough connection between the biological opinion and the ultimate relief sought by plaintiffs.

78. 830 F.2d 27 (3d Cir. 1987).

79. *Id.* at 28.

80. *Id.* at 29.

81. See, e.g., *State Bank of Coloma v. Nat'l Flood Ins. Program*, 851 F.2d 817 (6th Cir. 1988) (dismissing suit because plaintiffs had sued subordinate part of Federal Emergency Management Agency instead of the Director of the agency itself); *Calderon v. U.S. Dep't of Agric., Food & Nutrition Serv.*, 756 F. Supp. 181 (D.N.J. 1990) (dismissing case for failure to name United States as defendant as opposed to FNS); *Rhys v. U.S. Postal Serv.*, 702 F. Supp. 945 (D. Mass. 1989) (dismissing case for failure to name Postmaster General as defendant).

suspicion of Al Qaeda links and then designated by President Bush and Defense Secretary Rumsfeld as an enemy combatant.<sup>82</sup> The Defense Department held Padilla in a brig off of South Carolina, and denied him the right to counsel. Through an attorney acting as next friend, Padilla filed a petition for habeas corpus, contesting the continued incarceration and violation of his right to counsel.

The government responded in part by arguing that the case should be dismissed for failure to bring the action in the proper jurisdiction. Although Padilla had named as respondents the President, the Secretary of Defense, and the commander of the brig in which he was housed in South Carolina, the government argued that only the commander as the immediate custodian could be named as a respondent in a habeas corpus case. Because the case was not filed in South Carolina, the government argued that the case should have been dismissed. There have been numerous cases dismissing habeas corpus actions when the wrong party, such as the Attorney General, has been named instead of the warder or jailer,<sup>83</sup> and individuals contesting loss of parole must sue the prison warden, not the Board of Parole.<sup>84</sup> Petitioner, however, argued that the Secretary of Defense exercised *de facto* control over him because of the enemy combatant designation so that venue would have been appropriate in New York where, arguably, the Secretary of Defense could have been sued. The lower courts agreed.<sup>85</sup>

On certiorari to the Supreme Court, the government's brief explicitly relied on Congress' differentiation of functions: "The habeas statutes dictate, in the context of core habeas challenges to present, physical confinement, that the proceedings take place in the federal district of confinement . . . against his immediate, on-site custodian rather than a supervisory official located in another, potentially far-removed district."<sup>86</sup> The supervisor could not serve in the stead of a subordinate, despite the fact that the subordinate followed the supervisor's dictates. The Supreme Court agreed with the executive branch and ordered the habeas

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82. *Rumsfeld v. Padilla*, 542 U.S. 426 (2004).

83. *See, e.g., Sanders v. Bennett*, 148 F.2d 19, 20 (D.C. Cir. 1945) (holding that the warden and not the Attorney General is the appropriate respondent in a habeas case); *Monk v. Sec'y of the Navy*, 793 F.2d 364, 369 (D.C. Cir. 1986) (same).

84. *Billiteri v. U.S. Bd. of Parole*, 541 F.2d 938 (2d Cir. 1976).

85. *Padilla ex. rel. Newman v. Bush*, 233 F. Supp. 2d 564 (S.D.N.Y. 2002); *Padilla v. Rumsfeld*, 352 F.3d 695 (2d Cir. 2003).

86. Brief for the Petitioner at 16, *Rumsfeld v. Padilla*, 542 U.S. 426 (2004) (No. 03-1027), 2003 U.S. Briefs 1027.

petition to be dismissed,<sup>87</sup> holding that Rumsfeld was not an appropriate respondent even though he had ordered that Padilla be treated as an enemy combatant and exercised continuing “legal control” over petitioner. Presidents have rarely, to my knowledge, rejected the refuge of congressional venue provisions to permit suit against a federal official, even though suit would have been appropriate against another official over whom the court had jurisdiction.

Congress’s specification of the role to be played by specific executive branch actors has weight, and presidents have urged courts to dismiss suits when the congressional specifications have not been adhered to, even though a different federal actor—whether subordinate or supervisor—may have caused the injury. Presidents have missed an opportunity to assert the unitariness of the executive branch.

#### D. DISTINGUISHING BETWEEN AGENCY OFFICIALS AND THE PRESIDENTS THEY SERVE

Moreover, the executive branch has defended against suit on the ground that agency determinations do not reflect presidential input. Congress in a variety of contexts has set presidents to review agency decisions, thus suggesting a difference between agency and presidential determinations. Presidents have acquiesced in the distinction.

Consider the Supreme Court’s decision in *Dalton v. Specter*.<sup>88</sup> There, a number of plaintiffs sued in part to overturn the Secretary of Defense’s recommendation to the president to close a particular military base. Under the Defense Base Closure and Realignment Act,<sup>89</sup> the Secretary was to propose closure of bases based on congressionally set criteria to an independent commission appointed by the president. The commission then held public hearings and was to submit its report to the president.

The Court held, accepting the executive branch’s arguments, that the commission’s report was not “final agency action” under the Administrative Procedure Act,<sup>90</sup> in that the president need not comply with any recommendation by the commission. In other words, agency determinations were not viewed as actions of the president, but as the determinations of a

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87. *Rumsfeld v. Padilla*, 542 U.S. 426 (2004).

88. 511 U.S. 462 (1994).

89. 10 U.S.C. § 2687 (1988).

90. 5 U.S.C. § 704 (1966).

distinct legal personality. Accordingly, because the president could not be sued directly under the APA, the Court rejected the suit. Similarly, in *Franklin v. Massachusetts*<sup>91</sup> the executive branch successfully urged no review on the ground that census decisions of the Secretary of Commerce could not be imputed to the president.<sup>92</sup> The executive branch did not consider the Secretary's decision to reflect the views of the president.

To be sure, one could argue that the congressional scheme itself is consistent with the unitary executive because it vests ultimate decisionmaking in the president. But, in so doing, Congress has legislated a distinction between agency and president, and the executive branch has stood behind Congress's differentiation in defending against the suit. A nullification theory presupposes the potential for presidential intervention *ex ante*, not *ex post*. If subordinates in the executive branch can "exercise executive power . . . only by implicit or explicit delegation from the president," as the authors suggest (p. 4), then congressional efforts to distinguish between the decisions of the president and a subordinate would be invalid. Every "final" decision of a subordinate would in effect be that of the president. Yet, in litigation, presidents seemingly have furthered the notion that presidents and agencies have distinct legal personalities. By acquiescing to congressional structures that set presidents apart from the agency officials they control, the executive branch arguably has undermined the authors' claim that presidents consistently have asserted a conception of the unitary executive that permits no salient distinction between presidents and the agencies they supervise.<sup>93</sup>

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91. 505 U.S. 788 (1992).

92. To similar effect, see also *Chi. & S. Air Lines v. Waterman S.S. Corp.*, 333 U.S. 103 (1948) (denying review because Civil Aeronautics Board certification of airline routes had yet to be approved by the president).

93. Consider, as well, the sovereign act doctrine, which the executive branch has embraced to excuse contract performance by executive entities. In one of the first cases to articulate the doctrine, *Horowitz v. United States*, 267 U.S. 458 (1925), the Supreme Court examined the question of whether an agency's decision to embargo the shipment of silk was a sovereign act that precluded a different agency's prior contractual pledge to ship silk that the government had sold to a private entity. The Court held that "[w]hatever acts the government may do, be they legislative or executive, so long as they be public and general, cannot be deemed specially to alter, modify, obstruct or violate the particular contracts into which it enters with private persons." *Id.* at 461. The two characters of government—"contractor" and "sovereign"—could not be "fused." *Id.* Accordingly, one agency's policy decision could excuse another entity's breach without necessitating payment of damages.

Similarly, in *Derecktor v. United States*, 128 F. Supp. 136 (Ct. Cl. 1954), plaintiff had contracted with the Maritime Commission, a federal agency, to purchase a ship with the understanding that it could be transferred to a foreign registry. The State Department

Finally, there are a number of cases in which the executive branch has argued, and the courts have agreed, including in *Dalton* and *Franklin*, that there is no judicial review of presidential as opposed to agency officials' acts. However, if an agency official acts only at the explicit delegation of the president, why should there be a difference as to reviewability? Presidents should stand accountable for the acts of their agency heads and permit review to the same extent as presidential determinations since all executive branch decisions stem from the same fount of power. Yet presidents have never complained that Congress has subjected agencies, but not themselves, to APA requirements and the potential for judicial review. Indeed, they have asserted in litigation that agency officials as opposed to the chief executive should be subject to suit.<sup>94</sup> In so doing, presidents have further separated their own office from those of the agencies they control.

A cursory examination of litigation involving the executive branch reveals, therefore, that presidents in defending against litigation have taken positions that suggest a stratified executive branch. Agencies have sued other agencies in court; the absence of all agencies before a court needed to provide relief makes a case nonjusticiable; naming the wrong executive branch agency

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later intervened to prevent the transfer on the ground that it might be used to smuggle Jewish refugees to Palestine. Plaintiff sued for damages caused by the breach of contractual terms, but the court rejected the claim, reasoning that the State Department's embargo constituted a "sovereign act," excusing the Maritime Commission from contractual liability. As Judge Whitaker retorted in dissent: "This is a case in which this court gives sanction to bureaucratic action in violation of a right, this time a right acquired in consideration of the payment of a large sum of money to the defendant itself, who asserts the power to keep the money and to deny the right for which the money was paid." *Id.* at 142. He continued further that "[n]o sovereign has the power to induce the payment of money to it in consideration of a promise and then not keep the promise, or pay for the damages suffered for its failure to do so." *Id.* at 144. *See also* *Conner Bros. Constr. Co. v. Geren*, 550 F.3d 1368 (Fed. Cir. 2008) (holding that military commander's order shutting down base was a sovereign act excusing delay by Corps of Engineers before allowing construction project to proceed).

In a sense, the sovereign act doctrine can be understood more as a gloss on sovereign immunity than the unitary executive. The key issue, after all, is the nature of the governmental action, and it is immaterial whether the sovereign act stemmed from Congress or a different governmental agency. Nonetheless, the doctrine reveals an instance in which the executive has gone out its way to disclaim full unitariness: one agency's promise can be breached by another's policy priority. To the litigant, the executive branch has refused to stand as one undivided entity.

94. In *Nixon v. Fitzgerald*, 457 U.S. 731 (1982), for instance, the executive branch argued successfully that, although whistleblowers could bring claims directly against agencies for retaliation, they could not sue the president. Moreover, in cases such as *Mississippi v. Johnson*, 71 U.S. (4 Wall.) 475 (1866), they have argued that federal courts can enjoin agency officials but not the presidents who order them to take particular positions.

is grounds for dismissal, and agency head decisions are not deemed to be those of the president. Taken together, these positions strongly indicate that presidents have staked out claims inconsistent with the nullification version of the unitary executive advocated by the authors, and thus undermine the authors' thesis that there has been a consistent executive practice in this respect.

### CONCLUSION

Steven Calabresi and Christopher Yoo have performed a great service by exploring every president's exercise of the removal power. They relay the circumstances leading up to the removals, relate relevant presidential pronouncements, and depict the controversies that from time to time arose.

As a historical work gauging the extent to which each president's practice conformed with the unitary ideal, however, the book warrants only an incomplete. The book is both over and underinclusive in presenting examples during the respective presidential administrations. Moreover, the book's assertion of a nullification power is not even borne out by the examples that the authors themselves provide, and finds only limited support elsewhere. Had the authors examined the positions staked out in litigation by the executive branch, they would have been even more hard pressed to point to a nullification power in particular, for presidents widely have accepted and indeed furthered a conviction that executive agencies have distinct legal personalities. Thus, although the book's focus on the pivotal role of the removal authority throughout our history is exemplary, a more complete historical analysis of the unitary executive remains to be written.

# ORIGINALISM AS JUJITSU

**RETAINED BY THE PEOPLE: THE “SILENT” NINTH AMENDMENT AND THE CONSTITUTIONAL RIGHTS AMERICANS DON’T KNOW THEY HAVE.** By Daniel A. Farber.<sup>1</sup> New York: Basic Books, 2007. Pp. xiv + 236. \$26.95.

*Kurt T. Lash*<sup>2</sup>

## I. INTRODUCTION

*Jujitsu:*

*The art of using an opponents’ energy against them*

The Ninth Amendment<sup>3</sup> presents an irresistible mystery. It speaks of “other rights” retained by the people and it prohibits interpretations which “deny or disparage” those rights. The Amendment, however, tells us nothing about what these rights are or how they can be enforced. On the one hand, this makes the Ninth rather difficult to apply. On the other hand, the lack of definitional clarity also makes the Ninth Amendment something of a desideratum for those seeking expanded judicial protection of previously unrecognized individual rights. Accordingly, the Ninth Amendment has been cited in support of everything from Dial-a-Porn<sup>4</sup> to freedom from second hand smoke.<sup>5</sup>

The Supreme Court has generally shied away from discussing, much less relying upon, the Ninth Amendment. It has been left to legal academics to try and convince judges that the

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1. Sho Sato Professor of Law, University of California-Berkeley School of Law.

2. James P. Bradley Professor of Constitutional Law, Loyola Law School.

3. “The enumeration in the Constitution of certain rights shall not be construed to deny or disparage others retained by the people.” U.S. CONST. amend. IX.

4. PAUL R. ABRAMSON, STEVEN D. PINKERTON & MARK HUPPIN, *SEXUAL RIGHTS IN AMERICA: THE NINTH AMENDMENT AND THE PURSUIT OF HAPPINESS* (2003).

5. See *Gasper v. La. Stadium & Exposition Dist.*, 418 F. Supp. 716 (E.D. La. 1976).



Amendment can be explained and applied in a principled manner. To date, the effort has been no more than sporadically successful. The Supreme Court, for example, has generally ignored the Ninth Amendment the last quarter century.<sup>6</sup> Judicial enforcement of unenumerated rights, however, has continued unabated in one form or another ever since the modern Supreme Court initiated its privacy jurisprudence in *Griswold v. Connecticut*.<sup>7</sup> The right to privacy, for example, has expanded from protecting the right to contraception, to guaranteeing the right to abortion<sup>8</sup> and, most recently, guarding the right to sexual autonomy in *Lawrence v. Texas*.<sup>9</sup> Although Justice Kennedy's lead opinion in *Lawrence* did not expressly declare that sexual autonomy was a fundamental right, he nevertheless couched his opinion in language traditionally associated with the Court's heightened scrutiny for freedoms which should be beyond the reach of political majorities.<sup>10</sup> In one of the more controversial aspects of his opinion, Justice Kennedy looked to international law to support his conclusion that laws imposing particular burdens on homosexuals were constitutionally suspect.<sup>11</sup> Kennedy's reliance on foreign legal sources ignited a firestorm of criticism from the right and an on-going debate regarding the legitimacy of relying on foreign law in interpreting the American Constitution.<sup>12</sup>

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6. The last Supreme Court opinion (in the majority) to invoke the Ninth Amendment as an enforceable provision was the plurality opinion by Justice Burger in *Richmond Newspapers Inc. v. Virginia*, 448 U.S. 555, 579 (1980). The plurality in *Casey* came close, but ultimately affirmed the right to obtain an abortion on the basis of *stare decisis*. See *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 848 (1992) (plurality opinion). Cf. *Troxel v. Granville*, 530 U.S. 57, 91–92 (2000) (Scalia, J. dissenting) (describing parental rights as parts of the “other rights” referred to in the Ninth Amendment but claiming the clause is not judicially enforceable).

7. 381 U.S. 479 (1965).

8. *Roe v. Wade*, 410 U.S. 113 (1973).

9. 539 U.S. 558 (2003).

10. See, e.g., *Lawrence*, 539 U.S. at 578 (“Their right to liberty under the Due Process Clause gives them the full right to engage in their conduct without intervention of the government. “It is a promise of the Constitution that there is a realm of personal liberty which the government may not enter.” [citing *Casey*]).

11. *Lawrence*, 539 U.S. at 576–77 (citing decisions by the European Court of Human Rights and amicus briefs discussing international protection of homosexuality).

12. For the political response to judicial use of foreign sources, see American Justice for Americans Citizens Act, H.R. 1658, 109th Cong. § 3 (2005) (forbidding federal courts from interpreting the Constitution by employing contemporary foreign or international legal authorities not relied upon by the Framers); Constitution Restoration Act of 2004, S. 2323, 108th Cong. § 201 (2004) (“In interpreting and applying the Constitution . . . a court . . . may not rely upon any . . . law . . . of any foreign state or international organization or agency, other than English constitutional and common law.”); H.R. Res. 568, 108th Cong. (2004) (“[J]udicial determinations regarding the meaning of the laws of the United States should not be based in whole or in part on judgments, laws, or pro-

Enter Daniel Farber. In his new book, *Retained by the People: The "Silent" Ninth Amendment and the Constitutional Rights Americans Don't Know They Have*, Farber claims that conservatives are wrong to criticize either the result or the reasoning in *Lawrence*. According to Farber, the Founders themselves framed the Ninth Amendment with the understanding that courts would look beyond the borders of the United States in determining the nature of the people's retained fundamental rights. Although not an originalist himself (Farber has criticized the approach in prior works<sup>13</sup>), Farber uses originalism in order to illustrate what he believes is the hypocritical refusal of conservatives to apply their purported commitment to text and history when it comes to the Ninth Amendment. As Farber exclaims, if conservatives do not like his call to consider the norms of international law, don't blame him, "blame the Framers!" (p. 90).

Using originalism against (conservative) originalists is nothing new.<sup>14</sup> This kind of argumentative jujitsu, however, is a risky endeavor. Non-practitioners who use originalist methodology may not be familiar with the most sophisticated (and defensible) forms of originalism. But even if perfectly applied, originalism is a dangerous choice for a political partisan.<sup>15</sup> A historical record which supports your preferred outcome today may well expand in a manner that undermines your argument tomorrow. Worse, having yourself validated the use of history in constitutional interpretation, the inevitable counter-move will be all the more effective.

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nouncements of foreign institutions unless such foreign judgments, laws, or pronouncements . . . inform an understanding of the original meaning of the laws of the United States.").

13. See, e.g., DANIEL FARBER & SUZANNA SHERRY, *DESPERATELY SEEKING CERTAINTY: THE MISGUIDED QUEST FOR CONSTITUTIONAL FOUNDATIONS* (2002).

14. Examples abound, from Bruce Ackerman's series, *WE THE PEOPLE: FOUNDATIONS* (1993), *WE THE PEOPLE: TRANSFORMATIONS* (2000), to Jack Balkin, *Abortion and Original Meaning*, 24 *CONST. COMMENT.* 291 (2007).

15. Farber's book has rather obvious partisan goals. From the opening pages of his book, and throughout the work, Farber makes clear that "conservatives" are the particular target of his analysis. Just a few examples: The Ninth Amendment is "reviled by some—especially on the conservative end of the spectrum" (p. 1). There is a "conservative flight from the ninth amendment" (p. 3). "It is conservatives who should fear and deny the Ninth—and many do" (p. 3). "For all their talk about fidelity to the constitution, however, [conservatives] prefer to ignore inconvenient parts of it" (p. 3). "Since many conservatives do not want to hear its message, they pretend it does not exist" (p. 4). The usual conservative suspects, Justice Antonin Scalia and Judge Robert Bork are singled out as among the worst offenders when it comes to misconstruing the Ninth Amendment (p. 5).

Also in the category of “be careful what you wish for,” Farber’s insists that the Ninth Amendment should be read in light of the Founders’ embrace of the “law of nations” and the writing of early internationalists like Emmerich de Vattel (pp. 6–9). Here, Farber is more correct than he knows. Members of the Founding generation *did* rely on Vattel in their understanding of the Ninth Amendment, but their use of the law of nations points in the opposite direction of what Farber proposes. Internationalists like Vattel were particularly concerned about preserving the retained rights of sovereign nations. A sovereign might need to delegate away some of its sovereign prerogatives (in a treaty, for example), but such delegations were to be strictly construed, with the sovereign retaining all rights not clearly delegated away. The Founders shared this understanding of the retained rights of sovereignty and insisted that the law of nations called for a narrow construction of delegated federal power.<sup>16</sup> In the first constitutional treatise, St. George Tucker expressly read the Ninth and Tenth Amendments in light of Vattel’s law of nations rule regarding the strict construction of delegated power. International law thus informed the Founders’ original understanding of the Ninth Amendment as limiting federal power to intrude upon powers and rights left to sovereign control of the people in the states. This is the *opposite* of Farber’s assumption that the original understanding of the Ninth Amendment supports federal imposition of unenumerated human rights on dissenting state majorities.

After briefly sketching Farber’s approach to the historical Ninth Amendment, I will consider Farber’s work in the context of contemporary debates regarding originalism and the Ninth Amendment. Moving to particular historical issues, I then analyze Farber’s claims in light of a newly expanded historical record.

## II. THE BOOK

Farber divides his book into roughly two halves. The first half explores the history of the Ninth Amendment. The second presents Farber’s theory of judicial protection of individual rights and the methods by which courts can enforce these rights without reproducing the sin of *Lochner*, or imposing subjective judicial preferences on the rest of the country.

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16. See *infra* note 52 and accompanying text.

With the exception of his discussion of international human rights, Farber's story of the Ninth Amendment tracks what until recently has been a rough scholarly consensus regarding the Ninth since *Griswold v. Connecticut*.<sup>17</sup> According to this traditional view, Federalists like James Wilson (in his famous State House Speech<sup>18</sup>) and James Madison insisted that adding a Bill of Rights might be understood to imply that all non-enumerated rights had been "assigned" into the hands of the national government.<sup>19</sup> Although eventually pressed into adopting a Bill of Rights, Madison proposed the Ninth Amendment in order to prevent any erroneous assumptions about the existence of "other rights" beyond those listed in the Bill.<sup>20</sup> According to Farber, these "other rights" were fundamental natural rights "embedded in the law of nations" (pp. 24–25). Although the Ninth Amendment originally applied against the federal government, the same set of individual natural rights apply against the states by way of the Fourteenth Amendment's Privileges or Immunities Clause (p. 16).

Farber devotes the second half of his book to explaining how the historical understanding of the Ninth Amendment can be put into principled operation by the courts. Abandoning the originalist methodology of the first half, Farber advocates a "pragmatic" approach to judicial review and sets out a number of factors that courts can follow in deciding whether to recognize a new fundamental right (p. 108). Applying his theory to a num-

17. 381 U.S. 479 (1965).

18. See James Wilson, *State House Speech* (Oct. 6, 1787), in 1 THE FOUNDERS' CONSTITUTION 449 (Philip B. Kurland & Ralph Lerner eds., 1987).

19. James Madison, *Speech in Congress Proposing Constitutional Amendments* (June 8, 1789), in JAMES MADISON: WRITINGS 448–49 (Jack Rakove ed., 1999) [hereinafter WRITINGS]. As James Iredell declared in the North Carolina ratifying convention:

[I]t would be not only useless, but dangerous, to enumerate a number of rights which are not intended to be given up; because it would be implying, in the strongest manner, that every right not included in the exception might be impaired by the government without usurpation; and it would be impossible to enumerate every one. Let anyone make what collection or enumeration of rights he pleases, I will immediately mention twenty or thirty more rights not contained in it.

*Remarks of James Iredell in the North Carolina Ratifying Convention* (July 29, 1788), in 4 THE DEBATE IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION AS RECOMMENDED BY THE GENERAL CONVENTION AT PHILADELPHIA IN 1787, at 167 (Jonathan Elliot ed., 2d ed., J.B. Lippincott Co. 1941) (1836) [hereinafter, THE DEBATE]. For a general discussion of these arguments by Wilson, Madison, and Iredell, see KURT T. LASH, THE LOST HISTORY OF THE NINTH AMENDMENT 14, n.4 (2009).

20. James Madison, *Speech on Proposed Constitutional Amendments* (1789), in WRITINGS *supra* note 19, at 448–49.

ber of contemporary controversies, Farber concludes that much of the modern Supreme Court's substantive due process jurisprudence is justified, though he would expand the list of fundamental rights to include a positive right to education and government protection from private harm. Farber closes his book with a short "Appendix" that briefly presents alternate views of the Ninth Amendment and explains why they fail to do full justice to the original understanding of the text (p. 201).

Throughout the book, Farber employs a straight-forward and easily accessible narrative that is unencumbered by copious footnotes or detailed analysis of historical documents. Indeed, Farber expressly declines to engage the historical debate, insisting instead that he has presented "the best interpretation of history" (p. 5). This approach has the benefit of making the work far more accessible to a lay audience unfamiliar with this particular area of law (or indeed of constitutional law in general). Had Faber attempted to simply summarize a commonly held view of the Ninth Amendment, his light approach might have been appropriate. But Farber has a more ambitious agenda. He seeks to both discredit what he calls "conservative" readings of the Ninth Amendment and establish a textual and historical basis for judicial enforcement of international human rights. Given the current level of debate regarding the Ninth, neither of Farber's goals can be reached without a close engagement of an expanded (and expanding) corpus of historical materials.

### III. ORIGINALISM AND THE NINTH AMENDMENT

In the 1980s, conservatives hitched their wagons to the interpretive theory of original intent in response to what they viewed as the excesses of the Warren and Burger Courts. Brandishing terms like "strict construction" and "judicial restraint," figures like Edwin Meese and Robert Bork called for a return to the original intentions of the Framers.<sup>21</sup> The idea that the Constitution should reflect the intentions of the Founders had substantial rhetorical appeal, particularly for conservatives who were fairly sure that the Framers did not envision reproductive rights and sexual autonomy. Restoring the "original intent of the framers" thus became a kind of call to arms for conservative scholars and politicians alike.

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21. See generally ROBERT BORK, *THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW* (1990).

The call did not go unchallenged. Defenders of the Supreme Court's privacy jurisprudence called into question the very idea of discovering any "original intent." The assault came from two directions: First, legal theorists argued that determining a single "intent" was impossible.<sup>22</sup> Secondly, historians like H. Jefferson Powell argued that the framers themselves rejected the concept of using their intentions as a guide to constitutional meaning.<sup>23</sup> Although these critics were successful in terms of discrediting the search for framers' intent, the ultimate result of their efforts was to force originalists into rethinking both the methodology and normative justification for an historical approach to constitutional interpretation.<sup>24</sup> Today, most originalists have moved away from instrumentalist justifications like "judicial restraint," and instead tend to ground the originalist enterprise on the normative theory of popular sovereignty.<sup>25</sup> Instead of seeking original intent, most originalists today seek the likely public meaning of the text as understood by those with the sovereign right to alter or amend the Constitution—the ratifiers. The search for original understanding or "original meaning" avoids many of the theoretical pitfalls of the earlier search for original intent while at the same time placing the entire enterprise on firmer normative ground.

A more successful attack on the conservative originalism of the 1980s came from a group of scholars who adopted the methods of originalism and deployed them against conservative theories of constitutional meaning. Yale professor Bruce Ackerman, for example, discovered the foundations of modern liberal government in the public debates and constitutional commitments of the Founding generation.<sup>26</sup> Ackerman challenged the conservative idea that judicial enforcement of individual liberties presented a "counter-majoritarian difficulty" which called for the exercise of judicial restraint.<sup>27</sup> According to Ack-

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22. See Paul Brest, *The Misconceived Quest for Original Understanding*, 60 B.U. L. REV. 204 (1980).

23. H. Jefferson Powell, *The Original Understanding of Original Intent*, 98 HARV. L. REV. 885 (1985).

24. See ANTONIN SCALIA, *A MATTER OF INTERPRETATION* (1998); KEITH E. WHITTINGTON, *CONSTITUTIONAL INTERPRETATION: TEXTUAL MEANING, ORIGINAL INTENT, AND JUDICIAL REVIEW* (2001).

25. See, e.g., WHITTINGTON, *supra* note 24.

26. See ACKERMAN, *supra* note 14; AKHIL REED AMAR, *THE BILL OF RIGHTS* (1998).

27. Compare ALEXANDER BICKEL, *THE LEAST DANGEROUS BRANCH* (1986) (presenting the counter-majoritarian difficulty) with ACKERMAN, *supra* note 14 (persuasively resolving the same).

erman, the Founders established a dualist system of government in which the sovereign people enshrined their supermajoritarian will in a written Constitution (higher law), which courts then enforced against the majoritarian political process (ordinary law). Far from being counter-majoritarian, judicial review under such a system vindicated the people's sovereign authority to establish their own fundamental law.

By using their own historical commitments against them, liberal legal theorists were able to place conservative critics of "judicial activism" on the defensive. One of the biggest conservative complaints had been judicial recognition of the right to privacy. Their argument was (and remains) the fact that the right is nowhere mentioned in the text of the Constitution. In response, liberal scholars cited the Ninth Amendment, a text that seemed to clearly vindicate the unenumerated rights approach of the Supreme Court in cases like *Griswold* and *Roe v. Wade*. Instead of producing a counter-historical narrative regarding the original understanding of the Ninth, however, conservative legal thinkers had literally *nothing* to say. In one of the most famous exchanges in modern American constitutional law, Judge Robert Bork, one of the top constitutional theorists of his generation, testified to the Senate Judiciary Committee that he could no more find meaning in the Ninth Amendment than he could in a text obscured "by an inkblot." To his critics, Bork's refusal to find meaning in the Ninth seemed to illustrate conservative hypocrisy when it came to their purported commitment to the original understanding of the Constitution—a criticism Farber repeats throughout his book.

In defense of Judge Bork, however, at the time that he testified before the Senate *no one* knew much about the Ninth Amendment. As an originalist, Bork was committed to remaining agnostic about the meaning of a text until such time that sufficient historical evidence is uncovered to allow at least some tentative conclusions about its original meaning. Since Bork's testimony, however, a great deal of historical and theoretical work has taken place in regard to the Ninth. As a result, we are in a much better position today than Bork was to assess the most likely original understanding of the text.

#### THE EVOLVING DEBATE ON THE HISTORICAL NINTH

The first wave of scholarly commentary on Ninth focused on its text, not its history. This is not surprising given the as-

sumed lack of any such history and, besides, there seemed little reason to investigate the amendment's original understanding given the seemingly facial declaration of the Ninth that there were other individual rights beyond those listed in the text. The insistence by some scholars that the Ninth merely restated principles declared by the Tenth seemed implausible, given the Tenth's focus on *state powers* and the Ninth's focus on the *people's rights*. The Supreme Court, however, proved unwilling to develop a specific Ninth Amendment jurisprudence. For years, then, a stalemate existed between liberal scholars who insisted that the Ninth had meaning (but weren't exactly sure what it was) and conservatives who supported judicial non-enforcement (perhaps hoping the issue would just go away). As a result, historical analysis of the Ninth Amendment remained moribund and the Supreme Court turned to other constitutional provisions in support of substantive due process rights.

It was not until the last decade of the twentieth century that serious discussion of the historical Ninth Amendment reappeared. In a series of essays and, later, a full book, libertarian scholar Randy Barnett solved the problem of liberal application of the Ninth by reversing the burden of proof. Rather than requiring a party to prove a retained right exists, Barnett read the Ninth as requiring the government to prove power exists in situations impinging upon a broad class of individual liberties. Combining the Ninth and Fourteenth Amendment produced what Barnett calls "a presumption of liberty" against both federal and state regulation.<sup>28</sup>

Barnett's work not only provided an escape from the Ninth Amendment's black box of "other rights," he supported his reading of the Ninth with a close investigation of the historical record surrounding the drafting and adoption of the Amendment. Taking advantage of theoretical advances in originalist theory, Barnett embraced "original meaning" originalism and claimed that the Amendment would have been broadly understood as a rule calling for narrow construction of federal power. In a critical contribution to historical scholarship on the Ninth Amendment, Barnett focused on James Madison's speech against the Bank of the United States, in which Madison expressly declared that the Ninth was meant to operate as rule

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28. RANDY E. BARNETT, *RESTORING THE LOST CONSTITUTION: THE PRESUMPTION OF LIBERTY* (2003).



prohibiting any undue “latitude of interpretation” in regard to federal authority.<sup>29</sup>

Barnett’s work advanced the understanding of the historical Ninth Amendment in a number of ways. First, Barnett established that the Ninth Amendment was understood by at least some Founders as an active constraint on the interpretation of federal power. Some scholars had claimed that the Ninth was no more than a kind of restatement of the Tenth—with neither amendment representing anything more than a passive statement that all non-delegated powers remained to the states. By highlighting Madison’s speech, Barnett was able to persuasively argue that Founders like James Madison saw the Ninth as an enforceable rule of construction which actively constrained the interpretation of Congress’ enumerated powers.

In one significant regard, however, Barnett agreed with prior commentary on the Ninth that the Amendment had gone unnoticed in any significant manner prior to the Supreme Court’s 1965 decision in *Griswold*. Even as late as 2003, every published work on the Ninth continued to insist that the Amendment had languished in obscurity from 1791 to 1965. The problem was, every serious Ninth Amendment scholar knew this was not entirely true. Legal historians had long noted a curious body of case law, primarily from the nineteenth century, which cited the Ninth Amendment as working alongside the Tenth to prevent federal encroachment upon matters believed best left to state control. This is not a small group of judicial outliers—there are literally hundreds of such cases extending from the earliest decades of the Constitution to the time of the New Deal. By insisting that the Ninth had languished in obscurity, most scholars simply dismissed these early cases as “mistakes.” Everyone knows, they insisted, that the *Tenth* Amendment guards state rights and the *Ninth* protects the rights of the people. Thus, an entire body of case law linking the Ninth and Tenth Amendments was dismissed, leaving the Ninth to seem as if it appeared “out of nowhere” in 1965.

But just as the troubling existence of retrograde motion eventually forced a rethinking of the Ptolemaic universe, so it was inevitable that scholars would eventually be forced to revisit this seemingly anomalous body of case law and, perhaps, rethink the conventional wisdom regarding the Ninth Amendment. The

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29. See BARNETT, *supra* note 28, at 163. See also, James Madison, *Speech Opposing the Bank of the United States* (1791), in WRITINGS, *supra* note 19, at 480.

latest wave of Ninth Amendment scholarship takes a second look at the historical association of the Ninth and Tenth Amendments and argues that courts were not wrong to pair the amendments for more than one hundred years. Plumbing the depths of this new debate about the Ninth is beyond the scope of this particular review. Some of the more recent entries can be found in a recent volume of the *Stanford Law Review* where Randy Barnett and I debate the relative merits of the libertarian and federalist readings of the historical Ninth Amendment.<sup>30</sup> For the purposes of this review, I will only highlight where the current evidence undermines a number of Farber's (and most modern scholars') assumptions about the Ninth. More time will be spent on one of Farber's distinctive claims regarding the Ninth Amendment and international law.

#### NINTH AMENDMENT MYTHOLOGY AND THE HISTORICAL RECORD

Here, in a nutshell, are Farber's claims about the historical Ninth Amendment: (1) Unlike the rest of the Bill of Rights which reflected Anti-Federalist concerns about limiting federal power, the Ninth Amendment reflected *Federalist* concerns about protecting individual rights. (2) Language which was deleted from Madison's original draft of the Ninth proves that the Founders intended the Amendment to protect individual rights, as opposed to the Tenth Amendment which the Founders intended to limit federal power to interfere with matters left to the states. (3) The Ninth Amendment languished in obscurity prior to *Griswold v. Connecticut*. None of these assertions are particularly unique. Indeed, they reflect what until very recently has been the consensus view among legal scholars. Nevertheless, the complete historical record calls into question every one of these commonly accepted propositions.

#### THE NINTH AND THE CONCERNS OF THE STATE CONVENTIONS

One of Farber's goals is to establish a clear distinction between the Ninth and Tenth Amendments in terms of their underlying principles and goals. The Ninth is about individual

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30. See Randy E. Barnett, *Kurt Lash's Majoritarian Difficulty: A Response to a Textual-Historical Theory of the Ninth Amendment*, 60 STAN. L. REV. 937 (2008); Kurt T. Lash, *On Federalism, Freedom, and the Founders' View of Retained Rights: A Reply to Randy Barnett*, 60 STAN. L. REV. 969 (2008) See also, LASH, THE LOST HISTORY OF THE NINTH AMENDMENT, *supra* note 19.

*rights*, while the Tenth is about limiting federal *power*. Distinguishing the Ninth from the states' rights oriented Tenth is important in light of Farber's ultimate conclusion that the Ninth represents principles that can be applied against the states. Farber makes two basic arguments in his attempt to drive a wedge between the two amendments. First, he claims that the Ninth emerged out of Federalist concerns about individual rights (p. 37), not Anti-Federalist concerns about limiting federal power. Second, Farber argues that Madison's original intent to place the clauses in different sections of the Constitution illustrates how the Amendments had different purposes and goals.

Farber's first claim is that "the Ninth Amendment was the product of Madison's mind" (p. 209). Other scholars have made similar claims. Leonard Levy, for example, asserts that unlike the rest of the Bill of Rights which are rooted in proposals made by the state ratifying conventions, the language of the Ninth Amendment was the unique idea of James Madison alone.<sup>31</sup> While this is true of the final language of the Ninth, Madison's original proposal echoed language suggested by a number of state conventions, Virginia's proposed amendments in particular (which Madison helped draft).<sup>32</sup> Madison's original draft of the Ninth and Tenth Amendment also both addressed the same general subject: The need to limit federal power. Here are Madison's original drafts of both Amendments:

The exceptions, here or elsewhere in the Constitution, made in favor of particular rights, shall not be so construed as to diminish the just importance of other rights retained by the people, or as to enlarge the powers delegated by the Constitution; but either as actual limitations of such powers, or as inserted merely for greater caution.<sup>33</sup>

The powers not delegated by this Constitution, nor prohibited by it to the states, are reserved to the states respectively.<sup>34</sup>

Madison's Tenth has the effect of limiting the federal government to delegated powers (unlike the general police powers of the states). The Ninth forbids undue "enlargement" of those de-

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31. See, e.g., LEONARD W. LEVY, *ORIGINS OF THE BILL OF RIGHTS* 247 (1999) (Madison "improvised [the Ninth Amendment]. No precise precedent for it existed.").

32. Scholars have long noticed the link between Madison's original draft and proposals from Virginia and New York. For a discussion of these proposals, see Kurt T. Lash, *The Inescapable Federalism of the Ninth Amendment*, 93 IOWA L. REV. 801(2008).

33. Madison, *supra* note 19, at 443.

34. *Id.* at 444.

legated powers. The original draft of the Amendments thus addressed the same general goal, limiting national power. This not only links the original purposes of the Ninth and Tenth Amendments, it also ties them to the concerns of the state conventions. Limiting federal power, of course, was *more* of a concern to the doubters in the state conventions than the Federalist proponents of the Constitution.

Farber's second claim involves Madison's original intended placement of the two amendments. Madison had originally proposed placing the Ninth Amendment with the other amendments addressing individual rights, while placing the Tenth in Article VI. Farber believes that Madison's intended separation of the two amendments indicates the clauses originally had different purposes: The Tenth was about federalism while the Ninth "was about individual rights" (p. 44).<sup>35</sup>

Here Farber makes an assumption about Madison's intent based on his original planned placement of the amendments. But there is no need in this case to try and guess Madison's views about the relationship between the Ninth and Tenth Amendments." The man is on record as declaring, in both private letters and public speeches, that the Ninth and Tenth Amendments worked together to protect the reserved powers and rights of the states.<sup>36</sup> Farber does not mention Madison's explanations, both delivered while ratification of the Bill of Rights remained pending in the states. It is possible that Farber follows some historians in distinguishing between the "early" and "later" views of Madison, with the former taking a more nationalist view of federal power and rights and the latter taking more of a (post hoc) states rights approach in response to the nationalist policies of Alexander Hamilton and John Adams.<sup>37</sup> This bifurcated view of Madison generally attempts to distinguish the Madison who fathered the Constitution with the Madison who later advocated a rule of strict construction of federal power. Modern biographers of Madison, however, stress the remarkable consistency in Madi-

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35. The Founders do not seem to have shared Farber's clean distinction between limiting federal power (federalism) and protecting individual rights. For example, James Madison claimed that the Sedition Act violated both individual rights and the rights of states. See generally, Kurt T. Lash, *James Madison's Celebrated report of 1800: The Transformation of the Tenth Amendment*, 74 GEO. WASH. L. REV. 165, 181 (2006).

36. See Madison, *supra* note 29.

37. There are places in Farber's book where he appears to take this "early v. late" view of Madison's work. (e.g., p. 46: "In their reaction against Hamilton and the Federalist Part's platform, Southerners like Jefferson and Madison developed a constitutional theory that stressed states' rights and strict construction of federal power.").

son's thinking from the end of the Philadelphia Convention through his 1790s battles with the nationalist policies of men like Alexander Hamilton.<sup>38</sup> Indeed, Madison adopted a mixed view of the Constitution (both federal and national) throughout his life, for he fought as hard against ultranationalists like Hamilton as he did against ultra-states' rights theorists like Spencer Roane and John C. Calhoun.<sup>39</sup>

But even accepting the theory of the "two Madisons," one still cannot dismiss his declarations regarding the Ninth and Tenth Amendments. Madison's Virginia Resolutions were indeed a response to the aggressive nationalist policies of the Federalist Party, and they were written a decade after the adoption of the Constitution. But Madison's declarations regarding the Ninth and Tenth Amendment were written in 1791, even before the adoption of the Bill of Rights. In short, not only do we *know* Madison's views of the Ninth and Tenth Amendments, he declared those views, more than once, before the ink on the original Constitution was dry.

Putting aside for the moment the issue of Madison's personal intentions, by stressing the original proposed placement of the two amendments, Farber relies on an outmoded form of originalism. At most, Madison's placement proposal might tell us something of Madison's original private intentions regarding the two provisions. Contemporary originalists, however, do not seek the private intentions of the Framers. Instead, the effort is to recover the original public meaning of the text as it was understood by the ratifiers, the body with the sovereign authority to establish fundamental law. This shift in methodology reflects a shift in the normative justification for using original meaning as an interpretive method. Although presented in the past as a tool for constraining judicial activism, today the practitioners of originalism most often justify their efforts on the normative theory of popular sovereignty—the sovereign right of the people to establish fundamental law in a written and enforceable Constitution.<sup>40</sup> The relevant group in this endeavor is not the individual framers (and their private intentions), but the members of the ratifying assemblies who debated and adopted the text. *This*

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38. See, e.g., RALPH KETCHAM, JAMES MADISON: A BIOGRAPHY 323 (1990).

39. Farber himself has discussed the "mixed" position of Madison regarding state and national power in other works. See DANIEL FARBER, LINCOLN'S CONSTITUTION 39 (2003) [hereinafter FARBER, LINCOLN'S CONSTITUTION].

40. For the sophisticated (and complete) analysis of popular sovereignty based originalism, see WHITTINGTON, *supra* note 24.

*group* would not have known about Madison's original placement of the two amendments. Instead, they were presented with a single "Bill," with the Ninth and Tenth Amendments placed side by side.

#### THE ALTERED LANGUAGE

Two critical changes occurred between the time Madison presented his proposed amendments and when Congress presented the Bill of Rights to the states. First, as discussed above, the Amendments were consolidated into a single Bill to be added at the end of the original Constitution. Secondly, Madison's original language regarding the Ninth was trimmed. The final draft of the Ninth omitted the original language regarding federal power and focused solely on the issue of the retained rights of the people. Farber claims that this alteration *proves* that the final draft addressed only individual rights and had nothing to do with limiting federal power.<sup>41</sup> This is a common claim among those who read the amendment as *only* protecting individual rights. From a modern perspective, this assertion seems reasonable enough—language referring to the rights of the people seems unrelated to limiting the construction of federal power. But, as the writings of James Madison make clear, such was not the case at the Founding. In a letter discussing the Ninth Amendment that Farber does not address, Madison explained that protecting rights and limiting the construction of power amount to the same thing.

If a line can be drawn between the powers granted and the rights retained, it would seem to be the same thing, whether the latter be secured by declaring that they shall not be abridged, or that the former shall not be extended.<sup>42</sup>

To Madison, limiting powers and protecting retained rights were two sides of the same coin: accomplishing one goal, by definition, accomplished the other. Madison's letter was written in re-

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41. According to Farber:

[N]otice the deleted language saying that enumerated rights do not indirectly expand other federal powers. The deletion of this language is significant because it disproves one misreading of the Ninth Amendment, which tries to twist it into an effort to restrict federal powers rather than to recognize unenumerated rights. If the idea was to restrict federal power, that language was there as part of Madison's draft. The fact that this specific language was deleted shows that the remaining language had a different purpose (p. 42).

42. *Letter from James Madison to George Washington* (Dec. 5, 1789), in 5 THE DEBATE, *supra* note 19, at 221–22.

sponse to objections raised in the Virginia Assembly that the final draft of the Ninth did not containing language clearly limiting the construction of federal power. According to Madison, the objection was “fanciful” for language guarding retained rights had the same effect as language limiting the construction of federal power—only the language used the more powerful concept of *rights*. Advocates of a libertarian reading of the Ninth have struggled to explain (or discredit or ignore) this letter by Madison.<sup>43</sup> Recently, however, new evidence has come to light regarding the *subject* of Madison’s letter, objections in the Virginia assembly regarding the final draft. This new evidence makes clear (if the letter was not itself clear enough) that Madison believed the final version of the Ninth Amendment addressed the Virginia Assembly’s concerns about the need to limit federal power. Hardin Burnley, a member of the assembly charged with debating and ratifying the Bill, shared the same view.

Farber insists that it is a mistake to read the Ninth as limiting federal power. But not only does he ignore Madison’s (and Burnley’s) letter on the subject, he also ignores Madison’s 1791 speech against the Bank of the United States, in which Madison publicly declares that the Ninth Amendment guards against a “latitude of interpretation” in matters involving federal intrusion upon the autonomy of the states. This speech is particularly important as signaled to the Virginia ratifying assembly the meaning of the Ninth Amendment according to Virginia’s congressional delegate and *drafter of the clause*.

#### THE MYTH OF THE HISTORICAL OBSCURITY OF THE NINTH AMENDMENT

One of the most common assertions about the Ninth Amendment is that it disappeared from view following its adoption until resurrected by Justices Douglas and Goldberg in *Griswold v. Connecticut*. According to Farber, following its enactment, the Ninth Amendment “faded from view” (p. 46). Although one of the most common assertions about the Ninth, it is also one of most easily, and conclusively, disproved. Elsewhere, I have compiled a fairly exhaustive list of post-adoption cases and commentary on the Ninth Amendment.<sup>44</sup> Without

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43. See, e.g., Randy E. Barnett, *The Ninth Amendment: It Means What It Says*, 85 TEX. L. REV. 1, 54 (2006).

44. See Lash, *supra* note 19; Kurt T. Lash, *The Lost Jurisprudence of the Ninth*

going into detail here, suffice to say that courts and commentators repeatedly referred to the Ninth Amendment throughout the first century and a half of the Constitution. Highlights include Madison's letters and speeches, the first constitutional treatise, St. George Tucker's *View of the Constitution*,<sup>45</sup> Justice Story's Supreme Court opinion in *Houston v. Moore*,<sup>46</sup> and literally hundreds of state and federal judicial opinions.<sup>47</sup> The myth of the "forgotten Ninth Amendment" is so easily disproven that its continued reference in the literature raises an issue of its own. What can account for this myth's durability?

The primary reason, I believe, is the fact that almost all of these numerous historical references to the Ninth occur in conjunction with discussions of the Tenth Amendment and the need to limit federal power. Beginning with Bennett Patterson's 1955 "The Forgotten Ninth Amendment,"<sup>48</sup> modern Ninth Amendment scholars (including Farber) simply dismiss as "mistaken" any historical reference that links the Ninth and Tenth Amendments.<sup>49</sup> Given the sheer number of reference accordingly dismissed from consideration, this is a rather bold assumption. Nevertheless, if one first assumes that the Ninth and Tenth have nothing to do with one another, then it simply follows that any historical evidence to the contrary must be in error. The problem is with the assumption.

Again, this is not the place to fully investigate the full historical record of the Ninth Amendment. My purpose is only to alert readers to the existence of a number of historical documents that call into question Farber's reliance on Ninth Amendment mythology. Farber could have addressed this record and no doubt advanced our understanding of a developing historical record, as indeed he has done in prior works.<sup>50</sup> Unfortunately Farber simply avoids the current debate. Although readers are promised a more developed historical discussion in the book's "Appendix" (p. 201), this final section of the book

*Amendment*, 83 TEX. L. REV. 597 (2005) [hereinafter Lash, *Lost Jurisprudence*].

45. St. George Tucker, *Note D: View of the Constitution of the United States*, in 1 WILLIAM BLACKSTONE, COMMENTARIES 140 (Dennis & Co., Inc. 1965) (1803).

46. 18 U.S. (5 Wheat.) 1 (1820).

47. See Lash, *Lost Jurisprudence*, *supra* note 44.

48. BENNETT B. PATTERSON, THE FORGOTTEN NINTH AMENDMENT: A CALL FOR LEGISLATIVE AND JUDICIAL RECOGNITION OF RIGHTS UNDER SOCIAL CONDITIONS OF TODAY (1955).

49. P. 46: "When it was mentioned at all, the ninth was often erroneously lumped together with the tenth amendment (which preserves the 'powers retained by the states').".

50. See FARBER, LINCOLN'S CONSTITUTION, *supra* note 39.



provides only a cursory sketch and dismissal of various alternative interpretations of the Ninth Amendment.

#### THE LAW OF NATIONS, POPULAR SOVEREIGNTY, AND THE NINTH AMENDMENT

In some ways, Farber is absolutely right to insist we consider the Founders' view of the law of nations in determining the original meaning of the Ninth Amendment.<sup>51</sup> In particular, Farber correctly identifies the work of the eighteenth century internationalist Emmerich de Vattel as influencing the Founding generations' understanding of the retained rights of the people. The earliest constitutional treatise, St. George Tucker's 1803 *View of the Constitution*, cites Vattel's *Le Droit des Gens* ("The Law of Nations") throughout, especially in regard to the Ninth and Tenth Amendments.<sup>52</sup> But where Farber is concerned about retained individual rights, Vattel was most concerned with the retained rights of the *sovereign*. The distinction is critical in understanding how international law informed the meaning of the Ninth Amendment.

Although most Ninth Amendment scholarship focuses on the issue of individual natural rights, the text of the Ninth Amendment is not so limited. It speaks of "other rights," not just other individual rights, much less individual natural rights. At the time of the Founding, rights came in many different shapes and sizes: individual and collective, natural and positive. Nothing in the text of the Ninth Amendment excludes *any* category of right. For example, the people could retain the right to free expression (an individual natural right) or the collective right to determine municipal law (such as local piloting regulations) on a local level. It takes but a moment's thought to realize that "the people" (whether conceived of a single national people or the people in the several states, or both) would have wanted to retain under local control all those rights, whether individual and collective, which were not delegated into the hands of the national government. Madison was clear about this: In his speech against the Bank of the United States, Madison claimed that because chartering a bank was not within the delegated powers of Congress, passing the Bank Bill would violate the Ninth and Tenth Amendments. The Bill would not violate indi-

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51. Justices who "look[] beyond our national borders to seek the parameters of liberty ... honor the framers' intent" (p. 10).

52. See, e.g., Tucker, *supra* note 45, at 151.

vidual natural rights (there was no right of people in the states to prevent state chartered banks—indeed, most states had them). Instead, the Bill would violate what Madison saw as a retained right of the collective people in the several states.

In this way, the Ninth and Tenth Amendments preserved the Founding vision of popular sovereignty. A concept rooted in the English Bill of Rights, but which evolved significantly in Revolutionary America, popular sovereignty maintains that sovereign power resides in the collective people and *not* in their government. Locating sovereignty in extra-governmental conventions of the people was a key development along the road to the American embrace of written and enforceable constitutions. Prior to the adoption of the federal Constitution, of course, the people existed in separate sovereign states (the “free and independent states” of the Declaration of Independence). One of the major issues which arose during the ratification debates involved whether the people in the states would continue in their independent sovereign capacity, or whether they would be consolidated into a single national “people.” In order to secure ratification, the Federalists assured the conventions that no such consolidation would occur. As Madison assured the ratifiers in the Federalist Papers, the Constitution was neither wholly national nor wholly federal—each would have its independent and respective powers, jurisdictions, and rights following ratification.

The problem for those still on the fence regarding the proposed Constitution, however, was the possibility that delegated federal power would be so broadly construed as to render the independent sovereignty of the people in the states no more than a paper declaration. Once again, Federalists such as James Madison, Alexander Hamilton and James Wilson insisted that the federal government would have only expressly delegated powers, and that these powers would be strictly construed. As Hamilton pointed out, strict construction of delegated sovereign power was the established “law of nations.”

According to Vattel, the acknowledged expert on international law, sovereigns (be they Kings or a sovereign people) were assumed to never delegate away any more of their sovereign powers than was necessary to accomplish a particular purpose. Accordingly, delegated sovereign authority was read to include only those powers expressly enumerated or “clearly”

incident to the express delegation.<sup>53</sup> In the first constitutional treatise, St. George Tucker applied Vattel's law of nations to the specific issue of delegated federal power. A passionate defender of popular sovereignty, Tucker insisted that because the sovereign people in the several states had previously delegated broad powers to their state governments, establishing a new federal government required the people to recall some of these powers and delegate them into the hands of the national government. Citing Vattel, Tucker insisted that all such newly delegated power must be strictly construed, and that this principle of the law of nations had been constitutionally enshrined through the adoption of the Ninth and Tenth Amendments. John Overton, a member of the second North Carolina Ratifying Convention that ratified the Ninth Amendment, similarly viewed the Ninth as working alongside the Tenth to preserve the retained state right of "self-preservation." Writing as a judge on the Tennessee bench, Overton declared:

[N]ations as well as individuals are tenacious of the rights of self-preservation, of which, as applied to sovereign States, the right of soil or eminent domain is one. Constitutions, treaties, or laws, in derogation of these rights are to be construed strictly. *Vattel is of this opinion*, and, what is more satisfactory, the *Federalist*, and the American author of the Notes to Blackstone's Commentaries, two of the most eminent writers on jurisprudence, are of the same opinion [Here Judge Overton cites Vattel, Tucker's discussion of the Ninth and Tenth Amendments, as well as the amendments themselves].<sup>54</sup>

James Madison shared the same view—the people in the states had been promised strict construction of federal power—a promise made express in the final two amendments in the Bill of Rights. The above does not mean that Farber (and others) are wrong to insist the Ninth protects individual natural rights. To the contrary, it is clear that the state conventions (and Founders like Madison) were very much concerned about protecting such rights. The issue involves *how* such rights were to be protected, as well as *other* rights which also were considered among the retained rights of the people. For example, the Free Speech Clause

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53. In other works, Farber seems aware of this aspect of Vattel's writing. See FARBER, *LINCOLN'S CONSTITUTION*, *supra* note 39, at 33.

54. *Glasgow's Lessee v. Smith*, 1 Tenn. (1 Overt.) 144, 166 (1799) (Overton, J.) (citing "vat. B. 2 c, 17, §§ 305, 308; Amendment to Con. U. S. arts 11, 12; 1 T. Bl. app. to part 1, 307. 308; Ib. 412; Vat. B. 1, c., § 10; 2 Dall. 384; 1 T. Bl. app. to part 1, 269; 4 Johns. 163").

of the first amendment protected what Madison referred to as an individual natural right. This right was protected, however, by leaving regulation of speech to the people in the individual states. Thus, when the national government passed the Sedition Law, Madison objected that the law violated both the First *and* Tenth Amendments.<sup>55</sup> The same was true of the retained rights of the Ninth Amendment: these rights, be they individual or collective, were retained under the control of the people in the several states who could then leave the matter under the control of their state government, or retain the right from their state government as well by placing the matter in their state declaration of rights. The Ninth and Tenth Amendment ensured these retained rights of local self-government by limiting the federal government to delegated power (the Tenth Amendment) and requiring the strict construction of those powers which were delegated.

When Farber sees Founding-era references to retained rights and the law of nations, he reads these phrases through the lens of modern libertarian human rights law. For Vattel and those Founders who applied his work to the new Constitution, the emphasis was on the law of *nations*—how sovereignties relate to one another and the proper construction of delegated power. In fact, because Vattel's work powerfully supported strict construction of the Constitution, later nationalists like Joseph Story went out of their way to denounce reliance on "Europeans" like Vattel. Ironically, it was nationalists like Story and John Marshall who supplied the vision of national power that would ultimately be used to justify the New Deal Court's expansion of federal authority—a result that Farber appears to applaud. But these same nineteenth century nationalists *rejected* reliance on international law precisely because the law of nations called for a narrow construction of federal power. One can embrace broad theories of federal power, or one can embrace Vattel's contributions to the American theory of the people's retained rights. One cannot, however, embrace them both. Thus, when Farber argues in favor of both New Deal regulatory power *and* enforcement of international human rights law against the states,<sup>56</sup> he has doubly departed from the original vision of the Ninth Amendment.

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55. See James Madison, *Virginia Resolutions Against the Alien and Sedition Acts* (1798), in *WRITINGS*, *supra* note 19, at 590–91.

56. See p. 209 (criticizing the libertarian view as unduly encroaching on federal power), and pp. 96–97 (arguing against economic rights as fundamental rights).

Farber's history of the Ninth Amendment, of course, is only half of his book. The second half is devoted to exploring how courts can go about identifying and enforcing the fundamental individual rights Farber believes are protected under the Ninth and Fourteenth Amendments. Here Farber eschews any particular "global theory" of constitutional rights and instead advocates the kind of pragmatic form of judicial review that he has presented in previous works. Embracing an approach that seems at once descriptive (this is what courts have always done) and hesitantly normative (we are wise to follow the general views of the Founders), Farber presents a series of factors that he believes can both guide and constrain judicial enforcement of fundamental rights. But Farber never clearly provides a normative reason for embracing his pragmatic approach, and those who follow the tenets of originalism have good reason to *reject* his internationalist reading of the Ninth.

### CONCLUSION

Much has happened since the Founding. The Thirteenth, Fourteenth and Fifteenth Amendments introduced new libertarian rights, significantly altering the original balance of federal and state power, while at the same time establishing a new vision of American freedom. An originalist committed to the normative theory of popular sovereignty must reconcile these (and other) exercises of the people's sovereign will. If the retained rights of the people under the Ninth Amendment involved only fundamental individual rights, then it would be possible that the Fourteenth Amendment applied this same set of rights against the states. However, we know that the retained rights of the Ninth Amendment included all matters not left to federal control. Unless one interprets the Fourteenth as having nationalized *every aspect* of local municipal law and state responsibilities, there remain aspects of the original Ninth Amendment which are left to the control of people in the several states as a matter of right. Originalists are therefore left with the task of determining the *extent* to which the Fourteenth Amendment nationalized certain freedoms which, prior to 1868, had remained under local control as a matter of right.<sup>57</sup>

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57. A common move by libertarian Ninth Amendment scholars has been to posit a broad set of libertarian rights protected by the Ninth and then claim that the seemingly similar text of the Privileges or Immunities Clause of the Fourteenth Amendment protects the same set of rights. This move allows one to skip over what remain exceedingly

Nor are the results of such an inquiry necessarily “conservative” or “liberal.” We may find that although the First Amendment was considered a “privilege or immunity,” the non-establishment of religion was not. Perhaps parental rights were considered fundamental, perhaps also property and contract rights. Perhaps not. The point is that a commitment to originalism is a commitment to following the trail of evidence wherever it leads. In this regard, Daniel Farber is surely right to upbraid any proponent of original understanding who refuses to apply the theory when it appears to lead in an uncomfortable direction. But Farber’s book also stands as a warning to those who would use originalism as a form of political jujitsu. The move may work well enough for the moment, but there remains the on-going possibility that new historical discoveries will reveal that one’s opponents were more right than they knew.

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difficult questions about the original meaning and ratification of the Fourteenth Amendment. In the end, however, this is like using frog DNA to fill in missing portions of dinosaur DNA. In both situations, the project has good intentions but the outcomes are less than ideal. See MICHAEL CRICHTON, *JURASSIC PARK* (1991). If one’s reading of the original Ninth is in error, so too will be one’s reading of the Fourteenth.

