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A Textualist Defense of Article I, Section 7, Clause 3: Why *Hollingsworth v. Virginia* Was Rightly Decided, and Why *INS v. Chadha* Was Wrongly Reasoned

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Every Order, Resolution, or Vote to which the Concurrence of the Senate and House of Representatives may be necessary (except on a question of Adjournment) shall be presented to the President of the United States; and before the Same shall take Effect, shall be approved by him, or being disapproved by him, shall be repassed by two thirds of the Senate and House of Representatives, according to the Rules and Limitations prescribed in the Case of a Bill.

—U.S. Constitution, Article I, Section 7, Clause 3

The sweeping nature of this obviously ill-considered provision

—Professor Stanley Corwin's annotated Constitution (1964)

The Court, on the day succeeding the [oral] argument, delivered an unanimous opinion, that the [Eleventh] amendment being constitutionally adopted, there could not be exercised any jurisdiction, in any case, past or future, in which a state was sued by the citizens of another state, or by citizens, or subjects, of any foreign state.

—*Hollingsworth v. Virginia* (1798)

All this, of course, leaves us entirely in the dark as to how or why the Court thought it had evaded the clear language of Article I, Section 7, Clause 3. . . .

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I have elsewhere suggested that this case is inadequately reasoned. Now an unreasoned decision, uttered in the teeth of plain constitutional language, and with no really adequate reason *even projectable*, ought not to be followed beyond its own facts.

—Charles L. Black, Jr., Yale Law Journal (1978) (emphasis added)

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I. Ghosts of Jurisprudence Past

Pity the poor constitutional clause that lies forgotten. It has no defenders; it has no supporters; it has no friends. Not even an enemy with which to contend. It plays no role in political debate, past or present; between liberal and conservative; between populist and countermajoritarian. It is rarely read, and if read its text is not easily understood. Nay—its would-be interpreters claim that there is nothing of substance to understand. Indeed, bench,¹ bar,² and academy³—with unaccustomed unanimity—say the clause was unnecessary, redundant, residual, even ill-considered.⁴ How very sad.

1. See, e.g., *INS v. Chadha*, 462 U.S. 919, 946–47 (1983) (“During the final debate on Art. I, § 7, cl. 2, James Madison expressed concern that [presentment under Article I, Section 7, Clause 2] might easily be evaded by the simple expedient of calling a proposed law a ‘resolution’ or ‘vote’ rather than a ‘bill.’ As a consequence, Art. I, § 7, cl. 3 was added.”) (citations omitted). *But cf.* THE FEDERALIST NO. 48, at 313 (James Madison) (Clinton Rossiter ed., 1961) (noting that “a mere demarcation on parchment of the constitutional limits of the several departments is not a sufficient guard against those encroachments which lead to a tyrannical concentration of all the powers of government in the same hands”).

2. See, e.g., LINDA R. MONK, THE WORDS WE LIVE BY: YOUR ANNOTATED GUIDE TO THE CONSTITUTION 46 (2003) (stating that the Orders, Resolutions, and Votes Clause “ensures that the

How especially so because in the moment of its conception, it spoke to many, although perhaps not to all, Americans. It spoke to the *old*, to those who remembered (or imagined that they remembered) England⁵ and the Rights of Englishmen for which they organized and petitioned, and later—when they were satisfied that peaceful means could not succeed—fought a revolution. It spoke to those who served (and those who had aspired to serve) in the pre-Revolutionary colonial assemblies, to their voters, and to their more numerous constituents. George Washington, Roger Sherman, and Patrick Henry,⁶ and thousands of now forgotten loyal subjects and revolutionary patriots who served in colonial assemblies under royal governors at a time of royal charters and letters patent—they would have understood Article I, Section 7, Clause 3.

president participates in the legislative process, whether or not the law in question is labeled a bill or resolution”).

3. See, e.g., DAVID HUTCHISON, *THE FOUNDATIONS OF THE CONSTITUTION* 74 (1975) (arguing that the purpose of the Orders, Resolutions, and Votes Clause was to prevent Congress from circumventing the President’s veto as already described in Article I, Section 7, Clause 2).

4. THE CONSTITUTION OF THE UNITED STATES OF AMERICA: ANALYSIS AND INTERPRETATION, S. DOC. NO. 88-39, at 135 (1st Sess. 1964) [hereinafter ANALYSIS AND INTERPRETATION] (annotation of Professor Corwin) (decrying “[t]he sweeping nature of this obviously ill-considered provision”); John O. McGinnis & Michael B. Rappaport, *The Rights of Legislators and the Wrongs of Interpretation: A Further Defense of the Constitutionality of Legislative Supermajority Rules*, 47 DUKE L.J. 327, 342 n.68 (1997) (calling the Orders, Resolutions, and Votes Clause the “Residual Presentment Clause”); L. Gordon Crovitz, *The Line-Item Veto: The Best Response When Congress Passes One Spending “Bill” a Year*, 18 PEPP. L. REV. 43, 48–50 (1990) (finding the Orders, Resolutions, and Votes Clause “otiose” absent a presidential line item veto—a procedural mechanism itself lacking any textual support). *But see* Knowlton v. Moore, 178 U.S. 41, 87 (1900) (noting the “elementary canon of construction which requires that effect be given to each word of the Constitution”); Gopalan v. State of Madras, [1950] A.I.R. 27, 35 (S.C.) (Kania, C.J.) (“Every word of that clause must be given its true and legitimate meaning and in the construction of a Statute, particularly a Constitution, it is improper to omit any word which has a reasonable and proper place in it or to refrain from giving effect to its meaning.”).

5. I acknowledge that this view may not have been universal. See RALPH VOLNEY HARLOW, *THE HISTORY OF LEGISLATIVE METHODS IN THE PERIOD BEFORE 1825*, at 7 (1917) (“It is said that when plans were being made in Boston for celebrating the accession of William and Mary [in 1689], it was decided not to fly the English flag in honor of the occasion, for the very simple reason that not a single one could be found.”).

6. George Washington was born in 1732 and served in the House of Burgesses from 1758–1765. CHARLES W. MEISTER, *THE FOUNDING FATHERS* 313, 318 (1987). Roger Sherman was born in 1721 and served in the Connecticut Assembly from 1755–1756, 1758–1761, and 1764–1766. *Id.* at 292, 296; see also Richard D. Brown, *The Founding Fathers of 1776 and 1787: A Collective View*, 33 WM. & MARY Q. (3d ser.) 465, 474–76 (1976) (reporting that Sherman was the second oldest delegate at the Federal Convention). *But see infra* note 12 (explaining Connecticut exceptionalism). Patrick Henry was born in 1736 and served in the House of Burgesses in 1765. Henry, Patrick (1736–1799), *Biographical Directory of the United States Congress*, at <http://bioguide.congress.gov/scripts/biodisplay.pl?index=H000511> (last visited Jan. 10, 2005).

Still there were other men, younger men, ambitious men. When still a youth, Thomas Jefferson,⁷ it is said, stood in the hall just outside of the House of Burgesses and listened to Henry's speeches so that at a later, suitable time he would be able to participate in the politics of colonial life.⁸ And that was the limit of his (or any young Virginian's) political horizon because no one then (except Franklin perhaps)⁹ imagined that Virginia (or any other colony in British North America) would later become an independent nation, only to be shortly thereafter incorporated into a vast continental American empire. Jefferson's political star began to wax at the time immediately before the Revolution. And during the Revolution, the colonial governors,¹⁰ charters, and assemblies passed away, never to return to these shores. Ancient charters were replaced with state constitutions having democratic credentials even where they were not actually popularly ratified. Sovereignty was recognized as vested in the people. And the struggles over the control, election, agenda, timing, authentication, and procedures¹¹ of colonial parliaments—issues that were the warp and woof of the Revolution—were rapidly becoming objects of antiquarian interest, only remembered by Americans long in the tooth. Still, if anyone of Jefferson's years would have understood Article I, Section 7, Clause 3, it would have been he. Jefferson's *Manual of Parliamentary Practice* was an intellectual achievement of the first order. It is still read and used today throughout Commonwealth nations and relied on as a restatement of British

7. Thomas Jefferson was born in 1743 and served in the House of Burgesses from 1769–1775. Jefferson, Thomas (1743–1826), Biographical Directory of the United States Congress, at <http://bioguide.congress.gov/scripts/biodisplay.pl?index=J000069> (last visited Jan. 10, 2005).

8. See MARY PATTERSON CLARKE, PARLIAMENTARY PRIVILEGE IN THE AMERICAN COLONIES 191–92 (1943) (recording that the May 30–31, 1765 debate in the House of Burgesses in which Patrick Henry allegedly “uttered the well-known words about Caesar having his Brutus, and Charles I, his Cromwell” and “May George III profit by their example” was observed by “Thomas Jefferson and John Tyler, who at the ages of eighteen and twenty-three respectively were standing in the door-way listening . . .”). Clarke, although generally reliable, is mistaken here—Tyler was eighteen and Jefferson twenty-three at the time. The Political Graveyard: Index to Politicians: Tyler, at <http://politicalgraveyard.com/bio/tyler.htm#REY113LFC> (last visited Jan. 10, 2005).

9. Cf. WALTER ISAACSON, BENJAMIN FRANKLIN 295 (2003) (stating that Franklin “had juggled hope and despair that a breach [from England] could be avoided” for ten years prior to 1775).

10. For instance, the preamble of the New Hampshire Constitution of 1776 states:

The sudden and abrupt departure of his Excellency John Wentworth, Esq., our late Governor, and several of the Council, leaving us destitute of legislation
Therefore, for the preservation of peace and good order . . . we conceive ourselves reduced to the necessity of establishing A FORM OF GOVERNMENT to continue during the present unhappy and unnatural contest with Great Britain And that we shall rejoice if such a reconciliation between us and our parent State can be effectuated

2 BEN PERLEY POORE, THE FEDERAL AND STATE CONSTITUTIONS, COLONIAL CHARTERS, AND OTHER ORGANIC LAWS OF THE UNITED STATES 1279 (Washington, Government Printing Office 2d ed. 1878).

11. See generally CLARKE, *supra* note 8 (discussing various aspects of parliamentary procedure and privilege in the British New World colonial assemblies prior to 1776).

parliamentary practice at the close of the eighteenth century. But Jefferson's *Manual* nowhere explains the import of Clause 3. So even if Jefferson understood the purpose of this clause, it is possible that many of his peers did not.

And yet there were other men, younger than Jefferson. There was young Madison and young Marshall.¹² Young? Today, we only think of

12. Madison was born in 1751 and did not serve his *colony's* legislature. He did, however, serve in the First General Assembly of Virginia, which met in 1776, and he was subsequently elected to the Executive Council in 1778. See Madison, James (1751–1836), Biographical Directory of the United States Congress, at <http://bioguide.congress.gov/scripts/biodisplay.pl?index=M000043> (last visited Jan. 10, 2005). Although he saw additional “legislative” service in the Articles Congress, this was not a law-making body in any traditional sense.

Marshall was born in 1755 and, like Madison, did not serve in the *colonial* legislature. He did, however, serve in the post-independence legislature in 1780 and between 1782 and 1788. Again, like Madison, Marshall served on the legislature's Executive Council from 1782–1795. Marshall, John (1755–1835), Biographical Directory of the United States Congress, at <http://bioguide.congress.gov/scripts/biodisplay.pl?index=M000157> (last visited Jan. 10, 2005).

During the colonial period, most governors were appointed by the Crown. See Letter from Professor Forrest McDonald to Seth Barrett Tillman (Jan. 13, 2004, but mistakenly dated Dec. 13, 2004) (on file with the Texas Law Review) (explaining that only nine of thirteen colonial governors were Crown appointments, that Rhode Island and Connecticut governors were appointed by the freeholders, and that Pennsylvania and Delaware governors were appointed by the proprietors, the Penn family); accord DAVID LINDSAY KEIR, *THE CONSTITUTIONAL HISTORY OF MODERN BRITAIN SINCE 1485*, at 354–55 (1964) (indicating that the governors of the “proprietary provinces” were appointed by the proprietors “subject to the Crown's approval”). The popularly elected assemblies (or, more often, the popularly elected lower houses) were in open competition with royal governors for political power. With the departure of the colonial governors, at least during the Revolution, this competition decreased markedly. This friction decreased to a large extent under the early revolutionary constitutions because either: (1) the Governors were appointed by their legislatures and so were dependent on them; or (2) both the assemblies and the Governors were elected by the same public. See HARLOW, *supra* note 5, at 79. I am not suggesting that Madison and Marshall were unaware of this conflict, but rather that their age precluded their having had directly experienced the conflict from the point of view of sitting legislators and legislative officers institutionally responsible for the successful passage of a legislative program.

Clearly a forceful argument could be made on behalf of Connecticut and Rhode Island exceptionalism. Both states were exceptional in two distinct ways: (1) during the colonial period, they functioned absent royal and proprietary governors; and (2) after the Revolution, their colonial charters survived at a time when other states drafted new state constitutions having popular credentials. However, the survival of these two colonial charters was in a significant sense only a formal matter. The substance of the charters did not survive the Revolution: judicial appeals could no longer be taken from Connecticut and Rhode Island courts to the Privy Council in Britain. The transatlantic aspect, the British aspect, of the charters died with the opening salvos of the Revolution. See, e.g., MARY SARAH BILDER, *THE TRANSATLANTIC CONSTITUTION: COLONIAL LEGAL CULTURE AND THE EMPIRE* 5 (2004) (demonstrating that in the colonial period Rhode Island litigants could appeal judicial decisions to the Privy Council). Those who served in these colonies' legislatures would have tailored their local statutes to the details of the transatlantic legal constitution. Those who were too young to personally serve in the colonial legislature or in transatlantic litigation—those whose politics began with independence—might not have fully appreciated this process in all its details and complexity, particularly as “the transatlantic constitution [following 1776] faded slowly but incompletely from view.” *Id.* at 196. Although,

them as old men—after they had captured the great political prizes¹³ made available by the Revolution and after they had shaped their offices with the policies for which they are justly remembered. But in 1787, Madison and Marshall were comparatively young men—a full generation younger than Washington, Sherman, and Henry. And unlike the latter three and Jefferson too, Madison and Marshall never served in their colony’s assembly before the Revolution. They could not say “je me souviens.” For them, the struggles over parliamentary supremacy, procedure, and privilege were not objects of personal memory, however distant, but were shrouded in the mists of history.

Unfortunately for us, at least in this regard, it was Madison¹⁴ and Marshall who were to become our official interpreters of the Constitution of 1787 and not the older generation who understood the Orders, Resolutions, and Votes Clause (the “ORV Clause”), its purposes, and its meaning. And that is the source of our two hundred year tale of woe.

Although the purpose of this Article is to recapture the original public meaning of the ORV Clause, before turning to that effort we must first reexamine a long moribund and misunderstood eighteenth century Supreme Court case that has all but obscured our intellectual vision. Part II reexamines that case in detail in order to remove the intellectual bramble from our path. Having cleared the path, Part III lays out the “new” view, or what I would argue was, in fact, the original public meaning as understood by the well-informed public. Part IV summarizes the main findings discussed in this Article, and Part V offers suggestions as to what a future authentically American constitutional jurisprudence might look like following the close of the Madisonian epoch.

legislative procedure and legal institutions varied among the colonies, there were also significant common themes.

13. See JETHRO K. LIEBERMAN, THE ENDURING CONSTITUTION: A BICENTENNIAL PERSPECTIVE 44–45 (1987) (finding that the fifty-five Convention delegates went on to hold fifty-three federal offices).

14. It is almost established wisdom among academic lawyers that Madison was the primary early interpreter of the Constitution because he was one of the coauthors of *The Federalist Papers* and because his record of the debates of the Philadelphia Convention is considered the most detailed and accurate. See, e.g., Larry D. Kramer, *Madison’s Audience*, 112 HARV. L. REV. 611, 611 (1999) (“James Madison’s *The Federalist No. 10* is the ur-text of American constitutional theory . . .”); Marci Hamilton, *The Ten Commandments and American Law: Why Some Christians’ Claims to Legal Hegemony Are Not Consistent with the Historical Record*, FINDLAW, at <http://writ.news.findlaw.com/hamilton/20030911.html> (Sept. 11, 2003) (referring to “James Madison, leader of the Constitutional Convention, and drafter of the First Amendment . . .”).

The author of this Article has indicated in another place that a lack of critical distance from *The Federalist Papers* is a defect of our modern American jurisprudence. The author hopes to make clear in the remainder of this Article that our modern jurisprudence’s lack of critical distance from Madison’s record of the Philadelphia Convention expresses a similar professional myopia. See generally Seth Barrett Tillman, *The Federalist Papers as Reliable Historical Source Material for Constitutional Interpretation*, 105 W. VA. L. REV. 601 (2003).

II. The Mystery of *Hollingsworth v. Virginia*

The generalist reader, for whom this Article is intended, is perhaps not familiar with *Hollingsworth v. Virginia*.¹⁵ *Hollingsworth* is usually consigned to the tail ends of long string citations. Courts and legal case books will give it an occasional squib. For the purposes of this Article, however, it is our window into a lost and mysterious constitutional past.

A. *The Facts and Procedural Posture of Hollingsworth*

In *Chisholm v. Georgia*, the Supreme Court held that the Court's jurisdiction extended to suits brought against nonconsenting States by citizens of other States.¹⁶ And although we can be sure that *Chisholm* liked the result, the States and Congress apparently did not. Both the Congress and then the States took steps to ensure that the Supreme Court's decision would be nullified. The Third Congress proposed the Eleventh Amendment¹⁷ to the Constitution on March 11, 1794, during the Washington administration.¹⁸ The proposal was transmitted to the States by the same method that had already been used for the adoption of the Bill of Rights. And on January 8, 1798, President John Adams, Washington's successor in office, declared by proclamation that the amendment had been ratified by the requisite number of States.¹⁹ Thus, the Eleventh Amendment was born.

There were, of course, those who would have preferred that the amendment had never been born.

At the time President Adams's proclamation was announced, sundry cases brought against nonconsenting States by citizens of other States sat on

15. 3 U.S. (3 Dall.) 378 (1798). Many constitutional scholars have thought that *Hollingsworth* offers poor pickings for would-be constitutional scholarship. See 1 CHARLES WARREN, THE SUPREME COURT IN UNITED STATES HISTORY 1789–1835, at 153 (1935) (“[I]n 1797, eight cases were decided, none of which were of great importance. The Terms in 1798 were equally barren.”). But see *Calder v. Bull*, 3 U.S. (3 Dall.) 386, 391 (1798).

16. 2 U.S. (2 Dall.) 419 (1793). Interestingly, Chief Justice Jay and each associate Justice—Cushing, Wilson, Blair, and Iredell—presented separate opinions. See 1 THE DOCUMENTARY HISTORY OF THE SUPREME COURT OF THE UNITED STATES, 1789–1800: APPOINTMENTS AND PROCEEDINGS 214–15 (1985) [hereinafter DHSC] (noting the entry of a final order in *Chisholm*).

17. See U.S. CONST. amend. XI (“The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.”).

18. See CONSTITUTION, JEFFERSON'S MANUAL, AND RULES OF THE HOUSE OF REPRESENTATIVES OF THE UNITED STATES ONE HUNDRED SEVENTH CONGRESS, H.R. DOC. NO. 106-320, at 90 n.2 (Charles W. Johnson ed., 2001) [hereinafter JEFFERSON'S MANUAL]; see *infra* note 32 (recounting the Eleventh Amendment's chronology of congressional passage and authentication).

19. See JEFFERSON'S MANUAL, *supra* note 18, at 90 n.2; 5 DHSC, *supra* note 16, at 637–38 (giving the text of the President's message to Congress of Jan. 8, 1798: “This Amendment, having been adopted by three fourths of the Several States, may now be declared to be a part of the Constitution . . .”).

the dockets of the federal courts, including the Supreme Court.²⁰ *Hollingsworth* was one of those cases. The substance of the dispute related to land largely in the Monongahela Valley, then located in Virginia and now in West Virginia. In 1763, traders suffered deprivations at the hands of the Shawnee and other tribes, dependencies of the Six Nations.²¹ Afterwards, the traders organized a company, later known as the Indiana Company, to seek compensation.²² In 1768, at the Council of Fort Stanwix, the company obtained a deed for 1,800,000 acres from the chiefs of the Six Nations.²³ Although Virginia's representative to the Council signed the Treaty of Fort Stanwix, the Virginia legislature subsequently declared the Indiana Company's deed "utterly void."²⁴ The "legislature also announced plans to dispose of the disputed land by opening a land office . . ."²⁵ In 1792, the stockholders brought suit against Virginia in the Supreme Court of the United States.²⁶

On behalf of Virginia, the Attorney General of the United States, Charles Lee,²⁷ moved for an oral argument to determine whether the ratification of the Eleventh Amendment removed jurisdiction to adjudicate the merits of the underlying dispute (and, by implication, any suit brought against nonconsenting States by citizens of other States) from the Supreme Court.²⁸

20. See, e.g., *Grayson v. Virginia*, 3 U.S. (3 Dall.) 320 (1796), *dismissed sub nom. Hollingsworth v. Virginia*, 3 U.S. (3 Dall.) 378 (1798). The *Hollingsworth* judicial proceedings began in 1792 and were originally instituted by "William Grayson & others." 5 DHSC, *supra* note 16, at 282, 316–17. But see John J. Gibbons, *The Eleventh Amendment and State Sovereign Immunity: A Reinterpretation*, 83 COLUM. L. REV. 1889, 1904 n.74 (1983) (stating without documentary support that the *Hollingsworth* claim was initially brought in 1791). "In 1793 the original bill in equity was amended, and new process was awarded in the name of Levi Hollingsworth." 1 DHSC, *supra* note 16, at 289 n.267. William Grayson, the original lead petitioner, was the heir of the late Senator William Grayson, a Virginian who served in the first Senate. 5 DHSC, *supra* note 16, at 282. The shares had been sold to the Senator in 1779. *Id.* at 288 n.51.

21. See 1 JULIUS GOEBEL, JR., *HISTORY OF THE SUPREME COURT OF THE UNITED STATES: ANTECEDENTS AND BEGINNINGS TO 1801*, at 756 (1974) (stating that the Shawnee and other tribes seized a considerable quantity of the traders' property).

22. See *id.* at 757 (indicating that the traders began organizing in 1768).

23. 5 DHSC, *supra* note 16, at 274.

24. *Id.* at 277.

25. *Id.* at 278.

26. *Id.* at 277.

27. See *id.* at 344–45 & n.2. During the 1797 and 1798 *Hollingsworth* proceedings, Charles Lee's co-counsel was John Marshall. See *id.* at 288–89.

28. See *Hollingsworth v. Virginia*, 3 U.S. (3 Dall.) 378, 378 (1798).

Attorneys for Hollingsworth, Tilghman and Rawle,²⁹ argued that the Eleventh Amendment did not bar the Supreme Court from hearing *Hollingsworth* because, among other things, the political branches of the federal government failed to comply with the constitutionally mandated procedures for amending the Constitution laid out in Article V. Specifically, they argued that “[t]he amendment has not been proposed in the form prescribed by the Constitution, and, therefore, it is void. Upon an inspection of the original roll, it appears that the amendment was never submitted to the President for his approbation.”³⁰

Tilghman and Rawle’s argument was both elegant and simple. Article V lays out two distinct methods for proposing amendments to the Constitution. First, if two-thirds of the States apply to Congress for a convention, Congress shall call such a convention, and the convention is empowered to propose amendments to the Constitution. Second, Congress itself may propose amendments to the Constitution subject to a two-thirds supermajority requirement in each house. Only the second method was involved in proposing the Eleventh Amendment. (Indeed, the process of proposing amendments by an Article V national convention has never been used.) Once an amendment is proposed, it is sent to the States for ratification. Congress may choose one of two distinct routes to achieve (or block³¹) ratification. Congress may elect to have the ratification decision determined by each state’s legislature, or Congress may elect to have the ratification decision determined by specially chosen state conventions. In either event, ratification is effective only if three-quarters of the States (through the method chosen by Congress) adopt the amendment.

29. Like Attorney General Lee, William Rawle, representing the Petitioners, was also a political officeholder. Rawle was the U.S. Attorney for Pennsylvania. See The Rawle Collection, at <http://www.temple.edu/lawschool/library/rawle.htm> (last visited Jan. 10, 2005). Rawle, although not an actual Conventioneer, should perhaps also be remembered as the ex officio librarian of the Philadelphia Convention. 1 MAX FARRAND, THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 548 & nn.1–2 (1966) [hereinafter FARRAND] (noting that Rawle’s unofficial role in the Convention is evident through a July 7, 1787 entry in the Convention’s journal).

And William Tilghman? In 1801, Tilghman became one of Adams’s Midnight Judges, and like other Midnight Judges, Tilghman lost his judgeship when, absent any allegation of bad behavior, the Congress and Jefferson repealed the act that created his post. See Horace Stern, *William Tilghman*, in 2 GREAT AMERICAN LAWYERS 147, 152–53 (William D. Lewis ed., 1971). In 1806, he became Chief Justice of the Pennsylvania Supreme Court and held that high office until he died in 1827. *Id.* at 155, 172. Whether Tilghman and Rawle acted ethically during the *Hollingsworth* litigation is another matter. See *infra* section II(C)(2); cf. *infra* note 68 (discussing a potential conflict faced by Justice Wilson in *Hollingsworth*); *infra* note 82 (illuminating a possible conflict faced by Edmund Randolph).

30. *Hollingsworth*, 3 U.S. (3 Dall.) at 379.

31. Were a national convention to authorize an amendment not to the liking of Congress or trespassing on its extant powers or privileges, surely Congress has the undoubted power (and right) to select the mode of *state* ratification that it believes less likely to succeed.

In the case of the Eleventh Amendment, Congress proposed the amendment. Congress adopted the amendment in the form of a resolution.³² Congressional resolutions are discussed in the ORV Clause:

Every Order, Resolution, or Vote to which the Concurrence of the Senate and House of Representatives may be necessary (except on a question of Adjournment) shall be presented to the President of the United States; and before the Same shall take Effect, shall be approved by him, or being disapproved by him, shall be repassed by two thirds of the Senate and House of Representatives, according to the Rules and Limitations prescribed in the Case of a Bill.³³

To our modern sensibilities, the language of the ORV Clause is somewhat elliptical. It appears needlessly complex, if not arcane. The prevailing view—at least for the past century and a half—is that the clause means at least this: Any bicameral order, resolution, or vote having legislative effect beyond the narrow confines of Congress (and its officers and employees), except for an adjournment resolution, must be presented to the President, just as a bill must be presented to the President. Once presented, the President will act on the bicameral order, resolution, or vote in the same way as he would act on a bill. And that means, as every well-educated school child knows, that he may veto it or approve it. Here, Tilghman and Rawle argued that the enrolled resolution bore no indication of presentment or presidential approval. And as compliance with constitutional provisions is mandatory, the amendment was defective. This would allow their clients' suit against Virginia to continue because *Chisholm* would still

32. The resolution was introduced in the Senate on January 2, 1794. On January 14, 1794, the Senate passed the resolution. The House adopted the Senate's proposed amendment on March 4, 1794. See Journal of the House 79 (Mar. 4, 1794), available at <http://memory.loc.gov/ammem/amlaw/lawhome.html>. The House journal states:

The resolution of the Senate, containing the said proposed article of amendment, was read the third time, as followeth: *Resolved, by the Senate and House of Representatives of the United States of America, in Congress assembled, two thirds of both Houses concurring*, That the following article be proposed to the Legislatures of the several States, as an amendment to the Constitution of the United States, which, when ratified by three fourths of the said Legislatures, shall be valid as part of the said Constitution, viz: "The judicial power of the United States shall not be construed to extend to any suit in law or equity commenced or prosecuted against one of the United States by citizens of another State, or by citizens or subjects of any foreign State."

Id.; see also 5 DHSC, *supra* note 16, at 617–18, 620–23 (documenting the passage of this resolution in the House and Senate respectively). Thus, bicameral passage was complete by March 4, 1794. *Id.* at 620. However, the Speaker delayed authenticating the enrolled resolution until March 10, 1794. Afterwards, the Vice President authenticated the enrolled resolution on March 11, 1794. See Journal of the House 87 (Mar. 10, 1794), available at <http://memory.loc.gov/ammem/amlaw/lawhome.html>; Journal of the Senate 44 (Mar. 11, 1794), available at <http://memory.loc.gov/ammem/amlaw/lawhome.html>.

33. U.S. CONST. art. I, § 7, cl. 3.

be good case law, rather than case law superseded by a subsequent amendment to the Constitution.

The Supreme Court announced its opinion the day after the oral argument. If an extensive written opinion was issued, Alexander J. Dallas, the Court's reporter, failed to preserve it.³⁴ Instead, what we have is, at least by modern standards, an unusually terse opinion.

The Court, on the day succeeding the [oral] argument, delivered an unanimous opinion, that the [Eleventh] amendment being constitutionally adopted, there could not be exercised any jurisdiction, in any case, past or future, in which a state was sued by the citizens of another state, or by citizens, or subjects of any foreign state.³⁵

Dallas recorded one other observation of the Justices. On the day of the oral argument, Justice Chase stated: "There can, surely, be no necessity to answer [Petitioners'] argument. The negative of the president applies only to the ordinary cases of legislation: he has nothing to do with the proposition or adoption of amendments to the constitution."³⁶ Like the Court's "opinion," Chase's statement is more of a conclusion than a reasoned argument.

The *Hollingsworth* decision, such as it was, provided posterity with no express rationale for its holding. One would think that the absence of a rationale would lead academics and later courts to be somewhat circumspect with regard to explaining the Court's 1798 holding, particularly as the facts, circumstances, parties, and issues have become obscured by the passage of centuries. This has not been the case. Instead, five distinct schools have grown up around *Hollingsworth*. Some of these rival interpretations are contradictory, but few seem to have noticed, much less made an attempt to reconcile (in whole or in part), these rival positions. Furthermore, it must also be kept in mind that each school is attempting to answer two distinct questions. First, on what basis (if any) did the Court justify its ruling? Second, was the Court's ruling substantially correct, that is, was the Eleventh Amendment duly enacted?³⁷

34. See DAVID P. CURRIE, *THE CONSTITUTION IN THE SUPREME COURT: THE FIRST HUNDRED YEARS 1789–1888*, at 23 (1985) (explaining that in *Hollingsworth* "either the Court did not offer an explanation of its conclusions or Dallas did not report it"). *But see infra* section II(C)(4) (discussing the possibility that the *Hollingsworth* Court did, in fact, explain its rationale in the reported decision).

35. *Hollingsworth v. Virginia*, 3 U.S. (3 Dall.) 378, 382 (1798). *But see* *State ex rel. Livingstone v. Sec'y of State*, 137 Mont. 557, 567–68 (1960) (adjudicating the state analogue to the ORV Clause and holding in a 4–1 decision that a proposed state constitutional amendment in the form of a resolution must be presented to the governor); *Geringer v. Bebout*, 10 P.3d 514, 521–23 (Wyo. 2000) (adjudicating the state analogue to the ORV Clause and holding in a 3–2 decision that the proposed state constitutional amendment in the form of a resolution must be presented to the Governor, expressly rejecting the much criticized *Hollingsworth* decision).

36. *Hollingsworth*, 3 U.S. (3 Dall.) at 381, n.

37. The prevailing view is that, at least as a matter of principle, *Hollingsworth* was wrongly decided. Commentators have used unusually strong language to indicate their disagreement with

B. *The Post-1798 Interpretations of Hollingsworth*

Three schools of thought have grown up, not around the Court's decision *per se*, but around the Petitioners' argument that:

[u]pon an inspection of the original roll, it appears, that the amendment was never submitted to the president for his approbation. . . . The concurrence of the president is required³⁸

Each of these three schools of thought has emphasized a different part of the argument above. What these schools have in common is that they each agree that because the Court determined that the amendment had been constitutionally adopted, Petitioners' argument must have failed to persuade the Court. This is true as far as it goes. But what precisely was Petitioners' argument? Exactly what failed? And why did Tilghman and Rawle use the word "appears"—if they had viewed the original roll, as they indicated to the Court, why did they not take a more definite position?

the 1798 decision. See Charles L. Black, Jr., *Correspondence: On Article I, Section 7, Clause 3—and the Amendment of the Constitution*, 87 YALE L.J. 896, 898 (1978) [hereinafter Black, *Correspondence*] (calling *Hollingsworth* "inadequately reasoned" and opining that it was "an unreasoned decision, uttered in the teeth of plain constitutional language, and with no really adequate reason *even projectable*, [it] ought not to be followed beyond its own facts") (emphasis added); *id.* at 898 n.11 (arguing that "a different decision would have invalidated the whole Bill of Rights"). Professor Black uses similar strong language elsewhere, observing:

[T]he only even semirational ground for [*Hollingsworth*] is that the two-thirds vote necessary to pass an amendment is enough to overcome a veto, so that submission to the President is otiose. This is not a good ground, because it denigrates the process of reason by disregarding the possibility that some members of Congress might be convinced by the reasons in the President's veto message; why else should he be required to send it?

Charles L. Black, Jr., *Amending the Constitution: A Letter to a Congressman*, 82 YALE L.J. 189, 209 (1972) [hereinafter Black, *Amending the Constitution*]. Stephen Carter writes:

Hollingsworth is not an easy decision to justify, flying as it does in the face of the presentment clause's requirement that "Every Order, Resolution, or Vote to which the Concurrence of the Senate and House of Representatives may be necessary . . . shall be presented to the President" for approval or disapproval. But the rule of *Hollingsworth*—that the President plays no formal role in the proposition of constitutional amendments—has become firmly entrenched in our jurisprudence and was even restated by the majority in *Chadha*.

Stephen L. Carter, *The Constitutionality of the War Powers Resolution*, 70 VA. L. REV. 101, 130 (1984); see also Comment, *The Equal Rights Amendment and Article V: A Framework for Analysis of the Extension and Rescission Issues*, 127 U. PA. L. REV. 494, 530 n.184 (1978) (asserting that *Hollingsworth* "epitomizes . . . a conclusory opinion designed to affirm the congressional action" because "[i]t is a five-line opinion rendered the day after argument articulating no justification for the exclusion of the President from the amending process, thereby contracting the clear letter of art. I, § 7, of the Constitution"); Note, *Proposed Legislation on the Convention Method of Amending the United States Constitution*, 85 HARV. L. REV. 1612, 1623 & n.58 (1972) [hereinafter Note, *Proposed Legislation*] (quoting erroneously the statement of Justice Chase at oral argument as the opinion of the Court and suggesting that in *Hollingsworth* "the Court stated in an unreasoned opinion that the President 'has nothing to do with the proposition or adoption of amendments to the constitution'").

38. *Hollingsworth*, 3 U.S. (3 Dall.) at 379.

1. *The Presentment School*.—Adherents of this school take the position that Petitioners’ argument was that the amendment had “never [been] submitted” to the President.³⁹ And by implication, the fact that the enrolled resolution lacked the President’s signature arose directly from Congress having failed to deliver the amendment to the President. In short, no delivery implies no signature. According to this school, because the Court held that

39. *Id.*; see Thomas E. Baker, *Towards A “More Perfect Union”: Some Thoughts on Amending the Constitution*, 10 WIDENER J. PUB. L. 1, 6 n.24, 7 n.29 (2000) (describing *Hollingsworth* as “holding that the Presentment Clause does not apply to amendments”); Thomas E. Baker, *Exercising the Amendment Power To Disapprove of Supreme Court Decisions: A Proposal for a “Republican Veto”*, 22 HASTINGS CONST. L.Q. 325, 339 n.44 (1995) (“[*Hollingsworth* held] that the Presentment Clause does not apply to amendments.”); Helen Hershkoff, *State Courts and the “Passive Virtues”: Rethinking the Judicial Function*, 114 HARV. L. REV. 1833, 1862 n.153 (2001) (noting the Supreme Court’s rejection of the “procedural challenge to the enactment of the Eleventh Amendment that alleged . . . nonpresentment to the President” in *Hollingsworth*); Vasani Kesavan, *Is the Electoral Count Act Unconstitutional?*, 80 N.C. L. REV. 1653, 1789 & n.536 (2002) (citing *Hollingsworth* for the proposition that “[p]resentment is not required when Congress proposes amendments to the Constitution under Article V”); John F. Manning, *The Eleventh Amendment and the Reading of Precise Constitutional Texts*, 113 YALE L.J. 1663, 1716 n.196 (2004) (asserting incorrectly that the presentment argument was made by Attorney General Lee, when, in fact, it had been made by Rawle and Tilghman); Michael Stokes Paulsen, *I’m Even Smarter than Bruce Ackerman: Why the President Can Veto His Own Impeachment*, 16 CONST. COMMENT. 1, 3 n.5 (1999) (interpreting *Hollingsworth* as establishing that “constitutional amendment proposals . . . do not need to be presented to the President for his signature or veto”) (emphasis added); Robert J. Pushaw, Jr., *Judicial Review and the Political Question Doctrine*, 80 N.C. L. REV. 1165, 1190 (2002) [hereinafter Pushaw, *Judicial Review*] (contending that “in *Hollingsworth v. Virginia*, the Justices rejected the argument that the Eleventh Amendment’s adoption had violated Article I, Section 7 because of the failure to present it to the President for his approval”) (footnote omitted) (emphasis added); Robert J. Pushaw, Jr., *Justiciability and Separation of Powers: A Neo-Federalist Approach*, 81 CORNELL L. REV. 393, 449 (1996) [hereinafter Pushaw, *Justiciability*] (“[T]he Court rejected the claim that the adoption of the Eleventh Amendment violated the Constitution because it had not been submitted to the President for approval under Article I, Section 7.”) (emphasis added); William Howard Taft, *Can Ratification of an Amendment to the Constitution be Made to Depend on a Referendum?*, 29 YALE L.J. 821, 824 (1920) (expressing soon-to-be Chief Justice Taft’s view that “[i]n *Hollingsworth* . . . it was held that a proposal by two-thirds of both Houses was sufficient under . . . [Article V] without submitting it to the President for his approval or disapproval”) (emphasis added); William Michael Treanor, *Fame, the Founding, and the Power to Declare War*, 82 CORNELL L. REV. 695, 727–28 (1997) (offering that in “*Hollingsworth* . . . the one early Presentment Clause case, the Supreme Court rejected the claim that the Eleventh Amendment was invalid because it had not been signed by the President”) (emphasis added). For other similar treatments of *Hollingsworth*, see David Castro, *A Constitutional Convention: Scouting Article Five’s Undiscovered Country*, 134 U. PA. L. REV. 939, 966 n.75 (1986); Michael C. Hanlon, *The Need for a General Time Limit on Ratification of Proposed Constitutional Amendments*, 16 J.L. & POL. 663, 689 (2000); Mason Kalfus, *Why Time Limits on the Ratification of Constitutional Amendments Violate Article V*, 66 U. CHI. L. REV. 437, 444 n.51 (1999); Lewis L. Laska, *The 1997 Limited Constitutional Convention*, 61 TENN. L. REV. 485, 490 n.21 (1994); Patrick D. Robbins, *The War Powers Resolution After Fifteen Years: A Reassessment*, 38 AM. U. L. REV. 141, 178 n.250 (1988).

Chief Justice Rehnquist is probably a member of this school. See WILLIAM H. REHNQUIST, *GRAND INQUESTS: THE HISTORIC IMPEACHMENTS OF JUSTICE SAMUEL CHASE AND PRESIDENT ANDREW JOHNSON* 207 (1992) (stating without citation to authority that “the president has no constitutional role in the ratification of an amendment”). No doubt the Chief Justice considered authority unnecessary as *Hollingsworth* is now firmly entrenched.

the Eleventh Amendment was constitutionally adopted, *Hollingsworth's* holding means either that presentment is not a necessary component of the Article V process generally, or, at least, that presentment is not necessary under the particular facts that led to the adoption of the Eleventh Amendment. However, the proponents of this school have put forward no principled distinctions between the Eleventh Amendment and any other amendment, before or since.⁴⁰

There are those in this school who criticize the holding of *Hollingsworth*. The chief weakness of this school's critique of the decision is that it fails to make clear what Congress should or could have delivered, submitted, or presented to the President. Must Congress deliver the *original* enrolled resolution, assuming such a document ever existed? (What if there is no original enrolled resolution? What if each house of Congress merely relies on its individual journal entries?) Is the original the copy Congress kept for its own records, if it indeed kept such a copy, or alternatively, are the originals the *multiple copies* specifically prepared by Congress or the Executive Branch, as the case may be, and transmitted to the States? After all, it is those latter "copies" that the States act upon by ratification, not the copies kept in the federal government's archives. In that sense, the "copies" sent to the States are the originals.⁴¹ Has Congress presented an amendment if it sends the President merely an authenticated copy of the original enrolled resolution proposing the amendment? Will an unauthenticated copy sent by message by Congress's designated agents suffice? These questions go wholly unanswered by the Presentment School because they do not explain what, if anything, George Washington actually received in 1794 or what, if anything, was lacking in that delivery.

As will be explained below, adherents of the Presentment School cannot take the position that Congress made no delivery to the President. Such a position is not historically tenable. On the other hand, if their point is that *Hollingsworth* remains a presentment case in spite of congressional submission to the President, then they have failed to articulate the defect in Congress's delivery. Simply put, the adherents of this school have failed to investigate the record and they have failed to analyze the facts. They have no idea what Congress, the President, and the States did in the 1790s with regard to enacting the Eleventh Amendment. They have taken at face value Petitioners' position—made at oral argument—that presentment in some

40. See Black, *Correspondence*, *supra* note 37, at 898 n.11 (remarking that "a different decision would have invalidated the whole Bill of Rights"). This is a defense, of sorts, of the Court's holding, but it is hardly a principled defense in the normal sense of that term.

41. *Cf.*, e.g., Akhil Reed Amar, *Our Forgotten Constitution*, 97 YALE L.J. 281, 283–84 (1987) (noting differences between the Convention's signed, engrossed parchment of the Constitution of 1787 and the printed copies sent to the States for ratification).

substantial sense failed. Thus, it is no surprise that Congress's post-enactment procedures appear incomprehensible to this school's adherents. Moreover, having not analyzed the procedures Congress actually attempted in order to achieve passage of the Eleventh Amendment, they are in no position to explain what (if any) particular aspect of presentment failed (or succeeded). And without explaining how presentment failed, they are in no position to criticize the propriety of Congress's procedures, the President's subsequent inaction, and the Supreme Court's holding in *Hollingsworth*.

2. *The Signature School*.—Adherents of this school of thought take the position that Congress presented or delivered the proposed amendment to the President, at least in some form that allowed him to indicate his approval or rejection or both. But beyond that, the disciples of this school do not actually seem to know (or care) in what form presentment was achieved. Instead, they take the position that the focus of Petitioners' argument was not a failure of *congressional* presentment, but a failure of *presidential* action following presentment. In other words, this school takes the view that Petitioners argued that the active "concurrence of the [P]resident is required"⁴² in passing constitutional amendments generally.

For the adherents of this school, the Supreme Court's *Hollingsworth* opinion (such as it was) never reached the question of whether or not Congress must present a proposed amendment to the President, but only decided that the President's approval or signature on the face of the enrolled resolution is not a precondition to valid ratification.⁴³ The problem with the adherents of this school is the utter lack of any legal analysis on their part.

42. *Hollingsworth*, 3 U.S. (3 Dall.) at 379.

43. See RICHARD B. BERNSTEIN & JEROME AGEL, *AMENDING AMERICA* 57 (1993) (stating that the *Hollingsworth* plaintiffs argued that the amendment's "lack of a Presidential signature made it invalid under" the ORV Clause); Stewart Dalzell & Eric J. Beste, *Is the Twenty-seventh Amendment 200 Years Too Late?*, 62 GEO. WASH. L. REV. 501, 532 (1994) ("[T]he Court held [in *Hollingsworth*] that the signature of the President on a proposed amendment was not necessary for it to become 'constitutionally adopted' . . ."); John Harrison, *The Lawfulness of the Reconstruction Amendments*, 68 U. CHI. L. REV. 375, 389 n.79 (2001) ("In *Hollingsworth* . . . part of the objection was that the President had not *signed* the amendment . . .") (emphasis added); Paulsen, *supra* note 39, at 3 n.5 (interpreting *Hollingsworth* as establishing that "constitutional amendment proposals . . . do not need to be presented to the President for his *signature* or veto") (emphasis added); Treanor, *supra* note 39, at 727–28 ("[I]n *Hollingsworth* . . . the one early Presentment Clause case, the Supreme Court rejected the claim that the Eleventh Amendment was invalid because it had not been *signed* by the President.") (emphasis added); Laurence Tribe, *A Constitution We are Amending: In Defense of a Restrained Judicial Role*, 97 HARV. L. REV. 433, 434 n.4 (1983) (citing *Hollingsworth* as authority for "whether a congressional resolution proposing an amendment requires the President's signature"). For other similar treatments of *Hollingsworth*, see Brendon Troy Ishikawa, *Everything You Always Wanted to Know About How Amendments Are Made, but Were Afraid to Ask*, 24 HASTINGS CONST. L.Q. 545, 591 n.184 (1997) [hereinafter Ishikawa, *Everything*]; Kalfus, *supra* note 39, at 445 n.51; Jonathan L. Walcoff, Note, *The Unconstitutionality*

Petitioners made the argument that the strictures of Article I, Section 7, Clauses 2 and 3, which are thought generally to apply (at least) to the process of statutory lawmaking, also apply to the Article V amendment process. The Signature School goes further. Its proponents suggest that the absence of the President's signature from the enrolled congressional resolution proposing the amendment posed a conflict (real or apparent) between the two provisions. However, the normal process of statutory lawmaking does *not* require presidential action, much less a signature, except under a single unique and expressly stated condition. A President's signature is only required if Congress is adjourned ten days following presentment.⁴⁴ Therefore, even assuming, as Petitioners argued, that Article I, Section 7, Clauses 2 and 3 generally apply to the amendment process, the Signature School never explains why, on the facts of *Hollingsworth*, a signature might be thought necessary. Perhaps some adherents of this school believe (or believed) that the enrolled resolution was delivered to the President less than ten days prior to Congress's (end of session or final) adjournment. As explained, impending congressional adjournment is the *only* situation in which Article I, Section 7 expressly requires the President's signature for passage. But if this is the textual source of their position, they have kept this legal "fact" well hidden from the public and never once written this explanation into either a court opinion or a journal article.

Yet if imminent congressional adjournment is not the source of the implicit demand for a presidential signature, then what are we to make of Professor Black's statement:

The President's signature *and* the review by a Court in a proper judicial case are *both* normal safeguards as to legislation in general.

How could it be thought that we need any less as to the more important matter of constitutional amendment?⁴⁵

Undoubtedly, presentment *is* a fundamental safeguard in the normal statutory lawmaking process controlled by Article I, Section 7, Clause 2. But a signature is only required in exceptional circumstances. That Professor

of Voter Initiative Applications for Federal Constitutional Conventions, 85 COLUM. L. REV. 1525, 1536 n.81 (1985).

44. A President's signature is not required to enact any other piece of legislation or in any other circumstance. U.S. CONST. art. I, § 7, cl. 2.

45. Black, *Correspondence*, *supra* note 37, at 900. Ironically, before publication in the law review, Black's correspondence here was originally advice he gave to then sitting representatives with regard to the amendment process. *Id.* at 896–97. *But see* *Hawke v. Smith*, 253 U.S. 221, 229 (1920) (observing that in *Hollingsworth* the Court held "that the submission of a constitutional amendment did not require the action of the President"); 1 THOMAS M. COOLEY & WALTER CARRINGTON, A TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWER OF THE STATES OF THE AMERICAN UNION 70 (8th ed. 1927) (declaring, on the basis of *Hollingsworth* and *Hawke*, that "[t]he submission of an amendment does not require the action of the President").

Black fell into this error is a textbook example of the inflation of constitutional law as an academic discipline and illustrates how deeply held commitments about procedure defeat common sense. This lack of legal analysis on the part of Signature School proponents has not kept many of its adherents from criticizing the “unreasoned” *Hollingsworth* decision with an equally impassioned and unreasoned critique.

To put it another way, the Signature School is on the horns of a dilemma. If an adherent takes the position that *Hollingsworth* was wrongly decided because a signature is *required*, then he must be doing so on the basis of the timing of congressional presentment. As will be explained below, this position is not tenable. On the other hand, if the adherent takes the position that *Hollingsworth* was rightly decided, then the Court’s decision comports with (at least) two equally valid explanations: presentment was more than ten days prior to adjournment and so no signature could conceivably be necessary, or, alternatively, the Article V amendment process is a freestanding grant of power unaffected by the ORV Clause. The Signature School adherents cannot distinguish these two positions—at least not on the basis of the holding of *Hollingsworth*, a reported decision absent any express rationale. What is the most remarkable feature about this school is that its adherents do not even seem cognizant of the interpretive difficulty.

3. *The Approbation School.*—In direct opposition to their counterparts in the Presentment School, the Approbation School thinkers take for granted that the proposed amendment was submitted to the President. They argue that the focus of Petitioners’ argument was that the amendment had not been “submitted to the President *for his approbation.*”⁴⁶ Rather, the purpose of

46. *Hollingsworth*, 3 U.S. (3 Dall.) at 379; see David P. Currie, *The Constitution in Congress: The Third Congress, 1793–1795*, 63 U. CHI. L. REV. 1, 36 n.194 (1996) [hereinafter Currie, *Third Congress*] (noting that with regard to the Eleventh Amendment, “[a]s in the case of the twelve amendments that had been proposed in 1789, neither Congress nor the President *suggested* that proposed amendments had to be presented for presidential approval or veto under Article I, § 7”) (emphasis added); David P. Currie, *The Constitution in Congress: Substantive Issues in the First Congress, 1789–1791*, 61 U. CHI. L. REV. 775, 856–57 (1994) [hereinafter Currie, *First Congress*] (explaining that the Bill of Rights was “sent to the states for ratification without presidential approval, despite . . . Article I, § 7” and noting that “[t]he *Annals* [of Congress] reveal no discussion of this important question”) (footnote omitted); *id.* at 857 n.474 (noting that Washington’s presidential transmittal letter to the States also failed to discuss presidential approval). Professor Currie does not consider the possibility that presidential transmittal of an amendment to the States constitutes approval. See also Hanlon, *supra* note 39, at 689 (asserting that in *Hollingsworth* “the Court rejected a claim that the Eleventh Amendment was invalid because it had never been presented to the president for *approval*”) (footnote omitted) (emphasis added); Pushaw, *Judicial Review*, *supra* note 39, at 1190 (“[I]n *Hollingsworth v. Virginia*, the Justices rejected the argument that the Eleventh Amendment’s adoption had violated Article I, Section 7 because of the failure to present it to the President *for his approval.* . . .”) (footnote omitted) (emphasis added); Pushaw, *Justiciability*, *supra* note 39, at 449 (positing that “the Court rejected the claim that the adoption of the Eleventh Amendment violated the Constitution because it had not been submitted to the President *for approval* under Article I, Section 7”) (emphasis added); Taft, *supra* note 39, at 824

Congress's submission was merely to use the President and the Executive Branch as Congress's chosen vehicle through which to communicate the proposed amendment to the States. Of course, this position implies that delivery (of some sort) was in fact made and that the President could have registered his approval or disapproval on the document (or documents) Congress sent him. Thus the adherents of this school understand *Hollingsworth* to mean that when Congress tells the President that submission is for a limited purpose, then he is in some substantial sense bound by that instruction, even when the instruction itself is not part of a bill subject to a veto. Indeed, the position of the Approbation School is even more extreme, for have they not taken the position that when Congress *fails* to instruct the President that he might sign or veto a proposed amendment that this too is some substantial authority for believing that the President has (or had) no authority to do so? For this school, the lesson of *Hollingsworth*—that the Eleventh Amendment was constitutionally adopted—is that if Congress fails to inform the President that his signature or his veto may be registered on the proposed amendment as delivered, then that, in part, establishes the correctness of the practice and rationalizes the Court's holding.

This position, of course, makes no sense at all, and thus it cannot function as a defense of the *Hollingsworth* holding. Had Congress limited its own authority or powers by choosing a mode for post-congressional enactment somewhat at odds with the text of the Constitution, it might be taken as some substantial indication of the majority's view of constitutional propriety. But when Congress advises or notifies (or fails to advise or notify) the Executive Branch that the President's role is purely ministerial, Congress is quite possibly impermissibly aggrandizing its own role at the expense of a coordinate branch of government. In this situation, Congress's view of a contested practice must count for naught.

Moreover, the lack of the President's signature is not strong support for the position that George Washington and *his* legal advisers shared Congress's purported view: that the President had no legal right to sign or veto a proposed amendment.⁴⁷ It is quite possible that the President simply

("[I]n *Hollingsworth* . . . it was held that a proposal by two-thirds of both Houses was sufficient under . . . article [V] without submitting it to the President for his *approval or disapproval* . . .") (emphasis added). For other similar treatments of *Hollingsworth*, see Castro, *supra* note 39, at 959 n.75, 964; Christopher M. Kennedy, Note, *Is There a Twenty-seventh Amendment? The Unconstitutionality of a "New" 203-Year-Old Amendment*, 26 J. MARSHALL L. REV. 977, 992 n.104 (1993).

47. Cf. Currie, *First Congress*, *supra* note 46, at 857 n.474 (noting that Washington's presidential transmittal letter to the States also failed to discuss presidential approval). See generally *supra* note 46. The only source known to the author possibly discussing Washington's view with regard to his purported authority *vel non* to sign or veto a proposed amendment delivered to him by the Congress is his First Inaugural Address. In his address, Washington noted:

saw no reason to pick a fight with Congress with regard to a power *he* would never again have occasion to use (or contest) by signing an amendment that he supported anyway. Indeed, the fact that the President circulated the amendment to the States is strong reason to believe he supported it. One could reasonably argue that the President's transmittal of the amendment to the States was functional approval because the President was under neither constitutional nor statutory obligation to circulate the proposed amendment. More generally, the *absence* of a presidential veto only indicates that the President believed that he had no constitutional authority to veto (or sign) an amendment, if we know, from extrinsic contemporaneous evidence (i.e., beyond the face of the resolution) that the President opposed the measure. With regard to the Eleventh Amendment, we have no such information.

There are two other schools of thought that discuss *Hollingsworth*. But these positions, unlike the three discussed above, do not rely on the Petitioners' argument to make their core point.

4. *The Article V is Justiciable School*.—This school of thought focuses on the Court's decision, as opposed to the Petitioners' rejected argument. The Court held that the amendment was "constitutionally adopted."⁴⁸ According to this school, for the Court to have reached that conclusion, the Court must have first determined that the component elements of Article V passage are justiciable and afterwards determined that the presentment and/or signature requirements as put forward by Petitioners were not mandatory.⁴⁹

Besides the ordinary objects submitted to your care, it will remain with your judgment to decide how far an exercise of the occasional power delegated by the fifth article of the Constitution is rendered expedient at the present juncture by the nature of objections which have been urged against the system, or by the degree of inquietude which has given birth to them. Instead of undertaking particular recommendations on this subject, in which I could be guided by no lights derived from official opportunities, I shall again give way to my entire confidence in your discernment and pursuit of the public good

George Washington, *First Inaugural Address in the City of New York*, in JOINT CONGRESSIONAL COMMITTEE OF INAUGURAL CEREMONIES, INAUGURAL ADDRESSES OF THE PRESIDENTS OF THE UNITED STATES, S. DOC. NO. 101-10, at 4 (1989). Still, the first Attorney General had not yet been appointed. There are a few other questions worth raising: Is it likely that the President had consulted any other legal advisers before giving this speech? Was the President estopped from changing his mind on this point of law at the time the Bill of Rights or the Eleventh Amendment was delivered to him? Were future Presidents conclusively bound?

48. *Hollingsworth*, 3 U.S. (3 Dall.) at 382.

49. See Bruce A. Ackerman, *Discovering the Constitution*, 93 YALE L.J. 1064, 1072 n.91 (1984) (considering "Supreme Court decisions, stretching back to [*Hollingsworth*] . . . in which the Court displayed no similar inhibition in resolving Article V issues"); Dalzell & Beste, *supra* note 43, at 512 n.77, 516 n.104 (postulating that *Hollingsworth* was demonstrative of the early Supreme Court's willingness to interpret Article V); Walter Dellinger, *The Legitimacy of Constitutional Change: Rethinking the Amendment Process*, 97 HARV. L. REV. 386, 416–17 (1983) (relating that in *Hollingsworth* the Court "resolv[ed] issues arising under [A]rticle V"); Pushaw, *Judicial Review*, *supra* note 39, at 1190 ("Obviously, the Justices would not have rendered th[e] [*Hollingsworth*] opinion if they had thought that the amendment process involved political issues that the judiciary

Many of the adherents of this school never consider the possibility that Article V is not justiciable and that the Court determined that the amendment had been constitutionally adopted wholly on the basis of the President's proclamation and message to Congress.⁵⁰ If the Court's declaration that the amendment had been validly adopted were a mere act of comity,⁵¹ then the Court may never have examined Petitioners' argument regarding Article I, Section 7, Clause 3 or the *facts* of *Hollingsworth*. In this situation the Court need never have reached determinations regarding: the justiciability of Article V; the reach of the ORV Clause; or the alleged conflict between the two provisions. Indeed, arguments other than comity, as explained below, may be easily crafted in spite of Professor Black's admonition that a defense

was incompetent to entertain."); Pushaw, *Justiciability*, *supra* note 39, at 449 (noting that *Hollingsworth* "nowhere intimated that the amendment process raised political issues outside the judiciary's competence" but failing to note that the Court's opinion gave no rationale at all for—much less a discussion of—the political question doctrine); James G. Wilson, *The Morality of Formalism*, 33 UCLA L. REV. 431, 455 & n.77 (1985) (citing *Hollingsworth* as authority for the notion that "the Supreme Court had acted several times in reviewing the amendment process"); Note, *Proposing Amendments to the United States Constitution by Convention*, 70 HARV. L. REV. 1067, 1070 & n.17 (1957) (offering *Hollingsworth* as evidence that "the Supreme Court . . . had resolved controversies arising under Article V"). For other similar treatments of *Hollingsworth*, see Marty Haddad, *Substantive Content of Constitutional Amendments: Political Question or Justiciable Concern?*, 42 WAYNE L. REV. 1685, 1696 (1996); *id.* at 1692–93 n.30; Kennedy, *supra* note 46, at 1008; JoAnne D. Spotts, *The Twenty-seventh Amendment: A Late Bloomer or a Dead Horse?*, 10 GA. ST. U. L. REV. 337, 355 (1994). *But see* LESTER BERNHARDT ORFIELD, *THE AMENDING OF THE FEDERAL CONSTITUTION* 17 (1942) ("Thus up to 1920 there were no decisions by the Supreme Court itself *squarely* passing on the justiciability of amendments.") (emphasis added).

Of course, implicit in the worldview put forward by the Justiciability School is that the holding of *Hollingsworth* is either that the ORV Clause controls only statutory lawmaking procedures or that the ORV Clause has no implications for the Article V process. Although this position has certain structural attractiveness, it comes at the expense of the plain meaning of the constitutional text, at least as customarily read. *See, e.g.*, U.S. CONST. art. I, § 7, cl. 3 ("Every order, Resolution, or Vote . . .") (emphasis added); Black, *Amending the Constitution*, *supra* note 37, at 209 (decrying the Article V explanation for *Hollingsworth* as not even "semirational").

50. *Cf. Leser v. Garnett*, 258 U.S. 130, 137 (1922) (holding that ratification of an amendment "being certified to by [the Secretary of State's] proclamation . . . is conclusive upon the courts"); *Luther v. Borden*, 48 U.S. (7 How.) 1, 39 (1849) (observing that regarding state constitutional amendments "the political department has always determined whether the proposed constitution or amendment was ratified or not by the people . . . and the judicial power has followed its decision"); *cf. The Statute of Proclamations*, 1539, 31 Hen. 8, ch. 8 (Eng.) ("An act that proclamations made by the king shall be obeyed.").

51. *Cf. Field v. Clark*, 143 U.S. 649, 671–72 (1892). The Court stated:

Although the Constitution does not expressly require bills that have passed Congress to be attested by the signatures of the presiding officers of the two houses, usage, the orderly conduct of legislative proceedings and the rules under which the two bodies have acted since the organization of the government, require that mode of authentication.

. . . The respect due to coequal and independent departments requires the judicial department to act upon that assurance, and to accept, as having passed Congress, all bills authenticated in the manner stated . . .

Id.

of *Hollingsworth* is not “even projectable.” In *Hollingsworth*, it was in no sense necessary for the Court to reach the question of the amenability of Article V to judicial review.

5. *The Court Adopted the Reasoning of Justice Chase School.*—During the oral argument, Justice Chase interjected: “[T]he negative of the President applies only to the ordinary cases of legislation: [the President] has nothing to do with the proposition, or adoption, of amendments to the Constitution.”⁵² Although some articles have taken the position that Justice Chase’s statement is part of the Court’s opinion, this is clearly not the case.⁵³ Other articles seem to be aware that the statement is attributable only to Justice Chase at oral argument.⁵⁴ Of course, because the Court’s reasoning is lacking in *Hollingsworth*, one can hardly blame those who analyze it from grasping at the few available legal straws.

Chase’s statement is deeply problematic. The adherents of this school apparently take the position that Chase meant that the strictures of Article I, Section 7, Clauses 2 and 3 apply exclusively to the process of statutory

52. *Hollingsworth*, 3 U.S. (3 Dall.) at 381 n.

53. See Carter, *supra* note 37, at 130 (citing a statement of Justice Chase without explaining that it was from oral argument and not a bench decision); Dellinger, *supra* note 49, at 403 & nn.85–86 (citing Chase’s statements as part of the Court’s holding); David M. Golove, *Against Free-Form Formalism*, 73 N.Y.U. L. REV. 1791, 1812 n.71 (1998) (affirming, apparently on the basis of Justice Chase’s statement, “that [the] President has no role in [the] amendment proposal process”); Ishikawa, *Everything*, *supra* note 43, at 589 (offering that “the Supreme Court’s decision in *Hollingsworth* . . . held that the President does not serve any function in the amending process” but failing to note the President’s historic role in transmitting amendments to the States) (footnote omitted); Michael Stokes Paulsen, *A General Theory of Article V: The Constitutional Lessons of the Twenty-seventh Amendment*, 103 YALE L.J. 677, 730 (1993) (asserting that in *Hollingsworth*, the Court held that the “President has no role in the amendment process”); Pushaw, *Judicial Review*, *supra* note 39, at 1190 (“The Court ruled that this approval/veto power applied only to ordinary legislative bills, not to constitutional amendments.”); Pushaw, *Justiciability*, *supra* note 39, at 449 (relying on Justice Chase’s statement to support the notion that “[t]he Court held that the veto power applied only to ordinary legislation, not to constitutional amendments”); Treanor, *supra* note 39, at 728 & n.193 (citing Chase’s statement at oral argument as an observation of the Court); Saul Zipkin, *Judicial Redistricting and the Article I State Legislature*, 103 COLUM. L. REV. 350, 368–69 & n.92 (2003) (referring to Justice Chase’s statement at oral argument and proposing that “the Court ruled in 1798 that constitutional amendments passed by Congress are not subject to presidential veto”); Note, *Proposed Legislation*, *supra* note 37, at 1623 & n.58 (accepting Justice Chase’s statement as the opinion of the Court and concluding that in *Hollingsworth* “the Court stated in an unreasoned opinion that the President ‘has nothing to do with the proposition or adoption of amendments to the constitution’”) (quoting *Hollingsworth*, 3 U.S. (3 Dall.) at 381 n.). For other similar characterizations of Justice Chase’s statements, see Scott P. Glauber, *Citizen Suits Against States: The Exclusive Jurisdiction Dilemma*, 45 J. COPYRIGHT SOC’Y U.S.A. 63, 65 n.4 (1997), and Brendon Troy Ishikawa, *The Stealth Amendment: The Impending Ratification and Repeal of a Federal Budget Amendment*, 35 TULSA L.J. 353, 354 n.4 (2000) [hereinafter Ishikawa, *The Stealth Amendment*].

54. See, e.g., Kurt T. Lash, *Rejecting Conventional Wisdom: Federalist Ambivalence in the Framing and Implementation of Article V*, 38 AM. J. LEGAL HIST. 197, 207 n.70 (1994) (ascribing comments specifically to Chase).

lawmaking because presidential participation in the amendment process is not expressly mentioned in Article V.⁵⁵ Therefore, the absence of presentment or a presidential signature on the face of the Eleventh Amendment means that there was no failure to comply with any Article V procedure for amending the Constitution.

Unfortunately, this theory proves far too much. Indeed, it reduces much of the rest of the Constitution of 1787 to surplusage, if not gibberish. It is true that Article V is a freestanding article, but so are Articles II, III, IV, VI, and VII. Sometimes these latter articles expressly call for congressional action “by law”;⁵⁶ at other times the Constitution leaves ambiguous the form future congressional action is to take.⁵⁷ This is also true of Article V: the form by which Congress is to propose future amendments is left unstated; it is Congress that has *chosen* to act by bicameral resolution.

Thus, the argument that Article V excludes presidential action because it speaks to congressional action apart from statutory lawmaking leaves substantial unresolved implications for other constitutional provisions—

55. See, e.g., *Consumer Energy Council of Am. v. FERC*, 673 F.2d 425, 460 (D.C. Cir. 1982) (“By not mentioning presidential participation, Article V, which sets forth the procedure for amending the Constitution, makes *clear* that proposals for constitutional amendments are congressional actions to which the presentation requirement does not apply.”) (emphasis added); SPECIAL CONSTITUTIONAL CONVENTION STUDY COMMITTEE, AMERICAN BAR ASSOCIATION, AMENDMENT OF THE CONSTITUTION BY THE CONVENTION METHOD UNDER ARTICLE V 25 (1974) (“There is no indication from the *text* of Article V that the President is assigned a role in the amending process.”) (emphasis added); Ishikawa, *The Stealth Amendment*, *supra* note 53, at 354 n.4 (“Presidents, for example, have no official role in the amending process because they are *not at all mentioned* in Article V.”) (emphasis added).

56. See U.S. CONST. art. II, § 1 (establishing that “Congress may by Law provide for the Case of Removal, Death, Resignation, or Inability, both of the President and Vice-President”); *id.* art. II, § 2 (“Congress may by Law vest the Appointment of such inferior officers, as they think proper, in the Courts of Law, or in the Heads of Departments.”); *id.* art. III, § 2 (directing that any federal criminal “[t]rial shall be at such Place or Places as the Congress may by Law have directed”); *id.* art. IV, § 1 (“Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved”); *id.* art. VI (“This Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the Supreme Law of the Land . . .”).

57. See *id.* art. I, § 8 (empowering Congress “[t]o make *Rules* for the Government and Regulation of the land and naval Forces”) (emphasis added); *id.* art. V (leaving unresolved the form of congressionally proposed constitutional amendments).

There are, of course, a host of other clauses—*beyond* the confines of Articles I and V—that authorize congressional action but leave the form wholly unresolved. See, e.g., *id.* art. II, § 1 (“The Congress may determine the time of choosing the electors”); *id.* (“The President shall, at stated times, receive for his services a compensation”); *id.* art. III, § 1 (“The judicial Power of the United States shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish.”); *id.* (determining that judicial compensation shall not be diminished); *id.* § 2 (stating that “Congress shall make” exceptions to the appellate jurisdiction of the Supreme Court); *id.* § 3 (“The Congress shall have power to declare the Punishment of Treason”); *id.* art. IV, § 3 (“The Congress shall have Power to dispose of and make all needful *Rules and Regulations* respecting the Territory or other Property belonging to the United States”) (emphasis added); *id.* (“New States may be admitted by the Congress”); *cf. id.* art. VI (leaving unresolved the form of oath or affirmation to support the Constitution).

implications that adherents of the Chase School do not feel called upon to address, assuming that they are aware of the difficulty. Like Article V, these other articles also speak to congressional action without expressly mentioning presidential participation, statutory lawmaking, or even the form future congressional action is to take. Are we to believe that the President is similarly excluded in all these other cases as the Chase School adherents say he is excluded from the Article V amendment process? Is the President's participation optional—merely at the discretion of Congress? And if lawmaking (broadly understood) is a hard choice between statutes (or things that are just like statutes but merely called by other names) and amendments (and treaties), then why do so many constitutional articles in so many places have express language stating that Congress may “*by law*” act under the aegis of the provision and yet in other places leave unresolved the form future congressional action may or must take?

Nor can Chase School adherents rationalize their position by operation of the Necessary and Proper Clause.⁵⁸ The Necessary and Proper Clause already established that Congress may or must act by lawmaking. If we assume, as the Chase School does, that the absence of express text in Article V calling for presidential action implies that the President has no role, then the same argument can equally be made across other articles, particularly where those articles say nothing about congressional action through lawmaking. Indeed, the interpretive position put forward by the Chase School adherents is stronger with respect to these other articles because these other articles sometimes internally distinguish provisions demanding that Congress act by lawmaking from other provisions where the form of future congressional action is left unresolved.⁵⁹ Textually, there is no way to distinguish Article V from other provisions beyond the ambit of Article I, all of which apparently leave the form of future congressional action and the role of the President equally unresolved.⁶⁰

It is unlikely that Chase School adherents are willing to go so far as to exclude the President where non-Article V constitutional provisions fail to expressly indicate a role for presidential action. How could they? Such a position is at odds with the whole sweep of American legal history. Moreover, any rationale for the distinction between Article V and non-Article V provisions must also account for the fact that provisions demanding

58. *See id.* art. I, § 8, cl. 18 (“The Congress shall have Power . . . To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.”).

59. *Compare, e.g., id.* art. IV, § 1 (“Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof.”), *with id.* art. IV, § 3 (stating that the “Consent” of Congress is needed to admit new states).

60. *See supra* note 57.

that Congress act “by law” were added to the Constitution by the Convention after the addition of both the Necessary and Proper Clause and the ORV Clause. The Chase School proponent is reduced to arguing that these subclauses have no purpose in much the same way that constitutional traditionalists have argued that the ORV Clause is (and has always been) moribund.⁶¹ In short, the Chase School can only support their interpretation of Article V (no role for President in the amendment process) by reducing repeated text over many provisions in other articles to surplusage.

Legal academia is not alone in embracing the position of the Chase School. This view also holds substantial sway over academic historians of the early Republic. For example, Professor David E. Kyvig has argued that the *Hollingsworth* decision was indicative of the Supreme Court’s having adopted the position put forward by U.S. Attorney General Charles Lee and concludes that “the president was to play *no* role whatsoever in the adoption of constitutional amendments.”⁶² Supporting this position, Professor Kyvig,

61. See, e.g., JAMES MADISON, NOTES OF DEBATES IN THE FEDERAL CONVENTION OF 1787, at 594 (1966) (entry for Sept. 7, 1787) (recording Edmund Randolph’s motion that “[t]he Legislature may declare *by law* what officer of the U.S. shall act as President in case of the death, resignation, or disability of the President and Vice-President; and such officer shall act accordingly until the time of electing a President shall arrive”) (emphasis added). Madison added additional language, none of which related to the “by law” subclause. Gouverneur Morris seconded the motion, as modified by Madison, and it passed, ultimately becoming Article II, Section 1. See also *id.* at 647 (entry for Sept. 15, 1787) (recounting that Gouverneur Morris “moved to annex ‘but the Congress may *by law* vest the appointment of such inferior officers as they think proper, in the President alone, in the Courts of law, or in the heads of Departments’”) (emphasis added). Sherman seconded the motion. It was passed and ultimately became Article II, Section 2. Cf. *id.* (documenting the motion brought by unknown movant that “Art. II. Sect. 2. After ‘officers of the U.S. whose appointments are not otherwise provided for’ were added the words ‘and which shall be established *by law*’”) (emphasis added); *id.* at 607 (entry for Sept. 8, 1787) (taking up motion adding: “[n]o money shall be drawn from the Treasury but in consequence of appropriations made *by law*”) (emphasis added).

Furthermore, although the people of the United States at the time of ratification never saw this language, the Convention at one point required two-thirds of each house to override a veto of a bill, but required three-fourths of each house to override a veto of an order, resolution, or vote. See Report of the Committee of Style (Sept. 12, 1787), available at www.founding.com/library/lbody.cfm?id=111&parent=47. It is possible that this was a mere oversight on the Convention’s part. I include this argument to illustrate the completeness of the presentation within this Article, and not because I put any stock in this particular argument. Cf. EDWARD DUMBAULD, THE CONSTITUTION OF THE UNITED STATES 53 (1964) (“With respect to three topics it will be noted that the Committee of Detail introduced innovations on the strength of its own ipse dixit, without any prior authorization in the resolutions of the convention.”).

62. DAVID E. KYVIG, EXPLICIT AND AUTHENTIC ACTS: AMENDING THE U.S. CONSTITUTION, 1776–1995, at 114 & n.11 (1996) (emphasis added); see also *id.* at 162 & n.13 (citing *Hollingsworth* to support the statement that “the Supreme Court had ruled that presidential action was not intended to be a part of the Article V process”); cf. REHNQUIST, *supra* note 39, at 207 (stating that “the president has no constitutional role in the ratification of an amendment”). On the other hand, a minority of state governors participated in the ratification of the early constitutional amendments. See, e.g., CLYDE E. JACOBS, THE ELEVENTH AMENDMENT AND SOVEREIGN IMMUNITY 180 n.96 (1972) (documenting that some state governors participated in ratification of the Eleventh Amendment); 5 BERNARD SCHWARTZ, THE ROOTS OF THE BILL OF RIGHTS 1197–98

Willi Paul Adams, and other general academic and legal historians have marshaled a significant collection of roughly contemporaneous colonial, state, and preratification materials (some discussing the then-proposed Constitution of 1787) supporting their general thesis that state executives were not generally participants in the process of drafting or amending state constitutions or constitutions generally.⁶³ *Hollingsworth*, they argue, confirms the similar position they take with regard to the federal constitution, a position which contemplates no role for the President. This is a textbook example of the *post hoc, ergo propter hoc* fallacy. It may very well be true, as the historians have convincingly argued, that prior to 1787 the prevailing view in the American States was that governors and executives played no substantive role in the process of drafting or amending state constitutions or constitutions generally. This is not solid evidence that this particular view was the unexpressed rationale of the *Hollingsworth* Court. The historians' argument would be significantly bolstered if they had considered, but rejected (all) alternative rationales for the Court's decision. This they have not done, at least in their published literature. However, as explained below, and as indicated in the title of this Article, I ultimately conclude that the historians, and not the legal academics, are correct—that *Hollingsworth* was rightly decided, but for reasons substantially different than those put forward by the historians.

Furthermore, it is worth noting that although the historians have expressed great confidence with regard to their interpretation of the *Hollingsworth* decision, they also willingly concede that they might not have covered all their bases and so remain amenable to new ideas. This is substantially more than can be said for many academic lawyers or jurists

(1980) (recording that New York ratified the Bill of Rights by bill and that Governor George Clinton signed the bill on behalf of the Council of Revision).

63. See KYVIG, *supra* note 62, at 22 (“The new [state] constitutions that the Congress urged the colonies to create should derive their power . . . from the authority of the people expressed through their representatives.”); *id.* at 24 (asserting that the provincial assemblies adhered to the view “that elected representatives possessed complete authority to act for the people [when making new state constitutions]”); *id.* at 30 (arguing that “[a]lthough methods varied, most states sought to ensure that [state constitutional] amendment[s] could be achieved only when a broad consensus, a supermajority of the sovereign people or their representatives, agreed to a change”); see also WILLI PAUL ADAMS, *THE FIRST AMERICAN CONSTITUTIONS: REPUBLICAN IDEOLOGY AND THE MAKING OF STATE CONSTITUTIONS IN THE REVOLUTIONARY ERA* 62 (Rita & Robert Kimber trans., 2001) (arguing that state constitutions stressed “the representative character of the assembly that put them in force”). Generally, where specially called constituent or provincial assemblies made state constitutions, these assemblies put constitutions in force on their own authority or after ratification by the people. But where the regularly elected state legislature enacted a constitution by mere statutory processes, governors sometimes participated in constitution making, if they already enjoyed a share in the process of enacting statutes. *Id.* at 68–70 (noting that the South Carolina governor and legislature enacted the new state constitution).

specializing in or expounding upon *Hollingsworth* and other constitutional exotica.⁶⁴

Whatever may account for the willingness of the historians to embrace the Chase School—the Article V is a freestanding grant of power thesis—it

64. For example, Professor Black writes:

The *only* even semirational ground for [*Hollingsworth*] is that the two-thirds vote necessary to pass an amendment is enough to overcome a veto, so that submission to the President is otiose. This is not a good ground, because it denigrates the process of reason by disregarding the possibility that some members of Congress might be convinced by the reasons in the President's veto message; why else should he be required to send it?

Black, *Amending the Constitution*, *supra* note 37, at 209 (emphasis added).

Surely Professor Black must have been aware that passage of a constitutional amendment only required two-thirds of each house (a quorum present), not two-thirds of the entire membership. *E.g.*, *National Prohibition Cases*, 253 U.S. 350, 386 (1920). Thus, an amendment might be passed by a house with light attendance and therefore by less than a majority of the entire membership. In that event, a presidential veto—even absent significant reasons in the veto message—would in all likelihood lead to congressional reconsideration by a house with substantially different (and perhaps larger) composition. Such a veto is in no sense otiose. *But see* Adrian Vermeule, *The Constitutional Law of Congressional Procedure*, 71 U. CHI. L. REV. 361, 409 (2004) (asserting that the absence of “members present” language “suggests by negative implication that . . . the supermajority requirement[] for veto overrides or constitutional amendments [is] two-thirds of the whole membership”).

Professor Black is not alone in this sort of error. *See, e.g.*, *National Prohibition Cases*, 253 U.S. at 386 (“The two-thirds vote in each house which is required in proposing an amendment is a vote of two-thirds of the members *present*—assuming the presence of a quorum—and not a vote of two-thirds of the entire membership, present and absent.”) (emphasis added). Certainly the Supreme Court was entirely correct in not imposing a requirement that each house reach two-thirds of the membership. But why did it impose a requirement of two-thirds of the “members present,” rather than merely two-thirds of the votes legally cast? As in *Hollingsworth*, the Court offered no rationale for its position. Textually, the Constitution has imposed a “two-thirds present” requirement *only* with regard to Senate conviction following House impeachment and with regard to the Senate’s treaty making power. On the other hand, textually, the Constitution merely imposes a simple two-thirds requirement for veto override and for passage of constitutional amendments.

The House and Senate do not agree with the Supreme Court’s “holding.” *See* JEFFERSON’S MANUAL, *supra* note 18, at 52 (stating that with regard to action on a vetoed bill “[o]nly Members voting should be considered in determining whether two-thirds voted in the affirmative”). Jefferson’s Manual continues:

The vote required on a joint resolution proposing an amendment to the Constitution is two-thirds of those voting, a quorum being present The majority required to pass a constitutional amendment, like the majority required to pass a bill over the President’s veto . . . is *two-thirds of those Members voting either in the affirmative or negative*, a quorum being present, and Members who only indicate that they are “present” are not counted in this computation [although they are counted in the quorum].

Id. at 79 (emphasis added); *see also* FLOYD M. RIDDICK & ALAN S. FRUMIN, RIDDICK’S SENATE PROCEDURE: PRECEDENTS AND PRACTICES, S. DOC. NO. 101-28, at 683 (2d Sess. 1992); *id.* at 1409 (“It is the practice of the Senate to allow Senators who *decline to vote* to respond ‘present’.”) (emphasis added). *Cf.* *Mo. Pac. Ry. Co. v. Kansas*, 248 U.S. 276, 281 (1919) (proposing that the two-thirds requirement for veto override and passage of constitutional amendments through Congress are functionally identical). On the other hand, for an example of a legislature’s failure to impose a two-thirds present requirement where it is expressly authorized, *see infra* note 101 (describing Massachusetts practice).

is very unclear why this position has escaped unscathed from the most mundane interpretivist critique. Article V uses the term “Congress.” Is anyone willing to argue that Congress, when acting pursuant to Article V, is somehow constituted or defined differently than when it is acting pursuant to Article I? If not, then Article V must be interpreted intratextually with Article I, Section 1. Do the members of a Congress proposing amendments under Article V have different qualifications than congressional members voting on simple legislation? If not, then Article V implicitly adopts Article I, Sections 2 and 3. Can Congress, for the purpose of proposing a constitutional amendment under Article V, meet prior to the date established by statute for the assembly of the incoming Congress? If not, then Article V implicitly adopts Article I, Section 4. Do the rules adopted by the houses not apply when the Congress debates constitutional amendments? If the rules apply, then Article V implicitly adopts Article I, Section 5. Is Article V’s requirement for two-thirds of each house somehow interpreted or applied differently from Article I, Section 7’s requirement for two-thirds of each house to override a presidential veto? If not, then any interpretation of Article V (with regard to how legislative officers should determine if two-thirds of each house supported a proposed constitutional amendment) must be consistent with Article I, Section 7, Clause 2 (with regard to how legislative officers should determine if two-thirds of each house supported a veto override).

Clarity on this point is key. Those that argue that Article V is a free-standing grant of power do not mean that Article V is a separate mini-constitution interpreted independently of all other constitutional provisions. *Rather, they mean just the opposite.* Their position is that Article V must be interpreted consistently with every other constitutional provision, except Article I, Section 7, Clause 3. And with regard to Article I, Section 7, Clause 3, they are unwilling even to discuss its meaning, much less its impact (real or potential) on their interpretation of Article V. Essentially, this school is asking for an interpretive free ride with regard to the core intellectual problem in dispute. There is no reason to grant this school and its adherents the free ride they desire. If they wish to argue that the ORV Clause is the one provision in the Constitution having no impact on Article V, then intellectual honesty requires their adopting some position as to what the ORV Clause might mean and on what basis they arrived at that meaning.⁶⁵ It goes

65. Perhaps the most serious intellectual attempts within legal academia to wrestle with the *Hollingsworth* conundrum have been made by Professor Currie. See Currie, *Third Congress*, *supra* note 46; Currie, *First Congress*, *supra* note 46. It is my opinion that Professor Currie’s efforts failed to untie the Gordian knot that so burdened Professor Black.

Professor Currie’s position, although widely shared, is objectionable on many levels of generality. First, many contemporaries might have thought the newly proposed amendments were matters of little consequence. Even those who thought the substance of the proposed amendments important might not have stopped to consider the lesser aspects of the procedures for valid

without saying that Chase School adherents have been unwilling (and perhaps unable) to engage the issue.

In the remainder of this Article, I take the position that each of the five *Hollingsworth* schools of thought discussed above is substantially incorrect—incorrect as an explanation of the holding and incorrect on the merits. Customarily, the way to proceed at this point would be to explain the

ratification. Under those conditions, Professor Currie's expectations of a detailed commentary with regard to presidential participation in the amendment *process* is misplaced. Consider, for instance, Fisher Ames's letter to Professor Thomas Dwight:

Mr. Madison has introduced his long expected amendments. They are the fruit of much labor and research. He has hunted up all the grievances and complaints of newspapers, all the articles of conventions, and the small talk of their debates. It contains a bill of rights . . . freedom of the press, of conscience, of juries . . . This is the substance. There is too much of it. Oh! I had forgot, the right of the people to bear arms.

Risum teneatis amici?

Upon the whole, it may do some good towards quieting men, who attend to sounds only, and may get the mover some popularity, which he wishes.

Letter from Congressman Fisher Ames to Professor Thomas Dwight (June 11, 1789), *reprinted in 1 WORKS OF FISHER AMES WITH A SELECTION FROM HIS SPEECHES AND CORRESPONDENCE* 52, 52–53 (Seth Ames ed., 2d ed. 1854); *see also infra* note 99 (providing some indication that Thomas Jefferson thought the Bill of Rights of little moment). Second, Congress and the President might have had strategic reasons *not* to have discussed the full extent of their own powers and the powers of coordinate branches of government. Is it really surprising that Congress left no paper trail indicating the extent (or the existence) of presidential powers? It is worth noting that settling out one's maximalist position was pattern and practice during the colonial period during conflicts between elected assemblies and colonial governors. *See* CLARKE, *supra* note 8, at 232–33 (illustrating the conflict between the prerogative of colonial governors and the claims of privilege by local popular assemblies); *cf.* JOHN F. BURNS, *CONTROVERSIES BETWEEN ROYAL GOVERNORS AND THEIR ASSEMBLIES IN THE NORTH AMERICAN COLONIES* 321 (1923) (“The limits of the[] [people's] privileges in self-government were being minutely examined by them, and their interpretation widened as far as possible.”).

For the reader interested in Ames's Latin phrase, Niall Slater, Professor of Classics at Emory University, has graciously informed me that

[t]he phrase “risum teneatis amici” comes from line 5 of Horace's *ARS POETICA* or “The Art of Poetry.” The translation of those 5 lines (this from [The] Perseus [Digital Library] at Tufts [University]) is:

If a painter should wish to unite a horse's neck to a human head, and spread a variety of plumage over limbs [of different animals] taken from every part [of nature], so that what is a beautiful woman in the upper part terminates unsightly in an ugly fish below; could you, my friends, refrain from laughter, were you admitted to such a sight?

The particular phrase “risum teneatis amici” means “could you, my friends, refrain from laughter?” The problem with classical tags is that every educated man in the 18th century knew some of them so well that he could use them with a wide range of nuance. I'm sure Ames is being ironic—but at precisely whose expense may be more open to debate.

Email from Niall W. Slater, Professor of Classics, Emory University, to Seth Barrett Tillman (July 9, 2003) (on file with the Texas Law Review).

Ames was, of course, mocking his contemporaries (and by implication us) for thinking of the Bill of Rights as significant legislation. For the modern interpreter, the question is not whether Ames was ultimately correct as understood by later generations, but whether or not his opinion with regard to the Bill of Rights was fairly representative of his own time.

legal theories, competing arguments, and persuasive authority at issue in the hope of putting forward a rival and ostensibly better theory to account for the *Hollingsworth* holding or to explain why it should be rejected. But because the facts and legal issues of *Hollingsworth* are so far removed from our time, I will instead put forward a tentative opinion for the Court in the hope that this will make the constitutional text involved more comprehensible.⁶⁶

C. *Hollingsworth v. Virginia: Without Mystery*

Opinion of the Court. On our own authority, we vacate our prior opinion and order the clerk to serve the parties with this opinion and order in its stead. Attorneys for Petitioners,⁶⁷ Tilghman and Rawle, have argued that the Eleventh Amendment has not been “proposed in the form prescribed by the Constitution.” *Hollingsworth v. Virginia*, 3 U.S. (3 Dall.) 378, 379 (1798); see also U.S. CONST. art. V. Specifically, Petitioners have argued that the proposed “amendment was never submitted to the President for his approbation.” See U.S. CONST. art. I, § 7, cl. 3. And this they have determined by inspecting “the original roll”—that is, the enrolled resolution passed by the two houses of Congress, which bears no indication of either the President’s veto or concurrence. *Hollingsworth*, 3 U.S. (3 Dall.) at 379. The Court has carefully considered the positions, papers, and arguments of the parties. We have determined that this argument has no merit. Rather, we have determined that the Eleventh Amendment has been adopted in conformity with the procedures mandated by the Constitution. Nevertheless, because the members of this Court do not agree on any single rationale for its holding, each member of the Court has decided to reduce his reasoning to a short opinion.

1. *A Proceduralist’s Vision of Hollingsworth*.—Opinion of Cushing, J.⁶⁸ There are only two possibilities with which the Court must contend.

66. Admittedly, authority brought in the footnotes to the ad seriatim “opinions” may be anachronistic with respect to the timing of the *Hollingsworth* decision. See, e.g., Lon L. Fuller, *The Case of the Speluncean Explorers*, 62 HARV. L. REV. 616 (1949) (presenting a hypothetical, ad seriatim opinion for a case set in the deep future).

67. Grayson et al. originally brought the suit against Virginia under the Supreme Court’s original, as opposed to appellate, jurisdiction. Petitioners later substituted Hollingsworth for Grayson as the lead named petitioner. Attorney General Lee, representing the respondent, brought the particular motion discussed at oral argument. See *Grayson v. Virginia*, 3 U.S. (3 Dall.) 320 (1796), *dismissed sub. nom.*, *Hollingsworth v. Virginia*, 3 U.S. (3 Dall.) 378 (1798).

68. The Chief Justice, Oliver Ellsworth, did not participate—only Associate Justices William Cushing, James Iredell, William Paterson, and Samuel Chase were in attendance on the day the real *Hollingsworth* decision was announced. See 1 DHSC, *supra* note 16, at 304–05 (recording the fine minutes of the Supreme Court clerk). The record does not indicate that Associate Justice Wilson recused himself from participating in any preliminary *Hollingsworth* proceedings even though he had owned 300 shares in the company since 1781 and was listed on the petitioner’s original filings as a shareholder at the time the suit was instituted. See 5 DHSC, *supra* note 16, at 282 n.50, 300 &

Either Article I, Section 7, Clause 3, the ORV Clause, applies to the process Article V sets out for proposing amendments, or it does not.

If it does not apply, then there is no reason to inspect the enrolled resolution of the proposed amendment for the President's signature or veto message, and it is not incumbent upon Congress to deliver the amendment resolution to the President. The process of circulating a proposed amendment resolution to the States may be achieved through the office of the President, but it may also be achieved by means of any Executive Branch official, or, perhaps, by direct communications from Congress (or its officers) to the States.

Alternatively, if the ORV Clause does apply, then Congress must deliver the proposed amendment, customarily in the form of an enrolled resolution, to the President and such delivery constitutes presentment under Article I. Having made delivery, congressional action on the substance⁶⁹ of a proposed amendment ends and executive action (or rather, as in this case, inaction) begins. The President, having possession of the proposed amendment in the form of an enrolled resolution, must now take one of three courses of action. He may sign the resolution and then proceed to notify the States by circular. He may veto the resolution and return it to its house of origin with his objections. Or he may do neither. If on the tenth day following presentment the President has failed to act, and if Congress is adjourned, then inaction constitutes a so-called pocket veto. On the other hand, if Congress has not adjourned, then presidential inaction constitutes approval and again the President should proceed to transmit the proposed amendment to the States. Here, attorneys for the Petitioners have told the Court that they have inspected the enrolled resolution and that "it appears

n.4 (indicating that Associate Justice James Wilson was the last stockholder listed on the Bill of Equity, but that his name did not appear on the amended Bill of Equity). Like Ellsworth, Wilson was not in attendance the day the decision was announced. During the days of the six-member Supreme Court, deadlock, surprisingly, was not a major issue.

69. Congressional action on the substance of a proposed amendment ends with presentment, but Congress must still decide—if it has not yet already decided—what mode of ratification should be pursued by the States. It is *possible* that the two decisions are independent and that, if so, they need not be made contemporaneously nor embodied in any common document. More importantly, although the approval of two thirds of each house of Congress is required to pass the substance of a proposed amendment, it is quite possible that Congress may act by simple majority (as in the case of a bill) in deciding on the mode of state ratification. Compare U.S. CONST. art. V (directing that "Congress, whenever two thirds of both houses shall deem it necessary, shall propose Amendments"), with *id.* (prescribing that "one or the other Mode of [state] Ratification may be proposed by the Congress"). Whether or not the congressional resolution embodying Congress's choice of mode for state ratification must be presented to the President is a substantial legal question, but not one we need reach here today because no such argument was made by Petitioner. Thus, we have no occasion to reach the justiciability of this possible defect under Article V. See ORFIELD, *supra* note 49, at 49–50 n.28 ("The function of selecting the mode of ratification would seem to be apart from that of proposing the amendment, and it might be argued that only a majority vote is required. But Congress has always performed both functions in a single resolution.").

that the amendment was never submitted to the President for his approbation.” *Hollingsworth*, 3 U.S. (3 Dall.) at 379. This is, of course, a *non sequitur*. Congress is not obliged to write on the face of the enrolled resolution: “on such and such a date we, the Congress, delivered the proposed amendment to the President for his approval or rejection.”⁷⁰ Similarly, the President is not obliged by any statutory or constitutional provision to record on the face of the document the date he or his agent took possession of the document from Congress’s messenger. And again, the President is not obliged to note on the face of a proposed amendment that he failed to expressly approve or reject the proposed amendment.⁷¹ What would be the point of such a requirement except to undermine the President’s unambiguous right not to act?⁷² The absence of such indicia of passage on the face of the document tells us nothing in the event that the President has chosen not to sign it. Therefore, an examination of the enrolled resolution, without other extrinsic evidence, cannot conclusively establish whether or not the Congress and the President have scrupulously complied with all constitutional proprieties.

Again there are precisely two possibilities in which the absence of a presidential signature *might* constitute a violation of the procedures mandated

70. This is not to say that Congress has *no* obligations with regard to authenticating proposed amendments. Under joint rules and traditions dating from the First Congress, such documents are generally signed by the presiding officers of each House, and the signatures of the presiding officers are attested to by each House’s chief legislative officer, the clerk and the secretary. *See, e.g.*, 5 SCHWARTZ, *supra* note 62, at 1165 (recording that an authenticated copy of the Bill of Rights was signed by speaker, vice president, clerk of the House, and secretary of the Senate, with the latter two signatures attesting to the prior signatures); *Field v. Clark*, 143 U.S. 649, 671–72 (1892) (noting that “usage, the orderly conduct of legislative proceedings, and the rules under which [both houses] have acted since the organization of the government” require authentication “by the signatures of the presiding officers of the two houses”); *cf. Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 157–58 (1803) (setting out the process by which the President signs an officer’s commission, and, thereafter, the Secretary of State attests to the President’s signature by affixing the seal of the United States). Apparently, this two signature (or signature and seal) process is of great antiquity.

71. This point, perhaps, can be made more forcefully. Just as neither the Congress nor the President (when not signing) are obliged to mark the proposed amendment in any particular way, comity demands that the Courts presume regularity with constitutional norms. Thus, if a statute demands a majority of each house and an amendment demands two-thirds, the fact that the document has been enrolled and gone through the hands of Congress’s elected and appointed officers establishes that those conditions precedent have been met. The document need not expressly affirm either: (1) that this statute has been approved by a majority of the House and Senate in the case of a bill, or (2) that this proposed amendment has been approved by two-thirds of the House and Senate in the case of an amendment to the Constitution. *See Field*, 143 U.S. at 671–72; *see also* Act of June 6, 1898, 30 Stat. 432 (removing political disability imposed by the Fourteenth Amendment without any indication that the congressional action taken was passed by the necessary two-thirds supermajority of each house).

72. *See* U.S. CONST. art. I, § 7, cl. 2 (“If any Bill shall not be returned by the President . . . after it shall have been presented to him, the Same shall be a Law, in like Manner as if he had signed it, unless the Congress by their Adjournment prevent its Return, in which Case it shall not be a Law.”).

by the ORV Clause if we assume *arguendo* that that clause applies to the amendment process.

First, if Congress never presented the enrolled resolution to the President, and if he may have intended to (return or pocket) veto it, then the absence of his veto is an element necessary to establish a gross constitutional violation of the procedures implicit in Article V, assuming the coordinate applicability of the ORV Clause. Petitioners have entered no evidence into the record suggesting that Congress failed to deliver the proposed amendment to the President. The entirety of their evidence is the absence of information on the face of the resolution supporting either presentment or presidential action. Because no statute or constitutional provision mandates the production of such indicia of passage on the face of the proposed amendment, their argument must fail as a matter of law.

Second, if Congress presented the enrolled resolution to the President less than ten days prior to its adjournment, and if he failed to sign it, then the absence of his signature constitutes a pocket veto, assuming the applicability of the ORV Clause. But here, too, Petitioners have failed to develop the record. They have entered no evidence into the record establishing either the date of presentment or whether Congress had adjourned ten days following presentment. Therefore, their argument must fail as a matter of law.

In any other situation, presidential inaction constitutes functional approval.

I do not reach the question of whether or not the ORV Clause applies to Article V: This is a pure question of law. And in a proper case, I have no doubt that this Court will adjudicate that close question. But on this occasion, on these facts, we have no reason to decide the amenability of Article V to judicial review.

The Eleventh Amendment “was declared [constitutionally adopted] in a message from the President to Congress dated the 8th of January, 1798.”⁷³ This solemn proclamation is a public document of which we take judicial notice. It records final action with regard to a public transaction by highly placed elected public officials. Thus, it comes to us with the strongest possible presumption that every step of the process for amending the Constitution has been complied with, particularly when the facts in dispute and the timing of presidential inaction relate to information in the peculiar control of the President and his servants and because the facts in dispute relate directly to the privileges of his office. Do we really imagine that the

73. JEFFERSON’S MANUAL, *supra* note 18, at 90 n.2. Although George Washington was President at the time Congress proposed the amendment, the presidential proclamation of ratification occurred during the administration of John Adams on January 8, 1798. Likewise, the instant litigation concluded after the Proclamation but still during the Adams administration. See *Hollingsworth*, 3 U.S. (3 Dall.) at 378; see also 1 DHSC, *supra* note 16, at 304–05.

President would validate ratification if Congress arguably bypassed constitutionally mandatory presentment?⁷⁴

Petitioners have argued that the ORV Clause does apply to the amendment process. We do not expect Petitioners to *prove* such a legal proposition. Such a decision is for us. But we do demand that Petitioners establish a *factual* basis such that our deciding the applicability of the ORV Clause will have some bearing on any relief we might choose to grant. Petitioners having failed to establish any necessary or sufficient factual predicate, any decision on our part as to the applicability of the ORV Clause would be a pure advisory opinion or, at best, dicta. To put it another way, we will not decide the applicability of the ORV Clause to the amendment process as an abstract question. We will only reach that question if the facts of the case indicate that those requirements were *not* in fact carried out so that our decision as to applicability of the ORV Clause will have some bearing on our ultimate judgment. If, in fact, the ORV Clause's requirements were met here (i.e., Congress presented the enrolled resolution to the President, and presidential inaction was not a pocket veto because Congress had not adjourned), we will not decide the mere abstract question of whether or not the ORV Clause applies to Article V. Nor do we have occasion today to reach the question of whether defects in the ratification process are, as an abstract matter, amenable to judicial review.

Furthermore, the evidentiary burden imposed on Petitioners is exceedingly low: the date of final congressional action and authentication by House officers on a resolution, the date of presentment, and the date of congressional adjournment are all generally matters of public record. *See, e.g., Journal of the House; Journal of the Senate.* And if on the off chance no public record unambiguously establishes the contested facts, Petitioners could subpoena the officers and former officers of the Congress and of the United States who have or had first-hand knowledge of the relevant facts. After all, the events at issue did not occur hundreds of years ago during the unhappy reigns of long dead Stuarts or Plantagenets. Rather, all the contested events relating to congressional enactment and presidential participation happened during the administration of George Washington, whose term of office ended a year or so ago. Indeed, the Vice President

74. *See* THE FEDERALIST NO. 51, at 321–22 (James Madison) (Clinton Rossiter ed., 1961) (arguing that “the great security against a gradual concentration of the several powers in the same department consists in giving to those who administer each department the necessary constitutional means and personal motives to resist encroachments of the others”). Adams took office March 4, 1797 and issued his proclamation of ratification on January 8, 1798, not even a full year into his administration. It is reasonable to suggest that he may have thought it possible that other amendments might cross his desk before the conclusion of his term. Moreover, Adams ran (and lost) in his effort for a second term. This unfulfilled presidential aspiration would have presented some opportunity for further presidential action on future amendments. *See generally* DAVID MCCULLOUGH, JOHN ADAMS (2001); 2 PAGE SMITH, JOHN ADAMS: 1784–1826 (1962).

under Washington, the official charged with authenticating the enrolled resolution on behalf of the Senate, is now President of the United States. If Petitioners refuse to subpoena these officials, former officials, and their servants, then they cannot come to this Court for relief.

2. *An Historicist's Vision of Hollingsworth*.—Opinion of Paterson, J. I join only the judgment of my brother Cushing. For the reasons I elaborate below, I do not join his opinion.

The opinion of Justice Cushing is not addressed to the parties. Rather, it is addressed to future litigants and practitioners and serves as a warning that they put their claims or defenses in jeopardy if they fail to sufficiently develop the record in their filings, in their motions, and at oral argument. Although the decision we announce today is a final judgment, Petitioners are unfortunately free to seek reargument to introduce facts, affidavits, and testimony that might correct the deficiencies in the record elaborated by Justice Cushing. Reargument is discretionary, and we will only grant it in exceptional cases if the request is timely made. In most cases the decision to seek reargument is only of consequence to the parties, but in a case such as this, where many potential individual plaintiffs and state government defendants are intently watching the proceedings, we fail in our duty if we do not put the public mind at actual rest by fully resolving the underlying *legal* controversy, if we can do so without imposing on the named parties and the privilege of the bar to develop their own cases and record as they see fit. Here, Justice Cushing has indicated that public records could answer the question with regard to whether or not Congress presented the enrolled resolution to the President and with regard to whether or not Congress was in session ten days thereafter. These records are open to the inspection of the general public, to the inspection of the litigants, and to *us*. We therefore may take judicial notice of these records just as we can (and indeed must) take judicial notice of the statutes of the United States although uncited by parties before us in a case or controversy. In my opinion, it is our duty to do so particularly in a case such as this. In bringing such incontrovertible facts to light, we not only reduce our future case load and the future case load of the other federal courts, but we free future litigants from doubt as to the ultimate legitimacy of their claims and defenses vis-à-vis the Eleventh Amendment.

The *Journal of the Senate* records that the proposed Amendment passed the Senate on January 14, 1794.⁷⁵ The *Journal of the House* records that the proposed amendment passed the House on March 4, 1794.⁷⁶ The Speaker authenticated the enrolled resolution on March 10, and the Vice President

75. 5 DHSC, *supra* note 16, at 617 (recording the Senate passage).

76. *Id.* at 620–23 (recording the House passage); *see also id.* at 624 (recording the March 12, 1794 resolution of the two houses requesting presidential transmittal of the proposed amendment to the States).

authenticated the enrolled resolution on March 11, 1794.⁷⁷ Thus, bicameral

77. See Journal of the Senate 44 (Mar. 11, 1794) (indicating March 11, 1794 authentication by the Vice President and prior authentication by the Speaker), available at <http://memory.loc.gov/ammem/amlaw/lawhome.html>.

On March 11, 1794, the *Senate Journal* makes note of the fact that the Vice President authenticated the Eleventh Amendment and an unrelated separate free-standing bill, but only indicates that the latter was “to be laid before the President of the United States for his approbation.” *Id.* Of course, even assuming that this *Journal* entry is indicative of the opinion of the Senate, neither the President nor this Court is thereby bound. Irrespective of the Senate’s position on the legality of a presidential veto (or the necessity of the President’s concurrence) on a proposed amendment, both houses nevertheless agreed to *deliver* the enrolled resolution to the President and actually did so. See also *infra* note 78. This constitutes presentment for the purposes of Article I. Has anyone ever made the legal argument that presentment requires something more than mere delivery to the President or his agent? Whatever opinion the Senate (or even the Congress) had as to the propriety of presidential action on a proposed amendment is wholly irrelevant to our discussion if only because the President was free to exercise his independent judgment in this matter. The President is also free to consult with *his* legal advisers. He was free to veto, to attempt to veto, or to sign the enrolled resolution, even though his veto or signature might ultimately be determined by the courts to be a legal nullity. If acting on the advice of Congress, a coordinate branch of government, the President refrained from signing or vetoing the enrolled resolution, then his inaction constitutes waiver (as in the case of a bill left unsigned) and nonministerial discretionary presidential action (or rather inaction) with regard to the substance of a proposed amendment is at an end. Afterwards, the President had yet to fulfill the ministerial task of transmitting the proposed amendment to the States for ratification. And this the President did through his servants.

It should be noted, however, that the President was under no express constitutional or statutory duty to transmit the proposed amendment to the States. First, it is not clear that Congress has authority to impose purely ministerial duties on the President. Second, Congress passed no law purporting to impose such a duty on the President. Congress merely passed a resolution directing the President to transmit copies of the enrolled resolution to the States. Third, the language of the congressional resolution was directory, not mandatory. Although a President’s refusal to circulate an otherwise properly proposed amendment is in no sense a violation of any law or constitutional provision, any President acting on such narrow legalistic grounds risks impeachment and removal for his affront to Congress. Indeed the two-thirds majority necessary to propose an amendment in the House is substantially larger than the simple majority necessary to impeach by that body. See Tillman, *supra* note 14, at 617 & n.58 (noting the position of James Madison at the Virginia ratifying convention and the writings of St. George Tucker, each indicating that impeachment by the House is itself a constitutional incapacity subjecting the President to removal or suspension prior to Senate conviction); see also 1 ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 111–15 (Henry Reeve trans., Phillips Bradley ed., 1945) (indicating that although under European legal systems impeachment is an extraordinary remedy subjecting the defendant to criminal sanctions at the hands of a political body, under the American model, impeachment is a regular influence that “no one hesitates to inflict” and subjects the defendant only to removal from office and possible preclusion from future office).

It is true, however, that as a technical matter the two-thirds majority necessary to convict an impeached President in the Senate is *potentially* a larger majority than that required to pass a constitutional amendment. Compare U.S. CONST. art. I, § 3 (directing that the two-thirds majority needed for Senate conviction on impeachment charges is two-thirds of the members “present,” assuming the presence of a quorum), with *id.* art. V (mandating that the two-thirds majority for passing a constitutional amendment is merely two-thirds of the members voting and present, assuming the presence of a quorum). See also *infra* note 101 (indicating that the Convention considered this issue in other contexts). *Mason’s Manual of Legislative Procedure* notes:

The requirement of a two-thirds vote, unless otherwise specified, means two-thirds of the legal votes cast [assuming a quorum is present], not two-thirds of the members

congressional action on the substance of the proposed amendment concluded on March 11, 1794. On March 12, 1794, Congress passed a resolution directing its officers to transmit sixteen (equally authentic) parchment copies of the enrolled resolution to the President and directed the President to circulate one copy to each State.⁷⁸ I infer that one copy was for the permanent records of the Executive Branch and the remaining fifteen copies were for circulation to the then extant fifteen States, including the recently admitted states of Vermont and Kentucky.⁷⁹ We do not know the precise date the President received the sixteen copies by message from Congress.

present, or two-thirds of all the [elected and qualified] members [or two-thirds of the all the potential members assuming all potential members were elected and qualified].

AM. SOC'Y OF LEGISLATIVE CLERKS AND SEC'YS, MASON'S MANUAL OF LEGISLATIVE PROCEDURE § 512(3) (1989)

78. See Journal of the Senate 46 (Mar. 12, 1794) ("Sixteen enrolled copies of the . . . resolution were delivered to the Committee for Enrolled Bills, to be laid before the President of the United States, for transmission."), available at <http://memory.loc.gov/ammem/amlaw/lawhome.html>; see also 5 DHSC, *supra* note 16, at 624 n.1 ("State Department received '16 copies in parchment' of the proposed amendment from the [P]resident on March 12."); *id.* at 624 (reproducing the March 12, 1794 resolution of the two houses requesting presidential transmittal of the proposed amendment to the States).

79. The sixteenth copy may have been produced exclusively for Executive Branch records, but it may also have been produced so that the President might have a copy for his veto to act on. This is, of course, the issue now under consideration.

The reader might think that the sixteenth copy was sent to the Governor of the Tennessee territory, which was admitted to the Union as a State after final congressional action and presidential transmittal but prior to President Adams's proclamation. However, contemporaneous public records indicate that no such delivery was made in anticipation of Tennessee statehood. For instance, Secretary of State Timothy Pickering noted:

When I first wrote to the Governor of Tennessee [to determine if his State ratified the Eleventh Amendment], it did not occur to me that the Resolve of the two Houses of Congress proposing the amendment in question, having passed in March 1794, and been immediately transmitted by the President, at the request of the two Houses, to the "Executives of the several States," had not been communicated to Tennessee, which was not declared to be one of the United States until upwards of two years after, viz. on the first of June 1796. Therefore, on the 16th of October last I again wrote to the Governor of Tennessee, & inclosed [sic] a copy of the Resolve of March 1794, to be laid before the legislature for their consideration.

Letter from Secretary of State Timothy Pickering to President Adams (Dec. 28, 1797), reprinted in 5 DHSC, *supra* note 16, at 635, 636.

A similar situation arose after final congressional action on the Bill of Rights. Congress prepared fourteen engrossed copies at a time when there were only thirteen States, although North Carolina and Rhode Island had yet to ratify the Constitution. The Governors of Rhode Island and North Carolina received engrossed copies prior to their state's admission to the Union. See, e.g., 5 SCHWARTZ, *supra* note 62, at 1166. In a leading treatise on the amendment process, the authors took the position that the fourteenth copy was a mere file or records copy. Apparently these authors take the position that there is no reason to address the possibility that the fourteenth copy was prepared to provide a vehicle for presidential action, signature, or veto. See BERNSTEIN & AGEL, *supra* note 43, at 44 & n.33. Vermont, the fourteenth state, admitted to the Union subsequent to congressional action on the Bill of Rights, was one of the Bill of Rights's eleven ratifying states. See *id.* at 45. Apparently, Vermont acted although it never received one of the original fourteen engrossed copies.

The norms of parliamentary procedure demand that such deliveries must be made expeditiously following enrollment and authentication on March 11, 1794. We do know that on or before March 27, 1794, New York ratified the proposed amendment and communicated its ratification to the Federal Government. Thus the President had to have received the enrolled resolution on or after March 11, 1794, but before March 27, 1794. *And the Third Congress was in continuous session between December 2, 1793 and June 9, 1794.*⁸⁰ In this situation, the absence of the President's signature from the enrolled resolution no more frustrates valid passage than would the absence of his signature from a bill prevent the bill from becoming a law. And concomitantly, any argument founded on lack of presentment or delivery must also fail.

The records of the Executive Branch are in accord. The President did not personally circulate the copies of the enrolled resolutions to the governors of the States. He committed that matter to Secretary of State Edmund Randolph. The Secretary transmitted the resolutions and attached an accompanying letter with each resolution. The Secretary wrote:

Congress having requested the President of the United States to transmit to the Executives of the several States copies of the Amendment, proposed by them to be added to the Constitution of the United States, respecting the judicial power, I have it in charge from him to forward one of those copies to your Excellency.⁸¹

At least one of these letters was dated March 17, 1794, a date after congressional enrollment and prior to New York's ratification and well prior to the next congressional adjournment.⁸² We take judicial notice of the transactions and public records created by public officials.

Under these circumstances there cannot be a scintilla of doubt that Congress delivered the enrolled resolution to the President, that this delivery constituted presentment, and that the President's failure to sign the resolution

80. See YEARS OF THE 1ST THROUGH 108TH CONGRESSES 2 (July 2003), at <http://www.senate.gov/reference/congresses1.pdf> (listing dates of sessions of Congress since the First Congress, noting dates of adjournments and recesses, and indicating that June 9, 1794 terminated the first session of the Third Congress, with the second session convening on November 3, 1794); Journal of the Senate 3, 114–16 (Dec. 2, 1793) (noting the dates of commencement and adjournment of the Third Congress), available at <http://memory.loc.gov/ammem/amlaw/lawhome.html>.

81. See Letter from Edmund Randolph to the Governors of the States (Mar. 17, 1794), reprinted in 5 DHSC, *supra* note 16, at 625, 625.

82. *Id.* Interestingly, Randolph represented the Indiana Company—the real party in interest in *Hollingsworth*—at a preliminary stage of the prejudicial proceedings. See 5 DHSC, *supra* note 16, at 277 (“In June 1779, William Trent, assisted by Edmund Randolph, presented the Indiana Company’s case before a joint session of the legislature.”). *But cf. id.* at 281 (recording that Governor Edmund Randolph, at the Virginia ratifying convention, took the position that his former client had been “dissolved” and that its claim would “probably never be revived”).

in no sense vitiated the validity of the resolution under the ORV Clause, even assuming it applies to Article V.

Again, to be clear, like my brother Cushing, I do not reach the question of whether or not in proposing an amendment Congress must present the enrolled resolution to the President. Nor do I reach the question of whether the President has authority to return veto or to pocket veto a proposed amendment. Nor do I reach the question of whether purported procedural defects under Article V are justiciable. Rather, I only conclude that on these facts—when it cannot be doubted that Congress has actually presented the amendment prior to ten days before Congress’s end of session adjournment—presidential inaction in failing to sign the enrolled resolution is wholly consistent with all our procedural norms.

Lastly, I feel compelled to air my concern about the courtroom behavior of Tilghman and Rawle, attorneys for Petitioners. These two attorneys came into this Court and argued that “the amendment was never submitted to the President for his *approbation*.” They left this Court *and all future observers of our proceedings* with the distinct impression that Congress never delivered the proposed amendment to the President and that the President never received it. They knew, or should have known, otherwise. If on the other hand, the import of their statement was merely that the Congress (or, at least, the Senate) was of the opinion that the President plays only a ministerial role⁸³ in the amendment process and is otherwise without any power to veto or sign such a resolution, then their statement is technically accurate—the amendment, although presented, was not submitted for presidential “*approbation*.” But no one in open court hearing Tilghman and Rawle’s statement understood it to mean that. All understood it to mean that Congress failed to deliver the resolution to the President, thereby rendering him unable to comply with niceties of the ORV Clause. This has all the hallmarks of a lawyer’s trick, an imposition. If they knew the difference but willfully failed to clarify this point to the Court, they should be struck off. Perhaps such behavior passes muster in the municipal courts of Philadelphia and the state courts of Pennsylvania, but not here.

3. *A Dictionary’s View of Hollingsworth*.—Opinion of Chase, J. I join only the judgment of my brothers Cushing and Paterson. For the reasons I elaborate below, I do not join their opinions.

My brother Paterson has taken the position that we must put the public mind at rest. And in this regard he incontestably establishes the propriety by which this Amendment has been adopted. In doing so, he has opened Pandora’s box by exposing every other amendment to the Constitution to

83. See *supra* note 77 (referring to a Senate *Journal* entry indicating that the President plays no substantive role in amendment process).

substantial doubt. Unlike the Eleventh Amendment, the Bill of Rights was passed by the First Congress a mere four days prior to the adjournment at the end of its first annual session.⁸⁴ And the Bill of Rights, like the Eleventh Amendment, was not signed by the President.⁸⁵ It is true that this matter—the legal validity of the Bill of Rights—is not properly before us. But if we are, as brother Paterson suggests, obligated to put the public mind at rest, then far be it for us to buy one amendment at the cost of ten, or even to expose this hard-fought declaration to public doubt.

Admittedly, this Court is not competent to engage in freewheeling dicta by examining legal issues that are irrelevant to deciding the cases brought by actual litigants engaged in substantial controversies. Thus, if I were to suggest a means by which the Bill of Rights might be preserved in its integrity, but which was irrelevant to the case at hand, I would be remiss in presenting such dicta to the public. Such early publication of advance reasoning is not the role of this or any court of the United States.

On the other hand, if the means by which this case may be determined might also save the constitutionality of the Bill of Rights, and so put the public mind at rest, I would be equally remiss to hide from the public such arguments of general application by merely relying on arguments of more limited use but of equal applicability to the case at hand. And happily that is the situation here.

Under Article VII, the officers of the United States and of the States are obliged by solemn oaths (or affirmations) to uphold this Constitution. Whether that obligation started the day New Hampshire became the ninth State to ratify the Constitution (June 21, 1788), the day chosen by the Articles Congress for the new government to meet (March 4, 1789), or the day both houses of the new Congress finally had a quorum and began organizing the new national government (April 6, 1789), is an interesting

84. Final congressional action on the Bill of Rights occurred on September 25, 1789. 5 SCHWARTZ, *supra* note 62, at 1154 & caption 133. Congress subsequently adjourned on September 29, 1789. See YEARS OF THE 1ST THROUGH 108TH CONGRESSES, *supra* note 80, at 2 (listing dates of sessions of Congress since First Congress, including adjournments and recesses).

In this regard, Professor Black was prescient. Professor Black believed that a different result in *Hollingsworth* would necessarily put the Bill of Rights into doubt. See Black, *Correspondence*, *supra* note 37, at 898 n.11 (concluding that “a different decision would have invalidated the whole Bill of Rights”). In this he erred. But as explained here, *Hollingsworth* did have serious implications for the Bill of Rights arising out of the timing of annual congressional adjournment. Professor Black’s writings do not address the adjournment problem. Instead, he argued that the threat to the Bill of Rights arose from a possible failure of congressional presentment or presidential action. See Black, *Amending the Constitution*, *supra* note 37, at 206–09 (questioning the constitutionality of a bill that would exclude the President from the process of calling a convention); Black, *Correspondence*, *supra* note 37, at 897 (expressing his concern about the “possible elimination of the President from all parts of the [amendment] process”).

85. See, e.g., 5 SCHWARTZ, *supra* note 62, at 1154 & caption 133 (reproducing the image of the enrolled parchment including signatures).

question that we need not address.⁸⁶ Whenever that obligation began, it is now, almost a decade later, undoubtedly in force. It was a condition precedent of that obligation that at least nine of the original thirteen states *ratify* this Constitution. The Constitution having been ratified and the oaths to uphold that Constitution having been taken, it is not open to members of this Court to object to its legal validity on the basis of *preratification* procedural imperfections, assuming that they exist. This Court cannot today or on any future day examine the legality of each state's ratification under its own constituent charter prior to the adoption of this Constitution. Nor can this Court today or on any future day examine the propriety by which the Congress of the Articles of Confederation submitted the then-proposed Constitution of 1787 to the States in undoubted violation of the Articles of Confederation. Preratification violations of preconstitutional legal norms are not justiciable.⁸⁷ Even if such violations in some abstract sense could be shown to have occurred during the adoption of this Constitution, we—and every other officer of the United States and of the several States—have subscribed to oaths to uphold this Constitution nonetheless.

As I stated, the word “ratify” (or more accurately, its root) is used in Article VII; it is also used in Article V which governs the amendment process. Congress proposes amendments; the States ratify them. This relationship is not an equalitarian one. If the Founders intended an equalitarian relationship, the Constitution would have used a more appropriate word. For example, the relationship between the Senate and House is one built on equality. The House may have the power to initiate so-called money bills, but the Senate may “propose or concur with amendments” as it sees fit.⁸⁸ The concurrence of each house is necessary to pass a law, even a money bill. If only one house acts on a bill, the President's signature cannot save it. But with amendments it is altogether different. Once the requisite number of States have acted in reliance on a submission to them from the Federal Government the amendment has been ratified, and preratification defects are washed away. This result arises not

86. See U.S. CONST. art. VII (establishing that ratification of nine States is sufficient to bring the Constitution into effect); ANDREW C. MCLAUGHLIN, A CONSTITUTIONAL HISTORY OF THE UNITED STATES 202 (1936) (noting the date New Hampshire became the ninth state to ratify the Constitution); Jacob E. Cooke, *Organizing the New National Government*, in THE FRAMING AND RATIFICATION OF THE CONSTITUTION 317, 318 (Leonard W. Levy & Dennis J. Mahoney eds., 1987) (stating that while Congress was “scheduled to convene on March 4, 1789, . . . [c]ongressmen arrived so tardily that it was not until April 6 that a quorum of both the Senate and the House was first present”).

87. See THE ARTICLES OF CONFEDERATION art. XIII (prescribing that amendments required unanimous agreement of all thirteen states), available at <http://www.constitution.org/cons/usa-conf.txt> (last visited Jan. 10, 2005). See generally Wayne B. Wheeler, *The Constitutionality of the Constitution is not a Justiciable Question*, 90 CENT. L.J. 152 (1920).

88. U.S. CONST. art I, § 7, cl. 1.

from any organic theory relating to states' rights or to state sovereignty, but from the very terms of the Constitution itself.

If this result seems novel or strange, then one only need consult any dictionary to discover that the most prevalent meaning of the word "ratify" comes from contract law. The common law teaches that when an agent exceeds his authority in negotiating a contract with a third party, the agent's principal may ratify that excess. Having done so, the contract is binding on all. Article V does not say that Congress and the States jointly ratify amendments. Article V states that the States, by one of two methods, ratify proposed amendments. It is true that both Congress and the States act for the sovereign people. But the people, through the mechanism of the Constitution, have vested the power to ratify amendments in the States themselves. The States may not be the actual principal, but they have been empowered to act as the principal for at least this limited purpose. It may be that in a proper case this Court might inquire into whether or not a sufficient number of States have actually ratified an amendment and whether each purported state ratification was in conformity with Article V, at least as that Article applies to States. But once a sufficient number of States have acted as required by the Constitution, we cannot make any inquiries as to the impropriety of any purported procedural errors by Congress or by the President. Once the requisite number of States have acted, it is too late to complain of apparently absent presidential action. Both the Bill of Rights and the Eleventh Amendment have been ratified by the requisite number of States. That ends the matter.⁸⁹

Of course, like my brothers Cushing and Paterson, I have no occasion, on these facts, to decide the applicability of the ORV Clause to Article V. Nor do I have any occasion to discuss the amenability of Article V to judicial review. Quite the opposite, substantial compliance by the States with regard to ratification procedures precludes further review by this Court on these facts. The result might have been different had Petitioners sought an adjudication of the validity of the proposed amendment prior to ratification by the last necessary State.⁹⁰

89. Lester Orfield notes:

Suppose the Congressional procedure of proposing an amendment was [sic] defective in some respect. Would such defect be cured by ratification by the states? One writer asserts that the Supreme Court would have to find the amendment invalid. There are some cases involving amendment of state constitutions which hold that the defect would be cured.

ORFIELD, *supra* note 49, at 53 (footnote omitted).

90. See *Hawke v. Smith*, 253 U.S. 231, 232 (1920) (illustrating that rulings were sought concerning the constitutionality of state ratification procedures with regard to the then "proposed Nineteenth Amendment"). As of the date of this particular ruling, June 1, 1920, only 35 of 36 necessary states had ratified the proposed amendment. The Secretary of State's proclamation of ratification of the Nineteenth Amendment was dated August 26, 1920, after *Hawke* proceedings had

4. *An Exacting Literalist's View of Hollingsworth*.—Opinion of Iredell, J. I respectfully dissent from our decision to vacate our prior opinion and order. These proceedings and my brother Chase's opinion are quite unnecessary.

On the day of the oral argument, my brother Chase stated in open Court: “[T]he negative of the President applies only to the ordinary cases of legislation: [the President] has nothing to do with the *proposition*, or *adoption*, of amendments to the Constitution.” *Hollingsworth*, 3 U.S. (3 Dall.) at 381 n. (emphasis added). All understood my brother Chase's plain meaning and no one objected. The Federal Government *proposes* amendments;⁹¹ the States *adopt* them. And in our opinion, issued the next day, we unanimously held “that the [Eleventh] amendment [was] constitutionally *adopted*,” *Hollingsworth*, 3 U.S. (3 Dall.) at 382, thereby clarifying what everyone must already know, namely that the presidency is not part of the apparatus of the states, nor a constituent element of the process by which amendments are *adopted*. Thus, we have already held in our prior, but now vacated, opinion that once an amendment is *adopted* by the requisite number of States, it perforce becomes a valid amendment without regard to the process by which it was initially *proposed*—a subject not discussed in our prior opinion.

In short, I find my brother Chase's opinion to be wholly redundant with our already reported opinion. And I can only believe that our attempt today to clarify the rationale of our prior holding will either insult or confuse the litigants, the bar, and the literate public.

D. Is It Significant That Hollingsworth May Have Been Misread for 200 Years?

Hollingsworth is “about enclosures, walls and boxes . . . walls in the mind. Enclosures within which all can be controlled and safely structured. Outside is otherness and danger. Between the safety inside and the uncontrollable outside are few windows through which to look in or out.”⁹²

concluded. *See also* *Leser v. Garnett*, 258 U.S. 130, 136 (1922) (citing *Hawke* in a discussion of the constitutionality of state ratification procedures).

91. Evidently, the Founders believed that constitutional strictures relating to *congressionally* proposed amendments occurring prior to state ratification proceedings were of little import. Presidential participation with regard to proposing constitutional amendments (including transmittal to the States) is not discussed in *The Federalist Papers*. Nor does *The Federalist Papers* anywhere discuss congressional *supermajority* requirements relating to the proposition of future amendments. It is possible that President Adams has taken a similar position. *See* John Adams to the United States Congress (Jan. 8, 1798), *reprinted in* 5 DHSC, *supra* note 16, at 637, 637–38 (“This amendment, having been *adopted* by three fourths of the Several States, may now be declared to be a part of the Constitution . . .”) (emphasis added). *But see id.* (noting that the Eleventh Amendment was proposed by Congress).

92. W.J.F. JENNER, *THE TYRANNY OF HISTORY: THE ROOTS OF CHINA'S CRISIS* 83 (1992). Jenner, of course, was not writing about *Hollingsworth*, but his words are apt nonetheless.

As I have illustrated, there are a variety of modern views regarding *Hollingsworth*. All relatively recent commentators⁹³ think (or thought) the case has something profound to tell us about the Constitution or the early Republic.⁹⁴ Some see the case as a precursor to *Marbury* and see within it the first stirrings of the intellectual underpinnings of judicial review and justiciability. Others see in *Hollingsworth* confirmation of favored historical theories relating to popular sovereignty involving the affirmation of constitutional lawmaking through the people's representatives without countermajoritarian intervention by the Executive Branch. Yet others see it as a shameful decision, without any intellectual legs to stand on, a radical departure from constitutional text and settled norms of interpretation, only "justified" because any other decision would "necessarily" endanger the Bill of Rights. The intellectual oddity of this situation deserves note and explanation. First, *Hollingsworth* has no express rationale, and none of the would-be rationales put forward by the various schools is necessary to its holding. Second, not only are the positions put forward by the various schools unnecessary, but one could easily account for the holding of *Hollingsworth* without recourse to any issues of great legal or historical moment. Third, nearly all the disputants use unusually strong language with regard to this long moribund case, a case having no practical effect on our public life.⁹⁵ And, fourth, many of the disputants remain blissfully unaware of the great gulf that separates their position from their intellectual opponents' different (if not flatly contradictory) positions. These are vast windowless intellectual walls. The existence of these walls calls for some explanation.

93. *But cf. Hawke*, 253 U.S. at 229 (proposing that in *Hollingsworth* the Court held "that the submission of a constitutional amendment did not require the action of the President"); 1 COOLEY & CARRINGTON, *supra* note 45, at 70 (citing *Hollingsworth* and *Hawke* for the proposition that "[t]he submission of an amendment does not require the action of the President").

94. The desire to find something of significant or transcendental value in judicial opinions may be an American innovation. Compare PATRICK DEVLIN, *EASING THE PASSING: THE TRIAL OF DOCTOR JOHN BODKIN ADAMS* 220 (2d ed. 1986) ("I have started the process [of] forgetting most of my [legal opinions]: they were not addressed to posterity."), with RICHARD D. PARKER, "HERE THE PEOPLE RULE": A CONSTITUTIONAL POPULIST MANIFESTO 121 n.42 (1994) (remarking that fetishism regularly characterizes conversations on constitutional law among American lawyers), and DAVID L. PULLIAM, *THE CONSTITUTIONAL CONVENTIONS OF VIRGINIA FROM THE FOUNDATION OF THE COMMONWEALTH TO THE PRESENT TIME* 61 (1901) (reporting that U.S. Chief Justice John Marshall stated during proceedings of the Virginia Constitutional Convention of 1829–1830 that "I have always thought, from my earliest youth till now, that the greatest curse an angry heaven ever inflicted upon an ungrateful and a sinning people was an ignorant, a corrupt, or a dependent judiciary. Will you call down this curse upon Virginia?"). Perhaps Baron Devlin's British world view might have been more representative of the *Hollingsworth* Justices than Marshall's? Cf. Theodore B. Olson, *Restoring the Separation of Powers*, 7 REG. 19, 30 (1983) ("The alarmists who have been bemoaning the *Chadha* decision seem to have little faith in the Constitution.") (emphasis added).

95. The author does not believe that anything he may write might endanger the legal validity of any extant constitutional amendments.

I believe there is an explanation for the strange intellectual status quo surrounding *Hollingsworth*. At the heart of *Hollingsworth* is the mysterious ORV Clause whose purpose, meaning, and reach is not only unknown, but largely undiscussed. The presence of a clause of unresolved purpose and reach threatens those who pride themselves on having a significant stock of constitutional, legal, and historical knowledge. This claim is well-supported by the fact that no contemporary legal commentator, jurist, or historian discussing *Hollingsworth* has been willing to investigate what the text of the ORV Clause might mean apart from the meaning Madison put forward in his *Notes of the Debates in the Federal Convention of 1787 (Debates)*.⁹⁶ Moreover, the interpretive stakes surrounding the ORV Clause are heightened. The ORV Clause is not part of a constitutional sideshow—what is at stake here is not some lawyers-only clause such as the Full Faith and Credit Clause, nor a clause of mere aspirational reach such as the Guarantee Clause. The ORV Clause directly relates to the guts of the Constitution: the normal process for statutory lawmaking, lawmaking by constitutional amendment, or both. How is it even conceivable that after more than two hundred years of the American experiment, no substantial academic or judicial efforts have been made to discover the intellectual origins of the clause, its meaning, or its reach? The text of the ORV Clause seems applicable at least to all bicameral resolutions including congressional resolutions proposing constitutional amendments, but as a structural and historical matter, the reach of the ORV Clause may be limited to the process of statutory lawmaking. This difficulty has not been resolved, and perhaps cannot be resolved to the satisfaction of all. Given that the worldviews, interpretive commitments, and basic knowledge of the parties are fixed, there is little opportunity for any substantial shift in position. The *Hollingsworth* decision only adds to the intellectual difficulty and tension because it comes to us without any express rationale. Modern commentators tend to see in *Hollingsworth* either their favored positions or their deepest fears—a Court run amok without even attempting to fashion a principled rationale.

The remainder of this Article will prove somewhat troublesome for many readers—the conclusions startling and the methodology (such as it is) untried. What I have presented in the prior pages was an attempt to unnerve the reader. Let me put it more bluntly. In order to present a wholly new theory of the intellectual origins of the ORV Clause, the now prevailing intellectual views surrounding *Hollingsworth* must first die. *Hollingsworth* must die so that we can again see unobfuscated the text of the United States Constitution as (some of) the Founders and ratifiers (may have) understood

96. James Madison, *Notes of the Debates in the Federal Convention of 1787*, reprinted in 5 THE DEBATES IN THE SEVERAL STATES ON THE ADOPTION OF THE FEDERAL CONSTITUTION, at 110 (Jonathan Elliot ed., 2d ed. 1881) [hereinafter ELLIOT'S DEBATES]. Madison's *Debates* can also be found in FARRAND, *supra* note 29.

it. This process cannot begin as long as *Hollingsworth* occupies the intellectual field. *Hollingsworth*, in nearly all of its contradictory incarnations, restricts the scope of our constitutional past and thereby burdens our intellectual present. By killing this unnecessary past, I propose to open again the intellectual field in the service of a new idea or ideal, albeit a very uncomfortable idea that might place large elements of our shared intellectual capital at substantial risk. I must ask the reader to brave a double take, to reconsider our knowledge of the historical and legal past.⁹⁷ If we have been wrong for two centuries about *Hollingsworth*, is it not worth also pondering whether we have been wrong about other things, things more central to our shared political and intellectual life?

In the “opinions” presented above, I made an effort to demonstrate that on the precise facts of *Hollingsworth* any hard conflict that might exist between Article V and the ORV Clause could be accommodated in such a way that the decision could be explained while leaving the standard view of both constitutional provisions intact. But as a matter of principle, the conflict remains and might present itself again in later amendments or on other facts.

In the remainder of this Article, I will present a novel interpretation of the ORV Clause and will attempt to explain the reach of the clause under this interpretation and why the clause’s reach cannot extend to Article V even though it could reach other constitutional provisions beyond the scope of Article I and to processes *unrelated* to statutory lawmaking traditionally understood. This interpretation will also explain the presence of several apparently purposeless and scattered subclauses in the Constitution allowing or mandating congressional action “by law.” Thus, on the plus side of the ledger, this interpretation can account for the *Hollingsworth* holding, and it can do so in a way that leaves coordinate constitutional provisions (i.e., the ORV Clause and the several clauses directing congressional action “by law”) not only intact, but serving a live and newly discovered or rediscovered⁹⁸ constitutional purpose. On the other hand, this interpretation comes to the reader with two admittedly substantial marks against it. First, although it is conceivable that the interpretation put forward here may have been known by the *Hollingsworth* Court, and possibly accounts for its holding, all knowledge of this interpretation has been subsequently lost, assuming it was ever known to anyone in the eighteenth century.⁹⁹ In other words, although

97. See PARKER, *supra* note 94, at 27, 48–49. Professor Parker developed the idea of a “double take” in this sense. This Article is in some small way an attempt to concretely apply his prior theoretical work. If I have failed to achieve this, it is, of course, no reflection on his work.

98. Cf. EDWARD S. CORWIN, *THE TWILIGHT OF THE SUPREME COURT: A HISTORY OF OUR CONSTITUTIONAL THEORY* 183 (1934) (“But certain people have recently raised the cry, ‘Back to the Constitution.’ Just how far back would they like to go?”).

99. There is historical precedent for such events. *E.g.*, 2 *Kings* 22:8 (relating Hilkiah’s (re)discovery of the “lost” scroll of *Deuteronomy*). Contemporaries do not always consider such rediscoveries to be of significant or of immediate importance. Compare 2 *Chronicles* 34:16–18

the interpretation put forward here is consistent with the constitutional text, I have found *no* originalist materials *directly* supporting this position. Second, the interpretation put forward here risks misplaced constitutional hypertextualism because it contemplates “discovering” relationships across disparate constitutional provisions passed by the Convention at different times for different purposes with changed membership and concomitantly imputing expertise with regard to detailed and technical points of legal draftsmanship and parliamentary procedure to the Convention members¹⁰⁰

(indicating that the King’s scribe first reported how public funds were being spent and only afterwards reported the discovery of a “lost” scroll), *with* Letter from Secretary of State Thomas Jefferson to State Governors (Mar. 1, 1792) (reporting first the highly significant congressional acts of the last session relating to fishing rights and post offices and concluding by noting that some amendments to the Constitution—the Bill of Rights—had been ratified), *reprinted in* 5 SCHWARTZ, *supra* note 62, at 1203, 1203.

From time to time, legal academics have attempted to rediscover a lost constitutional past, even when the result was surprisingly counterintuitive. *See, e.g.*, AKHIL REED AMAR, *THE BILL OF RIGHTS* 32 (1998) (contending that one of the purposes of the Establishment Clause was to “prohibit[] the national legislature from interfering with, or trying to *dis-establish*, churches established by state and local governments”).

100. *But see* Robert N. Clinton, *Original Understanding, Legal Realism, and the Interpretation of “This Constitution”*, 72 IOWA L. REV. 1177, 1190 (1987) (“[T]he framers had a finite sense of the meaning of language and . . . they strove to use language precisely They picked words quite carefully to convey precisely what they meant, no more and no less.”); *see also* RICHARD BROOKHISER, *GENTLEMAN REVOLUTIONARY: GOUVERNEUR MORRIS—THE RAKE WHO WROTE THE CONSTITUTION* 87–90 (2003) (reporting that the work of the Committee of Style, which controlled the final draft of the Constitution, was singly handled by Gouverneur Morris and noting that Madison wrote that “[t]he finish given to the style and arrangement of the Constitution fairly belongs to [his] pen” and that “[a] better choice could not have been made”).

Some years later, Gouverneur Morris penned his own analogue to the ORV Clause. *See* 3 JARED SPARKS, *THE LIFE OF GOUVERNEUR MORRIS* 494 (1832) (writing in his *Notes on the Form of a Constitution for France* (circa 1791): “[e]very law, or ordinance having the force of a law”) (translated from French original). What is an ordinance? *See* GEORGE PETYT, *LEX PARLIAMENTARIA* 243 (photo. reprint 1978) (1689) (“The Difference between an *Act of Parliament*, and an *Ordinance in Parliament* is, for that the *Ordinance* wanteth the threefold Consent [Commons, Lords, and royal assent], and is ordained by one or two of them.”); *The Instrument of Government* arts. XXX, XXXI, XXXVIII & XXXIX (Dec. 16, 1653), *in* *THE CONSTITUTIONAL DOCUMENTS OF THE PURITAN REVOLUTION 1625–1660*, at 414, 414–17 (Samuel Rawson Gardiner ed., 3d ed. rev. 1906) (discussing “acts” and “ordinances” of Parliament); 2 WILLIAM STUBBS, *THE CONSTITUTIONAL HISTORY OF ENGLAND 585–90* (London 1877) (distinguishing acts from ordinances); ROBERT LUCE, *LEGISLATIVE PROCEDURE: PARLIAMENTARY PRACTICES AND THE COURSE OF BUSINESS IN THE FRAMING OF STATUTES* 554 (1922) (“The antiquary, D’Ewes, referring to an ancient precedent that did not support his position, boldly declared the Commons had the right to pass laws in the form of ‘ordinances’ without the consent of the Crown.”); *see also* CORWIN, *supra* note 98, at 102 (“The ‘founding fathers’ owed their mental sustenance much more largely to seventeenth-century England than to the England with which they were themselves contemporary.”). Of course, we cannot not be absolutely sure that Morris was using the term “ordinance” in this fashion. It is worth noting, however, that Petyt’s treatise was heavily cited by Jefferson in his *Manual*. *Cf. Psalms* 147:19 (“He tells His words to Jacob, His *statutes* and *ordinances* to Israel.”) (emphasis added), *reprinted in* SIDDUR TEHILLAT HASHEM: NUSACH HARI ZAL ACCORDING TO THE TEXT OF RABBI SCHNEUR ZALMAN OF LIADI 162 (Rabbi Nissen Mangel trans., 5747); CARLETON KEMP ALLEN, *LAW AND ORDERS: AN INQUIRY INTO THE NATURE AND SCOPE OF DELEGATED LEGISLATION AND EXECUTIVE POWERS IN ENGLISH LAW* 24 (3d ed.

when their primary focus had been on the Constitution's large structural components.

In the end, I believe that whether you, the reader, agree with the interpretation or not will depend largely on how you think about parliamentary sovereignty.

III. The Prevailing View of Article I, Section 7, Clause 3

The near universal¹⁰¹ and yet unchallenged view of the ORV Clause is that it was introduced in order to ensure “that Congress could not circumvent the presentment requirement” already placed in Article I, Section 7, Clause 2 “by calling proposed legislation” something “other than a bill.”¹⁰² According to this view, the ORV Clause is redundant: it adds no substantive value not already expressed in the Constitution, but merely serves as an added layer of textual protection to values already fully expressed in Clause 2. This view of the purpose of the clause has been handed to us from generation to generation from no less an authority than James Madison—recorder, participant, and prime mover at the Philadelphia Convention.

1965) (“‘Legislation’ has not always meant what we understand by it today, or even what Coke understood by it in the seventeenth century, as that which has received the ‘threefold assent’ of King, Lords and Commons.”); DONALD S. LUTZ, *THE ORIGINS OF AMERICAN CONSTITUTIONALISM* 19–20 (1988) (“An ordinance usually was an authoritative command, but had a narrower scope and a less permanent nature than did a law or statute.”).

An eighteenth century view of the term ordinance *might* also support the position that an ordinance was a lesser act of legislation that took operative effect absent executive assent. *Cf.* Email from Alan Simcock, Executive Secretary of the OSPAR Commission for the Protection of the Marine Environment of the North-East Atlantic, to Seth Barrett Tillman (Nov. 25, 2003) (on file with the Texas Law Review). Simcock explains:

In the Channel Islands, a distinction was (and still is) drawn between a “Law” and an “Ordinance.” The former required the assent of the King if it was to be permanent. The other could have temporary effect without royal assent. . . . [I]n London at least, an ordinance [as used in colonial legislation] would have been understood as something taking effect without royal assent (and therefore without the assent of the Governor since the assent a British governor gives is not his own, but the royal assent).

Id.; see also F. DE L. BOIS, *A CONSTITUTIONAL HISTORY OF JERSEY* 56–59 (1972) (reproducing the 1770 and 1771 Orders in Council discussing laws and ordinances); RICHARD HOCART, *AN ISLAND ASSEMBLY: THE DEVELOPMENT OF THE STATES OF GUERNSEY 1700–1949*, at 2 (1988) (“An ordinance of the Court [i.e., the legislative assembly] did not require the approval of the Crown . . . before becoming law and could be of indefinite duration.”); Email from Michael Nelson de la Haye, Greffier of the States of Jersey, to Seth Barrett Tillman (Jan. 12, 2004) (on file with the Texas Law Review) (“Your understanding [of Jersey law] is broadly correct.”). On the other hand, it should be noted that in the Channel Islands, legal institutions descended from Norman law and not from the English common law tradition. *Cf.* HENRY CABOT LODGE, *A SHORT HISTORY OF THE ENGLISH COLONIES IN AMERICA* 407 (rev. ed. 1909) (“There came also [to New England prior to 1765] a few Normans from the Channel Islands . . .”); PHILIPPE PAYEN, *LES ARRÊTS DE RÈGLEMENT DU PARLEMENT DE PARIS AU XVIIIÈ SIÈCLE: DIMENSION ET DOCTRINE* 39 (1997) (noting that ordinances are wrongly analogized with royal legislation).

101. Occasionally, the adventurous or foolhardy have made attempts to explain the origins of the ORV Clause. These attempts usually ended in failure of Scott-like proportions. See BRECKINRIDGE LONG, *GENESIS OF THE CONSTITUTION OF THE UNITED STATES OF AMERICA* 120–

21, 226 & n.74 (1926) (suggesting that the origin of the ORV Clause is to be had in the preface to Daniel Coxe's *A Description Of the English Province of Carolana*). Below is an excerpt from Daniel Coxe's work:

It is further humbly propos'd, That two Deputies shall be annually Elected by the Council and Assembly of each Province [of colonial British North America], who are to be in the Nature of a Great Council, or General Convention of the Estates of the Colonies; and by the Order, Consent or Approbation of the Lieutenant or Governour General, shall meet together, Consult and Advise for the Good of the whole . . . in all which Cases the Governor General or Lieutenant is to have a Negative; but not to Enact any Thing without their Concurrence, or that of the Majority of them.

DANIEL COXE, *A DESCRIPTION OF THE ENGLISH PROVINCE OF CAROLANA, BY THE SPANIARDS CALL'D FLORIDA, AND BY THE FRENCH LA LOUISIANE*, preface at C (1722) (emphasis omitted). Long deserves credit for, at least, making an effort.

For other attempts, see SYDNEY GEORGE FISHER, *THE EVOLUTION OF THE CONSTITUTION OF THE UNITED STATES 165-66* (1897) (arguing that the origin of Article I, Section 7 is to be found in the New York Constitution of 1777 and the Massachusetts Constitution of 1780); EDWARD CAMPBELL MASON, *THE VETO POWER: ITS ORIGIN, DEVELOPMENT AND FUNCTION IN THE GOVERNMENT OF THE UNITED STATES 1789-1889*, at 19 n.2 (Albert Bushnell Hart ed., Boston, Ginn & Co. 1890) (asserting that the veto power clause is based on the Massachusetts Constitution of 1780); discussion *infra* note 116 (exploring the similar position taken by Max Farrand). The difficulty with the Mason-Fisher-Farrand position is that Madison's motion of August 15, 1787 was taken almost word for word from the Massachusetts Constitution of 1780, but the Convention decisively defeated Madison's attempt to make the national constitution conform to the already in-force Massachusetts Constitution. Furthermore, as a textual matter, the Massachusetts Constitution of 1780 places a higher burden on the legislature than does the Constitution of 1787 with regard to the majority necessary to override an executive veto. Both require two-thirds to override. But there is a nuance of difference. The Massachusetts Constitution requires two-thirds of those "present" to override a Governor's veto, but the Constitution of 1787 only requires two-thirds of those present and voting, a quorum being present. Compare U.S. CONST. art. I, § 7, cl. 2 (directing that a veto override, "if approved by two thirds of that House, . . . shall become a Law"), with MASS. CONST. of 1780, pt. 2, ch. 1, § 1, art. II (mandating that a veto override "approved by two thirds of the members present, shall have the force of a law"), and *supra* note 77 (discussing the meaning of "two-thirds"). In the latter case, an otherwise present member's nonvote is effectively a vote against override. This is not true in the former case. Of course, this distinction is of no value to those who believe that parliamentary procedure was of little moment to the conventioners. It is worth noting that Massachusetts practice today does not conform to the text of their state constitution. See Email from William Welch, Senate Clerk, Massachusetts General Court, to Seth Barrett Tillman (Jan. 26, 2004) (on file with the Texas Law Review) (positing that a "4 to 2 [vote] would be considered a two-thirds vote" for a veto override were a quorum of 21 of the 40 Senate members present). It is unclear to the author if it ever conformed in the past. Of course, one must not be too hard on Massachusetts. Just as Massachusetts has ignored the textual requirement in its state constitution mandating that veto override reach two-thirds of members present (as opposed to two-thirds of votes cast), the Supreme Court has (ostensibly) imposed a two-thirds members present requirement where the U.S. Constitution is otherwise silent. See *supra* note 64 (discussing the *National Prohibition Cases*); cf. *United States v. Alice Weil*, 29 Ct. Cl. 523, 544 (1894) ("The only material change which the convention made [from the New York Constitution of 1777] was in the two-thirds clause, from which they struck the words 'of the members present' and inserted in their stead 'of that House.'").

Another line of thinking suggests that the ORV Clause was to ensure that minor or trivial acts of legislation were presented to the President. In other words, the purpose was not to block congressional legerdemain (avoiding presentment by calling a bill other than a bill), but to ensure that all acts of legislation, no matter how minor, were seen as being encompassed by the strictures governing presentment. See LUTHER HENRY PORTER, *OUTLINES OF THE CONSTITUTIONAL HISTORY OF THE UNITED STATES 115* (1883) ("All proceedings of Congress, even the most trivial, are thus subjected to executive scrutiny."); see also LUCE, *supra* note 100, at 555 (citing

Madison, in his notes from the Convention, recorded that he introduced a similar measure on August 15, 1787. With regard to the measure he

Pennsylvania constitutional disputes of 1783 and noting that “[r]esolution’ or ‘resolve’ won favor [over the once popular ‘ordinance’], at least for a time, as the designation of minor, inferior, perhaps temporary law”); *cf.* *INS v. Chadha*, 462 U.S. 919, 982 n.17 (White, J., dissenting) (noting that “resolve” under the Pennsylvania Constitution of 1776 was “urgent temporary legislation”). Although Luce’s theory for the origin of the ORV Clause might account for the term “resolve” or “resolution,” particularly to the ears of New Englanders, it cannot account for a term as broad as “vote.” Moreover, this theory stands as a clear rejection of the classical Madisonian position, which tied the ORV Clause to fears of congressional legerdemain with regard to substantial legislation. *Cf., e.g.,* 2 JOSEPH STORY, *COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES* § 889 (Fred B. Rothman Publications, photo. reprint 1991) (1833) (“[C]ongress, by adopting the form of an order or resolution, instead of a bill, might have effectually defeated the president’s qualified negative in all the *most important* portions of legislation.”) (emphasis added).

102. McGinnis & Rappaport, *supra* note 4, at 342 n.68 (quotation marks omitted). *But cf.* 1 FRANCIS NEWTON THORPE, *THE CONSTITUTIONAL HISTORY OF THE UNITED STATES 1765–1895*, at 513 (1901) (“Randolph *perhaps apprehensive* of objectionable legislation in some other form than that of a bill, proposed an entirely new and more comprehensive provision [than that already in Art. I, § 7] . . .”) (footnote omitted) (emphasis added). Thorpe was quite clearly uncomfortable with Madison’s explanation for Randolph’s motion.

Moreover, Madison’s concern had no British historical or procedural roots. Consider, for example, the following excerpts from an email I received from the Clerk of the United Kingdom House of Commons:

You are right in supposing that the problem Madison identified—the potential identification of fully enacted statute law with a resolution of either or both Houses—simply did not exist in eighteenth century England. . . .

Nor (certainly since the happy days of the Republic and the Commonwealth) have the enacting words of statutes varied much. The kind of ‘relabelling’ you envisage was never, I am sure, a possibility in Britain.

. . . .

Madison may have had reasons for his concern, derived from the kind of constitution he was building: but by the same token this concern was not remotely grounded in contemporary Britain.

Fundamentally, I think the position is this. The premise of the US constitutional provision you quote [the ORV Clause] could not arise or have arisen in Britain: no resolution could become a law.

Email from Sir William McKay, Clerk of the House of Commons (ret.), to Seth Barrett Tillman (June 3, 2003) (on file with the Texas Law Review). *But compare* Michael B. Rappaport, *The President’s Veto and the Constitution*, 87 NW. U. L. REV. 735, 752 n.64 (1993) (“This fear [of congressional attempts to evade presentment] was not hypothetical. During the dispute between the Long Parliament and Charles I, the House of Commons asserted the right to pass laws in the form of ‘ordinances,’ which it claimed required the approval only of one house . . .”) (citing LUCE, *supra* note 100, at 554), *with* CONRAD RUSSELL, *THE FALL OF THE BRITISH MONARCHIES 1637–1642*, at 370 (1991) (contending that single-house lawmaking by the House of Commons illustrated that “their real quarrel in the summer of 1641 was with the Lords as much as with the King”).

Nevertheless, the Madisonian position occupies the field. *See, e.g.,* GEORGE ANASTAPLO, *THE CONSTITUTION OF 1787: A COMMENTARY* 45–48 (1989); DUMBAULD *supra* note 61, at 105; WILLIAM M. MEIGS, *THE GROWTH OF THE CONSTITUTION IN THE FEDERAL CONVENTION OF 1787*, at 119–21 (1900); Clinton, *supra* note 100, at 1190 & nn.42–43; Crovitz, *supra* note 4, at 44–46 & nn.9–12; Robert W. Ginnane, *The Control of Federal Administration by Congressional Resolutions and Committees*, 66 HARV. L. REV. 569, 572–73 & nn.5–8 (1953); Harold J. Krent, *Separating the Strands in Separation of Powers Controversies*, 74 VA. L. REV. 1253, 1277–78 & n.101 (1988); J. Gregory Sidak & Thomas A. Smith, *Four Faces of the Item Veto: A Reply to Tribe and Kurland*, 84 NW. U. L. REV. 437, 465 & nn.161–68 (1990).

introduced, Madison “observ[ed] that if the negative of the President was [sic] confined to *bills*, it would be evaded by acts under the form and name of resolutions, votes, &c., [and so] proposed that ‘or resolve’ should be added after ‘*bill*,’ in the beginning” of Clause 2 “with an exception as to votes of adjournment”¹⁰³ His measure to amend Clause 2 was defeated eight to three, after “a short and rather confused” debate.¹⁰⁴ *This was the only debate at the Convention that Madison described as “confused.”* On August 16, 1787, the next day, and prior to any intervening significant reported debate or motions, Edmund Randolph, another Virginia delegate, proposed the ORV Clause. Unlike Madison’s proposal, which added text within an extant clause, Randolph’s proposal was a free-standing clause. Madison stated that Randolph’s measure was “a new form [of his prior] motion putting votes, resolutions, &c., on a footing [equal] with bills.”¹⁰⁵ Randolph’s motion carried nine to one. *Within less than twenty-four hours—and with only “confused” debate—seven¹⁰⁶ of ten voting states shifted their vote in support of a motion ostensibly serving the same purpose as one they had just rejected!* Even acting alone, these seven States (including Madison’s Virginia) were a quorum under the Convention’s rules. Indeed, if Madison’s and Randolph’s motions achieved identical ends, then Randolph’s bringing his motion on August 16, 1787 was (arguably) a violation of a standing order of the Convention: any renewal of a matter already rejected by the Convention required one day’s notice. And here no such notice was given.¹⁰⁷

103. 5 ELLIOT’S DEBATES, *supra* note 96, at 431 (recording Madison’s entries for August 15 and 16, 1787).

104. *Id.* The defeated “ayes” included Massachusetts, Delaware, and North Carolina. Rhode Island and New York were absent. All other states voted “nay.” 2 FARRAND, *supra* note 29, at 296.

105. 5 ELLIOT’S DEBATES, *supra* note 96, at 431. The Massachusetts delegation was “not present.” New Jersey was the only “nay” vote. Rhode Island and New York were again absent. All other states voted “aye.” 2 FARRAND, *supra* note 29, at 305.

106. Seven states that voted against Madison’s proposal voted for Randolph’s: New Hampshire, Connecticut, Pennsylvania, Maryland, Virginia, South Carolina, and Georgia. *See supra* notes 104–05.

107. *See* 5 ELLIOT’S DEBATES, *supra* note 96, at 124 (recording the adoption of rules by the Convention on May 28, 1787). Further rules were adopted on May 29, 1787, including: “That a motion to reconsider a matter, which had been determined by a majority, may be made, with leave unanimsly given, on the same day in which the vote passed, but otherwise, not without one days previous notice” 1 FARRAND, *supra* note 29, at 16; *see also id.* at 95, 104 (recording Hamilton’s objection that an amendment was out of order and demanding one day’s notice under the rules). Steven James, however, notes:

It does appear, on its face, that there is an argument that the Convention failed to enforce its rule regarding reconsideration.

. . . Under the practices of the Massachusetts House of Representatives, and of many, if not all, legislative bodies, unless an objection is made immediately subsequent to its being offered, a motion is considered to be in order.

Email from Steven James, Clerk of the House, Massachusetts General Court, to Seth Barrett Tillman (Dec. 2, 2003) (on file with the Texas Law Review); *cf.* Email from Steve Winter, Clerk of the New Hampshire Senate, to Seth Barrett Tillman (Dec. 3, 2003) (on file with the Texas Law

Now one might think that a person setting out to interpret (or reinterpret) the text of the ORV Clause might, in addition to Madison's convention notes, also consult the *Journal of the Convention* and extant convention papers kept by other delegates, the state ratifying debates, *The Federalist Papers*, and other pro- and anti-ratification documents and pamphlets, the early commentators—Judge Tucker, Thomas Sergeant, United States Attorney Rawle (perhaps there might be some bias here considering his role in *Hollingsworth*), Chancellor Kent, and Justice Story¹⁰⁸—or any of a number of federal (or state) cases over the past several hundred years. Search as one might, one discovers precious little case law or commentary discussing the actual text of the ORV Clause. Instead of serious discussion what one usually finds is this: the ORV Clause is quoted; Madison's explanation of the import of the ORV Clause is presented and accepted without discussion or noting any *even projectable* (to borrow a phrase)¹⁰⁹ nuance or textual difficulty; and the clause is frequently critiqued for being redundant with regard to values already fully expressed in Clause 2.¹¹⁰ Remarkably, no commentator or historian writing after the publication of Madison's *Debates* has ever felt called upon to account for a shift of seven states over the course of twenty-four hours.

How is it that Madison has so mesmerized American lawyers for two centuries? What images are conjured in the hearts and minds of American judges, lawyers, and scholars such that his merest scrawl is accepted as near incontrovertible truth?¹¹¹ How is it possible that there is no recorded

Review) (“Mr. Randolph’s motion was in order. He presented a new motion; he did not move to reconsider. The Motion to Reconsider is applied to a VOTE, not a measure.”).

108. Charles Warren was of the opinion that Sergeant, Rawle, Kent, and Story were the primary post-ratification commentators on constitutional law who published prior to the 1840 publication of Madison's *Notes of the Debates in the Federal Convention of 1787*. Inexplicably, Professor Warren left Judge Tucker off the list. See CHARLES WARREN, *THE MAKING OF THE CONSTITUTION* 802–03 (1928). But see FELIX FRANKFURTER, *THE COMMERCE CLAUSE UNDER MARSHALL, TANEY AND WAITE* 13 (1937) (“The influential early commentators on the Constitution—*The Federalist* and Tucker's *Blackstone* . . .”).

109. See *supra* note 37 (quoting Professor Black's judgment that there was “no really adequate reason even projectable” for the *Hollingsworth* decision).

110. See *supra* notes 1–4 and 102.

111. See, e.g., FAME AND THE FOUNDING FATHERS: ESSAYS OF DOUGLASS ADAIR 60 (Trevor Colbourn ed., 1974) (“No man in America knew as much about the specific clauses of the new Constitution as Madison; no man in all the world had studied so thoroughly the general problems of federalism.”). But see *infra* note 125 (noting Madison's inability to fathom the distinction between revenue bills and appropriations); notes 193–95 (noting Madison's inability to fathom the minimum number of votes necessary for passage of a bill through the two houses of Congress). Adair's statement is not objectionable because it inflates Madison's intellectual contribution to the Founding. Rather, it is objectionable because in order to assess Madison's knowledge, we, the modern observer, need an independent stock of constitutional knowledge against which to measure *his*. This is largely impossible because the greatest part of our modern conception of “correct” constitutional knowledge springs directly from Madison's writings, including his *Debates*. E.g., THE FEDERALIST NO. 10 (James Madison) (Clinton Rossiter ed., 1961); THE FEDERALIST NO. 51,

examination of the validity of his statements above—or at least none that the author could find after much research?

In this situation it might be best to follow the advice of Madison's useful contemporary, Justice Iredell, the lone dissenter from *Chisholm*: "It may be material first to see what the constitution says."¹¹²

Art. I, § 7, cl. 2. Every Bill which shall have passed the House of Representatives and the Senate, shall, before it becomes a Law, be presented to the President of the United States; If he approve he shall sign it, but if not he shall return it, with his Objections to that House in which it shall have originated, who shall enter the Objections at large on their Journal, and proceed to reconsider it. If after such Reconsideration two thirds of that House shall agree to pass the Bill, it shall be sent, together with the Objections, to the other House, by which it shall likewise be reconsidered, and if approved by two thirds of that House, it shall become a Law. But in all such Cases the Votes of both Houses shall be determined by yeas and Nays, and the Names of the Persons voting for and against the Bill shall be entered on the Journal of each House respectively. If any Bill shall not be returned by the President within ten Days (Sundays excepted) after it shall have been presented to him, the Same shall be a Law, in like Manner as if he had signed it, unless the Congress by their Adjournment prevent its Return, in which Case it shall not be a Law.

Art. I, § 7, cl. 3. Every Order, Resolution, or Vote to which the Concurrence of the Senate and House of Representatives may be necessary (except on a question of Adjournment) shall be presented to the President of the United States; and before the Same shall take Effect, shall be approved by him, or being disapproved by him, shall be repassed by two thirds of the Senate and House of Representatives, according to the Rules and Limitations prescribed in the Case of a Bill.¹¹³

supra note 74; see also Kramer, *supra* note 14, at 611 ("James Madison's *The Federalist No. 10* is the ur-text of American constitutional theory . . ."). If this seems like hyperbole to the reader, then check any case book on constitutional law for law students and count the combined citations to Tucker, Sergeant, Rawle, Kent, and Story. You will not need two hands.

112. 5 DHSC, *supra* note 16, at 153 (recording Justice Iredell's statement in Farquar's Ex'r. v. Georgia, Cir. Ct. D. Ga. (1791), *implicitly overruled by* Chisholm v. Georgia, 2 U.S. (2 Dall.) 419 (1793), *superseded by* U.S. CONST. amend. XI).

113. The reader may be interested in the text of the motion as originally proposed by Randolph: Every order resolution or vote, to which the concurrence of the Senate & House of Reps. may be necessary (except on a question of adjournment *and in the cases hereinafter mentioned*) shall be presented to the President for his revision; and before the same shall have force shall be approved by him, or being disapproved by him shall be repassed by the Senate & House of Reps. according to the rules & limitations prescribed in the case of a Bill.

A. *The Interpretive Mystery of Article I, Section 7, Clause 3*

There are two significant intellectual mysteries surrounding the ORV Clause. The first relates to the major interpretive difficulties posed by the clause's text. Several are noted below. But the greater mystery is the lack of *any substantial discussion* surrounding the meaning of this clause directly grappling with the text, the difficulties noted below, or its relation to Clause 2 and to other constitutional provisions as typified by articles and cases discussing *Hollingsworth v. Virginia*.

First, under Clause 2, "bills" become "laws." Orders, resolutions, and votes do not become laws—they "take Effect."¹¹⁴ Is this merely another way to say they become "laws"? Is this change in language evidence of Madison's position that the purpose of the ORV Clause was to put orders, resolutions, and votes on the same "footing with bills"? And if orders, resolutions, and votes are not "laws," are they excluded from the cognizance of the Article III courts that only have jurisdiction over the Constitution, laws, and treaties of the United States, as opposed to orders, resolutions, and votes that merely "take Effect"? Is bicameral passage of an order followed by presentment merely a shorthand procedural contrivance to exclude the federal courts? If Congress acts bicamerally, but neglects to label the document, is the default a bill (with Article III oversight), or an order (absent Article III oversight)? Does the Executive Branch get to make the determination after congressional action? Certainly excluding the cognizance of the federal courts over orders, resolutions, or votes is hardly indicative of the ORV Clause putting the former on the same "footing with bills."

Second, why is there a special exception for adjournments in the ORV Clause? And why is no similar exception placed into Clause 2? May Congress adjourn by law (with presentment) as opposed to an ORV Clause adjournment by bicameral resolution (absent presentment)?¹¹⁵ If the ORV

3 ELLIOT'S DEBATES, *supra* note 96, at 441–42 (emphasis added).

Although the italicized language was dropped by the Convention as having no application, "order" and "resolution" were left in the Constitution even though these words are used in no coordinate substantive provision of the Constitution of 1787. "Vote" is used in other constitutional provisions, but only with regard to unicameral action. How is it that this has gone unremarked? *Cf. infra* note 126 (discussing the likely original meaning of the term "vote").

114. Rankin M. Gibson, *Congressional Concurrent Resolutions*, 37 A.B.A. J. 421, 423 n.8 (1951) (noting the Constitution's textual distinction between bills that "become a Law" and resolutions that "take Effect").

115. The propriety of presidential participation in congressional adjournment orders embedded in laws perplexed the Washington administration. *Compare* James Madison, House Floor Speech (Sept. 21, 1789) (arguing that because the power to adjourn is assigned exclusively to the two houses, adjournment by law is a violation of the ORV Clause), *reprinted in* 12 THE PAPERS OF MADISON 416, 416–18 (Charles F. Hobson & Robert A. Rutland eds., 1979), *with* Letter from Secretary of State Thomas Jefferson to President George Washington (July 15, 1790) (relying on the ORV clause for the "opinion . . . that the adjournments of Congress may be by law [with

Clause by implication renders adjournment by law impossible under Clause 2, is this not expressive of Clause 3 enshrining a new (albeit limited) value? And if it expresses a new value, is this not inconsistent with Madison's rationale for the clause? Alternatively, one might also ask why Madison's motion made no exception for adjournment resolutions.

Third, why did Madison propose adding "resolve" to Clause 2 while Randolph added "orders, resolutions, and votes" to the ORV Clause? Is that consistent with Madison's apparent position that Randolph's clause achieved the same practical ends that his rejected proposal attempted to achieve? What precisely is an order, resolution, or vote? Are they different from one another or from bills? If the purpose, as Madison's intellectual heirs have argued, was to include every procedural contrivance that Congress might choose to label a bill and so escape the President's veto, should not the ORV Clause have read "every order, resolution, vote, or any other procedural contrivance (i.e., ballot) achieving legislative or juristic effect" or something to that effect? *And why were seven state delegations willing to vote on August 16, 1787 in support of Randolph's arguably broader proposal (encompassing orders, resolutions, and votes), but unwilling—even as an interim measure—to vote for Madison's more limited proposal (resolves) on August 15, 1787? Was the good (Madison's proposal) somehow the enemy of the best (Randolph's proposal)?*

Fourth, why does the ORV Clause use (apparently) needlessly syntactically complex and elliptical language: "the Concurrence of the Senate and House"? Who or what else would concur in a bicameral legislature? Moreover, if one house has already acted by passing the order, resolution, or vote, for surely it is not an order, resolution, or vote until at least a single house has acted upon the measure, then all that is required for normal bicameral passage is the "concurrence of the other house." Would not the ORV Clause have been clearer and simpler if it stated "every order, resolution, or vote to which the concurrence of the other house remains necessary shall be presented to the President"? And is not the word "necessary" unnecessary? Would not the ORV Clause have been clearer if it stated that "[e]very order, resolution, or vote upon concurrence by the other house shall be presented to the President"? Certainly this suggested language runs more closely parallel to Clause 2, and Clause 2 was already available to the Convention as a model for the ORV Clause. Does the ORV Clause's new language suggest the possibility that the purpose of the ORV Clause was to achieve a new substantive value not already expressed in Clause 2?

presidential participation], as well as by resolution [absent presidential participation]"), reprinted in 17 THE PAPERS OF THOMAS JEFFERSON 193, 193 (Julian P. Boyd ed., 1965). Between Madison and Jefferson, who was the greater expert on parliamentary procedure? See *supra* notes 7–12 and accompanying text.

Fifth, upon presidential veto of an order, resolution, or vote, the ORV Clause requires repassage “according to the Rules and Limitations prescribed in the case of a bill.” Does this latter restriction also apply to presidential *approval* of an order, resolution, or vote? In other words, is the Rules and Limitations Subclause linked only to the (immediately prior) Disapproval Subclause or does the Rules and Limitations Subclause also modify “approved by him”? If the Rules and Limitations Subclause does not modify “approved by him,” does that mean the President may approve an order, resolution, or vote without signing the document—that even absent a signature, presidential transmittal to the states of a congressional resolution proposing an amendment constitutes approval as substantial compliance? Moreover, this distinction, applying the Rules and Limitations Subclause only to the Disapproval Subclause but not to the Approval Subclause, can be supported by settled Supreme Court precedent and well established policy. In the lawmaking context, the primary purpose of the President’s signature is to bring a proposed law into force immediately (rather than waiting ten days following presentment).¹¹⁶ This is not the case with a proposed amendment;

116. See *La Abra Silver Mining Co. v. United States*, 175 U.S. 423, 454 (1899) (noting that “a bill when so signed becomes from that moment a law”). Many historians, including Max Farrand, have argued that the primary state source of Article I, Section 7 was the Massachusetts Constitution of 1780, *Frame of Government*, Chapter 1, Section 1, Article II, which also has a signature requirement. See MAX FARRAND, *THE FRAMING OF THE CONSTITUTION OF THE UNITED STATES* 145–46 (1913) (observing that the Convention committee “seem[s] to have copied directly from the constitution of Massachusetts, although Madison states it was modelled on New York”). But see *supra* note 101 (disagreeing with Farrand’s position). The Massachusetts Convention’s journal establishes that the purpose behind the introduction of the signature requirement, at least in Massachusetts, was to allow the governor to speed up the process of lawmaking. It states:

It was moved, and seconded, that a Committee be appointed to consider of the expediency of an additional clause or clauses . . . making provision for a more speedy decision upon the bills and resolves of the Legislature, in cases where the Governor shall have no objections to them, than is provided for [in Article II as it now stands]

See JOURNAL OF THE CONVENTION FOR FRAMING A CONSTITUTION OF GOVERNMENT FOR THE STATE OF MASSACHUSETTS BAY, FROM THE COMMENCEMENT OF THEIR FIRST SESSION, SEPTEMBER 1, 1779, TO THE CLOSE OF THEIR LAST SESSION, JUNE 16, 1780, at 143 (1832) (entry of Feb. 26, 1780); *id.* at 151 (entry of Feb. 29, 1780) (recording that the committee reported that “if [the Governor], upon such revision, approve thereof, he shall signify his approbation by signing the same”).

Although not contemporaneous with the Constitution of 1787, the position put forward here was adopted by the would-be founding fathers of the short-lived Confederate States of America. Compare U.S. CONST. art. I, § 7, cl. 3 (directing that “before the Same shall take Effect, shall be approved by him, or being disapproved by him, shall be repassed by two thirds of the Senate and House of Representatives, according to the Rules and Limitations prescribed in the Case of a Bill”), with C.S.A. CONST. art. I, § 7, cl. 3 (1861) (prescribing that “before the same shall take effect, shall be approved by him; or being disapproved by him, shall be re-passed by two-thirds of both Houses, according to the rules and limitations prescribed in the case of a bill”). Notice the shift from a comma to a semicolon immediately following “approved by him.” It seems to this author that the draftsmen of 1861 did not believe they were making new law, but rather were attempting to clarify a settled or otherwise obvious point. But see Jordan Steiker et al., *Taking Text and Structure Really*

signed or unsigned by the President, the amendment still must go through the relatively lengthy state ratification process. If a signature has no substantial legal effect, why should compliance be mandatory? This still leaves open the question of whether presentment with the concomitant possibility of a presidential veto remains mandatory in the context of a congressional resolution proposing a constitutional amendment.

Sixth, Clause 2 expressly provides for three possibilities: presidential signature, presidential veto, and presidential inaction, which may result either in functional approval or rejection arising from the timing of congressional adjournment. The ORV Clause, on the other hand, only expressly contemplates approval and disapproval; inaction and its consequences are not expressly mentioned. (a) Is this a limit on the President's power over orders, resolutions, and votes as opposed to bills—is inaction proscribed by implication? (b) Or, does the ORV Clause expand the President's authority because he is not subject to the ten-day event horizon in which presidential inaction constitutes functional passage or functional veto? (c) If there is no time window, can the President sit on an order, resolution, or vote beyond the adjournment of the (annual) congressional session, beyond the final adjournment sine die of a two-year Congress, or even from one presidential four-year term to another? If any of the prior three cases described (a through c) works an expansion *or* a contraction of presidential power, then must we not reject Madison's position that the ORV Clause puts orders, resolutions, and votes on the same "footing with bills"?

Alternatively, one might believe that Clause 2's ten-day event horizon is implicit in Clause 3's Rules and Limitations Clause. Was this Madison's position? Does the text support this construction? The reader will note that if the absence of a presidential signature after the passage of ten days following presentment does not constitute functional approval (absent congressional adjournment), then the "opinions" of Cushing and Paterson, above, in support of the constitutional propriety of the Eleventh Amendment must be rejected, at least assuming the applicability of the ORV Clause to Article V. Like Madison, the Cushing and Paterson "opinions" took for granted that the ORV Clause permitted the President to treat resolutions in substantially the same way as Clause 2 permits him to act on bills—that presidential inaction (absent adjournment) constitutes functional approval.

Having stated these six questions, is the reader (who has chosen in the past to rely on Madison) still sure that the ORV Clause is redundant? Did Madison really believe this? Should the reader believe Madison? Is it *even projectable* to thread an intellectually consistent set of answers to the six

Seriously: Constitutional Interpretation and the Crisis of Presidential Eligibility, 74 TEXAS L. REV. 237, 250–51 (1995) (observing that, from a strictly structural viewpoint, a comma might determine the meaning of a constitutional provision).

questions above that both square with Madison's *Debates* and comfortably square with the difficult text of the Constitution? And if not, which should give way: Madison speaking ex cathedra through his convention notes, or the public text of the Constitution?

Might not the time be long overdue to begin the process of searching for possible alternative meanings for the ORV Clause?

B. A Proposed Solution: Article I, Section 7, Clause 3—Without Mystery

In fact, the six questions do have an answer. Indeed they have the same answer.

Every [final] Order, Resolution, or Vote [of a single house] to which the [prior] Concurrence of the Senate *and* House of Representatives may be necessary [as bicameral congressional authorization for subsequent single-house action] . . . shall be presented to the President [so that his veto might act upon the subsequent single-house action just as it acted upon the prior authorizing legislation] . . . and before the same [subsequent single-house action] shall *take Effect* [in conformity with the prior authorizing legislation], shall be approved by him, or being disapproved by him, shall be repassed by two thirds of the Senate and House of Representatives, according to the Rules and Limitations prescribed in the Case of a Bill.¹¹⁷

If the solution proposed above is correct, then much that scholars and jurists have thought correct for more than two hundred years (or at least since commentators began to inflate the holding of *Hollingsworth*) must give way. Theories of “hard” bicameralism must be scrapped.¹¹⁸ Theories of

117. U.S. CONST. art. I, § 7, cl. 3 (emphasis added); *see, e.g.*, *INS v. Chadha*, 462 U.S. 919, 981 (1983) (White, J., dissenting) (arguing that “the [ORV] Clause does not specify the actions for which the concurrence of both Houses is ‘necessary’”). *But see id.* at 946–51 (stating that single-house action—absent bicameralism and presentment—having legislative effect is unconstitutional). For a more extensive discussion of *Chadha*, *see infra* notes 159–77 and accompanying text. *But see* *United States v. Estate of Romani*, 523 U.S. 517, 535–36 (1998) (Scalia, J., concurring in part and concurring in the judgment) (noting that besides passing a bill under Article I, Section 7, “[e]verything else the Members of Congress do is either prelude [to acting on a bill] or internal organization [of the Congress]”); Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849, 864 (1989) (“[H]istorical research is always difficult and sometimes inconclusive The inevitable tendency of judges [is] to think that the law is what they would like it to be”); Symposium, *Oversight and Review of Agency Decisionmaking*, 28 ADMIN. L. REV. 661, 690 (1976) [hereinafter Symposium, *Agency Decisionmaking*] (Antonin Scalia) (“[Justice White’s] contrived and hypertechnical response . . . [would make] the validity or invalidity of the one-house veto or the concurrent resolution depend upon whether the requirement for congressional approval is phrased in the [prior authorizing] statute as a *condition precedent* *You remember conditions precedent . . . from 15th century property law.*”) (emphasis added); *cf.* The Quotations Page, Sir Winston Churchill, at <http://www.quotationspage.com/quote/407.html> (last visited Mar. 10, 2005) (“Men occasionally stumble over the truth, but most of them pick themselves up and hurry off as if nothing ever happened.”).

118. ROBERT A. DAHL, HOW DEMOCRATIC IS THE AMERICAN CONSTITUTION? 45 (2001).

constitutional waiver must be rewritten. Even the hoary doctrine of checks and balances must be refurbished in light of a new truth. Furthermore, the reading above indicates that *Hollingsworth* could have just as easily been decided by the Justices under the aegis of the ORV Clause, as it could have been under Article V—assuming the Court was willing to reach constitutional questions at all given the absence of a genuine conflict between the two constitutional provisions.¹¹⁹ How so? Under the interpretation of the ORV Clause posed above, (single-house) orders, resolutions, and votes must be presented to the President, but only if they are authorized (or ratified) by prior (or subsequent) statutes. Thus the ORV Clause has *no* implications for congressionally proposed constitutional amendments. Congressionally proposed constitutional amendments, although in the form of (bicameral) resolutions, are not passed pursuant to statutory authority.

Is this the Rosetta Stone or key to a great constitutional conundrum? This Article's defense of this interpretation is made *exclusively* in subpart III(C) below. Here, in the remainder of this subpart, for the purpose of explaining this Article's unusual methodology, I explain the origin of the proposed solution for which I, in fact, cannot take credit. Therefore, readers interested only in the intellectual defense of the position outlined above should advance to the next subpart.

Some time ago, I came to the conclusion that Madison's *Debates* could not explain the meaning of the ORV Clause. For reasons that I will make clear below, I do not believe that his *specific* entries for August 15 and 16, 1787 are wholly reliable, particularly because seven of ten then-voting state delegations changed their position for no apparent reason and also because Madison reported that the debate was "confused."¹²⁰ Perhaps he had a singularly bad day, and he was confused. Still, what to do? The Founders and their contemporaries are long dead and buried, along with their world. Roughly contemporaneous American materials say virtually nothing about the ORV Clause. It was not one of the great issues of the day such as the unified executive and its method of election, bicameralism and the nature of representation in each house, and the appointment of federal officers. And try as I might, I could think of no purpose for the clause, particularly none that would account for its strange syntactic complexity.¹²¹

119. See *Siler v. Louisville & Nashville R.R.*, 213 U.S. 175, 193 (1909) (describing the Court's preference for avoiding a constitutional question if there are other means to decide the issue); see also *supra* notes 78–80 and accompanying text (demonstrating that, on the facts of *Hollingsworth*, an actual conflict between the two constitutional provisions is not possible because the Eleventh Amendment was submitted to the President more than ten days prior to Congress's end of session adjournment).

120. See *supra* note 104.

121. See Crovitz, *supra* note 4, at 44–45 & nn.9–12 (noting the "curious language" of the ORV Clause).

It occurred to me that although the Founders and their generation are not with us, *the imperial legal and parliamentary system under which they had lived endures*. I began to write letters by snail-mail and email. I wrote Commonwealth parliamentarians, national, state, and provincial legislative officers, clerks, and secretaries, and a smattering of foreign historians and legal scholars. If I did not already know, I asked them if they had an analogue to the ORV Clause in their legal or parliamentary systems. And whether they did or did not have such an analogue, I asked *them* what they thought *our* clause might mean, and, if they were willing to hazard a guess, what they thought it might have meant circa 1787.¹²² A handful of public officials and scholars replied with comments, some extensive. A few of my correspondents had a detailed knowledge of early American parliamentary and legal materials.¹²³

122. See M.E. BRADFORD, ORIGINAL INTENTIONS: ON THE MAKING AND RATIFICATION OF THE UNITED STATES CONSTITUTION 18–19 (1993) (“[I]t is difficult to overemphasize the English constitutional inheritance of the American people. . . . [A] public memory of that inheritance has heretofore stood almost alone in the way of certain kinds of chaos [particularly caused by those benefiting from] a useful ignorance.”); FORREST McDONALD, NOVUS ORDO SECLORUM: THE INTELLECTUAL ORIGINS OF THE CONSTITUTION 209 (1985) (“Whatever their political philosophies, most (though by no means all) of the delegates sought to pattern the United States Constitution, as closely as circumstances would permit, after the English Constitution.”); see also Roger P. Alford, *In Search of a Theory for Constitutional Comparativism*, 52 UCLA L. REV. 639, 650 n.2 (2005) (discussing the appropriateness of “genealogical comparativism” to understanding original intent). *But cf.* 13 REG. OF DEB. 417 (1837) (recording the January 14, 1837 statement of Senator John C. Calhoun) (“Talk of precedents [with regard to a disputed point of congressional procedure]? and precedents drawn from a foreign country? They don’t apply.”). *But cf.* CORWIN, *supra* note 98, at 119 (“[J]udicial researches into history for the purpose of establishing the intention of a vanished law-giver are *almost always* highly speculative enterprises, and necessarily so. . . . [A]nd where the law-giver wrought a century and a half ago, such a quest becomes purely illusory.”) (emphasis added). Corwin’s position, now firmly entrenched, has become a warrant supporting constitutional textual and historical laziness. Even if Corwin’s position is true with regard to most cases arising from ambiguous constitutional language, it need not be true in all cases. In any particular case arising from ambiguous language, a scholar must brave the extant materials available, including sometimes helpful foreign materials. Why leave any stone unturned? This is particularly true where the purported ambiguity is, in fact, eighteenth century legal jargon. Such stones are easily overturned.

123. Consider, for example, the following excerpts from my correspondence with Harry Evans, Clerk of the Senate, Parliament of Australia. I wrote:

Aus. Senate Standing Orders 86 & 87 use the phrase “order, resolution, or vote.”
 Could I ask you to expound upon what is meant here. Are these three mechanisms meant to be distinct from one another and/or perhaps exclude other vehicles for majority action not mentioned under the [Senate] rule. Or, alternatively, is the purpose to include all mechanisms by which the Senate majority may act and the standing order is merely trying to list different labels by which the majority may label Senate action? Why isn’t bill or act included in this list?

Email from Seth Barrett Tillman to Harry Evans, Clerk of the Senate, Parliament of Australia (Mar. 20, 2003) (on file with the Texas Law Review). Evans replied: “A bill is not included in the list because passage of a bill occurs by a series of orders, resolutions and votes. Every *decision* taken by the Senate falls into one of those three categories.” Email from Harry Evans, Clerk of the

The interpretation presented above is one of two put forward by Laurence B. Marquet, LL.B., D. Jur., Clerk of the Legislative Council and Clerk of the Parliaments, Parliament of Western Australia.¹²⁴ Marquet also believed that the text of the ORV Clause permitted authorizing legislation *subsequent* to single-house action, and that under either scenario—statutory authorization *prior* or *subsequent* to single-house action—the clause had its intellectual roots in British legislative practice relating to the passage of financial legislation.¹²⁵ Remarkably, the only other discussion in Madison’s

Senate, Parliament of Australia, to Seth Barrett Tillman (Mar. 21, 2003) (on file with the Texas Law Review) (emphasis added). In another email, he wrote that:

In Thomas Jefferson’s *Manual of Parliamentary Practice*, 2nd ed, 1812, section xxi, he draws the well-known distinction between orders and resolutions which is still repeated in standard works on parliamentary practice, but also refers to an incident in the [U.S.] Senate in 1796 in which a resolution was objected to apparently on the ground that it appropriated money and therefore should have been in the form of a bill. This strongly suggests that orders, resolutions and bills were clearly distinguish[ed] at that time, and that proposed laws were bills, with reference to the appropriation provision in article I . . . of the [U.S.] Constitution.

. . . .
Some years ago an academic suggested that . . . Parliament [may act] other than by a bill, ie, a proposed law, for example, by a joint resolution signed by the Governor-General. This view was not accepted then and *never has been accepted*, and it is assumed that *Parliament as a whole* acts only by proposed laws, ie, bills.

Email from Harry Evans, Clerk of the Senate, Parliament of Australia, to Seth Barrett Tillman (Mar. 24, 2003) (on file with the Texas Law Review) (emphasis added); *see also* 2 JOSEF REDLICH, *THE PROCEDURE OF THE HOUSE OF COMMONS: A STUDY OF ITS HISTORY AND PRESENT FORM* 80 (A. Ernest Steinthal trans., 1908) (“[T]o the outer world an agreement between the two Houses has no legislative effect except when it adheres strictly to the form of a bill, i.e., an inchoate act of parliament.”). The ORV Clause was not the only aspect of American law and legislative procedure discussed. The author hopes that in the future these other discussions might be developed into full-length scholarly articles.

124. *Compare* Email from Laurence B. Marquet, Clerk of the Legislative Council and Clerk of the Parliaments, Parliament of Western Australia, to Seth Barrett Tillman (Apr. 9, 2003) (“If you now read [the ORV Clause], you will see [] that it contains a *condition precedent*, viz, the vote etc must be one that requires the concurrence of both the Senate and HR.”) (emphasis added), *with* Symposium, *Agency Decisionmaking*, *supra* note 117, at 690 (Antonin Scalia) (“[Justice White’s] contrived and hypertechnical response . . . [would make] the validity or invalidity of the one-house veto or the concurrent resolution depend upon whether the requirement for congressional approval is phrased in the [prior authorizing] statute as a condition precedent *You remember conditions precedent . . . from 15th century property law.*”) (emphasis added); *see also* Email from M.J.C. Vile, Professor Emeritus, University of Kent, to Seth Barrett Tillman (June 23, 2004) (on file with the Texas Law Review) (“I accept your argument about the origins of the ORV Clause in the parliamentary practice regarding financial matters in Britain.”).

125. Laurence B. Marquet, Clerk of the Legislative Council and Clerk of the Parliaments, Parliament of Western Australia noted:

I therefore adhere to my earlier remarks that the words “vote, resolution etc” refer to the procedure of the House of Commons in granting *supply* through their Committees (of the whole House) of *Supply* and Ways and Means. It is still UK practice that money is advanced under authority of a resolution before the expenditure is ratified by an Act of Appropriation. We do something similar through a “Treasurer’s Advance” which is later ratified by an annual Treasurer’s Advance Authorization Act. If I recall

correctly, it was such a resolution of Ways and Means as to excise that brought about the Boston Tea Party!

.....

In light of well established [British] practice, at least by 1787, as to the fiscal meaning of vote and resolution as providing no more than an interim authorization pending enactment of statute, I cannot see how [the ORV Clause] can be read as suggested [per the Madisonian position].

See Email from Laurence B. Marquet, Clerk of the Legislative Council and Clerk of the Parliaments, Parliament of Western Australia, to Seth Barrett Tillman (Apr. 9, 2003) (on file with the Texas Law Review) (emphasis added); cf. PETER BROMHEAD, BRITAIN'S DEVELOPING CONSTITUTION 121 (1974) (noting that the Committee of Supply is empowered "to discuss the financial details of proposed expenditure"); THE LIVERPOOL TRACTATE: AN EIGHTEENTH CENTURY MANUAL ON THE PROCEDURE OF THE HOUSE OF COMMONS 59–66 (Catherine Strateman ed., 1937) (circa 1763) (describing House of Commons's procedure of approving expenditures through committees). Compare THE FEDERALIST NO. 58, at 359 (James Madison) (Clinton Rossiter ed., 1961) ("The House of Representatives cannot only refuse, but they *alone* can propose the supplies requisite for the support of government.") (emphasis added), with *Kilbourn v. Thompson*, 103 U.S. 168, 192 (1880) ("The House of Representatives having the exclusive right to originate all bills for raising revenue, whether by taxation or otherwise; having with the Senate the right to . . . vote the supplies which must pay [federal officer] compensation . . .") (emphasis added). Madison's terminology in *Federalist No. 58* is imprecise at best. The House alone can propose the ways and means or revenue of government under Article I, Section 7, Clause 1, but "supply" is a term generally applied to *expenditure*, not revenue.

Detailed discussions of contemporaneous British and colonial support for Marquet's thesis is generally beyond the confines of this Article, and well beyond my abilities. See *infra* note 232. However, some support is readily available. Chief Justice Darley of the Supreme Court of New South Wales held:

The course so invariably pursued in England has been invariably pursued here, and many Parliaments have given their sanction to the practice by passing statutes with a clause having a retrospective effect so as to legalise taxation which in the first instance was imposed without full Parliamentary authority [although founded upon resolutions of the Commons].

Ex parte Wallace & Co., 13 N.S.W.L.R. 1, 9 (Sup. Ct. N.S.W. 1892) (Darley, C.J.); see also SIR THOMAS ERSKINE MAY, A TREATISE ON THE LAW, PRIVILEGES, PROCEEDINGS, AND USAGE OF PARLIAMENT 573–74 (7th ed. 1873) (stating that "[i]t has been customary for the government to levy the new duties, instead of the duties authorised by law" either "immediately [after] the resolutions for that purpose have been reported from a committee, and agreed to by the house; or from the date expressed in such resolution, although the legal effect cannot be given to them by statute . . . and may ultimately be withheld by Parliament"); cf., e.g., Alex C. Castles & G.S. Reid, *Taxation by Parliamentary Resolution—A Case for an Australian Provisional Collection of Taxes Act*, 35 AUSTL. L.J. 74, 74–75 (1961) (reporting that a motion by a government minister introducing a tax resolution to a committee of the national parliament's lower house is sufficient authority—as a matter of custom—to impose a tax, even absent any vote by the committee or the house); Email from E. George MacMinn, Q.C., Clerk of the House, Legislative Assembly of British Columbia, to Seth Barrett Tillman (May 27, 2004) (on file with the Texas Law Review) (noting that "taxation, absent enabling legislation, strikes deep into the American psyche" and recording that "Modern [Westminster] practice seems to tolerate the concept provid[ed] at the time the taxation measure is announced, a clear undertaking is given by the government . . . to bring enabling legislation . . . at the earliest opportunity").

Although not entirely analogous to *taxation* authorized by Commons resolutions prior to statutory enactment, Commons (or, possibly, committee) resolutions sometimes authorized *expenditure* by eighteenth century British ministries in anticipation of full statutory enactment. See 3 JOHN HATSELL, PRECEDENTS OF PROCEEDINGS IN THE HOUSE OF COMMONS 207 (1818). Hatsell recounts, by way of example, events of 1783 through 1784:

Debates relating to the ORV Clause is the heretofore unexplained comment of Sherman:

Mr. SHERMAN thought [Randolph's ORV Clause] unnecessary, except as to votes taking money out of the treasury, which might be provided for in another place.¹²⁶

It had been usual for the Treasury, whilst the session of Parliament continued, to direct the application of any of the grants to the services voted by the House of Commons in that session; and this without any appropriation by Act of Parliament. *This they had been accustomed to do*, from the convenience it produced to the public service; and under the confidence, that, before the session was finally closed, an Act of Parliament would pass, which . . . would thereby confirm and authorize that proceeding [ex post].

Id. (emphasis added); MAY, *supra*, at 571–72 (“A grant from the Commons is not effectual, in law, without the ultimate assent of the Queen and of the House of Lords. It is the practice, however, to allow the issue of public money, the application of which has been sanctioned by the House of Commons, before it has been appropriated . . . by the Appropriation Act . . .”); THE LIVERPOOL TRACTATE, *supra*, at 61 (requiring that “the Resolution [of Supply] stays till put into the Clause of [an] Appropriation[s act] at the End of the Session”); *id.* at 65 (“The Chancellor [Edward Hyde, Earl of Clarendon] moreover represents this Method . . . as introductive to a Commonwealth, and not fit for Monarchy . . .”). See generally P.D.G. THOMAS, THE HOUSE OF COMMONS IN THE EIGHTEENTH CENTURY 86 (1971); P.G.M. DICKSON, THE FINANCIAL REVOLUTION IN ENGLAND: A STUDY IN THE DEVELOPMENT OF PUBLIC CREDIT 1688–1756, at 211 n.5 (1967).

Although Marquet took the position that the ORV Clause had its intellectual origins in legislative practice relating to financial legislation, he did not think the clause inapplicable to other areas of lawmaking otherwise within the constitutional scope of the legislature. See Email from Laurence B. Marquet, Clerk of the Legislative Council and Clerk of the Parliaments, Parliament of Western Australia, to Seth Barrett Tillman (Apr. 9, 2003) (on file with the Texas Law Review) (“I also note that cl. 3 in its terms is not confined to matters fiscal. Statutes may authorize executive acts if sanctioned by joint resolutions whether or not ratifying legislation is required.”).

126. 5 ELLIOT'S DEBATES, *supra* note 96, at 431. Compare *supra* note 125 (citing British and other authorities following British parliamentary traditions permitting taxation and/or appropriations based on lower house resolution ratified ex post by statute), with LEONARD WOODS LABAREE, ROYAL GOVERNMENT IN AMERICA: A STUDY OF THE BRITISH COLONIAL SYSTEM BEFORE 1783, at 303 (1930) (“The [colonial] assembly of Massachusetts tried to get financial control by appropriating money by *votes* and *resolves* of the *lower house alone*, thus eliminating the governor and council entirely from the disposition of money.”) (emphasis added), and *id.* at 307 (“In 1774 a new instruction was given to Lord William Campbell, recently appointed [South Carolina royal] governor, forbidding him to assent to any *appropriation bill* which *replaced* in the hands of the treasurer any money expended on the authority of the lower house *alone* [acting by order].”) (emphasis added), and 3 HERBERT L. OSGOOD, THE AMERICAN COLONIES IN THE EIGHTEENTH CENTURY 165 (Peter Smith 1958) (1924) (“[The Massachusetts colonial assembly] began making its grants in the form of *resolves*, so that they would escape revision by the privy council.”) (emphasis added).

Although the orthodox Madisonian theory of the ORV Clause indicates that the ORV Clause was passed to ensure presentment but took bicameralism for granted, it is more likely that Sherman's concern was tied to fears of an absence of bicameralism: he feared the then-extant colonial tradition of single-house delegation or, more specifically, single-house taxation and/or expenditures by resolution ratified ex post by statute. See, e.g., Rappaport, *supra* note 102, at 752 & n.64 (advocating the orthodox position that “[t]he clause was added to protect against congressional attempts to evade presentment . . .”) (citing J.R. POLE, POLITICAL REPRESENTATION IN ENGLAND AND THE ORIGINS OF THE AMERICAN REPUBLIC 57 (1966) (discussing Massachusetts resolves acted upon only by the lower house)). Compare Rappaport, *supra* note 102, at 754 n.73 (“The term ‘votes’ [in the ORV Clause] apparently did not even have a specific historical meaning . . .”), with

Sherman's comment cannot be easily reconciled with Madison's purported rationale for the ORV Clause. The proponents of Madison's explanation for the ORV Clause have made no efforts to explain why Sherman might have

HENRY ROSEVEARE, *THE TREASURY: THE EVOLUTION OF A BRITISH INSTITUTION* 93 (1969) ("At the end of the century critics of Pitt were still fighting a convention 'which rendered all the *votes of the House of Commons*, or bills for appropriating the supplies, ridiculous and nugatory,' but years of compliance testified against them.") (emphasis added) (quoted source not cited in the original), and 2 *THE COMPACT EDITION OF THE OXFORD ENGLISH DICTIONARY* 3658 (1971) (defining "vote" as "to grant, allow, or confer by vote" (citing SWIFT, *EXAMINER* NO. 46 (1711): "The Parliament voted subsidies, and the willing People cheerfully paid them.")), and Email from Dr. Paul Seaward, Director, History of Parliament, to Seth Barrett Tillman (Mar. 22, 2004) ("Lords never passed votes of credit/supply/votes on account. These are things which the House of Commons do and provide the basis for a bill which will pass both Houses."), and Email from Laurence B. Marquet, Clerk of the Legislative Council and Clerk of the Parliaments, Parliament of Western Australia, to Seth Barrett Tillman (Apr. 9, 2003) (on file with the Texas Law Review) ("[In light] of well established Brit[ish] practice, at least by 1787, as to the *fiscal meaning of vote* and resolution as providing no more than an interim authorization pending enactment of statute, I cannot see how [the ORV Clause] can be read as suggested [per the Madisonian position].") (emphasis added). Compare *supra* note 113 (suggesting that orders, resolutions, and votes are presumptively unicameral), with Owen Wister, *The Supreme Court of Pennsylvania*, 3 *GREEN BAG* 58, 70 (1891) ("There seems to be no escape from the [force of Tilghman's] argument [in *Hollingsworth*], *except through the construction of the words 'resolution, or vote.'*") (emphasis added), and RICHARD M. WEAVER, *IDEAS HAVE CONSEQUENCES* 168 (1948) ("Actually stable laws require a stable vocabulary Thus the magistrates of a state have a duty to see that names are not irresponsibly changed.").

Had the concerns of Sherman and his colleagues actually been allayed by the ORV Clause, the Convention would not have found it necessary or desirable to add the Appropriations Clause to the Constitution *after* the ORV Clause had already been added. See U.S. CONST. art. I, § 9, cl. 7. In other words, Sherman hoped to guarantee bicameralism in financial matters by demanding that Congress act through lawmaking. Had his proposed appropriations clause been passed on August 16, 1787, that would have guaranteed bicameralism and presentment, thereby allaying the concerns of Madison and any other conventioners who might have feared congressional legerdemain with regard to presentment. But if, as argued here, the ORV Clause only guaranteed presidential participation following single-house action outside of "normal" lawmaking, then Sherman's concerns regarding bicameralism with regard to appropriations would have been left unresolved on August 16, 1787. This would explain why the Convention had to add the Appropriations Clause at a later date despite Sherman's analysis that the ORV Clause was "unnecessary."

In modern times, the imposition of taxation under the authority of a Commons or lower-house resolution under the expectation of *subsequent* ratification by statute has been held illegal. See *Bowles v. Bank of England*, 1 Ch. D. 57, 84–85 (1912) (Parker, J.) (holding that taxation prior to a full statutory enactment is a violation of the English Bill of Rights), *superseded by* Provisional Collection of Taxes Act, 1913, 3 & 4 Geo. 5, c. 3 (U.K.) (legalizing, subject to specified limitations, taxation approved by resolution of the Committee of Ways and Means of the House of Commons); *Stevenson v. The Queen*, 2 Wyatt, Webb & A'Beckett 143, 148–49 (Sup. Ct. Victoria 1865) (Stawell, C.J.) (holding that taxation by authority of Commons committee resolution is illegal); *cf.* 51 *PARL. DEB.*, H.C. (5th ser.) 836 (1913) ("What we are proposing is not an innovation upon . . . the practice of the Treasury [I]t is a means of regularising and legalising the usage and custom which has been followed . . . for at least sixty years—so far as custom is concerned for a period that goes still further back.") (quoting the statement of the Chancellor of the Exchequer, Lloyd George, on introducing the Provisional Collection of Taxes Act to committee). *But see Ex parte Wallace & Co.*, 13 N.S.W.L.R. 1, 9 (Sup. Ct. N.S.W. 1892) (Darley, C.J.) ("[M]any Parliaments have given their sanction to the practice by passing statutes with a clause having a retrospective effect so as to legalise taxation which in the first instance was imposed without full Parliamentary authority [although founded upon resolutions of the Commons].").

thought that appropriations, as opposed to other money bills (i.e., revenue bills) or nonfinancial legislation, were at acute risk to the type of congressional legerdemain feared by Madison.

Who was best placed to interpret the ORV Clause? Sherman had twenty years of legislative experience in his colony's legislature; Madison had none.¹²⁷ Randolph, the author of the ORV Clause, had served as both a clerk of a legislative committee (before the Revolution) and clerk of a legislative house (after the Revolution);¹²⁸ Madison had no such experience. Marquet's reading, unlike Madison's, explains the multiplicity of heretofore unexplained clauses in the Constitution providing for congressional action "by law." *There is another way for Congress to act.* In other words, a constitutional clause which expressly calls for congressional action "by law"¹²⁹ is a functional entrenchment clause prohibiting otherwise available delegation to a single house, notwithstanding the President's veto. And

127. See *supra* note 12 (discounting Madison's "legislative" service in the Articles Congress because that irregular body did not generally act by statute, nor was it subject to royal or proprietary governors, nor was it part and parcel of the transatlantic constitution). That Madison included Sherman's comments, although he may not have understood their relevance, is an enduring testament to the general accuracy of the *Debates*. It is possible that Madison included Sherman's comments to demonstrate that the August 16, 1787 debate was again "confused" as he thought it had been on August 15, 1787. *But see* ADAIR, *supra* note 111, at 85 ("No man in America knew as much about the specific clauses of the new Constitution as Madison; no man in all the world had studied so thoroughly the general problems of federalism.").

128. See Colonial Williamsburg Foundation, *Edmund Randolph*, at <http://www.history.org/Almanack/people/bios> (reporting that Edmund Randolph was "Clerk of the Committee on Courts and Justice, House of Burgesses, May 1774") (last visited Jan. 10, 2005); E. GRIFFITH DODSON, *SPEAKERS AND CLERKS OF THE VIRGINIA HOUSE OF DELEGATES 1776-1955*, at 17 (1956) (documenting that Randolph was clerk of the House of Delegates (the successor of the Burgesses) from 1778-1779). Is it possible that Randolph, if only on the basis of institutional roles sought and held, might have known a bit more about British legislative practices than James Madison? See S. M. Pargellis, *The Procedure of the Virginia House of Burgesses*, 7 WM. & MARY Q. (2d ser.) 143, 156 (1927) ("[The House of Burgesses] remarkabl[y] adhere[d] to English forms and practices. . . . [They] adopt[ed] . . . the ancient procedure of parliament Throughout the colonial period the Virginians kept in close and constant touch with the work of parliament; men like Randolph and Byrd could present first-hand experience of English practices . . ."). Pargellis is probably referring to one of Edmund Randolph's close relatives.

129. See Case Comment, *Constitutional Law: Apportionment Bills Subject to Governor's Veto*, 50 MINN. L. REV. 1131, 1132 (1966) ("Where [a state] constitution provides that certain items be 'prescribed by law' or that passage be 'by law,' the full lawmaking process clearly is required—passage by both houses plus the governor's approval or re-passage in case of veto."). Harris L. White notes:

It is understood by *all authorities* that when the words "by law" or "by statute" are used, the legislature means that the matter can be done only by a bill passed by the legislature and signed by the chief executive [or over his veto] The words "by law" or "by statute" are *conspicuous by their absence*.

Harris L. White, Note and Comment, *Constitutional Law: Joint Resolutions: Effect Upon Statutes*, 22 CORNELL L.Q. 90, 92 (1936) (emphasis added); cf. J. Alexander Fulton, *Presidential Inability*, 24 ALB. L.J. 286, 286 (1881) ("Congress may *by law* provide [for the inability of the President and Vice President]. Not by a vote, joint, concurrent, or separate; nor by a resolution . . . but *by law*, introduced, considered, and passed in a regular, methodical manner.").

Marquet's reading also explains why seven state delegations changed their vote. They were providing for (or clarifying the existence of) a fundamentally new constitutional procedure. "New" to us, writing two centuries later, at any rate. "*Cedo qui vestram rempublicam tantam amisistis tam cito?*"¹³⁰

Undoubtedly, readers will have substantial and multiple objections to the condition precedent interpretation of the ORV Clause. I will attempt to answer a variety of those objections. Different readers will no doubt find different challenges to this interpretation more persuasive than others; I point out that they cannot all be answered simultaneously. Also, biographers and historians might have to reassess Randolph's intellectual contribution to the era of the Founding.¹³¹

In order to defend the position taken above regarding the original public meaning of the ORV Clause, the next subpart of this Article engages in a close textual analysis of the Constitution, including an analysis of both individual words and phrases.¹³² To achieve this, I also look to the shared historical, intellectual, political, and legal culture of those on the historical stage. Thus, the analysis also takes the form of a Randolph-centered prosopography, setting the intellectual context from which to examine the long-misunderstood text.

C. Challenges to the Condition Precedent Interpretation of the ORV Clause

Query: The ORV Clause says "every Order, Resolution, or Vote." Why have you limited it to "every *final* Order, Resolution, or Vote"?

130. EDMUND BURKE, REFLECTIONS ON THE REVOLUTION IN FRANCE 269 & n.58 (Thomas H. D. Mahoney ed., 1955) (1789) ("Tell me, how did you lose a commonwealth as great as yours so quickly?") (quoting the Roman dramatist Naevius).

131. *Compare, e.g.,* A Letter of His Excellency, Edmund Randolph, Esq., on the Federal Constitution; Addressed to the Honorable the Speaker of the House of Delegates, Virginia (Oct. 10, 1787), *quoted in* 1 ELLIOT'S DEBATES, *supra* note 96, at 482, 486 (opining that "excellence in the executive department" is correlative with "secrecy, dispatch, and vigor"), *with* THE FEDERALIST NO. 75, at 452 (Alexander Hamilton) (Mar. 26, 1788) (Clinton Rossiter ed., 1961) (positing that "decision, secrecy and dispatch" is incompatible with the House of Representatives), *and* THE FEDERALIST NO. 73, at 441 (Alexander Hamilton) (Mar. 21, 1788) (Clinton Rossiter ed., 1961) (exploring the "vigor of the executive"). Randolph published *before* Hamilton. However, the phrase may have had its origins in the Convention's debates. 1 FARRAND, *supra* note 29, at 66 (recording Madison's entry for June 1, 1787, in which Randolph referred to "the great requisites of the Executive department, vigor, despatch, & responsibility"); *id.* at 70 (reproducing Rufus King's entry for June 1, 1787, in which Wilson stated that "an extive. ought to possess the powers of secrecy, vigour & Dispatch—and to be so constituted as to be responsible"); *cf. id.* at 112 (quoting Mason's speech of June 4, 1787, where he argued that "a little reflection may incline us to doubt whether [the secrecy, dispatch, vigor, and energy of the Executive] are not greater in theory than in practice").

132. *See* Symposium, *Is There an Unwritten Constitution?*, 12 HARV. J.L. & PUB. POL'Y 1, 1 (1989) (Antonin Scalia) ("[T]he unwritten Constitution encompasses a whole history of meaning in the words contained in the Constitution, without which the Constitution itself is meaningless.").

Answer: This is the major textual interpretive difficulty with the ORV Clause. Indeed, the ORV Clause has been harshly criticized by commentators who have maintained that literal compliance with the clause would require giving the President a veto over every intermediate step of legislation prior to final enactment.¹³³ The apparent strength of this criticism has been the chief reason rationalizing the emasculation of the clause.

Intermediate steps of legislation never need concurrence of the other house. In other words, “necessary” and “final” are equivalent terms. When the House of Representatives recommits a bill, for example, permission from the Senate is not “necessary.” Therefore, the intermediate steps of legislation were never within the ambit of the ORV Clause. Because concurrence by the other house is not “necessary”¹³⁴ for intermediate steps, the ORV Clause does not “sweep” anything but final orders, resolutions, or votes into its domain, and only they need be sent to the President. As Marquet explains, “[W]hat underlies all this is the distinction [parliamentary] proceduralists draw between a procedural motion and a substantive motion.”¹³⁵

This might explain why the First Congress failed to present the first joint rules to the President.¹³⁶ Congress never suggested that these joint rules

133. See ANALYSIS AND INTERPRETATION, *supra* note 4, at 135–36 (commenting on “[t]he sweeping nature of this obviously ill-considered provision”) (emphasis added); *id.* at 136 (“Actually, it was impossible from the first to give [the ORV Clause] any such scope. Otherwise, the intermediate stages of the legislative process would have been bogged down hopelessly, not to mention the creation of other highly undesirable results.”); 2 RONALD D. ROTUNDA & JOHN E. NOWAK, TREATISE ON CONSTITUTIONAL LAW § 10.2 (1999) (citing *Hollingsworth* and the First Congress’s failure to present the Joint Rules for the proposition that “if taken literally, this clause would require across the board submission to the President of all orders, resolutions or votes made by Congress”).

134. *Cf.* S. REP. NO. 1335, 54th Cong., 2d Sess., § 1 (1897) (concluding that “necessary” extends only to orders, resolutions, and votes that are to have the force of law through concurrence by the other house but not arriving at the condition precedent interpretation described in the text); Black, *Amending the Constitution*, *supra* note 37, at 208 (stating that “[o]f course preliminary votes do not have to go to the President; they do not even fall within the literal terms of Article I, Section 7, because, as to them, the concurrence of both Houses is not ‘necessary’—but failing to arrive at the condition precedent interpretation).

135. Email from Laurence B. Marquet, Clerk of the Legislative Council and Clerk of the Parliaments, Parliament of Western Australia, to Seth Barrett Tillman (Mar. 25, 2003) (on file with the Texas Law Review). *But see* ANALYSIS AND INTERPRETATION, *supra* note 4, at 135–36 (observing “[t]he sweeping nature of this obviously ill-considered provision”) (emphasis added).

136. *But see* 2 ROTUNDA & NOWAK, *supra* note 133, § 10.2 (suggesting that the First Congress’s failure to present the first joint rules to the President may have been a violation of the literal terms of the ORV Clause); 4 ASHER C. HINDS, HINDS’ PRECEDENTS OF THE HOUSE OF REPRESENTATIVES OF THE UNITED STATES INCLUDING REFERENCES TO PROVISIONS OF THE CONSTITUTION, THE LAWS, AND DECISIONS OF THE UNITED STATES SENATE § 3430 n.6 (1907) (“The joint rules were [first] agreed to November 13, 1794, but many of them antedated even that time.”). *Compare, e.g., id.* at § 3430 & n.1 (documenting the July 27, 1789 passage in the House of the rule requiring that “[w]hile bills are on their passage between the two Houses they shall be on paper and under the signature of the Secretary or Clerk of each House, respectively”), *with* Journal of the Senate 54 (Aug. 6, 1789) (recording the Senate’s concurrence in the proposed joint rule), available at <http://memory.loc.gov/ammem/amlaw/lawhome.html>.

were laws. Thus, they did not have to be presented under Article I, Section 7, Clause 2. The ORV Clause only demands presentment of final single-house orders, resolutions, or votes taken pursuant to prior authorizing bicameral action, which necessarily contemplates the “Concurrence of the Senate and House.” The Joint Rules were bicameral action, but they were not taken pursuant to prior legislation. No prior bicameral action authorized the passage of any joint rule. Because the ORV Clause does not apply here, no presentment of the joint rules to the President need be made.

Furthermore, the condition precedent interpretation of the ORV Clause can also explain why concurrent resolutions announcing the opinions of the two houses are not presented to the President. Congress is not purporting to have made law, and so presentment under Clause 2 is unnecessary. Moreover, legislative expressions of opinion not authorized or taken pursuant to prior bicameral action need not be presented under the aegis of the ORV Clause.

The Madison supporter can explain the failure of the First Congress to present joint rules and concurrent resolutions only by arguing that the ORV Clause is implicitly limited to those bicameral acts having legislative or juristic effect. This self-imposed limitation on the clause’s text is pure ad hocery, which is itself the distinguishing characteristic of *Hollingsworth* jurisprudence. Moreover, the Madisonian interpretation cannot account for the clause’s syntactic complexity.

There is, perhaps, another way to explain the condition precedent interpretation. But it will appear highly stylized and formalistic to many readers, particularly to those readers who are unwilling to embrace the possibility that precise language had been an object of the Convention’s legal craftsmanship. To the extent the reader is of the opinion that parliamentary knowledge was not widespread among the conventioners and the ratifiers (and their more numerous constituents), this interpretation will appear tepid and the work of an overactive imagination. On this purely empirical question, there is room for reasonable minds to disagree.¹³⁷ On the other hand, to the extent that the conventioners and the ratifiers discounted judicial review as the ultimate guardian of all that is good and the necessary precondition for future American civilization, perhaps they thought the ORV Clause sufficiently clear if at least Congress and its future professional staff

137. Cf. CLARKE, *supra* note 8, at 269 (noting that “[t]he number of men who had actually sat in a [colonial] legislature consciously copying parliament in many details must have been very large” and that “[t]he number of men who had voted for these representatives and who, by newspapers and various electioneering activities, had become familiar with some aspects of legislation, was still larger”); *id.* at 268 n.3 (noting that the ratio in America prior to the Revolution between elected representatives and population was roughly 1 to 1,187 and that the corresponding ratio in Britain was 1 to 14,362).

(clerk¹³⁸ and secretary) understood the technical aspects of the clause and its relations to the fine points of parliamentary procedure that *they* would be charged with administering, at least in the first instance. Courts too have from time to time rejected popular meanings of a constitutional term in favor of technical meanings.¹³⁹

Orders, resolutions, and votes are the means by which a legislative house renders a decision on a proposition.¹⁴⁰ (Here I am using “legislative house” to refer generally to a legislative house following the customs and usages of the United Kingdom Parliament, or one of its predecessors, or either of its constituent houses.)¹⁴¹ After one house passes a bill by means of

138. *See, e.g.*, The Constitution as Reported by the Committee of Detail (Aug. 6, 1787) (directing in Article IX, § 2 that “the Clerk of the Senate shall strike [commissioners or judges to determine a controversy between two or more states] in behalf of the party absent”), *available at* http://www.constitution.org/dfc/dfc_0806.htm.

139. For instance, Chester Antieau notes:

Where a word used in a constitution has a technical, as well as a popular meaning, courts will generally accord it the popular signification, unless the nature of the subject indicates or the context suggests that it is used in a technical sense. . . . Being technical, the term “ex post facto” is, according to the United States Supreme Court, to be given the meaning customarily accorded to it by the bar at the time of the adoption of the Constitution.

CHESTER JAMES ANTIEAU, CONSTITUTIONAL CONSTRUCTION § 2.05 (1982) (citing *Calder v. Bull*, 3 U.S. (3 Dall.) 386 (1798)); *see also* 2 FARRAND, *supra* note 29, at 137 (presenting Edmund Randolph’s guidelines for the Committee of Detail to “use simple and precise language”); Clinton, *supra* note 100, at 1190 (“In some cases the framers deliberately chose constitutional terminology to create close-textured phrasing . . .”).

140. Email from Harry Evans, Clerk of the Senate, Parliament of Australia, to Seth Barrett Tillman (Mar. 21, 2003) (on file with the Texas Law Review) (“A bill is not included in the list because passage of a bill occurs by a series of orders, resolutions and votes. Every *decision* taken by the [Australian] Senate falls into one of those three categories.”) (emphasis added). The phrase “order, resolution, or vote” had an established meaning circa 1787. And that meaning—relating to single-house decisionmaking procedures—remains pellucidly clear in legal cultures where parliamentary knowledge is still prized. Lord Radcliffe notes:

[W]e may need to review the usual line of division which puts on one side orders and regulations and, if you please, bylaws, and on the other Acts of Parliament The former are commonly felt to be entitled to a lower status of authority despite the fact that both have to be obeyed. The formal ground of distinction is that the maker of orders and regulations enjoys a delegated authority within a prescribed field, whereas the legislative body itself possesses independent authority and there are no limits to its field. *Incidentally, in countries which enjoy the bracing restraints of a written Constitution this contrast loses its force.* It is interesting to speculate whether democracies organised on this pattern are not likely to preserve a more vivid sense of the status and authority of Law than countries such as our own in which the principles of Rousseau seem at least to have found a home.

RIGHT HON. LORD RADCLIFFE, LAW AND THE DEMOCRATIC STATE 4–5 (Holdsworth Club 1955) (emphasis added). It is this author’s view that the interpretive class in the United States long ago lost any vivid conception of law and legislation.

141. Of course, the Founders and ratifiers may very well have been familiar with other “English” parliaments, including some older than the Mother of Parliaments. The High Court of Tynwald, composed of the House of Keys and the Legislative Council, may be the oldest parliament in the world with an unbroken existence. *See* Tynwald: The Parliament of the Isle of Man, *at*

a vote on a resolution (and a concomitant vote on an order to notify the sister house), the other house proceeds to act on the bill. If it passes the bill, it also proceeds by means of votes on a resolution and on a concomitant order to notify the first-acting house of final passage. The second house concurs in the bill passed by the first house; the second house does not concur¹⁴² in the order or resolution of the first house. In other words, the House's vote (by means of a resolution and an order) decides that the bill passes *the House*. The Senate does not concur in the sense that it agrees that the bill has passed *the House*. The Senate decides by means of a vote on a resolution and an order that the bill has passed *the Senate*. In other words, the two houses *never* concur in the same order or resolution; rather, the two houses concur in passing the same underlying legislation. With that in mind, one can more clearly understand the complex, curious, and surprisingly exacting syntax¹⁴³ of the ORV Clause: "Every Order, Resolution, or Vote to which the Concurrence of the Senate and House . . . may be necessary . . . shall be presented to the President . . ." The Senate and House are not concurring in any common order, resolution, or vote. Rather, the two houses concur with one another in passing a common bill, legislation authorizing subsequent single-house action.

<http://www.tynwald.org.im> (last visited Jan. 10, 2005); *see also* The States of Jersey Government Website: Government Assembly, at <http://www.gov.je/government/govassembly.asp> (last visited Jan. 10, 2005); States of Guernsey Official Government Website, at <http://www3.gov.gg/content/directory.jsp> (last visited Jan. 10, 2005); States of Alderney Government, at <http://www.alderney.gov.gg/index.php/pid/25> (last visited Jan. 10, 2005); *see also* CHARLES SANFORD TERRY, *THE SCOTTISH PARLIAMENT: ITS CONSTITUTION AND PROCEDURE 1603-1707* (1905); *THE FEDERALIST* NO. 52 (James Madison) (Clinton Rossiter ed., 1961) (providing an extensive discussion of the Irish Parliament). Professor Pole has disputed the accuracy of Madison's exposition of British and Irish parliamentary affairs. *See, e.g., THE FEDERALIST* NO. 52, at 287 n.3 (James Madison) (J.R. Pole ed., 2005). *But compare* Brown, *supra* note 6, at 474-76 (supporting the claim that none of the Founders at the Convention were born in the specific outlying British territories or possessions named above, Ireland and Scotland excepted of course, but noting that Hamilton was born in the British West Indies), *with* LODGE, *supra* note 100, at 407 ("There came also [to New England prior to 1765] a few Normans from the Channel Islands . . .").

142. *See* U.S. CONST. art. I, § 7, cl. 1 ("All Bills for raising Revenue shall originate in the House of Representatives; but the Senate may propose or *concur* with Amendments as on other Bills.") (emphasis added). The Senate concurs in the bill with or without amendments. The Senate does not concur in the House's orders, resolutions, or votes. *Cf.* McGinnis & Rappaport, *supra* note 4, at 342 n.68 ("[T]he same rules that govern the passage of bills [under clause 2] should apply under [the ORV Clause], yet the [ORV] Clause does not use the term 'passed.' Instead, it uses 'concurrence' . . ."). Notably, McGinnis and Rappaport do not arrive at the condition precedent interpretation of the ORV clause. *See id.*

143. *But compare* CURRIE, *supra* note 34, at 21-23 ("The feeling nevertheless lingers that literal applicability of the veto clause to amendments is the result of careless drafting."), *with* Geringer v. Bebout, 10 P.3d 514, 521-23 (Wyo. 2000) (adjudicating a state analogue to the ORV Clause and holding that a proposed state constitutional amendment in the form of a resolution is presented to the governor, expressly rejecting *Hollingsworth*), *and* State *ex rel.* Livingstone v. Sec'y of State, 137 Mont. 557, 567-68 (1960) (adjudicating a state analogue to the ORV Clause and holding that a proposed state constitutional amendment in the form of a resolution is presented to the governor).

Query: The ORV Clause says “[e]very Order, Resolution, or Vote.” Why have you limited it to “[e]very Order, Resolution, or Vote [of a single house]”?

Answer: This criticism is correct. The ORV Clause is perhaps more textually complex than any other clause in the Constitution. In presenting this Article, it was necessary to start *somewhere*. The purpose of the ORV Clause is to ensure that when Congress authorizes one of its constituent parts to make binding legal relations, then that further legislative action (in the sense of the institution taking the lawmaking initiative) or executive action (in the sense of lawmaking limited by statutory delegation) gets vetted by the President. Perhaps the fullest expression of that power would be single-house action.¹⁴⁴ Congress cannot escape that result by authorizing further bicameral, as opposed to single-house, action. In other words, the greater power of Congress to authorize future single-house action subject to presidential veto also includes the lesser power of Congress to authorize future bicameral action subject to presidential veto. Although the clause supports both constructions, one textually and one by implication, it is not very likely that the conventioners and ratifiers believed that a future Congress (subject to veto) would ever authorize itself to subsequently act (subject to veto). Such preliminary authorization would be moribund because the latter Congress could always act in the first instance subject to presentment.¹⁴⁵

144. The fullest expression of Congress’s power under the ORV Clause might go beyond single-house action. My tentative view is that Congress could delegate lawmaking authority (subject to a veto) to the committee of the whole or to any other committee or subcommittee which could report to the full house and which could traditionally make an *affirmative* order, resolution, or vote subject to rejection by the full house. See *infra* note 237 (discussing the 1854 opinion of Attorney General Cushing). However, it appears to me that the other branches need not take cognizance of any such measure unless it is authenticated: by the speaker or clerk or other officer of the House for a House measure; or by the Vice President, pro tempore, or secretary of the Senate or other officer of the Senate for a Senate measure. This restriction does not rest upon the ORV Clause but arises from coordinate constitutional provisions. See U.S. CONST. art. I, § 2, cl. 5; *id.* art. I, § 3, cls. 4 & 5. The suggestion here is that only house-wide officers may provide the channels through which official congressional communications to the other branches of government may be transmitted. Moreover, committee action might be viewed as an internal submajority voting rule ratified *ex post* by an official responsible to the full house.

145. See, e.g., *Commonwealth v. Caton*, 8 Va. (4 Call.) 5 (1782), also reported at 2 DAVID JOHN MAYS, THE LETTERS AND PAPERS OF EDMUND PENDLETON 1734–1803, at 425 (1967) (noting that although the statute vests sole power to pardon in the Crown “[i]t was never doubted but an Act of Parliament would pardon any Attainder”). As traditionally understood, the Crown is a constituent element of Parliament. See *supra* note 100 (citing the Simcock correspondence); *infra* note 149 (discussing Tucker’s *Blackstone*). *Caton*, however, contains contrary authority too. In *Caton*, the Virginia legislature, acting by statute, gave the governor a pardon power to temporarily suspend a criminal sentence in treason cases until the legislature decided a convict’s fate by a subsequent bicameral legislative action. For a discussion of *Caton*, see *infra* notes 204–23 and accompanying text.

It appears to me that similar procedural maneuvering occasionally happened both prior to American Independence,¹⁴⁶ and immediately thereafter, but prior to 1787.¹⁴⁷ Of course, even if no American or British historical precedents exist for the ORV Clause, it is always possible that the ORV Clause was an American innovation—an American precursor to the Parliament Act of 1911, a statute authorizing subsequent legislative action by the Commons acting without concurrence from the Lords, but with the consent of the Crown.¹⁴⁸

146. Consider the following act of the Royal Colony of New Jersey:

An ACT [passed March 11, 1774] to oblige the Treasurers of the Colony of New-Jersey to give Security for the due Execution of their Offices

. . . and be it further enacted . . . [t]hat whenever the Council [the upper house] and Assembly [the lower house], or *either of them*, shall think such Treasurer not to have rendered a just or true Account . . . and shall make Application to the Governor . . . it shall and may be lawful for the said Governor . . . and he is accordingly, upon such Application, to order the said Bond to be immediately prosecuted for any such Omission or Misbehaviour as aforesaid.

See, e.g., 5 LAWS OF THE ROYAL COLONY OF NEW JERSEY 1770–1775, at 244–45 (Bush 1986) (emphasis in original omitted; emphasis added), *reprinted and modernized in* NEW JERSEY R.S. 52:18-4 (1877) (“The legislature, or either branch thereof, may, when in its judgment the obligors in the state treasurer’s bond appear to be insufficient, require the treasurer to give another bond, with surety, to be approved by the legislature.”); *supra* note 126 (collecting American secondary sources). *But see* The General Assembly of the State of New Jersey v. Byrne, 90 N.J. 376, 378 (1982) (striking down a legislative veto as a violation of the state constitution); Letter from Leonard J. Lawson, First Assistant to the Legislative Counsel, to Donna Phelps, Secretary of the New Jersey State Senate (undated, but sent on or before Sept. 9, 2003) (on file with the Texas Law Review) (suggesting that R.S. 52:18-4 may be the *only* example of New Jersey single-house action from the colonial period or thereafter: “it may be that [we] found the only needle in the haystack [for Mr. Tillman]”); *see also, e.g.*, 2 HERBERT L. OSGOOD, THE AMERICAN COLONIES IN THE EIGHTEENTH CENTURY 474 (1924) (discussing New York in the 1730s: “With the accession of Clarke to office the governor ceased to sit in council when it was in legislative session Because of the opposition of the council, a bill for the appointment of an agent by the *assembly alone* was dropped.”) (emphasis added); JOURNAL OF THE LEGISLATIVE COUNCIL OF THE COLONY OF NEW-YORK 691 (Albany 1861) (recording an entry for October 27, 1737) (“An Act to enable the *General Assembly* or *House of Representatives* of this Colony for the time being to name, constitute and appoint and pay one or more agent or agents to solicit the Publick Affairs of this Colony at the Court of Great Britain.”) (emphasis added). This appears to be an unsuccessful delegation by statute to a single house. It is impossible to be sure because the primary documents Professor Osgood relied upon are no longer legible. *See* NEW YORK (COLONY) COUNCIL: BILLS PLACED BEFORE THE PROVINCIAL LEGISLATURE WHICH FAILED TO BECOME LAW 1691–1770 (New York State Archives, Microfilm Series A1890, Roll 2: Nov. 10, 1711 and forward); *cf.* JACK P. GREENE, THE QUEST FOR POWER: THE LOWER HOUSES OF ASSEMBLY IN THE SOUTHERN ROYAL COLONIES 1689–1776, at 282–83 (1963) (recounting that in 1759 the Virginia House of Burgesses “secure[d] [by statute] control over a[] [colonial] agent,” having excluded participation in oversight by the Council and Governor); FORREST McDONALD, RECOVERING THE PAST: A HISTORIAN’S MEMOIR 186 (2004) (“The Framers . . . used old materials to create a new order for the ages.”).

147. *E.g.*, Commonwealth v. Caton, 8 Va. (4 Call.) 5 (1782), *also reported at* 2 MAYS, *supra* note 145, at 416–27 (“The Case of the Prisoners”). For a discussion of Caton, see *infra* notes 204–23 and accompanying text.

148. Parliament Act of 1911, 1 & 2 Geo. 5, c. 13 (U.K.) (providing that the House of Lords could delay a bill for up to two years after which Commons could act without the participation of the Lords, but that the crown’s assent was still required), *amended by* Parliament Act of 1949, 12,

The suggestion here is that statutory waiver of otherwise constitutionally mandated bicameralism was consistent with the British view of parliamentary sovereignty. Parliament, as sovereign, could always delegate to any body, within or without itself. Admittedly, outside the financial context, lawmaking through a single house pursuant to a prior authorizing or subsequent ratifying statute was probably not known in Britain until the mid-nineteenth century.¹⁴⁹

13 & 14 Geo. 6, c. 103 (U.K.) (reducing the period by which the House of Lords could delay a bill to one year). See The U.K. Parliament, at <http://www.parliament.uk/works/parliament.cfm#fourteenth> (last visited Jan. 10, 2005) (documenting that the lower house has exercised legislative power without the upper house three times since 1949). In Britain, single-house action may be in desuetude, but it is not forgotten. Some, however, question its validity. Peter Osborne notes:

[S]erious legal opinion has always doubted the validity of that 1949 Act. The problem is that the Attlee government used the 1911 Act itself to press through the 1949 measure. Right from the very start Britain's leading jurists pointed out that the 1911 Act—a piece of delegated legislation—did not permit the monarch and Commons acting alone to change its own terms [from the 1911 Act].

Peter Osborne, *The Dubious Means by which Labour Hopes to Ban Hunting by Christmas*, SPECTATOR, June 26, 2004, at 10; see also Francis Bennion, *Lord Donaldson of Lynton and the Parliament Acts*, 150 NEW L.J. 1789, 1789 (2000) (“Lord Donaldson says doubts have been raised [about the 1949 Act] by . . . the constitutional lawyers Sir William Wade, Professor Zelic and Professor Hood Phillips.”).

149. Sir William McKay notes:

The thing is not constitutionally impossible, as even today in the post-Thatcher era powers still exist by which the House of Commons may by [single-house] resolution under the Industrial Development Act 1972 (I think) make grants of specified amounts to identified “failing” industries. There used also to be powers under the Census Act 1920 to vary the questions in the census by resolution, but I have a feeling that has been swept away in some statutory clean-up.

So far as the earlier period is concerned, I would, as I said, be surprised to find such provisions, largely because those I have quoted are in effect a variation on the commonplace power conferred on the government by statute to make subordinate legislation which may then be subjected to legislative scrutiny, either by being of no effect till affirmed or put into effect with the possibility of a negative resolution to knock the regulation down. *That system was unknown until the latter half of the nineteenth century: so it would be odd to find it anticipated much earlier.*

Email from Sir William McKay, Clerk of the House of Commons (ret.), to Seth Barrett Tillman (May 28, 2003) (on file with the Texas Law Review) (emphasis added); see also BROMHEAD, *supra* note 125, at 131 (“There is nothing to stop Parliament from delegating part of its legislative power, and this is often done.”). Compare McKay’s comments with those of Blackstone:

These are the constituent parts of a parliament; the king, the lords spiritual and temporal, and the commons. Parts, of which each is so necessary, that the consent of all three is required to make any new law that shall bind the subject. Whatever is enacted for law by one, or by two only, of the three is no statute; and to it no regard is due, unless in matters relating to their own privileges. For though, in times of madness and anarchy, the commons once passed a vote[], “that whatever is enacted or declared for law by the commons in parliament assembled, hath the force of law; and all the people of this nation are concluded thereby, although the consent and concurrence of the king or house of peers be not had thereto;” yet, when the constitution was restored in all [its] forms, it was particularly enacted by statute . . . that if any person shall maliciously or advisedly affirm, that both or either of the houses of parliament have

Query: The ORV Clause says “take Effect.” Why not just see that as loose language meaning that bicameral action subject to presentment becomes a “law” as in Clause 2?

Answer: Yes, Madison probably thought that. I suggest that Randolph and others may have understood it differently. There were probably a variety of views at the Convention among those taking the time to think about this particular phrase within the ORV Clause.¹⁵⁰ For example, “At common law all statutes *took effect* from the first day of the legislative session and thus were retroactive in effect [because they received royal assent thereafter].”¹⁵¹ Thus, the purpose of the ORV Clause, as opposed to Clause 2, might have

any legislative authority without the king, such person shall incur all the penalties of a *praemunire*.

2 ST. GEORGE TUCKER, BLACKSTONE’S COMMENTARIES: WITH NOTES OF REFERENCE, TO THE CONSTITUTION AND LAWS OF THE FEDERAL GOVERNMENT OF THE UNITED STATES AND OF THE COMMONWEALTH OF VIRGINIA 160 (Rothman Reprints 1969) (1803).

150. Beyond the fact that seven of ten voting state delegations shifted their votes over less than twenty-four hours for no apparent reason, there is little evidence that the delegates gave this matter any thought. Nor does there appear to be any substantial discussion of the reach of this clause among the extant ratification debates. Generally, historians have followed suit and given the matter short shrift. *E.g.*, CARL VAN DOREN, THE GREAT REHEARSAL: THE STORY OF THE MAKING AND RATIFYING OF THE CONSTITUTION OF THE UNITED STATES (1948) (providing no discussion of the ORV Clause); *see also, e.g.*, CAROL BERKIN, A BRILLIANT SOLUTION: INVENTING THE AMERICAN CONSTITUTION 131–36 (2002) (omitting any discussion of the ORV Clause); CLINTON ROSSITER, 1787: THE GRAND CONVENTION 206–27 (1987) (same); JEFFREY ST. JOHN, CONSTITUTIONAL JOURNAL: A CORRESPONDENT’S REPORT FROM THE CONVENTION OF 1787, at 161–64 (1987) (failing, notwithstanding day-by-day entries, to report any discussion on the ORV Clause); CATHERINE DRINKER BOWEN, MIRACLE AT PHILADELPHIA: THE STORY OF THE CONSTITUTIONAL CONVENTION MAY TO SEPTEMBER 1787 (1986) (offering no discussion of the ORV Clause).

Even Randolph’s biographers have failed to include any discussion relating to the ORV Clause. *E.g.*, JOHN J. REARDON, EDMUND RANDOLPH: A BIOGRAPHY (1974); CHARLES FREDERIC HOBSON, THE EARLY CAREER OF EDMUND RANDOLPH, 1753–1789 (1971) (unpublished Ph.D. dissertation, Emory University); MONCURE DANIEL CONWAY, OMITTED CHAPTERS OF HISTORY DISCLOSED IN THE LIFE AND PAPERS OF EDMUND RANDOLPH: GOVERNOR OF VIRGINIA; FIRST ATTORNEY-GENERAL [&] UNITED STATES SECRETARY OF STATE (photo. reprint 1971) (1888); EDMUND RANDOLPH: A MEMOIR, BY ONE OF HIS DESCENDANTS (1869). It is a safe assumption that if the ORV Clause has failed to make it into the Randolph biographies, then it is even more unlikely to have appeared in the biographies of other delegates, Madison excepted. Likewise, I have discovered no record of any discussion of the ORV Clause in the collected letters or convention papers of other delegates or in any state ratification debate, including those published after *Elliot’s Debates*. *See, e.g.*, THEODORE FOSTER’S MINUTES OF THE CONVENTION HELD AT SOUTH KINGSTOWN, RHODE ISLAND, IN MARCH, 1790, WHICH FAILED TO ADOPT THE CONSTITUTION OF THE UNITED STATES 46–47 & nn.37–39 (Robert C. Cotner ed., 1929).

151. Frank E. Horack, Jr., *Constitutional Limitations on Legislative Procedure in West Virginia*, 39 W. VA. L.Q. 294, 313 (1932) (emphasis added). Luce, however, writes:

Until comparatively recent days it was the English rule that, when an act did not provide to the contrary, it was to be taken to operate from the beginning of the session in which it was passed. . . . The Federal Constitution has no specific provision as to the time when a statute shall take effect

LUCE, *supra* note 100, at 561. How did Luce miss the “take effect” language of the ORV Clause?

been to block the common law presumption of retroactivity.¹⁵² But this presumption was left intact in Clause 2. This difference must reduce the force of the Madisonian position.

Keeping in mind that the Ex Post Facto Clause was added to the text of the Constitution after the ORV Clause had already been added, it is possible that the Constitution's state convention ratifiers saw the necessity for the "take effect" language somewhat differently from the conventioners. For example, some may have thought the Ex Post Facto Clause already prevented retroactivity under the aegis of Clause 2 and therefore that it was unnecessary to add "take effect"-type language to that clause. This is because, as a textual matter, the Ex Post Facto Clause reaches "laws," the subject of Clause 2.¹⁵³ Alternatively, others may have thought additional constitutional text was necessary for law analogues. This argument cuts both ways. A Madison supporter, at the time of ratification, could argue that the courts would defer to Congress. In that situation, if the Ex Post Facto Clause only reached documents congressionally stylized as "laws," then orders, resolutions, and votes needed additional constitutional text blocking retroactivity. A Randolph supporter, on the other hand, may have taken the position that it was precisely because the ORV Clause extended to lawmaking by single-house action that additional language precluding retroactivity was needed; the Ex Post Facto Clause could not reach single-house action under any text-sensitive interpretation. Although the strength of these two positions is admittedly close, the Randolph supporter has the better argument: the Madison supporter's position is premised on the courts' inability to look beyond the enactment clause or style under which a bill becomes a law. Such a position assumes Congress will either bully or fool cowardly or stupid courts. Such fears are wholly consistent with what we know about Madison's political beliefs and expectations. But were Madison's fears obviously more representative of the Convention and wider society?

Furthermore, a Randolph supporter might also have argued that even if the Ex Post Facto Clause did not reach civil actions adjudicated under federal

152. Federal retroactivity jurisprudence is customarily examined under the aegis of the Due Process Clause and the Ex Post Facto Clause. *See, e.g., Landgraf v. USI Film Prods.*, 511 U.S. 244, 266 (1994) (examining the retroactivity of federal sexual harassment law and noting that the retroactivity principle is expressed by both the Due Process Clause and the Ex Post Facto Clause). Does the "take effect" language of the ORV Clause block retroactive changes to civil liability, particularly under the Madisonian view of the ORV Clause? Why has this line of inquiry gone unexplored? *See, e.g., LUCE, supra* note 100, at 554–55 (taking a position generally consistent with the Madisonian view without further exploring these questions).

153. U.S. CONST. art. I, § 9 ("No Bill of Attainder or ex post facto Law shall be passed.") (emphasis added). The Ex Post Facto Clause was first discussed at the Convention on August 22, 1787, some time after the ORV Clause was moved by Randolph. *See* 5 ELLIOT'S DEBATES, *supra* note 96, at 462–63 (recording Madison's entry for Aug. 22, 1787).

law,¹⁵⁴ those who bore the brunt of such laws at least had the benefit of the full expression of prior bicameralism. Arguably, single-house action would give the public less advance warning. Thus, fairness dictated limiting the retroactivity of lawmaking pursuant to the ORV Clause.

Query: You have said before that you do not trust Madison's *Debates* for August 15 and 16, 1787. Why not?

Answer: Let's look at the entries:

Wednesday, August 15, 1787:

Mr. MADISON, observing that if the negative of the President was [sic] confined to *bills*, it would be evaded by acts under the form and name of resolutions, votes, &c., proposed that "or resolve" should be added after "*bill*," in the beginning of section 13, with an exception as to votes of adjournment, &c. After a short and rather confused conversation on the subject, the question was put and rejected, the votes being as follows:—Massachusetts, Delaware, North Carolina, ay, 3; New Hampshire, Connecticut, New Jersey, Pennsylvania, Maryland, Virginia, South Carolina, Georgia, no, 8.

Thursday, August 16, 1787:

Mr. RANDOLPH, having thrown into a new form the motion putting votes, resolutions, &c., on a footing with bills, renewed it as follows:—

Every order, resolution, or vote, to which the concurrence of the Senate and House of Representatives may be necessary, (except on a question of adjournment, and in the cases hereinafter mentioned,) shall be presented to the President for his revision; and, before the same shall have force, shall be approved by him, or, being disapproved by him, shall be repassed by the Senate and House of Representatives, according to the rules and limitations prescribed in the case of a bill.

Mr. SHERMAN thought it unnecessary, except as to votes taking money out of the treasury, which might be provided for in another place.

On the question as moved by Mr. Randolph, it was agreed to.

154. Cf. *Calder v. Bull*, 3 U.S. (3 Dall.) 386, 391 (1798) (holding that the State Ex Post Facto Clause, Article I, Section 10, attaches only to criminal penalties).

New Hampshire, Connecticut, Pennsylvania, Delaware, Maryland, Virginia, North Carolina, South Carolina, Georgia, ay, 9; New Jersey, no, 1; Massachusetts, not present.

The amendment was made a fourteenth section of article 6.¹⁵⁵

If Madison had been concerned on August 15, 1787 with congressional legerdemain bypassing presentment by means of “resolutions, votes, &c.,” then he would have been extremely unwise in limiting his proposed amendment exclusively to “resolves.” Why not add “orders”? Why not add “votes”? The reason Madison wrote “votes, &c.” within his August 15, 1787 entry is that he wrote that entry sometime after Randolph made use of his more expansive language in the ORV Clause. In other words, the entry for August 15, 1787 was written on or after August 16, 1787. This might seem like an unnecessarily daring historical claim. But it is fully supported by the fact that Madison said *his* proposal of August 15, 1787, i.e., merely adding “or resolves,” also made an exception for adjournments. This is simply not true.¹⁵⁶ Madison’s proposal had nothing to do with adjournments. Only Randolph’s proposal, made the next day, spoke to adjournments. And had Madison’s motion passed, but not Randolph’s, there would be no constitutional text expressly removing the President from participating in either bicameral or single-house adjournment resolutions—depending on one’s point of view. This establishes that Madison wrote the August 15, 1787 entry sometime after debate on Randolph’s August 16, 1787 motion had concluded, and the entry for the former date was “confused” by debate

155. See 5 ELLIOT’S DEBATES, *supra* note 96, at 431–32 (indicating that Article 6 was the predecessor of Article I, Section 7).

156. See Letter from Professor Forrest McDonald to Seth Barrett Tillman (Jan. 13, 2004, but mistakenly dated Dec. 13, 2004) (on file with the Texas Law Review) (expressing the opinion that but for two minor exceptions (since corrected) the author’s positions taken in the instant Article are “historically *absolutely* convincing”) (emphasis added).

In the *Debates*, Madison stated that his motion was merely to add the phrase “or resolves.” It is likely that this was mere shorthand on his part. His full motion can be found in the Convention’s journal. 2 FARRAND, *supra* note 29, at 295 (“No Bill or resolve of the Senate and House of representatives shall become a Law, or have force, until it shall have been presented to the President of the United States for his revision . . .”). In short, both Madison’s *Debates* and the *Journal of the Convention* confirm the argument that the August 15, 1787 entry was confused by later events in that neither reports that Madison’s motion addressed adjournments in any way. This result is unchanged even if we reject the Convention journal as possibly inaccurate and construe Madison’s entry literally: Madison merely added “or resolves” into then extant Article I, Section 7, Clause 2. Clause 2 had no language addressing adjournments—then or now.

Interestingly, Madison’s motion made some minor changes to the source language originally appearing in the Massachusetts Constitution of 1780. See MASS. CONST. of 1780 (Frame of Government), Ch. 1, § 1, art. II (“No bill or resolve of the Senate *or* House of Representatives shall become a law, *and* have force as such, until it shall have been laid before the Governor for his revisal . . .”) (emphasis added).

from the latter date. Indeed, this possibility is consistent with Madison's claims with regard to how he took notes at the Convention.¹⁵⁷

I am certainly not suggesting that Madison lied,¹⁵⁸ nor am I suggesting that this error on Madison's part proves the unreliability of his substantive discussion within the entries for August 15 and August 16, 1787. I am only arguing that given Madison's undoubted error with regard to the narrative of the Constitution's chronology, the otherwise unexplained shift in the votes of an absolute majority of the state delegations, and Madison's claim that the debate was "confused," it is perhaps time to test the canonical Madisonian position against the text of the Constitution and against any alternative theories we might discover as to the meaning and reach of the ORV Clause.

I hasten to point out that nothing will be gained by a fruitless debate about burden shifting. And, if we are, at this late date, to talk of burdens, I maintain that the burden is on those who have for far too long and without care or consideration relied on Madison's *Debates* as a hermeneutical crutch blocking any critical or even any reasonable discussion. Moreover, the only judicial attempts to expound on the ORV Clause do so either in dicta or are otherwise clearly uninformed.

One such opinion—I maintain—is *INS v. Chadha*, the legislative veto case.¹⁵⁹ The facts of *Chadha* are fairly straightforward. Under the Immigration and Nationality Act,¹⁶⁰ Congress provided for the deportation of aliens following administrative hearings. Subject to statutory criteria, the Attorney General had discretion to suspend an administrative law judge's deportation decision. Afterwards, the Attorney General was required to report the suspension decision to Congress. At that point, either house of Congress acting alone by resolution had statutory authority to rescind the Attorney General's suspension decision. By reversing the Attorney General's decision, the administrative law judge's original decision to deport was again binding. This is, in substance, what happened to Jagdish Rai

157. See 3 FARRAND, *supra* note 29, at 550 (recording Madison's Preface to Debates in the Convention of 1787: "I was enabled to write out my daily notes during the session or within a few finishing days after its close . . .") (emphasis added); see also Daniel A. Farber, *The Originalism Debate: A Guide for the Perplexed*, 49 OHIO ST. L.J. 1085, 1088–89 (1989) (noting possible postratification alteration of Madison's notes).

158. For those particularly desirous of a theory to account for Madison's mistaken entry, they might consider the weather. See BOWEN, *supra* note 150, at 205 ("The August [1787] heat was merciless.").

159. *INS v. Chadha*, 462 U.S. 919 (1983); see, e.g., BRUCE ACKERMAN & DAVID GOLOVE, IS NAFTA CONSTITUTIONAL? 126 (1995) (noting that *Chadha* "involved another twentieth-century innovation: the 'legislative veto'"); *supra* note 149 (suggesting that the legislative veto was an extant practice in the United Kingdom parliament in the nineteenth century); *infra* notes 204–23 (discussing *Commonwealth v. Caton* and the legislative veto-like procedure extant in postindependence Virginia).

160. Pub. L. No. 84-414, 66 Stat. 163 (codified as amended in scattered sections of 8 U.S.C.) (repealed 1996).

Chadha. In 1974, an administrative law judge ordered Chadha's deportation. The Attorney General suspended that decision and reported his exercise of discretion to Congress. In 1975, the House of Representatives passed an affirmative resolution expressing disagreement with the Attorney General's decision. Chadha attacked the constitutionality of the action taken by the House, or to put it more precisely, Chadha argued that a single house acting alone cannot make binding legal relations. Chadha's attack on the constitutionality of the legislative veto was upheld by the Ninth Circuit and, on appeal, by the Supreme Court. In short, the Supreme Court struck down the use of the legislative veto for failing to comply with constitutionally mandatory bicameralism and presentment.¹⁶¹

Although I will refrain from criticizing the *Chadha* majority for being unfamiliar with the condition precedent interpretation of the ORV Clause, several substantial errors within the *Chadha* decision deserve note. It is my position that these mistakes are hauntingly similar to one another and reflect a common faux textualism rooted in an antimajoritarian conceit. First, without *any* analysis, the *Chadha* Court assures the reader that *Hollingsworth* was a presentment case.¹⁶² Although the *Chadha* Court, as explained below, adopted the Madisonian view of the ORV Clause, no textual explanation accounting for *Hollingsworth* is put forward. Instead, the absence of presidential participation in the amendment process is rationalized wholly on the basis of congressional supermajority requirements and the state ratification process, which the Court collectively termed "alternative protections."¹⁶³ Protections from what? From whom?

Second, the *Chadha* Court stated that there are "but four provisions in the Constitution, explicit and unambiguous, by which one House may act alone with the unreviewable force of law, not subject to the President's veto."¹⁶⁴ Here the Court named House impeachments, Senate trials on impeachment, the Senate's "final unreviewable power to approve or to disapprove presidential appointments," and the Senate's "unreviewable power to ratify treaties negotiated by the President."¹⁶⁵ One can only be underwhelmed by the Court's analysis. Senate trial is preconditioned on prior House impeachment. This is hardly one house "acting alone." Moreover, to the extent that House impeachment prior to Senate trial and conviction has immediate legal consequences by operation of a coordinate statute, the central holding of *Chadha* must be seriously questioned. For example, a federal statute precludes an impeached federal officer from

161. *Chadha*, 462 U.S. at 946–51.

162. *Id.* at 956 n.21 (citing *Hollingsworth v. Virginia*, 3 U.S. (3 Dall.) 378 (1798)).

163. *Id.*

164. *Id.* at 955 (footnote omitted).

165. *Id.*

succeeding to the presidency.¹⁶⁶ Does the reader agree with Congress's statute or with the Court? The Senate does not have a *final* power to approve any presidential appointments. That power is lodged exclusively with the President following Senate advice and consent.¹⁶⁷ And again, no treaty has *ever* been ratified by the Senate. That power, too, is lodged exclusively with the President following Senate advice and consent.¹⁶⁸ In both cases, a President can change his mind following "final" Senate action on the matter. Notwithstanding *Chadha*, in these two latter situations, the President has a functional "veto" over "final" Senate action.¹⁶⁹

Third, having informed the reader that there are "but four" textually based exceptions to otherwise mandatory bicameralism, the Court then goes on to name two additional exceptions in two footnotes.¹⁷⁰ The Court includes the House's contingent power to *elect* the President of the United States (and the Senate's concomitant power to *elect* the Vice President),¹⁷¹ and each house's power to act alone over "specified internal matters."¹⁷² And here, the reader discovers the full flavor of the Madisonian imagination in its modern

166. 3 U.S.C. § 19(e). Moreover, Madison noted:

[I]f the President be connected, in any suspicious manner, with any person, and there be grounds to believe he will shelter him, the House of Representatives can impeach him; they can remove him if found guilty; they can suspend him when suspected, and the power will devolve on the Vice-President. Should he be suspected, also, he may likewise be suspended till he be impeached and removed, and the legislature may make a temporary appointment. This is a great security.

3 ELLIOT'S DEBATES, *supra* note 96, at 498 (quoting Madison); *see also* 1 TUCKER, *supra* note 149, at 347–48 ("[I]t is presumable, that whenever a president may be actually impeached, he would be instantly incapacitated thereby from discharging the duties of his office, until a decision should take place; in which case also, the duties of the office of president, must devolve upon the vice-president.").

167. *See* *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 157 (1803) (recognizing that in appointing an officer of the United States, "[t]he last act to be done [is done] by the President" and that "[the President] act[s] on the advice and consent of the senate to his own nomination").

168. RESTATEMENT (THIRD) OF FOREIGN RELATIONS § 303 cmt. d (1987) ("[T]he President . . . 'makes' a treaty by ratifying or acceding to it . . . but he may do so only after the Senate consents."); *id.* § 312 cmt. j ("An international agreement made by the United States in the form of a treaty enters into force for the United States when the President . . . has ratified it or otherwise given official notification of assent to it, provided the agreement is also in force internationally.").

169. Following Senate advice and consent, a President may refuse to ratify a treaty he proposed. But can a successor President ratify the treaty relying on the prior President's submission and somewhat stale Senate advice and consent? Similarly, if a President refuses to appoint his own nominee following Senate advice and consent, can the appointment be finalized by the President's successor in office? If the answer is "yes," then a first-in-time President's "veto" over Senate advice and consent is better described as inaction, rather than final action. But, of course, the President's traditional veto over bills (the pocket veto excepted) still leaves the Congress with room to continue political maneuverings of a vetoed matter.

170. *Chadha*, 462 U.S. 955 nn. 20 & 21.

171. *Id.* at 955 n.20 (citing U.S. CONST. art. II, § 1, *amended by* U.S. CONST. amend. XII).

172. *Id.* at 955 n.21 (citing U.S. CONST. art. I, § 5, cl. 2). The Court actually cites only Clause 2, but the reader must assume that the Court was referring to Article I, Section 5 generally—otherwise the Court's interpretation is utter nonsense.

incarnation. The so-called power over “internal matters” includes nothing less than the power to disqualify would-be members and the power to expel sitting members. By what stretch of the imagination is this an “internal matter”? Are not contested elections a matter of considerable public concern, at least to the voters who participated in the contested election? Moreover, the Court took the position that exceptions to bicameralism generally embrace “precautionary alternative checks.”¹⁷³ Not only are such alternative checks on the House’s power to elect the President lacking, but in such circumstances the quorum requirement is considerably relaxed.¹⁷⁴

Notwithstanding its feigned textualism, *Chadha* had no intellectual legs on which to stand.

Of course, under these conditions, when the very words of the Constitution are alien to its interpreters, we cannot but take for granted that such a court would adopt the Madisonian position with regard to the ORV Clause:

The records of the Constitutional Convention reveal that the requirement that all legislation be presented to the President before becoming law was uniformly accepted by the Framers. Presentment to the President and the Presidential veto were considered so imperative that the draftsmen took special pains to assure that these requirements could not be circumvented. During the final debate on Art. I, § 7, cl. 2, James Madison expressed concern that it might easily be evaded by the simple expedient of calling a proposed law a “resolution” or “vote” rather than a “bill.” 2 Farrand [The Records of the Federal Convention of 1787 (1911)] 301–302. As a consequence, Art. I, § 7, cl. 3 . . . was added. 2 Farrand 304–305.¹⁷⁵

173. *Id.*

174. Compare U.S. CONST. art. I, § 5, cl. 1 (prescribing that generally a majority of members is a quorum, or 218 members of a 435 member House), with *id.* art. II, § 1 amended by amend. XII (directing that when the House of Representatives elects the president, as few as 34 members—one from each of two-thirds of the states—is a quorum of the 50 states). But see Vermeule, *supra* note 64, at 361 & n.4 (denominating the 34 House member quorum a “supermajority voting” rule rather than a submajority voting rule); Brett W. King, *The Use of Supermajority Provisions in the Constitution: The Framers, The Federalist Papers and the Reinforcement of a Fundamental Principle*, 8 SETON HALL CONST. L.J. 363, 372 n.25, 408 (1998) (describing the two-thirds requirement as a “supermajority rule”). Furthermore, the provision requiring an absolute majority of all state delegations to elect the President in the House, rather than a majority of either all represented or all voting delegations, although strict, is hardly a *supermajority* requirement.

175. *Chadha*, 462 U.S. at 946–47 (footnote omitted). Commenting on the same passage from the Convention record, Justice White, in dissent, wrote: “The chosen language, Madison’s comment, and the brevity of the Convention’s consideration, all suggest a modest role was intended for the [ORV] Clause and no broad *restraint* on Congressional authority was contemplated.” *Id.* at 981 (White, J., dissenting) (emphasis added). The possibility that the ORV Clause might be a power rather than a restraint was not even on Justice White’s radar screen.

The *Chadha* Court assumed that Madison's rationale for his own motion equally applied to Randolph's rationale for *his* motion. Moreover, the fact that Madison's motion failed seems to have escaped the Court's notice. Is it not a pathetic commentary on our jurisprudence that the only democratic component of the Convention record—the actual votes of the States—is unworthy of the Court's commentary or analysis? This sad state of affairs afflicts the *Chadha* majority, Justice Powell's concurrence, and Justice White's dissent. (And the Supreme Court is not our only federal court struck with this peculiar malady.¹⁷⁶) It is worth noting that not every earlier commentator on the Convention record was quite as confident as Chief Justice Burger and his majority.¹⁷⁷

Query: Have you not overstated the textually based case for the condition precedent interpretation? The language of the ORV Clause is:

Every Order, Resolution, or Vote to which *the Concurrence of the Senate and House of Representatives* may be necessary (except on a question of Adjournment) shall be presented to the President of the United States; and before the Same shall take Effect, shall be approved by him, or being disapproved by him, shall be repassed by two thirds of the Senate and House of Representatives, according to the Rules and Limitations prescribed in the Case of a Bill.

But if the concurrence of the two houses is necessary as (prior or subsequent) authorizing legislation, then Randolph should have written the clause generally along the following lines:

Every Order, Resolution, or Vote to which (*authorizing*) *legislation (subject to a veto)* may be necessary (except on a question of Adjournment) shall be presented to the President of the United States;

176. See, e.g., *Consumer Energy Council of America v. FERC*, 673 F.2d 425, 456 n.128 (D.C. Cir. 1982) (citing Farrand and quoting Madison on the ORV Clause's rationale); see also Antonin Scalia, *The Legislative Veto: A False Remedy for System Overload*, 3 REGULATION 19, 20 (1979) ("The purpose [of the ORV Clause], as confirmed by accounts [!] of the debate at the Constitutional Convention, is to prevent Congress from evading the President's legislative role (as some state legislatures before 1789 had evaded gubernatorial veto powers) by simply acting through measures that are not called 'bills.'") (emphasis and exclamation point added); Olson, *supra* note 94, at 30 ("The alarmists who have been bemoaning the *Chadha* decision seem to have little faith in the Constitution."). Cf. *infra* note 227.

177. See, e.g., 1 THORPE, *supra* note 102, at 513 ("Randolph *perhaps apprehensive* of objectionable legislation in some other form than that of a bill, proposed an entirely new and more comprehensive provision [than that already in Art. I, § 7] . . .") (emphasis added). For examples of sources referring to the ORV Clause as the "so-called Presentment clause," see Elliott H. Levitas & Stanley M. Brand, *Congressional Review of Executive and Agency Actions after Chadha: "The Son of Legislative Veto" Lives On*, 72 GEO. L.J. 801, 802 (1983); Stefan A. Riesenfeld, *The Powers of Congress and the President in International Relations: Revisited*, 87 CAL. L. REV. 817, 821 (1999); G. Alan Tarr, *Interpreting the Separation of Powers in State Constitutions*, 59 N.Y.U. ANN. SURV. AM. L. 329, 335 n.29 (2003).

and before the Same shall take Effect, shall be approved by him, or being disapproved by him, shall be repassed by two thirds of the Senate and House of Representatives, according to the Rules and Limitations prescribed in the Case of a Bill.

The absence of such clear language undermines the condition precedent theory. Right?

Answer: No, in fact it does not. But to understand Randolph's word choice we must first have a more detailed understanding of how congressional adjournments work. In other words, we need the sort of working knowledge Randolph and other skilled eighteenth century parliamentarians took for granted.

Parliamentary procedure as an area of law is not generally taught in American law schools. It is often seen as mere arcana or of historical interest, having few—if any—substantial implications for the enterprise of constitutional interpretation. As with *Hollingsworth* and the ORV Clause, this lack of interest is more than passingly strange. Many of the provisions of the Constitution are directed to the legislature and its officers. Even if we were to assume that not one of these clauses is justiciable, lawyers and scholars should still be interested in producing useful guidance and commentary for legislative officers who must, in any event, interpret these provisions in the first instance.¹⁷⁸

There are several constitutional provisions relating to congressional adjournment and recess. For example:

Art. I, § 5, cl. 1: [A] Majority of each [house] shall constitute a Quorum to do Business; but a smaller Number may adjourn from day to day

Art. I, § 5, cl. 4: Neither House, during the Session of Congress, shall, without the Consent of the other, adjourn for more than three days, nor to any other Place than that in which the two Houses shall be sitting.

Art. II, § 3: [The President] in Case of Disagreement between [the houses of Congress], with Respect to the Time of Adjournment, he may adjourn them to such Time as he shall think proper

As indicated above, although each house can adjourn for three days without action of the other house, an adjournment of Congress, a

178. See KENNETH BRADSHAW & DAVID PRING, *PARLIAMENT & CONGRESS* 69 (1972); see also HENRY CABOT LODGE, *Parliamentary Minorities*, in *HISTORICAL AND POLITICAL ESSAYS* 180, 180 (1892) (“The question of the rights and position of minorities in representative legislative bodies really involves at the present time the entire subject of modern parliamentary procedure. Yet the extent of the question and its importance are even now but little understood . . .”).

contemporaneous adjournment of both houses, is effected by a concurrent resolution.¹⁷⁹ This information is common knowledge.

However, common knowledge is not all knowledge. In fact, the process by which Congress adjourns is somewhat more complex than that described above. After completing their sessional agenda both houses of Congress may pass an adjournment resolution taking effect either immediately or on a specified future date. This is the simplest case. However, it sometimes occurs that one house has plowed through its sessional agenda more rapidly than its sister house. In these circumstances, the concurrent resolution allows the more advanced house to adjourn immediately by operation of the just passed resolution, leaving the other house intact to complete its business and then to adjourn by a resolution of that house acting alone. In other words, the concurrent resolution grants a single house the authority to dissolve pursuant to the prior authorizing bicameral resolution.¹⁸⁰ There is an additional permutation. A prior concurrent resolution may give both houses discretion to choose the time of their separate adjournments. Again, both houses act by single-house resolution taken pursuant to a single prior authorizing concurrent resolution.¹⁸¹

Now the reader has all the background information to understand the curious structure and word choice of Randolph's ORV Clause.¹⁸² I suggest that Randolph eschewed proposing "[e]very Order, Resolution, or Vote to which (authorizing) legislation (subject to a veto) may be necessary" because he wanted language that encompassed genuine authorizing legislation such as laws, but which was also broad enough to encompass bicameral adjournment resolutions (i.e., bicameral action absent presentment) authorizing later single-house action.

The beauty of this theory is that it explains the adjournment exception to the ORV Clause:

179. See JEFFERSON'S MANUAL, *supra* note 18, at 196 (stating that concurrent resolutions are used in "fixing time for final adjournment"). As a purely theoretical matter, it would be possible to achieve contemporaneous adjournment of both Houses of Congress for more than three days by means of two separate concurrent resolutions, each consenting to the adjournment of only one house.

180. See, e.g., *id.* at 35 ("[T]he House granted its consent to the Senate to an adjournment sine die at any time prior to December 25, 1954. The Senate acting under the authority of the aforementioned resolution adjourned sine die on December 2, 1954.").

181. Jefferson's Manual records:

The adjournment resolution in the second session of the 97th Congress provided for adjournment sine die of the House on December 20 or December 21 pursuant to a motion made by the Majority Leader or his designees, and granted the consent of the House to adjournment sine die of the Senate at any time prior to January 3, 1983, as determined by the Senate

Id. at 35–36.

182. See Crovitz, *supra* note 4, at 44–45 (noting the "curious language" of the ORV Clause).

Every Order, Resolution, or Vote to which the Concurrence of the Senate and House of Representatives may be necessary (*except on a question of Adjournment*) shall be presented to the President of the United States. . . .

The Madisonian interpretation has been that the adjournment exception within the parentheses attaches to bicameral resolutions authorizing adjournments. The weakness of this theory has been its pure ad hocery.¹⁸³ Why is adjournment the one form of bicameral action expressly excepted from the reach of the President's veto, particularly in light of the fact that the President and the outgoing Congress by law designate the time of the first assembling of the incoming Congress? Additionally, if the adjournment exception was important enough to merit a textual exception, why was no similar exception engrafted into Clause 2? Moreover, as long as the Founders were listing exceptions, how is it they forgot to include a concomitant exception for Article V resolutions proposing constitutional amendments, the issue that arose in *Hollingsworth v. Virginia*? The reader should not entertain doubts on this point: the Madisonian position is a direct affront to the care and skill of the Convention as a whole. If we build up Madison, we do so at the expense of his fifty-four remaining colleagues.

The condition precedent interpretation fully resolves this difficulty. The parenthetical does not reach the underlying bicameral adjournment authorizing resolution; rather, it reaches the single-house resolutions taken pursuant to the prior bicameral authorizing adjournment resolution. Single-house adjournment resolutions are procedurally situated differently from all

183. In fairness, it might be argued that without the Madisonian interpretation of the ORV Clause, there is no express text in the Constitution excepting the operation of the President's veto from bicameral congressional adjournment achieved by whatever means. Given that the President has the greater power of reconvening either or both Houses of Congress, the lesser power of vetoing an adjournment resolution might be seen as unnecessary. U.S. CONST. art. II, § 3. A Senate Report from 1897 notes, however, that:

[i]f it be contended that the exception in section 7 (whereby adjournment resolutions are excluded from those which must be presented to the President, although they require the concurrence of both Houses) somewhat corroborates the theory that all "other" concurrent resolutions are intended to be included, regardless of their character, it may be answered that such exception was rendered necessary because of that other provision of the Constitution (art. 1, sec. 5, subdiv. 4) which prevents adjournments for more than three days without the consent of each House.

S. REP. NO. 1335, 54th Cong., 2d Sess., § 6 (1897). The Report assumes that, when a constitutional provision demands the consent of both houses, presidential participation and statutory lawmaking (by whatever name) is implied. It goes without saying that this interpretation is far from obvious. See, e.g., *INS v. Chadha*, 462 U.S. 919, 981 (White, J., dissenting) (arguing that "the [ORV] Clause does not specify the actions for which the concurrence of both Houses is 'necessary'"). A Congress that acts pursuant to a provision demanding "consent" of both houses may very well have met the minimum requirement of the clause. However, by bypassing the President, the Congress might thereby have excluded the federal courts from enforcing its edict.

other congressional resolutions, single or bicameral. How so? Once one house has adjourned, a presidential veto subject to two-house override would be moribund or veto-proof, depending on how you look at it. In other words, single-house adjournment resolutions were not excepted from the reach of the ORV Clause because of some substantive policy difference ostensibly demanding special treatment. Rather, these single-house adjournment resolutions are procedurally unique. A veto with the possibility of override is impossible because one house has already adjourned pursuant to the prior bicameral resolution.

Query: What is the best evidence *against* the condition precedent interpretation?¹⁸⁴

Answer: Although Madison's *Debates* would not be published until 1840, it appears that Judge Tucker and Justice Story's treatises, published prior to 1840, were in basic accord with Madison's position.¹⁸⁵

In 1803, in the first major extensive post-ratification treatise on the Constitution, Judge Tucker wrote:

The president of the United States may be considered *sub modo*, as one of the constituent parts of congress, since the constitution requires that every bill, order, resolution, or vote, to which the concurrence of the senate and house of representatives may be necessary (except on a question of adjournment) shall be presented to him: if he approve he shall sign it, but if not he shall return it with his objections to that house in which it shall have originated, who shall enter the objections at large on their journal, and proceed to reconsider it. If after such reconsideration two thirds of that house agree to pass it, it shall be sent, together with the objections to the other house, by which it shall likewise be reconsidered, and if approved by two thirds of that house shall become a law. In all such cases the yeas and nays shall be

184. Here I discuss the views put forward within two leading treatises which do not confirm the condition precedent interpretation. There are many other such antebellum treatises. See *infra* text accompanying note 224 (listing early commentators on the Constitution, for instance William Alexander Duer). Some might object to my choice of best counter evidence. The practices of the early Congresses and the first joint rules discussing orders, resolutions, and votes are also some substantial persuasive evidence against the condition precedent interpretation. But cf. 2 FARRAND, *supra* note 29, at 193 (recording the 7-3 passage of the August 7, 1787 motion striking from the Constitution as reported by the Committee of Detail "each [house] shall, in all cases, have a negative on the other").

185. John C. Calhoun, writing after publication of the *Debates*, was firmly in the Madisonian camp. John C. Calhoun, *A Discourse on the Constitution and Government of the United States*, in 1 THE WORKS OF JOHN C. CALHOUN 109, 178 (Richard K. Cralle ed., 1851) ("No bill, resolution, order, or vote, partaking of the nature of a law, can be adopted without their concurring assent: so that each house has a veto on the other, in all matters of legislation.").

entered on the journals of both houses. If any bill, &c. be not returned by the president within ten days, Sundays excepted, unless in case of adjournment, whereby the return is prevented, it shall nevertheless be a law &c.¹⁸⁶

I do not find Judge Tucker's restatement fully persuasive. First, Judge Tucker, like most commentators since, fails to explain precisely what is an "order, resolution, or vote, to which the concurrence of the senate and house of representatives may be necessary." Instead of explaining the ORV Clause, its reach, and its purpose, his treatise merely recapitulates the text of the clause. This is a lawyer's trick. When lawyers have no case law giving a fulsome explanation of some complex or disputed provision, they fall back to merely reciting the provision's text. In that event, when a future court explains the clause, their prior interpretation cannot be proven wrong. Second, in recapitulating the ORV Clause, Judge Tucker collapses the text of the ORV Clause into the prior constitutional provision. This is by and large what the Convention refused to do when it decisively rejected Madison's motion on August 15, 1787. Tucker, of course, had no way to know this in 1803 because the *Journal of the Convention* was not first published until 1819. Third, Tucker's interpretation is against the weight of the evidence produced when the ORV Clause is compared to roughly contemporaneous provisions found in other significant preratification documents and legislation. For example, the British Parliament, in its 1764 Currency Act, provided:

That *every act, order, resolution, or vote* of assembly, in any of the said colonies or plantations, which shall be made to prolong the legal tender of any paper bills, or bills of credit, which are now subsisting and current in any of the said colonies or plantations in America, beyond the times fixed for the calling in, sinking, and discharging of such paper bills, or bills of credit, shall be null and void.¹⁸⁷

Another example can be found in Parliament's Declaratory Act of 1766:

And be it further declared and enacted by the authority aforesaid, That all *resolutions, votes, orders*, and proceedings, in any of the said colonies or plantations, whereby the power and authority of the parliament of Great Britain, to make *laws and statutes* as aforesaid, is

186. 1 TUCKER, *supra* note 149, at Editor's App. D (footnote omitted); *see also infra* note 223 (describing Tucker's lack of familiarity with a similar question that arose in a 1782 lawsuit in which he participated). Modern judges, like Tucker before them, have been unwilling to tackle the meaning of the ORV Clause. *See Chadha*, 462 U.S. at 981 (White, J., dissenting) (contending that "the [ORV] Clause does not specify the actions for which the concurrence of both Houses is 'necessary'").

187. The Currency Act, 1764, 4 Geo. 3, c. 34 (Gr. Brit.), *available at* http://ahp.gatech.edu/currency_act_1764.html (last visited Jan. 10, 2005) (emphasis added).

denied, or drawn into question, are, and are hereby declared to be, utterly null and void to all in purposes whatsoever.¹⁸⁸

The 1767 New York Suspending Act stated:

[I]t shall not be lawful for the governor . . . or for the council for the time being, within the colony plantation, or province of New York in America, to pass, or give his or their assent to, or concurrence in, the making or passing of any act of assembly; or his or their assent to any *order, resolution, or vote*, in concurrence with the House of representatives for the time being within the said colony, plantation, or province; or for the said House of representatives to pass or make any *bill, order, resolution, or vote* (orders, resolutions, or votes, for adjourning such house only, excepted) of any kind, for any other purpose whatsoever; and that all *acts of assembly, orders, resolutions, and votes* whatsoever, which shall or may be passed, assented to, or made, contrary to the tenor and meaning of this Act . . . within the said colony, plantation, or province, before and until provision shall have been made for supplying his Majesty's troops with necessaries . . . shall be . . . null and void . . .¹⁸⁹

In describing the New York Suspending Act, a contemporary American also lumped orders, resolutions, and votes together with bills:

The Assembly of the province of New York, having passed an Act of this kind, but differing in some articles, from the directions of the Act of Parliament . . . the House of Representatives in that Colony was prohibited by a Statute . . . from making any *bill, order, resolution or vote*, except for adjourning or chusing a Speaker, until provision should be made by the said Assembly for furnishing the troops.¹⁹⁰

In other words, the ORV Clause was preceded by a long line of British and colonial legislation and documents placing the four terms (bills, acts, or statutes alongside orders, resolutions, and votes) into the same provisions. Thus, Article I, Section 7's two provisions—one for bills and a separate

188. The Declaratory Act, 1766, 6 Geo. 3, c. 12 (Gr. Brit.), available at http://www.yale.edu/lawweb/avalon/amerrev/parliament/declaratory_act_1766.htm (last visited Jan. 10, 2005) (emphasis added).

189. New York Suspending Act, 1767, 6 Geo. 3, c. 59 (Gr. Brit.), available at <http://www.samuelbrenner.com/HI171/Documents/doc12c.htm> (last visited Jan. 10, 2005) (emphasis added).

190. Memorial to the Inhabitants of the British Colonies (Oct. 21, 1774), in 1 JOURNALS OF THE CONTINENTAL CONGRESS, 1774–1789, at 90, 93 (1904) (emphasis added). Many have attributed authorship of the Memorial to Richard Henry Lee. See *id.* at 90 n.1 (stating that the Memorial was “Drafted by Richard Henry Lee”). Others believe that it was written by John Dickinson. See John Dickinson's Draft Memorial to the Inhabitants of the Colonies, (Oct. 19–21, 1774), in 1 LETTERS OF DELEGATES TO [THE CONTINENTAL] CONGRESS, AUGUST 1774–AUGUST 1775, at 210, 217–20 (Paul H. Smith ed., 1976) (reprinting a draft manuscript of the Memorial “[i]n the hand of John Dickinson” and arguing that it demonstrates he was its author).

provision for orders, resolutions, and votes—represent a distinct break with prior legislative tradition. Tucker’s recapitulation and interpolation of the two provisions cannot account for this break in that tradition. Finally, although it is the better part of valor to avoid the dangers of literalism, we can only interpret what Tucker has actually put forward. Tucker’s passage above closes with “&c.” Why? Is not this some acknowledgement that orders, resolutions, and votes upon final (albeit concurrent) legislative passage and after presentment do not become laws? And if they do not become laws, what is their status? May they be enforced in the Article III courts? Does the Supremacy Clause operate on them against state officers? Tucker fails to discuss the implications of the logical consequences of his purported interpretation. And this is some indication that he did not think the interpretation through.

Although Judge Tucker’s treatise sits forlornly gathering dust on the shelves of most law school libraries, Justice Story’s jurisprudence has almost the canonical status of *The Federalist Papers*. A generation after Judge Tucker, Justice Story wrote:

The remaining clause merely applies to *orders, resolutions, and votes*, to which the concurrence of both houses may be necessary; and as to these, with a single exception, the same rule is applied, as is by the preceding clause applied to *bills*. If this provision had not been made, congress, by adopting the form of an order or resolution, instead of a bill, might have effectually defeated the president’s qualified negative in all the most important portions of legislation.¹⁹¹

Again, some of the same criticisms I urged against Tucker apply equally to Story. Story has told us nothing substantial, such as what is an order, resolution, or vote to which the concurrence of both houses may be necessary. Story has merely recapitulated the language of the ORV Clause, but he has explained nothing. This is a sort of preemptive legal positivism. The commentator tells the reader so little that no matter how a future court or legislative law officer interprets the provision under discussion, the commentator’s interpretation is left standing. Indeed, Story’s language is so broad that it fits comfortably with *both* the Madisonian interpretation and the condition precedent interpretation of the ORV Clause. Is it wholly unreasonable to suppose that Story meant “single-house action pursuant to prior authorizing legislation cannot be permitted to escape the President’s veto, because Congress would then have every incentive to pass general authorizing legislation subject to veto, while leaving the real business of the

191. See 2 STORY, *supra* note 101, § 889, at 355. It is worth noting again that Story’s *Commentaries* (1833) was published prior to Madison’s *Debates* (1840). Modern judges, like Story before them, have been unwilling to tackle the meaning of the ORV Clause. See *Chadha*, 462 U.S. at 981 (White, J., dissenting) (asserting that “the [ORV] Clause does not specify the actions for which the concurrence of both Houses is ‘necessary’”).

day to subsequent detailed single-house orders, resolutions, and votes to which the veto would not otherwise apply”? Is the Madisonian reading of Story the exclusive meaning that Story intended?

Moreover, even if Story’s view more closely corresponds with Madison’s than with the condition precedent interpretation, we should also remember why Story’s constitutional jurisprudence is revered: at the programmatic level, it fully embraced the Marshallian program of national consolidation. However, with regard to the actual concrete and *detailed* workings of Congress—its parliamentary forms and procedures—Story was largely out of his element.¹⁹² This counsels against relying on his position on the ORV Clause, whatever it might have been.

Query: Does *The Federalist Papers* add anything useful to this discussion?

Answer: Unfortunately, no.

Another advantage accruing from this ingredient in the constitution of the senate, is the additional impediment it must prove against improper acts of legislation. No law or resolution can now be passed

192. Justice Story notes:

On the day appointed for the assembling of a new congress, the members of each house meet in their separate apartments. . . . The [same] oath [as administered in the House] is administered by any member of the senate, to the president of the senate, who then administers a like oath to *all the members*, and the secretary of the senate; and this proceeding, is had, when, and as often as a new president of the senate, or member, or secretary, is chosen. As soon as these preliminaries are gone through, and *a quorum of each house is present*, notice is given thereof to the president [of the United States]

2 STORY, *supra* note 101, § 892 (citing Act of 1789, ch. 1, 1 Stat. 1) (footnote omitted) (emphasis added). Story is simply mistaken on these points. Only newly incoming senators are sworn in with each assembling of a new, two-year Congress; senators with two or four years remaining to their terms are already qualified by their previous oaths taken in prior Congresses. (Obviously, in the First Congress, all senators were sworn in.) See 1 Journal of the Executive Proceedings of the Senate of the United States of America 79 (1828) (documenting that in the March 4, 1791 special session for executive proceedings of the Second Congress only reappointed members qualified), available at <http://memory.loc.gov>; *id.* at 137 (recording that in the March 4, 1793 special session for executive proceedings of the Third Congress only a newly elected member was given the oath). Moreover, it is wholly superfluous for Story to add “a quorum of each house is present” because the qualifying oaths (or affirmations) are not taken until a quorum is already present. That Story, a former speaker of the lower house of the Massachusetts legislature, could make these errors supports the thesis that American sensitivity to parliamentary procedure had already deteriorated at a rapid clip.

As a matter of parliamentary theory and practice, the positions espoused by Story are perfectly sensible and perhaps even an improvement on then extant and still prevailing practices. But Story was purporting to report actual practice, not theoretical alternatives to the established order of things.

without the concurrence first of a majority of the people, and then of a majority of the states.¹⁹³

Undoubtedly, Madison's position in *The Federalist No. 62* exactly corresponds with the position he had already taken in the Convention on August 15, 1787. Madison believed that (at least some) bicamerally passed resolutions were law substitutes subject to the President's veto. And it is more likely than not that the purpose of this passage was to address the difficult language of the ORV Clause. Although this is what Madison believed, I very much doubt that his audience took the position he espoused here all that seriously.

Why? Madison's statement is wholly disconnected from parliamentary reality. Consider the Senate. First, a bill can be passed with exactly half, not a majority of Senators, with the concurrence of the Vice President. Every school child knows this. Second, a bill can be passed by just over one-quarter of the Senate, a simple majority of a quorum. The reader knows this. Everyone knew this at the Convention; it is even recorded in Madison's *Debates*.¹⁹⁴ Third, a bill can be passed with precisely *one* Senator voting in the affirmative. For example, given the configuration of the Senate and of the Union that prevails today, if a single Senator votes in the affirmative, and none in the negative, and if fifty other Senators vote present in a quorum call, the bill has passed.¹⁹⁵ The fact that bills generally do not pass through the Senate with but one vote in the affirmative does not arise from express strictures in the Constitution but from incentives relating to majority action in

193. THE FEDERALIST NO. 62, at 378 (James Madison) (Clinton Rossiter ed., 1961).

194. See 2 FARRAND, *supra* note 29, at 211 & n.26 (recording McHenry's entry for August 7, 1787, which observed that 17 of 33 members making a quorum (in a 65 member House) can pass a bill through the House; 8 of 14 members making a quorum (in a 26 member Senate) can pass a bill through the Senate); *id.* at 252–53 (recording Madison's entry for August 10, 1787) (same); *id.* at 319 (recording Madison's entry for August 17, 1787, which observed that 8 of 14 Senators is a majority of the Senate).

195. See RIDDICK & FRUMIN, *supra* note 64, at 1408 (“An amendment [to a bill], on a division, having received a majority of the votes cast, although not a quorum, was declared to have been adopted; while the number of votes announced by the Presiding Officer was less than a quorum, it does not officially show that a quorum is not present”); *cf.* *United States v. Ballin*, 144 U.S. 1, 9 (1892) (“The statute requiring the presence of four [of seven] alderman does not mean that, in the presence of four, a majority of the votes cast may not be enough.”) (quoting *Attorney General v. Shepard*, 62 N.H. 383, 384 (1882)); Email from William Welch, Senate Clerk, Massachusetts General Court, to Seth Barrett Tillman (Jan. 26, 2004) (on file with the Texas Law Review) (“A 1 to 0 vote [in the Massachusetts Senate] may be unanimous [assuming a quorum present] when you need a majority vote.”); Email from Robert Dove, George Washington University, Department of Political Science, and United States Senate Parliamentarian 1981–1986, 1995–2001, to Seth Barrett Tillman (June 30, 2004) (on file with the Texas Law Review) (noting that a “hypothetical of a 1-0 vote being valid could theoretically be true”). *But cf.* THE FEDERALIST NO. 58, *supra* note 125, at 361 (“It has been said that . . . more than a majority of a quorum [ought to have been required] for a decision.”).

legislative houses generally.¹⁹⁶ The reader might object to this last criticism of Madison's position. The reader might believe that my criticism is based upon abstruse or esoteric knowledge of parliamentary order, knowledge not widely known now and not even widely known to Madison's audience. On this point reasonable persons can disagree. Perhaps we can never know the full truth of the matter. But it is my position that just this sort of information was, in fact, widely known prior to *Marbury*, prior to 1789, and prior to the judicialization of all American public norms.¹⁹⁷ And, it certainly was the sort of information that could easily have been learned by any sitting legislators such as the conventioners and the ratifiers.

Admittedly, Madison's passage above does not confirm the condition precedent interpretation of the ORV Clause. But rather than asking whether this passage informed the public during ratification with regard to the original meaning of the ORV Clause, perhaps instead we ought to ask why this poorly crafted passage continues to be quoted as the voice of reason in our jurisprudence and in our scholarship.¹⁹⁸

* * *

The first thing that offers itself to our observation is the qualified negative of the President upon the acts or resolutions of the two Houses of the Legislature; or, in other words his power of returning all bills with objections [Without a veto], [the President] might gradually be stripped of his authorities by successive resolutions or annihilated by a single vote.¹⁹⁹

196. Cf. MARK TUSHNET, TAKING THE CONSTITUTION AWAY FROM THE COURTS 95–128 (1999) (describing an incentive-compatible constitution); 2 FARRAND, *supra* note 29, at 252 (recording Madison's entry for August 10, 1787, which observed that Gouverneur Morris moved to "fix the [quorum] number low . . . [so that] the[] [members] will generally attend knowing that advantage may be taken of their absence").

197. See 2 THOMAS HUTCHINSON, THE HISTORY OF THE COLONY AND PROVINCE OF MASSACHUSETTS-BAY 176 n. (Lawrence Shaw Mayo ed., 1970) (1768) (stating in his epitaph for Councillor Burrill: "I have often heard his contemporaries applaud him for his great integrity, *his acquaintance with parliamentary forms*, the dignity and authority with which he filled the chair, the order and decorum he maintained in the debates of the house . . .") (emphasis added). Could such a passage be written today? And if written, would it be widely understood? Can there be any doubt that in the eighteenth century this high praise was not lost on Hutchinson's audience? See *supra* note 137.

198. E.g., *MacDougall v. Green*, 335 U.S. 281, 290 n.1 (1948) (Douglas, J., dissenting); Michael B. Rappaport, *The Selective Nondelegation Doctrine and the Line Item Veto: A New Approach to the Nondelegation Doctrine and its Implications for Clinton v. City of New York*, 76 TUL. L. REV. 265, 308 n.147 (2001); cf., e.g., Tillman, *supra* note 14, at 613 n.40 & 617 n.58 (positing that bill passage (or House impeachment) requires a "majority of a quorum").

199. THE FEDERALIST NO. 73, *supra* note 131, at 442.

Most fair-minded readers would take the position that Hamilton's passage above is better evidence for the Madisonian interpretation than the condition precedent interpretation. But that all depends on whether a "single vote" means what it says or whether it implies "a single proposition voted upon twice, one time by each of two houses." To fit Hamilton neatly into Madison's position, we must first be absolutely comfortable with one equalling two. Ultimately, this passage is ambiguous.

* * *

So far as might concern the misbehaviour of the executive in perverting the *instructions*, or *contravening the views* of the senate, we need not be apprehensive of the want of a disposition in that body to punish the abuse of their confidence, or to vindicate their own *authority*.²⁰⁰

In all likelihood, Hamilton intended this passage—at least in part—as a gloss on the ORV Clause. An "instruction" of the Senate is synonymous with an "order" of the Senate. The "views" or "opinions" of the Senate would be embodied in resolutions.²⁰¹ Yet, isn't the better reading of this passage that the Senate might have a view, make an order, or enforce its will apart from the House, whose concurrence in the Senate's actions is a necessary element to both bill passage and impeachment? Isn't this passage a clear break from the orthodox Madisonian view of hard bicameralism, notwithstanding Senate advice and consent in the treaty process? Is it any wonder that this passage—which sits so uncomfortably with the traditional Madisonian view—is quoted only a single time across the thousands of law review articles available on Westlaw?²⁰²

At the end of the day, not one passage in *The Federalist Papers* expressly addresses the ORV Clause. Three passages impliedly discuss the meaning of the clause. One passage strongly leans toward the condition precedent interpretation, one strongly against, and a third is too ambiguous to draw any hard conclusions. For our purposes here, *The Federalist Papers* is perfectly useless. Moreover, the reader must keep in mind that the public saw these passages under the name of Publius, as opposed to individual

200. THE FEDERALIST NO. 66, at 406–07 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (emphasis added).

201. See JEFFERSON'S MANUAL, *supra* note 18, at 195 ("When the House commands, it is by an 'order.' But fact, principles, and their own opinions and purposes, are expressed in the form of resolutions."). This is Thomas Jefferson's statement as found in his original manual, and not merely part of the modern annotation to this publication appearing under the same name.

202. See Lori Fisler Damrosch, *Impeachment as a Technique of Parliamentary Control over Foreign Affairs in a Presidential System?*, 70 U. COLO. L. REV. 1525, 1538 n.38 (1999) (quoting this passage without critique).

papers having discrete authorship. Therefore, even if we could be sure that Madison's views veered from Hamilton's, that determination is not telling with regard to the original meaning as understood by the public that actually read *The Federalist Papers* at the time of ratification.

Query: What is the best originalist²⁰³ evidence for the condition precedent interpretation?

Answer: The Case of the Prisoners, *Commonwealth v. Caton*,²⁰⁴ is one of a handful of cases still remembered from the period of the Revolution. The chief reason it is remembered is that it is one of the few American decisions prior to *Marbury* that discusses the propriety of judicial review. In its day it was also notable for several other reasons. First, although the actual litigation was about a pardon, the underlying crime the prisoners stood convicted of was quite serious: treason against the Commonwealth. Second, the justices on the Supreme Court of Appeals of Virginia included several well-known Founding Fathers. Indeed, two of the eight justices, George Wythe and John Blair, attended the Philadelphia Convention representing Virginia. The President of the court was Edmund Pendleton, president of Virginia's revolutionary constitutional convention. Seven of the eight

203. I have already presented a substantial discussion of textual and intratextual evidence within the provisions of the Constitution supporting the condition precedent interpretation. See *supra* notes 133–43, 178–83 and accompanying text.

Those looking for originalist support for the condition precedent hypothesis beyond that described in the main text above might consider the fact that both the Committee of Detail (reporting August 6, 1787: art. VI, § 11—with actual passage of clause on August 15, 1787) and the Committee of Style (reporting September 12, 1787: art. I, § 7, cl. 1) presented draft constitutions with enactment clauses controlling the style of future congressional legislation. 2 FARRAND, *supra* note 29, at 294, 585. Madison and Randolph's motions were debated on August 15 and 16, 1787. *Id.* at 296–302, 304–11. After the Committee of Style reported its draft constitution, the Convention struck out the proposed enactment clause. *Id.* at 633 n.15. Given that the purpose of an enactment clause is to tie the hands of the legislature with regard to the form of future lawmaking, the chronology of actions taken by the Convention makes no sense as long as one accepts the Madisonian interpretation of the ORV Clause. On the other hand, if one accepts the condition precedent interpretation of the ORV Clause—an expansive role for Congress and congressional delegation admitting of multiple forms and style—then the fact that the Convention struck out the enactment clause poses no difficulty at all.

Consider the Convening Clause: “[the President] may, on extraordinary Occasions, convene both Houses, or either of them . . .” U.S. CONST. art. II, § 3. Those who object to the condition precedent interpretation of the ORV Clause are obliged to describe some possible exigency or “extraordinary Occasion” in which a President might convene just the House of Representatives. Why might he do so except to pass an “order, resolution, or vote” under delegated statutory authority? *But see* Letters of Cato, No. VII, reprinted in 2 THE COMPLETE ANTI-FEDERALIST 123, 123 (Herbert J. Storing & Murray Dry eds., 1981) (“No occasion can exist for calling the assembly without the senate; the words *or either of them*, must have been intended to apply only to the senate.”).

204. *Commonwealth v. Caton*, 8 Va. (4 Call) 5 (1782), also reported at 2 MAYS, *supra* note 145, at 416–27.

justices of the court sat as delegates to that convention.²⁰⁵ And, third, the attorney general representing Virginia would later become the first attorney general of the United States.

It is also just possible that this case was the immediate intellectual precursor of the ORV Clause. How is that possible? Among other points of law, this case adjudicated a state constitutional provision providing—at least according to one view—for the bicameral state legislature to act by *statute* and thereby transfer some designated part of the Governor’s pardon power to the lower legislative house which, acting alone, could issue a pardon in the form of a single-house *resolve*. However, on this point the justices were deeply divided. The relevant state constitutional text included:

[The Governor] shall, with the advice of the Council of State, have the Power of granting reprieves or pardons, except where the prosecution shall have been carried on by the House of Delegates, or the law shall otherwise Particularly direct; in which cases, no reprieves or Pardon shall be granted, but by resolve of the *House of Delegates*.²⁰⁶

The following statutory language was also relevant:

The Governor . . . shall in no wise have or exercise a right of granting Pardon to any person or persons convicted [of treason], but may suspend the Execution until the meeting of the General Assembly [which includes both houses], who shall determine whether such person or persons are proper objects of Mercy or not, and order accordingly.²⁰⁷

As explained above, in *Caton* the prisoners stood convicted of treason. After the prisoners had been convicted, the House of Delegates passed a resolution pardoning them and, consistent with the statute, sent the resolution to the Virginia Senate for its concurrence. The Senate refused. The prisoners argued that the constitutional provision trumped the statute and therefore the pardon remained effective despite the absence of bicameral

205. See 7 WILLIAM J. VAN SCHREEVEN ET AL., *REVOLUTIONARY VIRGINIA, THE ROAD TO INDEPENDENCE: A DOCUMENTARY RECORD* 22–25 (1983). Justice Peter Lyons was a well-known attorney and the only member of the court who did not sit as a delegate to Virginia’s revolutionary state constitutional convention. The Supreme Court of Appeals of Virginia “at that time consisted of the judges of the high court of chancery; those of the general court; and those of admiralty assembled together. . . . And the sitting members, upon the present occasion were [President] Edmund Pendleton, George Wythe and John Blair, judges of the high court of chancery; Paul Carrington, Bartholomew Dandridge, Peter Lyons and James Mercer, judges of the general court[;] and Richard Cary, one of the judges of the court of admiralty.” *Caton*, 8 Va. (4 Call) at 1 n. Three otherwise eligible judges did not participate in the case. 2 MAYS, *supra* note 145, at 426.

206. VA. CONST. of 1776, ch. 2, § 9 (emphasis added).

207. 1776 Va. Acts ch. 3, reprinted in *A COLLECTION OF ALL SUCH PUBLIC ACTS OF THE GENERAL ASSEMBLY, AND ORDINANCES OF THE CONVENTIONS OF VIRGINIA* 40 (photo. reprint 1982) (1783).

agreement. The Attorney General argued that the pardon, per the statute, was ineffective absent concurrence of the Senate.²⁰⁸

In dissent, two justices—James Mercer and Bartholomew Dandridge²⁰⁹—argued that the pardon was effective notwithstanding that the statute required concurrence of both houses. Justice Mercer held “that by the [Constitution], [the] power of pardon was, in all cases, in which the Executive was restrained [by statute], reserved to the House of Delegates alone, and this pardon good.”²¹⁰ Justice Mercer’s opinion implies that the statute’s two commands—(1) restraining the Governor’s pardon power in treason cases; and (2) committing that power to the General Assembly—are severable. In his view, the fact that the Act was ultra vires with regard to the latter power did not make the whole Act fail for lack of constitutionality. Rather, the statutory restraint on the Governor succeeded notwithstanding the unconstitutionality of the Act with regard to vesting the pardon power in the General Assembly as opposed to vesting it in the Delegates. Therefore, once the Act took the pardon power from the Governor, the superior force of the Constitution vested the pardon power in the House of Delegates alone. Thus, Mercer and Dandridge were of the view that a state constitutional provision might expressly provide for a bicameral legislature acting by statute to delegate specific powers to a single house acting by resolution. The condition precedent interpretation of the ORV Clause would not have been foreign to these Justices.

President Edmund Pendleton held that the pardon was ineffective. In Pendleton’s view, the statute was reasonably consistent with the related constitutional provision notwithstanding the constitution’s demanding pardon by resolve of the Delegates and the statute’s contemplating pardon via bicameral action. Pendleton took the position that once the statute had taken the pardon power from the Governor, that power could only be exercised by “Consent of the House of Delegates.” But “consent” did not imply that the power must be exercised “solely” by that House. As long as the method chosen by statute for exercising the pardon power still required consent of the Delegates, the statute passed constitutional muster.²¹¹ For Pendleton, the

208. *Caton*, 8 Va. (4 Call) at 5.

209. *See* 2 MAYS, *supra* note 145, at 426 (“[T]reason might be pardoned, either by the General Assembly according to the Act, or by the House of Delegates alone under the Constitution. This pardon good.”) (quoting Justice Bartholomew Dandridge). Our records of the other justice’s opinions largely come from Pendleton’s notes. *But see id.* at 418 (“[M]y memory will not allow me to do Justice to the reasoning of the other Judges . . .”). My analysis of the *Case of the Prisoners* is drawn from Pendleton’s notes, which differ in some regards from the case as reported by Daniel Call in 1827. Pendleton’s notes were contemporaneous with the underlying events; Call published his report many years thereafter.

210. *Id.* at 426.

211. *Id.* at 425–26. Pendleton and Wythe frequently competed with one another, sometimes for public office, sometimes sub silentio. In 1789, Washington offered Pendleton the post of federal district judge for the district of Virginia. Pendleton rejected it, causing Washington considerable

constitutional provision left the legislature sufficient discretion to make use of the second chamber. Thus, the ineffectiveness of the pardon resulted from the particulars of the statute, not from any constitutional or meta-structural stricture forbidding delegation to a single house. The legislature as a matter of principle would have been free to vest the pardon power in the Delegates alone.²¹²

Chancellor George Wythe and Chief Justice Paul Carrington²¹³ took a distinctly Madisonian approach. Wythe held:

[T]he word resolve has two senses: The first, where it applies to the affairs of the house only, without affecting the general interests of the country; and, then, the resolution is complete, without the assent of the senate. The second where it extends to the whole community; and, then, the resolution being legislative in its nature, requires the concurrence of the whole legislature, as every thing does, which affects the public at large.

The latter is the sense in which the word [“resolve” as it appears in the Virginia Constitution] ought to be taken in the present case . . . [b]ecause it goes to repeal a law; which can only be done by another law: and that makes the concurrence of the senate

distress. And although Wythe may possibly have been the best man for the job remaining in Virginia, Washington saw no point to offer Wythe a position that Pendleton had already turned down. Letter from George Washington to Edmund Randolph (Nov. 30, 1789), *reprinted in 2 MAYS, supra* note 145, at 561, 561 (“[I]f there was reason to apprehend a refusal [by Wythe] in the first instance, the non-acceptance of Colonel Pendleton would be no inducement to [Wythe] to come forward in the second.”).

In 1800, when Jefferson began the task of drafting his *Manual*, the two living authorities he consulted for guidance were Wythe and Pendleton. *See 2 MAYS, supra* note 145, at 677–92. For example, Jefferson asked if the time for amending the preamble to a bill is distinguished from the time for amending the preamble to a resolution. As they did in *Caton* eighteen years previously, Wythe and Pendleton again took different positions on a disputed point of parliamentary procedure. *See id.* at 686 (recording Pendleton’s position that the preamble for both a resolution and a bill should be addressed prior to amending the body of either); *id.* at 692 (documenting Wythe’s position that the preamble to both should only be amended after amendments to the body are first finished). Similarly, Harry Evans noted:

The conversation of the great men . . . appears to support the contention that resolutions etc. are different from bills. If they were not different, there would be no point in considering whether a rule applicable to one category should also apply to the other. The use of the word “paper” [by Jefferson] as a generic term for bills and resolutions etc. is also interesting. If the categories were equivalent a generic term of that degree of generality would hardly be required.

But I am sure that these points are apparent also to you.

Email from Harry Evans, Clerk of the Senate, Parliament of Australia, to Seth Barrett Tillman (Oct. 13, 2003) (on file with the Texas Law Review).

212. *See 2 MAYS, supra* note 145, at 424 (implying that consent of the Delegates may be by bicameral or single-house action as determined by statute).

213. Pendleton was president of the Supreme Court of Appeals of Virginia. Carrington was Chief Justice of the General Court, and in that capacity he also served on the Supreme Court of Appeals.

indispensable . . . but a resolution, affecting the whole community, is,
in fact, a law²¹⁴

It would be foolish to wholly discount Wythe's opinion. It has strengths, some of which were even recognized by Pendleton.²¹⁵ But it also has profound weaknesses.

First, if "resolves" and "laws" were coextensive in the sense Wythe argued, why did the constitutional draftsmen shift their terms within the same constitutional provision?

[The Governor] shall, with the advice of the Council of State, have the Power of granting reprieves or pardons, except where the prosecution shall have been carried on by the House of Delegates, or the *law* shall otherwise particularly direct: in which cases, no reprieves or Pardon shall be granted, but by *resolve* of the House of Delegates.²¹⁶

Second, under the Virginia Constitution of 1776, *every* law must originate in the Delegates. The Senate could only concur, reject, or amend.²¹⁷ Given the expansive constitutional role of the Delegates and the passive role of the Senate, why did the constitutional provision above mention that a "law" limits the Governor's veto power without any expression relating to the house of origin of that law, but that with regard to granting a pardon, the very same provision mandated that the pardon "resolve" must originate in the Delegates? Every law must originate in the Delegates—Wythe's interpretation renders the provision's text with regard to house of origin pure surplusage. Wythe fails to explain both the change of language within the provision and the surplusage implied by his interpretation. His holding is a mirror image of the Madisonian interpretation of the ORV Clause. Apparently, Chief Justice Paul Carrington took this position too.²¹⁸

Of course, if we must, we can save Wythe's interpretive position. We can argue that the Virginia constitutional convention, like Madison some years later, feared legislative legerdemain. *O tempore!* The Virginia Constitutional Convention feared that the Virginia Senate might choose to

214. *Commonwealth v. Caton*, 8 Va. (4 Call) 5, 12 (1782). *But cf.* 2 REDLICH, *supra* note 123, at 80 ("[T]o the outer world an agreement between the two Houses has no legislative effect except when it adheres strictly to the form of a bill, i.e., an inchoate act of parliament.").

215. *See* 2 MAYS, *supra* note 145, at 426 (reporting that Wythe "urged several strong and sensible reasons . . . to prove that an Anti-constitutional Act of the Legislature would be void" and that the Court must "declare it so").

216. VA. CONST. of 1776, ch. 2, § 9 (emphasis added).

217. *See* VA. CONST. of 1776, ch. 2, § 8.

218. *See* 2 MAYS, *supra* note 145, at 426 ("[I]f the House of Delegates alone had the Power [to pardon under the statute]," Chief Justice Carrington would have disallowed it as "an imperfect incomplete act."). Would any language in the Virginia Constitution of 1776 have been sufficient warrant for single-house action under Carrington's view of parliamentary propriety? Was Carrington actually interpreting the constitutional text?

act first in granting a pardon, and so it expressly added the phrase “resolve of the House of Delegates” to clarify which house should act first to make an effective pardon.²¹⁹ *O mores!* Such language would work to preserve the temporal priority of the lower house. The problem with this explanation is that if this had been the convention members’ goal, they could have avoided the whole problem by just replacing the word “resolve” with “law.” This would have both precluded any confusion with regard to legislative house of origin and concomitantly clarified the necessity of bicameral action in granting the pardon. And if the reader is uncomfortable adopting the Wythian position here in 1782, is not your comfort with the Madisonian position of 1787 based more on habit than on any inherent explanatory power?

Three other justices—Chancellor John Blair, Justice Peter Lyons, and Judge Richard Cary—ruled that the pardon was ineffective. The remaining records do not establish clearly whether the position these judges took leaned to Pendleton’s position or to Wythe’s.²²⁰ It may have been a third position taking elements of both.²²¹

From the record we have, the state’s highest court held, three to two, that a constitutional provision could authorize a statute delegating lawmaking in the form of a pardon to a single house. This is some indication that the condition precedent interpretation of the ORV Clause was within the bounds of the then-prevailing legal imagination. And it is this then-prevailing legal

219. The Governor had no veto or other formal role in lawmaking under the Virginia Constitution of 1776. So there could have been no fear of attempts to bypass presentment or executive veto or assent. *See* VA. CONST. of 1776, ch. 2, § 9.

However, one possible defense of Wythe’s position might be that “resolve,” as opposed to “law,” referred to a minor act of legislation: a pardon acts only one time on a particular named person but does not have permanent force with respect to unspecified future cases equally applicable to all persons within legislature’s competence. *See, e.g.,* F.A. HAYEK, THE CONSTITUTION OF LIBERTY 152–54, 208 (1960) (observing that the classical liberal conception of the rule of law requires that legislative enactments be “general and abstract rules” which are “laid down in ignorance of the particular case;” “known and certain” in application; and “equally applicable to all”). Although this might explain the statute’s shift from “law” to “resolve,” it would not explain the whole clause, i.e., “resolve of the House of Delegates.” *See* LUCE, *supra* note 100, at 554–58 (detailing the history of the use of resolutions in various states and differentiating resolutions and broader legislative acts); PORTER, *supra* note 101, at 115 (arguing that the U.S. Constitution requires all acts of Congress to be submitted to the executive, “even the most trivial”); *cf.* EDMUND BURKE, REFLECTIONS ON THE REVOLUTION IN FRANCE, AND ON THE PROCEEDINGS IN CERTAIN SOCIETIES IN LONDON RELATIVE TO THAT EVENT: IN A LETTER INTENDED TO HAVE BEEN SENT TO A GENTLEMAN IN PARIS 23 (London 1790) (observing that “*Privilegium non transit in exemplum*” that is, a special case does not make a rule). *But cf. supra* note 156 (suggesting the possibility that the Massachusetts Constitution of 1780 is arguably in line with Wythe’s position, although this position is somewhat undermined by Madison’s variation on that language as reported in the Convention Journal).

220. *See* 2 MAYS, *supra* note 145, at 426.

221. *Commonwealth v. Caton*, 8 Va. (4 Call) 5, 20–21 (1782) (noting joint position of Blair and the remaining justices, excepting Pendleton and Wythe).

imagination that should interest us with regard to interpreting the ORV Clause, not the abstract question of who, in 1782, had the best interpretation of the Pardon Clause within the Virginia Constitution of 1776: Pendleton (and his successor in 1787, Randolph), or Wythe (and his successor in 1787, Madison), the dissenters, or the remaining justices.

And who was Virginia's Attorney General who personally represented the Commonwealth in court during the proceedings? Edmund Randolph. So it was not merely that the idea of single-house action was in the then-prevailing legal imagination; statutory delegation to a single house was clearly known to the actual movant of the ORV Clause at the Convention.

Undoubtedly, this is not proof positive of the condition precedent interpretation. But it is the sort of evidence that Madison himself would have understood and appreciated—and so should we.²²² Nuances of language and shades of meaning led to unexpected consequences and difficult political controversies almost immediately following ratification. Should we really be surprised that this process had already begun among the conventioners at Philadelphia, even among those from the same state but who had different political views and professional experiences? The conflicting opinions of the Virginia Justices establish that the condition precedent interpretation of the ORV Clause has some originalist support within roughly contemporaneous American materials known to participants at the Convention.²²³

222. Madison noted:

[T]hat the language of our Constitution is already undergoing interpretations unknown to its founders will, I believe, appear to all unbiased inquirers into the history of its origin and adoption. Not to look farther for an example, take the word "consolidate" in the Address of the Convention, prefixed to the Constitution. It there and then meant to give strength and solidity to the Union of the States. In its current and controversial application, it means a destruction of the States by transfusing their powers into the Government of the Union.

Letter from James Madison to Henry Lee (June 25, 1824), *reprinted in* CHARLES WARREN, *THE MAKING OF THE CONSTITUTION* 688 n.3 (1928).

Moreover, the interpretive approach used in this Article is in general accord with Madison's own model for constitutional interpretation. Madison believed that the state ratifying convention debates provided the best vehicle for determining the meaning of disputed or ambiguous constitutional text. But with regard to the ORV Clause, there is *no* recorded debate within any of the extant journals of any of the thirteen states—even including Rhode Island and North Carolina, the two states that initially rejected the then-proposed Constitution of 1787 before they reversed course shortly thereafter. Furthermore, Madison believed that where text and state convention debate failed to provide a clear guide, the history of the Founding generation, particularly during the turbulent 1780s, was a useful guide. *See* DREW R. MCCOY, *THE LAST OF THE FATHERS: JAMES MADISON AND THE REPUBLICAN LEGACY* 73–83, 95 (1989). Perhaps Madison was correct.

223. It is worth adding that St. George Tucker was part of the supporting cast in the *Case of the Prisoners*. *See supra* notes 185–90 and accompanying text; 2 MAYS, *supra* note 145, at 418. Because the court was aware that it might find the state constitution and statute in conflict, it solicited the opinions of members of the local bar as to whether the court had the power and right to declare an otherwise valid statute void. There were several such oral presentations by amici. St. George Tucker gave one such presentation in which he argued that if the court were to find the statute and constitution in conflict, it was the court's duty to find the statute void. *See* William

IV. Summary

Hollingsworth has been one of our jurisprudential crutches. It has meant everything to everyone, thereby propping up weak and vapid legal theories by allowing them to enjoy the protective beneficence of a purported ancient precedent. This Article has removed that crutch. *Hollingsworth*, although rightly decided on its facts, need never have addressed the propriety of presidential participation in the amendment process. Absent the *Hollingsworth* crutch, what insulates the Bill of Rights from a somewhat delayed constitutional challenge for bypassing “mandatory” presidential participation per the ORV Clause? Surely not the dicta of *Chadha*. As Professor Black so ably stated, that position is not even semirational. (And, while we are at it, do not all those congressional joint resolutions—as a textual matter—escape judicial review?) Of course, the Bill of Rights would survive such a challenge, and joint resolutions would remain judicially cognizable *if the Madisonian view of the ORV Clause were mistaken*.

There are two theories in contention with regard to the original meaning of the ORV Clause. One theory—the Madisonian orthodox hypothesis—takes the position that “[e]very order, resolution, or vote to which the concurrence of the Senate and House [is] necessary” refers to every legislative act to which the Constitution demands bicameral action. In other words, the ORV Clause is a redundant demand that all legislative acts take bicameral form subject to presentment as would any statute however it is labeled. The other theory—the condition precedent hypothesis—takes the position that “[e]very order, resolution or vote to which the concurrence of the Senate and House [is] necessary” refers to single-house action taken pursuant to prior authorizing or later ratifying legislation.

In this bout there are two fighters. Madison’s corner of the ring is overflowing with supporters. These supporters include Madison’s *Debates*, *The Federalist Papers*, Judge Tucker, Justice Story, and no doubt a great many lesser luminaries if we were interested in further pursuing such materials (e.g., William Alexander Duer, Nathaniel Chipman, Peter S. Du Ponceau, James Bayard, Von Holst). Still I doubt the boxing commissioner would

Michael Treanor, *The Case of the Prisoners and the Origins of Judicial Review*, 143 U. PA. L. REV. 491, 526–27 (1994). However, with regard to the difficult question of statutory interpretation, i.e., whether the statute was in actual conflict with the state constitutional provision, Tucker expressed no opinion and told the court: “[h]ere my embarrassment is excessive on many Accounts—I have never seen the Treason Law.” *Id.* (quoting St. George Tucker). In 1782, when three men’s lives were at stake, Tucker had no opinion as to the propriety of single-house action. Why, twenty years later, when Tucker first published his commentary on the Constitution, should we be confident that he had taken the time to familiarize himself with the same issue under the aegis of the national constitution’s ORV Clause at a time when no lives were at risk and when his audience was merely composed of passive purchasers of a treatise as opposed to the judges of the highest court of the jurisdiction in which he lived and practiced law?

admit many of these fellows into the ring. They are a bit dodgy. Madison's *Debates* on the days in question is a bit "confused." The one paper in *The Federalist Papers* not authored by Madison, yet addressing the point in dispute, is ambiguous at best. Tucker was play-acting with the reader. Story's attempt to expound on the ORV Clause is so overbroad that it equally well comports with both hypotheses. Moreover, even if one were to assume that Story took the Madisonian point of view when he argued that the ORV Clause's purpose was to protect the President in the exercise of his veto with regard to the "most important" areas of bicameral legislation, it should be noted that this view was rejected by academia over the course of the next century, although it was subsequently forgotten. Luce and Porter argued that the purpose of the ORV Clause was to ensure that minor acts of legislation could not bypass the President's veto.²²⁴ And between the two, it is these latter academics that have the better theory.

Now let us examine the primary weaknesses of Madison's point of view. First, textually, Madison's position cannot account for the words, syntax, and structure of the clause or for its position as a freestanding clause as opposed to its being incorporated directly into the text of the prior clause—the position taken by Tucker and proposed by Madison, although expressly rejected by the Convention on August 15, 1787. Second, intratextually, Madison's theory cannot account for the structure of a great many other constitutional provisions, some demanding congressional action by law, and others, perhaps, merely demanding simple bicameralism. Third, Madison's theory cannot account for *Hollingsworth* (or the constitutionality of the Bill of Rights for that matter) or for why the conventioners were quick to recognize a need for a textual exception exclusively for adjournments but were unable to fathom a need for a concomitant textual exception for congressional resolutions proposing constitutional amendments. Fourth, Madison's supporters have made no substantial effort to explain the source of Madison's fear of congressional legerdemain. Did it spring from colonial or newly independent American history, or did his concern spring from more abstract or philosophical concerns? Apparently, his concern had no British roots.²²⁵ And more importantly, why did he

224. See *supra* notes 100–01.

225. See *supra* note 102 (citing Sir William McKay and Professor Michael Rappaport taking contrary positions). Professor Rappaport has taken the position that the ORV Clause has its intellectual origins in seventeenth century English history. *Id.* Antonin Scalia, on the other hand, has argued that the intellectual origins of the ORV Clause are to be gleaned from state legislative practices prior to 1789. See *supra* note 176. I see no compelling case for either position. I point out that Scalia supplies no actual *examples* of hypothesized eighteenth century state legislative legerdemain manipulatively bypassing a state governor's veto. Likewise, Rappaport has not illustrated that the particular mid-seventeenth century English events he cites occupied the legal or parliamentary imagination of any actual conventioners or ratifiers or were even generally known to the educated American public in 1787. It is indicative of the monopolistic power of the Madisonian

believe that a merely redundant parchment provision would minimize the risk?²²⁶ Alternatively, if congressional legerdemain was an actual concern of the Convention, why did the Convention, subsequent to debate and passage of the ORV Clause, strike out the proposed enactment clause that would have provided the future Congress with substantial guidance as to the concrete form future bills must take? All these questions are unaddressed by those that embrace Madisonian orthodoxy. And, fifth, Madison's position cannot explain why seven states voted down Madison's motion but supported Randolph's motion the next day. I would add that this lack of interest in the state delegations' shifting votes is indicative of the antidemocratic animus which forms the informing principle of nearly all modern American constitutional jurisprudence.²²⁷

In the other corner of the ring, we are apprised of a theory with no provenance, no heritage, no lineage. At most, the best originalist materials supporting this theory are an odd state supreme court case and an occasional colonial statute. Not too daunting a pugilistic contender, at first glance. On the other hand, this theory punches above its apparent weight—it has a great deal of explanatory power. It perfectly accounts for Randolph's word choice and syntax. Indeed, from this point of view, Randolph's motion is high legislative art, almost poetry. Second, this position accounts for the Constitution's varying usage, which sometimes, but not always, demands congressional action by law. Provisions demanding congressional action “by law” are entrenchment provisions against otherwise permitted single-house action taken pursuant to prior authorizing legislation. Third, this position explains *Hollingsworth*. The ORV Clause cannot reach Article V. There never was a textual inconsistency. Fourth, this interpretation explains the adjournments exception because it recognizes that single-house adjournments are procedurally unique. And, fifth, this theory explains why an absolute majority of the state delegations at the Convention changed their votes over the course of less than a day.

position that Rappaport and Scalia hold identical views regarding the meaning of the ORV Clause although their views as to its intellectual and historical origins are so very much at odds.

226. See, e.g., THE FEDERALIST NO. 48, *supra* note 1, at 313 (arguing that “a mere demarcation on parchment of the constitutional limits of the several departments is not a sufficient guard against those encroachments which lead to a tyrannical concentration of all the powers of government in the same hands”); see also THE FEDERALIST NO. 73, *supra* note 131, at 442 (noting that “[t]he insufficiency of a mere parchment delineation of the boundaries of each [department of the new government] has also been remarked upon”).

227. For recent well-informed originalist scholarship taking an opposing position, see Vasani Kesavan & Michael Stokes Paulsen, *The Interpretive Force of the Constitution's Secret Drafting History*, 91 GEO. L.J. 1113, 1194 (2003). Kesavan and Paulsen take the position that “[i]t is not at all clear why the recorded votes matter with respect to use of secret drafting history as evidence of the background history of politics and attitudes of the times, or of purpose, or as a specialized dictionary to discover the semantic meaning of the words and phrases of the Constitution.” *Id.*

At the end of the day, the reader is faced with the hard choice between nearly unanimous originalist materials absent any explanatory value,²²⁸ and an informed reading of the full complement of constitutional text fully consistent with then-declining British parliamentary norms on these shores. Authority versus intellectual integrity.

V. Some Parting Thoughts

I have attempted to achieve several related ends by writing this Article. First, I have attempted to persuade the reader that a working and detailed knowledge of eighteenth century British and American parliamentary procedure is a core requirement for any who would interpret the Constitution of 1787, particularly the provisions controlling the details of the legislative process. Second, I have attempted to illustrate that a text-sensitive interpretation of the Constitution can withstand even the most respectable and ancient originalist objections. The criticisms of James Madison need not make us quake in our boots when—dare I say it—the plain words of the Constitution say otherwise.

Admittedly, I also had a wider ambition.

America's many pasts—historical, judicial, and scholarly—have burdened the present with some unbearable loads: the constant presence of history and the Founders; traditions of academic autocracy²²⁹ that are still, in their zombie-like way, alive; stultifying legal forms that appear to offer no way out of the inherited problems that they can only perpetuate and exacerbate. All these problems are linked by a high, unified, uniquely American judicial culture that has had great success in imposing and perpetuating itself, thereby both burdening and to some extent sustaining a great civilization. This monograph has been in large part a set of gloomy reflections about that judicial culture. It has not tried to present a wholly balanced argument or to dwell on things that are good and attractive in American legal culture. I have only looked all too briefly at a single intellectual incident, albeit one spanning from the founding to our most recent Supreme Court jurisprudence. I have looked at some of the deep and

228. See, e.g., SUPPLEMENT TO MAX FARRAND'S THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 226 (James H. Hutson ed., 1987) (reproducing George Washington's Aug. 16, 1787 diary entry in its entirety) ("In Convention. Dined at Mr. Pollocks & spent the evening in my chamber."); *id.* (reproducing Letter from Thomas McKean, delegate, to William Atlee (Aug. 16, 1787)) ("[T]he Convention is still sitting; nothing transpires.").

229. See WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE UNABRIDGED 147 (1981) (defining "autocracy" as "a form of government in which one person possesses unlimited power"); see also Felix Frankfurter, *Josef Redlich*, 50 HARV. L. REV. 389, 391 (1937) (noting that Redlich took the position that "[h]istory shows that the way to deal with autocracy is to challenge it").

apparently daunting problems that our intellectually myopic scholarly past has forced on the present and at ways in which that past influences people's minds by narrowing and distorting past and present perceptions of the world and patterns of thinking. This in turn would seem to make solutions all the harder to find.²³⁰

I have no doubt that some reading this Article might conclude, as the largest segment of legal academia has maintained for nearly a century, that the past is a cloud and that nothing legally useful can be *proven* from the ambiguous past. Even Professor Corwin never argued on behalf of this maximalist position, although his intellectual descendants have used his writings as a secular dispensation to avoid the labors of due diligence with regard to even that narrow set of questions and issues that might be resolved by recourse to originalist materials.

Instead, this Article has tried to illustrate that recourse to “naive” textualism and history, including legal history, serves modern jurisprudence well by extending our legal imagination—by giving us “new” (to us at any rate) questions, new arguments, and new information arising from our scholarly forebears' achievements as well as from their most glaring intellectual errors²³¹—and all of this in service of today's political agenda and legal controversies, left or right, populist or even Madisonian countermajoritarian. Admittedly, nothing will be proven by such efforts. Indeed, the quasi-religious focus on proof, rather than on reasoned argument offered to our fellow citizens, is precisely what we must learn to give up.

We might also have to give up the near tyrannical monopoly of constitutional interpretation claimed by our academic and judicial betters. I maintain that their Lord and Ladyships do not deserve the monopoly. This Article has been offered as some evidence in support of that position.

Let me elaborate. There are those who, in spite of the arguments put forward here, will nevertheless continue to defend the policy-oriented, rationalizing jurisprudence and separation of powers doctrine at the core of our constitutional legal tradition. They will say that the content of this Article, even if “true,” is a mere intellectual oddity springing from an all too easily misread case, one of a limited number of pre-Marshall cases absent any apparent rationale. This is undoubtedly the siren's call of the unfalsifiable hypothesis. *INS v. Chadha* is our constitutional and legal

230. My soliloquy in this paragraph is a wholesale rewrite extracted almost word-for-word from Professor Jenner's opus on totalitarian China. See JENNER, *supra* note 92, at 209, 227 (discussing totalitarian China, modern and under the imperial regimes); Email from W.J.F. Jenner to Seth Barrett Tillman (Nov. 16, 2003) (on file with the Texas Law Review) (granting me permission to make use of this paragraph).

231. I have urged in another place the current value of analyzing yesteryear's scholarly mistakes. See Tillman, *supra* note 14.

present. It is not some ghost from a lost mysterious constitutional past, and it comes to us with extensive rationales in the Marshallian tradition. The *Chadha* Court (including Justice White's dissent and Justice Powell's concurrence) offered substantial reasons for their views. It follows that, if the hypothesis presented in this Article is the better theory—or even if it is within the realm of possibility such that reasonable minds might disagree—then *Chadha* is an intellectual embarrassment of staggering proportions. After two centuries plus, should not we Americans know how to pass laws and how to pass constitutional amendments? And if we do not know, then should not the federal courts get out of the way when Congress engages in arguably correct democratic procedural experimentation within the domain textually committed to its cognizance? The *Chadha* Court did not merely give the country the wrong answer; it did not even know the pertinent questions to ask to get to the answer. The Court relied on Madison without keeping any critical distance from his commentary. The *Debates* were not used as aids to the interpretive enterprise but instead wholly displaced the Constitution's text, which, as a result, was again left unexamined. To some this description of the intellectual status quo might seem overly harsh. You might think it particularly unfair for me to criticize our nine Solons when my Delphic oracle was a crown legislative officer from Perth, Australia. What do I propose, that every time the Supreme Court acts it must first consult a handful of foreigners? Is that really my position?

Clarity on this point is crucial. The question masks itself in patriotism. I do not eschew patriotism. I am not above loyalty. I do take issue with a false patriotism in service of protecting a narrow demand for interpretive monopoly when better alternatives are reasonably at hand. And they are. If our Supreme Court Justices, and other members of our appointed-for-life judiciary, can get closer to substantial justice when refereeing legal disputes between actual parties by placing a few carefully selected telephone calls to foreigners, then I—as a citizen and taxpayer—would gladly pay for those calls in addition to paying already substantial salaries, pensions, benefits, and perquisites. Let us admit then that the question above is not rooted in patriotism; it is rooted in fear.

But what exactly are we afraid of?

First, we should not be surprised that a foreign legislative officer has more imaginative and useful interpretations of our national charter than our most able litigators and judges could muster. I believe this result has arisen from two interrelated causes. Marquet actually read the Constitution's text. He did not run to Madison's *Debates* or to *The Federalist Papers* to do his thinking for him.

Is it possible that this is an advantage? And that those who have not been burdened by the Founders' presence are able to read the text of the

Constitution unobfuscated, in much the same way that the American public might have read it when it was first proposed?

Additionally, I believe this result occurred because we Americans have lost the ability to understand the political and parliamentary worlds as the Founders and ratifiers understood them.²³² Although at the time of the Founding many States had newly written state constitutions, many of the elder statesmen who met in Philadelphia well remembered a legal and political world founded on British parliamentary law, custom, and usage. This knowledge was part of their shared intellectual British and American colonial heritage. It was their shared heritage, but it is no longer ours. Detailed knowledge of such legal systems is now wholly lost on the largest swath of our jurists. Indeed, one is hard pressed to find an American law school that teaches American or British parliamentary law. Thus, our modern jurists (post-*Hollingsworth*) are not now institutionally well placed to interpret our national charter. If this result appears daunting, then it is also an opportunity to take a step back, to reflect, to consider anew all that which has long been thought settled. It is up to us to determine whether that opportunity will prove a blessing or a curse.

I have no doubt that actually slogging down this road will prove difficult. And that many of those whose intellectual commitments to the current legal order run deep will find themselves in extremis. The most difficult part will be letting go of our crutches. We are so attached to our crutches that we sometimes forget that we are intellectually hobbled,²³³ if not actually hobbled by the crutches themselves. *Madison's writings—they are the chief crutch.* We are intellectually shackled by Madison, his *Debates*,

232. I urge the reader to take note that at *no* point have I argued that the case for the condition precedent interpretation of the ORV Clause is dependent on the existence of roughly contemporaneous equivalent British practices. The interesting question is not what they were doing in Britain in 1787, but what Americans might have understood the ORV Clause to mean through the lens of then-prevailing parliamentary and administrative practices and norms. Marquet was sensitive to the existence of the condition precedent interpretation because of his familiarity with British and Australian parliamentary procedure. Although the existence of contemporaneous single-house delegation in Britain might slightly strengthen the affirmative case for the condition precedent interpretation, it is not necessary to it. The argument for the condition precedent interpretation is largely textual, as clearly stated in the title of this Article, and to the lesser extent that it relies on originalist materials, those materials are wholly American: *The Case of the Prisoners* (1782) and NEW JERSEY R.S. 52:18-4 (1877) (as passed March 11, 1774). See, e.g., *supra* notes 126 & 146.

233. If the reader still entertains doubts in this regard, consider *Hollingsworth*. There are roughly five discrete schools of thought interpreting this decision, a decision which is no longer than a paragraph. Not one of these schools of thought has even the most meager arguments or facts to support its position against its would-be rivals, assuming any one of them knows of the existence of a rival's position. See *supra* notes 38–65 and accompanying text; cf. LEO STRAUSS, NATURAL RIGHT AND HISTORY 312 (1953) (“All we do after is but a faint struggle, that shows we are in an element which does not belong to us.”) (quoting Edmund Burke’s *A Philosophical Inquiry into the Origin of Our Ideas of the Sublime and Beautiful*).

The Federalist Papers, and I would add the writings of Story and Marshall and all the works of the other icons from the era of the Founding and the early Republic. Too often these materials have stifled genuine intellectual debate. This is not to say that we should stop reading these materials. Indeed, our jurisprudence would be vastly improved if the idolaters occasionally read²³⁴ the literature that they claim to idolize.²³⁵ This literature is essential to any American jurisprudence connected to the best elements of our democratic past—the element most worth understanding and preserving. Rather, we must reject giving these or any other originalist materials an interpretive monopoly that undermines our own better judgment and tends to vitiate the constitutional text we are supposed to be interpreting.²³⁶ It is just too easy to allow ourselves the discretion to stop thinking merely because Madison thought otherwise. I have no doubt that this conclusion sounds trite to most readers who will vociferously object that the position just announced *is* the intellectual status quo. I can only ask those objectors precisely what *they* thought the ORV Clause meant prior to reading this Article, and *how* they arrived at that conclusion.

Second, we will have to come to terms with the fact that the proposed paradigm for constitutional interpretation—an interpretive position founded on a parliamentary culture celebrating elections, representative government, and the ability of ordinary people to participate in lawmaking—stands in direct opposition to the deeply held religious convictions of the (long-

234. Happily, there are a few exceptions to this pattern. *See, e.g.*, Abraham Lincoln, Address at Cooper Union, New York City, New York (Feb. 27, 1860), *reprinted in* ABRAHAM LINCOLN: THE GETTYSBURG ADDRESS AND OTHER SPEECHES 41, 41–72 (1995) (discussing discrete opinions of thirty-nine Founding Fathers on the power of Congress to exclude slavery from federal territory). How is it that this level of detailed analysis of originalist materials was beyond the capability of the *Chadha* Court?

235. I would add that the danger of Corwinism is also a real threat to the interpretive enterprise. *See, e.g.*, CORWIN, *supra* note 98, at 184 (“‘Back to the Constitution?’ The first requirement of the Constitution of a progressive society is that it keep pace with that society.”). For Corwin and his gaggle of legal positivists, it was simply unfathomable that ancient, unadjudicated, undiscussed constitutional provisions might supply actual answers to the problems of modern life. To them, reaching the better result would not only depend on a living interpretive enterprise operating against the grain of moribund precedent and text written against the background assumptions of a simpler era, but rather, might sometimes depend on re-examining our assumptions which obfuscate seeing that the text of the Constitution has, on occasion, already carefully provided for the complexities of a thoroughly modern political life. *Id. passim* (I believe I have paraphrased Corwin’s words here, but I have been unable to locate the source pages—apologies to the reader.)

236. For instance, Justice Souter stated:

In deciding these cases, which I have found closer than I had anticipated, it is The Federalist that finally *determines* my position. I believe that the most straightforward reading of No. 27 is authority for the Government’s position here, and that this reading is both supported by No. 44 and consistent with Nos. 36 and 45.

Printz v. United States, 521 U.S. 898, 971 (1997) (Souter, J., dissenting) (emphasis added). Justice Souter is to be commended for his intellectual honesty here. All too often such interpretive positions go unnoticed or without introspection.

standing and still) dominant Madisonian cult, espousing antimajoritarianism rationalized through fears of rent-seeking and opportunistic behavior by overbearing majorities composed along factional lines. The many provisions of the Constitution of 1787 contain elements supporting *both* views. The overwhelming dominance of the latter worldview within modern American legal culture is not a reflection of some obvious transcendental historical or legal truth arising from an uncontested past²³⁷ but rather is a reflection of their Lord and Ladyships being in basic agreement with Madison's fears and constitutional vision.

And that is why some might be afraid, very afraid. After two hundred years, they may come to realize that they backed the wrong horse.

237. Compare, e.g., Steven G. Calabresi & Christopher S. Yoo, *The Unitary Executive During the Second Half-Century*, 26 HARV. J.L. & PUB. POL'Y 667, 708 (2003) ("[T]he Pierce administration rebuffed one of the earliest attempts by Congress to impose what amounted to a legislative veto [T]he administration's primary instrument was an opinion by Attorney General Cushing") (citing 6 Op. Att'y Gen. 680, 682-85 (1854), with 6 Op. Att'y Gen. 680, 683 (1854) ("[N]o separate resolution of either House can coerce a Head of Department, *unless in some particular in which a law, duly enacted, has subjected him to the direct action of each*") (emphasis added). Cf., e.g., JAMES M. BUCHANAN & GORDON TULLOCK, *THE CALCULUS OF CONSENT: LOGICAL FOUNDATIONS OF CONSTITUTIONAL DEMOCRACY* 24 (1965) ("What does seem appropriate is to point out that the Madisonian theory, either that which is explicitly contained in Madison's writings *or that which is embodied in the American constitutional system*, may be compared with the normative theory that emerges from the economic approach.") (emphasis added); ROBERT A. DAHL, *A PREFACE TO DEMOCRATIC THEORY* 14 (1956) ("Madison, *and successors who out-Madisoned Madison*, have deduced the necessity for the whole complicated network of constitutional checks and balances") (emphasis added).