GROVE CITY COLLEGE

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GROVE CITY COLLEGE

Grove City College was founded in 1876 in Grove City, Pennsylvania. The College is dedicated to providing high quality liberal arts and professional education in a Christian environment at an affordable cost. Nationally accredited and globally acclaimed, Grove City College educates students through the advancement of free enterprise, civil and religious liberty, representative government, arts and letters, and science and technology. True to its founding, the College strives to develop young leaders in areas of intellect, morality, spirituality, and society through intellectual inquiry, extensive study of the humanities, the ethical absolutes of the Ten Commandments, and Christ's moral teachings. The College advocates independence in higher education and actively demonstrates that conviction by exemplifying the American ideals of individual liberty and responsibility.

Since its inception, Grove City College has consistently been ranked among the best colleges and universities in the nation. Recent accolades include: The Princeton Review's "America's Best Value Colleges," Young America's Foundation "Top Conservative College," and U.S. News & World Report's "America's Best Colleges."

GROVE CITY COLLEGE JOURNAL OF LAW & PUBLIC POLICY

The *Grove City College Journal of Law & Public Policy* was organized in the fall of 2009 and is devoted to the academic discussion of law and public policy and the pursuit of scholarly research. Organized by co-founders James Van Eerden ’12, Kevin Hoffman ’11, and Steven Irwin ’12, the *Journal* was originally sponsored by the Grove City College Law Society. The unique, close-knit nature of the College’s community allows the *Journal* to feature the work of undergraduates, faculty, and alumni, together in one publication.

Nearly entirely student-managed, the *Journal* serves as an educational tool for undergraduate students to gain invaluable experience that will be helpful in graduate school and their future careers. The participation of alumni and faculty editors and the inclusion of alumni and faculty submissions add credence to the publication and allow for natural mentoring to take place. The *Journal* continues to impact educational communities around the country and can now be found in the law libraries of Akron University, Regent University, Duquesne University, the University of Pittsburgh, and Pennsylvania State University. The *Journal* has been featured by the Heritage Foundation and continues to be supported by a myriad of law schools, law firms, and think tanks around the nation.

EDITOR'S PREFACE

Dear Esteemed Reader,

"The advancement and diffusion of knowledge
…is the only Guardian of true liberty."

These words written by James Madison, the architect of the United States Constitution, speak of a legacy that Thomas Jefferson hoped to bequeath this great nation.

When the *Grove City College Journal of Law & Public Policy* was founded eight years ago, the undergraduate pioneers of the *Journal* had a similar vision. They realized the importance of scholarly writing in academe and the impact such writing has in promulgating knowledge and cultural values. To that end, we present a journal filled with law and policy articles penned by undergraduate students of the 21st century, rooted in values and ideas perpetuated by the Founders of 18th century America.

Through a combination of seemingly diverse topics, we hope you will be reinvigorated by the rich history that surrounds the inception of the United States Constitution and the impact that such a powerful document has had on shaping American law and political thought over more than two centuries. Our authors examine several tough constitutional-era questions including: What is the proper meaning of federalism according to the founders? What is diversionary legislation and why is it unconstitutional? Was Lincoln's use of executive prerogative constitutionally legitimate?

Our team of twenty-five undergraduate editors has worked tirelessly to provide you with a scholarly journal comprised of thoughtful and well-researched articles. As a result of unforeseen production issues, we delayed publication of this edition of the *Journal* to provide you, the reader, with a high-quality work. On behalf of the editorial board, I thank you for your readership and continued support of the *Grove City College Journal of Law & Public Policy*. Please consider providing a tax-deductible donation by mailing a check to the Grove City College Office of Advancement, 100 Campus Drive, Grove City, PA 16127, or visiting giving.gcc.edu/givenow. It is with great pleasure that we present Volume 9 of our esteemed publication.

Falco A. Muscante II ’20
Interim Editor-in-Chief

* I must offer specific thanks to our adviser, Dr. Caleb Verbois, and to Adam Nowland in the GCC Advancement Office. Without their advice and guidance, this edition could not have been possible.

FOREWORD

Dear Reader,

Welcome to Volume 9 of the *Grove City College Journal of Law & Public Policy.* As the pre-law advisor at Grove City College and the advisor to the *Journal*, I have the privilege of working with an excellent group of students who work hard to publish one of the few undergraduate peer-reviewed journals in the country. Over the past several years numerous students that have either worked for the *Journal*, written for it, or both, have gone on to some of the top law schools and graduate programs in the country.

The current edition of the *Journal* is filled with essays that focus on a constitutional idea, or crisis, at some point in the nation's past and links that constitutional claim with contemporary issues in law and public policy. For example, the first essay, by Ben Hutchison, looks at President Lincoln's actions during the Civil War and argues that properly understood, Lincoln acted within the bounds of the Constitution, suggesting that if Lincoln could manage to do so during the Civil War, we should expect contemporary Presidents to do the same in lesser crises. The second article, by Samuel Leach, examines the issue of federalism from the founding and argues that it was misapplied during the Progressive Era in ways that still resonate today. The third essay, written by Micah Quigley, focuses on what Micah has termed "diversionary legislation," or legislation that accomplishes extra-constitutional ends by virtue of Congress' powers to

pursue constitutionally enumerated ends. Micah argues that this creates an unjust end-run around the Constitution with profound effects on governmental overreach. The fourth essay, by Luke Leone, reexamines compact theory and concludes that it should be rejected on both constitutional and historical grounds, and that doing so has modern implications via recent state nullifications of federal marijuana laws. The final piece by Deanna (Roepke) Longjohn reexamines the famous Steel Seizure case from the Korean War and argues that the case turned on a skewed understanding of separation of powers that still harms the proper relationship of the President and Congress over war powers.

Each of these essays takes a historical case or controversy, carefully considers it, and applies it to modern law and policy debates in a helpful way.

We hope you will enjoy and benefit from reflecting on these essays,

Dr. Caleb A. Verbois
Associate Professor of Political Science
Grove City College

LINCOLN'S EXECUTIVE PREROGATIVE AND CONSTITUTIONALITY: THE PRESIDENT'S ACTIONS JUSTIFIED

Ben Hutchison '18

Abstract: *Despite President Abraham Lincoln's heralded accolades as one of America's most cherished presidents, there still exists – both then and now – a chord of distrust among some historians and academics against Lincoln's use of executive power. While this growing cadre of critics condemns the president's actions as unconstitutional, this paper maintains the opposite by defending Lincolwn's actions as fully constitutional. Acting on the grounds of a thoughtful interpretation of executive prerogative, President Lincoln clearly demonstrated his commitment to the Constitution by understanding the preeminent function of his office in upholding the Union at all costs, evidence of which can be found in Lincoln's actions during the Civil War.*

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* Ben Hutchison graduated from Grove City College in 2018 with a major in Political Science and a minor in pre-med Biology. He served in multiple campus organizations in various roles, including content editor for the GCC Journal of Law and Public Policy. He currently works at Wake Forest School of Medicine as a project manager for clinical research on Alzheimer's disease and dementia, specifically working on the U.S. POINTER study. He currently lives with his wife, Kristin, in Winston-Salem, North Carolina and plans on attending medical school next year.

Perhaps no U.S presidency in history has probed the limits of Constitutional executive power more than Abraham Lincoln's presidency during the Civil War. Lincoln's actions launched a war against the Southern secession, raised an army independently from Congress, controversially suspended habeas corpus through exclusive use of the executive branch, and used the Article II power of "Commander in Chief" to "seize" and free Southern slaves.[1] His liberal use of power yielded a widespread response of criticism and fear from figures of the 19th century and modern historians and politicians ever since, citing Lincoln's "unconstitutional" abuse of the executive branch. Despite this criticism, Abraham Lincoln consistently acted constitutionally in accord with a rational understanding of constitutional executive action, confirming his commitment to reasonable and justified action while demonstrating his actions may have been less "despotic" than some have assumed. This constitutional commitment is demonstrated by Lincoln's pattern of

1 HOWARD GILLMAN, ET AL., 1 AMERICAN CONSTIUTIONALISM: STRUCTURES OF GOVERNMENT, (Oxford Univ. Press 2013), 296.

executive prerogative in the midst of special circumstances and backed by subsequent constitutional justifications for each action, illuminating Lincoln's understanding of an "elastic" Constitution permitting dubiously lawful acts "necessary" to protect the Constitution itself. Three succinct examples of this pattern are found in 1) Lincoln's action and response regarding the *Ex Parte Merryman* decision, 2) the narrative surrounding the *Prize Cases,* and 3) Lincoln's response to the *Dred Scott* decision, all of which defend Lincoln's actions as constitutional given the dire situation of the war.

The most foundational claim made against President Lincoln both at the time of the Civil War and in decades since was his alleged disregard for the meaning, spirit, and restraint of the Constitution, provoking a "tyrannical" and unlimited dictatorship (albeit a benign one).[2] Author of *The Real Lincoln,* Thomas DeLirenzo comments that Lincoln's long list of constitutionally non-provisioned actions including suspension of freedom of the press

2 Benjamin A. Kleinerman, *Lincoln's Example: Executive Power and the Survival of Constitutionalism,* 3 Perspectives on Politics 4, 802 (2005).

in newspapers and assembly of a "secret police" were "incidents of waging war on civilians", concurring with Clinton Rossiter's contempt for Lincoln's "amazing disregard for the …Constitution."[3] Harsh critics of Lincoln's executive power denounce the president as a "tyrant," "unlimited despot," and "monarch," while more approving critique only admits that the "benevolent" dictatorship had "never fallen into safer and nobler hands."[4] Despite these bold claims, one must first consider if these questionably constitutional actions were, in fact, reflective of constitutional disregard on Lincoln's part or instead a thoughtful understanding of the meaning and purpose of the Constitution in the first place rendering his actions reasonable and justified. His actions, it would seem, appear to support the latter view in which Lincoln's wartime measures were a thoughtful and reasonable execution of the Constitution.

The most basic response to Lincoln's critics and the

3 THOMAS J. DILORENZO, THE REAL LINCOLN, (Crown Publisher 2003).

4 Benjamin A. Kleinerman, *Lincoln's Example: Executive Power and the Survival of Constitutionalism,* 3 Perspectives on Politics 4, 802 (2005).

primary basis of Lincoln's interpretation of the Constitution lies first in a brief note to Lincoln's reverent admiration of the Constitution. Lincoln's high regard for constitutional government is found early in his political career in 1938, when at a speech to the Young Men's Lyceum of Springfield, Illinois, he called for a deep "reverence" and "attachment" to the Constitution in order to resist the dangerous ambitions of abusive regimes: for Lincoln, public support for constitutionalism alone could repel the dangers of an abusive dictator.[5] It was to this rallying cry and standard that Lincoln answered throughout the War. Above all, it appeared throughout his presidency that Lincoln was deeply concerned with justifying his executive actions through constitutional means in order that he might *uphold*—not tear down—the constitutional republic he was pledged to protect. "Lincoln makes clear his adherence to the orthodox conception of the Constitution as a written instrument," writes Herman Belz in his work on Lincoln's constitutionalism, "[and] his approach to constitutional

5 HERMAN BELZ, ABRAHAM LINCOLN, CONSTITUTIONALISM, AND EQUAL RIGHTS, 76, (Fordham Univ. Press 1998).

interpretation remained firmly text-bound."[6] Or, in the words of Benjamin Kleinerman, "If, in responding to the crisis, Lincoln destroyed the constitutional basis of the Union, his actions would have been self-defeating."[7]

Historical evidence also supports Lincoln's constitutionality, yet at the onset of Lincoln's presidency in the summer of 1861, many Americans had justified reason to question Lincoln's swift use of expansive executive power to combat the growing rebellion in the South. Never before had America witnessed such a utilization of powers as Lincoln demonstrated in his first months in office: in response to the "[un]lawful" secession of the South that he denounced during his Inaugural Address in March of 1961, he quickly raised an army to quell the rebel states, ordered a naval blockade in South Carolina, suspended habeas corpus in Maryland, and effectively instituted full wartime measures against the secession.[8] Despite cautious deliberation on the issue, the suspension

6 *Id.*

7 Benjamin A. Kleinerman, *Lincoln's Example: Executive Power and the Survival of Constitutionalism,* 3 Perspectives on Politics 4, 807 (2005).

8 HOWARD GILLMAN, ET AL., 1 AMERICAN CONSTIUTIONALISM: STRUCTURES OF GOVERNMENT, (Oxford Univ. Press 2013), 281-296.

of habeas corpus quickly evolved into a hotly contested legal battle.[9] Lincoln understood the dangers of suspending the right to habeas corpus (which ordinarily protects the right to regular civilian procedures and trials in response to crimes), but the growing danger of rebel insurrection and the destruction of bridges surrounding Baltimore presented a threat to the Union Army's ability to quickly move troops in and out of the capital. Suspending habeas corpus would allow Lincoln and his generals to seize anyone suspected of rebellion absent of any criminal charges.[10] While the suspension of habeas corpus is a constitutional power, the power is enumerated in Article I under the list of the legislature's powers, and had thus been assumed to be exclusively enumerated to Congress.[11] Knowing the legal dangers of employing executive power in this way, Lincoln felt compelled by the situation to order its suspension as Congress was not yet even in session: awaiting the ordinary

9 BRIAN R. DIRCK, LINCOLN AND THE CONSTITUTION, 72, (Southern Illinois Univ. Press 2012).

10 HOWARD GILLMAN, ET AL., 1 AMERICAN CONSTIUTIONALISM: STRUCTURES OF GOVERNMENT, (Oxford Univ. Press 2013), 299.

11 BRIAN R. DIRCK, LINCOLN AND THE CONSTITUTION, 74, (Southern Illinois Univ. Press 2012).

procedure risked the dissolution of the Union.

Chief Justice Roger Taney, sitting as a circuit court judge, swiftly objected to Lincoln's action. In coming to the aid of a Baltimore man by the name of John Merryman who had been detained under Lincoln's provision, Taney issued a writ of habeas corpus in *Ex Parte Merryman,* demanding that formal charges be brought forth against Merryman in a federal court or otherwise release him. In the writ, Taney argued that he saw "no ground whatever for supposing that the president, in any emergency, or in any state of things, can authorize the suspension of…habeas corpus," lamenting that he "supposed [the suspension of habeas corpus] to be one of those points of constitutional law upon which there was no difference of opinion."[12] Taney went on to support the traditional expectation that such powers were enumerated solely in the legislature, and that Lincoln's actions proved "the jealousy and apprehension of future danger which the framers…felt in relation to [the executive] department."[13] While the case remained a circuit

12 HOWARD GILLMAN, ET AL., 1 AMERICAN CONSTIUTIONALISM: STRUCTURES OF GOVERNMENT, (Oxford Univ. Press 2013), 300.

13 *Id.*

court case and never reached the Supreme Court, Taney's decision and the implications of the writ piqued national attention. Despite Taney's harsh rhetoric, Lincoln ignored both Taney's writ and his constitutional interpretation, instead awaiting his message before Congress to address the matter.

Lincoln addressed Taney's complaints during his "Fourth of July Message to Congress" in 1861 and defended both the necessity and constitutionality of his actions, illuminating the first example of Lincoln's pattern of wartime executive action and justification.[14] During the speech, Lincoln concluded that his actions were motivated not by reckless disregard for constitutional bounds, but instead by the legitimate belief of the "imperative duty… [of the] Executive, to prevent, if possible, the consummation of such attempt to destroy the Federal Union."[15] Lincoln continued by claiming that the executive's oath to protect the Constitution transcends

14 BRIAN R. DIRCK, LINCOLN AND THE CONSTITUTION, 83, (Southern Illinois Univ. Press 2012).

15 HOWARD GILLMAN, ET AL., 1 AMERICAN CONSTIUTIONALISM: STRUCTURES OF GOVERNMENT, (Oxford Univ. Press 2013), 296.

the letter of specific laws in special circumstances and justifies actions that would otherwise be non-legal. In response to harsh criticism of his actions, Lincoln famously continued: "Are all the laws, but one, to go unexecuted, and the government itself go to pieces, lest that one be violated? Even in such a case, would not the official oath be broken, if the government should be overthrown, when it was believed that disregarding the single law, would tend to preserve it?"[16] The executive's primary role, then, is to implement and carry out the law in order to protect the Union itself. According to Lincoln, if the implementation of specific laws inadvertently subverts, undermines, or destroys the very Union the law is intended to protect, the law must be ignored or entirely contradicted by the President. The preservation of the Union and the Constitution, then, lays higher claim on the decisions of the executive than the submission to individual laws, out of which breeds the theory of executive prerogative. This understanding of the President's role not only justifies

16 BRIAN R. DIRCK, LINCOLN AND THE CONSTITUTION, 83, (Southern Illinois Univ. Press 2012).

Lincoln's suspension of habeas corpus to protect the Union in the first place but subsequently defends his objection towards and disregard for Taney's *Merryman* decision as such a decision would directly undermine the protection of the Union.

As Lincoln suggests in his message, certain matters of national security and preservation of the government demand an expanded understanding of executive power, as this office is naturally the most equipped to deal efficiently with such circumstances.[17] However, while it is clear that Lincoln himself believed his actions were constitutional, defending Lincoln's actions requires that outside justification exist for his interpretation of the Constitution. Such justification is found not only in outside figures and commentators, but also in the Constitutional text itself.

Support for this concept of executive prerogative is found in both Lockean political philosophy and political commentators of our and Lincoln's day. Firstly, Lincoln's understanding of executive prerogative is firmly grounded

17 Benjamin A. Kleinerman, *Lincoln's Example: Executive Power and the Survival of Constitutionalism,* 3 Perspectives on Politics 4, 801 (2005).

in the political thought of John Locke: a bulwark of political philosophy in the American political formation. Locke's *Second Treatise of Government* clearly emphasizes the need for executive prerogative in extraordinary situations in order to uphold public interest, defend the natural law, and protect the very purpose of the government in the first place.[18] According to Locke, this power (well demonstrated by Lincoln), was the prerogative "to act according to discretion, for the public good, without the prescription of the Law, and sometimes even against it."[19] Locke did, however, admit that the discretion and judgement to use this power could not be easily accounted for in a constitution, producing a certain amount of tension between constitutionally provisioned actions and executive judgement—this admission easily applies to Lincoln's own situation and explains the controversy that arises around action out of executive prerogative.[20] Locke's

18 Sean Mattie, *Prerogative and the Rule of Law in John Locke and the Lincoln Presidency,* 67 Review of Politics 1, 77 (2005).

19 Larry Arnhart, *The God-Like Prince: John Locke, Executive Prerogative, and the American Presidency,* Presidential Studies Quarterly 9, 121 (1979).

20 Sean Mattie, *Prerogative and the Rule of Law in John Locke and the Lincoln Presidency,* 67 Review of Politics 1, 77 (2005).

thorough defense of the necessity of executive prerogative to properly defend the nation lends itself to Lincoln's own interpretation of the Constitution as the Founding Fathers of the United States relied heavily on Lockean thought and overtly modelled our Union with Locke's ideas in mind.

The constitutionality of Lincoln's executive prerogative also found support outside of Locke. The following day after Lincoln's response to Taney's *Merryman* decision, Attorney General Edward Bates issued his own opinion of Lincoln's suspension of habeas corpus and endorsed executive prerogative in "extraordinary" situations.[21] Bates argued that "it is the plain duty of the President (and his peculiar duty, above and beyond all other departments of the Government) to preserve the Constitution" which prescribes the "bounden duty to put down the insurrection… [in a manner] upon his discretion."[22] Since the Constitution enumerated such a large responsibility upon the president without

21 Benjamin A. Kleinerman, *Lincoln's Example: Executive Power and the Survival of Constitutionalism,* 3 Perspectives on Politics 4, 806 (2005).

22 HOWARD GILLMAN, ET AL., 1 AMERICAN CONSTIUTIONALISM: STRUCTURES OF GOVERNMENT, (Oxford Univ. Press 2013), 302.

specifications on the manner of its employment, claimed Bates, the executive possesses not just the constitutional approval to "lawfully" supersede the law, but also the constitutional "duty" to do so.[23] These affirmations from Bates concur with both Locke's and Lincoln's distinction between ordinary and extraordinary times and the executive powers and discretion associated with each. Lincoln specifically argued that the suspension of habeas corpus was intended by the Founders for a particularly "dangerous emergency," agreeing with Bates that the executive, therefore, is the most equipped branch to address national security.[24] Commentators of our day likewise concur with Locke's premise, particularly as Benjamin Kleinerman succinctly notes that a constitutional government can hardly exist in a nation without security, which demands, as Locke argued, for an executive with enough power to respond accordingly to such threats.[25]

Lincoln clearly understood the principle of

23 *Id.*

24 BRIAN R. DIRCK, LINCOLN AND THE CONSTITUTION, 83, (Southern Illinois Univ. Press 2012).

25 Benjamin A. Kleinerman, *Lincoln's Example: Executive Power and the Survival of Constitutionalism,* 3 Perspectives on Politics 4, 806 (2005).

prerogative in accordance with Locke, Bates, and Kleinerman, as his policy indicated that certain acts, while normally unconstitutional, were only constitutionally justified for the preservation of the Constitution itself: "Often a limb must be amputated to save a life; but a life is never wisely given to save a limb," Lincoln sagely observed.[26] Lincoln furthered this line of thought in a letter to newspaper editor Albert G. Hodges in 1864, where he noted that he "felt that measures, otherwise unconstitutional, might become lawful, by becoming indispensable to the preservation of the Constitution, through the preservation of the nation."[27] Lincoln's actions, therefore, were not merely "morally justified unconstitutional acts." Instead, even Lincoln's more severe actions were legitimately constitutional through a proper understanding of executive prerogative and the President's primary responsibility to uphold the Union. As Locke, Lincoln, and others demonstrate, even unconstitutional acts

26 *Id.*

27 HERMAN BELZ, ABRAHAM LINCOLN, CONSTITUTIONALISM, AND EQUAL RIGHTS, 94, (Fordham Univ. Press 1998) and Benjamin A. Kleinerman, *Lincoln's Example: Executive Power and the Survival of Constitutionalism,* 3 Perspectives on Politics 4, 806 (2005).

may, at times, become truly constitutional. While these arguments set up a particularly "Lincolnian" understanding of executive prerogative, Lincoln's defense of prerogative was not solely based on his Fourth of July Message. Lincoln offered textual evidence from the Constitution itself.

After concluding that the extraordinary and dangerous situation demanded pragmatic executive action in order to properly defend the constitutional government, Lincoln continued by defending the textual constitutionality of his actions, rather than simply defending his actions on the circumstances, he justified them as legitimate, constitutional executive powers. In his typical "lawyer-esque" manner, Lincoln noted, unlike the other enumerated powers found in Article I of the Constitution, that the authorization to suspend habeas corpus in Article I, Section 9 was written in the past tense, failing to specify which branch actually possessed the power. The possession of the power, argued Lincoln, was at best constitutionally ambiguous and, contrary to previous assumption, did not fall securely within the powers of Congress. This shrewd

inspection of the constitutional text again illuminates Lincoln's commitment to the constitutionality of his presidency, while his Fourth of July Message, then, serves as a "case study" to the pattern of Lincoln's wartime executive action: bold executive prerogative in the midst of special circumstances followed by a legitimate defense for the constitutionality of his action.[28] Furthermore, his suspension of habeas corpus subsequently received further constitutional justification when Congress passed the Habeas Corpus Act of 1863 which offered increased legal protection to the government when habeas corpus was suspended, effectively offering retrospective congressional approval of Lincoln's decision and further justifying Lincoln's actions as constitutional. [29]

Lincoln's pattern of constitutional executive action and justification continues in the narrative of the Lincoln-ordered Union naval blockade in South Carolina followed by *The Prize Cases*. Following the strategic blockade

28 Benjamin A. Kleinerman, *Lincoln's Example: Executive Power and the Survival of Constitutionalism,* 3 Perspectives on Politics 4, 806 (2005).

29 HOWARD GILLMAN, ET AL., 1 AMERICAN CONSTIUTIONALISM: STRUCTURES OF GOVERNMENT, (Oxford Univ. Press 2013), 303.

of Southern naval ports during the early secessionist insurrection in the summer of 1861, Southern merchants pressed charges after Union ships seized their cargo while being overtaken during enforcement of the blockade.[30] The merchants argued not only that Lincoln illegally enacted wartime measures before Congress was in session and therefore without congressional approval of the war, but also that Lincoln's blockade could only legally apply in the instance of a war declared against another nation, which directly opposed Lincoln's own posture that the Confederacy was merely a rebellion.[31] While Lincoln quickly sought congressional consent to justify his decision (which Congress readily accommodated), the merchants claimed Lincoln's blockade was only legally binding if preceded by an official, congressional declaration of war (none of which existed).[32] The 5-4 court decision delivered by Justice Grier, however, confirmed the lawfulness of Lincoln's executive prerogative in the circumstance of

30 *Id.* at 311.

31 JOHN YOO, CRISIS AND COMMAND: A HISTORY OF EXECUTIVE POWER FROM GEORGE WASHINGTON TO GEORGE W. BUSH, (Kaplan Publishing 2010), 20.

32 *Id.*

rebellion and supported the executive "military and naval" powers in circumstances of "insurrection," regardless of prior congressional authorization.[33]

Lincoln's order for the Union blockade, the retrospective consent of Congress, and the decision of the *Prize Cases* all further endorse Lincoln's growing pattern of executive prerogative. In Lincoln's determination, the blockade of Southern ports was a necessary response to protect national security, not only permitting, but demanding dubiously constitutional action by the executive. He did not settle for executive prerogative, however, as his justification for his decision, Lincoln also pursued post factum congressional approval in July of 1861, which legitimized the constitutional justification of the naval operation (of note, remarkably similar to Lincoln's pursuit of post factum congressional support of his suspension of habeas corpus with the 1863 Habeas Corpus Act).[34] The decision of the *Prize Cases* only further solidified Lincoln's constitutional use of the executive

33 HOWARD GILLMAN, ET AL., 1 AMERICAN CONSTIUTIONALISM: STRUCTURES OF GOVERNMENT, (Oxford Univ. Press 2013), 311

34 Rodger D. Criton, *Did Lincoln Violate the Constitution?* (Find Law 2003).

power by providing external legal sanction for his liberal, but necessary use of executive power, similar to Edward Bates' endorsement in 1861.

Although it does not follow the precise replica of the previous examples, Lincoln's interpretation of *Dred Scott* and the "Emancipation Proclamation" likewise exhibit a pattern of Lincoln expanding the executive power for an extraordinary situation. They simply do so on constitutional grounds. While Lincoln has been critiqued for apparent apathy towards the plight of slaves in 19th century America, which Benjamin Kleinerman describes as "[seeming unconcern] with the moral urgency of slavery," Lincoln simply held caution in approaching the issue as "he insisted upon" a constitutional solution to slavery. Had Lincoln abused power—even for the great cause of freedom—his efforts to defend a constitutional government would have been no more legitimate than the Confederate's claim to secession. In 1857, Justice Taney's majority opinion in *Dred Scott v. Sandford* infamously upheld slavery as constitutional, defended slave ownership as a "substantive"

right, and legally defined slaves as "property."[35] Lincoln strongly opposed the "erroneous" decision in his "Speech on the Dred Scott Decision," where he denied the Supreme Court the ability to "[establish] a settled doctrine for the country" and defended the responsibility of other federal branches to resist court decisions.[36] While Lincoln insisted that Court decisions on specific cases must be observed by the other branches, he endorsed federal departmentalism in interpreting the Constitution as a whole, holding that each branch held the authority and duty to interpret the document coequally and that the Court's opinion was not binding on the executive.[37]

Departmentalism, while definitional variances exist to the extent to which it applies, generally indicates the view that the departments of the government (executive, judicial, and legislative) independently interpret the meaning of the constitution while the interpretations of

35 Abraham Lincoln, *Speech on the Dred Scott Decision* (1857) and HOWARD GILLMAN, ET AL., 1 AMERICAN CONSTIUTIONALISM: STRUCTURES OF GOVERNMENT, (Oxford Univ. Press 2013), 218.

36 Abraham Lincoln, *Speech on the Dred Scott Decision* (1857).

37 Kevin C. Walsh, *Judicial Departmentalism: An Introduction*, 58 WILLIAM AND MARY L. REV. 1721 (2017).

one branch are not absolutely binding on the others.[38] Lincoln's own adoption of departmentalism appears to be a "departmentalism as to precedents" stance, whereby the executive and legislative branches are generally bound to the specific judgments of the judicial in specific cases[39], but more broadly independent in the Court's interpretation unless successive judicial precedent demands submission to an interpretation.[40] Lincoln's justification for such a stance appears most strongly in his response to the *Dred Scott* case during his inaugural address in 1861, where he warned that unchecked judicial supremacy in interpreting the Constitution allowed for an effective oligarchy of the Court whereby "the people will have ceased, to be their

38 Mike Rappaport, *Departmentalism versus Judicial Supremacy – Part I: Some Preliminary Distinctions,* (Law and Liberty 2015). http://www.libertylawsite.org/2015/06/11/departmentalism-versus-judicial-supremacy-part-i-some-preliminary-distinctions.

39 If Lincoln holds this view that the branches are bound to the judgement of the Court in specific cases, however, why did Lincoln feel empowered to reject Taney's *Merryman* decision on habeas corpus? It appears that Lincoln's argument for executive prerogative and the defense of the Union supersedes his view that the executive must submit to the Court on specific cases. In other words, Lincoln held that the priority of the executive to defend and protect the Union was so paramount that it trumped all other restrictions placed on the executive branch as long as the situation and circumstance justifiably demanded extreme action. For more on this "litmus test" for the necessity of the situation, see below.

40 Mike Rappaport, *Departmentalism versus Judicial Supremacy – Part I: Some Preliminary Distinctions,* (Law and Liberty 2015).

own rulers, having, to that extent, practically resigned their government, into the hands of that eminent tribunal."[41] If "policy…[is]…irrevocably fixed by decisions of the Supreme Court" without any cautionary allowance for their decisions to be "erroneous" and reasonably checked and disregarded by the other branches, argued Lincoln, the Union ceases to be ruled by the people and thus unconstitutional.[42] This posture certainly defended a stronger executive branch. As John Yoo observes, "No other President has challenged the binding scope of Supreme Court decisions as did Lincoln."[43]

Despite Lincoln's support of broader executive power in interpreting the Constitution, he simultaneously felt—even as President—legally handcuffed to personally abolish slavery. Lincoln saw no constitutional or "lawful [executive] right" to permanently outlaw slavery in the United States, but understood that a constitutional

41 HOWARD GILLMAN, ET AL., 1 AMERICAN CONSTIUTIONALISM: STRUCTURES OF GOVERNMENT, (Oxford Univ. Press 2013), 281, 296.

42 *Id.*

43 JOHN YOO, CRISIS AND COMMAND: A HISTORY OF EXECUTIVE POWER FROM GEORGE WASHINGTON TO GEORGE W. BUSH, (Kaplan Publishing 2010), 16.

amendment alone would appropriately address the evil of slavery.[44] The insurgency of the Confederacy, however, provided Lincoln with a constitutionally shrewd opportunity to make a hardline commitment to the slavery debate and a strategic maneuver for the Union. In September of 1862, in the midst of the War, Lincoln famously issued the "Emancipation Proclamation" declaring "all persons held as slaves within any State… in rebellion against the United States, shall be…forever free."[45] Interestingly, Lincoln's pronouncement only applied to slaves held within secessionist states, elegantly taking advantage of Taney's appropriation of slaves as "property." In accordance with Congress's Second Confiscation Act of 1862 and "by virtue of the power in [the executive] vested as Commander-in-Chief…in time of actual armed rebellion against…the United States," Lincoln "seized…the property" of the rebels and declared the slaves free.[46]

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44 David Nicholas, *The Emancipation Proclamation: Abraham Lincoln's Constitutionally Modest Proposal* (Law and Liberty 2015).

45 HOWARD GILLMAN, ET AL., 1 AMERICAN CONSTIUTIONALISM: STRUCTURES OF GOVERNMENT, (Oxford Univ. Press 2013), 308.

46 HOWARD GILLMAN, ET AL., 1 AMERICAN CONSTIUTIONALISM: STRUCTURES OF GOVERNMENT, (Oxford Univ. Press 2013), 308 and Confiscation Act of 1863.

Lincoln once again exhibited a liberal use of executive power in both his resistance to the *Dred Scott* case and his emancipation of Southern slaves, but did so within constitutional bounds and justification. While his opinion to Taney's decision was not explicitly executive prerogative, it certainly broadened the understanding of the president's power to interpret the Constitution. This doctrine, however, was not grounded in a desperate aspiration for "despotic" power, but instead in Lincoln's legitimate belief of executive departmentalism, deeming it fully constitutional. Similarly, Lincoln's prerogative in using his Article II powers to liberate Southern slaves incorporated with a constitutional justification of his actions further confirm Lincoln's standard practice of action, while also verifying his admirable constitutional restraint in his commitment to a legal avenue to abolition.[47] In accord with the previous examples, therefore, even Lincoln's dubiously constitutional actions proved not only pragmatically

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U.S., Statutes at Large, Treaties, and Proclamations of the United States of America*, The Second Confiscation Act* (Boston, 1863), 589–92.

47 Even further validated by his great commitment to the passage of the 13th Amendment, ensuring a constitutional means of nationwide abolition.

necessary due to the extreme situation of the war, but also constitutional in themselves.

These brief examples of Lincoln's treatment of wartime executive power, however, deserve a few words of commentary. It was not only Lincoln's profound respect for the Constitution that justified his broad executive action of the War, but instead, his very interpretation of the document itself created incredible lateral in the implementation of his Presidential authority. The Constitution, in the determination of Lincoln, held a certain quality of elasticity of which the Founders specifically intended.[48] For Lincoln, the Founders established constitutional means for "unconstitutional" executive action, a paradox that Lincoln deemed necessary in certain contexts.[49] Unlike Justice Taney who, in the words of Brian Dirck, "saw the Constitution as a strong but brittle instrument," Lincoln accepted a certain fluidity of the document that allowed the executive to constitutionally address crisis

48 Benjamin A. Kleinerman, *Lincoln's Example: Executive Power and the Survival of Constitutionalism,* 3 Perspectives on Politics 4, 806 (2005).
49 *Id.*

situations.[50] As Benjamin Kleinerman eloquently argues, this flexibility mixed a Jeffersonian view of "acceptable—but undoubtedly unlawful—unconstitutional acts" with the elastic Hamiltonian view of "lawful excessive executive action, to the point of potentially limitless bounds."[51] Lincoln's elastic prerogative combined an acceptable use of "unlawful" action only in the face of constitutional necessity, which he thereby believed made the unlawful–or at least questionably lawful–act truly constitutional.

Lincoln's constitutional interpretation of executive power is based on an emphasis of the presidential oath to "preserve, protect, and defend the Constitution," as found in Article II. To this end, Lincoln consistently exhibited debatably extra-constitutional action to the call of preserving the Union and the Constitution for which it stands. For Lincoln, this potentially abusive executive prerogative to defend the nation, however, was only permissible as far as the action was deemed and proven to be "necessary." Concurring to how Lincoln earlier

50 BRIAN R. DIRCK, LINCOLN AND THE CONSTITUTION, 73, (Southern Illinois Univ. Press 2012).

51 *Id.*

defended his 1862 Emancipation Proclamation as "a fit and *necessary* war measure for suppressing said rebellion" (emphasis added), Lincoln later wrote to General Benjamin Butler arguing the contrapositive: "Whatever is *not* within such *necessity* should be left undisturbed."[52]

Lincoln's executive actions throughout the Civil War of suspending habeas corpus, executively emancipating slaves, and engaging in far-reaching military power were, while undoubtedly unprecedented and extensive, consistently constitutional and reasonably justified. Far from being an unlawful dictator, Lincoln's presidency demonstrated a profound commitment to the original Constitution unparalleled by many U.S Presidents and a remarkable devotion to protect the meaning, spirit, and restraint of the Constitution and the nation itself.

52 HOWARD GILLMAN, ET AL., 1 AMERICAN CONSTIUTIONALISM: STRUCTURES OF GOVERNMENT, (Oxford Univ. Press 2013), 308 and Benjamin A. Kleinerman, *Lincoln's Example: Executive Power and the Survival of Constitutionalism,* 3 Perspectives on Politics 4, 806 (2005).

TOWARD A FEDERALIST MIDDLE GROUND

Samuel Leach '17

ABSTRACT: *"Federalism" is a loose term which may be used in various ways, but it had a particular meaning to the framers and a peculiar place in American constitutional history. This paper argues a twofold thesis: first, that the founders envisioned American federalism as a middle-ground between the extremes of a supreme national government and a weak league of states. This system would grant the federal government legal supremacy but provide states the means with which to resist it. Second, this system has been consistently misunderstood and misapplied throughout American history by both proponents and opponents of federal power. The paper has three parts: first, it analyzes the Constitution and related texts to discern the founders' intent relative to federalism. Second, it explores several misapplications of federalism from the founding to the Progressive era. Finally, it briefly reviews* Chisholm v. Georgia*, one early case that displays a properly functioning federalism.*

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The founders designed a system of federalism wherein the federal government would have only certain powers. Some of these powers were to exist exclusively in the federal government, some were to be shared with the states, and other unenumerated powers were to be reserved for the states. Several ultimately unsuccessful constitutional mechanisms and institutions were put into place to ensure that neither the states nor the federal government could encroach upon one another. The first Congress designed the Tenth Amendment to clarify this system of enumerated powers, not to fundamentally alter it. This balanced system of federalism has been consistently misinterpreted and misapplied throughout American history. Both those forces which have sought to expand the federal government and those forces which have favored a restrained federal government are guilty of this. Since shortly after the founding of the Republic, politicians have adopted policies and perspectives inconsistent with the framers' understanding of federalism. Strict constructionists and proponents of compact theory placed too great an emphasis on the sovereignty of the states. After the Civil War, the

opposite problem occurred. Economic conservatives and progressives alike expanded the federal government beyond the bounds of federalism and encroached upon state powers.[1] Neither extreme is in line with the system of federalism established in the Constitution. The founding fathers envisioned American federalism as a middle ground between the extremes of a supreme national government and a weak league of sovereign states in which the federal government, though legally supreme, would be limited in its powers and balanced by the states. Given how frequently this system has been misapplied, however, the mechanisms established to enforce federalism have clearly been insufficient.

The Constitution created a system in which the federal government would be powerful and sovereign, but limited. There were several clear changes in language from the Articles of Confederation to the Constitution which serve as evidence for the intent of the framers with regard to federalism. The Articles of Confederation First, the

1 The four examples discussed in this paper are in no way exhaustive; numerous examples of misunderstanding federalism exist.

preamble of the Articles refers to "We the delegates of the undersigned states…,"[2] while the Constitutional parallel is "We the People of the United States…"[3] Considering that the Constitution credits the unified people rather than representatives of the states, the latter clearly signifies a more powerful national government with less emphasis placed on the role of the individual states.

Furthermore, the second of the Articles declares that, "Each State retains its sovereignty, freedom, and independence, and every power, jurisdiction, and right which is not by this confederation, expressly delegated to the United States…"[4] The closest Constitutional parallel to this passage is the Tenth Amendment, which makes no reference to sovereignty, freedom, or independence, and omits the word "expressly."[5] The Tenth Amendment mentions only powers. By the omission of "expressly," moreover, it opens the door to implied powers. As John Marshall argued, the authors of the amendment realized the

2 ARTICLES OF CONFEDERATION OF 1781, pmbl.
3 U.S. CONST. pmbl.
4 ARTICLES OF CONFEDERATION OF 1781, art. II.
5 U.S. CONST. amend. X.

"embarrassments" of including the modifier "expressly" in the Articles.[6] This distinction indicates that the framers intended to create a stronger national government with broad, limited powers. The language which protects the states is much weaker than in the Articles, but it still affirms the idea that the federal government would only have enumerated powers, and that the states would retain many of their traditional powers. This system of enumerated powers lies at the core of the federalist middle ground established by the Constitution.

It is also noteworthy that the founders did not originally include the Tenth Amendment or any other clause analogous to the second Article. The original framers did not perceive a need to specify that the federal government only had enumerated powers. Similarly, James Madison, the author of the Bill of Rights, believed the Tenth to be unnecessary but harmless. As he said in Congress,

> …several are particularly anxious that it should be declared in the Constitution, that

6 John Marshall, *McCulloch v. Maryland, in* 1 AMERICAN CONSTIUTIONALISM: STRUCTURES OF GOVERNMENT, (Howard Gillman et. al. eds., Oxford Univ. Press 2013), 129, 131.

> the powers not therein delegated should be reserved to the several States. Perhaps words which may define this more precisely than the whole of the instrument now does, may be considered as superfluous. I admit they may be deemed unnecessary: but there can be no harm in making such a declaration…[7]

As Madison argued, the words of the Tenth are unnecessary because the Constitution as a whole already implies them. The Tenth Amendment, then, was intended to clarify, not to fundamentally alter the system which the Constitution created. It granted no greater power to the states than they already had under the Constitution.

While the Tenth Amendment did not fundamentally alter the relationship between the federal government and the states, several other features of the Constitution provided mechanisms by which the states could resist an overbearing federal government. First, the Constitution created institutions of state representation. One of these institutions is the Senate. The Constitution originally provided for two Senators to be elected by the legislatures

7 James Madison, *House of Representatives, Amendments to the Constitution, in* 5 THE FOUNDERS CONSTITUTION (Univ. of Chicago Press 1987).

of each state.[8] This provided each of the states with a representative who could help to assure that his or her state was not abused. In addition to the Senate, the Constitution also provided the states with some representation in the election of the President. The Constitution gave the states the ability to appoint Presidential electors through a process of their choosing. As Article II states, "Each State shall appoint, in such manner as the legislature thereof may direct, a number of electors…"[9] Though the Senate and electoral college are today driven by popular votes, they still provide the states with some nominal representation today.[10]

In addition to representation, the Constitution also provided the states with a significant role in constitutional change. Article V specifies two ways in which the nation can change the Constitution. Two-thirds of the legislature can propose a Constitutional Amendment, and two-thirds of the states can call for a Constitutional Convention. In either

8 U.S. CONST. art. I, §3.

9 U.S. CONST. art. II, §2.

10 The extent to which the popular vote for the election of Senators and electors has altered the representation of the states is beyond the scope of this article.

case, three-fourths of the states must vote to ratify in order for the changes to become part of the Constitution.[11] The states, then, were given a powerful role in Constitutional change. In theory, this could prevent the federal government from using the amendment process to usurp the long-held powers of the states. The states, moreover, have the sole authority over the convention process. Though they have never exercised this power, the states could potentially use this authority to curb a federal government that has gotten out of hand. By providing the states power to alter the supreme law of the land, the Constitution implies that states were not intended to be wholly subservient to federal power.

While the Constitution provides these means to the states, it also provides sweeping authority to the federal government over the states. The framers created a system in which the federal government would have legal supremacy. Article VI of the Constitution clearly establishes the supremacy of federal law and the Constitution. As it declares, "This Constitution, and the Laws of the United

11 U.S. CONST. art. V.

States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land…"[12] This measure precludes the states from nullifying or otherwise violating federal laws. While there have been some attempts to violate this (discussed below), these were few and they largely failed. The supremacy clause is the principal federal limit on state power. It has much broader, more sweeping power than those means provided to the states. This indicates that, while the states do have some means to resist the federal government, the power relationship clearly favors the latter.

The Fourteenth Amendment, ratified during Reconstruction, provides the federal government with further power over the states. The amendment made several changes to the Constitution, and the most important for the purposes of this paper are those associated with the equal protection clause. As the amendment states, "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall

12 U.S. CONST. art. VI, §2.

any State deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."[13] Many have interpreted this broadly and have argued that it created new Constitutionally-protected rights.[14] The most sober and logical approach to understanding the equal protection clause, however, is to view it in light of its historical context. It was adopted during Reconstruction at a time when the nation was seeking to move beyond slavery. As Justice Bradley argued in the Civil Rights cases, African slavery was a distinct entity which included, "disability to hold property, to make contracts, to have a standing in court, to be a witness against a white person."[15] The Fourteenth was, thus, a measure to ensure that every African American would enjoy the legal rights denied to them during slavery. This may, perhaps, be reasonably interpreted to apply to other groups relegated to second-

13 U.S. CONST. amend. XIV, §1.

14 See *Lochner v. New York* for an example. *Lochner* and the right to free contract is discussed below.

15 Joseph Bradley, *Civil Rights Cases, in* 1 AMERICAN CONSTIUTIONALISM: STRUCTURES OF GOVERNMENT, (Howard Gillman et. al. eds., Oxford Univ. Press 2013), 347, 349.

class status. A new, extremely broad set of constitutional rights, other than the right to freedom from involuntary servitude guaranteed in the Thirteenth Amendment, is not really related to the institution of slavery. The federal government was given new powers over the states to extend the rights of citizenship to African Americans, but not a new set of rights to protect.

The founders, then, envisioned a system in which the federal government and the states would have different powers and the means to balance one another. Despite this, it is clear to the modern observer that the federal government has become the dominant level of government. Since the Civil War and reconstruction era, the federal government has exercised much greater power over the states. For example, the post-Civil War Supreme Court struck down far more state laws than its predecessors. At its height in the late 1920's, for instance, it struck down fifteen state laws, compared to one or two in the 1850's and 60's.[16]

It is, thus, clear that the means which the founders

16 HOWARD GILLMAN, ET AL., 1 AMERICAN CONSTIUTIONALISM: STRUCTURES OF GOVERNMENT, (Oxford Univ. Press 2013), 330-331.

provided to the states have been insufficient to the task of preserving the crucial role of the states in federalism. While representation of the states in the Senate and the Electoral College is important, there are clear limits to the amount of change that Senators and electors can effect. Senators are limited by the popularly elected house and the (effectively) popularly elected President. As members of the federal government, furthermore, they have an inherent interest in expanding the power of that government. The Electoral College functions far differently than the founders envisioned. Electors still represent their states and are chosen through state processes. However, electors almost always respect the result of the popular vote in their states, and do not functionally serve as a barrier to the Presidency as the founders thought they might. Constitutional change, moreover, is a near political impossibility. The convention power is a forgotten relic which the states have never exercised. While the amendment process has been more frequently used, only the Eleventh Amendment (discussed in depth below) has done anything to practically limit the federal usurpation of power. Perhaps the requirement of

state approval has discouraged the proposal of amendments that would usurp state powers, but if true, this is a limited success. It is reasonable to argue that the founders should have included a more practical way for the states to check federal power. Nonetheless, the mechanisms and institutions that were included demonstrate that the founders intended to create a system in which the federal government would be balanced by the states.

Throughout American history, this original view of federalism has been misunderstood and misapplied. Though they were instrumental in the revolution and the founding, strict constructionists such as Thomas Jefferson and James Madison were among the first to misunderstand constitutional federalism. At the Constitutional Convention, Madison was worried about the tendency of overbearing states to "encroach upon federal authority."[17] Later, however, he seemed to reverse himself on federalism and counted himself among the strict constructionists. Both he

17 James Madison, *Debate in the Constitutional Convention, in* 1 AMERICAN CONSTIUTIONALISM: STRUCTURES OF GOVERNMENT, (Howard Gillman et. al. eds., Oxford Univ. Press 2013), 80.

and Jefferson opposed the creation of a national bank on the grounds that it violated the strictly interpreted letter of the Constitution. They particularly cited the necessary and proper clause, and favored a strict interpretation of necessity. As Madison argued, "…the proposed Bank could not even be called necessary to the Government; at most it could be put convenient."[18] Jefferson, likewise, argued that the government could exercise its powers to lay taxes and pay debts without the bank, and, therefore, the bank is not necessary.[19]

It is not, at first glance, obvious how strict construction relates to federalism. Indeed, the Tenth Amendment and federalism did not explicitly affect debates at this time.[20] In fact, however, federalism played a great part. St. George Tucker, a major proponent of

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18 James Madison, *House Debate on the Bank, in* 1 AMERICAN CONSTIUTIONALISM: STRUCTURES OF GOVERNMENT, (Howard Gillman et. al. eds., Oxford Univ. Press 2013), 126.
19 Thomas Jefferson, *Opinion on the Constitutionality of the Bill for Establishing a National Bank, in* 1 AMERICAN CONSTIUTIONALISM: STRUCTURES OF GOVERNMENT, (Howard Gillman et. al. eds., Oxford Univ. Press 2013), 127.
20 HOWARD GILLMAN, ET AL., 1 AMERICAN CONSTIUTIONALISM: STRUCTURES OF GOVERNMENT, (Oxford Univ. Press 2013), 119.

strict construction, argued that the Tenth and the Ninth Amendments were created to guard against encroachments on the states and people, and thus, concluded that "the powers delegated to the federal government, are, in all cases, to receive the most strict construction that the instrument will bear…"[21] Strict construction, then, was a perspective about the place of the states in the Constitution, not only a view about constitutional interpretation. This view misunderstands the intent of the Tenth Amendment. As noted above, the Tenth Amendment was not created to change the system of the Constitution, but to clarify and affirm the system of limited government and federalism. As discussed, Madison did not even believe it to be necessary, let alone a fundamental safeguard. It also used much weaker language than its counterpart in the Articles of Confederation, and, with the removal of "expressly," opened the door to broad implied powers.

The obvious dilemma for an originalist critique of strict construction like the one offered here is that

21 St. George Tucker, *in* 1 AMERICAN CONSTIUTIONALISM: STRUCTURES OF GOVERNMENT, (Oxford Univ. Press 2013), 120.

Madison, one of the Constitution's key authors, was a proponent of strict construction.[22] This dilemma can be resolved by analyzing Madison's own thoughts on the necessary and proper clause. Madison himself agreed that positive enumeration of all federal powers would be nearly impossible. In the Federalist papers, he wrote, "Had the convention attempted a positive enumeration of the powers necessary and proper for carrying their other powers into effect, the attempt would have involved a complete digest of laws on every subject to which the Constitution relates…"[23] As this passage demonstrates, Madison believed that there were parts of the Constitution that must be unwritten. The founders could have written a "complete digest of laws," but they did not. The Constitution is not a detailed code of laws, but a concise core of fundamental laws from which the statutes and codes of the nation could be derived. Because the Constitution would be at the center of innumerable national debates and issues, it would require a

22 That the framers did not agree on everything is one of the core problems with originalism as a school of constitutional interpretation. A detailed treatment of this problem is beyond the scope of this paper.

23 THE FEDERALIST No. 44 (James Madison).

broad interpretation. Strict construction, which argues that every word must be read as narrowly as possible, is out of step with this principle, and it is out of step with Madison's own logic in the *Federalist*.

Like the strict constructionists, proponents of compact theory emphasized the importance of the states in the relationship of federalism. In the Virginia and Kentucky Resolutions of 1798, the Kentucky legislature summed up compact theory by declaring that "by compact, under the style and title of a Constitution for the United States… [the states] constituted a general government for special purposes, delegated to that government certain definite powers, reserving, each state to itself the residuary mass of right to their own self-government…"[24] For proponents of compact theory, then, the Constitution was an agreement between the states which left the states with ultimate power. In the aforementioned resolutions, it justified the states' rights to declare a federal law unconstitutional.[25] Later,

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24 *Virginia and Kentucky Resolutions (1798), in* 1 AMERICAN CONSTIUTIONALISM: STRUCTURES OF GOVERNMENT, (Howard Gillman et. al. eds., Oxford Univ. Press 2013), 165.
25 *Id.*

compact theory would be used to justify the nullification of federal laws[26] as well as the secession movement which resulted in the Civil War.[27]

The proponents of compact theory were out of step with federalism as intended by the founders for two main reasons. First of all, it assumes that the states are the more powerful partner in the relationship of federalism. Given the supremacy clause, however, it is quite clear that the federal government holds the reins of power over the states. While the Constitution provides some mechanisms by which the states can defend themselves against an overbearing federal government, the supremacy clause provides the federal government with sweeping authority. Secondly, the means which the Constitution provides states to push back against the federal government are not the means which the proponents of compact theory sought to use. The founders could have provided the states with

26 See John C. Calhoun, *Fort Hill Address, in* 1 AMERICAN CONSTIUTIONALISM: STRUCTURES OF GOVERNMENT, (Howard Gillman et. al. eds., Oxford Univ. Press 2013), 228.
27 *South Carolina Ordinance of Secession, in* 1 AMERICAN CONSTIUTIONALISM: STRUCTURES OF GOVERNMENT, (Howard Gillman et. al. eds., Oxford Univ. Press 2013), 277.

the authority to somehow challenge federal laws, or even secede, but they did not for various reasons.

After the Civil War, a general shift in the understanding of federalism occurred. Unfortunately, however, the shift was not to a correct understanding, but to an equally poor understanding. *Lochner v. New York* was among the first examples to demonstrate this shift. In this case, Joseph Lochner was charged with violating New York's Bakeshop Act, which set hour requirements for bakery employees.[28] When the Supreme Court took up the case, the majority ruled that the law was unconstitutional on the basis that "the general right to make a contract in relation to his business is part of the liberty protected by the Fourteenth Amendment, and this includes the right to purchase and sell labor, except as controlled by the State in the legitimate exercise of its police power."[29]

The notion that the federal government has the authority to strike down such state actions based on a freedom of contract fundamentally undermines the

28 Lochner v. New York, 198 U.S. 45 (1905).
29 *Id.*

powers of the states. While *Lochner* was troubling for several reasons, the most troubling in relation to the issue of federalism is its assumptions about free contract. For Peckham, the author of the opinion, state governments could not violate the right to a free contract except through a "legitimate" police power that involves a benefit to the public health.[30] This is an extreme limitation of traditional police powers. Judges generally recognized police powers, which are broad state actions to protect the safety, order and morals of the people, as essential powers of state and local governments.[31] While the Fourteenth Amendment was, in some respects, a break with federalism in that it granted the federal government new powers over the states, its specific intent, as discussed above, was not to create new rights, but to extend old rights. As Holmes argued in his dissent, moreover, the idea that liberty of contract is implied by the Fourteenth Amendment is out of step with the way many laws, such as Sunday closings and limits

30 *Id.*

31 HOWARD GILLMAN, ET AL., 1 AMERICAN CONSTIUTIONALISM: STRUCTURES OF GOVERNMENT, (Oxford Univ. Press 2013), 392.

on usury, operate.[32] The idea that the Fourteenth justifies the undermining of one of the most important traditional powers of the states is a stretch to say the least.

On the other side of Peckham and like-minded economic conservatives who sought to keep government out of private enterprise was the rising Progressive movement. Progressives generally sought to modernize and democratize government. They worked for ballot reform, women's suffrage, an income tax, and direct election of Senators, among other things.[33] Along with this, they generally attempted to increase the size and scope of the federal government. This often encroached upon spheres of authority that traditionally belonged to the states. Woodrow Wilson, a Progressive president, championed such an approach. In the case of *Missouri v. Holland,* the Court mulled the legality of a treaty which Wilson made with Canada. This treaty effectively regulated hunting, which is pretty clearly outside the scope of federal powers.[34]

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32 Lochner v. New York, 198 U.S. 45, 75 (1905).

33 HOWARD GILLMAN, ET AL., 1 AMERICAN CONSTIUTIONALISM: STRUCTURES OF GOVERNMENT, (Oxford Univ. Press 2013), 326.

34 A regulation of hunting is probably best viewed as a police power.

Despite this, Justice Holmes, in the opinion of the court, defended this measure because treaties are Constitutional "when made under the authority of the United States,"[35] and because a national interest of such magnitude requires "national action."[36] While Lochner conservatives attempted to limit state powers, Wilson and Holmes attempted to usurp them.

In *Missouri v. Holland*, Holmes and the Progressives misunderstood federalism in two basic ways. First, "national interest" is not a sound justification for the federal government to exercise powers that were legitimately left to the states. The Constitution created a system of limited government in which some powers were left to the states. While the federal government may have some interest in the regulation of hunting, it cannot exercise powers that are reserved to the states. If something

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While an argument could be made that it is a regulation of commerce, no such argument was made in Missouri v. Holland.

35 Oliver Wendell Holmes, *Missouri v. Holland, in* 1 AMERICAN CONSTIUTIONALISM: STRUCTURES OF GOVERNMENT, (Howard Gillman et. al. eds., Oxford Univ. Press 2013), 378.

36 Oliver Wendell Holmes, *Missouri v. Holland, in* 1 AMERICAN CONSTIUTIONALISM: STRUCTURES OF GOVERNMENT, (Howard Gillman et. al. eds., Oxford Univ. Press 2013), 378.

as mundane as controlling bird populations is the standard for usurping powers, moreover, it is difficult to imagine what state powers the federal government cannot exercise for the "national interest." A national interest standard, then, would erode all sense of limited government and would dangerously encroach upon state powers. Secondly, it does not matter if the mechanisms used to exercise that power (in this case, treaty power) are constitutional. This, too, will result in the erosion of state powers. Treaties have great authority, but if the United States can exercise any power reserved to the states by simply signing a treaty, the Constitution and the system of federalism which it created are meaningless. The powers which Wilson attempted to usurp, then, were a clear violation of the system of federalism as intended by the founders.

While federalism has been consistently misunderstood throughout American history and continues to be misunderstood today, there have been times when federalism has operated as the founders imagined. *Chisholm v. Georgia* and its aftermath (also known as the sovereign immunity case), for instance, provides a strong

example. Alexander Chisholm, a South Carolina resident, attempted to sue the state of Georgia because he believed they owed money to his client's estate. This violated the traditional understanding of sovereign immunity, the idea that a state cannot be sued without its consent.[37] The court ruled that, in fact, the text of the Constitution clearly does not provide for the sovereign immunity of the states.[38]

The public reaction to this was swift. The nation was extremely anxious about the ruling. Georgia refused to enforce it, and threatened to execute anyone who tried. A day after the decision, the Eleventh Amendment, which provides for the sovereign immunity of the states, was proposed.[39] Georgia's violent reaction notwithstanding, the aftermath of *Chisholm* generally provides a good example of how the system of federalism was intended to work. The federal government made a ruling that the states felt

37 *Chisholm v. Georgia, in* 1 AMERICAN CONSTIUTIONALISM: STRUCTURES OF GOVERNMENT, (Howard Gillman et. al. eds., Oxford Univ. Press 2013), 159, 159.
38 Randolph, *Chisholm v. Georgia, in* 1 AMERICAN CONSTIUTIONALISM: STRUCTURES OF GOVERNMENT, (Howard Gillman et. al. eds., Oxford Univ. Press 2013), 159, 159.
39 HOWARD GILLMAN, ET AL., 1 AMERICAN CONSTIUTIONALISM: STRUCTURES OF GOVERNMENT, (Oxford Univ. Press 2013), 162-163.

was over the line. Rather than attempt to nullify the ruling, the states ultimately used the path which the Constitution provides and participated in the amendment process in order to protect themselves.

Federalism as the founders intended it has been misapplied throughout history. Before the Civil War, many held an extreme view in which the states held the dominant role in the Constitution. After the Civil War, the federal government began to limit and usurp state powers to protect rights and promote the national interest. The truth is that the intent of the founders was a middle ground between these extremes. The Constitution set up a system of federalism in which the federal government was legally supreme, but limited. The states retained many crucial powers such as police powers. The Tenth Amendment served to clarify and reinforce this system. Though they were ultimately insufficient, the states were provided with some protections against federal power. This displays that the founders intended a system in which the federal government and the states both complemented one another through their powers and balanced one another through these provisions.

CONGRESS, DIVERSION, AND THE COURT: AN ANALYSIS

Micah Quigley '18

Abstract: *Sometimes, Congress passes 'diversionary legislation': legislation that pursues extra-constitutional ends by virtue of Congress' power to pursue constitutionally enumerated ends. This paper argues a twofold thesis: first, that the Court in three specific cases upheld diversionary legislation on the basis of faulty reasoning; second, that diversionary legislation is unconstitutional per se. The paper has three parts. The first analyzes and criticizes two 20th-century cases in which the Court upheld diversionary legislation. The second analyzes a 20th-century case in which the Court struck down such legislation. This second section also argues for the broader claim that all diversionary legislation is unconstitutional. The final section treats a 21st-century case in which the Court upheld diversionary legislation.*

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Starting in the 1890's, the Progressive era wrought far-reaching changes to American constitutionalism. With respect to legislative power, the old constitutional orthodoxy said that Congress' powers could only be used for the attainment of constitutionally enumerated ends. During the Progressive era, Congress challenged this orthodoxy by pursuing extra-constitutional ends by virtue of its power to pursue enumerated ends. Since Congress' tactic in this kind of legislation was to circumvent longstanding constitutional limitations, this paper refers to such legislation as *diversionary legislation*.[1] In plain terms, diversionary legislation is that by which Congress, under the guise of enumerated powers, does what would be unconstitutional for it to do directly. During the Progressive era, diversionary legislation came before the Supreme Court several times, where short-term mixed results eventually gave way to jurisprudential acceptance. This paper argues a twofold thesis: first, that the Court in (at least) three cases upheld diversionary legislation on

1 This term is not meant to carry any normative weight; it is merely descriptive.

the basis of faulty reasoning; second, that diversionary legislation is unconstitutional.[2]

The paper takes three parts. First, it lays out two cases in which the Court upheld diversionary legislation, and argues that these rulings were faulty. Second, it examines a case in which the Court struck down diversionary legislation, and argues both that this ruling was correct and that its reasoning demonstrates the unconstitutionality of all diversionary legislation. Finally, it examines a recent case in which the Court upheld diversionary legislation. This last section both argues against the Court's ruling and mentions similarities among Court opinions upholding diversionary legislation.

Diversionary Legislation during the Progressive Era

Diversionary legislation has two main aspects: extraconstitutional and constitutional. The

2 Throughout, this paper uses "the Court upheld diversionary legislation" and similar phrases in the place of "the Court upheld the constitutionality of diversionary legislation" and similar phrases. This is solely for the sake of space; this paper only addresses the constitutionality of diversionary legislation *qua* diversionary legislation – not whether a given piece of diversionary legislation is good or bad policy.

extraconstitutional aspect is the true purpose of diversionary legislation. It is also, however, a purpose that Congress lacks the constitutional power to accomplish by normal means. The constitutional aspect is the part of the legislation which, Congress claims, grants congressional authority to enact the legislation. It is important to note that not all laws with constitutional and extraconstitutional aspects count as diversionary legislation. Most legislation has some extraconstitutional side effects; a law is only diversionary legislation if its main purpose is to do something Congress lacks the authority to accomplish directly.[3] This section of the paper critically examines cases in which the Court either upheld or struck down diversionary legislation, as such.

In Favor: *Missouri v. Holland*

In 1912, Congress passed a regulation to limit bird hunting throughout the United States, because some

3 A tariff on foreign steel, for example, might decrease overall domestic steel production and thereby decrease net carbon emissions. But this would only count as diversionary legislation if the main purpose of the law was to regulate emissions rather than to regulate foreign trade.

conservative states refused to pass conservatory legislation themselves. This regulation clearly exceeded Congress' constitutional authority, and challengers brought it to court on those grounds. The Wilson administration responded by negotiating the Migratory Bird Treaty of 1916 with Britain.[4] Congress subsequently enforced the treaty via the Migratory Bird Treaty Act of 1918.[5] In this case, the extraconstitutional aspect of the treaty and law was their allowing Congress to regulate what had hitherto been considered the property of the states (namely, wild game). The treaty and law did, however, respectively constitute and enforce an agreement between the United States and a foreign government. This was the constitutional aspect of the legislation; article six of the Constitution plainly states that treaties (along with the Constitution) are the supreme law of the land.[6] The Court upheld the treaty and law in *Missouri v. Holland*.

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4 HOWARD GILLMAN, ET AL., 1 AMERICAN CONSTIUTIONALISM: STRUCTURES OF GOVERNMENT, (Oxford Univ. Press 2013), 377-378.

5 *Convention Between the United States and Great Britain for the Protection of Migratory Birds*, 11 Am. J. of Int'l. L. , 62-66. Migratory Bird Treaty Act of 1918, Gr. Brit.-U.S., July 13, 1918 (16 U.S.C. 703).

6 U.S. Const. art. VI, § 2.

Justice Holmes wrote the Court's majority opinion. Holmes quite correctly states that the law is merely a necessary and proper execution of the treaty and that the real issue is thus whether the treaty itself is constitutional.[7] And, since Congress unaided by a treaty has no constitutional authority to regulate bird hunting, the constitutionality of the treaty depends on whether Congress can use the treaty power to do what it would otherwise have no power to do. Missouri argued before the Court that Congress cannot use the treaty power to exceed its normal limitations, and Holmes flatly denies this claim. He cites two cases in which a district court struck down similar federal regulations as unconstitutional.[8] About those cases, he says:

> Whether the two cases cited were decided rightly or not, they cannot be accepted as a test of the treaty power. Acts of Congress are the supreme law of the land only when made in pursuance of the Constitution, while treaties are declared to be so when made under the authority of the United States.[9]

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7 Missouri v. Holland, 252 U.S. 416, 432 (1920).

8 Id. at 432 *See* United States v. Shauver, 214 F. 154 (E.D. Ark. 1914); United States v. McCullagh, 221 F. 288 (D. Kan. 1915).

9 *Id.* at 433.

Here, Holmes is asserting that Congress can wield power in excess of its article one, section eight limitations so long as that power is exercised via a treaty. This is a direct affirmation of the constitutionality of diversionary legislation: Holmes' opinion entails that the constitutional aspect of the law (i.e. its status as a treaty) constitutionally justifies its extraconstitutional aspect (i.e. its exercise of powers not granted to the federal government).

But this is only the conclusion of Holmes' argument. His argument itself is structuralist in nature, and goes something like this:

1. For every exigent matter, the power to act is found in some level of government.
2. But in some matters of national exigence, the states are incompetent to act.
3. In such cases, therefore, another level of government must have the power to act.
4. The only other place this power could feasibly rest is in the federal government.
5. Therefore, in cases of national exigence where the states are incompetent to act, the federal government has the power to act.[10]

10 Missouri v. Holland, 252 U.S. 416, 433 (1920).

A clarification: Holmes uses the phrase "incompetent to act" to refer to states which refuse to enact hunting regulations. This is the same language used in the 1787 Virginia Plan, which (had it been adopted) would have given the federal government the power to act when the states *could* not – but not, as Holmes uses the phrase, to act when they *would* not.[11] Holmes provides no justification for this apparent misuse of terminology, and it would seem that this misuse *prima facie* disqualifies his argument from applying to the case at hand.

Even if Holmes' argument is sound, it has nothing to do with the treaty power. Holmes does spend a significant amount of time discussing the treaty power elsewhere; specifically, he states (seemingly without support) that the treaty power is what enables the federal government to exercise powers that would normally be reserved to the states by the Tenth Amendment.[12] But if Holmes' primary argument is sound, this invocation of the treaty power is entirely unnecessary. This is because

11 The Virginia Plan (1787), para. 6.

12 Missouri v. Holland, 252 U.S. 416, 434 (1920).

Holmes' reasoning effectively adds another enumerated power to article one, section eight: the power to act in cases of national exigence in which the states are incompetent to act. And it hardly takes a glance at *Gibbons v. Ogden* to see that congressional exercises of enumerated powers automatically supersede conflicting state laws.

It seems that Holmes holds that Congress has done what it could not have otherwise done by invoking the treaty power, which in his attempt to support this stance, Holmes ends up saying that Congress would have been able to do what it did *even without* the treaty power. Holmes' opinion thus offers support for the constitutionality of the legislation at hand without supporting the constitutionality of diversionary legislation – which is what the opinion itself claims to be doing. Perhaps another case will provide better support for diversionary legislation's constitutionality.

In Favor: *Champion v. Ames*

Though it is a much earlier case, *Champion v. Ames* has significant constitutional commonalities with *Missouri*

v. Holland. In 1894, Congress passed the Act for the Suppression of Lottery Traffic, which banned the interstate transport of lottery tickets in an effort to suppress lotteries themselves. The constitutional aspect of the law was its regulation of interstate commerce. The extraconstitutional aspect was the law's aim to suppress lotteries on moral grounds. This goal is extraconstitutional because the promotion of public morality is one of the police powers reserved to the states. The Court ruled in Congress' favor in the 1903 case *Champion v. Ames*.[13]

Harlan's majority opinion is fairly straightforward. His argument that the law is constitutional is as follows:

1. The commerce clause is both plenary and is broad enough to encompass commercial traffic. (Harlan cites a multitude of cases in support of this point.)[14]
2. The interstate transport of lottery tickets is a form of commercial traffic.[15]
3. Therefore, Congress has the authority to regulate

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13 Champion v. Ames, 188 U.S. 321 (1903).

14 *Id.* at 347, 348-352.

15 This point was hotly debated; in fact, most of the four-man dissent (penned by Fuller) depends on the claim that lottery tickets are merely the signification of a contract which has already been assented to. But even if Harlan is right about this, the law is still diversionary in nature and he thus still needs to defend it.

the interstate transport of lottery tickets, "subject only to such limitations as the Constitution imposes upon the exercise of the powers granted by it."[16]

4. No Constitutional limitation exists which would bar Congress from banning the interstate transport of lottery tickets.
5. Therefore, Congress has the authority to regulate the interstate transport of lottery tickets.[17]

Harlan spends much of his argumentative effort defending premise four against the challenge of the Tenth Amendment. Harlan himself describes the aim of this legislation as "guarding the people of the United States against the 'widespread pestilence of lotteries'…"[18] Since this is clearly a moral regulation and thus constitutes an exercise of police powers (which are implicitly reserved to the states by the 10th), how is it that the law does not violate that amendment? Harlan's first response is this:

16 Champion v. Ames, 188 U.S. 321, 353 (1903).

17 Harlan also spends quite a lot of time arguing that prohibition is a form of regulation, since the law bans tickets rather than regulating them *per se*. This is moot with respect to the present discussion.

18 Champion v. Ames, 188 U.S. 321, 357 (1903). More precisely, Harlan states that another of the legislation's goals is "to protect the commerce which concerns all the states." (par. 30). Since it is almost impossible to divine what this could mean (will interstate commerce become infected with vice-carrying lottery-bacteria, as if it were good meat packed with rotten meat?), this paper does not take it up.

> If it be said that the act of 1894 is inconsistent with the Tenth Amendment, reserving to the states respectively, or to the people, the powers not delegated to the United States, the answer is that the power to regulate commerce among the states has been expressly delegated to Congress.[19]

This is less a response and more a refusal to acknowledge that the legislation is really a congressional exercise of police powers: it goes without saying that, if this law were really just regulating commerce, it would not be in violation of the Tenth Amendment. But Harlan, just one paragraph away from his acknowledgement that this law is a federal exercise of police powers, simply ignores the law's true intent and speaks as if this were a simple case dealing merely with commerce regulation.

Harlan's second response is to argue that the law does not violate the Tenth Amendment because (a) many states had already banned lotteries themselves, and (b) the law does not ban intrastate transport of lottery tickets, but only interstate transport.[20] This response, again, misses the mark. It is difficult to see how either of these considerations

19 *Id.* at 357.

20 Champion v. Ames, 188 U.S. 321, 357 (1903).

have anything to do with Congress' ability to exercise police powers via its power to regulate commerce.

Harlan's *Champion* opinion acknowledges that the law at hand has a constitutional and an extraconstitutional aspect, and that the law uses its constitutional aspect as a mere justification for its extraconstitutional one. In the same breath, Harlan's opinion seems to pretend that the constitutional aspect of the law is all there is to consider. This oddity is similar to Holmes' inconsistent stance in *Missouri*, which claimed to uphold the law's diversionary nature even while providing an argument which ignored that nature. These Court rulings both fail to provide a good rationale for the constitutionality of diversionary legislation. The next step is to examine an argument to the contrary and see if it fares better.

Against: *Bailey v. Drexel Furniture Co.*

In 1919, Congress passed the Child Labor Tax Law, which put a 10% excise tax on employers who used child labor.[21] This law was Congress' second try at regulating

21 Bailey v. Drexel Furniture Co., 259 U.S. 20, 21 (1922).

child labor; the Court in *Hammer v. Dagenhart* had recently struck down Congress' attempt to do so via the commerce power.[22] The extraconstitutional aspect of the law, and its real aim, was its nationwide regulation of employment practices. Employment regulation, of course, falls under states' broad police powers to regulate in the interest of citizens' health, morality, and general welfare. The constitutional aspect of the law was that it placed an excise tax on businesses; this falls under Congress' article one, section eight taxing power. In 1922, the law came before the Court in *Bailey v. Drexel Furniture Company*. The Court struck down the law.[23]

Chief Justice Taft wrote the majority's opinion. Taft's argument that the law is unconstitutional is as follows:

1. The law shows on its face that it is primarily aimed at regulation of employment, and not at taxation. (Taft cites the law itself in support of this point; his citations are compelling, to say the least.)[24]
2. The regulation of employment is among the police

22 Hammer v. Dagenhart, 247 U.S. 251 (1918).
23 Drexel Furniture Company, 259 U.S. 20 (1922).
24 *Id.* at 34-35.

powers reserved to the states.[25]

3. It is unconstitutional for Congress to exercise police powers reserved to the states.
4. If a law shows on its face that it is primarily aimed at an unconstitutional end, then that law is unconstitutional.
5. Therefore, the law is unconstitutional.

Premise four is the only controversial premise in this argument; premise three would be called into question by an appeal to the idea of a living constitution, but that debate is involved and convoluted enough to fall beyond the bounds of this paper.[26] Taft does not state premise four explicitly, but his argument falls without it. He gives two lines of support for this claim. First is the structuralist support. Taft points out that, if Congress can exercise any police power it pleases under the guise of a tax, then federalism is as good as dead. In such a case, Congress

25 *Id.* at 36.

26 It is worth noting that Holmes' opinion in *Missouri* does in fact invoke the living constitution. But his argumentation on this point is very unclear. He seems to view the Living Constitution as a way out of Tenth Amendment troubles. But, again, if he has shown what he thinks he has shown, this is unnecessary. And anyway, if the Living Constitution really nullified the Tenth Amendment, there would be no need at all for the kind of diversionary legislation considered in these cases.

would be able to regulate any subject at all, so long as it did so by framing its regulation as a tax. The states would be left with no reserved powers.[27] Taft's second line of support is an appeal to precedent (though the precedent it cites is early enough to make this nearly an originalist appeal). Taft quotes Marshall in *McCulloch v. Maryland*:

> Should Congress, in the execution of its powers, adopt measures which are prohibited by the Constitution, or should Congress, under the pretext of executing its powers, pass laws for the accomplishment of objects not intrusted [sic] to the government, it would become the painful duty of this tribunal, should a case requiring such a decision come before it, to say that such an act was not the law of the land.[28]

Marshall here anticipates the advent of diversionary legislation, and preemptively declares it to be unconstitutional. Specifically, it is unconstitutional because it constitutes an extension of Congressional power beyond its proper bounds, and such an extension flies in the face of the system of enumerated powers the Constitution established. Marshall's strong reasoning and authoritative

27 Drexel Furniture Company, 259 U.S. 20, 38 (1922).
28 McCulloch v. Maryland, 17 U.S. 316, 423 (1819).

status make the above quotation perhaps the strongest support available for Taft's fourth premise.

It seems that Taft's *Bailey* opinion offers a sound argument that the law in question is unconstitutional. But this argument applies equally to any and all diversionary legislation: Taft's argument covers every law that is primarily aimed at an unconstitutional end. And diversionary legislation is, by definition, primarily aimed at unconstitutional ends – this includes the laws in question in *Champion v. Ames* and *Missouri v. Holland*.[29] Diversionary legislation is therefore unconstitutional.

A Contemporary Case: *National Federation of Independent Business v. Sebelius*

The 2010 Affordable Care Act (ACA) included a provision (in its Part III-B) penalizing non-exempt Americans for failing to maintain at least a minimal level of health insurance coverage. This penalty took the form of a

29 I have been referring to these ends as "extraconstitutional" for the sake of ecumenism. But it seems clear enough that the laws in question in these two cases extend Congress' power into the sphere of protected state powers, which (given the Fifteenth Amendment) makes their extraconstitutional ends unconstitutional.

"shared responsibility payment," which was payable to the IRS like a tax.[30] The text of the ACA itself described this payment as a "penalty" rather than as a tax.[31] In *National Federation of Independent Business v. Sebelius*, one of the crucial issues at hand was whether Part III-B was constitutional. Part III-B's extraconstitutional aspect was its goal of compelling individuals to buy a product. This is well beyond the scope of Congress' enumerated powers. The constitutional aspect, according to the government lawyers defending it, was that it constituted either a regulation of interstate commerce, a necessary and proper means of accomplishing the ACA's main goals, or an exercise of the taxing power.[32] In 2012, the Court upheld Part III-B as a constitutional exercise of Congress' taxing power.

Justice Roberts wrote the majority's opinion. He starts by establishing that Part III-B cannot be justified by either the commerce clause or the necessary and proper

30 Legal Information Institute, *syllabus for* National Federation of Independent Business v. Sebelius, 567 U.S. 519 (2012).

31 *Id.*

32 National Federation of Independent Business v. Sebelius, 567 U.S. 519, (2012).

clause.[33] From there, Roberts' argument goes like this:

1. If "the Government's alternative reading of the [mandate] – that it only imposes a tax on those without insurance – is a reasonable one," then the mandate is constitutional under Congress' taxing power.[34] (Roberts cites several past Supreme Court decisions to support this premise.)[35]
2. "The mandate can be regarded as establishing a condition – not owning health insurance – that triggers a tax…"[36]
3. Thus, the mandate need not be regarded as a command to buy insurance.[37]
4. Thus, the government's reading of the mandate as a tax increase is a reasonable one.
5. Therefore, the mandate is constitutional under Congress' taxing power.

The problem with this argument is that its second premise faces a dilemma. Either the second premise means, "the mandate can *possibly* be regarded as establishing a condition – not owning health insurance – that triggers

33 *Id.*

34 *Id.*

35 *See* Parsons v. Bedford, 3 Pet. 28 U.S. 433, (1830); Crowell v. Benson, 285 U.S. 22, (1932); Hooper v. California, 155 U.S. 648, 657 (1895); Blodgett v. Holden, 275 U.S. 142, 148 (1895).

36 National Federation of Independent Business v. Sebelius, 567 U.S. 519, (2012).

37 *Id.*

a tax…" or it means, "the mandate can *reasonably* be regarded as establishing a condition – not owning health insurance – that triggers a tax..." The first reading gives the mandate an extremely low bar to jump over: so long as it is possible, in however strained a way, to read the mandate as a tax rather than as a means of forcing people to buy a product, the mandate is constitutional. And, of course, the mandate could clear this bar. But on this lax reading, the argument is invalid. Premise one's if-then statement is restricted to *reasonable* readings; it does not cover all possible ones. And premise one could not be modified to cover all possible readings without cutting off its connection to the cases Roberts cites to support it, because those cases dealt with reasonable readings of statutes rather than merely possible ones. So this reading of premise two will not work.

The second reading sets a higher bar for the mandate to clear. On this reading, there need only exist one reasonable interpretation of the mandate that reads it as a tax. Roberts spills a lot of ink arguing that such an interpretation exists. The ultimate problem for this reading,

however, is this: if the phrase "reasonable interpretation" is not entirely vapid; that is, if the phrase rules out *any* interpretations as unreasonable, it should certainly rule out interpretations that plainly ignore the undeniable intention of the law in question. It is difficult to imagine an interpretation being less reasonable than one which interprets a *self-described* "penalty," which is admittedly designed to punish people for failing to buy health insurance, as a mere tax.[38] Yet this is precisely the kind of interpretation that Roberts characterizes as "reasonable." Roberts' reasoning here falls short precisely because it ignores the fact that Part III-B of the ACA is diversionary legislation. This error bears an eerie resemblance to Harlan's mistake in *Champion v. Ames* and to Holmes' mistake in *Missouri v. Holland*. The three opinions hold in common an odd duality: they acknowledge that the law at hand is primarily extraconstitutional, only to ignore this conceded fact in their subsequent legal reasoning.

At first glance, it seems odd that the three above-discussed opinions supporting the constitutionality of

38 *Id.*

diversionary legislation are themselves so diversionary. The opinions seem to dance around the issue, but they never quite argue head-on that Congress can pursue extraconstitutional ends under the guise of exercising broadly construed constitutional powers. In purely legal terms, this may be because no argument to that conclusion can stand constitutional muster. But this strictly legal analysis does not explain why the Court has repeatedly ruled as it has on the matter.[39] Legal analysis fails to account for such rulings because rulings do not happen in a vacuum, and they are not always decided on legal grounds alone. Every case has its attendant social and political pressures, and Supreme Court justices are not immune simply because of their lofty status. In the bluntest terms: sometimes Congress desperately wants to remedy problems that it lacks the authority to remedy, and the Court has often allowed Congress to try. Regardless of political and social

39 *See* Hammer v. Dagenhart, 247 U.S. 251 (1918) for a notable exception. Additionally, South Carolina v. Katzenbach, 383 U.S. 301 (1966) is an oddity in that it upheld Congress' right to determine whether state voting laws were mere pretenses for violations of the Fifteenth Amendment. The Court here seems to have said that diversionary legislation, at least when implemented by state governments, should be evaluated based on its true aims (and possibly, effects) rather than on any constitutional aspects it might have.

pressures to give Congress this leeway, it does not seem a stretch to say that the Court is not legally justified in doing so.

COMPACT THEORY AND MODERN NULLIFICATION

Luke Leone '18

ABSTRACT: *This paper will argue that compact theory should not be rejected due to its negative consequences in American history, but rather that it should be rejected for theoretical reasons based in American constitutional law and history. With this established, the paper will then consider the relevance of this conclusion to the modern state nullifications of federal marijuana laws and, finally, will argue that since compact theory is false, state legalization of marijuana is legally groundless regardless of whether marijuana legalization would be beneficial or not.*

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Few issues in the history of the United States have been as consistently and as damagingly divisive as compact theory and its implications of nullification and secession. From the ratification of the Constitution till the present day, these issues have plagued the nation. This paper will argue that one should not reject compact theory and its implications because of the consequences they have produced, but rather, because of the theoretical and legal fact that the ratification conventions did not form a compact. This paper's argument will proceed in five steps. First, it will provide definitions of compact theory, nullification, and secession. Second, it will briefly survey the historical wrongs to which compact theory has become inextricably tied. Third, it will argue that the consequences of compact theory, whether they are good or bad, provide no good reason for rejecting or accepting it; one should instead accept or reject it on theoretical grounds. Fourth, it will argue on theoretical grounds that compact theory is false. And last, it will argue that because consequences do not affect the truth of compact theory and because compact theory is false for legitimate, theoretical reasons,

one should reject the modern-day uses and permissions of it, such as some states nullifying the existing federal legislation banning marijuana.

What exactly is compact theory? It is the theory that, fundamentally, the ratification of the Constitution formed a compact not between the American people of the United States but between sovereign states themselves.[1] The most famous and influential statement of compact theory is in the Virginia and Kentucky Resolutions written by Thomas Jefferson and James Madison. They drafted these resolutions to provide arguments for states' nullification of John Adams' infamous Alien and Sedition Acts of 1798, which limited speech and protested the government's policies. The theoretical undergirding of their arguments is compact theory. Madison writes:

> That this Assembly doth... declare that it views the powers of the Federal government as resulting from the compact, to which the States are parties, as limited by the plain sense and intention of the instrument constituting that compact, as no further valid than they are authorized by the grant

1 HOWARD GILLMAN, ET AL., 1 AMERICAN CONSTIUTIONALISM: STRUCTURES OF GOVERNMENT, (Oxford Univ. Press 2013), 228.

> enumerated in that compact, and that in case of [an]... exercise of powers not granted by the said compact, the States... have the right, and are in duty bound, to interpose for arresting the profess of the evil, and for maintaining within their respective limits, the authorities, rights, and liberties appertaining to them.[2]

Because the Constitution is a compact, Jefferson and Madison argued, the states do not necessarily have to submit to the federal government; the government is not the final arbiter of disputes. Each state is an equal co-party with the other states, and each state has the power to interpret the Constitution for itself, as is the case of contracts between individuals.

This theory's implications are drastic and far-reaching. Jefferson, its chief proponent, wrote in a letter to Edward Everett, "The constitution of the United States is a compact of independent nations subject to the rules acknowledged in similar cases, as well that of amendment provided within itself, as, in case of abuse, justly dreaded

2 James Madison and Thomas Jefferson, *Virginia and Kentucky Resolutions (1978), in* 1 AMERICAN CONSTIUTIONALISM: STRUCTURES OF GOVERNMENT, (Howard Gillman et. al. eds., Oxford Univ. Press 2013), 164, 164-6.

but unavoidable *ultimo ratio gentium*."[3] Jefferson believed that this theory implies a state's right to forcefully resist a government perceived as encroaching upon its rights. Historically, the theory gave rise to the doctrines of nullification and secession. Nullification is the idea that a state legislature can nullify a federal law because it deems it contradictory to a constitutional right. Secession is the idea that a state can exit the compact because of breaches of compact by other parties.

Regardless of whether one thinks compact theory is true or not, it is a fact that compact theory's reputation has been tainted historically. It has repeatedly been on the "wrong side of history," as it were. This is due to its strong association with the southern states and the southern states' strong association with slavery and racism. For over a hundred years, compact theory was the theory behind the use, or threatened use, of secession and the nullification of federal laws contrary to southern policies favoring slavery and racism. There are two primary examples of this trend:

3 Thomas Jefferson, *To Edward Everett (1826),* in 12 THE WORKS OF THOMAS JEFFERSON: CORRESPONDENCE AND PAPERS 1816-1826, (Paul Leicester Ford ed., G. P. Putnam's Sons 1905), 469, 469.

the secession of the South from the Union in 1860 and the opposition movements to desegregation in the 1950s. In the South Carolina Ordinance of Secession, the South Carolina legislature's argument for their right to secede proceeds as follows. They first assert that the Declaration of Independence acknowledged the states as sovereign. The states retained this sovereignty even after the formation of the Constitution, which is fundamentally a compact between themselves. They then state its implications:

> We maintain that in every compact between two or more parties, the obligation is mutual; that the failure of one of the contracting parties to perform a material part of the agreement, entirely releases the obligation of the other; and that where no arbiter is provided, each party is remitted to his own judgement to determine the fact of failure, with all its consequences.[4]

In the Ordinance, they quote the Fugitive Slave Clause within the fourth article of the Constitution and then state that the breach of contract on the part of the northern states was their consistent refusal to return fugitive slaves. By the

4 *South Carolina Ordinance of Secession, in* 1 AMERICAN CONSTIUTIONALISM: STRUCTURES OF GOVERNMENT, (Howard Gillman et. al. eds., Oxford Univ. Press 2013), 277, 277-9.

time of the Civil War, slavery had come to be the South's primary economic and political interest, and compact theory provided a means by which the southern states could protect this interest. The other slaveholding states in the South soon accepted South Carolina's rationale for secession.[5]

Compact theory was again on the wrong side of history during the desegregation movements in the 1950s. In 1954, the Supreme Court ruled in *Brown v. Board of Education* that state laws allowing for segregation in the states' public-school systems are unconstitutional; they effectively overturned the infamous 1896 *Plessy v. Ferguson* "separate but equal" decision. Many of the southern states, however, rejected this decision as unconstitutional. Compact theory again became an expedient means to combat the perceived encroachment upon the southern states' rights. Inspired directly by the writings of Jefferson, Madison, and Calhoun, James J. Kilpatrick, an editorialist from the South, for example, resurrected the idea of interposition, another logical

5 *Id.*

entailment of compact theory. This idea claims that multiple states jointly can legitimately nullify federal law. "Our thought here," Kilpatrick wrote, "is that if six or seven—or hopefully, nine or ten—Southern States should unite in a common front, all of them undertaking to nullify the Court's mandate... the Supreme Court would be faced with a truly formidable problem in enforcing its orders."[6] Kilpatrick routinely denounced African-Americans as inferior to whites and feared that their presence in desegregated schools might hurt the education and morals of white children. With compact theory again providing intellectual grounds for racism, in the 1950s and 1960s there were massive protests against desegregation throughout the South which often turned violent.[7]

Compact theory's legacy has thus been inseparably tied to racism. Although compact theory has indeed often been on the wrong side of history, this fact is irrelevant to its truth or falsity. Compact theory is a legal theory

6 William P. Hustwit, *From Caste to Color Blindness: James J. Kilpatrick's Segregationists Semantics,* 77 THE JOURNAL OF SOUTHERN HISTORY No. 3, 639, 648 (2011).

7 *Id.* at 639-70.

and, as such, one must accept or reject it on theoretical grounds. An example from science may help to clarify this point. Social Darwinists in the late nineteenth century and early twentieth century used Charles Darwin's theory of natural selection to justify all manner of evils, such as racism, eugenics, imperialism, and unjust violence.[8] Clearly though, none of these unfortunate consequences of Darwin's theory has any legitimate bearing upon whether or not Darwin was doing good biology when he developed his theory. One should accept or reject his theory upon scientific, biological grounds, not consequential ones. Similarly, the question of compact theory boils down to this simple dilemma: either the state ratification conventions in 1787 formed a compact between the states or they did not. The question is a legal one confined to the historical facts leading up to the drafting of the Constitution in 1787 until the last state's decision to ratify it in 1791. Its consequences in the nineteenth and twentieth centuries ought to have no bearing on which horn of the dilemma is correct. If

8 Dennis Rutledge, *Social Darwinism, Scientific Racism, and the Metaphysics of Race,* 64 THE JOURNAL OF NEGRO EDUCATION, No. 3, 243-52 (1995).

compact theory is true, it is still true today, even if the consequences have historically been problematic.

One can reject both good ideas and bad ideas for bad reasons. Having dispensed with the fallacious thinking that rejects compact theory on the grounds of consequences, there still are legitimate reasons for rejecting compact theory. They are as follows: first, the consistent precedent of the Supreme Court; second, historical reasons to think the states were never individually sovereign entities; and finally, the actual text of the Constitution.

Given that the United States follows the tradition of common law, consistent precedent bears much weight in the discussion of the legitimacy of an idea. A brief survey of Supreme Court decisions is sufficient to show that precedent has always clearly been against compact theory and states' sovereignty. In the 1793 case of *Chisholm v. Georgia,* the majority of the Court ruled against Georgia's claim to sovereign immunity, by which they claimed a right not to be sued by individuals. The reasons the Court did so include an assertion of the falsity of compact theory. Justice James Wilson, for example, says, "To the Constitution of

the United States the term Sovereign, is totally unknown. There is but one place where it could have been used with propriety... [The people] might have announced themselves the 'Sovereign' people of the United States."[9]

In 1819, in what is one of the most significant and cited cases in the history of the United States, *McCulloch v. Maryland,* the Court unanimously argued for the constitutionality of a national bank and the unconstitutionality of a state's right to tax that bank. In the Court's decision, Chief Justice John Marshall rejects compact theory as well. He writes, "The government proceeds directly from the people; is 'ordained and established' in the name of the people..."[10] He continues by arguing that after the states' governments' Constitutional Convention had submitted their draft of a constitution, "The people were at perfect liberty to accept or reject it; and their act was final. It required not the affirmance, and could not

9 *Chisholm v. Georgia, in* 1 AMERICAN CONSTIUTIONALISM: STRUCTURES OF GOVERNMENT, (Howard Gillman et. al. eds., Oxford Univ. Press 2013), 158, 160.

10 *McCulloch v. Maryland, in* 1 AMERICAN CONSTIUTIONALISM: STRUCTURES OF GOVERNMENT, (Howard Gillman et. al. eds., Oxford Univ. Press 2013), 129, 130-4.

be negated, by the state governments. The constitution, when thus adopted, was of complete obligation, and bound the State sovereignties."[11]

In 1869, the Supreme Court granted an injunction permitting the federal government not to pay bondholders who purchased bonds from Texas during the Civil War. In the Court's decision, Chief Justice Samuel Chase commented upon secession and the nature of the union historically. He writes, "The Union of the States never was a purely artificial and arbitrary relation... By [the Articles of Confederation] the Union was solemnly declared to 'be perpetual'... the Constitution was ordained 'to form a more perfect Union.' It is difficult to convey the idea of indissoluble unity more clearly than by these words. What can be indissoluble if a perpetual Union, made more perfect, is not?"[12]

A final example is that of the Supreme Court's decision in *Aaron v. Cooper* in 1958. Regarding the

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11 *Id.*

12 *Texas v. White, in* 1 AMERICAN CONSTIUTIONALISM: STRUCTURES OF GOVERNMENT, (Howard Gillman et. al. eds., Oxford Univ. Press 2013), 290, 291-22.

rejection within the state of Arkansas of the famous *Brown v. Board of Education* decision, Chief Justice Warren argues on the grounds of the Fourteenth Amendment that "the constitutional rights of children not to be discriminated against in school admission on grounds of race or color declared by this Court in *Brown* can neither be nullified openly and directly by state legislators or state executive or judicial officers, nor nullified indirectly..."[13] In this case the Supreme Court ruled specifically against a state legislature's right to nullify a Supreme Court decision.

From this brief survey of pivotal Court decisions ranging over 150 years, it is clear that the Supreme Court has ruled consistently against compact theory and its implications of nullification, interposition, and secession. However, proponents of compact theory would obviously reject this argument based upon precedent for the reason that it might seem in the interest of the Supreme Court to reject a theory that takes power away from themselves. Even if one rejects the argument from judicial precedent,

13 *Cooper v. Aaron, in* 1 AMERICAN CONSTIUTIONALISM: STRUCTURES OF GOVERNMENT, (Howard Gillman et. al. eds., Oxford Univ. Press 2013), 440, 440-2.

however, there are still historical and textual reasons for rejecting compact theory and its implications.

An essential premise within compact theory is the claim that with the signing of the Declaration of Independence the states declared themselves to be individual, sovereign entities from Britain. If this were not the case, they could not have formed a compact wherein they each remained equal co-parties and in which no member or government could be above any other. Compact theorists routinely look to the Declaration of Independence and the Articles of Confederation as evidence that the states were independent sovereignties. The South Carolina Ordinance of Secession, for instance, quotes the Declaration of Independence's statement, "that [the colonies] are, and of right ought to be, FREE AND INDEPENDENT STATES...," and it quotes the Articles of Confederation's second article which declares, "that each State retains its sovereignty, freedom and independence, and every power, jurisdiction, and right, which is not by this Confederation expressly delegated to the United States,

in Congress assembled."[14] This may seem to be conclusive evidence. However, there is reason to think that this *sine qua non* of compact theory is simply historically false; these claims are actually out of their historical context. There has always existed a perpetual union among the states.

Abraham Lincoln, for example, argues that the Union began while the colonies were still under the authority of Britain.[15] This happened through the drafting of the Articles of Association in 1774. In these Articles, the delegates from the thirteen colonies at the First Continental Congress agreed upon a series of fourteen articles relating to commerce with Britain. The Articles conclude by saying, "And we do solemnly bind ourselves and our constituents, under the ties aforesaid, to adhere to this association, until such parts of the several acts of parliament passed since the close of the last war... are repealed."[16] Through

14 *South Carolina Ordinance of Secession, in* 1 AMERICAN CONSTIUTIONALISM: STRUCTURES OF GOVERNMENT, (Howard Gillman et. al. eds., Oxford Univ. Press 2013), 277, 278.

15 Abraham Lincoln, *First Message to Congress: Message to Congress in Special Session 1861,* (Boston, Directors of the Old South Work, 1902), 10.

16 1 ANNALS OF CONG. 975 (1790).

these Articles, the colonies bound themselves together indefinitely; they were united at least until Parliament retracted its detested laws, or until the Continental Congress reconvened to determine once again the status of the Union.

With the context of the thirteen colonies having formed a kind of unity against Britain, the above-quoted section of the Declaration of Independence takes on a new meaning. Lincoln writes, "The object plainly was not to declare their independence of one another or of the Union, but directly the contrary, as their mutual pledge and their mutual action before, at the time, and afterwards abundantly show."[17] They were declaring themselves to be states within a Union, as opposed to colonies within a Union. The colonies created the Union, but the Union created the states and won independence for them.

This in turn helps make sense of the Articles of Confederation's assertion of perpetuity in its thirteenth article, which says, "Every State shall abide by the

17 Abraham Lincoln, *First Message to Congress: Message to Congress in Special Session 1861,* (Boston, Directors of the Old South Work, 1902), 10.

determination of the United States in Congress assembled, on all questions which by this confederation are submitted to them. And the Articles of this Confederation shall be inviolably observed by every State, and the Union shall be perpetual."[18] This article clearly sets forth two legal realities contrary to compact theory. First, the states were not equal co-partners in the confederation; the Articles established a government above the states whose decisions were final. Second, the Articles declared the Union of the states to be perpetual. The first clearly excludes the implication of nullification, and the second excludes secession.

Thus, sovereign states did not ratify the Constitution. The Constitution was formed within a Union which predated the states, and the Union's purpose in the drafting and ratification of the Constitution was "to create a more perfect union." Through replacing the Articles of Confederation, the Union was perfecting itself.[19] The states were never sovereign entities, and without this essential

18 ARTICLES OF CONFEDERATION of 1781, art. XIII.

19 Abraham Lincoln, *First Inaugural Address,* in LINCOLN: POLITICAL WRITINGS AND SPEECHES, (Terence Ball ed., Cambridge Univ. Press 2012), 115-23.

premise compact theory fails.

Suppose, however, for the sake of argument, that the original states did at some point exist as sovereign entities. Even if that were the case, there still remain textual reasons which are strong enough alone to falsify compact theory. The opening words of the Constitution are extremely telling: "We the People of the United States, in Order to form a more perfect Union... do ordain and establish this Constitution for the United States of America."[20] After months of debate in the Constitutional Convention, these were the words chosen to open the Constitution. It is important to note both which words were chosen and which words were not.

First, it says, "We the People of the United States." It does not say, "We the States," nor does it say, "We the People of the States." These wordings would have made clear the sovereignty of the individual states and their compacting together, but this is not the language the Founders chose nor that which the People ratified. Justice Jay wrote in his decision in *Chisholm v. Georgia,* "From

20 U.S. CONST. pmbl.

the crown of Great Britain, the sovereignty of their country passed to the people of it... 'We the People of the United States...' Here we see the people acting as sovereigns of the whole country."[21] Only this explanation can make sense of the historical fact that the state legislatures did not ratify the Constitution; totally separate ratification conventions occurred, and the people choose their own delegates. They were acting, as the Constitution says, as the "People of the United States," not as the "People of the sovereign States."[22]

Second, the Constitution says, "do ordain and establish," not "contract and agree to." The clear import of these words is that the sovereign "People of the United States" were declaring what fundamental law would be for the United States; they were not bargaining upon a contract. Only this interpretation of the chosen wording can explain the exact similarity of language between the Constitution and many of the state constitutions. The

21 Justice Jay, *Chisholm v. Georgia, in* 1 AMERICAN CONSTIUTIONALISM: STRUCTURES OF GOVERNMENT, (Howard Gillman et. al. eds., Oxford Univ. Press 2013), 158, 161.

22 Joseph Story, 3 COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES, (Boston, Hilliard, Gray, and Company 1833).

1776 Constitution of Virginia, for example, says, "We therefore, the delegates and representatives of the good people of Virginia... do ordain and declare the future form of government of Virginia."[23] The 1780 Constitution of Massachusetts similarly states, "We, therefore, the people of Massachusetts... DO agree upon, ordain and establish, the following Declaration of Rights, and Frame of Government, as the CONSTITUTION of the COMMONWEALTH of MASSACHUSETTS."[24] No one doubts that the people of the states did not establish a merely convenient contract, but a fundamental law which compels obedience. The use of the same language in the case of the states and the nation necessarily implies the same legal creation: a declaration of fundamental law, not a contract.[25]

Third, it says, "Constitution," not "compact" or "confederation." The definitions of the latter two terms imply the idea of multiple, equal co-parties contracting

23 VA. CONST. § 1.

24 MASS. CONST. pmbl.

25 Joseph Story, 3 COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES, (Boston, Hilliard, Gray, and Company 1833).

together for some purpose. Being equal, each party may interpret its own rights and duties and leave at its pleasure; it does not imply permanence. The definition of a "constitution," on the other hand, is a much stronger term. It implies only one party—namely, the People of the United States. The word also implies that once it has been accepted by the party in question, it is perpetual, obligatory, and fundamental law.[26] Therefore, having carefully examined each of the significant wordings in the Preamble of the Constitution, it is overwhelmingly evident that none of them even remotely gives proof for compact theory. And thus, all three of the considerations—precedent, history, and the text of the Constitution—create together a very strong case for declaring compact theory false on purely legal and theoretical grounds.

Lastly then, the preceding conclusions of this paper's argument have very significant, practical implications for contemporary law, specifically, for marijuana legalization. One should reject compact theory for theoretical reasons, and one should not reject it

26 *Id.*

because of its bad consequences. However, to be logically consistent, neither should one accept compact theory because of perceived good consequences. In the recent decades, nullification has been reappearing, only this time it is often on the "right side of history," as many see it; because of this, the state and federal governments have permitted its existence. The realm of laws that states have been nullifying is massive and includes the following subjects: health insurance, experimental medicines, gun control, sports gambling, and immigration.[27] For the sake of space, this paper will look at a single, primary modern-day instance: state legalization of marijuana. The possession or use of marijuana is a federal offence. According to the *Comprehensive Drug Abuse Prevention and Control Act of 1970,* marijuana is a "Schedule 1" drug. This means it has a high potential for abuse and no significant medicinal potential. It is a federal crime to possess, buy, sell, or use marijuana, and those convicted of a crime involving marijuana are punishable with up to 30 years in prison, a

27 Ernest A. Young, *Modern-Day Nullification: Marijuana and the Persistence of Federalism in an Age of Overlapping Regulatory Jurisdiction,* 65 CAS. W. RES. L. REV. 769, 772 (2015).

50,000 dollar fine, or both.[28]

Despite federal law, dozens of states have legalized the medicinal use of marijuana; some have even legalized its recreational use – most notably and ironically, the District of Columbia. These states are blatantly and willfully violating Congress's laws.[29] Colorado, for example, led the way in 2012, by legalizing recreational marijuana through the passage of Amendment 64 to their state constitution. In this amendment, the legislature acknowledges their infringement of federal law:

> Although the use of marijuana for medical purposes is not authorized under federal law, Colorado and several other states have enacted legislation allowing the use of medical marijuana. To date, state regulation of medical marijuana establishments has generally been allowed to occur, although the federal government has ordered some businesses to close.[30]

The states are aware of their abuse of the federal law, but they simply do not care. And, as is evidenced by their

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28 H. R. 18583, 91st Cong. 1970.

29 Ernest A. Young, *Modern-Day Nullification: Marijuana and the Persistence of Federalism in an Age of Overlapping Regulatory Jurisdiction,* 65 CAS. W. RES. L. REV. 770-1 (2015).

30 CO. CONST. amend. LXIV.

consistent refusal to seriously resist these laws, neither do the federal officials.

These actions of the states are nothing other than modern-day nullifications, which only have a leg to stand on if compact theory is true. Since compact theory is false, as demonstrated in the above arguments, the federal and state government officials have either been justifying their actions by a false theory, which the federal government has historically rejected, or they have been performing their actions by no concrete, legal principles at all. Rather, the mere, arbitrary wills of those in power has been determining action. Either of these options is a poor justification.

This issue is so pressing because it is setting dangerous precedents: namely, that states can nullify federal laws that they think the federal government will not care much about, and that the federal government can simply choose not to care about the abuses of its law. History shows, however, that the United States fought a Civil War to stop precedents based upon false theory. Perhaps marijuana should be legal, but if this is the case,

it ought only to be allowed on legitimate, constitutional grounds, not expedient, false theory or the arbitrary whims of government officials. To live in a government of laws and not of men, as John Adams dreamed, requires at the bare minimum that men take those laws seriously.

WAR POWERS

Deanna J. (Roepke '18) Longjohn

Abstract: *When the Founders wrote the Constitution they set up a system of separate and shared powers between the branches of government. One such power was over war. Leading up to the* Steel Seizure Case *in 1952, the Supreme Court upheld the Founders view of the balance of war powers. Justice Jackson's three-prong-test was instituted in the* Steel Seizure Case *and changed the distribution of war powers forever. The current court has a skewed understanding of war powers where the President is subject to congressional approval. The Founders' intention for war powers is no longer upheld by the court.*

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Over the past decade, the issue of war powers, who has control over the military and decisions of going to war, has been present in the media. The dispute stems from the disagreement over how to share political powers over war between the different political branches of government. Since the term separation of powers was coined, emphasis has been placed on the divisions of powers within government. The Founders set up a government of separate but also shared powers. One such power in particular was power over war. The Founders set up a government in which war powers were shared between Congress and the President based on their strengths as offices. This understanding was upheld by the courts through the Civil War and until *Youngstown Sheet and Tube vs. Sawyer (1952)* in which Jackson's three-prong-test of executive power was introduced. Jackson's three-prong-test placed the President's power at the mercy of congressional approval through a system of three categories. Since the *Steel Seizure Case*, presidential power over war has become subject to congressional approval and the constitutional

divisions no longer apply. The current understanding of war powers is inconsistent with the vision of the Founders and early judicial precedent because Jackson's three-prong-test placed the President's power at the mercy of Congress' consent.

The term, separation of powers, did not represent the Founders' intentions for the three departments of government. The Founders did not design a government of completely separate powers. The government they designed was one of shared powers. The federation of three branches was intended to have distinct powers that exercised their strengths. Not only did they have separate powers, however, but they also shared powers over specific issues. The branches shared power over one issue but had separate responsibilities under that power. War power was one such power that they shared. Congress was given the power to declare and finance war and the Executive was given the power to make war. Declaring war is the formal declaration to the world that a country is at war. Making war is directing the war that has already begun. The federal government executes its power well when each branch is

using their strengths and each of the branches are checked by the others. The Founders intended for a balance of separate and shared powers.

Article II, Section 2 of the Constitution outlines the Founders' intended powers for the Executive Branch. Clause 1 states, "The President shall be commander in chief of the Army and Navy of the United States, and of the militia of the several states, when called into the actual service of the United States."[1] The first clause of Article II gives the President power to make war. The President's power to make war includes the power to declare treaties, to command military officers, to hire officers, and to fire officers. The President's power also includes control over the boots on the ground as Commander in Chief.

The second clause shows how the Executive and Legislative branches share war powers. The second clause states the President, "shall have power, by and with the advice and consent of the Senate, to make treaties, provided two thirds of the Senators present concur."[2] The second

1 U.S. CONST. art. II § 2, cl. 1.
2 U.S. CONST. art. II § 2, cl. 2.

clause explains that the President can end a war if he has the approval of the Senate. The Founders intended that the Senate would provide consent or disapproval when the President made a treaty. Two-thirds of the Senate had to approve of the treaty for it to become legally binding. The second clause did not put the President under the Senate, it just allowed for the Senate to be consulted on treaties. These two clauses show that the Founders intended the President to have power to make war and preserve relations with foreign nations. The Founders gave the Executive leader powers that played to his strengths. The President is a swift and powerful actor which is necessary when making war and preserving foreign relations.

The Founders placed the war powers for Congress in Article 2 Section IIX of the Constitution. Section IIX reads, “The Congress shall have power… to declare war, grant letters of marque and reprisal, and make rules concerning captures on land and water; To raise and support armies… To provide and maintain a navy… To provide for calling forth the militia to execute the laws of

the union, suppress insurrections and repel invasions."[3] Congress is vested with the limited power to declare an official war and the power of the purse. William Rogers explained the importance of the power of the purse for war powers in his California Law Review article. Rogers said, "In addition, Congress has the sole authority to appropriate funds, a vital power in the war powers and foreign relations area."[4] Congress has power over the legal declaration of a war and the funding to execute the war. These powers are part of Congress' responsibilities as a deliberative body.

The Constitution was ratified in 1789 to replace the failed Articles of Confederation which showed the need for a division of war powers. Under the Articles, the legislative body was given all power over war. The Articles stated, "No State shall engage in any war without the consent of the United States in Congress assembled."[5] Congress is the deliberative branch and so they did not execute the quick decision making that is involved in

3 U.S. CONST. art. I, § 8.

4 William P. Rogers, *Congress, the President and War Powers*, 59 CA. L. REV. 1194, 1195 (1971).

5 ARTICLES OF CONFEDERATION of 1781, art. VI, para. 1.

making and directing war. When the Founders penned the Constitution they created a government with shared war powers to allow for an energetic Executive that could better fulfill the role of a maker of war. This new division of war powers was reinforced in Alexander Hamilton's Federalist Seventy Four.

At the time of the Founders, the Anti-Federalists worried that this change in war powers gave too much power to the executive branch, the intent of which is explained by Hamilton in Federalist Seventy-Four. Hamilton said that the power of Commander in Chief had to go to the President because every other magistrate of foreign nations had this power. He also argued the power fit with the attributes of the position. He said it was an obvious truth, "The propriety of this provision is so evident in itself… that little need be said to explain or enforce it."[6] Hamilton went on to explain that the power was self-evident because a 'common strength' was necessary for war making power, "The direction of war implies the direction of the common strength; and the power of directing

6 THE FEDERALIST No. 74 (Alexander Hamilton).

and employing the common strength, forms a usual and essential part in the definition of the executive authority."[7] The President is the perfect war maker because he can act swiftly and is backed with approval of the nation.

The Founders' division of war powers was also reinforced when George Washington shut down the House Debate on the Jay Treaty. Washington did not want to hand over confidential papers related to a treaty with England, but Representative Albert Gallatin argued that the House of Representatives had a right to ask for the confidential papers because they were going to sign off on a treaty and make it binding. Gallatin argued, "The House had a right to ask for the papers proposed to be called for, because their cooperation and sanction was necessary to carry the Treaty into full effect, to render it a binding instrument, and to make it properly speaking, a law of the land; because they had a full discretion either to give or to refuse that co-operation."[8] Washington strongly disagreed with Gallatin's

7 *Id.*

8 Albert Gallatin, *House Debate on the Jay Treaty (1796), in* 1 AMERICAN CONSTITUTIONALISM: STRUCTURES OF GOVERNMENT (Howard Gillman et. al. eds., Oxford Univ. Press 2013), 173, 173-174.

argument that the President had to submit his confidential papers to the House so that they could make their decision with all of the information in mind.

In true Washington fashion, he walked into the House and explained exactly why no President had to release confidential foreign relations information to Congress. He wanted to set a precedent that the President and Congress were on equal ground in war powers and that the President was not subservient to Congress. Washington said treaty-making power was the President's part of war powers and that the Senate was the only one who had to consent. Washington argued, "Every Treaty so made, and promulgated, thenceforward becomes the law of the land. It is thus that the Treaty-making power has been understood by foreign nations, and in all the Treaties made with them, we have declared, and they have believed, that when ratified by the President, with the advice and consent of the Senate, they become obligatory."[9] Washington's statement

9 George Washington, *House Debate on the Jay Treaty (1796), in* 1 AMERICAN CONSTIUTIONALISM: STRUCTURES OF GOVERNMENT (Howard Gillman et. al. eds., Oxford Univ. Press 2013), 174, 174-175.

set precedent that part of the President's war-making power was the power to create treaties. His statement also clarified that the Senate, not the House of Representatives, was the entity that had to provide consent to the President's actions. The House Debate over the Jay Treaty solidified, with presidential precedent, that war powers were shared between the two branches and that they were on equal footing.

Until the Civil War, the Federal government operated under the Founders' understanding of separate and shared war powers. When a new form of unconventional war occurred, the debate rang out over who had power to act. The Civil War cases included many constitutional issues involving war powers. These cases included the group of 'civil wars' in the same category as 'traditional wars'. These cases also included an explanation of the Founders' shared war powers for civil wars. During *The Prize Cases* in 1863 this new addition of civil wars was added. *The Prize Cases* were a success in preserving the Founders' vision for war powers. The cases justified Lincoln's actions and showed that the President was the

maker of war and Congress was only to declare and fund war.

In the 1860s, President Lincoln ordered a blockade of the Southern ports. During this blockade, the Quaker City Union ship conquered and looted the Confederate ship, the *Amy Warwick*. The crew of the *Warwick* argued that the Union troops' looting was unlawful because the blockade itself was unconstitutional. Despite Congress' approval of the blockade after the fact, the South did not agree it was constitutional and said that Congress' actions could not apply retroactively. When this case climbed the steps of the Supreme Court, the Court ruled that Congress and the President had shared war powers. The President had war making powers and Congress had declaring powers. The Justices ruled Lincoln's actions constitutional because he was making war as the Commander in Chief during an obvious war. The rationale was that the Civil War was an obvious war even if it was not officially declared by Congress. The argument was that because the South had succeeded, and the North and South started fighting each other, the war was obvious. Lincoln, therefore, had full

constitutional authority in this action.

Justice Grier explained in the majority opinion of *The Prize Cases*, that if any rebellion began it was a war, regardless of who started it, and that the President then had normal power to act. Grier explained, "If a war be made by invasion of a foreign nation, the President is not only authorized but bound to resist force by force. He does not initiate the war, but is bound to accept the challenge without waiting for any special legislative authority."[10] Justice Grier determined that the President was Commander in Chief; he was in charge of the protection of the nation and had the responsibility to respond. He went on to explain that the Civil War was a war against a rebellious province so the normal rules of war applied. The President was Commander in Chief and had power to direct the military, saying, "It is not necessary that the independence of the revolted province or State be acknowledged in order to constitute it a party belligerent in a war according to the

10 Robert Grier, *The Prize Cases (1863), in* 1 AMERICAN CONSTIUTIONALISM: STRUCTURES OF GOVERNMENT (Howard Gillman et. al. eds., Oxford Univ. Press 2013), 311, 311-312.

law of nations."[11] Even though the Civil War was different than previous wars, it was still a war, so the normal separation of war powers applied.

Justice Nelson wrote the dissenting argument in this case and stated that Lincoln's military actions were unconstitutional. The defeat of Justice Nelson's dissent ingrained into history for the next century that the President did not have to wait for Congressional approval to take actions of war. Justice Nelson, in the dissent, argued that Congressional recognition of war could not approve the President's blockade. The blockade happened before Congress recognized the war so the blockade had to be unconstitutional. Justice Grier and the majority explained that requirement was not in the Constitution and President Lincoln's actions were justified. *The Prize Cases* added another layer of precedent to the President and Congress' shared control over war powers. The President still shared the power and was not placed at the mercy of Congress.

Until the mid-twentieth century there was general agreement on the constitutional division of war powers.

11 *Id.* at 311.

The President had the power to make war by making treaties and acting as the Commander and Chief of the armed forces during war. Congress had the power to declare war as well as the power of the purse to fund war. *Youngstown Sheet and Tube vs. Sawyer (1952)* changed the normal understanding and pulled the Supreme Court away from the constitutional provisions. Often referred to as the *Steel Seizure Case*, *Youngstown Sheet and Tube vs. Sawyer (1952)* was a case that involved President Truman and a steel plant during the Korean War. At this point in American history, the United States was in an un-declared war with North Korea and Truman was Franklin Delano Roosevelt's Vice President. Roosevelt was a powerful example and greatly influenced Truman's expectations of presidential power. In 1951 the Steelworkers of America union wanted to strike. Charles Sawyer, Secretary of Commerce, was given power by Truman's executive order to keep the steel mill running. Truman argued that this action was within his power because it was important for the war effort. FDR had exercised similar types of power while he was president and Truman expected the same level of flexibility. Congress

did not approve of his actions and this went to the Supreme Court.

Justice Black's opinion showed that the constitutional division of war powers did not allow for Truman to take this action. Black began by arguing that the President was not given power to seize private property during war time. He said, "Even though 'theater of war' be an expanding concept, we cannot with faithfulness to our constitutional system hold that the Commander in Chief of the Armed Forces has the ultimate power as such to take possession of private property in order to keep labor disputes from stopping production. This is the job of the Nation's lawmakers, not for its military authorities."[12] Justice Black continued in his opinion to further explain the President's power: "In the framework of our Constitution, the President's power to see that the laws are faithfully executed refutes the idea that he is to be a lawmaker."[13] Truman was only given power to execute laws on United

12 Hugo Black, *Youngstown Sheet and Tube Co. v. Sawyer* (1952), *in* 1 AMERICAN CONSTIUTIONALISM: STRUCTURES OF GOVERNMENT (Howard Gillman et. al. eds., Oxford Univ. Press 2013), 493, 494.

13 *Id.* at 494.

States' soil. He could not create laws on American soil and force the steel mill employees to work because the theater of war was only in Korea. The Executive power to control the steel mill would have to come from war powers or a delegation from Congress. Neither of these sources provided the power, so it was unconstitutional. The Constitution does not give the President power over commerce in times of war. Thus, Justice Black's decision, in this case, was correct.

Justice Jackson, in his concurrence, changed forever the way the Supreme Court evaluated war powers disputes with his three-prong-test. Justice Jackson explained that the Constitution was impossible to understand: "Just what our forefathers did envision, or would have envisioned had they foreseen modern conditions, must be divined from materials almost as enigmatic as the dreams Joseph was called upon to interpret for Pharaoh."[14] He compared the founding document of the United States with the dreams Joseph was to interpret in the Bible. He argued that there

14 Robert Jackson, *Youngstown Sheet and Tube Co. v. Sawyer* (1952), *in* 1 AMERICAN CONSTIUTIONALISM: STRUCTURES OF GOVERNMENT (Howard Gillman et. al. eds., Oxford Univ. Press 2013), 493, 494.

should be a three-prong-test to determine how strong the President's power was instead. His three-prong-test separated Supreme Court precedent from the traditional and constitutional understanding of war powers to the detriment of the nation.

The three-prong-test placed the strength of the President's power on a sliding scale in connection with Congressional approval, which was exactly what George Washington was trying to avoid in the debate on the Jay Treaty in 1796. Jackson determined that the President was most powerful when he was operating with the support of Congress. He said, "When the President acts pursuant to an express or implied authorization of Congress, his authority is at its maximum, for it includes all that he possesses in his own right plus all that Congress can delegate."[15] The second prong then explained that when the President acted neither with nor without Congressional appeal he was in a zone of twilight. The zone of twilight became a gray area that where the President's power was not at its maximum because it was not reinforced by Congress. Finally, when

15 *Id.*

the President acted in opposition to Congress he was at his lowest ebb. Jackson said, "When the President takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb, for then he can rely only upon his own constitutional powers minus any constitutional powers of Congress over the matter."[16] Jackson's three-prong-test defined the degree of presidential power by the amount of congressional support. The new test provided a way for the Supreme Court Justices to look at one aspect of a case and determine if it was justified without having to refer to the Constitution. Under this test many unconstitutional divisions of war power could occur and still be deemed constitutional.

Justice Jackson wrote in his concurrence that Truman's actions were unconstitutional. Jackson's decision was not reached by reading the Constitution but by noting that Truman acted against Congress. Truman was wrong because he was operating from the lowest ebb of power. Congress did not approve of Truman controlling the mill, so it was declared unconstitutional. Jackson's new

16 *Id.* at 477.

three-prong-test fundamentally changed the way that the Supreme Court judged disputes over war power because it made the President's power subject to congressional approval which Washington did not want. The Founders did not intend for this sliding scale of shared power. They intended for Congress to declare war and fund it and the Executive to make war and make the quick decisions needed. This original division of powers played to each branches' strengths. The new division of power, created by Jackson in the *Steel Seizure Case*, placed the extent of Executive power at the mercy of Congress.

Jackson's three-prong-test for executive power changed the way the Supreme Court ruled in that they no longer looked to the text of the Constitution but to which category the presidential action fell under. An example of this was *Dames and Moore v. Reagan (1981)* when President Reagan acted with approval from Congress when he made his executive order regarding claims. The Supreme Court ruled his actions constitutional because he was operating with the largest majority of power. Justice Rehnquist wrote the majority opinion and stated, "Because

the President's action in nullifying the attachments and ordering the transfer of the assets was taken pursuant to specific congressional authorization, it is "supported by the strongest of presumptions and the widest latitude of judicial interpretation, and the burden of persuasion would rest heavily upon any who might attack it. *Youngstown, 343 U.S. at 343 U. S. 637 (Jackson, J., concurring)*."[17] President Reagan's actions were deemed constitutional because his war powers fell under the maximum authority; it did not matter if his specific action was constitutional. All that mattered was that it fell under the first prong of the test.

In 1973, the War Powers Resolution was passed, and it further disrupted the original division of war powers. This resolution required the President to get a declaration of war that authorized the use of force from Congress within sixty to ninety days of deploying troops. The law stated that, "Such sixty-day period shall be extended for not more than an additional thirty days if the President determines and certifies to the Congress in writing that unavoidable military necessity respecting the safety of

17 Dames & Moore v. Regan, 453 U.S. 654, 674 (1981).

United States Armed Forces requires the continued use of such armed forces in the course of bringing about a prompt removal of such forces."[18] The War Powers Resolution further placed the President in submission to congressional appeal. Not only would the President's actions be declared unconstitutional but he would also have to withdraw troops already engaged in a war. This Act was not constitutional but works under Jackson's three-prong-test.

Congress passed the unconstitutional War Powers Resolution even though President Nixon vetoed. Nixon said, "House Joint Resolution 542 would attempt to take away, by a mere legislative act, authorities which the President has properly exercised under the Constitution for almost 200 years."[19] He also explained how this was detrimental to actions in foreign policy by saying, "For it would seriously undermine this Nation's ability to act decisively and convincingly in time of international

18 *The War Powers Act of 1973, in* 1 AMERICAN CONSTIUTIONALISM: STRUCTURES OF GOVERNMENT (Howard Gillman et. al. eds., Oxford Univ. Press 2013), 547, 548.

19 *Veto of the War Powers Resolution (1973), in* 1 AMERICAN CONSTIUTIONALISM: STRUCTURES OF GOVERNMENT, (Howard Gillman et. al. eds., Oxford Univ. Press 2013), 549, 549.

crisis."[20] Nixon explained how the Resolution was both unconstitutional and detrimental to the country. Nixon demonstrated understanding of the Founders' intention to split the war powers to accentuate each branches' strengths.

Since the War Powers Resolution of 1973 was passed, Presidents have found loopholes to leave their foreign policy power unaffected. Now Presidents invade, fight, and win wars in other countries within sixty to ninety days. The fortieth President, Ronald Reagan, invaded and conquered Grenada in three days. He never had to go to Congress to ask them to declare war on Grenada because he worked through the ninety-day loophole. The War Powers Resolution has not helped define the war powers division. The law does not work because it distorts the Founders' intention for the separation of war powers and it does not play to each branches' strengths. The War Powers Resolution also does not work because it does not force the President to consult Congress on decisions of war if the President can execute the war in under ninety days. This, in essence, has allowed the President to take on Congress'

20 *Id.* at 549.

power to declare war which is not what the Founders had intended.

Since the creation of Justice Jackson's three-prong-test in the *Steel Seizure Case,* the Constitution is no longer the basis upon which the Supreme Court then judges war powers definitions and disputes. The Founders originally intended for a division of war powers where Congress declared war and the President made war. The Founders' framework was upheld until the mid-1900s. Justice Jackson's concurrence in the Steel Seizure case created an unconstitutional three-prong-test that eliminated the need to refer to the Constitution in issues over war powers. Since this concurrence, the Supreme Court no longer uses the constitutional divisions. War powers are now determined by whether Congress approves or disapproves of the President's actions. Attempts to redefine the Founders' division of the shared war powers has only caused confusion over who has what power. The creation of Jackson's three-prong-test has created a subjective value system by which to judge the constitutionality of the President's actions regarding war. Since the creation of that

test, the opinions that followed have further distorted the Founders' vision. The Supreme Court has created a system that excludes the need to refer to the Constitution to resolve constitutional power disputes. The Supreme Court no longer judges the constitutionality of these cases based on the Constitution.