Comparing Apples to Apples: A Federalism-Based Theory for the Use of Founding-Era State Constitutions to Interpret the Constitution

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TABLE OF CONTENTS

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INTRODUCTION

Defining the relationship between the national government and the individual states formed one of the major debates among the delegates of the Constitutional Convention of 1787.[1] All agreed that the relationship as it existed under the Articles of Confederation required revision.[2] Notwithstanding the problems created under the Articles' decentralized power structure, the Framers—with the stench of King George still lingering in their nostrils—remained wary of centralized national governments.[3] Consequently, they entered historically uncharted territory and adopted the middle road—a federalist balance of power that vested supremacy in the national government but retained for the states an independent sphere of sovereignty insulated from excessive intrusion by the

1. *See, e.g.*, Bute v. Illinois, 333 U.S. 640, 650–53 (1948) (discussing the Constitution's "division of powers" in a federal system).

2. Myers v. United States, 272 U.S. 52, 116–17 (1926) (observing that members of the Convention knew that the Articles "had not worked well"); Cohens v. Virginia, 19 U.S. (6 Wheat.) 264, 416–17 (1821) ("All acknowledge that [the Convention had] the purpose of strengthening the confederation . . . .").

3. *See* RICHARD BEEMAN, PLAIN, HONEST MEN: THE MAKING OF THE AMERICAN CONSTITUTION 125–26 (2009).

national government.[4] Where the Articles seemed more like a treaty or compact between independent sovereignties,[5] the Constitution truly transferred power to a new governing entity, creating another layer of sovereignty.[6]

Federalism was not the only novelty of the Framers' creation. This governing charter—unlike the English Constitution composed of tradition, royal declarations, and parliamentary supremacy—was written.[7] A written constitution offered advantages. As Thomas Jefferson explained, "written constitutions may be violated in moments of passion or delusion, yet they furnish a text to which those who are watchful may again rally [and] recall the people; [written constitutions] fix too for the people the principles of their political creed."[8] Yet a written Constitution presented challenges as well: how should the new nation determine precisely what the words mean?[9]

This question became more salient when the fruit of the 1787 Convention ripened in 1788 as New Hampshire became the ninth state to ratify the Constitution, and its words became law.[10] As Chief Justice Marshall famously explained in *McCulloch v. Maryland*, this document was a *constitution*, lacking in the "prolixity of a legal code."[11]As a consequence, ambiguity in the words of the Constitution was all but certain to eventually arise. Since then, judges, scholars, and litigants have squabbled over the proper method for interpreting the world's oldest written constitution.[12]

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4. *See* U.S. Term Limits, Inc. v. Thornton, 514 U.S. 779, 838 (1995) (Kennedy, J., concurring) ("Federalism was our Nation's own discovery. The Framers split the atom of sovereignty. It was the genius of their idea that our citizens would have two political capacities, one state and one federal, each protected from incursion by the other.").

5. At the Constitutional Convention, Gouverneur Morris suggested that the Articles amounted to nothing more than a treaty and argued in favor of drafting a new governing charter. BEEMAN, *supra* note 3, at 99–100.

6. "We the *People*," its opening phrase proclaimed, not "We the States." *See* U.S. CONST. pmbl (emphasis added); *see also* AKHIL REED AMAR, AMERICA'S CONSTITUTION: A BIOGRAPHY 5–10 (2005) (discussing the popular vote's unique role in the Constitution's ratification); AMAR, *supra,* at 297 ("Prior to 1788, each state people had been sovereign, but in 1788, these state peoples had merged to form the sovereign people of the United States.").

7. AMAR, *supra* note 6, at 8.

8. Letter from Thomas Jefferson to Doctor Joseph Priestly (June 19, 1802), *in* 8 THE WRITINGS OF THOMAS JEFFERSON 158, 159–60 (Paul Leicester Ford ed., 1897). Justice Jackson's dissent in *Korematsu v. United States*, 323 U.S. 214, 242–48 (1944), for example, highlights constitutional "rally" and "recall" after violation in time of "passion."

9. The principle of separation of powers made this question even more important. Unlike the unwritten English Constitution, which could be easily altered through statutory acts of Parliament, *see* Warren J. Newman, *The Principles of the Rule of Law and Parliamentary Sovereignty in Constitutional Theory and Litigation*, 16 NAT'L J. CONST. L. 175, 195–96 (2005), Congress could not easily override the Supreme Court's interpretation of the written words in the Constitution.

10. Article VII provided that the Constitution would become operative upon the ratification of nine states. U.S. CONST. art. VII.

11. 17 U.S. (4 Wheat.) 316, 407 (1819) ("[O]nly [a constitution's] great outlines should be marked.").

12. *Compare* ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 37–47 (1997) (discussing "the Great Divide . . . between *original* meaning . . . and *current* meaning"), John O. McGinnis & Michael B. Rappaport, *Original Methods Originalism: A New Theory of Interpretation*

This piece avoids that debate. Rather, it assumes the validity of originalism as a method of constitutional interpretation and examines one particular originalist tool: the use of founding-era state constitutions.[13] Originalists—who interpret the Constitution historically by referencing the founding era—have often looked toward founding-era state constitutional provisions for interpretive guidance. Because these state provisions contain similar wording to the text of the Constitution, the argument goes, the Constitution's words must have a similar meaning.[14] Few judges and commentators, however, have examined how the Framers' other great innovation—federalism—influences this interpretive practice. Most originalists simply assume the relevance of similarly worded state provisions.[15]

This Note challenges that assumption. It argues that judges and scholars should consider the principles of federalism and state sovereignty when using state constitutions to determine the original meaning of the federal constitution. By failing to consider the federalist division of governmental authority when looking toward state constitutions, courts might "import" reserved powers exercised in the state constitutional provisions into the Constitution. While most cases using state constitutions as interpretive tools have not examined the source of authority underlying the state provision,[16] the Supreme Court has

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and the Case Against Construction, 103 NW. U. L. REV. 751, 751 (2009) (defending a form of originalism that "us[es] the interpretive methods that the constitutional enactors would have deemed applicable to [the Constitution]"), Edwin Meese III, *Interpreting the Constitution*, *in* INTERPRETING THE CONSTITUTION: THE DEBATE OVER ORIGINAL INTENT 13, 14 (Jack N. Rakove ed., 1990) (discussing "the meaning of Constitutional fidelity"), William H. Rehnquist, *The Notion of a Living Constitution*, 54 TEX. L. REV. 693, 693 (1976) (critiquing the theory of living Constitutionalism), *and* Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849, 854–56 (1989) (noting "defect[s]" of "nonoriginalism"), *with* William J. Brennan, Jr., *The Constitution of the United States: Contemporary Ratification*, *in* INTERPRETING THE CONSTITUTION: THE DEBATE OVER ORIGINAL INTENT 23, 28 (Jack N. Rakove ed., 1990) ("Interpretation must account for the transformative purpose of the text."), Paul Brest, *The Misconceived Quest for the Original Understanding*, 60 B.U. L. REV. 204, 205 (1980) (arguing for "nonoriginalist adjudication"), *and* Terrance Sandalow, *Constitutional Interpretation*, 79 MICH. L. REV. 1033, 1033 (1981) ("The meaning of the Constitution . . . changes over time to accommodate altered circumstances and evolving values.").

13. Even for nonoriginalists who place little interpretive weight in the historical circumstances of the founding era, this Note and its examination of founding-era state constitutions bears significance. The Court has in recent years more frequently employed originalist methodology when interpreting the Constitution. *See, e.g.*, District of Columbia v. Heller, 554 U.S. 570 (2008). All Americans—originalists and nonoriginalists alike—have an interest in ensuring that this method of interpretation is employed correctly. Special thanks to my Applied Legal Composition classmates for pointing out this observation.

14. *See, e.g.*, *id.* at 603 (noting that a collective rights interpretation of the Second Amendment would "treat the Federal Second Amendment as an odd outlier, protecting a right unknown in state constitutions . . .").

15. *See* City of Boerne v. Flores, 521 U.S. 507, 553 (1997) (O'Connor, J., dissenting) ("After all, it is *reasonable to think* that the States that ratified the First Amendment *assumed* that the meaning of the federal free exercise provision corresponded to that of their existing state clauses." (emphasis added)); LACKLAND H. BLOOM, JR., METHODS OF INTERPRETATION: HOW THE SUPREME COURT READS THE CONSTITUTION 96–97 (2009) (noting that in *Locke v. Davey*, 540 U.S. 712 (2004), both the majority and the dissent agreed that "if the analogy [to state constitutions] was sound, then these provisions would be of significant evidentiary value").

16. *See, e.g.*, *Heller*, 554 U.S. at 600–03.

employed precisely this approach when determining the extent to which English law illuminates the meaning of the Constitution.[17]

When considering the interpretive value of a founding-era state constitution, courts should determine if the state provision involves the exercise of a power reserved to the states or prohibited to the national government. If not, the state provision may be freely compared to the federal Constitution. If, however, the state provision implicates a reserved or prohibited power, then the Court must interpret the federal provision in a manner consistent with the vertical division of governmental authority in America's federalist system, even if such an interpretation requires applying different meanings to similar language in the state and national constitutions. Failure to consider the interpretive implications of federalism when consulting state constitutions is not merely an academic concern. In at least two instances—the exceptions carved from the First Amendment's free speech protection and the recognition of self-defense as the primary purpose of the Second Amendment right to bear arms—the Court has given meaning to the constitutional text in a way that undermines federalism and insults the concept of reserved powers.

Part I of this Note provides a brief explanation of the theory underlying the originalist method of constitutional interpretation. Part II describes how the Supreme Court examined the governmental authority animating English law when determining whether English law is an appropriate tool for interpreting the U.S. Constitution. Part III describes an analytical theory for the interpretive use of founding-era state constitutions that is more respectful of federalism and state sovereignty than the Court's current practice. Finally, Part IV applies this approach to two cases in which the Court improperly used state constitutions for interpretation.

A brief comment about the scope of this Note: I am not criticizing the theory of originalism itself.[18] Nor am I generally criticizing the use of state constitutions to interpret the U.S. Constitution. Founding-era state constitutions are an extremely useful method for illuminating the original meaning of the Constitution to those who ratified it, especially when read alongside the state ratification

17. *See, e.g.*, Myers v. United States, 272 U.S. 52, 118 (1926) (finding English law relevant when not "incompatible with our republican form of government").

18. To the extent the topic can be persuasively addressed in a footnote, original meaning originalism (*see infra* section I.B.) seems the interpretive method most likely to limit judicial lawmaking, enshrine the principles of government and liberties the founding generation sought to protect, and ensure the democratic amendment of the Constitution through the input of the entire populace. *Cf.* RANDY E. BARNETT, RESTORING THE LOST CONSTITUTION: THE PRESUMPTION OF LIBERTY 104–05 (2004) (noting that "[r]equiring that judges and legislators respect an independent original meaning of the Constitution" has benefits such as preserving meaning and checking governors); SCALIA, *supra* note 12, at 47 ("If the courts are free to write the Constitution anew, they will . . . write it the way the majority wants . . . . This, of course, is the end of the Bill of Rights . . . ."); Scalia, *supra* note 12, at 862 ("The purpose of constitutional guarantees . . . is precisely to prevent the law from reflecting certain *changes* in original values that the society adopting the Constitution thinks fundamentally undesirable.").

debates.[19] My argument simply advocates a more nuanced interpretive use of state constitutions that provides greater respect for American federalism and the pseudo-sovereign nature of the states. This nuanced approach will result in a more perfect originalism through more accurate determinations of original meaning. Furthermore, it renders state constitutions a more powerful interpretive tool and ensures that the reserved powers remain reserved.

Additionally, because this Note focuses on originalist uses of state constitutions, I am concerned *only* with the use of founding-era state constitutions to interpret the *federal* Constitution.[20] My theory does not apply to some of the other ways the Court has used state constitutions. For example, it does not apply to the use of state constitutions to give meaning to statutory language[21] or the use of state constitutions (both modern and historical) to demonstrate the primacy or importance of a particular right.[22]

I. ORIGINALISM: "IN THE HEAT OF THESE SENTIMENTS THE CONSTITUTION WAS FORGED."[23]

Although not a recent development in constitutional interpretation,[24] originalist methodology saw a rise in influence at the close of the twentieth century.[25]

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19. The role of state constitutions in determining the original meaning of the U.S. Constitution becomes even more apparent with the recognition that many of the protections in the Bill of Rights were drawn from the protections afforded citizens under the founding-era state constitutions. *See* Donald S. Lutz, *The States and the U.S. Bill of Rights*, 16 S. ILL. U. L.J. 251, 252–54 (1992).

20. For the sake of brevity, throughout much of this Note, I refer simply to "state constitutions" rather than "founding-era state constitutions."

21. *See, e.g.*, Limtiaco v. Camacho, 549 U.S. 483, 491 (2007); Karcher v. Daggett, 462 U.S. 725, 756 & n.18 (1983) (Stevens, J., concurring).

22. *See, e.g.*, Lemon v. Kurtzman, 403 U.S. 602, 647–49 & n.6 (1971); Piccirillo v. New York, 400 U.S. 548, 563 (1971) (Brennan, J., dissenting); Duncan v. Louisiana, 391 U.S. 145, 153 (1968); Miranda v. Arizona, 384 U.S. 436, 443 (1966); Irvin v. Dowd, 366 U.S. 717, 721–22 (1961); Parsons v. Bedford, 28 U.S. (3 Pet.) 433, 446 (1830).

23. Faretta v. California, 422 U.S. 806, 827 (1975).

24. As early as 1821, Chief Justice Marshall expressed originalist sentiments in *Cohens v. Virginia*, noting that when interpreting the Constitution "[g]reat weight has always been attached, and very rightly attached, to contemporaneous exposition." 19 U.S. (6 Wheat.) 264, 418 (1821); *see also* United States v. Brown, 381 U.S. 437, 442 (1965) (inquiring into the "reasons for . . . [the Bill of Attainder Clause's] inclusion in the Constitution" in determining the scope of the Clause); Myers v. United States, 272 U.S. 52, 112–19 (1926) (considering Madison and other Founders' Congressional debate and voting to determine whether the removal power was vested in the president alone); *Ex parte* Grossman, 267 U.S. 87, 108–09 (1925) (interpreting the pardon provision of the Constitution "by reference to the common law" because the drafters "thought and spoke in its vocabulary"); Twining v. New Jersey, 211 U.S. 78, 107 (1908) (looking to the meaning of "due process" at the time of the founding to determine whether the right against self-incrimination "was so fundamental that there could be no due process without it").

25. A speech to the ABA by then-Attorney General Edwin Meese III helped spark the resurgence of originalism. *See* Att'y Gen. Edwin Meese, III, Speech Before the American Bar Association (July 9, 1985), *in* ORIGINALISM: A QUARTER-CENTURY OF DEBATE 47 (Steven G. Calabresi ed., 2007). The work of Justice Antonin Scalia and other conservative legal thinkers has helped fuel the originalist fire that the Attorney General's speech ignited. *See, e.g.*, BARNETT, *supra* note 18, at 89–117; SCALIA, *supra* note 12, at 37–47; Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, *in* INTERPRETING

The willingness of nonoriginalist Justices to engage conservative jurists on originalist and historical grounds, rather than focusing their arguments on the flaws of originalist methodology, indicates the extent of originalism's influence.[26] This Part briefly describes two theories of originalism[27]—original intent and original meaning—and identifies the interpretive value that founding-era state constitutions offer under each theory.[28]

A. ORIGINAL INTENT

In the 1980s, advocates of originalism argued for an original-intention theory of originalism: courts should give the Constitution's text the meaning the Framers intended.[29] Any historical source that sheds light on the intentions of

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THE CONSTITUTION: THE DEBATE OVER ORIGINAL INTENT 197, 197–212 (Jack N. Rakove ed., 1990); Scalia, *supra* note 12 at 852–65.

26. *See, e.g.*, McDonald v. City of Chicago, 130 S. Ct. 3020, 3121–22 (2010) (Breyer, J., dissenting); Citizens United v. FEC., 130 S. Ct. 876, 948–52 (2010) (Stevens, J., concurring in part and dissenting in part); District of Columbia v. Heller, 554 U.S. 570, 640–79 (2008); (Stevens, J., dissenting).

Originalism as a method, however, has not gone without criticism. *See, e.g.*, Marsh v. Chambers, 463 U.S. 783, 816–17 (1983) (Brennan, J., dissenting) ("Finally, and most importantly, the argument tendered by the Court is misguided because the Constitution is not a static document whose meaning on every detail is fixed for all time by the life experience of the Framers . . . . To be truly faithful to the Framers, 'our use of the history of their time must limit itself to broad purposes, not specific practices.' Our primary task must be to translate 'the majestic generalities of the Bill of Rights, conceived as part of the pattern of liberal government in the eighteenth century, into concrete restraints on officials dealing with the problems of the twentieth century . . . .'" (citation omitted)); Brennan, *supra* note 12, at 25–28 (criticizing originalist methods of interpretation); *see also* Brest, *supra* note 12; Sandalow, *supra* note 12.

Others have suggested that the documentary record of the Constitutional Convention lacks sufficient accuracy and reliability for judicial determination of the original intentions of the Framers. James H. Hutson, *The Creation of the Constitution: The Integrity of the Documentary Record*, *in* INTERPRETING THE CONSTITUTION: THE DEBATE OVER ORIGINAL INTENT 151, 154–68 (Jack N. Rakove ed., 1990). Even Justice Scalia has recognized the imperfection of the historical record and the difficulty of reconstructing the original meaning of the constitutional text. Scalia, *supra* note 12, at 856–57.

27. John McGinnis and Michael Rappaport have advocated a new theory of originalism: original methods. McGinnis & Rappaport, *supra* note 12. McGinnis and Rappaport's approach interprets the Constitution "using the interpretive methods that the constitutional enactors would have deemed applicable to it." *Id.* This approach finds support for both original intent and original meaning methods of interpretation. *See id.* at 752.

28. Little development and discussion of originalism as a cohesive theory of constitutional interpretation occurred before the 1980s. Consequently, many cases employing originalist methods combine both original meaning and original intent rationales in support of the historical sources cited in the case. *See, e.g.*, *Myers*, 272 U.S. at 136 (noting that the constitutional interpretation of the First Congress is important because it occurred within two years of the Constitutional Convention and shortly after the Constitution's ratification (an original meaning rationale) and because many leaders of the First Congress were also members of the Constitutional Convention (an original intent rationale)).

29. *See* Meese, *supra* note 12, at 17; *see also* Richard S. Kay, *Original Intention and Public Meaning in Constitutional Interpretation*, 103 NW. U. L. REV. 703, 704–09 (2009) (arguing that original-intention interpretation was the original mode of interpretation and rejecting two objections to the approach).

the Framers is a permissible interpretive tool under original intent theory.[30] This theory of originalism has been roundly criticized, both by scholars advocating a living constitution[31] and originalists who argue that the original meaning of the constitutional text is the more appropriate historical inquiry.[32]

For original intent theorists, founding-era state constitutional provisions carry a limited amount of interpretive value. Except to the extent that state provisions specifically animated the Framers' intentions regarding certain provisions of the Constitution,[33] founding-era state constitutions shed only a dim light on the intentions of the Framers. Given the limited weight that original-intent theorists place on state constitutions, this Note's argument for the interpretive value of state constitutions focuses on their use under original-meaning theory.

B. ORIGINAL MEANING

The original meaning approach to originalism focuses not on the intentions of the Framers but rather defines the constitutional text to mean what reasonable Americans of the framing generation would have thought the words meant.[34]

Original-meaning originalists use any source to interpret the Constitution that illuminates the popular meaning of the constitutional text at the time of the framing. These sources—a more expansive list of interpretive tools than original-

30. Original intent rationales have supported interpretive use of the Convention debates, *see, e.g.*, Vieth v. Jubelirer, 541 U.S. 267, 275 (2004); Utah v. Evans, 536 U.S. 452, 474–75 (2002); Printz v. United States, 521 U.S. 898, 915 n.9 (1997), James Madison's and Alexander Hamilton's contributions to *The Federalist*, *see, e.g.*, Cohens v. Virginia, 19 U.S. (6 Wheat.) 264, 418–20 (1821), and the interpretation of the Constitution in the First Congress, *see, e.g.*, *id.* at 420. Other historical sources—such as dictionaries, the common law, and English law—are only relevant to an original intent analysis to the extent that the Framers intended to adopt the rules articulated in these sources. *Cf.* Kay, *supra* note 29, at 710 (noting that intentions of the Framers are relevant to the extent they identify the legal rules the Framers intended to enact).

31. *See, e.g.*, Brest, *supra* note 12; *see generally* H. Jefferson Powell, *The Original Understanding of Original Intent*, 98 HARV. L. REV. 885 (1985) (criticizing the use of original intent as an interpretive method).

32. *See, e.g.*, BARNETT, *supra* note 18, at 90–93.

33. *Cf.* Minnesota v. Carter, 525 U.S. 83, 93 (1998) (Scalia, J., concurring) (analyzing state constitutions with language similar to that of the Fourth Amendment); Davis v. United States, 328 U.S. 582, 605 (1946) (Frankfurter, J., dissenting) ("The court there had before it the terms of the Massachusetts Constitution, on which, with like provisions in other State Constitutions, the Fourth Amendment was based . . . .").

34. *See* SCALIA, *supra* note 12, at 38. Original meaning theory answered one of the most prominent criticisms of the original intent approach: it allowed individuals who employ a textualist approach to statutory interpretation that refuses to examine legislative intent or legislative history to also subscribe to an originalist approach to statutory interpretation. *See* Kay, *supra* note 29; *see also* BARNETT, *supra* note 18, at 90; SCALIA, *supra* note 12, at 23–25. As a result, original meaning has become the dominant form of originalism. Kay, *supra* note 29, at 703–04; *see, e.g.*, John Doe #1 v. Reed, 130 S. Ct 2811, 2832–34 (2010) (Scalia, J., concurring in the judgment) (original meaning of First Amendment did not encompass right to secret voting); Graham v. Florida, 130 S. Ct. 2011, 2044–45 (2010) (Thomas, J., dissenting) (original meaning of Eighth Amendment did not impose a proportionality requirement); District of Columbia v. Heller, 554 U.S. 570, 576–77 (2008) (original meaning of Second Amendment created an individual right to bear arms); Morse v. Frederick, 551 U.S. 393, 410–11 (2007) (Thomas, J., concurring) (original meaning of First Amendment did not encompass student speech).

intent theorists employ[35]—can include founding-era dictionaries,[36] statutes and common law,[37] debates at the Constitutional Convention,[38] English law,[39] *The Federalist*,[40] and the interpretation of the Constitution in the First Congress.[41] Additionally, statements made during the debates in the state ratification conventions are particularly relevant because they suggest the States' understanding of the constitutional text when they agreed to be bound by it.[42] Importantly, statements of the Framers—either in *The Federalist*, as delegates to the Constitutional Convention, or members of the First Congress—are given no more weight than the founding-era statements of non-Framers.[43]

Founding-era state constitutions prove more useful as interpretive tools under the original meaning theory than under the original intent theory.[44] To original meaning theorists, *any* founding-era state constitutional provision provides a contemporaneous understanding of the meaning of those words to the Framing generation and, therefore, illuminates the meaning of similar words in the Constitution.[45] Original meaning theorists are particularly fond of consulting founding-era state constitutions (as well as founding-era English law) when interpreting constitutional provisions derived from preexisting rights or powers.[46]

Original meaning, however, fails to move beyond the assumption that state

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35. *See supra* note 30.

36. *See, e.g.*, Nixon v. United States, 506 U.S. 224, 229–30 (1993).

37. *E.g.*, Virginia v. Moore, 553 U.S. 164, 168 (2008).

38. Statements at the Convention debates, however, are given the same weight as other historical sources. *Cf.* SCALIA, *supra* note 12, at 38 (noting that writings of non-Framers are given the same interpretive weight as writings of Framers). Original intent theorists, in contrast, place heavy emphasis on these debates. *See supra* note 30.

39. *See, e.g.*, *Ex parte* Grossman, 267 U.S. 87, 108–09 (1925).

40. *E.g.*, Cohens v. Virginia, 19 U.S. (6 Wheat.) 264, 418–20 (1821).

41. *See id.* at 420. The statements of members of the First Congress are given interpretive weight under original meaning theory because, as members of the framing generation, these statements are relevant indicators of what the framing generation saw as the plain meaning of the constitutional text. Unlike original intent theorists, however, original meaning theorists place equal weight in the interpretation of the First Congress and other founding-generation statements of plain meaning, such as an interpretation in a newspaper editorial. SCALIA, *supra* note 12, at 38.

42. U.S. Term Limits, Inc. v. Thornton, 514 U.S. 779, 791–92 (1995). *See* Dep't of Revenue of Ky. v. Davis, 553 U.S. 328, 364 (2008) (Kennedy, J., dissenting); Alden v. Maine, 527 U.S. 706, 778–81 (1999) (Souter, J., dissenting); Chauffeurs, Teamsters and Helpers, Local No. 391 v. Terry, 494 U.S. 558, 580–81 (1990) (Brennan, J., concurring in part & concurring in the judgment); *see also* BARNETT, *supra* note 18, at 104 (discussing the importance of ratification conventions).

43. SCALIA, *supra* note 12, at 38.

44. *See, e.g.*, City of Boerne v. Flores, 521 U.S. 507, 553 (1997) (O'Connor, J., dissenting) ("After all, it is reasonable to think that the States that ratified the First Amendment assumed that the *meaning* of the federal free exercise provision corresponded to that of their existing state clauses." (emphasis added)).

45. *See, e.g.*, Kelo v. City of New London, 545 U.S. 469, 512 (2005) (Thomas, J., dissenting) ("Nevertheless, several early state constitutions at the time of the founding likewise limited the power of eminent domain to 'public uses.' Their practices therefore shed light on the original meaning of the same words contained in the Public Use Clause.") (citations omitted).

46. *See, e.g.*, District of Columbia v. Heller, 554 U.S. 570, 600–03 (2008) (discussing preexisting rights). Indeed, references to state constitutions in *The Federalist* suggest that the Framers knew of and

constitutional provisions bear relevance in determining the original meaning of the Constitution's words. As a result, original meaning theory fails to account for how the different contexts in which the words are used—state constitutions versus national constitutions and the respective *authority* granted to each level of government[47]—might influence the meaning of those words to the framing generation.[48]

II. THE COURT'S USE OF ENGLISH LAW

Although interpreters have not examined the effect of governmental authority on original meaning when using state constitutions as interpretive tools, they have examined the effect of variation in authority when referring to English law to interpret the Constitution. Despite the English origins of American law, the Court has not reflexively assumed the relevance of founding-era English law when interpreting the Constitution.[49] Rather, the Court and its Justices have generally looked at whether the power or right under English law was consistent with the republican, federalist system of government that the Constitution created.[50] Consequently, when determining whether words of the Constitution bear the same meaning as words describing a similar right or power in English law, the Court has considered the nature of governmental authority conferred by the English Constitution and compared it to the American Constitution's grant of authority. The Court should likewise consider differences in state and national governmental authority when consulting state constitutions.

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considered state constitutional provisions when drafting the Constitution. *See* THE FEDERALIST NO. 24 (Alexander Hamilton), NOS. 44, 47 (James Madison).

47. *See infra* section III.B.1.

48. Words, of course, mean different things in different contexts. *See* 1 WILLIAM BLACKSTONE, COMMENTARIES *60 (noting that an English law forbidding clergy to "purchase *provisions* at Rome" did not forbid the purchase of food but the purchase of "benefices by the pope"). A nonlegal example might help illustrate my point: what does the word "note" mean? Read in isolation, "note" could bear several different meanings. It could refer to a short memo jotted on a pad of paper. It could refer to a notation on a musical staff to indicate a desired pitch. Or, it could refer to the written material on a record jacket or CD insert. Depending on the *context* surrounding the use of the word, the meaning changes: "Did you get the note I left on the kitchen table?" "I'm so disappointed that I hit the wrong note while playing *Rhapsody in Blue* for my piano recital." "The album liner notes for Oscar Peterson's *Night Train* are really interesting." *Cf.* JOHNJOE MCFADDEN, QUANTUM EVOLUTION 175–76 (2002) (using a similar analogy to describe the concept of superposition of subatomic particles in the scientific theory of quantum mechanics).

49. *See* BLOOM, *supra* note 15, at 59–71 (describing the Court's use of English law to interpret the Constitution). The Court has, on at least one occasion, suggested that previous case law had too readily consulted English law: "The doctrine of English cases has been generally accepted by the courts of this country, *sometimes with scant regard for distinctions growing out of the constitutional restrictions upon legislative action under our system.*" Richards v. Wash. Terminal Co., 233 U.S. 546, 553 (1914) (emphasis added).

50. *See* Harmelin v. Michigan, 501 U.S. 957, 975–76 (1991) (opinion of Scalia, J.); United States v. Brewster, 408 U.S. 501, 508–09 (1972); Myers v. United States, 272 U.S. 52, 118 (1926); Twining v. New Jersey, 211 U.S. 78, 101 (1908); United States v. Lee, 106 U.S. 196, 208–09 (1882); Fleming v. Page, 50 U.S. (9 How.) 603, 618 (1850); Charles River Bridge v. Warren Bridge, 36 U.S. (11 Pet.) 420, 1837 WL 3561, at *162 (1837) (Baldwin, J., concurring).

When the Constitution confers on the American government authority similar to that which the English government possessed—such that the English rule would not contravene the republican, federal system of American government—the Court has used founding-era English law to interpret the words of the Constitution.[51] The Court has most readily consulted English law when interpreting individual rights in the Constitution.[52] For example, the Court relied heavily on English law and history in early cases interpreting the Due Process Clause because the words "due process of law" derived from the phrase "law of the land" in the Magna Carta.[53] The Court has also frequently consulted the English law of arrest and trespass when interpreting the Fourth Amendment.[54] In addition to the interpretation of individual rights, the Court has also consulted English law when interpreting language granting powers to the federal government.[55] The President's executive power, for example, included the right to remove executive officials in part because the repository of executive power in the English system, the King, possessed such power, and the President's exer-

51. *See, e.g.*, Faretta v. California, 422 U.S. 806, 821–26 (1975) (England's ultimate rejection of forced representation before the Star Chamber by the time of the Framing supports existence of right to self-representation in Sixth Amendment); *Myers*, 272 U.S. at 118 (removal of executive officials granted to President under Constitution implies the English king's authority to remove officials is relevant to interpreting the Constitution). Justices have also relied on the absence of particular rights in English law to conclude that the Constitution did not contain those rights. *See, e.g.*, John Doe #1 v. Reed, 130 S. Ct. 2811, 2835–36, (2010) (Scalia, J., concurring in the judgment) (observing that the absence of the right to anonymous voting in English law supports the absence of a First Amendment right to anonymity in signed petitions having legislative effect); Morse v. Frederick, 551 U.S. 393, 413–16 (2007) (Thomas, J., concurring) (examining the English legal traditions of *in loco parentis* and nineteenth century case law to conclude that the First Amendment did not protect school speech); Washington v. Glucksburg, 521 U.S. 702, 711–12 (1997) (English common law's failure to recognize a right to suicide supports a conclusion that assisted suicide bans did not violate the Due Process Clause because right to suicide not deeply rooted in nation's traditions); *Twining*, 211 U.S. at 107–08 (stating that right against compelled self-incrimination not encompassed by "law of the land" in Magna Carta, thus supporting conclusion that right was not part of due process).

52. *See, e.g.*, *Fleming*, 50 U.S. at 618.

53. *See* Murray's Lessee v. Hoboken Land & Improvement Co., 59 U.S. (18 How.) 272, 276–77 (1856); *see also* Pac. Mut. Life Ins. Co. v. Haslip, 499 U.S. 1, 29–35 (1991) (Scalia, J., concurring in the judgment); Duncan v. Louisiana, 391 U.S. 145, 169–70 (1968) (Black, J., concurring); Munn v. Illinois, 94 U.S. 113, 123–25 (1876). Chapter thirty-nine of the Magna Carta reads: "No free man shall be taken, imprisoned, disseised, outlawed, banished or in any way destroyed, nor will We proceed against or prosecute him, except by the lawful judgment of his peers and by the law of the land." 9 Hen. III, c. 39 (1225).

54. *See* Minnesota v. Carter, 525 U.S. 83, 94 (1998) (Scalia, J., concurring); Wilson v. Arkansas, 514 U.S. 927, 931–32 (1995); Boyd v. United States, 116 U.S. 616, 625–30 (1886). Members of the Court have consulted English law when interpreting other amendments in the Bill of Rights as well. *E.g.*, District of Columbia v. Heller, 554 U.S. 570, 592–95 (2008) (interpreting the Second Amendment); Parklane Hosiery Co. v. Shore, 439 U.S. 322, 344–45 (1979) (Rehnquist, J., dissenting) (interpreting the Seventh Amendment); *Faretta*, 422 U.S. at 821–26 (interpreting the Sixth Amendment).

55. *See, e.g.*, Powell v. McCormack, 395 U.S. 486, 527–28 (1969) (construing English cases on expelling members of the House of Commons); Coleman v. Miller, 307 U.S. 433, 460 (1939) (opinion of Frankfurter, J.) (examining the nature of the "Judicial Power" under English law); *Myers*, 272 U.S. at 118 (1926) (examining the power to appoint and remove executive officers under English law); *Ex parte* Grossman, 267 U.S. 87, 110–12 (1925) (examining the power of the pardon under English law).

cise of that power would not undermine American principles of republican government.[56] In sum, the Court has used English law as an interpretive tool when the nature of *governmental authority* underlying the exercise of a power or protection of a right in the American Constitution resembles the governmental authority in English law.

When the American government's authority differed from the English government's authority with respect to a particular right or power—because the structure of American government differed from English structure,[57] the American Constitution explicitly prohibited exercise of a power the English government possessed,[58] or the American Constitution explicitly protected a right not known to British subjects[59]—the Court has declined to rely on English law as an interpretive tool. In these situations, the Court's hesitancy to consult English law derived from a fear of erroneously conferring powers on the national government beyond the scope of powers that the Constitution authorized. For example, *Fleming v. Page* declined to import the King's power to annex territory into the President's executive power because the Constitution gave Congress the authority to annex territory.[60] Likewise, the Court feared conferring excessive power on Congress by importing the full scope of Parliament's contempt power.[61] The Constitution explicitly enumerated the powers of Congress—and the contempt power was not among them—meaning that any exercise of a congressional contempt power must be necessary and proper to the exercise of an enumerated power, a stark contrast to the unlimited contempt power of Parliament.[62] When English law varied from American law in a way that would confer powers on American government that the Constitution did not

56. *Myers*, 272 U.S. at 118.

57. *See, e.g.*, Kilbourn v. Thompson, 103 U.S. 168, 183–89 (1881) (rejecting precedent from English Parliament); *Fleming*, 50 U.S. (9 How.) at 618 (distinguishing Presidential powers from those of the English Crown). The structure of American government may differ from the English structure because a power may have been conferred on a different branch of government, *see, e.g.*, Marshall v. Gordon, 243 U.S. 521, 534–38 (1917); *Kilbourn*, 103 U.S. at 192–93, conferred on the state governments, *see, e.g.*, Harmelin v. Michigan, 501 U.S. 957, 975–76 (1991) (opinion of Scalia, J.), or reserved to the people, *see, e.g.*, United States v. Lee, 106 U.S. 196, 208–09 (1882).

58. *See, e.g.*, Stogner v. California, 539 U.S. 607, 622–26 (2003) (Parliament's attempt to banish the Earl of Clarendon in 1667 informed the Framers' view of the Ex Post Facto Clause); United States v. Brewster, 408 U.S. 501, 517 (1972) (abuse of legislative immunity by English Members of Parliament motivated Framers not to adopt the full scope of immunity that English Parliamentarians enjoyed); Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123, 145–46 (1951) (Black, J., concurring) (noting that the abuse of bills of attainder by Parliament motivated the Framers to include a prohibition on such legislation in the Constitution: "Memories of such events were fresh in the minds of the founders when they forbade the use of the bill of attainder."); United States v. Lee, 106 U.S. 196, 208 (1882) (noting the different sources of power in American and English governments).

59. *See, e.g.*, Citizens United v. FEC, 130 S. Ct. 876, 906 (2010) (First Amendment adopted in response to English repression of speech and press as well as colonial taxation of the press); Crawford v. Washington, 541 U.S. 36, 43–46 (2004) (English and colonial abuses of the common law right to confront an accuser prompted the Framers to include its guarantee in the Sixth Amendment).

60. *Fleming*, 50 U.S. (9 How.) at 614–615, 618.

61. *Marshall*, 243 U.S. at 534–38; *Kilbourn*, 103 U.S. at 183–89.

62. *Marshall*, 243 U.S. at 537.

authorize, the Court rejected English law when interpreting the Constitution.

The Court's treatment of English law as an interpretive tool—undertaking, as a threshold question, an examination of the governmental authority underlying the power or right described in the constitutional provision—provides a useful analogue for determining the validity of state constitutions as interpretive tools in the context of American federalism. Differences in English monarchical and American republican governmental authority affect the validity of English law as an interpretive tool; likewise, differences in state and national governmental authority should influence the interpretive validity of state constitutions.[63] Ultimately, the Court's treatment of English law suggests that state constitutions are valid interpretive aids when the state provisions themselves animate the words in the federal Constitution—just as the words of the Magna Carta animated the Due Process Clause.[64] When the national government lacks the authority animating the power or right in the state constitution, however, the state provision is not a valid interpretive tool, just as the Court declined to use English law as an interpretive tool when the Constitution did not confer similar authority on the American government.

III. STATE CONSTITUTIONS AS INTERPRETIVE AIDS: A FEDERALISM-FRIENDLY FRAMEWORK FOR USE

While the Court has been cognizant of the different allocations of governmental authority in the American and English systems when consulting English law, courts have notably ignored the different governmental authorities of the state and national governments when using state constitutions as interpretive tools.[65]

Most original-meaning theorists simply assume that textually similar provisions in the Constitution and state constitutions bear the same meaning, especially when the provision codifies a preexisting right or power.[66] This assumption

63. *See* Thomas B. McAffee, *The Federal System as Bill of Rights: Original Understandings, Modern Misreadings*, 43 VILL. L. REV. 17, 22 (1998) (noting that state constitutions presumed legislatures of general powers limited by state declarations of rights while the Constitution presumed a Congress of limited powers).

64. *See* Murray's Lessee v. Hoboken Land & Improvement Co., 59 U.S. (18 How.) 272, 276–77 (1856).

65. *See, e.g.*, District of Columbia v. Heller, 554 U.S. 570, 600–03 (2008) (assuming state constitutions are relevant to construing the Second Amendment); Roth v. United States, 354 U.S. 476, 482–83 (1957) (assuming state constitutions are relevant to construing the First Amendment); Kilbourn v. Thompson, 103 U.S. 168, 202–03 (1880) (assuming state constitutions are relevant to construing the scope of legislative immunity).

66. *See Heller*, 554 U.S. at 584–85 (examining the "right to bear arms" in state constitutions); Lutz, *supra* note 19, at 252 (noting the presence of many provisions protecting individual rights in colonial constitutions before the existence of the federal Constitution); *cf.* Robertson v. Baldwin, 165 U.S. 275, 281 (1897) (observing that the Bill of Rights was "not intended to lay down any novel principles of government, but simply to embody certain guarantees and immunities which we had inherited from our English ancestors"). This argument is most important when invoked in the context of preexisting rights codified in both the state and national constitutions. Such an assumption, though, is illogical—an analogous argument could be made with respect to a preexisting power of government codified in

provides a useful starting point, and the ratifying generation may rightly be presumed to have viewed the meaning of words in the Constitution similarly to the meaning of words in the state constitutions. Failure to move beyond this assumption and consider what factors might require rejecting the state meaning, however, undermines federalism and risks permitting the national government to exercise powers that neither the Framers nor the ratifying generation contemplated conferring on it.

Rather than assuming the relevance of founding-era state constitutions, this Part draws upon the Court's interpretive treatment of English law and proposes a theoretical framework for when state constitutions may permissibly inform the interpretation of the national Constitution. First, I demonstrate that even when a constitutional provision derives from a preexisting right or power, the precise meaning of the words may differ from other codifications of that right or power. Second, I argue that when state constitutions are used interpretively, the federalist division of governmental authority may require that similar language in the two constitutions bear a different meaning.

A. SIMILAR LANGUAGE, (SLIGHTLY) DIFFERENT MEANING

The assumption that text in state constitutions or English law bears the same meaning as comparable text in the Constitution is a reasonable starting point for constitutional interpretation. Failure to move beyond this assumption, however, can graft unequivocally the precise English or state constitutional meaning of the preexisting right or power into the Constitution and render the Constitution's actual text irrelevant.[67] At times, though, interpreters have moved beyond the assumption of similar meaning and found that similar—or even identical—language in preexisting law meant something different in the Constitution. In these cases, the nature of governmental authority required a different meaning than the meaning implied in other texts' preexisting manifestation of the power or right.[68]

English law yet the Court has not simply assumed the interpretive value of the English provision. Rather, it has evaluated whether a direct comparison to the English is consistent with the nature of American government. *See supra* section I.B.

67. Alan Brownstein, *The Constitutionalization of Self-Defense in Tort and Criminal Law, Grammatically-Correct Originalism, and Other Second Amendment Musings*, 60 HASTINGS L.J. 1205, 1221–24 (2009); *cf.* Harmelin v. Michigan, 501 U.S. 957, 975 (1991) (opinion of Scalia, J.) ("Unless one accepts the notion of a blind incorporation, however, the ultimate question is not what 'cruell and unusuall punishments' meant in the Declaration of Rights, but what its meaning was to the Americans who adopted the Eighth Amendment."). The Eleventh Amendment jurisprudence of *Hans v. Louisiana*, 134 U.S. 1 (1890) forms perhaps the Court's most blatant disregard of text when interpreting the Constitution. *See* Brownstein, *supra*, at 1223.

68. *See Heller*, 554 U.S. at 592–94 (declining to adopt the original scope of the right to bear arms in the 1689 English Bill of Rights—which was confined only to Protestants—because by the time of the founding it had "become fundamental" for English subjects); United States v. Brewster, 408 U.S. 501, 508 (1972) (though derived from English law, purpose of Speech and Debate Clause was to preserve legislative *independence*, not legislative *supremacy* as was the purpose of the English parliamentary privilege); Twining v. New Jersey, 211 U.S. 78, 101 (1908) (noting that although the Due Process

In *Harmelin v. Michigan*, Justice Scalia interpreted the meaning of the Eighth Amendment's Cruel and Unusual Punishment Clause,[69] which used language identical to the English Declaration of Rights of 1689.[70] The English Declaration prevented judges from imposing punishments outside the common law tradition unless statutorily authorized.[71] Despite identical "cruel and unusual punishment" language, Justice Scalia nevertheless concluded that "a direct transplant of the English meaning to the soil of American constitutionalism would . . . have been impossible" in light of American federalism.[72] Unlike their English and state judge counterparts, federal judges in the American system have no common law authority.[73] As a consequence, the Eighth Amendment did not check judicial authority like the Declaration of Rights, but rather checked the legislative authority to define the punishments for criminal acts.[74] Despite identical language, the structure of American government required a different meaning than the preexisting codification of the right against cruel and unusual punishment.

Likewise, in *United States v. Brewster*, the Court articulated a meaning of the Speech and Debate Clause[75] that differed from the parliamentary privilege.[76] Despite the origins of the Speech and Debate Clause in the parliamentary privilege, the Court declined to interpret the scope of the Speech and Debate Clause as coextensive with the scope of parliamentary privilege.[77] In rejecting the precise meaning of the preexisting privilege, the Court relied on structural differences in the allocation of authority between the American and English governments. In the English system, with relatively few checks on the execu-

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Clause derived from the Magna Carta, "[i]t does not follow . . . that a procedure settled in English law at the time of the emigration, and brought to this country and practised by our ancestors, is an essential element of due process of law"); Hurtado v. California, 110 U.S. 516, 531–32 (1884) (provisions of the Bill of Rights that derived from the Magna Carta should "receive . . . a corresponding and more comprehensive interpretation" because the Magna Carta restricted the power of the monarch, while the Bill of Rights limited all branches of government.); *cf.* AMAR, *supra* note 6, at 27 (noting that the Constitution used "old legal words in new legal ways without clear warning").

69. U.S. CONST. amend VIII.

70. 501 U.S. 957, 966, 974–76 (1991) (opinion of Scalia, J.). The English Declaration of Rights stated that "excessive Baile ought not to be required nor excessive Fines imposed nor cruell and unusuall Punishments inflicted." *Id.* at 966 (quoting Bill of Rights, 1 W. & M. 2, c. 2 (1689) (Eng.)).

71. *Id.* at 973–74 (opinion of Scalia, J.).

72. *Id.* at 975 (opinion of Scalia, J.).

73. *See id.*; *see also* United States v. Hudson, 11 U.S. (7 Cranch) 32, 33–34 (1812) (federal courts lack inherent authority to punish common law crimes).

74. *Harmelin*, 501 U.S. at 975–76 (opinion of Scalia, J.); *see also In re* Kemmler, 136 U.S. 436, 446–47 (1890) (Eighth Amendment prohibits certain types of punishment).

75. U.S. CONST. art. 1, § 6, cl. 1.

76. 408 U.S. 501, 508 (1972). The Court had previously recognized parliamentary privilege as the preexisting power inspiring inclusion of the Speech and Debate Clause in the Constitution. *See* Kilbourn v. Thompson, 103 U.S. 168, 182–84, 189 (1881); *see generally* AMAR, *supra* note 6, at 101–02. Professor Amar also notes that the legislative debate privilege in Congress and the state legislatures contained a federalism dimension: legislators at both levels could criticize the other without fear of prosecution or civil libel suits. AMAR, *supra* note 6, at 102.

77. *See Brewster*, 408 U.S. at 508, 524–25.

tive, the parliamentary privilege ensures legislative *supremacy*.[78] The American President, in contrast, faces numerous checks and balances, with a Speech and Debate Clause aimed at legislative *independence*.[79] The Court also compared the separation of legislative and judicial authority in the American system with Parliament's unified legislative and judicial authority.[80] Absolute immunity of Members of Parliament (MP) was justified because Parliament, in addition to its legislative functions, also functioned as England's highest judicial tribunal.[81] Trial of an MP in any lower tribunal would undermine parliamentary supremacy.[82] No similar concern exists in the American system. These differences required a different scope to the Speech and Debate Clause: while parliamentary immunity was absolute, the Speech and Debate Clause provided immunity only for actions taken in a law-making capacity.[83]

Even when the Constitution codifies pre-existing rights or powers from other sources of law, the scope of that right or power may differ. The structural allocation of authority in the American system—either the horizontal distribution of power among coordinate branches in *Brewster* or the vertical distribution of authority between the states and national government in Justice Scalia's *Harmelin* opinion—imply different interpretations for those rights and powers. Courts must remember these implications when consulting state constitutions as interpretive aids and move beyond the assumption that text in state constitutions is always relevant to determining the meaning of similar text in the Constitution.

B. THE PROPER WAY TO CONSULT FOUNDING-ERA STATE CONSTITUTIONS WHEN INTERPRETING THE CONSTITUTION

Because structural differences in the allocation of governmental authority might require different meanings of similar language, courts must consider the federalist structure of American government when consulting state constitutions. The states possess reserved powers not explicitly granted to the federal government, and the Constitution explicitly deprives the national government of some powers.[84] As a consequence, some state constitutional provisions reflect the exercise of these reserved or prohibited powers.[85] If the Court relies on one of these state constitutional provisions to interpret the federal Constitution, it

78. *Id.* at 517–18.

79. *Id.* at 508. Indeed, under the American system of three coequal branches of government, no such thing as "legislative supremacy" even exists.

80. *Id.* at 518.

81. *Id.*

82. *Id.*

83. *Id.* at 524–25; *cf.* District of Columbia v. Heller, 554 U.S. 570, 579–81 (2008) (looking to the use of the term "the people" in the Fourth, Ninth, and Tenth Amendments to conclude that in the Second Amendment, the term referred to individuals, rather than the collective citizenry as it did in some state constitutions).

84. *See* U.S. CONST. amend. X.

85. *See, e.g.*, CAL. CONST. art. 9 (exercising reserved power to regulate education).

runs the risk of granting the federal government powers that its ratifiers never desired the national government to have. Essentially, the recognition that a state constitutional provision exercises a reserved or prohibited power rebuts the assumption that similar language in the Constitution bears a similar meaning.[86]

This section first argues that consideration of federalism when using state constitutions as interpretive tools is consistent with the ratifying generation's conception of governmental authority. Second, this section proposes a practical framework for the interpretive use of state constitutions that is more respectful of federalism than the Court's current practice.

1. Consideration of Federalism when Using State Constitutions as Interpretive Tools Is Consistent with the Founding Generation's Conception of Governmental Authority

America's Founders recognized the risk that careless consultation of state law to determine the breadth of federal authority might undermine the concept of enumerated powers. In 1798, Federalists in the Fifth Congress passed the Alien and Sedition Acts.[87] The Sedition Act permitted the federal government to punish seditious libel by criminalizing "false, scandalous and malicious" statements about the government or government officials.[88] Blatantly partisan—the Sedition Act expired the day before John Adams's presidency ended[89]—the laws sparked a vigorous debate over their constitutionality. Federalists maintained that the law was constitutional, arguing that the First Amendment did not

86. Of course, interpretive evidence *actually demonstrating* that the ratifying generation understood similar language in the Constitution to have the same meaning as similar state constitutional language (notwithstanding the fact that the state provision appears to exercise a reserved or prohibited power) would require that courts ascribe the state meaning to the national Constitution. In a way, this evidence would rebut the rebuttal of the original assumption. Importantly, because differential allocations of governmental authority can require that similar or identical constitutional texts bear different meanings, *see supra* section III.A., courts must rely on more than mere textual similarity to establish that the ratifiers actually understood the meanings to be the same. A court can satisfy this prerequisite—that the ratifying generation actually understood the two constitutional provisions to bear the same meaning—through consultation of other sources of originalist interpretation: the ratification debates, statements of the Framers, founding-era dictionaries, *The Federalist*, etc. Consequently, when the state provision implicates a reserved or prohibited power, demonstrating the state provision's interpretive relevance actually renders consultation of the state provision unnecessary—the other sources of originalism have already established the meaning of the federal provision. Mere reliance on textual similarity as a sufficient indicator that the ratifying generation understood the two provisions to have similar meanings is nothing more than the assumption that this Note criticizes.

87. An Act Respecting Alien Enemies, ch. 66, 1 Stat. 577 (1798) (codified at 50 U.S.C. §§ 21–24); An Act for the Punishment of Certain Crimes Against the United States, ch. 74, 1 Stat. 596 (1798); An Act Concerning Aliens, ch. 58, 1 Stat. 570 (1798); An Act to Establish a Uniform Rule of Naturalization, ch. 54, 1 Stat. 566 (1798) (repealed 1802); *see also* Jay S. Bybee, *Taking Liberties with the First Amendment: Congress, Section 5, and the Religious Freedom*, 48 VAND. L. REV. 1539, 1567 (1995) (discussing Federalists' support for the Alien and Sedition Acts).

88. §§ 1–2, 1 Stat. at 596–97.

89. § 4, 1 Stat. at 597; *see also* Akhil Reed Amar, *The Bill of Rights as a Constitution*, 100 YALE L.J. 1131, 1150 (1991) ("The Sedition Act itself was a textbook example of attempted self-dealing among the people's agents; it criminalized libel of incumbents, but not challengers. Yet another dead giveaway: the Act conveniently provided for its own expiration after the next election.").

imply an absence of federal power "to legislate on the subject of speech and press"; rather, it served as an "independent disability" that protected individuals.[90] Given the States' common law authority to punish seditious libel, the Federalists argued, the federal government possessed comparable authority.[91]

The Democratic-Republican response was vocal and vigorous. Speaking before the Virginia General Assembly, James Madison attacked the Federalist argument, rooting his counterargument in the dual-sovereignties of American federalism:

> The sedition act presents a scene which was never expected by the early friends of the Constitution. It was then admitted that the State sovereignties were only diminished by powers specifically enumerated, or necessary to carry the specified powers into effect. Now, Federal authority is deduced from implication; and *from the existence of State law, it is inferred that Congress possess a similar power of legislation*; whence Congress will be endowed with a power of legislation in all cases whatsoever, and the States will be stripped of every right reserved, by the concurrent claims of a paramount Legislature.[92]

Although all now agree that the Alien and Sedition Acts were unconstitutional,[93] Madison's fear—that reckless comparison of federal authority to states' exercises of power could obliterate the concept of reserved powers—remains a threat through the undiscerning use of state constitutions to interpret similar provisions of the federal Constitution.[94]

In the state ratification conventions, the debate surrounding the need for a bill

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90. Bybee, *supra* note 87.

91. *See id.*

92. James Madison, Address of the General Assembly to the People of the Commonwealth of Virginia (Jan. 23, 1799), *in* 6 THE WRITINGS OF JAMES MADISON 332, 333 (Gaillard Hunt ed., 1906) (emphasis added). Thomas Jefferson expressed similar sentiments in a letter to Abigail Adams:

> Nor does the opinion of the unconstitutionality, and consequent nullity of [the Sedition Act] remove all restraint from the overwhelming torrent of slander, which is confounding all vice and virtue, all truth and falsehood, in the United States. The power to do that is fully possessed by the several State legislatures. It was reserved to them, and was denied to the General Government, by the constitution, according to our construction of it.

Letter from Thomas Jefferson to Mrs. Adams (Sept. 11, 1804), *in* 4 MEMOIRS, CORRESPONDENCE, AND PRIVATE PAPERS OF THOMAS JEFFERSON 27, 28 (Thomas Jefferson Randolph ed., 1829).

93. Three of the four statutes expired before the Supreme Court could examine their constitutionality. The Court has suggested, however, that the Alien and Sedition Acts were, in fact, unconstitutional. N.Y. Times Co. v. Sullivan, 376 U.S. 254, 276 (1964).

94. Erroneous reliance on founding-era state constitutions would create national standards that threatened federalism's chief benefit—experimentation in the states. *See* Harmelin v. Michigan, 501 U.S. 957, 989–90 (1991) (opinion of Scalia, J.) (approving different punishment regimes in different states); New State Ice Co. v. Liebmann, 285 U.S. 262, 386–87 (1932) (Brandeis, J., dissenting) ("It is one of the happy incidents of the federal system that a single courageous state may, if its citizens choose, serve as a laboratory . . . and try novel social and economic experiments without risk to the rest of the country.").

of rights—particularly the reservation of powers in the Tenth Amendment—indicates that not only the Framers, but the ratifying generation more broadly expressed concern that state authority might be ceded to the national government via implication. At the Virginia ratification convention, George Mason, a leading Anti-Federalist, suggested that "[h]e could see no clear distinction between rights relinquished by a positive grant, and *lost by implication*. Unless there were a bill of rights, implication might swallow up all our rights."[95] Without an express reservation of rights, Patrick Henry explained, Americans would "by a natural and unavoidable implication, give up [their] rights to the general government."[96] Other Anti-Federalists echoed these concerns.[97] The Federalists ultimately acquiesced and addressed Anti-Federalist worries through the Ninth and Tenth Amendments.[98] This Anti-Federalist fear of a national government exerting implied powers—and the Federalist acquiescence to such concerns with the Bill of Rights—indicates a ratifying generation that, like Madison, feared transferring to the national government anything beyond specific and limited powers. As a consequence, the failure to recognize differences between the authority of state governments and the national government when consulting state constitutions as interpretive tools actually realizes the fear that Anti-Federalists fought so hard to prevent.

The structural function of the Bill of Rights also supports the need for a federalism-sensitive approach to the interpretive use of state constitutions. State constitutions did not create governments of enumerated powers[99] but instead created governments of general powers limited by declarations of rights.[100] In contrast, the Bill of Rights was appended to a document that, unlike the state constitutions, defined a government of specific, limited powers.[101] The debate surrounding the necessity of the Bill of Rights centered not on whether the national government should possess the authority to exercise the powers prohib-

95. George Mason, Address to the Virginia Ratifying Convention (June 14, 1788), *in* THE COMPLETE BILL OF RIGHTS: THE DRAFTS, DEBATES, SOURCES, AND ORIGINS 694 (Neil H. Cogan ed., 1997) [hereinafter COMPLETE BILL OF RIGHTS] (emphasis added).

96. Patrick Henry, Address to the Virginia Ratifying Convention (June 14, 1788), *in* COMPLETE BILL OF RIGHTS, *supra* note 95, at 695.

97. *See* Patrick Henry, Address to the Virginia Ratifying Convention (June 12, 1788), *in* COMPLETE BILL OF RIGHTS, *supra* note 95, at 691–92; Thomas Tredwell, Address to the New York Convention on Ratification (July 1, 1788), *in* COMPLETE BILL OF RIGHTS, *supra* note 95, at 684–87.

98. McAffee, *supra* note 63, at 96–97.

99. AMAR, *supra* note 6, at 327.

100. McAffee, *supra* note 63, at 22, 63 n.177, 64; *see also* BEEMAN, *supra* note 3, at 346–47 (noting that founding-era state constitutions "not only replace[d] the old colonial charters," but also "serve[d] as Revolutionary manifestos explicitly announcing the separation of each state from the mother country"); *cf.* James Wilson, Address at Pennsylvania Ratifying Convention (Oct. 28, 1787), *in* COMPLETE BILL OF RIGHTS, *supra* note 95, at 689 ("[E]ven in single governments, a bill of rights is not an essential or necessary measure. But in a government consisting of enumerated powers . . . a bill of rights would not only be unnecessary, but . . . highly imprudent.").

101. The Anti-Federalists disputed this claim, seeing an opening for the national government's exercise of implied powers in the Necessary and Proper Clause. *See* McAffee, *supra* note 63, at 46. The ultimate inclusion of the Tenth Amendment assuaged the Anti-Federalist's fears. *Id.* at 96–97.

ited in the Bill of Rights—the consensus at the ratifying conventions demonstrates that Federalists and Anti-Federalists alike agreed that the national government should not—but on the accuracy of Federalist claims that the Constitution truly created a government of enumerated powers.[102] Consequently, the Bill of Rights did not merely *codify* substantive rights contained in the declarations of rights in state constitutions.[103] Rather, the Bill of Rights *clarified* that certain governmental actions fell outside the list of enumerated powers in the Constitution.[104] In this sense, while the state declarations of rights focused solely on substantive liberties, the Bill of Rights was also a structural provision that reinforced the barrier between the national government and powers reserved to the states.[105] In light of the structural function of the Bill of Rights, the Court should only carefully analogize between the Constitution—especially the Bill of Rights—and state constitutions that exercise reserved or prohibited powers.

Ultimately, consideration of federalism when comparing words in founding-era state constitutions and the national Constitution is consistent with the ratifying generation's understanding of the system of government it created and adopted. Fear that the national government would assume powers not explicitly enumerated in the Constitution animated much of the debate in the state conventions and should inform the Court's interpretive use of founding-era state constitutions.

2. A Practical Framework for the Interpretive Use of Founding-Era State Constitutions

When the Court cites a state-constitutional provision without examining the origins of the power exercised in that state provision, it risks granting the

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102. Many Federalists, for example, argued against the need to explicitly protect the freedom of the press because no enumerated power conferred on the national government the authority to interfere with the press. *See, e.g.*, General Charles Cotesworth Pinckney, Address to the South Carolina Ratifying Convention (Jan. 18, 1788), *in* COMPLETE BILL OF RIGHTS, *supra* note 95, at 98–99; Governor Edmund Randolph, Address to the Virginia Ratifying Convention (June 15, 1788), *in* COMPLETE BILL OF RIGHTS, *supra* note 95, at 100; Richard D. Spaight, Address to the North Carolina Ratifying Convention (July 30, 1788), *in* COMPLETE BILL OF RIGHTS, *supra* note 95, at 97–98; *see also* James Wilson, Speech at a Meeting in Philadelphia (Oct. 6, 1787), *in* COMPLETE BILL OF RIGHTS, *supra* note 95, at 102.

103. AMAR, *supra* note 6, at 319.

104. *Id.*

105. *See* McAffee, *supra* note 63, at 20 ("[T]he federal system itself was actually considered a sufficient guarantor of popular rights by those who drafted the Constitution."); *cf.* Elk Grove Unified Sch. Dist. v. Newdow, 542 U.S. 1, 50 (2004) (Thomas, J., concurring in the judgment) ("Quite simply, the Establishment Clause is . . . a federalism provision—it protects state establishments from federal interference but does not protect any individual right."); Amar, *supra* note 89, at 1205 ("[T]he original Bill of Rights was webbed with structural ideas. Federalism, separation of powers, bicameralism, representation, amendment—these issues were understood as central to the preservation of liberty."). That no state constitutions contained provisions similar to the Ninth or Tenth Amendments underscores the structural nature of the Bill of Rights, AMAR, *supra* note 6, at 327, particularly when viewed alongside the unadopted structural amendments that Madison originally proposed to begin the Bill of Rights. Amar, *supra* note 89, at 1137–46, 1200.

federal government authority to exercise a power that the Constitution actually reserved to the States. The appropriate use of state constitutions as interpretive tools turns on the authority involved—the authority of the federal government vis-à-vis the authority of the states. Indeed, preserving a sphere of exclusive state authority was the bedrock purpose of specifically enumerating the new national government's powers.[106] Disrupting this balance (along with distaste for the decidedly partisan motivation underlying the Alien and Sedition Acts) formed the crux of James Madison's concern when he attacked the Federalist rationale that exercise of a particular power by the states permitted the federal government to exercise similar power.[107]

Thus, while founding-era state constitutions are useful for determining the popular meaning of the words in the Constitution, interpreters must evaluate whether the governmental authority animating the state and federal provisions is the same. If the federal government lacks the authority animating the state provision, the interpreter risks inferring non-enumerated powers for the national government from the existence of state law. In short, interpreters must ensure that their interpretive use of founding-era state constitutions truly is a comparison of apples to apples. Doing so will result in a more credible, more nuanced originalism that reflects a greater respect for federalism.

Consequently, before giving interpretive weight to provisions in founding-era state constitutions, the Court must determine if the state constitutional provision implicates any reserved or prohibited power. If not, the Court may analogize between the state provision and the federal provision, importing the meaning of the state constitutional text to the federal provision as evidence of the founding-era meaning of those words. If the state provision does implicate a reserved power—the police power, for example—respect for federalism requires that similar provisions in the state and national constitutions be given different meanings consistent with federalism's vertical division of governmental authority.[108] An interpretation that equates the state and national constitutional provisions without analyzing the authority underlying the provisions risks "stripp[ing]" the States "of every right reserved."[109]

a. Proper Uses of State Constitutions. Justices have, on several occasions, appropriately looked to state constitutional provisions that have not involved concurrent powers when arguing for a particular interpretation of the Constitution. In *Calder v. Bull*, for example, Justice Paterson looked to state constitutional provisions prohibiting passage of ex post facto laws to give meaning to the federal Ex Post Facto Clause.[110] Similarly, in *Kilbourn v. Thompson*, the

106. *See, e.g.*, THE FEDERALIST NO. 28 (Alexander Hamilton), NOS. 45, 51 (James Madison).

107. *See supra* note 92 and accompanying text.

108. *See supra* section III.A.

109. Madison, *supra* note 92.

110. 3 U.S. (3. Dall.) 386, 396–97 (1798) (opinion of Paterson, J.). Typical of the state provisions Justice Paterson cited is North Carolina's: "That retrospective laws, punishing facts committed before

Court permissibly looked to the legislative immunity provisions contained in the state constitutions to conclude that the federal Speech and Debate Clause operated as a defense to a false imprisonment suit brought against a member of the House of Representatives.[111] In both instances, the comparison between the federal and state provisions does not raise any federalism concerns because the authority to define the powers and privileges of the legislature is not exclusive to the states.

Similarly, state constitutional provisions are relevant to interpreting the Takings Clause of the federal Constitution because eminent domain (subject, of course, to governmental compensation for the taking) is a concurrent power permissibly exercised by both levels of government. In *Richards v. Washington Terminal Co.*, the Court noted that "under the [Fifth] Amendment, *as under state constitutions containing a similar prohibition*, . . . [the legislature] may not confer immunity from action for a private nuisance" amounting to a taking of private property for public use.[112] Justice Thomas, dissenting in *Kelo v. City of New London*, also properly consulted state constitutional provisions containing a "'public use'" requirement to determine the meaning of the same words in the Fifth Amendment.[113] Because both levels of government possess eminent domain authority, federalism is not undermined by comparing takings provisions in the state and national constitutions.

Ultimately, in each of these cases, the Court—without explicitly recognizing the propriety of its comparison—appropriately used founding-era state constitutions without offending the federalist design because both levels of government possessed similar authority with respect to the powers at issue.[114] In short, the Court's comparisons were apt. Madison's fear of undermining the concept of enumerated powers through comparison to state law went unrealized.

b. Use of State Constitutional Provisions Exercising Powers Denied to the Federal Government. While the Court has never articulated a comprehensive theory for when state constitutions form valid interpretive aids, Justices have,

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the existence of such laws, and by them only declared criminal, are oppressive, unjust, and incompatible with liberty; wherefore no ex post facto law ought to be made." N.C. CONST. of 1776, art. XXIV. Because the state constitutions limited the definition of ex post facto laws to laws "referring to crimes, pains, and penalties," the federal prohibition on ex post facto laws, U.S. CONST. art. I, § 10, cl. 1, did not extend to a law impairing the obligation of contracts. *Calder*, 3 U.S. (3 Dall.) at 397 (opinion of Paterson, J). Justice Paterson's use of state constitutional provisions, therefore, was valid because the ban on ex post facto laws contained in the state provisions did not implicate any of the States' reserved powers.

111. 103 U.S. 168, 202–03 (1881).

112. 233 U.S. 546, 553 (1914) (emphasis added); *see also* Sw. Oil Co. v. Texas, 217 U.S. 114, 119 (1910) ("[I]t is to be remembered that [a takings provision] appeared in most of the state Constitutions long before the [Fourteenth] Amendment was adopted, and that principle was accepted everywhere as vital in the American systems of government.").

113. 545 U.S. 469, 512 (2005) (Thomas, J., dissenting).

114. I do not mean to suggest that these two instances are the only proper uses of state constitutions. I discuss them only as examples to illustrate how state constitutions might properly be used.

on occasion, rejected the use of similarly worded state constitutional provisions as interpretive tools when the state provisions involved the exercise of powers prohibited to the national government or reserved to the states.[115] Consequently, this hesitancy to look toward state constitutional provisions is consistent with the theoretical framework for consulting state constitutions that this Note proposes.

In *U.S. Term Limits, Inc. v. Thornton*, the Court rejected the interpretive use of state provisions that addressed a prohibited power.[116] Justice Stevens stated (if only briefly in a footnote) that some state constitutional provisions would not be relevant when interpreting the Constitution.[117] Founding-era state constitutional provisions imposing religious tests on state legislators were irrelevant to determining the Article I qualifications for service in Congress because the Constitution explicitly prohibited religious tests.[118] The two governments possessed different powers regarding their ability to impose qualifications on their legislators, so the state provisions did not inform the meaning of the national Constitution.

The use of state constitutions to interpret the Establishment Clause similarly recognized that state constitutions were inadequate tools of interpretation. Because the Establishment Clause initially applied only to the national government, the states possessed powers with respect to religion that the federal government could not exercise.[119] For example, some founding-era states established official state churches and imposed religious qualifications on holding political office.[120] As a result of this differing authority with respect to state religion, founding-era state practice regarding religious qualifications on holding political office was irrelevant in determining the meaning of the Establishment Clause.[121] Variations in the allocation of authority between the federal

115. In *Myers v. United States*, the Court also rejected the use of state constitutional provisions as interpretive aids. 272 U.S. 52, 118 (1926). *Myers*, however, rejected the use of state constitutions not because they concerned a power denied to the federal government, but because the state constitutions dispersed power among the three branches of state government in a different way than the Constitution distributed power among the legislative, executive, and judicial branches of the federal government. *See id.*

116. 514 U.S. 779, 823–25 n.35 (1995).

117. *Id.* at 825 & n.35.

118. *Id.*; *see also* U.S. CONST. art. VI.

119. McDaniel v. Paty, 435 U.S. 618, 637 (1978) (Brennan, J., concurring); *see also* Elk Grove Unified Sch. Dist. v. Newdow, 542 U.S. 1, 50 (2004) (Thomas, J., concurring in the judgment) (noting that founding-era states established religions).

120. *McDaniel*, 435 U.S. at 637 & nn.11–13 (Brennan, J., concurring).

121. *Id.* at 637 (Brennan, J., concurring). The Court flirted with a similar argument in *Marsh v. Chambers*. 463 U.S. 783 (1983). In deciding the question of whether legislative prayer violated the Establishment Clause, the Court discussed only the state practice of Virginia and Rhode Island. *Id.* at 787 & n.5. Both states had disestablished religion early in their histories yet retained legislative prayer, suggesting that legislative prayer did not violate the Establishment Clause. *Id.* at 787–89. Importantly, the Court noted the inadequacy of looking toward the practice of states with established churches. *Id.* at 787 n.5 ("The practice in colonies with established churches is, of course, not dispositive of the legislative prayer question.").

government and the state governments—the Establishment and Free Exercise Clauses (initially, at least) limited the federal government's authority without imposing similar restrictions on the states—made interpretive consultation of religious practices in the states improper.

Therefore, if the founding-era state constitutional provision does not concern a power explicitly denied to the national government or reserved to the states, then the Court may fully employ the state provision to help determine the meaning of the Constitution without offending federalism. If the state's constitutional provision involves a power prohibited to the national government or reserved to the states, however, careless reliance on that state provision undermines the federalist division of power and raises the fears that Madison voiced in opposition to the Sedition Act.[122]

* * *

Neither the Court nor any scholars have articulated a theoretical framework for when reference to founding-era state constitutions operates as a permissible interpretive technique for determining the meaning of the Constitution. This Part proposed such a theory. Use of this framework to analyze the validity of references to founding-era state constitutions will ensure that constitutional interpretation preserves and protects the benefits of federalism while arriving at a more accurate original meaning analysis.

IV. IMPLICATIONS OF FEDERALISM WHEN USING STATE CONSTITUTIONS AS INTERPRETIVE TOOLS

My criticisms of constitutional interpreters' failure to consider the federalist division of power between the states and the national government when using state constitutions are not merely theoretical. While the Court has rarely described founding-era state constitutions as dispositive of the outcome in a

122. This theory would not necessarily bar future generations from adopting amendments that "retake" reserved powers from the states by parroting the language in state constitutions. Rather, this theory would require something akin to the clear statement rule of the federalism canon in statutory interpretation. *See* Gregory v. Ashcroft, 501 U.S. 452, 460–61 (1991); John F. Manning, *Clear Statement Rules and the Constitution*, 110 COLUM. L. REV. 399, 407–10 (2010). Under the federalism canon of statutory interpretation, courts will not presume that a congressional statute preempts the historic powers of the states, disrupting the delicate federal balance, unless such an intention is "clear and manifest" from the text of the statute. *Gregory*, 501 U.S. at 460–61 (citation omitted). Thus, if Americans intend to provide the national government with authority that had previously been reserved or prohibited, any such amendment should say so explicitly. Of course, one might argue that the presence of language in the Bill of Rights similar or identical to state constitutional language was precisely such an attempt by the framing generation to "carve out" for the national government powers formerly reserved to the states. The Court, however, should require interpretive evidence beyond mere textual similarity before reaching this conclusion. *See supra* note 86. Moreover, this conclusion seems unlikely because none of the early constitutional amendments bestowed power on the national government: the first twelve amendments all functioned to limit the power of the national government and, in the case of the Eleventh Amendment, expand the power of the state governments. *See* AMAR, *supra* note 6, at 316; *see also* U.S. CONST. amend. XI ("The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.").

particular case, the Court's misuse of state constitutions by failing to consider the federalist division of power may have disrupted the national–state balance of power in at least two areas of law: the First Amendment jurisprudence of *Roth v. United States*[123] and *Alberts v. California*,[124] and the Second Amendment jurisprudence of *District of Columbia v. Heller*.[125] Part IV applies the theoretical framework described in Part III to the Court's interpretive use of state constitutions in these two areas to show that the Court improperly relied on state constitutions in a way that risks undermining federalism and grants the national government authority to exercise powers originally reserved to the states.[126]

A. THE FIRST AMENDMENT

The Court, as well as Justices writing separately, has often turned to the founding-era state constitutions to define the scope of the First Amendment and determine the type of speech that the First Amendment protects. In *Roth v. United States* and *Alberts v. California*, the Court addressed whether the First Amendment protected obscene speech. Roth had been convicted under a federal statute criminalizing the use of the mails to circulate obscene materials.[127] Alberts, in contrast, was convicted under a California state obscenity statute for "lewdly keeping for sale obscene and indecent books" and "composing and publishing an obscene advertisement."[128] Upholding both statutes, the Court concluded that obscenity was not protected by the First Amendment.[129] The Court stated that, in 1792, all ten States with state constitutional provisions protecting freedom of expression also criminalized profanity or blasphemy, or both.[130] Although not as many statutes criminalized obscenity, "sufficiently

123. 354 U.S. 476 (1957), *overruled by* Miller v. California, 413 U.S. 15 (1973). Although *Miller* overruled *Roth*, it did not criticize the use of state constitutions in *Roth*. In fact, although *Miller* narrowed the definition of obscenity, 413 U.S. at 24–25, it left intact the conclusion in *Roth* that both the federal and state governments may regulate obscenity without violating the First Amendment. *Id*. at 23. Furthermore, the *Miller* Court's application of the community standard for determining whether speech constitutes obscenity actually recognizes the same federalism concerns that underlie the interpretive misuse of state constitutions in *Roth*. *See id.* at 30–33.

124. 354 U.S. 476 (1957). *Roth* and *Alberts* were companion cases decided in the same opinion.

125. 554 U.S. 570 (2008).

126. Importantly, my discussion of these cases is limited to the Court's use of state constitutions. Other arguments or legal principles may have required precisely the outcome the Court reached in each case. I am not arguing that the cases were wrongly decided (in fact, I think that *Heller* was at least partially correct), nor am I attempting to relitigate or rebrief these cases. Rather, I argue simply that the Court misused state constitutions in its constitutional interpretation. To the extent that the state constitutions were central to the Court's holding, my argument of course challenges the correctness of that holding, but I do not intend for this Note to be a broadside attack on the outcome of these cases. As a consequence, this section identifies the deficiencies in the Court's use of the state constitutions and suggests how the Court could have engaged in an analysis that was more careful and more respectful of federalism.

127. *Roth*, 354 U.S. at 480.

128. *Id.*

129. *Id.* at 481.

130. *Id*. at 482.

contemporaneous evidence" showed that obscenity was likewise outside the scope of the state provisions protecting speech: several states with free speech provisions also criminalized obscenity.[131]

In *Pennekamp v. Florida*, a freedom of the press case, Justice Frankfurter rationalized the First Amendment exceptions for obscenity, or other forms of harmful speech like libel[132] and fighting words,[133] despite the absence of explicit exemptions in the Amendment's text:

> Most State constitutions expressly provide for liability for abuse of the press's freedom. That there was such legal liability was so taken for granted by the framers of the First Amendment that it was not spelled out. Responsibility for its abuse was imbedded in the law. The First Amendment safeguarded the right.[134]

The state constitutions, Justice Frankfurter noted, often couched the free speech right in police power terms, making citizens "'responsible for the abuse of that right.'"[135]

In assuming the validity of comparing the First Amendment to state free-expression provisions, the Court interpreted the First Amendment in a way that undermined the federalist division of authority in the Framers' scheme and intruded upon the states' police power.

1. The Free Expression Provisions in the State Constitutions Exercised a Reserved Power, Specifically States' Power To Protect the Health and Welfare of Their Citizens

To the extent that the free expression provisions in state constitutions preserved the authority of the State to punish libel, slander, or obscenity, or to hold individuals accountable for the effects of incendiary speech, the state constitutions implicated the exercise of powers reserved to the states under the Tenth Amendment. Justice Harlan, who concurred in *Alberts* but dissented in *Roth*, recognized the underlying implications for federalism in the Court's interpretation of the First Amendment. Declining to invalidate the California statute in *Alberts*, Justice Harlan invoked the traditional police power of the State: "Since

131. *Id.* at 483 & n.13. In *Beauharnais v. Illinois*, the Court adopted a similar rationale in concluding that the First Amendment did not protect libel and slander. 343 U.S. 250 (1952). Because many founding-era states criminalized libel despite free speech provisions in their state constitutions, the First Amendment did not protect libelous speech. *Id.* at 255–57 (noting that criminal libel laws did not violate the First Amendment). The Court's interpretation of the free speech right in *Beauharnais* was perfectly reasonable, however, because unlike *Roth, Beauharnais* involved interpretation of the First Amendment *as applied to the states*.

132. *See Beauharnais*, 343 U.S. at 255–57.

133. *See* Chaplinsky v. New Hampshire, 315 U.S. 568, 572 (1942).

134. Pennekamp v. Florida, 328 U.S. 331, 356 (1946) (Frankfurter, J., concurring) (footnote omitted).

135. *Id*. at 356 n.5 (paraphrasing similar language in the constitutions of Massachusetts, New Hampshire, South Carolina, Vermont, and West Virginia).

the domain of sexual morality is preeminently a matter of state concern, this Court should be slow to interfere with state legislation calculated to protect that morality."[136] Conversely, Justice Harlan would have invalidated the federal obscenity statute because the national government lacks the police power.[137] The "interests [that] obscenity statutes purportedly protect are primarily entrusted to the care, not of the Federal Government, but of the States. Congress has no substantive power over sexual morality."[138] Unlike the majority, Justice Harlan recognized the federalism concerns at stake in *Alberts* and *Roth* and permitted the federalist division of power to inform his analysis of these cases.

Justice Harlan's opinion, however, failed to connect these federalism concerns to the majority's use of state constitutional provisions to interpret the First Amendment. Rather than arguing that the First Amendment prohibited the national or state governments from regulating obscenity, Justice Harlan asked whether the national government had the affirmative, substantive power to regulate obscenity under the Postal Power.[139] Essentially, Justice Harlan grazed over the First Amendment issue. His approach was weak. The Tenth Amendment, after all, reserves only those powers "not delegated to the United States by the Constitution nor prohibited by it to the States."[140] The Postal Power is quite clearly delegated to the United States and provides the national government with authority to regulate the mails.[141]

Justice Harlan could have strengthened his argument by focusing on the First Amendment and attacking the majority's use of state constitutions to create a category of speech unprotected from federal regulation by the First Amendment. Regardless of whether an enumerated power would otherwise permit the national government to engage in a certain activity, the national government cannot take any action which the Bill of Rights forbids. At its core, though, Justice Harlan's opinion in *Roth* and *Alberts* makes one very crucial point: the state constitutional provisions permitting regulation of obscenity (as well as libel and fighting words) were exercises of the state's police power to protect the health, safety, and welfare of its citizens. By failing to recognize this distinction, the *Roth* majority allowed the national government to intrude on this exercise of state power.

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136. Alberts v. California, 354 U.S. 476, 502 (1957) (Harlan, J., concurring in the judgment).

137. Roth v. United States, 354 U.S. 476, 504 (1957) (Harlan, J., dissenting).

138. *Id.*

139. *Id.* at 504 (Harlan, J., dissenting) ("Whether a particular limitation on speech or press is to be upheld because it subserves a paramount governmental interest must, to a large extent, I think, depend on whether that government has, under the Constitution, a direct substantive interest, that is, *the power to act, in the particular area involved.*") (emphasis added). The majority had concluded that the federal obscenity statute was a valid exercise of the Postal Power. *Id.* at 492–93 (majority opinion).

140. U.S. CONST. amend. X; *see Roth*, 354 U.S. at 493 ("'If granted power is found [for the national government to act], necessarily the objection of invasion of those rights, reserved by the Ninth and Tenth Amendments, must fail.'" (quoting United Pub. Workers v. Mitchell, 330 U.S. 75, 95–96 (1947)).

141. U.S. CONST. art. I, § 8, cl. 7; *Ex parte* Rapier, 143 U.S. 110, 134 (1892).

2. Respect for Federalism Requires that the First Amendment Free Speech Protections Extend More Broadly than the Protections of the State Constitutions[142]

Respect for the exercise of the police power to regulate obscenity in the state declarations protecting freedom of speech prevents importing similar caveats to the First Amendment's scope of protection. Moreover, an interpretation of the First Amendment that extends to all speech is consistent with the historical record, especially early America's response to the Alien and Sedition Acts.

The Democratic-Republican opposition to the Alien and Sedition Acts demonstrates the gulf between the scope of the First Amendment and the free speech provisions in state constitutions. Arguing in support of the law, the Federalists employed the similar argument that would animate the *Roth* decision 150 years later: because the states possessed authority to regulate state seditious libel, so did the federal government.[143] Both Madison and Jefferson opposed this argument, citing concerns that such reasoning would permit the national government to regulate speech in ways that the Constitution actually reserved to the states.[144]

Both Jefferson and Madison contemplated a different scope to the protections of the First Amendment than the scope of protections found in the free expression provisions of state constitutions.[145] In the Election of 1800, in which the Alien and Sedition Acts were a major issue, the people then endorsed Jefferson's and Madison's view of the First Amendment's applicability to the Alien and Sedition Acts when they punished the Federalists at the polls.[146]

The text of the First Amendment itself suggests that its scope differed from the scope of the state provisions.[147] In contrast to many of the state free

142. My discussion of potential interpretations for the First and Second Amendments in sections IV.A.2 and IV.B.2 is not a full originalist analysis of the meaning of these provisions. That effort exceeds the scope of this Note. Rather, I merely attempt to demonstrate that alternative interpretations more consistent with federalism are not implausible. In any event, the Court's interpretive use of state constitutions in First and Second Amendment jurisprudence would have been strengthened by expressly recognizing the potential difficulties resulting from the exercise of reserved powers in the state constitutional provisions, and explicitly describing how other originalist sources require application of the same meaning despite the federalism concerns.

143. *See* Bybee, *supra* note 87, at 1567 (noting that Federalists argued that the Sedition Act was a "federal analogue of state statutes" punishing libel).

144. *See supra* note 92 and accompanying text.

145. The Kentucky and Virginia Resolutions, penned by Jefferson and Madison, respectively, voiced similar arguments to (somewhat unsurprisingly) those advanced publicly by Jefferson and Madison. James Madison, Virginia Resolutions Against the Alien and Sedition Acts (Dec. 21, 1798), in JAMES MADISON: WRITINGS 589, 589–91 (Jack N. Rakove ed., 1999); Thomas Jefferson, Drafts of the Kentucky Resolutions of 1798 (Nov. 17, 1798), *in* 8 THE WRITINGS OF THOMAS JEFFERSON 289, 289–309 (Paul Leicester Ford ed., 1896). Moreover, the approval of these resolutions by the state legislatures only eight years after the ratification of the First Amendment provides further support that the scope of the First Amendment differed from the scope of the free expression provisions in the state constitutions.

146. *See* Amar, *supra* note 89, at 1135.

147. *Cf.* Harmelin v. Michigan, 501 U.S. 957, 975–78 (1991) (opinion of Scalia, J.) (noting that the absence of a proportionality clause in the Eighth Amendment—a clause expressly contained in many

expression provisions, which permit regulation under the state's police power,[148] the First Amendment reads simply "Congress shall make no law . . . abridging the freedom of speech, or of the press . . . ."[149] Like the Pennsylvania Constitution of 1790, the First Congress could have guaranteed Americans' right to freedom of speech subject to the abuses of the right. It did not, despite taking precisely that approach when drafting the Freedom of Assembly Clause, a neighbor of the Free Speech Clause in the First Amendment.[150] Expressly excluding libel, slander, or obscenity from the protections of free speech, however, simply makes no sense in the context of a provision explicitly addressed to Congress, a government body that, in the absence of a general police power, has no authority to regulate libel, slander, or obscenity in the first place.[151] The text of the amendment itself recognizes the differing scope of the right as codified in the First Amendment and the state constitutions.

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Roth exemplifies the danger of carelessly relying on state constitutional provisions. By looking toward state constitutional provisions that relied on

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founding-era state constitutions—suggested that unlike these state constitutions, the Eighth Amendment lacked a proportionality requirement).

148. *See* PA. CONST. of 1790, art. IX, §7 ("[E]very citizen may freely speak, write and print on any subject, *being responsible for the abuse of that liberty*.") (emphasis added); S.C. CONST. of 1778, art XXXVIII ("No person whatsoever shall speak anything in their religious assembly irreverently or seditiously of the government of this State."); *see also* Pennekamp v. Florida, 328 U.S. 331, 356 & n.5 (1946) (Frankfurter, J., concurring) (noting that many mid-twentieth century state constitutions explicitly subjected the right of free speech to regulation under the police power); Thomas Jefferson, Draft Virginia Constitution (1776) *in* 2 THE ROOTS OF THE BILL OF RIGHTS 243, 243–46 (Bernard Schwartz ed., 1980) ("Printing presses shall be free, except so far as by commission of private injury cause may be given of private action.").

Founding-era constitutions in other states placed police-power limits on other First Amendment freedoms as well. *See* DEL. DECLARATION OF RIGHTS of 1776, § 3 ("That all persons professing the Christian religion ought forever to enjoy equal rights and privileges in this state, unless under colour of religion, any man disturb the peace, the happiness or safety of society."); N.Y. CONST. of 1777, art. XXXVIII ("That the liberty of conscience [of religion], hereby granted, shall not be so construed as to excuse acts of licentiousness, or justify practices inconsistent with the peace or safety of this State."); GA. CONST. of 1777, art. LVI ("All persons whatever shall have the free exercise of their religion; provided it be not repugnant to the peace and safety of the State . . ."); N.H. BILL OF RIGHTS of 1783, art. V ("Every individual has a natural and unalienable right to worship God according to the dictates of his own conscience, and reason . . . provided he doth not disturb the public peace or disturb others in their religious worship.").

149. U.S. CONST. amend. I.

150. *Id.* ("Congress shall make no law . . . abridging . . . the right of the people *peaceably* to assemble . . . .") (emphasis added).

151. *See* Terminiello v. City of Chicago, 337 U.S. 1, 28 (1949) (Jackson, J., dissenting) ("The Federal Government was then a new and experimental authority, remote from the people, and it was supposed to deal with a limited class of national problems. Inasmuch as any breaches of peace from abuse of free speech traditionally were punishable by state governments, it was needless to reserve that power in a provision drafted to exclude only Congress from such a field of law-making.").

Indeed, free speech exceptions for libel and slander were "imbedded in the law." *Pennekamp*, 328 U.S. at 356 (Frankfruter, J., concurring). By arguing that the Framers took these exceptions for granted, however, Justice Frankfruter misplaced the source of law in which they were imbedded: they were imbedded not in the First Amendment, but in state law. *See supra* note 148 and section III.B.1.

reserved police power authority, the Court undercut the benefits of federalism and created precisely the expansion of federal power that Madison feared in his opposition to the Sedition Act. Because the state provisions involved the use of a reserved power, the Court should have examined whether the allocation of governmental authority required applying a different meaning to the First Amendment. This analysis would have shown that, while the First Amendment codified the same free speech right as the state provisions, the scope of that right differed in the federal context.

B. THE SECOND AMENDMENT

Like the *Roth* Court, in *District of Columbia v. Heller*[152] the Court simply assumed the interpretive relevance of state constitutional provisions without considering how federalism might influence the analysis. The *Heller* Court recognized that self-defense was the primary purpose of the right to bear arms, if not necessarily the reason for codification of the right.[153] The Court relied heavily on several founding-era state constitutions that included specific language placing the right to bear arms alongside the right to self-defense.[154] Preratification constitutions of two states, Pennsylvania and Vermont, stated that "the people have a right to bear arms *for the defence of themselves*, and the state . . . ."[155] Moreover, the Court observed, both the Massachusetts Supreme Court[156] and the North Carolina Supreme Court[157] suggested that the right to bear arms in their constitutions embraced self-defense.[158] Finally, many colonial statutes required individuals to carry weapons for "public-safety reasons."[159] *Heller* also examined the language of nine right to bear arms provisions in state constitutions adopted between 1789 and 1820. Of these nine, seven explicitly rooted the right in self-defense.[160] The final two states used language similar to the Massachusetts provision.[161]

Heller used these state provisions to conclude that the Second Amendment

152. 554 U.S. 570 (2008).

153. *Id.* at 599 ("The prefatory clause [of the Second Amendment] does not suggest that preserving the militia was the only reason Americans valued the ancient right; most undoubtedly thought it even more important for self-defense and hunting. But the threat that the new Federal Government would destroy the citizens' militia by taking away their arms was the reason that right—unlike some other English rights—was codified in a written Constitution."); *see also* McDonald v. City of Chicago, 130 S. Ct. 3020, 3048 (2010).

154. *Heller*, 554 U.S. at 584–85 & n.8–9, 586, 600–03; *see also* Eugene Volokh, *State Constitutional Rights To Keep and Bear Arms*, 11 TEX. REV. L. & POL. 191, 205, 206–07 tbl. 1 (2006) (cataloguing state constitutional provisions that contain references to self-defense).

155. *Heller*, 554 U.S. at 600–01 (emphasis in original) (internal quotation marks omitted).

156. Commonwealth v. Blanding, 20 Mass. (3 Pick.) 304 (1825).

157. State v. Huntly, 25 N.C. (3 Ired.) 418 (1843).

158. *Heller*, 554 U.S. at 601–02.

159. *Id.* at 601.

160. *Id.* at 602–03. These seven states were: Kentucky, Ohio, Indiana, Missouri, Mississippi, Connecticut, and Alabama. *Id.* at 602.

161. *Id.* at 602–03.

likewise embraced a right to bear arms in self-defense. Holding otherwise would "treat the Federal Second Amendment as an odd outlier, protecting a right unknown in state constitutions or at English common law, based on little more than an overreading of the prefatory clause."[162]

Like the Court in *Roth*, though, the *Heller* Court simply assumed that these state provisions are relevant without considering whether the law of self-defense resides chiefly with the states under the police power. Consequently, interpreting the Second Amendment requires a more thorough analysis of whether the state constitutions are valid interpretive tools. *Heller* does differ from *Roth*, though, in the depth and quality of its (if often criticized) historical analysis. While *Roth* simply identified the relevant state constitutions and drew its conclusions, the *Heller* opinions—both the majority and the dissents of Justice Stevens and Justice Breyer—marshalled an extensive array of historical evidence.[163]

1. The Right To Bear Arms Provisions in the State Constitutions Implicate the Exercise of a Reserved Power, Specifically the States' Police Power Authority To Protect the Safety of its Citizens

The state constitutions referencing self-defense implicate the police power of the states to protect the health, safety, and welfare of their citizens. By creating a state constitutional right for citizens to bear arms in self-defense, the state really made a choice about how best to protect its citizens from violence and crime.[164] This authority—the ability to make decisions regarding how best to protect a state's citizens—falls squarely within the police power reserved to the states: promoting the "safety of persons and property is unquestionably at the core of the State's police power . . . ."[165] In *United States v. Morrison*, the Court likewise noted that "we can think of no better example of the police power, which the Founders denied the National Government and reposed in the States,

162. *Id.* at 603.

163. *See* Bret Boyce, Heller*,* McDonald *and Originalism*, 2010 CARDOZO L. REV. DE NOVO 2, 2 (noting that *Heller* had been described as a "triumph of originalism" and quoting Dave Kopel proclaiming "we are all originalists now"); David Thomas Konig, *Why the Second Amendment Has a Preamble: Original Public Meaning and the Political Culture of Written Constitutions in Revolutionary America*, 56 UCLA L. REV. 1295, 1302 (2009) (quoting commentators' descriptions of *Heller*'s significance in its thorough, unabashed application of originalism); Cass R. Sunstein, *Second Amendment Minimalism:* Heller *as* Griswold, 122 HARV. L. REV. 246, 246 (2008) (describing *Heller* as the "most explicitly and self-consciously originalist opinon" in the Court's history).

164. *See* Nat'l Rifle Assoc. of Am., Inc. v. City of Chicago, 567 F.3d 856, 859–60 (7th Cir. 2009), *overruled by* McDonald v. City of Chicago, 130 S. Ct. 3020 (2010).

165. Kelley v. Johnson, 425 U.S. 238, 247 (1976); *see also* Gonzales v. Oregon, 546 U.S. 243, 270 (2006) ("[T]he structure and limitations of federalism, which allow the States 'great latitude under their police powers to legislate as to the protection of the lives, limbs, health, comfort, and quiet of all persons.'"(quoting Medtronic, Inc. v. Lohr, 518 U.S. 470, 475 (1996)); United Auto., Aircraft, & Agric. Implement Workers of Am. v. Wis. Emp't Relations Bd., 351 U.S. 266, 274 (1956) ("The dominant interest of the State in preventing violence and property damage cannot be questioned. It is a matter of genuine local concern.").

than the suppression of violent crime and vindication of its victims."[166] Consequently, the states that preserved the right to bear arms in self-defense made a police power judgment that the state could best protect citizens by permitting them to carry their own arms in self-defense.

The nature of public police forces at the time these state provisions were adopted underscores the conclusion that the state provisions referencing self-defense were exercises of the states' police power authority to protect the safety of their citizens. Throughout the nineteenth century, public police forces were largely underdeveloped.[167] They usually protected only the urban cities; outside the cities, citizens enjoyed "virtually no public police protection."[168] Statewide police forces did not exist, and the federal government hired "private guards and detectives for its occasional police work."[169] Even Justice Alito in *McDonald v. City of Chicago* recognized the police-power origins of these provisions in state constitutions, claiming that state constitutional provisions referencing self-defense

> reflected a lack of law enforcement in many sections of the country. In the frontier towns that did not have an effective police force, law enforcement often could not pursue criminals beyond the town borders. Settlers in the West and elsewhere, therefore, were left to "repe[l] force by force when the intervention of society . . . [was] too late to prevent an injury."[170]

Essentially, the states enacted these self-defense-referencing constitutional provisions as alternatives to the establishment of a police force in certain parts of the state. Rather than training and paying police officers to protect the health, safety, and welfare of the citizenry, the states enshrined in their constitutions the citizens' ability to protect themselves.

2. Respect for Federalism Would Prevent the Court from Recognizing Self-Defense as a Purpose of the Second Amendment

An interpretation of the Second Amendment that articulated a purpose for the Amendment other than self-defense would respect state authority and would be

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166. 529 U.S. 598, 618 (2000); *see also* Monroe v. Pape, 365 U.S. 167, 237 (1961) (Frankfurter, J., dissenting) (arguing that Article III jurisdiction assumed that "state courts . . . would remain the primary guardians of that fundamental security of person and property which the long evolution of the common law had secured to one individual as against other individuals"); United States v. E.C. Knight Co., 156 U.S. 1, 11 (1895) ("[T]he power . . . to protect the lives, health, and property of its citizens . . . is a power originally and always belonging to the States . . . .").

167. David A. Sklansky, *The Private Police*, 46 UCLA L. REV. 1165, 1211 (1999).

168. *Id.*

169. *Id.* Perhaps the most famous of the private detectives hired by the federal government was Allan Pinkerton, who provided security for Abraham Lincoln as the president-elect travelled from Springfield, Illinois, to the District of Columbia for his inauguration. *See* DAVID HERBERT DONALD, LINCOLN 277–78 (1995).

170. 130 S. Ct. 3020, 3042 n.27 (2010) (alteration in original) (citation omitted) (quoting District of Columbia v. Heller, 554 U.S. 570, 595 (2008)).

consistent with the historical record. In fact, protecting the delicate balance of power between the states and the national government itself may have been the purpose of the Second Amendment (rather than simply the reason the right was codified, as Justice Scalia suggests).[171] Importantly, however, the purpose of the Second Amendment does not alter the fact that it protected an individual right to bear arms.[172] Essentially, like other provisions of the Bill of Rights, the Second Amendment may have created an individual right for the collective purpose of ensuring that the enumerated powers of the national government do not expand via implication.

First, the text of the Amendment supports this interpretation. As both Justice Scalia and Professor Amar explain, the operative language of the Second Amendment resides in the clause referring to "the people," not the clause referring to "the states," suggesting an individual right.[173] Moreover, an interpretation that reads the Second Amendment as protecting only the ability of states to arm organized military units does not accurately consider the meaning of "the militia" to eighteenth-century Americans.[174] Yet the operative clause inescapably sits between two clauses dealing with the military.[175] The role that the Bill of Rights as a whole plays in securing the federalist balance of power further supports the argument that the Second Amendment secured an individual right for structural purposes.[176]

Second, the Framers' discussion of the Second Amendment and the role that the militia would play in limiting the powers of the national government support a structural purpose for the Second Amendment. In Federalist No. 28, Alexan-

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171. *See Heller*, 554 U.S. 570, 599 (2008). The other historical sources that *Heller* cites in support of a self-defense purpose, namely English law and state court cases, *id.* at 592–95, 610–14, fall short. First, notwithstanding the historical debate surrounding the true purpose of the English right, *see McDonald*, 130 S. Ct. at 3121–22 (Breyer, J., dissenting), the nature of a particular right in English law says nothing about the level of government to which Americans of the ratifying generation assigned the right for safekeeping. *See* AMAR, *supra* note 6, at 105–06; McAffee, *supra* note 63, at 81. Second, many of the state court cases recognizing a purpose of self-defense were not drafted until well into the 1800s. *Heller*, 554 U.S. at 610–14. By then, the founding-era conception of the Militia had begun to erode, replaced with the self-defense justification for the right that blossomed in the Reconstruction Acts. AMAR, *supra* note 6, at 325; *see also McDonald*, 130 S. Ct. at 3039–41.

172. Although recognizing a different purpose for the right would not change the outcome of *Heller* itself, *Heller*'s characterization of the purpose of the right as self-defense had huge implications for *McDonald*'s incorporation of the right. *McDonald* relied heavily on the self-defense purpose of the right to incorporate it against the states. *McDonald*, 130 S. Ct. at 3036. If it is true that self-defense is the purpose of the Second Amendment, then the right is about the relationship between two individuals and neither the state nor the federal government should be allowed to interfere. If, however, the purpose of the right is to protect the balance of power between the states and the national government, then incorporation makes no sense. *See McDonald*, 130 S. Ct. at 3111–12 (Stevens, J., dissenting) (quoting Elk Grove Unified Sch. Dist. v. Newdow, 542 U.S. 1, 45 (2004) (Thomas, J., concurring in the judgment)).

173. *Heller*, 554 U.S. at 592–95; AMAR, *supra* note 6, at 322–26.

174. *See* Amar, *supra* note 89, at 1166–67.

175. *See* AMAR, *supra* note 6, at 322. This fact is also true in many state constitutions, which discuss the right to bear arms alongside military issues. *Id*. at 323.

176. *See supra* notes 99–105 and accompanying text.

der Hamilton argued that the people have "no resource left but in the exertion of that original right of self-defence" when the people's governmental representatives betray their interest.[177] Hamilton's ensuing discussion made clear that his use of "self-defence" referred to the organized resistance of the state militia acting as a check on national power. He continued to discuss not the use of arms by one individual to protect himself against the criminal acts of another, but rather described the importance of a state-organized militia in resisting the tyranny of the national government. Without the organized militia of the individual states, Hamilton wrote, "[t]he citizens must rush tumultuously to arms, without concert, without system, without resource; except in their courage and despair."[178] James Madison expressed a similar role for the state militia in Federalist No. 46.[179] Read in conjunction with the Militia Clause[180] and the views of the authors of *The Federalist*, the Second Amendment confers an individual right for a collective purpose: citizens' ability to exercise in concert their individual right to bear arms for the collective self-defense.[181]

* * *

The *Heller* Court's reliance on founding-era state constitutions to interpret the primary purpose of the Second Amendment as self-defense seems misplaced. The protection of the citizenry falls squarely within the states' police power under the Tenth Amendment. Because the state constitutional provisions relied on a reserved power, the *Heller* Court should have interpreted the purpose of the Second Amendment in a way consistent with the structural differences between the Bill of Rights and the state provisions. It failed to do so. Recognizing the structural role of the Bill of Rights in protecting the federalist balance of power would have prevented the Court from invading the reserved powers of the states.[182]

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177. THE FEDERALIST NO. 28, at 162 (Alexander Hamilton) (Gary Wills ed., 1982). Neither the majority nor dissenting opinions in *Heller* or *McDonald* cite Hamilton's use of the word "self-defence" in *The Federalist No. 28.*

178. *Id.*

179. THE FEDERALIST NO. 46, at 290–91 (James Madison) (Gary Wills ed., 1982).

180. U.S. CONST. art. I, § 8, cl. 16.

181. *See* Amar, *supra* note 89, at 1166–71. Indeed, the failure of the *Heller* dissents to recognize the individual right (if for a collective purpose) is my chief complaint with those opinions.

182. This Note focused mainly on the use of founding-era state constitutions to interpret the original eighteenth century meaning of a constitutional provision as it applied to the national government. By now, however, the reader has probably recognized that adoption of the Fourteenth Amendment, combined with the need to determine precisely how the Bill of Rights applies to the states, complicates matters. For example, if the First Amendment really protects obscenity as well as political speech, then incorporation of the First Amendment through the Fourteenth would have negated the states' ability to regulate any such obscene speech. Such an interpretation of the Fourteenth Amendment seems unlikely. *See* Beauharnais v. Illinois, 343 U.S. 250, 293 (1952) (Jackson, J., dissenting) ("[T]he men who sponsored the Fourteenth Amendment in Congress, and those who ratified it in the State Legislatures, knew of such provisions then in many of their State Constitutions. Certainly they were not consciously canceling them or calling them into question, or we would have some evidence of it.").

Consequently, the application of my theory would require the language of the First Amendment to bear two different meanings: one meaning as originally applied to the federal government and another

CONCLUSION

The resurgence of originalism in the 1980s has directed attention to founding-era constitutions as a source of constitutional interpretation. Because the Constitution denies some powers to the national government that the states may exercise, this interpretive approach risks undermining federalism if the state provision relies upon an exercise of one of the powers reserved to the states or prohibited to the national government. When courts assume such provisions have interpretive value, a power that the Constitution never granted to the national government may nevertheless be imported into the Constitution. An interpretive theory for the use of state constitutions that recognizes this risk will strengthen respect for federalism relative to the ad hoc, inconsistent way that interpreters have previously used state constitutions.

When the Framers designed our federalist system, they were trying something new. It has, no doubt, been a success. Even if the localization of certain governing decisions no longer seems necessary today, this design has contributed to the longevity of both the nation and the Constitution. It has permitted experimentation in governance and expanded the marketplace of ideas. It has empowered communities and ensured that most government remains local, close to home, where Americans' scrutiny is greatest. The theory for using state constitutions as interpretive tools described in this Note, which considers the federalist division of governmental authority when determining the validity comparing state and federal constitutional provisions, strengthens the Framers' innovation and ensures that the powers of the national government remain specifically enumerated.

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as applied to the states through the Fourteenth Amendment. The Court, however, has consistently rejected this "two-track" approach to incorporation. McDonald v. City of Chicago, 130 S. Ct. 3020, 3046, 3048 (2010). The theory for the interpretive use of state constitutions articulated in this Note might support the Court giving the two-track approach, for which Justice Harlan so forcefully argued, *see, e.g.*, Mapp v. Ohio, 367 U.S. 643, 678–80 (1961) (Harlan, J., dissenting), a second look.

Professor Amar offers another possibility for reconciling the potential dissonance between the meaning of the Bill of Rights as originally applied to the national government and the meaning as applied to the states through the Fourteenth Amendment. According to Professor Amar, the Fourteenth Amendment would operate to alter the meaning of the Bill of Rights as applied to both the federal government and the states: the Fourteenth Amendment "incorporated core elements of the Bill of Rights while at the same time refining and redefining the Founders' text." AMAR, *supra* note 6, at 390.

A full exploration of how this Note's theory for the interpretive use of founding-era state constitutions would influence the debate surrounding incorporation is beyond the scope of this Note. This footnote merely flags the issue for future scholarly thought.