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ORIGINALISM AND SECOND-ORDER *IPSE DIXIT* REASONING IN *CHISHOLM V. GEORGIA*

D. A. JEREMY TELMAN*

ABSTRACT

This Article presents a new perspective on the Supreme Court's constitutional jurisprudence during the Early Republic. It focuses on what I am calling second-order *ipse dixit* reasoning, which occurs when Justices have to decide between two incommensurable interpretive modalities. If first-order *ipse dixit* is unreasoned decision-making, second-order *ipse dixit* involves an unreasoned choice between or among two or more equally valid interpretive options. The early Court often had recourse to second-order *ipse dixit* because methodological eclecticism characterized its constitutional jurisprudence, and the early Court established no fixed hierarchy among interpretive modalities.

Chisholm, the pre-Marshall Court's most important constitutional decision, illustrates second-order *ipse dixit* reasoning. The Justices issued their opinions *seriatim*, and they did not engage with one another's reasoning. As a result, the Court issues a ruling, but there is no agreement as to the basis for that ruling. Rather, the Justices present us with five separate legal essays in which they ruminate on the nature of sovereignty and its relationship to the jurisdiction of the federal courts.

Scholarly engagement with the constitutional jurisprudence of the early Court has gained new urgency because originalist scholars have recently claimed that originalism informed the early Court's approach to constitutional interpretation. This Article finds that contemporary filters do not capture the essence of eighteenth-century constitutional adjudication. Like modern textualists, the Justices of the *Chisholm* Court begin their inquiries with an examination of the constitutional text. However, the constitutional text rarely provided clear constraints on the early Court's discretion because, to borrow language from New Originalists, their cases arose in the "zone of construction" where original meaning "runs out." Justices chose among plausible arguments about the Constitution's meaning. At key points, the Justices simply declared what the law was. They did so, not without justification, but also not based on evidence of the Framers' intent or the original meaning of the constitutional text.

CONTENTS

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I. INTRODUCTION: THE QUESTION OF ORIGINALISM IN THE EARLY REPUBLIC

Most scholarship on originalism, written both by originalists and non-originalists, acknowledges that the movement was a response to the perceived excesses of the Warren and Burger Courts.[1] Until recently, most originalists recognized that originalism is a twentieth-century invention, not without its historical antecedents, but not realized as a comprehensive approach to interpretation until about 200 years after

[1] *See, e.g.*, Robert N. Clinton, *Original Understanding, Legal Realism and the Interpretation of "This Constitution,"* 72 IOWA L. REV. 1177, 1261 (1987) (noting that after the 1950s, "judicial conservatives became uncomfortable with the naked exercises of raw judicial power employed by a federal judiciary that had come to accept the realists' vision of the judicial role"); Thomas B. Colby & Peter J. Smith, *Living Originalism*, 59 DUKE L.J. 239, 247 (2009) (explaining that the "sweeping decisions of the Warren Court" led conservatives to insist that "the Constitution be interpreted to give effect to the intent of the framers"); Stephen M. Griffin, *Rebooting Originalism*, 2008 U. ILL. L. REV. 1185, 1188 (2008) (observing that originalism "was driven by concerns that the Warren and Burger Courts had gone too far," particularly in the realms of substantive due process and equal protection); Robert Post & Reva Siegel, *Originalism as a Political Practice: The Right's Living Constitution*, 75 FORDHAM L. REV. 545, 550–54 (2006) (describing modern conservative jurisprudential thought as a response to the judicial activism of the liberal Warren Court); Lee Strang, *The Most Faithful Originalist?: Justice Thomas, Justice Scalia, and the Future of Originalism*, 88 U. DET.-MERCY L. REV. 873, 881 (2011) (describing originalism as a "subversive movement" and acknowledging that "[o]riginalist arguments first appeared in modern form in the 1970s"). Robert Bork dates the movement away from originalism back to the *Dred Scott* decision. ROBERT BORK, THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW 28–32 (1990) (crediting *Dred Scott* with inventing the concept of substantive due process).

the Framing.[2] In his charming and candid defense of his own version of originalism, Justice Scalia acknowledged as much:

> It would be hard to count on the fingers of both hands and the toes of both feet, yea, even on the hairs of one's youthful head, the opinions that have in fact been rendered not on the basis of what the Constitution originally meant, but on the basis of what the judges currently thought it desirable for it to mean.[3]

Some early originalists claimed that constitutional adjudication before the New Deal was largely informed by originalist instincts.[4] Critical literature quickly undermined that claim,[5] and so-called New Originalists, writing since the 1990s, largely abandoned it.[6]

Recently, in Senate testimony in support of the nomination of Neil Gorsuch to succeed Justice Scalia on the Supreme Court, originalist scholar Lawrence Solum observed: "For most of American history, originalism has been the predominate view of constitutional interpretation."[7] Increasingly, originalists have begun to echo Solum's claim.[8]

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[2] *See* Lorianne Updike Toler et al., *Pre-"Originalism,"* 36 HARV. J.L. & PUB. POL'Y 277, 287 (2012).

[3] Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. Rev. 849, 852 (1989).

[4] *See, e.g.*, RAOUL BERGER, GOVERNMENT BY JUDICIARY: THE TRANSFORMATION OF THE FOURTEENTH AMENDMENT 373–79 (1977) (characterizing Justice John Marshall as a strict constructionist who attempted to give effect to the Framers' original intent); BORK, *supra* note 1, at 22–24 (arguing that Justice Marshall's opinion *Marbury v. Madison* was motivated by a desire to preserve the Constitution's original purposes); CHRISTOPHER WOLFE, THE RISE OF MODERN JUDICIAL REVIEW: FROM CONSTITUTIONAL INTERPRETATION TO JUDGE-MADE LAW (1977) (contrasting the nineteenth-century tradition of judicial "interpretation" with judicial "legislation" beginning in the *Lochner* era).

[5] *See, e.g.*, Clinton, *supra* note 1, at 1220 (concluding that "originalist interpretation . . . constituted neither a predominant nor exclusive interpretive methodology" in early constitutional adjudication); H. Jefferson Powell, *The Original Understanding of Original Intent*, 98 HARV. L. REV. 885, 906–07 (1985) (pointing out the Federalists' view that the intentions of the drafters of the Constitution would not be legally relevant because they were "mere scriveners" appointed to draft an instrument for the people).

[6] *See, e.g.*, Randy E. Barnett, *The Ninth Amendment: It Means What It Says*, 85 TEX. L. REV. 1, 6 (2006) ("The idea of originalism as an exclusive theory, as *the* criterion for measuring constitutional decisions, emerged only in the 1970s and 1980s."); Randy E. Barnett, *An Originalism for Nonoriginalists*, 45 LOY. L. REV. 611, 611–12 (1999) (dating the advent of originalism to the writings of Edwin Meese and Robert Bork); Keith E. Whittington, *The New Originalism*, 2 GEO. J.L. & PUB. POL'Y 599, 599 (2004) (conceding that, for much of United States history, originalism "was not a terribly self-conscious theory of constitutional interpretation").

[7] *Hearings on Nomination of the Honorable Neil M. Gorsuch to be an Associate Justice of the Supreme Court of the United States*, at 4 (Mar. 23, 2017) (statement of Lawrence B. Solum).

[8] *See, e.g.*, J. HARVIE WILKINSON III, COSMIC CONSTITUTIONAL THEORY: WHY AMERICANS ARE LOSING THEIR INALIENABLE RIGHT TO SELF-GOVERNANCE 34 (2012) (claiming that Marshall "routinely displayed originalist tendencies"); Steven Calabresi, *The Tradition of the Written Constitution, Text, Precedent, and* Burke, 57 ALA. L. REV. 635, 646 (2006)

In this Article, I show that such claims are misleading in two ways. First, their authors define originalism too broadly, characterizing as originalist any opinion that, at some point, invokes the original meaning of the text or the original intent of the Framers. By this definition, almost anybody could be considered an originalist. Non-originalists do not regard the Constitution as an inconvenient speed bump impeding the delivery of their partisan version of justice. In an uncharacteristic, non-combative moment, Justice Scalia conceded that most non-originalists are moderate and that little separates a moderate non-originalist from his own "faint-hearted" originalism.[9] Indeed, many scholars now stress the commonalities uniting originalist and non-originalist approaches.[10] Beginning with an attempt to discern the original meaning of the Constitution is a methodological commonality that unites originalists and non-originalists.[11] The fact that eighteenth-century opinions reference original meaning does not make them originalist any more than do similar references in contemporary opinions by Justices who think that the Constitution protects a fundamental right to privacy in the contexts of family planning and same-sex marriage.[12]

(characterizing Marshall's opinions in *Gibbons* and *McCulloch* as an "attempt at a textual and originalist interpretation"); Michael Stokes Paulsen, *The Irrepressible Myth of* Marbury, 101 MICH. L. REV. 2706, 2725 (2003) (seeing originalist textualism as implicit in Marshall's opinion in *Marbury*). John McGinnis and Michael Rappaport are a bit slippery on this issue. They begin their book with a quotation from James Madison in support of the claim that "Originalism . . . has been an important principle of constitutional interpretation since the early republic." Their language ("an important principle") suggests that it is but one of many, but they go on to associate that principle with the originalism of Justices Scalia and Thomas, for whom it is not merely one of many. JOHN O. MCGINNIS & MICHAEL B. RAPPAPORT, ORIGINALISM AND THE GOOD CONSTITUTION 1 (2013) [hereinafter MCGINNIS & RAPPAPORT, ORIGINALISM AND THE GOOD CONSTITUTION]. Indeed, a few pages later, they write of originalism's "resurgence in the latter part of the twentieth century," as if Justice Thomas's originalism were the same as Madison's originalism. *Id*. at 7. Later, they assert that the Marshall Court "largely articulated an original meaning approach." *Id*. at 137 (citing WOLFE, *supra* note 4, at 41–63). They also accept Howard Gilman's argument that "originalism was the standard mode of constitutional interpretation until the Progressive Era." *Id.* at 138 (citing Gillman, *The Collapse of Constitutional Originalism and the Rise of the Notion of the "Living Constitution" in the Course of American State-Building*, 11 STUDIES IN AM. POL. DEV. 191, 205–09 (1997)). In an endnote, they state that originalism remained the "dominant philosophy of interpretation" into the early twentieth century. *Id*. at 259 n.36.

[9] Scalia, *supra* note 3, at 862.

[10] *See, e.g.*, JACK BALKIN, CONSTITUTIONAL REDEMPTION: POLITICAL FAITH IN AN UNJUST WORLD (2011) [hereinafter BALKIN, CONSTITUTIONAL REDEMPTION] (arguing that constitutional interpretation should aid in the realization of the Constitution's overarching goal of a more perfect union); JACK BALKIN, LIVING ORIGINALISM (2011) (reconciling originalism and living constitutionalism through a "text and principle" approach); Colby & Smith, *supra* note 1 (arguing that originalist methodology has adapted and changed in much the way that living constitutionalism describes).

[11] Non-originalists supplement historical evidence with other interpretive tools, including: "history, tradition, precedent, purpose and consequence." STEVEN BREYER, ACTIVE LIBERTY 8 (2005); *see also* DANIEL A. FARBER & SUZANNA SHERRY, JUDGMENT CALLS 6 (2009) (advocating judicial restraint through adherence to precedent, process constraints, and internalized norms).

[12] Some self-styled originalists have offered defenses of Supreme Court decisions that have traditionally been treated as the poster children of non-originalism. Jack Balkin provides an

Second, these originalists rely on cherry-picked evidence and invocations of the Framers' intentions as confirmations that the early Court was committed to a fully-developed originalist methodology. As Randy Barnett, a leading New Originalist scholar, has pointed out, the early Court at times relied on "counterfactual hypothetical intentions of the [F]ramers."[13] Gestures towards the Framers' intentions become the sleight of hand through which the Justices obscure other interpretive modalities, such as appeals to natural law or pragmatic considerations. Some early court decisions preface their *ipse dixit* (conclusory) judgments with invocations of original intent, thus masking subjective opinions with rhetorical appeals to authority.[14] Often, when eighteenth-century judges reference original meaning or intention, they actually pay no mind to evidence of either, and generally they have no choice in the matter, because evidence of original meaning or intent was scant or anecdotal until the advent of originalist scholarship in the last third of the twentieth century.[15]

In what follows, I show that the modern distinction between originalism and non-originalism does not really capture the nature of constitutional adjudication in the *Chisholm* Court. Part II lays out four frameworks that inform the Article's analysis of *Chisholm*: (1) the rather malleable concept of "originalism;" (2) non-hierarchical interpretive pluralism; (3) the eighteenth-century practice of issuing opinions *seriatim*; and (4) what I call second-order *ipse dixit* reasoning. Part III examines the opinions in *Chisholm v. Georgia*[16] in detail. *Chisholm* was the most important constitutional case that the Court decided in the eighteenth-century, and it illuminates the early Court's interpretive methodologies. In *Chisholm*'s multiple opinions, we see various

originalist defense of abortion rights. Jack Balkin, *Abortion and Original Meaning*, 24 CONST. COMMENT. 291 (2007) [hereinafter Balkin, *Abortion*]. Will Baude contends that originalist reasoning informed Justice Kennedy's majority opinion in *Obergefell v. Hodges.* William Baude, *Is Originalism Our Law?*, 115 COLUM. L. REV. 2349, 2382 (2015) [hereinafter Baude, *Is Originalism Our Law?*]; *see also* Steven G. Calabresi & Hannah M. Begley, *Originalism and Same-Sex Marriage*, 70 U. MIAMI L. REV. 648 (2016) (concluding that state laws that prohibit same-sex marriage violate the original meaning of the Fourteenth Amendment). Most originalists do not think that the Constitution provides a basis for either abortion rights or same-sex marriage. Originalist Justices Scalia and Thomas reject the idea that the Constitution as originally understood protects a right to privacy in the context of reproductive rights or a right to same-sex marriage. *See*, *e.g.*, Obergefell v. Hodges, 135 S. Ct. 2584, 2632–37 (2015) (Thomas, J., dissenting) (maintaining that the Constitution as an originalist matter, provides no basis for the recognition of a right to same-sex marriage); *id*. at 2627–28 (Scalia, J., dissenting) (maintaining that the original meaning of the Fourteenth Amendment could not provide a basis for prohibiting bans on same-sex marriages); Gonzalez v. Carhart, 550 U.S. 124, 169 (2007) (Thomas, J., with Scalia, J., concurring) (reiterating the view that "the Court's abortion jurisprudence . . . has no basis in the Constitution").

[13] *See* Randy E. Barnett, *The People or the State?*, Chisholm v. Georgia *and Popular Sovereignty*, 93 VA. L. REV. 1729, 1744 (2007) [hereinafter Barnett, *The People or the State?*] (naming *Dred Scott* and *Hans v. Louisiana* as examples of this rhetorical strategy).

[14] *See* Toler et al., *supra* note 2, at 281 ("[T]hose who have studied anecdotal evidence have largely taken Justices' claims at face value, without discovering whether the Justices' claimed and practiced methodology align."); *id*. at 325–26 (reiterating this conclusion).

[15] *See* Clinton, *supra* note 1, at 1213 (finding it unsurprising that originalism did not predominate in early constitutional jurisprudence "in light of the general unavailability at that time of primary historical materials necessary to undertake originalist research").

[16] 2 U.S. (2 Dall.) 419 (1793).

interpretive methodologies at work, side by side. The Justices barely acknowledge rival approaches and key judgments take place, as if it were, off-stage. The Justices frame the issue in *Chisholm* differently, based on second-order *ipse dixit* decisions, about what considerations are relevant to the resolution of the controversy. Part IV concludes with an assessment of the lasting importance of the precedents for judicial reasoning established during the Early Republic.

II. FRAMEWORKS

Before we delve into the interpretive techniques that inform the opinions of the *Chisholm* Court, this Part introduces four frameworks that I apply to the Court's five opinions: (1) originalism, (2) non-hierarchical interpretive pluralism, (3) *seriatim* opinions, and (4) second-order *ipse dixit* opinions. While Section II.A ultimately concludes that originalism does not provide the best perspective through which to view the work of the early Court, the piece neither supports nor opposes originalism as an approach to contemporary problems of constitutional interpretation. Originalism can make, and has made, many contributions to our understanding of the Constitution, and such contributions retain their validity regardless of whether originalism helps describe the workings of the early Court.

In Section II.B, I describe the early Court's approach to constitutional adjudication, which was non-hierarchical interpretive pluralism. That is, the Court used many different interpretive modalities: textualism, intentionalism, purposivism (teleology), structuralism, and approaches informed by historical and legal precedent, pragmatism, logic, and common sense. The Justices established no hierarchy among these approaches, but made use of whatever interpretive modality seemed most appropriate to the occasion.[17]

Pluralism was very much in evidence in the pre-Marshall Court, because, as discussed in Section II.C, the Justices presented their opinions *seriatim*. Early opinions featured no majority, concurring, or dissenting opinions.[18] Each Justice wrote for and reasoned for himself.[19] The Justices did not engage with or consider one another's arguments.[20] The separate opinions displayed different interpretive modalities, and each opinion could command equal dignity as a legal precedent.

The Justices' non-hierarchical, pluralist approach to interpretation, coupled with *seriatim* opinions, meant that second-order *ipse dixit* reasoning, discussed in Section II.D, bracketed the legal opinions of the early Court. Each Justice presented a legal opinion that was a world unto itself. Each Justice chose an interpretive framework that guided his legal reasoning. While the legal reasoning was, at times, brilliant, the Justices made no arguments for or against the frameworks within which they reasoned. Whatever might be the normative arguments for particular approaches to constitutional adjudication today, Justices of the early Court applied common-law techniques to constitutional adjudication. Their interpretive methodologies retain a kinship with but are not reducible to either modern-day originalism or living

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[17] *See generally id.*

[18] Ronald D. Rotunda, *The Fall of Seriatim Opinions and the Rise of the Supreme Court*, VERDICT (Oct. 9, 2017), https://verdict.justia.com/2017/10/09/fall-seriatim-opinions-rise-supreme-court.

[19] *Id.*

[20] *Id.*

constitutionalism. Moreover, second-order *ipse dixit* decisions established the parameters within which legal interpretation occurred and set the stage for the Justices' public interpretive acts, their legal opinions.

A. Originalism and the Supreme Court in the Early Republic

Today, the term "originalism" encompasses an extended family of methodological approaches.[21] Some originalists welcome the term's elasticity, but self-proclaimed originalists sometimes challenge others' claims to belonging within the originalist fold.[22]

In order to mitigate the vagueness of the term, I have adopted Larry Solum's definition of originalism, comprising two components. First, the "fixation thesis" affirms that the meaning of each constitutional clause "is fixed at the time [it] is framed and ratified."[23] Second, the "constraint principle" stands for the view that the meaning

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[21] One critic of originalism has identified seventy-two different theoretical strains within the originalist camp. Mitchell N. Berman, *Originalism Is Bunk*, 84 N.Y.U. L. REV. 1, 14 (2009); *see also* Thomas B. Colby, *The Sacrifice of the New Originalism*, 99 GEO. L.J. 713, 719–20 (2011) (listing various strains within originalism, including original intent, original meaning, subjective and objective meaning, actual and hypothetical understanding, standards and general principles, differing levels of generality, original expected application, original principles, interpretation, construction, normative and semantic originalism); James E. Fleming, *Jack Balkin's Constitutional Text and Principle: The Balkinization of Originalism*, 2012 U. ILL. L. REV. 669, 670 (2012) (arguing that originalists are united only in their rejection of moral readings of the Constitution).

[22] This is most manifest in the responses to Jack Balkin's originalism. *See, e.g.*, Larry Alexander, *The Method of Text and ?: Jack Balkin's Originalism with No Regrets*, 2012 ILL. L. REV. 611 (2012) (characterizing Balkin's "text and principle" approach as yielding the same results as non-originalism); Fleming, *supra* note 22 (pointing out the similarities between Balkin's approach and Dworkin's "moral reading" of the Constitution and predicting that originalism might split into warring camps); John O. McGinnis & Michael B. Rappaport, *The Abstract Meaning Fallacy*, 2012 ILL. L. REV. 737 (2012) (rejecting Balkin's premise that constitutional provisions have an abstract meaning); Lawrence B. Solum, *Faith and Fidelity: Originalism and the Possibility of Constitutional Redemption*, 91 TEX. L. REV. 147 (2012) (expressing doubt as to whether Balkin's progressive image of constitutional redemption can be reconciled with fidelity to the constitutional text). Similarly, Eric Segall, a prominent critic of originalism, claims that his work furthers the project of early originalists like Raoul Berger, Robert Bork and Lina Graglia, because he, like them, focuses on judicial restraint. Segall criticizes originalists who think activist judges can determine original meaning and overturn legislation enacted through democratic processes. *See* Eric J. Segall, *Judicial Engagement, New Originalism, and the Fortieth Anniversary of "Government by the Judiciary,"* FORDHAM L. REV. ONLINE (2017) (arguing that contemporary originalism departs from classic originalism and from early jurisprudential practice in calling for vacation of precedent absent evidence of clear error).

[23] Lawrence B. Solum, *Originalism and the Unwritten Constitution*, 2013 U. ILL. L. REV. 1935, 1941 (2013) [hereinafter Solum, *Originalism and the Unwritten Constitution*]. The implications of Jonathan Gienapp's work on the fixation thesis have not yet emerged. Gienapp contends that the Framers did not think of the Constitution as fixing meaning in 1789, but that they came to do so over the course of the 1790s. JONATHAN GIENAPP, THE SECOND CREATION: FIXING THE AMERICAN CONSTITUTION IN THE FOUNDING ERA (2018). However, originalists who adhere to the fixation thesis can, consistent with Gienapp's argument, do so based on fidelity to how the Framers came to think of the Constitution in the 1790s or based on normative theory untethered to the accidents of history.

of the constitutional text should constrain those who interpret, implement, and enforce constitutional doctrine.[24] That is, originalists seek to find the original meaning and, having found it, treat it as dispositive of constitutional disputes.

Solum's definition leaves room for a great deal of variation among originalists.[25] However, if originalism is to have any bite[26]—if the concept is actually to help us to distinguish among modalities of constitutional adjudication—Solum's two principles are key. Originalists can, and often do, disagree on how particular cases ought to be decided,[27] and some originalists refuse to comment upon particular cases, reluctant to permit such details to interfere with the elaboration of their theoretical models.[28] All judges begin with the constitutional text,[29] but what distinguishes originalists from non-originalists is that originalists believe that, where original meaning is clear, there is no need for further judicial inquiry.

Non-originalists tend to be far more skeptical about textual clarity and thus about the text's ability to fix meaning. The Constitution does not, as Chief Justice Marshall put it, have "the prolixity of a legal code."[30] Instead, it features what Justice Brandeis called "majestic generalities,"[31] such as "equal protection of law" and "cruel and unusual punishment," to which the Framers may have expected later generations to assign content. As a result, non-originalists find that the constitutional text often does

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[24] Solum, *Originalism and the Unwritten Constitution*, *supra* note 23, at 1942.

[25] James Fleming finds that this characteristic of originalism renders it a "family of theories" rather than a coherent approach to constitutional theory. James E. Fleming, *The Inclusiveness of the New Originalism*, 82 FORDHAM L. REV. 433, 435 (2013).

[26] *See* William Baude & Stephen Sachs, *Originalism's Bite*, 20 GREENBAG 2D 103, 107–08 (2016) (specifying that originalism's bite requires following our original Constitution as *lawfully* changed, and listing Supreme Court opinions that likely do not meet this standard).

[27] *See* D. A. Jeremy Telman, *Originalism: A Thing Worth Doing . . .*, 42 OHIO N. U. L. REV. 529, 548 & nn.131–33 (2016) [hereinafter Telman, *Originalism*] (providing examples of basic questions that divide originalist scholars and of cases in which Justices Scalia and Thomas, both originalists, came to different conclusions or concurred with one another based on completely different reasoning).

[28] *See* Baude & Sachs, *supra* note 26, at 108 ("In our theoretical work we've tried to avoid getting sucked into specific historical or doctrinal controversies, as that might detract from our arguments about *theory*."). Larry Solum and Lee Strang are two additional examples of originalist scholars who, despite voluminous writings, rarely apply their theories to specific cases.

[29] *See, e.g.*, Berman, *supra* note 21, at 24–25 (averring that all non-originalists "explicitly assign original meaning or intentions a significant role in the interpretive enterprise"); Paul Brest, *The Misconceived Quest for the Original Understanding*, 60 B.U. L. REV. 204, 236 (1980) (noting that even nonoriginalists accord "presumptive weight to the text and original history"); David A. Strauss, *The Supreme Court, 2014 Term—Foreword: Does the Constitution Mean What It Says?*, 129 HARV. L. REV. 1, 4 (2015) ("It is never acceptable to announce that you are ignoring the text . . . .").

[30] McCulloch v. Maryland, 17 U.S. 316, 407 (1819).

[31] *See* W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 639 (1943) (writing with trepidation of the judge's task of translating majestic generalities into concrete restraints on state officials).

not significantly bind judicial discretion.[32] Even when the text is clear, non-originalists do not think that constitutional interpreters need be bound absolutely to original meaning.[33]

It requires considerable work of translation to apply any version of contemporary originalism to the constitutional jurisprudence of the Early Republic. Because the Constitution was the first of its kind, there was no consensus about the interpretive method or methods appropriate to this unique document.[34] The Justices nevertheless undertook constitutional interpretation without much discussion of the appropriate methodology for doing so.[35] Faced with specific questions of constitutional interpretation on which the Framers themselves were sharply divided, the early Justices made interpretive choices that were not dictated by the Constitution itself and were constrained, but not determined by general interpretive canons.[36] The Justices were not far enough removed from the time of the founding for there to be occasion to introduce the notion of a living constitution, but, as Jonathan Gienapp's work indicates, the Framers did not subscribe to the notion that the Constitution could have a fixed meaning and purpose in 1789.[37] That idea slowly took root during debates over the Constitution's meaning in the 1790s.[38]

As we shall see, in the Early Republic, constitutional adjudication often took place in what contemporary New Originalists call the "zone of construction"[39] in which original meaning "runs out."[40] That is, when the early Supreme Court faced

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[32] *See, e.g.*, Strauss, *supra* note 29, at 59–60 (highlighting the difference between the Constitution's "majestic generalities" and technical provisions and noting that the former are treated as statements of general principles and not as binding authority).

[33] *See* Brest, *supra* note 29, at 237 (observing that nonoriginalists treat text and original history as presumptively binding and limiting but not as dispositive).

[34] *See, e.g.*, Kurt T. Lash, *Originalism All the Way Down*?, 30 CONST. COMMENT. 149, 159–61 (2014) [hereinafter Lash, *Originalism All the Way Down?*] (rejecting the notion that interpretive methodologies appropriate to state constitutions could be applied to the federal Constitution and stressing ways in which the unique nature of the latter called for different interpretive approaches); Caleb Nelson, *Originalism and Interpretive Conventions*, 70 U. CHI. L. REV. 519, 560–78 (2003) (discussing different interpretive traditions at the time of the Framing).

[35] *See generally* Chisholm v. Georgia, 2 U.S. (2 Dall.) 419 (1793).

[36] *See* Lash, *Originalism All the Way Down?*, *supra* note 34, at 154–65 (describing methodological heterodoxy in constitutional interpretation at the time of the drafting and ratification of the Constitution and during the Early Republic).

[37] GIENAPP, *supra* note 23, at 1.

[38] *See id.* at 1–19 (introducing his thesis that the conception of the Constitution as fixed was not inevitable and was developed in the course of debates among the Founders in the 1790s).

[39] *See* Keith Whittington, *Constructing a New American Constitution*, 27 CONST. COMMENT. 119, 123 (2010) (arguing that once interpretive tools are exhausted, constitutional decision-makers operate within a zone of construction, where they undertake "a particularly political task, a creative task involving normative choices in a realm of constitutional indeterminacies").

[40] *See, e.g.*, Randy E. Barnett, *Interpretation and Construction*, 34 HARV. J.L. & PUB. POL'Y 65, 69 (2011) (acknowledging that the meaning of the Constitution sometimes runs out and that

constitutional issues, those issues had never been ruled on before (cases of "first impression"), and the constitutional text provided no clear solutions. In such circumstances, even today, the lines between originalism and non-originalism are fuzzy.[41]

In the eighteenth-century, the meta-interpretive frame in which constitutional interpretation occurred was itself within the zone of construction. By "meta-interpretive," I mean that the Justices addressed subjects of interpretation that also provided the framework for resolving other interpretive issues.[42] Meta-interpretive frames establish the parameters within which constitutional decision-makers can resolve particular interpretive issues.[43] In *Chisholm*, for example, that subject was the question of sovereignty.[44] Because the Framers disagreed about the theory of sovereignty informing the Constitution, originalism cannot resolve these meta-interpretive issues. Constitutional decision-makers must resort to sources of authority other than the Constitution's original meaning to resolve them. I have argued elsewhere that differences between originalists and non-originalists may amount to disagreements about how often original meaning runs out.[45] In the eighteenth-century, because interpretation took place within a non-originalist meta-interpretive frame, original meaning ran out before interpretation began.[46]

B. Non-Hierarchical Interpretive Pluralism

The Constitution is a unique document. During the Framing and the Early Republic there were no fixed rules for the interpretation of a written constitution.[47] Caleb Nelson elaborates:

> Did such a document trigger the rules of interpretation applicable to an ordinary statute? To a treaty? To a contract? Might different aspects of the Constitution implicate different sets of preexisting conventions, so that a hybrid approach was appropriate? Could special canons of construction, not applicable to any ordinary legal documents, be derived from the Constitution's unique context and purpose? If so, what were those canons?

"[o]riginalism is not a theory of what to do when original meaning runs out"); Lawrence B. Solum, *Semantic Originalism* 19 (Univ. of Ill. Coll. of Law Ill. Pub. Law & Legal Theory Research, Paper Series No. 07-24, 2008), http://papers.ssrn.com/sol3/papers.cfm?abstract_id_1120244 (observing that when the meaning of the constitutional text is underdetermined, original meaning "runs out" and must be supplemented with constitutional construction).

[41] *See* ERIC J. SEGALL, ORIGINALISM AS FAITH 98–99 (2018) (arguing that Solum's two originalist principles play a very small role in the zone of construction and thus do not help judges decide hard constitutional questions).

[42] D. A. Jeremy Telman, *All That Is Liquidated Melts into Air: Five Meta-Interpretive Issues*, 24 BARRY L. REV. (forthcoming 2019).

[43] *Id.*

[44] *See infra*, Part III.C.

[45] Telman, *Originalism*, *supra* note 27, at 551.

[46] *See infra*, Part III.C.

[47] *See* Nelson, *supra* note 34, at 555.

> The answers to these questions were far from clear, and members of the founding generation expressed a variety of different views.[48]

For example, Nelson cites an 1820 case from a South Carolina court in which the judge lamented, "The Constitution of the United States . . . is so unlike those instruments for which the common law has provided rules of construction, that a Court must always feel itself embarrassed whenever called upon to expound any part in the smallest degree doubtful."[49] In his treatise on the Constitution, Joseph Story concluded that disagreements about the Constitution's meaning resulted from "the want of some uniform rules of interpretation, expressly or tacitly agreed on by the disputants."[50]

Consistent with these later statements, eighteenth-century adjudication was pluralist and non-hierarchical. As a result, it is inconsistent with forms of contemporary originalism that privilege one interpretive modality (for example, textualism or intentionalism) over others.[51] Constitutional adjudication in the eighteenth century is also inconsistent with John McGinnis and Michael Rappaport's "original methods originalism," to the extent that that approach excludes modalities that were common during the founding era.[52]

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[48] *Id.* at 555–56.

[49] *Id*. at 569 (citing M'Clarin v. Nesbit, 11 S.C.L. (2 Nott & McC.), *519–20 (S.C. Ct. App. 1820) (Huger)).

[50] JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION (1833) § 398, at 1:304.

[51] Not all forms of originalism require a choice or a preference. McGinnis and Rappaport find intentionalism and textualism equally valid. *See* MCGINNIS & RAPPAPORT, ORIGINALISM AND THE GOOD CONSTITUTION, *supra* note 8, at 137 (finding substantial support for textualism and some support for intentionalism in the evidence of the interpretive approach of the Framers).

[52] McGinnis and Rappaport argue that constitutional construction was not an original method. *See* John O. McGinnis & Michael R. Rappaport, *Original Methods Originalism: A New Theory of Interpretation and the Case Against Construction*, 103 NW. L. REV. 751, 773 (2009) [hereinafter McGinnis & Rappaport, *Original Methods*] ("[A]dvocates of construction have not provided evidence that anyone embraced construction at the time of the Constitution's enactment, and we have been able to find none."). However, William Baude and Stephen Sachs, who likewise offer a version of original methods originalism, think construction was an original method. *See* Baude, *Is Originalism Our Law?*, *supra* note 12, at 2357–58 (acknowledging that originalists turn to construction or liquidation to resolve ambiguities or vagueness in the constitutional text); William Baude & Stephen Sachs, *The Law of Interpretation*, 130 HARV. L. REV. 1079, 1128 (2017) (finding the distinction between interpretation and construction "both real and useful").

McGinnis and Rappaport also argue that living constitutionalism was not an original method. McGinnis & Rappaport, *Original Methods*, *supra* note 52, at 788–92. The claim is empirical, and I cannot address it fully in this space. Because McGinnis and Rappaport say they find no evidence of construction, only a few counterexamples are necessary to suggest that their review of original methods is either incomplete or conceptually flawed.

While the example is not clear-cut, Joseph Story provides evidence that the Framers considered a change in circumstances as grounds for ignoring a statute's commands.

> We find it laid down in some of our earliest authorities in the common law; and civilians are accustomed to a similar expression, cessante legis praemio, cessat et ipsa lex [the law itself ceases if the reason for the law ceases]. Probably it has a foundation in the exposition of every code of written law,

There have been several attempts at enumerating typologies of legal reasoning. John Hart Ely identifies six modes of non-originalist ("non-interpretivist" is his term) interpretation: (1) natural law, (2) a judge's values, (3) neutral principles, (4) reason, (5) tradition, and (6) consensus.[53] Philip Bobbitt's typology is probably the most well-known. He identifies six modalities of argument: (1) historical, (2) textual, (3) doctrinal, (4) prudential, (5) structural, and (6) ethical.[54] Richard Fallon identifies five modalities: (1) text, (2) historical intent, (3) constitutional theory, (4) precedent, and (5) values.[55] Both Bobbitt and Fallon note that it is often difficult to isolate and identify individual modes of argumentation, because judges tend to use interpretive modalities in combination, and each is used to reinforce the same result.[56] Jack Balkin identifies eleven "topics" (*topoi* or modalities) of constitutional argument.[57] His modalities differ from Bobbitt's in that Balkin does not think that modalities are necessarily "incommensurable"; that is, Balkin believes modalities are tools that can be combined to aid in constitutional construction. He also contends that one can overcome arguments based on one modality with arguments drawn from another.[58]

In my reading of the opinions of the early Court, I see Justices engaged in nine well-recognized interpretive modalities: (1) textualism, (2) intentionalism, (3) structuralism, (4) purposivism (teleology) and (5) appeals to precedent, (6) history, (7) morals, (8) logic, or (9) common sense, which may also entail pragmatic considerations. Like Bobbitt, I acknowledge that there may be additional modalities,[59] but these seem to me to be the main ones. The Justices freely deploy whichever interpretive modality strikes them as fitting for the case. They frequently combine

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> from the universal principle of interpretation, that the will and intention of the legislature is to be regarded and followed.

STORY, *supra* note 50, § 459, at 1:350. The context makes clear that Story thinks the Latin maxim applies to the Constitution, which suggests an endorsement of something like living constitutionalism.

[53] JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 44–69 (1980).

[54] PHILIP BOBBITT, CONSTITUTIONAL FATE: THEORY OF THE CONSTITUTION 7–8 (1984) [hereinafter BOBBITT, CONSTITUTIONAL FATE].

[55] Richard H. Fallon, Jr., *A Constructivist Coherence Theory of Constitutional Interpretation*, 100 HARV. L. REV. 1189, 1189–90 (1987).

[56] *See* BOBBITT, CONSTITUTIONAL FATE, *supra* note 55, at 8 ("The various arguments illustrated often work in combination"); Fallon, *supra* note 56, at 1240 ("The implicit norms of our practice of constitutional interpretation prescribe an effort to achieve plausible understandings of arguments from text, the framers' intent, constitutional theory, precedent, and relevant values, all of which point to the same result.").

[57] Jack Balkin, *The New Originalism and the Uses of History*, 82 FORDHAM L. REV. 641, 659–61 (2013).

[58] Jack Balkin, *Arguing About the Constitution: The Topics in Constitutional Construction* (forthcoming in CONST. COMMENT. (2018)) (manuscript at 209), https://ssrn.com/abstract=3133131 [hereinafter Balkin, *Arguing about the Constitution*].

[59] *See* BOBBITT, CONSTITUTIONAL FATE, *supra* note 54, at 8 (acknowledging that his list might not be complete and that it could be supplemented).

interpretive modalities as all supporting the same outcome, but in *seriatim* opinions, it is easy to see that the modalities are often at odds.

What happens when different modalities lead to different conclusions, as they often do? In such circumstances, second-order *ipse dixit* reasoning comes into play. For Bobbitt, this means that conflicts among different modalities must be resolved by recourse to individual moral sensibility or conscience,[60] which are more likely to be stated than argued. Statements of moral sensibility or conscience constitute modes of second-order *ipse dixit* reasoning, but they are not the only ones. My typology differs from others in that it stresses the extent to which the judgments of the early Court turned on a tenth and largely unacknowledged modality: second-order *ipse dixit* reasoning.

C. Second-Order Ipse Dixit Reasoning

1. Cases of First Impression and Second-Order *Ipse Dixit*

A pluralistic approach to interpretation permits judges to exercise, consciously or unconsciously, considerable discretion.[61] Where different interpretive approaches can lead to different results, the judge may choose the approach that accords with her own sense of justice, practicality, or fairness to the parties to the dispute. To this day, even originalists have articulated no hierarchy of interpretive modalities that could cabin judicial discretion.[62]

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[60] *See* PHILIP BOBBITT, CONSTITUTIONAL INTERPRETATION 168 (1991) [hereinafter BOBBITT, CONSTITUTIONAL INTERPRETATION] (contending that the Constitution relies "on the individual moral sensibility when the modalities of argument clash").

[61] *See* CHARLES F. HOBSON, THE GREAT CHIEF JUSTICE: JOHN MARSHALL AND THE RULE OF LAW 34 (1996) (arguing that Marshall learned from his time as a Virginia practitioner "that judges in the ordinary course of deciding cases had broad discretion to determine what the law was, compelled as they were to choose from a variety of sources").

[62] John McGinnis and Michael Rappaport do not explain how their "original methods" originalism resolves issues when different interpretive modalities lead to contradictory results. *See* McGinnis & Rappaport, *Original Methods*, *supra* note 52, at 752 (introducing their conclusion that living constitutionalism and constitutional construction were not among the original methods but that ambiguity and vagueness could be resolved by considering evidence of history, structure, purpose, and intent). Will Baude recognizes a hierarchy with originalism at the top. *See* Baude, *Is Originalism Our Law?*, *supra* note 12, at 2353. However, his is an inclusive originalism, embracing multiple interpretive modalities. *See id*. at 2355 (describing an "inclusive" originalism that recognizes "the validity of other methods of interpretation or decision"). Moreover, Baude concedes "a certain amount of [judicial] discretion both in articulating the rules and in deciding whether to apply them in a particular case." *Id*. at 2360. Jack Balkin maintains that lawyers and judges who "embrace multiple interpretive theories" may "adopt a hierarchical ordering," but he does not seem to think such a hierarchy is necessary, nor does he say what it is. Balkin, *Arguing about the Constitution*, *supra* note 58, manuscript at 215. Richard Fallon offers a hierarchy, but also argues (persuasively) that, in practice, the hierarchy may be flipped:

> I shall argue, the implicit norms of our constitutional practice accord the foremost authority to arguments from text, followed, in descending order, by arguments concerning the framers' intent, constitutional theory, precedent, and moral and policy values. But a caution is in order. For reasons to be explored later, the highest ranked categories are those in which any particular argument, in hard cases, is least likely to prove uniquely persuasive or determinate. Arguments from text and from the framers' intent therefore possess less independent influence than their hierarchical

In the absence of an interpretive hierarchy or a coherent interpretive scheme, second-order i*pse dixit* reasoning can settle matters. Ultimately, judges deciding constitutional cases of first impression decide by deciding, when there is no other way to do so.

Lacking either precedent or evidence of a clear consensus among the Framers, Justices of the early Court often had recourse to second-order *ipse dixit* decisions in constitutional adjudication. We think of *ipse dixit* judgments as devoid of all reasoning. Second-order *ipse dixit* judgments are not without justification, but they are decisions made at a crossroad where the arguments in favor of one path or another are equally valid. The judge decides simply by choosing one of two equally viable options. As we shall see in Part III, second-order *ipse dixit* judgments assert the correctness of the chosen path and ignore the alternative or waive it away with incredulity.

Because case law now significantly hems in judges' discretion, *ipse dixit* judgments are less common today. Still, they are not unheard of. Philip Bobbitt relates a story of a troubled Judge Henry Friendly who sought counsel from Judge Learned Hand on how to resolve a difficult case.[63] According to Bobbitt, Learned Hand's advice was, "Damn it, Henry, just decide it! That's what you're paid for."[64] Bobbitt agrees. In difficult cases, Bobbitt acknowledges, interpretive modalities do not constrain the judge. "The case must be *decided*."[65]

2. Varieties of *Ipse Dixit*

Judges never reveal their *ipse dixit* methods by announcing as the ground for their decision, "Because I say so." Moreover, because judges want their reasoning sound in law, rather than in other normative realms, they are unlikely to volunteer the non-legal reasons that guide them into their legal analysis. Instead, judges disguise their *ipse dixit* reasoning as other things. Thus, *ipse dixit* reasoning can be hard to identify and can take many forms.

In the early Court, appeals to the Framers frequently serve as both a prelude to and a disguise for *ipse dixit* pronouncements. There is, after all, a great difference between invocations of intentionalism and actual engagement in intentionalist methods of constitutional interpretation. Justices in the Early Republic would frequently state that they wanted to discern the intentions of the Framers, but they rarely made specific references to Framing-era texts.[66] In most cases, when nineteenth-century Justices invoked the Framers or the Constitutional Convention or the ratification conventions,

> status suggests. By contrast, although value arguments occupy the lowest rung in the hierarchy, they are likely to exert a very powerful influence on conclusions within other categories in a successful effort to reach coherence.

Fallon, *supra* note 55, at 1193–94.

[63] BOBBITT, CONSTITUTIONAL INTERPRETATION, *supra* note 60, at 166–67.

[64] *Id.* at 167.

[65] *Id.*

[66] *See* WILLIAM R. CASTO, THE SUPREME COURT IN THE EARLY REPUBLIC: THE CHIEF JUSTICESHIPS OF JOHN JAY AND OLIVER ELLSWORTH 231 (1995) (calling appeals to the Framers "a literary device"); Toler et al., *supra* note 2, at 308–09 (concluding that in its first hundred years, the Supreme Court specifically referenced individual Framers only twenty-one times, and most of those refer to influential people from the Framing era who did not actually participate in the Framing or to Framers who wrote in their personal capacity).

they would not specify a Framer, a part of the Constitutional Convention, or the ratification convention of a particular state.[67]

Justices rarely referenced documents from the period beginning with the convening of the Constitutional Convention in 1787 through the ratification of the Bill of Rights in 1791.[68] Early Justices drew on their own recollections of the founding events, but those recollections were by no means always in accord.

The early Court's failure to research the intentions of the Framers is unsurprising, given that the source materials that make originalism possible today were not available to eighteenth-century judges. George Washington held on to the official records of the debates from the Constitutional Convention.[69] Washington eventually handed over those records, which are incomplete, to John Quincy Adams, who published them in 1819.[70] That version was edited and more widely circulated in 1830.[71] James Madison's influential account of the Constitutional Convention was first published in 1840.[72] Just after Madison's account appeared, there was a brief increase in reliance on historical materials relating to the Constitution's drafting and ratification,[73] but its appearance did not transform constitutional jurisprudence. Late nineteenth-century constitutional adjudication looked a lot like late eighteenth-century constitutional adjudication in terms of its consultation of source materials relating to the Constitution's drafting and ratification.[74]

The first scholarly edition of the Constitutional Convention did not appear until 1911.[75] Powerful criticisms have been raised with respect to the accuracy of Madison's

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[67] Toler et al., *supra* note 2, at 310.

[68] *See id.* at 304–05 (finding that less than 10% of citations to historical materials reference materials from the period of the Framing). Early on, Paul Brest noted that "if you consider the evolution of doctrines in just about any extensively-adjudicated area of constitutional law . . . explicit reliance on originalist sources has played a very small role compared to the elaboration of the Court's own precedents." Brest, *supra* note 29, at 234.

[69] Mary Sarah Bilder, *How Bad Were the Official Records of the Federal Convention?*, 80 GEO. WASH. L. REV. 1620, 1626 (2012) [hereinafter Bilder, *How Bad?*].

[70] *Id.*

[71] *Id.*

[72] JAMES MADISON, DEBATES IN THE FEDERAL CONVENTION OF 1787 (Gordon Lloyd ed., 2014).

[73] *See* Clinton, *supra* note 1, at 1219 ("The publication of Madison's notes in 1840 sparked a renewed interpretive interest in the treasure of historical material that his papers contained.").

[74] *See* Toler et al., *supra* note 2, at 302–17 (observing that reference to sources from the Framing period was extremely rare in the Court's first 100 years, and most of those references came during the Marshall Court).

[75] THE RECORDS OF THE FEDERAL CONVENTION OF 1787 (Max Farrand ed., 1911) [hereinafter Farrand].

account[76] and as to the official records of the Constitutional Convention.[77] Such accounts are most relevant to intentionalists. Because most twenty-first-century originalists are more concerned with original public meaning than they are with original intent, the more important documents relate not to the drafting of the Constitution in Philadelphia but to its ratification in the several States.

But there, the situation is no better. The first comprehensive scholarly account of the ratification was published in 2010.[78] Even today, the documentary record relating to ratification is incomplete.[79] We have detailed records of some ratification assemblies and almost none relating to others.[80] Making sense of the ratification records is also a challenge, because the process took two years.[81] Caleb Nelson contends that "conventions that ratified the Constitution early on (like Delaware and Pennsylvania) surely viewed the document differently in some respects than conventions that acted later (like Virginia and New York)."[82] As a result, Nelson concludes, originalists seeking to enforce the ratifiers' understanding of the Constitution "would have a menu of ideas to choose from."[83]

The record of deliberations relating to the Bill of Rights is also problematic. The first Congress discussed the Amendments, so we know something of the issues up for debate.[84] However, the congressional debates leave many fundamental issues unresolved.[85] Moreover, the final text was the product of a committee that kept no

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[76] *See* MARY SARAH BILDER, MADISON'S HAND: REVISING THE CONSTITUTIONAL CONVENTION (2015) (contending that Madison revised his account of the Convention in the years after the Convention to reflect his evolving views of the Constitution in action and of the men responsible for drafting it).

[77] *See* Bilder, *How Bad?*, *supra* note 70, at 1623 (defending the usefulness of the official records and the competence of the recording secretary against Max Farrand's assessment that the records are flawed and the secretary incompetent).

[78] PAULINE MAIER, RATIFICATION: THE PEOPLE DEBATE THE CONSTITUTION, 1787–88 (2010); *see id.* at x (discussing previous scholarship on ratification, the best of which consisted of two edited collections that appeared in 1988 and 1989 but which devoted separate chapters to the ratification process in each state and thus missed part of the story).

[79] *See id.* at xiii–xiv (describing the way Federalists conspired to create a one-sided record of the ratification debates that favored their perspective).

[80] *See id.* at xii (noting that in the twenty-one-volume collection, *The Documentary History of the Ratification of the Constitution*, the records for Delaware, New Jersey, Georgia, and Connecticut take up one volume, while four volumes are devoted to Virginia and five to New York).

[81] *See* Nelson, *supra* note 34, at 585.

[82] *Id.*

[83] *Id.* at 588; *see also* STORY, *supra* note 50, § 406, at 1:309 (observing that "there can be no certainty, either that the different State conventions in ratifying the Constitution gave the same uniform interpretation to its language, or that even in a single State convention the same reasoning prevailed with a majority, much less with the whole of the supporters of it").

[84] *See generally* CREATING THE BILL OF RIGHTS: THE DOCUMENTARY RECORD FROM THE FIRST FEDERAL CONGRESS (Helen E. Veit et al. eds., 1991).

[85] *See, e.g.*, Thomas Y. Davies, *Correcting Search-and-Seizure History: Now-Forgotten Common-Law Warrantless Arrest Standards and the Original Understanding of "Due Process of Law,"* 77 MISS. L.J. 1, 155 (2007) (observing that the legislative history does not clarify

minutes of its proceedings and of a vote in the Senate, whose deliberations were secret by design.[86] We know almost nothing of the state deliberations concerning adoption of the Bill of Rights.[87]

A recent comprehensive review of the Supreme Court's reliance on history and precedent found that, while the Court has generally espoused intentionalism, it has, throughout its history, strayed from intentionalist practice.[88] The authors conclude that nineteenth-century constitutional adjudication was far more akin to common law adjudication, than it was to contemporary intentionalism.[89] Surprisingly, they find that references to sources from the Constitution's drafting history and ratification have become much more common in Supreme Court opinions written since 1980.[90]

Justices in the Early Republic sometimes invoke the Framers' intentions when they are actually just ascribing their own interpretation to the Framers.[91] While the Supreme Court frequently invokes the intentions of the Framers in constitutional adjudication,[92] through the nineteenth century, the Court rarely sought after or ruled based on those intentions.[93] All of this is consistent with the early originalists' self-understanding of originalism as a self-conscious approach to constitutional interpretation dating from the last third of the twentieth century.[94]

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whether "due process" was intended to incorporate common-law standards); Michael Anthony Lawrence, *Second Amendment Incorporation Through the Fourteenth Amendment Privileges or Immunities and Due Process Clauses*, 72 MO. L. REV. 1, 9 (2007) (noting that the legislative history does not clarify whether Congress intended for the Bill of Rights to apply to the states); H. Jefferson Powell, *The Modern Misunderstanding of Original Intent*, 54 U. CHI. L. REV. 1513, 1533 (1987) (calling the legislative history of the Bill of Rights "exceptionally unreliable").

[86] *See* RICHARD LABUNSKI, JAMES MADISON AND THE STRUGGLE FOR THE BILL OF RIGHTS 204 (2006) (noting that "little is known about the debate" in the Senate that winnowed the Bill of Rights down from seventeen amendments to twelve because "the Senate met behind closed doors until 1794, and thus the record of their discussion is sparse").

[87] *See* Tom Stacy, *The Search for the Truth in Constitutional Criminal Procedure*, 91 COLUM. L. REV. 1369, 1424 (1991) (citing multiple authorities).

[88] *See* Toler et al., *supra* note 2, at 283, 328 apps. 1–18 (2012) (recording references to historical sources in Supreme Court majority opinions, concurrences and dissents, including references to historical sources, precedent, secondary sources, and commentary on interpretive methodology).

[89] *Id.* at 314.

[90] *Id.* at 285.

[91] *See* Christopher L. Eisgruber, Marbury, *Marshall, and the Politics of Constitutional Judgment*, 89 VA. L. REV. 1203, 1221 (2003) (noting that John Marshall derived "the Framers' intent from his theory of constitutional purposes, not the other way around").

[92] *See* Toler et al., *supra* note 2, at 301 (finding that 60% of the Court's statements regarding its own interpretive method in cases of constitutional first impression are best described as intentionalist).

[93] *See id*. at 303 (concluding upon closer inspection that the Justices may have been doing something other than actually relying on the intention of the Constitution's creators).

[94] *See id*. at 287 & n.23 (dating the advent of the originalist movement in the 1980s and acknowledging that Justice Black's originalist positions were generally stated in dissent).

As I illustrate in Part III with the *Chisholm* opinions of Justices Blair and Cushing, *ipse dixit* reasoning can look like textualism. A judge can provide a dispositive textual interpretation, while ignoring, or downplaying, the significance of a rival textual interpretation of similar plausibility. Moreover, teleological interpretations can exist in tension with textual readings, and judges freely avail themselves of both, thus enabling them to favor textual or teleological approaches based on *ipse dixit* hunches. Most commonly, evidence of *ipse dixit* reasoning must be looked for outside of the opinion in which it occurs. *Seriatim* opinions help us to see the roads not only not taken but bypassed without comment. The point here is to show the range of available approaches and the Court's lack of consistency in its reliance or non-reliance on available approaches.

3. Ipse Dixit as a Descriptive, Not a Normative, Term

Second-order *ipse dixit* decisions are not arbitrary decisions. Judges are constrained through the usual mechanisms, including history, precedent, prudential considerations, logic, and common sense. In addition, they are disciplined by their courts' cultures of collegiality. Because Supreme Court opinions are matters of public record, Justices take care to write opinions that will garner approbation from their colleagues on the bench, the legal profession, and the court-watching public.[95]

More generally, Jack Balkin has argued persuasively that judges are bound by something akin to a fiduciary duty of good faith interpretation, which exerts its own constraining pull on judges.[96] Balkin's version of originalism requires fidelity to constitutional principles, but not to the Framers' original expectations regarding how the constitutional text would be applied in specific situations.[97] As he puts it:

> Constitutional interpretation by judges requires fidelity to the Constitution as law. Fidelity to the Constitution as law means fidelity to the words of the text, understood in terms of their original meaning, and to the principles that underlie the text. It follows from these premises that constitutional interpretation is not limited to those applications specifically intended or expected by the [F]ramers and adopters of the constitutional text.[98]

Our common-law legal culture entails extensive judicial elaboration of the legal reasoning that leads to the holding. This tradition of discursive rationality constrains judges in ways that the political branches are not constrained. Legislation may be the product of horse-trading and back-room deals. Executive officers exercise considerable discretion and, absent scandal and investigation, need not explain their actions or inaction, or even their decision-making processes. Judges, by contrast, must justify their rulings and they do not want their reputations as apolitical and impartial

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[95] On the influence of public opinion on the Court, *see generally* BARRY FRIEDMAN, THE WILL OF THE PEOPLE: HOW PUBLIC OPINION HAS INFLUENCED THE SUPREME COURT AND SHAPED THE MEANING OF THE CONSTITUTION (2009).

[96] *See* BALKIN, CONSTITUTIONAL REDEMPTION, *supra* note 10, at 103–04 (arguing that fidelity to the text is the entire point of interpretation and arguing that judges and lawyers, regardless of whether they understand themselves as originalists, adhere to constitutional fidelity).

[97] *See* Balkin, *Abortion*, *supra* note 12, at 295.

[98] *See id.*

arbiters of legal disputes tainted by evidence of political partisanship, conflicts of interest, or reasoning to a pre-ordained result. Politicians, journalists, and judges empowered to challenge precedent will scorn and ridicule partisan or poorly reasoned judicial opinions.[99]

I do not intend the phrase *ipse dixit* in a pejorative sense, nor do I think *ipse dixit* reasoning is inconsistent with Balkin's idea of constitutional fidelity. Different modalities of constitutional interpretation might align. For example, the constitutional requirement that the President be at least thirty-five years old[100] is uncontroversial because all interpretive modalities lead to the same conclusion as to the provision's meaning.[101] But, different modalities might also yield different results. A judge might be persuaded that the common understanding of the word "commerce" as used in the eighteenth-century connotes only "trade," and not "manufacturing" or "navigation."[102] However, the same judge might also conclude that the purpose of the Commerce Clause is to empower Congress to regulate the economy in ways that the states cannot or will not.[103] The textual meaning and the purposive meaning are at odds, and the judge must choose between two plausible meanings of the constitutional text. When equally authoritative interpretive modalities are in conflict, they are incommensurable. A textual argument cannot defeat a structural argument, and a structural argument cannot defeat a textual argument.[104] In the Early Republic, the Court often heard constitutional cases of first impression in which various interpretive modalities pointed towards different outcomes, and the Justices had to choose among equally plausible renderings of the Constitution's meaning.[105] The Justices took care to put up

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[99] *Id.* at 335 & n.114.

[100] U.S. CONST. art. II, § 1, cl. 5.

[101] *See* Eric Berger, *Originalism's Pretenses*, 16 U. PA. J. CONST. L. 329, 342 (2013) (noting the "virtually unanimous agreement" that the Constitution "requires that the President of the United States be at least thirty-five years old" and that "[n]o reasonable interpretive gloss can disrupt sufficiently that plain meaning so as to alter the Article II rule").

[102] *See, e.g.*, Randy E. Barnett, *New Evidence of the Original Meaning of the Commerce Clause*, 55 ARK. L. REV. 847, 856–62 (2003) (finding that the term "commerce" connoted only trade and exchange of goods when used in the *Pennsylvania Gazette* between 1728 and 1800); Randy E. Barnett, *The Original Meaning of the Commerce Clause*, 68 U. CHI. L. REV. 101 (2001) (finding that the word "commerce" was used to mean only trade and exchange of goods in the records of the Constitutional Convention, the ratification debates, and the *Federalist Papers*); Thomas R. Lee & James C. Phillips, *Data-Driven Originalism* 22–23 (unpublished manuscript) (forthcoming in U. PENN. L. REV (2018)), https://ssrn.com/abstract=3036206.

[103] *See* Jack Balkin, *Commerce*, 109 MICH. L. REV. 1, 6 (2010) (arguing that Congress's Commerce Clause powers were part of a structural design "to give Congress power to legislate in all cases where states are separately incompetent or where the interests of the nation might be undermined by unilateral or conflicting state action").

[104] If the text is absolutely clear and cannot in any circumstances be reconciled with a purposive or structural argument, the text prevails. *See* STORY, *supra* note 50, § 401, at 1:306 (observing that no recourse to alternative interpretive means is necessary where "the words are plain and clear"). However, that situation rarely, if ever, obtained in the constitutional adjudication of the Early Republic.

[105] D. A. Jeremy Telman, *John Marshall's Constitution: Distinguishing Originalism from* Ipse Dixit *in Constitutional Adjudication* 19 (Valparaiso Univ. Law Sch. Legal Studies

signposts to highlight their engagement in traditional, acceptable interpretive modalities, but ultimately, they had to choose among equally authoritative but non-reconcilable options.

Ipse dixit reasoning is neither originalist nor living constitutionalist reasoning. Equally importantly, *ipse dixit* reasoning is not opposed to originalism or living-constitutionalism. A recent example may help illustrate this point. In discussing a five–four decision of the Supreme Court in *U.S. Term Limits, Inc. v. Thornton*,[106] Nelson Lund notes that the majority and the dissent agreed that the case could not be resolved based on the constitutional text, its legislative history, or the Court's precedents.[107] In *Thornton*, the Court invalidated an Arkansas law that required incumbent Senators to run as write-in candidates after two terms, as well as an incumbent Member of Congress's ability to do so after three terms.[108] Absent a firm footing in text, history or precedent, Justice Stevens, writing for the majority, relied on "basic principles of our democratic system,"[109] which he found articulated in a speech *attributed* to Alexander Hamilton.[110] Justice Thomas, writing for the dissenters, relied on a different fundamental principle. For Justice Thomas, our federal government is one of limited and enumerated powers.[111] Powers not granted to the federal government are reserved to the states.[112]

Even though Justice Stevens' and Justice Thomas' inclinations lie on different sides of the originalism fault-line, that is not what separates them in this case. Rather, they each make decisions based on other principles and their judgments in the case follow from those principles, which are arrived at not by debating the principles, but by stating them.[113] Originalists and non-originalists both engage in such second-order *ipse dixit* reasoning. During the Early Republic, when second-order *ipse dixit* reasoning predominated because so many constitutional issues could not be resolved by appeals to text or intention, the originalism/non-originalism divide does little explanatory work.

Research Paper Series, Paper No. 18-9, 2018), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3249726.

106 514 U.S. 779 (1995).

107 Nelson Lund, *Judicial Supremacy: Palladium of Liberty or Academic Paradox*, 33 CONST. COMMENT. 45, 45–46 (2018) (reviewing MARTIN REDISH, JUDICIAL INDEPENDENCE AND THE AMERICAN CONSTITUTION: A DEMOCRATIC PARADOX (2017)).

108 *Id.* at 45.

109 *Thornton*, 514 U.S. at 806.

110 Lund, *supra* note 108, at 46.

111 *Id.*

112 *Thornton*, 514 U.S. at 847–48 (Thomas, J., dissenting).

113 *See* Lund, *supra* note 108, at 46 ("Rather than respond to Stevens with an alternative theory of democracy, Thomas relies on a legal principle that he thinks is implied by the Constitution's enumeration of powers.").

D. The Eighteenth-Century Tradition of Seriatim Opinions

In the 1790s, Supreme Court Justices issued their opinions *seriatim*.[114] Each Justice spoke for himself.[115] They engaged the arguments of the attorneys, but they did not attack, or even acknowledge, one another's reasoning. "For almost a thousand years, decisions of multimember courts in England were delivered orally by each judge seriatim and without any prior intracourt consultation."[116] David Currie contends that the practice of *seriatim* opinions made it difficult to know what the Court's holding was in any given case,[117] and the absence of an authoritative majority opinion weakened the Court as a political institution.[118]

John Marshall ended the practice of *seriatim* opinions in a self-conscious effort to enhance the prestige of the Court, by having it speak with one voice.[119] Marshall's strategy of insisting on consensus paid off, elevating the Court, and Marshall, who signed most of the Court's important opinions while he was Chief Justice.[120] It also reduced or eliminated the cacophony produced by *seriatim* opinions, and thus clarified the law, while also making the legal process less transparent.

As we shall see, in *Chisholm*, the Court's tradition of issuing *seriatim* opinions made it possible for the Justices to engage in a variety of interpretive approaches without having to explain or justify their methodological decisions. In *Chisholm*, textual (Cushing and Blair), historical (Iredell, Jay, and Wilson), precedential (Iredell), and purposive (Jay and Wilson) approaches are on display. The Justices do not strive towards consensus either as to outcome or approach. They tacitly acknowledge the validity of diverse approaches and seem to welcome that diversity as a check against dogmatism or groupthink.

III. SECOND-ORDER IPSE DIXIT IN CHISHOLM V. GEORGIA

A. Ipse Dixit and Constitutional Fidelity

For the most part, before the Marshall Court, Congress rather than the courts decided constitutional questions, as David Currie has detailed.[121] However, *Chisholm*

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[114] *See* Scott Douglas Gerber, *Introduction: The Supreme Court Before John Marshall*, *in* SERIATIM: THE SUPREME COURT BEFORE JOHN MARSHALL 1, 20 (Scott Douglas Gerber ed., 1998) [hereinafter GERBER, SERIATIM].

[115] *See id.*

[116] M. Todd Henderson, *From Seriatim to Consensus and Back Again: A Theory of Dissent*, 2007 SUP. CT. REV. 283, 292 (2008).

[117] DAVID P. CURRIE, THE CONSTITUTION IN THE SUPREME COURT: THE FIRST HUNDRED YEARS, 1789–1888, 44–45 (1985) [hereinafter CURRIE, THE FIRST HUNDRED YEARS].

[118] *Id.* at 55.

[119] *See* GERBER, SERIATIM, *supra* note 115, at 20 (explaining the strategy behind Marshall's abandonment of the tradition of *seriatim* opinions). Chief Justice Ellsworth tried to do away with the practice of *seriatim* opinions, but his efforts were only partially successful. *See* CASTO, *supra* note 66, at 110–11.

[120] GERBER, SERIATIM, *supra* note 115, at 20.

[121] DAVID P. CURRIE, THE CONSTITUTION IN CONGRESS: THE FEDERALIST PERIOD, 1789–1801 (1999); *see* CURRIE, THE FIRST HUNDRED YEARS *supra* note 118, at 4 (listing *Chisholm* as one of three "full-scale opinions construing the Constitution before the Marshall Court").

provides an important exception.[122] It also illustrates the extent to which constitutional interpretation in the Early Republic turned on second-order *ipse dixit* reasoning.

The legal issue in *Chisholm* was whether federal courts could exercise jurisdiction over a suit brought against a state by a citizen of another state.[123] *Chisholm* raised the important political and constitutional issue of state sovereignty.[124] If states could be hailed into court by ordinary citizens, they were not sovereigns, but as the Georgia legislature put it, "tributary corporations to the government of the United States."[125] In addition, *Chisholm* had important economic implications. If Chisholm prevailed, states could be inundated with claims from loyalists or their heirs for debts that state laws had liquidated.[126] States faced significant potential liability.[127] Maryland, Virginia, New York, and Massachusetts all faced similar suits.[128]

Chisholm arose out of events that took place in 1777; the claim was finally settled in 1847.[129] In 1777, a merchant named Robert Farquhar sold nearly $170,000 of goods to the State of Georgia for the provisioning of American troops quartered near

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[122] *See* Barnett, *The People or the State?*, *supra* note 13, at 1730 (calling *Chisholm* "the first great constitutional case decided by the Supreme Court"); Kurt T. Lash, *Leaving the* Chisholm *Trail: The Eleventh Amendment and the Background Principle of Strict Construction*, 50 WM. & MARY L. REV. 1577, 1691 (2009) [hereinafter Lash, *Leaving the* Chisholm *Trail*] ("*Chisholm* was the first great constitutional case issued by the Supreme Court. . . .").

[123] *See* Chisholm v. Georgia, 2 U.S. (2 Dall.) 419, 466 (1793) (opinion of Cushing, J.) ("The grand and principal question in this case is, whether a State can, by the Federal Constitution, be sued by an individual citizen of another State?").

[124] *Id.* at 46–64.

[125] Lash, *Leaving the* Chisholm *Trail*, *supra* note 123, at 1631, citing Proceedings of the Georgia House of Representatives, Dec. 14, 1792, *reprinted in* 5 THE DOCUMENTARY HISTORY OF THE SUPREME COURT OF THE UNITED STATES 1789–1800: SUITS AGAINST THE STATES 161 (Maeva Marcus ed., 1994). [hereinafter 5 DHSC]. Others associated the exposure of states to suits by ordinary citizens with a reduction of their status from sovereigns to corporations. *See, e.g.*, Lash, *Leaving the* Chisholm *Trail*, *supra* note 123, at 1585, citing JAMES SULLIVAN, OBSERVATIONS UPON THE GOVERNMENT OF THE UNITED STATES OF AMERICA (1791); *id.* at 1622–23, citing Justice James Iredell, *Observations on State Suability* (1792). Iredell revisited this notion in *Chisholm*. *Chisholm*, 2 U.S. at 447–48 (opinion of Iredell, J.) (contending that an action in assumpsit against a state would lie only if the state were considered a subordinate corporation, a position Iredell would "by no means admit").

[126] *See Chisholm*, 2 U.S. at 447–48 (opinion of Iredell, J.).

[127] Willis P. Whichard, *James Iredell: Revolutionist, Constitutionalist, Jurist*, *in* GERBER, SERIATIM, *supra* note 115, at 198, 211.

[128] *See* Lash, *Leaving the* Chisholm *Trail*, *supra* note 123, at 1618–19 (discussing *Straphorst v. Maryland*, a contract dispute in which Dutch brothers sought to recover from the state of Maryland in federal court); *id.* at 1621–25 (discussing *Oswald v. New York*, in which the executor of a printer's estate sued the state for recovery of unpaid services); *id.* at 1626–27 (discussing *Hollingsworth v. Virginia*, in which the Indiana Company sued the State of Virginia over land claims in the western part of that state); *id.* at 1650–51 (discussing *Vassal v. Massachusetts*, the case that motivated Massachusetts to lead the movement to pass the Eleventh Amendment).

[129] Doyle Mathis, Chisholm v. Georgia*: Background and Settlement*, 12 AM. J. LEGAL HIST. 112, 115 (1968).

Savannah.[130] Farquhar was not paid.[131] Farquhar died in 1784, and Chisholm, as executor of his estate, pursued Farquhar's claim.[132] After the Georgia legislature voted not to pay the claim in 1789, Chisholm brought his claim in federal court.[133] Justice Iredell, sitting with Nathaniel Pendleton of the U.S. District Court for Georgia, heard the case as a U.S. Circuit Court judge.[134] They dismissed the case for want of jurisdiction, and Chisholm appealed to the U.S. Supreme Court.[135] Despite repeated invitations from the Court, Georgia refused to appear to argue the case.[136]

Four of the five Justices issued opinions in Chisholm's favor.[137] The reasoning of the Justices in the majority broke down along two lines. Two Justices relied primarily on the text of Article III, which provides for federal jurisdiction over "controversies . . . between a State and citizens of another State."[138] That provision exactly describes the situation at hand, and so, as a textual matter, it seems obviously to confer jurisdiction. However, two Justices in the majority focused less on the constitutional text than on the nature of sovereignty under the Constitution.[139] For them, sovereignty resided in the people and in the federal government.[140] States were not sovereign and thus could claim no sovereign immunity to suit.[141]

Justice Iredell disagreed with the outcome.[142] He regarded Article III as what we today call non-self-executing.[143] That is, some constitutional provisions are self-executing. They are binding law as soon as the Constitution goes into effect. No further action is required to make them enforceable law, although in cases such as *Mapp v.*

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130 *Id*. at 115.

131 *Id.*

132 *Id.*

133 *Id.* at 115.

134 *Id.* at 116.

135 *Id.*

136 *Id.* The Court went so far as to invite any member of the bar in attendance to speak in opposition to Chisholm's suit, but none volunteered. Lash, *Leaving the* Chisholm *Trail*, *supra* note 123, at 1631.

137 *See* Chisholm v. Georgia, 2 U.S. (2 Dall.) 419, 466 (1793).

138 U.S. CONST. art. III, § 2, cl. 1.

139 *See Chisholm*, 2 U.S. at 466.

140 *Id.*

141 *Id.*

142 *Id.* at 449–50.

143 John Marshall first introduced the idea that some constitutional provisions are not self-executing. *See* Foster v. Neilson, 27 U.S. 253, 314 (1829) (holding that treaties are not immediately operative as domestic law when they, by their terms, call for some additional legislative act), *overruled on other grounds*, United States v. Percheman, 32 U.S. 51, 89 (1833). The term "self-executing" first appeared in *Whitney v. Robertson*, 124 U.S. 190, 194 (1888) (noting that stipulations that are not self-executing require legislation).

Ohio, a court may have to use its common-law powers to fashion a remedy.[144] For example, the President became Commander-in-Chief of the Armed Forces (once called into service)[145] as soon as the Constitution was ratified. Congress did not need to pass a statute giving him such powers, because the Commander-in-Chief Clause is regarded as self-executing. By way of contrast, the Supreme Court has held that, notwithstanding the Supremacy Clause,[146] which renders treaties "supreme law," treaties do not automatically create binding domestic law.[147] Non-self-executing treaties require congressional implementation before they can have effect as part of our domestic legal system.[148]

In Justice Iredell's view, the Constitution set the outer bounds of the federal courts' jurisdiction, but the courts could not exercise the full scope of that jurisdiction without congressional authorization, which was wanting in *Chisholm*.[149] The outcome of the case turned on second-order *ipse dixit* determinations about the nature of the legal issue and the interpretive methods to be deployed. Four Justices combined textual approaches with historical and purposivist approaches, and allowed for the exercise of federal jurisdiction.[150] Justice Iredell combined a structural approach to the Constitution with a historical inquiry into the exercise of jurisdiction in cases against states.[151] All Justices were attempting to construe the Constitution, but they arrived at different conclusions as to the meaning of that document because their opinions stemmed from *ipse dixit* determinations not defended in the text of their opinions.

The Justices do not express disagreement with one another or even engage one another's arguments.[152] Each speaks for himself, and each opinion turns, at crucial junctures, on *ipse dixit* reasoning.[153] Far from deferring to the intentions of the Framers, all of the Justices, including Justice Iredell, reject (again without acknowledgement or discussion) Alexander Hamilton's assurances in *Federalist* No.

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144 *See* Mapp v. Ohio, 367 U.S. 643 (1961) (creating the exclusionary rule as a remedy for violations of the Fourth Amendment's prohibition on unlawful searches and seizures).

145 *See* U.S. CONST. art. II, § 2, cl. 1 ("The President shall be commander in chief of the Army and Navy of the United States, and of the militia of the several states, when called into the actual service of the United States.").

146 *See* U.S. CONST. VI, § 2 ("This Constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land . . . .").

147 *See* Medellín v. Texas, 552 U.S. 491, 519 (2008) (citing nineteenth-century authorities for the proposition that treaties are non-self-executing and do not have effect as domestic law when "they can only be enforced pursuant to legislation to carry them into effect").

148 *See id.* at 504–05.

149 *See* Chisholm v. Georgia, 2 U.S. (2 Dall.) 419, 433 (1793) (opinion of Iredell, J.).

150 *See id.* at 419.

151 *See id.* at 433 (opinion of Iredell, J.).

152 *See generally id.*

153 *Id.*

81[154] and similar statements by others during the ratification process that the states would retain their sovereign immunity under the new Constitution.[155] At the same time, each Justice strives to give effect to the Constitution as he understands it.

B. The Justices as Framers

In Justice Iredell's dissenting opinion, which is now regarded as vindicated with the passage of the Eleventh Amendment,[156] he states that he is giving effect to the Framers' intentions.[157] He alone of the five Justices who heard the case would have held that federal courts have no jurisdiction over a suit between a state and a citizen of another state.[158] In reaching this conclusion, Justice Iredell rejected two possible interpretations offered by Attorney General Edmund Randolph, who served as counsel for Chisholm.[159] Justice Iredell certainly had no greater claim than Randolph to insights into what the Framers of Article III intended. Unlike some of his colleagues on the *Chisolm* Court, Justice Iredell did not attend the Constitutional Convention,[160] apparently for want of means rather than want of interest.[161] Randolph was not only there; he introduced the Virginia Plan.[162] Although he refused to sign the document at the end of the Constitutional Convention, Randolph changed his mind[163] and, as chair

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[154] *See* THE FEDERALIST NO. 81 at 529 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (arguing that states retain their sovereignty under the Constitution and that sovereign entities are not amenable to suit without their consent).

[155] *See* JEFFERSON POWELL, LANGUAGES OF POWER: A SOURCE BOOK OF EARLY AMERICAN CONSTITUTION HISTORY 70 (1991) [hereinafter POWELL, LANGUAGES OF POWER] (noting that the *Chisholm* opinion "upset expectations created by ratification assurances . . . that the states would retain their sovereign immunity"); Lash, *Leaving the* Chisholm *Trail*, *supra* note 123, at 1599–1603 (citing examples from the ratification debates suggesting that Federalists, including Madison, Marshall, Hamilton, and Rufus King, conceded that the powers of the federal courts should be strictly (or narrowly) construed so as to preserve state sovereignty).

[156] *But see* John V. Orth, *Truth About Justice Iredell's Dissent in* Chisholm v. Georgia *(1793)*, 73 N.C. L. REV. 255, 263 (1994) (arguing that the Eleventh Amendment went well beyond Justice Iredell's opinion, which limited itself to the subject of assumpsit).

[157] *See Chisholm*, 2 U.S. at 433 (opinion of Iredell, J.) ("The Constitution intended this article . . . to be the subject of a Legislative act.").

[158] *See id.* at 449 (concluding that Article III must be implemented through legislation and that such legislation is wanting with respect to suits between a state and a citizen of another state).

[159] *See id.* at 430 ("[A]fter the fullest consideration, I have been able to bestow on the subject, and the most respectful attention to the able argument of the Attorney-General, I am now decidedly of the opinion that no such action as this before the Court can legally be maintained.").

[160] CASTO, *supra* note 66, at 62.

[161] *See* Whichard, *supra* note 128, at 198, 206–07 (ascribing Iredell's absence from the Convention to his "cursed poverty" but noting his influence on the North Carolina delegation through correspondence).

[162] Farrand, *supra* note 75, at 20–22.

[163] MAIER, *supra* note 78, at 261 (describing Randolph as having "made his peace" with ratification as "the anchor of our political salvation, with amendments to follow under Article

of the Virginia Ratification Convention, where some of the most storied debates took place,[164] became one of the Constitution's greatest advocates.[165] Iredell, meanwhile, was a "star speaker" at North Carolina's Hillsborough Convention,[166] which voted not to ratify the Constitution without amendments.[167] North Carolina ratified the Constitution in November 1789 after the new Constitution had already gone into effect.[168]

In his *Chisholm* opinion, Justice Iredell refers to the intentions of the Framers, but he cites to no evidence of such intention. Rather, he cites to the text and to practice and custom.[169] Significantly, he rejects without discussion Randolph's proffered arguments, drawing on the Law of Nations[170] and policy considerations.[171] Justice Iredell's position was not that such considerations are *per se* inadmissible to decide a constitutional case; rather, Justice Iredell saw no need to consult either when the constitutional case was, in his view, clear.[172]

The other Justices, who agreed with Randolph's view that the exercise of jurisdiction was proper, included John Jay, one of the authors of *The Federalist Papers*, and James Wilson, a member of the Constitutional Convention's Committee of Detail,[173] as well as a leader of Pennsylvania's ratifying convention.[174] Many scholars consider Wilson "as crucial a member of the Constitutional Convention as any other, including James Madison."[175] Justice William Cushing served as Vice

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[164] *Id*. at 257 (observing that Patrick Henry forced the Virginia Convention to "confront big questions . . . that had not been explored, certainly not with equal rhetorical flare, in any previous ratifying convention").

[165] *Id*. at 260 (describing Randolph as the "obvious person" to answer Patrick Henry's criticisms of the Constitution); *id*. at 320 (quoting contemporary commentary that Randolph "amazed everyone" with his enthusiastic support for ratification).

[166] *Id*. at 406; *see also id*. at 411 (describing Iredell as having taken the lead in defending the Constitution at the Hillsborough Convention).

[167] *Id*. at 421.

[168] *Id*. at 457.

[169] *See* Chisholm v. Georgia, 2 U.S. (2 Dall.) 419, 433 (1793) (opinion of Iredell, J.).

[170] *See id.* at 449 (remarking that he had had no "occasion to notice many arguments offered by the Attorney General relating to the Law of Nations").

[171] *See id*. at 450 (opinion of Iredell, J.) (noting that a court should entertain policy considerations only if the case is "very doubtful" and that in this case his own view of policy diverged from that of the Attorney General).

[172] *See id.* at 449 (finding no need to discuss the Law of Nations where domestic law clearly provided no basis for jurisdiction).

[173] William Ewald, *The Committee of Detail*, 28 CONST. COMMENT. 197, 202 (2012).

[174] MAIER, *supra* note 78, at 103–15 (describing Wilson's role as the only member of the federal convention present and as the chief expounder and defender of the Constitution at the Pennsylvania convention).

[175] Barnett, *The People or the State?*, *supra* note 133, at 1733; *see also* Mark D. Hall, *James Wilson: Democratic Theorist and Supreme Court Justice*, *in* SERIATIM, *supra* note 115, at 126,

President of the Massachusetts ratifying convention.[176] John Blair represented Virginia in the Constitutional Convention[177] and was a quiet defender of a strong national government at the Virginia ratifying convention.[178] Prior to that, he had been an important legislator[179] and jurist in Virginia[180] before being among the first men whom George Washington nominated to the Supreme Court.[181] If the point of the exercise was to determine the intentions of the Framers, Justice Iredell could have surveyed the Framers assembled around him. Iredell arrived at his conclusions by other means, not even citing evidence of the Framers' intentions that supported his position.[182]

C. The Opinions

Taking the opinions of *Chisholm* together, we see the Justices engaging in numerous modes of constitutional interpretation, but each opinion turns on its author's idiosyncratic reasoning. Justice Iredell's opinion turns on his view that the Constitution's Article III is not self-executing.[183] Justice Blair assumes the opposite, and thus, concludes that the text of Article III as written gives rise to federal jurisdiction without the need for statutory authorization.[184] Justice Cushing's approach is very similar. He rejects Justice Iredell's position without mentioning it and without engaging with Iredell's arguments.[185] Justice Wilson focuses on the nature of sovereignty, and his opinion turns on his view that sovereignty rests with the people or with the union but not with the states.[186] Chief Justice Jay's opinion similarly focuses on the nature of sovereignty.[187] Regarding sovereignty as residing with the people, he rejects Georgia's claim that sovereign immunity deprives the federal courts of jurisdiction over a suit against a state by a citizen of another state.[188]

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129 (citing seven prominent scholars of the Founding era who rank Wilson just behind Madison as the most important figures at the Constitutional Convention).

176 *See* MAIER, *supra* note 78, at 193 (describing Cushing as vice president of the convention and a leading federalist).

177 *See* Wythe Holt, *John Blair*: "*A Safe and Conscientious Judge," in* SERIATIM, *supra* note 115, at 162 (noting that, according to Madison's records, Blair never spoke at the Convention).

178 *See* CASTO, *supra* note 66, at 59. According to James Monroe, Blair said nothing but favored the adoption of the Constitution. Holt, *supra* note 179, at 162.

179 *See* Holt, *supra* note 178 at 157–58.

180 *See id.* at 158–61.

181 *Id*. at 162.

182 *See* Chisholm v. Georgia, 2 U.S. (2 Dall.) 419, 432 (1793) (opinion of Iredell, J.) ("The framers of the Constitution, I presume, must have meant one of two things").

183 *See id.* at 432–33.

184 *See id.* at 451 (opinion of Blair, J.).

185 *See id.* at 467 (opinion of Cushing, J.).

186 *See id.* at 454, 455, 458 (opinion of Wilson, J.).

187 *See id.* at 469–70 (opinion of Jay, J.).

188 *See id.* at 479.

1. Justice Iredell and Assumpsit Claims Against the Sovereign

Justice Iredell had written on the question of whether states could be sued prior to *Chisholm*.[189] The issue arose in an earlier case, *Oswald v. New York*.[190] It seems that Iredell prepared an opinion for that case, which was dismissed on other grounds.[191] Iredell's draft opinion became his draft essay, *Observations on State Suability*, which he worked on in February 1792, but never finalized,[192] some of which found its way into his *Chisholm* opinion.[193] His opinion turns on two bits of second-order *ipse dixit* reasoning. First, he decides that states are sovereign.[194] Second, he takes Article III of the Constitution to be non-self-executing.[195]

Justice Iredell begins his analysis with a historical methodology, which remains his primary mode of interpretation. Under English common law, Justice Iredell notes at the outset, a court would have no jurisdiction over a case such as Chisholm's, sounding in assumpsit, against a sovereign.[196] Justice Iredell next turns to the text of the Constitution and notes that Section 13 of the 1789 Judiciary Act follows the Constitution and grants the Supreme Court non-exclusive jurisdiction over "civil controversies" between a state and a citizen of another state.[197]

Justice Iredell then entertains two possibilities for the meaning of the word "controversies" in this context. First, Article III may have intended to convey "that part of the Judicial power" not allocated to the other branches, but that reading would entail an assumption that the "Judicial power" entails authority only relating to matters over which common-law courts could exercise jurisdiction in the eighteenth century.[198] Second, Article III may be understood to empower Congress to create federal jurisdiction with respect to the cases or controversies enumerated in Article III.[199] Such congressional action would be necessary where there was no common-law basis for the exercise of such jurisdiction.[200] In other words, with respect to the enumerated cases and controversies, Article III either granted the federal courts such

189 *See* Lash, *Leaving the* Chisholm *Trail*, *supra* note 123, at 1622.

190 *See id.*

191 *See id.* at 1622–23.

192 James Iredell, *Observations on State Suability*, (Feb. 11–14, 1792), *reprinted in* 5 DHSC, *supra* note 125, at 76–88.

193 *See* Lash, *Leaving the* Chisholm *Trail*, *supra* note 123, at 1622–23.

194 *See* Iredell, *supra* note 193, at 82.

195 *See* Scott Douglas Gerber, *Deconstructing William Cushing*, *in* SERIATIM, *supra* note 115, at 108.

196 *See* Chisholm v. Georgia, 2 U.S. (2 Dall.) 419, 430 (1793) (opinion of Iredell, J.) (noting that, as the Attorney General surely knows, an action against the Crown in assumpsit will not lie).

197 *See id.* at 431 (summarizing the Judiciary Act).

198 *See id.* at 432 (referring to "antecedent laws for the construction of the general words" used).

199 *See id.*

200 *See id.* (allowing that Congress might be empowered to grant courts jurisdiction "at least in cases where prior laws were deficient for such purposes . . . .").

jurisdiction as already existed under common law, or it granted that jurisdiction, plus whatever additional jurisdiction Congress created pursuant to its Necessary and Proper Clause powers.[201]

However, Attorney General Randolph offered a third possibility, which was, Justice Iredell noted, "a construction, I confess, that I never heard of before, nor can I now consider it grounded on any solid foundation[.]"[202] That construction was that the Constitution conveys to the judiciary the powers vested therein, without reference to the eighteenth-century common-law background and without the need for further action by the legislature.[203] But in refuting Randolph's view of the scope of federal judicial power, Justice Iredell appealed not to the constitutional text nor to the Framers' intent but to his own conception of the judiciary:

> My conception of the Constitution is entirely different. I conceive, that all the Courts of the United States must receive, not merely their organization as to the number of Judges of which they are to consist; but all their authority, as to the manner of their proceeding, from the Legislature only.[204]

In Justice Iredell's view, the jurisdictional grants in Article III were non-self-executing. The federal courts could exercise jurisdiction only over cases over which they would have had jurisdiction at common law or over cases that Congress, through legislation, granted them. This reading of Article III grounds the legal reasoning that follows.

Having rejected the Attorney General's contention that the Constitution automatically grants federal courts jurisdiction over all categories of cases enumerated in Article III, Justice Iredell dutifully searches for a basis in positive law for the federal courts' exercise of jurisdiction in this case. Such jurisdiction could come from only two sources, legislative act or common law.[205] He entertains the possibility that state law could give rise to such an action, but he quickly concludes that Georgia law does not do so, nor do the laws of any other state.[206]

Justice Iredell turns back to the Judiciary Act, Section 14, which establishes the courts' powers to issue writs "which may be necessary for the exercise of their respective jurisdictions, and agreeable to the principles and usages of law."[207] He seizes on the reference to "usages" to argue that the Act intended to limit the courts' exercise of jurisdiction to those controversies over which they had traditionally had jurisdiction under English common law.[208] Justice Iredell then undertakes an

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[201] *See id.* at 432 (referencing Congress's Necessary and Proper Clause powers as the legal basis for such action).

[202] *Id.*

[203] *See id.*

[204] *Id.*

[205] *See id.* at 434.

[206] *See id.* at 434–35.

[207] *Id.* at 433–34.

[208] *See id.* at 434.

exhaustive review of existing case law and concludes that no action at law existed against the sovereign; the only remedy was a petition of right.[209]

The remainder of the opinion looks like textualism informed by history and precedent. However, the diversion into history is made possible through a crucial turn at an *ipse dixit* crossroad.[210] In Justice Iredell's view, states are either just as sovereign as the English King, or they are mere corporations subordinate to the federal government.[211] Facing this stark choice, Iredell could only treat states as sovereign, stating: "The United States are sovereign as to all the powers of Government actually surrendered: Each State in the Union is sovereign as to all the power reserved."[212] The notion that the Justices had to choose between treating states as sovereign and treating them as corporations illustrates the nature of *ipse dixit* reasoning; no other Justice expressed the view that states, not being sovereign, were mere corporations subordinate to the federal government.[213] Justice Iredell could not accept a world in which states retain aspects of their sovereignty and yet surrender their sovereign immunity to suit by ordinary citizens.[214]

Justice Iredell's reasoning is as follows: (1) there must be a legislative enactment giving the courts jurisdiction over an action in assumpsit against a state; (2) the legislature has authorized no such action, and custom and usages recognize no such action; therefore, (3) the courts are without jurisdiction.[215] All of this follows logically from Justice Iredell's principles, but his legal conclusion can persuade only those who agree with his views that states are sovereign and that Article III is not self-executing.

Justice Iredell ultimately falls back on his own sense of what is fitting and proper in constitutional arrangements. Such *ipse dixit* reasoning is inevitable, even within originalist interpretive modalities, as originalist interpretation can point towards many different solutions. Ultimately, the judge has to choose the conclusion that seems right, even though the alternatives are plausible. Justice Iredell's logic is sound, but it assumes that states are sovereign and that Article III is non-self-executing, and those propositions cannot be proven or disproven based on appeal to original meaning or

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[209] *See id*. at 437–46.

[210] I am not the first to characterize Iredell's opinion as *ipse dixit*. *See* CASTO, *supra* note 66, at 190 (calling Iredell's opinion "superficially comprehensive" and accusing Iredell of engaging in "virtual ipse dixit" and question begging).

[211] *See Chisholm*, 2 U.S. at 435, 447 (opinion of Iredell, J.).

[212] *Id.* at 435; *see also id*. at 447–49 (rejecting the notion that states are corporations subordinate to the federal government).

[213] Attorney General Randolph addressed the argument only to dismiss it as irrelevant to the case. *Id*. at 429 (argument of Att'y Gen. Randolph) ("I banish the comparison of States with corporations; and, therefore, search for no resemblance in them."). Justice Cushing finds that the question is not whether states are corporations but "what are their powers?" *Id*. at 468 (opinion of Cushing, J.). Justice Wilson says something similar, at much greater length, as is his wont. He notes that a state is an "artificial person" and goes on to characterize the range of attributes that such an artificial person might have. *Id*. at 455 (opinion of Wilson, J.).

[214] *Compare id.* at 435 (opinion of Iredell, J.), *with id.* at 447.

[215] *See id.* at 449.

intention.[216] As is clear from the differing views of the Justices in *Chisholm*, the Framers left the issue unaddressed and made different and irreconcilable assumptions as to its resolution.

In his conclusion, Justice Iredell frankly states that he sees no need to address the majority of Attorney General Randolph's arguments on behalf of Chisholm.[217] "I have not had occasion to notice many arguments offered by the Attorney General, which certainly were very proper, as to his extended view of the case, but do not affect mine."[218] So it is when opinions are informed by different *ipse dixit* perspectives.

2. Justice Blair's "Unimaginative"[219] Textualism

Justice Blair, in his short opinion in *Chisholm*, announces, "The Constitution of the United States is the only fountain from which I shall draw; the only authority to which I shall appeal,"[220] thus saving himself the trouble of addressing the arguments of his brethren, Jay, Wilson, and Iredell. In short order, he reads the constitutional text as clearly conferring jurisdiction on the federal courts to hear a controversy between a state and a citizen of another state.[221] The only question for him was whether a state could be a defendant in such a case.[222] Reviewing other areas of the federal courts' jurisdiction, Justice Blair quickly concludes that the Constitution is best understood as granting the federal courts jurisdiction regardless of the state's status as plaintiff or defendant.[223] After all, federal courts have jurisdiction over cases involving two states,[224] and in such a case, one of the states must be the defendant.[225] Moreover, federal courts have jurisdiction over controversies "between a state . . . and foreign states."[226] It is unlikely that a foreign state would be a defendant in a United States court, so it seems that the last-named party could be a plaintiff as well as a defendant.[227]

Justice Blair's breezy conclusion that Article III eliminates the states' sovereign immunity to suit by a citizen of another state also ignores significant evidence that the

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[216] *But see* Scott Douglass Gerber, *Deconstructing William Cushing*, *in* SERIATIM, *supra* note 114, at 108 [hereinafter Gerber, *Deconstructing William Cushing*] (accusing Iredell of ignoring "the plain words of the Constitution").

[217] *See Chisholm*, 2 U.S. at 449 (opinion of Iredell, J.).

[218] *Id.*

[219] CASTO, *supra* note 66, at 192. *But see* Gerber, *Deconstructing William Cushing*, *supra* note 219, at 109 (defending Blair's and Cushing's textualism).

[220] *Chisholm*, 2 U.S. at 450 (opinion of Blair, J.).

[221] *See id*. at 450 (opinion of Blair, J.) (finding that this case "undoubtedly" comes within the scope of cases over which Article III grants federal courts jurisdiction, unless the purpose of the language is to permit only cases initiated by a state).

[222] *See id*. at 450–51 (opinion of Blair, J.).

[223] *See id.* at 451.

[224] *See* U.S. CONST. art. III, § 2, cl. 1 (giving federal courts jurisdiction over "controversies between two or more states").

[225] *See Chisholm*, 2 U.S. at 451 (opinion of Blair, J.).

[226] U.S. CONST. art. II, § 2, cl. 1.

[227] *See Chisholm*, 2 U.S. at 451 (opinion of Blair, J.).

Framers had a contrary intention. John Marshall, responding to anti-Federalists in the Virginia Ratification Convention, insisted that Article III would not grant federal courts jurisdiction over states as defendants for the obvious reason, "It is not rational to suppose, that the sovereign power should be dragged before a Court."[228] James Sullivan, the Massachusetts Attorney General and an early voice in support of the Eleventh Amendment, also thought Article III best construed as granting federal courts jurisdiction only when the state was a plaintiff in a suit against a citizen of another state.[229] Given that the issue in *Chisholm* had already been raised in other federal cases, Blair likely knew that even many staunch federalists read Article III differently. He did not feel the need to address their arguments, and indeed what could he do other than point to the text?

Justice Blair does consider the practical question of enforcement of judgments against states but finds the issue easily resolved. If a state were to resist the enforcement of a federal court judgment against it, the same action could then be brought in state court, and Justice Blair imagines that the federal judgment would be treated as *res judicata*.[230] It is in this context that he briefly addresses Justice Iredell's arguments about the common-law tradition that courts did not entertain actions in assumpsit against sovereign states. He sees "no reason for confining the Plaintiff to proceed by way of petition," and he notes that doing so might even be an "impropriety."[231] By adopting the Constitution, Georgia forfeited that aspect of its sovereignty.[232] His reasoning seems purely textualist, but, by not looking beyond the text, Justice Blair also engages in *ipse dixit* reasoning, deeming Article III self-executing without inquiry.

3. Justice Wilson on Sovereignty Under General Principles of Right

Justice Wilson's opinion is a short treatise in political theory. As Randy Barnett has noted, Justice Wilson relies primarily on "'general theories of right' and only secondarily on the constitutional text."[233] Although Wilson had a pecuniary interest in the outcome of the case,[234] his reasoning in *Chisholm* is consistent with his views expressed in other contexts.[235]

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[228] *See* Lash, *Leaving the* Chisholm *Trail*, *supra* note 123, at 1601 (quoting remarks of John Marshall in the Virginia Convention, June 20, 1788).

[229] *See* Lash, *Leaving the* Chisholm *Trail*, *supra* note 123, at 1619 (citing JAMES SULLIVAN, OBSERVATIONS UPON THE GOVERNMENT OF THE UNITED STATES OF AMERICA (1791)).

[230] *See Chisholm*, 2 U.S. at 452 (opinion of Blair, J.) ("Might [plaintiff] not rely upon the judgment given by this Court in bar of the new suit? To me it seems clear that he might.").

[231] *Id*.

[232] *See id*.

[233] Barnett, *The People or the State?*, *supra* note 13, at 1731.

[234] *See* CASTO, *supra* note 66, at 195 (recounting Wilson's interest in the Indiana Company that was a party to a case raising the same issue in *Hollingsworth v. Virginia*).

[235] *See id*. Although Kurt Lash regards Justice Wilson and Chief Justice Jay as having had "significant conflicts of interest" in *Chisholm* (Lash, *Leaving the* Chisholm *Trail*, *supra* note 123, at 1694), Casto points out that eighteenth-century judges saw no need to recuse themselves when they had an interest in the outcome of a case, as they had sworn an oath to do justice in any case. CASTO, *supra* note 66, at 195 (citing Blackstone).

His method of constitutional exposition in the initial section has little to do with textual interpretation. His only source material is the logic of what he calls "principles of general jurisprudence."[236] He proceeds by Socratic method, posing questions and immediately answering them and dismissing all possible objections.[237] He begins with a discussion of the nature of states as aggregates of persons.[238] States, he says, as "artificial persons," can do many of the things that natural persons can do.[239] They can take on legal obligations, and when they do so, they cannot seek to avoid them by claiming that they are sovereign.[240]

But, that conclusion is of little importance to Justice Wilson's analysis, as he rejects Georgia's claim to sovereignty in any case.[241] First, he argues, the Constitution has no sovereign in one sense, because it creates a republican government with citizens, not subjects.[242] Second, in a republic, sovereignty resides in the people.[243] "As to the purposes of the Union, therefore, Georgia is NOT a sovereign state."[244] Finally, Georgia is obviously not sovereign in the sense that term has in the context of feudalism, because the feudal system "never extended to the American States."[245]

Justice Wilson next conducts a historical review even more searching than that of Justice Iredell, tracing notions of sovereignty back to the ancient Greeks.[246] He finds various traditions, including those of the Spaniards of Aragon, England up to the time of Edward I, and Frederick the Great's Prussia, in which the Crown was not above the law and could be sued even by a commoner.[247] This discussion leads him to the conclusion that, for the purposes of the federal union, Georgia is not a sovereign at all.[248] Indeed, Justice Wilson places the sovereignty of the Union itself at a lower rank than the sovereignty of the people of the United States.[249]

Justice Wilson has no doubt that, as a matter of general political theory, the Constitution could vest power in the federal judiciary to hear a case between a state

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[236] *Chisholm*, 2 U.S. at 457 (Wilson, J.).

[237] *See, e.g.*, *id*. at 456 ("Is the foregoing description of a State a true description? It will not be questioned but it is."); *id*. (asking whether a state may escape its legal obligations by asserting its sovereignty and answering "Surely not").

[238] *See id*. at 455.

[239] *Id*.

[240] *See id*. at 455–56.

[241] *See id*. at 457.

[242] *See id*. at 456.

[243] *See id*. at 457.

[244] *Id*.

[245] *Id*.

[246] *Id*. at 459.

[247] *Id*. at 458–61.

[248] *Id*. at 461.

[249] *See id*. at 462 (arguing that to toast the United States was not "politically correct;" one ought really to toast the "People of the United States").

and a citizen of another state.[250] Justice Wilson then questions whether the Constitution, empowered to do so, actually did create such jurisdiction.[251] His initial interpretive methodology is intentionalist and purposive. He notes that the Articles of Confederation established no power to regulate individual citizens but only the states.[252] "That defect was remedied by the national constitution," Justice Wilson notes, but the Constitution does not strip the federal government of its power to regulate states as well as its citizens.[253] Justice Wilson then determines that the Constitution in fact conveys jurisdiction over Chisholm's case to the courts by virtue of the Constitution's express "objects" and its "general texture."[254]

In his penultimate paragraph, Justice Wilson points out that the Constitution expressly creates federal jurisdiction over controversies between a state and a citizen of another state.[255] He also echoes (without acknowledgment) Justice Blair's reading that, if federal courts have jurisdiction over cases between states, one of those states must be the defendant.[256] He had previously pointed to the Contracts Clause,[257] which would be a meaningless provision if courts were not empowered to enforce it against states.[258]

Justice Wilson's methodology thus brings together textual, intentionalist, historical, and teleological modes of interpretation. However, Justice Wilson grounds his opinion not in law, but in political theory. While he and Justice Iredell both look to history, they reference completely different categories of history, and even where their opinions contradict one another, neither acknowledges the other's arguments. The opinions pass in the night, having launched from different ports and sailed in opposite directions.

4. Justice Cushing: *Ipse Dixit* Exemplified

Justice Cushing rejects all appeals to history and bases his opinion solely on the constitutional text, which he reads as establishing the federal courts' jurisdiction over the case.[259] He dismisses, rather than reckons with, his colleagues approaches: "The point turns not upon the law or practice of England . . . nor upon the law of any other country whatever. . . ."[260] He acknowledges, as did Justice Blair, the possibility that

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250 *Id*. at 464.

251 *Id.*

252 *Id.*

253 *See id.* at 464 ("[T]he people of the United States intended to bind the several States, by the Legislative power of the national Government.").

254 *See id.* at 465 (including among the Constitution's "objects" goals such as creating a more perfect union and establishing justice).

255 *Id.* at 466.

256 *Id.*

257 *See* U.S. CONST. art. I, § 10, cl. 1 ("No state shall . . . pass any . . . Law impairing the Obligation of Contracts").

258 *Chisholm*, 2 U.S. at 465 (opinion of Wilson, J.).

259 *Id.* at 466–67 (opinion of Cushing, J.).

260 *Id*. at 466.

the Constitution intended to create jurisdiction only where the state was a plaintiff, but he rejects this reading of the Constitution for want of textual evidence in its favor.[261]

Justice Cushing does directly respond to Justice Iredell's concern that states will be reduced to the status of subordinate corporations.[262] For Justice Cushing, the term "corporation" is not necessary.[263] The main point is that the Constitution details the allocation of sovereign powers. It lodges many sovereign powers with Congress,[264] and it prohibits states from engaging in other activities associated with sovereignty. [265] It may well be that states retain aspects of their sovereignty, but immunity to suit in federal courts has been eliminated by Article III's express terms. Because the Constitution's language clearly grants to courts jurisdiction over suits such as Chisholm's, the states' only recourse would be to make use of the amendment process.[266]

Justice Cushing does not address or acknowledge Justice Iredell's historical arguments;[267] rather, he simply declares his contrary conclusion:

> A second question made in the case was, whether the particular action of assumpsit could lie against a State? I think assumpsit will lie, if any suit; provided a State is capable of contracting.[268]

It would be hard to formulate a purer expression of *ipse dixit* reasoning. Justice Cushing has no interest in Justice Iredell's arguments because he engages only in textual analysis. In this case, at least, he sees no need to look beyond the plain meaning of the text.

5. Chief Justice Jay on Sovereignty Under the Constitution

Like Justice Wilson, Chief Justice Jay was not disinterested in the outcome of *Chisholm*. He had no pecuniary interest in the case, but if Georgia prevailed, that outcome would make the Treaty of Paris, which Jay had helped negotiate, more difficult to implement.[269] More generally, Jay joined the Court, in part, in order to

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[261] *Id*. at 467; *see also id.* at 476 (opinion of Wilson, J.) ("If the Constitution really meant to extend these powers only to those controversies in which a State might be Plaintiff, to the exclusion of those in which citizens had demands against a State, it is inconceivable that it should have attempted to convey that meaning in words, not only so incompetent, but also repugnant to it.").

[262] *Id*. at 468 (opinion of Cushing, J.).

[263] *Id.*

[264] *See id*. (listing some of the powers enumerated in Article I, Section 8 of the Constitution).

[265] *See id.* (listing some of the limitations on state powers named in Article I, Section 10 of the Constitution).

[266] *See id*. ("If the Constitution is found inconvenient in practice in this or any other particular, it is well that a regular mode is pointed out for amendment.").

[267] Casto thus calls Justice Cushing, like Justice Blair, "unimaginative." CASTO, *supra* note 66, at 192.

[268] *Chisholm*, 2 U.S. at 469 (opinion of Cushing, J).

[269] *See* Sandra Frances Van Burkleo, *"Honor, Justice, and Interest:" John Jay's Republican Politics and Statesmanship on the Federal Bench*, *in* GERBER, SERIATIM, *supra* note 115, at 26, 48 ("At issue was Georgia's constitutional right to resist federal judicial power *in a dispute*

ensure the enforceability of the United States' international obligations against the states.[270] In Jay's opinion, the nation properly provided for a national judiciary in order to address "evils" such as the delinquency of state courts in abiding by the international obligations of the United States.[271]

The Chief Justice's opinion begins by outlining the questions to be addressed: (1) Georgia's status a sovereign state, (2) whether such a sovereign can be sued, and (3) whether the Constitution authorizes a suit such as Chisholm's.[272] Jay's approach combines elements of the approaches of Justices Iredell and Wilson. He, like Wilson, focuses on the nature of sovereignty. Like Wilson, Jay treats individuals as the sources of sovereignty,[273] but like Iredell he is interested ultimately only in the version of sovereignty embodied in the Constitution.[274] That document, for Chief Justice Jay, is a compact among the people, who transferred many prerogatives to the federal government.[275]

Chief Justice Jay contrasts European sovereignty, which resides in the princes who exercise it, with sovereignty under the Constitution, which resides in the people for whom governmental authorities act as agents.[276] In addition, European sovereignty is based on feudal principles in which the people are subjects, not citizens.[277] Assumptions derived from European sovereignty are inapposite when applied to a compact among sovereign citizens.[278]

Turning to the text of the Constitution, the Chief Justice combines purposive and textualist approaches, beginning with the Constitution's Preamble,[279] which he uses to identify the policy considerations underlying each grant of jurisdiction in Article III, Section 2.[280] The text of Article III clearly seems to convey jurisdiction over Chisholm's case, unless it is read to cover only cases in which the state is the plaintiff. The Chief Justice rejects this argument because, "[i]t is politic, wise, and good that, not only the controversies, in which a State is Plaintiff, but also those in which a State is Defendant, should be settled."[281] Returning to a form of textualism, the Chief Justice

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involving the Paris peace, and thus to invite renewed conflict with Britain and fresh castigation of Americans in Europe.").

[270] Lash, *Leaving the* Chisholm *Trail*, *supra* note 123, at 1694.

[271] *Chisholm*, 2 U.S. 419, 474 (1793) (opinion of Jay, J.).

[272] *Id*. at 470.

[273] *See id*. at 479 (affirming the "great and glorious principle, that the people are the sovereign of this country . . . .").

[274] *Id.* at 471.

[275] *See id*. at 468 (pointing to various constitutional provisions as "a most essential abridgement of State sovereignty").

[276] *Id*. at 471.

[277] *Id.*

[278] *Id*. at 471–72; *see also id.* at 456–57 (opinion of Wilson, J.) (finding that Georgia can have no sovereign claims on its citizens and certainly not on citizens of another state).

[279] *Chisholm*, 2 U.S. at 474–75 (opinion of Jay, J.).

[280] *Id*. at 475–76.

[281] *Id*. at 476.

then points out that, if the Framers meant to preclude federal courts from the exercise of jurisdiction over cases in which a state is the defendant, they could have expressly so stated.[282]

On one point, the Chief Justice does engage Justice Iredell's opinion directly. He does so not by specifically addressing Justice Iredell, but by simply stating an opposing view.[283] Underlying Justice Iredell's broad reading of state sovereignty is a canon of construction that delegations of sovereignty ought to be strictly construed.[284] Thus, because the Constitution does not state that its object was to make states amendable to suits in cases sounding in assumpsit, courts ought not to assume such an intention. Chief Justice Jay's perspective is that the expansion of the jurisdiction of the federal courts to cover states is "remedial" and thus is to be "construed liberally."[285]

The Chief Justice's opinion is unusual, in that it acknowledges a strong textual argument on the other side. If citizens can sue a state, they should also be able to sue the United States, as Article III uses similar language to create jurisdiction over suits involving states and suits involving the United States.[286] The Chief Justice has no textual or even any legal argument in response. Rather, he simply maintains that, while the federal executive can enforce judgments against the states, there is no power that can enforce a decision against the federal government.[287] He then concludes by apologizing for a hastily written opinion that cites neither cases nor other authority, but he assures his readers that "former Congresses and the State Conventions are replete with similar ideas."[288] Finally, he appeals to honesty, utility, and "the great moral truth, that justice is the same whether due from one man or a million."[289]

D. Ipse Dixit Reasoning in Seriatim Opinions

From the modern perspective, it may seem that the swift passage of the Eleventh Amendment was a legislative overrule of *Chisholm*,[290] proving that Justice Iredell got things right. However, that conclusion is by no means obvious. Kurt Lash has argued that the Eleventh Amendment was already in the works before *Chisholm* was

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[282] *Id*. at 476–77.

[283] *Id.* at 476.

[284] *See id.* at 450 (opinion of Iredell, J.) (maintaining that "nothing but express words, or an insurmountable implication" would justify permitting a suit against a state); *see also* Lash, *Leaving the* Chisholm *Trail*, *supra* note 122, at 1640–41 (elaborating on Iredell's strict constructionist approach to limitation on sovereignty).

[285] *Chisholm*, 2 U.S. at 476 (opinion of Jay, J.). Lash also notes the disagreement between Chief Justice Jay and Justice Iredell. *See* Lash, *Leaving the* Chisholm *Trail*, *supra* note 122, at 1635 (calling the Chief Justice's approach "precisely the opposite of the rule of strict construction that excludes application of federal power against the states unless called for by express enumeration or unavoidable implication").

[286] *Chisholm*, 2 U.S. at 478 (opinion of Jay, J.).

[287] *Id*.

[288] *Id.*

[289] *Id*. at 479.

[290] *See* Orth, *supra* note 157, at 256 (noting that the adoption of the Eleventh Amendment took place less than two years after *Chisholm* was decided).

decided.[291] As Randy Barnett points out, the passage of the Eleventh Amendment could signify that the Court correctly interpreted the Constitution, but the states decided that they did not like this consequence of the Constitution and so followed constitutional procedures for amendment.[292] John Marshall observed in *Fletcher v. Peck*, that "[t]he [C]onstitution, as passed, gave the courts of the United States jurisdiction in suits brought against individual States."[293] Justice Wilson and Chief Justice Jay both rejected any notion that states could not be sued.[294] Even Justice Iredell did not deny Congress's power under the Constitution to create federal jurisdiction over suits like *Chisholm*.[295] He simply did not think that Congress had done so in the Judiciary Act of 1789.[296] He held, as a matter of *statutory construction* only, that states could not be sued.[297] The outcome of the case turned on whether Justice Iredell was correct that the Constitution's Article III is not self-executing. None of the other Justices addressed that claim directly. Justice Wilson came closest, but while Justice Iredell focused on the legacy of the English common law, Justice Wilson surveyed constitutional law dating back to the ancient Greeks.[298]

The swift passage of the Eleventh Amendment indicates that the United States of 1793 was not the United States of 1787, or even 1789. By 1793, the enthusiasm for Federalism had waned significantly.[299] James Madison, a founding Federalist, was already collaborating with Thomas Jefferson to form the Democratic-Republican Party, the political opposition to what would become the Federalist Party.[300] Attacks on *Chisholm* appeared in the partisan, anti-Federalist press.[301]

The five opinions of the Court show that the Justices appeal to history, the constitutional text, read in light of the document's purposes, and relevant political theory. They reference the intentions of the drafters or ratifiers without specifying which intentions matter, but they undertake no investigation into those intentions.

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[291] Lash, *Leaving the* Chisholm *Trail*, *supra* note 123, at 1692 ("*Chisholm* occurred midway down the road to the Eleventh Amendment").

[292] Barnett, *The People or the State?*, *supra* note 13, at 1737.

[293] 10 U.S. 87, 139 (1810).

[294] *Chisholm*, 2 U.S. at 466, 478 (opinions of Wilson, J. and Jay, J.)

[295] *See* Orth, *supra* note 157, at 263 (noting Justice Iredell's insistence that his decision was based on the statutory text and not on the Constitution).

[296] *Chisholm*, 2 U.S. at 449 (opinion of Iredell, J.).

[297] *Id.* at 436 (opinion of Iredell, J.).

[298] *Id.* at 459 (opinion of Wilson, J.).

[299] *See* STANLEY ELKINS & ERIC MCKITRICK, THE AGE OF FEDERALISM: THE EARLY AMERICAN REPUBLIC, 1788–1800 288 (1993) (describing the elections of 1792 as the first in the United States that were contested on a partisan basis, with republican interests aligned against those associated with the Hamiltonian, federalist Treasury Department).

[300] *See, e.g.*, *id.* at 257–302 (recounting the advent of political parties beginning late in 1791); NOAH FELDMAN, THREE LIVES OF JAMES MADISON: GENIUS, PARTISAN, PRESIDENT 337–71 (2017) (describing Madison's founding of a democratic Republican party in opposition to Hamiltonian Federalism).

[301] *See* POWELL, LANGUAGES OF POWER, *supra* note 156, at 72 (citing a critical editorial in *The National Gazette*, and other anti-Federalist sources).

Each Justice started from some principle that he stated rather than proved, and in their *seriatim* opinions, the Justices did not take up or refute each other's principled stands. Ultimately, each *Chisholm* opinion turns on *ipse dixit* reasoning rather than on an appeal to evidence of the original meaning of the constitutional text or the original intentions of the Framers.

IV. CONCLUSION: THE IMPORTANCE OF THE EARLY COURT'S SECOND-ORDER *IPSE DIXIT* DECISIONS

I have limited myself in this Article to a discussion of the practices of the pre-Marshall Court. I have argued, and used the *Chisholm* case to illustrate, that the opinions of the pre-Marshall Court turned on second-order, *ipse dixit* reasoning. That reasoning was neither originalist nor non-originalist. The Court embraced a non-hierarchical pluralism of interpretive approaches, and the opinions often turned on the resolution of meta-interpretive issues decided without reference to any components of the originalist toolkit and often based on commitments that sounded more in political theory or policy than in law.

John Marshall transformed the U.S. Supreme Court. He eliminated *seriatim* opinions[302] in favor of unanimous opinions, the most important of which he authored himself.[303] But, he did not stray from the early Court's non-hierarchical methodological pluralism, nor did he reduce the role of second-order *ipse dixit* reasoning in constitutional cases. Marshall's approach to constitutional adjudication then in turn became the model that American courts followed at least until the *Lochner* Era. His contemporary, Joseph Story, suggested that Marshall's epitaph should read: "here lies the expounder of the Constitution."[304] John Bradley Thayer's assessment towards the turn of the twentieth century was that Marshall was preeminent in the field of constitutional law, "first, and with no second."[305]

Marshall's strategy of authoring majority opinions strengthened the authority of the Court while sacrificing some transparency. *Seriatim* opinions make it easy to see the Justices' meta-interpretive moves. Under Marshall, the Court conveyed an appearance of unanimity that suppressed evidence of rival approaches. Still, one can see from the briefs of counsel and the critiques of the Marshall Court's opinions in the Republican press that Marshall's approach was not the only one. His approach, like that of the *Chisholm* Court, was grounded in political commitments and assumptions about the nature of the Constitution that were asserted rather than reasoned.

What we today would call originalist methods of constitutional interpretation, such as textualism and intentionalism, were part of the methodological toolkit available to

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[302] *See* G. EDWARD WHITE, THE MARSHALL COURT AND CULTURAL CHANGE, 1815–35 191 (Abridged ed., 1991) (crediting Marshall with initiating the practice of writing the "opinion of the Court"); Charles F. Hobson, *The Marshall Court (1801–1835): Law, Politics, and the Emergence of the Federal Judiciary*, *in* THE UNITED STATES SUPREME COURT: THE PURSUIT OF JUSTICE 47, 57 (Christopher Tomlins ed., 2005) (observing that opinions during the Marshall Court were "the product of collaborative deliberation, carried out in a spirit of mutual concession and accommodation").

[303] *See* WHITE, *supra* note 305, at 191 (stating that Marshall wrote 547 opinions, while his colleagues combined to write 574).

[304] Quoted in JEAN EDWARD SMITH, JOHN MARSHALL: DEFINER OF A NATION xi (1996); *see id.* at 2 (calling John Marshall's great decisions "the ABCs of American constitutional law").

[305] JOHN BRADLEY THAYER, JOHN MARSHALL 56–57 (1901).

Justices during the Early Republic and into the nineteenth century. However, such approaches did not predominate. Reliance on text or on the Framers' presumed intentions informed some opinions, but those opinions were also informed, at a more fundamental level, by perspectives that looked outside of the Constitution and beyond the law. The opinions turned on determinations made outside of the frame of their written opinions. Such second-order *ipse dixit* decisions were inevitable where the constitutional text provided inadequate guidance and the Framers disagreed among themselves as to its meaning. In the Early Republic, original meaning often ran out before constitutional interpretation began. The early Justices' legal opinions issued from within a non-legal meta-interpretive frame.