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Recommended Citation
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THERE IS NO SUCH THING AS TEXTUALISM:
A CASE STUDY IN CONSTITUTIONAL METHOD

Paul E. McGreal*

INTRODUCTION

Textualism is constitutional law's Loch Ness Monster. Like Old Nessie, many people claim that textualism exists, some even claim to have seen it themselves. Also, believers in both myths offer sketchy evidence to support their claims. Just as we have grainy pictures of something that could be the fabled sea beast, we have even sketchier theories claiming that meaning resides in the Constitution's text. And in the end, both beliefs are nothing more than a good story passed down from one generation to the next.

Sadly, the similarity ends there. While accounts of the Loch Ness Monster are relegated to notorious scandal sheets like The National Enquirer and The Star, accounts of textualism appear in the pages of respected publications such as the United States Reports and elite law reviews. While a professed belief in the Scottish monster can lead to ridicule and a bed in an asylum, belief in textualism can bring professional respect and even a seat on the Supreme Court. Why this difference? While we all know deep down that there is no such thing as the Loch Ness Monster, we just cannot bring ourselves to accept that there is no such thing as textualism. This difference should bother us. For, while the tale of Old Nessie is a harmless fable that entertains, textualism is a legal tool used to decide questions of life, liberty, and property.¹

* Associate Professor, South Texas College of Law <pmcgreal@stcl.edu>. Many thanks to Hans Baade, Sandy Levinson, and Jim Paulsen for helpful conversations on prior drafts of this Article. I also benefited greatly from comments on a presentation of the Article at the Constitutional Studies Colloquium at the University of Texas School of Law. And, special thanks to Bruce Burton, who once again read and discussed multiple drafts of my writing. His keen insights, intellectual enthusiasm, and consummate collegiality make the writing process a joy. Of course, all miscues, missteps, and mistakes that remain are mine.

¹ See generally Robert M. Cover, Justice Accused: Antislavery and the Judicial Process (1975); Robert M. Cover, The Supreme Court, 1982 Term-Foreword: Nomos and Narrative, 97 Harv. L. Rev. 4 (1983); Pierre Schlag, Normative and Nowhere to Go, 43 Stan. L. Rev. 167, 187 (1990) (stating that the emptiness of normative legal thought “can seem very funny. That’s because it is very funny. It is also deadly serious. It is deadly serious, because all this normative legal thought, as Robert Cover
This Article searches for the mythical textualist monster, hoping to expose it for the fraud it is. To do so, however, we need to get past current ways of thinking about constitutional method. Typically, explorations of textualism, or any other interpretive method (like original intent), take one of two approaches. First, some authors discuss textualism "in theory" or "in the abstract," seeking the objective foundation or essence of that method. Once found, that foundation or essence both defines textualism and justifies its use. Second, some authors critique how other authors use textualism. These critiques claim either that someone used textualism incorrectly, or that textualism should not have been used at all. Both approaches share the same perspective: an interpretive method is an object that we can examine and compare to a rational, ideal form. Just as one might assess a diamond based on the four "c's" of clarity, cut, carat, and color, one can assess textualism, or the use of textualism, based on its textbook definition.

The dominant approaches misunderstand the nature of interpretive methods. Interpretive methods are practices—they are activities that lawyers engage in, not objects that lawyers talk about. Lawyers "do not learn the forms of argument by studying them as forms, but by legal practice; they do not presuppose mental entities to which they conform and which can be handed over to the student." Consequently, we learn little if anything useful about the methods by analyzing them "in theory" or "in the abstract," as many commentators do. We need a new approach.

A new approach would treat interpretive methods as something lawyers do. Put simply, we learn about the methods only through actually using them. To offer yet another analogy, one cannot get a feel for how a car handles by reading the owner's manual or watching someone else drive it. Rather, one needs to get behind the wheel and put it through its paces. Similarly, we need to see textualism in action—take it out for a spin and see how it handles.

There is only one way to take a constitutional method out for a test drive: use it to analyze a constitutional question. This Article takes that approach. Instead of discussing textualism in theory or critiquing a judge's use of textualism, I propose a constitutional case study that allows me, and the reader, to put textualism to use. Then, as I am making constitutional arguments and engaging in the practice of constitutional interpretation, I hope, through a sideways glance, to learn something about how the constitutional methods work. Riding along on this case study, I hope the reader might get a glimpse of what I see from the driver's seat: there is no such thing as textualism.

explained, takes place in a field of pain and death.").

The case study discusses a little-remembered provision of the congressional joint resolution admitting Texas to the Union. In that provision, Congress authorized the Texas legislature to divide the state into as many as five states by creating four new states within its limits. Each new state would be automatically admitted into the Union, with no additional congressional action required. Imagine that—five Texases! Eight additional senators and electoral votes. Four more stars on the flag. And all if the Texas legislature gets the itch to do so.

But, would this be constitutional? It seems just plain weird for a state to spontaneously divide, as if it were a political amoeba. While weirdness is not a constitutional standard, it should at least cause us to ask questions. The answers depend on how one interprets the Constitution’s Statehood Clause:

New States may be admitted by the Congress into this Union; but no new State shall be formed or erected within the Jurisdiction of any other State; nor any State be formed by the Junction of two or more States, or Parts of States, without the Consent of the Legislatures of the States concerned as well as of the Congress.

The Texas five-state provision raises three interpretive questions. First, does the Clause allow division of an existing state? The middle part of the Clause provides, “no new State shall be formed or erected within the Jurisdiction of any other State,” which suggests that no division is allowed. But, the last part of the Clause, italicized above, allows certain actions with the consent of Congress and the states involved. The interpretive question is whether the consent provision leaps back across the second semi-colon to allow division of a state with proper consent.

Second, if states can be divided, can Congress “consent” to division in the same legislative act that admits the state into the Union? The Statehood Clause speaks of creating new states “within the Jurisdiction of any other State.” Until Congress approved the resolution admitting Texas into the Union, Texas was not yet “any other State” that could be divided. So, we must determine whether

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3. Joint Resolution for Annexing Texas to the United States, 28th Cong., 2d Sess., 5 Stat. 797, 798 (1845) (“New States, of convenient size, not exceeding four in number, in addition to said State of Texas, and having sufficient population, may hereafter, by the consent of said State, be formed out of the territory thereof, which shall be entitled to admission under the provisions of the federal constitution.”).

4. Of course, deciding which of the five states would retain the cherished designation “Texas,” along with the iconic Lone Star flag, would set off a political battle royale that would make the Clinton impeachment seem like a bipartisan picnic.

5. Cf. Romer v. Evans, 517 U.S. 620, 633 (1996) (noting that state’s action was “unprecedented in our jurisprudence” and that this was a reason to raise constitutional concerns).

6. U.S. Const. art. IV, § 3 (emphasis added).

7. Some argue that admission of Texas itself was unconstitutional because it was
Congress could simultaneously create a state and consent to its division.

Third, is there any time limit within which Congress and a state must consent to division? Congress passed the five-state provision in 1845. One hundred fifty-six years later, however, the Texas legislature has yet to consent to the division. Is it too late for Texas to do so? Is there some statute of limitations on consent? If so, the five-state provision will have lapsed into history.

Needless to say, these three questions are not ripe for judicial review. The Texas legislature has never come close to dividing the state, and I know of no current political lobby pushing the issue. For that very reason, the five-state provision makes an attractive case study. The typical case study involves a question with either an obvious answer or immediate political consequences. Either type of question distorts the ultimate analysis. If the answer is obvious, the author's "conclusion" is pre-determined and her analysis is just "going through the motions." If the question is politically charged, unacknowledged ideological influences will be more likely to push the analysis one way or the other, distorting our view of the interpretive methods in action. The five-state provision case study avoids these problems. Because no one presently has a personal or political stake in the five-state provision, and the answer is not obvious, we may pursue the methods with an unbiased view.


8. The only serious attempt to divide the state took place at the special convention called to draft a Reconstruction constitution for Texas. See generally Ernest Wallace, The Howling of the Coyotes: Reconstruction Efforts to Divide Texas (1979). While the convention sent a single constitution to Congress, a rogue faction of delegates also presented Congress with a constitution for a separate State of West Texas. Id. at 91-108. Congress ultimately opted for an undivided Texas, sending a single state constitution back for ratification. Id. at 124. On ante-bellum agitation for division, see id. at 3-15; on post-Reconstruction agitation for division, see id. at 137-46.

9. See, e.g., Sanford Levinson, Authorizing Constitutional Text: On the Purported Twenty-Seventh Amendment, 11 Const. Comment. 101, 102-03 (1994) (analyzing the constitutionality of ratification of the Twenty-Seventh Amendment, which dealt with the political hot potato of congressional pay raises); Jordan Steiker et al., Taking Text and Structure Really Seriously: Constitutional Interpretation and the Crisis of Presidential Eligibility, 74 Tex. L. Rev. 237, 238-52 (1995) (analyzing whether any Presidents other than John Adams, John Quincy Adams, and Zachary Taylor were constitutionally eligible to hold the office). These studies often make the point that constitutional methods are manipulable, either because the methods can support counterintuitive results, or because all sides of a political controversy can invoke them. Some authors go further to examine the canons of constitutional law. J. M. Balkin & Sanford Levinson, The Canons of Constitutional Law, 111 Harv. L. Rev. 963, 1002-21 (1998).
This Article proceeds in three parts. Parts I and II compose the case study on the Texas five-state provision. Part I sketches the historical context of the five-state provision, placing it within the saga of Texas annexation. Part II then analyzes the three constitutional questions raised by the five-state provision, using the accepted methods of text, history, structure, past government practice, and judicial precedent. While this Article focuses on textualism, the case study must use all the methods of constitutional interpretation because textualism reveals its true nature only when used alongside the other methods of interpretation.

Part III then draws two main lessons about constitutional method from the case study. First, as the title states, there is no such thing as textualism. While text may appear to play some role in interpretation, it merely masks the role of other forces at work. Second, the textualist myth has misled constitutional theorists to classify clauses of the Constitution as "vague and ambiguous" or "relatively specific," and then offer different approaches to interpreting each type of clause. After dispelling the textualist myth, we will see that supposedly "vague and ambiguous" clauses may indeed have specific

10. I use these methods because, for the most part, they currently constitute our practice of constitutional interpretation, not because of some foundationalist belief that these methods are correct or proper. See Philip Bobbitt, Constitutional Fate: Theory of the Constitution 5-6 (1982) ("Arguments are conventions,... they could be different,... but then we would be different.") [hereinafter Bobbitt, Fate]; Bobbitt, Interpretation, supra note 2, at 6-22. My commitment to these particular methods, then, is descriptive, not normative.

11. Some commentators refer to this as a coherence approach to interpretation, whereby an interpreter compares the analysis under each method and seeks coherence among the various methods. See J.M. Balkin, Understanding Legal Understanding: The Legal Subject and the Problem of Legal Coherence, 103 Yale L.J. 105, 123-24 (1993) (describing such an approach under the label of "rational reconstruction"); Richard H. Fallon, Jr., A Constructivist Coherence Theory of Constitutional Interpretation, 100 Harv. L. Rev. 1189, 1240 (1987) (labeling this approach as the constructivist coherence theory of constitutional interpretation). Professor Richard Fallon describes the practice of coherence as follows:

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. A provisional conclusion may be reached as to the balance of argument within each factor; perhaps more commonly, the decisionmaking process will have a gestalt-like quality, in which each category is considered with all of the others in mind. But if the conclusions fail to cohere into a uniform prescription for how the case or issue ought to be resolved, then any or all of the individual conclusions may be reexamined, and the results adjusted insofar as plausible within the prevailing conventions of constitutional analysis, in an effort to achieve a uniform outcome.

Id.

12. Part III also reviews three other lessons from the case study, but those lessons are really byproducts of the overall focus of the project, which is to learn something about textualism. Thus, while this Article does not ignore those secondary lessons, neither does it focus on them.
meaning, while "relatively specific" clauses may raise difficult constitutional questions. This should not be surprising, given that text does little if any interpretive work in constitutional law.

I. A BRIEF HISTORY OF THE FIVE-STATE PROVISION

The battle over Texas annexation was in part a struggle to avoid two wars as well as to save a political party. First, given the contentious relationship between Mexico and the Republic of Texas, annexation was thought to entail war with Mexico. Second, annexation was so fraught with sectional controversy that merely debating the issue might push the United States closer to civil war. As we know today, both premonitions were correct—annexation both precipitated the Mexican-American War and continued the trajectory toward the Civil War. Third, the annexation issue helped destroy the Whig Party by exacerbating sectional divisions. Together, these three factors help explain why Congress included the five-state provision in the Texas statehood resolution, which will be clarified by analyzing each factor in turn.

Few people wanted war with Mexico. If the United States was to go to war, there had to be something significant to gain. Since annexation of Texas would likely result in war with Mexico, the first hurdle for annexationists was to prove that something important hung in the balance. Through the early 1840s, neither major political party saw any great advantage in annexing Texas. In addition to likely war, annexation would open sectional rifts within both the Democrat and Whig Parties. These reasons were sufficient to keep annexation a non-issue in the 1834 and 1840 presidential elections. And, as the 1844 presidential election approached, the issue did not seem destined for either party's agenda.

Slave politics and an exiled sitting president helped overcome the inertia against Texas annexation. Then-President John Tyler had come to office in a unique way. In 1840, he was elected the Vice President to war hero General William Henry Harrison, who swept the Whigs to their first presidential victory, as well as to convincing

15. Id. ("Before Texas, tendencies towards secession were merely foreshadowed. After annexation, events would come in a rush.").
17. Id. at 171-72.
18. Id. at 168 ("Texas annexation, involved the sectionally divisive question of slavery expansion, a dispute with ominous potential to divide both the Whig and Democratic parties along sectional lines.").
victories in the House and the Senate. Harrison had promised to be a hands-off president who would defer to the Whigs in Congress. So, Whig legislators anticipated enacting a sweeping domestic legislative agenda, which included a strengthened national banking system, tariffs, and federally-funded internal improvements.

Before the Whig Congress ever got going, their war-hero president died. For the first time in United States history, the Vice President succeeded to the presidency. Shortly thereafter, the Whigs learned that President Tyler, known derisively as "His Accidency," did not support most of his party's legislative agenda. Consequently, the ensuing years of the Tyler Administration saw many battles between the President and his party in Congress. After a string of vetoes that gutted their legislative agenda, the Whigs tossed Tyler out of the party. Tyler was a President without a party.

As the end of his term approached, Tyler feared that his presidency had consisted mostly of vetoing legislation. Without prominent positive accomplishments, he feared for both his legacy and his chances of re-election. Texas annexation seemed the perfect issue to address both concerns. On the legacy side, Tyler would be known as the president who pushed United States expansion further into the southwest. On the re-election side, Tyler would use annexation to split the Democrat and Whig parties along sectional lines, riding a new Southern alliance to an electoral victory.

Texas annexation proved such a divisive issue because many saw it as central to the question of whether slavery would ever be abolished. In the South, some saw annexation as the only way to preserve slavery. To reject annexation was to place the South on a slippery slope to abolition and thus anarchy. The logic, while perhaps a bit paranoid, rested on two core beliefs: the Republic of Texas needed to settle its hostilities with Mexico, and England wished to spread abolition throughout the world. A series of diplomatic signals from England and Texas, some misperceived, some not, led several southern leaders to believe that England would take advantage of

19. Id. at 112-13.
20. Id. at 122 ("Harrison had repeatedly pledged to defer to the will of Congress, and Whigs intended to prove that congressional initiative could work.").
21. Id. at 122-23, 128.
22. Id. at 128.
23. Frehling, supra note 13, at 364; Holt, supra note 13, at 128-50.
24. Holt, supra note 13, at 170-71, 982.
25. Id. at 170.
26. In this brief account, I repeatedly make the unforgivable historical sin of referring to a single South, as if all Americans below a specified latitude shared the same beliefs and world view. See Frehling, supra note 13, at viii ("Whenever someone declaims on a South,... ask them which South is meant, and when?") (emphasis in original)). I do so to simplify the account of Texas annexation to only those matters necessary for the legal analysis that follows. Thus, historians would rightly criticize me for doing lawyer's history.
Texas' situation to push abolition into the United States. England would offer Texas military protection from Mexico in exchange for abolition of slavery. Once abolition gained a foothold in Texas, it would somehow spread to the United States, devastating the South.\textsuperscript{27} While southern leaders were not always clear how precisely this would happen, their fear was real enough to spur them to action, and Tyler knew it.\textsuperscript{28}

Tyler ultimately got the legacy but not the re-election. After he signed a treaty of annexation with Texas, the Democrats saw the political possibilities in annexation and nominated James Polk, a pro-Texas southerner, as their presidential standard-bearer.\textsuperscript{29} With the Democratic party now pro-annexation, the South had no need for a Tyler-led third party.\textsuperscript{30} But, with his legacy still at stake, Tyler continued to work for annexation. He submitted the treaty to Congress, where the Whigs continued to oppose annexation.\textsuperscript{31} Thus, going into the 1844 presidential election, the two major parties stood on opposite sides of the day's main issue.

Here enters the third factor behind the five-state provision: problems within the Whig Party. During the 1844 presidential campaign, with Henry Clay as their candidate, the Whigs believed that economic issues, such as banking, tariffs, and internal improvements, would be the main battleground.\textsuperscript{32} Consequently, Clay felt free to voice his opposition to immediate annexation of Texas.\textsuperscript{33} This position ultimately proved unpopular in the South, contributing to Clay's narrow defeat even in southern states where Harrison, the 1840 Whig candidate, had run strong.\textsuperscript{34} Clay's campaign had stung the Whigs with the harsh label "anti-Texas."

At that time, not all federal elections were held on the same day. In 1844, states held their elections for presidential electors throughout the fall. In many states, however, elections for the House and Senate were not held until 1845.\textsuperscript{35} Thus, many Whig representatives and

\begin{itemize}
\item\textsuperscript{27} Id. at 388-98.
\item\textsuperscript{28} Id. at 398-401.
\item\textsuperscript{29} Id. at 430-31.
\item\textsuperscript{30} Id. at 433 ("Polk's nomination made Tyler's race both counterproductive (because annexationist votes would be split) and unwinnable (because the regular party candidate running on the same issue had too great an advantage).")
\item\textsuperscript{31} Id. at 431-33.
\item\textsuperscript{32} Holt, supra note 13, at 171-87.
\item\textsuperscript{33} Freehling, supra note 13, at 426-28, 435-37; Holt, supra note 13, at 177-87; Robert V. Remini, Henry Clay: Statesman for the Union 640 (1991) (on his anti-Texas stance, Clay "stated that he felt perfectly confident about the ground he had taken and had no fear of the consequences because he knew that Van Buren, the likely Democratic candidate, also opposed annexation").
\item\textsuperscript{34} Freehling, supra note 13, at 437-39; Holt, supra note 13, at 199-200; Remini, supra note 33, at 646-47 (by nominating Polk, "with a single stroke, the Democrats had virtually annihilated Clay in the South and in every other place where expansionism was the dominant issue" (citation omitted)).
\item\textsuperscript{35} At that time, state legislatures chose the senators, and many states did not
senators had time to learn from Clay’s mistakes. Specifically, some southern Whigs felt the need to take a strong pro-Texas stance, yet, to make gains on the Democrats these Whigs had to appear more stridently pro-Texas than the Democrats. For this reason, Representative Milton Brown, Whig of Tennessee, proposed that Texas be allowed to divide itself into as many as five states. Where Democrats offered a single slave Texas, southern Whigs offered as many as five. Where Democrats offered two additional slave senators, southern Whigs offered the potential for ten. The five-state provision was calculated to prove the southern Whigs’ bona fides on Texas and thus on slavery.

Congress could not agree on all aspects of Texas annexation, including the five-state provision, yet, a majority at least agreed that annexation was desirable. So, Congress passed a joint resolution that authorized the President to decide whether to negotiate with Texas over terms of annexation, or to offer Texas annexation as a slave state that could divide into as many as five slave states. President Tyler chose the latter option, and offered Texas annexation as a slave state along with the five-state provision. Texas accepted the offer, and Congress later confirmed Texas’ admission to the Union.

II. THE LONE STAR STATES?: A CASE STUDY IN CONSTITUTIONAL METHOD

The Texas five-state provision raises three constitutional questions. First, does the Constitution allow division of an existing state into two or more states? Second, may Congress admit a state into the Union and consent to its future division in the same legislative act? Third, is there a time limit on dividing a state? The next three sections address these questions.

A. Division of an Existing State

Article IV, section 3 addresses admission of new states into the Union:

elect their new legislatures until 1845. Holt, supra note 13, at 218.

36. Id. at 218-20.

37. Freehling, supra note 13, at 440 (“A few Southern Whigs sought to reverse electoral defeats they had suffered from being labeled soft on Texas. They would enable Texas, once admitted to the Union, to balloon into five slave states.”); Holt, supra note 13, at 220.

38. For the mixed results of this Whig strategy, see Holt, supra note 13, at 222-24.


40. Freehling, supra note 13, at 448-49.


[1] New States may be admitted by the Congress into this Union; [2] but no new State shall be formed or erected within the Jurisdiction of any other State; [3] nor any State be formed by the Junction of two or more States, or Parts of States, without the Consent of the Legislatures of the States concerned as well as of the Congress.  

The bracketed numbers divide the Statehood Clause into three parts, using the semi-colons as dividers. Part 1 grants Congress power to admit new states; part 2 generally prohibits the division of a state into two or more states; and part 3 generally prohibits the consolidation of two or more states or parts of states. For current purposes, the main interpretative puzzle lies in the italicized portion of part 3. Plainly, the italicized language allows consolidation of two or more states, or parts of states, upon consent of Congress and the state legislatures. The question is whether this consent provision also applies to part 2's prohibition against dividing an existing state. If so, the Statehood Clause would allow division of an existing state upon consent of Congress and the state to be divided. If not, the Clause bars division of an existing state regardless of the circumstances. The following sections examine text, history, structure, precedent, and past government practice for an answer to our first question.

1. Text

In the eyes of the strict grammarian, part 3's consent provision does not reach into part 2. To see this, consider the nature and function of the punctuation mark separating parts 2 and 3: the semi-colon. A semi-colon generally links two independent clauses. Independent clauses are grammatically complete in themselves—they contain a subject and verb and do not need additional language to make sense. While related, the independent clauses on either side of a semi-colon each express a complete thought. Consequently, modifiers or dependent clauses within an independent clause do not modify a separate, linked independent clause on the other side of the semi-colon.

Under common grammatical rules, all three parts of the Statehood Clause are independent clauses. Each part expresses a complete idea and, while related to the other parts, does not modify the others. Our strict grammarian would read parts 2 and 3 separately, confining the consent provision to part 3. Thus, part 2 prohibits division of a state regardless of whether Congress and the state consent.

43. U.S. Const. art. IV, § 3 (emphasis added).
44. Merriam-Webster's Third New International Dictionary 2063 (1986) (defining a semi-colon: "used to separate independent clauses when the clauses are joined by no connective").
46. As Professor Hans Baade graciously brought to my attention, no discussion of
While this might be the best grammatical reading of the Statehood Clause, it need not be the best interpretation of the Constitution. In interpreting the Constitution, we look to rules of grammar because those rules describe how people generally use language. The Constitution is an instance of language in use and therefore it makes sense to presume that the drafters and ratifiers, as users of language themselves, knew of and used the grammar rules in drafting and understanding that document. Grammar rules are descriptive, however, and the presumption in favor of those rules must yield to evidence that better describes how the Constitution uses language. Later sections explore other evidence, such as history, structure, past government practice, and judicial precedent.

Grammar rules are not the only aspect of textual interpretation. An alternative method is to examine other portions of the Constitution to determine how the drafters used language in other instances. One commentator has termed this method "intratextualism." While grammar rules attempt to describe how an entire community uses language, intratextualism asks only how the people who drafted and ratified the Constitution used language. The idea is that the framers and ratifiers may have used language in a

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48. See Steven Pinker, The Language Instinct 370 (1994) ("To a linguist or psycholinguist, of course... [t]he way to determine whether a construction is 'grammatical' is to find people who speak the language and ask them.").


different manner than that dictated by the rules of grammar and usage.\textsuperscript{51} This personal usage can be gleaned from examining how they used language throughout the Constitution.\textsuperscript{52}

For our question, we need to examine some other portion of the Constitution to help shed light on whether the consent provision in part 3 of the Statehood Clause applies to part 2 of the Clause. The third clause in Article I, section 10 offers a possible candidate:

No State shall, \textit{without the Consent of Congress}, lay any Duty of Tonnage, keep Troops, or Ships of War in time of Peace, enter into any Agreement or Compact with another State, or with a foreign Power, or engage in War, unless actually invaded, or in such imminent Danger as will not admit of delay.\textsuperscript{53}

Several aspects of this clause are relevant to our interpretation of the Statehood Clause. Like the Statehood Clause, this clause lists actions that are prohibited. Also, like the Statehood Clause, this clause allows certain actions upon “consent” of a specified body. But, there is a crucial difference between the two clauses: the above-quoted clause places both the prohibition (“No State shall”) and the allowance for consent (“\textit{without the Consent of Congress}”) at the beginning of the listed items. This structure indicates that the prohibition and consent apply to \textit{all} of the items that follow. Additionally, the listed items are separated by commas, not semicolons, indicating that all items are part of the same provision. Under the rules of grammar, this clause is a straightforward statement that all the listed items are prohibited unless Congress consents.

Now, compare the text of the Statehood Clause:

[1] New States may be admitted by the Congress into this Union; [2] but no new State shall be formed or erected within the Jurisdiction of any other State; [3] nor any State be formed by the Junction of two or more States, or Parts of States, \textit{without the Consent of the Legislatures of the States concerned as well as of the Congress}.\textsuperscript{54}

Placing the consent provision at the end of the Clause seems like a roundabout way to cover the prohibitions in parts 2 and 3. A more straightforward way to achieve that result, and a way consistent with

\textsuperscript{51} Id. at 791-92.
\textsuperscript{52} One could also look to the framers’ and ratifiers’ other writings to determine how they use language, what one might call inter-textualism. For example, consider the Constitution’s provision that federal judges “shall hold their Offices during good Behavior.” U.S. Const. art. III, § 1. The main interpretive question is whether this clause sets forth a ground for judicial impeachment, or whether the clause simply states that federal judges shall have life tenure. To the modern ear, “good Behavior” sounds an awful lot like a standard of conduct. See Paul E. McGreal, \textit{Impeachment as a Remedy for Ethics Violations}, 41 S. Tex. L. Rev. 1369, 1375-76 (2000). But, the writings of those who drafted and debated the Constitution show that they used the term “good Behavior” simply to mean life tenure. \textit{Id.}
\textsuperscript{53} U.S. Const. art. I, § 10, cl. 3 (emphasis added).
\textsuperscript{54} Id. art. IV, § 3, cl. 1 (emphasis added).
the drafting of Article I, section 10, discussed above, might be the following:

New States may be admitted by the Congress into this Union. Congress shall not, without the consent of the Legislatures of the States concerned, form or erect a new State within the Jurisdiction of any other State, or form a State by the Junction of two or more States, or Parts of States.

This language more naturally expresses that both dividing and consolidating states are allowed with the consent of Congress and the states. Furthermore, Article I, section 10 illustrates that the framers used just such a structure—prohibition, followed by allowance for consent, followed by an enumerated list separated by commas—to express a similar idea. Given this textual comparison, we can infer that the drafters meant something different when they took a different approach in drafting the Statehood Clause. Specifically, they meant the consent provision to apply only to part 3 regarding consolidation of states.

Some criticize intratextualism as making too much of small differences in language. According to these critics, the intratextualist gives the Constitution's drafters too much credit, imputing to them care in usage of language that is unsupported by history.55 One need not refute intratextualism's critics to find it a useful tool of interpretation. As with rules of grammar, one can concede that intratextualism is not dispositive but nonetheless continue to believe in its relevance. To borrow a metaphor from evidence law, intratextualism is one more brick in building the wall of constitutional meaning.56 At this point, intratextualism bolsters the interpretation suggested by the rules of grammar: the consent provision applies only to consolidation of states, not division.

Text need not be the final word in interpretation. Even those who make text the primary, or even sole, interpretive focus reject textual interpretations that produce an absurd result.57 Here, the question is whether interpreting the Statehood Clause to allow consolidation of states but not division of a state produces an absurd result. Asked another way, is there any reason to allow consolidation of states but not division?


56. Professors Vermeule and Young note that this “weak” version of intratextualism is “relatively uncontroversial.” Vermeule & Young, supra note 55, at 734.

The circumstances of Texas statehood suggest a reason to distinguish division from consolidation. Recall that southern, slave-supporting members of Congress inserted the five-state provision to sow the seeds of greater political influence. As a slave state, Texas bolstered the slave-state delegations in the House and Senate. Four additional Texas states would add eight more slave-state senators, increasing the Senate by 7.5%, from sixty to sixty-eight.

As the Texas example illustrates, a majority party could use state division to perpetuate its hold on government power. That party could divide a sympathetic state into infinitely smaller units, each entitled to two senators. The majority party would overwhelm its political opponents, as well as the other states, in the Senate. All this could be done over the objection of minority parties and without consent of the other states. Consequently, it makes some sense for the Constitution to prohibit division of states, which Congress can manipulate to political ends, while allowing consolidation, which is not so vulnerable to partisan abuse. A strict grammatical reading is not absurd.

The preceding textualist arguments view the Constitution through the grammatical rules of today. But, did the drafters and ratifiers follow the same grammatical conventions? Specifically, did the founding generation use semi-colons the way we do today? The existing evidence suggests that the drafters either ignored the significance of punctuation or used semi-colons much as we use commas today. The Supremacy Clause of Article VI illustrates this usage:

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; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

The last part of the Supremacy Clause, after the final comma, is known as the non obstante provision. Under modern grammar rules, the non obstante provision would be confined to the portion of the

58. See supra notes 35-38 and accompanying text.
59. Professor Caleb Nelson describes their practice as follows: "To lawyers of the day, little hinged on the difference between a semi-colon and a comma. Not only were punctuation marks thought to lack the legal status of words, but commas and semi-colons were not as distinct as they are today." Caleb Nelson, Preemption, 86 Va. L. Rev. 225, 258-59 (2000); for examples of the different usage, see also Joseph Robertson, An Essay on Punctuation (1789); Noah Webster, A Grammatical Institute for the English Language app. 118 (6th ed. 1800).
60. This example is taken from Nelson, supra note 59, at 257-59.
61. U.S. Const. art. VI, §1, cl. 2.
62. On the meaning and function of the non obstante provision, see Nelson, supra note 59, at 254-60.
Supremacy Clause after the final semi-colon, applying only to state judges who interpret or apply federal law. In a world where semi-colons are not terminal punctuation, however, the *non obstante* provision refers to the entire Supremacy Clause, binding all actors who interpret or apply federal law. History supports the latter reading and therefore the *non obstante* provision is a good example of the drafters' indifference between commas and semi-colons.

State ratifications of the Constitution hold further evidence of historical semi-colon usage. Many states appended a copy of the Constitution to their form of ratification. On several of these copies, punctuation differs in many places from the punctuation of the document promulgated by the drafting convention. One common difference is the substitution of commas for semi-colons. An example of this switch, of particular relevance here, occurred in the South Carolina form of ratification. In the Constitution included with that state's ratification, the Statehood Clause reads as follows:

New States may be admitted by the Congress into this Union; but no new State shall be formed or erected within the Jurisdiction of any other State, nor any state be formed by the Junction of two or more States, or parts of states, without the consent of the Legislatures of the states concerned as well as of the Congress.

The second semi-colon is now a comma, removing any grammatical doubt that the consent provision applies to division of states. Importantly, none of the South Carolina delegates argued that this change in punctuation altered the Clause's meaning. Thus, the South Carolina form of ratification is best read as confirming the historical indifference between semi-colons and commas.

The textual answer to our question depends, therefore, in part on whether we use the grammatical conventions of the past or the present. One way to choose is to ask whether past or present grammar best promotes the democratic legitimacy of the Constitution. On the one hand, using present conventions promotes democratic self-government by making the Constitution's text comprehensible to current-day readers. The average educated citizen could think and

63. *Id.* at 255.
64. See *id.* at 258 n.102.
65. *Id.* at 259 n.103.
67. 4 Jonathan Elliot, Debates on the Adoption of the Federal Constitution 253 (1788) (debate in South Carolina ratifying convention regarding the Statehood Clause).
68. A similar switch in punctuation occurred in the copy of the United States Constitution included with the Texas laws accepting annexation. 2 The Laws of Texas (1822-1897) 1262 (1898). In that copy, the Statehood Clause's second semi-colon is changed to a comma. *Id.* at 1262.
69. See generally Frank I. Michelman, *The Supreme Court 1985 Term-Foreword:*
argue about the Constitution without researching historical grammatical practices. Increased participation in turn would yield two further benefits. First, a greater diversity of views would enrich constitutional dialogue. Second, wider participation would give more people a stake in and foster greater acceptance of constitutional decisions.

On the other hand, using past conventions also promotes democratic legitimacy. As some have argued, acts gain democratic legitimacy only after sustained, heightened public debate and acceptance. At the time of the founding, the public intensely debated and ratified the Constitution as understood under then-prevailing rules of grammar. While those rules have changed over time, the American public has neither debated nor approved the effect of such changes, if any, on the Constitution's meaning. Thus, changed constitutional readings caused by changes in grammar do not bear the hallmarks of democratic legitimacy.

Apart from democratic principles, the textualist ought to distinguish changes in grammar from other changes that bear on constitutional meaning, such as changes in word usage or in social circumstances. When word usages or social circumstances change over time, there is good reason to infer corresponding changes in constitutional meaning. In each case, the reason behind such change will often suggest a reason for a corresponding constitutional change. To see the distinction, consider an example of changed word usage and changed social circumstances.

First, consider the word "people," used twice in the original Constitution. The Supreme Court held that "people" refers to those individuals who may participate in American political government. At the time of the founding, many accepted that very few "people"—basically, white, male property owners—could participate in American political life. Today, we have a much more expansive view of political participation, so it would seem irrational to give the term "people" anything but the ordinary usage "all individuals." The

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70. See Bruce Ackerman, We the People: Foundations 108-13 (1991) [hereinafter Ackerman, Foundations]; Bruce Ackerman, We the People: Transformations 261-65 (1998) [hereinafter Ackerman, Transformations].

71. Professor Ackerman argues that the public has debated and approved extra-Article V constitutional changes wrought during the New Deal era. See Ackerman, Foundations, supra note 70, at 119-21; Ackerman, Transformations, supra note 70, at 261-65. For criticisms of this view, see William E. Forbath, Constitutional Change and the Politics of History, 108 Yale L.J. 1917, 1921-22 (1999).

72. U.S. Const. preamble ("We the people of the United States... "); id. art. I, § 2, cl. 1 ("The House of Representatives shall be composed of Members chosen every second Year by the People of the several States... ").


reason behind the change in usage (increased social diversity and acceptance of others) suggests a good reason for constitutional change (greater inclusion in political activities).

Second, consider the meaning of the word "commerce" as used in the Constitution. When drafted, the Constitution's Commerce Clause targeted state-erected barriers to free trade. For example, some states imposed prohibitive taxes on goods that crossed their borders. In that context, most economic activity was local, and "commerce" became a national concern only when goods were traded across state lines. Today, however, we have a nationally integrated economy where local economic activity in one state can substantially affect the larger national economy. In this context, "commerce" is more readily a national concern, and Congress' power to regulate interstate "commerce" has naturally grown.

Unlike changes in word usage or social circumstances, changes in grammar do not imply corresponding changes in constitutional meaning. Grammar changes are substantively neutral; they do not signal changes in underlying substantive ideas or concepts. Consequently, any corresponding changed constitutional readings would be mere accidents, logically unrelated to why the grammar rules have changed.

In sum, both democratic principles and logic favor historical grammar rules. Here, that would mean treating the semi-colons as commas, or non-existent, and reading the consent provision to allow division of an existing state. The next four sections examine whether history, structure, past government practice, and judicial precedent support this reading.

2. History

This section looks at two types of history regarding the Statehood Clause. First, the drafting history details the Clause's evolution through various versions and amendments. Second, debate over the

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79. Bobbitt, *Fate*, supra note 10, at 36 ("The contemporary understanding of the word 'commerce'... is far more comprehensive and hence a more promising source of national power than the understanding of a century ago, reflecting our more interconnected economy as well as our awareness of that interconnectedness.").
Clause reveals whether the Convention delegates said anything about division of existing states. In the end, both sources support authority to divide a state with consent.

The drafting history of the Statehood Clause supports the historical textual reading that allows state division with consent of Congress and the state involved. The Statehood Clause started as a simple grant of power to Congress to admit new states. Next, the drafting convention added a provision allowing for division of states with the consent of Congress and the state to be divided. The convention then added a provision regarding the consolidation of states, again with the permission of Congress and the affected states. At this point, the text still plainly allowed division of states with consent. Finally, the Statehood Clause went into the black box of the drafting convention—the Committee of Style—which edited the Clause to its present form. Because the Committee of Style intended no substantive changes, we may assume that the present Statehood Clause is simply an unclear way to provide for state division with consent. The remainder of this section reviews this drafting history.

The Virginia Plan, submitted to the delegates near the beginning of the drafting Convention, contained a simple provision for admission of new states:

10. Resolvd. that provision ought to be made for the admission of States lawfully arising within the limits of the United States, whether from a voluntary junction of Government & Territory or otherwise, with the consent of a number of voices in the National legislature less than the whole. 80

The convention adopted this provision without recorded debate. 81

Language allowing division of a state first appeared in the draft constitution reported by the Committee of Detail:

New States lawfully constituted or established within the limits of the United States may be admitted, by the Legislature, into this Government; but to such admission the consent of two thirds of the members present in each House shall be necessary. If a new State shall arise within the limits of any of the present States, the consent of the Legislatures of such States shall be also necessary to its admission. If the admission be consented to, the new States shall be admitted on the same terms with the original States. But the Legislature may make conditions with the new States, concerning the public debt which shall be then subsisting. 82

This text unambiguously authorizes division of a state if Congress and the affected state consent. Debate over this provision centered on whether new states ought to be admitted on equal terms with existing

81. Id. at 121.
states. Gouverneur Morris moved to delete the last two sentences, dealing with the provision for equal admission and the public debt respectively, and the Convention agreed. In lieu of other amendments, Morris then simply moved to substitute the following language for the entire Clause:

New States may be admitted by the Legislature into this Union: but no new State shall be erected within the limits of any of the present States, without the consent of the Legislature of such State, as well as of the Genl. Legislature.

Again, the text still allows division with consent. The Convention approved this language with only minor tinkering. Finally, John Dickinson proposed language to address consolidation of states, which the Convention approved.

After debating the entire draft reported by the Committee of Detail, the Convention convened a Committee of Style to consolidate the various provisions, as amended, and clean up the language. As shown above, the Statehood Clause submitted to the Committee of Style plainly allowed division of a state with consent of Congress and the affected state. The Committee of Style rewrote that text to the Clause we have today, inserting the semi-colons that bedevil our current-day textualist.

We should not read the Committee’s change to alter the Clause’s meaning. First, that was not the Committee’s role. They were called the Committee of Style—and not the Committee of Substantive Revisions—for a reason: Their role was to clean up the document’s style. Just because their stylistic revisions may have at times obscured, rather than clarified, constitutional meaning does not mean we should attribute substantive designs to their work.

83. Id. at 454-56. For example, the delegates debated whether new states admitted from western territories should have equal representation in the Senate. Id. at 454 (“The existing small States enjoy an equality now, and for that reason are admitted to it in the Senate. This reason is not applicable to [new] Western States.”).

84. Id.

85. Id. at 455.

86. Id. The Convention voted to change the word “limits” to “jurisdiction.” Id. at 463. This change was intended to clarify that Vermont could be admitted to the Union without New York’s consent. Id. Apparently, some delegates believed that Vermont was not within New York’s “jurisdiction,” but arguably was within the “limits” of New York. Id.

87. Id. at 465 (“Nor shall any State be formed by the junction of two or more States or parts thereof, without the consent of the Legislatures of such States, as well as of the Legislature of the U. States.”).

88. Id. at 602.

89. See Powell v. McCormack, 395 U.S. 486, 538-39 (1969) (“[T]he Committee ... had no authority from the Convention to make alterations of substance in the Constitution as voted by the Convention, nor did it purport to do so ... .”’ (quoting Charles Warren, The Making of the Constitution 422 n.1 (1928)); 2 Farrand, supra note 82, at 553 (describing the Committee of Style’s role as “to revise the stile of and arrange the articles which had been agreed to”).
Second, none of the delegates suggested that the Committee had changed the Statehood Clause's meaning. The draft approved and submitted to the Committee of Style plainly allowed division of states. If the Committee had reversed that decision, surely some delegate would have at least remarked upon the change. But, the Convention approved the Committee's redrafted Clause without debate. Again, we may infer that the Committee's edits made no substantive change.

Similarly, the drafting and ratifying debates support state division with consent. Delegates to the drafting and state ratifying conventions spoke as if the proposed Statehood Clause allowed division. The most striking example comes from the drafting Convention's only extended debate over the Clause. All delegates who spoke agreed that an existing state may be divided. The only dispute was whether Congress should be allowed to do so without the state's consent. Several delegates were concerned that states such as Virginia and North Carolina were laying claim to lands extending far to the west. These states could assert political control over western land and people without gaining those people's consent. Even worse, the states could maintain their government and other valuable establishments a considerable distance from the western lands, effectively freezing westerners out of state government. This exploitation of western land and people would continue unabated as long as the Constitution required a state's consent before Congress could divide a state. To prevent this abuse, some delegates argued, Congress ought to have power to divide a state without its consent.

Those favoring state consent made three arguments. First, granting Congress power to unilaterally divide a state was an intolerable invasion of state sovereignty. States ought to retain that central power of political self-determination, defining the bounds of their political community. Second, the power to unilaterally divide a state could be abused. For example, any group of state citizens could petition Congress for division of a state simply out of disagreement with a state's policy. If the losers in state politics could always do so, "nothing but confusion would ensue." Third, unilateral congressional division violated the democratic principle of majority
rule. A small minority within the state could petition Congress for division, and Congress could accede regardless of what the majority of the state desired.

The Convention debate shows a common understanding that Congress may divide a state; the only question was whether to require state consent. The Federalist Papers reinforce this understanding. James Madison's Federalist No. 43 is the only paper to discuss the Statehood Clause: "[t]he particular precaution against the erection of new States, by the partition of a State without its consent, quiets the jealousy of the large States...." The evil addressed is not division of a state simpliciter, but rather division of a state "without its consent." The proportionate "precaution" was to require state consent, not to prohibit all division. Thus, Madison is best read as endorsing division with proper consent.

History weighs heavily on the side of state division with consent. The drafting history shows that the initial drafts plainly allowed division, and that only the Committee of Style's inartful editing muddled the waters. The debates over the Statehood Clause show that the Committee intended no substantive change to the Clause.

3. Structure

Given history's strong verdict, considering structure may seem overkill, but, a review of structure still serves two purposes. First, it can help determine whether our discussion of text or history missed some important aspect of constitutional law. Second, it serves as a warm-up to discussion of our next issue, where text and history will not provide as clear an answer.

Federalism, one of our most basic constitutional structures, refers to the relationship between the states and the national government. As applied by the current Supreme Court, that relationship has three main aspects. First, each state entered the Union with its sovereignty intact, except where the Constitution abrogates that

98. Id. at 456 (James Wilson argued, "[t]he aim of those in opposition to the article, he perceived, was that the Genl. Government should abet the minority, & by that means divide a State against its own consent" (emphasis in original)).
100. As Professor Sanford Levinson has argued, the Supreme Court indisputably plays a major role in establishing the language of "law talk" that lawyers use in arguing about constitutional law. See Sanford Levinson, Diversity, 2 U. Pa. J. Const. L. 573, 578 (2000), stating that:

   Whatever the actual efficacy of the Supreme Court in changing the behavior of American institutions, it seems indisputable that the Court sometimes fulfills the function of the French Academy in establishing the conventions of 'law talk,' so that all properly socialized lawyers, and many non-lawyers as well, adopt certain conventions of argument because the Court leads the way.

   Id.
sovereignty. Second, several clauses of the Constitution abrogate aspects of state sovereignty by expressly prohibiting the states from taking certain actions. Third, the Constitution abrogates other aspects of state sovereignty by granting the national government certain enumerated powers and providing that all duly enacted national laws supercede conflicting state laws. As a rough summary, the Constitution and the national government are supreme within their limited spheres, with the states otherwise retaining their sovereignty.

As sovereigns, the states would possess the power to subdivide themselves into smaller sovereign units. Therefore, in our federalist system, the states retain this power unless the Constitution has withdrawn it. The Statehood Clause is ill-suited to abrogate a pre-constitutional state power. First, the Statehood Clause is not included in the express limitations on state power which are set forth in Article I, section 10. Rather, the Clause is in Article IV, section 3, which sets forth two grants of federal power. This placement suggests that the Statehood Clause adds a federal role to state division, as opposed to abrogating state power to do so.

Second, the Statehood Clause's text is an awkward way to abrogate state sovereignty. Again, consider Article I, section 10. That section explicitly abrogates state sovereignty, using the language "No State shall" to preface its litany of prohibited conduct. Conversely, the Statehood Clause does not direct any prohibition against the states. Again, a rather equivocal way to abrogate state sovereign power.

In sum, states appear to retain the power to divide, subject only to Congress' power to admit those sub-divisions into statehood. No clause of the Constitution abrogates that power. In addition, placement of the Statehood Clause within the Constitution suggests that the Clause is not a limitation on state power.

4. Precedent

The Supreme Court has never decided whether the Statehood Clause allows division of an existing state. Several of its opinions, however, have described the Clause in language suggesting that

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102. See, e.g., U.S. Const. art. I, § 10.
103. See, e.g., id. art. I, § 8.
104. Id. art. VI, §1, cl. 2.
105. See Jianming Shen, Sovereignty, Statehood, Self-Determination, and the Issue of Taiwan, 15 Am. U. Int'l L. Rev. 1101, 1150-52 (2000). This power should be distinguished from the power of part of a state to secede without the consent of the state's general government. Id. at 1152-55.
106. Article IV, § 3 grants Congress power to admit new states and to make laws for American territories. U.S. Const. art. VI, § 3.
107. See, e.g., U.S. Const. art. I, § 10 ("No State shall enter into any treaty, alliance, or confederation . . .").
division is allowed. For example, in Coyle v. Smith, the Court decided that Congress could not require a newly-admitted state to locate its capital in a specific city. In describing Congress' power to admit new states, the Court explained: "[t]he only expressed restriction upon this power is that no new State shall be formed within the jurisdiction of any other State, nor by the junction of two or more States . . . without the consent of such States, as well as of the Congress." The Court's paraphrase of the Statehood Clause clearly allows division with consent. The Court went even further in Pollard v. Hagan, changing the second semi-colon to a comma in quoting the Statehood Clause. Of course, because neither case decided whether the Clause allows division, these passages technically are dicta, and the Court is free to disavow these descriptions in a later case. Nonetheless, they provide some evidence that the Supreme Court reads the Statehood Clause to allow division of a state.

5. Past Government Practice

The First Congress admitted two new states by dividing existing states. In 1791, Congress admitted Kentucky, which was an undisputed part of Virginia, and Vermont, which New York claimed was within its jurisdiction. In each case, the appropriate state legislature consented to admission, and Congress voted to admit. All actors agreed that the Constitution allowed division of a state with proper consent. This early congressional practice provides strong evidence supporting division with consent. The First Congress consisted of

108. 221 U.S. 559 (1911).
109. Id. at 565-66.
110. Id. at 566.
111. 44 U.S. 212 (1845).
112. Id. at 223.
115. See 2 Annals of Cong. 1774 (1790).
116. Id. at 1798. While New York claimed that Vermont was within its jurisdiction, the territorial government of Vermont did not agree. Thus, Vermont did not believe it needed New York's consent to gain statehood. But, because New York consented anyway, the issue of New York's rights was moot. The main point is that regardless of New York's rights, all parties agreed that if Vermont was within New York's jurisdiction, Congress could still admit Vermont with New York's consent.
117. Later congressional practice also supports division of an existing state. In 1820, Congress admitted Maine, which was formerly part of Massachusetts, see Act of Mar. 3, 1820, ch. 19, 16th Cong., 1st Sess., 3 Stat. 544 (admitting Maine to the Union with Massachusetts' prior consent), and in 1863, Congress admitted West Virginia, which was formerly part of Virginia. See Act of Dec. 31, 1862, ch. 6, 37th Cong., 3rd Sess., 12 Stat. 633.
many members of the federal drafting and state ratifying conventions. Presumably, these men knew what the Constitution allowed. Their contemporaneous, uncontested assent to division of two states—both Kentucky and Vermont were admitted on unanimous votes—is compelling evidence of the Constitution's meaning.\(^{118}\)

6. Coda

History, structure, judicial precedent, and past government practice all support division with consent. The answer to our first question, then, is one of those happy cases where most of the available interpretive data points in the same direction. The only uncertainty arose under textual analysis, where changes in grammatical usage obscured the Clause's meaning. One important lesson is that text is often useless unless placed within some larger context, and that the other methods of interpretation supply that context.

B. Simultaneous Admission and Consent to Division

Given that Congress can divide a state with the state's consent, the issue becomes whether Congress can simultaneously create a new state and consent to later division of that state. This section analyzes that issue.

1. Text

Again, consider the relevant text:

> New States may be admitted by the Congress into this Union; but no new State shall be formed or erected within the Jurisdiction of any other State... without the Consent of the Legislatures of the States concerned as well as of the Congress.\(^ {119}\)

The Clause speaks of Congress giving its "Consent" to a "new State... formed or erected within the Jurisdiction of any other State..." Thus, the consent must be to division of a "State," which must be either one of the thirteen ratifying states or a state later admitted by Congress. Accordingly, for the five-state provision to serve as consent, Texas must have been a "State" at the time Congress gave that consent. But, Congress included the five-state provision in the very legislation that admitted Texas. So, the question is whether the same vote of Congress can both create a "State" and bestow Congress' consent to future division of that "State."

\(^{118}\) Cf. McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316 (1819) (in deciding whether Congress could charter a national bank, Chief Justice John Marshall gave interpretive weight to the fact that the First Congress passed the bank bill after full consideration of the constitutional issues).

\(^{119}\) U.S. Const. art. IV, § 3.
The question is further complicated because, as an historical matter, Texas was not admitted to the Union upon the passage of the joint resolution that contained the five-state provision. Instead, as noted briefly above, the joint resolution of Congress allowed the President to offer Texas admission as either a free state or a slave state subject to division. President Tyler offered Texas admission as a slave state with the five-state provision, and Texas accepted. Congress then confirmed admission of Texas. Consequently, the state of Texas did not exist until some time after Congress approved the five-state provision. Technically, it is incorrect to argue that Congress admitted Texas and that the simultaneous consent immediately attached to the newly-admitted state. As a plain textual matter, the five-state provision seems dead.

Once again, this is merely text in a vacuum. In context, the matter may look different. Textually speaking, the most important context is the first part of the Statehood Clause, which allows Congress to admit new states. Presumably, Congress could have carved the Republic of Texas into five territories and simply admitted each one as a new state. If so, why not allow Congress to admit a state and allow the state to determine whether division is, or becomes, appropriate? Using the textualist's rubric, would it be absurd to allow Congress to divide a territory and admit multiple states, but prohibit Congress from admitting a single state and consenting to its future division?

Federalism principles suggest that it would be absurd. One reason the Constitution divides power between national and local governments is that some matters require central planning while other matters require tailoring to local needs and circumstances. The decision to admit a state could be said to have both aspects. On the one hand, Congress decides whether admission of a territory is in the interests of the nation as a whole. On the other hand, the newly-admitted state may be best able to determine whether it can effectively govern itself as a single state, or whether division into multiple states, along geographic, political, or other lines, would be most advantageous. Thus, simultaneous admission and consent to division may be a sensible accommodation of federalism principles.

Further, we do not gain much by forcing Congress to postpone its consent. Congress could take two consecutive votes, the first on admission and the second on consent to division. Nothing of substance is gained by forcing this form on Congress.

These rationales hold even in the case, as with Texas, where consent briefly ante-dates admission. In the Texas case, Congress

120. See supra notes 39-42 and accompanying text.
121. See Paul E. Peterson, The Price of Federalism 17-39 (1995) (arguing that local governments are better suited to handle developmental matters and national governments are better situated to handle redistributive policies); David L. Shapiro, Federalism: A Dialogue 75-91 (1995).
simultaneously made its decisions to admit and consent to division. The mere fact that the President had to carry out the mandate does not affect the reasonableness of considering Congress’ actions as a single policy decision. Moreover, forcing Congress to make a second vote would not serve any useful purpose.

In sum, text offers conflicting guidance. On the one hand, the Clause’s language suggests that a state must already exist for Congress to consent to its division. On the other hand, it seems absurd to allow Congress to admit a territory as several states but not admit it as one state with consent to future division. The other methods will have to decide the issue.

2. History

History provides little help on the present question. Neither the drafting nor the ratifying debates mention the issue. Also, none of the issues debated bear on the question of simultaneous admission and consent to division. The debates mainly discuss whether new states should be admitted on equal terms with existing states, and whether Congress could divide a state without its consent. Neither concern bears on the issue of simultaneous admission and consent.

3. Structure

As discussed above in reference to the Statehood Clause’s text, allowing simultaneous admission and consent preserves aspects of federalism by promoting proper allocation of decisions between local and national government. Congress may consider the national interest in deciding whether to admit the state, and the state legislature may consider local needs and circumstances in deciding whether to divide. Each level of government makes the decision best suited to its situation.

Another constitutional structure bearing on our issue is the accountability of representatives to their constituents. When in doubt, we ought to choose the constitutional interpretation that promotes accountability. For example, the Supreme Court has held that allowing Congress to commandeer states into making law erodes accountability. In commandeering, Congress makes an unpopular policy choice and then forces states to enact that policy choice into law. Since state legislators ultimately make the applicable law, the

122. 2 Farrand, supra note 82, at 454.
123. See supra notes 90-98 and accompanying text.
124. See supra note 121 and accompanying text.
126. For example, New York v. United States involved a federal law that directed the states to enact specific regulations for siting facilities to dispose of low level radioactive waste. Id. at 152-53. This law allowed Congress to take credit for the
THERE IS NO SUCH THING AS TEXTUALISM

public will hold them accountable for the policy choice even though that choice was made by Congress. Because the wrong government actors are blamed, commandeering upsets the structure of accountable government.

Like the prohibition on commandeering, allowing simultaneous admission and division promotes accountable decision-making. Congress gets to make the policy choice whether to admit a state to the Union. In doing so, Congress considers the national interest and is accountable to a national constituency. By pre-consenting to division of the newly-admitted state, Congress allows the new state’s government to decide whether to divide. The decision whether to divide will bear most heavily on the citizens of the newly-admitted state. Accordingly, the principle of accountability is best served by leaving that decision to the newly-admitted state’s government.

Thus, while not overwhelming, structure supports simultaneous admission and consent to division. Allowing Congress to do so enhances federalism and promotes accountability by properly allocating decision-making power between Congress and the states.

4. Past Government Practice

Congress has admitted new states thirty-seven times. Each time, Congress presumably acted upon its understanding of what the Statehood Clause allows. This section examines several state admissions for clues as to what actions Congress believes it may take prior to or simultaneously with admitting a state.

In the election contest styled Phelps and Cavanaugh, the House considered whether to seat two representatives from Minnesota. In 1857, in anticipation of gaining statehood, the Territory of Minnesota held congressional elections. After admission into the Union, when the state’s two representatives appeared at the Thirty-Fifth Congress, the question arose whether Minnesota’s pre-statehood elections were valid. Opponents argued that only states were decision to tackle low level radioactive waste, while forcing states to take the blame for enacting and administering a specific regulatory scheme. Id. at 168-69.


128. Id. Another issue was the validity of a congressional election held prior to statehood. Id. at 249 (“An objection is urged to the right of the claimants to their seats on the ground that their election was prior to the admission of the State into the Union.” (quoting Report of the Committee of Elections)). The Committee of Elections concluded that pre-statehood elections were valid. Id.

129. The territory had elected three representatives, but only two were sent to Congress when Minnesota was allocated two representatives upon statehood. Id. at 250.

130. Id. at 249. It was also objected that Minnesota’s elections were at large, which violated the requirement of the Apportionment Act of 1842 that all House members be elected by single-member districts. Id. (“Another objection urged against the
entitled to elect members of the House, and because Minnesota was not a state at the time of the elections, the results were void.

The House Committee of Elections considered the issue and concluded that the Minnesota elections were proper. Prior to admission, Congress had passed an enabling act that authorized Minnesota to form a state government and draft a state constitution. Implicit in the enabling act was Congress' permission to take all actions necessary to prepare Minnesota for statehood. As a newly-admitted state, Minnesota would be entitled to immediate representation in Congress. The enabling act allowed Minnesota to elect representatives prior to statehood to allow those representatives to take their seats immediately upon admission. Thus, the Minnesota elections were valid and their representatives ought to be seated. The House concurred in this conclusion, voting 135 to 63 to seat Minnesota's representatives.

Phelps and Cavanaugh shows Congress taking pre-statehood action—the enabling act—that had post-statehood validity. The enabling act authorized pre-statehood elections that supplied post-statehood congressional representatives. This precedent could yield two different rules. On the one hand, Phelps and Cavanaugh could stand for Congress' power to take any pre-statehood action that is in anticipation of statehood. An enabling act is designed to prepare a territory for statehood, thus it is a perfect source for such legislation. Similarly, the very legislation that admits a state would serve the same function. Thus, on this reading of Phelps and Cavanaugh, the five-state provision, which was included in Congress' joint resolution authorizing annexation of Texas, would be a valid congressional act in anticipation of statehood.

On the other hand, Phelps and Cavanaugh may stand for Congress' power to take only those pre-statehood actions that are necessary for preparing a territory for statehood. Recall, all states are entitled to full representation in Congress, and pre-statehood elections are the only means of selecting representatives who will be ready to serve immediately upon statehood. Conversely, the five-state provision did not authorize anything Texas needed for full statehood. Indeed,

admission of the members who claim seats in the House of Representatives from Minnesota is, because of their election by general ticket instead of districts.

133. Id.
134. Id. at 251. The Committee's Report concluded with a resolution that read in pertinent part: "Resolved, That W.W. Phelps and James M. Cavanaugh, claiming seats as members of this house from the State of Minnesota, be admitted and sworn as such . . . ." Id. at 250.
Texas has been a full state for over 150 years without exercising its rights under the five-state provision. Rather, that provision looked beyond statehood to the admission of other states. Thus, the second reading of Phelps and Cavanaugh does not support Congress' power to consent to division before statehood.

Phelps and Cavanaugh illustrates the difficulty in using past government practice as precedent. Past government practices serve a meaningful role only if it is clear what aspects of the past practice were significant and why. In Phelps and Cavanaugh, we know that Congress was allowed to authorize pre-statehood elections. But, why? Was it because Congress acted in anticipation of statehood? Or, was it because pre-statehood elections were necessary to exercise full statehood upon admission? Unfortunately, past practices do not always come with judicial-like opinions explaining their full rationale. Even the Committee report in Phelps and Cavanaugh devotes only a single paragraph to the issue, leaving these important questions unanswered. To make past practices fully usable in constitutional interpretation, then, some other source must supply the rationale for the practice.

One source for such a rationale is Congress' practices in admitting other states into the Union. We could examine Congress' pre-statehood actions in admitting other states. Specifically, has Congress consistently limited pre-statehood legislation to matters necessary to statehood? Or, has Congress addressed other matters in pre-statehood legislation? The answers to these questions might imply a rationale behind the practices as well as provide a context in which to better understand Phelps and Cavanaugh.

One matter commonly handled in pre-statehood legislation is the disposition of cases then-pending in the territorial courts. As national courts, territorial courts are subject to regulation only by Congress. Upon admission of a state, the territorial court no longer exists and thus cannot act on its pending cases. Furthermore, the newly-

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136. At first glance, the Northwest Ordinance and the Missouri Compromise seem to be such legislation. First, the Northwest Ordinance, enacted in 1787, specified the circumstances under which a community outside an existing state could organize into a territory and apply for statehood. See Northwest Ordinance of 1787, art. V, The Avalon Project at the Yale Law School, available at http://www.yale.edu/lawweb/avalon/nworder.htm. Second, the Missouri Compromise, enacted in 1820, provided that each state admitted to the Union from the Louisiana Purchase that was located north of Missouri's southern border would be a free state. See Act of Mar. 6, 1820, ch. 22, § 8, 16th Cong., 1st Sess., 3 Stat. 545, 548; see also An Act to Organize the Territories of Nebraska and Kansas, ch. 59, 33th Cong., 1st Sess., 10 Stat. 277 (1854) (repealing Missouri Compromise). While each law addressed matters related to statehood, neither purported to give pre-statehood congressional consent to state action to be taken post-statehood.
admitted state cannot transfer or otherwise dispose of the pending cases because states have no power over national courts.\textsuperscript{138} So, unless Congress addresses the matter, the pending cases are left in limbo. For this reason, Congress has often provided for cases pending in territorial courts in legislation passed either before or simultaneously with admission of a state.\textsuperscript{139}

It is not clear whether disposition of cases pending in territorial courts is a matter necessary for statehood. Regardless of whether those cases are provided for, the newly-admitted state will be able to establish its government and constitution. Further, the new state can participate fully in the new national government, electing House members, senators, and presidential electors. Therefore, only the litigants in territorial courts will be inconvenienced: their cases will be in limbo, unless they re-file in the state or federal courts of the newly-admitted state. Either way, the state can accomplish all it needs for statehood.

Conversely, the newly-admitted state may not be able to fully organize its judiciary until it is clear how the territorial cases will be treated. Will the new state judges need to hear the old territorial cases? If so, how many? These questions may affect how many state judgeships are created and whether (and where) the records of the territorial courts should be transferred. Additionally, pending litigation should not be casually postponed to the distant future, to be addressed when convenient. Due process requires timely adjudication of parties' rights. Consequently, the matter of pending territorial cases can be seen as necessary to statehood.

Even after examining another practice, it is still not clear how Congress decides what issues may be addressed pre-statehood. Arguments can be made both ways in most situations. At this point, perhaps a dose of judicial precedent can help us better see the issue.

5. Precedent

The canonical constitutional law case \textit{McCulloch v. Maryland}\textsuperscript{140} may help resolve the confusion over Congress' past practices in admitting states. One issue in \textit{McCulloch} was the scope of Congress' implied powers. All agreed that Congress could exercise certain implied powers that were "necessary and proper" to executing Congress' enumerated powers. The question was how broadly to construe those implied powers. For example, Congress has the enumerated powers to lay and collect taxes, coin money, and to raise

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\textsuperscript{138} Freeborn, 69 U.S. at 174; \textit{Hunt}, 45 U.S. at 590.
\textsuperscript{140} 17 U.S. (4 Wheat.) 316 (1819).
\end{flushright}
and support an army and a navy.\textsuperscript{141} The question in \textit{McCulloch} was whether Congress had the implied power to create a national bank in aid of exercising those enumerated powers.

One camp argued that the Constitution limits Congress to only those powers "absolutely necessary" to exercising an enumerated power. The other camp contended that the Constitution gave Congress more leeway, allowing those implied powers that made exercise of the enumerated powers more "convenient." Ultimately, the Supreme Court sided with the latter camp, adopting a broad interpretation of Congress' powers.\textsuperscript{142}

In light of \textit{McCulloch}, the discussion in the preceding section looks like an issue of the scope of Congress' implied powers. The enumerated power at issue is Congress' power to admit a state. The implied power is Congress' power to address other matters related to statehood. The question then is how closely related to statehood those matters must be.

The preceding section provided a broad and narrow interpretation of Congress' implied powers regarding statehood. The broad interpretation was that Congress may make any law in anticipation of statehood, and the narrow interpretation was that Congress may make only laws absolutely necessary for statehood. \textit{McCulloch} helps us choose between these competing interpretations. The latter interpretation is the argument made in \textit{McCulloch}: that Congress has only those implied powers absolutely necessary to the exercise of an enumerated power. The \textit{McCulloch} Court rejected that argument, holding instead that Congress may enact all laws "convenient" or "helpful" to the exercise of an enumerated power. It would be both convenient and helpful for Congress to handle as many matters pre-statehood as possible, eliminating the need for future legislation. Thus, \textit{McCulloch} supports the broader reading of Congress' pre-statehood legislative power.

6. Coda

Once again, text proved unhelpful. The only insight came from the absurdity principle, which helped frame the issue. If Congress could have admitted Texas as five states, why not allow Congress to admit one state with consent to future division? Next, we looked to other sources of meaning. Structure showed that simultaneous admission and consent to division promoted federalism values and accountable government. Past government practice showed that Congress had in fact addressed statehood matters in pre-statehood legislation. Judicial precedent showed that Congress' power to address statehood matters ought to be construed broadly. While hardly a resounding

\begin{footnotes}
\item[141] U.S. Const. art. I, § 8.
\item[142] \textit{McCulloch}, 17 U.S. (4 Wheat.) at 421-23.
\end{footnotes}
endorsement, the methods largely support Congress' power to pass the five-state provision. As with the prior issue, text was useless without the other methods.

C. Time Limit for Consent

Well, it appears as though the five-state provision was constitutional when enacted. Now, the question presented is whether the Texas legislature may still take Congress up on its offer. Put more generally, are congressional and state legislative consent constitutionally valid to divide a state when given over 150 years apart? This section uses our five methods of interpretation to analyze this issue.

As we will see, the debate over the constitutionality of the Twenty-Seventh Amendment will provide some arguments for consideration.\textsuperscript{143} Congress proposed that amendment in 1789, but the last state did not ratify it until 1992.\textsuperscript{144} The question is whether the Constitution limits the time between proposal and ratification. When appropriate, we will consider arguments from that debate.\textsuperscript{145}

Before moving to the analysis proper, I must bracket an important historical question. As the Civil War approached, several states, Texas included, purportedly seceded from the United States.\textsuperscript{146} After the War, Congress seated representatives from each Confederate state after the state ratified the Fourteenth Amendment.\textsuperscript{147} Upon secession, one could argue, the \textit{State} of Texas no longer existed and, thus, Congress' prior consent to division of the then-existing state of Texas lapsed. Subsequently, when it re-admitted Texas, Congress did not include another five-state provision with the re-admission. Secession arguably terminated the five-state provision soon after it went into effect.

\begin{footnotesize}
\begin{enumerate}
\item \textsuperscript{143} U.S. Const. amend. XXVII ("No law, varying the compensation for the services of the Senators and Representatives, shall take effect, until an election of Representatives shall have intervened."); \textit{see generally} Richard B. Bernstein, \textit{The Sleeper Wakes: The History and Legacy of the Twenty-Seventh Amendment}, 61 Fordham L. Rev. 497 (1992) (reviewing the history behind Amendment XXVII, including the controversies that existed over congressional compensation and the public outcry which fueled the passing of the amendment, and what implications the amendment has for the practice of "amendment politics"); Stewart Dalzell & Eric J. Beste, \textit{Is the Twenty-Seventh Amendment 200 Years Too Late?}, 62 Geo. Wash. L. Rev. 501 (1994) (arguing "that the theoretical underpinnings of the Constitution requires that some element of timeliness be included" in the Article V process in order to "give effect to the 'will of the people'")); Michael Stokes Paulsen, \textit{A General Theory of Article V: The Constitutional Lessons of the Twenty-seventh Amendment}, 103 Yale L.J. 677 (1993).
\item \textsuperscript{144} Levinson, \textit{supra} note 9, at 102.
\item \textsuperscript{145} I rely heavily upon Professor Levinson's account of the debate in \textit{id}.
\item \textsuperscript{146} An Ordinance to Dissolve the Union Between the State of Texas and the Other States, United Under the Compact Styled "The Constitution of the United States of America" (Feb. 1, 1861), The Avalon Project at the Yale Law School, \textit{available at <http://www.yale.edu/lawweb/avalon/texan03.htm>}.\textsuperscript{147} See Ackerman, Transformations, \textit{supra} note 70, at 110-13.
\end{enumerate}
\end{footnotesize}
Devotees of President Abraham Lincoln's constitutional jurisprudence could save the five-state provision from the secession argument. From the beginning, Lincoln maintained that a state could not secede from the Union—it made no logical sense. Under this view, Texas was temporarily at odds with its fellow states but never legally left the Union. Because secession never legally occurred, it cannot bar application of the five-state provision.

I do not choose between these competing views of secession—it is outside the scope of this project, and it has been discussed extensively elsewhere. Besides, in Texas v. White, a case decided during Reconstruction, the Supreme Court explained that the Union is an "indissoluble relation;" the southern states could not secede. The Court repeated this explanation only forty years ago in United States v. Louisiana. These judicial pronouncements further minimize the secession objection.

1. Text

If text seemed opaque on the last question, it is a virtual black hole on this question, yielding no light at all. The problem ultimately lies in the absence of text—the Statehood Clause does not say anything about time limits one way or the other. Equally plausible explanations exist for this textual silence, and each explanation suggests an opposite result. Text alone provides no basis for choosing.

The first argument from the text's silence runs as follows: the Statehood Clause does not place any time limit on consent, so division occurs whenever Congress and a state consent, regardless of the intervening time. Professor Laurence Tribe has made a similar argument regarding a time limit for ratification of a constitutional amendment under Article V. Article V simply requires congressional proposal and state ratification, with no time limit specified. According to Professor Tribe, textual silence is conclusive; if the drafters wanted a time limit, they would have included one.
Professor Tribe's argument relies on a view of how people ordinarily use language. Specifically, he assumes that the ordinary drafter would include a time limit if intended, rather than assume that such a limit is implied. But why does his assumption better reflect ordinary legal usage than the contrary one? Contemporary law contains illustrative counter-examples. Some federal statutes do not contain a statute of limitations, but textual silence has not stopped the Supreme Court from inferring such a time limit. Similarly, the common law doctrine of laches may bar assertion of rights even when no applicable statute of limitations exists. Under contract law, even if an offer does not contain a time limit, courts infer a reasonable time limit on acceptance. Similarly, inherent in the concept of due process is a timely resolution of controversies. Given the ubiquity of implied legal time limits, Professor Tribe's confidence in textual silence is puzzling.

Even if Professor Tribe could persuade us that his assumption reflects contemporary ordinary legal usage, that still does not determine how ordinary legal drafters used language at the time of the founding. As discussed in Part II.A, rules of grammar have changed over time. How much confidence do we have that drafting conventions have remained constant over the last two hundred years?

While ordinary legal usage may not lend support, Professor Tribe's argument finds intratextual support, as the Constitution sets forth time limits in several places. For example, the Constitution prohibited Congress from abolishing the slave trade for twenty years, and

154. See Levinson, supra note 9, at 104-05 (discussing letter from Professor Paul Gewirtz to Senator Paul Simon that made this argument regarding validity of the Twenty-Seventh Amendment).
157. Dalzell & Beste, supra note 143, at 523-26 (arguing that because the Constitution is a social compact, Article V amendment process ought to be interpreted consistent with contract interpretation principles); Grover Rees III, Throwing Away the Key: The Unconstitutionality of the Equal Rights Amendment Extension, 58 Tex. L. Rev. 875, 880 n.20 (1980) (arguing that Article V proposal and ratification of constitutional amendment is analogous to offer and acceptance of contract); see Restatement (Second) of Contracts §§ 35, 36(1)(b) (1981). But see Paulsen, supra note 143, at 705-06 (criticizing the "contract model" of Article V).
159. See supra notes 44-79 and accompanying text.
160. Cf. Nelson, supra note 59, at 298-303 (explaining how Supreme Court's current preemption doctrines fail to understand the text of the Supremacy Clause, which incorporates statutory drafting conventions from the founding).
161. U.S. Const. art. I, § 9 ("The Migration or Importation of such Persons as any
prohibited constitutional amendments that would allow Congress to do so.\(^{162}\) limits military appropriations to two years;\(^{163}\) places a ten-day limit on the president's power to sign or veto a bill;\(^{164}\) and limits the terms of office of representatives and senators.\(^{165}\) The drafters included time limits when they wanted them, implying that omission of a time limit was not accidental. This observation is akin to the statutory interpretation canon *expressio unius exclusio alterius*: the inclusion of one thing implies the exclusion of others.\(^{166}\)

The problem with canons is that they are not immutable laws of nature. Rather, as with Professor Tribe's assumption, they are meant to reflect ordinary usage of language. Consequently, evidence of contrary usage can overcome the canon's presumption. And, as noted above, the law often infers time limits despite textual silence. So, textual arguments yield a draw: we have equal reasons to draw opposite inferences from textual silence.

2. History

As with the prior issue, history does not shed any light. The only debate over division of a state concerned whether Congress could do so without a state's consent.\(^{167}\) As the Statehood Clause reflects, the Convention decided in favor of state sovereignty by requiring a state's consent. Neither answer to our present question—time limit, or no time limit—better serves state sovereignty. Either way, a state cannot be divided without its consent, which was the main concern behind the consent provision. How long states have to consent, if they choose to do so, is merely a collateral matter.

3. Structure

The constitutional structure of federalism offers support, albeit

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162. *Id.* art. V ("[N]o Amendment which may be made prior to the Year One thousand eight hundred and eight shall in any Manner affect the first and fourth Clauses in the Ninth Section of the first Article . . . .").

163. *Id.* art. I, § 8, cl. 12 (stating that Congress has the power "[to] raise and support Armies, but no Appropriation of Money to that Use shall be for a longer Term than two Years").

164. *Id.* art. I, § 7, cl. 2 ("If any Bill shall not be returned by the President within ten Days (Sundays excepted) after it shall have been presented to him, the Same shall be a Law, in like Manner as if he had signed it, unless the Congress by their Adjournment prevent its Return, in which Case it shall not be a Law.").

165. *Id.* art. I, § 2, cl. 1 ("The House of Representatives shall be composed of Members chosen every second Year by the People of the several States."); *id.* § 3, cl. 1 ("The Senate of the United States shall be composed of two Senators from each State, chosen by the Legislature thereof, for six Years . . . .").

166. See William N. Eskridge, Jr., Dynamic Statutory Interpretation 323 (1994).

167. See *supra* notes 90-98 and accompanying text.
weak, for no time limit. Recall from the discussion above that an important federalism principle is that state governments ought to control local matters.\textsuperscript{168} That discussion concluded that the question \textit{whether} to divide is laden with many local concerns best decided at the state level. Similarly, the question \textit{when} a state should divide is a local matter. Perhaps a state is best governed as a single unit during the early stages of its development, but division becomes appropriate when several urban centers, with diverse regional identities, emerge within the state. The state government, with ground-level representation from all corners of the state, is best situated to gauge when division becomes appropriate.

Conversely, the democratic structure of accountability offers weak support for a time limit. Proponents of a time limit on ratification of constitutional amendments made a similar argument. Constitutional amendments respond to a felt need to change a fundamental aspect of American government. The two-step ratification process—congressional proposal followed by state ratification—is structured to gauge whether a contemporary consensus exists on the proposed amendment. If ratification is strung out over too long a time period, we have no confidence that a sufficiently \textit{contemporary} consensus ever existed. All we know is that a variety of isolated groups at different periods of time felt the same passion. Isolated, sporadic passions are not the stuff of constitutional change.\textsuperscript{169} Democratic legitimacy requires some time limit on the process.

The same argument could be made for congressional and state consent to division of a state. The two-step process of congressional and state consent is meant to gauge whether there is contemporary national and local support for division. Congress determines whether division is in the national interest, considering both the contemporary needs of other states and the nation as a whole. The state to be divided determines whether division is in its interest. A time limit would ensure that the national-local consensus co-exists. Otherwise, significant passage of time might change the circumstances that formed the basis of Congress’ consent. In that case, the later state consent would no longer reflect a contemporaneous national-local consensus. Rather, it would represent the self-interested decision of one state that has an effect on the entire nation. Allowing one state to impose its will on all others violates the structural principle of democratic accountability.\textsuperscript{170}

\textsuperscript{168} See supra note 121 and accompanying text.

\textsuperscript{169} See Ackerman, Transformations, supra note 70, at 389-92 (describing the failed constitutional moment of the Reagan era).

\textsuperscript{170} Cf. McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316 (1819) (holding that a state cannot tax the national bank because that would allow the state to effectively tax the rest of the nation).
As with text, the structure argument is a standoff. Federalism arguments tilt toward no time limit, while democratic accountability arguments tilt toward a time limit. We thus move on to past government practice with the analysis in a constitutional dead heat.

4. Past Government Practice

The First Congress admitted two states by dividing an existing state: Kentucky, by dividing Virginia, and Vermont, by dividing New York. Both cases followed a three-part pattern: (1) the state to be divided consented to division, (2) the territory to be admitted applied to Congress for admission, and (3) Congress admitted the new state. Also, in each case, the entire process occurred within the span of no more than two years.

The five-state provision differs from the Kentucky-Vermont pattern in two important respects. First, Congress' consent came first, not last. Second, over 150 years later, the process is still not complete. So, on the surface, the five-state provision does not fit with past practice on dividing states.

Next, we need to ask whether the Kentucky-Vermont pattern of admission reflects some deeper constitutional meaning, or whether it is nothing more than the product of specific circumstances. Were

171. As noted above, Congress also admitted Maine by dividing Massachusetts. I exclude Maine from the textual discussion for two reasons. First, because Maine was not admitted by the First Congress (Maine was admitted in 1820), its admission is not as persuasive evidence of the Framers' meaning as Kentucky and Vermont. See supra notes 114-118 and accompanying text. Second, and perhaps more important, in admitting Maine, Congress followed the same pattern as in admitting Kentucky and Vermont, and thus Maine does not add anything new to the analysis. See Act of Mar. 3, 1820, ch. 19, 16th Cong., 1st Sess., 3 Stat. 544 (admitting Maine to the Union with Massachusetts' prior consent).

Arguably, West Virginia supplies a fourth case of prior government practice, as that state was formerly a part of Virginia. The dubious constitutionality of West Virginia's admission to the Union, however, makes it ill-suited to serve as constitutional precedent. See J.G. Randall & David Donald, The Civil War and Reconstruction 236-42 (2d ed. 1961). The Virginia "legislature" that consented to West Virginia's admission was a Union-recognized group of dissident Virginians, as the state's pre-Civil War legislature had seceded from the Union. Using the Supreme Court's logic regarding other constitutional irregularities of that period, such constitutional issues were settled by the war, and we ought not inquire into them today. Testa v. Katt, 330 U.S. 386, 390 (1947) ("[T]he fundamental issues over the extent of federal supremacy had been resolved by war."). Given that the Texas five-state provision was not a war time measure, West Virginia's admission offers little support or guidance.

172. As noted above, proponents of Vermont statehood did not concede New York's claim that Vermont was within its jurisdiction. See supra note 116. But, because New York consented to Vermont's statehood, the question never required resolution. Thus, without resolving the question of New York's rights, we can treat Vermont as a case where at least some of the actors viewed the matter as involving division of a state. Since Vermont followed the same pattern as Kentucky, Vermont merely supports whatever precedent Kentucky establishes.

Kentucky and Vermont admitted as they were because those involved believed the Constitution required that method of proceeding? Or, was that method merely the most logical under the circumstances, even though the Constitution allowed other methods?

History advises against reading too much into the Kentucky and Vermont admissions. Both Kentucky and Vermont petitioned for admission during Congress' first session, when that body was preoccupied with establishing the new national government; initiating admission of new states was not a priority. As mentioned above, the drafting and ratifying conventions worried that Congress' power to divide a state might threaten state sovereignty. Consequently, the Constitution prohibits Congress from dividing a state without its consent. Given this concern about federal power, it seems unlikely that the first Congress would have taken the initiative, even if constitutionally permissible, in dividing an existing state. Better to let the states make the first move, than to provoke an early debate over Congress' abuse of the states.

The historical context of the five-state provision stands in stark contrast to that of Kentucky and Vermont. First, unlike Kentucky and Vermont, Texas fit logically within the contemporary congressional agenda. Slavery was an important contemporary issue, and Texas' annexation figured prominently in that debate. Second, at the time the five-state provision was proposed, Texas was not an existing state. By proposing future division of Texas, Congress was not threatening the sovereignty of an existing state. Indeed, several existing states saw it to their advantage to have as many as five new slave states on their side in the Senate. These differences may explain why the five-state provision quite logically followed a different pattern than Kentucky and Vermont.

Kentucky and Vermont therefore do not tell us anything relevant about the meaning of the Statehood Clause. Once again, the problem with past government practice is that it is unknown why the past practice was followed. Specifically, why were Vermont and Kentucky admitted as they were? Without a rationale for Congress' practice, it is impossible to know what lessons, if any, that practice holds for other cases. Also, we do not know whether the differences between admission of Vermont and Kentucky, on the one hand, and the five-state provision, on the other hand, are more important than their similarities. Proper analogies require the reasons behind decisions, and past government practices are often silent on that score.

Perhaps a non-statehood government practice can help here. Again, consider the case of amending the Constitution. In some instances, Congress has included a time limit for ratification of a proposed amendment. For example, Congress placed a seven-year
limit on ratification of the proposed Equal Rights Amendment.\textsuperscript{174} One might infer that Congress did so because it believed Article V otherwise imposed no time limit. Further, Congress has expressly approved ratification of the Twenty-Seventh Amendment, which was proposed in 1789 and ratified in 1992. Again, Congress acted as if Article V established no time limit on the amendment process.

On the surface, the analogy to state division would be that there is no time limit on the division process unless Congress establishes one in consenting to division of a state. For example, Congress could have consented to the future division of Texas, but only if the state legislature did so within ten years. Since Congress did not include a time limit in the five-state provision, and the Constitution does not impose one, Texas may still divide itself.

The problem with this analogy to the amendment process is that it really begs the question: Are Congress' actions in the amendment process probative of the meaning of the state-division process? This issue raises many further questions that have no answers. Why did Congress include time limits in some, but not all, amendments? Did Congress believe there was \textit{no} time limit on ratification? Or, did Congress believe that the time limits set forth for some amendments were shorter than the constitutional time limit for ratification? Was Congress' acceptance of ratification of the Twenty-Seventh Amendment a constitutional decision, or, as some have suggested, mere political expedience?\textsuperscript{175} Can we even attribute a consistent approach to different Congresses over time? Even if Congress did believe there was no time limit on ratification, what was the reason for this belief? Are the reasons unique to the amending process? If not, do those reasons apply to the state-division process? These unanswered questions once again illustrate that past government practices often offer only weak analytical direction.

Once again, we are left without much guidance. History provides two instances of state division, yet it is unclear how they should be understood. Also, analogy to the amendment process raises more questions than it answers. So, with our issue still in doubt, we move to the final method of interpretation—judicial precedent.

5. Precedent

No judicial precedent addresses time frames under any aspect of the Statehood Clause, including division of a state. Again, however, one can analogize the division of a state to the amendment process, where Supreme Court dicta supports a time limit on ratification. In \textit{Dillon v.}
Gloss, the Court reviewed proposal of the Eighteenth Amendment. In the resolution proposing that amendment, Congress for the first time set a time limit on ratification—seven years. The Court upheld Congress’ power to impose a time limit, relying on its conclusion that Article V implicitly requires ratification within a reasonable time. If the Constitution requires ratification within an unspecified reasonable time period, Congress certainly has power to specify the time period for a given amendment.

The Court offered three reasons for construing Article V to require ratification within a reasonable time period:

First, proposal and ratification are not treated as unrelated acts but as succeeding steps in a single endeavor, the natural inference being that they are not to be widely separated in time. Secondly, it is only when there is deemed to be a necessity therefor that amendments are to be proposed, the reasonable implication being that when proposed they are to be considered and disposed of presently. Thirdly, as ratification is but the expression of the approbation of the people and is to be effective when had in three-fourths of the States, there is a fair implication that it must be sufficiently contemporaneous in that number of States to reflect the will of the people in all sections at relatively the same period, which of course ratification scattered through a long series of years would not do.

Proposal and ratification must occur together in time because the amendment process (1) is a “single endeavor,” (2) that responds to a current “necessity,” and (3) is meant to gauge a “contemporary” consensus. Our question is whether these three principles also apply to the statehood process. Consider each principle in turn.

First, the steps of congressional and state consent to division are a “single endeavor.” Both consents have a single focus and purpose—to

176. 256 U.S. 368 (1921).
177. Id. at 370-77. The Eighteenth Amendment states:

Section 1. After one year from the ratification of this article the manufacture, sale, or transportation of intoxicating liquors within, the importation thereof into, or the exportation thereof from the United States and all territory subject to the jurisdiction thereof for beverage purposes is hereby prohibited.

Section 2. The Congress and the several States shall have concurrent power to enforce this article by appropriate legislation.

Section 3. This article shall be inoperative unless it shall have been ratified as an amendment to the Constitution by the legislatures of the several States, as provided in the Constitution, within seven years from the date of the submission hereof to the States by the Congress.

U.S. Const. amend. XVIII.
179. Dillon, 256 U.S. at 375 ("We conclude that the fair inference or implication from Article V is that the ratification must be within some reasonable time after the proposal.").
180. Id. at 375-76.
181. Id. at 374-75.
divide an existing state into two or more states. These actions do not serve any collateral function that might consist of another "endeavor." Thus, under the reasoning in Dillon, "the natural inference" is that state and congressional consent "are not to be widely separated in time."

Second, unlike a constitutional amendment, admission of a state does not always respond to a current necessity. Most amendments, as well as the Constitution itself, have responded to existing problems that required immediate solutions. The Constitution addressed the serious problems posed by a weak central government that had no power to tax or to regulate interstate commerce. The Bill of Rights responded to the call of many state ratifying conventions to protect individuals and the states from the new national government. The Eleventh Amendment, withdrawing federal court jurisdiction over diversity suits brought against states, responded to a Supreme Court decision that threatened states with crippling litigation. And the list goes on. With the exception of the Twenty-Seventh Amendment, every amendment proposed without a time limitation has been ratified within four years. Thus, our experience has been that amendments by their nature respond to needs of the times, and are ratified while the need is extant.

By contrast, the decision to admit a state may or may not involve a response to necessity. During the nation's first century, acquisition of new territories served the United States' immediate commercial and military interests. In addition, just prior to the Civil War, the North and South saw some urgency in admitting new states on their side of the slavery controversy. As the Twentieth Century illustrates, however, admission of a state is not always a matter of perceived necessity. For example, Alaska statehood took ninety-two years.

182. See Stanley Elkins & Eric McKitrick, The Age of Federalism 58 (1993) ("[E]very amendment beginning with the Eleventh has been framed with a very specific object, in response to what was seen as a substantive need.").
183. The Federalist No. 15 (Alexander Hamilton) (describing flaws in government under the Articles of Confederation that led to drafting of the Constitution).
185. See Chisholm v. Georgia, 2 U.S. (2 Dall.) 419 (1793).
186. See Dalzell & Beste, supra note 143, at 524.
187. For example, the Lincoln Administration recognized the severance of a pro-North section of Virginia as the new state of West Virginia. See Randall & Donald, supra note 171, at 236-42. According to President Lincoln, admission of West Virginia was "expedient" under the circumstances of the Civil War. Abraham Lincoln, Opinion on the Admission of West Virginia into the Union (Dec. 31, 1862), in VI The Collected Works of Abraham Lincoln, supra note 148, at 27; see also Walter Dean Burnham, Constitutional Moments and Punctuated Equilibria: A Political Scientist Confronts Bruce Ackerman's We the People, 108 Yale L.J. 2237, 2263 n.47 (1999) (describing the admission of West Virginia as "full of procedural irregularities").
188. Alaska was a district from 1867 to 1912, and then an organized territory from 1912 until statehood in 1959. See http://www.50states.com/statehood.htm.
and Hawaii statehood took sixty-one years. The territory of Puerto Rico has debated statehood for many years. The lesson of history is that statehood can be the product of necessity, but is not inherently so.

Third, unlike the amendment process, the statehood process is not designed to gauge a contemporary consensus. Consider two differences between the two processes. To begin with, the amendment process requires super-majority votes in both houses of Congress as well as a super-majority of state ratifications. The Statehood Clause, by contrast, does not specify the vote required for admission or division of a state, presumably allowing a simple majority vote. Another difference is that to gauge whether broad-based national support exists, Article V requires submission of a proposed amendment to all states. Conversely, to divide an existing state, Congress needs only the consent of the state to be divided. Consequently, by seeking super-majority approval from a wider constituency, the amendment process is uniquely designed to seek a contemporary consensus.

On the whole, the three Dillon factors provide weak support for a time limit on state division. Division can be characterized as a single endeavor, but that factor itself is fairly weak. Many activities can be described as a “single endeavor,” yet take place over a long period of time. Indeed, the Constitution itself could be described as a single endeavor in republican government. The other two factors—necessity and contemporary consensus—fit poorly with the Statehood Clause.

The analogy to Dillon does not help this analysis. Further, the Dillon factors are technically dicta because the issue whether the Constitution imposes a time limit was not before the Court. Subsequent to deciding Dillon, the Court held in Coleman v. Miller.

189. Hawaii was an United States territory from its acquisition in 1898 until statehood in 1959. See id.
190. Puerto Rico was ceded to the United States by Spain in 1898 and remains a territory today. On statehood efforts, see http://www.puertorico51.org/library/library_body.htm.
191. Article V states:
The Congress, whenever two thirds of both Houses shall deem it necessary, shall propose Amendments to this Constitution, ... which ... shall be valid to all Intents and Purposes, as Part of this Constitution, when ratified by the Legislatures of three fourths of the several States, or by Convention in three fourths thereof, as the one or the other Mode of Ratification may be proposed by the Congress.
U.S. Const. art. V. The Constitution also provides for amendment when two-thirds of the states call a convention for that purpose. Id. As no proposed amendment has followed this route, I focus on the other method here.
that aspects of the amendment process pose non-justiciable political questions.\textsuperscript{194} Thus, we can expect no further elaboration on \textit{Dillon}. For all of these reasons, \textit{Dillon}, our only tangentially relevant judicial precedent, does not assist in our analysis of this question.

6. Coda

Our analysis has hit a dead end. Text allows opposite inferences. History is silent. Structure pulls both ways. Past government practice is too sparse to yield guidance. Four square precedent does not exist, and the only loosely analogous precedent is not supportive.

So, if you were charged with deciding the issue, how would you answer? One option would be to pick the outcome you find more appropriate (on whatever basis you choose), and then comb the preceding discussion for bits and pieces of analysis that support that outcome. Another option would be to appeal to some extra-constitutional principle. For example, a federal judge might follow the principle that federal judges ought to uphold any government action unless the Constitution, as interpreted using the methods employed above, forbids that action. Either way, it will not be the methods dictating the result. Rather, something outside the methods, and thus outside the Constitution, will drive the answer.

III. LESSONS LEARNED ALONG THE WAY

We have completed our journey through three constitutional issues, bringing the methods of interpretation to bear on each. It is now time to evaluate the teachings of this case study. The next section draws four lessons about the methods from the case study. The final section then turns to lessons about constitutional interpretation generally, offering a typology of constitutional issues.

A. Lessons About Constitutional Method

Lesson 1: There is No Such Thing as Textualism

In our case study, text alone did not even suggest an answer to any

\textsuperscript{194} \textit{Id.} at 447-56; see also \textit{Nixon v. United States}, 506 U.S. 224, 229-30 (1993) (stating that what it means for the Senate to "try" an impeachment is a political question committed to the discretion of the Senate); \textit{Powell v. McCormack}, 395 U.S. 486, 548-49 (1969) (concluding that the propriety of the House's refusal to seat a member for lack of qualifications was not a political question); \textit{Baker v. Carr}, 369 U.S. 186, 226-27, 237 (1962) (deciding that whether state legislative apportionment that did not proportionally reflect the state's population violated the Equal Protection Clause was not a political question); \textit{Coleman v. Miller}, 307 U.S. 433, 456 (1939) (determining that issues concerning the amendment process are political questions committed to discretion of Congress).
of the three central questions. This is remarkable, especially given that the first issue proved to be quite easy after consulting the other methods. In sum, text was a non-factor.

It should not be surprising that text is so unhelpful. Text consists of language, and language does not have intrinsic meaning. Language is not a vessel that holds meaning; it is a tool used to convey meaning. At its core, language is a social practice that has meaning only within a group that engages in the practice. It is the practices surrounding language that allow it to have meaning, not vice versa. For example, nothing inherent in the letter combination "hat" makes it a word that has meaning, as opposed to the letter combination "flirexty." We (those who speak a common language) simply use "hat" in ways we recognize; shared usage allows us to communicate and, on average, understand one another. Indeed, someday we may use "flirexty" as part of our language, or we may not. Whether we do so does not depend on anything inherent in those letters. Rather, it depends on our social practices.

To make matters worse, different groups who speak the same language may nonetheless use words in different ways. For example, at times, lawyers use the word "consideration" differently from non-lawyers. So, if someone says, "Did you give Ann consideration?" it would be helpful to know whether the speaker is a lawyer.

Language is a practice, and therefore it is really a mistake to speak of "plain text," as if the text itself imparts meaning. Text is only a symbol that draws upon larger social understandings, assumptions, and practices that lie outside text. Text may point us in a direction,

195. See supra notes 44-79, 119-121, 152-166 and accompanying text.
196. See Gerald Graff, "Keep Off the Grass," "Drop Dead," and Other Indeterminacies: A Response to Sanford Levinson, 60 Tex. L. Rev. 405, 405-06 (1982).
197. Id. at 406 (rejecting the conception that "meaning is a substance or spirit reposing in language" (emphasis omitted)).
198. See Gene Anne Smith, Wittgenstein and the Sceptical Fallacy, in Wittgenstein and Legal Theory 157 (Dennis M. Patterson ed., 1992). Smith explains that:

[Language is a practice, a technique, that we learn. It depends upon a given community of understanding and established practices, to be sure. But this is required not in order to verify my judgments. It is required to give the context in which I can make meaningful judgments at all.

Id. at 179 (emphasis omitted).
199. Graff, supra note 196, at 405 ("[W]ords by which we signify 'tables' and 'chairs' are only somewhat arbitrary sounds . . . .").
200. Id. at 407-08 (noting that the command "Keep off the grass," will mean something different depending on whether it is spoken by a gardener or a narcotics-counselor).
201. Cf. Cass R. Sunstein, Principles, Not Fictions, 57 U. Chi. L. Rev. 1247, 1247 (1990) ("[T]he culture furnishes the interpretive principles that courts and other interpreters use in order to give meaning to any 'text.' Legal words are never susceptible to interpretation standing by themselves, and in any case they never stand by themselves.").
but it is the understandings, assumptions, and practices that convey meaning. When we claim to interpret text, we are putting those understandings, assumptions, and practices into action. Perhaps this explains the phenomenon, noted by other commentators, that constitutional interpretation goes on quite often without resort to the Constitution's text. Text is merely the symbolic representation, often imperfect, of choices, decisions, and ideas that constitute the Constitution. Text merely reminds us of these choices, decisions, and ideas which, once brought into view, do the real work in the constitutional interpretation.

So, as most textualists admit, for text to be helpful, one must open the door to context. Once one does so, however, the question becomes which aspects of context should be invited into the analysis? At the very least, we must know how people who speak that language use the words at issue, but words often have many usages, so we must choose which usage is most appropriate. This choice will cause further resort to context, and yet, even when we believe we have a proper usage in mind, that usage may not answer our interpretive question.

To see these aspects of textualism, consider a portion of the Constitution's text that most commentators see as posing little interpretive difficulty: "No Person... shall be eligible to the Office of President... who shall not have attained to the Age of thirty five Years ...." Admittedly, the Clause seems straightforward, and in most cases it is easy to apply. But why? It is not the words themselves. To prove this, let's play some games with the words. The accepted meaning of the clause is that a person must reach a chronological age of thirty-five to be eligible for president. But, why not interpret the clause to simply require a level of maturity—that of a person approaching middle age—with the electorate as the judge of that qualification? For example, dictionaries list one usage of the word "age" as, "a certain period of human life, as infancy, youth, manhood, and old age; the age of youth; the age of manhood." Under this usage, "age of thirty five years" is just a way of saying "age of mature judgment."


204. U.S. Const. art. II, § 1, cl. 4.


206. Judge Frank Easterbrook offers other possible interpretations of the clause:

When the Constitution says the President must be thirty-five years old, we cannot be certain whether it means thirty-five as the number of revolutions of the world around the sun, as a percentage of average life expectancy (so that the Constitution now has age fifty as a minimum), or as a minimum number of years after puberty (so the minimum now is thirty or so).
As you read the last paragraph, your gut told you, "I know that 'age of thirty-five years' means chronological age and not some less-defined period of life." But, how do you know this? Text does not tell you. Rather, it is the way we use such time limits throughout society. You cannot drive until you are sixteen years of age; you cannot vote until eighteen years of age; you cannot drink until twenty-one years of age. We use age limits in many areas of life, and, when we do so, our practice is to require chronological age. Indeed, we may make exceptions for people who are not of the requisite chronological age but nonetheless seem eligible. Our practice, however, is to treat these cases as exceptions because we use the age qualification to mean chronological age.

Other portions of the Constitution reflect this practice. Article I sets forth age requirements for representatives (twenty-five) and senators (thirty). Generally, we do not see twenty-five, thirty, and thirty-five as marking vastly different periods in a person's life, and we are therefore inclined to read the Constitution as referring to chronological age. Again, however, it is not the language of the three time limits that drives this conclusion. Rather, it is our understanding of social practices, such as the major milestones that mark a person's life.

Consequently, easy questions are easy because they draw upon usual, accepted practices, not because the language is somehow itself plain or clear. Text merely invokes those practices, and then the

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Frank H. Easterbrook, *Statutes' Domains*, 50 U. Chi. L. Rev. 533, 536 (1983). I would dispute, however, that "we cannot be certain" that the clause requires chronological age. As discussed next, our practice of using chronological age for legal age limits allows us to be "certain"—or, as "certain" as we can be about language use—about how to apply the clause. See infra notes 207-17 and accompanying text.


208. Similarly, our practice is to state age limits in base ten, the same method we use to express chronological age in daily life.

209. U.S. Const. art. I, § 2, cl. 2; § 3, cl. 3.

210. Thus, it should be no surprise that intratextualism may sometimes fail. For example, in Part II.A, we saw that intratextualism misdirected our analysis. Our comparison of the Statehood Clause to Article I, § 10 supported the reading that state division was not allowed. See supra notes 50-55 and accompanying text. All other interpretive evidence, however, pointed to the opposite conclusion. This instance supports those commentators who urge caution in adopting intratextualism's integrated vision of the Constitution.

211. One commentator states:

Though we can say that certain utterances "normally" are used to mean one thing rather than others they might potentially be used to mean (and it's such normal expectations that enable us to make educated guesses of what is meant in particular cases), this fact itself demonstrates that interpretation is concerned not with what words or sentences mean "in themselves" but with how speakers actualize the semantic potential of words and utterances in particular speech acts.
practices do the interpretive work. To see this consider a difficult question raised by the thirty-five-year age requirement. Suppose a candidate for president has a birth certificate that fixes her age at 34, but the hospital birth records fix her age at 35. One record is obviously mistaken. Which record do we credit? What are the criteria for deciding? Who should decide? Our seemingly obvious text is ambiguous on these issues, not because the words have become less plain in meaning, but rather because no practice surrounding these words addresses these questions.

The same could be said for other questions under the presidential age requirement. For example, must any person who holds an office that succeeds to the presidency upon death of the president be thirty-five years old?212 For, if the person is not “eligible” for the presidency, how can they be placed in the line of succession? Under the unamended Constitution, must the Vice President have been thirty-five years old?213 Was there even a minimum age requirement for Vice President? The Vice President is President of the Senate,214 and senators need only be thirty years old.215 But, the Vice President is

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212. Congress has provided for the following line of succession in the event that neither the President nor the Vice President can fulfill their duties: Speaker of the House of Representatives, President pro tempore of the Senate, Secretary of State, Secretary of Treasury, Secretary of Defense, Attorney General, Secretary of the Interior, Secretary of Agriculture, Secretary of Commerce, Secretary of Labor, Secretary of Health and Human Services, Secretary of Housing and Urban Development, Secretary of Transportation, Secretary of Energy, Secretary of Education, Secretary of Veterans Affairs. 3 U.S.C.A. § 19 (West 1997). Congress derives this power from the Succession Clause of the Constitution. U.S. Const. art. II, § 1, cl. 5. See generally Akhil Reed Amar & Vikram David Amar, Is the Presidential Succession Law Constitutional?, 48 Stan. L. Rev. 113 (1995) (arguing that the presidential succession law violates the Constitution’s requirement that an “Officer” be appointed to replace the President by placing the Speaker of the House and the President pro tempore of the Senate in the line of succession). Our practice seems to be that a person need not be eligible to be President to hold an office in the line of succession. A recent example is former Secretary of State Madeleine Albright. Secretary Albright is not a natural born United States citizen, and thus is not eligible to be President, but she held the office third in the presidential line of succession after the Vice President.

213. Today, the Twelfth Amendment provides that “no person constitutionally ineligible to the office of President shall be eligible to that of Vice-President of the United States.” U.S. Const. amend. XII.

214. Id. art. I, § 3, cl. 4.

215. Id. cl. 3.
not a "senator" and has no vote unless the Senate is "equally divided." Text offers no answers here, not because the words themselves are not clear, but rather because no practice or understanding surrounding the words provides guidance.

A further example of how practice, not text, determines meaning can be found in the textualists' poster child for plain meaning—the Due Process Clauses of the Fifth and Fourteenth Amendments. The Fourteenth Amendment provides, "No State shall . . . deprive any person of life, liberty, or property, without due process of law." Due process textualists, like Justice Antonin Scalia and Professor John Hart Ely, argue that the plain language of these clauses preclude a doctrine of substantive due process. Scalia writes:

By its inescapable terms, [the Due Process Clause] guarantees only process. Property can be taken by the state; liberty can be taken; even life can be taken; but not without the process that our traditions require—notably, a validly enacted law and a fair trial. To say otherwise is to abandon textualism, and to render democratically adopted texts mere springboards for judicial lawmaking.

Ely makes the point more colorfully: "substantive due process’ is a contradiction in terms—sort of like ‘green pastel redness.’ The basic point is that “process” is the opposite of “substantive,” thus a due process clause is about procedure, not substance.

The Scalia-Ely argument makes sense to a lawyer reared in the post-Erie, post-Legal Process world. Since Erie Railroad Co. v. Tompkins, lawyers have been taught to distinguish between substantive and procedural law in federal court diversity cases. Similarly, “the major theme” of the Federal Rules of Civil Procedure, which came into effect in 1938, the same year the Court decided Erie, was that procedure should step aside and not interfere with substance. Further, the Legal Process school of thought, most closely associated with Harvard Professors Henry Hart and Albert Sacks, argued that legal legitimacy could be grounded on fair procedures, separate from the applicable substantive law. For the

216. Id. cl. 1 ("The Senate of the United States shall be composed of two Senators from each State . . . ").
217. Id. cl. 4.
218. Id. amend. XIV. The Fifth Amendment is identical, except written in the passive voice.
219. Scalia, supra note 203, at 24-25 (emphasis in original).
221. 304 U.S. 64 (1938).
modern lawyer, the practices and understandings that lie behind the word “process” all point to rules concerning procedure, usually in judicial proceedings. It is these practices and understandings, not the words “due process” themselves, that drive the Scalia-Ely argument.

To see this point starkly, consider the historical argument of Professor James W. Ely that “due process” was originally used to connote both procedural and substantive restrictions on government power. Our Due Process Clauses are descendants of the “law of the land” clause in the Magna Carta. Over time, the colonies and then the emerging state governments incorporated the “law of the land” language into their charters and constitutions, with some changing the language to “due process of law.” The latter language ended up in the Constitution’s Fifth and Fourteenth Amendments. Professor James Ely argues that historical materials establish two usages of language among founding era lawyers: first, “due process of law” was used interchangeably with “law of the land;” and second, both phrases were used to include procedural and substantive restrictions on government power.

Regardless of whether Professor James Ely is correct, his argument illustrates the flaw in the Scalia-Ely textual argument. The Scalia-Ely argument treats the word “process” as if it has some intrinsic meaning apart from its use in the Constitution. Consider the following passage from John Hart Ely’s argument:

[T]here is simply no avoiding the fact that the word that follows “due” is “process.” No evidence exists that “process” meant something different a century ago from what it does now—in fact as I’ve indicated the historical record runs somewhat the other way—and it should take more than occasional aberrational use to establish that those who ratified the Fourteenth Amendment had an eccentric definition in mind.

Scalia and Ely, embedded in the post-Erie and Legal Process understandings of modern lawyers, fixate on the word “process” and allow their own intellectual baggage to imbue that word with meaning. The full phrase “due process of law,” however, may have

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224. Indeed, Ely seems to assume that “process” normally refers to judicial proceedings, as he expressly notes when he wants to include political process within his analysis. Ely, supra note 220, at 87.
226. Id. at 320-21.
227. Id. at 322-27.
228. Id. at 327-38.
229. Ely, supra note 220, at 18.
230. Cf. Fish, supra note 211, at 196.
historical practices and understandings behind it not reflected by modern usage of the single word “process.” Thus, while modern (and perhaps founding era) lawyers may use the word “process,” standing alone, to connote procedural matters, that does not mean that the phrase “due process of law” must have been used the same way. Language simply does not work that way. As Professor James Ely argues, the full phrase “due process of law” may have a different usage than the word “process” standing alone.

The Scalia-Ely argument, then, makes two mistakes. First, it does not recognize that its procedure-only interpretation rests on practices and understandings, not text alone. Second, and derived from the first, they do not consider whether those living at the time of the framing used the phrase “due process of law” differently than lawyers use the word “process” today. Thus, the seemingly simple textual refutation of substantive due process really illustrates that textualism does not exist as a separate method.

Justice Hugo Black, another recognized textualist, made a similar error in interpreting the First Amendment Establishment Clause. That Clause provides: “Congress shall make no law respecting an establishment of religion . . . .” Black held the view that this prohibition was absolute, and that the plain text required this interpretation. He defended his view in the following terms:

I’ll read you the part of the first amendment that caused me to say there are absolutes in our Bill of Rights . . . . Now, if a man were to say this to me out on the street, “Congress shall make no law respecting an establishment of religion”—that’s the first amendment—I would think: Amen, Congress should pass no law. Unless they just didn’t know the meaning of words. That’s what they mean to me. Certainly they mean that literally.

Justice Black explains that the words of the First Amendment standing alone, primarily the word “no,” tell him that the First Amendment states an absolute prohibition. The word “no,” however, cannot bear this interpretative burden. To understand why, consider several uses of the word “no” that are less than absolute:

As his birthday approaches, a husband says to his wife, “No party this year.” The wife, knowing her husband has said the same thing every year since they met, and that he has always enjoyed a birthday party, infers that her husband’s “no” is a false protestation. Call this a “false no.”

231. Tribe, supra note 207, at 1297 n.247 (noting different usages of “due process” at different times).
232. U.S. Const. amend. I.
234. Cf. Fish, supra note 211, at 180-96 (discussing ironic use of language).
A doctor asks a patient if she has any allergies, and the patient replies, "I have no allergies." The prudent doctor understands the patient to mean, "I have no known allergies," because, without extensive testing or exposure to potential allergens, the patient simply cannot make an unqualified statement. Call this a "qualified no."

A person places a sign near the front door of their home that says, "No solicitors." An approaching solicitor knows that this sign is a statement of the homeowner's preference, but that no legal sanction will attach to a violation of the preference. Call this a "requested no."

A city ordinance states: "No person shall operate a vehicle in a public park. Violation of this ordinance shall be punishable by a fine of no more than $1,000." The average citizen reads the ordinance as prohibiting the described conduct. Call this a "proscriptive no."

The word "no" is used in many senses. The applicable usage depends on the circumstances under which the word is used and the language conventions associated with those circumstances.

So, how does Black know that the First Amendment uses a proscriptive no, and not the false, qualified, or requested no? The answer is not encoded in the word "no." Rather, it is the circumstances under which he encounters the word—application of a legal document that grants and limits government power—as well as the practices concerning how such documents operate, that yield the relevant meaning of "no." And, even if practice specifies that the First Amendment be read to state a proscriptive no, it is not at all clear that our practice is to read a "proscriptive no" as an absolute prohibition. For example, in the case of the city ordinance set forth above, few would apply the prohibition to an ambulance that came to

235. A painful reminder of this fact can be found in the rape context, where male assailants have used the "'no' didn't really mean no" argument to rationalize their violent violation of women. See Susan Estrich, Real Rape 5 (1987).

236. See Marie McGinn, Wittgenstein and the Philosophical Investigations 59 (1997) (explaining "Wittgenstein's idea that the structure and function of language are revealed only in situ, when it is embedded in the active lives of those who speak it"); Feldman, supra note 211, at 180-81 (stating that understanding, interpretation, and application of text can only take place in a concrete setting). One commentator explains this point in the context of the "no vehicles in the park" ordinance: "We are not just talking about parks and vehicles here; we are talking about parks and vehicles in a legal rule in a legal system in a particular culture." Pierre Schlag, No Vehicles in the Park, 23 Seattle U. L. Rev. 381, 387 (1999).

237. McGinn, supra note 236, at 59 ("[I]t is the structures and distinctions that are revealed in our actual use of language, and not those that remain when language is abstracted from its application, that show us how our language functions, or what sort of phenomenon it is."). Professor Stanley Fish has made the point as follows:

The person who looks about and sees, without reflection, a field already organized by problems, impending decisions, possible courses of action, goals, consequences, desiderata, etc. is not free to choose or originate his own meanings, because a set of meanings has, in a sense, already chosen him and is working itself out in the actions of perception, interpretation, judgment, etc. he is even now performing.

the aid of a heart attack victim in the park. So, Black's argument that the "literal" term "no," standing alone, dictates an absolute reading of the Establishment Clause profoundly misunderstands how words convey meaning.

Language (and thus text) is a social practice. Our practices are constituted by forces such as history, past practices, past decisions, ideologies, and beliefs. These forces, in turn, are merely the other methods of constitutional interpretation. Textualism, therefore, is not an independent method of interpretation. To treat it as such masks resort to the other methods. Consequently, textualism offers a false sense that the Constitution's words, something outside of us, dictate our interpretations. Yet, the text is us; it represents all our shared practices and understandings. In the end, everything is textualism, thus there is no such thing as textualism.

One last word before moving on. I am not arguing that text plays no role in our constitutional government. Text points us to the relevant practices and understandings that then yield meaning. For example, in our case study, the Statehood Clause provided a point of reference in examining history, structure, past government practice, and judicial precedent. We knew to look for material that concerned the Clause or its subject matter. It is possible, however, for a constitutional regime to function without an official text. In that case, constitutional decision-makers would resort directly to the shared history, practices, and understandings that constitute their government. That the United States has adopted a constitutional text, and that the text is often pushed into rhetorical service, should not obscure that interpretation proceeds from sources that lie behind text.

In our case study, we saw how history, precedent, and past government practice determined usage of the Statehood Clause. The text of the Clause could not determine whether division was prohibited because words alone are not meaning. Instead, meaning came when we situated the text as words spoken by certain people who practiced certain rules of grammar. Also, the words appear in a Constitution that has its own applicable history and practices. That

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239. Cf. Pierre Schlag, Hiding the Ball, 71 N.Y.U. L. Rev. 1681, 1691 (1996) ("The Constitution is not so much a text or a structure or a charter, but rather a combination of various modes of legal argument. What is to be interpreted and given effect is not words or clauses or even structures, but rather the self-referential practices of constitutional meaning.").
240. England is often cited as such a regime. See Bernard Bailyn, The Ideological Origins of the American Revolution 67-69 (1967) (describing the British conception of a constitution, which did not entail a written document enforceable against the government).
history showed the framers discussing the Clause as if it allowed division, and judicial precedent showed the Supreme Court doing the same. Past government practice showed Congress acting like the Clause allowed division. These various practices, not the text, helped us understand the Clause's language.

One might object that the textual analysis in Part II.A.1 proves that textualism exists. After all, that discussion actually offered competing interpretations of the text of the Statehood Clause. But the perception that text speaks to our question is an illusion. Underlying the textual analysis were unspoken assumptions that lie outside text. Without these assumptions, not only would constitutional analysis be impossible, but the question itself would be unintelligible.

To see how unspoken assumptions really controlled the textualist analysis, consider how text that seemed ambiguous to a present-day interpreter seemed clear in historical context. This dissonance is explained by changing expectations over time. At the time of the founding, the United States was a nation on the verge of great expansion. Of immediate relevance, the Constitution's framers knew that the existing states were quickly laying claim to western lands, expanding their territorial jurisdiction in conflict with claims of the United States and other states. Indeed, before drafting the Constitution, this same generation had passed the Northwest Ordinance, which brought order and structure to American expansion north of the Ohio River and east of the Mississippi River. At both the national and state level, territorial boundaries were often in flux or in dispute.

From this perspective, power to divide an existing state seemed obviously expedient. States might expand their territorial reach beyond their ability to govern legitimately. At a time of relatively undeveloped transportation and communication, a great distance between citizens and the seat of state government could mean effective disenfranchisement. Also, as settlement and development of large states occurred apace, different regional interests might arise that would be better served by different state governments.

241. Of course, this listing will be incomplete for two reasons. First, for reasons of practicality, space is short, and a partial list will serve the present purpose. Second, given how deep many of these assumptions run, a single writer may not be able to unearth all the assumptions that underlie her constitutional analysis. Indeed, that the reader will identify other assumptions that the writer failed to acknowledge illustrates how covertly these assumptions influence our thinking.


243. Id. at 59.

244. Rosemarie Zagarri, The Politics of Size: Representation in the United States, 1776-1850, at 21 (1987) ("Eighteenth century Americans routinely assumed that outlying regions would be less well represented than those nearer the capital.").

245. 2 Farrand, supra note 82, at 463-64 (discussing how delegate Luther Martin of Maryland raised concerns about those citizens living in the western reaches of
Division could solve both problems. Thus, it should be no surprise that the framers agreed that division was a necessary power, and argued only over how division should occur.  

Today, the concerns that animated state division are largely forgotten. America's era of territorial expansion lies behind her, and state boundaries have stabilized. While each census reveals population shifts and demographic changes, we no longer treat these matters as cause to reconsider state boundaries. Perhaps Americans are less tied to state identities. Or, perhaps state governments seem less relevant since the New Deal expansion of federal power. Regardless, we treat the composition of the fifty existing states as given. Division does not enter our thoughts.

I believe that these differing perspectives, and not the words of the Statehood Clause, explain the textual analysis in Part II.A.1. During that analysis, no answer to our question—does the Constitution allow division of an existing state—leapt out as obvious. So, we bounced around among different possible interpretations, imbuing factors such as punctuation and word order with exaggerated significance. This ambivalence was possible only because we came to the issue with no expectations, for the expectations we bring to the analysis help us select among plausible constitutional interpretations. Each possible interpretation of the Statehood Clause is associated with a set of expectations within which that interpretation makes sense. If one interpretation matches our expectations, that interpretation is privileged, and all other evidence is judged against that preferred interpretation. For example, if we lived in a world where territorial expansion and shifting state boundaries were the norm, we would expect our Constitution to allow division of an existing state. Instead, our contemporary frame of reference creates no expectations about division, and thus multiple interpretations of the Statehood Clause seem plausible.

To further illustrate the role of expectations, consider Professor David Strauss' recent article on the relevance of constitutional amendments. Professor Strauss argues that constitutional amendments make little difference in constitutional interpretation for two reasons. First, if the amendment reflects an overwhelming national consensus—what I refer to above as a generation's "expectations"—then a constitutional amendment is not necessary.

Virginia, North Carolina, and Georgia).  

See supra Part II.A.  

Today, state boundary disputes largely concern the shifting course of natural features, such as rivers, that serve as state boundary lines. See, e.g., Illinois v. Kentucky, 500 U.S. 380, 382 (1991) (boundary dispute arose when dams raised level of the Ohio River).  


Id. at 1462.
Constitutional interpretation will reflect the national consensus regardless of whether it is enshrined in a written amendment.\textsuperscript{250} Second, if an amendment does not reflect a national consensus, decision-makers will evade the requirements of the written amendment.\textsuperscript{251} Either way, constitutional text plays no interpretive role.

Similarly, consider whether the constitutional result concerning the power to divide an existing state would be any different if the Statehood Clause had been written differently. Imagine that a separate sentence of the Clause provided, "No new State shall be formed or erected within the Jurisdiction of any other State." If this wording contradicted strongly held expectations, one would expect Congress to evade the purported limitation. For example, in admitting a new state that lay within an existing state, Congress could argue that the new state lay outside the legitimate "Jurisdiction" of the existing state.\textsuperscript{252} Expectations would control implementation of text.\textsuperscript{253}

In sum, textual analysis proceeds even though text does not do the interpretive work. An issue arises, such as whether the Constitution allows division of an existing state, and we identify text that supposedly bears on that issue. If we bring strong expectations to that issue, one answer grabs hold and is then tested against the other methods of interpretation. If we have no expectations, a variety of interpretations present themselves, with each such interpretation assuming a set of expectations. Ultimately, the methods of history, structure, precedent, and past government actions will help us choose the relevant set of expectations and associated interpretation. Text does not and cannot do so.

Lesson 2: The Proper Role of Grammar

Grammar is important to communicating by written word. Used properly, grammar helps us say what we mean. But, we all have had those moments when a grammarphone corrects our technical mistake, and we respond in an irritated tone, "You know what I mean." And they did know what you meant. That is because grammar is just one means to understanding; it is not understanding itself. The full
context of usage conveys meaning. So, while grammar is helpful, when confronted with a grammatically correct interpretation, we should not ignore that voice whispering from within the text: "You know what I mean."

We should be even warier of grammar-based arguments when the text is from an earlier time, as grammar rules may change over time. The Statehood Clause demonstrates that the semi-colon and the comma did not always serve distinct grammatical functions. This knowledge dissolved what was otherwise a difficult interpretive problem for our modern-day grammarian. Again, text must be placed in its proper context.

When grammar conventions change, we ought to honor the grammar practices at the time of the drafting. As discussed above, we have two good reasons for doing so. First, changed constitutional readings based on changes in grammar do not have democratic legitimacy. The Constitution gains its legitimacy, in part, from the heightened form of popular consent it purportedly represents. While society might reach a consensus about new grammar practices, it is unlikely the effect of those changes on the Constitution’s meaning was considered. Thus, popular consent to changes in grammar does not imply popular consent to corresponding changes in constitutional meaning.

Second, because changes in grammar are substantively neutral, any corresponding change in constitutional meaning will be random, having no relationship to the reasons why the grammar rules changed. For example, the change in how we use semi-colons does not suggest anything about whether, and if so, how Congress may divide a state. This is unlike changes in word usage, which often imply a substantive idea that supports a changed reading of the Constitution.

Lesson 3: The Limited Utility of Past Government Practice

A past government practice may serve as precedent only for precisely the same conduct, and is of limited use in supporting somewhat different conduct. When a past practice is invoked to support a somewhat different practice, the question becomes whether the difference is relevant, thus destroying the analogy. To be useful, we need to know something about why the past practice was engaged in. The problem is that past practices often come without explanations.

254. See Smith, supra note 47, at 16-17 (everyone knows that the Twenty-Sixth Amendment and Seventeenth Amendment mean something other than what a grammatical reading of their texts suggest).

255. See supra notes 69-71 and accompanying text.

256. See supra notes 72-79 and accompanying text.
Consider the past government practices discussed in this case study. First, in determining whether the Statehood Clause allowed Congress to divide a state, we reviewed the admission of Kentucky and Vermont to the Union. Congress created these states by dividing Virginia and New York respectively. Here we have the most helpful case of past government practice: the issue is whether Congress has power to take a specific action, and history shows that Congress has taken that specific action. The past government practice can serve as precedent without any need for analogies or inquiry into the government's reasons for acting.

The second government practice at issue was whether Congress could simultaneously admit a state and consent to its future division. Since Congress has never done so, there is no past government practice directly on point. Rather, we looked to a similar situation where Congress authorized Minnesota to hold pre-statehood elections for her post-statehood federal representatives. The question was whether pre-statehood congressional authorization of elections should serve as precedent for pre-statehood congressional authorization of division of a state. The answer depends on why Congress thought it could authorize elections. If Congress believed it could authorize any action related to statehood, then division of a state fits that rationale. If, however, Congress believed it could authorize only matters necessary to statehood, then division of a state does not fit. Without knowing why Congress acted as it did, we cannot know how the past government practice applies to our issue.

The third issue—whether congressional and state consent to division must occur within a time limit—received even less help from past government practice. Since there are no relevant practices under the Statehood Clause, we examined practices under other constitutional provisions. The amendment process looked promising because Congress had addressed a similar issue of time limits: Does the Constitution limit the time between congressional proposal and state ratification? This government practice, however, posed two interpretive problems. First, it is not clear whether precedent from the amendment process is relevant to the statehood process. Do both processes serve the same functions or purposes? Without answering these questions, we cannot know whether practices from one context can shed light on practices from the other. Second, it was not clear why Congress decided to accept the Twenty-Seventh Amendment despite the lengthy ratification process. Without knowing why Congress did so, we do not know whether that decision applies to the five-state provision. Because Congress acted without explaining itself,

257. See supra notes 114-116 and accompanying text.
258. See supra notes 127-134 and accompanying text.
259. See supra note 174 and accompanying text.
we have little if any basis for analogizing or distinguishing these
government practices.

This problem with past government practices can be seen in the
contemporary commentary on Professor Bruce Ackerman’s theory of
constitutional moments. Professor Ackerman argues that “We the
People” may amend the Constitution outside of the Article V
Amendment process. Specifically, we may do so when all branches of
the federal government and the People concur with, or acquiesce in, a
changed reading of the Constitution after a period of heightened
debate.260 The main problem with this theory is determining when this
has happened. Consider the four instances when Professor Ackerman
argues such heightened debate and consensus has occurred: the
founding era’s establishment of the Constitution; the Reconstruction
era’s shift from state to federal power; the New Deal era’s
consolidation of national power over the economy; and the post-
World War II move from treaties to congressional-executive
agreements. In each case, commentators have taken Professor
Ackerman to task for reading too much into historical events. Where
he sees heightened debate and popular consensus, others see chaos
and political compromise.261 Who is correct? We just do not know,
primarily because historical practices often do not come with handy
explanations that fit within theories or methods of constitutional
interpretation. Sometimes, to paraphrase a popular saying, stuff
happens. To imbue it with more significance than that is simply futile.

260. Professor Ackerman summarizes the project as follows:
Decisions by the People occur rarely, and under special constitutional
conditions. Before gaining the authority to make supreme law in the name
of the People, a movement’s political partisans must, first, convince an
extraordinary number of their fellow citizens to take their proposed
initiative with a seriousness that they do not normally accord to politics;
second, they must allow their opponents a fair opportunity to organize their
own forces; third, they must convince a majority of their fellow Americans to
support their initiative as its merits are discussed, time and again, in the
deliberative fora provided for “higher lawmaking.” It is only then that a
political movement earns the enhanced legitimacy the dualist Constitution
accords to decisions made by the People.

Ackerman, Foundations, supra note 70, at 6. Professor Ackerman breaks this extra-
Article V process, which he calls “higher lawmaking,” into four phases: “signaling”
“proposal,” “mobilized popular deliberation,” and “legal codification.” See id. at 266-
67. He explains how these functions have been performed during past constitutional
movements, such as during the New Deal era. In doing so, he addresses questions
such as when a movement has coalesced enough support to propose its higher
lawmaking agenda to the People, and when the People have given such a proposal
sufficient focus and serious consideration, and assent, to constitute successful higher
lawmaking. See id. at 272-90. For our current purposes, however, we do not need a
detailed picture of Professor Ackerman’s theory. Rather, the important point is that
his work seeks to identify conditions under which the Constitution sanctions extra-
Article V higher lawmaking.

261. See Tribe, supra note 207, at 1284-85 (arguing that the initial move from treaty
to congressional-executive agreement was done out of political compromise, with all
actors recognizing the dubious constitutionality of the practice).
As lawyers in a common law system, we should not be surprised that past government practice will often be of limited utility. A system of precedent works only if decision-makers explain their decisions. Their explanations then serve as the basis for deciding whether the next case is similar to or different from the prior case. Without an explanation, we have no basis for comparison. Consequently, past government practice will be helpful in two cases: first, where the past practice is identical to the practice under consideration; second, where the government explained its reasons behind the past practice, giving current decision-makers a basis on which to analogize to or distinguish from the past practice.

Lesson 4: The Myth of Judicial Supremacy

A final lesson flows from the following practical question: Who could decide the constitutionality of the five-state provision? It is all well and good to discuss issues in an academic setting, but who would have the power to act on these arguments if the circumstances arose? Our natural inclination, which is unfortunately shared by many politicians, is that questions of constitutional law are for the courts. This belief often lies behind the claim that judicial review leads to judicial supremacy. Critics of judicial review use the term “judicial supremacy” to mean that federal judges force their interpretation of the Constitution on the other branches of national government.

Some critics of judicial review ignore the fact that many issues of constitutional law are decided, both initially and finally, without involving federal judges. Consequently, the notion that judicial review necessarily entails judicial supremacy is false. The five-state provision illustrates how judicial review of a complicated federalism issue may be either highly contingent or non-existent.

At the moment, with Texas taking no action to divide itself, the issue is not ripe for any decision-maker. But, assuming the five-state provision catches the eye of some ambitious state legislator, who would decide the constitutional issue? As with many legal questions, the answer is, “It depends.”


263. See Balkin & Levinson, supra note 9, at 1016 (“[B]ecause most contemporary casebooks and courses are so unrelentingly U.S. Supreme Court-centered, they offer a highly distorted understanding of the American constitutional system to the hapless students exposed to them.”); see also Larry Alexander and Frederick Schauer, On Extrajudicial Constitutional Interpretation, 110 Harv. L. Rev. 1359, 1359-62 (1997) (advocating judicial supremacy in constitutional interpretation); Neal Devins & Louis Fisher, Judicial Exclusivity and Political Instability, 84 Va. L. Rev. 83 (1998) (reviewing claims of judicial exclusivity in constitutional interpretation).
First, the Texas state legislature would decide whether it believed division of Texas was constitutional. The legislators would have to debate the three issues raised above to determine if the five-state provision ever was, and still is, constitutionally valid. Presumably, if they decided the provision was not valid, they would proceed no further. In that case, the issue would remain dormant, finally decided by the state legislature.

But assume the Texas legislature believes division is still constitutional and passes a bill authorizing a special committee to draft a plan of division for four new states. Under Texas law, all bills passed by the state legislature go on to the governor for approval or veto. If the governor approved, the state would move on toward division. But assume the governor did not approve and attempted to veto the bill consenting to division. Both the Constitution and the five-state provision speak in terms of consent by the state's "legislature," omitting reference to the state's executive. Do the Constitution and the five-state provision give final say to the state legislature, or may the governor play a role?

At this point, federal courts may play a role in deciding the role of the governor. The Supreme Court has never decided this issue, and its precedents in other contexts are divided. For example, the Court has held that the reference to the state legislature in Article V on ratification of amendments means only the state legislature, leaving no role for state referenda. Conversely, the Court has held that the reference to the state legislature in Article I, section 4, granting state legislatures the power to regulate the times, places, and manner for federal elections, includes the state executive if that officer has veto power over ordinary state legislation. Regardless of how this initial issue is decided, the Court would still not be deciding the core issue—whether the five-state provision is constitutional.

If the Texas governor is ultimately conceded a role in consenting to division, her decision will determine how the process continues. If the governor decides division is unconstitutional (or politically inadvisable), she will veto the bill consenting to division, and the legislature will need a two-thirds vote of each chamber to override the veto. If the state legislature cannot override the veto, division is dead (for now), and no court has touched the issue.

But assume that the governor approves the consent, the legislature overrides the governor's veto, or the governor is held to have no role in the process. In any of these cases, Texas moves on toward division. At this point, does anyone have standing to sue Texas in federal court?

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265. Smiley v. Holm, 285 U.S. 355, 367 (1932) ("As the authority is conferred for the purpose of making laws for the State, it follows ... that the exercise of the authority must be in accordance with the method which the State has prescribed for legislative enactments.")
to challenge the constitutionality of division? The Supreme Court has held that a litigant has standing only if she has suffered a concrete personal injury traceable to the challenged conduct, and a court decision would redress that injury. Consider several potential litigants under this standard.

First, consider a Texas citizen. It is not clear what injury the person would allege. Some current Texas citizens would become citizens of one of the new states. Presumably, each of the new states would have governments constituted in accordance with the Constitution. For example, the new state governments would have to be "republican" in character, could not exclude citizens based on race, and so on. So, as long as the new states' governments are consistent with the Constitution, what injury is caused by changing the political boundaries of a state? An individual citizen does not suffer any concrete harm. She is still guaranteed all rights under the Constitution. She still has a vote in both state and national government. She may still relocate to another state at will. Standing will likely fail for this reason.

Next, consider a fellow state. The state could allege an injury of diluted political power in the Senate. With one Texas, each state delegation is one-fiftieth of the Senate; with five Texans, each state is reduced to one-fifty-fourth—not a major dilution, but a dilution nonetheless. But, the Supreme Court recently held that government officials do not have standing to challenge government actions that dilute the effectiveness of their power in the abstract, unconnected with a specific vote. This rationale could be applied to the states to deny them standing.

Last, consider an official of the United States government, such as the President or a member of Congress. The President could argue an injury regarding a changed electoral college count in the next election, assuming the president was eligible for re-election. A Senator could argue vote dilution, just as the states did above. But, once again, these

268. Id. amend. XIV.
269. Even if the citizen could identify some injury, that injury will not be personal to her. The Supreme Court has rejected standing when the litigant's only injury is a "generalized grievance" shared by most other citizens. See Tribe, supra note 152, § 3-17, at 415-24.
270. Id. § 3-20, at 453 ("Whether a state suing on its own behalf has standing to do so in the case at hand depends on whether the ordinary rules of standing are satisfied; no special standing rules are applied.").
271. Raines v. Byrd, 521 U.S. 811, 829-30 (1997) (holding Members of Congress do not have standing to challenge Line Item Veto Act, which allegedly altered the effectiveness of a member's vote by giving president power to cancel part of a bill).
272. See Tribe, supra note 152, § 3-20, at 452-56 (discussing various ways states may have standing).
claims of power dilution may not present the type of concrete, personal injury required for standing. 273

If no litigant has standing, Texas may forge ahead and establish four new state governments. Each of these new states would be entitled to two senators and an unspecified number of representatives. 274 Upon election, these senators and representatives would appear at Congress seeking their seats. At this point, the House and the Senate would decide whether to seat these members, and, in doing so, effectively decide whether the new state governments were constitutionally created. 275 If both chambers seat the new members, the issue of constitutionality would again be resolved without court intervention.

If either the Senate or the House refuses to seat the new Texas members, those members could sue Congress for their seats. Representative Adam Clayton Powell did so when the House refused to seat him based on allegations of criminal wrongdoing. 276 These members would likely have standing, but then the question would be whether their challenge raised a non-justiciable political question. Strong arguments exist for finding a political question: judges have no standard for setting a time limit on consent, 277 and the Statehood Clause appears to commit statehood issues to Congress. 278 Further, the issue would require the Court to decide which governments were lawfully established within Texas, an issue the Court has previously declined to decide. 279 If the suit presented a political question, the courts would dismiss without reaching the merits.

In sum, the constitutionality of the five-state provision seems likely to evade judicial review. The most likely reason is that no one will ever try to use the provision to divide Texas. But, even if a future Texas legislature had an itch to do so, the doctrines of standing and political question may conspire to keep the issue out of the courts.

273. See Raines, 521 U.S. at 829-30.
274. The Constitution does not address re-apportionment of representatives when a state is divided between decennial censuses. Presumably, each of the new states would receive their share of representatives after the next intervening census, but until that time Congress would have to make provision for interim representation. It is not clear whether the new Texas states could make some provision among themselves without congressional action.
275. U.S. Const. art. IV, § 4 ("The United States shall guarantee to every State in this Union a Republican Form of Government . . . .").
277. See Nixon v. United States, 506 U.S. 224, 229-30 (1993) (indicating that propriety of Senate process used to try impeachment is a political question in part because Constitution does not provide a judicially applicable standard for resolving the issue).
278. See id. at 229 (stating that propriety of Senate impeachment process is a political question in part because Constitution commits trial of impeachments to the Senate's "sole" discretion).
Thus, we might add the five-state provision to the list of counter-examples that disprove the myth of judicial supremacy.

B. Lessons About Constitutional Law: A Typology of Constitutional Questions

In addition to the discrete lessons just discussed, our case study reveals something about constitutional interpretation more generally. Each of the three questions suggests a different type of constitutional issue and the interpretive challenges associated with it. One caveat, though, before I proceed. I am not prescribing how constitutional analysis ought to proceed; this section is not normative. Rather, I offer a descriptive account of analysis under the methods, constructed from the attempt at doing constitutional law in Part II.

The picture of constitutional interpretation painted by our case study stands in stark contrast to the picture painted by some commentators. These writers take a text-based view, categorizing constitutional interpretation based on the type of clause involved. Once again, Professor John Hart Ely offers a good example. On the one hand, Professor Ely identifies what he calls "relatively specific" clauses where "the language is so clear that a conscious reference to purpose seems unnecessary." On the other hand, he identifies "extremely open-textured" clauses that require resort outside the Constitution for interpretation. In between lie different gradations of clauses, some more ambiguous than others, that may be interpreted, with more or less difficulty, by consulting historical materials. Professor Ely, then, takes a clause-based approach to identifying interpretive problems.

We can see the difficulty with Professor Ely's approach when we consider examples from each category. First, he cites the thirty-five year presidential age limit as an example of a relatively specific constitutional provision—one that can be interpreted with text alone. But, as discussed above, the text of even that Clause does little interpretive work. The easy questions, such as whether the Clause refers to chronological age or a period in a person's life, are answered by practices and understandings that lie behind the text, not the text itself. Further, when no practice or understanding exists, the Clause is difficult to apply. Thus, it seems that the ambiguity of a

282. Id.
283. Id. Professor Dworkin cites the same Clause for the same proposition. See Dworkin, supra note 280, at 8.
284. See supra notes 204-217 and accompanying text.
Clause depends on the question asked and does not inhere in the text itself.

Second, the Due Process Clauses of the Fifth and Fourteenth Amendments provide examples of relatively open-textured provisions. While Professor Ely argues that the clauses plainly concern process and not substance, they do not further prescribe what "process" is "due." But, all lawyers would agree that these clauses at least require notice and an opportunity to be heard in virtually all judicial proceedings. This unanimity does not flow from the text; the clauses do not mention either notice or a hearing. Yet, few, if any, lawyers would say that the requirement came from outside the Constitution; they would insist that the clauses on their own require notice and a hearing. How do we reconcile these seemingly inconsistent beliefs? Again, through a proper understanding of how text works. Text has practices and understandings associated with it, and the text is used as a stand-in for these practices and understandings. The widespread practice and understanding of the legal community is that litigants are due both notice and a hearing in most judicial proceedings. The question is easy because of widely shared practices and understandings, not because text is plain or clear.

The clause-based categorization does not accurately describe how constitutional law works. Our case study points to a different approach: an issue-based categorization. In Part II, the same text—the Statehood Clause—produced both easy and hard questions of interpretation. The difficulty of the question had nothing to do with whether the text was "open-textured" or "relatively specific." Rather,

285. See supra notes 218-230 and accompanying text.

286. See Tribe, supra note 158, § 10-7, at 664; see also Ely, supra note 220, at 19 (noting that "the general outlines of the law of procedural due process were pretty clear and uncontroversial").

287. Professor Pierre Schlag makes a similar point regarding so-called "totality of the circumstances" tests:

Consider, for instance, the "balancing" or "totality of circumstances" tests that are often used in constitutional law. These tests viewed in isolation look very flexible. But as soon as we consider how they are applied by judges, it becomes apparent that these tests merely defer the constraints on judicial decision making to some external source such as precedent. In other words, the very flexibility of balancing and totality of circumstances tests refers litigants and judges to other stable norms to inform decision making. This precedent boundedness is inflexible. But we tend not to see this inflexibility as an aspect of the standard. Rather, we see the inflexibility as external: If judges and litigants pay too much attention to the facts of precedent, that is their own choice, not something attributable to the standard form of balancing or totality of circumstances tests—or so the argument goes. I think this is wrong: Inflexibility is just as much a part of standards as their supposed flexibility.

the difficulty had to do with whether the various sources of meaning that lie behind the text and give it meaning addressed our question. The three issues from our case study illustrate different levels of interpretative difficulty that in turn suggest a rough typology of constitutional issues.

First, a metaphor for discussion purposes. Now, I know that constitutional law needs another metaphor for interpretation as urgently as law professors need self-esteem training. Constitutional interpretation has been analogized to translating a foreign language, religion, playing music, interpreting literature, and writing a chain novel. I offer yet another analogy here, but neither as a rigorous description intended to capture all aspects of constitutional interpretation, nor as a normative prescription for constitutional interpretation. Rather, the analogy illustrates that our interpretive practice—as revealed by the case study—involves issues of varying difficulty, not clauses of varying ambiguity. In short, our practice is issue-centered, not clause-centered.

A person doing constitutional interpretation is in a similar position to a person who has a piece to a jigsaw puzzle and knows that it belongs to one of two puzzles. Both puzzles are only missing one piece, and the question is in which puzzle does the piece fit best? In this metaphor, the two puzzles represent two possible interpretations of the Constitution and the piece is the available interpretive information—text, structure, history, and so on. Which puzzle (interpretation) does that piece (interpretive information) best complete?

As with an issue of constitutional interpretation, the puzzle problem may be easy or hard. The easiest case would be where only one puzzle is missing a piece the same shape and size as the available piece. The puzzle builder's choice is obvious. This case is analogous to the issue whether the thirty-five-year presidential age limit refers to chronological age or a period in a person's life. Recall that that issue seemed obvious because of our uniform practice that age limits refer


292. See Sanford Levinson, Law as Literature, 60 Tex. L. Rev. 373, 373-77 (1982).

293. See Ronald Dworkin, Law's Empire 228-29 (1986).

294. Of course, the metaphor could be changed to three or more puzzles if there are three or more competing interpretations of the Constitution.

295. Theorists as varying as Ronald Dworkin and Stanley Fish concede that different decision-makers will, in good faith, read the same interpretive data in different ways. See Dworkin, supra note 280, at 11-12; Fish, supra note 237.
to chronological age. Indeed, any other interpretation seemed absurd. Thus, the easiest case is when only one interpretation is plausible on its face. Call this a Type I question.

Before moving on, a quick word on "obviousness." Again, the criteria for judging "obviousness" and "absurdity" are the currently-accepted methods of constitutional interpretation, as well as the then-accepted uses of those methods, which we used throughout the case study. To someone who either follows different methods (as in another legal system), does not accept the methods, or makes different rhetorical uses of the methods, the answer will not seem obvious. Further, to say that an answer appears "obvious" given certain practices is not to say that the answer is objectively or normatively correct. The methods and their accepted uses merely constitute existing practices, they do not provide a normative justification. Indeed, if our practices change, answers that once appeared obvious under prior practices will no longer appear so. As Professor Stanley Fish puts it, "[Y]ou always know, but... what you know, because it rests on a structure of assumptions and beliefs (which produce [different] meanings), is subject to challenge or revision, as a result of which you will still always know, even though what you know will be different."

Now, let's make things a little more, but not too, difficult for our puzzle builder. Assume that the available piece is the same size and shape as the holes in our two puzzles. Also, assume that the missing piece depicts a car, and one puzzle depicts downtown traffic at rush hour, while the other puzzle shows stars in the night sky. Our puzzle builder should have little trouble placing the piece in the proper puzzle. The missing piece fits the context of only one puzzle. Call this a Type II question.

The first issue—whether the Statehood Clause allowed division of an existing state—is a Type II question. Because neither answer seemed absurd on its face, we do not have the easiest case where the piece physically fits only one puzzle. However, the question was still easy. While text was obscure, history, structure, past government practice, and precedent fit quite clearly into only one interpretation—the Statehood Clause allows division of states. Thus, the next easiest case is where all the methods point to one of two plausible interpretations.

Now things start getting hard for our puzzle builder. Assume once again that the available piece depicts a car, and one puzzle shows downtown traffic at rush hour. Assume this time, however, that the second puzzle depicts a child playing with toy cars. This case presents

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296. See supra note 10 and accompanying text.
297. See supra note 10 and accompanying text.
298. See Fish, supra note 211, at 196.
our puzzle builder with more difficult judgments. Because the piece is not obviously out of place in either picture, our puzzle builder must start asking questions. Does the missing piece look more like a real car or a toy car? Does the car fit better within the overall background of one puzzle or the other? At this point, we are still trying to draw clues from the puzzle and the piece itself, trying to harmonize both. Call this a Type III question.

Our second issue—can Congress simultaneously admit and consent—presented a Type III question. Unlike the first issue, none of the methods answered our specific question. Some methods, like text and past government practice, fit with both interpretations. Other methods, such as structure and judicial precedent, supplied principles, arguments, and examples for analysis. Our task was to determine whether these principles, arguments, and examples best fit with arguments for or against our issue, or provided equal (or no) support to either side. In the end, the methods were most consistent with allowing Congress to simultaneously admit and consent.

Finally, we come to the hardest case for our puzzle builder. Assume once again that the missing piece depicts a car, and both puzzles show downtown traffic in the same city, one during rush hour and one at mid-day. Identifying the proper puzzle for a piece now requires an aesthetic judgment. Which color scheme works better? Which puzzle has better flow with the piece? These questions ask us to bring criteria outside the puzzle to bear. Call this a Type IV question.

In constitutional interpretation, a Type IV question exists when none of the methods fit better with one interpretation than the other. At that point, the decision-maker must resort to principles, ideologies, or preferences outside the interpretive methods. For example, Justice Antonin Scalia adopts a background principle of democratic accountability in cases of interpretive doubt. When interpretive methods provide no answer, he upholds the decision of accountable government actors. Conversely, one could opt for a background

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299. Again, the constitutional methods are themselves merely descriptive and, thus, are not neutral, objective criteria for judging the rightness of a constitutional interpretation. Cf. Stephen M. Feldman, Playing with the Pieces: Postmodernism in the Lawyer's Toolbox, 85 Va. L. Rev. 151, 178 (1999) (noting that "from a postmodern standpoint, having unexamined background assumptions is unavoidable").

300. See Planned Parenthood v. Casey, 505 U.S. 833, 980 (1992) (Scalia, J., concurring in the judgment in part and dissenting in part) ("A State's choice between two positions on which reasonable people can disagree is constitutional even when (as is often the case) it intrudes upon a "liberty" in the absolute sense."); Rutan v. Republican Party of Ill., 497 U.S. 62, 95 (1990) (stating that "when a practice not expressly prohibited by the text of the Bill of Rights bears the endorsement of a long tradition of open, widespread, and unchallenged use that dates back to the beginning of the Republic, we have no proper basis for striking it down") (Scalia, J., dissenting). Of course, this principle is useless for a member of Congress in making the initial
principle of individual liberty: when interpretive methods provide no answer, decide the way that increases individual liberty from government action. Either way, an extra-constitutional background principle, not constitutional method, supplies the answer.

Now, one might object that the background principle, ideology, or preference described above is itself constitutional in origin. For example, Justice Scalia argues that his democracy-promoting principle is itself a constitutional principle. This objection is misplaced for two reasons. First, it mistakenly assumes that the Constitution prefers one interpretive method, approach, or principle over all others. As I have argued elsewhere, this is incorrect. Second, if a principle like democracy has any bearing on a constitutional issue, it has been already considered, to the extent relevant, in analysis under the other interpretive methods. Democratic values may have been a concern in drafting a specific clause, or democratic government may be a constitutional structure. If so, democratic principles will show up in those methods of interpretation. If not, then the decision-maker is importing extra-constitutional, personally-held principles, values, or ideology into the analysis.

It is on a Type IV question that our decision-maker is most susceptible to her political preferences. When the methods are in equipoise, political preference may tip the scale one way or the other, causing the decision-maker to mistakenly perceive the case for one interpretation as stronger than the other. When the judge nonetheless justifies her decision based on the methods, she will be criticized as using constitutional method to rationalize a decision based on other grounds.

In practice, it may be impossible to distinguish Type III and Type IV constitutional questions. In most cases, personal preferences and beliefs will affect our perception without our conscious knowledge, as if we are wearing a pair of glasses we forget we have on. We cannot reliably tell whether the slight weight of the methods or personal preferences produced a given constitutional interpretation. Perhaps our only guide will be that Type IV cases cause more vehement and venomous rhetoric from the opposing sides. For, when personal principle, not constitutional method, supplies the deciding factor, a judge may react viscerally to criticism or opposition because she may feel under attack personally and not simply professionally. We are vested in our personal principles in a way that we are not in the methods of interpretation. We feel the sting of rebuttal more deeply when it hits personal principles than when it hits our use of method. Thus, while we intellectually may not be able to distinguish between decision whether to pass a constitutionally doubtful law.

301. See McGreal, supra note 262, at 1172-96.
interpretations produced by method versus personal views, our gut may be able to do so for us.

Our case study helps us to see that Type IV cases exist. It is likely that few, if any, people have strongly held personal or political views that bear on the constitutionality of the five-state provision. Further, the likelihood of Texas dividing itself any time soon is almost zero. The five-state provision may be the rare constitutional issue that allows use of the interpretive methods free from the usual outside influences. The case study, then, offers an ideal opportunity to identify a Type IV question. And, the third question—is there a time limit on congressional and state consent to division—posed a Type IV question, unresolvable under the constitutional methods. Each method either has nothing to say or supports both interpretations equally. If that question is to be answered, we must resort to some extra-constitutional principle or policy.

CONCLUSION: THE DILEMMA OF TYPE IV CASES

While the admission that Type IV cases exist may seem like a defeat for the rule of law and principled constitutional decision-making, it is really just a recognition that law is a human endeavor. No single system of human thought can solve all problems and answer all questions. Thus, it should be no surprise that the methods of legal analysis, born of human practice and not divine inspiration, have their limits. Beyond those limits, the make up of the individual takes over. Is it surprising that Justice Hugo Black, a Senator from Alabama and one time member of the Klu Klux Klan, having seen first hand southern resistance to racial equality, took a strong stand against southern resistance to Brown v. Board of Education? Similarly, is it surprising that Justice Harry Blackmun, former general counsel to the Mayo Clinic expressed great deference to the judgment of medical professionals in his abortion decisions? Or, that Justice Scalia, a professed Roman Catholic, reserves his most venomous rhetoric for decisions upholding abortion rights and homosexual rights? That is

305. See, e.g., Roe v. Wade, 410 U.S. 113, 164 (1973) ("For the stage prior to approximately the end of the first trimester, the abortion decision and its effectuation must be left to the medical judgment of the pregnant woman’s attending physician.").
306. Cf. Michael Stokes Paulsen & Steffen N. Johnson, Scalia’s Sermonette, 72 Notre Dame L. Rev. 863, 864 (1997) (quoting a speech by Justice Scalia where he addresses modern-day criticism of Christian believers: "To be honest about it, that is the view of Christians taken by modern society. We are fools for Christ’s sake. We must pray for the courage to endure the scorn of the modern world.").
not to say that people’s actions are perfectly determined by their past experiences, or that anyone would have foreseen these Justices’ specific decisions. Rather, the point is that we do not check ourselves at the door when we make legal decisions.

So, what should we do about Type IV cases? Consider three approaches. First, we could screen life-tenured judges for personal preferences and the like, but there probably is no reliable way to do so. Two people who have the same experience may take different lessons from it, and people from the same region, profession, religion, and so forth, are not homogenous. Perhaps the only relevant data may be the person’s past actions. How has the person acted when she made decisions or expressed her views? Even then, it may be no more than reading tea leaves.

Second, some commentators admit that outside principles must come into the analysis, but privilege one source or another for these principles. One commentator has called this approach the search for a “meta-algorithm” that can resolve constitutional questions when the methods are unclear or in conflict. For example, Professors Ronald Dworkin, John Hart Ely, and Douglas Laycock have argued that these principles can be found in the Constitution itself. Each attempt to derive background principles from various aspects of the Constitution. And, commentators have criticized these authors for deriving their principles from personal political commitments, not the Constitution.

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308. Indeed, Justice William Brennan, also a Roman Catholic, disagreed with Justice Scalia on many constitutional issues, including abortion.
311. A similar approach is to privilege one of the methods over the others. For example, some argue that history or text ought to take precedence over other methods of interpretation. This approach has two problems. First, it offers no guidance when the preferred method is silent on the issue at hand. Second, these commentators have no persuasive reason to privilege any single method over the others. See Bobbitt, Interpretation, supra note 2, at 31-35, 155-56; Paul Brest, The Misconceived Quest for the Original Understanding, 60 B.U. L. Rev. 204, 237-38 (1980); Fallon, supra note 11, at 1209 (criticizing theorists who privilege one interpretive method over the others).
312. Bobbitt, Interpretation, supra note 2, at 122-25, 155.
The problem for these authors is that if their principles were constitutional in origin, the methods would have already revealed them. Once the methods have run out, so has the Constitution's ability to answer the question. We truly are at a point where the practice of constitutional interpretation offers no answer. Any attempt to ground their principles in the Constitution, outside the methods themselves, is futile, and serves only to deny the real basis of the authors' analysis.

Other commentators, like Professor Michael Perry, overtly privilege a non-constitutional source of principles. Professor Perry resorts to moral principles in deciding hard cases.

When the standard methods provide no answer, the decision-maker should identify moral principles that can break the impasse. While Professor Perry offers general guidance in identifying moral principles, he cannot claim a consensus for his approach. Indeed, critics charge that his "moral principles" amount to no more than personal preferences.

Judge Richard Posner also looks outside the Constitution, urging consideration of policy and practical consequences when constitutional method runs out. Law is instrumental, a tool to achieve concrete goals and results. When a law is not clear, judges ought to implement the interpretation that best achieves the goals or results valued in that context. Posner, then, encourages an empirical approach to law. If the concrete goal of equal protection is to obtain real opportunities for minorities and women, judges ought to ask whether their decision will actually create opportunities. For example, will a decision prohibiting an all-male, public military college from excluding women really provide women an opportunity for a military-style education? For Posner, empirical questions like this decide constitutional cases, not abstract legal arguments.

The multiplicity of views on the proper source of extra-constitutional principles proves what we already know deep down, but are perhaps afraid to admit—no objectively defensible source exists. Commentators can offer proposals and try to persuade us that we ought to follow suit. For example, Judge Posner uses his pragmatic approach to analyze Supreme Court decisions and explain how his approach helps decision-makers better implement policy in the real world. His repeated critiques may persuade us that a pragmatic approach best solves hard cases. In the end, however, only the actions

314. See generally Michael J. Perry, Morality, Politics, and Law: A Bicentennial Essay (1988). Professor Ronald Dworkin can be read to take a similar approach in an early work. See generally Ronald Dworkin, Taking Rights Seriously (1977). In his recent work, however, Professor Dworkin stresses that moral principles must fit the Constitution's "language, precedent, and practice" for judges to properly implement those principles through constitutional interpretation. See Dworkin, supra note 280, at 11.

of those in the legal system will determine whether his proposal becomes practice.\textsuperscript{316} Until then, the burden of persuasion rests on the commentator, and failure to follow a given approach is neither illegitimate nor unjustified.\textsuperscript{317}

Third, we could bring resort to extra-constitutional principles within the overt practice of constitutional interpretation.\textsuperscript{318} If this type of reasoning is part of constitutional analysis, it already functions as an accepted method; it is part of the practice of constitutional interpretation.\textsuperscript{319} By making resort to this method overt, we open it to critique and encourage decision-makers to discuss that basis for their decision. Conversely, if resort to ideology is viewed as outside constitutional practice, it takes on the air of the forbidden, and those who admit to its practice are stigmatized and chastised as illegitimate. Of course, the practice will still go on because it is inevitable. It will simply go on undercover, unacknowledged.

Professor Philip Bobbitt comes closest to providing an overt role for ideology,\textsuperscript{320} urging the decision-maker to consult her "conscience."\textsuperscript{321} When the methods conflict or are unclear, decision-makers must still make decisions—that is the function of constitutional interpretation.\textsuperscript{322} When the methods run out, individual conscience fills the gap: "[t]he space for moral reflection on our ideologies is created by the conflict among [methods], just as garden walls can create a space for a garden."\textsuperscript{323} The decision-maker self-consciously reflects on her "values" and renders the decision most consistent with those values.\textsuperscript{324}

\textsuperscript{316} Professor Pierre Schlag makes the further point that normative legal theorists are often so removed from real legal work that they have little influence on that work: "[N]ormative legal thought is so much in a hurry that it will tell you what to do even though there is not the slightest chance that you might actually be in a position to do it... When was the last time you were in a position to rule whether judges should become pragmatists, efficiency purveyors, civic republicans, or Hercules surrogates?" Schlag, supra note 1, at 178-79.

\textsuperscript{317} See Dennis Patterson, Law and Truth 137 (1996) (discussing legitimacy and justification in law).

\textsuperscript{318} See Dennis Patterson, Conscience and the Constitution, 93 Colum. L. Rev. 270, 303-07 (1993) (arguing that resort to ideology is not currently part of our constitutional practice).

\textsuperscript{319} Cf. Stephen M. Feldman, The Supreme Court in a Postmodern World: A Flying Elephant, 84 Minn. L. Rev. 673, 692 (2000) ("Postmodernists often turn toward their own social practices and make the cultural and theoretical awareness of those practices part of the practices themselves.").

\textsuperscript{320} Bobbitt, Interpretation, supra note 2, at 141-86 (identifying and defending role for individual "conscience" in constitutional interpretation).

\textsuperscript{321} Id. at 178-86.

\textsuperscript{322} Id. at 39 ("Decisions are sought, decisions are required, when their consequences have legal effect, that is, an effect that calls forth actions of the state that must be rationalized in accordance with the decision.").

\textsuperscript{323} Id. at 177; see id. at 168 ("The United States Constitution formalizes a role for the conscience of the individual sensibility by requiring decisions that rely on the individual moral sensibility when the modalities of argument clash.").

\textsuperscript{324} Id. at 170 ("The US Constitution engages our moral sensibilities by the clash of its interpretive modalities, which require the moral instance of our judgment.").
In doing so, the decision-maker must not adopt a meta-theory to constrain or discipline conscience, for our conscience and moral judgments are neither static nor susceptible to rigorous and systematic definition. We must be “constantly” open to “self-conscious examination” of how conscience shapes our decisions, and the need to decide constitutional questions supplies an unending stream of opportunities to do so.

Making resort to ideology a constitutional method is easier said than done. Recall that the constitutional methods are not normative, but rather reflect our practices in arguing and deciding constitutional issues. In current practice, ideology acts sub silentio in constitutional decision-making. Decision-makers either consciously manipulate the methods to hide ideology, or are not conscious of ideology’s effect on their decision. Consequently, we have no discernable practice for expressing and critiquing the use of ideology in constitutional argument. If ideology is to function overtly as a constitutional method, we must develop a practice for doing so.

An overt practice of ideology is unlikely to evolve in the current constitutional climate. Consider the near compulsive drive of some constitutional commentators to rid constitutional law of individual ideology, if not individual discretion. Similarly, politicians fuel the fire with their sloganeering for judges who, “interpret the law, not make it,” as if that shibboleth had real meaning. And, charges of “legislating from the bench” or “reading personal preferences into the Constitution” have become standard judicial put-downs. No wonder we have no vocabulary for speaking about ideology’s role in constitutional interpretation.

Then again, maybe we have such a vocabulary without even knowing it. Constitutional arguments, whether by judges, legislators, or other government officials, or by litigants, law professors, or other commentators, are routinely critiqued by other constitutional practitioners. This critique often “exposes” how someone’s constitutional argument is not supported by the methods, but rather rests on hidden assumptions, has internal inconsistencies, or the like. For example, a litigant’s brief will do so to the opposing party’s arguments. Or, a dissenting judge will do so to her court’s majority opinion, and vice versa. Or, the President will do so in response to congressional action, or vice versa. Or, a law professor will do so to the constitutional arguments of any of the above actors, as well as to

325. Id. at 168, 173-74.
326. Id. at 184-85.
327. See id. at 184 (“This particular sort of recollection [to ideology] is the very thing that the current commentary on constitutional decisionmaking seeks to dispense with by insisting on the illegitimacy of our practices and the need for a particular decision process.”); Patterson, supra note 317, at 303-07 (noting absence of a descriptive account of the use of ideology in constitutional decision-making).
the arguments of other professors. In each instance, the critic claims
to expose how a specific argument relies on something outside the
methods of argument, what we have called personal ideology. The
critic's conclusion is that the argument is fatally flawed because of its
resort to ideology.

The practice of constitutional critique, then, shows constitutional
practitioners ferreting out resort to ideology in constitutional
argument. But, our practice ends there. It is like a pig foraging for
truffles, only to discard the prize once found. Like the gourmet chef,
we must figure out how to incorporate these savory morsels into our
repertoire, not discard them as if toxic waste.

Perhaps the only way to change our practices is to continually show
how ideology plays an inevitable role in constitutional decision-
making. To do so, a wide diversity of perspectives could be brought to
bear on the important task of constitutional critique and commentary.328
Only by repeated examination and critique from
different viewpoints can we gradually reveal the manipulation of
method or the unexamined influence of ideology.329 An author
writing from an "outsider" perspective may identify a hidden
assumption or bias missed by mainstream legal academics.330 For
example, "an African-American constitutional scholar might
recognize more readily than a white scholar that the Constitution is a
tool of both oppression and liberation: the Constitution appeared to
legitimate slavery and Jim Crow laws as legal institutions, yet
supported the Civil Rights Movement and desegregation."331
Repeated critique, sustained over a long time, may slowly reveal the
role of ideology and help change the climate toward its role.332

328. See Feldman, supra note 319, at 684-86 (including members of once-excluded
groups in the legal academy yielded scholarship that offered alternate accounts of
legal events).

329. Id. at 689. Feldman explains that:
As previously excluded or subjugated outgroups and minorities began to
voice their rights and claims, the idea that a natural or neutral baseline or
foundation truly existed began to look like a myth.... [T]hose baselines
represented no more than the cultural preferences of a dominant majority in
American society. From this vantage, competing normative claims in
constitutional law began to represent no more than different cultural
perspectives comprised of different voices and different truths.

Id.

330. See id. at 684-88; Feldman, supra note 299, at 180 ("[I]f there are postmodern
paths to justice, they lie in the deconstructive disclosure of the ever-present tacit
assumptions and cultural values that always hide or marginalize some metaphorical
Other—an oppressed and subjugated subcultural group.").


332. The goal of such critique is not to ultimately reveal some neutral, object
position from which unbiased legal decision-making can proceed; no such position
exists. See Fish, supra note 211, at 439 (stating that "impartiality" is simply an activity
defined from an individual's partial position, "constitutive of and inseparable from
some partial view of the world" (emphasis in original)). Rather, such critique may
revise an individual's partial world view, yielding a different set of assumptions that
Even if the climate does someday change, and constitutional decision-makers acknowledge the role of ideology, we need not develop an overt practice of resorting to ideology. Instead, we might simply acknowledge that Type IV cases exist, and then go on with constitutional law as before, as if we did not know any better. In this view, to openly acknowledge Type IV cases is to start us down a postmodernist road that can only end in the inability of the legal system to function. Once Type IV cases are exposed, it will not be long before the methods themselves are exposed as merely culturally contingent conventions. And, because these conventions are used to divvy up things in society—wealth, power, status, etc.—many people have a stake in which conventions are used. Then, the conventions themselves will be up for grabs, just another political football. The conventional understanding of legal reasoning will dissolve, and law will appear just another form of politics. Finally, its form will match its substance.

To some in the legal academy, the preceding paragraph is de rigeur, or even passe. But to most of those who work and live in our legal system, such an acknowledgment would shatter that faith that holds the system, and perhaps society, together: the rule of law, meaning that something other than contingent personal preferences decide legal outcomes. What would be the consequences of dispelling this guide her action. Id. This new set of assumptions will be no more neutral or objective than the prior set, but it will be different in a way that accommodates others, perhaps yielding greater consensus on legal decisions.

333. This approach has been called an ironic use of constitutional method. See Feldman, supra note 319, at 677 (“[W]hereas modernist scholars use the tools of legal reasoning] earnestly, postmodernist scholars use them ironically, knowing that the tools cannot perform as promised.”). If we know that the methods do not decide Type IV cases, but still act as if they do, our analysis proceeds with an ironic, knowing wink to the reader. Id. at 697-98 (observing that some justices wink at the reader by using unconventional arguments in their opinions).


335. Schlag, supra note 1, at 184 (“Once legal thinkers understand that the significance of the normative categories and the normative grammar is largely performative, they assume a new stance towards normative rhetoric. They see it as an instrumental vehicle for achieving their favorite political or moral ends.”).

336. See id. at 183-87.

337. See Feldman, supra note 319, at 686; Schlag, supra note 1, at 186 (“[M]y sense is that the disenchantment of normative legal thought is already well on its way.”); Pierre Schlag, Law as the Continuation of God by Other Means, 85 Cal. L. Rev. 427, 440 (1997) (“[O]nce you say that God is just a bunch of conventions, he loses a great deal of his appeal. Correspondingly, worship comes to lack a certain seriousness. The same goes for law.”).

338. See Schlag, supra note 1, at 182 (“[I]t is one of the vexations of our condition in the legal academy, as elsewhere, that various kinds of thought remain socially and institutionally operative (in fact dominant) long after their intellectual vitality has
belief? Consider this warning from Justice John Marshall Harlan:

Perhaps no characteristic of an organized and cohesive society is more fundamental than its erection and enforcement of a system of rules defining various rights and duties of its members, enabling them to govern their affairs and definitively settle their differences in an orderly, predictable manner. Without such a "legal system," social organization and cohesion are virtually impossible. . . . Put more succinctly, it is this injection of the rule of law that allows society to reap the benefits of rejecting what political theorists call the "state of nature."339

Judges, lawyers, litigants, and others in the system act as if the rule of law has meaning. If their faith is shattered, how will they act? If the conventions of legal reasoning are cast aside as an illusion, how will judges decide cases? If the mass of Americans goes from believing that legal decisions reflect the law, to believing that the law is no more than the preferences of an elite few, how will that change society? Is the rule of law a form of secular religion that serves as the opiate of the American masses?

While the preceding paragraph has the tone of a Chicken Little rant, it underscores a very real point about academic commentary. Many postmodern legal commentators tear down the edifice of current legal practices but offer no practical alternative. The fact is that the day after postmodern enlightenment is achieved,340 the world will continue turning on its axis, and judges will still have to decide cases, lawyers will still have to advise clients, and regulators will still have to administer the law. But, how should they do so?

Perhaps the best we can do is muddle through. Like the postmodernist, we can use the constitutional methods ironically. Though we know those methods cannot support a strong conception of the rule of law, they are all we have,341 and they do constrain discretion. Further, because we do know better, we remain open to voices that reveal biased and inconsistent use of the methods.342 In sum, we do the best we can with what we have.343

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340. I realize the irony in the phrase "postmodern enlightenment."
341. See Minda, supra note 223, at 333 n.12 ("Postmodernists . . . would be the first to concede that the vocabulary, grammar, and worldview of modernity remains pervasive and continues to shape the thinking of people generally," and "that the vocabulary and grammar of modernism are the only vocabulary and grammar available."); Schlag, supra note 1, at 174 n.18 ("[T]he problem for postmodernists . . . is that while the normative vocabulary and grammar are no longer an acceptable currency for intellectuals to use in advancing claims for human beings, there is no other vocabulary, no other grammar, as of yet."). Indeed, as Professor Bobbitt has argued, while the methods cannot determine a single, correct answer to many constitutional questions, they nonetheless legitimate constitutional interpretation and justify its practice. See Bobbitt, Interpretation, supra note 2, at 171-77.
342. But our openness and skepticism are themselves partial, defined by our
current beliefs and assumptions about the world. See Fish, supra note 211, at 440 ("Skepticism is not a state, but an activity, something one performs, and one can perform it only within—and not outside of—the already structured field that is consciousness; it is a part of that field, and therefore is a mistake to think that skepticism (or critical self-reflection or critique or self-awareness or provisionality or a healthy tentativeness or anything else in that line) has an independence of other (equally field-specific) operations such that it can act as a check on them.").

343. Professor Pierre Schlag has expressed a similar sentiment:

Should we call this game off? Frankly, it's not our call. And it's likely that, for some time, judges will continue to play this game. They have to decide cases, and it is understandable that they should strive to ascribe their legal interpretations to something they call law. And it is even understandable that in this endeavor they should try to fake it (and even fake it to themselves). What is more, given the reflexive nature of the game, it's not even clear that they are faking it.

Schlag, supra note 236, at 389.
Notes & Observations